First Tier Tribunal Appeal Number [2011] 15368.PHL
HESC Chamber
Primary Health Lists Jurisdiction
Heard at: Pocock Street London
On: 12th to 15th December 2011
Before:

Judge John Aitken
Deputy Chamber President
Specialist Member Dr S Sharma
Specialist Member Ms L Bromley

Between

Dr Hasmukhlal Himatlal Shah

Appellant

-v-

South East Essex Primary Care Trust

Defendant

Representation:
The Appellant : Mr S Samarasinghe

The Respondent Mr R Booth

Decision

1. This appeal is brought by Dr H Shah in respect of the refusal by South East Essex Primary Care Trust to include him on their performers list under regulation 6(1)(a) of ***The National Health Service (Performers Lists) Regulations 2004*** on the grounds of unsuitability, the Primary Care Trust later adding that in any event the appellant should not be included for efficiency under ***Section 6(1)(e)***.

2. The Primary Care Trust make 6 allegations which they argue make the appellant unsuitable and or lack the necessary efficiency to be included within the Performers List. These matters were listed as follows:

   (1) "On 07.11.01 the Appellant performed an internal examination of Patient A's vagina
   (a) without the presence of a chaperone;
   (b) without his first having offered Patient A the opportunity to have a chaperone present.

   (2) Between approximately August 2001 and December 2005 the Appellant performed further internal examinations of Patient A's vagina

(a) without the presence of a chaperone;
(b) without his first having offered Patient A the opportunity to have a chaperone present;
(c) and he failed to record, adequately or at all, after each consultation the fact that such internal examinations had been performed by him.

(3) On 02.12.05 Patient A, complaining of hip pain, attended a consultation with the Appellant. During his examination of Patient A, the Appellant inappropriately touched her breasts under her clothing. This touching was not clinically justified and was sexually motivated.

(4) In July 2009 a Fitness to Practise Panel of the GMC found the facts set out in paragraphs 1-3 inclusive above to have been proved. The Appellant did not appeal that finding.

(5) At a FTPP Review Hearing on 15.07.10 the Appellant through his solicitor submitted that "the previous incident was out of character and that he had insight into his misconduct.

(6) By letter dated 15.07.10 the Appellant wrote to David Amess MP to say that he had never accepted that he did any misconduct and alleged that new evidence had come to light which threw doubt on Patient A's complaint. The Appellant still did not seek permission to appeal (admittedly, out of time) the findings of fact made by the FTPP in July 2009.

AND THAT by reason both of his conduct towards Patient A and of his lack of integrity regarding the issue of insight, the Appellant is unsuitable to be included on the Respondent's Performers List

AND FURTHER OR ALTERNATIVELY THAT the Appellant's inclusion in the Respondent's Performers List would be prejudicial to the efficiency of the services to be provided by those on the List"

3. Dr Shah has worked as a GP, mostly in Southend on Sea for 47 years. On 10th July 2009 the Fitness to Practice Panel of the General Medical Council found that Dr Shah had inappropriately and in a sexually motivated way touched the breasts of Patient A on 2nd December 2005. They also found that Dr Shah had performed vaginal examinations on Patient A between August 2001 and September 2005 without offering her the opportunity to have a chaperone present. He was found to be impaired and he was suspended from practice for 12 months. No appeal was lodged. As a consequence of his suspension the Primary Care Trust removed Dr Shah from their Performers List.

4. On 15 July 2010 the GMC Fitness to Practise Review Panel determined that Dr Shah's fitness to practise was no longer impaired and the suspension order expired on 7 August 2010. Dr Shah informed the Primary Care Trust of his intention to re-apply for inclusion on the Performers List and submitted his application on 29 July 2010, and his completed Criminal Records Bureau form on 5 August 2010.On 27th September 2010 the Primary Care Regulation Group who consider and advise upon such applications to the Chief Executive of the Primary Care Trust, indicated that they were minded to recommend refusal of Dr Shah's application, this was expressed conditionally as the Primary Care Regulation Group had not yet considered the enhanced Criminal Records Bureau check as is required under the regulations.

