



Neutral Citation Number: [2021] EWHC 1288 (Admin)

Case No: CO/4514/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14 May 2021

Before:

MR JUSTICE CHAMBERLAIN

Between:

**PROFESSIONAL STANDARDS AUTHORITY for
HEALTH AND SOCIAL CARE**

Appellant

- and -

**(1) GENERAL MEDICAL COUNCIL
(2) CHRISTIAN HANSON**

Respondents

Michael Standing (instructed by **Browne Jacobson LLP**) for the **Appellant**
Christopher Knight (instructed by **GMC Legal**) for the **First Respondent**

Approved Judgment

MR JUSTICE CHAMBERLAIN:

Introduction

- 1 On 9 March 2021, I gave judgment in an appeal by the Professional Standards Authority for Health and Social Care (“PSA”): [2021] EWHC 588 (Admin). The appeal was against a decision of the Medical Practitioners Tribunal Service (“the Tribunal”), which by s. 1(3)(h) of the Medical Act 1983 is a statutory committee of the General Medical Council (“GMC”). The Tribunal imposed a 10-month suspension on Dr Christian Hanson, a specialist in emergency medicine who had worked at the Rotherham General Hospital.
- 2 I allowed the appeal, holding that, on the material before the Tribunal, there was only one sanction that could properly be imposed: erasure. I substituted a decision that Dr Hanson’s name be erased from the register pursuant to s. 29(7)(c) of the National Health Services Reform and Health Care Professions Act 2002 (“the 2002 Act”).
- 3 The PSA now seeks its costs in the sum of £12,633.72, including VAT, from the GMC and Dr Hanson. Dr Hanson did not engage with the proceedings before the Tribunal, or before this Court and has not filed any submissions on costs. The GMC adopted a neutral stance in the appeal, but have filed submissions opposing in principle any costs order against them. No separate objection is taken to the sum claimed.

Submissions for the PSA

- 4 For the PSA, Michael Standing submits that the PSA was the successful party. Although neither the GMC nor Dr Hanson played any part in the appeal, neither “consented” to it. The result was that the PSA had to pursue the matter to an oral hearing.
- 5 Mr Standing submits that, uniquely amongst healthcare regulators, and unlike inferior courts or tribunals, the GMC has the right to appeal final decisions of the Tribunal. Section 40A(3) of the 1983 Act confers on the GMC power to appeal a decision of the Tribunal if they consider that the decision is “not sufficient (whether as to a finding or a penalty or both) for the protection of the public”. Other healthcare regulators have no such power and thus have to rely upon the PSA to appeal.
- 6 In this case, Mr Standing submits that the appeal succeeded because of failings in the Tribunal, for which the GMC is responsible. The GMC should have appealed. Reliance was placed on the decision of Cox J in *Professional Standards Authority for Health and Social Care v General Pharmaceutical Council & Onwughalu* [2014] EWHC 2521 (Admin), at [28] (“*Onwulghalu*”).

Submissions for the GMC

- 7 For the GMC, Christopher Knight submitted that there should be no costs order against the GMC. He noted that the Tribunal was operationally independent of the GMC: *General Medical Council v Michalak* [2017] UKSC 71, [2017] 1 WLR 4193, [10]. This is not true of all tribunals in the healthcare sector, a point made by Cox J in *Onwughalu*, at [49]. There was now an established body of authority to the effect that costs should not be awarded against the GMC where the PSA has appealed a decision of the Tribunal and the GMC has not defended the appeal: *Professional Standards Authority for Health and Social Care v General Medical Council & Hilton* [2019] EWHC 2192 (Admin), [9] (Freedman J);

Professional Standards Authority for Health and Social Care v General Medical Council & Sarkar [2020] EWHC 1896 (Admin), [44]-[46] (Tipples J); *Professional Standards Authority for Health and Social Care v General Medical Council & Dighton* [2021] EWHC 21 (Admin), [23]-[24] (Farbey J).

- 8 Mr Knight submits that these authorities establish that the position of the Tribunal is to be equated with that of an inferior court or tribunal. Where the decision of a court or tribunal is challenged in appeal or judicial review proceedings, and the court or tribunal has not opposed the challenge, no order for costs would be made against it. Furthermore, the success of an appeal by the PSA does not show that the GMC ought itself to have appealed the Tribunal's decision. The GMC has no duty to appeal and reasonable authorities may take different views about whether, and to what extent, the Tribunal materially erred.
- 9 In this case, Mr Knight submits that the GMC adopted a neutral stance throughout. Whilst the PSA is undoubtedly the successful party, the GMC cannot be properly characterised as the unsuccessful party. The only party fitting that description is Dr Hanson.
- 10 As to the complaint that the GMC did not consent to the appeal, Mr Knight points out that it was not asked to do so. In any event, its consent would have been irrelevant, because the appeal could not have been resolved without the active participation and consent of Dr Hanson: see *Dighton*, [27]. In this regard, Mr Knight drew attention to s. 29A(3) of the National Health Service Reform and Health Care Professions Act 2002, which provides as follows:

“If the General Medical Council is the respondent in the case of a reference under section 29, and the Authority either wishes to withdraw the reference or, having agreed the terms of a settlement of the case with the person to whom the relevant decision relates, wishes the case to be disposed of on those terms, the Authority must give notice of its wish to the Council.”

