The Queen on the Application of Compton v General Medical Council

CO/6170/2007

High Court of Justice Queen's Bench Division The Administrative Court

11 November 2008

[2008] EWHC 2868 (Admin)

2008 WL 4820334

Before: Mr Justice Pitchford

Tuesday, 11 November 2008

Representation

- Mr J Joliffe (instructed by Bar Pro Bono Unit) appeared on behalf of the Claimant.
- Miss E Grey (instructed by GMC (Legal)) appeared on behalf of the Defendant.

Judgment

Mr Justice Pitchford:

1 On 15th June 2007, the Fitness to Practise Panel of the General Medical Council found that by reason of dishonest conduct Dr Michael Sealy Compton's fitness to practise was impaired. Acting under section 35D of the Medical Act 1983 , the Panel suspended his registration for a period of 12 months.

2 This is an appeal against the finding of the Panel under section 40 of the Act. This is a rehearing. The court may substitute its own view, but will give due weight to the assessment of the evidence by the Panel. The hearing before the Panel concerned the claimant's applications to regional health authorities for approval under section 12(2) of the Mental Health Act 1983 . Such approval was necessary before the claimant was entitled to authorise the detention of mental health patients.

3 Dr Compton had a lifetime's experience in medicine, much of it overseas. During the relevant period, which was 2001 to 2006, he sought authorisation to qualify for work as a locum psychiatrist. The case for the GMC was that when on four occasions he applied for authorisation he failed to disclose that previous applications to other health authorities had been unsuccessful. That conduct fell below the standard required by paragraph 51 of the guidance, Good Medical Practice (2001 edition), which provided:

> “You must not write or sign documents which are false or misleading because they omit relevant information.”

4 At the time of the hearing before the Panel, on 14 and 15 June 2007, Dr Compton was resident abroad. The hearing proceeded in his absence. He was aware of the hearing, submitted evidence and representations to the Panel and decided not to attend. His choice was occasioned, he was to inform the Panel, by the lack of the plane fare to bring him to the United Kingdom. No complaint is made that the Panel proceeded in his absence. His complaint is that in his absence his interests should have been better protected by elucidation to the Panel of the weaknesses in the GMC's case.

5 The conduct under scrutiny began with an application to West Midland Regional Advisory Panel, completed by the claimant on 10 October 2001. He required authorisation in his locum post at Shelton Hospital in Shrewsbury. Dr Compton received a reply on 25 October 2001 from Mrs Goodwin, the Mental Health Coordinator for Regional Services, in the following terms:

> “I have been in conduct with Sue Fraser, Senior Secretary at Shelton Hospital and explained to her that in order for you to meet the Regional Advisory Panel's criteria for

> Non Career Grade doctors who are applying for Section 12(2) approval the Medical Director of your Trust will need to arrange the local induction Training for you which I described over the telephone."

She continued in the penultimate paragraph:

> "I am afraid that until I receive a letter from Dr Everett confirming that you have satisfactorily completed the local training the Trust has arranged for you I am unable to submit your application for approval to the Panel."

Dr Compton was disappointed with the response and made his view known in correspondence. His view was that he should be granted provisional approval pending his attendance at an approved training course.

6 On 3 July 2002, the claimant made an application to the London Regional Approval Panel. Again he was unsuccessful. The Chairman of the Panel wrote to him on 11 October informing him that his application had been declined. On 5 November 2002, Dr Compton wrote again to Mrs Goodwin at West Midlands to inform her that he had now attended two one-day courses and had applied to the Royal College for CPD enrolment. He had been offered locum employment at consultant or associate specialist level in the West Midlands, provided he was given temporary section 12 approval. He asked that his name be put forward to the Panel and Mrs Goodwin replied enclosing a new application form, since it was more than 12 months since his last application.

7 On 11 November 2002, Dr Compton completed the form. In it he was asked the following question at paragraph 13:

> "HAS APPROVAL UNDER SECTION 12(2) BEEN:
>
> (a) granted by any other Health Authority?
>
> (b) name of Authority which gave Approval;
>
> (c) Date of expiry of approval
>
> (d) If section 12(2) approval has been refused by any other Health Authority,
>
> Please give details."

Dr Compton replied to paragraph 13(a) by deleting the option "yes", thereby indicating that he had not been granted approval by any other health authority, but he left blank the section in which he was invited to disclose whether section 12(2) approval had been refused by any other health authority.

