PUBLIC RECORD

Dates: 05/06/2023 – 16/06/2023; 28/07/2023; 03/01/2024 – 05/01/2024

Medical Practitioner's name:	Dr Neil GRAHAM
GMC reference number:	2383392
Primary medical qualification:	MB ChB 1977 University of Leeds

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

Summary of outcome

Suspension, 12 months
Review hearing directed
Immediate order

Tribunal:

Legally Qualified Chair	Mr Julian Weinberg
Lay Tribunal Member:	Ms Elizabeth Daughters
Medical Tribunal Member:	Mr Thomas George

Tribunal Clerk:	Miss Keely Crabtree

Attendance and Representation:

Medical Practitioner:	Present, represented
Medical Practitioner's Representative:	Mr Michael Rawlinson, Counsel, instructed by Weightmans
GMC Representative:	Mr Alan Taylor, Counsel

Attendance of Press / Public

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

Overarching Objective

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

Determination on Facts - 28/07/2023

1. This determination will be handed down in private. However, as this case concerns Dr Graham's misconduct a redacted version will be published at the close of the hearing.

Background

2. Dr Graham qualified in 1977 with a Bachelor of Medicine, and Bachelor of Surgery (MB ChB) from Leeds University. He trained as a Radiology Registrar at Middlesex Hospital between 1982 and 1985. Dr Graham worked as a Senior Registrar in Radiology at St Bartholomew's Hospital from1985 until 1987, becoming a Fellow of the Royal College of Radiologists in October 1985.

3. Dr Graham took his first substantive Consultant post at Milton Keynes General NHS Trust in 1988 until 2014. In addition to his full time Consultant Radiologist post, he was sequentially a Radiology Tutor, Assistant District Clinical Tutor, District Clinical Tutor, Chair of Clinical Audit and Clinical Director of Imaging for Milton Keynes University Hospital (MKUH).

4. Dr Graham was also the Assistant Director of Post Graduate Medical Education for the Oxford Deanery between 2003 and 2008. He was responsible for the training schemes for Consultants in all disciplines who had educational/clinical supervisor responsibilities for training grade doctors.

5. Because of XXX, Dr Graham withdrew from on-call and all additional roles in 2008. From 2014 to 2020 Dr Graham was a Locum Consultant Musculoskeletal Radiologist at MKUH as well as undertaking private practice roles at the Saxon Clinic, the InHealth Diagnostic Centre in Milton Keynes (InHealth) and the Three Shires Hospital in Northampton. From 2014 to 2019 Dr Graham acted as a mentor to medical students at Buckingham University Medical School in the Pastoral Care Team.

6. Dr Graham has not practised since October 2019 and does not intend to return to clinical work.

7. The allegation that has led to Dr Graham's hearing can be summarised as that on a date in 2017 (the 2017 incident), and on a separate occasion on 14 October 2019, Dr Graham's behaviour towards a work colleague was sexually motivated and/or amounted to sexual harassment.

8. Dr Graham self-referred to the GMC on 4 August 2020 by email. Concerns were also raised with the GMC on 13 August 2020 by Dr B, Medical Director and Deputy Chief Executive at MKUH and Dr Graham's Responsible Officer (RO) as set out at paragraphs 4 to 7 of the Allegation.

The Outcome of Applications Made during the Facts Stage

9. The Tribunal granted Dr Graham's application, made pursuant to Rule 17(6) of the General Medical Council (Fitness to Practise Rules) 2004 as amended ('the Rules'), to amend paragraph 5 of the Allegation so that the date reads 10 July 2017. Mr Rawlinson, on behalf of Dr Graham, did not object to the application. The Tribunal was satisfied that it would cause no injustice or unfairness to amend the Allegation which merely required an amendment to reflect the correct date in question.

10. Mr Rawlinson on behalf of Dr Graham, made an application under Rule 17(2)(g) of the Rules. Mr Rawlinson submitted that Dr Graham had no case to answer in relation to paragraphs 4, 5, 6 and 7 of the Allegation. Mr Taylor opposed the application with the exception of paragraph 4(c). The Tribunal determined that Dr Graham has no case to answer in respect of paragraphs 4(a), 4(b), 5, 6 and 7 of the Allegation. The Tribunal's full decision on the application is included at Annex A.

The Allegation and the Doctor's Response

11. The Allegation made against Dr Graham is as follows:

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

1. On a date in 2017, at BMI Saxon Clinic Eaglestone ('the Clinic') after Colleague A had knocked on your office door, you:

i. told Colleague A to 'come in sweetie', or words to that effect; To be determined

ii. pulled Colleague A into your office by her wrist; To be determined

iii. slapped Colleague A on her bottom with your hand whilst she was in your office. To be determined

2. On 14 October 2019, you were in a reporting room at the Clinic with Colleague A and:

a. you locked the door to the reporting room; To be determined

b. you turned off the lights in the reporting room; To be determined

c. you rubbed your hand across Colleague A's bottom cheek(s); To be determined

d. you held your hand on Colleague A's bottom cheek(s) for a period of time; To be determined

e. when Colleague A stepped forward to prevent your hand from touching her bottom cheek(s) you:

i. stepped forward to where Colleague A was standing; To be determined

ii. said "oh sweetie, I've not finished yet" or words to that effect; To be determined

iii. repositioned your hand on Colleague A's bottom cheek(s). To be determined

3. Your actions as set out at paragraphs 1 and/or 2c-e were:

a. sexually motivated; and/or To be determined

b. unlawful sexual harassment related to sex by virtue of Section 26(2) of the Equality Act 2010, in that you engaged in unwanted conduct of a sexual nature which had the purpose or effect of violating the dignity

of Colleague A, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. To be determined

4. You confirmed that you had "nothing to declare" in relation to "suspensions, restrictions on practice or being subject to an investigation of any kind" in your annual appraisal forms for the periods:

   a. ~~1 April 2016 to 31 March 2017, signed on 4 August 2017;~~ No case to answer following a successful Rule 17(2)(g) application

   b. ~~1 April 2017 to 31 March 2018, signed on 24 April 2018;~~ No case to answer following a successful Rule 17(2)(g) application

   c. ~~1 April 2018 to 31 March 2019, signed on 26 January 2019.~~ No case to answer following a successful Rule 17(2)(g) application

5. ~~You knew the declaration referred to at paragraph 4a and/or 4b and/or 4c above to be untrue in that you knew you had been under investigation by InHealth in relation to incidents which occurred on 16 January and 3 August 10 July 2017~~. No case to answer following a successful Rule 17(2)(g) application

6. ~~Your actions at paragraph 4a and/or 4b and/or 4c were dishonest by reason of paragraph 5.~~ No case to answer following a successful Rule 17(2)(g) application

7. ~~In 2017 – 2019 you failed to disclose to your Responsible Officer that you had been under investigation by InHealth in 2017~~. No case to answer following a successful Rule 17(2)(g) application

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

Witness Evidence

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

- Colleague A, in person;
- Dr B; Consultant Physician, Medical Director and Deputy Chief Executive at MKUH and Dr Graham's RO at the time of the index events by telephone link;

- Ms C, Director of Clinical Quality at InHealth by video link;
- Ms D, Operations Director for the Imaging Centre at InHealth, by video link;
- Dr E, Consultant Appraiser, video link;
- Dr F, Consultant in Clinical Radiology at InHealth, by video link.

