

## PUBLIC RECORD

Dates: 04/05/2021 – 14/05/2021

Medical Practitioner's name: Dr Nadarasar YOGANATHAN

GMC reference number: 3402533

Primary medical qualification: MB BS 1983 University of Colombo

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

**Summary of outcome**  
Suspension, 1 month.

**Tribunal:**

Legally Qualified Chair	Mr Damian Cooper
Lay Tribunal Member:	Dr Matthew Fiander
Medical Tribunal Member:	Dr Damian McDermott
Tribunal Clerk:	Ms Lauren Duffy

**Attendance and Representation:**

Medical Practitioner:	Present and represented
Medical Practitioner's Representative:	Mr Ben Rich, Counsel, instructed by RadcliffesLeBrasseur
GMC Representative:	Ms Caoimhe Daly, 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 - 12/05/2021

### Background

1. Dr Yoganathan qualified in 1983 from the University of Colombo. He came to the UK in 1985 and undertook his postgraduate training in sub-specialities of psychiatry. After various posts as a Consultant Psychiatrist, Dr Yoganathan took up a substantive post as a Consultant Psychiatrist in Adult Mental Health at the then Isle of Wight PCT, now Isle of Wight NHS Trust ('the Trust').
2. On 30 April 2017, Dr Yoganathan's employment with the Trust came to an end. From May to August 2017 he worked as a part time Consultant Psychiatrist at Change, Grow, Live ('CGL'). Following his post at CGL, Dr Yoganathan was employed by South West London and St George's Mental Health NHS Trust as a Locum Consultant Psychiatrist.
3. The Allegation that has led to Dr Yoganathan's hearing relates to an interview that he had with CGL on 10 February 2017. It is alleged that Dr Yoganathan failed to disclose that he was subject to a GMC investigation between March 2014 and March 2015 and further matters relating to disciplinary proceedings at the Trust, including a twelve-month final written warning. It is also alleged that, during a meeting with CGL on 28 June 2017, he stated that a settlement agreement, signed between him and the Trust in January 2017, had resulted in all outstanding issues having been resolved and that the disciplinary warning from the Trust had been revoked or words to that effect. It is alleged that Dr Yoganathan knew this was not the case and that his actions in this regard were dishonest.

4. It is further alleged that between November and December 2017, Dr Yoganathan inappropriately contacted a former vulnerable patient on social media, when there was no clinical requirement for him to make such contact and he had previously agreed with the Trust that he would not contact any patient or former patient on social media.
5. The initial concerns were raised with the GMC by the Trust on 20 January 2017.

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

6. On day one of the hearing, the Tribunal granted an application by Ms Daly, Counsel for the GMC, made pursuant to rule 17(6) of the General Medical Council (GMC) (Fitness to Practise) Rules 2004, as amended ('the Rules') to amend paragraph 2 of the Allegation. Ms Daly suggested the following amendment to paragraph 2 of the Allegation:

2 You were obliged to disclose to CGL one or more of all the matters described at paragraph 1a- 1d.

7. On behalf of Dr Yoganathan, Mr Rich, Counsel, had no objections to the amendment. The Tribunal was satisfied that no injustice would be caused by allowing the amendment to be made.
8. At the end of the GMC's case, an application was made by Dr Yoganathan's Counsel, Mr Rich, of no case to answer, pursuant to rule 17(2)(g) of the Rules. As a result of this application and decisions made by the Tribunal, a number of the paragraphs of the Allegation have been deleted as reflected below. The Tribunal's full decision on the application is included at Annex A.

### The Allegation and the Doctor's Response

9. The Allegation made against Dr Yoganathan is as follows:
  1. On 10 February 2017, during an interview with Change, Grow, Live ('CGL'), when given the opportunity to provide any other information of relevance to the job application you failed to disclose you were:
    - a. ~~subject to a GMC investigation between March 2014 and March 2015;~~  
**Deleted after a successful rule 17(2)(g) application**
    - b. ~~subject to a chaperone arrangement at the Isle of Wight~~

~~NHS Trust ('the Trust') between 6 April 2016 and 17 October 2016; Deleted after a successful rule 17(2)(g) application~~

- c. given a final written warning for a period of 12 months following a disciplinary hearing at the Trust on 17 October 2016; **To be determined**
  - d. ~~the subject of concerns raised with the Isle of Wight Council Safeguarding Team by the Care Quality Commission ('CQC') in or around November 2016. Deleted after a successful rule 17(2)(g) application~~
2. You were obliged to disclose to CGL one or more of all the matters described at paragraph 1a- 1d. Amended under rule 17(6). Deleted after a successful 17(2)(g) application insofar as it relates to paragraphs 1a, 1b & 1d. To be determined insofar as it relates to paragraph 1c.
3. During a meeting with CGL on 28 June 2017, you said that a settlement agreement between you and the Trust had resulted in:
- a. all outstanding issues being resolved; **Admitted and found proved**
  - b. the revocation of the warning detailed at paragraph 1c; or words to that effect. **Admitted and found proved**
4. When you made the comment as described at paragraph:
- a. 3a, you knew that the settlement agreement did not seek to resolve all outstanding issues between you and the Trust; **To be determined**
  - b. 3b, you knew that the warning had not been revoked. **To be determined**
5. Your actions were dishonest as described at paragraph:
- a. 3a by reason of paragraph 4a; **To be determined**
  - b. 3b by reason of paragraph 4b. **To be determined**
6. Between November and December 2017, you contacted Patient A, a former psychiatric patient, on social media as set

out in Schedule 1. **Admitted and found proved**

7. Your actions at paragraph 6 were inappropriate in that:
  - a. Patient A was a vulnerable patient by virtue of her health; **Admitted and found proved**
  - b. Patient A was a former patient and there was no clinical requirement for you to contact her; **Admitted and found proved**
  - c. you had previously agreed with the Trust that you would not contact any patient or former patient of the Trust on social media. **Admitted and found proved**

### The Admitted Facts

10. At the outset of these proceedings, through his counsel Mr Rich, Dr Yoganathan made admissions to some paragraphs and sub-paragraphs of the Allegation, as set out above, in accordance with Rule 17(2)(d) of the Rules. In accordance with Rule 17(2)(e) of the Rules, the Tribunal announced these paragraphs and sub-paragraphs of the Allegation as admitted and found proved.

### The Facts to be Determined

11. In light of Dr Yoganathan's response to the Allegation made against him, the Tribunal is required to determine whether during his interview with CGL on 10 February 2017 he failed to disclose, when given the opportunity to do so, that following a disciplinary hearing at the Trust he was given a final written warning for a period of twelve months. The Tribunal is also required to determine whether there was an obligation for Dr Yoganathan to disclose this information. Further, it must determine whether, during a meeting with CGL on 28 June 2017 when he stated that a settlement agreement had resulted in all outstanding issues being resolved and revocation, or words to that effect, of his twelve-month warning, he knew this was not the case and that his actions were dishonest.

### Evidence

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

- Dr A, former Deputy Medical Director at the Trust; and

- Dr B, Associate Medical Director at CGL at the time of Dr Yoganathan’s employment.

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

- Ms C, Interim Human Resources Manager at the Trust; and
- Dr D, Dr Yoganathan’s previous line manager at CGL.

14. Dr Yoganathan provided his own witness statement, dated 31 March 2021 and also gave oral evidence at the hearing.

### Documentary Evidence

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

- Email to Dr A attaching screenshots of the messages between Patient A and Dr Yoganathan;
- Dr Yoganathan’s email to the Medical Protection Society, dated 13 December 2016 detailing the protected conversation with the Trust which took place on 12 December 2016;
- Signed final settlement agreement between the Trust and Dr Yoganathan, dated 17 January 2017 (and two earlier unsigned versions);
- Various correspondence between the Trust and Dr Yoganathan;
- The Trust’s NHS referral form to the GMC, dated 20 January 2017;
- Dr Yoganathan’s appeal statement, dated 22 September 2017;
- Dr Yoganathan’s NHS Job application form to CGL;
- Handwritten interview notes in relation to Dr Yoganathan’s interview with Dr B and Dr D at CGL;
- Minutes from the fact-finding meeting between CGL and Dr Yoganathan, dated 8 June & 28 June 2017; and
- Various testimonials on behalf of Dr Yoganathan, dated between 5 March – 3 May 2021.

