

**Dates:** 26/11/2018 - 06/12/2018

**Medical Practitioner's name:** Dr Arshad Ali

**GMC reference number:** 6133437

**Primary medical qualification:** MB BS 1993 Bahauddin Zakariya University

**Type of case**

New - Misconduct

New - Deficient professional performance

**Outcome on impairment**

Impaired

Not Impaired

**Summary of outcome**

Suspension, 1 month.

**Tribunal:**

Legally Qualified Chair	Mr Jetinder Shergill
Lay Tribunal Member:	Ms Glenys Evans
Medical Tribunal Member:	Dr Keith Dunnett
Tribunal Clerk:	Ms Keely Crabtree

**Attendance and Representation:**

Medical Practitioner:	Present and represented
Medical Practitioner's Representative:	Mr Giles Powell, Counsel, instructed by BLM Law
GMC Representative:	Mr Paul Williams, instructed by GMC

## **Record of Determinations – Medical Practitioners Tribunal**

### **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.

### **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 - 29/11/2018**

1. Dr Ali qualified as a doctor in 1993 (MB BS) from Bahauddin Zakariya University, Pakistan.
2. The allegation that has led to Dr Ali's hearing can be summarised as follows; that between November 2015 and February 2016, Dr Ali attempted to establish an improper emotional relationship with a vulnerable patient. It is further alleged that between June and September 2017, Dr Ali underwent a GMC performance assessment, which found his performance unacceptable or a cause for concern in a number of areas.

### **The Outcome of Applications Made during the Facts Stage**

3. Mr Powell, Counsel, on behalf of Dr Ali, made an application under Rule 34(13) and (14), of the General Medical Council (fitness to Practise Rules) 2004 as amended ('the Rules') for an additional witness Dr B to give evidence via video link. The GMC did not object to Mr Powell's application. The tribunal decided it appropriate to grant the application due to the considerable distance that the witness would have to travel.
4. The tribunal decided of its own volition, under Rule 17(6) of the Rules, to amend paragraph 6 of the allegation. The tribunal's full decision is included at Annex A.
5. The tribunal refused the GMC's application made under Rule 34(1) of the Rules, to admit evidence of a transcript from an interim orders hearing. The tribunal's full decision is included at Annex B.
6. XXX

## Record of Determinations – Medical Practitioners Tribunal

### The Allegation and the Doctor's Response

7. The Allegation made against Dr Ali is as follows:
  1. On 21 November 2015 you treated Patient A at Tunbridge Wells Hospital following an overdose. **Admitted and found proved**
  2. At all material times Patient A was vulnerable. **Admitted and found proved**
  3. During your consultation with Patient A you stroked Patient A's face. **To be determined**
  4. Following your consultation with Patient A you gave her £20 towards the cost of a taxi home. **Admitted and found proved**
  5. You inappropriately obtained Patient A's telephone number from her medical records. **Admitted and found proved**
  6. Between 21 November 2015 and February 2016 you inappropriately sent ~~one or more~~ text messages to Patient A some ~~the~~ nature of which are set out at Schedule 1. **Admitted and found proved**
  7. Your actions as at paragraphs 3-6 were an attempt to establish an improper emotional relationship with Patient A. **Admitted and found proved**
  8. Between June 2017 and September 2017 you underwent a General Medical Council assessment of the standard of your professional performance. **Admitted and found proved**
  9. Your professional performance was unacceptable in the following areas:
    - a. Domain 1: Knowledge, Skills and Performance;
      - i. assessment; **Admitted and found proved**
      - ii. clinical management. **Admitted and found proved**
  10. Your professional performance was a cause for concern in the following areas:
    - a. Domain 1: Knowledge, Skills and Performance;

## Record of Determinations – Medical Practitioners Tribunal

- i. maintain professional performance; **Admitted and found proved**
- ii. record keeping. **Admitted and found proved**

And that by reason of the matters set out above your fitness to practise is impaired because of your:

- a. misconduct in respect of paragraphs 1 - 7;  
**To be determined**
- b. deficient professional performance in respect of paragraphs 8 - 10. **To be determined**

8. At the outset of these proceedings, Dr Ali made admissions to some paragraphs and sub-paragraphs of the Allegation, as set out above, in accordance with Rule 17(2)(d) of 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.

9. The only factual issue to be determined by the tribunal related to whether during his consultation with Patient A on 21 November 2015, Dr Ali stroked Patient A's face. The tribunal also indicated that it would give a narrative with regards to paragraph 6.

### **Factual Witness Evidence**

10. The Tribunal received evidence on behalf of the GMC from the following witnesses:

- Patient A, in person

11. The Tribunal also received evidence on behalf of the GMC in the form of witness statements from the following witnesses who were not called to give oral evidence:

- Mr C, Deputy Medical Director at Maidstone and Tunbridge Wells NHS Trust

12. Dr Ali provided his own witness statement dated 11 October 2018 and also gave oral evidence at the hearing. XXX.

### **Documentary Evidence**

## **Record of Determinations – Medical Practitioners Tribunal**

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

- Medical Records Patient A dated 21 dated November 2014
- Transcript of consultation with Patient A -21 November 2015
- Text Messages between Dr Ali and Patient A – various dates
- Complaint form dated 2 March 2016; enclosing Email from Patient A dated 29 February 2016 & Hospital Admission Record dated 21 November 2015
- Letter from Maidstone & Tunbridge Wells Trust to Patient A dated 4 March 2016
- Letter from Maidstone & Tunbridge Wells Trust to Patient A dated 18 March 2016
- Performance Assessment Report June – September 2017

### **The Tribunal’s Approach**

14. 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 Ali 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.