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

- Ms G, Clinical Services Manager in imaging at BMI Saxon, Milton Keynes at the time of the index events.

14. Dr Graham provided his own witness statement dated 19 May 2023 and also gave oral evidence at the hearing.

15. The Tribunal also received written testimonial evidence on behalf of Dr Graham.

Documentary Evidence

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

- Dr Graham's self-referral to the GMC dated 4 August 2020;
- GMC referral form dated 13 August 2020;
- Minutes of Investigation Meeting at BMI Saxon, Milton Keynes dated 18 October 2019;
- Colleague A's police witness statement dated 22 November 2019;
- Colleague A's Occupational Health notes dated February/March 2020;
- Letter from Dr B to Dr Graham dated 4 November 2019;
- Emails between Dr B and the Business Manager at MKUH re appraisal declarations dated December 2021;
- Email chain: Colleague A, Ms H, Ms G dated 14 October 2019;
- Extracts from Dr Graham's appraisal's dated 4 August 2017 (2016/2017), 24 April 2018 (2017/2018) and 26 January 2019 (2018/2019);
- External Reference Form (for appraisal) dated 20 February 2016;
- Appraisee Checklist;
- Online Incident Reporting forms dated January 2017 and August 2017;

- Email from Ms I to Ms C dated 4 August 2017;
- InHealth internal emails dated August 2017;
- Email from IT Service Manager dated 18 August 2017;
- Emails between Ms C and Ms D dated 10 August 2017 and April 2018;
- Extracts from Dr Graham's disciplinary hearing transcript notes;
- Dr Graham's statement of case for the disciplinary hearing dated 2 July 2020;
- Extracts from Management Investigation Report;
- Trust interview with Dr Graham dated 14 January 2020;
- Notes of investigation meeting dated 29 October 2019;
- InHealth - Practising Privileges Policies;
- InHealth - Conduct and Disciplinary Policies;
- InHealth - Responding to Concerns Policies;
- InHealth - Risk Management Policy;
- InHealth - Risk Scoring Matrix;
- InHealth - Incident Reporting Policy;
- InHealth - Adverse Event and Reporting management Policy;
- MKUH - Disciplinary Policy and Procedure;
- MKUH - Maintaining High Professional Standards Policy and Procedures;
- Colleague A's medical reports;
- Minutes of Investigation meeting dated 18 October 2019.

The Tribunal's Approach

17. In reaching its decision on facts, the Tribunal has borne in mind that the burden of proof rests on the GMC and it is for the GMC to prove the Allegation. Dr Graham 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.

18. The Tribunal has also had regard to the advice of the Legally Qualified Chair (LQC) which, whilst being a matter of record, included, but was not limited to, advice on: the burden of standard of proof; the assessment of witness' demeanour including with reference to cases of alleged sexual misconduct; sexual motivation; sexual harassment and good character.

The Tribunal's Analysis of the Evidence and Findings

19. 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.

Paragraphs 1(i), 1(ii) and 1(iii)

20. The Tribunal noted the background prior to the 2017 index events. It was uncontentious that Dr Graham and Colleague A had a professional relationship for a number of years.

21. Dr Graham stated that he had a cordial, effective working relationship with Colleague A and that she would bring radiology requests for agreement and priority as well as radiology reports for authorisation to him in the radiologists' darkened reporting room/office nearly every week.

22. Colleague A described how she had always found Dr Graham 'very touchy' and that when she spoke with him, he would touch her hip or her shoulder and would sometimes put both hands on her cheeks and call her 'sweetie'. Colleague A said that she had thought that Dr Graham was a bit overfriendly and a bit weird, and therefore she only really went to him when she had to.

23. The Tribunal noted Colleague A's account of the incident in 2017. She stated that one day in 2017, she had knocked on Dr Graham's office door and popped her head in to ask him to quickly protocol a number of referrals for her. Dr Graham had then said to her 'come in sweetie' and grabbed her left wrist and pulled her into the room.

24. She described that there was a desk directly in front of her as she opened the door and that there was not much room, and it was therefore very tight with two people in the room.

25. Colleague A stated that she stood to the right of Dr Graham whilst he was sitting down at his desk, and she asked him if he could look through some urgent referrals for her. She said that he then wheeled his chair over to her and slapped her on her bottom. Colleague A said that she did not really know how to take this and as the lights were dimmed in the room, she was not prepared to confront Dr Graham, so she just left. She stated that she was in disbelief and just wanted to get away.

26. Colleague A stated that after she left the room, she went to speak with the Imaging Manager, Ms J, straight away because she thought that what Dr Graham had done was unacceptable. She told Ms J what had happened and gave her a written statement of the incident. She said that Ms J told her to think about what she wanted to do about it.

27. Colleague A stated that all she wanted was for Dr Graham to be told it was not acceptable and to make sure that it did not happen again. She said that Ms J had ensured her that she would have a word with him, so she therefore left matters in her hands.

28. Colleague A said that after this, there were no further incidents until the alleged incident in 2019. She stated that because of what happened in 2017, she only went to see Dr Graham if there was a problem with his clinic, but otherwise kept her distance from him. Because there had been no repetition of similar behaviour in the two years that followed the 2017 incident, she stated that she believed that Dr Graham had been spoken to. She thought that he was also distancing himself from her because he was aware she had raised a complaint.

29. The Tribunal also noted Dr Graham's evidence. He stated that he had no recollection of the events that Colleague A referred to in 2017. He said that he would never act in the manner alleged and was shocked when he first heard of the allegations.

30. Dr Graham stated that he had no recollection of telling colleague A to 'come in sweetie'. However, he acknowledged that he was a relatively informal person and that it would not have been unusual for him to have called colleagues by nicknames or pet names. He accepted that he would often call female staff 'sweetie', 'dear' or 'love', and male staff, 'mate' or 'buddy'.

31. The Tribunal therefore concluded that it was more likely than not that Dr Graham told Colleague A to 'come in sweetie', or words to that effect.

32. Dr Graham stated that his office was in a busy corridor and people would frequently be coming in and out of the office to ask questions and put referrals on his desk. Dr Graham said that he would not have grabbed Colleague A by the wrist or slapped her on the bottom and that this behaviour was contrary to his nature.

33. The Tribunal noted Colleague A's email dated 14 October 2019, as follows:

'Over three years ago I reported that Dr Neil Graham had pulled me into the reporting room and slapped my bottom. I instantly puled away [sic] *without saying anything directly to him as I thought this was accidental.*

A few days later Dr Graham stopped me in the corridor and ask me a question, he then went on to place both hands onto my face, calling me 'Sweety'
I went on to report this to [Ms J] (Acting Imaging Manager) [Ms O] approached me regarding my complaint, she advised me that [Ms J] had gone to her for advice/guidance…'

34. The Tribunal also noted Ms G's email dated 14 October 2019, as follows:

'[Colleague A] has written the below statement. This happened at 12pm today and apparently isn't the first time it has happened, a similar scenario about 3 years ago. [Colleague A] went to tell [Ms H] immediately afterwards, [Ms H] came and spoke to me, then [Colleague A] came in to tell me fully what happened. She was very shaken and teary…'

35. The Tribunal noted that Colleague A's recollection of the incident was fundamentally consistent in her GMC witness statement, her email written on the day of the 2019 events, as well as in the BMI Saxon investigation meeting minutes dated 18 October 2019 and in police statement dated 22 November 2019.

