PUBLIC RECORD

Dates: 09/10/2023 - 20/10/2023

Medical Practitioner's name:	Dr Martin WHITENBURGH
GMC reference number:	3612866
Primary medical qualification:	MB ChB 1991 University of Liverpool

Type of case	Outcome on facts	Outcome on impairment
New - Misconduct	Facts relevant to impairment found proved	Impaired

Summary of outcome

Conditions, 12 months.
Review hearing directed

Tribunal:

Legally Qualified Chair	Mr Jonathan Storey
Lay Tribunal Member:	Mrs Sue Wadham
Medical Tribunal Member:	Dr Keith Dunnett

Tribunal Clerk:	Ms Evelyn Kramer

Attendance and Representation:

Medical Practitioner:	Present and represented
Medical Practitioner's Representative:	Mr Ben Rich, Counsel, instructed by the Medical Protection Society
GMC Representative:	Mr Lee Fish, Counsel

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 - 17/10/2023

Background

1. Dr Whitenburgh qualified in 1991 from the University of Liverpool. Subsequently, Dr Whitenburgh completed his medical training and became a General Practitioner (GP). Since 2005, Dr Whitenburgh has been a GP Principal and Medical Director at the Cockhedge Medical Practice ('the Practice').

2. The allegation that has led to Dr Whitenburgh's hearing is that, on one or more occasions between 14 to 26 April 2021, Dr Whitenburgh spoke to Patient A to discuss a complaint raised by Patient A's partner, Ms B. It is alleged that Dr Whitenburgh repeatedly asked Patient A to drop the complaint and suggested that he would pay £5000 if the complaint was dropped. It is further alleged that on 25 April 2021 Dr Whitenburgh inappropriately telephoned Patient A from his personal mobile number outside of normal working hours.

3. The initial concerns were raised with the GMC on 31 August 2022 by Patient A. Patient A raised these concerns when the GMC contacted him about its investigation into Dr Whitenburgh's fitness to practise which arose from the complaint made by Ms B.

The Outcome of Applications Made during the Facts Stage

4. The Tribunal refused an application, made on behalf of Dr Whitenburgh by Mr Rich, Counsel, pursuant to Rule 17(2)(g) of the General Medical Council (Fitness to Practise Rules) 2004 as amended ('the Rules'), that there was no case to answer in respect of paragraph 1.b.i. of the Allegation. The Tribunal's full decision on the application is included at Annex A.

5. The Tribunal granted the application, made on behalf of Dr Whitenburgh pursuant to Rule 34(1) of the Rules, to admit the evidence and exhibits of Ms C. The GMC did not oppose this application. The Tribunal's full decision on the application is included at Annex B.

The Allegation and the Doctor's Response

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

That being registered under the Medical Act 1983 (as amended):

1. On one or more occasions, between 14-26 April 2021, you:

a. spoke to Patient A, by telephone, in which you discussed the complaint which had been raised by Patient A's partner ('Ms B') and you:

i. asked whether Ms B was 'mentally unstable', or words to that effect;
To be determined

ii. repeatedly asked Patient A to drop the complaint and/or not take it any further;
To be determined

iii. suggested you would pay Patient A or Ms B £5000, if the complaint was dropped;
To be determined

iv. asked 'what is it going to take for this to go away?' or words to that effect;
To be determined

b. inappropriately telephoned Patient A;

i. from your personal mobile number;
To be determined

ii. outside of normal working hours on 25 April 2021, repeating your behaviour, as described at paragraph 1(a)(ii).
To be determined

And that by reason of the matters set out above your fitness to practise is impaired because of your misconduct. **To be determined**

The Admitted Facts

7. At the outset of these proceedings, through his Counsel, Mr Rich, Dr Whitenburgh indicated that he admitted the stem of paragraph 1.a of the Allegation alone. Specifically, he admitted that, as a matter of fact, he had spoken to Patient A, by telephone, on one occasion, in which he discussed the complaint which had been raised by Patient A's partner, Ms B.

The Facts to be Determined

8. In the light of Dr Whitenburgh's response to the Allegation against him, the Tribunal is required to determine whether, on one or more occasions while speaking on the telephone to Patient A, Dr Whitenburgh asked whether Ms B was 'mentally unstable', or words to that effect; repeatedly asked Patient A to drop the complaint and/or not take it any further; suggested that he would pay Patient A or Ms B £5000 if the complaint was dropped; and asked 'what is it going to take for this to go away?' or words to that effect. It is also required to determine whether Dr Whitenburgh inappropriately telephoned Patient A from his personal mobile number and outside normal working hours on 25 April 2021, repeating his request for Patient A to drop the complaint and/or not take it any further.

Factual Witness Evidence

9. The Tribunal received evidence on behalf of the GMC from Patient A, in the form of a witness statement dated 10 December 2022 and a supplemental witness statement dated 28 April 2023. Patient A also gave oral evidence in person.

10. The Tribunal also received evidence on behalf of the GMC in the form of a witness statement from Mr D, Head of the Customer Contact Centre for NHS England, dated 22 May 2023.

11. Dr Whitenburgh provided his own witness statement, dated 1 September 2023 and also gave oral evidence, in person, at the hearing. In addition, the Tribunal received evidence

from Ms C, in person, on Dr Whitenburgh's behalf. Ms C's witness statement was dated 10 October 2023.

Documentary Evidence

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

- Extracts of Patient A's medical records;
- Screenshots of telephone calls from Dr Whitenburgh to Patient A;
- Extracts of NHS England's log relating to Ms B's complaint, dated between 18 April and 1 June 2021;
- XXX;
- Dr Whitenburgh's written responses to Ms B and Patient A following the concerns raised with NHS England, dated 27 April 2021 and 11 May 2021;
- Various testimonials written in support of Dr Whitenburgh, dated between July and October 2023.

The Tribunal's Approach

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

14. It was agreed that prior to the events that are the subject of this hearing, XXX, Dr Whitenburgh was a man of good character.

15. The Tribunal was also made aware of Patient A's previous criminal convictions, the most recent of which was 2013. The Tribunal gave this very limited weight in its consideration of the facts of this case.

The Tribunal's Analysis of the Evidence and Findings

16. The Tribunal first considered the relevant and agreed background to the events that occurred in April 2021.

17. Patient A joined the Practice as a new patient in September 2010. The Tribunal took account of the summary of Patient A's medical history XXX. This included the following matters:

- Taking an accidental overdose of co-codamol on 15 January 2016 when it was prescribed for pain following a dental abscess;
- On 31 March 2016 he was prescribed a course of co-codamol, 30/500 1-2 tablets four times a day, a packet of 100 tablets for acute episodes for his musculoskeletal chest pain;
- XXX;
- XXX; and
- On 1 October 2019, 5 November 2019, 19 November 2019 and 9 December 2019 he was prescribed the same course for ongoing pain related to the thigh injury.

18. The co-codamol was prescribed to Patient A by its trade name 'Zapain', an analgesic containing codeine (30mg) and paracetamol (500mg), the maximum dose of which is eight tablets a day, equating to approximately 220 a month. While co-codamol is a Schedule 5 drug and is a moderately potent opioid medication which can cause opioid toxicity, there are fewer restrictions on its prescribing when compared with other controlled drugs.

19. Dr Whitenburgh undertook a medical review of Patient A on 19 November 2019, prior to changing his prescription for co-codamol from acute to repeat. The first issue of the medication to Patient A as a repeat prescription was on 9 December 2019. On 20 January 2020 Patient A signed up to the online repeat prescription service known as EMIS Access, a system used by general practices to enable patients to order medication online. During 2020 and up to 31 March 2021 a large number of repeat prescriptions were issued to Patient A via EMIS Access.

Chronology relevant to the Allegation

20. On Wednesday 14 April 2021, Ms B contacted the Practice to complain about Patient A's use of the co-codamol that had been prescribed by Dr Whitenburgh.

21. Dr Whitenburgh accepted that he was made aware of Ms B's complaint on the same day. Dr Whitenburgh subsequently contacted Patient A by telephone, a record of which was made in Patient A's medical records at 09:48 in the following terms:

'Problem	***History of opiate misuse*** *(First)*
History	*partner rang complaining that overusing co-codamol* *so spoke to patient who admits athat he was addicted to co-codamol* *and taking up 20 per day* *ongoing for month offering several excuse* *admits that abused his position during covid by abusing his on-line account and passing them on to third parties but would not declare who*
Comment	*advised that will no put prescription on acutes and given details of Pathways*
Referral	*Patient referral for drug addiction rehabilitation To: Other'*

22. Later that morning at 11:24, Dr Whitenburgh followed up his phone consultation with Patient A with a text message:

> *'Dear* [Patient A] *Thank you for talking to me today. It was nice that you were open and honest with me. I am here to help you at all times and as we discussed I will help you with your addiction to the best of my ability. The practice has made great efforts to contact a team of specialists today were your case was discussed to help you recover from your problem. I would therefore ask that in the first instance you contact them. They are called "Pathways to Recovery". Their number is* […] *The Practice will then assist and guide you thereafter. Thanks, Martin WhitenburghCockhedge Medical Centre'*

23. On Thursday 15 April 2021, Dr Whitenburgh had another telephone consultation with Patient A. Dr Whitenburgh's entry in Patient A's medical records was made at 08:53 in the following terms:

'Problem	***History of opiate misuse*** *(Review)*
History	*long chat!!!* *pt rang today to apologise profusely of misuse and selling drugs to 3rd party* *he acknowledged that he abused his on line access and this will not*

	happen again
	pt asking for uss [ultrasound scan] *to exclude pathology*
	advised serology
Comment	*pt is aware of Pathways but insists that he does not need the service*
Test request	*Ultrasound – Unknown specimen*
	Test Request : US Abdomen
	Blood Science – Unknown specimen
	Test Request : B12 & Folate (Haematinics)
	Test Request : CRP
	Test Request : Erythrocyte sedimentation rate
	Test Request : Full blood count – FBC
	Test Request : Iron Profile
	Test Request : HbA1c
	Test Request : Liver function test
	Test Request : Renal profile
	Test Request : Thyroid function test'

24. Later that morning at 09:16, Dr Whitenburgh followed up his telephone consultation with Patient A with a text message:

> *'Dear* [Patient A] *As requested a scan has been arranged on an urgent basis. Best wishesMartin WhitenburghCockhedge Medical Centre'*

25. On Sunday 18 April 2021, Ms B contacted NHS England (NHSE) via email with a formal complaint about Dr Whitenburgh.

26. Subsequently, NHSE contacted the Practice. On the face of the documents, there was an inconsistency as to the date and time this conversation took place. However, during the course of the hearing, the parties agreed that it was more likely that this conversation had taken place on Tuesday 20 April 2021 around 14:15 as recorded by Dr Whitenburgh in the *'Administration note'* he entered on to Patient A's medical records, rather than on Wednesday 21 April 2021 at 10:06 as had been recorded on the NHSE log.

