

Hearing (part)-held in private

Summary

Name:	SINGH, Jasbinder [Registration number: 68488]
Type of case:	Professional Conduct Committee (initial) – Preliminary Application
Outcome:	The Committee accedes to the application for a stay of these proceedings on the grounds of abuse of process
Date:	2 June 2015

Ms Bradley,

You have made a preliminary application to stay these proceedings on the grounds of abuse of process. The hearing was part heard in private however there is nothing in this determination which needs to be in private.

In considering this application the Committee has had regard to all the evidence before it. This includes hearing bundles submitted by the General Dental Council (GDC) which are not agreed by the Defence and bundles submitted by you which include evidence of the remediation Mr Singh has undertaken. In addition, the Committee has been assisted by skeleton arguments in writing from you, in support of the application, and from Ms Plaschkes on behalf of the GDC. The Committee has carefully considered all the documentary material and the oral submissions made by both parties. It has accepted the advice of the legal adviser.

It was accepted by both parties that in considering this application, the Committee should apply the test set out by Dyson JSC in R v Maxwell [2011] 1 WLR 1837, SC [D4/2]:

“namely (i) where it will be impossible to give the accused a fair trial, and (ii) where it offends the court's sense of justice and propriety to be asked to try the accused in the particular circumstances of the case.”

Ms Bradley also drew the Committee's attention to further comments by Dyson JSC in R v Maxwell [2011], that:

“In the second category of case, the court is concerned to protect the integrity of the criminal justice system. Here a stay will be granted where the court concludes that in all the circumstances a trial will offend the court's sense of justice and propriety (per Lord Lowry in R v Horseferry Road Magistrates' Court, Ex p Bennett [1994] 1 AC 42 , 74 G) or will undermine public confidence in the criminal justice system and bring it into disrepute (per Lord Steyn in R v Latif [1996] 1 WLR 104 , 112 F).”

The Committee has borne in mind that a stay of proceedings on the grounds of abuse of process is an exceptional remedy and will only rarely be used. It reminded itself that a stay of proceedings should not be used to punish the GDC for any failings in this case or to deter the GDC from behaving in a similar manner in the future.

In considering this application, the Committee has taken into account the principle of proportionality and that its primary role is to protect the public. It has balanced the public interest which includes public protection and public confidence in the proper regulation of the dental profession with Mr Singh's interests in having a fair hearing. The Committee has reminded itself that as you have made this application, the burden of proof lies with you; that is, you must establish that on the balance of probabilities that there is evidence to support a stay of proceedings on one or both of the limbs of the test set out in R v Maxwell [2011].

The Committee first considered whether it would be possible for Mr Singh to receive a fair hearing at a future date. In doing so it reminded itself that there is a high threshold for granting a stay on the grounds of abuse of process in this regard and that if the hearing process is able to remedy any identified failings then a fair hearing remains possible.

The Investigating Committee met to consider this case on 18 July 2014. The first telephone case management hearing was held on 28 August 2014. The GDC agreed that Standard Directions should apply, setting a date for disclosure of the GDC's case as 2nd December 2014. Despite several requests and reminders from the Defence, the GDC failed to provide disclosure until 12th December 2014. Further disclosure was sought and was made at intervals, over a period of months, leading up to the scheduled hearing date.

The GDC has described this as a simple case involving one patient witness. However, in total the GDC has produced nine different expert reports dated 3 February 2014, 9 November 2014, 18 November 2014, 6 December 2014, 8 December 2014, 29 December 2014, 26 January 2015, 28 March 2015 and 27 April 2015. Five of these reports were only disclosed from 6 May 2015 onwards. The PCC hearing was scheduled to commence on 11 May 2015. Disclosure continued up to and including Saturday 9 May 2015. The GDC had been informed, before they made this last minute disclosure running to some hundreds of pages of material, that you were not available over the weekend. You informed the Committee that, as a result of the late disclosure, you had not been able to adequately prepare for the case. You stated that you had had insufficient time to read all the material disclosed at the weekend, prior to the commencement of the hearing. In addition, this late disclosure meant that you had not had the opportunity to discuss its content with your expert witness or to take instructions from Mr Singh. Material was still arriving from the GDC by email download to your solicitor on the first day of this hearing, 11 May 2015.

Further, the Committee noted the late disclosure of an addendum witness statement from Patient 1 on 6 May 2015. On reading it, the Committee concluded that this additional witness statement contains new material and that the Defence had a very limited opportunity to gather evidence to rebut this new material.

By email on 9 May 2015 the GDC assured the Defence that they intended to rely on three of the nine expert reports and a fourth report was to be included in the bundle before the Committee, despite an acknowledgement that this fourth report may not have been admissible.