### The Tribunal's Approach

16. In reaching its decision on facts, the Tribunal has borne in mind that the burden of proof rests on the GMC. Dr Yoganathan 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 as alleged.

17. In respect of the allegations that Dr Yoganathan acted dishonestly, the Tribunal applied the test laid down by the Supreme Court in *Ivey v Genting Casinos (UK) Ltd [2017] UKSC 67* ('Ivey'), namely that the Tribunal should first ascertain subjectively the actual state of Dr Yoganathan's knowledge or belief as to the facts. Whether the belief is reasonable may be a matter of evidence, but reasonableness is not an additional requirement when considering whether the belief was genuinely held. The Tribunal should then ascertain whether his conduct was dishonest applying the objective standards of ordinary decent people.

### The Tribunal's Analysis of the Evidence and Findings

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

#### Paragraph 1c

19. The Tribunal first considered whether, during his interview with CGL on 10 February 2017, Dr Yoganathan was asked a question which prompted him to disclose that he was subject to a twelve-month final written warning from the Trust. The Tribunal had careful regard to the way in which the GMC has put its case, in that it was submitted that Dr Yoganathan was specifically asked a question or questions which should have prompted him to provide the interview panel with information of the kind originally set out in paragraph 1 of the Allegation.

20. The Tribunal first considered Dr B's and Dr D's contemporaneous handwritten notes from the interview. The Tribunal noted that on the interview proforma there is a prompt for the interviewer which reads, '*Are there any outstanding issues and concerns*'. However, there was no evidence put before the Tribunal of the exact terms of any question(s) actually posed as a result of the prompt. The Tribunal took into account that neither set of notes records either that the question was put to, or was answered by, Dr Yoganathan.

21. The Tribunal then considered the witness statement of Dr B, prepared almost two years after the date of the interview. In it, Dr B referred to the prompt and stated that, Dr Yoganathan was given the opportunity to disclose concerns raised in relation to his practice.

22. The Tribunal went on to consider Dr B's oral evidence, now being given some four years after the date of the interview. She told the Tribunal that she is the member of the interview panel that always asks the questions in the section at the end of the interview, which included the question, *'Are there any outstanding issues and concerns'*. Whilst Dr B confirmed that her memory of the interview was limited and that she *'does not recall the exact words that were used'*, she told the Tribunal that she was confident that she would have asked Dr Yoganathan a question which, in her view, should have prompted him to disclose the fact that he was subject to a twelve-month warning by the Trust. She also told the Tribunal that, had Dr Yoganathan answered *'yes'* to this question, she would have written down notes to reflect his answer. Whilst the Tribunal noted that Dr B was doing her best to assist the Tribunal, given that her memory of the interview had somewhat faded, it determined that it could place minimal weight on what, in the Tribunal's judgement amounted to little more than an assumption on her part that she asked the question(s), and placed more weight on the contemporaneous handwritten interview notes.

23. The Tribunal had regard to Dr D's GMC statement which stated, *'there was no information given on any previous regulatory or investigation issues. I cannot recall exploring these types of issues'*.

24. The Tribunal also had regard to the minutes of the fact-finding meetings attended by Dr B, Dr D and Dr Yoganathan in June 2017. The Tribunal considered that these meetings would have been an opportunity for Dr B to challenge Dr Yoganathan that he was asked a question at the interview which should have prompted the relevant disclosure. The Tribunal noted that the notes from the fact-finding meetings do not record such a challenge being put to Dr Yoganathan.

25. The Tribunal went on to consider Dr Yoganathan's evidence. In his GMC statement he stated, *'I was not asked whether there were any outstanding issues or concerns for me to disclose in relation to any investigation by the GMC or my employer. If I had been asked, I would have made clear the position...'* In his oral evidence, he told the Tribunal that he has very little memory of the details of the interview.

26. The Tribunal also considered the non-verbatim notes of Dr Yoganathan's Appeal Hearing with CGL, dated 22 September 2017. During this meeting, Dr Yoganathan was asked whether he understood that CGL would be interested in any allegations made against him regarding his fitness to practise and safeguarding concerns. Whilst there is reference to Dr Yoganathan confirming that he was asked if there '*were any ongoing concerns*', the Tribunal noted Dr Yoganathan's evidence that when he was asked this question, his answer referred to what he had been asked on the application form. The Tribunal was of the view that the notes were vague as to whether or not Dr Yoganathan was asked a specific question at interview which should have prompted him to provide the interview panel with information in relation to any restrictions on his practice. The Tribunal was not satisfied that Dr Yoganathan was asked, at interview, any question(s) that went beyond what he had already been asked on the application form.

27. Therefore, the Tribunal determined that the GMC has not discharged the burden of proof that, on the balance of probabilities, a member of the interview panel asked Dr Yoganathan a specific question or questions which provided the opportunity for him to disclose that he was given a final written warning for a period of twelve months. Given the Tribunal's determination that Dr Yoganathan was not asked a question, it follows that he did not fail to disclose the fact that he was subject to a twelve-month warning in response, as alleged.

28. Accordingly, the Tribunal found paragraph 1c of the Allegation not proved.

#### Paragraph 2

29. In order for the Tribunal to find paragraph 2 of the Allegation proved, it is required to determine that, even if Dr Yoganathan was not specifically asked question(s) to prompt him to disclose the twelve-month warning from the Trust, he was nevertheless under a general obligation to do so. The Tribunal noted the GMC's position that this paragraph of the Allegation was in the context of an obligation at the time of his interview with CGL on 10 February 2017.

30. Before determining whether Dr Yoganathan was under an obligation to disclose his twelve-month warning from the Trust, the Tribunal considered it necessary to determine whether or not Dr Yoganathan knew, at the time of his interview with CGL, that he was still subject to the warning.

31. The Tribunal had regard to the disciplinary outcome letter, dated 19 October 2016. This letter confirmed that the disciplinary panel *‘decided that a Final Written Warning is issued for a period of 12 months.’* Following receipt of the outcome letter, it is clear from the evidence provided to the Tribunal that Dr Yoganathan did not agree with the outcome and took steps to appeal the decision. Dr Yoganathan also confirmed in oral evidence that he wanted to appeal the whole of the Trust’s investigation and not merely the outcome of the disciplinary hearing.

32. On 12 December 2016, Dr Yoganathan engaged in a *‘protected conversation’* with the Trust (Dr Yoganathan’s employment adviser from the British Medical Association (‘BMA’) also attended this meeting). The Tribunal had regard to the only written record of that meeting placed before it, namely Dr Yoganathan’s contemporaneous note of this meeting which is set out in his email to the Medical Protection Society (‘MPS’) on 13 December 2016. It noted that Dr Yoganathan stated that, *‘The essence of this conversation was that, due to recent developments, my pending appeal and grievances, trust had broken down. The meeting was to establish how best to resolve this situation, through my acceptance of a severage (sic) package, without prejudice. With Ms E’s support, we agreed the terms of my termination of contract, which have not yet been put in writing’.* In his oral evidence, Dr Yoganathan told the Tribunal that the settlement agreement had accorded with the discussion which took place during the *‘protected conversation’* on 12 December 2016.

33. The Tribunal also had regard to the final version of the settlement agreement which was signed by Dr Yoganathan on 17 January 2017. Clause 1.1 and Clause 1.2 of the agreement stated:

*‘IT IS AGREED as follows:*

**1. ARRANGEMENTS ON TERMINATION**

1.1 *The Employee’s employment with the Trust will terminate on 30 April 2017 (Termination Date) by reason of his resignation.*

1.2 *The Employee agrees not to pursue his appeal against the final written warning dated 19 October 2016 and to withdraw his grievance dated 10 June 2015, and also the informal concern raised in a letter to Mr F dated 10 August 2016. The Trust confirms that no formal investigation will be undertaken regarding the matters discussed with the Employee on 7 December 2016...’*

34. The Tribunal went on to consider Dr Yoganathan's evidence. In his GMC statement, Dr Yoganathan stated that it was his *'honest and reasonable belief at the time that because my appeal against the final written warning had not been heard, the sanction had not taken effect. I understood it was in abeyance...'* In his oral evidence, Dr Yoganathan told the Tribunal that it was his belief that the settlement agreement had introduced a *'clean-break'* and therefore he did not think the outcome of the disciplinary hearing still stood.

35. The Tribunal was of the view that the terms of the settlement agreement were clear, in that it specified that the appeal against the final written warning was withdrawn. In the Tribunal's view, it was clear that the document does not suggest that the final written warning was revoked.