5. Formal refusal took place on 4th February 2011 following oral representations from Dr Shah before the Primary Care Regulation Group. In that notification the reasoning of the panel was adopted. In short that panel noted that the General Medical Council had found that Dr Shah had touched a patient on her breasts in a sexual way during an examination of her hip and the failure to offer a chaperone, whilst recognising such matters as the actions of Dr Shah in keeping his knowledge up to date, and bearing in mind his previous good conduct, and the period since that matter occurred, the panel considered he was lacking insight into the gravity of the misconduct found against him. They further considered that the behaviour was extremely serious in that he touched the breasts of a patient in a sexually motivated manner during an examination, repetition could not be excluded and he was therefore unsuitable.

6. The hearing before us is a rehearing and we do not, for that reason, rely upon the findings of the General Medical Council as to what has happened: we have heard evidence and drawn our own independent conclusions on disputed matters. We note that the burden of establishing that a doctor is unsuitable within the regulations lies upon the Primary Care Trust.

7. We heard evidence from Patient A. She adopted her previous statements and described many internal examinations all performed with neither the presence nor even the offer of a chaperone. She also described attending Dr Shah's surgery with a hip problem on 2nd December 2005, she and her then 16 year old son attended together because her son already had an appointment and Dr Shah indicated he could squeeze both into one consultation slot. We observe at this point that Dr Shah is popular with his patients and we have seen a number of testimonials. Likewise it was suggested after this witness gave evidence that she too had remarked at one point about this time that she liked the flexibility of the practice, and no doubt this is an instance of it.

8. Patient A had worn no brassiere that morning having rushed to get her son to the appointment. She was examined first, with her son in the consulting room, and she lay on the examination bed, her body mostly concealed from her son by a curtain. Dr Shah manipulated her leg to examine her hip, then without warning cupped first one then the other breast reaching under her top to do so. At this time her son was facing the opposite way reading posters on the wall. She made no significant sound or protest and explained in cross examination that she was shocked, confused, having thoughts such as whether the Doctor thought she may have a heart problem racing through her mind. The examination ended, she sat next to her son whilst he was examined, her mind still racing and in shock, they left together and once outside she asked her son if what had happened to her was a normal examination. He suggested not, and she retuned home. She took advice from her father and subsequently called NHS direct and they referred her to the Primary Care Trust who in turn referred her to the Police. The Crown Prosecution Service decided that there was insufficient evidence to prosecute. However the case was taken up by the General Medical Council and she gave evidence before the fitness to practice committee.

9. In cross examination by Mr Samarasinghe, she denied the incident was invented for the purposes of obtaining compensation. She accepted that she had not reported this to the receptionist or the practice nurse at the practice, rather to her son and later to her father and then NHS Direct. She accepted that her last Doctor always offered chaperones and that she could have asked for one, but she explained that she believed that it was the Doctor's responsibility to offer a chaperone. Questioned about the detail of her account she maintained it was correct, although she may be mistaken about the arrangement of the chairs and table in the room, but she confirmed her son was facing away at the time of the incident.

10. She was also cross examined about her claim that Dr Shah had undertaken a number of internal examinations of her, "*more often than not*" when she saw him and whilst unable to say they took place every time there were a number and a chaperone was never offered.

11. Patient A's son gave a similar account of the consultation, noting his mother seemed quiet afterwards, During the examination he heard his mother say ooh or ah as if she was shocked or hurt and she looked embarrassed or shocked on rejoining him. We consider that the sounds may have been from the painful hip being manipulated. Once outside the surgery she asked about the examination and touching of breasts, he swore and said she should report it.

12. He was cross examined and made it plain that he was looking away during the examination looking at posters on the wall, he had not asked she looked embarrassed and nothing was reported until they were

outside.