27. The conversation between an NHSE employee and Dr Whitenburgh was recorded in the NHSE log as follows:

‘I received a call back from the PM and explained i had a safeguarding concern for this patient given the amount of medication he may have taken and the levels of toxicity he may have. The PM advised she was with the GP so put him on.

The GP explained that there are not safeguarding concerns. he stated that this was not a complaint as the patient has not complained. He stated I should not contact him as what i am reporting is hearsay and not from the patient. he advised that it only becomes a complaint once we receive consent. He said he has had dealings with NHSE before and asked if i was my colleague i said no and stated my name.

I advised him that any expressions of dissatisfaction are logged as complaints and any member of the public or staff can raise a concern either on their own behalf or on behalf of another. I explained that we would always seek to get consent from the patient, their guardian or POA before proceeding with a complaint. However in instances were there are concerns for patient safety we have to bypass DPA to ensure that patients do not come to any harm.

The GP stated that the patient is not at risk as he has not been taking the medication and if he had he would be dead. He said he understands that the patient has been selling or giving the medication away potentially to his partner the complainant. He said the patient had assured him he would not complain as the GP made him aware that if he had been selling the drugs or giving them away it would be a police matter. I asked had he contacted the police he said he had not as the patient said he wouldnt complaint. i advised the GP that either way he is a mandatory reporter and he should raise this.

The GP stated that the issue lies with the patient access system. prior to the pandemic receptionists would triage prescription requests and highlight if patients were requesting too early or too often, under the current workload prescriptions are going direct to the GP and the GP admitted that he has been signing these off. he says that there is no fail safe within patient access to prevent this. i advised that ultimately he is responsible as the prescriber but he said the patient has abused the system and it is not the GPs fault. he said any patient in any surgery can abuse the system in this way.

The GP then began to say that i had breached DPA by contacting the surgery and sharing the complaint and that i shouldnt discuss the complaint until i have the patients consent. i advised that my contact with the surgery was not relating to the

complaint but rather that a safeguarding concern had been highlighted that we have to follow up. again the GP stated that the patient is not taking the medication. I asked could other patients be doing the same and are their concerns for the wider community of the surgery and the GP said he wouldnt know but all GPs work in this way not just him.

He again said that i do not know my job and i have breached DPA i advised that i would seek advice from […] *but assured him that i am obligated to report safety concerns. I explained that i do not know the patient or the situation so i have to check. he said he knows the patient very well and i dont so therefore i shouldnt get involved.*

I said numerous times that i didnt feel the conversation was productive as the GP was very frustrated at the situation. i thanked him for his time and ended the call…'

28. On Tuesday 20 April 2021 at 14:15, Dr Whitenburgh's record of the same call was recorded as an *'Administration note'* in Patient A's medical records:

'Problem	***History of opiate misuse*** *(Review)*
History	*received cal from* […] *from NHSE* *informed that she received a complaint from pts partner* *allegedly this was his partner that I was overprescribing* *I informed that this was not a complaint until the personal in question made a complaint.* *She then advised that it was not a complaint she was infering about but a Safeguarding Issue.* *I asked her they why she was sending a complaints form out to paient to complete and disclosing Patient Identifiable information* […] *rudely put the phone down immediately and cut me off'*

29. The Tribunal considered that the record made in both the NHSE log and Patient A's medical records had clear similarities. In response to questions from the Tribunal, Dr Whitenburgh confirmed that he had only one telephone conversation with NHSE and accepted that the NHSE log was a broadly accurate record of it.

30. Dr Whitenburgh accepted the chronology set out by Mr Fish, on behalf of the GMC, that after he had concluded his conversation with the NHSE employee, he almost immediately called Patient A.

31. The Tribunal had been provided with a screenshot from Patient A's mobile phone that showed that he had received a call from a mobile number belonging to Dr Whitenburgh timed at 14:28. That call had a duration of 13 minutes and 11 seconds. Dr Whitenburgh accepted during cross-examination that it was likely that this screenshot was a record of the phone call Dr Whitenburgh had with Patient A on Tuesday 20 April 2021 as documented by him in Patient A's medical records at 14:59. That record was as follows:

'Problem	***History of opiate misuse*** *(Review)*
History	*Spoke to pt* *Pt admidst that partner and her family and himself are in dispute due to own reasons* *no longer his partner* *Pt admits that she has allegedly sought legal advice and pt would possibly get up to Â£25K* *and will settle if she gets Â£5K* *pt admits that if she received this then she would take the case no further'*

32. According to the NHSE log from that same day, 20 April 2021 at 16:21, a different NHSE employee took a call from Patient A. This call was recorded in the NHSE log as follows:

> '[Patient A] *called him today and has been on the phone to him for 14mins pressuring him not to continue with the complaint and when the consent forms come to throw them in the bin. He said he is stressed enough that he is trying to come off this medication after he has been over prescribing him. He said its not fair for him to be contacting him off his personal number pressuring him to not complain.*
>
> *He said he has the conversations have been recorded. He said the GP has contacted him 4 times over the past week on his personal number to ask him not to complain. He has made a comment about his partner being mentally stable because she raised a complaint on his behalf.*
>
> *The GP has told him NHS England have contacted him in regards to a complaint. He said he doesn't want the GP to be contacting from his personal number.'*

33. The following day, Wednesday 21 April 2021, Dr Whitenburgh again spoke to Patient A on the telephone. Dr Whitenburgh's entry in Patient A's medical records was made that day at 07:56 in the following terms:

'Problem	***History of opiate misuse*** *(Review)*
History	*spoke to pt directly today* *he confirmed that he was not taking any tablets whatsoever* *deep questioning of signs of liver disease such as jaundice spider naevi palmer erytema*
Comment	*Offered appointment at his convenience* *also advised blood form ready for collection* *declined both offers* *Discussion about clinical red flag warning sign* *Safety netting advice offered e.g. 111, A&E, GPooH'*

34. A screenshot taken by Patient A was provided to the Tribunal showing two missed calls from a mobile number belonging to Dr Whitenburgh at 20:04 and 20:05 on Sunday 25 April 2021. No entry was added to Patient A's medical records to document these attempts to call him.

35. There was no further record of any telephone contact between Patient A and Dr Whitenburgh, except for a screenshot of a phone call made by Patient A to Dr Whitenburgh's number timed at 11:21. The date of that call was, however, unknown and it was not clear from the screenshot whether it had been successful as there was no indication of its duration. No such call with a time corresponding to around 11:21 could be identified in Patient A's medical records.

36. On 26 April 2021, Patient A took screenshots of Dr Whitenburgh's calls to him from 20 April 2021.

37. On 27 April 2021, Dr Whitenburgh wrote to Ms B with a response to her complaint.

38. On 11 May 2021, Dr Whitenburgh wrote to Patient A with a response to the concerns raised with NHSE about his clinical care.

39. On 11 June 2021, Patient A's blood test results came back as normal. These tests corresponded with those ordered by Dr Whitenburgh on 15 April 2021. There was, however,

no evidence as to when Patient A collected the blood form, or when or where he had his blood samples taken. It was noted in evidence that the Practice did not provide this service directly. Further there was no evidence to suggest that Dr Whitenburgh had seen the results.

40. On 1 July 2021, Patient A's medical records were requested via email from the Practice by solicitors he had instructed.

41. On 2 August 2021, Patient A, Ms B and their infant daughter were removed from the Practice's patient list.

42. Having set out the chronology of events, primarily from the documentary evidence before it, the Tribunal went on to consider each paragraph of the Allegation separately and has evaluated the evidence in order to make its findings on the facts.

Paragraph 1.a

43. Dr Whitenburgh had admitted that, on one occasion, he had spoken with Patient A, by telephone, and discussed the complaint which had been raised by Patient A's partner (Ms B). Dr Whitenburgh's evidence was that this discussion with Patient A took place on Tuesday 20 April 2021.

44. The Tribunal considered Dr Whitenburgh's call with Patient A on Wednesday 14 April 2021. It was mindful that this call took place after Dr Whitenburgh had been notified by a member of the Practice staff that Ms B had complained about Patient A's use of the co-codamol that Dr Whitenburgh had been prescribing for him. Dr Whitenburgh made reference to Ms B's complaint in his entry in Patient A's medical record about that telephone consultation. The Tribunal was satisfied that Ms B's complaint had clearly prompted him to speak to Patient A about his use of co-codamol. As such, the Tribunal concluded that there were at least two conversations in which Ms B's complaint was discussed, on Wednesday 14 April 2021 and Tuesday 20 April 2021.

Paragraph 1.a.i

45. The Tribunal was required to determine whether, on one or more occasions between 14 and 26 April 2021 Dr Whitenburgh spoke to Patient A, by telephone, in which he discussed the complaint which had been raised by Ms A and asked whether Ms B was 'mentally unstable' or words to that effect.

46. The Tribunal had already found that Dr Whitenburgh had made at least two phone calls to Patient A in which Ms B's complaint was discussed. This was plain from his entries in Patient A's medical records from 14 and 20 April 2021.

47. There was no direct evidence of what was said about Ms B's complaint in either phone call. Therefore, there was no direct evidence that Dr Whitenburgh asked Patient A whether Ms B was 'mentally unstable' or words to that effect.

48. The Tribunal had regard to Patient A's witness statement:

> *'12. On one occasion, I remember answering a call from him whilst I was at work. I don't know if this is one of the phone calls referenced in the medical records or another time but if it was, the records do not reflect the conversation. Dr Whitenburgh begged me to drop the complaint and was blaming* [Ms B]*. His exact words to me were 'is your partner mentally unstable?' and he said 'what is it she's after? money?' If was as though Dr Whitenburgh was trying to blame everything on* [Ms B] *because I wasn't in a fit state to put the complaint in. As mentioned above, I wasn't in the right frame of mind at this time, so I probably did say it was all her and she made the complaint. This was because of the way I was at the time and because Dr Whitenburgh was trying to make out like it was all* [Ms B]*'s doing. I probably did blame it on* [Ms B] *a bit when I spoke to Dr Whitenburgh, I went along with him and might have agreed with him that she wanted money. However, I clearly remember receiving numerous calls from Dr Whitenburgh begging me to drop the complaint. He said what is it going to take for this to go away, or words to that effect and I did respond to say that I'd get* [Ms B] *to drop the complaint. I probably also said give her some money and we'll forget about it, but I did not bring the topic of money up first. It was definitely Dr Whitenburgh who mentioned this first. He raised the topic of money a few times- at least 3 or 4 times. I'm not sure which phone call was which, but I definitely remember him ringing me and saying this to me when I was at work. There were a lot of phone calls and missed calls, which is not reflected in the medical records at all.'*

49. Patient A was consistent in his oral evidence that Dr Whitenburgh had, on at least one occasion during a phone call, asked whether Ms B was 'mentally unstable' or said words to that effect.

