The proper approach to sanction in professional disciplinary cases based on convictions for serious offences

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Professional Standards Authority for Health and Social Care v (1) General Dental Council (2) Naveed Patel [2024] EWHC 243 (Admin)

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> *"In many cases, no doubt, a suspension running concurrently with the period or part of the period over which the criminal penalty is served or is to be completed may be appropriate. That will follow the general principle in Fleischmann and meet public expectations. In other cases, an approach fitted to the particular circumstances will be required."*

> *"As Mr Tankel submitted "the fact that Mr Patel had been given condign punishment by the criminal court was a reason for, not against, imposing a suspension coterminous with the criminal sentence.""*

> *"The starting point ought to have been consideration of suspension, unless there were circumstances plainly justifying a different course. If there were such circumstances, then a reprimand might be appropriate but this was not the route the Committee took."*

Comment

Sweeting J's judgment of 7 February 2024 offers a useful guide as to the proper approach to sanction in professional disciplinary cases based on convictions for serious offences. It also includes instructive comment on the ambit of the High Court's power to substitute a decision on sanction.

Overview

On 24 August 2021 Mr Naveed Patel was convicted of causing death by careless driving on 15 February 2019. On 27 September 2021 he was sentenced to 15 months' imprisonment, suspended for 2 years with 280 hours unpaid work, and he was disqualified from driving for 3 years.

On 10 October 2022 he appeared before the Professional Conduct Committee of the GDC ("the Committee"). He admitted his conviction and admitted failing to inform the GDC before the date of conviction that he was charged with the offence. The Committee found it proved that his conduct in relation to failing to inform the GDC was misleading; an equivalent charge of dishonesty was found not proved.

Mr Patel received the sanction of a reprimand. The GDC referred the Committee's decision to the Professional Standards Authority ("PSA"), who referred the case to the court on the principal ground that the sanction imposed was inappropriate and unduly lenient. The appeal hearing was heard on 13 July 2023.

On 7 February 2024 Sweeting J allowed the appeal, concluding *"that the sanction imposed was not sufficient to maintain public confidence and was "wrong"."*

Legal Principles

Sweeting J placed particular emphasis on the judgment of Newman J. in *Council for the Regulation of Health Care Professionals v GDC v Fleischmann* [2005] EWHC 87, highlighting the following principles:

- the approach to sanctions in cases involving convictions for serious offences will include an assessment of the gravity of the offending, taking into account (para.51 of *Fleischmann*):
    - the penalties set by Parliament for the offences,
    - the rationale for the creation of the offences,
    - the guidance from the Court of Appeal, and
    - the proceedings in the Crown Court, including the sentence imposed."
    - (Sweeting J added to this list: consideration of any applicable Sentencing Council guidelines)

- *"…as a general principle, where a practitioner has been convicted of a serious criminal offence or offences he should not be permitted to resume his practice until he has*

satisfactorily completed his sentence. Only circumstances which plainly justify a different course should permit otherwise." (para.54 of *Fleischmann*, Sweeting J's emphasis)

- a practitioner should only return to practice where they had *"paid their debt to society".*

Sweeting J also noted that the Committee was required to follow the Sanctions Guidance unless there was good reason to depart from it. The Guidance makes specific reference to *Fleischmann*, incorporating the "general principle" set out by Newman J, and it states that that principle applies to suspended sentences.

In the present case, the PSA suggested that a suspension from practice of twelve months would have been the appropriate sanction, as the disciplinary proceedings took place about twelve months before the expiry of the period of suspension of the sentence of imprisonment.

Sweeting J held that the general principle in Fleischmann and the Sanctions Guidance could not be applied as it if were a rule:

- It might be thought to produce an anomalous result in some cases if applied generally; for example, had Mr Patel been sentenced to immediate custody (which the general public might well conclude would indicate a more serious case), the expiry of his sentence would only have been three months away from the date of the disciplinary proceedings.

- This anomaly could be even greater in cases involving a short custodial sentence suspended for a lengthy period.

