CASE REPORT

The Professional Standards Authority: overseeing the health and social care regulators

D. Beech,[1] T. J. David,[2] S. Ellson[3]
[1]*Manchester Medical School, University of Manchester*
[2]*Chair, Fitness to Practise Committee, University of Manchester*
tdavidmd@gmail.com
[3]*Fieldfisher LLP, Manchester*

Abstract

The Professional Standards Authority (PSA) reviews the fitness-to-practise decisions of all nine health and social care regulators in the UK. In 2016–17, the authority reviewed 4,285 determinations. If the PSA deems a particular decision to be 'insufficient for the protection of the public' (previously the test was 'unduly lenient'), that decision can be referred to the High Court, where it can be reviewed and, if appropriate, overturned. To help illustrate this aspect of the work of the PSA, this report presents the case of a midwife whose fitness to practise had been considered by the Nursing and Midwifery Council (NMC), the statutory regulator of nurses and midwives. The PSA considered that the outcome had been unduly lenient (i.e. it was considered under the earlier test), and the High Court agreed. The matter was remitted back to a differently constituted committee of the NMC, where it was decided that the appropriate outcome was that her name should be removed from the register, thereby effectively ending the career of the midwife.

Introduction

The Professional Standards Authority (PSA) was first created in 2003, when it was named the Council for the Regulation of Health Care Professionals (CRHP). It was renamed the Council for Healthcare Regulatory Excellence (CHRE) in 2008, before becoming the PSA in 2012. The primary function of the PSA is to oversee the regulation of health and social care professionals in the United Kingdom. One element of its work involves reviewing the fitness-to-practise decisions made by the nine health and social care regulators.

The PSA plays an important role in public protection by ensuring that

Manchester Medical Journal, 2018 © The Authors.
Published by Manchester University Press, The University of Manchester Library and the Manchester Medical School
http://dx.doi.org/10.7227/MMJ.0023

healthcare professionals who do not meet acceptable standards are sanctioned appropriately. This case report outlines the case of a midwife who allegedly bullied and harassed a junior colleague over a year-long period, demonstrated inappropriate behaviour towards two patients, and exhibited two serious clinical shortcomings. Her alleged misconduct was considered by the Nursing and Midwifery Council's (NMC's) Conduct and Competence Committee (CCC). The CCC concluded that the midwife's fitness to practise was not impaired. The PSA appealed this decision to the High Court. The appeal was upheld,[1] and the midwife's case was remitted back to a differently constituted CCC, at which it was decided that the appropriate outcome was erasure from the register. Were it not for the intervention of the PSA, which challenged the NMC's decision, the public would have potentially been exposed to a midwife whose conduct fell seriously below acceptable professional standards.

The aim of this report is to increase awareness and understanding of one aspect of the role of the PSA in the regulation of health and care professionals.

The powers of the Professional Standards Authority

Section 29 of the National Health Service Reform and Health Care Professions Act 2002 gives the PSA the power to refer to the High Court any fitness-to-practise case decided by the nine regulatory bodies.[2] The PSA does this if it considers that an individual decision is 'not sufficient (whether as to a finding or a penalty or both) for the protection of the public' (the previous wording before the 2017 amendments was 'unduly lenient').[3] Once the PSA has decided to refer the case and commence court proceedings, there are two possible outcomes. The case may be resolved by means of a consent order, meaning that the PSA, the regulator and the registrant all agree that the relevant decision must be changed or remitted back for a new consideration. Alternatively, the case may be contested in the High Court.[3] In the case of the midwife reported here, the decision by the NMC's CCC that her fitness to practise was not impaired was considered by the PSA to be 'unduly lenient', and it was referred to the High Court. The court's role is to decide whether to accept or reject the appeal of the PSA based on an evaluation of the initial investigation, the initial hearing and the final decision of the CCC. Considerable deference is afforded to the original committee and its expertise, but if the case meets the test and the appeal is upheld, the court can either quash the decision, substitute a new decision or remit the case back to the regulator.[3]

The Nursing and Midwifery Council's investigation of the case

The case of the midwife was first brought to the attention of the NMC following three separate complaints about her conduct from a colleague, a patient and an NHS trust. An investigation was conducted, and this

resulted in her case being considered by the CCC, in which she faced five main allegations, summarised in Table 1.

All charges except 1b and 5 were found proven by the CCC. Its final decision was that the midwife was guilty of misconduct but her fitness to practise was not impaired, enabling her to remain in clinical practice.

The assessment of the case by the High Court

Table 1: Main audit results

Charge number	Charge summary	Decision of the CCC
1a	The midwife failed to support a junior colleague who had asked her to perform a vaginal examination to confirm the presentation of a baby	Proven
1b	The midwife failed to perform a vaginal examination when asked for a second time	Not found proven; the response by the midwife was found to be justified
2	The midwife subjected the same junior colleague to bullying and harassment over the following 11-month period.	Proven
3	The midwife failed to provide appropriate care to a patient who had been admitted for the delivery of her baby that had died in utero	Proven
4	The midwife failed to record and/or supervise the death of a baby of 20 weeks' gestation	Proven
5	The midwife failed to comply with the necessary academic requirements during a period of supervised practice	Not found proven; there were doubts as to where fault lay for this failure

In the referral to the High Court, the NMC supported the submission of the PSA, but the matter was contested by the midwife. A summary of the key statements in the CCC decision and the points raised on appeal by the PSA and accepted by the High Court are shown in Table 2.