8 The terms in which Dr Compton had been notified of the rejection of his application to London Regional Approval Panel was as follows, in a letter signed by Dr Peter Jefferys, the Chair of the Panel:

> "I am writing to let you know the outcome of your application for approval. As I explained to you on the telephone on 29 July 2002, your particular professional circumstances are somewhat unusual, and members of the Approval Panel asked for full discussion at a Panel meeting before making a decision.
>
> The Approval Panel met on 3rd October and had available your application, your CV and references. They decided not to grant approval. The Panel felt that:

- •Your qualifications and experience did not comply with the normal criteria for approval (enclosed) which are based on the Department of Health circular.
- •You do not possess the MRCPsych [Member of the Royal College of Psychiatrists], which is the normal core requirement for approval for a psychiatrist.
- •You are not a Principal in General Practice with MRCGP.
- •In exceptional circumstances the Panel may approve doctors holding permanent Staff

Grade posts for a minimum duration of six months (assuming at least 3 years full-time equivalent psychiatric experience). You are not in this position at present as a locum. The quality of supervision is higher in longer-term positions and it is easier to obtain reliable reports on relevant aspects of a doctor's competence.

- •I know that you will be disappointed with this decision, for which I am sorry. May I assure you that our refusal is not based on any adverse information provided by your referees. Please let me know if you need further clarification."

9 The terms of Dr Jeffrey's letter could hardly have been more explicit. Dr Compton's previous application to West Midlands had not been placed before the Panel, however his application to the London Region had been refused a month before he made his application. That fact was not revealed. This was the first application: the subject of complaint. The Panel found that Dr Compton's conduct in favour to disclose the refusal by the London Region was inappropriate and misleading.

10 Dr Compton's second application to West Midlands was refused on 6 December 2002. In a letter from the Medical Director, Professor George, he was informed:

"I am afraid, however, that the Panel is unable to recommend you for approval as they do not feel that you meet the Department of Health's criteria in that:

- • you have not obtained your Membership of the Royal College of Psychiatrists.
- • you have not worked in an approved training scheme post in psychiatry within the last three years.
- •you have not worked as a principle in general practice in the United Kingdom

The Panel also understands from the Royal College of Psychiatrists that your request for affiliation to the College is still pending and that you are not actually yet registered for CPD as indicated on your application form."

11 On 18 March 2003, Dr Compton submitted a further application to the London Regional Approval Panel. On 6 June 2003, Miss Bertha Knott, a section 12 administrator for the London Panel, telephoned Dr Compton to inform him that his application had been refused. On 30 June, in the same year, an application for approval was made to the Eastern Regional Approval Panel in support of Dr Compton's locum employment at 7Runwell Hospital. One member of the Panel was concerned at the number of short-term locum appointments and wanted to see a fuller curriculum vitae supported by dates. Dr Compton was informed of the requirement on 16 October 2003.

12 However, when the Mental Health Administrator, Mrs Goborusa, enquired at Runwell Hospital she learned he was no longer employed there. On 18 November 2003, she wrote to Dr Compton to inform him his application would not be approved. On 12 November 2003, Dr Compton completed an application for approval to Doncaster and South Humber NHS Trust on behalf of the Trent and Yorkshire Approvals Panel. In the form was the following specific question:

"Have you ever been denied section 12(2) approval?"

13 In order to indicate the answer to that question the maker of the form had a choice whether to delete the letter "Y" or delete the letter "N". When Dr Thompson completed his answer "N", that is no, he had never been denied section 12(2) approval, he had in fact been refused approval on 11 October 2002, on 6 December 2002, on 6 June 2003 and 30 June 2003, by respectively the London Regional, the West Midlands, the London Regional, and Eastern Regional Approval Panels.

14 The Fitness to Practise Panel found that Dr Compton's conduct in completing the application form, submitted to Doncaster and South Humber, was inappropriate, misleading, intended to deceive and dishonest. Again the claimant's application was unsuccessful.

15 The Medical Director, Dr Goodhead, wrote on 18 November 2003:

> "… we are unable to grant approval at this time, as you do not have a relevant postgraduate qualification within psychiatry, this does not meet the requirements specified for Psychiatrists under the most recent guidance HSG (96)3, (extract enclosed), or the new criteria as agreed by the East Midlands & Yorkshire joint Mental Health Act Approval Panel, (extract enclosed)."

16 Dr Compton's previous application to the Eastern Region in June 2003 was kept under consideration by the Director of Public Health, Dr Woolaway, who, on 30 January 2004, sought the views of a colleague, Dr 0'Flynn, consultant psychiatrist at West Suffolk Hospital who served on the Panel with him. He wrote:

> "I would value your advice on this application where panel members have disagreed. We did discuss this briefly at the October panel meeting, but did not progress it because he (that is Dr Compton) had left the region. He is now seeking locum employment in Ipswich, which is subject to approval being granted.
>
> Dr Compton has been refused approval by three other panels largely on the basis of recent experience being continuous short-term locums and not having MRCPsych [Membership of the Royal College of Psychiatrists]. He is now 70 and he has never been approved. He is applying as a locum consultant but does not have MRCPych. He does have more than 3 years staff grade experience.
>
> My main concern is lack of peer audit and accountability because of the locum work pattern. He does not live in our region and we have been unable to obtain a permanent UK address for him.
>
> My view is that given this background, should we ask for evidence of supervision in the practice of the Mental Health Act over a period of at least six months in a single post."