50. In his witness statement, Dr Whitenburgh stated:

> *'I was concerned about Patient A's welfare when Ms B raised her concerns. Indeed, I was grateful that she did raise a concern given the risk of addiction to the medication and health implications. I had no reason to, nor would it be appropriate to make comments of this nature. Ms B's mental and physical health had no bearing on the concerns raised.'*

51. In his oral evidence, Dr Whitenburgh said terms like 'mentally unstable' were not language he used.

52. The Tribunal had regard to the chronology of events on Tuesday 20 April 2021. First, Dr Whitenburgh had a challenging conversation with NHSE about whether Patient A was at risk. Very shortly afterwards he called Patient A. It had been accepted by Dr Whitenburgh that this call appeared to be the one for which Patient A had provided a screenshot and that it had lasted 13 minutes and 11 seconds.

53. According to the documentary evidence, later that same day, Patient A had called NHSE and spoke to a different NHSE employee. The NHSE log recording the content of that call is set out in the chronology above. In Patient A's witness statement, it was written:

> *'I remember phoning NHS England on my way home from work one day, I was driving home at the time. I asked them to please tell Dr Whitenburgh to stop contacting me. After that, I assume they told him, as the phone calls completely stopped…'*

54. The Tribunal considered that the timing of the NHSE log entry from 16:21 on 20 April 2021 appeared to be consistent with Patient A's account that he called after work after receiving a call from Dr Whitenburgh.

55. The Tribunal had regard to the references to consent in both Dr Whitenburgh's call with NHSE and the account recorded by NHSE of Patient A's phone call to them. Dr Whitenburgh appeared to have been insistent with NHSE that there was not yet a complaint because Patient A had not consented to one. When Patient A called NHSE later that day, it was recorded that he said Dr Whitenburgh had called *'pressuring him not to continue with the complaint and when the consent forms come to throw them in the bin.'* The Tribunal concluded that it was more likely than not that Dr Whitenburgh had raised the issue of whether Patient A consented to Ms B's complaint during their phone call on 20 April 2021.

56. The Tribunal considered Dr Whitenburgh's entry which included:

‘Pt admits that she has allegedly sought legal advice and pt would possibly get up to Â£25K
and will settle if she gets Â£5K
pt admits that if she received this then she would take the case no further’

57. During Tribunal questions, Dr Whitenburgh had been asked whether there was any significance to his use of the word *‘admits’* in the record of his phone call with Patient A on 20 April 2021. Dr Whitenburgh had said that there was no significance to this. However, the Tribunal was not persuaded by this answer, particularly when considering the documentary evidence of Dr Whitenburgh’s own entry in Patient A’s medical records and the NHSE log.

58. The Tribunal also had regard to the letter Dr Whitenburgh wrote to Ms B about her complaint on Tuesday 27 April 2021. Dr Whitenburgh set out the arrangement he had made for Patient A, including a blood test, an ultrasound and a referral to Pathways, the Drugs Addiction Team in Warrington. He wrote that Patient A *‘was happy with this but warned me that you (his ex-partner) was not happy with this arrangement and he himself was willing to let the matter settle.’*

59. Dr Whitenburgh wrote, in respect of 20 April 2021, that after hearing about Ms B’s complaint to NHSE he rang Patient A *‘immediately as I thought the matter was settled and to confirm that he had consented to the complaint.’* He said that Patient A *‘informed me that he did not consent to his personal information being disclosed to NHSE whatsoever and that he did not want to complain but you did for financial reasons. He informed me that you told him to demand £5,000 from myself and you would drop the case without question. I completely refuted these demands’*.

60. At the end of his letter to Ms B, Dr Whitenburgh set out the following:

‘1. I refute that [Patient A] *is a co-codamol addict as you accuse him of. To my knowledge of him he is definitely not.*

2. I refute that even if [Patient A] *is a drug addict (as insisted by you) that I was solely to blame.*

3. I refute that you are his partner (as you suggested) as you do not live in his house as it well known in the public domain that he evicted you from his home due to an alleged long standing domestic dispute (witnessed).

4. I also refute that [Patient A] *lacks mental capacity to instigate this complaint for himself. To my understanding it was solely you who wanted to generate this complaint.*

5. In this respect, I will not proffer any monies to dissolve a complaint no matter how serious that complaint is.'

61. The Tribunal was mindful that Dr Whitenburgh's assertion to Ms B that Patient A was not a *'co-codamol addict'* was inconsistent with him referring Patient A to a drug addiction treatment service, which he had referenced earlier in the same letter.

62. In his letter to Patient A, dated 11 May 2021, about the concerns raised to NHSE, Dr Whitenburgh wrote:

'As per our conversation on 15th April 2021, you should now, in my professional opinion, undertake our agreed arrangements outlined below;

- *Once you have any health issues of concern then you must inform the clinicians of the practice with immediate effect.*
- *You must not attempt to over order repeat prescriptions (as the new system will now alert us of this- the same applies to other patients wanting even paracetamol as an example).*
- *You should have a full blood (and toxicology) test*
- *You should have an ultrasound scan of your abdomen*
- *You should attend Pathways to Recovery (The Drug Addiction Team in Warrington)*

This strategy is for your own safety and you were very happy with this at the time of our consultations.

However, to my understanding, you expressed concerns that this strategy may not pacify your ex-partner for non-clinical reasons.'

63. The Tribunal was satisfied, on the basis of this evidence, that Dr Whitenburgh had concluded that Ms B was the driver of the complaint. Consequently, the Tribunal determined that it could infer from Dr Whitenburgh's record of his conversation with Patient A on 20 April 2021 that he was probing Patient A about the nature of Ms B's complaint and her

motivations. In the Tribunal's judgement, Dr Whitenburgh considered that Ms B was the instigator of concerns being raised into his prescribing and treatment of Patient A and was frustrated about Ms B's involvement. In those circumstances, and noting the contemporaneous corroboration of his alleged words within the NHSE log, the Tribunal was satisfied that it was more likely than not that Dr Whitenburgh had asked whether Ms B was 'mentally unstable' or words to that effect during a conversation with Patient A about the complaint Ms B had made.

64. The Tribunal therefore found paragraph 1.a.i of the Allegation proved.

Paragraph 1.a.ii

65. The Tribunal was required to determine whether, on one or more occasions between 14 and 26 April 2021, Dr Whitenburgh spoke to Patient A, by telephone, in which he discussed the complaint which had been raised by Ms A and, repeatedly asked Patient A to drop the complaint and/or not take it any further.

66. Patient A's evidence was consistent. He maintained that Dr Whitenburgh had, on many occasions, sought to pressure him into dropping, or not taking further, the complaint that had been made by Ms B.

67. The Tribunal accepted, as had Dr Whitenburgh, that there were four phone calls documented in Patient A's medical records, 14, 15, 20 and 21 April 2021. In addition, there were two missed calls on 25 April 2021.

68. The Tribunal had regard to the content of Dr Whitenburgh's entries in Patient A's medical records following their telephone consultations on 14 and 15 April 2021.

69. The Tribunal considered that following the 15 April 2021 telephone consultation, Dr Whitenburgh had done everything he could reasonably be expected to do. He had arranged tests, an ultrasound scan and a referral to a drug addiction treatment service. He had spoken to Patient A on two occasions. He had concluded that Patient A did not require urgent medical attention and that he was not a safeguarding risk.

70. Dr Whitenburgh's evidence was that his further calls to Patient A, on 20 April 2021 and 21 April 2021, were made out of an ongoing concern for Patient A's welfare. However, during cross-examination, he said that his call with Patient A on 20 April 2021 was *'fruitless'*.

The record of that call did not contain any clinical information and did not document any welfare checks that Dr Whitenburgh had made.

71. When asked in cross-examination about the missed calls on Sunday 25 April 2021, Dr Whitenburgh said that he was attempting to call Patient A to remind him to collect the blood forms for the blood tests ordered. The Tribunal was, however, mindful that Dr Whitenburgh made no further telephone contact with Patient A after 25 April 2021. This did not align with Dr Whitenburgh's evidence that his calls to Patient A were due to his ongoing concern about Patient A's wellbeing. If he had been so concerned that Patient A had not collected his blood forms, further contact with Patient A would surely have been necessary.

72. The Tribunal was not persuaded that there was sufficient clinical justification for Dr Whitenburgh to call Patient A on at least four further occasions following 15 April 2021.

73. The Tribunal reminded itself of the evidence as to what occurred on 20 April 2021. Dr Whitenburgh had admitted that he discussed Ms B's complaint with Patient A on 20 April 2021. However, the Tribunal had regard to the references to *'consent'* in both Dr Whitenburgh's record of his conversation with NHSE, the NHSE log that he agreed was a broadly accurate record of their conversation, and the separate NHSE log for Patient A's call. The Tribunal noted that none of these documents recorded any concern for Patient A's wellbeing on that date. Rather, they were focused on Ms B's complaint, whether it was valid and whether it had been consented to by Patient A. This evidence was not consistent with Dr Whitenburgh's purported concern for Patient A, in spite of Ms B's complaint.

74. In absence of any further clinical justification, and considering what occurred on 20 April 2021, the Tribunal concluded that that it was more likely than not that Dr Whitenburgh had, on at least one occasion, repeatedly asked Patient A to drop the complaint, or not take it any further.

75. The Tribunal therefore found paragraph 1.a.ii of the Allegation proved.

Paragraph 1.a.iii

76. The Tribunal was required to determine whether, on one or more occasions between 14 and 26 April 2021, Dr Whitenburgh spoke to Patient A, by telephone, in which he discussed the complaint which had been raised by Ms A and, suggested that he would pay Patient A or Ms B £5000, if the complaint was dropped.

77. The Tribunal had regard to Patient A's witness statement:

'The phone call on 20 April, which is at page 2 of Exhibit […]*, relates to a conversation about me seeking legal advice and money to settle the complaint. I did tell Dr Whitenburgh that* [Ms B] *made a complaint straight away when I first spoke to him, so he was aware of this. I'm concerned that the entry in the record makes out that the topic of money came from me but it didn't. I admitted to Dr Whitenburgh that I did seek legal advice and said I would sue him. However, I didn't say that I would settle the complaint for £5,000. Dr Whitenburgh first mentioned this; he brought it up and asked me if £5,000 would settle it…*

I probably also said give her some money and we'll forget about it, but I did not bring the topic of money up first. It was definitely Dr Whitenburgh who mentioned this first. He raised the topic of money a few times- at least 3 or 4 times.'