Reply submissions for the PSA

- 11 In reply, Mr Standing submitted that the PSA is a “meta-regulator”, funded by contributions from all the regulators bodies whose decisions it supervises. It would be unfair to the other regulators if they had to pay the costs of an appeal made necessary by an error by of a Tribunal for which the GMC was responsible.
- 12 Mr Standing submitted that the decisions in *Hilton*, *Sarkar* and *Dighton* do not bind this court and in any event are “factually quite different”. In *Hilton*, the decision was said at [10] to rest on the particular features of that case and the PSA was only partially successful: see at [2]. In *Sarkar*, the PSA was not the successful party: see at [40]. In *Dighton*, the GMC had contended for suspension before the Tribunal. The factors referred to at [30] of the decision in that case are not engaged here.

Discussion

- 13 I start with the decision of Tipples J in *Sarkar*, which contains a comprehensive analysis of the legislative scheme and principles applicable to costs in appeals by the PSA. In that case, the PSA made the same submission as it now makes before me: that the GMC should have appealed. Tipples J said this:

“59. I do not know why the GMC did not appeal the decision. I do not have any evidence about this in the papers before me. I certainly do not have any evidence to show that it was unreasonable on the part of the GMC not to pursue an appeal against the decision under section 40A(3) of the 1983 Act. Further, the decision of the Divisional Court in *Jagjivan* [*General Medical Council v Jagjivan* [2017] EWHC 1247 (Admin), [2017] 1 WLR 4438] makes it clear that the High Court will approach ‘with diffidence’ an appeal against sanction in a case such as this.

60. In these circumstances, I do not accept the PSA’s submissions that, because the GMC could appeal the decision but did not, it should bear the costs of the Second Appeal simply because the PSA, in the exercise of its public function, took a different view of the decision, and decided that it was one that should be appealed.”

14 Tipples J then went on to consider the extent of the PSA’s success in the case before her. At [64], she accepted the submission of the GMC that “as the statutory body responsible for the Tribunal, the position of the GMC is no different to the position of an inferior court or tribunal in a judicial review”. In such a case it was “well established... that the ordinary rule is that no order for costs will be made against the court or tribunal unless it has actively opposed the appeal”. On the facts, given the GMC’s neutral stance in the appeal, there was “no basis to depart from the general rule that there should be no order for costs against the GMC”: [65].

15 *Dighton* was another case in which the GMC had been neutral, although it had instructed counsel. At [29], Farbey J said this:

“I do not accept Ms Morris’s submission that the GMC was under an obligation to launch an appeal (which would have avoided the involvement of – and the costs incurred by – the PSA). The key question is whether, in light of its public function, the GMC exercised its discretion unreasonably by failing to appeal (*PSA v GMC & Hilton* [2019] EWHC 2192 (Admin), para 9; *Sarkar*, above, paras 59-60). The question of the merits of an appeal may be answered differently by different lawyers without any unreasonableness. It does not, therefore, follow that the GMC was unreasonable to refrain from appealing because the PSA succeeded. It is in any event a matter for the GMC to assess its own competing priorities in the public interest and in light of its overall resources.”

16 That the facts of *Sarkar* and *Dighton* were different is not a sufficient basis for contending, as the PSA does, that they provide “only limited assistance”. They establish two propositions which are of general application:

- (a) The position of the GMC, as the statutory body responsible for the Tribunal, is no different from that of an inferior court or tribunal in judicial review proceedings. The general rule is that no order for costs will be made against it unless it has actively opposed the appeal: *Sarkar*, [64];
- (b) Although it is open to the court to depart from this general rule, the fact that the GMC could have appealed and did not do so will not, in and of itself, be a reason for doing so. This is because different the GMC and PSA may perfectly reasonably take

different views as to the appropriateness of a sanction and as to whether an appeal is justified in the public interest: *Sarkar*, [59]-[60] and *Dighton*, [29].

- 17 Mr Standing points out that neither *Sarkar* nor *Dighton* binds me. That may be so, but Mr Standing has advanced no argument that was not considered in those cases. That being so, I would be obliged to follow those decisions unless convinced that they were clearly wrong. Mr Standing has made no attempt to engage in any serious way with the detailed reasoning contained, in particular, in *Sarkar*. Far from being clearly wrong, that reasoning seems to me to be compelling and correct. The fact that it was applied by Farbey J in *Dighton* gives it added force.
- 18 In this case, I conclude that:
- (a) The GMC did not actively oppose the appeal. Therefore, there should be no order for costs against them absent some special reason for departing from the general rule.
 - (b) There is no special reason here. The GMC were not asked to consent to the disposal of the appeal, no doubt because, as Mr Knight submitted, their consent would have been irrelevant while Dr Hanson was not engaging.
 - (c) The fact that I found the Tribunal's decision to be "wrong" does not mean that the GMC's decision not to appeal it was unreasonable. The GMC is entitled to decide for itself which decisions of the Tribunal to appeal, taking into account its own view of the appropriateness of the penalty, the likely practical effect of an appeal and its own resources and priorities. There is nothing to suggest that the decision not to appeal was unreasonable.
- 19 I accordingly decline to make any costs order against the GMC.
- 20 Dr Hanson's position is different. He can properly be regarded as the unsuccessful party: the result of the appeal is that his name has been erased from the register. Although he did not make submissions, the need for a hearing was occasioned by his refusal to engage and consent to the allowing of the appeal. He has had the opportunity to explain why he should not have to pay the PSA's costs, or all of those costs, but has not availed himself of it. I will accordingly make an order for costs against Dr Hanson alone for the sum sought.

Conclusion

- 21 For these reasons:
- (a) I refuse the PSA's application for a costs order against the GMC.
 - (b) I shall make an order that Dr Hanson pay the PSA's costs of the appeal, which I summarily assess in the sum of £12,633.72 including VAT.
- 22 If the PSA wish to pursue an application for costs against the GMC in another case where the GMC has not actively opposed the appeal, I hope they will draw the judge's attention to *Sarkar* and *Dighton*, as they should have done in this case.