IT'S NOT OVER, UNTIL IT'S OVER….

by

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Case Review: The position of fresh evidence after the Panel's decision on facts

TZ v General Medical Council [2015] EWHC 1001 Admin, Gilbart J

This case concerned a request to admit fresh evidence before a Fitness to Practise Panel after the Panel had heard closing submissions, but before it had formally handed down or "announced" its determination on the facts.

The allegations:

The Appellant was working as a Locum Senior House Officer in the Emergency Department of a London hospital. It was alleged that on 6 February 2010 during the course of treating a female patient ("Patient A") for abdominal pain, the Appellant carried out an unnecessary intimate examination and conducted himself in a manner that gave rise to a complaint of sexually improper behavior. The Appellant was assisted in the treatment of Patient A by a Health Care Assistant ("HCA").

Following the alleged incident, Patient A called her boyfriend ("Mr B") and told him most (but not all) of what had happened. She also told her mother about the incident when her mother called her.

It was the Appellant's case that he that he had examined Patient A in the appropriate way. He denied performing a vaginal examination, either externally or internally. He further denied any impropriety.

The criminal proceedings:

As a consequence of Patient A's complaint, the Appellant faced prosecution. In December 2011, the Appellant was acquitted at Blackfriars Crown Court. At the criminal trial, Mr B gave evidence for the prosecution and the HCA gave evidence for the defence.

The subsequent GMC hearing:

Fitness to Practise proceedings were brought by the GMC following the Appellant's acquittal, and a Fitness to Practise Panel was convened.

At the Fitness to Practise hearing, the Panel heard oral evidence from Patient A and Patient A's mother, and received written evidence from the triage nurses at the hospital and the police officers who had interviewed Patient A after the alleged incident. The Panel also saw the hospital notes, an expert report by a consultant in

accident and emergency, a transcript of the video interview of Patient A and Patient A's witness statement.

Crucially, neither Mr B nor the HCA, were called to give evidence, notwithstanding that the HCA being able to given important factual information about what went into the room during Patient A's treatment.

The Panel's determination:

After hearing closing submissions, the Panel adjourned to deliberate. On day ten of the hearing, the Panel decided to adjourn to allow time to draft its findings in full and therefore it made the decision to send out an *"embargoed draft form"* of the determination in advance of the resumed hearing.

The Panel sent out a draft determination on 24 April 2014. The Panel preferred Patient A's version of events despite numerous inconsistencies in the evidence given by Patient A and contradictions between her evidence and the evidence given by her mother (to whom she had spoken directly after the alleged incident).

Upon receipt of the draft determination, the Appellant wrote to the MPTS highlighting that two key witnesses - the HCA and Mr B - had not been called by the GMC. He requested that these witnesses both be called to give evidence before the Panel handed down its determination.

The hearing resumed on 24 June 2014. At this point it was brought to the Panel's attention that the Appellant (who was not represented and not present at the hearing) was seeking an adjournment in order to secure legal representation and to make an application to re-open the case.

Following submissions by counsel for the GMC and advice from the legal assessor, the Panel concluded that it had already made a determination and that it did not have the power to re-open the case. The Panel went on to conclude that no purpose would be served by adjourning the hearing, and proceeded to hand down its determination on facts and misconduct.

The Panel reconvened on 26 August 2014. The Appellant was present at this hearing but unrepresented. He reiterated his submissions that the matter should be re-opened so that the evidence of Mr B and the HCA could be heard. However the legal assessor's firm advice to the Panel was that there was no jurisdictional power to reopen the facts. The Chair therefore indicated that the matter would not be re-opened as the determination had been handed down. The panel proceeded to consider impairment and sanction, and duly erased the Appellant's name from the register.

The appeal:

The Appellant appealed to the Administrative Court. on the following grounds:

(i) The Panel's analysis of the credibility of Patient A and of the Appellant was wrong;

(ii) The Panel's reasons for preferring the evidence of Patient A's over the evidence of the Appellant were inadequate;

(iii) The Panel should have admitted the evidence of the HCA and/or Mr B, and failure to do so resulted in the Panel's findings of fact being wrong;

(iv) The Panel's failure to investigate an allegation of possible impropriety amounted to a serious procedural failing.