78. In his letter to Ms B about her complaint, Dr Whitenburgh wrote:

'[Patient A] *informed me that you told him to demand £5,000 from myself and you would drop the case without question. I completely refuted these demands He also informed me that you had originally considered £25,000 but would settle for this small sum of money instead.* [Patient A] *also confirmed that he wasn't actually administering all of the tablets for his own usage for long period of time. Again* [Patient A] *asked me to think about paying £5,000. Once again I declined this offer. It was completely unprofessional.'*

79. In his witness statement, Dr Whitenburgh stated:

'Allegedly, the solicitor informed Ms B that Patient A could receive approximately £25,000 for my prescribing error. Patient A relayed this information and informed me that both Ms B and he would accept £5,000 directly from myself to stop such legal proceedings. I was dismayed with Patient A's disclosure and dismissed such demands. I made a contemporaneous note in the clinical records as detailed in […] *and I reiterated my position regarding this later in the letter I sent to Ms B via NHSE dated 27 April 2021 in the last paragraph of the second page. I exhibit this letter to my statement as*[…]*.'*

80. Dr Whitenburgh accepted that there was a discussion about money as a means to stop the complaint proceeding, as supported by the documentary evidence. Patient A acknowledged in oral evidence that he may himself have said that giving Ms B £5000 could make her drop the complaint, which he had also referenced in his witness statement.

81. The Tribunal was mindful that there was no reference to money being offered in the NHSE record of Patient A's call to them on 20 April 2021.

82. In addition, the Tribunal accepted Mr Rich's submission that if Dr Whitenburgh had offered Patient A money to drop the complaint, he would have been unlikely to document that in Patient A's medical records. It accepted that Dr Whitenburgh had also referred to the discussion about money in his letter to Ms B. There was no evidence from that time that Ms B or Patient A had taken issue with Dr Whitenburgh stating that they had asked him for money. The Tribunal accepted that it was inherently unlikely that Dr Whitenburgh would have documented this if it were false.

83. Further, the Tribunal accepted that Patient A's account was that his recall was impacted by his use of, and then withdrawal from, co-codamol. It therefore considered that it could not rely on his account alone that Dr Whitenburgh had first raised the possibility of giving him or Ms B money to drop the complaint.

84. There was no documentary evidence to support Patient A's account that Dr Whitenburgh had brought up the topic of money first, or that he had suggested that he would pay £5000 if the complaint was dropped.

85. The Tribunal determined that there was not sufficient evidence that could prove, on the balance of probabilities, that Dr Whitenburgh had suggested that he would pay Patient A or Ms B £5000 if the complaint was dropped.

86. The Tribunal therefore found paragraph 1.a.iii of the Allegation not proved.

Paragraph 1.a.iv

87. The Tribunal was required to determine whether, on one or more occasions between 14 and 26 April 2021, Dr Whitenburgh spoke to Patient A, by telephone, in which he discussed the complaint which had been raised by Ms B and asked Patient A 'what is it going to take for this to go away?' or words to that effect.

88. Patient A’s evidence was that on more than one occasion, Dr Whitenburgh had asked ‘what is it going to take for this to go away?’ or words to that effect. He said that Dr Whitenburgh called him on many occasions, the majority of which are not documented in Patient A’s medical records. This was denied by Dr Whitenburgh.

89. There was no direct evidence of what was said during each documented telephone conversation. Additionally, there was no contemporaneous documentary evidence from which the Tribunal could corroborate Patient A’s account. Accordingly, in the absence of any supporting evidence that contained the same or similar phrases, the Tribunal concluded that there was not sufficient evidence to prove this paragraph of the Allegation.

90. The Tribunal therefore found paragraph 1.a.iv of the Allegation not proved.

Paragraph 1.b.i

91. The Tribunal was required to determine whether, on one or more occasions, between 14-26 April 2021, Dr Whitenburgh inappropriately telephoned Patient A from his personal mobile number.

92. The Tribunal accepted that Dr Whitenburgh had, as a matter of fact, called Patient A from a mobile number belonging to him.

93. Dr Whitenburgh and Ms C had acknowledged in their evidence to the Tribunal that the mobile number in question was used for both business and personal purposes.

94. The Tribunal also noted that Dr Whitenburgh had, on more than one occasion, not withheld his number when calling Patient A.

95. The Tribunal was, however, not satisfied that it was, in and of itself, inappropriate for Dr Whitenburgh to call Patient A from his mobile number.

96. The Tribunal therefore found paragraph 1.b.i of the Allegation not proved.

Paragraph 1.b.ii

97. The Tribunal was required to determine whether, on one or more occasions, Dr Whitenburgh inappropriately telephoned Patient A outside normal working hours on 25 April 2021, repeating his request for Patient A to drop the complaint and/or not take it any further.

98. The Tribunal had heard evidence about Dr Whitenburgh's working hours and how he occasionally made calls to patients on a Sunday. This was not disputed by the GMC.

99. Dr Whitenburgh had attempted to call Patient A on two occasions on Sunday 25 April 2021 at 20:04 and 20:05. A screenshot provided by Patient A confirmed this.

100. It was Patient A's evidence that Dr Whitenburgh had made a further call that evening repeating his request for the complaint to be dropped. However, there was no contemporaneous documentary evidence to confirm that a further call did take place during which Dr Whitenburgh asked Patient A to drop the complaint or to not take it any further. Dr Whitenburgh's evidence was that after the second missed call at 20:05 on 25 April 2021, he did not attempt to contact Patient A by telephone again.

101. The Tribunal determined that there was not sufficient evidence from which it could conclude that a further conversation took place between Dr Whitenburgh and Patient A on 25 April 2021. In the absence of finding that a phone call took place, an assessment of its appropriateness was not required.

102. The Tribunal therefore found paragraph 1.b.ii of the Allegation not proved.

The Tribunal's Overall Determination on the Facts

103. The Tribunal has determined the facts as follows:

1. On one or more occasions, between 14-26 April 2021, you:

   a. spoke to Patient A, by telephone, in which you discussed the complaint which had been raised by Patient A's partner ('Ms B') and you:

      i. asked whether Ms B was 'mentally unstable', or words to that effect;

      Determined and found proved

ii. repeatedly asked Patient A to drop the complaint and/or not take it any further;
Determined and found proved

iii. suggested you would pay Patient A or Ms B £5000, if the complaint was dropped;
Not proved

iv. asked 'what is it going to take for this to go away?' or words to that effect;
Not proved

b. inappropriately telephoned Patient A;

i. from your personal mobile number;
Not proved

ii. outside of normal working hours on 25 April 2021, repeating your behaviour, as described at paragraph 1(a)(ii).
Not proved

And that by reason of the matters set out above your fitness to practise is impaired because of your misconduct. **To be determined**

Determination on Impairment - 19/10/2023

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 Whitenburgh's fitness to practise is impaired by reason of misconduct.

The Evidence

2. The Tribunal has taken into account all the evidence received during the facts stage of the hearing, both oral and documentary.

3. In addition, the Tribunal received further documentary evidence on behalf of Dr Whitenburgh. Dr Whitenburgh provided a Continuing Professional Development (CPD) bundle which contained certificates and reflections in relation to courses and other training including on the subjects of Controlled Drugs, Safeguarding Adults (Level 3), Open Disclosure

Conversations, Consent, Ethics and Ethical Standards for Doctors, and Professional Standards for Doctors.

Submissions

<u>On behalf of the GMC</u>

4. On behalf of the GMC, Mr Fish submitted that Dr Whitenburgh's fitness to practise is currently impaired by reason of his misconduct. Mr Fish submitted that Dr Whitenburgh had failed to act with integrity as required by Good Medical Practice (2013) (GMP) and that his actions had also breached paragraph 65 of GMP, which states: *'You must make sure that your conduct justifies your patients' trust in you and the public's trust in the profession.'* Mr Fish submitted that the facts found proved against Dr Whitenburgh amounted to serious misconduct. He submitted that asking a patient to drop a complaint, let alone a legitimate complaint, and in the course of so doing questioning the mental stability of the original complainant (Ms B) was a significant departure from GMP.

5. Mr Fish referred the Tribunal to *CHRE v NMC and Paula Grant* [2011] EWHC 927 Admin ('*Grant*'), citing Dame Janet Smith in her Fifth Shipman Report, where she identified the following as an appropriate test for panels considering fitness to practise:

> *'Do the findings of fact … show that his fitness to practise is impaired in the sense that he:*
>
> *a. 'Has in the past acted and/or is liable in the future to act so as to put a patient or patients at unwarranted risk of harm; and/or;*
> *b. Has in the past brought and/or is liable in the future to bring the medical profession into disrepute; and/or;*
> *c. Has in the past breached and/or is liable in the future to breach one of the fundamental tenets of the medical profession; and/or;*
> *d. Has in the past acted dishonestly and/or is liable to act dishonestly in the future.'*

6. Mr Fish submitted that Dr Whitenburgh's proven actions engaged limbs a, b and c of *Grant*. He submitted that undermining a patient's right to complain and challenge clinical errors was capable of placing patients at risk of harm. Further, he submitted that it brought the profession into disrepute for a doctor to ask a patient to drop a complaint and to question the mental stability of the person who made it. Mr Fish submitted that Dr Whitenburgh had breached fundamental tenets of the profession as set out in GMP.

7. Mr Fish submitted that a finding of impairment was required to uphold proper professional standards and maintain public confidence in the profession. He submitted that there was limited evidence of insight and remediation before the Tribunal. In Mr Fish's submission there was insufficient material before the Tribunal to allow it to conclude that Dr Whitenburgh's misconduct would not be repeated.

On behalf of Dr Whitenburgh

8. On behalf of Dr Whitenburgh, Mr Rich reminded the Tribunal of the limited findings of fact it had made. Mr Rich submitted that questioning the mental stability of Ms B, in and of itself, might not be considered to amount to serious misconduct. But he accepted that any attempt to persuade a patient not to complain would be sufficiently serious to justify a finding of misconduct. Nevertheless Mr Rich identified a number of mitigating factors that he asked the Tribunal to take into account, including that Patient A did not instigate the original complaint, that Dr Whitenburgh had not sought to cover up the complaint, and that he had done everything he medically could for Patient A.