### **The Tribunal’s Analysis of the Evidence and Findings**

15. The tribunal has considered the outstanding paragraph of the Allegation and has evaluated the evidence in order to make its findings on the facts.

16. The tribunal firstly considered the evidence of Patient A. It found that throughout her oral evidence she was credible and did her best to assist the tribunal. She conceded certain issues and acknowledged when she could not recall things. It acknowledged that a witness’s recollection of incidents can change over time, because memories fade. In addition, reflecting on issues can influence perspectives of what occurred. Patient A openly admitted that there were many things that she did not recall. She made a complaint by e-mail to the hospital on 29 February 2016 and part of that e-mail referred to her claim that Dr Ali “kept stroking my face”. Patient A told the tribunal that it was only after discussing Dr Ali with her mother that she had reflected on the treatment she had received in A&E.

17. Patient A’s witness statement does not recall the specifics of what happened and refers to “he stroked my face”. That could be interpreted as occurring on more than one occasion but, when asked in oral evidence; she demonstrated how she recalled the stroking of her face and confirmed it only happened once. Patient A also confirmed she had a hazy recollection of her time in hospital, she did not recall who

## **Record of Determinations – Medical Practitioners Tribunal**

she saw and when. In her oral evidence Patient A confirmed she could not remember Dr Ali examining her.

18. The tribunal noted that there is a detailed contemporaneous medical record from Dr Ali which has not been challenged by the GMC. Dr Ali explained that it would be his normal practice to do a full examination including checking for jaundice, pallor and feeling for parotid, submental and submandibular glands. It is Dr Ali's case that this examination would necessarily involve touching Patient A's face several times in different places. Dr Ali stressed that when doing such an examination he would explain what he was doing, and why he was doing it, at all times.

19. There is no record in the notes of this examination. However, the tribunal accepted Dr Ali's explanation that this was due to time constraints in a busy A&E and that he would only record things that were important i.e. positive findings and important things that were negative.

20. In giving his oral evidence Dr Ali explained and demonstrated on three occasions how he would undertake the examination. The tribunal concluded that it is plausible that Patient A, who said she had never previously had a doctor stroke her face, had interpreted the examination he undertook as him "stroking" her face.

21. The tribunal has therefore concluded that Patient A simply misinterpreted what Dr Ali was doing when he was touching her face. She was admitted at what must have been a very distressing and confusing time for her. She correctly recalls having her face stroked but the tribunal decided there was nothing improper about this because it was more likely than not to be part of the medical examination carried out by Dr Ali. The tribunal was not satisfied that the GMC has proved the allegation on the balance of probabilities. Accordingly, the tribunal found paragraph 3 not proved.

### Narrative regarding paragraph 6

22. The tribunal had indicated at the outset of the hearing that it would be giving a narrative with regards to paragraph 6, even though that was an admitted fact. That was because this related to the additional evidence that had not been expressly set out at schedule 1 and had led to an amendment to the allegation. Dr Ali admitted paragraph 6 as amended and the tribunal permitted his request XXX.

23. The tribunal had two concerns about other text messages which were not expressly set out in schedule 1: Dr Ali's persistence in messaging Patient A and his continuing to do so when told by Patient A to stop; and offering to buy Patient A a Christmas present.

24. With regards to persistence the tribunal was invited by Mr Powell to consider whether it should be characterised as 'continued' or 'repeated conduct'. Patient A

## Record of Determinations – Medical Practitioners Tribunal

had specifically said “can you stop texting me please” (after the first few messages he sent on day 1) and on another occasion “why are you even texting me” and that she was “concerned” about what he was doing. Therefore, looking at the content and number of messages the tribunal decided that the messages sent by Dr Ali can be categorised as persistent.

25. The tribunal noted that Dr Ali had offered to buy Patient A a Christmas present and this followed on from an earlier text message which he had said “please please feel free if you need any medical or financial help I love to help people”. The offer to buy a Christmas present was inappropriate and should not have occurred.