36. Mr Rawlinson submitted that in relation to Colleague A's evidence generally, the Tribunal should have significant reservations about her credibility and reliability. As a result, he submitted that, in relation to paragraphs 1 and 2, her account of events could not be relied upon. In contrast, he submitted that Dr Graham's account of events where it differed from Colleague A's should be preferred. He reminded the Tribunal that Dr Graham was an experienced doctor with an unblemished record and of good character.

37. In summary, he submitted that Colleague A's evidence was unreliable because:

- Prior to the hearing, Colleague A had failed to mention that XXX. This, he submitted, suggested that Colleague A's evidence was evolving and not consistent;
- Colleague A had chosen to seek Dr Graham's advice in 2019, in relation to XXX when she could just have easily sought the opinion of another Consultant;

- These events were inconsistent with Colleague A's assertion that she was wary of Dr Graham.

38. In assessing the reliability of Colleague A's evidence, the Tribunal has borne in mind that, if Dr Graham's version of events was correct, and the alleged events did not occur, the Tribunal concluded that it would be unlikely in those circumstances that Colleague A would have made a wholly unfounded allegation against him. The Tribunal was also mindful that, noting there was no reversal of the burden of proof, that no explanation or evidence had been given to the Tribunal to explain why Colleague A might make a false allegation. The Tribunal was also mindful of Dr Graham's position that Colleague A might have misinterpreted an innocuous situation. However, the Tribunal rejects that position for the reasons set out later in this determination.

39. The Tribunal did not accept Mr Rawlinson's submissions as set out above were such that the reliability of Colleague A's evidence was fundamentally undermined. In relation to the 2017 incident the Tribunal found the consistency in Colleague A's account to be credible and reliable and absent of malice, in the absence of any explanation for deliberately making a false allegation.

40. The Tribunal has considered whether it was credible that Colleague A had simply misinterpreted Dr Graham's actions and concluded that she had not. The Tribunal accepted that any physical contact between work colleagues is capable of being considered innocuous or sinister depending on the circumstances and context of that contact, for example touching a colleague's arm or shoulder. The Tribunal however, accepted Colleague A's evidence that Dr Graham slapped her bottom with his hand whilst she was in his office. For the reasons set out above the Tribunal did not consider that Colleague A's evidence in this regard was fabricated or could have been a misinterpretation of some other innocent contact.

41. In all the circumstances, the Tribunal was satisfied that, on the balance of probabilities, it was more likely than not that Dr Graham had pulled Colleague A into his office by her wrist and slapped her bottom with his hand whilst she was in his office.

42. Accordingly, the Tribunal found paragraphs 1(i), 1(ii) and 1(iii) of the Allegation determined and found proved.

Paragraph 2(a)

43. The Tribunal had regard to Colleague A's evidence. She stated that on 14 October 2019, Dr Graham was coming out of the ultrasound room after he had just finished with a difficult patient, so she had gone round to ensure all was well with the patient.

44. Colleague A said that Dr Graham had come out of the room and said 'all good', so she had asked if she could have a moment to ask for his advice and opinion in relation to an x-ray XXX.

45. Colleague A stated that Dr Graham had gone into the reporting room and asked her to join him and let him look at the images. She said that she stood at the entrance with the door open trying to pull up the images on her phone, and Dr Graham told her to come in and shut the door. She stated that she stepped forward and the door shut automatically behind her, but she remained close to the door so that if she put her hand out behind her, she would be able to open it.

46. Colleague A said that when she entered the room, the lights were on, and Dr Graham stood to the left of her whilst she was trying to get the images up on her phone. However, he then turned the lights off and locked the door. Colleague A said that she could not understand why he had turned the lights off because they were looking at the images on her phone, not a monitor, so it would not have made any difference if the lights were on or off. She said that he stood with his shoulder touching hers, but she had thought that he was just trying to look at her phone to look at the images.

47. Colleague A said that she did not see Dr Graham locking the door but stated that she heard it lock.

48. The Tribunal also had regard to Dr Graham's evidence. He had a specific recollection of the incident in question and denied that he acted as alleged. He stated that he recalled Colleague A coming to see him in 2019 in relation to XXX and that she wanted to show him an x-ray XXX on her phone.

49. Dr Graham said that Colleague A had showed him the phone in the corridor where the lights were quite bright. Therefore, he had asked her to come into the reporting room, which he always kept dark, so that he could view the images better.

50. Dr Graham said that he could clearly remember looking at the images on Colleague A's phone. However, he denied that he locked the door or that he had turned off the lights.

He said that the lights were always kept low in the reporting room so that images can be seen clearly when they are reviewed. Therefore, there would be no need to turn off the lights in any event. Similarly, the door was self-closing so there would be no need to ask her to close the door. Dr Graham said that he had entered the room first and sat down and Colleague A had followed. He said that if he had gone to lock the door, he would have had to go past Colleague A to do so.

51. Having considered the evidence of both Colleague A and Dr Graham, the Tribunal concluded that there was a degree of uncertainty as to precisely what happened to the lock. It was an agreed position by the parties that the door would automatically close and could only be entered from the outside by putting in a numerical code. The Tribunal noted that there was reference to a latch on the inside of the door. Colleague A stated that she heard what she considered to be a lock on the door. However, the Tribunal has had regard to the fact that her conclusion was reached on the basis of what she heard rather than as a result of what she had seen. The Tribunal could not therefore be satisfied as to whether or not any sound heard was the noise of the latch either being put on or off. The Tribunal concluded that it was not a proper inference to draw that the door must have been locked simply by reason of what Colleague A had heard. The Tribunal reached that conclusion because Colleague A was familiar with the room and in any event would have known how to open the door even if it was locked.

52. The Tribunal therefore concluded that the GMC had failed to discharge its burden of proof that Dr Graham locked the door.

53. Accordingly, the Tribunal found paragraph 2(a) of the Allegation not proved.

Paragraph 2(b)

54. The Tribunal had regard to Colleague A's evidence as above and noted her police witness statement dated 22 November 2019, in which she stated:

> *'I had my mobile phone in my hand and I was bringing up some x-ray images that I had [XXX] to show Dr GRAHAM. As I was doing so the light in the room went out and the switch was directly behind me… and I was still searching for the images. Then (sic) the lights went out I thought that this was so that Dr GRAHAM could view the images on my phone…*

55. The Tribunal also noted the BMI Saxon investigation meeting minutes dated 18 October 2019, as follows:

> '*Dr Graham turned the light off and the door was locked behind me. I stood there, stopped talking, I thought he needed to see the image more clearly.'*

56. The Tribunal had regard to Dr Graham's evidence. He stated that the lights were always kept low in the reporting room so that the images could be seen clearly when they are reviewed and that this happened automatically. Therefore, there was no need to turn off the lights.

