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IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

[2019] EWHC 3349 (Admin)



No. CO/2342/2019

Royal Courts of Justice

Tuesday, 19 November 2019

Before:

MR JUSTICE MOSTYN

BETWEEN :

REKA TAPSTER

Appellant

- and -

NURSING AND MIDWIFERY COUNCIL

Respondent

THE APPELLANT appeared in Person.

MR M. CASSELLS (of NMC Regulatory Legal Team) appeared for the Respondent.

J U D G M E N T

MR JUSTICE MOSTYN:

- 1 This is my judgment on the appeal of Mrs Reka Tapster against the decision of the Nursing and Midwifery's Council's Fitness to Practise Committee, made on 5 June 2019, to impose a suspension order for a further period of four months from 29 June 2019.
- 2 I will explain that this further suspension order followed on from a period of suspension of one year, which took effect on 29 June 2018. Where there has been a prior order of suspension, then, by virtue of Article 30 of The Nursing and Midwifery Order 2001 (SI 2002/253), the Committee is obliged to review the order and may extend it. This obligation is mandatory unless the original committee, or the Court on appeal, has made a direction pursuant to Article 29(8)(A) declaring that it is not necessary for there to be a review which may lead to a further extension. However, no such direction was made in this case and so the Committee was obliged, as I have explained, to conduct the review.
- 3 Now, when the papers were first placed before me, I discovered, on reading them, that, on the day that the further extension was due to expire, the Committee made a further order striking the appellant off the register. In such circumstances, I formed the preliminary view that this appeal was thereby rendered wholly academic and that the principle expressed by Lord Bridge in the case of *Ainsbury v. Millington* [1987] 1 WLR 379 in the Judicial Committee of the House of Lords would apply. That principle is, as is well known, that it is a fundamental feature of our judicial system that the courts decide disputes between parties before them and do not pronounce on abstract questions of law where there is no dispute to be resolved, even though the question of law raised might be one of general importance.
- 4 In that case, the House of Lords had given permission to appeal in respect of the refusal of the courts below to award an injunction ousting from a domestic dwelling a partner in a *de facto* relationship. The court at first instance and the Court of Appeal had both decided that the court had no jurisdiction to award such an injunction. The House of Lords gave permission to appeal. However, by the time that the appeal was called on for hearing before the Appeal Committee, the parties' tenancy of the council house had been terminated. This led the House of Lords to refuse to hear the appeal on its merits. Lord Bridge enunciating the principle which I have expressed.
- 5 It seemed to me in such circumstances that that principle directly applied to the facts of this case. What possible benefit could the appellant derive from me allowing the appeal in circumstances where she had later been struck off? However, Mr Cassells explained to me that there may be a benefit to the appellant in being allowed to pursue her appeal because, if she could persuade me that the Committee on 5 June 2019 was wrong to conclude that impairment endured, then it would follow that the later Committee, sitting on 29 October 2019, did not have power to strike her off the register. In those circumstances, I agreed to hear the appeal.
- 6 I will now explain the circumstances in which the one-year long suspension, which ended on 29 June 2019, came to be awarded. On 2 July 2014, the appellant sent an email and certain attachments containing, allegedly, confidential patient information to one or more of certain listed email recipients. This led to a complaint of professional misconduct being raised against her. On 4 June 2016, the Committee found the allegations of misconduct based on

that act of the appellant to be proved. It found that the appellant's fitness to practise to be impaired and it directed that her name be struck off the register.