Dr O'Flynn replied on 17 February 2004 agreeing that before approval could be considered:

> "… we should have some evidence of his being supervised and, therefore, assessed in Mental Health Act assessments".

17 On 27 February 2004, Dr Woolaway wrote personally to Dr Compton to inform him of the rejection of his application. He continued:

> "The Panel's main concerns are that you do not hold any higher qualification in psychiatry and although you have several years psychiatric experience, your pattern of short-term locum work does not ensure the opportunity for peer review and audit of quality of work.
>
> The Panel recommend a supervised period of employment of approximately 6 months' duration with evidence of practice in the Mental Health Act before applying again."

18 Dr Compton protested in a letter, dated 5 April 2004, and Dr Woolaway again wrote to Dr O'Flynn. In a letter of 26 April Dr Woolaway informed Dr O'Flynn of Dr Compton's "latest challenge to our decision". It was Dr Woolaway's view that no new issues had been raised by Dr Compton's letter. He sought Dr O'Flynn's response.

19 In his reply on, or about, 5 May 2004 Dr O'Flynn said this:

> "I have read the enclosures including Dr Compton's letter of the 5th April 2004 and his curriculum vitae through to December 12 2003; you included also items of correspondence connected with the application.
>
> Our criteria is quite clear and I agree with you that unless Dr Compton can demonstrate a period of supervised practice we should uphold our previous decision.
>
> He can, of course, apply to a fourth panel and need not, as I understand it, disclose the results of his previous applications."

20 Dr O'Flynn's view expressed in the final sentence of his letter was the subject of oral evidence before the Fitness to Practise Panel, and I shall return to it later in this judgment. Dr Compton was notified of the confirmation of Eastern Region's decision on 12 May 2004.

21 In the meantime the refusal by Doncaster and South Humber Trust to grant approval was kept under review. Having obtained information about the length of Dr Compton's locum service within their own area, the Panel resolved to grant approval for a period of 12 months from 16 June 2004. When his approval was due for renewal in June 2005 Dr Compton applied again to the South West Region in a form he dated 6 June 2005. At paragraph 16 the form asked:

> "If approval has previously been granted by any health authority, please state:
>
> (a) Health Authority granting approval … (b) Expiry date…"

Dr Compton filled in the details required under paragraph (a) with Doncaster and South Humberside, and the expiry date of 15 June 2005. Paragraph 19 asked:

> "Have you been refused approval/re-approval by another health authority, if so, by which authority?"

To which question Dr Compton answered: "no".

22 At the time he completed that answer he had been refused approval on four occasions between 11 October 2002 and 30 June 2003, which I have itemised above, and on a further occasion by the Eastern Region on 27 February and 12 May 2004. He signed a declaration, dated 6 June 2005, attached to his application to the South West Region that the information provided in the form was true. The Fitness to Practise Panel found that his conduct in completing his answer to paragraph 19 was inappropriate, misleading, intended to deceive and dishonest.

23 On 14 June 2005, the South West Region notified Dr Compton that his application had been successful. He was granted approval for a period of four months, which would be extended to 12 months, after his attendance at a refresher training course. He completed a further application form on 4 October 2005 in which the same paragraph 19 question was posed. This time he placed a dash as his answer conveying that he had no relevant answer to give. The Fitness to Practise Panel found that his conduct in this respect was inappropriate, misleading, intended to deceive and dishonest.

24 Approval was extended for a period of one month, pending details of a further reference. A further referee was found and his approval was, on 21 November 2005, extended to 16 November 2006. Dr Compton then applied for his approval to be transferred to the London Region. While that application was being processed it became apparent that Dr Compton had previously made applications to other regions which had not been disclosed to the South West Regional Panel. The medical director, Dr Arden Tomison, wrote to Dr Compton on 6 December 2005 as follows:

> "…
>
> Please provide me with a full explanation of why the London, the Midlands and the Eastern Regions refused to authorise your approval under Section 12. Supporting documentation, where available, would be helpful.
>
> You will understand that false declarations are viewed extremely seriously and may result in referral to the GMC.
>
> In the meantime, I must ask you to cease all Section 12 practice from receipt of this letter. Your approval will remain suspended during the investigation and I will write to you again at the conclusion of that process."

25 Dr Compton said that he did not receive that letter and learned of developments only as a result of a telephone conversation, on 29 December 2005, between Miss Hilary Eagles, Lead Administrator for the South West Panel and, Dr Compton's "agent". Following her telephone conversation Miss Eagles wrote as follows:

> "… I enclose as requested a copy of the letter sent to you on the 6 December together with copies of your last two application forms for approval. As you will see you did not declare on either form that you have been previously refused approval by another region. As explained on the phone the South West Regional Panel Chair is on annual leave until the 17 January however, on receipt of your written explanation, as discussed I will take further advice as to your section 12 status with my departmental director. Please note you are currently suspended from the register of approved practitioners until further notice."

