Record of Determinations –
Medical Practitioners Tribunal

PUBLIC RECORD

Dates: 24/09/2018 - 02/10/2018

Medical Practitioner's name: Dr Amitabh DWIVEDI

GMC reference number: 4020211

Primary medical qualification: MB ChB 1993 University of Sheffield

Type of case
New - Misconduct

Outcome on impairment
Impaired

Summary of outcome
Suspension, 3 months.
Immediate order imposed

Tribunal:

Legally Qualified Chair	Ms Chitra Karve
Medical Tribunal Member:	Dr Nigel Langford
Medical Tribunal Member:	Dr Farhan Munawar

Tribunal Clerk:	Mr Stuart Peachey

Attendance and Representation:

Medical Practitioner:	Present and represented
Medical Practitioner's Representative:	Mr Marios Lambis, Counsel, instructed by Eastwoods Solicitors
GMC Representative:	Mr Charles Garside, QC

Attendance of Press / Public

In accordance with Rule 41 of the General Medical Council (Fitness to Practise) Rules 2004 the hearing was held in public.

Record of Determinations – Medical Practitioners Tribunal

Overarching Objective

Throughout the decision making process the tribunal has borne in mind the statutory overarching objective as set out in s1 Medical Act 1983 (the 1983 Act) to protect, promote and maintain the health, safety and well-being of the public, to promote and maintain public confidence in the medical profession, and to promote and maintain proper professional standards and conduct for members of that profession.

Determination on Facts - 28/09/2018

Background

1. Dr Dwivedi qualified MBChB in 1993 at the Sheffield University medical school.

2. Prior to the events that are the subject of this hearing, Dr Dwivedi commenced vocational training to practice as a General Practitioner ('GP') around 1999. He gained employment as a GP in May 2001 at the Ridge Green Medical Centre, which has a branch surgery, Freshbrook Surgery ('the Practice')

3. At the time of the events Dr Dwivedi was practising as a GP at the Practice and also undertook six clinical sessions per week at Ridge Green Medical Centre.

4. The Allegation that has led to Dr Dwivedi's hearing can be summarised as misconduct which has arisen from his treatment of Patients A and B and some sub-paragraphs of the Allegation that there were failings to carry out actions that were required for the treatment and care of the patients. It is also alleged that Dr Dwivedi's conduct in relation to when he saw Patient A at Ridge Green Medical Centre and at a home visit was sexually motivated.

The Outcome of an Application Made during the Facts Stage

5. The Tribunal granted Dr Dwivedi's application, made pursuant to Rule 17(2)(g) of the General Medical Council (Fitness to Practise Rules) 2004 as amended ('the Rules'). The Tribunal's full decision on the application is included at Annex A.

The Allegation and the Doctor's Response

6. The Allegation made against Dr Dwivedi is as follows:

Patient A

1. You prescribed Olanzapine to Patient A which was not clinically indicated on:

a. 1 July 2015; **To be determined**

b. 10 August 2015. **To be determined**

2. On 9 March 2016 you saw Patient A at Ridge Green Medical Centre and you:

   a. offered to make a home visit in order to perform an intimate examination when:

      i. a chaperone was not available for the visit; **To be determined**

      ii. you had not discussed the availability of a chaperone; **To be determined**

      iii. a home visit was not necessary in order to examine Patient A adequately; **To be determined**

      iv. you had not explained fully to Patient A what would be involved in the examination or why it was necessary; **To be determined**

   b. initiated a hug with Patient A in the surgery which was inappropriate in that Patient A did not initiate it. **To be determined**

3. On 9 March 2016 you attended Patient A at her home and you:

   a. helped Patient A to remove her underwear which was inappropriate in that she had not asked for any assistance in removing her clothing; **To be determined**

   b. carried out a vaginal examination, which was:

      i. not clinically indicated; **To be determined**

      ii. excessively long. **To be determined**

   c. failed to:

      i. wear gloves during the examination at paragraph 3b above; **Admitted and Found Proved**

      ii. offer a chaperone; **To be determined**

iii. record the offer of a chaperone and/or any response from Patient A. **Admitted and Found Proved**

d. gave Patient A a hug in her bedroom when:

i. patient A was not fully clothed; **To be determined**

ii. no chaperone was present; **To be determined**

iii. patient A did not initiate the hug. **To be determined**

Patient B

4. On 26 November 2013 you carried out a vaginal examination on Patient B and you failed to:

a. obtain Patient B's consent; **To be determined**

b. record whether Patient B had consented; **Admitted and Found Proved**

c. offer a chaperone; **To be determined**

d. record whether a chaperone was offered. **Admitted and Found Proved**

5. You carried out intimate examinations on Patient B on:

a. 14 April 2014; **Admitted and Found Proved**

b. 28 November 2014; **Admitted and Found Proved**

c. 6 May 2015. **Admitted and Found Proved**

6. On each of the occasions at paragraph 5 above you failed to:

a. offer a chaperone; **To be determined**

b. record whether a chaperone was offered. **Admitted and Found Proved**

7. Your conduct in paragraphs 2-3 was sexually motivated. **To be determined**

The Admitted Facts

7. At the outset of these proceedings, through his Counsel, Mr Marios Lambis, Dr Dwivedi made admissions to some paragraphs and sub-paragraphs of the Allegation, as set out above, in accordance with Rule 17(2)(d) of the General Medical Council (GMC) (Fitness to Practise) Rules 2004, as amended ('the Rules'). In accordance with Rule 17(2)(e) of the Rules, the Tribunal announced these paragraphs and sub-paragraphs of the Allegation as admitted and found proved.

Factual Witness Evidence

8. The Tribunal received evidence on behalf of the GMC from Patient A, in person and in her witness statement, dated 23 August 2017.

9. Dr Dwivedi provided his own witness statement (which referred to Patient A), dated 19 September 2018, and a supplementary witness statement (which referred to Patient B), dated 9 August 2018. Dr Dwivedi also gave oral evidence on day two of the hearing.

Expert Witness Evidence

10. The Tribunal also received evidence from two expert witnesses:

Dr E, instructed by the GMC:

- Oral Evidence; and
- Expert report, dated 19 September 2018 (Patient A and B).

Dr F, on behalf of Dr Dwivedi:

- Oral Evidence; and
- Expert reports, dated 28 August 2018 (Patient B), and 19 September 2018 (Patient A).

The Tribunal had regard to a joint expert report between Dr E and Dr F, dated 19 September 2018.

11. Dr E and Dr F's evidence primarily consisted of assisting the Tribunal in understanding the professional standards to be expected of a reasonably competent General Practitioner.

Documentary Evidence

12. The Tribunal had regard to the documentary evidence provided by the parties. This evidence included, but was not limited to:

- Medical Records of Patients A and B;
- Transcript of Police Interview with Patient A, dated 9 March 2016, and Dr Dwivedi of the same date;
- GMC Guidance:
    - *'Consent: patients and doctors making decisions together'*, 2 June 2008;
    - *'Intimate examinations and chaperones'*, 22 April 2013.
- Various testimonials submitted on behalf of Dr Dwivedi from colleagues, patients and friends.

The Tribunal's Approach

13. In reaching its decision on facts, the Tribunal has borne in mind that the burden of proof rests on the GMC and it is for the GMC to prove the Allegation. Dr Dwivedi does not need to prove anything. The standard of proof is that applicable to civil proceedings, namely the balance of probabilities, i.e. whether it is more likely than not that the events occurred.

14. The Tribunal has considered all the evidence, both oral and documentary, together with the submissions made by Mr Charles Garside QC, on behalf of the GMC and those of Mr Marios Lambis, on Dr Dwivedi's behalf.

The Tribunal's Analysis of the Evidence and Findings

Obligation and/or Duty

15. When considering whether Dr Dwivedi had failed in a particular obligation and/or duty, the Tribunal looked first for actions or responsibilities which were mandated as opposed to optional (even if good practice). Thus, the Tribunal had particular regard to the guidance in the publications Good Medical Practice (2013 edition)('GMP'), *Consent: patients and doctors making decisions together* and *Intimate examinations and chaperones*, in making its decision as to whether Dr Dwivedi had an obligation and/or duty during his examination of Patient A.

Findings

16. The Tribunal has considered each paragraph of the Allegation separately and has evaluated the evidence in order to make its findings on the facts.

