Neutral Citation Number: [2019] EWHC 716 (Admin)

Case No: CO/4207/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
Sitting at Leeds Combined Court

Date: 22/03/2019

Before :

MR JUSTICE KERR

- -

Between :

DR MOHAMMAD QASIM IHSAN **Appellant**

- and -

GENERAL MEDICAL COUNCIL **Respondent**

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Alan Jenkins (instructed by **Radcliffes Le Brasseur**) for the **Appellant**
Peter Mant (instructed by **GMC Legal**) for the **Respondent**
Hearing date: 14th March 2019

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Approved Judgment

Mr Justice Kerr:

1. This is another sad case of a doctor erased from the medical register because of sexual misconduct. Dr Ihsan appeals against the erasure decision taken by a tribunal of the Medical Practitioners' Tribunal Service, the independent tribunal set up under the relevant legislation to hear misconduct cases brought by the General Medical Council (the GMC). The GMC is responsible for discipline and upholding standards of conduct in the medical profession.

2. Dr Ihsan appeals under section 40 of the Medical Act 1983. The appeal proceeds as a rehearing, but without oral evidence. I can dismiss or allow the appeal and if I allow it I can remit the case or substitute a different decision. But I can only allow the appeal if I find that the decision of the tribunal was wrong or unjust because of a serious procedural irregularity. The correct approach in law to an appeal such as this is so well known that I have sought to discourage unnecessary citation of authority.

3. Dr Ihsan qualified in medicine in 2007 from Manchester University. In July 2015, he began working as a locum general practitioner at a surgery in South Kirby, West Yorkshire. In November 2015, he saw "patient B" who reported domestic violence and asked for anti-depressants. He recommended counselling and provided her with a "sick note" for her work. She returned on 7 July 2016, asking for a review of her contraceptive pill. Dr Ihsan knew of the vulnerability she had shown at the previous consultation.

4. He prescribed a new contraceptive pill and asked her how she was feeling. She said she was feeling better and was now single and had started a healthy regime. Up to that point, their accounts given in the later disciplinary proceedings tally. From then on, they diverge and I take the facts as found by a tribunal in 2017, since neither party asserts that its findings of fact can be questioned in this appeal.

5. That tribunal sitting in 2017 (the first tribunal) preferred the evidence of Dr Ihsan to that of patient B and, with one exception, only found proved what Dr Ihsan himself admitted. I omit matters found not proved. The first tribunal accepted his account that patient B made advances to him, asked him to examine her neck and attempted to kiss him and that a "brief sexualised conversation" followed.

6. He told her she looked good. This observation was not, the first tribunal accepted, sexually motivated. He touched her cheek with his hand, not for sexual gratification but at her invitation when he examined her neck. He also said he felt horny and offered to lock the door. He expressed approval of her nails and said he wanted her to see his balls. He denied saying he "really really" wanted her to see them but the first tribunal found that he had used that phrase. He asked to see her bum. He offered to clear his desk and have sex with her on it if she wanted. These matters were, he admitted, sexually motivated as was obvious from the words used.

7. Patient B complained four days later. This led to Dr Ihsan's conduct being referred to the GMC. He disclosed patient B's name to his wife, in breach of his obligation of confidentiality. His wife contacted patient B on Facebook, causing her distress.

At some point, a "rule 4" letter was sent to Dr Ihsan. I was not shown it but it must have set out in brief terms that he was under investigation and why.

8. An "interim orders" tribunal hearing took place on 22 August 2016. Interim conditions were imposed, including that a chaperone must be present at all times when he was seeing a female patient. In late 2016 and early 2017, Dr Ihsan made voluntary contact with another doctor who was to act as a mentor to him, Dr Davies, to discuss issues arising from the incident with patient B.

9. On 3 January 2017, Dr Ihsan moved into a rented serviced apartment. The housekeeper was a Ms A. They became acquainted at some point after he moved in, as she was responsible for cleaning his room. On 13 January 2017, he was sent a "rule 7" letter containing draft charges arising from the patient B incident. On 24 January, the interim conditions were renewed by an interim orders tribunal. There was then an incident involving Dr Ihsan and Ms A on 4 April 2017 which became the subject of further disciplinary proceedings.

10. The facts, as later found by a different tribunal (the second tribunal), were as follows. The second tribunal did not accept much of the evidence of either Ms A or Dr Ihsan. The latter's account was that they had a consensual sexual encounter. The tribunal rejected that as implausible. Ms A alleged that Dr Ihsan had made various unwanted sexual advances including parading naked before her and exposing his erect penis. The tribunal rejected much of that account as unreliable.