26 Dr Compton responded in a letter of 5 January 2006 that he had no intention to deceive. He was, he said, extremely concerned that defamatory remarks had been made during the telephone conversation, to which I have referred. After making the point that he would hardly have asked his agent to phone with regard to his section 12 status if it had been his intention to deceive, he went on:

> "When I first resumed exclusive locum psychiatry 6 years ago, I had not attended Section 12 courses. Because of moving from Region to Region (to meet the needs of different Trusts), the different regional authorities considered themselves to have had insufficient time to consider my application and/or I had already moved to another Region. It was stressed that refusal was in no way due to any adverse comment in my references. I was also advised that I was free to apply in the next region. Eventually I was considered to have spent sufficient time as a consultant psychiatrist, have the required Section 12 courses and, of course, demonstrated my competence in MHA work. The Ministry directive makes it clear that approval gained in one Region is valid throughout England and Wales. In this connection I was surprised to hear that the London Region was querying my approval.
>
> I have around fifty years experience in the diagnosis and treatment of mental disorder, including the last six years exclusively in the speciality of locum NHS psychiatrist. I have never received any complaint about my conduct or professional competence or, in particular, my functions in carrying out assessments, recommendations and other duties under the 1983 Act …
>
> I have never applied for nor accepted any substantive posts due to my other non-medical commitments. Most of my locum consultant posts (13 in the last 3 years) have been in challenging situations due to the withdrawal or illness of predecessors. You are aware that I had current approval in another Region until June this year when I came to your Region in May, being employed in Stroud. For this reason application for renewal was made to you. The question on your form does not read: " **ever** refused" but reads "refused approval/re-approval", which I took to be in the context of my current situation and application, ie the required annual re-approval.
>
> To have **never** been refused is not in your criteria for approval, and would surely have been an extraordinary reason for refusing re-approval. Other colleagues have also required time to fulfil all criteria. Further, if an unanswered question eg a dash placed on your form, had been important, why was it not referred back to me?
>
> After your re-approval for four months, I was informed that my re-approval for a full year was only subject to attendance at your own MHA refresher course at Taunton on October 13 2005, with which I duly complied. …"

27 It may be thought that Dr Compton's response of 5 January 2006 left unanswered several pertinent questions. In so far as his response was an assertion of his own state of mind when completing the application to the South West Region on 4 October 2005, namely that he had not realised the Panel wanted details of any previous refusal by another health authority, his assertion was undermined by the completion of the application to the Trent and Yorkshire Region, dated 12 November 2003, in which he had explicitly replied "no" to the question:

> "Have you ever been denied section 12(2) approval?"

28 On 3 February 2006, Dr Compton sent a facsimile letter to Dr Thompson whose content represented a change of tact. This time he said:

> "It is necessary to understand the meaning of "refusal" would imply that there was some substantial incompetence in performance or conduct, rather than deferral pending compliance with criteria.
>
> I did not "misunderstand" the question in your Region's form. At the time, (June 2005), I had been approved/re-approved in another Region, so in the context of that application for re-approval it would have been incorrect to have answered that I had been refused by another region, neither Yorkshire & East Midlands nor any region refused re-approval.
>
> This I had already mentioned in my letter of 5 January. I also made it clear that I had a long period qualifying for approval, and am on record in the past as disagreeing with my deferment of approval, except when I had yet to attend Section 12 Courses (of which I have now attended 3).
>
> The London Panel clearly indicated to me in writing that non-approval was in no way related to any adverse comment by referees, (nor any reason other than those subsequently inapplicable). I was also reminded in writing by the Eastern Region that I was "of course free to apply in another region".
>
> I simply needed to be in one place long enough to be adequately appraised.
>
> I applied in another region, Yorkshire and East Midlands, where the Panel after deliberation extended approval in June 2004 to June 2005 following satisfactory references from colleagues I had worked with, my familiarity and performance within the 1983 Act, and a far longer time working in their region.
>
> In any case why should it be considered simply that failure to be approved or to have approval deferred in years passed be a reason for withdrawing approval. Such a reason is not in your criteria, nor as far as I aware in that of any other region."

Dr Compton went on to make points that he had made in his previous letter of 5 January.

29 On 9 February, Dr Tomison replied that the matter would be referred to the GMC and, on 11 June 2006, Dr Compton wrote to the GMC drawing attention to the fact that when he placed a dash against the question of paragraph 19 he was not asked to clarify what was the meaning of his response. Thus it seems to me Dr Compton was saying that he understood the relevant questions to be directed towards (1) the current year in which application for approval or re-approval was being made, and (2) any refusal based upon lack of clinical competence, which is why he had answered those questions in the negative, or had not responded.