Paragraph 1(a) and (b) of the Allegation

17. The Tribunal had regard to the Medical Records which state that Dr Dwivedi had an appointment with Patient A on 1 July 2015. The Medical Records indicate a list of various medications that had been prescribed prior to the prescription for Olanzapine. Patient A had been reviewed by Dr Dwivedi on 10 August 2015. The Medical Records indicate that Patient A was feeling better.

18. In Dr F's Expert Report, he stated that a responsible body of GPs could reasonably prescribe Olanzapine. Dr E acknowledged this opinion stating that *'the guidance in the BNF states that in the short term this drug can be used for severe anxiety…'*. In the joint Expert Report, Dr F qualified his opinion that *'due to the complex emotional and psychiatric history and the fact that many previous agents used were ineffective, it was consistent with the guidance in the BNF that this antipsychotic medication could be used in the short term for severe anxiety'*. This perspective was confirmed by the experts in cross-examination.

19. The Tribunal accepted both Experts evidence that, given Patient A's diagnoses that Olanzapine was potential a clinical option. The Tribunal therefore concluded that there was potentially a clinical indication for the use of Olanzapine.

20. Therefore, the Tribunal found Paragraph 1(a) and (b) of the Allegation, not proved.

Paragraph 2 of the Allegation

21. The Tribunal had regard to the following guidance when assessing the evidence in Paragraph 2 of the Allegation:

> `*Intimate examinations and chaperones:*
>
> *5. Before conducting an intimate examination, you should:*
>
> *a. explain to the patient why an examination is necessary and give the patient an opportunity to ask questions*
>
> *b. explain what the examination will involve, in a way the patient can understand, so that the patient has a clear idea of what to expect, including any pain or discomfort*
>
> *c. get the patient's permission before the examination and record that the patient has given it*
>
> *d. offer the patient a chaperone*

…

f. give the patient privacy to undress and dress, and keep them covered as much as possible to maintain their dignity; do not help the patient to remove clothing unless they have asked you to, or you have checked with them that they want you to help.'

Paragraph 2(a)(i) of the Allegation

22. In his witness statement, Dr Dwivedi stated that a chaperone was not available. This was expanded upon in his oral evidence, where he told the Tribunal that in hindsight; he should have offered a chaperone, and apologised for not doing so. Further, he stated that he *'intended to have a chaperone there but there wasn't one'*.

23. The Tribunal accepted Dr Dwivedi's own admission. Based on the evidence before it, the Tribunal concluded that on the balance of probabilities that Dr Dwivedi offered to make a home visit in order to perform an intimate examination when a chaperone was not available for the visit.

24. Therefore, the Tribunal found Paragraph 2(a)(i) of the Allegation, proved.

Paragraph 2(a)(ii) of the Allegation

25. The Tribunal had regard to the Medical Records where there is no evidence that Dr Dwivedi discussed the availability of a chaperone with Patient A.

26. In her witness statement, Patient A stated that Dr Dwivedi did not ask her if she wanted a chaperone.

27. In his witness statement, Dr Dwivedi stated that he has no specific recollection of having a discussion with Patient A about the availability of a chaperone.

28. The Tribunal accepted Patient A's account, the lack of evidence in the Medical Records about any chaperone, and Dr Dwivedi's evidence; and found that, on the balance of probabilities Dr Dwivedi had not discussed the availability of a chaperone with Patient A.

29. Therefore, the Tribunal found Paragraph 2(a)(ii) of the Allegation, proved.

Paragraph 2(a)(iii) of the Allegation

30. With regard to this Allegation, the Tribunal considered the construction of the sub-paragraph, focussing on the word *'necessary'*.

31. In Dr Dwivedi's oral evidence, he accepted that he could see some people might consider a home visit was not necessary.

32. In Dr F's Expert Report, the Tribunal noted his opinion that undertaking a home visit was an alternative way in which the examination could be performed. However, in Dr E's expert report, her opinion that it was unnecessary for the intimate examination to be undertaken at Patient A's home as there were other more suitable alternatives available to perform the intimate examination. She was of the view that Dr Dwivedi should have rebooked the appointment. However, in her oral evidence, Dr E modified her approach and commented that *'I would not do it but others may'*.

33. The Tribunal accepted that home visits would be offered and deemed appropriate for some patients despite it not being necessary. It has seen no evidence that could persuade it that it was absolutely necessary to have a home visit to examine Patient A. The Tribunal accepted that it was a clinical judgement for Dr Dwivedi.

34. Based on the evidence before it, the Tribunal found on the balance of probabilities that a home visit was not a necessity in order to examine Patient A adequately.

35. Therefore, the Tribunal found Paragraph 2(a)(iii) of the Allegation, proved.

Paragraph 2(a)(iv) of the Allegation

36. In her witness statement, Patient A explained that she knew she was having an internal examination like she had had before. In her oral evidence, she told the Tribunal that there was a discussion; and Dr Dwivedi was going to carry out an internal examination.

37. In his witness statement, Dr Dwivedi states that he explained in detail the options available and Patient A requested that he conduct a thorough search for the cause of pain. In Dr Dwivedi's oral evidence, he told the Tribunal that when he had discussed with Patient A what was going to happen in the examination he had said that he was going to be searching for the pain and investigate it.

38. In their joint Expert Report, Dr E and Dr F both noted that *'both the records and Patient A's witness statement indicate that she was aware that an internal examination would take place during the visit'*.

39. Based on the evidence before it, the Tribunal accepted both Patient A's and Dr Dwivedi's account of the events and found on the balance of probabilities, he had explained fully to Patient A that she required a vaginal examination and why it was necessary.

40. Therefore, the Tribunal found Paragraph 2(a)(iv) of the Allegation, not proved.

Paragraph 2(b) of the Allegation

41. In her witness statement, Patient A stated that she appreciated the hug and that he was *'just being nice, it was friendly'*. In Patient A's oral evidence, she told the Tribunal that she thought Dr Dwivedi's hug was *'sweet'* and that he was trying to give her emotional support when she was crying. Further, she told the Tribunal that the hug happened quickly, lasting only a few seconds.

42. In their joint Expert Report, Dr E and Dr F both agree that *'if the hug was as described by Patient A as only lasting for a couple of seconds and 'more of a friendly it will be ok kind of a hug' then this would be appropriate'*.

43. Based on the evidence before it, the Tribunal found on the balance of probabilities, that Dr Dwivedi initiated a hug with Patient A. However, the Tribunal considered that his actions were not inappropriate given that Patient A was of the view that Dr Dwivedi was offering support in what was a difficult consultation.

44. Therefore, the Tribunal found Paragraph 2(b) of the Allegation, not proved.

Paragraph 3(a) of the Allegation

45. In her witness statement, Patient A states that she had underwear on when Dr Dwivedi started examining her pressure points. In her oral evidence, she told the Tribunal that Dr Dwivedi first carried out an examination when she had her underwear on, this included examining her hips and knees. In order to continue his examination, Dr Dwivedi asked her to remove her underwear. She started to remove them, but was in a lot of pain, and struggled to sit up. She stated in her police interview shortly after the incident happened, Dr Dwivedi offered to remove her underwear.

46. In her oral evidence, Patient A stated that she was thinking that she was alone and something *'wasn't right'*. She admitted that moving was awkward and it was difficult to get up and take her underwear off due to the pain she was feeling.

47. In his oral evidence, Dr Dwivedi told the Tribunal that Patient A's underwear was around her knees at the time when he offered to help her. He assisted in taking them off.

48. In their joint Expert Report, Dr E and Dr F both agree that *'the removal of the underwear as described in Dr Dwivedi's witness statement would be appropriate provided he asked Patient A's permission'*.

49. The Tribunal considered that it is an agreed fact that Dr Dwivedi helped Patient A remove her underwear. It has seen no evidence that she had asked specifically for any assistance in the removing of her clothing. However, the Tribunal considered that it was not inappropriate in that Patient A was struggling to remove her underwear and admitted that she was in pain. Further, the Tribunal noted that both Patient A and Dr Dwivedi in their written evidence state that Dr Dwivedi offered to assist prior to his actions. The Tribunal accepted Dr Dwivedi's account that by the time he helped Patient A, her underwear was around her knees.

50. Based on the evidence before it, the Tribunal found on the balance of probabilities that Dr Dwivedi's actions in helping Patient A remove her underwear was not inappropriate, given the circumstances in which it was done.

