CRHP v HPC (1) Harrison (2) – Judgment of Mr Justice Jackson

Thursday, 30 March 2006

Court 7, St Dunstan's House

Jenni Richards for the CRHP
Parishil Patel for the HPC

This is an application for costs. The facts are as follows.

The Second Respondent, Mr Simon Harrison, is a physiotherapist. In 2004, Mr Harrison was working as a locum at Wrexham Hospital. He behaved inappropriately. The First Respondent, the Health Professions Council, brought disciplinary proceedings before its Conduct and Competence Committee ("the CCC"). The findings of the CCC were that Mr Harrison had committed the following:

1. *On a date between 28 June 2004 and 5 July 2004 he put his arm around Miss A and put her head on to his shoulder.*

2. *On a date between 28 June 2004 and 5 July 2004 he put his arms around Miss A, hugging her and placing his head on her chest.*

3. *On 5 July 2004 he outstretched his hands towards Miss A's breasts, made various inappropriate comments of a sexual nature to Miss A in front of a patient and made inappropriate comments in relation to a patient's genitalia.*

4. *On a date between 28 June 2004 and 5 July 2004 he attended at work smelling of alcohol.*

5. *On a date between 28 June 2004 and 5 July 2004 he attended at work smelling of alcohol.*

6. *On 5 July 2004 he attended at work smelling of alcohol.*

The penalty of the CCC was a direction that the record of the First Respondent should be annotated with a caution for three years. The CRHP took the view that the penalty and disposal were unduly lenient. Therefore, the CRHP brought an appeal against the decision

of the CCC pursuant to Section 29 of the NHS Reform and Healthcare Professions Act 2002. The appeal was launched by a Notice of Appeal, received by the Administrative Court on 8 August 2005, three days short of the time limit for the CRHP to bring such proceedings.

No letter before action from CHRP to the First Respondent was sent. There was, however, a phone call prior to the commencement of proceedings. The Appellant's Notice was served by letter on 10 August 2005. On 19 August 2005 a skeleton argument was sent. Thereafter, there was some debate between the solicitors. On 5 September 2005 the solicitors for the First Respondent indicated in principle that they would be willing to compromise. There was some delay but in due course the Second Respondent agreed. A consent order was drawn up reflecting the terms of the letter of 5 September2005.

The consent order, which I have today made, provides that the appeal would be allowed and the decision of the CCC and caution remitted; and that the decision would be remitted to the CCC in line with the following: they would have regard to the Appellant's Notice and the skeleton arguments; they would give their decision with full reasoning; and costs were to be agreed or ordered.

At the hearing today, CRHP seeks an order that the HPC pay its costs up to 5 September 2005. No application is made against the Second Respondent.

The First Respondent opposes the application on a number of grounds. Although the First Respondent has consented to the appeal being allowed, there has been no judicial determination. If there had been a full hearing, the appeal may have failed. Commercial reasons prevail and therefore they are asking for no order as to costs. Counsel for the First Respondent cites two well known authorities: R –v- Liverpool City Council ex parte Newman and Boxall –v- The Mayor & Burgess of the London Borough of Waltham Forest.

Boxall reflects and builds on Newman. I will therefore set out the crucial passage from Boxall, which is that: the Court has the power to make a costs order where there is no trial; in between the positions of clear success and failure there is a middle ground dependant on costs and conduct; and in such cases there should be no order as to costs. The Court is not to discourage judicial review concessions at an early stage.

Mr Patel urges upon me the wisdom in such cases of conceding rather than contesting. However, in the circumstances of the present case, I have concluded that if the appeal had proceeded it would have been bound to succeed. Therefore, I reject Mr Patel's first argument.

There is a point of principle which may need to be considered. Can a regulatory body concede an appeal against a decision of its disciplinary committee if (a) the decision was favourable to the disciplined person and (b) there may be good grounds for resisting the appeal? This is not relevant here but it may arise in other cases. This Court can only make an order, even if by consent, if it is satisfied that it is proper to allow the appeal.

I now come to the second argument advanced by Mr Patel, which is that the Claimant failed to send any letter before action and that a great deal of costs could have been saved had it done so. The First Respondent therefore did not know what case it had to meet. Miss Richards submits that there is no need for a letter before action to any regulatory body before the institution of Section 29 proceedings. She points out, correctly, that there is no pre-action protocol which applies. If you look at the closest, which is the pre-action protocol for judicial review, paragraph 6, it states "a letter before action is not appropriate where the Defendant has no legal power to change the decision made". I conclude Miss Richards is right and there is no protocol which requires the merits of the case of CHRP to be debated in correspondence.