36. The Tribunal noted that Dr Yoganathan was advised by a BMA representative in respect of the settlement agreement. It is also clear from the evidence that Dr Yoganathan did request some amendments to the settlement agreement; it went through three iterations before Dr Yoganathan signed the final version. There is no evidence before the Tribunal that suggests that Dr Yoganathan ever questioned the absence of a term addressing the status of the final written warning. This includes his email to the MPS on 13 December 2016. Notwithstanding the amendments to the settlement agreement, clause 1.2 remained unchanged and specifically set out that Dr Yoganathan agreed not to pursue his appeal. The Tribunal was of the view that the settlement agreement made it clear that Dr Yoganathan would not pursue his appeal against the decision of the disciplinary panel to impose a twelve-month warning. The Tribunal was of the view that Dr Yoganathan's explanation that he thought the settlement agreement had introduced a *'clean-break'*, which disappplied the outcome of the disciplinary hearing, was not credible.

37. Having determined that Dr Yoganathan knew that the settlement agreement did not revoke the twelve-month warning imposed in him at the disciplinary hearing, the Tribunal went on to consider whether he was obliged to disclose this information to CGL at the interview on 10 February 2017.

38. The Tribunal had regard to the general duty under Good Medical Practice (GMP) that requires doctors to be open and honest and to act with integrity. The Tribunal was of the view that there could, in some circumstances, be an obligation for a doctor to disclose an active warning to a potential new employer. However, the Tribunal noted that, in this case, it has not been provided with any information as to the context of the warning which resulted

from Dr Yoganathan's disciplinary hearing. The Tribunal was of the view that any obligation to disclose a warning may depend on the potential consequences for the new employer and what lay behind the initial warning (for example whether or not this related to patient safety or public confidence concerns). Further, the Tribunal noted that the CGL application form, in relation to local employment restriction, asked only about restrictions placed as part of the revalidation process, which the warning was not. The Tribunal has not been provided with any evidence that Dr Yoganathan's warning related to matters which should have been disclosed to CGL. Therefore, the Tribunal determined that the GMC has not discharged the burden of proof that, on the balance of probabilities, Dr Yoganathan was under an obligation to inform CGL about his final written warning.

39. Accordingly, the Tribunal found paragraph 2 of the Allegation not proved insofar as it relates to paragraph 1c.

#### Paragraph 4a

40. Dr Yoganathan has admitted that, during a meeting with CGL on 28 June 2017, he said that a settlement agreement between him and the Trust had resulted in all outstanding issues being resolved. It is agreed by both parties that the *'outstanding issues'* relate only to the twelve-month warning from the Trust and the Trust's referral of Dr Yoganathan to the GMC.

41. In relation to the twelve-month warning, the Tribunal has already determined that Dr Yoganathan knew that this was not removed as part of the settlement agreement.

42. The Tribunal went on to consider whether or not the settlement agreement led Dr Yoganathan to an understanding that the Trust would no longer make a GMC referral. The Tribunal first had regard to the disciplinary outcome letter, dated 19 October 2016 which stated that, *'A referral to the GMC will be made in accordance with the GMC referral guidance'*. Following notification from Dr Yoganathan that he was going to appeal the disciplinary decision the Executive Medical Director of the Trust, Dr G wrote to Dr Yoganathan on the 16 November 2016 to confirm that he had not forwarded a referral to the GMC.

43. The Tribunal went on to consider the *'protected conversation'* which took place on 12 December 2016. In his email to the MPS on 13 December 2016, Dr Yoganathan wrote that, at the meeting on 12 December 2016, he was *'told that the Trust might also have to reconsider*

*its own referral of me to the GMC, as recommended by the Disciplinary Panel on 17 October 2016*’. The Tribunal noted that the settlement agreement is silent on the issue of the GMC referral.

44. Dr Yoganathan has confirmed that the settlement agreement mirrored the ‘*protected conversation*’ between himself and the Trust on 12 December 2016. His record of that meeting deals with the GMC referral as a distinct issue. The settlement agreement is silent on the GMC referral. The Tribunal was of the view that, at the time the settlement agreement was signed, Dr Yoganathan was aware that the Trust may make a GMC referral. The Tribunal had regard to Dr Yoganathan’s oral evidence that, at the time of his interview with CGL on 10 February 2017, there still remained a possibility that the Trust would proceed with his referral to the GMC. The Tribunal acknowledged that Dr Yoganathan received no further communication from the Trust in relation to the GMC referral, or indeed in relation to any matters, during the remaining period of his employment. He only became aware that they had referred him to the GMC when he received correspondence from the GMC on 19 May 2017. Notwithstanding the lack of communication from the Trust, for these reasons, the Tribunal determined that Dr Yoganathan knew that there remained a possibility that the Trust would make the GMC referral. Therefore, when he made the comment at the meeting on 28 June 2017 (as set out in paragraph 3a of the Allegation), he knew that the settlement agreement did not seek to resolve all outstanding issues between himself and the Trust.

45. Accordingly, the Tribunal found paragraph 4a of the Allegation proved.

#### Paragraph 4b

46. Dr Yoganathan has admitted that, during a meeting with CGL on 28 June 2017, he said that a settlement agreement between him and the Trust resulted in the revocation of the warning from the Trust. For the reasons set out above (in relation to paragraph 2 of the Allegation) the Tribunal has already determined that Dr Yoganathan knew that the settlement agreement did not establish a ‘*clean-break*’. For the same reasons, the Tribunal determined that, when Dr Yoganathan made this statement on 28 June 2017, he knew that the warning had not been revoked.

47. Accordingly, the Tribunal found paragraph 4b of the Allegation proved.

#### Paragraph 5a

48. The Tribunal has already concluded that Dr Yoganathan did not hold a genuine belief that that the settlement agreement sought to resolve all outstanding issues between himself and the Trust. He knew that the warning and the potential for a GMC referral remained. Given Dr Yoganathan's knowledge, the Tribunal considered that his actions in telling CGL that the settlement agreement had resolved the outstanding issues would be considered dishonest by the standards of ordinary decent people. Therefore, the Tribunal found paragraph 5a of the Allegation proved.

#### Paragraph 5b

49. The Tribunal has already concluded that Dr Yoganathan did not hold a genuine belief that that the settlement agreement sought to revoke the twelve-month warning which was the outcome of the Trust's disciplinary hearing. The Tribunal has already determined that he knew he was still subject to the final written warning. Given Dr Yoganathan's knowledge, the Tribunal considered that his actions in telling CGL that the settlement agreement had resulted in the removal of the warning would be considered dishonest by the standards of ordinary decent people. Therefore, the Tribunal found paragraph 5b of the Allegation proved.

#### **The Tribunal's Overall Determination on the Facts**

50. The Tribunal has determined the facts as follows:

1. On 10 February 2017, during an interview with Change, Grow, Live ('CGL'), when given the opportunity to provide any other information of relevance to the job application you failed to disclose you were:
  - a. ~~subject to a GMC investigation between March 2014 and March 2015;~~  
**Deleted after a successful rule 17(2)(g) application**
  - b. ~~subject to a chaperone arrangement at the Isle of Wight NHS Trust ('the Trust') between 6 April 2016 and 17 October 2016;~~ **Deleted after a successful rule 17(2)(g) application**
  - c. given a final written warning for a period of 12 months following a disciplinary hearing at the Trust on 17 October 2016; **Not proved**
  - d. ~~the subject of concerns raised with the Isle of Wight Council Safeguarding Team by the Care Quality Commission ('CQC') in or around November 2016.~~  
**Deleted after a successful rule 17(2)(g) application**

2. You were obliged to disclose to CGL one or more of all the matters described at paragraph 1a- 1d. **Amended under rule 17(6). Deleted after a successful 17(2)(g) application insofar as it relates to paragraph 1a, 1b & 1d. Not proved insofar as it relates to paragraph 1c.**
3. During a meeting with CGL on 28 June 2017, you said that a settlement agreement between you and the Trust had resulted in:
  - a. all outstanding issues being resolved; **Admitted and found proved**
  - b. the revocation of the warning detailed at paragraph 1c; or words to that effect. **Admitted and found proved**
4. When you made the comment as described at paragraph:
  - a. 3a, you knew that the settlement agreement did not seek to resolve all outstanding issues between you and the Trust; **Determined and found proved**
  - b. 3b, you knew that the warning had not been revoked. **Determined and found proved**
5. Your actions were dishonest as described at paragraph:
  - a. 3a by reason of paragraph 4a; **Determined and found proved**
  - b. 3b by reason of paragraph 4b. **Determined and found proved**
6. Between November and December 2017, you contacted Patient A, a former psychiatric patient, on social media as set out in Schedule 1. **Admitted and found proved**
7. Your actions at paragraph 6 were inappropriate in that:
  - a. Patient A was a vulnerable patient by virtue of her health; **Admitted and found proved**
  - b. Patient A was a former patient and there was no clinical requirement for you to contact her; **Admitted and found proved**
  - c. you had previously agreed with the Trust that you would

not contact any patient or former patient of the Trust on social media. **Admitted and found proved.**

#### Determination on Impairment - 13/05/2021

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, Yoganathan'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. In addition, the Tribunal received further testimonials and Continued Professional Development ('CPD') documentation on behalf of Dr Yoganathan.