57. The Tribunal accepted Dr Graham's evidence that the lighting in the room would have been dimmed and that a reduction in light would happen automatically.

58. In considering whether Dr Graham had turned off the lights, as opposed to the lights being dimmed, the Tribunal was mindful that if that were the case, the only light source in the room would have been Colleague A's mobile phone. The Tribunal concluded that it was more likely that the lighting was simply less bright in the reporting room than outside, than the room being in total darkness with only Colleague A's phone as a light source. The Tribunal has therefore concluded that it was more likely than not that the lights in the reporting room were dimmed as opposed to being switched off.

59. The Tribunal therefore concluded that the GMC has not discharged its burden of proof in relation to the facts alleged.

60. Accordingly, the Tribunal found paragraph 2(b) of the Allegation not proved.

Paragraphs 2(c) and 2(d)

61. The Tribunal was mindful that the evidence of Colleague A and Dr Graham were fundamentally opposed. In assessing whether or not the GMC has discharged its burden of proof, the Tribunal has taken into account those factors set out above in relation to the Tribunal's assessment of Colleague A and Dr Graham's credibility. In doing so, it has taken account of the consistency of Colleague A's various statements, and their consistency with that of Ms G. Whilst noting that it has not found paragraphs 2a and 2b of the Allegation proved, the Tribunal considered that the particular circumstances of the underlying facts in relation to those paragraphs were such that its findings were not inconsistent with, nor undermined its view as to Colleague A's credibility and reliability generally.

62. The Tribunal had regard to Colleague A's GMC witness statement dated 19 January 2022, as follows:

> *'He was stood with his shoulder touching mine, but I thought he was just trying to look at my phone to see if he could spot the images. I then felt his hand rub across one bottom cheek onto the other and remain there. He didn't clench or grab, just rubbed his hand across me and left it there. I could feel myself getting a bit panicky, so I was looking for the images a bit more frantic. I took quite a large step forward as his hand wasn't moving, but he stepped forward to where I was and said 'oh sweetie, I've not finished yet'. His hand repositioned on my bottom as he stepped forward and even when I showed him the images and asked him questions, he kept his hand on my bottom. I asked him if [XXX] looked like it was healing and he confirmed that it was healing nicely and not to worry. At this point, he moved away and put the light back on and unlocked the door for me to leave and I thanked him for his time. I'm not sure why I said that, my head had not processed what had just happened, but I remember feeling frightened and trapped and needed to get out of the room. [left the room quite shaken and my colleague [Ms K] saw me and asked if everything was ok. I told her what had happened and she said that I needed to report it, so I went to see my manager [Ms H] and explained what had happened. [Ms H] asked me to put it in writing, which I did on the same day.'*

63. The Tribunal noted Colleague A's email dated 14 October 2019, as follows:

> *Today I asked [Mr L] if Dr Graham was still in the ultrasound room as I needed to catch him before he left.*
> *Lucky enough a few moments later Dr Graham came out of the ultrasound room at that point I asked if he had a few moments to ask his advice on a personal matter and to discuss a disgruntled patient on his list.*
> *I followed Dr Graham into the reporting room and showed him an X-Ray photo [XXX] on my mobile phone.*
> *Dr Graham turn't the light off and locked the door at the same time as soon as we entered the room. I was stood with Dr Graham near the door with our backs facing the wall when I became uncomfortable as he was standing very close but again thought this was so he could see the image clearly then as he went on to explain this was [XXX] his hand rubbed across my bottom and remained there until I realized what was happening then I moved forward to avoid his advances. Dr Graham move towards me again placing his hand on my bottom and saying 'Sweety' Again I moved away!*

At this point he moved away and turn't the light back on and unlocked the door then mentioned the unhappy patient was fine.
I left the room quite shaken and straight away informed [Ms H]
Regards,
Colleague A

64. The Tribunal also noted Collegue A's police witness statement dated 22 November 2019, as follows:

> *'I then showed him a picture and I was aware he was stood close to me on my left hand side, s he looked at the image I felt his hand brush across my bottom from left to right and he left it there for a few seconds and then I moved forwards 2 steps and I felt him move with me and then place him hand on my bottom again and at the same time he said words to the effect of 'sweetie' I haven't finished with you'…'*

65. The Tribunal noted that Colleague A had reported the incident to Ms G straight away and made a written statement of the events, she had also reported the matter to the police.

66. It has borne in mind that there are no independent witnesses as what took place in the reporting room. The Tribunal, however, has paid particular regard to the evidence of Ms G whose unchallenged statement stated as follows:

> *I remember Colleague A coming into my office; she was clearly shaken and was upset and in tears. Colleague A is normally quite a loud, confident, and vocal person, though when she came in there was a difference in her demeanour and I knew that something was wrong. She came and sat in the chair that was next to my desk and I asked her to tell me what had happened.*
>
> *I then asked her to put everything down in writing, while it was fresh in her memory. Although I don't recall exactly what was said, Colleague understood that the matter would have to be escalated and that this is why I was asking for her to put what had happened in writing.*

67. The Tribunal had regard to Dr Graham's GMC witness statement dated 19 May 2023, as follows:

'I may have been close to Colleague A in order to view the phone. I may have inadvertently touched her while doing so, but I would not have rubbed my hand across her bottom as alleged.

I recall that as Colleague A scrolled through the images that she appeared to be upset and concerned. I think that I put my hand on her shoulder. In doing so I was attempting to reassure her. I told her that [XXX] looked fine.'

68. For the reasons set out earlier in this determination, the Tribunal preferred the evidence of Colleague A in relation to the allegation that Dr Graham touched Colleague A's bottom. It repeats its conclusion that it does not consider it credible that Colleague A would have made a wholly false allegation and had Dr Graham's version of events been correct, given that Colleague A specifically spoke to Dr Graham to seek his medical opinion about XXX. In addition, the evidence of Ms G corroborated Colleague A's evidence that Dr Graham's actions left her frightened and shaken. Furthermore, whilst not being determinative, the Tribunal considered that Colleague A's prompt reporting of the incident supported the Tribunal's conclusion that her account of events was credible and reliable.

69. Noting that Dr Graham stated that he may have touched Colleague A's shoulder, the Tribunal considered whether Colleague A might have misinterpreted what took place. The Tribunal did not consider it credible that Colleague A could have mistaken Dr Graham's inadvertent brushing of her shoulder with rubbing her bottom cheeks or holding his hand on them for a period of time. Colleague A's response to Dr Graham's actions as witnessed by Ms G was consistent with what she alleged took place.

70. Accordingly, the Tribunal found paragraphs 2(c) and 2(d) of the Allegation determined and found proved.

<u>Paragraph 2(e)(i)</u>

71. For the reasons set out above, the Tribunal has found Colleague A's evidence to be credible and reliable in relation to what Dr Graham said to Colleague A and his physical contact with her. The same rationale for accepting her evidence applies equally to paragraphs 2(e)(i) to 2(e)(iii).

72. The Tribunal was therefore satisfied that, on the balance of probabilities, it was more likely than not that Dr Graham stepped forward to where Colleague A was standing.