The Committee considered that there was information in the initially undisclosed material, including the unused material, which may have been of assistance in preparing Mr Singh's defence. In a letter dated 6 May 2015, in response to an oral request for disclosure of the correspondence between the GDC and Patient 1 regarding his addendum statement and between the GDC and its own expert regarding the third addendum report, the GDC's Senior Prosecution Lawyer stated that "*In relation to your request for disclosure of these items of unused please advise why you say that this will assist your client's case or undermine the GDC's.*" The Committee was at a loss to know how, without sight of the

documents, those advising Mr Singh could know in what way the content of the undisclosed material would assist them. The Committee noted that the Defence have a right to request disclosure of unused material, in order to ascertain if it would indeed assist them. The Committee considered this to be an example of the GDC's obstructive conduct in its prosecution of this case. Furthermore, unused material which may have assisted in preparing Mr Singh's defence, was finally disclosed during this hearing. This was in the form of an email to the GDC from Mr Roberts-Harry dated 9 May 2015, in which he was suggesting that one of the heads of charge may no longer be valid.

In these circumstances, it has not been possible to place an agreed hearing bundle before this Committee.

It is clear from the documents before the Committee that there was a serious, consistent and ongoing failure on the part of the GDC to meet its obligations in relation to disclosure with regard to both used and unused material. In the Committee's judgement, the effect of this is that a fair hearing would not have been possible commencing on 11 May 2015. Nonetheless, the Committee accepts that late disclosure can be remedied by a period of adjournment which would allow you and those who instruct you to properly prepare Mr Singh's defence.

The GDC's failures in relation to disclosure have resulted in the Defence having disclosed its case before full disclosure of the GDC case against Mr Singh had been made. This potential prejudice to Mr Singh cannot be undone, as in the Committee's opinion, the GDC now has the unfair advantage of knowing the Defence case prior to finalising the charge. The case is however a relatively simple one concerning a single patient. From the evidence before the Committee, and the nature of the charges, it appears to the Committee that Mr Singh's defence is not significantly different to that which might have been expected. The Committee therefore takes the view that there is not sufficient prejudice to preclude Mr Singh from receiving a fair hearing.

The Committee had regard to the evidence of the GDC's interactions with Patient 1, which resulted in the production of Patient 1's Addendum Witness Statement dated 28 April 2015, which was disclosed to the Defence on 6 May 2015, five days prior to the scheduled hearing. The patient had been contacted by telephone on an unknown date, as the GDC

lawyer involved had failed to make a contemporaneous note of that telephone conversation. The Committee was told that the email from the GDC to the Defence solicitors dated 24 April 2015, contained a list of the questions put to Patient 1 during that telephone conversation, and Patient 1's answers. The Committee considered the wording of Question 1, which stated:

"You made a comment to the effect that Dr S did not explain the treatment options, give a written treatment plan, or explain that there was or might be an additional cost of retainers."

The Committee has had regard to the patient's original complaint and witness statement and considered that this statement in Question 1 appears to contain inferences drawn by the GDC, rather than reflecting any spontaneous comment previously made by the patient. Further, Question 1 goes on to ask:

"Were you shown a video explaining the treatment?"

The Committee determined that this was a leading question in that it suggested the desired answer.

The Committee also noted Question 3:

"3) You attended the defendant on 28/08/13 (at which point adjustments were made). You returned on 09/10/13 (visit recorded but no note made). You complained to the GDC on 14/10/13. The note relating to charges being discussed is 11/12/13 (although presumably they were discussed at the "no note" October appointment). There is a discussion about retainers on 04/12/13 and the retainers are finally ordered after the 23/12 appointment.

a. In view of this chronology can you recall the period of time for which you were wearing the final aligner?"

The Committee determined that this was also a leading question as it, too, suggested the desired answer.

In addition, the Committee noted the contents of Question 3.b:

"3) You attended the defendant on 28/08/13 (at which point adjustments were made). You returned on 09/10/13 (visit recorded but no note made). You complained to the GDC on 14/10/13. The note relating to charges being discussed is 11/12/13 (although presumably they were discussed at the "no note" October

appointment). There is a discussion about retainers on 04/12/13 and the retainers are finally ordered after the 23/12 appointment.

b. Can you comment upon the dentists version of events – i.e. that he could have a (removable) essix retainer for free but had to pay for (removable) invisalign or fixed retainers, and/or that the delay in getting the retainer was because you were uncertain about what option you wanted to go for.”

The Committee also noted the content of Question 2:

“2) The length of time you had to wear the aligners is not clear:

a. At para 8 you say 3 to 4 weeks

b. In para 9 you say 6 to 8 weeks

c. In the initial complaint you say 12 weeks – albeit if you add up your numbers it seems to come to 16 weeks

Are you able to say anything that would clarify these apparent conflicts in time periods?”

The Committee concluded that both these questions demonstrate clear evidence of coaching the witness in what he should say and, in the Committee’s judgement was an attempt to improve on the patient’s original written statement.

