

**PUBLIC RECORD**

**Dr Nkomo has appealed the Tribunal's decisions. His registration will therefore remain suspended by reason of the immediate order until the appeal is determined.**

**Dates:** 17/12/2018 - 20/12/2018

**Medical Practitioner's name:** Dr Collen NKOMO

**GMC reference number:** 6081972

**Primary medical qualification:** MB ChB [Zimbabwe] 2002 University of Zimbabwe

**Type of case**

New - Misconduct

New - Conviction / Caution

**Outcome on impairment**

Impaired

Impaired

**Summary of outcome**

Erasure

Immediate order imposed

**Tribunal:**

Legally Qualified Chair	Mr Russell Butland
Lay Tribunal Member:	Mr Peter Brown
Medical Tribunal Member:	Dr Sarah Vause

Tribunal Clerk:	Mr Stuart Peachey
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**Attendance and Representation:**

Medical Practitioner:	Present and represented
Medical Practitioner's Representative:	Mr Stephen Chinnery, Solicitor, instructed by Olliers Solicitors
GMC Representative:	Mr Robin Kitching, Counsel

## **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 partly in public and partly in private.

### **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 and Impairment - 18/12/2018**

#### **FACTS**

##### **Background**

1. Dr Nkomo qualified in 2002 in Zimbabwe, and prior to the events which are the subject of the hearing Dr Nkomo moved to the United Kingdom, and became a United Kingdom citizen.
2. Between 2013 to 2015, Dr Nkomo worked in the United Kingdom as a Locum General Practitioner ('GP') at various times for the following agencies, Coben Medical, Medical and Locum Staffing Ltd, Malling Health UK (which was taken over by IMH Group Ltd as of September 2015), Hays Specialist Recruitment, and Merco Medical Staffing Ltd.
3. The initial concerns were raised with the GMC on 14 August 2017 as a self-referral by Dr Nkomo by email correspondence. At that time, Dr Nkomo was working as a GP locum in the North of England, as well as at Alder Hey Children's Hospital, Liverpool. Dr Nkomo is currently practising as a GP with a specialist interest in Paediatrics.

##### **The Allegation and the Doctor's Response**

4. The Allegation made against Dr Nkomo is as follows:
  1. On 26 October 2015 at Manchester and Salford Magistrates Court you were convicted of:

when suspected of having driven a vehicle and having been required to provide a specimen or specimens of breath for analysis in the course of an investigation into whether you had

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committed an offence, and failing without reasonable excuse to do so, contrary to section 7(6) of the Road Traffic Act 1988 and Schedule 2 to the Road Traffic Offenders Act 1988;

**Admitted and Found Proved**

driving a motor vehicle on a road otherwise than in accordance with a licence authorising you to drive a motor vehicle of that class, contrary to section 87(1) of the Road Traffic Act 1988 and Schedule 2 to the Road Traffic Offenders Act 1988;

**Admitted and Found Proved**

failing, without a reasonable excuse, to co-operate with a preliminary test in pursuance of a requirement imposed under section 6 of the Road Traffic Act 1988, contrary to section 6(6) of the Road Traffic Act 1988 and Schedule 2 to the Road Traffic Offenders Act 1988.

**Admitted and Found Proved**

2. On 13 November 2015 you were sentenced in respect of the convictions referred to at paragraph 1 above:
  - a. carry out unpaid work for 60 hours;  
**Admitted and Found Proved**
  - b. disqualification from holding or obtaining a driving licence for 2 years.  
**Admitted and Found Proved**
3. You failed to notify the GMC without delay that you had been:
  - a. charged with the criminal offences detailed in paragraph 1;  
**Admitted and Found Proved**
  - b. convicted of the criminal offences detailed in paragraph 1.  
**Admitted and Found Proved**
4. On 30 May 2017 at Manchester, Minshull Street Crown Court you were convicted on indictment of fraud. **Admitted and Found Proved**
5. On 24 July 2017 you were sentenced in respect of the conviction referred to at paragraph 4 above to 20 months imprisonment suspended for 24 months. **Admitted and Found Proved**
6. You failed to notify the GMC without delay that you had been:

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- a. charged with the criminal offence detailed in paragraph 4;  
**Admitted and Found Proved**
- b. convicted of the criminal offence detailed in paragraph 4.  
**Admitted and Found Proved**

### **The Admitted Facts**

5. At the outset of these proceedings, Dr Nkomo made admissions to the entirety 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 that the Allegation had been admitted and found proved.

6. In this determination, the Tribunal refer to the convictions in Paragraph 1 of the Allegation as the 'Driving Convictions', and the conviction in Paragraph 4 of the Allegation as the 'Fraud Conviction'.

### **IMPAIRMENT**

7. In accordance with Rule 17(2)(k) of the Rules, the Tribunal has considered whether, on the basis of the facts which it has found proved, Dr Nkomo's fitness to practise is impaired by reason of his convictions and/or misconduct.

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

8. Pursuant to Rule 34(1) of the Rules, the Tribunal granted an application made on behalf of Dr Nkomo to admit two documents into evidence. The application was not opposed by the GMC. The first document was a witness statement of Mr Chinnery, dated 14 December 2018 and the exhibit thereto. The second was an email exchange between Mr Chinnery and Dr A, Dr Nkomo's Clinical Supervisor and Lead GP at his current GP practice, dated 14 and 15 December 2018. In respect of fairness, the Tribunal noted that the application to admit documents was not opposed by the GMC. In respect of relevance, the Tribunal was satisfied that the documents were relevant to the case, as they related to a letter of reference and an offer of future employment for the doctor.

### **Witness Evidence**

9. The Tribunal received witness evidence on behalf of the GMC in the form of a witness statement from Mr B, GMC Investigation Officer, dated 17 August 2018. Mr B was not called to give oral evidence.

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10. Dr Nkomo provided three of his own witness statements, dated 18 December 2018, 1 and 31 November 2018 [sic], and gave oral evidence on the first day of this hearing. Mr Chinnery, Solicitor, on behalf of Dr Nkomo confirmed to the Tribunal that 31 November 2018 was a typographical error and the correct date of Dr Nkomo's third witness statement, was 30 November 2018.

11. Mr Chinnery provided the statement referred to in paragraph 8 above.

### Dr Nkomo's Evidence

12. Dr Nkomo's first witness statement explained that the context of the Fraud Conviction was XXX. Dr Nkomo acknowledged that he had made 'an error of judgment', XXX.

13. In his oral evidence, Dr Nkomo apologised for his conduct and admitted that he had made errors of judgment. He expressed embarrassment and contrition for his actions.