51. Therefore, the Tribunal found Paragraph 3(a) of the Allegation, not proved.

Paragraph 3 of the Allegation

52. The Tribunal considered that the vaginal examination referred to includes both times that Dr Dwivedi had palpated Patient A's perineum and genitalia at her home.

Paragraph 3(b)(i) of the Allegation

53. The Tribunal noted from the Police interview Transcript of both Patient A and Dr Dwivedi, that Dr Dwivedi examined Patient A's perineum on two separate occasions. With regard for the need to carry out a vaginal examination, Dr E in her oral evidence made it clear that Patient A had enough symptoms for Dr Dwivedi to have carried out the examination.

54. Following the initial examination, Dr Dwivedi had a further discussion with Patient A. Both Patient A and Dr Dwivedi's witness statements indicate a discussion was had with respect of the need for further therapy, prior to Dr Dwivedi making a further examination of Patient A's perineum and genitalia.

55. The Tribunal noted in their Expert Report, Dr E and Dr F both declared that they do not have any experience or expertise in *'myofascial pelvic pain and vaginal examination'* but that they have considerable experience in diagnosing and treating

patients with *'fibromyalgia'*. Further, it noted their declaration that they are both experienced in the *'identification of trigger points'*.

56. Both Dr E and Dr F stated that if the Tribunal accepts Dr Dwivedi's witness statement, the examination may have been appropriate. However, if the Tribunal was to accept Patient A's witness statement, both experts agree that examination as described in Dr Dwivedi's witness statement, was not clinically indicated.

57. Based on the evidence before it, the Tribunal accepted Dr Dwivedi's evidence that there were enough symptoms for the examination to have been clinically indicated both times.

58. Therefore, the Tribunal found Paragraph 3(b)(i) of the Allegation, not proved.

Paragraph 3(b)(ii) of the Allegation

59. In her witness statement, Patient A stated that Dr Dwivedi was applying pressure for a few seconds. In the police transcript, Patient A stated that he *'held it there for about 40 seconds'*. In oral evidence, Patient A stated that Dr Dwivedi had pressed for 10 to 20 seconds in 2 to 3 areas.

60. In his oral evidence, Dr Dwivedi told the Tribunal that he would have spent several minutes on all the areas. He said that the examination would have taken 1 or 2 minutes in the perineal area having applied pressure to trigger points for 30 seconds.

61. In Dr F's Expert Report, he stated that a vaginal examination lasting over 5 minutes would be considered to be excessively long.

62. In their joint Expert Report, Dr E and Dr F both agree that *'there is nothing in the statement of Patient A to indicate the length of time spent performing the vaginal examination'* and therefore could not comment on whether it was excessively long.

63. Based on the evidence before it, the Tribunal noted that there was no evidence that the vaginal examination was in excess of 5 minutes. Given Dr Dwivedi and Patient A's account of the events, the Tribunal concluded on the balance of probabilities that the vaginal examination undertaken by Dr Dwivedi was not excessively long.

64. Therefore, the Tribunal found Paragraph 3(b)(ii) of the Allegation, not proved.

Paragraph 3(c)(ii) of the Allegation

65. In his oral evidence, Dr Dwivedi told the Tribunal that his usual practice is to use a chaperone and that he intended to use one but that it *'slipped his mind'*.

66. In her oral evidence, Patient A told the Tribunal that she was never asked about a chaperone at any point.

67. In their joint Expert Report, Dr E and Dr F both agree that *'failing to offer a chaperone would be seriously below the standard expected if not done'*.

68. In relation to Dr Dwivedi's obligation and/or duty to offer a chaperone to Patient A, the Tribunal noted paragraph 17 of Good Medical Practice (2013 edition)('GMP') and paragraphs 5(d) and 8 of *intimate examinations and chaperones guidance*, which it considered engaged in this case. They state:

> GMP
>
> **17** *'You must be satisfied that you have consent or other valid authority before you carry out any examination or investigation, provide treatment or involve patients or volunteers in teaching or research.'*
>
> Intimate examinations and chaperones guidance
>
> *5. Before conducting an intimate examination, you should:*
>
> *…*
>
> *d. offer the patient a chaperone*
>
> *…*
>
> *8. When you carry out an intimate examination, you should offer the patient the option of having an impartial observer (a chaperone) present wherever possible. This applies whether or not you are the same gender as the patient.'*

69. Based on the evidence before it, the Tribunal found that Dr Dwivedi had a duty to offer a chaperone and had failed to do so. This breached the standards outlined above.

70. Therefore, the Tribunal found Paragraph 3(c)(ii) of the Allegation, proved.

Paragraph 3(d) of the Allegation

71. The Tribunal first considered whether a hug took place.

72. In her oral evidence, Patient A told the Tribunal that after the second examination, she sat up, Dr Dwivedi sat next to her and they discussed pressure point triggers and further treatment. She then stated that Dr Dwivedi said *'every time I see you I feel like you need a hug'*. Patient A told the Tribunal that Dr Dwivedi hugged her for longer than the hug at the Ridge Green Medical Centre and that she was very aware that she had no underwear on. She told the Tribunal that she then stood up and Dr Dwivedi stated that he needed to wash his hands. She told Dr Dwivedi to go to the downstairs washroom. Patient A said that she did not feel comfortable with Dr Dwivedi there.

73. Dr Dwivedi in his written and oral evidence, denied that he gave Patient A a hug at her home.

74. The Tribunal considered that Dr Dwivedi is referred to by Patient A as a very kind and caring doctor who is *'sympathetic'*. It considered that, given Dr Dwivedi's previous behaviour at Ridge Green Medical Centre, it was likely that he had done something physical to reassure his patient. On the balance of probabilities, the Tribunal found that Dr Dwivedi gave Patient A a hug at her home.

Paragraph 3(d)(i) of the Allegation

75. In her oral evidence, Patient A indicated that this hug took place immediately after the second examination when they were sitting on the bed. She stated that she pulled down her nightie as she felt uncomfortable without her underwear on. Patient A also stated she had on her dressing gown. The Tribunal accepted that *'fully clothed'* in these circumstances would include wearing underwear.

76. Given the Tribunal's finding at Paragraph 3(a) of the Allegation, Dr Dwivedi would have known that Patient A was not fully clothed as he had helped to remove her underwear.

77. In these circumstances, the Tribunal found on the balance of probabilities that Dr Dwivedi gave Patient A a hug when she was not fully clothed.

78. Therefore, the Tribunal found Paragraph 3(d)(i) of the Allegation, proved.

Paragraph 3(d)(ii) of the Allegation

79. Given the Tribunal's findings at Paragraph 3(c)(ii) of the Allegation that there was no chaperone present when Dr Dwivedi attended Patient A's home, the Tribunal found Paragraph 3(d)(ii) of the Allegation, proved.

Paragraph 3(d)(iii) of the Allegation

80. In their joint Expert Report, Dr E and Dr F both agree that *'whether or not Patient A initiated the hug is irrelevant and it would be inappropriate even if she did'*.

81. Given the Tribunal's findings at Paragraph 74 of this determination above, it accepted that Dr Dwivedi initiated a hug in the Ridge Green Medical Centre and at her home.

82. Therefore, the Tribunal found Paragraph 3(b)(iii) of the Allegation, proved.

Paragraph 7 of the Allegation

83. In relation to sexual motivation, the Tribunal took into consideration not just the facts found, but the inferences that could be drawn from these facts. It also took into consideration the submissions of both Mr Garside QC and Mr Lambis.

84. Mr Garside QC submitted that sexual motivation may not be the sole motivation and that the Tribunal should bear in mind modern learning about sexual offences that were often about power as opposed to just lust. He asked what other motivation there might be for not washing hands, not wearing gloves, and he submitted that the motivation was in part, sexual. Mr Garside QC had earlier also suggested to Dr Dwivedi that he was using Patient A as an experimental object in relation to trigger point therapy. He also indicated that the Tribunal could rely on Patient A's testimonial in this respect.

85. Mr Lambis's submissions were that the mere fact that Dr Dwivedi had admitted not wearing gloves during intimate examination went to his credibility. He further referred to the testimonial evidence provided for Dr Dwivedi in this case and pointed the Tribunal to the statements of shock many of his colleagues and patients felt when they had heard of the Allegation against Dr Dwivedi.