The Committee also considered the instruction given to Patient 1 by the GDC lawyer, as set out in an email dated 24 April 2015, that he should “*only state something when absolutely sure*”. It is the view of the Committee that this advice was incorrect and that a witness should always answer to the best of their ability and be free to say that they are sure or unsure as may be the case.

In the judgement of the Committee, the GDC acted inappropriately in their contact with the single patient witness in regard to all the matters detailed above. However, it is the Committee’s view that there would be the opportunity for these irregularities to be aired in full at any future hearing by the PCC. The PCC is independent of the GDC and would be advised by an independent legal adviser in relation to the weight it would be appropriate to place on the witness’ evidence in these circumstances. Thus, the Committee determined that in relation to Patient 1’s evidence it would be possible for Mr Singh to have a fair hearing.

The GDC agreed, in accordance with its Standard Directions to disclose the final charge that Mr Singh would face by 2 December 2014. The draft charge was disclosed on 12 December 2014. In a letter dated 21 January 2015, the GDC paralegal stated "*Further to your request for final charges, we will not be disclosing these at this stage. As you are aware, we cannot draft final charges until you disclose your case to us. Final charges are not disclosed until they are incorporated into the Notice of Hearing that is sent to the Registrant.*" The Committee failed to understand how Mr Singh could be expected to disclose his case before the final charge he had to answer had been disclosed to him. In the Committee's judgement, the position posed by the GDC in this letter is perverse and inherently unfair. Further, in a letter dated 28 January 2015 the GDC assured the Defence solicitors that the charge would not change "*significantly, if at all*" prior to the hearing. When the Notice of Hearing dated 13 April 2015 was received 28 days before the hearing, the number of charges had been reduced, but the wording of some of the remaining allegations had been altered to include the concept of adequacy. The Committee accepted your submission that this widened the charge at a very late stage, which has had a detrimental effect on the preparation of Mr Singh's defence.

In the Committee's judgement, the submissions made by Ms Plaschkes, Counsel instructed midway through the hearing, in opposing this application, framed the allegations in a completely different context to that which has so far been the GDC case against Mr Singh. Miss Plaschkes raised issues regarding the appropriateness of advertising Invisalign treatment on Groupon and the timing of payment to Mr Singh under the Groupon scheme. The Committee considered that these criticisms are not reflected in the charge as stated in the Notice of Hearing. This has caused concern on the part of the Committee, as it further demonstrates the continuing, confused and inaccurate approach to this case by the GDC.

The Committee determined that the extraordinary conduct by the GDC, as described above, in relation to the charge that Mr Singh was to face would have made a fair hearing commencing on 11 May 2015 impossible. However, provided that there is an adequate period of adjournment to allow you and those who instruct you to prepare Mr Singh's defence in relation to the final charge, there is no impediment to Mr Singh having a fair hearing at a future date.

The Committee has considered the behaviour of Mr Roberts-Harry, the expert witness instructed by the GDC. The Committee reminded itself that the role of an expert witness is a privileged one; only expert witnesses are allowed to offer opinion evidence. This privilege must be exercised with care. An expert's opinion must be independent of those instructing him or her and confined to matters within his or her expert knowledge.

There is before the Committee a letter from Mr Roberts-Harry to the GDC dated 2 March 2015 in which he said "*I have reviewed the charges and wonder if some are too specific*". Of his own volition he suggested changes to the wording of the charge to include the concept of adequacy. As he provided no clinical justification for this change, the Committee concluded that it is more likely than not that his motive was to make it easier for the charges to be found proved. The wording of the charge as it now appears in this case reflects the changes suggested by Mr Roberts-Harry.

In addition, Mr Roberts-Harry of his own volition raised a serious, and what is clearly from subsequent documentary evidence provided by the Defence, an erroneous, non-clinical potential allegation against Mr Singh. Mr Roberts-Harry was granted access to the online ClinCheck notes for Patient 1, for the specific purpose of viewing some digital images. The Committee was concerned that it appeared that Mr Roberts-Harry undertook investigations outside this remit. Mr Roberts-Harry suggested that Mr Singh's claim that at the time of treating Patient 1 he was a 'Diamond' provider for Invisalign, may not have been true as the online system reflected that Mr Singh was a 'Platinum Elite' provider. In fact, there is evidence before the Committee which makes clear that Mr Singh was a 'Diamond' provider at the time he treated Patient 1. In the Committee's judgement, for an expert witness to investigate a non clinical area which is not a head of charge, using confidential log-in details provided for a different purpose, is wholly unacceptable.

Further, in the email to the GDC dated 9 May 2015, Mr Roberts-Harry appeared to suggest that Mr Singh's clinical notes might not be contemporaneous. The Committee has seen no evidence to suggest that this was ever raised as a concern by the GDC, and noted that there is no documentation before the Committee to suggest that Patient 1's notes were not contemporaneous.