14. In relation to the Fraud Conviction, he explained he had acted out of pain and frustration XXX. However, he accepted he had been dishonest.

15. In relation to his failure to report the charges and convictions without delay to the GMC, he explained that his mind-set was that he wanted to wait until the conclusion of both criminal processes had concluded, before doing so. However, he acknowledged that he was aware of his duties in Good Medical Practice (2013 edition)('GMP').

### **Documentary Evidence**

16. The Tribunal received documentary evidence which included (but was not limited to):

- Driving Convictions:
  - Charge sheet, dated 8 February 2015;
  - Case summary, dated 24 March 2015;
  - Pre-sentencing report, dated 11 November 2015;
  - Certificate of Conviction from Manchester and Salford Magistrates Court, dated 13 November 2015;
  
- Fraud Conviction
  - Case summary, dated 29 July 2016;
  - Requisition from Manchester Crown Court, dated 10 April 2017;
  - Pre-sentencing report, dated 30 May 2017;

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- Crown Court Hearing (documents dated 24 July 2017):
  - Record of Hearing;
  - Sentencing remarks;
  - Certificate of Conviction; and
  - Prosecution Report.
- Self-referral letter from Dr Nkomo to the GMC, dated 14 August 2018;
- Telephone record of call between Dr Nkomo and the GMC, dated 5 September 2018;
- Email correspondence from the Department of Work and Pensions ('DWP') to the GMC, dated 11 September 2018;
- Letter from Dr A to Mr Chinnery, dated 3 December 2018; and an email from Dr Nkomo to Mr Chinnery dated 4 December 2018; and
- Email correspondence between Mr Chinnery and Dr A, dated 14 and 15 December 2018.

### Submissions

17. The Tribunal does not intend to rehearse in full the submissions made by both parties. The following is a brief summary.

#### Submissions on behalf of the GMC

18. Mr Kitching, Counsel, submitted that Dr Nkomo's fitness to practise is currently impaired by reason of both his misconduct and convictions. He submitted that the Tribunal must consider the three limbs of the over-arching objective in Section 1(1A) of the Medical Act 1983 as amended ('the Act') together, but that in this case the second and third limbs – to promote and maintain public confidence in the medical profession, and to uphold proper professional standards – were the most significant. Further, he stated that the Tribunal should adopt a two stage process when dealing with matters of misconduct in this case, and that a similar consideration should be taken when determining the seriousness of the convictions.

19. Mr Kitching directed the Tribunal's attention to the Sanctions Guidance (February 2018 edition) ('SG') (acknowledging that it is not directly applicable to stage two), and to GMP when making its determination. In relation to paragraph 77 of GMP, Mr Kitching submitted that '*other organisations*' was wide enough to cover government bodies such as the XXX.

20. Mr Kitching submitted that the seriousness of Dr Nkomo's convictions individually and collectively means that his fitness to practise is impaired, notwithstanding his admissions to the entirety of the Allegation and any insight demonstrated. He submitted that the Driving Convictions were serious in that they required a two year disqualification from driving which was compounded by not disclosing them to the GMC until August 2017. Mr Kitching submitted that Dr Nkomo

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has not given any clear explanation as to why he did not disclose the charges and convictions at the time.

21. However, Mr Kitching submitted that the Fraud Conviction is the most serious matter the Tribunal must consider. He submitted that whilst there is no Allegation of dishonesty in this case, the offence that is the subject of the Fraud Conviction is in itself an offence of dishonesty. Mr Kitching stated that Dr Nkomo repeatedly lied XXX and that those lies could not remedy any concern he might have had XXX. Mr Kitching submitted that Dr Nkomo's dishonest actions were repeated and persistent, and resulted in an arrears of at least '£40,800' XXX when he was earning over 'XXX' through his companies. Further, he stated that these matters only came to light due to the XXX investigation.

22. Mr Kitching acknowledged that whilst Dr Nkomo admitted the Allegation at a late stage, he had made a guilty plea at an early stage during the Crown Court proceedings and was given full credit for doing so by the Judge in sentencing. However, the Judge described Dr Nkomo's behaviour as dishonest, and issued a suspended sentence of imprisonment which continues to this day.

### Submissions on behalf of Dr Nkomo

23. Mr Chinnery submitted that Dr Nkomo admitted the Allegation and has recognised his dishonest conduct in these matters. He submitted that the Allegation relating to the matters of fraud '*clearly make out impairment in relation to Dr Nkomo's practice*' and did not '*wish to take the Tribunal's time in making speeches that would say to the contrary*'.

24. Mr Chinnery stated that the Tribunal heard from Dr Nkomo that the matter relating to the XXX was couched within the circumstances XXX. He submitted that Dr Nkomo has accepted he was wrong in relation to the delay in reporting these matters to the GMC which was clearly a breach of GMP. The Tribunal heard evidence in relation to his thinking as to why he considered it appropriate at the time to not report the matters to the GMC and that he is remorseful.

25. Mr Chinnery submitted that it is a matter for the Tribunal whether Dr Nkomo's conduct is sufficient to give rise to impairment of his fitness to practise. He submitted that it is right that the public expect a high degree of honesty and probity from doctors, and Dr Nkomo accepts that his conduct fell below those standards.

26. Mr Chinnery submitted that there is no allegation of dishonesty in relation to the Driving Convictions, and that his offence was clearly an error of judgement.

27. Mr Chinnery clarified that his submission was that Dr Nkomo's fitness to practise was impaired at the time of his offences. However, he stated that the current position is that Dr Nkomo has had time to reflect on his conduct and that

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there is no impairment currently, and that he would not undertake the same course of conduct again.

### **The Relevant Legal Principles**

28. 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.

29. In approaching its decision, the Tribunal should be mindful of the two stage process to be adopted. Firstly, the Tribunal should consider whether the Facts found proved amount to one or more of the six grounds of impairment in section 35C(2) of the Act. Those grounds include misconduct and criminal convictions in the United Kingdom. Secondly, the Tribunal should consider whether the doctor's fitness to practise is currently impaired.

30. In exercising its judgment, the Tribunal should be mindful of the overarching objective of the GMC set out in Section 1(1B) of the Act to:

- 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.

The Tribunal should consider the over-arching objective as a whole and not give excessive weight to any one limb.

31. The Tribunal must determine whether Dr Nkomo's fitness to practise is currently impaired by reason of misconduct and/or convictions, taking into account Dr Nkomo's conduct at the time of the events and subsequently. The Tribunal should consider whether the conduct is remediable, has been remedied, and the likelihood of repetition, and any other relevant factors.