In summary, the main points made by the judge were:

- The threefold test applied in the case of Cohen[4] had been misapplied in this case, in which the misconduct was serious and prolonged. Cohen identified relevant factors to be taken into account, the weight of which will vary from case to case (i.e. it is not a legal test in itself). Thus the CCC had addressed the question of impairment of fitness to practise on an incorrect basis. This was not a case where there was an isolated lapse in clinical standards and little factual dispute as to what had happened, nor was there any real concern about this registrant's clinical competence. Whilst the various incidents which formed the subject of the charges obviously took place within a clinical setting, the misconduct

Table 2: Recommendations from the audit and potential barriers to change

Key statements in the CCC decision	Points raised on appeal by the PSA and accepted by the High Court
1. *During a period of supervision between June and November 2007, senior midwives found the midwife to be competent*	The submissions of the senior midwives 'related far more to the registrant's clinical competence, which was not the concern underlying the allegations of misconduct levelled against her'
2. *She had been on a 'journey of self-awareness' and had 'thoroughly come to terms with her failings and had addressed them'*	'It is difficult to see how, viewing the picture as a whole, a profound change can be demonstrated evidentially' Low level of insight shown and no change of attitude as she strongly denied the allegations in July 2009 No recognition or admission of wrongdoing by the midwife
3. *The CCC accepted that she had been seriously unwell from November 2007 to June 2009 so that is why she had not taken any steps to remedy her behaviour in this time period*	The CCC accepted this illness 'unsupported by any medical evidence'
4. *She embarked on a series of courses from June 2009; in particular, she attended a course on communication and empathetic understanding, which 'enabled her to reflect upon her ability to deal with others'*	Only a 1-day communication course was judged to be relevant The CCC had placed 'more weight upon this course than it could properly bear'
5. *A threefold test from a previous case – Cohen v General Medical Council – was judged to be relevant and used in the decision-making process; the CCC used this to conclude that the 'behaviour of [the] registrant was remediable. It has been remedied. The panel consider that it is most unlikely that the registrant will commit misconduct again'*	The committee erred in their interpretation of the threefold test in Cohen[4] The misconduct in this case was not an isolated incident; it was 'serious and persistent' In addition, 'the allegations were strongly denied by her at the fact-finding stage, where her evidence was rejected as 'incredible', meaning her conduct was not easily remediable It was also essential, when deciding whether fitness to practise is impaired, not to lose sight of the fundamental considerations of the need to protect the public and the need to 'declare and uphold' proper standards of conduct and behaviour so as to maintain public confidence in the profession

running throughout the various heads of charge raised serious attitudinal or behavioural issues rather than issues of clinical competence.

- There was no evidence of a change in attitude or development of insight by the midwife throughout the process. The midwife had denied the allegations and challenged the evidence – the panel rejected her evidence as lacking credibility but the CCC appears to have accepted her

evidence at the later stage of the hearing without careful scrutiny.

- The series of courses undertaken by the midwife were of less significance than was reasoned by the CCC.
- The committee failed to make any reference to the public interest, or to the need to maintain public confidence in the profession, when considering impairment of fitness to practise and had lost sight of the fundamental public-interest requirements that must be factored in at this stage. The committee members should therefore have asked themselves not only whether the midwife continued to present a risk to members of the public, but whether the need to uphold proper professional standards and public confidence in the midwife and in the profession would be undermined if a finding of impairment of fitness to practise were not made in the circumstances of this case. This was especially so where a finding that her fitness to practise was not impaired would amount to a complete acquittal in the face of serious and persistent misconduct.

The High Court decision

In the judgement, a finding of impaired fitness to practise was substituted for 'no impairment', and the case was remitted to a differently constituted CCC.[1] The second CCC decided to remove the midwife's name from the NMC register, concluding that her conduct had been fundamentally incompatible with continued registration and that 'confidence in the profession and the NMC would be undermined if the registrant were not to be struck off'.[5]

Conclusion

The changing of the CCC's decision, thereby preventing the midwife from practising, demonstrates one way in which the PSA functions to protect the public. The PSA does not exist to interfere with the regulators' exercise of their functions, but is there to oversee their work. Out of the 4,285 fitness-to-practise decisions reviewed by the PSA in 2016, it may be that not every first-instance decision was the same as would have been reached by the PSA.[6] Indeed, every case is highly fact sensitive. But, as shown by this midwife's case, the PSA attempts to ensure that any erroneous decisions are overturned and the public is protected.

Acknowledgement

We are very grateful to colleagues at the PSA for their helpful comments on a draft of the manuscript.

References

1 Council for Healthcare Regulatory Excellence v Nursing and Midwifery Council and Paula Grant. EWHC 927 (Admin). 2011.
2 National Health Service Reform and Health Care Professions Act 2002.
3 PSA. Section 29 process and guidelines. London: PSA; June 2016.
4 Cohen v General Medical Council. EWHC 581 (Admin). 2008.
5 Conduct and Competence Committee. Appeal Case (Sanction), PIN 81/1453E [Internet]. London: NMC; 2011 [cited April 2017]. Available from: www.nmc.org.uk/globalassets/sitedocuments/ftpoutcomes/2011/october2011/reasons-grant-cccsh--20111010.pdf.
6 PSA. Review of professional regulation and registration with annual report and accounts 2016/2017. London: PSA; 2017.