73. Accordingly, the Tribunal found paragraph 2(e)(i) of the Allegation determined and found proved.

Paragraph 2(e)(ii)

74. The Tribunal had regard to Colleague A's GMC witness statement dated 19 January 2022, as follows:

> *'When I moved away and Dr Graham said he wasn't finished yet, that to me felt like a threat.'*

75. The Tribunal also had regard to Dr Graham's witness statement dated 19 May 2023, as follows:

> *'It is possible that I said that I had not finished viewing the images, and may have called her 'sweetie', but I deny that this was in any way sexually motivated. I was purely concerned with viewing the images on her phone.'*

76. The Tribunal noted Dr Graham's acceptance that factually he may have said those words to Colleague A but that he was referring to not having finished viewing the images.

77. The Tribunal was satisfied that on the balance of probabilities, it was more likely than not that Dr Graham had said 'oh sweetie, I've not finished yet'.

78. Accordingly, the Tribunal found paragraph 2(e)(ii) of the Allegation determined and found proved.

Paragraph 2(e)(iii)

79. The Tribunal considered whether, when Colleague A stepped forward to prevent Dr Graham's hand from touching her bottom cheek, he repositioned his hand on her cheek.

80. For the reasons set out above, the Tribunal has found Colleague A's evidence to be credible and reliable in relation to what Dr Graham said to Colleague A and his physical contact with her. The same rationale for accepting her evidence applies equally to paragraph 2(e)(iii).

81. The Tribunal was therefore satisfied that, on the balance of probabilities, it was more likely than not that Dr Graham had acted as alleged.

82. Accordingly, the Tribunal found paragraph 2(e)(iii) of the Allegation determined and found proved.

Paragraph 3(a)

83. Having found the facts of paragraphs 1(i) to 1(iii), 2(c) to 2(e), the Tribunal has gone on to consider if Dr Graham's actions were sexually motivated.

The Tribunal has borne in mind the case of *Basson v GMC 2018 ewhc 505 (Admin)* in which the high court defined that acting with sexual motivation as conduct done either in pursuit of sexual gratification or in pursuit of a future sexual relationship. Colleague A does not suggest that Dr Graham said or did anything that indicated that he was pursuing a future sexual relationship with her. The Tribunal has therefore considered sexual motivation by reference to pursuing sexual gratification alone.

84. The Tribunal had regard to Colleague A's account of events. It was of the view that the matters alleged made her feel uncomfortable and were inappropriate.

85. In relation to Allegation 1 the Tribunal concluded that having gone to and entered Dr Graham's room voluntarily and at her instigation, albeit Dr Graham pulled Colleague A's wrist, that it could not realistically be concluded that those actions in isolation could be considered to be sexually motivated. However, in relation to paragraph 1(iii) the Tribunal has concluded that slapping Colleague A's bottom was sexually motivated. Whilst Colleague A considered that Dr Graham may have been 'playful', she justifiably concluded that his behaviour was not acceptable and should not be repeated. She stated that she left the room in a state of disbelief.

86. The Tribunal concluded that slapping Colleague A's bottom is an act of a wholly different nature to, for example touching an arm or a shoulder in reassurance. Slapping Colleague A's bottom, as opposed to any other part of her anatomy, the Tribunal concluded it was sexual in nature because:

- Colleague A's bottom is a private part of her body which would not be ordinarily touched by a work colleague, even if Dr Graham was seeking to reassure her for whatever reason about something;
- There was no other plausible or justifiable reason for slapping her bottom.

87. The Tribunal has concluded that by slapping Colleague A's bottom, Dr Graham was motivated by sexual gratification by way of an element of sexual excitement or arousal derived from touching her bottom.

88. In the circumstances, the Tribunal finds Paragraph 3(a) proved in relation to Paragraph 1(iii).

89. Adopting the same rationale, the Tribunal finds Dr Graham's actions as found proved at 2(c) and 2(d) of the Allegation to be sexually motivated.

90. In the circumstances, the Tribunal finds Paragraph 3(a) proved in relation to Paragraphs 2(c) and 2(d) of the Allegation.

91. Adopting the same rationale, the Tribunal finds Dr Graham's actions as found proved at 2(e)(iii) of the Allegation to be sexually motivated.

92. In the circumstances, the Tribunal finds Paragraph 3(a) proved in relation to Paragraph 2(e)(iii) of the Allegation.

93. In relation to paragraph 2(e)(i), the Tribunal has concluded that it is a proper inference to be drawn that Dr Graham stepped forward to where Colleague A was standing so that he could reposition his hand on Colleague A's bottom cheek(s) as such, the Tribunal has concluded that Dr Graham's actions as found proved at 2(e)(i) were sexually motivated.

94. In the circumstances, the Tribunal finds Paragraph 3(a) proved in relation to Paragraph 2(e)(i) of the Allegation.

95. In relation to paragraph 2(e)(ii) Dr Graham conceded that whilst he may have used the words alleged it would have been with reference to viewing all the images of XXX. Whilst it is understandable given the circumstances of the incident that Colleague A concluded that Dr Graham's words referred to rubbing her bottom, it is no less plausible that Dr Graham's explanation is true.

96. In the circumstances, the Tribunal concluded that the GMC has not discharged its burden of proof establishing that the words alleged in paragraph 2(e)(ii) of the Allegation was sexually motivated.

97. Accordingly, the Tribunal found paragraph 3(a) in relation to 2(e)(ii) not proved.

Paragraph 3(b)

98. Having found the facts of paragraphs 1(i) to 1(iii), 2(c) to 2(e), the Tribunal has gone on to consider whether Dr Graham's actions amounted to unlawful sexual harassment related to sex by virtue of section 26(2) Equality Act 2010 which states:

'26 Harassment

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) A also harasses B if—

(a) A engages in unwanted conduct of a sexual nature, and

(b) the conduct has the purpose or effect referred to in subsection (1)(b).

(3) A also harasses B if—

(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,

(b) the conduct has the purpose or effect referred to in subsection (1)(b), and

(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are—
age;
disability;
gender reassignment;
race;
religion or belief;
sex;
sexual orientation'

99. In relation to the 2017 incident, the Tribunal has taken into account Dr Graham's denial of the alleged conduct and of anything that could be construed as sexual harassment.

100. The Tribunal recognises that Colleague A considered that Dr Graham may have slapped her bottom by way of him being 'playful' and that 'I thought that was just his manner', she also stated that:

> *'I didn't really know how to take it and the lights were dimmed in the room, so I wasn't prepared to confront him, so I just left. I was in disbelief and just wanted to get away, so I just walked straight out…*
>
> *All I wanted was for him to be told it wasn't acceptable and to make sure it didn't happen again and she ensured me she would have a word with him, so I left it in her hands.'*

101. The Tribunal therefore determined that Dr Graham's actions had the effect of creating an intimidating, hostile, humiliating environment for Colleague A. In all the circumstances, the Tribunal determined that Dr Graham's actions amounted to unlawful sexual harassment relating to sex by virtue of section 26(2) Equality Act 2010.

102. The Tribunal therefore found Paragraph 3(b) of the Allegation proved in relation to Paragraph 1(iii) of the Allegation.