11. I omit matters which the second tribunal subsequently found not proved. What they did find proved was what Dr Ihsan did not dispute. He admitted that he asked Ms A if it was alright to take a shower while she was in the apartment "in part to gauge her reaction" (in his words). He left the shower door open, emerged from the shower with a towel round him, admitted that he was sexually interested in her at that point and that the towel dropped and his penis was exposed to her, though not (the tribunal accepted) erect. This, the second tribunal found, was unwanted sexual attention to Ms A and was sexually motivated conduct.

12. After that, in May or June 2017, Dr Ihsan attended a workshop about maintaining professional boundaries. Ms A eventually complained to the police about Dr Ihsan's conduct. He was interviewed by police on 13 June 2017. No charge was brought against him and the police did not pursue the matter further. His interim conditions of practice were then renewed again in July 2017 and extended by this court on 1 August 2017.

13. In the autumn of 2017, Dr Ihsan had some further sessions with Dr Davies. He did not inform Dr Davies about the incident involving Ms A. The first tribunal sat from 4-15 September and 6-7 November 2017 to consider the allegations made by patient B. It also considered allegations about another patient, patient A, but I need not say more about that because the first tribunal found no wrongdoing by Dr Ihsan arising from his dealings with patient A.

14. The first tribunal found the facts in relation to the patient B matter as I have related above. Dr Ihsan accepted, and the first tribunal found, that his actions amounted to misconduct and that his fitness to practise was impaired. The GMC sought erasure

but the tribunal weighed the mitigating and aggravating features and decided to give him a second chance. They suspended him for nine months, with a review at the end of the period of suspension.

15. They took into account an apology from Dr Ihsan, a "reflective" document, the engagement with Dr Davies and "extensive insight into your misconduct" coupled with steps taken to "remediate" it, including attending courses. They took the view that the incident was isolated and repetition unlikely. The sexual misconduct was found to "fall within the lower end of the severity" [sic].

16. The first tribunal made clear what it expected Dr Ihsan to have achieved by the end of the suspension period: evidence of further progress and insight, a report from his mentor, Dr Davies, "detailing your journey to remediation", evidence that his clinical skills were kept honed and provision of any other information he considered relevant.

17. The first tribunal was unaware of the ongoing investigation into the matters complained of by Ms A, which included not just the incident on 4 April 2017 but other complaints of other earlier instances of unwanted sexual attention to her. The complaints about events earlier than 4 April were subsequently found not proved by the second tribunal. When the first tribunal decided to suspend Dr Ihsan for nine months, its members did not know he was under investigation for different sexual misconduct.

18. Those matters became the subject of further disciplinary charges, heard by the second tribunal initially from 2 July to 2 August 2018. On the second day of that tribunal hearing Dr Ihsan informed Dr Davies for the first time about being subject to disciplinary proceedings in connection with Ms A. On 26 July 2018, by agreement, the GMC and Dr Ihsan put before the second tribunal a short document stating that Dr Ihsan was subject to a review arising from the conversation with patient B on 7 July 2016.

19. That statement of agreed facts included the point that Dr Ihsan "did not face an allegation that his actions amounted to unwanted sexual attention. The allegations were largely admitted including an admission that his conduct was sexually motivated. Sexual motivation was denied in respect of one allegation which the Tribunal subsequently found proved".

20. The second tribunal gave its decision on matters of fact, as I have related above, on 30 July 2018, near the end of that hearing. It found not proved an allegation that he had "allowed your towel to fall to the floor exposing your erect penis". This must have been because, as the tribunal explained, Ms A herself had said she was not sure if it was erect.

21. Dr Davies provided an email on 1 August 2018, seen by the second tribunal, confirming that he had been unaware of the allegations concerning Ms A until 3 July and that his sessions with Dr Ihsan had only been about the issues arising from the incident with patient B.

22. The second tribunal gave its decision on misconduct on 1 August 2018. It accepted the GMC's submission that Dr Ihsan's conduct amounted to misconduct and rejected the submission of his then counsel, Mr Alun Jones, that the threshold of seriousness had not been crossed. They reasoned that his conduct included taking a shower with Ms A in the apartment going about her duties, leaving the bathroom door open, emerging wearing only a towel; and that "at some point shortly afterwards, the towel fell exposing his penis".