### The Tribunal’s Overall Determination on the Facts

26. The Tribunal has determined the facts as follows:

1. On 21 November 2015 you treated Patient A at Tunbridge Wells Hospital following an overdose. **Admitted and found proved**
2. At all material times Patient A was vulnerable. **Admitted and found proved**
3. During your consultation with Patient A you stroked Patient A’s face. **Found not proved**
4. Following your consultation with Patient A you gave her £20 towards the cost of a taxi home. **Admitted and found proved**
5. You inappropriately obtained Patient A’s telephone number from her medical records. **Admitted and found proved**
6. Between 21 November 2015 and February 2016 you inappropriately sent ~~one or more~~ text messages to Patient A some ~~the nature~~ of which are set out at Schedule 1. **Admitted and found proved**
7. Your actions as at paragraphs 3-6 were an attempt to establish an improper emotional relationship with Patient A. **Admitted and found proved**
8. Between June 2017 and September 2017 you underwent a General Medical Council assessment of the standard of your professional performance. **Admitted and found proved**
9. Your professional performance was unacceptable in the following areas:

## Record of Determinations – Medical Practitioners Tribunal

- a. Domain 1: Knowledge, Skills and Performance;
    - i. assessment; **Admitted and found proved**
    - ii. clinical management. **Admitted and found proved**
10. Your professional performance was a cause for concern in the following areas:
- a. Domain 1: Knowledge, Skills and Performance;
    - i. maintain professional performance; **Admitted and found proved**
    - ii. record keeping. **Admitted and found proved**

And that by reason of the matters set out above your fitness to practise is impaired because of your:

- a. misconduct in respect of paragraphs 1 - 7;  
**To be determined**
- b. deficient professional performance in respect of paragraphs 8 - 10. **To be determined**

### **Determination on Impairment - 04/12/2018**

1. The tribunal now has to decide in accordance with Rule 17(2)(l) of the Rules whether, on the basis of the facts which it has found proved as set out before, Dr Ali's fitness to practise is impaired by reason of misconduct and deficient professional performance.

### **The Evidence**

2. The tribunal has taken into account all the evidence received during the facts stage of the hearing, both oral and documentary. In addition, the tribunal received written evidence from Dr E (Dr Ali's Responsible Officer).

3. Dr Ali provided his own witness statements dated 11.10.2018 and 06.11.2018 and also gave oral evidence at the hearing. In addition, the tribunal received written and oral evidence from the following witnesses on Dr Ali's behalf:

- Dr F, Consultant in Emergency Department, by telephone link

## **Record of Determinations – Medical Practitioners Tribunal**

- Dr G, Consultant in Emergency Department - educational and clinical supervisor, by telephone link
- Dr B, Consultant and Clinical Lead of the Emergency Department - educational and clinical supervisor, by telephone link

4. The tribunal also received in support of Dr Ali a number of witness statements and testimonials from colleagues and supervisors, all of which it has read.

### **Submissions**

5. On behalf of the GMC, Mr Williams submitted that it relied on the Performance Assessment dated 30 October 2017 (carried out June-September 2017) ('the Assessment') to support the contention that Dr Ali's performance was deficient. Mr Williams stated that, although on the face of it, there had been improvement, Dr Ali still has significant work to do to bring him up to the necessary level required. He submitted that Dr Ali recognised this because, in giving his evidence, he estimated that he was around 80% along his journey to improve his performance.

6. Mr Williams relied on the tribunal's narrative in the facts determination, regarding the persistent nature of Dr Ali's misconduct. He stated that this is important as Patient A was a vulnerable patient because of her mental health. Mr Williams cited standards set out in Good Medical Practice (GMP); guidance on 'Maintaining A professional boundary between you and your patient' and aspects of the Sanctions Guidance.

7. Mr Williams submitted that this was very serious misconduct, and an abuse of the doctor-patient relationship for the doctor's own personal needs. He accepted that a considerable amount of work regarding insight had been undertaken by Dr Ali but the live issue was remediation and recognition of the wider public interest.

8. Mr Powell on behalf of Dr Ali, submitted that Dr Ali's educational and clinical supervisors had been surprised by the failings identified in the Assessment and considered these were out of character. Mr Powell stated that all evidence put before the tribunal points to the fact that Dr Ali is working safely at the level expected of him. He said that the performance assessment was over a year ago and Dr Ali was, at worst, considered to be 'average' by two of the seven colleagues who wrote in support of him.

9. Mr Powell detailed the difficult personal circumstances that Dr Ali had faced at the time of the incident with Patient A. XXX. He referred to the GMC's concession about Dr Ali having developed insight and said that the misconduct was an isolated incident because it only related to one patient.

### **The Relevant Legal Principles**

## Record of Determinations – Medical Practitioners Tribunal

10. The tribunal reminded itself that at this stage of proceedings, there is no burden or standard of proof and the decision as to impairment is a matter for the tribunal's judgement alone.

11. In approaching the decision, the tribunal was mindful of the two stage process to be adopted in relation to misconduct: first whether the facts as proved amounted to misconduct and if so whether that misconduct was serious; and secondly whether the finding of 'serious' misconduct could lead to a finding of impairment.

12. The tribunal also had to consider whether the admitted deficient professional performance was so significant as to amount to a finding of impairment.

13. The tribunal must determine whether Dr Ali's fitness to practise is impaired today, looking forward, taking into account Dr Ali's conduct and performance at the time of the events and any relevant factors since then such as whether the matters are remediable, have been remedied and any likelihood of repetition.