- 7 The appellant exercised her right of appeal and her appeal came before Hayden J on 2 March 2017. On 3 March 2017, Hayden J ordered that the appellant's appeal be allowed on the basis that the sanction that was imposed was plainly wrong. He substituted a decision, in lieu of the order striking the appellant from the register, of a period of suspension for 12 months, beginning on 2 March 2017. However, by virtue of the exercise of further rights of appeal, the date for the commencement of the period of suspension did not come into effect until 29 June 2018.
- 8 The appellant's grounds of appeal, unquestionably, sought to challenge the findings that had been made against her by the Committee on 4 June 2016. Although I have not seen a judgment of Hayden J, and I do not believe that there was a reasoned judgment, it is clear that the challenge to the primary findings failed. This is clearly implicit in his decision to allow the appeal solely on the basis that the sanction was plainly wrong.
- 9 The appellant sought to appeal the decision of Hayden J. She applied to the Court of Appeal for permission to appeal, but, on 29 June 2018, Arden LJ refused permission to appeal.
- 10 In the meantime, the appellant had commenced a collateral attack on the decision made by the Committee on 4 April 2016. She commenced a claim in the Queen's Bench Division of the High Court on 29 March 2017 seeking damages against the Nursing and Midwifery Council. That claim was transferred to the Administrative Court and placed before Lavender J who, on 19 June 2017, struck it out. The appellant subsequently filed an application seeking to set aside the decision of Lavender J, which came before Andrews J on 8 August 2017. She ordered that the matter should be treated as an application, pursuant to CPR 52.30, to reopen the appeal which was disposed of by Hayden J. She ordered transcripts to be obtained and listed an oral hearing for 11 October 2017. However, by an order made by her on 13 October 2017, the application to reopen the appeal before Hayden J was dismissed on the basis that the appellant had an adequate alternative remedy of seeking permission to appeal from the Court of Appeal and that such an application was then currently pending.
- 11 The appellant sought to appeal that decision, as well, to the Court of Appeal and that, too, was before Arden LJ on 29 June 2018, when she also refused permission to appeal.
- 12 It can, therefore, be seen, both on the primary track and on the collateral track, that the appellant has sought to challenge the factual findings made by the Committee on 4 April 2016; that she has failed before the High Court; and that her attempt to appeal to the Court of Appeal has been dismissed. It was because the matter had proceeded to the Court of Appeal that the start date for the period of suspension was deferred and only came into effect upon Arden LJ making her orders on 29 June 2018. That period of one year then elapsed, as I have explained, on 29 June 2019 and was extended for four months by the order which is the subject of the appeal before me.
- 13 In her submissions to me, the appellant has made it abundantly clear that her primary objective is to seek to challenge the findings of fact made by the Committee on 4 April 2016. However, I am of the clear view that it would be demonstrably abusive for her to be allowed to do so. I am of the clear view that the decision that has been made by the Committee on 4 April 2016, confirmed implicitly by the decision of Hayden J, as I have described - and that decision being confirmed by refusal of permission to appeal by Arden LJ, as I have described - gives rise to an issue estoppel, which the appellant cannot now seek

to re-litigate before me. If I am wrong about that, then for her to be allowed to re-litigate the issue would be a procedural abuse clearly within the principle enunciated by Vice Chancellor Wigram in *Henderson v. Henderson* (1843) 3 Hare 100. That principle was well expressed by Lord Bingham in *Johnson v. Gore Wood and Co* [2000] UHL 65, where he said:

“The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter.”

In this case, the respondent has already been twice vexed, arguably three times vexed, and the application now is to vex the respondent with the same allegations or the same challenges to its findings on at least a fourth occasion.

14 I, therefore, reject, *in limine*, the attempt by the appellant to seek to undermine the findings made by the Committee on 4 April 2016. That road has reached its end and there is nowhere else for the appellant to go.

15 The sole question, therefore, is whether the Committee was right, on the historical bedrock of the findings made on 4 April 2016 and having regard to the appellant’s actions and conduct during the period of the suspension, to find a continuance of impairment and to find that there should be a further period of extension. I have expressed the question, was the Committee right, when, in fact, the legally-correct way of posing the question would be to ask: has it been shown that the Committee was wrong to adopt this course?

16 On 4 May 2019, shortly before the hearing before the Committee on 5 June 2019, the appellant wrote a letter to the Committee. It reads as follows:

“I can assure the committee I will never again email anonymised patient information to regulating authorities (or anyone), to raise concerns about severe patient harm. I now know that it is seen as unacceptable and ‘deplorable’ conduct worthy of severe punishment.

