

CO/67/2005

Neutral Citation Number: [2005] EWHC 1129 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2

Friday, 13th May 2005

B E F O R E:

MR JUSTICE LEVESON

THE QUEEN ON THE APPLICATION OF AZAM

(CLAIMANT)

-v-

HEALTH PROFESSIONS COUNCIL

(DEFENDANT)

Computer-Aided Transcript of the Stenograph Notes of
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(Official Shorthand Writers to the Court)

The CLAIMANT appeared as a litigant in person
MR M CAPLAN QC (instructed by Kingsley Napley) appeared on behalf of the
DEFENDANT

J U D G M E N T
(As Approved by the Court)

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1. MR JUSTICE LEVESON: This appellant is a registered biomedical scientist and, in consequence, falls to be regulated by the Health Professions Council which was established pursuant to section 60 of the Health Act 1999 and Article 3(1) of the Health Professions Order 2001. The functions of the Council include the investigation of fitness to practice and the conduct of disciplinary tribunals.
2. On 6th January 2004 the Council received allegations that Mr Azam's fitness to practice was impaired. That was said to be based upon the facts that he had been convicted of common assault and criminal damage on 7th July 2003 at Horseferry Road Magistrates' Court and, furthermore, had damaged two items of property belonging to the Barking, Havering and Redbridge Hospitals NHS Trust on 12th December 2003.
3. Having investigated the matter, it was determined that the allegations should be placed before the Conduct and Competence Committee of the Council who, in turn, would conduct a hearing pursuant to the Health Professions Council Conduct and Competence Procedure Rules of 2003. Having been given appropriate notice, that Tribunal was due to sit on 9th December 2004. As everyone had assembled, an email was received from Mr Azam which is in these terms:

"I am writing this letter with the intention of obtaining an adjournment of the hearing scheduled for today. The main reason for this is that the union representative health care specialist who deals with this is unavailable to represent me today and I only found this out yesterday afternoon. Therefore, I and the area representative from Amicus feel it is unfair for the hearing to go ahead without any form of representation as my state registration is at stake. I only received the papers informing me of the hearing two weeks ago as I have been working away from home. Also I have recently moved home and did not get my forwarded post until I went home for the weekend ... The union representative that I spoke to yesterday advised me not to travel to the hearing without representation and that is why I have not attended today. I would appreciate it if you could adjourn the hearing to a later date and apologise for any convenience this may cause to yourselves and other parties. I have been 'on the case', so to speak, with the union for nearly a year now and they have really let me down with this issue."

The letter then went on to ask the Panel to examine the details of the case carefully if it did proceed in his absence.

4. The email was brought to the attention of the Panel and it is abundantly clear from the transcript of what transpired that they were advised entirely appropriately as to their powers. Having retired to consider the matter, they returned and refused to adjourn in these terms:

"We the Panel accept that the notice was served in time. We accept that the request for adjournment has come too late, in other words after the published start time of the hearing. We accept that the interests of both

the witnesses and the need to act entirely in a manner to protect the public interest outweigh Mr Azam's arguments for an adjournment. In addition, as the contents do not seek to deny the base of the allegations, we continue with the hearing."

5. The Tribunal then embarked upon the substantive allegations, learning of the facts behind the convictions for common assault and criminal damage from the officer in charge of that investigation whose evidence was read, and also of the incident at the hospital which was the subject of evidence from witnesses who had attended. It is unnecessary to include within this judgment the details of the allegations, but sufficient to note that the Panel concluded that the conviction for violence and assault "demonstrates that [Mr Azam] has fallen below both Standards 3 and 16 of the HPC Standards of Performance and Ethics", as a result of which they concluded that his fitness to practice was impaired. In relation to the allegation of damage, they found that the facts were proved and amounted to misconduct, but did not consider that this particular act of misconduct alone constituted impairment of Mr Azam's fitness to practice.
6. They then proceeded to consider penalty (taking into account a letter which Mr Azam had faxed following the refusal of the adjournment) and observed:

"The Panel has taken account of a number of factors. These are that since his conviction there have been further episodes of anger and aggression. He has shown a lack of insight into his own behaviour and he has shown no evidence of remorse for the actions leading to his conviction ... It is not possible in his absence to impose conditions of practise designed to bring his standards of self-control up to an acceptable level. His absence today does not give us confidence that he would be willing to engage in such a sanction. We have directed the registrar to impose a suspension order for six months to allow him time to address his behaviour and attitude. The Committee will review his case at a hearing which will be held at a date before that suspension ends."