9. Mr Rich submitted that, in considering impairment, this was not a public safety case. He submitted that Dr Whitenburgh was a practitioner of long and trouble-free experience who has a general reputation for honesty and integrity. He submitted that there were a unique set of circumstances in this case where a change to an electronic system opened a loophole which, for a time, Dr Whitenburgh failed to close. Mr Rich reminded the Tribunal of the actions of Ms B in instigating a complaint, discussing a monetary settlement via Patient A, and then seeking to pursue legal action against Dr Whitenburgh.

10. Mr Rich submitted that Dr Whitenburgh has been put under immense stress, this being XXX. He submitted that these proceedings had taken a significant toll on Dr Whitenburgh. Mr Rich submitted that, as a result, Dr Whitenburgh would never allow himself to be in a similar position again. He submitted that the risk of repetition was negligible. Even before he was found, by this Tribunal, to have done anything wrong he took steps to address the risk he posed by undertaking relevant training.

11. Mr Rich submitted that it would not undermine public trust for the Tribunal not to make a finding of impairment. He submitted that Dr Whitenburgh's actions amounted to an exceptional lapse in judgement, in relation to one patient, in unforeseeable and worrying circumstances.

12. Mr Rich submitted that a fair-minded member of the public would be aware of all the relevant context in these proceedings, including that Dr Whitenburgh is a sole practitioner in a deprived area where his services, at the time of events, were under considerable pressure. Mr Rich submitted that, while the fair-minded member of the public would disapprove of Dr Whitenburgh's conduct, they would be unlikely to think it reflected on the medical profession. He submitted that they would be more likely to conclude that Dr Whitenburgh's conduct was an unfortunate and unacceptable outcome of a confluence of pressures.

13. Mr Rich submitted that a fair-minded member of the public would be conscious that Dr Whitenburgh's original misconduct was not malicious or discreditable, but a genuine mistake which relied on Patient A dishonestly taking advantage of a loophole. Mr Rich submitted that whilst it was not acceptable to persuade a patient not to complain, Patient A's actions and the other relevant context would colour how members of the public would consider Dr Whitenburgh's actions and their impact on the public perception of the profession as a whole.

14. Mr Rich invited the Tribunal, at the impairment stage, to consider the public interest in keeping Dr Whitenburgh in practice. He reminded the Tribunal that if it made no finding of impairment, it could still consider issuing a warning. Mr Rich submitted that, in this case, a finding of current impairment was not required.

The Relevant Legal Principles

15. The Tribunal reminded itself that at this stage of proceedings, there is no burden or standard of proof and the decision of impairment is a matter for the Tribunal's judgment alone.

16. In approaching the decision, the Tribunal was mindful of the two stage process to be adopted: first, whether the facts as found proved amounted to misconduct that was serious; and second, whether as a result of such a finding Dr Whitenburgh's fitness to practise is impaired.

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

The Tribunal's Determination on Impairment

Misconduct

18. The Tribunal had regard to the nature of its factual findings. It had concluded that during a telephone call with Patient A on 20 April 2021, Dr Whitenburgh had asked whether Ms B, the original complainant, was 'mentally unstable' or words to that effect. It also found that he had, on at least one occasion, repeatedly asked Patient A to drop the complaint or to not take it any further.

19. The Tribunal accepted that Dr Whitenburgh's misconduct related to his conversations with one patient and comments about that patient's partner that he made on 20 April 2021.

20. The Tribunal noted that Ms B's original complaint was entirely legitimate and identified an issue in the electronic prescribing system being used by Dr Whitenburgh's practice. This issue was so serious that it led to a number of changes to Dr Whitenburgh's prescribing practices, XXX.

21. The Tribunal considered that it was appropriate to assess Dr Whitenburgh's conversation with Patient A on 20 April 2021 as a whole. It accepted that questioning Ms B's mental stability might not in isolation have amounted to misconduct that was serious. However, it bore in mind the context in which this comment was made, namely in the course of a conversation in which Dr Whitenburgh made repeated attempts to persuade Patient A to ensure the complaint was dropped. It considered that Dr Whitenburgh's comment about Ms B's mental instability was, in this context, an attempt to discredit her. In the light of the inherent power imbalance between a doctor and a patient, and the importance of upholding the right of any person to complain about healthcare matters and have their complaint taken seriously, whether or not they have a diagnosed mental health condition, it took the view that the actions proved against Dr Whitenburgh amounted to misconduct and that the misconduct was serious.

22. The Tribunal accepted the GMC's submission, through Mr Fish, that Dr Whitenburgh's actions had breached paragraph 65 of GMP, set out above. His conduct, in repeatedly asking Patient A to drop the complaint against him, and casting aspersions in relation to Ms B, did not justify the trust patients and the wider public have in him, as a GP and a member of the wider medical profession. It took the view that fellow practitioners would consider Dr Whitenburgh's proven conduct to be deplorable.

23. The Tribunal therefore concluded that Dr Whitenburgh's conduct fell so far short of the standards reasonably to be expected of a doctor as to amount to misconduct that was serious.

Impairment

24. The Tribunal, having found that the facts found proved amounted to misconduct that was serious, went on to consider whether, as a result, Dr Whitenburgh's fitness to practise is currently impaired.

25. The Tribunal had regard to the evidence from which it could assess Dr Whitenburgh's level of insight. The Tribunal accepted that it may be difficult for a practitioner to demonstrate meaningful insight when they have denied the Allegation.

26. Nevertheless, the Tribunal considered that Dr Whitenburgh had shown a reflective approach towards the over-prescribing of co-codamol to Patient A. He addressed the issue appropriately, notifying relevant bodies and taking steps immediately to ensure that Patient A could not continue to access such volumes of co-codamol. This appropriate and comprehensive response was not, however, replicated in relation to the concerns raised with NHSE about Patient A feeling pressured by Dr Whitenburgh to drop the complaint.

27. The Tribunal noted the apologies contained within Dr Whitenburgh's letters to Ms B and Patient A. However, those apologies related to his prescribing error rather than the way in which he behaved towards Patient A or the comment he made about Ms B. The Tribunal was concerned that Dr Whitenburgh had not provided evidence to demonstrate that he understood the importance of taking complaints seriously, treating complainants with respect and ensuring that appropriate complaints procedures are followed consistently.

28. The Tribunal concluded that without such evidence, Dr Whitenburgh's insight into his actions and their wider impact on patients, the public and the profession, could only be considered limited.

29. The Tribunal had regard to the CPD that Dr Whitenburgh has completed. It considered that some of this was XXX, and much of it related to more general update training. In the Tribunal's view, Dr Whitenburgh has shown a willingness to reflect on what he has learned from his training and how it applies to his practice. However, there is little of direct relevance to the findings of this Tribunal. The Tribunal was satisfied that Dr

Whitenburgh could make some progress in terms of remediation. It considered, however, that without evidence showing that he currently understands the importance of taking complaints seriously, treating complainants with respect and ensuring that appropriate complaints procedures are followed consistently his remediation is not yet complete.

30. In considering the risk of repetition, the Tribunal was mindful that Dr Whitenburgh has fully engaged with two MPT hearings this year, and that the experience is likely to have had a salutary effect on him and his practice. However, in circumstances in which the Tribunal is not yet satisfied that Dr Whitenburgh has fully understood, reflected on and remediated his misconduct, a risk of repetition remains.

31. The Tribunal applied the test set out in *Grant*. It concluded that limbs a and b were engaged. In the Tribunal's judgement, patients must feel confident that their concerns about any medical professional treating them will be taken seriously and handled appropriately. The proper handling of such concerns and complaints is not merely a matter of procedure, but underpins the health, safety and wellbeing of patients and the public. The Tribunal concluded that, in seeking to undermine a patient's right to complain, Dr Whitenburgh's conduct potentially put patients at risk of harm. It further considered that this conduct, and questioning a complainant's mental stability in an attempt to discredit her complaint risked bringing the profession into disrepute. Without further evidence of remediation, it considered that Dr Whitenburgh may be liable in the future to put patients at risk of harm and bring the profession into disrepute should another complaint arise.

32. The Tribunal had regard to the overarching objective. It concluded that a finding of impairment was required to protect the health, safety and well-being of patients and the public, to maintain public confidence in the medical profession, and to promote and maintain proper professional standards and conduct for members of that profession.

33. The Tribunal therefore determined that Dr Whitenburgh's fitness to practise is impaired by reason of misconduct.

Determination on Sanction - 20/10/2023

1. Having determined that Dr Whitenburgh'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 it was relevant to reaching a decision on sanction.

3. No further evidence was adduced at this stage of proceedings.

Submissions

On behalf of the GMC

4. On behalf of the GMC, Mr Fish submitted that suspension was the proportionate sanction in this case. He identified some mitigating factors, referring the Tribunal to the testimonial evidence provided on behalf of Dr Whitenburgh and to the apologies he made to Patient A and Ms B about over-prescribing. Mr Fish reminded the Tribunal of its findings that there was limited evidence of insight and remediation in relation to these matters.

5. In considering the sanctions in ascending order of seriousness, Mr Fish submitted that to take no action on Dr Whitenburgh's registration would be inappropriate as this was not an exceptional case. Mr Fish submitted that it was difficult to see what conditions could be imposed on Dr Whitenburgh's registration to deal with his proven misconduct.

6. Mr Fish referred the Tribunal to paragraphs 91 to 106 of the Sanctions Guidance (2020) ('the SG'). He submitted that suspension has a deterrent effect which is important in a case such as this. Mr Fish submitted that whilst Dr Whitenburgh's misconduct amounted to a serious breach of GMP, it was not conduct that was fundamentally incompatible with continued registration. Mr Fish acknowledged that there was no evidence of repetition since April 2021.

7. Mr Fish made no submissions on the length of any suspension. He invited the Tribunal to order a review on the basis that it had been unable to rule out a risk of repetition due to the currently limited nature of Dr Whitenburgh's insight and remediation. Mr Fish submitted that a review would also be appropriate to ensure patient safety given the Tribunal's finding that Dr Whitenburgh's conduct had the potential to place patients at risk of harm.

On behalf of Dr Whitenburgh

8. On behalf of Dr Whitenburgh, Mr Rich reminded the Tribunal that this was a case regarding one complaint in unusual circumstances. He submitted that two and a half years had elapsed since these events and no further issues have arisen. He stated that Dr Whitenburgh has been qualified for 33 years and, prior to the events of April 2021, had no previous fitness to practise history. He submitted that the Tribunal could conclude that Dr Whitenburgh's misconduct was not evidence of a developed or long-term attitudinal issue.

9. Mr Rich submitted that Dr Whitenburgh had taken wide-ranging and appropriate steps when he became aware of the fault in the Practice's electronic prescribing system. He amended Patient A's prescription, closed the loophole that had allowed him to receive excessive quantities of co-codamol, and disseminated the lessons he learned to relevant bodies and other practices.