I apologise for my earlier belief that the risk of severe preventable patient harm would justify my email to raise the awareness of regulating authorities, who may prevent it. I now understand that the risk to patient confidentiality outweighed the risk of ongoing patient harm at the Isle of Wight NHS Trust where I was employed at the time.”

17 She wrote three days later an email to the Committee, which had offered her the opportunity of participating in the hearing by telephone or video, in which she said this:

“The NMC lacks consistency in their disciplinary decisions and I have to live with their decision whatever it is. I can only confirm that I will refrain from repeating the conduct for which I am punished. I have nothing else to say.”

18 The question that the Committee on 5 June 2019 had to decide was whether there had been proven a continuance of impairment and, if so, what sanction should be imposed, if any. The Committee produced a decision where it dealt, relatively shortly, with the question of whether impairment had been proven. I shall read its decision as it is relatively short.

“In reaching its decision, the panel was mindful of the need to protect the public, maintain public confidence in the profession and to declare and uphold proper standards of conduct and performance.

The panel was of the view there was no evidence that Mrs Tapster had reflected on the consequences of her actions and the risk to patients. It noted that there was no sign of remorse from her. The panel took into account that in an email dated 7 May 2019, Mrs Tapster stated 'I can only confirm I will refrain from repeating the conduct for which I am punished', however, there was no insight into the importance of patient confidentiality.

The panel was of the view that Mrs Tapster could have provided evidence that she had surrendered or destroyed the 'personal book' which was still in her possession at the time of the original hearing. However, there was no evidence of this.

The panel noted Mrs Tapster's letter, dated 4 May 2019, and was of the view that the tone of the letter did not satisfy the panel that Mrs Tapster was genuine in her remarks. It took into account that it contains no insight, no reflection and no remorse. The panel was satisfied that there was no evidence that Mrs Tapster has remediated her failings. In light of this, the panel determined that she remains liable to repeat matters of the kind found proved. The panel, therefore, decided that a finding of continuing impairment is necessary on the grounds of public protection.

The panel had borne in mind that its primary function was to protect patients and the wider public interest, which includes maintaining confidence in the nursing profession and upholding proper standards of conduct and performance. The panel determined that, in this case, a finding of continued impairment on public interest grounds is required.

For these reasons, the panel finds that Mrs Tapster's fitness to practise remains impaired."

- 19 Now, it is established that, in order to demonstrate insight and remediation, it is not a requirement that the registrant has to accept the allegations made against him or her chapter and verse. It is the same as the age-old conundrum about whether prisoners who adamantly deny their crimes should be eligible for parole without having previously admitted their wrongdoing. However, there is scope for somebody in the position of the appellant to say, "If (which is denied) I did commit a wrong then I will conduct myself in a certain way", but, nonetheless, that statement has to be judged to be sincere; and the Committee, on this occasion, found that the tone of the letter of 4 May and of the email of 7 May simply was not sincere, and that was a finding for them to make. I have to say, having heard the appellant make her submissions before me, it is a finding with which I entirely agree. She was bursting with indignation at the wrongful treatment that she believes has been meted out to her and was explicit in her acceptance before me that the terms of her letter had been very carefully considered and did not amount to any kind of admission by her that she was, objectively, in the wrong. Her position before me was clearly that she was at all times completely guiltless and had not misconducted herself in any way. The insincerity of the terms of her letter was thereby very clearly demonstrated to me.
- 20 In such circumstances, I am not satisfied that the appellant has demonstrated, in relation to the Committee's finding about impairment, that it was wrong; indeed, I conclude that it was plainly right and it would have been perverse for the Committee to have reached any other conclusion on the material before it.
- 21 The Committee then moved to its determination on sanction. It said this:

“The panel first considered whether to take no action or to impose a caution order but concluded that these would be inappropriate in view of the risk of repetition identified and the seriousness of the case. The panel decided that it would be neither proportionate nor in the public interest to take no further action or to impose a caution order.

