A Warning to Disciplinary Panels of Regulatory Bodies: The Impact of "Bloodgate" Goes Beyond Sport.

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Introduction

Many people will remember the infamous fake blood incident that tarnished the sport of rugby union which became known as "Bloodgate". It is interesting to note that while Harlequins Rugby Club recently won the Amlin Challenge Cup and Tom Williams has been playing for the team, the consequences for one off the field participant have been much more severe.

Former Harlequins physiotherapist Stephen Brennan (the **Appellant**) was struck off for his role in the "Bloodgate" scandal by a panel of the Conduct and Competence Committee of the Health Professions Council (the **Panel**). In the case of *Brennan –v- Health Professions Council*[1], the Appellant challenged the decision of the Panel on the basis that inadequate reasoning had been provided by them, the English High Court quashed this decision and remitted it to the same Panel with the direction that it reach a decision and clearly explain the reasons for that decision.

This decision will be of interest to practitioners who advise disciplinary panels of regulatory bodies in both a sporting and non-sporting context as it deals with a key issue of the extent to which such panels should such panels explain the reasons for their decision.

Background

The disciplinary action stemmed from an incident which occurred during a European Rugby (Heineken) Cup quarter final match between Harlequins and Leinster in April 2009.

The Appellant, who was the Harlequins physiotherapist at the time, was instructed by Dean Richards, the then Harlequins Coach, to bring a fake blood capsule onto the pitch and give it to Harlequins player Tom Williams to enable him to fake a blood injury thus permitting a substitution to be made. The Appellant followed the instruction, the ploy was successful but Harlequins lost the match. Following the incident, there was widespread suspicion that a fake blood injury had occurred and the organisers of the tournament, European Rugby Cup Limited (**ERC**) launched an investigation.

At the initial ERC disciplinary hearing in July 2009, the Appellant along with Tom Williams, Dean Richards and Dr. Wendy Chapman, the Harlequins' match-day doctor, each produced a false account of events. Despite this, Harlequins and Tom Williams were found guilty of misconduct and the others were cleared.

Tom Williams subsequently decided to tell the truth and an appeal by the ERC followed. At the appeal, the Appellant accepted that he had lied at the initial disciplinary hearing and revealed that he had been involved in four previous fake blood injury incidents. As a result, the Appellant was banned from participating in all rugby activities for two years.

[1] [2011] EWHC 41 (Admin)

Subsequently, the matter became the subject of a fitness to practice hearing before the Panel, which formed part of the regulator of physiotherapists in the UK. The Panel ruled that the Appellant's actions were sufficiently serious to justify striking him off, which was the highest penalty possible. The Appellant subsequently appealed this decision to the English High Court.

First Panel Hearing

The Panel had the power to impose sanctions on the Appellant under Article 29(5) of the Health Professions Order 2001[2] ranging from a caution up to strike off.

The imposition of sanctions was guided by the Health Professions Council's Indicative Sanctions Policy[3]. Importantly for the Appellant, it stated that fitness to practice proceedings are not intended to be punitive, rather the focus for the Panel should be to take the most appropriate steps to protect the public from any future risk.

The Panel, in choosing the option of strike off, stated that it arrived at the decision:

"…not only by a process of elimination but also because it is the sanction the panel considers to be necessary for the public and other professionals to understand that this sort of behaviour is unacceptable[4]."

Appeal

The Appellant challenged the decision of the Panel on the basis that inadequate reasoning had been provided by them. He did not appeal against the findings of misconduct, nor against the conclusion that his actions impaired his fitness to practice as a physiotherapist.

The Court ruled that the Panel "…had gone to the ultimate sanction, without explaining why in light of the evidence, a lesser sanction, whether conditions of practice or suspension was not appropriate[5]…Its reasoning is not legally adequate; it does not enable the informed reader to know what view it took of the important planks in Mr Brennan's case[6]."

Essentially, Mr. Justice Ouseley was of the view that it was not sufficiently clear from the Panel's decision why it believed that it was proportionate to impose the sanction of strike off rather than a lesser sanction.

It was stated that while the Indicative Sanctions Policy stated that striking off should only be imposed where there is no other way to protect the public, he noted that due to the unique circumstances of the case, no need to protect the public existed.