103. In relation to Paragraphs 2(C), 2(d) and 2(e)(i) and 2(e)(ii) Colleague A stated that:

'I could feel myself getting a bit panicky, so I was looking for the images a bit more frantic…

I remember feeling frightened and trapped and needed to get out of the room. I left the room quite shaken.'

104. The Tribunal has also taken into account that Ms G stated that:

'I remember Colleague A coming into my office; she was clearly shaken and was upset and in tears. Colleague A is normally quite a loud, confident, and vocal person, though when she came in there was a difference in her demeanour and I knew that something was wrong.'

105. The Tribunal therefore determined that Dr Graham's actions had the effect of creating an intimidating, hostile, humiliating environment for Colleague A. In all the circumstances, the Tribunal determined that Dr Graham's actions amounted to unlawful sexual harassment relating to sex by virtue of section 26(2) Equality Act 2010.

106. The Tribunal therefore found Paragraph 3(b) of the Allegation proved in relation to Paragraphs 2(c), 2(d), 2(e)(i) and 2 (e)(iii) of the Allegation.

The Tribunal's Overall Determination on the Facts

107. The Tribunal has determined the facts as follows:

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

1. On a date in 2017, at BMI Saxon Clinic Eaglestone ('the Clinic') after Colleague A had knocked on your office door, you:

    i. told Colleague A to 'come in sweetie', or words to that effect; **Determined and found proved**

    ii. pulled Colleague A into your office by her wrist; **Determined and found proved**

iii. slapped Colleague A on her bottom with your hand whilst she was in your office. **Determined and found proved**

2. On 14 October 2019, you were in a reporting room at the Clinic with Colleague A and:

   a. you locked the door to the reporting room; **Not proved**

   b. you turned off the lights in the reporting room; **Not proved**

   c. you rubbed your hand across Colleague A's bottom cheek(s); **Determined and found proved**

   d. you held your hand on Colleague A's bottom cheek(s) for a period of time; **Determined and found proved**

   e. when Colleague A stepped forward to prevent your hand from touching her bottom cheek(s) you:

      i. stepped forward to where Colleague A was standing; **Determined and found proved**

      ii. said "oh sweetie, I've not finished yet" or words to that effect; **Determined and found proved**

      iii. repositioned your hand on Colleague A's bottom cheek(s). **Determined and found proved**

3. Your actions as set out at paragraphs 1 and/or 2c-e were:

   a. sexually motivated; and/or **Determined and found proved in relation to 1(iii), 2(c), 2(d), 2(e)(i) and 2(e)(iii) and not proved in relation to 1(i), 1(ii) and 2(e)(ii)**

   b. unlawful sexual harassment related to sex by virtue of Section 26(2) of the Equality Act 2010, in that you engaged in unwanted conduct of a sexual nature which had the purpose or effect of violating the dignity of Colleague A, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. **Determined and found proved in relation**

to 1(iii), 2(c), 2(d), 2(e)(i) and 2(e)(iii) and not proved in relation to 1(i), 1(ii) and 2(e)(ii)

4. You confirmed that you had "nothing to declare" in relation to "suspensions, restrictions on practice or being subject to an investigation of any kind" in your annual appraisal forms for the periods:

   a. ~~1 April 2016 to 31 March 2017, signed on 4 August 2017;~~ No case to answer following a successful Rule 17(2)(g) application

   b. ~~1 April 2017 to 31 March 2018, signed on 24 April 2018;~~ No case to answer following a successful Rule 17(2)(g) application

   c. ~~1 April 2018 to 31 March 2019, signed on 26 January 2019.~~ No case to answer following a successful Rule 17(2)(g) application

5. ~~You knew the declaration referred to at paragraph 4a and/or 4b and/or 4c above to be untrue in that you knew you had been under investigation by InHealth in relation to incidents which occurred on 16 January and 3 August 10 July 2017~~. No case to answer following a successful Rule 17(2)(g) application

6. ~~Your actions at paragraph 4a and/or 4b and/or 4c were dishonest by reason of paragraph 5.~~ No case to answer following a successful Rule 17(2)(g) application

7. ~~In 2017 – 2019 you failed to disclose to your Responsible Officer that you had been under investigation by InHealth in 2017.~~ No case to answer following a successful Rule 17(2)(g) application

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 - 04/01/2024

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

The Evidence

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

Submissions

110. On behalf of the GMC, Mr Taylor referred the Tribunal to Section 1A of the Medical Act 1983. He submitted that the Tribunal must have the statutory overarching objective at the forefront of its consideration at this impairment stage and he submitted that all three limbs are engaged in this case.

111. Mr Taylor stated that the impairment stage follows a two-step process. He referred the Tribunal to paragraph 19 of *Cheatle v General Medical Council (2009) EWHC 645 (Admin)*. Mr Taylor submitted that taking this into account the Tribunal must therefore ask itself whether Dr Graham's actions as found proved by the Tribunal amount to misconduct and, if so, whether Dr Graham's fitness to practise was impaired as a result.

112. Mr Taylor stated that *Misconduct* was a matter of judgment for the Tribunal, rather than a matter of proof. It is also a word of general effect, involving some act or omission which falls short of what would be proper in the circumstances. However, *misconduct* is qualified in two respects: firstly, by the word *professional*, which links the misconduct to the profession of medicine. And secondly, by the word *serious* (*Roylance v General Medical Council (No 2) (2000) 1 AC 311)*. Mr Taylor stated that the Tribunal must therefore ask itself whether the facts found proved against Dr Graham amount to serious professional misconduct.

113. In reference to seriousness, Mr Taylor referred the Tribunal to Collins J in *Nandi v General Medical Council* (2004) EWHC 2317 (Admin), Auld LJ in *Meadow v General Medical Council (2007) 1 All ER 1* and Elias LJ in *R (on the application of Remedy UK Limited) v General Medical Council* (2010) EWHC 1245 (Admin (paragraph 37).

114. Mr Taylor submitted that both kinds of misconduct are present in this case. Dr Graham's misconduct occurred in the context of his exercising his clinical practice, when he slapped Colleague A on the bottom in his office at the BMI Saxon Clinic, Eaglestone on the first occasion in 2017, and when he sexually touched her bottom twice in the reporting room

on the second occasion in October 2019. Mr Taylor submitted that Dr Graham's conduct was also dishonourable, bringing disgrace upon himself and thereby prejudicing the reputation of the profession. He therefore submitted that Dr Graham's misconduct could properly be described as going to his fitness to practise.

115. Mr Taylor submitted that Dr Graham's sexually motivated conduct towards Colleague A on two separate occasions, slapping her on the bottom on the first occasion, and positioning his hand on her bottom twice (not taking no for an answer when she stepped forward) on the second occasion, would undoubtedly be regarded as deplorable by fellow practitioners.

116. Mr Taylor submitted that Dr Graham's conduct also amounted to unlawful sexual harassment. He abused his position as a senior consultant in creating an intimidating, hostile and humiliating environment for Colleague A.