32. In relation to the question of impairment by misconduct, the Tribunal should follow the two stage approach set out in *CHRE v NMC & Grant [2011] EWHC 927 (Admin)*. Firstly, the Tribunal should consider whether the Facts as found proved amount to misconduct. Secondly, the Tribunal should consider whether the misconduct is sufficiently serious to amount to impairment.

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

#### **Impairment by reason of Conviction**

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33. In determining whether Dr Nkomo's fitness to practise is currently impaired by reason of his convictions, the Tribunal has first considered the relevant factors that relate to the two separate convictions in this case, being the:

- Driving Convictions; and
- Fraud Conviction.

The Tribunal in arriving at its determination borne in mind the advice given to it by the Legally Qualified Chair.

### Driving Convictions

34. On 26 October 2015, at Manchester and Salford Magistrates Court, Dr Nkomo was convicted of three driving offences, which included *'when suspected of having driven a vehicle and having been required to provide a specimen or specimens of breath for analysis... failing without reasonable excuse to do so'*, *'drove a motor vehicle...on a road...otherwise than in accordance with a licence authorising you to drive a motor vehicle of that class'*, and *'failed, without reasonable excuse, to co-operate with a preliminary test'*.

35. As a result of his conviction, on 13 November 2015, Dr Nkomo was sentenced to carry out unpaid work for 60 hours, and was disqualified from holding or obtaining a driving licence for 2 years. Dr Nkomo appealed the Driving Conviction to the Crown Court, but his appeal was dismissed on 23 June 2017.

36. The Tribunal noted that in the pre-sentencing report, the Assessor stated *'there is no pattern of offending and no concerns about problems which could indicate the likelihood of repeat offending, which is therefore assessed as low'*.

### Fraud Conviction

37. On 30 May 2017, at Manchester, Minshull Street Crown Court, Dr Nkomo was convicted on indictment of fraud. The charge to which Dr Nkomo pleaded guilty and of which he was convicted, was *'between 04/04/2013 and 19/11/2015 at Altrincham committed fraud in that you dishonestly made a false representation, namely that the information provided was correct and complete whereas you failed to provide full and accurate details of your income, intending to cause loss to [...] or to expose that person to risk of loss contrary to sections 1 and 2 of the fraud act 2006'*

38. As a result of his conviction, on 24 July 2017, Dr Nkomo was sentenced to 20 months imprisonment, suspended for 24 months.

39. XXX.

40. The Tribunal noted that in the pre-sentence report, the author stated *'Dr Nkomo presented as genuinely remorseful about this behaviour, and I assess that*

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*the current Court proceedings have acted as a salutary lesson to him'. The pre-sentence report also noted that 'This offence took place over a protracted duration and involved repeatedly submitting false information XXX. This formed a pattern of deliberately dishonest behaviour in and of itself'. It also concluded that 'These were deliberate acts of dishonesty in specific circumstances and I do not assess it likely they will recur in the future'.*

41. The Tribunal noted that Dr Nkomo is still currently serving his suspended sentence and has approximately 7 months remaining.

42. The Tribunal considered that any conviction of fraud is serious.

43. The Tribunal had regard to GMP, which sets out the standard that a doctor must meet and continue to meet, throughout their professional career. In relation to the Fraud Conviction, it had regard to paragraphs 65, 71(a)(b) and 77 of GMP, that state:

**65** *'You must make sure that your conduct justifies your patients' trust in you and the public's trust in the profession.'*

**71(a)(b)** *'You must be honest and trustworthy when writing reports, and when completing or signing forms, reports and other documents. You must make sure that any documents you write or sign are not false or misleading.'*

*a. You must take reasonable steps to check the information is correct.*

*b. You must not deliberately leave out relevant information.'*

**77** *'You must be honest in financial and commercial dealings with patients, employers, insurers and other organisations or individuals.'*

44. The Tribunal was of the view that Dr Nkomo's actions in relation to the Fraud Conviction were dishonest, calculated and persistent. It noted that Dr Nkomo had continued his dishonest actions for approximately 2 years and 7 months, and that he had accrued approximately £40,800 illegally by his dishonest interactions with XXX, having had multiple opportunities to declare his true status. The Tribunal was of the view that the act of committing fraud, for personal and/or financial gain goes against the fundamental tenets of GMP, specifically paragraphs 65, 71 and 77, and the statutory over-arching objective. The Tribunal accepted Mr Kitching's submission that paragraph 77 of GMP was wide enough to encompass a doctor's financial dealings with public bodies XXX.

45. The Tribunal concluded that Dr Nkomo's actions and his criminal conviction have had the effect of bringing the profession into disrepute and betraying the public's trust in the profession. The public expects doctors to open and honest in all financial dealings. Public confidence in the profession and the need to maintain

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proper professional standards and conduct for members of the profession would be undermined if a finding of impairment was not made.

46. The Tribunal had not been presented with any evidence that demonstrates that Dr Nkomo has repeated his actions, nor that he has failed to comply with the sentence in relation to the Fraud Conviction. The Tribunal noted the pre-sentence report's conclusion that repetition was unlikely. Dr Nkomo pleaded guilty to the Fraud Conviction at an early stage in the criminal process, and has expressed sorrow and contrition for his actions in his witness statements and in his oral evidence to the Tribunal. The Tribunal heard that Dr Nkomo has reflected on what he described as his error of judgement, and has attended a XXX course to address the issues that were the context for his conduct. However, Dr Nkomo did not provide any evidence to the Tribunal he had reflected on how his conduct fell short of his professional values and obligations and how it might reflect on the public's perception of the medical profession. The Tribunal was also not presented with evidence of any CPD courses attended, specifically on ethics and professional boundaries that would have assisted it further in establishing Dr Nkomo's level of insight and remediation into his conviction. The Tribunal therefore concluded that Dr Nkomo had developed some insight into his conduct, but had scope for further development. The Tribunal also concluded that the risk of repetition was low.

47. However, the Tribunal concluded that in a case which involved a conviction for sustained dishonesty the development of some insight and a low risk of repetition did not outweigh the need to maintain public confidence and reaffirm professional standards. The Tribunal considered that an informed and reasonable member of the public would expect a conviction for fraud involving sustained dishonest conduct over a period more than two years for significant personal gain would impair a doctor's fitness to practise. The Tribunal noted that Dr Nkomo's actions in relation to the Fraud Conviction did not endanger the health and safety of the public, but considered that this did not outweigh the need to maintain public confidence and proper professional standards.