13. Ms Vivien Barnes gave evidence about the procedure undertaken by the Primary Care Trust and although it was suggested to her that somehow she had orchestrated the complaint by Patient A she denied doing anything other than offering appropriate support and taking a complaint seriously.

14. Dr Shah gave evidence; he gave evidence in a mild mannered and restrained way, sometimes having problems with his hearing, but always seeking to have a question repeated where necessary. We are satisfied he understood all of the questions asked. He explained that he always offered chaperones during intimate examinations and indeed his invariable practice was to have a chaperone present, he had never undertaken an intimate examination of a female without the presence of a chaperone, If the presence of a chaperone was refused by the patient then if another chaperone was suitable it was rearranged to ensure their presence, but if refused outright the examination had to be done by someone else. He regarded his notes as good, indeed perfect, but could of course never exclude the slim possibility that he had been interrupted by an emergency before he could get an accurate record down. That may explain why there was no record of a chaperone in the record of his consultation with Patient A on 7th November 2001 when he accepted that the record of a High Vaginal swab being taken indicated he had performed an internal examination.

15. In respect of 10th July 2002 when a Depro Provera injection was given an internal examination was clinically justified, however if it was not recorded it was not done, unless it was one of those rare occasions when something had caused his recording to be interrupted. He had not performed any other internal examinations.

16. He was cross examined and maintained his position generally, accepting that there was no clinical justification for the touching alleged by Patient A during the last examination, but denying that it had occurred. He also indicated that he did not consider that what was described could be done by accident.

17. We heard evidence from Susan Stoneman who worked for many years as Dr Shah's receptionist, and who considered him a popular and well-respected Doctor. She had been made aware of the complaint about 2 weeks after Patient A had been examined, she recalled then and now that Patient A said nothing on her way out, but did not look anything other than normal.

18. At paragraph 6 of her statement she recorded this *"I am not aware of any instances when Dr Shah would conduct intimate examinations on female patients without the offer of a chaperone and I received no complaints from female patients in this regard."* Within her statement at paragraphs 7 and 8 she described the chaperone system and how it

operated. She often acted as a chaperone and was likely to have done so for Patient A in 2001.

19. Mr Rahul Shah, the appellant's son gave evidence, he too was a doctor now trained as a surgeon, although he had done some patient liaison work for the practice to improve his own CV. He was generally unhappy with the decisions made in this case, feeling that insufficient account had been taken of his father's character and how he was regarded by other medical professionals, his staff and patients.

20. We were also supplied with a number of references from patients, the patient participation group, employees and clinicians. All speak well of Dr Shah and their experience of him.

21. There are direct conflicts between Patient A and Dr Shah in respect of their evidence. Patient A speaks of a number of regular internal examinations without a chaperone even being offered, and touching on the last occasion, Dr Shah speaks of one perhaps two internal examinations over 4 years, never without a chaperone and no touching.

22. It does not seem to us that the accounts can be reconciled. We have borne in mind not only Dr Shah's record of 47 years as a Doctor, but also the references supplied by clinical colleagues and a number of patients. We have heard Susan Stoneman in person and noted her great respect for him; we have seen Mr Shah, who it seems fair to say was himself inspired to become a doctor from growing up with a father who did that work honourably for many years. However we note also that Patient A has given a clear consistent account of what occurred, has no reason to have enmity towards Dr Shah and reported the matter to her son within minutes. We regard that report as significant, although she was not detected as being shocked by the reception staff at the practice, we would not necessarily expect that seeing patients ill or uncomfortable (and Patient A was complaining of hip pain at this time) for a few seconds, without them even speaking, would form a reliable basis for assessing accurately whether they were shocked or not as they passed by.