- Moreover, a period of suspension may not exceed 12 months and the power to review the sanction cannot be used as a method of imposing a longer sanction of suspension (per *Khan v General Pharmaceutical Council* [2016] UKSC 64); accordingly, an earlier hearing date in the case would have meant that a suspension could not be entirely co-extensive with the suspended prison sentence.

- Furthermore, *Fleischmann* did not suggest that suspension fell away as an available sanction just because a criminal sentence has been "completed".

- The above considerations led Sweeting J to the following conclusions:

> *"both [Fleischmann] and the "general principle" derived from it in the GDC Guidance must bend to the overarching requirement to impose a sanction which is*

just, proportionate and only that which is necessary to maintain public confidence."

"In many cases, no doubt, a suspension running concurrently with the period or part of the period over which the criminal penalty is served or is to be completed may be appropriate. That will follow the general principle in Fleischmann and meet public expectations. In other cases, an approach fitted to the particular circumstances will be required."

The Grounds of the Appeal

In applying the above principles to Mr Patel's case, Sweeting J quoted extensively from the judge's sentencing remarks, identifying them as indicative of both the circumstances and the seriousness of the offence, and concluding that, notwithstanding the decision to suspend the custodial sentence, *"She must nevertheless have regarded this offence as very serious, and rightly so in my view."*

After citing the Committee's decision and reasons, Sweeting J considered each of the grounds of appeal in turn, leaving Ground 1 for last. The PSA had argued that:

- **Ground 2**: the Committee had not properly taken into account the judge's findings as to Mr Patel's lack of insight and, at best, should have decided that Mr Patel was slow to develop insight.

  Sweeting J rejected this contention, holding that, on the material the Committee had before it, it was entitled to reach the view that Mr Patel had shown adequate insight, and the risk of repetition was low.

- **Ground 3**: undue weight was given to mitigation and family impact.

  Sweeting J agreed, holding that there was force in the PSA's general observation that the Committee must have given considerable weight to personal mitigation in order to have arrived at its conclusion to the appropriate sanction, in circumstances where such mitigation could only be afforded a reduced role.

- **Ground 4**: in assessing the effect of the conviction on public confidence the Committee wrongly relied on the absence of evidence of public concern about Mr Patel's continuing practice following his conviction.

Sweeting J emphasised that the assessment of public trust and confidence is an objective exercise (per *Adil v GMC* [2023] EWHC 797 (Admin) [35]), and he agreed with the PSA's submissions that, in the circumstances of this case, it would be surprising to find evidence of the kind that the Committee had identified as absent; the Committee had improperly attached weight to the fact that there was no such evidence.

- **Ground 5**: the Committee had relied upon inapposite factors in support of reprimand and had taken the wrong approach to the penalty imposed in the Crown Court and the punitive effect of suspension from practice.

  Sweeting J accepted this Ground too, pointing out that the Guidance suggests that a reprimand may be appropriate where the misconduct or level of performance is at the lower end of the spectrum; but a conviction for causing death by careless driving was not, on any view, conduct at the "the lower end of the spectrum" of driving offences.

  Sweeting J also held that the Committee took a flawed approach to implementing the principle that the purpose of imposing a sanction was not to punish the registrant but to protect patients and the wider public interest. The Committee's decision referred to the facts that Mr Patel did not need any further punishment added to that imposed by the criminal court and that a suspension order would be extremely punitive. However,

  > *"The fact that Mr Patel had received a severe punishment in the criminal court was not in itself a reason to consider applying a lesser sanction nor was the fact that the regulatory sanction might be punitive in operation. The seriousness of the offence, reflected in the sentence imposed, was a measure of the impact on public confidence that it was likely to have. As Mr Tankel submitted "the fact that Mr Patel had been given condign punishment by the criminal court was a reason for, not against, imposing a suspension coterminous with the criminal sentence." Equally the punitive effect of a sanction articulated in terms of its inevitable effect on any dental practice was not a factor to which substantial weight could be attached in a conviction case."*

  The factors set out in paragraph 6.9 of the Sanctions Guidance, which are said to indicate where a reprimand may be suitable *"may be readily applicable in a case involving misconduct in a clinical context, [but] are, at best, an uncertain guide to any assessment of the seriousness of criminal offending".* For example, danger to the public as a dentist did not arise, but insofar as the conviction was concerned, Mr Patel posed a risk to the public as a driver which the judge had held could be managed in

the community. Had the Committee undertaken an appropriate analysis, those factors would not have fallen to be considered at all or they would not have been regarded as supporting the imposition of a reprimand.