23. They also accepted that his conduct had had "a significant detrimental effect" on Ms A. They took into account the previous finding of sexually motivated conduct made by the first tribunal, about which they had properly been informed. Although the second incident was not in a clinical setting, it had occurred less than a year after the first incident and showed the doctor's "lack of appreciation of sexual boundaries".

24. The second tribunal then adjourned part heard after 2 August and did not resume until 24 September. Sadly, his counsel Mr Jones died during the summer break and was replaced by Mr Jenkins, who also appeared for him before me on this appeal. On reconvening, the second tribunal was to consider the question of impairment and sanction. The day before the hearing, Dr Ihsan spoke to Dr Davies for about an hour. The latter provided an email the next day expressing optimism that Dr Ihsan would not repeat his transgressions.

25. That email and a further "reflective" document were produced by Mr Jenkins as part of a short bundle of "mitigation documents", also including various testimonials, for the tribunal to consider. The second tribunal was also furnished with a copy of the decision of the first tribunal, but with the parts relating to patient A (in respect of whom the first tribunal had found no wrongdoing) redacted out.

26. The tribunal heard submissions on impairment on 24 September 2018. Under the rules, and by agreement, it also became responsible for conducting the review ordained by the first tribunal, and did so. The tribunal gave its determination on 25 September. It summarised the findings of the first tribunal concerning patient B, summarised the submissions and referred to the mitigation relied on by Mr Jenkins.

27. The second tribunal then assessed that material. They found that the further reflective statement added little, if anything, to an earlier one. They accepted that the breach of confidentiality in disclosing patient B's name to his wife was unlikely to be repeated. They expressed concern that Dr Ihsan had not told Dr Davies about the second case, involving Ms A. They found no evidence that Dr Ihsan had taken steps to "remediate his misconduct" in relation to the second case. They were not satisfied there would be no repetition.

28. They then added, at paragraph 32:

> "The Tribunal has already concluded that Dr Ihsan's actions amounted to misconduct which is serious. The Tribunal decided that Dr Ihsan's actions had put patients at risk of harm, had breached fundamental tenets of the profession and brought it into disrepute. The Tribunal determined that the lack of insight and remediation shown in relation to Patient B and Ms A was such that it could not rule out a repetition of similar sexually motivated conduct in future."

29. Having found that Dr Ihsan's fitness to practise was impaired by reason of his misconduct, they heard submissions on sanction. The GMC, through its counsel, Ms Helena Duong, again advocated erasure. Dr Ihsan, through Mr Jenkins, advocated a further suspension, arguing that Dr Ihsan was far from irremediable and was not a serial abuser.

30. In the course of his submissions, Mr Jenkins pointed to the use of the plural "patients" in paragraph 32 of the impairment decision and suggested in diplomatic language that they might consider whether the risk of harm should not be restricted to patient B. The tribunal did not refer to this point when giving its determination on what the appropriate sanction should be.

31. In addressing that issue, the second tribunal considered the Sanctions Guidance document, as is usual. It then set out the aggravating features, including a "lack of recognition of, and true insight into the causes and effects of, his sexually motivated behaviour"; two findings of sexual misconduct arising from incidents eight months apart; that Dr Ihsan's misconduct in the second case occurred while he was under investigation in the first case; that he had failed to disclose the second matter to Dr Davies; that patient B was vulnerable as his patient; and that Ms A was vulnerable because it was her job to clean his room.

32. The list of mitigating features was briefer: there had been no similar misconduct since April 2017; Dr Ihsan had "made admissions at the outset of both sets of proceedings (but not in relation to his sexual motivation)"; he had made "some attempts to remediate by undertaking courses and counselling"; and he had engaged with the GMC investigation and the disciplinary proceedings.

33. The tribunal gave its reasons for ruling out suspension in paragraphs 28-31 of the determination on sanction. They noted paragraph 150 in the Sanctions Guidance emphasising the seriousness of sexual misconduct especially where it involves an abuse of power, such that erasure will often be appropriate in such cases. Here, there were two such incidents close together and both women were vulnerable in different ways. The risk of repetition remained. Suspension would not be sufficient to reflect the seriousness of the sexual misconduct.

34. Mr Jenkins attractively presented four criticisms of the tribunal's reasoning which, he argued, had led it into error, blinded it to the force of the mitigating features in the case and induced it to impose a disproportionately harsh sanction when set against the misconduct of Dr Ihsan which was, he submitted, at the low end of the spectrum of seriousness and, in particular, did not involve any touching of either woman or any attempt to make further contact with either of them.

