Case No: C3/2018/1152

Neutral Citation Number: [2019] EWCA Civ 1298
IN THE COURT OF APPEAL (CIVIL DIVISION)

The Royal Courts of Justice
Strand, London, WC2A 2LL

Tuesday, 25 June 2019

Before:

LORD JUSTICE LONGMORE
and
SIR RUPERT JACKSON

- -

Between:

ADEKOLA

Appellant

- and -

NHS ENGLAND

Respondent

- -

DAR Transcription by Epiq Europe Ltd,
8th Floor, 165 Fleet Street, London, EC4A 2DY
Tel No: 020 7404 1400 Fax No: 020 7404 1424 Web:
www.epiqglobal.com/en-gb/ Email: civil@epiqglobal.co.uk
(Official Shorthand Writers to the Court)

- -

The **Appellant** appeared in person

MR C HAMLET (instructed by Blake Morgan LLP) appeared on behalf of the **Respondent**

- -

Judgment

(Approved)

LORD JUSTICE LONGMORE:

1. The question which Dr Adekola asks us to have determined in this appeal is whether, before the Northamptonshire Primary Care Trust could succeed in obtaining a national disqualification order disqualifying her from practice, that primary care trust proved to the satisfaction of the First-tier Tribunal that she was on its medical practitioners list (which I shall call "the MPL"). The MPL is the list of medical practitioners maintained by each primary care trust ("PCT").

2. Before 2006 Dr Adekola was on an MPL maintained by the Cherwell Vale PCT pursuant to the National Health Service *(*Performers Lists*)* Regulations 2004 (" the 2004 Regulations"). That PCT was dissolved when the Primary Care Trusts *(*Establishment and Dissolution*) (*England) Order 2006 ("the 2006 Order") came into force on the 1 October 2006 when smaller PCTs were abolished and PCTs covering wider geographical areas were introduced and, relevantly here, PCTs covering Northamptonshire and Oxfordshire. Dr Adekola maintains that she was never transferred to either list and therefore that the Northamptonshire PCT could not obtain an order for her disqualification and that the tribunal which ordered her disqualification had no jurisdiction to do so. If her argument is correct and Dr Adekola was on no MPL after 1 October 2006, it may follow that from that date she was practicing medicine unlawfully, but that fact could not give the FTT jurisdiction which it did not have to issue a national disqualification order.

3. I turn to the background facts. Dr Adekola began working as a salaried general practitioner at Brackley Health Centre at Brackley in Northamptonshire. Her contract of employment was with the health centre rather than with the local PCT. She registered as a medical practitioner on the relevant MPL at that time, that of Cherwell Vale PCT. Pursuant to the 2006 order on 1 October 2006 Cherwell Vale PCT was abolished and divided between the Oxfordshire PCT and the Northamptonshire PCT. Brackley fell within the Northamptonshire PCT. Article 8 of the order provided:

> "A practitioner whose name was included in an old list maintained by an old PCT shall have his name included in the corresponding

list of the relevant new PCT."

4. One view of the matter might therefore be that as from 1 October 2006 Dr Adekola was on the Northamptonshire MPL. It may well be that nobody gave much thought to the matter at the time.

5. On the 30th of March 2011Dr Adekola and her husband were arrested after a police visit inquiring about an attempted acquisition by them of death stalker scorpion venom and black spider venom. They were both said to be abusive and uncooperative with the police, but in the event no charges were brought against either Dr Adekola or her husband. Naturally enough, however, the health centre was very concerned. It suspended Dr Adekola from work at the health centre on 4 April 2011 and in due course dismissed her on 21 July 2011. Dr Adekola initiated a claim in the employment tribunal in respect of that dismissal, but it was out of time and not proceeded with. At the end of July she emigrated to Australia, but she has now returned.

6. Meanwhile, a reference committee had been set up to determine whether Dr Adekola should be removed from the Northamptonshire PML in which it was assumed her name was included. She was invited to participate but did not participate and did not attend. That reference committee, pursuant to regulation 10 of the 2004 Regulations, first suspended her for 60 days and then on 21 September 2011 concluded that she should be removed from the list on grounds of unsuitability. That had the effect that she could no longer practice for the NHS in Northamptonshire. She has not appealed this decision. The decision also warned Dr Adekola that proceedings might be taken to obtain a national disqualification order, which would mean that she could not practice anywhere else for the NHS in England.