The panel considered whether conditions of practice would be appropriate but concluded that it would not be as there is no evidence of issues with Mrs Tapster’s clinical practice. Further, she has not demonstrated she would be willing to comply with conditions.

The panel considered the imposition of a further period of suspension. It was of the view that a suspension order would allow Mrs Tapster further time to reflect on her previous failings. It considered that Mrs Tapster needs to demonstrate that she has gained a full understanding of the impact that breaching patient confidentiality can have on patients, their families and the wider nursing profession. The Panel concluded that a further 4 month suspension order would be the appropriate and proportionate response and would allow Mrs Tapster adequate time to develop her insight and remediation.”

22 In my judgment, having made the finding of impairment in the terms that it did, and having regard to the facts of this case, the decision as to sanction was fully and squarely within the remit of available sanctions to the Committee. Indeed, I am completely satisfied that it cannot be said that their decision was wrong and, again, I would proclaim that, in my judgment, the decision was manifestly the right decision to make.

23 Therefore, the appeal is dismissed. I want to end by making one thing crystal clear. Mrs Tapster has been struck off by virtue of a decision made on 29 October 2019. This court is not concerned at all with the rightness or wrongness of that decision. Mrs Tapster has a statutory right to appeal against that decision. Her time for lodging such an appeal expires on 26 November 2019. It is open for her to pursue an appeal against that sanction.

24 That concludes this judgment.

MR CASSELLS: My Lord, I think there are perhaps two matters that I need to address you on. By my calculation, the time limit to appeal, in fact, runs out on 26 November, as opposed to the 29th, as you indicated.

MR JUSTICE MOSTYN: Okay. Is it 28 days?

MR CASSELLS: It is, yes.

MR JUSTICE MOSTYN: It is not a month, it is 28 days?

MR CASSELLS: That is right.

MR JUSTICE MOSTYN: The judgment will be corrected to say 26 November.

MR CASSELLS: I am grateful. My Lord, I also indicate in my skeleton that the NMC sought a declaration that the points made seeking to re-litigate the matters previously before this court, and, indeed, the Court of Appeal, were totally without merit. I do not know if your Lordship is minded to make such a declaration.

MR JUSTICE MOSTYN: Yes, I am satisfied that they are totally without merit.

MR CASSELLS: My Lord, I am grateful. In that case, it does----

MR JUSTICE MOSTYN: Not the appeal against the four-month sanction.

MR CASSELLS: No, indeed.

MR JUSTICE MOSTYN: But the attempt to re-litigate is manifestly abusive.

MR CASSELLS: My Lord, I----

MRS TAPSTER: Uh----

MR JUSTICE MOSTYN: Do you mind? He is still talking.

MR CASSELLS: My Lord, that being the case, there is a requirement to consider whether a civil restraint order would be appropriate.

MR JUSTICE MOSTYN: But there has to be a number of them.

MR CASSELLS: My understanding is that, if there is a finding that a matter is totally without merit, there needs to be consideration as to whether there should be.

MR JUSTICE MOSTYN: No. Well, I am not imposing a civil restraint order.

MR CASSELLS: Very well. My Lord, in that case----

MR JUSTICE MOSTYN: Apart from anything else, I am not sure that we are in the -- it has to be repetitious conduct. There has been some repetitious conduct, but I am not going to put a civil restraint order on her, not least because she has been struck off and I stated quite clearly----

MR CASSELLS: Of course.

MR JUSTICE MOSTYN: -- that she has a right to appeal.

MR CASSELLS: Yes, no, I appreciate that, my Lord. The only final matter then is that there is a schedule of costs from the respondent. I do not know if that has made its way to your Lordship.

MR JUSTICE MOSTYN: Yes.

MR CASSELLS: It was served on Mrs Tapster. I can be relatively brief. Plainly, the usual course would be the costs follow events. In my submission, the quantum is perfectly reasonable, but, of course, that is a matter for you on summary assessment, having had the----

MR JUSTICE MOSTYN: Do you not charge VAT?