48. In relation to the Driving Convictions, the Tribunal considered that, given the length of time that has elapsed since the index events, and the Assessors' remarks, the risk of Dr Nkomo repeating his actions is low. Further, it considered that it was a single incident for which Dr Nkomo paid the penalty and does not go to the core of his current practice as a General Practitioner. The Tribunal heard that Dr Nkomo has avoided drinking alcohol since the incident to minimise the risk of repetition. The Tribunal considered that if it was faced with just the Driving Convictions, it would not find current impairment.

49. However, the Driving Convictions are not the only convictions, and in light of the Fraud Conviction, the Tribunal determined that Dr Nkomo's fitness to practise is currently impaired by reason of his convictions.

### **Impairment by reason of Misconduct**

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50. The Tribunal next went on to consider whether Dr Nkomo's fitness to practise is currently impaired by reason of misconduct.

### Misconduct

51. The Tribunal first of all considered whether the Facts found proved amount to misconduct by reference to the rules and standards ordinarily required to be followed by a medical practitioner.

52. The Tribunal had regard to paragraph 75(b) of GMP that states:

**75(b)** *'You must tell us without delay if, anywhere in the world:*

...

*b. you have been charged with or found guilty of a criminal offence'*

53. Dr Nkomo has admitted that he failed to notify the GMC without delay of his being charged and his subsequent convictions for both the Driving and Fraud Convictions. He notified the GMC of both convictions only on 14 August 2017, some 2 years and 6 months after being charged with the Driving Convictions, and some 4 months after being charged with the Fraud Conviction. The Tribunal considered Dr Nkomo's conduct fell far short of the standards required by paragraph 75(b) of GMP, and so constitutes misconduct.

54. The Tribunal then considered whether that misconduct constitutes a sufficiently serious departure from those standards to amount to impairment. The Tribunal considered that it is a fundamental principle of GMP that every Medical Practitioner should inform the GMC of any charges and/or convictions. Effective regulation requires professionals to be open, honest and transparent with their regulator.

55. Dr Nkomo's breach of paragraph 75(b) of GMP fell far short of the standards expected of a Medical Practitioner, given the serious nature of the charges and subsequent Driving and Fraud Convictions, and the length of time for which he delayed.

56. In his evidence, Dr Nkomo gave a consistent explanation for his misconduct, namely that he wanted to wait for the conclusion of all elements of the criminal processes he was involved in before informing the GMC. However, that explanation does not justify or detract from the seriousness of the misconduct. Paragraph 75(b) is clear that criminal charges must be reported and therefore that doctors cannot wait until the conclusion of a criminal process, but must notify the GMC at the outset. Dr Nkomo's explanation in fact shows that he was aware of his obligations but chose not to comply with them.

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57. The Tribunal determined that public confidence is diminished, and professional standards undermined, by doctors who do not follow the principles set out in GMP, in particular the need to be open and transparent by disclosing to their regulator that they faced charges and/or convictions. Further, although there was no suggestion in this case that Dr Nkomo's conduct endangered patients, it is necessary to protect, promote and maintain the health, safety and wellbeing of the public that the importance of compliance with paragraph 75(b) of GMP is emphasised. In other cases, a delay in notification of a criminal charge to the GMC, thus preventing its investigation and/or the institution of interim measures, could well risk harm to patients and or the wider public. Therefore, it concluded that Dr Nkomo's actions constituted serious misconduct which would impair his fitness to practise.

### Impairment

58. The Tribunal considered that Dr Nkomo has demonstrated some insight into the gravity of his misconduct. It noted that Dr Nkomo had ultimately reported both convictions to the GMC himself, and had subsequently cooperated fully with the regulatory process, including admitting the allegation in its entirety. In his oral evidence Dr Nkomo stated that he had since re-read GMP and included it in his reflective portfolio. He has now accepted responsibility and shown remorse for his actions. However, the Tribunal has seen no evidence that Dr Nkomo has thought about the implications for patients or colleagues of his misconduct. The Tribunal would have been assisted by receiving evidence of CPD material specifically relating to ethics and professional boundaries.

59. Paragraph 1 of GMP makes it clear that honesty and trust-worthiness, acting with integrity and within the law, are cornerstones of the profession, and the Tribunal considers that the public expect doctors to meet these standards. As outlined earlier in this determination, the Tribunal regards the timely reporting of charges and/or convictions to the GMC as fundamental to proper governance of the profession. A failure in this regard would, and does, bring the profession into disrepute.

60. The Tribunal therefore determined that the only conclusion it can properly

### **Conclusion on Impairment**

reach consistent with the over-arching objective is that Dr Nkomo's fitness to practise is impaired by reason of misconduct.

61. The Tribunal determined that Dr Nkomo's fitness to practice is currently impaired by reason of his convictions and his misconduct.

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### **Determination on Sanction - 20/12/2018**

1. Having determined that Dr Nkomo's fitness to practise is impaired by reason of his convictions and misconduct, the Tribunal moved to consider what sanction, if any, it should impose on Dr Nkomo's registration.
2. In so doing, the Tribunal gave careful consideration to all the evidence adduced together with the submissions on behalf of the GMC, and those made on Dr Nkomo's behalf.

### **The Outcome of Applications Made During Sanctions Stage**

3. Pursuant to Rule 34(1) of the Rules, the Tribunal granted an application made on behalf of Dr Nkomo to admit a further set of documents into evidence. The application was not opposed by the GMC. Those documents were:
  - An email dated 17 December 2018 from Dr Nkomo to Mr Chinnery setting out a list of XXX. Mr Chinnery authenticated this information;
  - A letter dated 1 November 2012 from XXX;
  - Two letters dated 22 September 2017 and 7 September 2018 XXX to Dr Nkomo;
  - Dr Nkomo's SA302 forms derived from his Individual Tax Returns for the tax years 2014/2015, 2015/2016, and 2016/2107. These bear the official IR mark;
  - A letter dated 18 February 2016 from the XXX to Dr Nkomo;
  - Three email exchanges, XXX between Dr Nkomo and XXX; and
  - An email dated 22 November 2012 from XXX to Dr Nkomo.

4. In respect of fairness, the Tribunal noted that the application to admit these documents was not opposed by the GMC. In respect of relevance, the Tribunal was satisfied that the documents were relevant to the case XXX. They were thus relevant to Dr Nkomo's likely personal mitigation submissions at this stage.