35. The errors Mr Jenkins said the tribunal made were, as set out his skeleton argument, that the tribunal was under the following misapprehensions:

    (1) that Dr Ihsan had caused harm to more than one patient;

    (2) that he had not admitted sexual motivation with regard to patient B;

(3) that he had shown no insight with regard to his behaviour towards patient B; and

(4) that he had taken no steps to remediate his conduct towards patient B.

36. He also submitted that the tribunal was not entitled to proceed on the basis that Dr Ihsan had exposed his penis to Ms A, since a specific charge to that effect had been "withdrawn", by which the tribunal meant that a submission of no case to answer by Mr Jones had succeeded and the GMC through Ms Duong had not been permitted to amend the charge. Thus, Mr Jenkins argued, Dr Ihsan should not have been sanctioned on the footing that he had done anything worse in Ms A's case than been in her presence clad in a towel that fell out of place.

37. Mr Mant reminded me, in case I needed reminding, that the second tribunal was an expert professional body whose judgment was entitled to considerable deference; that it was not required in its reasons to deal with every point; that its use of language should not be subjected to nice textual criticism; that it saw and heard the witnesses; and he submitted that there was ample justification for the sanction of erasure to be found in the tribunal's determination, setting forth its reasoning.

38. In relation to the specific errors relied on by Mr Jenkins, he responded as follows:

(1) The use of the plural in paragraph 32 of the impairment decision ("patients") was not repeated at the sanctions stage; the tribunal was aware of Mr Jenkins' point; impairment was not disputed and his reading of paragraph 32 is too literal. It is not realistic to suppose that the tribunal treated Dr Ihsan as having committed misconduct on more than the two occasions in respect of which it was found proved.

(2) The tribunal made a slip or was guilty of inconsequential "infelicity" of language when listing as a mitigating feature the point that Dr Ihsan had "made admissions at the outset of both sets of proceedings (but not in relation to his sexual motivation)". While it is true that he admitted sexual motivation in relation to patient B, he did not in the case of Ms A and the tribunal must have meant to refer only to the case of Ms A. Elsewhere in the tribunal's written determinations, it is clear they were aware of what he had admitted and denied.

(3) The second tribunal was not merely entitled but bound under the procedural rules when carrying out its review function to revisit and if necessary contradict the findings of the first tribunal relevant to current impairment (see rules 21A and 22(e)-(f) of the GMC (Fitness to Practise) Rules 2004). Those rules required the second tribunal to decide the issue of insight as it stood at the time of its decision. Its knowledge of the incident involving Ms A, of which the first tribunal was ignorant, put the decision of the first tribunal in a different light.

(4) The second tribunal did not state that Dr Ihsan had made no attempt to remediate his conduct towards patient B, only that his efforts to do so

were insufficient to satisfy the tribunal there was no risk of repetition of the misconduct. The tribunal accepted in the list of mitigating features that he had made some attempts to remediate his conduct by undertaking courses and counselling. The tribunal did not make the error asserted by Mr Jenkins.

39. In relation to the harshness of the sanction of erasure, Mr Mant submitted that lack of touching and the absence of any attempt to make further contact with either woman were not mitigating features; they were merely an absence of aggravating features; and it was not for the tribunal to list all the absent aggravating features, which would go on interminably. He also submitted that it was unrealistic to suggest the tribunal should ignore the exposure of Dr Ihsan's penis to Ms A when that was admitted and there was a finding of unwanted sexual attention. Agreed facts relevant to the context of the misconduct may be taken into account.

40. I come to my reasoning and conclusions. In relation to the first misapprehension asserted by Mr Jenkins, I accept that the use of the plural "patients" was unfortunate. It is true that Ms A was not a patient. But the sentence did not refer to actual harm but the "risk of harm". The interim orders tribunal had required a chaperone to be present when Dr Ihsan was seeing female patients. That was presumably to protect those patients from the risk of harm.

41. It is not far fetched to say that his "actions" (in the plural) had exposed more than one patient to the risk of harm. He had treated other female patients, apart from patient B. Those other female patients may have been at some risk of harm from him, since he was found by the second tribunal to have an inadequate understanding of sexual boundaries. I therefore accept Mr Mant's submission that Dr Ihsan's reading of that passage is too literal.