However, the practice direction on protocols provides as follows: "Where there is no protocol, the Court expects parties in accordance with the CPR to act reasonably in trying to avoid the necessity of recourse to litigation." It is generally speaking good practice in all classes of litigation for the Claimant to inform the prospective Defendant of the relevant facts of the claim.

Let me turn to the position of the CRHP. Under a time limit for commencement of appeals which is sometimes 28 days, sometimes 56 days, the CRHP has to consider 600 – 700 determinations per year. Often it needs to obtain further information in order for the matter to be considered. A report must be produced and a meeting of three members convened to decide whether or not to bring an appeal. Given the volume of work and the steps needed to be taken, together with the time limits, I do not think that in the general run of cases it is practical to debate the merits in correspondence. Where this can be done, however, it is

good practice. But it should not be imposed by regulation or costs sanction. It would be simply unworkable given the statutory scheme and the workload of the CHRP.

Even if the CHRP persuades a regulatory body that a decision of its disciplinary committee should be quashed, there is still a need for proceedings to ensue and, even if there is a Consent Order, the Judge still needs to be persuaded.

Considering all these matters, the failure to send the letter before action is not in itself grounds for imposing a costs sanction or denying costs, if it is otherwise appropriate to award such costs.

Turning to the appropriate costs order in this case, Miss Richards has furnished me with two additional authorities: CHRE v (1) General Medical Council (2) Bassiouny, and CRHP v (1) General Dental Council and (2) Fleishman. The approaches to these two cases are helpful in illuminating the position I should adopt in this case. As in these two, the original error and need for proceedings arose because of a mistake of a disciplinary committee for which the regulatory body is responsible. It is open to the regulatory body to mitigate by conceding that the appeal should be allowed. As a result of this, costs can be reduced.

Therefore the First Respondent should pay the costs of the CRHP up to 5 September 2005 for three reasons:

(1) the First Respondent is responsible for an error made by its CCC even though they are an independent disciplinary committee;

(2) the First Respondent did not concede until 5 September 2005; and

(3) proceedings are and always were necessary to obtain the consent order that has now been made.

...

I am asked summarily to assess the costs up to 5 September 2005. The Claimants have provided a detailed schedule of costs. In eight areas Mr Patel has suggested a reduction. I am concerned not by what is reasonable for the CRHP to pay to its own solicitors, but rather what CRHP recovers against the First Respondent.

The first area is a collection of items on page 2 regarding a report and research before the decision was taken. This is 14 hours of work by a solicitor/partner and a paralegal. I feel that this is properly spent.

The second item is 3½ hours on Section 29 meeting notes. I have these notes at tab 11 of the bundle. Although there are 7 pages, it is clear that a lot of work has gone into these notes and therefore the charges should not be reduced.

The third and fourth items are time spent on drafting the witness statement of Miss Julie Stone and drafting the grounds of the appeal. These two are merged in the schedule, taking approximately 9 hours and costing £1,400. I would deduct £400 leaving these 9 hours at £1,000.

The fifth item is consideration of the skeleton argument by a partner and assistant solicitor, the total time taken 4½ hours. I suggest that the £800 approximately be reduced by £200.

The sixth item is costs regarding correspondence during August totalling £1,055.50. I see here that there are one or two crucial letters, but I feel that this should be reduced by £500 as between the parties it is not justified; therefore the costs here will be £555.50.

In relation to item seven, I suggest that it was entirely proper for both a partner and a solicitor to attend the s29 meeting.

Finally, turning to the fees of the trainee solicitor in lodging the bundle, I feel this was unjustified and that an outdoor clerk included in the office overheads should have taken the bundle for lodging and I therefore deduct £400.

Miss Richards has suggested that the First Respondent's costs incurred today were unreasonable and that this should in some way go towards the determination of her side's costs. I suggest that the costs of today are completely irrelevant to this exercise and I decline to take that factor into account.

I therefore reduce the costs by £1,500 with a corresponding reduction for VAT. I therefore assess costs to 5 September 2005 in the sum of £13,703.28.