30 The ground upon which the decision of the Fitness to Practise Panel was criticised is that the hearing which took place in Dr Compton's absence was not as fair as the circumstances permitted. It is common ground that the Panel was not advised by their legal adviser in the terms referred to by Rose LJ in Hayward, Jones and Purvis [2001] EWCA Crim 168 at paragraph 22(6). Rose LJ was dealing with the consequences of a decision to proceed with a criminal trial in the defendant's absence. He said:

> "6. If the judge decides that a trial should take place or continue in the absence of an unrepresented defendant, he must ensure that the trial is as fair as the circumstances permit. He must, in particular, take reasonable steps, both during the giving of evidence and in the summing up, to expose weaknesses in the prosecution case and to make such points on behalf of the defendant as the evidence permits. …"

31 With necessary adaptations for the nature of the proceedings it is agreed that these are the principles on which any Tribunal considering such matters should act. They apply to a hearing before the Fitness to Practise Panel as they do to a criminal trial. The question I have to consider is whether, in the absence of such advice, the Panel was aware of its obligations to search for points favourable to Dr Compton, reasonably available on the evidence, and fairly undertook that obligation.

32 The matters which Mr Joliffe submits should have been drawn specifically to the attention of the Panel are the following: (1) Dr Compton's defence as revealed in his letters of 5 January and 2 February 2006; (2) the opinion of Dr O'Flynn which supported Dr Compton's own view that he was not required to reveal previous refusals not based on clinical competence; (3) the existence of the application forms on which no request was made to disclose previous refusals and (4) Dr Compton's letters of 12 February and 4 March 2004, which, it is said, were consistent with a contemporaneous belief that it was only professional competence with which the Panels were concerned.

33 I shall deal with each of these matters in turn. First, Dr Compton's defence. The legal assessor is not a judge, he is an adviser to the Panel on matters of law (see paragraph 2, the General Medical Council (Legal Assessors) Rules 2004). The legal assessor's duty as a legal advisor embraces, in my judgment, the responsibility to inform the Panel of the need for vigilance in circumstances such as these, namely in the absence of the doctor identifying points which might be of assistance to him. It does not, in my judgment, embrace a need to sum up the evidence to the Panel.

34 The legal assessor explicitly did draw the Panel's attention to the letters of 5 January 2006 and 2 February 2006, in terms which could have left the Panel in no doubt of their relevance in considering Dr Compton's defence. The relevant parts had been read to the Panel in opening. Their attention was drawn to the letters in the legal advisor's open advice, and the Panel plainly did give those letters close attention. The Chairman remarks in expressing the findings of the Panel:

> "The Panel did not find the explanations contained in several of Dr Compton's letters to be credible."

35 Mr Joliffe acknowledges that the defence being put forward in the letters was perfectly straightforward. It did not, therefore, require elucidation or development. It was not necessary, in my view, for the legal assessor to descend to particulars in order to preserve the fairness of the proceedings, and there is no hint in the transcript of the proceedings that the Panel required any such assistance.

36 Dr O'Flynn expressed his personal view that Dr Compton could apply to other health authorities for approval without revealing that he had been refused by his own. Dr O'Flynn was called to give evidence precisely because, on one view, it might be of assistance to Dr Compton. He was asked questions by the Chairman whose purpose was plainly to elicit answers which might assist Dr Compton. It needs to be recalled in this context that Dr O'Flynn's health authority was not one of those which sought disclosure, at least at that time, of previous refusals, but many other authorities did.

37 The Chairman asked Dr O'Flynn how he had come to the view that he did about the lack of necessity to make disclosure, whether he had ever discussed that view with other colleagues, and when he first came to realise that he had been in error in holding that view. Why, if he would expect the doctor (that is to say Dr Compton) to have a clearer picture of the rules than Dr O'Flynn did himself, would it be reasonable for an applying doctor to make the same error that Dr O'Flynn did?

38 On two occasions the Chairman stated explicitly that the reason she was asking these questions was that they might be asked if the doctor was present, or represented at the hearing. Counsel for the GMC, in order to place Dr O'Flynn's view in context, asked him whether he was aware that other regions did ask the specific question whether there had been previous approvals. He said that he was unaware of that fact.

39 Dr Compton was not, of course, saying that he did not think he was required to make disclosure. He was saying he did not think he had to make disclosure unless he had been rejected for lack of clinical competence. Secondly, no one had communicated Dr O'Flynn's view to him at the time when he was making the applications. Dr O'Flynn's view only became apparent to him once the matter had been handed to the GMC. Thirdly, Dr Compton was responding to a specific question in application forms. He was not being criticised for failure to volunteer information without being requested for it. He was being criticised for answering untruthfully to a specific question requiring information from him.

40 In my judgment there was no further relevant question which Dr O'Flynn could have been asked. The Panel was plainly aware to what issue his evidence went, and there was no necessity for further advice to be provided to the Panel by their legal assessor in respect of it.