- **Ground 6**: there had been an unjustified departure from the general principle in *Fleischmann*; the Committee should have applied it unless there was a good reason not to.

  Sweeting J agreed, holding that:

  > *"The starting point ought to have been consideration of suspension, unless there were circumstances plainly justifying a different course. If there were such circumstances, then a reprimand might be appropriate but this was not the route the Committee took."*

  Sweeting J concluded that none of the Committee's reasons for departing from the general principle – namely, the nature of the offence itself in terms of lack of any criminal intent, the lapse of time since the incident, and the good standing in the profession earned by Mr Patel – plainly justified a departure from *Fleischmann*.

  > *"…[lack of] criminal intent…was "built in" to the offending…isolating a feature of the offence which would be common to every case…was not a clear justification for departing from the principle in Fleischmann."*
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  > *"The principle in Fleischmann can only be engaged once there has been a conviction and sentence…impairment by reason of a conviction…is the matter the Committee had to assess…it is difficult to see how on the facts of the present case [the age of the predicate offence] could be regarded as a factor which plainly justified a departure from Fleischmann. The Committee was considering the matter a year after conviction and during the operational period of the sentence imposed."*
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  > *"…good standing as a dentist…is likely to be the position in many conviction cases; it was not exceptional or a matter which plainly justified a departure from Fleischmann"*

- **Ground 1**: the Committee had failed to consider the seriousness of the offence.

Sweeting J agreed with the submissions that the Committee could not have arrived at a reprimand as an appropriate sanction had it properly assessed the seriousness of the criminal offence and the application of the Sanctions Guidance.

Mr Patel had been driving at grossly excessive speed in a built-up area. The judge, in her sentencing remarks, had explained carefully why this was a serious offence of its type. Sweeting J concluded:

> "*An offence which results in a sentence of imprisonment whether immediate or suspended should normally be regarded as a serious criminal offence for the purpose of the guidance. Any doubt about that in this case could quickly be dispelled by reading the judge's sentencing remarks."*
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> *"Suspension from practise [sic] (in a case not requiring erasure) was the starting point in accordance with Fleischmann and the GDC Guidance…It was then necessary to consider whether there were circumstances plainly justifying a different course and, if not, the appropriate period of suspension. The factors identified by the Committee did not in my view justify any different course being taken..."*

Disposal of the Appeal

Sweeting J allowed the appeal. He rejected a submission made on Mr Patel's behalf that it was open to the court to allow the appeal without quashing the decision, referring to the wording in s.29(8)(b) of the 2002 Act High Court by s.29(8)(c) of the National Health Service Reform and Health Care Professionals Act 2002 ("the 2002 Act"), that the court may either dismiss the appeal or *"allow the appeal and quash the relevant decision"* (emphasis added).

In considering the power in s.29(8)(c) of the 2002 Act, to *"substitute for the relevant decision any other decision which could have been made by the committee...",* Sweeting J indicated that it was in principle open to the court to take into account additional material and arguments, such as the elapse of time that had passed between the disciplinary proceedings and the appeal (during which the suspension period of the sentence had expired and Mr Patel had completed his unpaid work requirement), when deciding what sanction was now appropriate.

However, Sweeting J also expressed doubt as to whether the wording *"…any other decision…"* (emphasis added) empowered him to quash the decision to reprimand Mr Patel, but then substitute in the same sanction of reprimand.

Sweeting J quashed the decision and remitted the case to the Committee to reconsider sanction, with a direction that when the Committee considered what sanction was required to maintain public confidence it should take into account the fact that Mr Patel had completed his sentence.

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