86. The Legally Qualified Chair, having given directions as to good character then accepted Mr Lambis's provision of directions on sexual motivation. This required a two stage test firstly whether, by its nature, the conduct might be sexual and only if that was found to be the case would a Tribunal then look at the circumstances of the case in order to decide if Dr Dwivedi's motivation for the conduct was in fact sexual. The first is an objective test and the second is a subjective one for the Tribunal.

87. In the Tribunal's view, the objective test is met. The circumstances of a home visit involving an intimate examination without a chaperone, and without gloves could be found by its nature to be sexual.

88. With regard to consideration to the subjective test, the Tribunal took the circumstances of the case into account. In relation to the home visit, Dr Dwivedi explained his reasons for this which was to see the patient in her own home where she would be more comfortable without having to take off and put on her clothes. Patient A also indicated that she had been in excruciating pain and just taking off her coat earlier in the surgery had been a struggle.

89. Dr Dwivedi also explained that his intention at the home visit was to carry out an examination of pathology and her pain in order to assess what treatment might be suitable, and he had in mind trigger point therapy. Patient A's explanations for his reason to examine her were similar.

90. The Tribunal noted that, taking Patient A's account, Dr Dwivedi did what he said he intended to do. He examined various trigger points on her body including her hips knees and back, before moving to the perineal and genital area. Patient A had earlier indicated that that was where she was feeling new excruciating pain. Dr Dwivedi examined these areas.

91. Dr Dwivedi told the Tribunal that having found what he assessed was the trigger point – the entrance to the vagina, he then explained to Patient A that he intended to apply pressure to these parts. Patient A corroborates that this is what Dr Dwivedi did. During the procedure she suffered intense pain and told him to stop. She stated that he stopped after which they discussed further treatment options sitting side by side on the bed. He then hugged her, went downstairs to wash his hands and left.

92. The Tribunal noted in their own reading of written evidence, that Patient A *'felt violated'* and *'felt he took advantage of me being vulnerable'*. In her oral evidence, Patient A stated that she felt *'awkward'*, *'uncomfortable'* and she was very aware that Dr Dwivedi had not washed his hands. She also stated that she was very aware that she did not have her underwear on and that it *'felt wrong'*. When asked about Dr Dwivedi's demeanour, Patient A replied that he seemed overly caring with the hug and sitting next to her on the bed. She also recalled a discussion about whether she massaged her clitoris in order to release endorphins to which she had replied *'no'*. The Tribunal asked her if he had massaged her clitoris and she replied *'no'*.

93. When Dr Dwivedi was asked by both Mr Garside QC and Mr Lambis why he had not worn gloves, he replied that he had been distracted by her medical condition. While the fact that he did not wear gloves troubled the Tribunal, it could not find a sufficient link between not wearing gloves and sexual motivation.

94. In balancing the facts of the case, the Tribunal considered that the vaginal examination was an appropriate action. According to expert evidence, the optimal place for this to have taken place was on the bed. The length of time it took to

perform was not excessively long. Further the Tribunal noted that Dr Dwivedi stopped when Patient A asked. Following the examination Dr Dwivedi discussed further treatment options before leaving. In oral evidence, Dr Dwivedi was apologetic and accepted his errors, in particular in relation to not having a chaperone and not wearing gloves. He told the Tribunal that he was distracted by his intention to treat a complex case. In her oral evidence, Patient A stated Dr Dwivedi was caring; this caring approach is corroborated by the testimonial evidence. Patient A later went on to state that she felt the second hug was overly caring.

95. Taking all these circumstances into account, the Tribunal is unable to draw an inference that there was a sexual motivation. It accepted that, as Mr Lambis put it, something went very wrong during this home visit. The Tribunal could not reasonably infer from all the circumstances of the incident including Patient A's stated feelings of awkwardness and wrongness in her evidence, that Dr Dwivedi's motivation was sexual.

96. Therefore, the Tribunal found Paragraph 7 of the Allegation, not proved.

The Tribunal's Overall Determination on the Facts

Patient A

1. You prescribed Olanzapine to Patient A which was not clinically indicated on:

    a. 1 July 2015; **Not proved**

    b. 10 August 2015. **Not proved**

2. On 9 March 2016 you saw Patient A at Ridge Green Medical Centre and you:

    a. offered to make a home visit in order to perform an intimate examination when:

        i. a chaperone was not available for the visit; **Found Proved**

        ii. you had not discussed the availability of a chaperone; **Found Proved**

        iii. a home visit was not necessary in order to examine Patient A adequately; **Found Proved**

iv. you had not explained fully to Patient A what would be involved in the examination or why it was necessary; **Not Proved**

b. initiated a hug with Patient A in the surgery which was inappropriate in that Patient A did not initiate it. **Not Proved**

3. On 9 March 2016 you attended Patient A at her home and you:

a. helped Patient A to remove her underwear which was inappropriate in that she had not asked for any assistance in removing her clothing; **Not Proved**

b. carried out a vaginal examination, which was:

i. not clinically indicated; **Not Proved**

ii. excessively long. **Not Proved**

c. failed to:

i. wear gloves during the examination at paragraph 3b above; **Admitted and Found Proved**

ii. offer a chaperone; **Found Proved**

iii. record the offer of a chaperone and/or any response from Patient A. **Admitted and Found Proved**

d. gave Patient A a hug in her bedroom when:

i. patient A was not fully clothed; **Found Proved**

ii. no chaperone was present; **Found Proved**

iii. patient A did not initiate the hug. **Found Proved**

Patient B

4. On 26 November 2013 you carried out a vaginal examination on Patient B and you failed to:

a. ~~**obtain Patient B's consent;**~~ **Deleted after a successful Rule 17(2)(g) application**.

b. record whether Patient B had consented; **Admitted and Found Proved**

c. ~~**offer a chaperone;**~~ **Deleted after a successful Rule 17(2)(g) application.**

d. record whether a chaperone was offered. **Admitted and Found Proved**

5. You carried out intimate examinations on Patient B on:

a. 14 April 2014; **Admitted and Found Proved**

b. 28 November 2014; **Admitted and Found Proved**

c. 6 May 2015. **Admitted and Found Proved**

6. On each of the occasions at paragraph 5 above you failed to:

a. ~~**offer a chaperone;**~~ **Deleted after a successful Rule 17(2)(g) application.**

b. record whether a chaperone was offered. **Admitted and Found Proved**

7. Your conduct in paragraphs 2-3 was sexually motivated. **Not Proved**

Determination on Impairment - 02/10/2018

1. Having given its determination on the Facts in this case, in accordance with Rule 17(2)(l) of the Rules, the Tribunal has considered whether, on the basis of the facts which it has found proved, Dr Dwivedi's fitness to practise is impaired by reason of misconduct.

The Evidence

2. In considering whether or not Dr Dwivedi's fitness to practise is impaired, the Tribunal carefully considered all the documentary and oral evidence adduced during the course of these proceedings.

3. The Tribunal had regard to a bundle submitted on Dr Dwivedi's behalf. This bundle enclosed evidence of Continuing Professional Development ('CPD') and some reflective material relating to courses that he has attended.

Submissions

Submissions on behalf of the GMC

4. Mr Garside QC submitted that Dr Dwivedi's fitness to practise is currently impaired by reason of his misconduct, and that all three limbs of the overarching objective are engaged in this case.

5. Mr Garside QC submitted the following in relation to the sub-paragraphs of the Allegation:

Paragraphs 2(a)(i) and (ii) of the Allegation

Dr Dwivedi's conduct was seriously below the standards to be expected of a reasonably competent GP according to Dr F's evidence.

Paragraph 2(a)(iii) of the Allegation

Mr Garside QC acknowledged that this Allegation, although found proved, had been qualified by the Tribunal and he accepted that this sub-paragraph on its own does not constitute misconduct.

Paragraphs 3(c)(i) and (ii) of the Allegation

Mr Garside QC submitted that Dr Dwivedi's actions in relation to these sub-paragraphs of the Allegation were seriously below the standard of conduct expected of a reasonably competent GP.

Paragraph 3(c)(iii) of the Allegation

Mr Garside QC accepted that if the offer of a chaperone was not made there could not have been any response. However, he submitted that the failure to make the offer should have been recorded and the reasons for that failure should have been recorded. Mr Garside QC submitted that Dr Dwivedi's failure to record the offer of a chaperone and/or any response from Patient A was below the standards expected of a reasonably competent GP, but not seriously below.

Paragraphs 3(d)(i), (ii) and (iii) of the Allegation

Mr Garside QC submitted that whilst Dr F did not deal with these sub-paragraphs of the Allegation explicitly, Dwivedi's actions were indicative of behaviour seriously below the standards expected of a reasonably competent GP.