### **The Evidence**

5. The Tribunal has taken into account evidence received during the earlier stages of the hearing where relevant to reaching a decision on sanction. The Tribunal heard further oral evidence from Dr Nkomo.

### Dr Nkomo's Evidence

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6. XXX. Dr Nkomo explained that his tax returns showed that in the tax year 2015/2016 he had received a substantially larger dividend from his companies than in prior and subsequent tax years. He explained that, following the discovery of his fraud, XXX had calculated his XXX payments and arrears based on this one year of higher income. He explained that he was unable to meet those payments fully, and informed XXX who initially refused to adjust the payments. He said that is why his arrears continued to accrue after he was sentenced in July 2017. However, the 7 September 2018 letter from XXX revised his payment plan to £500 per month, with which he has since complied.

7. Dr Nkomo stated that he was appalled and ashamed by what he had done and accepts the gravity of the matter. He stated that he acted as he did out of pain and frustration, XXX. He stated that if the Tribunal would consider a sanction of conditions this would allow him to remediate and fully reflect on the impact his actions have had on colleagues and public confidence in the profession. He stated that he intends to undertake various modules on ethics as a way to help remediate his misconduct and conviction. He explained that he was single at the time of the events but now has a family XXX, and felt that he has grown as a person and a doctor.

### **Submissions**

8. The Tribunal does not intend to rehearse in full the submissions made by both parties. The following is a brief summary.

### **Submissions on behalf of the GMC**

9. On behalf of the GMC, Mr Kitching submitted that the only appropriate sanction in Dr Nkomo's case is erasure. He submitted that only erasure would reflect the Tribunal's findings, particularly in regard to the various paragraphs of GMP breached and the seriousness of Dr Nkomo's misconduct and convictions, in particular the Fraud Conviction. Throughout his submissions Mr Kitching invited the Tribunal to consider relevant paragraphs of the Sanctions Guidance (February 2018) ('SG').

10. Mr Kitching submitted that the Fraud Conviction involved repeated dishonest acts over an extended period, and that the case summary details nine separate occasions where Dr Nkomo misled XXX. He noted that Dr Nkomo only admitted guilt in May 2017, and his conduct caused a loss of £40,800 to third parties. The seriousness of this conduct is compounded by the late disclosure of both the Driving and Fraud Convictions to the GMC.

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11. Mr Kitching submitted that there were few mitigating factors in Dr Nkomo's case. He submitted that the doctor has shown limited insight into the concerns in this case. He drew the Tribunal's attention to the case of *Yeong v GMC [2009] EWHC 1923 (Admin)* and stated that misconduct which relates to a person's integrity is much harder to remediate than cases of poor clinical performance, and this is the case in these circumstances. He submitted that the Tribunal should take into account the aspects of personal mitigation advanced by Dr Nkomo, but following the guidance in *Bolton v Law Society [1994] 1 W.L.R 512*, should accord it little weight.

12. Mr Kitching submitted that no order or an imposition of conditions would not be appropriate at all in this case. He then referred the Tribunal to paragraphs of the SG which relate to these sanctions.

13. Mr Kitching acknowledged that in appropriate cases suspension can satisfy the public interest, but submitted that suspension in this case would not be appropriate as Dr Nkomo's conduct and convictions are fundamentally incompatible with continued registration. Mr Kitching submitted that bearing in mind the findings in this case, a sanction of suspension would not address the breaches of GMP.

14. Mr Kitching then referred the Tribunal to the paragraphs of the SG which advise when erasure may be the appropriate sanction. He drew the Tribunal's attention to the factors listed in paragraph 109 of the SG. Mr Kitching submitted that many of these factors were engaged and thus erasure was the proportionate and reasonable sanction in this case. He also drew the Tribunal's attention to paragraphs 120-128 of the SG which provide specific guidance on considering dishonesty.

### Submissions on behalf of Dr Nkomo

15. Mr Chinnery submitted that Dr Nkomo accepts and acknowledges that the appropriate sanction is one of suspension and this would be sufficient to restore the faith of the public in the medical profession. He referred the Tribunal to the relevant paragraphs of the SG and outlined why a sanction of suspension is proportionate in this case.

16. Mr Chinnery reminded the Tribunal that Dr Nkomo has admitted that his behaviour fell below the standard expected and has accepted responsibility for his actions. He told the Tribunal that Dr Nkomo pleaded guilty in the Crown Court, has demonstrated a degree of insight, and understands that public confidence in the

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profession would be undermined by his actions. He submitted that there have been no previous findings against the doctor, and the risk of repetition was low.

17. Mr Chinnery submitted that the context of Dr Nkomo's conduct provides not only mitigation, but an insight into Dr Nkomo's motivations. He submitted that context shows the conduct was misguided, but that it was not for personal gain. He submitted that in that context it fell just short of being fundamentally incompatible with continued registration.

18. Mr Chinnery submitted that the potential impact of a sanction of erasure would be extremely significant and would be very detrimental and have profound consequences for Dr Nkomo and his family.

19. Mr Chinnery referred the Tribunal to the table at paragraph 102 of the SG, which he submitted acknowledges that dishonesty may attract suspension rather than erasure. He submitted that paragraph indicates that suspension is appropriate *for 'sustained acts of dishonesty'*, and contrasted it with paragraph 128 of the SG that indicates that *'dishonesty, if persistent and/or covered up, is likely to result in erasure'*. He submitted that Dr Nkomo did not cover up his dishonesty and that Dr Nkomo's conduct was more accurately described as sustained dishonesty rather than persistent dishonesty. In support of that submission he relied upon the case summary for the Fraud Conviction, which he said showed that Dr Nkomo provided misleading information in the XXX form on 4 April 2013, and although he did not correct that information, he was not challenged as to its accuracy until the interview on 3 December 2015, where he conceded its inaccuracy. He also referred the Tribunal to the definitions of *'persistent'* and *'sustained'* in the Oxford English Dictionary ('OED').

### The Relevant Legal Principles

20. The Legally Qualified Chair reminded the Tribunal that the decision as to the appropriate sanction, if any, is a matter for this Tribunal's own independent judgement. In reaching its decision, the Tribunal should take 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. The Tribunal should consider the overarching objective as a whole, and not give excessive weight to any one limb.

21. The Tribunal should recognise that the purpose of imposing sanctions is to protect the public and not to be punitive, although it may have a punitive effect.

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Throughout its deliberations, the Tribunal should apply the principle of proportionality, balancing Dr Nkomo's interests with the public interest. Although the Tribunal should make sure that the sanction imposed is appropriate and proportionate, the reputation of the profession as a whole is more important than the interests of any individual doctor.