41 Mr Joliffe submitted that the Panel's attention should have been directed towards the two completed forms which did not request disclosure, that is to say, London Region, dated 18 March 2003, and Eastern Region, dated 30 June 2003. I asked Mr Joliffe how that could have assisted Dr Compton's case and he suggested that the absence of the question could have implied that it was irrelevant to competence. Mr Joliffe acknowledged that this was not an argument placed before the Panel by Dr Compton personally either contemporaneously with the applications, or in written submissions to the GMC, but there was a duty, he submitted, on the legal assessor, or counsel to the GMC, to appreciate that argument and to place it before the Panel.

42 In my judgment, there was no such obligation for two reasons. First, the doctor had given his reasons for his conduct. He had not relied on the strained interpretation Mr Joliffe now seeks to advance in respect of the two forms, to which I have referred. Second, it in fact provides Dr Compton with no comfort. The fact that two health authorities did not ask the question cannot raise a possible argument that the others had no interest in replies to their questions, or that the replies they might receive were irrelevant to the health authorities receiving them.

43 Mr Joliffe submitted that the legal assessor should have drawn the Panel's attention specifically to two letters of his: the first, dated 12 February 2004, to Doncaster and South Humberside NHS Trust and the second, dated 2 March 2004, to Bedfordshire and Hertfordshire. Dr Compton was making the point that the authorities were giving the impression that he was being rejected on the grounds of professional incompetence when that was not the case.

44 Having considered these letters, which the Panel had in their bundle, I do not conclude that Dr Compton could have derived any relevant assistance. They do not illuminate the reason why he chose to respond to the question for disclosure, as he did, and, in my view, could not reasonably do so. He was in fact engaged in those letters in a criticism of the health authorities making a requirement that he take up longer term posts. There is, in my view, nothing of substance in any of those criticisms which go to the fairness of the proceedings.

45 Before the Panel retired they were given a legal advice as to the two-stage test for dishonesty elucidated by Lord Lane CJ in R v Gosh [1982] 1 QB 1053 . Lord Lane said at page 1064D:

> “In determining whether the prosecution has proved that the defendant was acting dishonestly, a jury must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest. If it was not dishonest by those standards, that is the end of the matter and the prosecution fails.
>
> If it was dishonest by those standards, then the jury must consider whether the defendant himself must have realised that what he was doing was by those standards dishonest. In most cases, where the actions are obviously dishonest by ordinary standards, there will be no doubt about it. It will be obvious that the defendant himself knew that he was acting dishonestly. It is dishonest for a defendant to act in a way which he knows ordinary people consider to be dishonest, even if he asserts or genuinely believes that he is morally justified in acting as he did.”

In his advice to the Panel the legal assessor said this:

> “The prosecution must make you sure that the defendant was acting dishonestly. In this case you must decide two questions: was what the doctor did dishonest by the ordinary standards of reasonable and honest people? And I think you can actually interpose the words “doctors” - reasonable and honest doctors. In this regard you must form your own judgment as to what those standards are.
>
> Must the defendant himself have realised that what he was doing would be regarded as dishonest by those standards? In deciding this you must consider the doctor's own state of mind at the time of the events. If, after taking into account all the evidence you are sure that the answers to both of those questions are “yes”, the element of dishonesty is proved. If you are not sure of that, the element of dishonesty is not proved.”

46 Mr Joliffe had no criticism to make of the advice given, but he said that it would have been preferable if Lord Lane's own words had been used. I do not accept that criticism. The legal assessor's explanation was simple and it was correct. Secondly, Mr Joliffe submits that the legal assessor should have given a holy (?) example to illustrate what was meant by that direction. I disagree. The illustration that was suggested would in fact have served to confuse, having no apparent analogy with the facts of the present case.

47 Finally, Mr Joliffe asserted that the legal assessor failed to advise the Panel that no adverse inference should be drawn from the fact that the doctor was not present at the hearing. In fact the legal assessor advised the Panel that they should not hold against Dr Compton the fact that he had not given evidence in support of his case. Counsel for the GMC, before the Panel retired, underlined that advice by referring to it in the particular context of inferences arising from a failure to attend trial. The Panel was reminded that no adverse inference should be drawn from the fact that Dr Compton did not attend his trial.

48 In delivering their findings the Chairman of the Panel stated explicitly that the advice tended to them by counsel had been accepted by stating that no such inference had been drawn. I accept the submission of Miss Gray, on behalf of the GMC, that notwithstanding the absence of specific reference to paragraph 22(6) of Rose LJ's judgment in Jones , the proceedings before the Panel were manifestly fair, were conscientiously conducted and that the Panel did everything reasonable to ensure that anything that might assist Dr Compton was not missed.

49 I am afraid that the result of this hearing before the tribunal can be explained by the simple fact that the Panel did not find that the reasons given by the doctor in his letters were credible. In my judgment, Dr Compton has no reasonable complaint about either the process or the result of the hearing, and the appeal must be dismissed.