### The Tribunal's Determination on Impairment

#### Misconduct

14. The tribunal first considered whether Dr Ali's actions amount to misconduct. Misconduct can be found in circumstances where there have been serious departures from expected standards of conduct and behaviour, which can be identified by reference to GMP. With regard to Dr Ali's conduct, the tribunal identified that the following paragraph of GMP was relevant to the case:

*"53. You must not use your professional position to pursue [an ...] improper emotional relationship with a patient ..."*

15. In addition, the tribunal considered the supplementary guidance to GMP 'Maintaining a professional boundary between you and your patient'. This sets out applicable guidance relating to current and former patients and specifically deals with issues relating to vulnerability. Dr Ali accepted he pursued an improper emotional relationship with Patient A in order to seek some kind of emotional support from her. This is a clear breach of what is expected under supplementary guidance which states:

*"Whatever your specialty, you must not pursue a personal relationship with a former patient who is still vulnerable."*

16. The tribunal decided that the circumstances of Patient A's admission to hospital and her mental health would have been an obvious sign of her vulnerability. Dr Ali's case taken at its 'highest' is that he was concerned about Patient A. The tribunal considered that giving her £20 in order for her to get home in a taxi was

## Record of Determinations – Medical Practitioners Tribunal

inadvisable but may have been forgiven as a human response in all of the circumstances. The concern arises from him accessing Patient A's medical records to get her mobile number and then sending her messages. Whilst the tribunal considered this to be an obvious breach of expected standards, taking Dr Ali's case at its highest he may have had a genuine concern for her welfare. However, after a number of text messages sent later on the same day that she was discharged, Patient A makes her position clear by stating "can you stop texting me please".

17. The tribunal's concern is that whilst this behaviour of itself was a departure from expected standards it may not have crossed the threshold of serious misconduct had matters ended there. The tribunal has already set out in its facts determination at paragraph 24 why it considered the doctor's behaviour to be persistent. It was not persuaded by the submissions made that the periods of inactivity when he did not contact her somehow diminished the seriousness of what he was doing. Indeed, Dr Ali was criticised by Dr D because of his inability to "properly reflect on his response" to Patient A which was "especially concerning given his knowledge and experience of Psychiatry". The offer to buy a Christmas present was more than simply enquiring how she was coping at what can be a difficult time for someone in Patient A's circumstances. XXX. The tribunal considered that Dr Ali has shown evidence of insight in that he has apologised for his misconduct and has reflected on it. However in all of the circumstances, the tribunal was satisfied that a reasonably informed observer would consider Dr Ali's behaviour to be of concern. The tribunal agrees with Dr Ali's own evidence that his behaviour was "disgraceful". The tribunal is satisfied that his behaviour amounts to misconduct which was serious.

18. Turning to the risk of repetition, the tribunal was impressed by the work Dr Ali has undertaken in developing his insight, as confirmed by the GMC's own observations. Of particular relevance was the three day course that he attended at the Clinic for Boundary Studies. This covered a comprehensive range of issues relating to maintaining professional ethics including specifically: emotional over involvement; and non-sexualised inappropriate interactions. Dr Ali has written a comprehensive reflection on the issues raised in the course and his learning from it; and he has reflected on the incident with Patient A. He has also produced a development plan setting out how he will address situational risk factors XXX. The tribunal was satisfied that this evidence demonstrated a significant degree of insight and reflection. It also noted that, despite criticisms about Dr Ali's past behaviour Dr D was of the opinion that Dr Ali would not enter into any further inappropriate relationships with patients.

19. The totality of evidence before the tribunal leads it to conclude that Dr Ali has insight into his misconduct and has put in place a number of factors that would significantly reduce any risk of repetition. His oral evidence to the tribunal was full and frank, having admitted the totality of the charges that have been found proved. Overall, the risk of him repeating his misconduct is remote. However, the tribunal is

## **Record of Determinations – Medical Practitioners Tribunal**

concerned that the departure from professional standards of behaviour was significant because it was repeated over a period of time and involved a vulnerable patient. Accordingly the tribunal concluded that Dr Ali's conduct fell far short of the standards of conduct reasonably to be expected of a doctor, such that it was necessary in the public interest to declare and uphold professional standards by making a finding of impairment.

20. The tribunal has therefore determined that Dr Ali's fitness to practice is impaired by reason of misconduct.

### **Deficient Professional Performance**

21. Dr Ali underwent a GMC Performance Assessment, June - September 2017. His professional performance was found to be unacceptable in the following areas:

- Assessment
- Clinical management

His professional performance was a cause for concern in the following areas:

- Maintaining professional performance
- Record keeping

22. The assessment team therefore concluded that the standard of Dr Ali's performance had been deficient. Having considered the findings of the Assessment and Dr Ali's admissions to the resulting factual allegations the tribunal finds that the facts proved amounted to deficient professional performance. It then went on to consider whether Dr Ali's fitness to practise is currently impaired.

23. The tribunal had regard to the many positive testimonials provided on Dr Ali's behalf including those from his educational and clinical supervisors, all of whom state that Dr Ali is fit to practise at the level of SHO. Dr B was in a particularly strong position as the clinical director to comment upon Dr Ali's performance. His evidence also had particular weight because of his experience in medical education. He indicated that as a consequence of his supervision, Dr Ali's confidence has improved to the extent that it is now appropriate for him to move on in his career to a more senior level.