7. In February 2012 the First-tier Tribunal ("the FTT") made an order for national disqualification of Dr Adekola following an application by Northamptonshire Primary Care Trust pursuant to Regulation 18A(3) on the 2004 Regulations. Once again Dr Adekola was given every opportunity to participate in the proceedings, but she did not engage with the tribunal and has not appealed the FTT order. She was however entitled to ask the FTT to review its decision after the lapse of two years. On 1 May 2014 she did indeed apply to the FTT for such a review pursuant to Regulation 18A(6) of the

2004 Regulations. It was at that stage that for the first time she submitted before the FTT, inter alia, that Northamptonshire PCT did not have jurisdiction to apply for a national disqualification order against her because she was not and had never been on the medical performer's list for that PCT. The FTT rejected that submission and confirmed the original national disqualification order. Dr Adekola appealed to the Upper Tribunal on a number of grounds. The Upper Tribunal upheld the decision of the FTT. So far as concerned jurisdiction, the Upper Tribunal held that the FTT had erred in law in accepting without sufficient evidence or reasoning that the PCT had jurisdiction to apply for national disqualification, but it said that that error was not material. Dr Adekola now appeals to this court, having been given permission to appeal on the sole ground that the Upper Tribunal erred in finding that the FTT had made no material error of law as to whether the appellant was included on the medical performance list of Northamptonshire PCT.

8. I must now mention the previous decisions in more detail. The 2012 FTT comprised Tribunal Judge Nancy Hillier, Dr Douglas Kwan and Ms Jackie Neylon. It decided that an order for national disqualification on the application of Northamptonshire PCT would be appropriate and proportionate on the grounds that the appellant had (1) consistently failed to engage with NHS Northamptonshire, (2) permitted the use of her name to attempt to procure scorpion and spider venom with the intention of conducting unregulated research, and (3) engaged in abusive behaviour towards the police. The FTT also took into consideration fourthly the unappealed findings of the Reference Committee to similar effect. As I have already said, Dr Adekola had been given every opportunity to engage with the proceedings before the FTT but had declined to do so, and she did not appeal.

9. Now for the 2014 FTT. Dr Adekola's application for review, once the statutory two years had expired, rightly named NHS England as the respondent since she had been disqualified from being on any MPL in England. The 2014 FTT comprised Judge Melanie Plimmer, Dr Elizabeth Walsh Heggie and Ms Mary Harley. Both parties stated that they wished the hearing to take place on the papers, and that request was granted. It confirmed the order for national disqualification made by the 2012 FTT. As to the scope of the action before the 2014 FTT, the FTT noted that Dr Adekola "has

expressly agreed that the sole question for the tribunal to determine is her current suitability for inclusion on the performer's list in light of all the evidence now available". The FTT identified this as "the overarching issue". It is thus clear that her application was that she should now be included in an MPL. In relation to the issue of suitability, the FTT found that the appellant was unsuitable for inclusion on any MPL. That finding was based on (1) Dr Adekola's attitude towards regulation by NHS bodies ("She continues to demonstrate a blatant disregard for the role of the respondent and its predecessors in regulating her as an NHS performer and in investigating matters of concern"); (2) the appellant's failure to cooperate with the attempts by the police and NHS Northamptonshire to investigate her role in trying to acquire venom in April 2011; (3) the contents of the appellant's website, which "gives rise to serious concern about her fitness to practice generally as well as demonstrating continuing disrespect to and a lack of regard for authority and statutory agencies"; (4) the appellant's continuing lack of insight and/or self-reflection; and (5) the appellant's failure to submit any cogent and credible mitigation.