#### Submissions

3. On behalf of the GMC, Ms Daly submitted that Dr Yoganathan's fitness to practise is impaired by reason of his misconduct. She reminded the Tribunal of the two-stage process to be adopted. Firstly, whether the facts found proved amount to misconduct and secondly, whether Dr Yoganathan's fitness to practise is currently impaired by reason of his misconduct.

4. Ms Daly referred to Good Medical Practice (2013 edition) ('GMP') and submitted that Dr Yoganathan's dishonest conduct under paragraph 5 of the Allegation had breached a fundamental tenet of the medical profession. Further, she submitted that Dr Yoganathan's dishonesty occurred in relation to his position as a doctor in that he was dishonest in the course of his employment with CGL. She submitted that this would be considered deplorable by fellow medical practitioners and that his dishonesty amounted to misconduct. With regard to the facts admitted and found proved in relation to Patient A, Ms Daly submitted that Dr Yoganathan's interaction with a former patient was sufficiently serious as to amount to misconduct.

5. In relation to Dr Yoganathan's remediation, Ms Daly recognised that it can be difficult to remediate dishonesty. Whilst Ms Daly acknowledged that Dr Yoganathan has completed

extensive CPD, she submitted that the testimonials provided only go so far with respect to dishonesty. Ms Daly submitted that Dr Yoganathan has only demonstrated limited insight.

6. In relation to contact with Patient A, Ms Daly reminded the Tribunal of Dr Yoganathan's oral evidence and submitted that he appeared to be suggesting that his contact with a former patient was appropriate because it related to her career. Whilst Dr Yoganathan has admitted the paragraphs of the Allegation in relation to Patient A, she submitted that, in assessing his level of insight, his admissions must be considered in the context of the evidence. Dr Yoganathan had previously given an undertaking to the Trust not to contact former patients. He had contacted Patient A and then did so again a week later. He had actively typed the messages he sent to her.

7. Ms Daly submitted that a finding of impairment is necessary in this case to maintain public confidence in the profession and to promote and uphold professional standards and conduct for members of the medical profession.

8. On behalf of Dr Yoganathan, Mr Rich told the Tribunal that Dr Yoganathan acknowledges the seriousness of the Tribunal's findings in relation to dishonesty. Mr Rich accepted that a finding of dishonesty will, almost always, amount to a finding of misconduct. Mr Rich asked the Tribunal to have regard to the situation that Dr Yoganathan found himself in on 28 June 2017 during the fact-finding meeting with CGL. Whilst the Tribunal has found that Dr Yoganathan was dishonest during this meeting, Mr Rich reminded the Tribunal that it had also determined that Dr Yoganathan was not under a duty to reveal such information at the interview stage but is now judged for giving dishonest reasons for not disclosing such information. Taking the context of the case into account, Mr Rich submitted that Dr Yoganathan's dishonesty falls at the lower end of the spectrum.

9. Mr Rich reminded the Tribunal that denial of an allegation is not the same as a lack of insight. He submitted that Dr Yoganathan demonstrated insight into the importance of honesty when he stated that, had he been asked about the concerns at the interview stage, he would have disclosed them. Further, he referred to the positive testimonials received on behalf of Dr Yoganathan and submitted that there is a low risk that Dr Yoganathan would repeat his dishonesty.

10. Mr Rich submitted that no issues of patient safety arise in this case. However, he acknowledged that in relation to Dr Yoganathan's dishonesty, a finding of impairment in

almost inevitable in order to maintain public confidence in the profession and to promote and uphold professional standards and conduct for members of the medical profession.

11. In relation to Patient A, Mr Rich submitted that Dr Yoganathan's actions do not amount to misconduct. Mr Rich asked the Tribunal to consider the context of Dr Yoganathan's contact with Patient A. Dr Yoganathan has told the Tribunal that Patient A's details appeared automatically on his phone within a social media application. Further, the content of the messages does not support any improper motivation. Dr Yoganathan's evidence is that he engaged in a conversation with Patient A about her studies and career.

12. Mr Rich submitted that Dr Yoganathan understands that it was inappropriate to contact a former patient. However, he submitted that this conduct, whilst inappropriate and perhaps foolish, does not cross the threshold to be considered as disgraceful or deplorable by fellow medical practitioners. He submitted that this conduct does not amount to misconduct. He further submitted that, even if the Tribunal found it to be misconduct, Dr Yoganathan's fitness to practise was not currently impaired. He had admitted the paragraphs of the Allegation and expressed his regret and embarrassment, He had not vigorously pursued contact and there had been no repetition since.

### **The Relevant Legal Principles**

13. 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 judgement alone.

14. 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 and then whether the finding of that misconduct could lead to a finding of impairment.

15. The Tribunal must determine whether Dr Yoganathan'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, have been remedied and any likelihood of repetition.

16. The Tribunal took account of *Roylance v GMC [2000] 1 AC 311* in which Lord Clyde stated that misconduct is conduct that relates to the profession of medicine and is a serious breach of the expected professional standard.

17. Whilst there is no statutory definition of impairment, the Tribunal was assisted by the guidance provided by Dame Janet Smith in the Fifth Shipman Report, as adopted by the High Court in *CHRE v NMC and Paula Grant [2011] EWHC 297 Admin*. In particular, the Tribunal considered whether its findings of fact showed that Dr Yoganathan's 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.'*

## The Tribunal's Determination on Impairment

### Misconduct

#### Paragraph 5 of the Allegation - Dr Yoganathan's dishonesty

18. The Tribunal first considered whether Dr Yoganathan's dishonesty amounted to misconduct.

19. The Tribunal noted that doctors have an obligation to be honest and to act with integrity and that this is a key principle set out in GMP and a fundamental tenet of the medical profession. It considered that the following paragraphs of GMP had been engaged in this case:

*'1 Patients need good doctors. Good doctors make the care of their patients their first concern: they are competent, keep their knowledge and skills up to date, establish and maintain good relationships with patients and colleagues, are honest and trustworthy, and act with integrity within the law.'*

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

20. Having considered the evidence, the Tribunal was satisfied that Dr Yoganathan's dishonesty amounted to a breach of his professional obligations.

21. In considering the seriousness of the dishonesty, the Tribunal had regard to the particular circumstances of this case. The Tribunal has borne in mind that there has been no finding that Dr Yoganathan had breached a duty, or was otherwise generally obliged, to disclose the final written warning or the potential GMC referral during his interview with CGL in February 2017. However, it had regard to the fact that during the fact-finding meeting in June 2017 CGL asked Dr Yoganathan legitimate questions about the reasons for his non-disclosure at the interview stage. Notwithstanding the complications of the settlement agreement, and Dr Yoganathan's expressed concern about what he was permitted to say about it, the Tribunal has already determined that Dr Yoganathan was dishonest in the answers that he provided.

22. The Tribunal was of the view that Dr Yoganathan's dishonest conduct would be considered deplorable by fellow practitioners. In all the circumstances, the Tribunal concluded that Dr Yoganathan's conduct was a sufficiently serious breach of the standards of conduct reasonably to be expected of a doctor as to amount to misconduct.