24. In determining whether Dr Ali's fitness to practise is currently impaired the tribunal is mindful of the fact that the performance assessment was conducted over a year ago. It took account of Dr B's evidence that, in his view, Dr Ali had underperformed during the Assessment and had not demonstrated the knowledge that he knew Dr Ali had. Furthermore the evidence from Dr Ali's senior colleagues stated that he had made steady progress in the standard of his performance particularly since February 2018 which was regarded as a 'turning point'. Those

## **Record of Determinations – Medical Practitioners Tribunal**

colleagues placed Dr Ali as being, at worst, 'average' within his cohort of practitioners at a similar level and there was opinion that placed him better than average. That included Dr B who placed him "near the top of his cohort of SHO colleagues...I have no doubt that upon the lifting of [interim conditions] we would encourage him to pursue a role at Registrar grade". His current supervisor, Dr H, confirmed that he is a "safe and reliable clinician".

25. The tribunal concludes, having had regard to all the evidence from multiple sources, that Dr Ali has remediated any potential concerns that had arisen from the Assessment; and that he is a safe clinician practicing at the level required. The tribunal therefore concludes that his fitness to practise, as it relates to his professional performance, is not currently impaired.

### **Determination on Sanction - 06/12/2018**

1. Having determined that Dr Ali's fitness to practise is impaired by reason of misconduct, the tribunal now has to decide in accordance with Rule 17(2)(n) of the Rules on the appropriate sanction, if any, to impose.

### **The Evidence**

2. The tribunal has taken into account evidence received during the earlier stages of the hearing where relevant to reaching a decision on sanction.

3. The tribunal received further evidence on behalf of Dr Ali namely details about an additional training day at the Clinic for Boundaries Studies.

### **Submissions**

4. On behalf of the GMC, Mr Williams submitted, with regard to the issue of termination of employment, that the tribunal did not have specific evidence from Dr Ali's employer as to what they would do. Trusts often take a pragmatic approach if the length of the suspension is one that they can cope with. He also submitted that the mere fact of loss of employment should not prevent a tribunal putting in place a sanction that is appropriate and that the issue goes to proportionality.

5. He relied on various paragraphs of the Sanctions Guidance and submitted that it was deeply inappropriate for no order to be made and, given the seriousness of the case, conditions would undermine public confidence particularly as it was not possible to draft conditions to meet the specific concerns of the case. He stated the GMC's position was that, given the steps taken by the doctor, it was possible to draw back from erasure. He submitted the Sanctions Guidance pointed the tribunal to imposing a period of suspension because it would have a deterrent effect sending out a signal about the behaviour.

## **Record of Determinations – Medical Practitioners Tribunal**

6. On behalf of Dr Ali, Mr Powell submitted the case 'cries out' for a written warning but that is not open to the tribunal. He accepted that there were unlikely to be exceptional circumstances which would allow for no action. He said the professional position was marked by a finding of impairment because the information would be in the public domain and would have to be disclosed to future employers. He made submissions that the tribunal had considered the misconduct to be persistent but not of a predatory nature. He said the overarching objective and requirements regarding the safety of the public would be met by conditions. These would be appropriate because Dr Ali was of utility to the hospital, performing well, had shown insight, apologised; and accepted all charges found proved and had disclosed important evidence.

7. He invited the tribunal to consider imposing a condition for Dr Ali to reflect further on what happened and provide to his supervisor every 2 months how his personal development plan is being implemented and should review the progression made. He submitted that this, along with the impairment finding and apology, was sufficient to mark Dr Ali's default. He suggested that a condition of a chaperone being required could be considered. He also proposed that Dr Ali would attend the fourth day of the course he had already undertaken. He submitted that such conditions addressed the gravamen of the concerns in this case.

8. He said that a short suspension does not do that because it just marks the event rather than complying with conditions that are continuous. It would be disproportionate and does not do anything to safeguard the public. He relied on section 47 of the Medical Act to show that Dr Ali would be at risk of having his employment terminated. He submitted that Dr Ali was a valuable member of the team and there was a public interest in maintaining him in employment and not for his contract to be automatically terminated. He accepted that there was not a prohibition on suspension but it was a proportionality issue to be considered.

### **The Tribunal's Determination on Sanction**

9. The tribunal accepted the LQC's legal advice which included issues such as approaching sanctions from the least restrictive upwards, the need to consider proportionality and the need to take into account mitigating/aggravating factors.

10. There was no specific reliance on the doctor's financial position but the tribunal noted the following: XXX; he rents a room XXX. A reasonable inference can be drawn that Dr Ali has modest financial means. This is taken into account by the tribunal as part of the proportionality assessment.