42. The second error was more serious. The second tribunal did make a significant mistake by overlooking the point that Dr Ihsan had admitted sexual motivation in his conduct towards patient B. He could hardly have done otherwise, given the content of the conversation admitted by him to have taken place. The tribunal should have acknowledged that admission and should not have imputed to him a failure to own up to sexual motivation in both cases. I do not think Mr Mant is right to read the tribunal's observation as confined to the case of Ms A.

43. In the case of Ms A, the issue of sexual motivation was more nuanced. Dr Ihsan admitted it up to a point, in that he stated that he wanted to see how matters would develop and asked her permission to shower while she was present in the flat "in part to gauge her reaction" and in the hope if not the expectation that something sexual would happen. He was also admitting much more raw sexual motivation by claiming (falsely, the second tribunal found) to have engaged in a consensual sexual encounter with Ms A.

44. I think the error was regrettable, but I am not persuaded that it is material. The tribunal was well aware of its own findings in the matter of Ms A and Dr Ihsan had failed to admit that his sexual attentions to Ms A were unwanted by her. This is not the same thing as sexual motivation and the tribunal may have confused the two. While they should not have done so, they were aware of the facts and I do not think

they misunderstood what Dr Ihsan had admitted and what he had denied. The various determinations were, as a whole, careful and detailed.

45. In relation to the third alleged error, I am unable to accept Mr Jenkins' submission that the second tribunal impermissibly went behind the findings in relation to insight made by the first tribunal. Mr Mant is correct to point out that a subsequent tribunal may contradict a previous tribunal's findings when later acquired knowledge casts a different light on the previous tribunal's decision. The second tribunal was entitled and indeed bound, in its capacity as the reviewing tribunal, to revisit the findings of the first tribunal. It properly did so.

46. I do not accept, finally, that the second tribunal made the fourth error attributed to it by Mr Jenkins in his skeleton argument, of finding that Dr Ihsan had taken no steps to remediate his conduct towards patient B. In oral argument, he accepted that was putting the matter too high. The true position was that the second tribunal did accept that there had been some remediation but it was not enough.

47. Thus, while the second tribunal did state that "the lack of insight and remediation shown in relation to Patient B and Ms A was such that it could not rule out a repetition of similar sexually motivated conduct in future" (paragraph 32); at paragraph 22 in the sanctions decision it listed as a mitigating feature that he "has made some attempts to remediate by undertaking courses and counselling…". So there was no error made in that regard.

48. It remains to consider Mr Jenkins' submission that the sanction of erasure was too harsh. I do not think it is realistic to expect the second tribunal to ignore the fact that Dr Ihsan's penis was exposed to Ms A, on the basis that a charge of exposing his erect penis had failed because Ms A had said she could not be sure his penis was erect. He admitted that it was exposed. It would be far too technical to require a tribunal such as this to disregard the agreed fact that the doctor's (non-erect) penis was exposed to Ms A on the occasion when the towel fell.

49. That undisputed fact formed part of the context of the proved offending and was obviously relevant to the severity of the misconduct. The tribunal was entitled to take it into account when deciding whether suspension would be insufficient to meet the gravity of the case. I recognise that a different tribunal might have been more merciful but there were two acts of sexual misconduct close together here. I am not able to conclude that this tribunal's rejection of suspension was wrong.

50. The tribunals are entrusted with the task of upholding the standards of the profession and are helped in that task by the Sanctions Guidance, which they are required to take into account. In this case, the weighing of the aggravating and mitigating feature is not, in my judgment, open to criticism. No specific mis-application of the content of the Sanctions Guidance was asserted on Dr Ihsan's behalf. I do not think there was any error in the way in which they were applied. The judgment reached was severe but justified on the facts.

51. The misconduct in Ms A's case occurred during the time when a chaperone would be present if he were in his consulting room seeing a female patient. No chaperone was present in the rented flat where Ms A had to be in order to do her job. It is

inescapable that he exploited that vulnerability on her part. I think the second tribunal was justified in taking a dim view of that.

52. Dr Ihsan had failed to understand that he remained responsible for meeting the required standards of his profession while away from his place of work. Dr Davies could surely have enlightened him on that point if Dr Ihsan had had the wisdom to inform his mentor about the investigation into the incident at the flat.

53. In the light of the facts found and on a fair reading of the second tribunal's decision as a whole, I am not satisfied that the decision to erase Dr Ihsan from the register was wrong. There was no procedural irregularity. The appeal must be dismissed.