It was accepted by both parties that Rule 17 of the Fitness to Practise Rules 2004 governed the procedure to be followed by the Panel, which sets out the following stages to be carried out sequentially:

- Stage 1 - hearing evidence on facts and misconduct (Rules (f) to (h));
- Stage 2 - consideration and announcement of findings of fact (Rule (i));
- Stage 3 - evidence and submissions on whether fitness to practice is impaired by misconduct (Rule (j));
- Stage 4 - consideration and announcement on impairment with reasons being given (Rule (k));
- Stage 5 - evidence, submissions and determination on sanction (Rules (l) and (m)).

Counsel for the Appellant argued that the "announcement" of the findings of fact did not occur until the Panel handed down its decision on 24 June 2014. By merely sending out an embargoed draft form to the parties, the panel had not announced its findings and therefore it had erroneously refused to consider exercising its discretion to hear further evidence

Counsel for the GMC stated that the announcement had taken place when the draft had been sent out to the parties on 28 April 2014 and therefore the Panel had quite properly found that it had no discretion to hear further evidence

The Judgment:

The Court found that, taking into account the definition of "announce" in the Oxford Dictionary (*"make a formal public statement about a fact, occurrence, or intention"*), the GMC's interpretation of the word was highly improbable and required a distortion of its natural meaning. Furthermore, in the context of the relevant Rules, the Panel is required to carry out its function in public in order to ensure that the principle of open justice is maintained; issuing decisions as to matters of fact otherwise than in public would be incompatible with that requirement.

The Court found that because the Panel had not made an announcement until its decision was handed down on 24 June, the Panel was **not** deprived of the ability to consider the evidence submitted by the Appellant, and it was not prevented from exercising its discretion to receive and consider the evidence. The Court went on to say that the Panel ought to have exercised that discretion at some time between the receipt of the Appellant's letter and handing down its determination of the facts on 24 June 2014. The Court accepted, however, that had the determination formally been handed down before the request had been made, then the Panel would have had no discretion to re-open the case.

Whether fresh evidence should have been admitted by the Panel in this case:

The Court then considered whether the panel, had it used its discretion, should have admitted the evidence of Mr B and the HCA.

The Court set out the factors for the Panel to consider on the exercise of discretion would have been:

(i) what was the relevance of new evidence?

(ii) why had it not been called before?

(iii) what significance did it have in the context of the draft findings of the Panel?

(iv) what effects would its admission have on the conduct of the hearing, and in particular on:
  (a) the need to recall witnesses
  (b) the length of the hearing

(v) taking all matters into account, would justice be done if it were not received and heard?

The Court found on these facts that the evidence of the HCA was particularly relevant to the allegations made in respect of the Appellant. Her evidence suggested that the account given by Patient A was untrue or at best unreliable. If it had been accepted then it would have at least cast doubt on the reliability of the evidence of Patient A on some issues of critical importance. Finally, the Court concluded that the failure of the Panel to admit the evidence caused a real risk of injustice to the Appellant as it may have made a difference to the overall outcome of his case.

Discussion:

This case is one of a number of recent GMC appeals which tend to indicate that the Court is relaxing its position on the late admission of fresh evidence. Panels have the discretion to admit fresh evidence at any stage of the hearing until a determination is formerly handed down and any failure to do so could be deemed to be contrary to the interests of justice.

For practitioners, it indicates that late applications to secure the attendance of additional witnesses (who have not been indicated already) may be acceded to at any stage before the Panel hands down its determination.

This relaxed approach to the late admission of fresh evidence is likely to increase pressure on regulators, who have the additional burden of ensuring that all witnesses are called to give evidence, including those who do not support the allegations. The consequence of this relaxed approach and the additional pressure on regulators may to lead to longer hearings, more adjournments, and ultimately greater costs for regulators.