MR CASSELLS: My Lord, no. It is simply the guideline rates as set out within the CPR.

MR JUSTICE MOSTYN: I see. All right. Yes, Mrs Tapster.

MRS TAPSTER: Thank you. It just seems unjust that the respondent can issue sanction for the same conduct time and again and I cannot challenge the findings on it.

MR JUSTICE MOSTYN: Yes, but you are doing exactly what I said is not permitted, you are trying to re-litigate.

MRS TAPSTER: Okay. With regards to costs, in that case-----

MR JUSTICE MOSTYN: Costs, yes.

MRS TAPSTER: -- I have a submission that I am on benefits, so I am unable to afford much. So any costs ordered have to be repaid at about £2 month or £5 a month.

MR JUSTICE MOSTYN: How much?

MRS TAPSTER: I am on benefits, your Honour.

MR JUSTICE MOSTYN: You are on benefits?

MRS TAPSTER: Yes. And I have got a statement from the benefits office.

MR JUSTICE MOSTYN: How much a month are you offering?

MRS TAPSTER: A maximum of £5 a month, if there are any costs.

MR JUSTICE MOSTYN: How much do you get in benefits?

MRS TAPSTER: £112 a week.

MR JUSTICE MOSTYN: 112?

MRS TAPSTER: Yes.

MR JUSTICE MOSTYN: Do they pay your rent?

MRS TAPSTER: No.

MR JUSTICE MOSTYN: Well, what do you have to pay out of that?

MRS TAPSTER: My partner pays everything. That is literally just my pocket money.

MR JUSTICE MOSTYN: Say it again.

MRS TAPSTER: I pay rent to my partner and he keeps me, basically.

MR JUSTICE MOSTYN: I see. So your accommodation is your partner's house?

MRS TAPSTER: Yes.

MR JUSTICE MOSTYN: I see. So what benefits -- Is it Universal Credit you are getting?

MRS TAPSTER: No, it is contribution-based employment support allowance.

MR JUSTICE MOSTYN: I see. Okay.

MRS TAPSTER: It is on there.

MR JUSTICE MOSTYN: All right. Well, I think that that is fair enough.

MRS TAPSTER: If I may submit my costs and my -- There is a letter attached from the benefits office. (Handed) (Pause)

MR JUSTICE MOSTYN: Right. Thank you very much. I am minded to say that I will make an award of costs, but I am going to state a rate for as long as she is on benefits.

MR CASSELLS: Yes, my Lord.

MR JUSTICE MOSTYN: Do you understand?

MRS TAPSTER: Yes, thank you.

MR JUSTICE MOSTYN: In the application for costs the amount claimed is £4,198. The amount of costs is manifestly reasonable -- very reasonable. The general rule, which is that the loser pays the costs, shall apply. However, Mrs Tapster is on benefits and I have seen a letter that her sole income amounts to employment support allowance of £116 a week. That must mean that she is living very close to the breadline. Therefore, I am going to say that for as long as she remains on benefit and not in gainful employment, she does not have to pay more than £5 a month towards these costs.

MR CASSELLS: Thank you, my Lord. I am grateful.

MR JUSTICE MOSTYN: However, there is an obligation on you, Mrs Tapster, that, if you obtain gainful employment, to tell the respondent. Do you understand? And then that will be reconsidered. Well, then it will have to be reconsidered at that point.

MRS TAPSTER: Your Honour, I will be charged----

MR JUSTICE MOSTYN: But, for as long as you are on benefits, you pay only £5 a month. Do you understand?

MRS TAPSTER: I have been trying to gain employment for the last three and a half years.

MR JUSTICE MOSTYN: No, I appreciate that. I mean, I have seen----

MRS TAPSTER: The respondent, when they alleged that I breached the patient confidentiality, no one wants to hire me.

MR JUSTICE MOSTYN: Okay. Thank you.

(12.16 p.m.)

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This transcript has been approved by the Judge.