Paragraphs 4(b) and (d) of the Allegation

Mr Garside QC submitted that Dr E and Dr F suggest that Dr Dwivedi's failures were below the standards expected of a reasonably competent GP, but was not seriously below.

Paragraphs 5(a), (b), (c) and 6(b) of the Allegations

Mr Garside QC submitted that there is no record of Dr Dwivedi offering a chaperone to Patient B.

6. Mr Garside QC submitted that in the opinion of Dr F and in light of the facts as the Tribunal has found them; Dr Dwivedi's actions amounted to serious misconduct.

7. Mr Garside QC submitted that the effect Dr Dwivedi had on Patient A was dramatic and should be taken into account, given the Facts found proved and Patient A's immediate complaint to the police after the examination in that she stated that it *'did not feel right to her'*.

Submissions on behalf of Dr Dwivedi

8. Mr Lambis submitted that Dr Dwivedi's fitness to practise is not currently impaired by reason of his misconduct.

9. Mr Lambis did not seek to address the Tribunal on the matter of whether Dr Dwivedi's actions amounted to misconduct and submitted that it is a matter for the Tribunal to consider.

10. Mr Lambis directed the Tribunal's attention to *PSA v NMC (SM) [2017] CSIH 29 (Scottish Case)* and the case of *Zygmunt v GMC [2008] EWHC 2643 (Admin)*. He submitted that as in the case of *Zygmunt v GMC* this was a situation where there was a single error on the part of the practitioner where the chance of it being repeated was low. In relation to *PSA v NMC (SM)* he submitted that just going through a rigorous regulatory process with a finding of misconduct would be sufficient in this case. He submitted that the public interest would be satisfied in a finding of misconduct in Dr Dwivedi's case.

11. Mr Lambis submitted that Dr Dwivedi's remediation bundle demonstrated that he has tried to correct what took place during the events outlined in the Allegation against him. He submitted that Dr Dwivedi had made a mistake and when it had been brought to his attention, he had made several admissions and sought to correct his mistakes. Further, Mr Lambis submitted that the evidence before the Tribunal shows that Dr Dwivedi is a caring doctor who was dealing with difficult patients. In light of this, Mr Lambis submitted that a finding of misconduct would be sufficient.

The Relevant Legal Principles

12. The Legally Qualified Chair reminded the Tribunal that at this stage of proceedings, there is no formal burden or standard of proof and the decision on impairment is a matter for the Tribunal's judgment alone.

13. In approaching its decision, the Tribunal was mindful of the two stage process to be adopted: first whether the Facts as found proved amount to misconduct which is sufficiently serious to call the doctor's fitness to practise into question. If so, it must then consider whether the doctor's fitness to practise is currently impaired by reason of such misconduct.

14. The Tribunal has been mindful of the overarching statutory objective of the GMC set out in Sections 1A and 1B of the Medical Act 1983 (as amended) to protect the public, by pursuing the following objectives:

a. Protect, promote and maintain the health, safety and well-being of the public,

b. Promote and maintain public confidence in the medical profession, and

c. Promote and maintain proper professional standards and conduct for members of that profession.

15. Whilst there is no statutory definition of impairment, the Tribunal is assisted by the guidance set down by Dame Janet Smith in the Fifth Shipman Report as endorsed and adopted as the approach in *CHRE v NMC and Paula Grant [2011] EWHC 927 QBD (Admin)*. This recognises that as part of the process in determining whether a doctor is fit to practise today it must take account of past actions or failures to act. In particular, relevant considerations as to whether Dr Dwivedi's Fitness to Practise is impaired and whether he:

a. 'Has in the past acted and/or is liable in the future to act so as to put a patient or patients at unwarranted risk of harm; and/or

b. Has in the past or is liable in the future to bring the medical profession into disrepute; and/or

c. Has in the past breached or is liable to breach in the future one of the fundamental tenets of the medical profession; and/or

d. Has in the past acted dishonestly and/or is liable to act dishonestly in the future.'

16. The Tribunal was also guided by the cases of:

- *Calhaem [2007] EWHC 2606 (Admin);*
- *Zygmunt v GMC [2008] EWHC 2643 (Admin); and*
- *Roylance v GMC (No.2)[2000] 1 AC 311.*

17. The Tribunal must determine whether Dr Dwivedi's fitness to practise is currently impaired by reason of misconduct, taking into account his conduct at the time of the events and any relevant factors such as whether the matters are remediable, have been remedied, any development of insight and the likelihood of repetition.

The Tribunal's Determination

18. In considering the question of impairment, the Tribunal has taken account of all of the evidence, and the submissions of Mr Garside QC, on behalf of the GMC and those of Mr Lambis, on Dr Dwivedi's behalf.

Misconduct

19. In determining whether Dr Dwivedi's fitness to practise is currently impaired by reason of misconduct, the Tribunal first of all considered whether the Facts found proved amount to professional misconduct by reference to the rules and standards ordinarily required to be followed by a medical practitioner. It went on to consider whether that misconduct constituted a serious departure from those standards and is therefore misconduct likely to impair Dr Dwivedi's fitness to practise.

20. The Tribunal considered that GMP sets out the standard that a doctor must meet and continue to meet, throughout their professional career. It had regard to the GMC guidance *'Intimate examinations and chaperones'* and paragraphs 17, 19 and 21(b) and (c) of GMP, that states:

17 *'You must be satisfied that you have consent or other valid authority before you carry out any examination or investigation, provide treatment or involve patients or volunteers in teaching or research.'*

> **19** *'Documents you make (including clinical records) to formally record your work must be clear, accurate and legible. You should make records at the same time as the events you are recording or as soon as possible afterwards.'*
>
> **21(b)(c)** `*Clinical records should include:*
>
> *…*
>
> *b. the decisions made and actions agreed, and who is making the decisions and agreeing the actions*
>
> *c. the information given to patients…'*

21. Although the Tribunal considered the Allegation in the sub-paragraphs in turn against Dr Dwivedi, it had regard to the whole conduct from the time in the surgery until when he left Patient A's home 9 March 2016.

22. Turning to the matters found proved in the Allegation, it concludes as follows:

Paragraph 2(a)(i), (ii); 3(c)(ii), (iii); and 3(d)(ii) of the Allegation

23. The Tribunal considered the need to offer a chaperone. It noted the joint Expert Report that stated that in their opinion Dr Dwivedi by not offering a chaperone fell seriously below the standards expected of a reasonably competent GP.

24. The Tribunal considered that in particular, b and c of the overarching objective are engaged in these sub-paragraphs of the Allegation. It noted that Patient A felt uncomfortable in being examined without a chaperone present. The Tribunal was of the view that Dr Dwivedi had a duty of care to have a chaperone available and for him to discuss the availability of one with Patient A.

25. The Tribunal determined that Dr Dwivedi's conduct is a serious breach of the fundamental tenets of the profession and his actions fall far short of the standards expected of medical practitioner.

26. The Tribunal determined that Dr Dwivedi's actions in Paragraphs 2(a)(i) and (i); 3(c)(ii), (iii); and 3(d)(ii) of the Allegation amounted to misconduct which was serious.

Paragraph 2(a)(iii) of the Allegation

27. Whilst the Tribunal found proved that the home visit was not necessary, it accepted the joint Expert Report by Dr E and Dr F that it was one of the options available to a practitioner.

28. Accordingly, the Tribunal determined that Dr Dwivedi's actions in Paragraph 2(a)(iii) of the Allegation does not amount to misconduct.

Paragraph 3(c)(i) of the Allegation

29. Taking into account the Tribunal's finding, the joint Expert Report by Dr E and Dr F, and Patient A's evidence, it was of the view that Dr Dwivedi should have worn gloves during the vaginal examination with Patient A.

30. The Tribunal considered that b and c of the overarching objective are engaged in this sub-paragraph of the Allegation. Further, it had regard to Patient A's evidence in that she was very aware of, and troubled by, Dr Dwivedi's conduct in this regard.

31. The Tribunal accepted Dr E and Dr F's expert evidence and determined that Dr Dwivedi's conduct undermined public confidence in the medical profession and failed to maintain proper professional standards, and therefore his actions fall far short of the standards expected of reasonably competent GP.

32. The Tribunal determined that Dr Dwivedi's actions in Paragraph 3(c)(i) of the Allegation amounted to misconduct which was serious.

