Are pharma course applicants required to disclose criminal convictions? (HA v University of Wolverhampton)

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Local Government analysis: The case of HA v University of Wolverhampton looked at whether a university may lawfully ask an applicant to an accredited Master of Pharmacy degree course (MPharm) whether they have spent and unfiltered convictions, and whether the university can require them to undergo an enhanced criminal record check. Nicola Greaney, who was instructed by the intervenor, the General Pharmaceutical Council (GPhC), comments on the case.

HA v University of Wolverhampton [2018] EWHC 144 (Admin), [2018] All ER (D) 136 (Feb)

What are the practical implications of this case?

The case confirms that a university, that had been accredited by the GPhC to offer a course which is an essential first step on the road to qualification as a pharmacist, was entitled to ask candidates to disclose spent criminal convictions (other than those treated as protected under the legislation), and to undergo an enhanced criminal record check as part of the application process.

Generally, the position is that a person applying for a job or university course would be entitled to treat a question about criminal convictions as not applying to spent convictions (section 4 of the Rehabilitation of Offenders Act 1974 (ROA 1974)). In this situation, an exception applied (Article 3(1) of the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975, SI 1975/1023, and section 113B of the Police Act 1997, and regulations made under it with reference to the regime for enhanced criminal record certificates).

The judge held that the university was entitled in its own right to ask questions about spent convictions and was not acting on the basis of powers delegated by the GPhC, and was doing so to ascertain whether a prospective student was suitable to enter the pharmacy profession and/or to carry out specified work (regulated activity in relation to children or vulnerable adults). Plainly, however, the university was not deciding whether a particular student will enter the pharmacy profession—that decision being one for the GPhC at the conclusion of the completion by the student of the required academic and practical training stages.

The judge held that a university in these circumstances was acting as a ‘gatekeeper’ to the profession, to ensure it identifies at an early stage those who are likely not fit to practise as pharmacists and would not be likely, for that reason, be admitted to the Register if they were allowed to progress.

The judge also confirmed that the GPhC had the power to set entry requirements for the entry to education as a prospective pharmacist, which must include requirements as to criminal record checks so as to ensure patient safety. Pharmacy students have contact with patients from the first year of the course.

Further, the judge stated that a challenge to the disclosure regime as violating Article 8 of the European Convention on Human Rights (ECHR) could not be made in the abstract but on the particular facts of the case. In this case, there was plainly a rational connection between the claimant’s offending and his fitness to practise as a pharmacist, and the disclosure was in accordance with the law and necessary in a democratic society.

The case is of wider interest to those advising regulators, particularly in the healthcare sector. Healthcare regulators that operate a system of accreditation or approval of courses, leading to a qualification approved for the purpose of professional registration (and an essential step on the road to professional registration), are likely to be entitled to require institutions to ask prospective candidates to disclose unspent criminal convictions and to undergo enhanced Disclosure and Barring Service (DBS) checks. However, the statutory provisions are complex, and the basis of the exemption and the entitlement to ask for an enhanced DBS check would need to be considered with reference to an individual regulator and the course in question.

Although an Article 8 ECHR challenge to the required disclosure failed on the facts of this case (because the convictions were recent, for serious offences and there was a rational connection between the offences committed, patient safety and his fitness to practise as a pharmacist), an Article 8 challenge to a requirement to disclose spent criminal convictions might succeed on different facts in another case.

What was the background?

The claimant had applied for a place on the MPharm course at Wolverhampton University. As part of the application process he had to complete online forms which included a form that expressly stated that he was required to disclose convictions that would otherwise be treated as spent, because the course, like the profession of pharmacy, is exempt from ROA 1974.

The claimant did not disclose two offences of robbery and assault occasioning actual bodily harm which were committed when he was 14 years old. The claimant said he had not read the form properly at the time. His convictions came to light following an induction lecture. The claimant came before the fitness to practice suitability panel (FtPP) at the university. The panel found that the claimant had failed to meet the principles of the Student Code of Conduct for Pharmacy Students, and his fitness to practice was impaired and he was permanently excluded from the course. The decision was based on the failure to disclose, as well as the seriousness of the convictions.

He submitted an appeal, but the appeal was dismissed by the university's academic registrar. The claimant then commenced judicial review proceedings. After the grant of permission, the university made an open offer to settle the case by putting the case before a new FtPP which would not know of the claimant's failure to disclose the convictions. The offer was rejected because the claimant maintained that the university was not entitled to ask him about spent convictions.

What did the court decide?

The judge held that a university was entitled to ask a candidate applying for admission for a place on an MPharm course (accredited by the GPhC) to disclose spent criminal convictions (other than those treated as protected convictions), and to undergo an enhanced criminal record check as part of the application process.

The legislative regime did not require the university expressly to inform the person that information about spent convictions was required specifically by virtue of SI 1975/1023, and it was sufficient to say that the law required them to disclose spent convictions. The requirement to disclose spent convictions interfered with his right to private life under ECHR Article 8(1), but the interference was for a legitimate aim, in accordance with the law and necessary in a democratic society.

However, the decision to exclude the claimant from the course was quashed on the grounds that the decision on sanction was unlawful.

What guidance does this case give on proportionality of sanction in regulatory proceedings?

The judge decided that on the facts the panel had failed to consider the claimant's mitigation, which made the decision unlawful in *Wednesbury* terms. However, the judge also considered that failure infringed the principle of proportionality because the panel had not struck a fair balance between the protection of the public and the rights of the claimant by failing to identify relevant aggravating and mitigating factors and weigh them in a reasonable way.

He also found that the FtPP had erred by failing to consider the sanctions in ascending order of seriousness, as required by the GPHC's guidance on student fitness to practise procedures, and that such an approach was required by the principle of proportionality. He stated that this criticism would, probably, not have been enough on its own to quash the decision, but it supported his conclusion that the failure to consider mitigating features vitiated the decision.

I don't consider this case gives any general guidance on proportionality of sanction.

Interviewed by Anne Bruce.

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