7. The Panel were then reminded that the order of suspension could not take effect before the expiry of the period within which an appeal against which that order may be made: see Regulation 29(11) of the Health Professions Order 2001. They were invited to make order of interim suspension under Regulation 31(2)(a), on the basis that if no such order was made, Mr Azam was able to continue in practice, notwithstanding the Committee's conclusion that it was necessary for the protection of members of the public, or otherwise in the public interest, that he be suspended. That interim order continues while this appeal is pending and, of equal significance, the period of suspension which was the penalty imposed does not bite until the appeal is withdrawn or otherwise finally disposed of: see Regulation 29(11)(b).
8. Mr Azam, in accordance with the advice proffered by his union, did give notice to appeal. So it is now, three weeks short of the 6 month period, his appeal falls to be determined. If unsuccessful on the face of it, the period of suspension will only start today. I shall return to this feature of the case later in this judgment.

9. Mr Azam appeals on two specific grounds. First, he argues, with moderation and care, that the order of the Tribunal was unjust on the grounds that he was not represented on the day of the hearing, having been advised not to attend. He has explained that he was told at 4 o'clock on the day before the hearing as he was about to leave from Norwich, where he was then based, to London, that the union representative who had agreed to represent him was due to commence leave and would thus not be available. The union apparently advised that he should not attend and, if necessary, appeal an adverse decision. Speaking for myself, I find that advice, if given in those terms, to be remarkable. It is not in the slightest surprising that the Tribunal determined to continue with the hearing. Indeed, a decision to adjourn when the witnesses were available and when the application for an adjournment was literally made by email on the morning of the hearing, would have been difficult to justify.
10. The consequences, namely that Mr Azam was not present either to explain mitigating features or otherwise to demonstrate to the Panel that he had learnt lessons from his misbehaviour, are all too obvious. Having said that, however, it is sufficient for the purposes of this appeal if I make it clear that the Panel were entitled to reject the application for an adjournment and that no error of law is revealed from within the consideration of the application to do so. This ground of appeal fails.
11. Mr Azam also appeals on the basis that the outcome was "extremely severe" considering that prior to his convictions he was of previous good character. On the other hand, he recognises that at the time of the first incident, affected by alcohol for reasons which it is unnecessary to list, he behaved wrongly. He also agreed that his loss of temper in the December incident was unacceptable.
12. What is to be said about the sentence imposed? There is abundant authority for the proposition that professional disciplinary tribunals still remain the body best fitted to assess the seriousness of professional misconduct and that an appellate court should be slow, save in a clear case, to interfere in the sentence of the relevant tribunal: see, for example, **Newfield v The Law Society** [2005] EWHC 765 Admin, and in particular the observations of Laws LJ at paragraph 37.
13. I can make the same point slightly differently. In my judgment the penalty for any disciplinary offence must always fall within the range of potentially reasonable responses to the conduct of which complaint is made. It is only if a penalty imposed falls outside the range of reasonable responses that an appellate court is likely to interfere. This is all the more so where members of the disciplinary panel include fellow professionals of the person whose behaviour has given rise to complaint because they are usually in the best position to identify the true impact of that behaviour on the proper conduct of professional life.
14. There is some force in the concern expressed by Mr Azam that the outcome was extremely severe, but that may be because the Tribunal specifically expressed themselves as not having confidence that he would be able to engage in conditions, given that he had not attended the hearing. That, however, is a conclusion which the Tribunal were entitled to reach. In the circumstances, the overall view taken of this

appellant's conduct was not outside the proper range of available sanctions and therefore the appeal against sentence also fails.

