The WLR Daily case summaries

[2021] WLR(D) 310

Queen's Bench Division

Dad *v* General Dental Council

[2021] EWHC 1376 (QB)

2021 May 6; 25

Collins Rice J

Dentist— Discipline — Registration— Dentist removed from register— Dentist failing to declare details of criminal investigation in application for restoration— Dentist restored to register— Professional conduct committee subsequently finding non-disclosure dishonest and misleading and imposing sanction of erasure— Whether committee erring as to scope of duty to declare— Whether duty to declare investigation

In 2006 the appellant dentist was removed from the dentists' register for non-payment of the annual fee. This was a deliberate decision on the part of the dentist, who at the time was being investigated by National Services Scotland's Counter Fraud Services ("NSS CFS") over a business rates fraud and faced criminal proceedings, as he hoped that by coming off the register he could sort out his problems without having to inform his professional regulatory body about the investigation. The appellant applied successfully for restoration to the register in February 2007, but failed to declare the ongoing criminal proceedings against him. He was subsequently convicted of fraud offences and his name was erased from the register in 2010, on the grounds of the convictions and his failure to declare. The appellant applied to be restored again to the register in January 2018. The application form asked applicants whether they were "currently the subject of any police investigations which might lead to a conviction or a caution" or "currently subject to any proceedings or investigations by a regulatory or licensing body in the UK". The attached guidance notes also stated: "We also need to know if you have been the subject of any professional proceedings in the past, or any are being contemplated, by a regulatory or licensing body in the UK or any other country. You will also need to advise the [regulatory body] of any future criminal proceedings/police investigations, convictions or cautions." The dentist declared his convictions, but not his regulatory history. In or around November 2018 the claimant was made aware that he was subject to another CFS investigation, again with a view to criminal proceedings. He did not update the information in his application for restoration to reflect the fact that he was being investigated. The appellant was restored to the register in June 2019 with conditions imposed on his practice. Thereafter, the regulatory body was notified of the investigation and brought misconduct proceedings against him, charging him with failure to declare. A professional conduct committee of the regulatory body rejected the dentist's contention that he had no obligation to declare because NSS CFS investigation was neither a "police investigation" nor "proceedings or investigations by a regulatory or licensing body" within the meaning of the application form. It found that NSS CFS was a regulatory body for the purposes of the application form question and that the dentist's failure to declare its new investigation was misleading and dishonest such that his fitness to practice was impaired, and it ordered his name to be erased from the register.

On appeal by the dentist—

Held, appeal dismissed. (1) The duty to declare had to be sought in the application form itself as there was no freestanding duty, derivable from any applicable professional code, to declare an investigation like that of the NSS CFS to the regulatory body, nor was there any other external source for what had to be declared on a restoration application. Whether the dentist was obliged to declare the new investigation was a question of interpretation and not law and the correct approach was not necessarily the same as would be applied when interpreting a statute. The intention of the regulatory body as the author of the application form was a proper aid to interpretation in an appropriate case where a genuine question arose, as was the applicant's perspective. The risks of misinterpreting the duty to decare were asymmetrical as the risks of under-declaration were substantial, not only to an applicant, but also to the proper administration of the application process and to the public if the regulatory body did not perform its gatekeeper function properly. Thus, applicants were deliberately placed in regulatory jeopardy of under-declaration as they had the knowledge demanded by the form, which was essential to the process, and there were commensurate sanctions for failure to do so. In contrast, the converse risks of over-declaration were relatively minor. The risk to the applicant of unnecessarily disclosing adverse material was not to be overstated as, against the poor impression created by adverse material, there could be set the good impression created by conscientious candour and the restoration procedure was engineered so as to ensure an applicant was not prejudiced by irrelevant history. The restoration application form had a limited, functional and transactional purpose, which was to elicit relevant material from those who had it. As the whole exercise was about assessing whether an applicant was fit to be registered as a responsible professional that did not encourage self-serving literalism but instead encouraged responsible reflection on relevance to the professional procedure in hand. Accordingly, the better interpretative approach was not forensic minimalism, but "if in doubt, declare". An applicant was fairly required at least to think, to acknowledge the professional context, and if in doubt to check and err on the side of declaration. While applicants were entitled to fair consideration of their case for restoration they needed to think purposively and were not entitled to control the limits of the duty to declare, nor to control the factual matrix of the decision-making. That did not imply an unfair imbalance of power or jeopardy, and it was not an oppressive duty (paras 20, 23, 24, 28–32, 32, 34, 36, 38).

(2) Adopting that approach to interpretation, what had to be declared was the fact of a relevant criminal investigation, either of a kind specified on the form or analogous to it. The test of relevance inevitably made the duty to declare fact-sensitive, precisely because important and divergent public policy interests were held in tension in the process of applying for restoration to the register, and because the process was transactional. It involved the respondent, on behalf of the public, taking a fresh look at an applicant's absence from the register. The target of the form was information which was clearly relevant, even if outside the indicative bullseye, and the pull of the public protection dimension and the intention of the regulatory body would prevail over the specificity or silence of the form to impose a duty to declare what was clearly relevant. The gravity of an investigation, and the clarity of its relevance to the restoration process, were material to the scope of the duty to declare. The appellant could not fairly have been in any doubt at all about the central relevance of the November 2018 criminal investigation to his application for restoration to the register nor, if he were in any doubt about his duty to declare it, about how to resolve that doubt. It had therefore been open to the professional conduct committee to conclude, on the basis of the facts found and on a proper interpretative approach, that the appellant had a duty to declare the criminal investigation. It being accepted that if there was a duty to declare, then it was dishonest and misleading of the dentist not to do so, the decision to erase him from the register was neither wrong nor unjust because of serious procedural irregularity (paras 36, 38, 40, 41, 45, 48, 50).

Anthony Metzer QC and *Heather Beckett* (instructed by direct access) for the claimant.

Eloise Power (instructed by *General Dental Council, Legal Department*) for the regulatory body.

BENJAMIN WEAVER ESQ, Barrister