23. It has been suggested that Patient A may be motivated by compensation. It was, however, some years before she made any claim, and a person who is affected as she claims, would be entitled to some compensation. We note also that for this to be correct she would have to have invented a touching incident, decide to use her son as a witness by telling him of it, and persist for years in lies before a number of regulatory and professional bodies. We do not consider that she was motivated by any intention to claim compensation. It has been suggested that a short time before this incident, Dr Shah had insisted on recording asthma on the medical note given to Patient A's son when he went to join to the army, and he had been asked not to and this may be the cause of some enmity. We heard it explained by her son that

childhood asthma was not a condition which needed to be recorded and there were instructions to that effect which is why it had arisen, and he was in any event now expecting to join the army in April 2012. We do not consider this to provide any motivation for the witnesses to lie. It was also suggested that because Patient A was at times depressed and had a difficult period at the school where she worked that this may have led to this false accusation. We do not consider that this is at all likely to be the explanation for her account given her persistence with it and her lack of enmity toward Dr Shah.

24. We have looked carefully at the transcript of Patient A's telephone call to National Health Service Direct, it commences at page 533 of bundle 4 within the transcript of the GMC proceedings. Within those calls Patient A relates an account which has been broadly consistent throughout, but also reveals her nervousness and bewilderment at her situation, she is plainly asking for advice. That transcript supports her account that she was confused and wanted advice, rather than being, as has been suggested, a person with a plan to ruin a good Doctor for reasons of personal greed or because of some imagined slight. We consider that it provides good support for her assertion that she is not motivated by malice.

25. We note that she alleges no offer of a chaperone and examinations took place without one. It is some support for her allegation in this respect that there is an examination recorded on 7th November 2001 with no note of a chaperone. Given how rare such a mistake would be on Dr Shah's account it is a remarkable co-incidence that she claims there was an examination without a chaperone, and her records do not have one recorded. We note that other doctors who had examined her had a chaperone present. She accepted she could have asked for one, but thought it was up to the Doctor. Whilst Patient A is a mature and obviously educated person we accept that she placed her trust in Dr Shah on this point.

26. Dr Shah claimed that his policy was not to conduct any intimate examination upon a female patient without a chaperone, and we note immediately that there is no evidence outside that of Patient A that he was doing so. However although Dr Shah has explicitly told us what his policy on chaperone was, Ms Stoneman did not repeat that simple policy. Both the documents from the surgery that Dr Shah produced and was using after Patient A made a complaint and Ms Stoneman indicated a policy of offering chaperones, rather than insisting on them at every intimate examination. The patient notification of the chaperone policy is at page 114 of the appellant's bundle, it makes it plain that all patients may request a chaperone, and that "*your healthcare professional may also require a chaperone for certain consultations".* What it does not do is explain Dr Shah's claimed policy. We do not understand why this should be so and it casts doubt upon Dr Shah's reliability.

27. We did not derive any assistance from the fact that Dr Shah did not appeal the decision of the GMC fitness to practice panel. We accept that sometimes proceedings can weary anyone and they may not appeal for reasons other than acceptance of the decision, nor from the assertion that at times his representatives seemed to admit his behaviour to mitigate his penalty. We are satisfied he made it plain throughout that he denied the allegations, and that consistency we have borne in mind in assessing his account. In particular his use of the word "respect" as in respecting the decision seems to us to be making the plain point that he does not accept the truth of something, it is common enough to use the word respect as a prelude to complete disagreement. We are also aware that some years ago there was a Crown Court trial involving Dr Shah, we are aware he was acquitted and have considered Dr Shah to be of good character and treated him and his evidence as being supported by that.

28. Taking all matters into consideration we accept the account of Patient A, we find that she was given more than one internal examination without a chaperone present nor was one offered, in particular an internal examination was given on 7th November 2001. We also find that on 2nd December 2005 Dr Shah touched her breasts as she has described and that the only reasonable explanation of that is that it was done in a sexual manner.

29. In respect of the allegations made we find 1, 2 and 3 proved in all respects. We find 4 irrelevant, 5 irrelevant and 6 not to have been established. We find that the touching of a patient for sexual gratification during an examination in these circumstances is one which renders the appellant unsuitable within regulation 6(1).

Decision

Appeal Dismissed.

Judge John Aitken
3 January 2012