#### Paragraphs 6 & 7 of the Allegation – contact with Patient A

23. The Tribunal went on to consider whether Dr Yoganathan's actions in relation to Patient A amounted to misconduct.

24. In her submissions Ms Daly directed the Tribunal to paragraph 53 of GMP, which states:

'53 *You must not use your professional position to pursue a sexual or improper emotional relationship with a patient or someone close to them.'*

25. The Tribunal also had regard to paragraphs 12 and 14 of the GMC guidance document, *'Maintaining a professional boundary between you and your patient'* (2013), which is referenced as a footnote to paragraph 53 of GMP:

*'12 Pursing a relationship with a former patient is more likely to be (or seen to be) an abuse of your position if you are a psychiatrist or a paediatrician.*

*14 You must consider the potential risks involved in using social media and the impact that inappropriate use could have on your patients' trust in you and society's trust in the medical profession. Social media can blur the boundaries between a doctor's personal and professional lives and may change the nature of the relationship between a doctor and a patient. You must follow our guidance on the use of social media.'*

26. The Tribunal considered the evidence before it in relation to Dr Yoganathan's exchange with Patient A. It accepted Dr Yoganathan's evidence that he did not seek out Patient A's contact details and instead was somehow prompted to initiate contact with her via a social media application on his phone. Dr Yoganathan's evidence was that he got in touch with Patient A to ask about her studies and career. The Tribunal considered that it had not been provided with any evidence that supported an asserted that Dr Yoganathan's motive in contacting Patient A was to pursue a sexual or improper emotional relationship with her.

27. By Dr Yoganathan's own admission, contacting Patient A was inappropriate. In addition, in his GMC witness statement, he stated, *'I bitterly regret doing so, I should not have done so, and I apologise sincerely for doing so'*. In the Tribunal's view the contact was inappropriate, particularly in light of his earlier undertaking to the Trust that he would not contact former patients. Whilst it was of the view that it was also foolish and unwise, having considered the evidence and guidance before it, the Tribunal was of the view that this did not amount to a breach of Dr Yoganathan's professional obligations as set out in GMP. Therefore, the Tribunal determined that Dr Yoganathan's actions in relation to Patient A did not amount to misconduct. As a result, it was not necessary for the Tribunal to go on to consider seriousness.

## **Impairment**

28. The Tribunal, having determined that Dr Yoganathan's dishonesty amounts to misconduct, went on to consider whether, as a result of that misconduct, his fitness to practise is currently impaired.

29. The Tribunal reminded itself of the unusual circumstances in which the dishonesty in this case had arisen. Whilst it considered it relevant that Dr Yoganathan's dishonesty occurred in relation to the employer/employee relationship, it had regard to the fact that the dishonesty concerned the reasons for his non-disclosure of information in relation to which there has been no finding of either a duty or obligation to disclose.

30. The Tribunal first considered Dr Yoganathan's level of insight into his dishonesty. The Tribunal was of the view that he does have insight into the requirement for doctors to be open, honest and to act with integrity. In his written statement, Dr Yoganathan stated that he *'was not asked whether there were any outstanding issues or concerns for me to disclose in relation to any investigation by the GMC or my employer. If I had been asked, I would have made the position clear'*. The Tribunal accepted his evidence. Further, given Dr Yoganathan's acceptance that dishonesty by a doctor was both wrong and serious, the Tribunal was satisfied that he does have some insight.

31. The Tribunal acknowledged that, whilst dishonesty is capable of being remedied, remediation is difficult to demonstrate. The Tribunal noted that this incident took place almost four years ago and it has not been provided with any evidence that Dr Yoganathan has acted dishonestly before, or since.

32. The Tribunal had regard to the positive testimonials provided in support of Dr Yoganathan. It was clear to the Tribunal that he is a well-regarded doctor. There have been no issues with his probity raised following the dishonesty in June 2017. The Tribunal was satisfied that, given his appreciation of the seriousness of the Tribunal's findings, the period of time elapsed since the incident without any probity concerns, and the testimonials it has seen, there was not a significant risk of Dr Yoganathan repeating his dishonesty.

33. However, in considering whether Dr Yoganathan's fitness to practise is currently impaired, the Tribunal balanced the level of insight and the low risk of repetition against the public interest and the overarching objective. It was of the view that there were no patient safety or public protection concerns in this case. However, the Tribunal, in light of its findings of misconduct, was satisfied that the need to promote and maintain public confidence in the medical profession and the need to promote and maintain proper professional standards and conduct for members of the profession would be undermined if a finding of impairment were not made in this case.

34. Accordingly, the Tribunal determined that Dr Yoganathan’s fitness to practise is impaired by reason of his misconduct.

#### **Determination on Sanction - 14/05/2021**

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

#### **The Evidence**

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

#### **Submissions**

3. On behalf of the GMC, Ms Daly submitted that the most appropriate and proportional sanction in this case would be one of suspension.

4. Ms Daly referred to the relevant paragraphs of the Sanctions Guidance (November 2020) (SG). She reminded the Tribunal of the overarching objective and submitted that a period of suspension would send out a message to the doctor, the profession and public about what is regarded as behaviour unbecoming a registered doctor.

5. Ms Daly acknowledged that although the Tribunal had found that Dr Yoganathan has some insight into his dishonest conduct, and there have been no further probity issues since, it is still necessary to mark the seriousness of his conduct and to take action to maintain public confidence and trust in the medical profession. She reminded the Tribunal it would need to consider the nature and scope of the dishonesty in determining the relevant sanction. She submitted that it is the GMC’s position that erasure would be disproportionate in this case but that the case fell clearly into the suspension category.

6. Ms Daly submitted that the length of suspension is a matter for the Tribunal to determine.

7. On behalf of Dr Yoganathan, Mr Rich submitted that it would be appropriate and proportionate in this case to take no further action.

8. Mr Rich reminded the Tribunal that there are no public safety concerns in this case. He stated that it is a matter for the Tribunal to determine the least restrictive sanction to ensure that public confidence is maintained and that an appropriate signal is sent out to the public as to the action it is prepared to take in response to dishonest conduct.

9. Mr Rich submitted that it important for the Tribunal to consider the seriousness of the dishonesty. He reminded the Tribunal of its finding that Dr Yoganathan gave a dishonest explanation for not disclosing facts that he was not obliged to disclose to CGL. Taking into account the circumstances of this case, which included:

- The difficult relationship between Dr Yoganathan and the Trust;
- The fact that Dr Yoganathan had been subject to three GMC referrals without regulatory action arising;
- The loss of Dr Yoganathan’s job with the Trust and then also with CGL;
- The inaccurate disclosures made by the Trust to CGL; and
- Dr Yoganathan’s surprised reaction on hearing that he had been referred to the GMC

Mr Rich submitted that Dr Yoganathan’s dishonesty falls at the lowest end of the spectrum of dishonesty.

10. Mr Rich told the Tribunal that Dr Yoganathan does have insight into the need for doctors to be open and honest. He referred to the positive testimonials provided in support of Dr Yoganathan and submitted that there have been no clinical issues or concerns with his probity raised since this incident.

11. Further, Mr Rich submitted that it is in the public interest to keep a safe doctor such as Dr Yoganathan in practice. He referred to the current strains on the healthcare service due to the current Covid-19 pandemic, and submitted that the need for psychiatrists has never been greater. Mr Rich submitted that the finding of impairment was sufficient to uphold public confidence in the medical profession. Mr Rich submitted that there were exceptional circumstances in this case. In light of those circumstances, a fair-minded member of the public, apprised of all the facts, would be reassured by the finding of impairment and therefore no further sanction is necessary.

## The Tribunal’s Determination on Sanction

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

13. 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 Yoganathan's interests with the public interest

#### Mitigating and aggravating factors

14. Before considering what action, if any, to take in respect of Dr Yoganathan's registration, the Tribunal considered the aggravating and mitigating factors in this case.

#### Aggravating Factors

15. The Tribunal has already found that Dr Yoganathan acted dishonestly in the context of him being employed as a Consultant Psychiatrist at CGL. The Tribunal did not consider that the paragraph of the Allegation found proved, on which Dr Yoganathan's fitness to practise had been found to be impaired, was of itself an aggravating factor in this case and identified no others.

#### Mitigating Factors

16. The Tribunal considered the following to be mitigating factors:

- Dr Yoganathan has demonstrated some insight into his dishonest conduct;
- The incident occurred almost four years ago and there is no evidence of any other concerns over Dr Yoganathan's probity before the incident or since during a 36-year career; and
- The positive testimonials received in support of Dr Yoganathan demonstrate that he is a well-regarded clinician and colleague with no other concerns raised about his probity.