50 MISS GRAY: In those circumstances may I ask you, firstly, for an order to that effect dismissing the appeal, and secondly may I address the subject of costs? My Lord, this is a short hearing lasting less than a day. In those circumstances we did serve on the defendant, and also, I think, on Mr Joliffe, a statement of costs. I do not know whether that has reached your Lordship as well, probably not.

51 MR JUSTICE PITCHFORD: Dated 7 November?

52 MR JOLIFFE: My Lord, yes, it is.

53 MR JUSTICE PITCHFORD: I have it.

54 MISS GRAY: May I ask for the GMC's costs in that sum. Your Lordship will see how they are set out. If your Lordship has any questions to me on the calculations I will endeavour to assist. They represent, in essence, some five hours, plus work on the documents, by those instructing me, plus attendance today and essentially, on my part, effectively a figure that also reflects a day's work, plus attendance today.

55 MR JUSTICE PITCHFORD: Thank you very much. Mr Joliffe?

56 MR JOLIFFE: My Lord, I cannot dispute the principle that we should pay, but I do take issue with the rates and the hours. If I may address you briefly on those? The relevant starting point for this is Practice Direction, Part 48 , of the procedural rules, which is at page 1369 of my copy of the White Book.

57 MR JUSTICE PITCHFORD: I only have the 2007 edition. For Part 48 I do not suppose there will be any material difference. Which part?

58 MR JOLIFFE: At page 1396 at Part 48.49 the rates of fees for different grades of solicitors in different parts of London are set out. The GMC's statement of costs states that Julian Graville, the solicitor, is a grade A and charged out at £304 hours per hour. That rate, we say, is excessive in the light of the CPL provisions there.

59 MR JUSTICE PITCHFORD: What should I be comparing it with?

60 MR JOLIFFE: The appropriate band is £210 to £246 for out of London. The relevant one in the GMC's case is NW1. Accordingly, the highest rates are given between minimum and maximum figures of £210 to £246. The sum of £246, we say, is the highest that should be

claimed for a grade A fee earner of Mr Gravel's type. The same point goes against the rate claimed for Mr Owen, who is the grade B fee earner referred to on the statement of costs. The range is £158 to £210 there.

61 The Practice Direction is explicit on the postcodes, to which it applies to. It might well, with some reason, be said for the GMC tat they are only just outside Central London, so the upper end of these rates is the appropriate one. I would struggle to counter that submission. Those are the maxima which the GMC can properly claim.

62 If I may turn to the number of hours claimed, moving on from the rates. The work done on documents is claimed in the sum of five hours' worth. I do not know what the basis for that is, but it seems surprising to me and excessive for this reason: the documents before this court are identical to those that were before the Panel. There was no new material, of any kind, that needed additional work. Mr Graville provided the Bar Pro Bono Unit with one copy of the bundle, which I myself had copied for the court and for Miss Gray. It is difficult to see how five hours can reasonably have been expended on documents. I would suggest that an appropriate figure is one-and-a-half hours.

63 As to the attendance at the hearing, looking at the clock, six hours is about right, but the suggestion that there is an additional hour of travel that should be reasonably recoverable, we say, is excessive. As to Miss Gray's fee claimed on the second page of the sheet, that, we also say, is excessive and the relevant table is at CPR 48.51 over the page from those of the solicitors. The rate for a senior junior of ten or more years call in the administrative call for a half-a-day hearing should be £1,746, rather than the £3000 claimed.

64 It is open to question whether the GMC needed to instruct counsel of Miss Gray's seniority. She was called, as the form makes clear, in 1990. I understand Miss Gray is on the Attorney General's Panel of Counsel which might be thought to be very senior. It may very well be that that is the going rate for Miss Gray, but that is more than is merited by the facts of this case. I would suggest that the maximum appropriate rate for a junior of ten or more years call is £1,746. Depending on whether you accept the submissions, the VAT may need to be calculated appropriately.

65 MISS GRAY: Briefly in reply: firstly, these figures relate to January 2007. We are now approximately a year-and-a-half onwards. To the extent that the rates claimed by my solicitors are slightly in excess of the rates of a band set out in this table, I would respectfully draw that to your Lordship's attention.

66 MR JUSTICE PITCHFORD: Have there been any more recently uprated figures?

67 MISS GRAY: My learned friend has the 2008 White Book.

68 MR JUSTICE PITCHFORD: Those are the same figures in the 2007 edition.

69 MISS GRAY: Indeed, in my submission it is not unfair to apply a small uplift to reflect the fact that we are working on figures that have been around for some length of time: January 2007, and we are now late 2008. In terms of postcodes, my Lord, I accept that technically the GMC whose postcode here is NW1 3JN, falls into the outer London postcode. The fact is that their address is 350 Euston Road, which your Lordship may know is the main road running between Euston Station and Regent's Park. In reality, these are Central London solicitors.