10. Notwithstanding the limited scope of the proceedings before the 2014 FTT, the FTT did address the issue of jurisdiction of the first FTT. It explicitly rejected the submission that NHS Northamptonshire did not have the legal basis to take action against her. It held as follows (and I now quote from paragraph 19 and 20):

> "19. Whilst there was some understandable confusion as to who was the correct body to hold responsibilities for the Applicant's performer's list inclusion due to reconfiguration changes to the NHS structure, we are satisfied that NHSN was entitled to take the steps that it did. We accept the evidence of Dr Hopton that the Applicant has sought to raise obscure and irrelevant issues relating to the historic transfer arrangements to the PCT's lists in 2006 and the alleged failure on the part of NHSN to issue her with a certificate of inclusion then. We accept that it was lawful for the Applicant as a GP to be transferred to another PCT upon the dissolution of a previous PCT in accordance with the PCT (Establishment and Dissolution) (England) Order 2006 and that PCTs did not routinely issue certificates of inclusion on performers lists.
>
> 20.In any event, the Applicant has singularly failed to acknowledge that whatever historic concerns she had, a NHS body was entitled

> to regulate her inclusion on the performers list at the relevant time. We note that the matter was scrutinised in some depth and in accordance with the appropriate procedures by NHSN. This included a NHSN reference committee meeting being held in July 2011 as well as reference committee hearings in August and September 2011.We consider that NHSN acted in good faith at all material times and the Applicant has unnecessarily and unreasonably sought to question historical matters, without demonstrating any insight at all into the fact that the matters of concern required investigation and that she should assist with that investigation."

11. The FTT concluded that in the circumstances an order for national disqualification would be proportionate and balanced and that the original order should therefore be confirmed.

12. I now turn to the Upper Tribunal's decision. The Upper Tribunal, consisting of Knowles J upheld the decision of the 2014 FTT. She dealt with several issues not relevant to the present appeal. In short, she found that (1) the 2014 FTT had due regard to the decision of the 2012 FTT but had not improperly fettered itself from conducting a fair review; (2) the decision of the 2014 FTT to decide the review on the papers without an oral hearing was reasonable in the circumstances; (3) the fairness of the 2012 FTT hearing was not in issue; (4) the 2014 FTT had dealt properly with the effect of the GMC's decision; and (5) the allegations of bias against the 2014 FTT were not made out.

13. So far as concerns the jurisdiction issue, the Upper Tribunal held that the FTT had erred in law because its decision that it was lawful for Dr Adekola to be transferred to another PCT upon the dissolution of previous PCT was inadequately reasoned and thus that there was an error of law. In particular, the statement of Dr Hopton did no more than assert her opinion on the issue and the Scott schedule, to which the FTT had referred, lacked particularity when addressing the transfer issue. However, the Upper Tribunal found the error of law was not material on the grounds that (1) the appellant had agreed before the 2014 FTT that the issue before the tribunal was her suitability to work as a GP; (2) the 2012 FTT had found that a national disqualification order was appropriate and proportionate on a range of grounds that were unaffected by the

jurisdictional arguments and went directly to suitability, and that decision had not been appealed; (3) the 2014 FTT had adequate and relevant information to conduct a proper review and did so; (4) the Upper Tribunal bore in mind NHS England's submission that inclusion on a medical performer's list comprised a longstanding requirement for practice as a GP, and Dr Adekola knew perfectly well that she had to be included in an MPL to work as a general practitioner at all.

14. **This appeal**

By an appellant's notice filed on 6 April 2018 and sealed on 2 May, Dr Adekola applied for permission to appeal on a range of grounds. By his order of 7 December 2018, Holroyd LJ granted permission to appeal on the jurisdiction ground only on the basis that it was only this ground which had any real prospect of success and raised an important point of principle. Holroyd LJ formulated this ground as follows:

> "Whether the Upper Tribunal erred in law in finding that the First-tier Tribunal had made no material error of law as to whether the appellant was at any material time including (whether by operation of law or otherwise) in a performer's list of NHS Northamptonshire or Northamptonshire PCT."

15. There are therefore two issues to be considered: (1) whether the 2014 FTT made an error of law and (2) whether, if so, it was material. So I turn to the first issue. Was there an error of law by the second FTT? Dr Adekola in a concise and well-formulated oral argument submitted (1) the method by which a medical practitioner transferred to a new MPL after the 2006 order required (a) notification of the intended change and/or (b) an invitation to select an appropriate PCT and/or (c) some act on her part, namely an application to be on either the Oxfordshire or the Northamptonshire MPL. She had neither received such notification or invitation and had made no such application and was therefore on no list. (2) Article 8 of the order had to be read with Article 2 of the order, which provided that for the purpose of Article 8, the meaning of "the relevant new PCT was to be determined in accordance with Articles 10 to 14 of the order. (3) Article 10 provided that any practitioner could nominate a particular new PCT in writing, in which case the relevant PCT would be the nominated PCT, but that for any doctor who (like Dr Adekola) had no contract with a PCT and who had not nominated a