After all, the Panel had acknowledged that the Appellant was still recognised as being an excellent physiotherapist and the misconduct had not occurred in the course of treating a patient nor was the dishonesty alleged against a patient, nor were his actions against a patient's interests. Rather the

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2 S.I. 254/2002

3 http://www.hpc-uk.org/assets/documents/10000A9CPractice_Note_Sanctions.pdf

4 [2011] EWHC 41 (Admin) per paragraph 11

5 Per paragraph 27

6 Per paragraph 45

Appellant was instructed to engage in the deceptive act by Dean Richards, the Harlequins Coach.

Rather than imposing the sanction of strike off on the basis of a need to protect the public, the Panel imposed the sanction in order to deter others from engaging in similar behaviour and also to protect and maintain confidence in the profession of physiotherapy. However, what the Panel didn't do was assess the Appellant's case in detail, or assess whether another sanction would have been a more proportionate way to achieve the same aim. As a result of the Panel's failure to take these steps, their decision was quashed.

The decision does not represent a departure from the law in England or Ireland in this area. The current law in both jurisdictions is that the reasons given for a decision by a disciplinary body must be intelligible and adequate, and that a challenge based on a failure to provide reasons will only succeed if the party challenging the decision can satisfy a court that he has been substantially prejudiced by the failure to give reasons.

The High Court recognised the substantial prejudice and serious consequences of the Panel's decision for the Appellant, who had lost the position he had been due to take up as physiotherapist with the English national rugby team and whose private clinic had closed, causing a loss of 75% of his income, and this justified the Panel's decision being quashed.

It is interesting that the Mr Justice Ouseley then chose to remit the matter to the Panel with the direction that it reach a reasoned decision on the chosen sanction and avoided usurping the function of the Panel.

It was stated that remitting the matter to the Panel was appropriate because it had heard all the evidence in the initial hearing and it was recognised that the Panel was best qualified to judge what the best interests of the profession of physiotherapy were and how these could be best protected. The court also ruled that the second hearing would be in front of the same panel that had made the original ruling.

Second Panel Hearing

On Thursday 19 May 2011, following a two day hearing, the Panel ruled that the decision to strike off the Appellant would be replaced with a caution order to be noted on the Register of Physiotherapists for the maximum period of five years[7].

The Panel stated that its decision stemmed from the belief that the Appellant had shown genuine remorse for his actions, which it acknowledged was in contrast to the position adopted by the Panel at the first hearing.

The Panel also acknowledged that the Appellant had suffered a great deal, both professionally and personally, from the incident for the reasons outlined above. It was also significant that the Appellant had taken steps towards remediating his actions including giving a series of lectures to other physiotherapists and health professionals about professional standards and medical ethics in the context of his unique experience. As a result of all these factors, it was believed that there was a very low risk of such conduct being repeated in the future.

Implications for Regulatory Bodies

[7] http://www.hpc-uk.org/complaints/hearings/index.asp?id=1512&month=5&year=2011&EventType=H

This case demonstrates that where a disciplinary body, whether it be sporting or non-sporting, does not give adequate reasons for a decision which has seriously detrimental consequences for the person before it, that decision may be open to legal challenge.

In order to avoid such a challenge, such a body should give detailed reasons for its decision, including a clear assessment of the merits or otherwise of the case before it. It should also clearly state the aim of any sanction and why the particular sanction chosen is believed to be the most proportionate way to achieve that aim. If necessary, legal advice should be taken before its reasons are formulated. This case demonstrates that legal advice may also be appropriate when drafting or amending rules of procedure or policies applicable to disciplinary bodies.

Bibliography

Cases:

- *Brennan –v- Health Professions Council* [2011] EWHC 41 (Admin)
- *Deerland Construction –v- Aquatic Licensing Appeals Board* [2009] 1 I.R. 673
- *R (Howlett) –v- Health Professions Council* [2009] EWHC 36617
- *Giele v General Medical Council* [2005] EWHC 2143 (Admin)
- *Gupta –v- General Medical Council* [2002] 1 WLR 699
- *Marinovitech -v- General Medical Council* [2002] ALL ER (D) 187 (Jun)
- *Ghosh –v- General Medical Council* [2001] 1 WLR 1915

Legislation:

- *The Health Professions Order 2001*: S.I. 254/2002

Literature:

- *Ruling of the second hearing of the Conduct & Competence Committee of the Health Professions Council with regards to Stephen Brennan*

http://www.hpc-uk.org/complaints/hearings/index.asp?id=1512&month=5&year=2011&EventType=H

- *The Health Profession Council's Indicative Sanctions Policy*

http://www.hpc-uk.org/assets/documents/10000A9CPractice_Note_Sanctions.pdf