22. The Tribunal should first consider the aggravating and mitigating factors in this case and then move on to consider each possible sanction in turn, starting with the least restrictive.

23. The Tribunal should take submissions of personal mitigation into account, but give them limited weight, following the guidance in *Bolton*, which the High Court in *Stone v GMC [2017] EWHC 2534 Admin* and *Patel v GMC [2018] EWHC 171 (Admin)* has confirmed applies to the regulation of doctors. The Tribunal should also bear in mind that remediation by the doctor may have less significance set against allegations of dishonesty than in cases of clinical errors or incompetence (*Yeong* and *Patel* above).

24. However the Tribunal may take into account considerations as to Dr Nkomo's clinical competence and useful future services he may provide as a doctor (*Bilj v GMC [2001] UKPC 42; Bawa-Garba v GMC [2018] EWCA Civ 1879*). Finally the Tribunal should bear in mind the Court of Appeal's judgment in *Bawa-Garba* that:

- The SG contains very useful guidance to help provide consistency in approach and outcome at MPTS hearings, and should always be consulted, but that it is no more than non-statutory guidance, the relevance and application of which will always depend on the precise circumstances of the particular case; and
- The use of the words '*may*' and '*indicate*' in paragraph 109 of the SG signifies that the presence of one or more of the factors in that paragraph does not necessarily require erasure in every case, but may indicate that erasure is the appropriate and proportionate sanction, dependant on the facts of the case.

25. 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**

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### Aggravating Factors

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

- The seriousness of the Fraud Conviction, involving a course of criminal dishonest conduct over two years and seven months;
- That the primary victim of his dishonesty was XXX;
- He failed to notify the GMC without delay that he had been charged and convicted of two separate sets of offences;
- His actions amounted to a serious breach of the paragraphs of Good Medical Practice identified in its determination on Facts and Impairment;
- He appeared evasive and inconsistent at times during his evidence for the reasons set out in paragraphs 27 and 28 below;
- The Tribunal's conclusion in its determination on Facts and Impairment that Dr Nkomo has only demonstrated partial insight into how his actions impacted on his profession; and
- Notwithstanding Mr Chinnery's submission to the contrary, the Tribunal considered that Dr Nkomo did gain financially from his conduct in the Fraud Conviction.

27. When questioned by Mr Kitching and the Tribunal on his tax returns and his income from his locum work Dr Nkomo did not provide clear answers. He explained that all of the dividend income was paid to him by companies of which he is the sole shareholder and director, and is generated by his locum work. He explained that the very high dividend paid in the 2015/2016 tax year did not represent locum income solely earned in that tax year, but included locum income paid to his companies in prior years but that was retained in the companies. The Tribunal makes no criticism of how Dr Nkomo chooses to structure his tax arrangements.

28. However when questioned by the Tribunal on whether his employment income and dividends recorded as paid in his 2016/2017 tax return represented all of his locum income earned in that tax year, or if further sums were retained in his companies, Dr Nkomo asserted that it did represent all of his locum income, and no money was retained. This would give Dr Nkomo an income of £43,000 in that tax year. Dr Nkomo estimated that he worked for 46 weeks in that tax year as a Locum GP, usually for three or four days each week. Given Locum GP rates, the Tribunal were sceptical that Dr Nkomo's evidence as to his income was accurate. When

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questioned by Mr Kitching as to how much he earned per month as a locum Dr Nkomo sought to avoid answering the questions, even saying he was unable to give an estimate. Eventually he stated that he had earned approximately £30,000 in the last three months, a figure potentially inconsistent with his assertion that he only earned £43,000 in the entirety of the 2016/2017 tax year (only potentially so, as whilst it relates to the same work, it concerns a different time period). The Tribunal was concerned by these potential inconsistencies, and by Dr Nkomo's attempts to evade questions on his income.

### Mitigating Factors

29. The Tribunal balanced the aggravating factors with the mitigating factors in Dr Nkomo's case:

- His personal circumstances at the time of events, XXX; That no issues have been raised with his clinical competence and he has a positive reference and an offer of employment from Dr A;
- XXX;
- He has taken some steps to remediate;
- He has shown a degree of insight;
- The conclusions of both pre-sentence reports were that the risks of his re-offending are low;
- He pleaded guilty in the Fraud Conviction and has co-operated at all stages with these proceedings, including complying with an Interim Order of conditions;
- The likely effect of a more severe sanction on Dr Nkomo's career, family, XXX; and
- His clear expressions of remorse and apology in these proceedings, which the Tribunal accepted were genuine.

30. In paragraph 48 of its determination on Facts and Impairment the Tribunal concluded that, if faced with the Driving Convictions alone, it would not have found Dr Nkomo's fitness to practise currently impaired. The pre-sentence report for the Fraud Conviction did not consider the two convictions to be related or form part of a pattern of offending. Consistent with its earlier view, the Tribunal has not treated the Driving Convictions as an aggravating factor in its determination on sanction.

## **The Tribunal's Decision**

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31. 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

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

33. The Tribunal had regard to paragraphs 68-70 of the SG. The Tribunal was satisfied that there were no exceptional circumstances in Dr Nkomo's case which would justify taking no action. It determined that given the seriousness of the actions that led to a finding of misconduct, and of the Fraud Conviction, taking no action would be inappropriate, inadequate and would not be in the public interest, and would be viewed as such by informed members of the public.

### Conditions

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

35. The Tribunal concluded that a period of conditional registration would not be appropriate as it would not adequately address the main concerns raised in Dr Nkomo's case. Given the serious nature and gravity of Dr Nkomo's Fraud Conviction and misconduct, and its findings on fact and impairment, the Tribunal could not envisage being able to formulate workable conditions to address an issue of such gravity. The Tribunal noted that paragraph 56 of the SG indicates that issues relating to probity in a doctor's personal life are an aggravating factor that likely require more serious action. The Tribunal considered that an order of conditions in this case would not mark the seriousness of the misconduct and Fraud Conviction, and so undermine both public confidence in the medical profession and the maintenance of proper professional standards and conduct for members of the profession.

36. Dr Nkomo's registration was subject to conditions imposed by the Interim Orders Tribunal ('IOT'). The Tribunal noted that Dr Nkomo, both in his evidence and through his representative, argued that the decision of the IOT should be borne in mind by this Tribunal at the sanction stage. However an IOT neither makes findings of fact, nor determines the Allegation against a doctor, and applies a different test in imposing an interim order to that which this Tribunal must apply in considering

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sanctions. Therefore the Tribunal did not consider the interim order of conditions placed on Dr Nkomo was relevant to its determination, save to the extent that Dr Nkomo's compliance with those conditions was a relevant mitigating factor.