In the Committee's judgement, Mr Roberts-Harry has twice raised unfounded serious concerns relating to Mr Singh's probity.

In some versions of his report Mr Roberts-Harry sought to suggest that an advertisement placed by Mr Singh was misleading. This is a matter of fact for the PCC to determine on the evidence and not a matter for expert opinion.

The Committee considered that Mr Roberts-Harry failed to confine his opinion to clinical matters within his field of expertise. Rather than providing an independent expert view, the Committee considered that he acted in a manner which suggested bias towards the GDC's prosecution of the case. The Committee viewed this as deplorable conduct on the part of an expert witness. It is also considered that the GDC had failed to act appropriately, as there is no evidence to suggest that it has sought to remind Mr Roberts-Harry of his responsibilities. In its submissions to this Committee, the GDC has, indeed, sought to justify Mr Roberts-Harry's actions. These irregularities could however be the subject of cross examination at any future hearing in front of the independent PCC with access to independent legal advice as to the weight that might be placed on the GDC expert's evidence. Thus, the Committee determined that in relation to Mr Roberts-Harry's evidence it would be possible for Mr Singh to have a fair hearing.

The Committee accepted the many criticisms levelled at the GDC's management of this case which are evidenced in the documents placed before it. However, having considered each area of criticism in turn, the Committee has determined that the first limb of the test it must apply, is not met and that it would be possible for Mr Singh to have a fair hearing at a future date.

The Committee next considered whether its sense of justice and propriety would be offended if the case against Mr Singh was allowed to continue and whether the case continuing would undermine public confidence in the regulatory process and bring the regulatory process into disrepute.

This Committee has made findings relating to unacceptably late disclosure of significant documents. This includes nine versions of the GDC expert's report, an addendum witness statement from the only patient witness and unused material. The Committee considered

that the unused material could potentially have undermined the GDC's case and assisted the Defence and, thus, by the GDC's own test, should have been disclosed without question. An analysis of the indices to the bundles before the Committee and the chronology describing contacts between Mr Singh's solicitors and the GDC's legal team demonstrates, in the Committee's opinion, the chaotic state of the GDC's case against Mr Singh as of 11 May 2015.

In addition, late changes to the charge were faced by Mr Singh, as well as a lack of clarity about the documents upon which the GDC intended to rely. Significantly, there is clear evidence of inappropriate contact between the GDC's lawyer and the only patient witness in the case and of inappropriate conduct by the GDC expert witness. This is not a case where there has been a single failure in process or where there is a single area of concern. This case is exceptional in that there have been multiple, repeated and very serious failings in fairly prosecuting the case against Mr Singh. In the Committee's judgement, the GDC has shown a cavalier disregard for fairness and due legal process. In the course of this hearing there has been little evidence of insight by the GDC into these serious and ongoing failings; rather, Counsel for the GDC has sought to minimise the impact of these failings. The Committee considered that, even during its submissions at this hearing, the GDC was raising concerns which are not captured by the charge as it appears in the Notice of Hearing. The Committee was deeply concerned by the apparent lack of understanding by the GDC of the disadvantage its behaviour has caused to Mr Singh in the preparation of his defence and the lack of fairness with which he has been treated. Regulatory processes can result in a loss of professional reputation and potentially the loss of a professional's livelihood. Accordingly, such proceedings must be prosecuted in a scrupulously fair manner.

The Committee concluded that the GDC's conduct in this case is so egregious that the Committee's sense of justice and propriety is offended.

The Committee noted that the GDC sets the standards for the dental profession, and that registrants are required to follow those standards. In this case, in the Committee's judgement, the GDC failed to follow its own Standard Directions for the progress of the case or to behave in a way that was fair and proportionate. In the Committee's view, the GDC cannot conduct a prosecution in this way whilst, at the same time, maintaining the

confidence of the professionals it regulates or that of the wider public, for whose protection it carries out that function. The Committee considered that, if this case was allowed to proceed, a fair minded and informed member of the public would be deeply concerned and confidence in the regulatory function would be undermined.

The Committee has reminded itself that its overriding duty is to protect the public. It has considered the evidence of remediation undertaken by Mr Singh. This remediation is evidenced by training, clinical sessions with an orthodontic specialist, a reflective log, audits and a report from his mentor. In the Committee's judgement, this remediation is sufficient to allay any concerns regarding public safety if this case were to be stayed and the charges against Mr Singh were not to be considered by the Practice Committee at a future date.

Therefore, the Committee accedes to your application for a stay of these proceedings on the grounds of abuse of process, as it offends the Committee's sense of justice and propriety and it is necessary to protect the integrity of the regulation of the profession.

That concludes the case.