### **No action**

## Record of Determinations – Medical Practitioners Tribunal

11. The tribunal considered that its finding of impairment was made to declare and uphold professional standards and therefore taking no action would run contrary to that. Whilst it accepted that a finding of impairment itself can mark out a breach of professional standards and behaviour in some circumstances, the underlying facts of this case would mean that taking no action would be inappropriate and insufficient. There were no exceptional circumstances to this case over and above the mitigation that has already been taken into account at an earlier stage.

### Conditions

12. Mr Powell said that in other regulatory environments there was an option to issue a written warning but this was not available to this tribunal. He invited the tribunal to consider conditions as meeting the public interest and the overarching objective. He proposed what he considered to be workable and appropriate conditions. These included Dr Ali meeting with his supervisor to discuss the particular areas of concern with a review of his progression after 9 months. He also proposed attendance at a continuation day on the course that Dr Ali had already done at the Clinic for Boundaries Studies. Mr Powell had submitted that these conditions would be sufficient to mark the public interest. However, the tribunal decided that conditions were not appropriate in this case. Dr Ali had already reflected on his misconduct and had taken sufficient remedial steps such that the tribunal had already concluded that the risk of repetition was remote. There were no supervision issues to be addressed because the doctor practises at the required level and does so safely. The tribunal was not satisfied that the relevant paragraphs relating to the appropriateness of conditions in the Sanctions Guidance were met. Furthermore, the tribunal did not consider that it was possible to formulate appropriate and workable conditions which would adequately reflect the concerns about Dr Ali's misconduct as set out in the impairment determination. An order of conditions might be the least restrictive for the purposes of Dr Ali's interests but would not adequately address the public interest in needing to declare and uphold professional standards.

### Suspension

13. The tribunal went on to consider whether an order of suspension was appropriate and proportionate. It decided that paragraph 92 of the sanctions guidance summarised the tribunal's concerns and approach to finding a suitable sanction:

**92** *Suspension will be an appropriate response to misconduct that is so serious that action must be taken to protect members of the public and maintain public confidence in the profession. A period of suspension will be appropriate for conduct that is serious but falls short of being fundamentally incompatible with continued registration (ie for which erasure is more likely to be the appropriate sanction because the tribunal considers that the doctor*

## Record of Determinations – Medical Practitioners Tribunal

*should not practise again either for public safety reasons or to protect the reputation of the profession).*

14. The tribunal was satisfied that an order of suspension was required to maintain public confidence in the profession by declaring and upholding professional standards in the circumstances of this case. The tribunal considered the personal mitigation and circumstances that led up to Dr Ali's misconduct and, whilst critical of his departure from expected standards, the tribunal concluded that this misconduct did not meet the threshold of requiring anything more than a short period of suspension.

15. Dealing specifically with Mr Powell's submission that a period of suspension operates as a ground for terminating an employment contract, the tribunal was satisfied that this was a familiar issue faced by tribunals in striking a fair balance between competing interests. The courts have recognised that there may be unintended consequences from regulatory sanctions on the doctor's ability to practise. However, such consequences do not make this order of suspension disproportionate as the tribunal was satisfied that it struck a fair balance between the wider public interest and Dr Ali's interests.

16. In assessing the length of time for a suspension the tribunal considered the seriousness of the findings: the departure from principles of GMP; that this was inappropriate behaviour for some time; and that Patient A was vulnerable. Balancing against those factors were the subsequent steps taken by the doctor to remediate his actions, showing insight, offering an apology and putting into place a comprehensive action plan. The tribunal understands that Dr Ali has been open and honest about his actions from the outset. He has given full and frank evidence before the tribunal and had himself disclosed two pieces of evidence, XXX and additional text messages, which had the potential to undermine his case. The other mitigation that was put forward on his behalf was the risk of Dr Ali losing his job if suspended. During the tribunal's deliberation in camera an email was provided through the tribunal clerk with the agreement of both parties. This email was from Dr B and stated that: "my clinical director's initial reaction is that we would not be able to hold a post open for him were he to be suspended...".

17. The tribunal took all these matters into account and decided that a short period of suspension was necessary and sufficient to "send out a signal to the doctor, the profession and public about what is regarded as behaviour unbecoming a registered doctor" (paragraph 91 SG). This would properly mark the wider public interest whilst balancing the doctor's interests and reflect the positive aspects of his case. Anything shorter than one month would tend to undermine the public interest aspect and much more than one month would not give proper credit to the doctor for the positive aspects and mitigation set out above. Furthermore, the tribunal took into account evidence that Dr Ali's professional performance had improved to the extent that would allow him to pursue a role at a higher grade or widen his scope of

## **Record of Determinations – Medical Practitioners Tribunal**

practice. The tribunal considers that to permit Dr Ali to resume practice after a short period of suspension is also in the public interest because he would not become deskilled.

18. The tribunal therefore decided to impose an order of suspension for one month. However, as this is solely for the purposes of marking the wider public interest there would be no value in a review hearing; and this allows finality to these fitness to practise proceedings.

### **Determination on Immediate Order - 06/12/2018**

1. Having determined to suspend Dr Ali's registration for one month, the Tribunal has considered, in accordance with Rule 17(2)(o) of the Rules, whether Dr Ali's registration should be subject to an immediate order.

