Mental health considerations in dishonesty cases, time limits and costs

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Dr Sun v General Medical Council [2023] EWHC 1515 (Admin)

[ ] paragraph number of Fordham J's judgment

This judgment deals with an appeal brought by a doctor against her erasure from the GMC register. The judgment discusses the significance of the doctor's mental health difficulties in the context of findings of dishonesty, the law on time limits, and it provides a helpful demonstration of how CPR 52.19 (applications to limit recoverable costs) may be applied in statutory appeals of this nature.

The substantive issue

At the MPTS hearing, there were 13 allegations of dishonesty against Dr Sun. All were admitted [5]. Current impairment of fitness to practise was admitted [5]. Both the GMC and Dr Sun invited the Tribunal to impose suspension rather than erasure. Nevertheless, the Tribunal decided to direct erasure.

The Tribunal heard evidence from four expert witnesses (all Consultant Psychiatrists). '*The four experts agreed that Dr Sun had had a mental health condition during the period in which the Conduct had taken place'* [5]. However, Fordham J reasoned that [35]:

> *The key point was that all the evidence and argument, regarding Dr Sun's conduct being "affected by her mental health condition", did not extend to any sustainable suggestion that Dr Sun's mental health had led her to misappreciate what she was doing. Dr Sun knew what she was doing. She had the actual state of knowledge and belief which made the entirety of the Conduct "misconduct". She had the actual state of knowledge and belief which made the 13 incidents "dishonest". There was no mental health distortion capable of defending, excusing or exonerating any of the Conduct. That was a central point made by the GMC. It was a central point accepted by the Tribunal. To take each*

of the 13 incidents, the Tribunal found that Dr Sun wrote those untruthful communications on all 13 occasions, she did so knowing and understanding that what she was saying was false. As the Tribunal recorded, Dr Sun:

knew what she was saying was false, but she said it anyway.

The key point was therefore this. Dr Sun's mental health condition did not alter the character of the "misconduct". It did not excuse or exonerate. This was carefully explored by the Tribunal, whose conclusions were clear and fully justified. As Ms Hearnden put it in her oral submissions, the recognition of this key point 'fundamentally changed the exercise', in evaluating the evidence relating to the mental health condition.

In dismissing Dr Sun's appeal, the High Court effectively affirmed the well-established principle that personal mitigation (in this case mental health difficulties) carries less weight in this field of law than elsewhere, because the jurisdiction is not punitive but one designed to protect the public, protect the reputation of the profession and declare and uphold proper professional standards [44]. The Tribunal's conclusions were not wrong and the sanction of erasure was not excessive or disproportionate [45].

Time limits –exceptional circumstances?

Dr Sun's appeal was filed outside of the 28-day statutory time limit. The last day for filing the appeal and paying the fee was 29 April 2022. The appeal was only filed with the correct court (and the fee paid) on 4 May 2022 [51].

Fordham J addressed the time limit issue in detail. While a full discussion of the relevant case law is outside the scope of this summary, the conclusion on time limits is noteworthy given last year's judgment in *Stuewe v HCPC* [2022] EWCA Civ 1605.

In *Stuewe*, the Court of Appeal summarised the law in the following terms; *'there is a discretion (or duty) to extend time for the bringing of a statutory appeal but only in exceptional circumstances, namely where to deny a power to extend time would impair the very essence of the right of appeal. That is the key question. Once the discretion (or duty) arises, it must then be exercised to the minimum extent necessary to secure ECHR compliance*' (paragraph 49 (Carr LJ)). The Court of Appeal held that while there is no independent requirement for the party seeking an extension to show that he has done all he personally can to bring and notify timeously, this is

a valuable guide as exceptional circumstances are unlikely to be found if a party has not personally done all he can to appeal in time. At paragraph 54, Carr LJ held that *'therefore, the central and only question for the court is whether or not "exceptional circumstances" exist, namely where to deny a power to extend time would impair the very essence of the right of appeal. Any gloss is unhelpful... Once the discretion (or duty) arises, it must then be exercised to the minimum extent necessary to secure compliance with Article 6 rights'* [emphasis added].

Notwithstanding the above, Fordham J considered it necessary to address directly two matters set out in the earlier case law [51, 53]:

> *The applicable Article 6 standards permit the appeal to be excluded – and an extension of time refused – only if the application of the time limit on the particular facts: (i) does not restrict or reduce the access to the court left to the individual in such a way that the very essence of the access to the court is impaired; and (ii) involves a restriction with a reasonable relationship between the means employed and the legitimate aim sought to be achieved*

Fordham J went on to make findings of fact relevant to the time limit issue [55-57]. In brief, the MPTS determination was served on Dr Sun on 25 March 2022. Dr Sun relied on the Medical Protection Society (MPS) until 20 April 2022, on which date she was informed that MPS could not assist and that she would have to manage matters herself. The decision was a shock to Dr Sun, her health deteriorated and she received counselling on 8 and 14 April 2022. Dr Sun sought advice from the British Medical Association (BMA) on 21 April 2022. The BMA informed Dr Sun that it could not assist on 26 April 2022. Dr Sun spoke with a barrister (informally) on 28 April 2022 (the day of the deadline). The barrister advised Dr Sun that her appeal should be lodged with the Chancery Division. That advice was wrong. Dr Sun emailed documents to Chancery Division on deadline day. On 29 April 2022 the Chancery Listing Officer informed Dr Sun that her appeal needed to be filed with the Administrative Court. Following further correspondence with the court, the appeal was filed with the correct court (and the fee paid) on 4 May 2022 [51].

