

Shades of grey: Dishonesty and impairment in fitness to practise proceedings

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Summary

To what extent must a finding of dishonesty in professional regulatory proceedings go hand-in-hand with a finding of impaired fitness to practise?

This was one of the issues at the heart of a recent case which came before the High Court after the GMC appealed the decision of a Medical Practitioners Tribunal in *GMC v Chaudhary (2017)*.

The case highlights that a finding of impairment does not inevitably flow from a finding of dishonesty, with the Tribunal being entitled to look at the dishonesty in context. In doing so, however, the Tribunal must give proper weight to all three elements of the GMC's statutory overarching objective.

In this briefing we explore this decision and its implications.

What was the case about?

Dr C is a GP with expertise in urology. Some years ago, he performed ritual circumcisions within the local Muslim community at a clinic set up for that purpose. This service is not available on the NHS and Dr C's work within his community was intended to reduce the risks posed by untrained individuals performing these procedures.

The circumcision he carried out on Patient A, a baby boy, led to a fistula (a rare but recognised complication).

After several attempts at repairing the fistula himself over a number of months, Dr C referred Patient A to a consultant paediatrician. In the referral letter to the hospital, Dr C described the patient as '*...my relative (my nephew's son)*', which was not the case. In that letter, Dr C also gave his own home address as Patient A's address and gave the impression that he was Patient A's registered GP, which he was not.

Dr C informed Patient A's registered GP about the circumcision and complications some months later. In that letter, Dr C said that Patient A's family had opted to register with his GP practice.

Broadly, Dr C's case was that Patient A's family had agreed the arrangements outlined in his letters in order for him to retain oversight and responsibility for the case and to refer easily to the most suitable hospital, which was relatively local to his surgery. He had referred to Patient A as his relative as a mark of the closeness of the relationship that had developed between his and Patient A's family. Whilst he accepted that certain parts of the letters were untrue, in the circumstances he denied dishonesty. Patient A's family denied agreeing to such arrangements.

Dr C thereafter attended consultations with Patient A's family at the hospital. After further surgery in secondary care, the fistula healed.

Some years later, Patient A's family referred Dr C to the GMC.

What did the Medical Practitioners Tribunal decide?

The MPT found that the untrue parts of Dr C's letters to the hospital and GP were dishonest and amounted to misconduct. Failing to inform and update the registered GP about these events presented issues over communication with colleagues amounting to misconduct.

The key issue, however, was whether Dr C's fitness to practise was impaired as a result of that misconduct.

In considering this, the MPT said it was important to look at the dishonesty '*in the context of the particular circumstances of your case*'. It found that Dr C perceived a need to retain control of the case out of a misplaced sense of duty to follow up and put right any problems arising out of his own circumcision practice.

Having heard evidence about the remedial steps taken by Dr C in relation to these matters, the MPT concluded that Dr C had remediated his dishonest misconduct and that it was highly unlikely to be repeated. He had not, however, remediated the

communicative misconduct.

The Tribunal accordingly concluded that Dr C's fitness to practise was impaired in relation to the communication issues, but that it was not impaired by reason of the dishonesty.

Conditions were imposed to address the communication issues. At a review hearing 12 months later, communication issues were found to be remediated and the conditions were lifted, leaving Dr C's registration unrestricted.

GMC's appeal

The GMC appealed against the MPT's decision that Dr C's fitness to practise was not impaired by reason of dishonesty.

The main ground of appeal was that, in considering the impact of the dishonest misconduct on Dr C's fitness to practise, the Tribunal gave too much weight to remediation, at the expense of giving appropriate weight to all three elements of the GMC's overarching objective. These include not only protecting public safety, but also promoting public confidence in the profession and maintaining proper professional standards and conduct.

The GMC also argued that the MPT was wrong in its assessment of Dr C's motivation for his conduct (appeal ground 2) and that its overall assessment of the gravity of the case was wrong (appeal ground 3).

Outcome

The High Court found that, in concluding that fitness to practise was not impaired by reason of dishonesty, the MPT gave undue priority to Dr C's remediation and the fact that such conduct was unlikely to be repeated. This primarily went to the first element of the overarching objective - public safety. Whilst the MPT went on to consider public confidence in the profession and the need to promote proper standards of conduct, it did so only after it had effectively reached its conclusion on impairment and thus it had not properly placed them in the balance.

The Court dismissed appeal grounds 2 and 3. In doing so, it found that the MPT was fully entitled to 'contextualise' the dishonesty when considering impairment. The Judge rejected as '*a step too far*' the GMC's submission that the overall gravity of the misconduct '*cried out*' for him to substitute a finding of impairment. The Court affirmed that dishonesty is not necessarily a '*monolithic concept*' and that there is a distinction between a factual finding of dishonesty on the one hand and underlying deeper questions of motive on the other. Dishonesty will be a matter of degree and does not have to be an '*all-pervading*' trait in the sense that a person can be dishonest on just one occasion.

As to the final outcome, the Court considered the wider picture and accepted that, rather than remit the matter, in the '*somewhat unusual circumstances of the case*' it was appropriate to accept a pragmatic invitation to substitute a finding of impairment in relation to probity, honesty and trustworthiness whilst, at the same time, directing that no further action be taken.

Impact

There are two key points to take from this:

- The case is a reminder that, when considering impairment, Tribunals are entitled to contextualise and consider shades of grey in any given instance of dishonesty. A finding of dishonesty need not inexorably lead to a finding of impaired fitness to practise.
- A Tribunal decision will be open to challenge if it is reached without having demonstrably first placed in the balance all three elements of the overarching objective. Remediation and unlikelihood of repetition are important factors in considering current impairment and they must be weighed in the balance, but they do not of themselves mandate a finding of no impairment.

How we can help

Our national Professional Regulatory team has extensive experience of representing healthcare professionals across the full range of professional regulatory proceedings. We can provide advice and support at any stage of the process, from casting an experienced eye over an initial response to allegations through to representation at final hearings, including:

- Sensitive and supportive approach to the most challenging allegations, including allegations of dishonesty and sexual misconduct;
- Providing expert representation in person or in writing at any stage of the professional regulatory process;
- Advising on the merits of bringing or resisting an appeal to ensure the greatest chance of success;
- Assisting in related proceedings - e.g. police investigation or coroner's inquest.

If you need advice in relation to any healthcare professional regulatory matter, please contact [Christopher Briggs](mailto:cbriggs@dacbeachcroft.com) on: +44 (0)161 934 3115 or cbriggs@dacbeachcroft.com.

DAC Beachcroft represented Dr C in the MPT and in the appeal.

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