#### **No action**

17. The Tribunal first considered whether to conclude the case by taking no action. It noted that taking no action following a finding of impaired fitness to practise would only be appropriate in exceptional circumstances.

18. The Tribunal carefully considered Mr Rich's submissions and the reasons for his assertion that there were exceptional circumstances in this case to justify no further action being taken. The Tribunal acknowledged that there were some difficult circumstances that Dr Yoganathan found himself in preceding the incident in June 2017. In the Tribunal's view, there were elements of this case which were unusual. These included the finding of dishonesty in relation to the reasons that Dr Yoganathan gave for his earlier non-disclosure of information, when there had been no finding that he was under a duty or obligation to disclose such information. However, there was nevertheless a finding of dishonesty in the context of his employment relationship as a Consultant Psychiatrist. Further, the dishonesty had been found in relation to the second of two fact-finding meetings with CGL when Dr Yoganathan was already aware that GCL had concerns regarding his knowledge of the GMC referral. The Tribunal was not satisfied that the facts of this case amounted to exceptional circumstances.

19. Further, whilst the Tribunal recognised the circumstances of the current pandemic and its impact on mental health services, it did not consider that this amounted to an exceptional circumstance itself or affected its view of the circumstances overall.

20. For these reasons, the Tribunal was not satisfied that there were exceptional circumstances in this case to warrant it taking no action. The Tribunal determined that it would not be sufficient, proportionate, or in the public interest to conclude this case by taking no action.

### **Conditions**

21. The Tribunal next considered whether to impose conditions on Dr Yoganathan's registration. It bore in mind that any conditions imposed should be appropriate, proportionate, workable and measurable.

22. On the facts of this case, the Tribunal determined that conditions would be insufficient to meet the public interest and specifically to maintain public confidence in the profession and to maintain proper professional standards of conduct for the members of the profession.

## Suspension

23. The Tribunal then went on to consider whether suspending Dr Yoganathan's registration would be appropriate and proportionate. The Tribunal bore in mind the SG in relation to suspension including paragraphs 91 and 92, in which it states:

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

*92 Suspension will be an appropriate response to misconduct that is so serious that action must be taken to protect members of the public and maintain public confidence in the profession. A period of suspension will be appropriate for conduct that is serious but falls short of being fundamentally incompatible with continued registration (ie for which erasure is more likely to be the appropriate sanction because the tribunal considers that the doctor should not practise again either for public safety reasons or to protect the reputation of the profession).'*

24. The Tribunal identified the following factors as set out in paragraph 97 of the SG as relevant in Dr Yoganathan's case, indicating suspension may be appropriate where there is:

*'a A serious breach of Good medical practice, but where the doctor's misconduct is not fundamentally incompatible with their continued registration, therefore complete removal from the medical register would not be in the public interest*

*...*

*f No evidence of repetition of similar behaviour since incident.*

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

25. The Tribunal was in no doubt that dishonesty on the part of a doctor is serious. The Tribunal took into account the context of Dr Yoganathan's dishonesty. It acknowledged the lack of communication that Dr Yoganathan received from the Trust after the '*protected conversation*' in December 2016 until his employment ended at the end of April 2017, and inaccuracy in the information the Trust provided to CGL. The Tribunal reminded itself that

there has been no finding that Dr Yoganathan had breached a duty, or was otherwise generally obliged, to disclose the final written warning or the potential GMC referral during his interview with CGL. However, during the second fact-finding meeting, Dr Yoganathan provided dishonest answers to CGL. Taking this context into account, the Tribunal was of the view that this was a single incident of dishonesty and it was satisfied that this fell at the lower end of the spectrum of possible dishonest conduct.

26. The Tribunal gave careful consideration to the mitigating factors it has identified. Dr Yoganathan has acknowledged the seriousness of the Tribunal's findings and has demonstrated insight into the need for doctors to be open, honest and to act with integrity. The Tribunal had regard to the positive testimonials that it has received in support of Dr Yoganathan. It has not seen any evidence that Dr Yoganathan has repeated his behaviour since the incident and has already determined that the risk of repetition in this case is low.

27. For these reasons, it considered that a period of suspension was the appropriate and proportionate sanction in this case. The Tribunal carefully balanced all of the circumstances in this case and it was satisfied that such a sanction would be sufficient to promote and maintain both public confidence in the profession and standards and conduct for members of the profession.

28. The Tribunal went on to consider the period of suspension. The Tribunal had regard to Dr Yoganathan's insight and its finding that there is a low risk of repetition in this case. This was an example of a single instance of dishonesty with some unusual attributes, as the Tribunal has explained in its earlier determinations. In addition, the Tribunal had regard to Mr Rich's submissions in relation to the public interest in retaining psychiatrists in NHS practice at this particular time. Taking into account the circumstances of this case, balancing the wider public interest, and acknowledging the seriousness of dishonesty, the Tribunal was satisfied that a period of one month suspension would send a clear message to the public and appropriately mark the seriousness of Dr Yoganathan's conduct. It was of the view that a period of suspension longer than one month would be disproportionate given the facts of this case.

29. The Tribunal considered whether to direct a review in this case. The Tribunal bore in mind that no doctor should be allowed to resume unrestricted practice following a period of suspension unless the Tribunal considers that he/she is safe to do so. The Tribunal noted that there are no patient safety concerns in this case. Given Dr Yoganathan's level of insight The

Tribunal concluded that at the end of this relatively short period of suspension there would be no value in a review hearing.

30. The Tribunal concluded that Dr Yoganathan's registration should be suspended for a period of one month and the Tribunal did not direct a review hearing.

#### **Determination on Immediate Order - 14/05/2021**

115. Having determined to impose a period of suspension on Dr Yoganathan'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.

#### **Submissions**

116. On behalf of the GMC, Ms Daly submitted that an order of immediate suspension was required to mark the seriousness of the Tribunal's findings.

117. On behalf of Dr Yoganathan, Mr Rich reminded the Tribunal that there are no patient safety concerns in this case. He submitted that the overarching objective has been met by the Tribunal imposing the one-month suspension and that it is not necessary to impose an immediate order in this case.

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

118. The Tribunal had careful regard to the Sanctions Guidance (November 2020) ('the SG'). It found the following paragraph relevant:

*'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. The interests of the doctor include avoiding putting them in a position where they may come under pressure from patients, and/or may repeat the misconduct, particularly where this may also put them at risk of committing a criminal offence. Tribunals should balance these factors against other interests of the doctor, which may be to return to work pending the appeal, and against the wider public interest, which may require an immediate order.'*

119. The Tribunal reminded itself that there are no patient safety or public protection concerns in this case. It went on to balance the interest of Dr Yoganathan with the wider public interest. Dr Yoganathan has been working for the past four years since his dishonest conduct. The Tribunal has already determined that the appropriate and proportionate sanction is to impose a one-month suspension. The Tribunal could not identify any public interest requirement that it should impose an additional immediate order of suspension. The Tribunal considered that it was not necessary or proportionate to impose an immediate order in the circumstances of this case.

120. This means that Dr Yoganathan's registration will be suspended 28 days from when notice of this decision is deemed to have been served upon him, unless he lodges an appeal. If Dr Yoganathan does lodge an appeal, his registration will remain unaffected until the outcome of any appeal is known.

121. The Tribunal determined to revoke the current interim order on Dr Yoganathan's registration.

122. That concludes this case.

**Confirmed**

**Date** 14 May 2021

Mr Damian Cooper, Chair

ANNEX A – 06/05/2021

**Rule 17(2)(g) Application**

1. At the conclusion of the GMC's case, Mr Rich on behalf of Dr Yoganathan, made an application under Rule 17(2)(g) of the Rules, which states:

*'17(2) The order of proceedings at the hearing before a Medical Practitioners Tribunal shall be as follows –*

*...*

*(g) 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;'*

2. This application related to the stem of paragraph 1 and paragraphs 1a, 1b, 1d and 2 of the Allegation as amended:

*'1 On 10 February 2017, during an interview with Change, Grow, Live ('CGL'), when given the opportunity to provide any other information of relevance to the job application you failed to disclose you were:*

*a. subject to a GMC investigation between March 2014 and March 2015;*

*b. subject to a chaperone arrangement at the Isle of Wight NHS Trust ('the Trust') between 6 April 2016 and 17 October 2016;*

*...*

*d. the subject of concerns raised with the Isle of Wight Council Safeguarding Team by the Care Quality Commission ('CQC') in or around November 2016.*

*2 You were obliged to disclose to CGL one or more of all the matters described at paragraph 1a- 1d. '*

**Submissions on behalf of Dr Yoganathan**

3. Mr Rich submitted that the test to be applied by a Medical Practitioners Tribunal in determining whether to accede to a submission of no case to answer is that set out, suitably modified for regulatory proceedings, by Lord Lane LCJ in *R v Galbraith [1981] 1 WLR 1039 at 1042*:

*(1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty – the judge will 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 concludes that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, on 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 witnesses 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 on which the 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.'*

4. He also referred the Tribunal to the case of *R v Shippey [1988] Crim LR 767* which is best known for the comment that *'taking a prosecution case at its highest did not mean picking out the plums and leaving the duff behind'*.