117. Mr Taylor stated that each one of these incidents on its own constituted *serious professional misconduct*, and it was obviously concerning that they happened over a 2/3-year period. Mr Taylor submitted that the facts found proved in this case are very serious, and there can be no doubt that Dr Graham's actions both individually and collectively amount to *serious professional misconduct.*

118. Mr Taylor stated that impairment was a matter of judgment for the Tribunal, rather than a matter of proof and referred the Tribunal to *Meadow v General Medical Council* (2007) 1 All ER 1 (paragraph 32), *Council for Healthcare Regulatory Excellence v (1) Nursing and Midwifery Council (2) Grant* (2011) EWHC 927 (Admin) and *R (on the Application of Cohen) v General Medical Council (2008) EWHC 581 (Admin)].*

119. Mr Taylor stated that although remedial action may be highly relevant in relation to impairment arising from clinical errors and errors of judgment, there are some forms of misconduct which are so serious that the need to uphold proper professional standards and public confidence in the profession would be undermined if a finding of impairment was not made, whatever the remedial steps taken. He referred the Tribunal to *Yeong v General Medical Council* (2009) *EWHC 1923 (Admin).*

120. Mr Taylor submitted that the need to uphold proper professional standards and public confidence in the profession would be undermined if no finding of impairment was made in the circumstances of this case. He stated that reasonable and properly informed

members of the public would be shocked and disgusted by Dr Graham's actions towards Colleague A, who had already given him the benefit of the doubt in 2017, and who had trusted him on the second occasion by seeking his advice XXX.

121. Mr Taylor submitted that Dr Graham's acts of misconduct were more analogous to misconduct of the type found in *Yeong* rather than that identified in *Cohen.* Mr Taylor stated that sexual misconduct of this type does not lend itself to easy remediation, and so such efforts as have been made by Dr Graham to address his behaviour for the future carry very little weight. Further, Dr Graham denied that he had acted in the ways alleged, he denied sexual motivation and sexual harassment of his colleague, and so remediation was of little relevance. The account he gave in an attempt to exculpate himself from very serious allegations was not accepted by the Tribunal.

122. Mr Taylor submitted that the likelihood of repetition could also have no material bearing in a case of sexual misconduct. If Dr Graham were to have made efforts to address his behaviour for the future, and there was no evidence that any such efforts have been made, they would in any event, carry very little weight.

123. Mr Taylor stated that in terms of insight, it cannot be said that Dr Graham has insight, because he contested the allegations made against him and put forward an account which was rejected and reminded the Tribunal of paragraph 72 of *Grant*. Mr Taylor also referred the Tribunal to *Martin v General Medical Council* (2011) EWHC 3204 (Admin).

124. Mr Taylor submitted that the relevant paragraphs of *Good Medical Practice* (2013) in Dr Graham's case are paragraphs 35, 36, 37 and 65. He stated that Dr Graham's actions represent very serious departures from the standards of conduct and behaviour expected of registered medical practitioners and require a finding of impairment to be made.

125. Mr Taylor submitted that in all the circumstances, the Tribunal should find that Dr Graham's fitness to practise is impaired because of his misconduct.

126. On behalf of Dr Graham, Mr Rawlinson confirmed that he did not intend to make detailed submissions on behalf of Dr Graham at this stage of the proceedings. He stated that Dr Graham had accepted the Tribunal's findings at stage 1 and conceded that it was likely that the Tribunal would consider Dr Graham's behaviour amounted to misconduct and that his fitness to practise is impaired. He stated that he wanted to keep his powder dry and that he would make relevant submissions at the sanction stage.

The Relevant Legal Principles

127. 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.

128. In approaching its decision, the Tribunal was mindful of the two-stage process to be adopted: first whether the facts as found proved amounted to misconduct, and that the misconduct was serious; and then, whether the finding of that misconduct which was serious could lead to a finding of impairment.

129. In deciding whether Dr Graham's fitness to practise is impaired, the Tribunal has exercised its own judgement and borne in mind the statutory overarching objective of the GMC set out in Section 1(1B) of the Medical Act 1983 to:

> *'a. Protect, promote and maintain the health, safety and well-being of the public,*
>
> *b. Promote and maintain public confidence in the medical profession, and*
>
> *c. Promote and maintain proper professional standards and conduct for members of that profession.'*

130. The Tribunal must determine whether Dr Graham's fitness to practise is impaired today, taking into account Dr Graham's 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.

131. Whilst there is no statutory definition of impairment, the Tribunal was assisted by the guidance provided by Dame Janet Smith in her *Fifth Shipman Report* 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 Graham's fitness to practise is impaired in the sense that he:

> *'a. ….*
>
> *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 ...'

The Tribunal also took into account the guidance of Mrs Justice Cox set out in the *Grant* case, specifically paragraphs 71 and 74 which state:

71. '*However, it is essential, when deciding whether fitness to practise is impaired, not to lose sight of the fundamental considerations …., namely, the need to protect the public and the need to declare and uphold proper standards of conduct and behaviour so as to maintain public confidence in the profession.*

74. In determining whether a practitioner's fitness to practise is impaired by reason of misconduct, the relevant panel should generally consider not only whether the practitioner continues to present a risk to members of the public in his or her current role, but also whether the need to uphold proper professional standards and public confidence in the profession would be undermined if a finding of impairment were not made in the particular circumstances.'

132. The Legally Qualified Chair (LQC) gave detailed legal advice, accepted by both parties, in relation to misconduct and impairment with specific reference to the approach that the Tribunal should take when factual Allegations were denied.

The Tribunal's Determination on Impairment

Misconduct

133. The Tribunal first considered whether the facts found proved amounted to a sufficiently serious departure from the standards of conduct reasonably expected of Dr Graham as a registered medical practitioner, so as to amount to misconduct.

134. The Tribunal had regard to the fact that Dr Graham, whilst employed and working as a Consultant, inappropriately slapped Colleague A (who had previously been a patient of Dr Graham) on her bottom in 2017. Further, in 2019, he repeated his sexually motivated behaviour by rubbing and holding his hand on Colleague A's bottom cheek(s) for a period of time.

135. The Tribunal concluded that Dr Graham's repeated sexually motivated behaviour occurred within a clinical setting. In addition, there was a significant power imbalance between Dr Graham and Colleague A and an abuse of his position. It has also concluded that Dr Graham's actions had the effect of creating an intimidating, hostile, humiliating environment for Colleague A and determined that his actions amounted to unlawful sexual harassment.

136. The Tribunal had regard to GMP, in particular paragraphs 35, 36 and 65 of GMP, which state:

> *'35. You must work collaboratively with colleagues, respecting their skills and contributions.*
>
> *36. You must treat colleagues fairly and with respect.*
>
> *65. You must make sure that your conduct justifies your patients' trust in you and the public's trust in the profession.'*

137. The Tribunal determined that by reason of his sexually motivated conduct these paragraphs of GMP were engaged. Dr Graham had breached a fundamental tenet of the medical profession which had the potential to undermine patient's and the public's trust in the profession. As such, it concluded that limbs b and c of the approach taken in *Grant* were engaged.

138. In all the circumstances, the Tribunal concluded that, Dr Graham's conduct fell far below the standards expected of a doctor. The Tribunal concluded that the facts found proved both individually and collectively amounted to a serious falling short of the standard expected. The Tribunal was of the view that fellow members of the medical profession would consider Dr Graham's behaviour by Dr Graham deplorable and seriously below the standard expected of medical practitioner.