Paragraph 3(d)(i) and (iii) of the Allegation

33. In the joint Expert Report, Dr E and Dr F state that hugging a patient in a state of being partially clothed is seriously below the standards expected. The Tribunal noted Patient A's evidence in that she felt vulnerable at the time in that she did not have underwear on. The Tribunal considered the circumstances of Dr Dwivedi giving a hug to Patient A. It was of the view that the hug at Ridge Green Medical Centre occurred in understandable circumstances, in that Patient A was distressed and thought it was *'sweet'* at the time. However, in the context of the second hug at Patient A's home, the Tribunal was concerned that Dr Dwivedi completely misread the situation.

34. The Tribunal considered that Dr Dwivedi should have been mindful of the vulnerable position he had placed Patient A in at this time. Intimate examinations are undertaken with chaperones in order to reassure the patient and give confidence in the procedure itself. It was of the view that to initiate a hug with a patient who was not fully clothed, in the circumstances that Patient A was in at that time, amounted to misconduct that was serious.

35. Taking into account the overriding objectives and the context of Patient A's vulnerability in being only partially clothed, the Tribunal considered Dr Dwivedi's

conduct was a serious breach of the fundamental tenets of the profession and that his actions fall far short of the standards expected of a reasonably competent GP.

36. The Tribunal determined that Dr Dwivedi's actions in Paragraph 3(d)(i) and (iii) of the Allegation amounted to misconduct which was serious.

Paragraphs 4(b), (d) and 6(b) of the Allegation

37. Dr Dwivedi admitted that he had not made a record of obtaining Patient B's consent during the consultation. The Tribunal noted Dr Dwivedi's evidence that Patient B attended consultations with her husband and that it was a patient that he saw regularly.

38. In Dr E's Expert Report, she stated that Dr Dwivedi's care was below but not seriously below the standards expected. Both experts opinion was also similar in that the failure to record or offer a chaperone was below but not seriously below the standards expected of a reasonably competent GP.

39. The Tribunal considered that a Medical Practitioner should make sure that they have always obtained a patient's consent before proceeding with an intimate examination and that the practitioner has a duty to record said consent.

40. The Tribunal accepted the Expert evidence and determined that Dr Dwivedi's actions in Paragraphs 4(b), (d) and 6(b) of the Allegation amounted to misconduct but was not serious misconduct.

Paragraph 5 of the Allegation

41. Paragraph 5 of the Allegation, as framed, is merely a statement of a series of facts, as the Tribunal has previously determined. There is no conduct on which the Tribunal can undertake an analysis of Dr Dwivedi's misconduct.

42. Accordingly, the Tribunal determined that Dr Dwivedi's actions in Paragraph 5 of the Allegation do not amount to misconduct.

Misconduct Overall

43. GMP sets out the standard that a doctor must meet and continue to meet, throughout their professional career. The Tribunal found in the specific instances set out above, that Dr Dwivedi's conduct falls seriously below the expected GMP standard and constitutes misconduct likely to impair his fitness to practise. The Tribunal is of the view that Dr Dwivedi's conduct had the potential to undermine public trust in the profession and was also a failure to maintain proper professional standards.

Impairment by reason of Misconduct

44. Having found that some of the Facts found proved amounted to misconduct which was serious, the Tribunal went on to consider whether, as a result of this, Dr Dwivedi's fitness to practise is currently impaired by reason of his misconduct.

45. In determining whether a finding of current impairment of fitness to practise is necessary, the Tribunal first looked for evidence of insight and remediation, and the likelihood of repetition, balanced against the three elements of the overarching statutory objective.

46. The Tribunal had regard to the guidance set down by Dame Janet Smith in her Fifth Shipman Report and the more recent approach in *CHRE v NMC and Paula Grant* (in Paragraph 15 above) in considering how a doctor is likely to act in the future, it is relevant to take into account how they have acted in the past. The Tribunal considers that b and c of this paragraph are engaged in this case.

47. The Tribunal considers that insight is important in order for a doctor to recognise areas of their practice that require improvement and to take appropriate and relevant steps to address them, thus reducing the likelihood of repetition.

48. The Tribunal took account of the testimonial evidence in that there are a number of patients and colleagues attesting to Dr Dwivedi's good character and his *'kind'* and *'caring attitude'* towards patients demonstrates that he has an empathetic attitude. The Tribunal accepted that Dr Dwivedi is a man of good character and accepted that there was a low likelihood of repetition of his misconduct.

49. The Tribunal noted that Dr Dwivedi has undertaken some CPD in relation to chaperoning, record keeping and maintaining professional boundaries, as well as various other clinical CPD. However, the Tribunal considered that the evidence provided of Dr Dwivedi's reflective answers in relation to the CPD module undertaken on 19 March 2017 indicated that he had developed only partial insight into his actions. Further, there is little evidence within the bundle indicating how Dr Dwivedi had reflected on his actions and the impact they had on Patient A's thoughts and feelings.

50. The Tribunal considered Mr Lambis's submissions in relation to *Zygmunt v GMC*. However, the Tribunal considered that Dr Dwivedi made a series of errors over the course of the day in relation to one patient that had compounded the misconduct over the course of two consultations. The Tribunal noted that some of the failures with Patient A were repeated with Patient B.

51. The Tribunal concluded that Dr Dwivedi's actions have had the effect of undermining public confidence in the profession and the need to maintain proper professional standards.

52. Accordingly, the Tribunal has found that Dr Dwivedi's fitness to practise is currently impaired by reason of his misconduct.

Determination on Sanction - 02/10/2018

1. Having determined that Dr Dwivedi's fitness to practise is impaired by reason of his misconduct, the Tribunal moved to consider what sanction, if any, it should impose with regard to Dr Dwivedi's registration.

The Evidence

2. In so doing, the Tribunal gave careful consideration to all the evidence adduced during the course of these proceedings.

Submissions

Submissions on behalf of the GMC

3. Mr Garside QC submitted that the appropriate sanction in Dr Dwivedi's case is one of suspension from the Medical Register. However, he made no submissions on the length of the suspension.

4. Mr Garside directed the Tribunal's attention to the Sanctions Guidance (February 2018 edition)('SG') and to its previous findings in relation to paragraphs 48 to 51 of its Impairment determination at this stage.

5. Mr Garside QC submitted that this is clearly not a case where to take no action would be appropriate. Further, he submitted that it would not be possible for the Tribunal to impose conditions on Dr Dwivedi's registration, and that it would not properly address the matters of this case. Mr Garside QC accepted that Dr Dwivedi has acknowledged his fault. However, his actions were a serious departure from the principles outlined in GMP.

6. Mr Garside QC submitted that suspension would send a message to Dr Dwivedi and the public. He submitted that the Tribunal has previously found that the public interest and public confidence is engaged in this case. Mr Garside QC submitted that Dr Dwivedi's conduct, albeit serious, does not fall into the category of incompatibility with continued registration. However, he submitted that it is serious enough to take action to protect the public and maintain public confidence in the profession.

Submissions on behalf of Dr Dwivedi

7. Mr Lambis submitted that the appropriate sanction on Dr Dwivedi's case is one of conditions placed on his registration, with a review directed.

8. Mr Lambis submitted that the Tribunal is aware that in any system of justice, it is important for it to consider all of the material and background of each case that comes before it. He submitted that each case has its own *'factual matrix'*, its own *'quirks'* and *'nuances'*. Mr Lambis submitted that whilst the SG is important, it is *'just guidance'*.

9. Mr Lambis submitted that at this stage, the Tribunal is confronted with two competing interests. Firstly, the duty of a Tribunal to is to reflect the seriousness of the Allegation that brings Dr Dwivedi before it. Secondly, the Tribunal has to make sure that any sanction it directs, is not only proportionate to the Allegation, but that it takes account of Dr Dwivedi and his personal circumstances.

10. Mr Lambis submitted that, taken with paragraphs 48 to 51 of the Tribunal's Impairment determination, the appropriate and proportionate sanction in this case is one of conditions. He invited the Tribunal to take note of the particular circumstances of this case. Mr Lambis submitted that if sanctions are not there to punish then it would be sufficient to impose conditions on Dr Dwivedi for a period it considered to be appropriate and to direct a review at the completion of said conditions. He submitted that conditions could be designed to be measurable, workable and transparent. Mr Lambis submitted that another aspect of conditions would be that they will maintain a level of scrutiny on Dr Dwivedi. He submitted that Dr Dwivedi is a good and well liked practitioner with a long career, and that conditions would allow him to continue to practise.