#### Paragraph 1

5. Mr Rich submitted that the Tribunal first needs to look at whether or not Dr Yoganathan was asked to provide any relevant information regarding any concerns during his interview with CGL. The Tribunal will also need to determine whether or not there was a duty on Dr Yoganathan to disclose the information as set out in paragraph 1a-1d of the Allegation.

6. Mr Rich referred the Tribunal to Dr B's evidence and submitted that she is the only person who has given any evidence that a question was asked of Dr Yoganathan at his interview with CGL to prompt him to disclose the information set out at paragraphs 1a-1d of the Allegation. He reminded the Tribunal that there is no record in Dr B's interview notes that such

a question was asked. Mr Rich submitted that Dr B's written GMC statement, dated January 2019 (two years after the interview) is the first time that she refers to such a question being asked at the interview. Mr Rich also submitted that the GMC's case is not assisted by the two separate handwritten notes of the interview. In addition, Dr D had no recollection of the question being asked.

7. Mr Rich drew the Tribunal's attention to the case of *R. (on the application of Dutta v GMC 2020 EWHC 1974 (Admin)*. He reminded the Tribunal that the best approach is to base factual findings on inferences drawn from documentary evidence and known or probable facts. He referred to paragraph 39 of the judgment which states:

*'...This does not mean that oral testimony serves no useful purpose...But its value lies largely...in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny...Above all , it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth...'*

8. Mr Rich submitted that, even if the Tribunal saw potential in determining that Dr B did give Dr Yoganathan the opportunity to disclose any relevant concerns at the interview stage, there is no evidence as to the exact wording of the question asked by her. Mr Rich submitted that there has been no evidence adduced by the GMC in relation to the specific wording of the question asked.

9. In relation to paragraph 1a Mr Rich submitted that, had Dr Yoganathan been asked whether there were any outstanding concerns it would not be reasonable to expect Dr Yoganathan to state that he had been referred to the GMC back in 2014 but that this was closed off in 2015. Further, he stated that, had Dr Yoganathan been asked if there was anything else of relevance he wanted to add, it is a matter of opinion as to whether this would have been relevant. He submitted that the GMC has adduced no evidence to demonstrate that Dr Yoganathan was under a duty to disclose this information.

10. In relation to paragraph 1b Mr Rich submitted that, had Dr Yoganathan been asked whether there were any outstanding concerns it would not be necessary for him to mention the chaperone agreement as this came to an end some months before his interview. Had Dr Yoganathan been asked if there was anything else of relevance he wanted to add, Mr Rich submitted that it is a matter of opinion as to whether this would have been relevant. He submitted that the GMC has adduced no evidence to demonstrate that Dr Yoganathan was under a duty to disclose such information.

11. In relation to paragraph 1d of the Allegation, Mr Rich submitted that Dr Yoganathan was not aware of the safeguarding concerns when he attended the interview with CGL. Mr Rich submitted that the GMC has adduced no evidence that Dr Yoganathan knew about these concerns and therefore there is no evidence that Dr Yoganathan was under a duty to disclose such concerns. He submitted that this paragraph fell within the first limb of the test in *Galbraith*.

#### Paragraph 2

12. Mr Rich reminded the Tribunal that to find this Allegation proved, it would need to determine that, even if Dr Yoganathan was not asked a specific question in relation to any concerns at his interview, there was a free-standing obligation on him to disclose the information set out in paragraphs 1a-1d. Mr Rich submitted that the GMC has not adduced any evidence of such a free-standing obligation.

13. In her oral evidence, Dr B told the Tribunal that she would have expected Dr Yoganathan to raise such issues. Mr Rich submitted that it cannot be that every doctor is bound by the expectations of one individual. He submitted that it would not be reasonable for it to be accepted that this imposed a duty upon doctors.

14. Mr Rich referred to Good Medical Practice ('GMP') and stated that it is clear that doctors are required to be open and honest. Whilst Mr Rich submitted that this would extend to an example of someone lying about their qualifications on an application form, he submitted that requiring a doctor to make a judgment on whether a two year old, closed off, GMC matter or a previous chaperone requirement should have been disclosed was a step too far.

15. Mr Rich submitted that it is rare that something framed as a free-standing obligation should form the basis of a charge potentially affecting a registrant's fitness to practise. For example, if a doctor gets a conviction and does not report it to the GMC, this is frequently prosecuted as a failure of a duty. Whilst it is not correct to say the GMC cannot charge in the way it has in this case, Mr Rich submitted that the Tribunal is being asked to extend doctors' obligations to require them to audit their career and decide what warranted disclosure. He stated that the doctor is exposed without any real guidance as to where the boundaries lie and submitted that the Tribunal should hesitate to create such an obligation.

Submissions on behalf of the GMC

Paragraph 1

16. In relation to the stem of paragraph 1 of the Allegation, Ms Daly referred to the oral evidence of Dr B and submitted that, whilst she was not clear on the specific wording of the interview question, she gave clear evidence that Dr Yoganathan was asked a question that gave him an opportunity to make the relevant disclosures. She submitted that the case law does not state that the oral testimony of a witness should be disregarded, instead the evidence should be looked at in the round. Ms Daly submitted that Dr B was placing reliance on the prompt to ask the question and the fact that this question is only asked by her. She stated that there is consistent documentary and oral evidence that Dr B asked the question and this amounts to sufficient evidence for the Tribunal to make its own interpretation at the facts stage.

17. In relation to paragraph 1a of the Allegation, Ms Daly referred to the agreed fact relating to a GMC referral made in 2014 which resulted in a finding in 2015 of no realistic prospect of Dr Yoganathan's fitness to practise being impaired. She submitted that the GMC position is that this was sufficiently proximate, about two years before the interview, and Dr Yoganathan ought to have disclosed this information at the interview.

18. In relation to 1b, Ms Daly submitted that, whilst it is agreed that the chaperone arrangement had been lifted on 17 October 2016, prior to the CGL interview, this needed to be put into context. She reminded the Tribunal that Dr Yoganathan was on leave from the Trust at the time of his interview and was not able to undertake work. As the chaperone agreement had been lifted in the period immediately preceding the interview, she submitted that it is clearly something that should have been disclosed.

19. In relation to 1d, Ms Daly submitted that there is some evidence to support this paragraph of the Allegation. She referred to the agreed fact that, on 23 November 2016 the CQC raised concerns and the Trust was made aware of them. She referred to the witness statement of Ms C which confirms that Dr Yoganathan was made aware of the CQC concerns during a meeting on 30 November 2016 and submitted that there is sufficient evidence in respect of this paragraph of the Allegation.

Paragraph 2

20. Ms Daly referred to Mr Rich's submission that, in effect, imposing such an obligation on a doctor is a step too far and is over and above of that expected by GMP. Ms Daly stated that the Tribunal needs to have regard to the factual matrix of this case and submitted that the '*step too far*' does not arise in this case. Ms Daly told the Tribunal that, in a scenario where a specific question was not asked by an interviewer of a doctor, it is only the doctor who knows their own personal circumstances and the difficulties that he may or may not have had. Therefore, the interviewer is unlikely to know the specific question to pose to the doctor to elicit the required information. She reminded the Tribunal that a key cornerstone of GMP is for a doctor to be open, honest and act with integrity and submitted that to disclose such matters as set out in paragraph 1a-1d of the Allegation falls within this category.

The Relevant Legal Principles

21. The Tribunal accepted the advice of the Legally Qualified Chair in determining the application. The Legally Qualified Chair ('LQC') referred the Tribunal to Rule 17(2)(g) of the Rules.

