

The Issue of the Inadequate Charge

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Case Reviews: Should the panel amend the charges after hearing evidence?

Following the case of *The Professional Standards Authority for Health and Social Care v The Nursing and Midwifery Council, Ms Winifred Nompumelelo Jozi* [2015] EWHC 764 (Admin), the position seemed clear. The comments of Mr Justice Singh re-enforced the need for disciplinary panels to play more of an active role in ensuring that the charges brought by the regulator adequately reflected the real mischief of the case. Time after time, the case presenter would drag out the case of *Jozi* at the end of hearing evidence to persuade the panel that it should use its powers to amend the charge when it became clear that the regulator had undercharged (or incorrectly charged) the registrant. Panels were given firm guidance to take more control in hearings of such matters as it was 'in the public interest', and they were warned that if they did not take a more hands on approach, their decisions could be appealed.

However, the Court of Appeal seems to have clarified reversed the position in the case of *PSA v HCPC & Doree* [2017] EWCA Civ 319. This case involved two appeals by the Professional Standards Authority, both of which were dismissed.

Mr Doree, a Prosthetist, faced allegations that he had bullied a colleague by calling him a range of inappropriate names, driving his car toward the colleague in an intimidating manner and belittling him in front of other people. He also faced allegations that he demonstrated inappropriate sexual behaviour in relation to another colleague, by making numerous inappropriate comments and inappropriate gestures. The panel found that he has acted as alleged in most of the charges, that his actions had amounted to misconduct and that his fitness to practise was impaired. After hearing a great deal of mitigation and a number of positive references, the Panel imposed a Caution Order for 5 years.

The PSA had various concerns about the Panel's finding, and therefore appealed the Panel's decision on a number of grounds. One issue that arose was whether the Panel should have amended some of the charges that had not been found proved. For example, the evidence indicated that something had happened on more than one occasion, but not 'frequently' as set out on the charge. Furthermore, the HCPC were unable to prove that Mr Doree had made offensive statements 'publically', as alleged in the charges. The PSA submitted that the Panel ought to have amended the allegations themselves to conform to their relevant findings of fact, or invited the HCPC to make such amendments. Furthermore,

the PSA submitted that the amendments would have been modest and therefore would not have caused unfairness to the registrant.

At the first appeal, Lang J considered that “*amending the charge retrospectively after the evidence had been heard and considered, in order to secure a guilty finding, would have been a gross breach of fair hearing procedure*“. At the second appeal, Lindblom LJ stated that ‘*there will no doubt be cases where a late amendment of the allegations faced by a registrant will be justified, even after the evidence has been heard and findings of fact have been made. But in the particular circumstances of this case I cannot accept [the PSA’s] submission that the Panel fell into error. The allegations against Mr Doree were drafted by the Council on the strength of the material available to it at the time. Framed as they were, they did not constitute “under-prosecution”*’.

Discussion:

The case of *Doree* makes it difficult to conceive of circumstances in which it would be fair for a panel to amend the charges after hearing the evidence, even if the regulator has undercharged the registrant. The decision clearly has ramifications for regulators and for the adjudicating panel as any amendment at the close of evidence, which is over and above correcting a typographical error, could be seen as a *gross breach of the fair hearing procedure*. Ultimately, it is the responsibility of the regulator to make the correct charging decisions based on the evidence they have gathered and they cannot rely on the panel (or case presenter) to rectify any errors they make when drafting allegations.

Consequently, the decision in *Doree* is likely to increase the pressure on regulators to obtain the best possible evidence and perfectly pitch the charges based on that evidence; the failure to accurately particularise the alleged conduct raises the risk of undercharging yet the inclusion of multiple elements to the allegations raises the likelihood of charges failing. No one said it was an easy task.

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