15. That is not, however, the last word that I wish to add in relation to this appeal. When it became clear that Mr Azam was not disputing the finding that fitness to practice was impaired, as it did when the notice of appeal was served, the Director of Fitness to Practice at the Health Professions Council wrote and drew Mr Azam's attention to Article 30 of the Health Professions Order 2001 which provided that he could request that a panel of the Conduct and Competence Committee review the suspension order that it imposed. Although not expressly set out, I have no doubt that the writer of the letter had in mind that, pending the appeal, Mr Azam would remain suspended and that the six months in position of suspension would not start to bite until the appeal concluded.
16. Whether Mr Azam appreciated that precise feature is unclear. Such a course remains open to him, and although it is entirely a matter for his judgment, I, for my part, would encourage him to apply under Regulation 30(2) for the following reasons. First of all, although the Panel that imposed the penalty were entitled to conclude that Mr Azam's failure to attend did not give them confidence that he would obey any conditions imposed, they had not been told that Mr Azam was not in fact in London at the time he was requesting an adjournment (which was the address on the fax to which I have referred) but rather in Norwich, and having been advised by his union not to attend, did not have the opportunity, having spoken to a representative of the Council on the morning of the hearing, to change his mind. It is quite clear from the submissions made to me that he felt obliged to follow the advice of his union representative and certainly intended no discourtesy or lack of respect to or for the Panel.
17. Secondly, it is equally clear that in the months that he has been suspended and unable to follow his professional employment, he has been engaging in activities designed to assist him to develop personally. He has stopped drinking alcohol, he has been involved in a difficult 6th Form College and has maintained patience in difficult circumstances without losing his temper. The stressors that were evident in 2003 have now passed. He recognises that the second incident of damage demonstrated that he had not learned from the first incident of violence and had still lost his temper. He is now in a position to have addressed those features.
18. Given that a hearing of the panel to review the suspension, should Mr Azam wish to make one, could not be convened for about four weeks, the six months ordered by ordered by the Panel will in fact have passed. It is, of course, a matter for them to consider whether the history of Mr Azam's non-attendance and the efforts that he has since made are sufficient to allay the concerns expressed initially that the public interest required his suspension. For my part, I hope that they will feel able to reach that conclusion. Having said that, for the reasons which I have shortly given, this appeal must be dismissed.
19. MR CAPLAN: My Lord, there is one matter. That is a question of costs.
20. MR JUSTICE LEVESON: Yes, I thought that was going to come up.

21. MR CAPLAN: I am sure my Lord will understand that the Health Professions Council is a public body and has registrars who fund it. Therefore we feel compelled to make an application for costs. I can hand up a schedule. Can I add this also. If my Lord were kind enough to grant costs, a decision will have to be taken as to whether any application is enforced. I cannot give an indication, as I am sure my Lord understands, but that is a matter that will be considered.
22. MR JUSTICE LEVESON: Mr Azam, you brought an appeal and you have been unsuccessful. Have you seen a copy of the costs schedule?
23. MR AZAM: Yes, my Lord.
24. MR JUSTICE LEVESON: Do you have any observations to make?
25. MR AZAM: It is a lot of money and it is a lot of money which I do not have. I have not worked for five months. I am on unemployment benefit at the moment so there is no way I could make any payment whatsoever, really. I have no money around me. It is just impossible.
26. MR JUSTICE LEVESON: Well, it is very difficult. Thank you very much indeed. Mr Caplan, there are lots of lawyers involved in this. I am very grateful for your assistance and I have deliberately taken time, but whether this is a case that justified leading counsel is another matter.
27. MR CAPLAN: Well, my Lord, I occupy a rather strange position, as you may appreciate. I am in fact a solicitor and part of the firm. Two matters. Firstly, the only two people involved is Miss Hill who was in fact the solicitor involved below. I do not think the amount of time involved is great and is unfair. Also, of course, we would have to appear by way of counsel in any event. It may be that my Lord will take a view as to a lesser sum. Although I can, of course, give no undertaking, a sensible view would have to be taken. I hope my Lord will understand the way the Health Professions Council have conducted themselves thus far and take a sensible view of the position. Normally, in any event, where there is an appeal unless they are at fault --
28. MR JUSTICE LEVESON: I am not suggesting that, of course I am not, but Miss Hill is very familiar with the whole case because she conducted it in the lower panel, did she not?
29. MR CAPLAN: Yes. Maybe a figure my Lord would have in mind -- in one sense perhaps I can put it this way. There is a principle involved for my clients, bearing in mind they are answerable to the registrars as well.
30. MR JUSTICE LEVESON: Well, I understand that. I will order a payment for a contribution towards costs which I shall assess in the sum of £5,000. Whether the Council feel it necessary to pursue that in the context of this case is a matter for them. It is not a matter for me. It is one of the difficulties that Mr Azam has faced that the person to whom he turned for advice, namely his union, appears, on the face of what he tells me, to have let him down and no-one else was there available to point out the pitfalls of the course of action upon which he was embarking.

31. MR CAPLAN: Yes, my Lord. I do assure my Lord that those comments will be taken into account.
32. MR JUSTICE LEVESON: Mr Azam, I have done what I can for you. I have made it clear that everyone should think very carefully. My advice to you is to find out whether a form is necessary, or whether a letter is sufficient, to apply back to the panel, to write today and ask them, in the light of all the circumstances, if they would please be prepared to review the sentence of suspension imposed upon you as soon as possible. I have no doubt that Kingsley Napley will be able to download in due course from the internet a copy of this judgment and you will then be provided with a copy which makes the points that I hope might be made on your behalf. Thank you very much.
33. MR CAPLAN: Thank you, my Lord.
34. MR JUSTICE LEVESON: Thank you Mr Caplan. I will return your booklets.
35. MR CAPLAN: I am most grateful to my Lord for the judgment.