10. Mr Rich referred the Tribunal to the testimonials provided on behalf of Dr Whitenburgh which attest to him being a dedicated practitioner with a general reputation for integrity. Mr Rich reminded the Tribunal of its findings that Dr Whitenburgh has demonstrated that he has the potential to remediate his misconduct. He submitted that Dr Whitenburgh had, to date, completed some relevant CPD but accepted that he had yet to specifically address the issues about dealing with patient complaints.

11. Mr Rich acknowledged the GMC's submission that suspension was the appropriate and proportionate sanction in this case and accepted that suspension was an option in this case. He also referred the Tribunal to the paragraphs of the SG relating to erasure and submitted that such a sanction would be disproportionate and not justified in this case.

12. Mr Rich submitted that in imposing a sanction, what needs to be achieved is an opportunity for Dr Whitenburgh to demonstrate remediation in a context in which the public is protected from the risks to its health and wellbeing which might be occasioned by any repeat of the conduct found proved, along with the protection of the public interest. Mr Rich reminded the Tribunal of the nature of Dr Whitenburgh's single-handed practice, the 3100 patients on his list and the benefit those patients receive in terms of continuity of care. He submitted that it was in the public interest to keep a GP safely in practice and, where possible, avoid even their temporary removal from the medical register.

13. Mr Rich submitted that conditions could be the appropriate and proportionate sanction in this case. He referred the Tribunal to paragraph 79 to 90 of the SG. Mr Rich acknowledged that whilst Dr Whitenburgh's case was not strictly a clinical one, conditions

could address the deficiency identified in his practice. Mr Rich submitted that there was ample evidence that Dr Whitenburgh would be willing to engage with conditions because he had appropriately engaged with the complaint about his over-prescribing in April 2021 and had engaged seriously and soberly with these proceedings.

14. Mr Rich acknowledged that suspension does have a deterrent effect. However, he submitted that there is also a deterrent effect associated with conditions and a finding of impairment. He submitted that Dr Whitenburgh's record will reflect these proceedings for a considerable period of time. Mr Rich submitted that to impose conditions would be a personal and general deterrent which sent a message to the public that the sort of conduct proved against Dr Whitenburgh is not to be tolerated.

15. Mr Rich submitted that whilst suspension was an option, the Tribunal must ask itself whether suspension was the least serious sanction that could achieve the required objectives. Mr Rich suggested a number of conditions for the Tribunal to consider. These included a requirement to log and audit all complaints coming into the Practice; supervision and case based discussions to support Dr Whitenburgh in how he deals with complaints and recognising the importance of doing so appropriately; completion of targeted CPD about complaints; and a proper review of the Practice's complaints policy.

16. Mr Rich submitted that imposing conditions on Dr Whitenburgh's registration would meet the requirement for protecting public safety whilst giving him time to develop insight and remediate. He submitted that, if conditions were imposed for six months, Dr Whitenburgh would be able to demonstrate that he had been practising without incident for three years. Mr Rich accepted that it would be appropriate for a review hearing to be directed.

17. Mr Rich asked the Tribunal to bear in mind whether it would be possible for Dr Whitenburgh to comply with all conditions if an immediate order of those conditions was also imposed.

The Tribunal's Determination on Sanction

18. The decision as to the appropriate sanction, if any, to impose in this case is a matter for the Tribunal exercising its own judgement. In reaching its decision, the Tribunal has taken the SG into account and borne in mind the overarching objective.

19. The Tribunal reminded itself that the main reason for imposing any sanction is to protect the public and that sanctions are not imposed to punish or discipline doctors, even though they may have a punitive effect. Throughout its deliberations, the Tribunal has applied the principle of proportionality, balancing Dr Whitenburgh's interests with the public interest.

Aggravating and Mitigating Factors

20. The Tribunal has already set out its decision on the facts and impairment which it took into account during its deliberations on sanction. Before considering what action, if any, to take in respect of Dr Whitenburgh's registration, the Tribunal considered and balanced the aggravating and mitigating factors in this case.

21. The Tribunal identified the following aggravating factors:

- Dr Whitenburgh's conduct was found to have been capable of causing harm to patients by undermining their ability to complain and raise concerns;
- He has not yet demonstrated sufficient insight or remediation into the specific misconduct found in these proceedings.

22. The Tribunal identified the mitigating factors as follows:

- Dr Whitenburgh is a man of previous good character. He has been a qualified medical practitioner for 33 years and until April 2021 had no previous fitness to practise history;
- He has demonstrated that he is capable of remediation through the work he has undertaken regarding his over-prescribing XXX and in evidence at these proceedings. He has already completed some relevant CPD and has co-operated fully with his regulator;
- Testimonials provided on his behalf confirm that he is of good standing with his peers and in his community.

23. The Tribunal considered the aggravating and mitigating factors throughout its deliberations on what the appropriate and proportionate sanction to impose would be, if any. The Tribunal considered each sanction in ascending order of severity, starting with the least restrictive.

No action

24. The Tribunal first considered whether to conclude the case by taking no action. It accepted that taking no action following a finding of impaired fitness to practise would only be appropriate in exceptional circumstances. The Tribunal determined that there are no exceptional circumstances in this case and that, given the seriousness of its findings, it would not be sufficient, proportionate, or in the public interest to conclude this case by taking no action.

Conditions

25. The Tribunal next considered whether it would be appropriate and proportionate to impose conditions on Dr Whitenburgh's registration. The Tribunal took account of the relevant paragraphs of the SG, paragraphs 79 to 90. It acknowledged that conditions are likely to be most appropriate in circumstances including where there is evidence of shortcomings in a specific area of a doctor's practice. The Tribunal had regard to paragraph 82 of the SG which sets out that:

> *'82 Conditions are likely to be workable where:*
>
> > *a the doctor has insight*
> >
> > *b a period of retraining and/or supervision is likely to be the most appropriate way of addressing any findings*
> >
> > *c the tribunal is satisfied the doctor will comply with them*
> >
> > *d the doctor has the potential to respond positively to remediation, or retraining, or to their work being supervised.'*

26. The Tribunal was satisfied that Dr Whitenburgh could address the failings identified in his practice in relation to his complaints handling through a period of supervised educational training. Whilst it found that his insight and remediation were currently limited, the Tribunal accepted that this was, at least in part, a result of Dr Whitenburgh exercising his right to deny the Allegation. Having considered XXX, it had evidence of Dr Whitenburgh having successfully developed his insight and remediation in relation to Patient A's over-prescribing. The Tribunal also bore in mind that Dr Whitenburgh had fully engaged with these proceedings throughout.

The Tribunal was satisfied that if it was to impose conditions, Dr Whitenburgh would comply with them. Given the steps he had taken to address the over-prescribing issue, the Tribunal was also satisfied that Dr Whitenburgh has the potential to respond positively to remediation, retraining and targeted supervision.

27. The Tribunal had regard to paragraph 84 of the SG which sets out the types of case where, if the following factors are present, conditions may be appropriate:

> *'**84** Depending on the type of case (eg health, language, performance or misconduct), some or all of the following factors being present (this list is not exhaustive) would indicate that conditions may be appropriate:*
>
> > ***a** no evidence that demonstrates remediation is unlikely to be successful, eg because of previous unsuccessful attempts or a doctor's unwillingness to engage*
> >
> > ***b** identifiable areas of their practice are in need of assessment or retraining*
> >
> > ***c** willing to respond positively to retraining, with evidence that they are committed to keeping their knowledge and skills up to date throughout their working life, improving the quality of their work and promoting patient safety (Good medical practice, paragraphs 7–13 on knowledge, skills and performance and paragraphs 22–23 on safety and quality)*
> >
> > ***d** willing to be open and honest with patients if things go wrong (Good medical practice, paragraphs 55 and 61)*
> >
> > ***e**…'*

28. The Tribunal was satisfied that there was evidence that remediation would be successful, because Dr Whitenburgh had demonstrated successful remediation before. It considered that there was an identifiable area of his practice that had been found to be deficient and needed to be improved, namely his understanding of the importance of taking complaints seriously, treating complainants with respect and ensuring that appropriate complaints procedures are followed consistently. It accepted that Dr Whitenburgh would be willing to respond positively to further training.

29. The Tribunal was mindful that it had not been alleged that Dr Whitenburgh had failed to be open and honest with Patient A. However, it accepted that in seeking to persuade Patient A to drop the complaint or not take it any further, Dr Whitenburgh had failed to handle the concerns raised appropriately. Nevertheless, within two weeks of the initial complaint about over-prescribing Dr Whitenburgh set out in detail, first in his letter to Ms B on 27 April 2021, and then his letter to Patient A on 11 May 2021, how the over-prescribing error had occurred and what he had done about it. Whilst this was not the specific subject of these proceedings, the Tribunal accepted that Dr Whitenburgh had demonstrated his willingness to be open and honest with patients when things went wrong.

30. The Tribunal also had regard to paragraph 85 of the SG which confirms that *'Conditions should be appropriate, proportionate, workable and measurable'*.

31. The Tribunal determined that it was appropriate to consider paragraphs 91-106 of the SG regarding suspension before determining whether conditions were the appropriate and proportionate sanction and would uphold the overarching objective.

32. The Tribunal accepted that suspension does have a deterrent effect and could be used to send a signal to Dr Whitenburgh, the profession, and the public about what is regarded as behaviour unbefitting a registered doctor. The Tribunal acknowledged that the SG provides that suspension may be appropriate where there is an acknowledgement of fault and it is satisfied the conduct is unlikely to be repeated.

33. The Tribunal considered carefully, however, whether Dr Whitenburgh's misconduct was so serious that action must be taken to protect members of the public and maintain public confidence in the profession by temporarily removing his name from the medical register. It had regard to its findings and bore in mind that Dr Whitenburgh's misconduct spanned a brief period and related to one patient and one complaint. The Tribunal also accepted that the circumstances of Dr Whitenburgh's misconduct were unusual. Dr Whitenburgh's misconduct was limited when considered against the many years he had practised without incident before April 2021 and since without any evidence of repetition. It was not persuaded that suspension was the least severe sanction sufficient to meet the public interest.

