

GENERAL MEDICAL COUNCIL

FITNESS TO PRACTISE PANEL (SERIOUS PROFESSIONAL MISCONDUCT)

Thursday, 21 January 2010

Regent's Place, 350 Euston Road, London NW1 3JN

Chairman: Mr Andrew Reid, LLB JP

Panel Members: Ms Joy Julien
Mrs Pamela Mansell
Mr William Payne
Dr Roger Smith

Legal Assessor: Mr Duncan Smith

CASE OF:

BARTON, Jane Ann

(DAY FIFTY-ONE)

MR TOM KARK of counsel and MR BEN FITZGERALD of counsel, instructed by Field Fisher Waterhouse, Solicitors, appeared on behalf of the General Medical Council.

MR TIMOTHY LANGDALE QC and MR ALAN JENKINS of counsel, instructed by the Medical Defence Union, appeared on behalf of Dr Barton, who was present.

(Transcript of the shorthand notes of T A Reed & Co Ltd.
Tel No: 01992 465900)

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A THE CHAIRMAN: Welcome back everyone. We left matters yesterday at the point when I was about to invite the Legal Assessor to provide us with his advice and you will recall that Mr Langdale indicated that the doctor would not be able to be present herself but was content for us to continue in her absence.

Mr Jenkins, I take it that you are going to stand in, as it were, for Mr Langdale today?

B MR JENKINS: I am, sir, yes.

THE CHAIRMAN: Very well, then I will invite the Legal Assessor to provide us with his advice.

THE LEGAL ASSESSOR: Thank you, Chairman.

- C 1. I wish to make it abundantly clear that matters of judgment and discretion are entirely outside the boundaries of the advice and assistance that I am required to give to the Panel. For the avoidance of doubt, the Panel is the judge of the law. I advise on matters of law to assist the Panel in the discharge of its functions. I will advise only. I will not give directions. To do so might create in the mind of the informed observer a suspicion of improper influence. Should any hint of a suspicion arise in the Panel's mind that any advice I give breaches the boundaries or exceeds the limits imposed upon all legal assessors by The General Medical Council (Legal Assessors) Rules 2004 the Panel must be equally assiduous to resist and challenge such an intrusion into what is and remains the Panel's sole domain.
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- E 2. The Panel, exercising its own independent judgment, must now consider whether it judges Dr Barton to have been guilty of serious professional misconduct based on the facts found proved. This is an exercise in making a judgment without reference to any burden or standard of proof. Serious professional misconduct, if found to have been committed is an historical fact unlike the new concept of impairment fitness to practise.
- F 3. On 6th August last, my predecessor, Mr Chamberlain, gave advice to the Panel as to what constitutes serious professional misconduct and, as it has been commended by Mr Kark without demur from Mr Langdale, I do not propose to repeat it as the Panel has a written copy of that advice to refer to.
- G 4. I would emphasise, however, the need to judge Dr Barton's actions not with the wisdom of ten years' hindsight and the advantage of modern approaches to palliative care, but in the context of the culture prevailing at the time of the events in respect of which findings have already been made. Context is important because the Act requires the Panel to consider whether Dr Barton has been guilty of serious professional misconduct.
- H 5. The Panel ought not to lose sight of the fact that it is the GMC case against Dr Barton which it is trying and not a hypothetical case against any other practitioner in respect of whom, in the course of the evidence, it might have been tempted to be critical. This is not to say, however, that her actions are to be judged in isolation. An injustice would occur were she to be judged the scapegoat for possible systemic failings

A beyond her control. Her actions must be judged in context. The Panel has had the benefit of hearing a great deal of evidence and is best placed to define that context.

6. It is a requirement of the rules that reasons be given for the decision taken. The extent of the reasoning was, in part, the subject of the appeal in the case of *Phipps v General Medical Council* [2006] EWCA Civ 397; [2006] Lloyd's Rep Med 345 in which Wall LJ said:

B “85 ... [E]very Tribunal (including the PCC of the GMC) needs to ask itself the elementary questions: is what we have decided clear? Have we explained our decision and how we have reached it in such a way that the parties before us can understand clearly why they have won or why they have lost?”

C 86. Very grave outcomes are at stake...Respondents to proceedings before the PCC of the GMC are liable to be found guilty of serious professional misconduct and struck off the Register. They are entitled to know in clear terms why such findings have been made.”

- D 7. As Sir Anthony Clarke MR put it in *Meadow v General Medical Council* [2006] EWCA Civ 1390; [2007] 1 QB 462:

E “In short, the purpose of [fitness to practise] proceedings is not to punish the practitioner for past misdoings but to protect the public against the acts and omissions of those who are not fit to practise. The FPP thus looks forward not back. However, in order to form a view as to the fitness of a person to practise today, it is evident that it will have to take account of the way in which the person concerned has acted or failed to act in the past.” (para 32).

- F 8. I refer to this passage not because this Panel is required to make a judgment on the statutory concept of impairment of fitness to practise, but because Mr Langdale used the phrase “fitness to practise” in his submissions. A Fitness to Practise Panel proceeding under the old rules, and following a finding that a practitioner has been guilty of serious professional misconduct must, in the exercise of its discretion as to sanction, look forward to avoid the criticism that it is exercising retributive justice.

- G 9. The purpose of sanctions is not to punish even though their effect might be and often is punitive. Their purpose is to provide protection to the public interest. The public interest includes amongst other things the following four:

- H
- a. Protection of patients
 - b. Maintenance of public confidence in the profession
 - c. Declaring and upholding proper standards of conduct and behaviour
 - d. It may, on occasion, also include the doctor's safe return to work but bear in mind that neither the GMC nor the Panel has any responsibility for the rehabilitation of doctors.

