



## briefing

Health, Risk and Regulatory - January 2010

### Edward Emmanuel v (1) South Gloucestershire Primary Care Trust (2) Family Health Services Appeal Authority (2009)

**A Family Health Services Appeal Authority (FHSAA) had unlawfully exercised its discretion not to call an individual to give oral evidence. The individual's written evidence about her relationship with a doctor went to the heart of whether the doctor should be removed from the medical performers list and there was no opportunity to test the evidence or assess her credibility.**

In or about June 2008, the PCT were informed by a person referred to in the determination as an "anonymous whistle blower" of certain allegations relating to the appellant, namely that he had engaged in an improper relationship with a former patient (Ms LJ) and by whom he had fathered a child.

The complaint was investigated by the PCT and there followed an oral hearing by the PCT. He was suspended from the "medical performers list" and the GMC were informed of the allegations. A removal hearing was held by the PCT on 11 March 2009, and the appellant was removed from the list, on the grounds of unsuitability.

The appellant appealed to the FHSAA against this decision. The hearing took place on 2 July 2009 at a hotel in Birmingham, during the course of one day's sitting. The hearing concluded at 19.45. The appeal panel heard evidence from the Head of Governance at the PCT and from Ms LJ's GP. It also heard evidence from the appellant on his own behalf. So far as documentary evidence was concerned, the Panel had before it typed notes of face-to-face and telephone

interviews between Ms LJ and the Head of Governance at the PCT and from Ms LJ's GP. No handwritten notes of the interviews were considered by the Panel, and the Panel did not hear from Ms LJ directly.

Following the FHSAA panel's decision to uphold the PCT's findings, the appellant appealed to the High Court under section 11(1) of the Tribunals and Inquiries Act 1992 on the grounds that the FHSAA's hearing had been procedurally unfair, rendering the decision unlawful.

The grounds of the appeal were threefold:

1. the approach to the evidence of Ms LJ, and in particular the fact that reliance was placed upon Ms LJ's written and, on some issues, inconsistent evidence as set out in the interview notes in preference to the appellant's oral evidence in circumstances where the main issues of fact were disputed;
2. the lack of disclosure of any handwritten notes of the telephone and face to face interviews;
3. the length of the sitting day.

The appellant argued that the central issues before the panel included the date the sexual relationship started, and that there was thus a dispute of fact between himself and Ms LJ and it was incumbent on the panel to assess the conflicting evidence. He contended that Ms LJ's failure to give evidence in person meant that there was no opportunity to test her evidence against the documents that were submitted or of assessing her credibility.

The High Court held that although the FHSAA had discretion under the Family Health Services Appeal Authority (Procedure) Rules 2001 r.41 (2) and r.35 (1) not to call Ms LJ to give evidence before it, the exercise of the discretion amounted to an error of law. The Court noted that first and foremost, the date when the sexual relationship started was fundamental. In addition, nowhere in the panel's determination did it assess either Ms LJ's vulnerability or her reluctance to give evidence, and nowhere in the determination did the Panel state that it had placed Ms LJ's failure to give

evidence to the panel in the matters that affected its conclusions.

In relation to the lack of disclosure of any handwritten notes, the Court found nothing in the way in which the Panel dealt with that matter that was open to challenge. The Court did, however, suggest that hearings lasting until 19.45, even with breaks, should be avoided if at all possible. Good practice determined that tribunals and courts should not place themselves in a situation where their sitting hours became so unreasonable that it could no longer be stated with certainty that the conduct of the proceedings was fair.

The Court quashed the decision of the FHSAA and directed that the appeal by the appellant be redetermined by a fresh panel of the FHSAA.

### More information

If you have any questions about this case and it's implications for you or should you require further advice and training on Performer's List issues please contact either Tessa Shellens or Tina Whitman .



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**Tessa Shellens, Consultant**

T: 029 2038 5924

E: [tessa.shellens@morgan-cole.com](mailto:tessa.shellens@morgan-cole.com)



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**Tina Whitman, Solicitor**

T: 029 2038 5911

E: [tina.whitman@morgan-cole.com](mailto:tina.whitman@morgan-cole.com)

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