#### **Submissions**

2. On behalf of the GMC, Mr Williams submitted that as a result of our findings it was necessary to protect members of the public to impose an immediate order of suspension. He relied on issues of public safety and that it would be in the public interest to make such an order. He also indicated that it may be in the doctor's best interest.

3. On behalf of Dr Ali, Mr Powell submitted that perversely it was in the doctor's best interest to impose an immediate order of suspension because of the operation of section 47 of the Medical Act 1983. He accepted that his proposition stretched the ordinary application of what is in the doctor's best interests and he relied on the reasoning in the tribunal's determinations.

#### **The Tribunal's Determination**

4. The tribunal rejected the submissions made that there were patient safety issues. A proper reading of both of the earlier determinations leads to the conclusion that the doctor is safe to practice and the risk of repetition of his misconduct is remote. It is therefore not necessary to impose an immediate order. Furthermore, the basis upon which the one month's suspension has been imposed is to mark proper standards and the tribunal concluded it was not necessary for there to be a review. That is because the tribunal was satisfied that remediation has been achieved. The tribunal could not conclude that imposing an immediate order was otherwise in the public interest in light of its earlier rationale. The submission relating to what was in the doctor's best interest was a novel concept and was not sufficiently persuasive for the tribunal to conclude that it would be in the doctor's best interest to impose an order.

## **Record of Determinations – Medical Practitioners Tribunal**

5. This means that Dr Ali's registration will be suspended 28 days from today, unless he lodges an appeal. If Dr Ali does lodge an appeal he will remain free to practise unrestricted until the outcome of any appeal is known.

6. The interim order currently imposed on Dr Ali's registration is hereby revoked. No immediate order is made.

**Confirmed**  
**Date** 06 December 2018

Mr Jetinder Shergill, Chair

## Record of Determinations – Medical Practitioners Tribunal

**ANNEX A – 26/11/2018**

### **Application to Amend Allegation**

1. As is usual practice the tribunal had been provided with bundles in advance and a matter arose from documents at page 233 onwards. These documents are printouts of text messages from Dr Ali's phone which he himself has exhibited. They run from 21 November 2015 to 22 February 2016. It is not disputed that these text messages were sent by Dr Ali to Patient A. There is a run of messages up to Christmas Eve 2015 which are not reflected in Schedule 1 of the allegation. Those text messages gave context as to how Dr Ali started messaging Patient A and contained three important elements which the tribunal had some concerns about. The first messages were sent on the same day as she was discharged from hospital and by the end of that day she asked him to stop texting her; there were similar text messages indicating her disquiet on other dates. The second issue was that despite these negative responses from Patient A and, on occasions, not responding at all, Dr Ali continued to text her and the tribunal was concerned that this indicated some level of persistence. The third issue of concern to the tribunal was that Dr Ali had offered to buy Patient A a Christmas present. The tribunal concluded that these matters were not explicitly reflected in the charges before it. At the outset of the hearing as a preliminary issue the LQC raised these concerns in light of the case of Professional Standards Authority v NMC and Silva [2016] EWHC 754. That case dealt with issues of undercharging where the panel had not taken account of evidence because the NMC had not relied on that evidence in an explicit charge. The general upshot of the case is that panels and tribunals must have "regard to the imperative need for protection of the public...[and]should play a more proactive role than a judge presiding over a criminal trial in making sure that the case is properly presented and that the relevant evidence is placed before it " (paragraph 28).

2. Submissions were invited from both parties. Mr Powell on Dr Ali's behalf had some concerns that the tribunal raising this put the Dr at a disadvantage in presenting his case. Mr Williams, on behalf of the GMC, said that the tribunal was empowered to take account of such concerns and if necessary amend the charges. Both parties were given further time to take instructions. Mr Williams indicated that his instructions from the GMC were that the charges were appropriate based on the evidence that had been gathered and that the tribunal was entitled to take into account all of the evidence such that it was not simply restricted to what was referenced in Schedule 1. He indicated that the tribunal was fully entitled to take this evidence into account including for the purposes of stage 2 (misconduct and impairment). He indicated that if the tribunal was of the view that the charges did not adequately reflect the evidence before it and, considering the overriding objective, an amendment could be made. He said the GMC were neutral on that. He also raised as a practical matter that Patient A was due to attend the hearing to give evidence in the afternoon. She was a vulnerable witness and had travelled a long way. There would be practical knock-on consequences for the timetabling of the case if her evidence was not heard on day 1.

## Record of Determinations – Medical Practitioners Tribunal

3. Mr Powell on Dr Ali's behalf accepted that the evidence was admissible and could be relied upon but raised some concerns that if there was to be an additional charge or an aggravating feature then this should be indicated before the case proceeded. He submitted that the tribunal was entitled to consider all of the evidence that goes to an allegation and that it could be considered under the umbrella of paragraph 6 because Schedule 1 was not to be viewed as an exhaustive list. XXX. The tribunal considered the various submissions and reflected upon its concerns. It proposed that an amendment could be made to paragraph 6 of the allegation in order to properly reflect: a) the concession that was made that the messages set out at schedule 1 was not an exhaustive list; and b) that the messages set out in Schedule 1 only reflected those sent on 22 Feb 2016.