- A 10. In his submissions Mr Langdale made reference to the question of public trust and confidence in the profession. He submitted that this means properly informed public trust and confidence. He said it did not mean the view of members of the public who have relied on uninformed, biased and/or inflammatory reports in the media. If the Panel adopts this valid submission it may be assisted by part of the dictum of Lord Hope in the Scottish case of *Helow –v- Secretary of State for the Home Department and Another [2008] UKHL 62*. Their Lordships were dealing with
- B an appeal against the refusal by a judge, a member of the International Association of Jewish Lawyers and Jurists, to recuse herself from hearing a case involving a Palestinian litigant. Lord Hope said:
- C “Then there is the attribute that the observer is “informed”. It makes the point that, before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read into its overall social, political or geographical context. She is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment...”
- D 11. To practise safely, doctors must be competent in what they do. They must establish and maintain effective relationships with patients, respect patients’ autonomy and act responsibly.
12. Doctors have a respected position in society and their work gives them privileged access to patients, some of whom may be very vulnerable. A doctor whose conduct has shown that he/she cannot justify the trust placed in him/her should not continue in unrestricted practice while that remains the case.
- E 13. The public is entitled to expect that their doctor is fit to practise and follows the GMC’s principles of good practice by ensuring the following:
- F a) The provision of good clinical care;
 b) The maintenance of good medical practice;
 c) The maintenance of good relationships with patients and with colleagues;
 d) Honesty and trustworthiness;
 e) Their own health does not endanger patients.
14. Consider both the aggravating and the mitigating features of the case. Take into account also the evidence contained in the testimonials and character evidence called. The watchword, as ever, is “proportionality”.
- G 15. This is a balancing exercise. It requires the Panel to balance the competing interests. On the one hand is the public interest, on the other there are the interests of the practitioner.
16. The interests of the practitioner include:-
 a. Returning immediately to unrestricted practice;
 b. Consideration of her character and all personal mitigation available to her. It is at this stage that the Panel should consider the time that has elapsed since the matters giving rise to these proceedings.
- H 17. Only such sanction as is necessary to provide these safeguards should be imposed.

- A 18. That the GMC makes submissions as to the appropriate sanction to impose is not to be taken as binding upon the Panel's determination. The Panel's discretion and judgment is unfettered save by the application of proper principles I outline in this advice.
- B 19. Should the panel judge Dr Barton to have been guilty of serious professional misconduct, it must first determine whether it would be sufficient to take no action following its finding that she has been guilty of serious professional misconduct. This power is regarded as appropriate only in exceptional cases.
- C 20. Should there be a finding of serious professional misconduct and the Panel does not think it sufficient to conclude the case by taking no action, a reprimand is a course that can be adopted. A reprimand is not a sanction proper, it is not empowered by the legislation. It is an expression of the Panel's opinion about the conduct of a practitioner. The Panel has the guidance to refer to.

I would say, as a rider at this stage, that the guidance to which you have been referred, and which you should refer should you require further elaboration, is the amended 2009 edition of the Indicative Sanctions Guidance.

- D 21. The correct approach to the imposition of sanctions is to consider them in turn beginning with the least onerous, namely the sanction of applying conditions to the practitioner's registration.
22. Conditions can be imposed up to a maximum of three years. The purpose of imposing conditions is protection of patients. Conditions should be appropriate, proportionate, workable and measurable. It is required that the problem is amenable to improvement through education and that the objectives of the conditions are clear.
- E 23. Only if this sanction fails to provide the required protection will the Panel go on to consider the power to suspend. This power is limited to suspension for a period of 12 months. If either conditions or suspension are imposed, then the Panel is empowered to order a review of both or either order.
24. Finally, Erasure only takes effect should suspension fail to provide the protection required.

F Sir, that is the advice that I give at this stage. If there are any matters which members of the Panel would wish assistance on specifically, then, again, if they could raise them with me, I will do my best to assist them.

THE CHAIRMAN: Thank you, Legal Assessor. I will take that final invitation first. Is there anything that members of the Panel wish to raise at this point? No? Very well. Mr Kark, do you have any observations on the advice just tendered?

G MR KARK: No, thank you very much.

THE CHAIRMAN: Mr Jenkins, do you have any observations?

MR JENKINS: Nor I, thank you very much.

THE CHAIRMAN: Thank you very much indeed.

H Very well, what will happen now is that the Panel will go into camera to consider the matters now placed before it. I would expect this to take some considerable time and, as I indicated

A yesterday, I am not going to put any marking by way of likely timetable down. However, so
far as visitors and members of the public are concerned, I will undertake that we will not
return to read our determination until a sufficient period of notice has been given. In other
words, for example, if on Wednesday we were to conclude that we would be ready to read on
Thursday, we would notify members of the public and press through the usual channels that
we would be expecting to read the following day, so we will attempt to give as near to as we
can at least a full day's notice. I should say to members of the bar that, as always, there is the
B potential, while the Panel is in camera and in discussion, that it may find it requires further
advice from the Legal Assessor and/or indeed from the advocates themselves, and if that
happens, what we will do is cease discussion at that point and, using the numbers that I
understand the Panel Secretary has, we will let the parties know that we do require such
advice and we will then make arrangements for that advice to be tendered and indeed for you
to make such comments as you might wish on that. It may or may not happen, sometimes it
does, sometimes it does not. We understand Mr Kark is going to be in the building anyway.

C Mr Jenkins, are you going to be within a reasonable time call away?

MR JENKINS: Yes.

THE CHAIRMAN: Very well, that is what we shall do then..

D Ladies and gentlemen, we are going into camera now and you will next hear from us when
we are ready to resume. Thank you very much indeed, ladies and gentlemen

STRANGERS THEN, BY DIRECTION FROM THE CHAIR, WITHDREW
AND THE PANEL DELIBERATED IN CAMERA

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