### Suspension

37. The Tribunal then went on to consider whether a sanction of suspension on Dr Nkomo's registration would be appropriate and proportionate. It had regard to the following paragraphs of the SG:

**91** *'Suspension has a deterrent effect and can be used to send out a signal to the doctor, the profession and public about what is regarded as behaviour unbecoming a registered doctor. Suspension from the medical register also has a punitive effect, in that it prevents the doctor from practising (and therefore from earning a living as a doctor) during the suspension, although this is not its intention.'*

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

**93** *'Suspension may be appropriate, for example, where there may have been acknowledgement of fault and where the tribunal is satisfied that the behaviour or incident is unlikely to be repeated. The tribunal may wish to see evidence that the doctor has taken steps to mitigate their actions.'*

**97(a)(e)(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.*

...

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*(e) No evidence that demonstrates remediation is unlikely to be successful, eg because of previous unsuccessful attempts or a doctor's unwillingness to engage.*

...

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

38. The Tribunal considered suspension very carefully. It noted its previous finding that:

*'Paragraph 1 of GMP makes it clear that honesty and trust-worthiness, acting with integrity and within the law, are cornerstones of the profession, and the Tribunal considers that the public expect doctors to meet these standards'.*

39. The Tribunal noted that suspending Dr Nkomo would send a signal that his behaviour in the Fraud Conviction and his misconduct were not acceptable for a doctor. The Tribunal accepted Dr Nkomo had acknowledged fault, and the behaviour was unlikely to be repeated. Therefore aspects of paragraphs 91, 93, and 97(e) were present in this case. However, as set out in its Facts and Impairment determination, the Tribunal considered Dr Nkomo to have only developed partial insight, which it considered insufficient to satisfy paragraph 97(g) of the SG.

40. The Tribunal had regard to the summary of the case law on sanctions for dishonest conduct set out by the High Court in *Theodoropoulos v GMC [2017] EWHC 1984 (Admin)*, and in particular the following paragraphs:

*'35 The importance of honesty and integrity on the part of the members of a profession, including the medical profession is generally recognised in the case law...Findings of dishonesty lie at the top end of the spectrum of gravity of misconduct*

...

*38 Furthermore, the case law recognises that where a doctor engages in deliberate dishonesty and lacks insight, erasure may, in practical terms, be inevitable.*

...

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*45 ...Misconduct does not have to occur in a clinical setting before it renders erasure, rather than suspension, the appropriate sanction’.*

41. Dr Nkomo was convicted of a fraud lasting two years and seven months, XXX. He compounded that behaviour by failing to notify the GMC without delay of that charge and conviction, and of the Driving Convictions. His behaviour clearly lies at the *‘top end of the spectrum of gravity of misconduct’*. He has only developed partial insight. There was little acknowledgement of the impact his misconduct may have on the reputation of the profession as a whole.

### Erasure

42. The Tribunal therefore considered whether erasure was appropriate and proportionate in this case. In so doing, the Tribunal found the following paragraphs of the SG to be particularly relevant:

**108** *‘Erasure may be appropriate even where the doctor does not present a risk to patient safety, but where this action is necessary to maintain public confidence in the profession. For example, if a doctor has shown a blatant disregard for the safeguards designed to protect members of the public and maintain high standards within the profession that is incompatible with continued registration as a doctor.*

**109** *‘Any of the following factors being present may indicate erasure is appropriate (this list is not exhaustive).*

*(a) A particularly serious departure from the principles set out in Good medical practice where the behaviour is fundamentally incompatible with being a doctor.*

*(b) A deliberate or reckless disregard for the principles set out in Good medical practice and/or patient safety.*

...

*(h) Dishonesty, especially where persistent and/or covered up (see guidance below at paragraphs 120–128).*

...

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*(j) Persistent lack of insight into the seriousness of their actions or the consequences'*

**120** *'Good medical practice states that registered doctors must be honest and trustworthy, and must make sure that their conduct justifies their patients' trust in them and the public's trust in the profession.'*

**124** *'Although it may not result in direct harm to patients, dishonesty related to matters outside the doctor's clinical responsibility (eg providing false statements or fraudulent claims for monies) is particularly serious. This is because it can undermine the trust the public place in the medical profession. Health authorities should be able to trust the integrity of doctors, and where a doctor undermines that trust there is a risk to public confidence in the profession. Evidence of clinical competence cannot mitigate serious and/or persistent dishonesty.'*

**128** *'Dishonesty, if persistent and/or covered up, is likely to result in erasure (see further guidance at paragraph 120–128).'*

43. The Tribunal bore in mind the advice of the Legally Qualified Chair that it must have regard to the principle of proportionality in deciding on the least restrictive sanction it must impose in order to protect the public in accordance with the three limbs of the over-arching objective. The Tribunal must balance the public interest against the interests of Dr Nkomo and in doing so must impose the sanction it determines necessary to protect the public, even if it causes the difficulties for Dr Nkomo outlined by Mr Chinnery in his submissions. In considering its responsibility to uphold confidence in the medical profession, the Tribunal must reflect the views of an informed and reasonable member of the public in possession of the full facts of the case and able to see it in its full context (*Giele v GMC [2005] EWHC 2143 (Admin)*).

44. Paragraphs 97(a) and 109(a) of the SG indicate that whether or not the departures from GMP are fundamentally incompatible with being a doctor is a critical dividing line between suspension and erasure. The Tribunal considered that Dr Nkomo's conduct that was the subject of the Fraud Conviction, and his misconduct in not reporting either the Driving Convictions or the Fraud Conviction to the GMC without delay, are fundamentally incompatible with being a doctor. The Fraud Conviction involved a course of criminal dishonest conduct over 2 years and 7 months, resulting in a personal gain to Dr Nkomo, and loss to XXX, of at least £40,800. The fundamental issues as to Dr Nkomo's probity that this raises is compounded by his further misconduct in failing to disclose charges and convictions to the GMC without delay on two occasions.