4. The tribunal considered Rule 17(6) of the Rules which states:

*"Where, at any time, it appears to the Medical Practitioners tribunal that—*

*(a) the allegation or the facts upon which it is based and of which the practitioner has been notified under rule 15, should be amended; and*

*(b) the amendment can be made without injustice,*

*it may, after hearing the parties, amend the allegation in appropriate terms"*

5. The tribunal, of its own volition, determined under Rule 17(6) of the Rules, to amend paragraph 6 of the Allegation in the following terms:

6. Paragraph 6:

Between 21 November 2015 and February 2016 you inappropriately sent ~~one or more~~ text messages to Patient A some ~~the nature of~~ which are set out at Schedule 1

7. Mr Williams, Counsel did not oppose the application to amend paragraph 6.

8. Mr Powell, Counsel did not oppose the application to amend paragraph 6.

9. The tribunal was satisfied that it was entitled to consider the entirety of the evidence before it and the concession made that Schedule 1 was not an exhaustive list allayed some of its concerns. The tribunal was mindful of the public interest in considering cases expeditiously and of Patient A's circumstances i.e. being in attendance and being a vulnerable witness who would have to recount evidence from three years previously. The tribunal considered that the proposed amendment to the allegation balanced the need to consider all of the relevant evidence in

## Record of Determinations – Medical Practitioners Tribunal

discharging its public interest duty (including applying the overarching objective) with the competing public interest of expediency.

10. The tribunal was satisfied, as there was no objection from parties, that it would cause no injustice to Dr Ali to amend the allegation.

### **ANNEX B – 27/11/2018** **Application to Admit Evidence**

1. Having heard from Dr Ali and before tribunal questions were asked of him, a matter arose as to whether there was any documentary evidence relating to Dr Ali's first accounts of what had occurred when he had treated Patient A on 21 November 2015. This was because Dr Ali was no longer employed at the hospital in question at the time so there had been no internal investigation and Dr Ali had, apparently, not been invited to respond in writing to the allegations made by Patient A. During the lunch break the GMC found material documents that it wished to submit before the tribunal. That was the transcript of the interim orders review hearing on the 15 July 2016 which included remarks and submissions made on the Doctors behalf relating to the events. Mr Williams submitted there were inconsistencies between what had been submitted on the Doctor's behalf at that hearing versus what his evidence was before this tribunal. He sought to admit two pages of that transcript which dealt with the issue that the tribunal had raised and also sought to reopen the GMC case and question the Doctor about apparent inconsistencies.

2. Mr Powell opposed this application and said that there was only one passage at paragraph E of the transcript which was relevant to what the tribunal had asked for and that allowing the GMC to reopen its case would cause various difficulties.

3. The tribunal considered rule 34 (1) of the rules:

*"... a tribunal may admit any evidence they consider fair and relevant to the case before them..".*

The tribunal indicated that, when it had asked for any documents detailing the Doctors first account of events, it had envisaged that there may have been interview notes or a statement or response letter from the Doctor. It anticipated that any such evidence would have been first hand from the Doctor and as close to the events as possible.

4. The tribunal decided that the characterisation of what the GMC had found and the brief description of what was in that transcript did not fit with what it had anticipated may have been available. As such, it did not appear to be of particular relevance to the question that the tribunal had raised about the existence of any first hand account.

## **Record of Determinations – Medical Practitioners Tribunal**

5. In terms of the wider use of the transcript document for the GMC to be able to demonstrate inconsistencies and to reopen cross-examination this raised issues of fairness. The tribunal was concerned that the GMC had been in possession of the material for nearly two and half years and to raise an issue of inconsistencies at this stage was of concern. The tribunal decided it would be inappropriate to do so at this late stage and that the admission of the documentation and the reopening of re-examination would be wholly unfair and would not be permitted. The tribunal concluded that the fairest option was not to take the matter any further and the tribunal decided not to admit any of the transcript documentation into evidence.

## **Record of Determinations – Medical Practitioners Tribunal**

### **SCHEDULE 1**

“Hi How are you?”

“Hi I met you few months ago how r you doing?”

“I am just a friend please let me know if you need any help”

“I would like to do so my pleasure”

“Please do not take it negative it is just that I like helping people who I can do something for”

“Just asking that if you need money”

“I can give if you need any”

“Jabbar but why you asking my name”

“Ok”

“Only to help someone but not if it bothers you sorry if I upset in any way”

“Ok to break the suspense please do not get upset I met you in Pembrury”

“I got to tell you few things but never got chance to do so”

“I am sorry if I upset you but it looks like I seem unable to forget you something is there which is stoping me not bothering you”

“I am not sure why but I know one thing that I sincerely want to do something good”

“I know on face value people are bound to take it wrong but believe me not at all”

“I know it is not appropriate to say here but as you are the only one reading this text”

“I know you were having rough time”

“I know we as human being can only do so much for someone remaining in our own means”

“I am not sure if you need any economical help”

“Yes if so”