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Freedom of Speech, Covid Scepticism, and Interim Orders: What Will be the Effect of White v GMC [2021] EWHC 3286?

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Introduction

In the recent case of *Dr Samuel White v General Medical Council* [2021] EWHC 3286, the High Court overturned an interim order of conditions imposed by an Interim Orders Tribunal ("IOT") of the Medical Practitioners Tribunal Service on the registration of a doctor who was

alleged by the GMC to have spread misinformation about Covid 19 and related matters. The basis for the decision was, put briefly, that the panel failed to give consideration to section 12(3) of the Human Rights Act 1998 (“HRA”) and consider whether the GMC was likely to establish that “publication should not be allowed” of the material that was the subject of the allegations at a substantive fitness to practise hearing.

The Facts and Judgment

The allegations which formed the subject matter of the interim order application by the GMC were as follows:

Through a seven-minute social media video the doctor spread misinformation and inaccurate details about the Coronavirus and how it was diagnosed and treated, including saying the vaccine was a form of genetic manipulation which could cause serious illness and death and that he advised against wearing masks;

He had potentially put patients at risk and diminished the public’s trust in the medical profession by disseminating misinformation and inaccurate details about the measures taken to tackle the Coronavirus pandemic; and

He signposted viewers of his online video to comments and articles of others on the internet who shared the same views as him and this raised concerns as to those individuals also promoted information which was inaccurate or untrue.

The IOT imposed an order requiring, among other conditions:

(i) that he must not use social media to put forward or share any views about the Covid-19 pandemic and its associated aspects, and

(ii) that he must seek to remove any social media posts he had been responsible for or had shared relating to his views of the Covid-19 pandemic and its associated aspects. It considered an interim order imposing conditions of practice both necessary to protect the public and also in the wider public interest.

The doctor applied to the Court to terminate the order under section 41A(10) of the Medical

Act 1983.

Dove J said that the conditions which were attacked by the doctor were clear and obvious limitations on his right to freedom of expression under Article 10 ECHR. This was agreed by both parties. The effect of the order was to impose constraints on an interim basis, prior to the issues in respect of compliance with Article 10 having been fully heard and resolved at a final hearing. Specific provision existed within the HRA in relation to the granting of relief in cases engaging freedom of expression and it was not disputed at the hearing that section 12 of that Act was of application to proceedings in the IOT.

The test as outlined by the Supreme Court in *PJS v News Group Newspapers Ltd* [2016] UKSC 26 was whether the party seeking to restrain a person exercising free speech before trial was “likely to establish that publication should not be allowed”. The IOT did not direct its mind to this test nor was the provision drawn to its attention by the parties during the hearing. Instead, the IOT approached the making of the order in this case on what might be described as a conventional assessment of the balance of risk and proportionality, without appreciating and applying the specific provisions arising if they were proposing to restrict the practitioner's freedom of expression, and that was an error of law.

The Court rejected the GMC’s submissions that the questions it did direct itself to, namely those of 'risk' and of 'necessity' were equivalent to the requirements of section 12(3).

The Court also observed, obiter, that any condition proposing to curtail freedom of expression on an interim footing, in order to be proportionate, is likely to need to be specific as to what views or opinions the person subject to the order is precluded from expressing.

Analysis

This judgment is likely to have a significant impact on a number of cases where registrants have made comments on social media and other platforms which their regulators consider to be inappropriate, for scientific or other reasons, and where the regulator intends on using an interim order to restrain them from such further publication.

There are, however, a number of matters which remain unclear.

It is unclear precisely what “likely to establish that publication should not be allowed” means. The most obvious interpretation is that this must mean that the regulator needs to satisfy the panel that it is more likely than not that a panel hearing that substantive hearing will impose a condition stopping the registrant from publishing such comments online. That could prove to be a tall order in many cases, given the very early stage at which interim orders are usually sought and given the fact that panels in these circumstances will effectively be invited to speculate what remediation may have been undertaken in the interim by the registrant and what impact that may have on the panel hearing the substantive case.

In addition, regulators will need to start giving very careful thought to the drafting of conditions when making applications rather than leaving them up to the panel, in order to ensure they are not a disproportionate interference with the registrant’s Art. 10 rights.

A matter not dealt with in this case is what would be the position had the registrant failed to attend the hearing, given that section 12 HRA is engaged. Section 12(2) provides that:

(2) If the person against whom the application for relief is made ("the respondent") is neither present not represented, no such relief is to be granted unless the court is satisfied –

(a) that the applicant has taken all practicable steps to notify the respondent; or

(b) that there are compelling reasons why the respondent should not be notified

Sub-section (2)(a) would appear to require a departure from the usual approach adopted by panels when considering applications to proceed in a registrant’s absence and the principles in *Adeogba v General Medical Council* [2016] EWCA Civ 162, whereby serving a notice of hearing on a registrant’s registered address is adequate to discharge its duty of notifying the registrant of a hearing.

Regulators would be advised to take extra steps to ensure it can demonstrate actual knowledge of the hearing by the registrant in cases where section 12 HRA is likely to be engaged.

Guy Micklewright is a specialist fitness to practise, disciplinary and regulatory barrister, having practised in the area for 14 years, acting for both regulators and registrants. Guy has particular experience of complex disciplinary cases before a variety of healthcare, accountancy, legal, and engineering regulators. He is ranked as a 'Rising Star' in The Legal 500 [2020 and 2021] for his professional discipline and regulatory work (Solicitors Guide).

Guy's practice includes governance advisory work, GDPR advisory work, inquests and firearms/shotgun licensing appeals, and advisory work.