11. Mr Lambis submitted that Dr Dwivedi has demonstrated that he has insight, albeit not to the totality expected by the Tribunal, in terms of his admissions and the evidence he has given. He stated that Dr Dwivedi had made wrong decisions in relation to difficult patients.

12. Mr Lambis submitted that Dr Dwivedi would comply with conditions and that he has the potential to respond positively to the training and supervision that conditions could require. In terms of the conditions available to the Tribunal, Mr Lambis suggested that it could impose conditions that Dr Dwivedi:

- Does not undertake intimate examinations without a chaperone;
- Must maintain a log (when seeing female patients and/or when he undertakes home visits);
- Should get the approval of a Responsible Officer before he works out of hours services;

- If necessary for a Clinical Supervisor to review his practise; and
- Consider what further reflections a reviewing Tribunal would want to see.

The Relevant Legal Principles

13. The Tribunal took into account all of the documentary evidence adduced during the course of these proceedings and the submissions of Mr Garside QC, on behalf of the GMC, and those of Mr Lambis, Counsel, on Dr Dwivedi's behalf.

14. The decision as to the appropriate sanction is a matter for this Tribunal's own independent judgement. In reaching its decision, the Tribunal took into account the SG and the statutory overarching objective, which includes protecting and promoting the health, safety and wellbeing of the public, promoting and maintaining public confidence in the profession, and promoting and maintaining proper professional standards and conduct.

15. The Tribunal recognised that the purpose of a sanction is not to be punitive, although it may have a punitive effect. Throughout its deliberations, the Tribunal applied the principle of proportionality, balancing Dr Dwivedi's interests with that of the public interest.

16. The Tribunal has already provided a detailed determination on Facts and Impairment and it has taken those matters into account during its deliberations on sanction.

The Tribunal's Determination on Sanction

Aggravating and Mitigating Factors

Aggravating Factors

17. The Tribunal had regard to the following aggravating factors in Dr Dwivedi's case:

- No evidence of reflection in relation to the impact his actions had had on Patient A, which is relevant to insight;
- Did not have an awareness of appropriate doctor-patient boundaries at a time when a patient was in a vulnerable situation; and
- That although he was an experienced GP, he undertook an intimate examination without wearing a pair of gloves, which goes against the expected fundamental standards of medical practice.

Mitigating Factors

18. The Tribunal balanced those aggravating factors, with the mitigating factors in Dr Dwivedi's case, namely that he has:

- Demonstrated developing insight into his Misconduct, and has taken some steps to address it;
- Repeatedly apologised for his conduct to the Tribunal;
- Made numerous admissions to sub-paragraphs of the Allegation at an early stage;
- Evidence of previous good character and positive clinical attributes;
- Undertaken a significant amount of clinical CPD activities keeping his knowledge and skills up to date;
- Undertaken CPD relevant to the Allegation;
- A wealth of positive testimonials attesting to his good standing and trust in the medical community;
- Been open and frank to the Tribunal;
- Not repeated his Misconduct;
- A long service working at the Ridge Green Medical Centre for 23 years; and
- No evidence of previous Medical Practitioners Tribunal hearings against him.

The Tribunal's Decision

19. In deciding what sanction, if any, to impose, the Tribunal reminded itself that it must consider each of the sanctions available, starting with the least restrictive, to establish which is appropriate and proportionate in this case.

No Action

20. The Tribunal first considered whether to conclude the case by taking no action.

21. The Tribunal was satisfied that there were no exceptional circumstances in Dr Dwivedi's which would justify taking no action. It determined that given the seriousness of the actions that led to a finding of misconduct, taking no action would be inappropriate, inadequate and would not be in the public interest.

Conditions

22. The Tribunal considered whether imposing an order of conditions on Dr Dwivedi's registration would be appropriate. It bore in mind that any conditions imposed should be appropriate, proportionate, workable and measurable.

23. The Tribunal was of the view that Dr Dwivedi would (and has the potential to) respond positively and comply with conditions imposed on his registration. It accepted Dr Dwivedi's evidence that he understood that he should have offered a chaperone and worn gloves when conducting an intimate examination.

24. The Tribunal considered that there is no aspect of Dr Dwivedi's clinical competency that is in need of retraining. Dr Dwivedi has accepted his clinical failings and the Tribunal is satisfied that there is a low risk of repetition.

25. However, the Tribunal concluded that a period of conditional registration would not be appropriate as it would not adequately address the seriousness of its findings and the clear breach of the standards outlined in GMP. Furthermore, the Tribunal considered conditional registration would not protect the public.

Suspension

26. The Tribunal next considered whether a period of suspension would be an appropriate and proportionate sanction to impose on Dr Dwivedi's registration.

27. The Tribunal had regard to paragraph 91 of the SG and acknowledged that a sanction of suspension has a deterrent effect and can be used to send a signal to Dr Dwivedi, the profession, and the public about what is regarded as behaviour unbefitting a registered doctor. It also acknowledged that suspension is an appropriate response to misconduct which is sufficiently serious that action is required in order to protect members of the public and maintain public confidence in the profession, and is the least restrictive sanction which serves this case.

28. The Tribunal had regard to paragraph 97(a)(f) and (g) of the SG, which it considered are engaged in this case:

> **97(a)(f)(g)** *'Some or all of the following factors being present (this list is not exhaustive) would indicate suspension may be appropriate:*
>
> *a. A serious breach of Good medical practice, but where the doctor's misconduct is not fundamentally incompatible with their continued registration, therefore complete removal from the medical register would not be in the public interest. However, the breach is serious enough that any sanction lower than a suspension would not be sufficient to protect the public or maintain confidence in doctors.*
>
> *…*
>
> *f. No evidence of repetition of similar behaviour since incident.*

g. The tribunal is satisfied the doctor has insight and does not pose a significant risk of repeating behaviour.'

29. The Tribunal considered that Dr Dwivedi's behaviour was inappropriate in that he had failed to take action when Patient A's dignity was compromised. These actions risked the loss of public confidence and resulted in a serious breach of the standards outlined in GMP. However, Dr Dwivedi has acknowledged his faults during the course of these proceedings and the Tribunal is satisfied that he has shown developing insight into his misconduct, and does not pose a significant risk of repeating his behaviour. Further, the Tribunal has seen no evidence that Dr Dwivedi has repeated his actions since the index event.

30. The Tribunal acknowledged that Dr Dwivedi has taken some steps to address his behaviour. However, his actions had compromised Patient A's dignity (not wearing gloves during an intimate examination and non-clinical contact when Patient A was partially clothed) and could not be justified.

31. The Tribunal considered suspension as the appropriate sanction for Dr Dwivedi in this case. It reflects the gravity of his behaviour and whilst the Tribunal acknowledged that this would deprive the public of a highly regarded doctor, no lesser sanction would adequately serve the public interest. It recognised that there had been a departure from the standards outlined in GMP and concluded that suspension would address this proportionately.

32. The Tribunal recognised that Dr Dwivedi's conduct as found in this case is an aberration in an otherwise unblemished career. It therefore considered that whilst Dr Dwivedi's behaviour fell short of what is expected of doctors, it is not fundamentally incompatible with continued registration such as to justify erasure.

33. In determining the duration of Dr Dwivedi's suspension, it considered that a period of 3 months is necessary to mark the Tribunal's previous findings, sending out a clear message to Dr Dwivedi and the public that such actions cannot be tolerated. It would also give time for Dr Dwivedi to further reflect on the Tribunal's findings without causing him any loss of his clinical skills.

34. The Tribunal therefore concluded that in order to promote and maintain public confidence in the medical profession, to maintain proper professional standards, that Dr Dwivedi's name be suspended from the Medical Register for 3 months. In light of all of the evidence presented to it, the Tribunal was satisfied that suspension is the necessary, proportionate and appropriate sanction.

Record of Determinations – Medical Practitioners Tribunal

Determination on Immediate Order - 02/10/2018

1. Having determined that Dr Dwivedi's registration be suspended for a period of 3 months, the Tribunal has considered, in accordance with Rule 17(2)(o) of the Rules, whether his registration should be subject to an Immediate Order.