22. The LQC advised the Tribunal to have regard to the test set out by Lord Lane CJ in *R v Galbraith [1981] 1 WLR 1039* (as set out above). The LQC also referred to the case of *R. (on the application of Dutta v GMC 2020 EWHC 1974 (Admin)* and *Khan v GMC [2021] EWHC 374* raised by Mr Rich, and advised that it was necessary for the Tribunal to consider all the evidence in the round. It was also important to consider documentary evidence and to use any oral testimony critically to scrutinise the objective documentary evidence before it.

23. The Tribunal reminded itself that, at this stage, its purpose was not to make findings of fact but to determine whether sufficient evidence had been adduced so that a Tribunal, correctly advised as to the law, could properly find the relevant paragraph(s) of an Allegation proved to the civil standard. The Tribunal considered the submissions made by Mr Rich and Ms Daly. It also took account of the evidence presented, both oral and documentary, in reaching its decision.

### The Tribunal's Decision

24. The Tribunal first considered the evidence it had before it in relation to the stem of paragraph 1 of the Allegation and specifically whether or not Dr Yoganathan had been asked a question which gave him the opportunity to disclose the details as set out in paragraphs 1a-1d of the Allegation. The Tribunal had regard to the documentary evidence provided by the GMC. It noted the prompt on the interview sheet which asks '*Are there any outstanding issues or concerns*'. Further, the Tribunal noted the written evidence of Dr B along with her oral testimony. It also noted the contemporaneous handwritten notes of the interview taken by Dr D, Dr B, and Dr D's GMC witness statement.

25. The Tribunal concluded that there was sufficient evidence, taking it at its highest, that a properly directed Tribunal could find that Dr Yoganathan had been given an opportunity to disclose the relevant information. It considered that it would be for the Tribunal to evaluate the evidence in due course in order for it to make a facts determination on this point.

#### Paragraph 1a

26. The Tribunal had regard to the agreed fact that the GMC investigation had been closed in 2015 without any further action. The Tribunal went on to consider the evidence adduced by the GMC in support of this paragraph of the Allegation. It had regard to Dr B's oral evidence that she would have expected Dr Yoganathan to disclose that he had been subject to a GMC investigation in 2014 and 2015. The Tribunal also had regard to Ms Daly's submission that the 2014/2015 GMC investigation was sufficiently proximate to the interview to have been relevant for disclosure.

27. Having considered the evidence and submissions, the Tribunal concluded that, the GMC's evidence at its highest, was based on the expectations of one individual and was therefore so vague and tenuous that no Tribunal properly directed could find that Dr Yoganathan was under a duty to disclose the closed GMC investigation as relevant to his job application. Accordingly, the Tribunal determined that there was no case to answer in respect of paragraph 1a of the Allegation.

#### Paragraph 1b

28. The Tribunal noted the agreed fact that the chaperone requirement had been lifted on 17 October 2016, prior to Dr Yoganathan's interview with CGL. The Tribunal went on to

consider the evidence adduced by the GMC in support of this paragraph of the Allegation. It had regard to Dr B's oral evidence that she would have expected Dr Yoganathan to disclose that he had previously been subject to a chaperone requirement. The Tribunal also had regard to Ms Daly's submission although the chaperone arrangement had been lifted, it was sufficiently proximate to the interview to have been relevant for disclosure.

29. Having considered the evidence and submissions, the Tribunal concluded that, the GMC's evidence at its highest, was based on the expectations of one individual and was therefore so vague and tenuous that no Tribunal properly directed could find that Dr Yoganathan was under a duty to disclose the fact that he had previously been subject to an interim chaperone arrangement, which had been lifted at the conclusion of a formal disciplinary process. Accordingly, the Tribunal determined that there was no case to answer in respect of paragraph 1b of the Allegation.

#### Paragraph 1d

30. The Tribunal had regard to Ms C's GMC supplemental witness statement, dated 16 February 2021, which confirmed that the Trust had been made aware of the concerns raised by the CQC in November 2016. In her witness statement, she confirms that Dr Yoganathan attended a meeting on 30 November 2016 and was *'informed that staff had raised concerns with the CQC in relation to his conduct'*. However, the Tribunal was of the view that this related to the conduct concerns raised by the CQC as opposed to the concerns raised with the Isle of Wight Council Safeguarding Team ('the Safeguarding Team').

31. The Tribunal had regard to Dr A's evidence that he was only aware of the conduct concerns by the time he had met with Dr Yoganathan on 12 December 2016 and was not aware of the safeguarding issues set out in paragraph 1d of the Allegation.

32. The Tribunal determined that the GMC had not adduced any evidence on which a properly directed Tribunal could find that Dr Yoganathan had been made aware by the Trust and therefore knew about the concerns raised with the Safeguarding Team. Therefore, it was of the view that Dr Yoganathan could not have been under a duty to disclose something of which there is no evidence he was aware. The Tribunal determined that there was no case to answer in respect of paragraph 1d of the Allegation.

Paragraph 2

33. The Tribunal accepted that in order for paragraph 2 of the Allegation to be found proved, it would need to determine, in due course, that Dr Yoganathan was under an obligation to disclose any of the matters as set out in paragraphs 1a-1d of the Allegation even if he was not directly asked a question prompting such disclosure. The Tribunal was mindful of Mr Rich's submission in relation to the difference between an obligation and duty.

34. In relation to paragraphs 1a and 1b of the Allegation, it is agreed that the GMC investigation and the chaperone requirement were closed matters prior to Dr Yoganathan's interview with CGL. The Tribunal has determined that it has not been provided with sufficient evidence for a Tribunal at the facts stage of fitness to practise proceedings to determine that Dr Yoganathan was under a duty to disclose such information if prompted. For similar reasons, it was of the view that neither was there sufficient evidence for a properly directed Tribunal to find that he was under a general obligation to disclose them proactively.

35. In relation to paragraph 1d of the Allegation, the Tribunal has already determined that the GMC has not adduced any evidence to demonstrate that Dr Yoganathan knew about the concerns raised with the Safeguarding Team and therefore there is no evidence that he was under a duty to disclose such concerns. It follows that Dr Yoganathan could similarly not be obliged to disclose something of which there is no evidence he was aware. The Tribunal determined that there was no evidence before it upon which a properly directed Tribunal could find paragraph 2 of the Allegation proved with respect to the matter in paragraph 1d.

36. Insofar as paragraph 2 of the Allegation relates to paragraph 1c, the Tribunal considered the evidence that it had received in respect of the 12-month final written warning issued by the Trust to Dr Yoganathan in October 2017. The Tribunal noted the evidence that Dr Yoganathan's interview with the CGL took place on 10 February 2017, whilst he was still employed by the Trust. Dr Yoganathan's employment with the Trust came to an end on 30 April 2017.

37. The Tribunal went on to consider Ms Daly's submission that GMP may give rise to an obligation of disclosure arising from the duty upon doctors to be open and honest and to act with integrity. The Tribunal was of the view that, given that Dr Yoganathan was still employed by the Trust and subject to the final written warning, paragraph 1c was distinguished from paragraphs 1a and 1b, which concerned matters which had been formally closed. On the basis of the evidence currently before it, the Tribunal was of the view that there was

sufficient evidence that a properly directed Tribunal could find paragraph 2 of the Allegation proved in relation to paragraph 1c.

38. Therefore, Mr Rich's application in respect of no case to answer was accepted in relation to paragraph 2 of the Allegation insofar as it relates to paragraphs 1a, 1b and 1d. However, the Tribunal determined that there was a case to answer in relation to paragraph 2 insofar as it relates to paragraph 1c of the Allegation.

SCHEDULE A

25 November 2017

08:58

Dr Yoganathan: 'Hi are you still interested in criminology? I am now working in a prison in Surrey. Dr.Y.'

Patient A's reply: 'Hi, I am yes I have just started at XXX university studying forensic and psychopathology psychology 😊'

15:36

Dr Yoganathan: 'How are you? Hope you're getting good support from mental health services!!'

Patient A's reply: 'I'm good thank you, and yourself? I'm on a waiting list for therapy again but that's been while. Very slow as you know.'

Dr Yoganathan: 'I am fine. Working in a prison setting. Let me know when you are free to talk?'

6 December 2017

15:42

Dr Yoganathan: 'Are you still working in a prison? I am also involved in a staff training and if you need any help with your studies let me know'  
'J'