34. Similarly, whilst Dr Whitenburgh does require time to develop insight and remediation into the Tribunal's findings, it was not persuaded that the most appropriate way this could be achieved was through the more restrictive sanction of suspension. The Tribunal

was also mindful that the specific circumstances of Dr Whitenburgh's working arrangements, as a single-handed GP, could have a significant negative impact on his patients were he to be removed from practice temporarily. It considered that Dr Whitenburgh needs to develop a deeper understanding of appropriate complaints handling and the impact of his actions. It determined that he could do so most effectively through a period of structured supervised training and development specifically targeted at developing his understanding of the importance of taking complaints seriously, treating complainants with respect and ensuring that appropriate complaints procedures are followed consistently. The Tribunal considered that conditions would allow him to embed this learning and reassure a future Tribunal that there has been no repetition of his misconduct whilst still providing the necessary GP support for patients at the Practice.

35. Taking all of this into consideration, the Tribunal was satisfied that imposing conditions on Dr Whitenburgh's registration, having found his fitness to practise impaired by reason of misconduct, would have a significant deterrent effect and send out the message that such conduct as that which was proved against him was not acceptable. The Tribunal concluded that in imposing appropriate, proportionate, workable and measurable conditions, it would be possible to uphold the overarching objective in terms of maintaining public confidence and proper professional standards whilst allowing Dr Whitenburgh time to develop his insight and remediation in practice.

36. In the specific circumstances of this case, the Tribunal was satisfied that a period of conditional registration would adequately mark the seriousness with which it viewed Dr Whitenburgh's misconduct. Furthermore, a period of conditional registration would allow Dr Whitenburgh to continue to work towards developing insight, completing his journey of remediation, and to be able to demonstrate, with objective evidence, that he has learned from his failings and has implemented steps to address them.

37. The Tribunal gave careful consideration to how to make conditions workable for Dr Whitenburgh as a single-handed practitioner. It had regard to the requirement that all doctors on conditions must have a workplace reporter. It referred itself to the relevant guidance *'Reports from the workplace for doctors with restrictions on their practice'* which includes the following statement:

> *'Single-handed GPs: If a doctor with restricted registration is working as a single-handed practitioner, a named individual from the contracting England Area Team/Health Board/Local Health Board/Health and Social Care Board may be*

nominated by the doctor and/or employer or contracting body to provide feedback as the workplace reporter.'

38. Mr Rich had made a number of helpful suggestions for possible conditions in his submissions. The Tribunal bore these in mind. Mr Rich had suggested a supervising mentor for Dr Whitenburgh, but the Tribunal was mindful that the mentoring relationship is confidential and that the GMC does not require mentors to provide any reports of their interactions with a doctor. The Tribunal therefore considered that the most appropriate way to support Dr Whitenburgh in developing insight and remediating his misconduct in respect of complaints handling was to require him to engage with an educational supervisor. That supervisor would be required to provide reports to the GMC in respect of Dr Whitenburgh's progress. The Tribunal acknowledged that there are no clinical failings which would need to be addressed with an educational supervisor. Their role would be specific to providing support to Dr Whitenburgh in developing and progressing with a Personal Development Plan (PDP) addressing his understanding of the importance of taking complaints seriously, treating complainants with respect and ensuring that appropriate complaints procedures are followed consistently.

39. The Tribunal also determined to impose a condition that Dr Whitenburgh log all concerns and complaints raised with him or with staff where he works. The Tribunal wishes to encourage Dr Whitenburgh to share this log with his educational supervisor and to meet regularly to discuss any concerns or complaints so that together they can explore how these complaints are being handled and identify relevant learning outcomes and appropriate training and development opportunities.

40. Having considered the sanctions in ascending order of severity and having determined to impose a period of conditional registration, the Tribunal went to on to consider the length of such an order. After careful consideration the Tribunal determined to impose conditions on Dr Whitenburgh's registration for a period of 12 months. It was satisfied that such a period was the minimum necessary to mark the seriousness of his misconduct, maintain patient safety and public confidence in the profession and uphold proper professional standards. The Tribunal concluded that a period of conditional registration of this length would provide Dr Whitenburgh with sufficient opportunity to develop insight into his misconduct and achieve appropriate remediation.

41. The Tribunal therefore determined to impose the following conditions upon Dr Whitenburgh's registration:

1 He must personally ensure the GMC is notified of the following information within seven calendar days of the date these conditions become effective:

a the details of his current post, including:

i his job title

ii his job location

iii his responsible officer (or their nominated deputy)

b the contact details of his employer and any contracting body, including his direct line manager

c any organisation where he has practising privileges and/or admitting rights

d any training programmes he is in

e the organisation on whose medical performers list he is included

f the contact details of any locum agency or out of hours service he is registered with.

2 He must personally ensure the GMC is notified:

a of any post he accepts, before starting it

b that all relevant people have been notified of his conditions, in accordance with condition 8

c if any formal disciplinary proceedings against him are started by his employer and/or contracting body, within seven calendar days of being formally notified of such proceedings

d if any of his posts, practising privileges or admitting rights have been suspended or terminated by his employer before the agreed date within seven calendar days of being notified of the termination

e if he applies for a post outside the UK.

3 He must allow the GMC to exchange information with any person involved in monitoring his compliance with his conditions.

4 a He must have a workplace reporter appointed by his responsible officer (or their nominated deputy).

b He must not work until:

i his responsible officer (or their nominated deputy) has appointed his workplace reporter

ii he has personally ensured that the GMC has been notified of the name and contact details of his workplace reporter.

5 a He must design a personal development plan (PDP), with specific aims to address the deficiencies in the following areas of his practice:

- Complaints handling, specifically:
    - The importance of taking complaints seriously
    - Treating complainants with respect
    - Ensuring that appropriate complaints procedures are followed consistently.
- Treating patients with respect and dignity, especially where concerns have been raised about a patient's care or his clinical practice.

b His PDP must be approved by his responsible officer (or their nominated deputy)

c He must give the GMC a copy of his approved PDP within three months of these substantive conditions becoming effective.

d He must give the GMC a copy of his approved PDP on request.

e He must meet with his responsible officer (or their nominated deputy), as required, to discuss his achievements against the aims of his PDP.

6 a He must keep a log detailing any complaint or concern he or the practice where he works receives.

b He must give the GMC a copy of this log on request.

7 a He must have an educational supervisor appointed by his responsible officer (or their nominated deputy) specifically to provide supervision for:

i the development of his PDP

ii progress towards meeting the aims of his PDP

iii any learning and development relevant to his handling of any concern or complaint received by him or the practice where he works

b He must not work until:

i his responsible officer (or their nominated deputy) has appointed his educational supervisor

ii he has personally ensured that the GMC has been notified of the name and contact details of his educational supervisor.

8 He must personally ensure the following persons are notified of the conditions listed at 1 to 7:

a his responsible officer (or their nominated deputy)

b the responsible officer of the following organisations:

i his place(s) of work, and any prospective place of work (at the time of application)

ii all his contracting bodies and any prospective contracting body (prior to entering a contract)

iii any organisation where he has, or has applied for, practising privileges and/or admitting rights (at the time of application)

iv any locum agency or out of hours service he is registered with

v If any of the organisations listed at (i to iv) does not have a responsible officer, he must notify the person with responsibility for overall clinical governance within that organisation. If he is unable to identify this person, he must contact the GMC for advice before working for that organisation.

c the responsible officer for the medical performers list on which he is included or seeking inclusion (at the time of application)

d the approval lead of his regional Section 12 approval tribunal (if applicable) - or Scottish equivalent

e his immediate line manager and senior clinician (where there is one) at his place of work, at least 24 hours before starting work (for current and new posts, including locum posts).

42. The Tribunal determined to direct a review of Dr Whitenburgh's case. A review hearing will convene shortly before the end of the period of conditional registration. The Tribunal wishes to clarify that at the review hearing, the onus will be on Dr Whitenburgh to demonstrate compliance with the conditions imposed and how he has developed insight and remediated his misconduct. It therefore may assist the reviewing Tribunal if Dr Whitenburgh provides to it:

- His PDP and all relevant supporting documentation including details of any relevant CPD;
- The complaints log;
- A report, or series of reports, from his educational supervisor and RO about his achievements against the aims of his PDP;
- The Practice's complaints policy and details of any review that has been undertaken and its outcomes;
- Written evidence demonstrating the development of insight into his misconduct and the relevant targeted remediation he has completed.

43. Dr Whitenburgh will also be able to provide any other information that he considers will assist.

Determination on Immediate Order - 20/10/2023

1. Having determined to impose conditions on Dr Whitenburgh's registration, the Tribunal has considered, in accordance with Rule 17(2)(o) of the Rules, whether his registration should be subject to an immediate order of those same conditions.

Submissions

2. On behalf of the GMC, Mr Fish submitted that an immediate order was not being sought in this case.

3. On behalf of Dr Whitenburgh, Mr Rich submitted that an immediate order was not necessary in this case and that it would be disproportionate to impose one. In any event, Mr Rich submitted that it was in the public interest to allow Dr Whitenburgh 28 days to put in place the requirements of these conditions so that he can preserve the continuity of care to his patients.

The Tribunal's Determination

4. The Tribunal had regard to paragraphs 172 to 178 of the SG. It took account of the guidance, the submissions of both parties and the specific basis upon which the Tribunal reached its determination on sanction.

> '172 *The tribunal may impose an immediate order if it determines that it is necessary to protect members of the public, or is otherwise in the public interest, or is in the best interests of the doctor…*
>
> *173 An immediate order might be particularly appropriate in cases where the doctor poses a risk to patient safety. For example, where they have provided poor clinical care or abused a doctor's special position of trust, or where immediate action must be taken to protect public confidence in the medical profession.'*

5. The Tribunal determined that the substantive order upholds the overarching objective in maintaining public confidence in the profession and that in the absence of any concerns about his clinical practice and his ability to treat patients safely, an immediate order would

not be necessary in this case.

6. The Tribunal therefore determined not to impose an immediate order of conditions on Dr Whitenburgh's registration.

7. This means that Dr Whitenburgh's registration will be made subject to conditions 28 days from the date on which written notification of this decision is deemed to have been served, unless he lodges an appeal. If Dr Whitenburgh does lodge an appeal he will remain free to practise unrestricted until the outcome of any appeal is known.

8. There is no interim order to revoke.

9. That concludes the case.

ANNEX A – 10/10/2023

Application under Rule 17(2)(g)

1. At the close of the GMC's case, Mr Rich, Counsel on behalf of Dr Whitenburgh, made an application under Rule 17(2)(g) of the General Medical Council (Fitness to Practise Rules) 2004 as amended ('the Rules') that there was no case to answer in respect of paragraph 1.b.i of the Allegation.