70 When my Lord looks at that, and then looks at a rate of £304 per hour for Mr Graville and £231 per hour for Mr Owen, I would respectfully submit that that is not unreasonable both in terms of uplift and the actual location of the solicitors.

71 My Lord, in terms of the work done on the documents, with respect to my learned friend, it is not limited to photocopying a set of papers and sending them to the Bar Pro Bono Unit. It is a product of Mr Graville assessing the documents, including the initial Notice of Appeal from the Panel, which raised a series of points which were not pursued, in the event, when Mr Jolly came into the case; assessing the papers in the light of those; preparing instructions for myself; sending those instructions to me; discussing the case with me (in brief, it would be fair to say). Then there was work performed by those instructing me in responding, and putting input into the skeleton argument, which made its way before your Lordship, in terms of assisting me on matters such as the proper approach to the excesses.

72 In the light of that, my Lord, we do say that in reality, particularly when one bears in mind this case went off in one direction initially because of the grounds of appeal prepared by Dr Compton, and then in another direction when Mr Joliffe came on the scene and focused the argument further, that five hours work is not unreasonable. You heard there is no issue as to the number of hours at the court. An hour travelling and waiting to get from Euston to here and back again, and waiting time in this court, again is not unreasonable.

73 When it comes to one's own fee it is always a slightly invidious defence. I would say two things: firstly, in terms of those fees I would say that the time, or the rate, claimed reflects, as I said to your Lordship before, the fact that there has been two days work put into this case. Approximately two hours were spent reading the papers initially before we had Mr Joliffe's assistance by way of his skeleton, and approximately another five to six hours preparing the first draft of the skeleton, including the legal research. It then has to be sent to the solicitors, with inevitably a certain amount of time spent to-ing and fro-ing and finally lodging in the court. Then your Lordship has the day's attendance in court. The reality is that the brief fee represents approximately 14 to 15 hours work, approximately a figure between £175 and £200 an hour.

74 If your Lordship takes the view that less senior counsel should have been instructed, then I would have to accept the brief fee might reflect that slightly. Your Lordship sees in the Administrative Court the figures given for a day's hearing. We have the first figure for a one-hour hearing, the second figure, which my learned friend is relying upon, is, to be fair, for a half-a-day-hearing and this matter was listed for, and has taken, a day, rather than a half a day. One has to apply again an up-lift to those figures set out there.

75 So, my Lord, for all those reasons I would respectfully suggest that the claim by the GMC for the costs is a fair one, whilst, of course, leaving it in your Lordship's hands to make any adjustments should you consider that appropriate.

76 MR JUSTICE PITCHFORD: Mr Joliffe, on behalf of the claimant, does not seek to challenge the principle of an award of costs in favour of the successful party, but makes the following observations relevant to my assessment on the summary basis. First, he observes that the rate per hour being claimed by a grade A and grade B fee earner exceed, by some magnitude, the figures contained in the guide to the summary assessment of costs at CPR 48.49 . To assist assessors a guideline rate of £210 to £246 per hour is identified as appropriate for firms working in Outer London rather than Central London. The distinction being made by identification postcodes and for a grade B fee earner is a bracket of £158 to £210 per hour.

77 It is submitted, on behalf of the defendant, by Miss Gray that it is perhaps an accident of circumstance that the location of the solicitor's offices, while regarded by all those who work there as part of Central London, in fact happened to have a postcode NW1, which in the guide places them outside Central London.

78 In my view the rates charged for the work done on this particular case, taking into account its comparative complexity, seem to me to be too high. I accept the submission made on behalf of the claimant that the grade A fee earner should be limited to £246 per hour and the grade B fee earner to £210 per hour. Secondly, Mr Joliffe, I have to observe somewhat speculatively, argues that no more than one-and-a-half hour's work was required on these documents. I am informed by Miss Gray that in fact the preparation of documents was not quite as straightforward as represented, since it is only in comparatively recent times that some focus and order has been brought to the grounds upon which the appeal was to be launched. I accept her submissions of the hours of work done as set out in the statement of costs.

79 Finally as to counsel's fees, Mr Joliffe submits that Miss Gray is far too senior an operator to be appearing before me on an appeal from the General Medical Council. I disagree. Secondly, that her fee should be, at least as far as the assessment of costs is concerned, limited to half a day. I disagree. This is a one day case and the fee claimed is reasonable. I would be very grateful, therefore, if those decisions which I have made are converted by calculator, together with the addition of the relevant sum for Value Added Tax, so that I can name the sum that should be payable.

80 MISS GRAY: Sorry, we think that the amended figure should be £7,153.30.

81 MR JUSTICE PITCHFORD: I shall make an order that the claimant pay the defendant's costs in the sum summarily assessed at £7,153.30. Mr Joliffe, as you just hinted, you appeared today

as a result of your membership of the Bar Pro Bono Unit. You are a credit to your profession.