No “right to remain silent” in healthcare disciplinary proceedings

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It has long been the position that a tribunal in healthcare disciplinary proceedings cannot draw an adverse inference where the registrant does not give evidence. However, in a recent unprecedented decision, the High Court held that a tribunal may draw adverse inferences where the registrant does not give evidence.

This decision arises from the case of *Kuzmin v General Medical Council [2019]*. Dr Kuzmin faced disciplinary proceedings, including an allegation of dishonesty. Dr Kuzmin made submissions halfway through the proceedings that there was no case to answer. His application was refused, so he withdrew his witness statement and did not give evidence before the tribunal. At the conclusion of the hearing, the GMC submitted that the tribunal may draw an adverse inference from the fact that Dr Kuzmin did not give evidence. Despite submissions on behalf of Dr Kuzmin, the tribunal concluded that it did have that power.

Dr Kuzmin challenged the tribunal’s decision. The High Court had to decide whether the tribunal was correct in finding that it had the power to draw adverse inferences when a doctor does not give evidence where charges are made against them.

Dr Kuzmin relied on the fact that disciplinary proceedings are of a quasi-criminal nature and the common law position is that the right to silence is the same as that applied in criminal proceedings. The GMC argued that disciplinary proceedings are civil, not criminal proceedings and as such, the tribunal should be able to draw an adverse inference. It was further submitted by the GMC that it is in the public interest for the tribunal to have the power to draw adverse inferences, where the doctor does not give evidence.

The Court rejected Dr Kuzmin’s position and considered that disciplinary proceedings are civil in nature and that it is in the public interest for tribunals to draw adverse inferences where the healthcare professional does not give evidence. The Court held that “*disciplinary tribunals have the legal power to draw adverse inferences from the silence of an individual charged with breaches of the regulatory scheme to which he or she is subject, even if in practice they have not in the past drawn such inferences in individual cases.*”

The Court emphasised that whether an adverse inference is drawn will be highly dependent upon the facts of the particular case. The Court further stated that “no inference will be drawn unless:

1. a prima facie case to answer has been established;

2. the individual has to be given appropriate notice and an appropriate warning that, if he does not give evidence, then such an inference may be drawn; and an opportunity to explain why it would not be reasonable for him to give evidence and, if it is found that he has no reasonable explanation, an opportunity to give evidence;

3. there is no reasonable explanation for his not giving evidence; and

4. there are no other circumstances in the particular case, which would make it unfair to draw such an inference."

The Court commented that it would be helpful if the GMC (and other healthcare regulators) publish guidance confirming the existence of the power and how it might be used in disciplinary hearings.

This recent decision will apply to all healthcare professionals facing professional disciplinary proceedings. It is likely to have the greatest impact in respect of cases where allegations are of a criminal nature. The decision emphasises the importance of seeking legal advice when you face disciplinary charges, to ensure you are fully prepared and understand the implications of the decision. The importance of seeking early advice is particularly critical for those who face both regulatory and criminal proceedings.

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