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45. The Tribunal rejected Mr Chinnery's submissions that there was a meaningful distinction between sustained dishonesty requiring suspension, and persistent dishonesty requiring erasure. The Tribunal noted that the SG is not statutory guidance, the relevance and application of which will always depend on the circumstances of each case (*Bawa-Garba* above). The Tribunal did not consider the language used in the SG to be suited to the same interpretation techniques that may be applied to a statute or statutory guidance. Further, the table at paragraph 102 of the SG appears under the heading '*Determining the length of suspension*', as an example of an aggravating factor '*that will also be relevant to the length of suspension, under broad categories, depending on the nature of the case*'. It is therefore indicating, not that sustained dishonesty indicates suspension is the appropriate sanction, but that if a Tribunal has already decided suspension is the appropriate sanction, sustained dishonesty indicates a longer period of suspension would be appropriate.

46. Equally paragraph 109(h) of the SG lists 'dishonesty, especially where persistent and/or covered up' as a factor that indicates erasure maybe appropriate. As the Court of Appeal held in *Bawa-Garba*, the use of 'may' in these paragraphs signifies that not all cases involving the factors in paragraph 109 will necessarily result in erasure. Therefore, cases of persistent dishonesty may, on their facts, lead to a lesser sanction. Paragraph 109(h) of the SG is equally clear that single incidents of dishonesty, even if not persistent or covered up (or, to the extent there is a difference, sustained) may indicate erasure is appropriate. Paragraph 128 of the SG simply confirms that persistent and/or covered up dishonesty is likely (but not certain) to result in erasure.

47. The Tribunal was not assisted by the OED definitions of sustained and persisted. Mr Chinnery in fact sought to equate 'sustained' with the second definition of 'persisted' in the OED; namely '*continuing to exist or occur over a prolonged period*'. This in fact demonstrated that the concepts have a significant degree of overlap and equivalence, further indicating that they are not intended by the SG to be distinct concepts in relation to dishonesty, one leading to suspension the other to erasure. In any event, the Tribunal did not accept the factual premise of Mr Chinnery's submission that the case summary for the Fraud Conviction shows that Dr Nkomo's initial provision of misleading information was not challenged. The case summary shows that after submitting the XXX form, Dr Nkomo had seven phone calls with the XXX in which he both failed to correct the misleading information in the XXX form and on occasion provided further misleading information. In particular on 21 November 2013, a XXX put bank statements obtained by the XXX to Dr Nkomo that appeared to contradict the information in the XXX form, and requested that he complete a new XXX. This is a clear challenge by the XXX to Dr Nkomo's provision of misleading information, in response to which Dr Nkomo persisted in his fraudulent conduct for a further two years.

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48. The Tribunal's conclusion is that Dr Nkomo's dishonest conduct engaged paragraphs 109(h) and 128 of the SG, further indicating that erasure is the appropriate sanction in this case. It also constituted a deliberate breach of the principles of GMP set out in the Tribunal's determination on Impairment, as did Dr Nkomo's misconduct in failing to notify the GMC. Therefore paragraph 109(b) of the SG is a further indication that erasure maybe appropriate in this case.

49. The Tribunal has concluded that Dr Nkomo has demonstrated partial insight, and accepts his genuine expressions of remorse. It also notes that Dr Nkomo has taken some steps to remediate, and indicated in his oral evidence his willingness to take further steps to do so. The Tribunal does not consider that there is a persistent lack of insight so as to engage paragraph 109(j) of the SG.

50. The Tribunal also took into account that Dr Nkomo's actions occurred in difficult personal circumstances, and that the sanction of erasure would have a significant detrimental effect on Dr Nkomo, his family, XXX. However, the cases of *Bolton*, *Yeong*, *Stone*, and *Patel* that the Tribunal was referred to indicate that these matters of personal mitigation and remediation should carry less weight in the regulatory context and in considering a case of dishonesty. The Tribunal also took into account that the matters before it raise no concerns with Dr Nkomo's clinical competence. However, the Tribunal noted that paragraph 124 of the SG guides that '*evidence of clinical competence cannot mitigate serious and/or persistent dishonesty*'.

51. The Tribunal concluded that Dr Nkomo's behaviour is fundamentally incompatible with continued registration given the serious, deliberate, and dishonest nature of the Fraud Conviction, and the length of time for which he delayed informing the GMC of both the Driving and the Fraud Convictions. Paragraph 109(a)(b) and (h) all indicate that erasure is the appropriate sanction in such circumstances. The Tribunal considered that any lesser sanction, including suspension, would not fulfil the over-arching objective, as it would fail to mark the seriousness of Dr Nkomo's conduct, and thus undermine public confidence in the medical profession and undermine proper professional standards. In light of the guidance in the case law and the SG as to the weight to be given to the mitigating factors in this case, the Tribunal considered that it could not justify a lesser sanction.

52. The Tribunal has therefore determined that erasure is the only sufficient sanction which would maintain public confidence in the profession and send a clear message to the profession and the public that Dr Nkomo's misconduct constituted

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behaviour unbefitting and fundamentally incompatible with that of a registered doctor.

53. Accordingly, the Tribunal determined to direct that Dr Nkomo's name be erased from the Medical Register in order to protect the health, safety, and wellbeing of the public, maintain public confidence in the profession, and declare and uphold proper standards of conduct and behaviour.

### **Determination on Immediate Order - 20/12/2018**

1. Having determined that Dr Nkomo's name be erased from the Medical Register, the Tribunal has now considered whether to impose an immediate order of suspension on Dr Nkomo's registration in accordance with Section 38 of the Medical Act 1983, as amended.

#### **Submissions on behalf of the GMC**

2. Mr Kitching submitted that, given the seriousness of the Tribunal's findings and the impact on public confidence in the profession, an Immediate Order of suspension is necessary.

#### **Submissions on behalf of Dr Nkomo**

3. Mr Chinnery submitted that it was not necessary for the Tribunal to impose an Immediate Order on Dr Nkomo's registration. He stated that Dr Nkomo requested that *'it would assist patients at his practice for a delay of an Immediate Order'*. Mr Chinnery submitted that he was *'unclear what arrangements at the practice have been put in place'*.

#### **The Tribunal's Decision**

4. 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. It has also borne in mind the guidance given in the relevant paragraphs of the SG, specifically 175, 176 and 178.

5. The Tribunal determined that in light of the gravity of its findings, and in the particular circumstances of this case, an Immediate Order of suspension was appropriate and necessary. It determined that it would be necessary for the protection of members of the public, in the public interest, and to uphold and maintain proper professional standards.

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6. The effect of this order is that Dr Nkomo's registration will be suspended from the date when written notice of this decision is deemed to have been served upon him.
7. The Interim Order currently imposed on Dr Nkomo's registration will be revoked when the Immediate Order takes effect.
8. That concludes this case.

**Confirmed**

**Date** 20 December 2018

Mr Russell Butland, Chair