new PCT, the relevant new PCT would be determined in accordance with Article 14. (4) Article 14 provided that the new PCTs involved had to agree between themselves which new PCT was to be the relevant PCT after considering any representations from the practitioner, and, if they could not agree, the strategic health authority would determine the matter. (5) No such procedures had occurred with respect to Dr Adekola and accordingly she was not on any list, and (6) no practitioner could be deemed to be on the list of a PCT because Regulation 3 of the 2004 Regulations required the list to be a published document.

16. Mr Hamlet, who appeared for NHS England, submitted (1) Article 8 provided for the automatic inclusion in the relevant new PCT of any practitioner whose name was on an old list maintained by an old PCT. There was no precondition that practitioners had to be notified of the intended change or given an express invitation to say to which PCT they should be transferred. (2) Articles 10 to 14 only came into play if the practitioner expressed a preference for any new PCT or if there was a doubt or dispute about which new PCT was the correct PCT to which a practitioner should be allocated. (3) Otherwise Article 2(2) came into play, which provided:

> "For all other purposes and subject to the provisions of paragraph (3), in relation to that part of the area for which the dividing PCT was established which is specified in column (2) of Schedule 3, the relevant new PCT is the new PCT which is specified in column (3) of that Schedule in relation to that part."

17. (4) In this case the dividing PCT was the Cherwell Vale PCT, which was to be divided between Oxfordshire and Northamptonshire. (5) Schedule 3 listed the Cherwell Vale PCT as the dividing PCT. Column (2) under the heading of "Part of area for which dividing PCT established" listed Brackley and column (3) under the head of "Relevant new PCT in respect of that part" listed Northamptonshire PCT as the new PCT for Brackley practitioners. (6) Accordingly Dr Adekola was transferred to the Northamptonshire PCT and it was of no consequence when or indeed whether the physical MPL had Dr Adekola's name upon it. Even if Dr Adekola's name did not appear on the list, she had to be treated as being on the list by operation the law.

18. I have concluded, in spite of Dr Adekola's excellent argument, that NHS England is right in its construction of the order and that is for the following reasons. First, the order must in accordance with modern authorities on statutory interpretation be given a purposive construction. Secondly, it could never have been the intention of those drafting the order that there should when the order came into force on 1 October 2006 be any doubt or hiatus about to which MPL any practitioner should belong. It is natural that any doctor's wishes should be taken into account, but those wishes had to be notified in writing on or before 31 August 2006 so that any doubt or dispute could be resolved by 1 October 2006. On that date every practitioner had to belong to one PCT or another. Thirdly, many practitioners would take no specific action and be content to be allocated to the new PCT covering the area in which they practiced. Those who were not so catered for would be dealt with during September 2006 so there could be a seamless transition. Fourthly, there was no requirement that medical practitioners should be notified of impending changes to their PCT; nor was there a requirement that practitioners should be invited to choose a PCT. The transition was essentially a bureaucratic procedure without any need for applications unless a practitioner actually wanted to make an application for an area other than that to which his or her original PCT was being allocated. That was not envisaged as being a common occurrence. Fifthly, if this were not the case, many practitioners in general and Dr Adekola in particular would have been practising unlawfully and could not be subject to the disciplinary and other processes of the PCT to which they apparently belonged. Regulation 22 of the 2004 Regulations specifically provides that a medical practitioner may not perform primary care services unless his name is included in an MPL.

19. It is fair to say, as the Upper Tribunal did, that the 2014 PCT was inadequately reasoned since it purported to rely on a letter from Dr Hopton which merely asserted the position, but the FTT's conclusion that Dr Adekola was as a matter of law to be treated as being on the Northamptonshire MPL was right for the reasons I have just given. The absence of adequate reasoning does not therefore in the end matter, and, to the extent that inadequacy of reasoning constitutes an error of law, such error was indeed immaterial. It is not therefore necessary to consider the other reasons why the Upper Tribunal considered any error of law on the part of the FTT to be immaterial, and for my part I would dismiss this appeal.

SIR RUPERT JACKSON:

20. I agree.

Order: Appeal dismissed