2. Paragraph 1.b.i of the Allegation is as follows:

1. On one or more occasions, between 14-26 April 2021, you:

b. inappropriately telephoned Patient A;

i. from your personal mobile number;
To be determined

Submissions

On behalf of Dr Whitenburgh

3. On behalf of Dr Whitenburgh, Mr Rich referred the Tribunal to the case of *R v Galbraith* [1981] 73 Cr App R 124 ('*Galbraith*') which was authority for the proposition that where there is no evidence, or evidence of a tenuous character, for example because of inherent weakness or vagueness, a Tribunal should stop a paragraph of the Allegation from going forward. Mr Rich submitted that the evidence relied on by the GMC in respect of whether Dr Whitenburgh used his personal mobile number to contact Patient A was somewhere between there being *'no evidence'* and *'contradictory evidence'*. Mr Rich submitted that his understanding was that the only evidence to support that Dr Whitenburgh called from his personal mobile number was because that is what Patient A, the complainant, had said.

4. Mr Rich reminded the Tribunal of Patient A's evidence during cross-examination that he had no particular reason to think the number Dr Whitenburgh called him from was a personal mobile. Patient A's concern was that it was a call from a mobile phone number which he was not expecting. Mr Rich submitted that there was no evidence beyond that of

Patient A to suggest that Dr Whitenburgh had called Patient A from his personal mobile number, rather than a business mobile number. Mr Rich reminded the Tribunal that it could only consider the evidence adduced by the GMC at this stage. He submitted that there was either no evidence, or effectively close to no evidence to support paragraph 1.b.i of the Allegation. He invited the Tribunal to find that there was no case to answer in respect of paragraph 1.b.i of the Allegation.

On behalf of the GMC

5. On behalf of the GMC, Mr Fish submitted that there was evidence to support paragraph 1.b.i of the Allegation. Mr Fish submitted that Patient A could not have possibly known what Dr Whitenburgh's personal mobile number was. However, he submitted that it was a matter of reasonable inference, on the evidence available, that the mobile Dr Whitenburgh called from was his personal mobile number. He submitted that this inference could be properly drawn because, as a fact, Dr Whitenburgh used that number to contact Patient A. It was Patient A's evidence that Dr Whitenburgh called on a number of occasions, for reasons that at this stage remain in dispute. Mr Fish submitted that Dr Whitenburgh has chosen to use that mobile number rather than contacting him through his practice landline number.

6. Mr Fish submitted that there was no evidence before the Tribunal, at this stage, to explain the status of the mobile number used to call Patient A. Further, he submitted there was no evidence regarding why Dr Whitenburgh chose to call Patient A using that particular number. Mr Fish submitted that the Tribunal should examine how the number was used, the number of occasions it was used, and the times it was used, namely outside of normal practice hours. He submitted that Dr Whitenburgh's call to Patient A on the evening of Sunday 25 April 2021 was consistent with him having called from his personal mobile number. Mr Fish invited the Tribunal to refuse the application made under Rule 17(2)(g) of the Rules.

The Relevant Legal Principles

7. The Tribunal applied the test set out in *Galbraith*, in which Lord Lane LCJ said:

'How then should the judge approach a submission of 'no case'?

(1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case.

(2) The difficulty arises where there is some evidence but it is of a tenuous character, for example, because of inherent weakness or vagueness or because it is inconsistent with other evidence.

(a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case.

(b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness' reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury.'

8. It also had regard to Rule 17(2)(g) of the Rules:

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

9. The Tribunal accepted the Legally Qualified Chair's advice that it should give the word *'personal'* its ordinary English meaning.

The Tribunal's Decision

10. The Tribunal considered that this was not a case where there was no evidence to support paragraph 1.b.i of the Allegation.

11. The Tribunal had regard to Patient A's evidence that he had received numerous calls from Dr Whitenburgh, some of which had come from a mobile number. Patient A had accepted during cross-examination that he did not know whether the mobile number Dr Whitenburgh called him from was a personal or business mobile number.

12. Nevertheless, the Tribunal took the definition of *'personal'* to mean *'belong to or affecting a particular person rather than anyone else'* as set out in the Oxford Dictionary of English.

13. The Tribunal was satisfied that, taking the evidence adduced by the GMC at its highest, it could conclude that the mobile number Dr Whitenburgh called Patient A from belonged to him, rather than anyone else. As such, it was satisfied that, the evidence to support this paragraph 1.b.i of the Allegation was not so tenuous in nature as to prevent a Tribunal, properly directed, from finding it proved. As such, it concluded that there was a case to answer.

14. The Tribunal determined to refuse the application made on behalf of Dr Whitenburgh, pursuant to Rule 17(2)(g) of the Rules.

ANNEX B – 10/10/2023

Determination on the admission of evidence pursuant to Rule 34(1)

1. At the outset of Dr Whitenburgh's case, Mr Rich informed the Tribunal of his intention to adduce a witness statement and exhibits from Ms C and call her to give oral evidence. Ms C's witness statement was dated 10 October 2023.

2. On behalf of the GMC, Mr Fish did not oppose Ms C's evidence being put before the Tribunal. However, he observed that it was not particularly satisfactory that this evidence had been served so late, namely after the GMC had closed its case. Further, he submitted that it was noted that Ms C had been present during the entirety of the GMC's case.

3. Having received Ms C's witness statement and exhibits, the Tribunal invited parties to make submissions in respect of Rule 35(6) and Rule 34(1) of the Rules:

> *Rule 35*
>
> *(6) A witness of fact shall not, without leave of the Committee or Tribunal, be entitled to give evidence at a hearing unless he has been excluded from the proceedings until such time as he is called.*

Rule 34

(1) The Committee or a Tribunal may admit any evidence they consider fair and relevant to the case before them, whether or not such evidence would be admissible in a court of law.

Submissions

On behalf of Dr Whitenburgh

4. On behalf of Dr Whitenburgh, Mr Rich referred to Rule 35(6) of the Rules and submitted that the rule exists to prevent contamination of a witness's evidence by another, or the possibility of collusion between witnesses who are giving evidence on the same events. He submitted that the real risk, when one witness heard the evidence of another, was that they could adjust their own evidence to either match that of another witness or to contradict it.

5. Mr Rich reminded the Tribunal that Dr Whitenburgh has not yet given evidence. He submitted that given Ms C's proximity to Dr Whitenburgh, as both the Practice Manager and a member of his family, she was likely to already be intimately aware of his evidence. Mr Rich submitted that whilst Ms C was present for Patient A's oral evidence, she had not been party to any of the phone calls between Dr Whitenburgh and Patient A. He submitted that Ms C's evidence was essentially factual background evidence to assist the Tribunal in understanding how Dr Whitenburgh's practice operates.

6. Mr Rich referred the Tribunal to Ms C's evidence. He submitted that there was no realistic way that her evidence could have been tainted or affected in any adverse way by her hearing the evidence of Patient A. Ms C's evidence was, in Mr Rich's submission, no less helpful to the Tribunal because she had attended the first day of the hearing.

7. In respect of admissibility, Mr Rich submitted that Ms C's evidence was clearly relevant. Turning to fairness, Mr Rich submitted that given Patient A's repeated assertions in oral evidence that Dr Whitenburgh was a *'liar'*, it was fair for him to be able to call a corroborating witness. Mr Rich submitted that some of the evidence he was seeking to admit was by way of rebuttal. He submitted that the exhibits attached to Ms C's statement were highly unlikely to be controversial and as such were unlikely to face challenges to their authenticity or veracity.

8. Mr Rich referred the Tribunal to Patient A's oral evidence, in particular his comments about his family being removed from the Practice's patient list. He submitted that it had not been foreseen that this issue would gain such significance, particularly as it does not form part of the Allegation. He further submitted that it would be unfair if Dr Whitenburgh were not permitted to rebut the claim made by Patient A and explain why his family were removed the Practice's patient list at the time they were.

9. Mr Rich drew the Tribunal's attention to the other exhibits provided by Ms C. He submitted that admitting Ms C's evidence and exhibits did not create any unfairness to the GMC. He reminded the Tribunal that the GMC will have an opportunity to cross-examine Ms C if her evidence is admitted.

10. Mr Rich submitted that if his application to adduce Ms C's evidence was refused, he would, in any event, seek to have the exhibits to Ms C's statement adduced by Dr Whitenburgh. Mr Rich invited the Tribunal to grant his application and submitted that calling Ms C to give evidence would be the fair and appropriate way to continue these proceedings.

On behalf of the GMC

11. On behalf of the GMC, Mr Fish submitted that the position remained the same, that the GMC did not oppose the admission of Ms C's witness statement and exhibits. He submitted that Ms C's evidence was clearly relevant. Further, he submitted that no serious unfairness would be suffered by the GMC if it were admitted.

12. Mr Fish repeated his observation that it was unsatisfactory for Ms C's evidence to emerge in the way it had done, from a witness who had heard all of the oral evidence in the GMC's case. However, he submitted, putting that criticism aside, that Ms C's evidence was, in reality, generic in its nature. It sets out the general working practices of Dr Whitenburgh's Practice. He submitted that Ms C has not given any direct evidence about the crucial issue for the Tribunal to determine, namely Dr Whitenburgh's interaction with Patient A. Mr Fish submitted that he did not anticipate a challenge to the veracity of the exhibits seeking to be adduced by Ms C. He submitted that the GMC's position remains that there was no objection to the evidence of Ms C being admitted.

The Relevant Legal Principles

13. The Tribunal had regard to Rule 35(6) and Rule 34(1) of the Rules (set out above) and accepted the Legally Qualified Chair's advice.

The Tribunal's Decision

14. The Tribunal considered that the way Ms C's evidence had emerged in these proceedings was irregular and unsatisfactory, particularly as she had been present throughout Patient A's oral evidence. However, it did not consider that this alone prohibited the evidence from being admitted.

15. The Tribunal had regard to the evidence of Ms C. It accepted that the evidence was plainly relevant to a number of matters to be determined.

16. The Tribunal accepted that some of Patient A's evidence, and the emphasis he placed on certain points, including his family being removed from the Practice's patient list, could not have been foreseen.

17. The Tribunal bore in mind that the GMC was not opposing the admission of Ms C's evidence. It had been submitted that its admission did not pose any serious unfairness. In addition, Mr Rich had submitted that Ms C would be called to give evidence, meaning that her evidence could be tested in cross-examination and through questions from the Tribunal. In such circumstances, the Tribunal was satisfied that Ms C's evidence could be admitted without unfairness to the GMC.

18. The Tribunal considered that the impact of Ms C having been in attendance at these proceedings before producing her witness statement could be dealt with as part of its consideration of what weight to give her evidence in due course.

19. Accordingly, the Tribunal determined that it was fair and relevant to admit Ms C's evidence. Therefore, it determined to grant the application made on behalf of Dr Whitenburgh, pursuant to Rule 34(1) of the Rules.