Submissions

Submissions on behalf of the GMC

2. Mr Garside QC submitted that given the nature of this case, an Immediate Order on Dr Dwivedi's registration should be imposed to protect the public interest and maintain confidence in the medical profession.

3. Mr Garside QC submitted that the Interim Order currently on Dr Dwivedi's registration should be revoked.

Submissions on behalf of Dr Dwivedi

4. Mr Lambis submitted that Dr Dwivedi is currently suspended under an Interim Order and did not seek to address it, and the issue of an Immediate Order is a matter for the Tribunal to determine.

The Tribunal's Decision

5. In reaching its decision, the Tribunal has exercised its own judgement, and has taken account of the principle of proportionality. The Tribunal has borne in mind that it may impose an Immediate Order where it is satisfied that it is necessary for the protection of members of the public, is in the public interest, or is in the best interests of the practitioner. The Tribunal had regard to the submissions of Mr Garside QC on behalf of the GMC, and those of Mr Lambis, on Dr Dwivedi's behalf.

6. The Tribunal determined that in light of the particular circumstances of this case, an Immediate Order of suspension was appropriate and necessary. It determined that this was primarily necessary to maintain public confidence in the profession and to uphold and maintain proper professional standards.

7. The effect of this order is that Dr Dwivedi registration will be suspended from the date when written notice of this decision is deemed to have been served upon him.

8. The Interim Order currently imposed on Dr Dwivedi registration will be revoked when the Immediate Order takes effect.

9. That concludes this case.

Record of Determinations –
Medical Practitioners Tribunal

Confirmed
Date 02 October 2018 Ms Chitra Karve, Chair

ANNEX A – 25/09/2018

Application under Rule 17(2)(g)

1. Mr Marios Lambis, Counsel, on behalf of Dr Dwivedi, made an application under Rule 17(2)(g) of the General Medical Council ('GMC') ('Fitness to Practise') Rules 2004 (as amended)('the Rules'), in respect of Paragraphs 4(a), (c) and 6(a) of the Allegation.

2. Rule 17(2)(g) states:

> *'The practitioner may make submissions as to whether sufficient evidence has been adduced to find some or all of the facts proved and whether the hearing should proceed no further as a result, and the Medical Practitioners Tribunal shall consider any such submissions and announce its decision as to whether they should be upheld.'*

Submissions

Submissions on behalf of Dr Dwivedi

3. Mr Lambis invited the Tribunal to exercise its power under Rule 17(2)(g) to delete Paragraphs 4(a), (c) and 6(a) of the Allegation in relation to Patient B.

4. By way of background, Mr Lambis submitted that on 12 July 2018 by email, the GMC informed Dr Dwivedi's representatives that Patient B did not want to engage with the GMC and there was no witness statement.

5. In light of that email, Dr Dwivedi's representatives invited the GMC to delete Paragraphs 4(a), (c) and 6(a) of the Allegation on the basis that Patient B's evidence would be instrumental in any Tribunal being able to find these Allegations proved. Mr Lambis submitted that the GMC declined the invitation.

6. Mr Lambis submitted that there is a distinction to be drawn between a *'recording'* omission and the substantive action. He said that it cannot logically follow that because Dr Dwivedi did not record a discussion about chaperones that a discussion about chaperones did not take place. Further, Mr Lambis submitted that just because a practitioner had failed to record consent, does not mean that in fact there was no consent.

7. Mr Lambis submitted that the GMC flouts the general principle that justice must not only be done but must be seen to be done. Taking the GMC's position essentially means that the presence (or lack thereof) of a witness makes no material difference to the manner in which the GMC can present its case.

8. Mr Lambis submitted that not being able to challenge the witness's evidence would be prejudicial to Dr Dwivedi and that in relation to Rule 17(2)(g) of the Rules, insufficient evidence had been adduced in order to proceed in respect of Paragraphs 4(a), (c) and 6(a) of the Allegation.

Submissions on behalf of the GMC

9. Mr Garside QC apposed Mr Lambis's application to delete Paragraphs 4(a), (c) and 6(a) of the Allegation.

10. Mr Garside QC acknowledged that the GMC has been unable to secure the attendance of Patient B. He submitted that the only evidence which bears directly on the Allegation relating to Patient B consists of Medical Records, Good Medical Practice guidance and expert evidence.

11. Mr Garside QC submitted that Good Medical Practice required doctors to obtain consent for examinations. He submitted that doctors have a duty to record what they have done.

12. Mr Garside QC directed the Tribunal's attention to the general guidance in relation to chaperone's, in Good Medical Practice (2013 edition)('GMP'), which has been referred to in Dr E's GMC Expert Report. He submitted that practitioners have to record what they have done including the offer of having chaperones. Mr Garside QC submitted that having no documentary evidence is a clear indication that Dr Dwivedi breached the standards outlined in the guidance. He said that if there was no further evidence the Tribunal could make findings on the history and sequences of events, that indicate that Dr Dwivedi did not carry out the duties, as outlined in Paragraphs 4(a), (c) and 6(a) of the Allegation.

13. Mr Garside QC submitted that he does not invite the Tribunal to investigate what Patient B could say if she attended these proceedings. However, he said that it does not mean that the Tribunal cannot act on the evidence already adduced.

The Tribunal's Approach

14. The Tribunal has borne in mind that its role at this stage of proceedings is not to make findings of fact, it simply has to decide whether sufficient evidence has been adduced on the relevant allegation that it could find the facts proved.

15. If it finds that there is sufficient evidence, then at the end of the fact finding stage it will have to decide in the light of all the evidence before it, whether the Allegations have been found proved or not.

16. The Legally Qualified Chair made reference to *R v Galbraith*. She advised that, if the Tribunal considered that there was no evidence before it, then it should find

that Dr Dwivedi had no case to answer in relation to Paragraphs 4(a), (c) and 6(a) of the Allegation. She also agreed with Mr Lambis' submission that the wording of paragraph 17(2)(g) should be carefully considered in relation to sufficiency of evidence. The Legally Qualified Chair stated that if the Tribunal was of the view that there was evidence before it, then it should assess this evidence and determine whether the GMC case, taken at its highest, could properly be found proved.

17. Further, having considered Mr Lambis' and Mr Garside QC's submissions, the Legally Qualified Chair advised that the Tribunal must be satisfied that the facts denied could, on the balance of probabilities, be proved in order to continue with regard to those Allegations. However, she stated that the Tribunal should also take into consideration the lack of other adduced evidence in regard to Patient B, and the possible disadvantage that this will cause Dr Dwivedi.

The Tribunal's Decision

18. In making its decision, the Tribunal accepted the submissions of Mr Lambis that the criminal case of *R v Galbraith*, is not particularly helpful in this case. Further, the wording of Rule 17(2)(g) of the Rules gives rise to concerns about whether or not there is sufficient evidence adduced in this case. This would have to be carefully considered.

19. The Tribunal addressed the sub-paragraphs of the Allegation dealt with in submissions.

Paragraphs 4(a), (c) and 6(a) of the Allegation

20. Paragraphs 4(a), (c) and 6(a) of the Allegation states:

> *4. On 26 November 2013 you carried out a vaginal examination on Patient B and you failed to:*
>
> *a. obtain Patient B's consent;*
>
> *…*
>
> *c. offer a chaperone;*
>
> *…*
>
> *6. On each of the occasions at paragraph 5 above you failed to:*
>
> *a. offer a chaperone;'*

21. The Tribunal had regard to the evidence available it has before it with regard to Patient B, which included Medical Records and no other factual evidence has been adduced. It has not received any witness statements from Patient B or oral evidence during the course of these proceedings.

22. The Tribunal further noted that GMP states, in relation to consent that there is a duty on a practitioner to obtain consent, which could assist it in findings of fact.

23. However, the Tribunal considered that the question is whether there is enough evidence before it in relation to that duty in accordance to the guidelines, to which there is not. It considered that in order for the Tribunal to obtain evidence to allow it to find Paragraphs 4(a), (c) and 6(a) of the Allegation proved, it would require an account from Patient B. Such evidence cannot be gained solely from Patient B's Medical Records.

24. In the absence of such evidence, the Tribunal could not realistically or fairly make a finding on these sub-paragraphs of the Allegation. The Tribunal was therefore satisfied, when taken at its highest, that **insufficient** evidence has been adduced which could enable it to find Paragraphs 4(a), (c) and 6(a) of the Allegation proved.

Mr Lambis's submission in respect to Paragraph 4(a), (c) and 6(a), is upheld