Fordham J accepted that Dr Sun had been provided with an information sheet which pointed her in the direction of web-pages where she could have found an explanation of the relevant court and how to pay the relevant fee. '*She could have acted differently'* [59].

However, on the above facts, Fordham J would have extended time if his lordship had been persuaded of the substantive merits of the appeal [59]. This is surprising given that difficulties obtaining legal advice or representation and understanding court process are common challenges

faced by many litigants. And, while Dr Sun's health deteriorated following the MPTS determination, it does not appear that this was a central reason for her failure to appeal in time.

The outcome is also difficult to reconcile with *Stuewe*; there the appeal was submitted out of time in circumstances where the practitioner had made several attempts to obtain legal advice and was a resident of Gibraltar (with no UK address). He asserted that he was unable to travel to the UK at the material time due to the Covid-19 pandemic. The crucial error was the failure to file an Appellant's Notice with an application to be permitted to rely on an address in Gibraltar, before the 28 day deadline expired. The Court of Appeal thought it was clear that the required exceptional circumstances did not exist.

In light of the above, although Fordham J's reasoning emphasises that all cases turn on their particular facts, would be appellants who have missed a time limit due to difficulties obtaining advice or navigating the court process should not assume they will be granted an extension of time; the judgment should be treated with caution given its apparent conflict with *Stuewe*.

CPR 52.19 – Orders to limit the recoverable costs of an appeal

The risk of an adverse costs order is a matter which often weighs heavily on the minds of practitioners considering whether to appeal a finding of impairment of fitness to practise or a sanction imposed by their professional regulator, particularly because a requirement to pay costs does not follow automatically in proceedings before many professional regulators. In some cases, for example in proceedings before the NMC's Fitness to Practise Committee, there is no power to order costs. In contrast, significant costs orders are routinely made against losing parties in High Court statutory appeals.

Considering the above, Dr Sun's case helpfully draws attention to the under-utilised provisions in CPR 52.19:

> ***52.19***
> *(1) Subject to rule 52.19A, in any proceedings in which costs recovery is normally limited or excluded at first instance, an appeal court may make an order that the recoverable costs of an appeal will be limited to the extent which the court specifies.*
>
> *(2) In making such an order the court will have regard to—*
> *(a) the means of both parties;*
> *(b) all the circumstances of the case; and*

(c) the need to facilitate access to justice.

(3) If the appeal raises an issue of principle or practice upon which substantial sums may turn, it may not be appropriate to make an order under paragraph (1).

(4) An application for such an order must be made as soon as practicable and will be determined without a hearing unless the court orders otherwise.

In Dr Sun's case, the GMC accepted that CPR 52.19 applied in principle [61]. It also accepted that Dr Sun had made the application promptly.

In determining the application, account was taken of the GMC/MPTS costs rules. Costs are not awarded automatically but where conduct has been unreasonable [62]. The function of CPR 52.19 is to allow, in an appropriate case, '*the fact of an underlying costs regime of that kind to resonate for costs purposes in the subsequent appeal'* [62].

The court took account of Dr Sun's means (following erasure she secured a part time job with an annual salary of £7,000), significantly below her expenditure. And although the GMC argued that the costs of Dr Sun's appeal should not fall on the medical profession as a whole, that is what usually happens at first instance (in proceedings before the MPTS). Fordham J also attached weight to Dr Sun's mental health condition, the fact that she was not regarded as a risk to the public and the fact that the GMC did not seek erasure at first instance [62].

In all the circumstances, a limited costs order was made in favour of the GMC: £2,000 rather than the £12,150 sought by the GMC.

It is unclear why the application was only dealt with at the appeal hearing, the default position is that the application should be determined on the papers (CPR 52.19(4)). It is obviously to the advantage of both sides to an appeal to know where they stand in relation to costs at an early stage.

It is also unclear on what basis the court made any costs order against Dr Sun. The judgment does not explain why the specific sum of £2,000 was appropriate. There is no clear finding of unreasonable conduct, as required in proceedings before MPTS.

Nevertheless, any practitioner considering an appeal against a fitness to practise determination of a statutory regulator with limited (or no) costs powers should consider whether to make an

application for an order limiting the recoverable costs of the appeal. Of course, the court's power to limit recoverable costs is discretionary and all the circumstances of the case must be considered. It should also be kept in mind that, if such an order is made, it may mean that an appellant is unable to recover their own costs if their appeal is successful.

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