139. The Tribunal therefore concluded that Dr Graham's conduct as found proved amounted to misconduct.

<u>Impairment</u>

140. Having found that the facts found proved amounted to misconduct, the Tribunal went on to consider whether Dr Graham's fitness to practise is currently impaired by reason of that misconduct.

141. The Tribunal noted that there were no specific submissions made on Dr Graham's behalf at this stage of the hearing but that relevant submissions would be made at the sanction stage. Mr Rawlinson conceded that the Tribunal was likely to make a finding of impairment. However, this is not determinative and the decision on impairment remained a matter for the Tribunal's judgement.

142. It first considered whether Dr Graham's misconduct was remediable, has been remedied and whether there was the likelihood of any repetition.

143. The Tribunal considered that sexually motivated behaviour of the type found in this case is difficult to remediate. The Tribunal recognised that the mere fact that Dr Graham had denied sexual motivation in relation to which the Tribunal had made adverse findings against him was not necessarily demonstrative of lack of insight on his part. However, the Tribunal at this stage had no meaningful evidence of any insight developed by Dr Graham in response to his sexually motivated behaviour or any steps to remediate it. In the circumstances, the Tribunal concluded that there remained an ongoing risk of repetition.

144. Dr Graham's sexually motivated conduct had been of a kind which is liable to bring the profession into disrepute. A reasonable and fully informed member of the public would be shocked to learn that a Tribunal had found that a doctor had sexually touched a work colleague on two separate occasions, that his conduct amounted to unlawful sexual harassment, and for the reasons set out above had concluded that there remains an ongoing risk of repetition, yet had not gone on to make a finding of impaired fitness to practise. The Tribunal therefore concluded that a finding of impairment is necessary in order to protect, promote and maintain the health, safety and wellbeing of the public; maintain public confidence in the profession; and to promote and maintain proper professional standards and conduct for members of the profession.

145. The Tribunal has therefore determined that Dr Graham's fitness to practise is impaired by reason of his misconduct on each of the three limbs of the overarching objective.

Determination on Sanction - 05/01/2024

146. Having determined that Dr Graham'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

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

148. The Tribunal received further evidence on behalf of Dr Graham including:

- Dr Graham's reflective statement;
- Continuing Professional Development (CPD) certificate: Probity and Ethics Course dated 1 August 2020;
- Updated testimonials.

Submissions

149. In the course of his submissions on behalf of the GMC, Mr Taylor referred the Tribunal to relevant paragraphs in the 'Sanctions Guidance' (SG). In summary, Mr Taylor submitted that the appropriate and proportionate sanction in this case was one of erasure. Mr Taylor submitted that such a sanction would protect and promote the health, safety and wellbeing of the public, promote and maintain public confidence in the medical profession and would promote and maintain proper professional standards and conduct for members of the profession.

150. Mr Taylor submitted that it was significant that the Tribunal have found at the impairment stage that Dr Graham's fitness to practise is impaired by reason of his misconduct on each of the three limbs of the overarching objective. Mr Taylor reminded the Tribunal that the reputation of the profession as a whole is more important than the interests of any individual doctor and that was particularly applicable in this case. In relation to mitigating factors, Mr Taylor referred the Tribunal to the cases of *Bolton v the Law Society [1994] 1 WLR 512 and Bakare v GMC [2021] EWHC 3278 (Admin).*

151. Mr Taylor stated that there are some cases where a doctor's failings are irremediable. This is because they are so serious that, despite steps subsequently taken, action is needed to maintain public confidence in the profession. Mr Taylor reminded the Tribunal of its findings at the impairment stage when it stated that '*sexually motivated behaviour of the type found in this case is difficult to remediate.'* Mr Taylor submitted that the remediation in this case has been limited. He stated that Dr Graham has had from 28 July 2023 since this hearing adjourned to think about stages two and three of these proceedings. Further, he stated that Dr Graham's CPD dated back to August 2020, before this Tribunal's findings of fact and that there has been nothing since.

152. Mr Taylor stated that the Tribunal has been provided with four testimonials from colleagues/friends in support of Dr Graham. These testimonials were submitted to the Tribunal at stage one and have since been updated to say that these four people stand by their original testimonials and continue to give him their support. Mr Taylor stated that these testimonials should be weighed appropriately against the nature of the facts found proved in this case and to that extent, he submitted that they are of limited weight.

153. Mr Taylor submitted that Dr Graham has expressed his regret in his reflection statement. However, he still did not accept Colleague A's version of events and continues to deny the matters, which of course is his right, but it is difficult when apologising for something you say you have not done. Therefore, any regrets or apologies must be seen in the context of the extent to which they are being proffered.

154. Mr Taylor submitted that there is no meaningful evidence of any real insight developed by Dr Graham in response to his sexually motivated behaviour or any steps taken to remediate it. Within his reflective statement there is no demonstration of an understanding of sexual misconduct, no demonstration of an understanding of sexual harassment, no demonstration of an understanding of the impact of this behaviour on women and no real or meaningful acceptance of responsibility. Mr Taylor referred the Tribunal to the cases of *Motala v GMC [2017] EWHC 2923 (Admin), Irvine v GMC [2017] EWHC 2038 (Admin), Sayer V General Osteopathic Council [2021] EWHC 370 (Admin)* and *GMC v Khetyar [2018] EWHC 813 (Admin).*

155. Mr Taylor submitted that it was an aggravating factor that Dr Graham advanced a false account of events in his defence which have been summarised by the Tribunal in its finding of facts.

156. In relation to sanction, Mr Taylor submitted that there were no exceptional circumstances for the Tribunal to take no action in this case. In regard to conditions, Mr Taylor submitted that conditions are not applicable for the reason that Dr Graham has not practised since October 2019 and does not intend to return to clinical work. In any event, conditions would not mark the seriousness of Dr Graham's misconduct.

157. Mr Taylor submitted that suspension is a not an appropriate sanction in this case due to Dr Graham's repeated sexually motivated behaviour which occurred within a clinical setting. In addition, there was a significant power imbalance between Dr Graham and Colleague A and an abuse of his position. Mr Taylor submitted that it is more than merely a signal which needs to be sent out in a case of this gravity.

158. Mr Taylor submitted that Dr Graham's misconduct is fundamentally incompatible with continued registration due to his persistent lack of insight into the seriousness of his actions and consequences.

159. On behalf of Dr Graham, Mr Rawlinson submitted this is not a case which involves findings and behaviour that is fundamentally incompatible with Dr Graham's continued registration. Denial, he submitted, is not to be in any way equated with lack of insight. Seen in the context of Dr Graham's entire career, whilst undoubtedly serious, the proper and proportionate response to such conduct is a sanction of suspension.

160. Mr Rawlinson submitted that the most serious sanction should be reserved for the most serious behaviour. He stated that without seeking to minimise the seriousness of Dr Graham's sexual misconduct, on the spectrum of sexual misconduct, the Tribunal's findings cannot fairly or properly be described as the most serious.

161. Mr Rawlinson submitted that the following matters be considered by the Tribunal:

- In terms of aggravating features, it was conceded that there was more than one incident, but that Dr Graham's misconduct could not properly be described as persistent. He accepted that the element of repetition would be considered the principal aggravating factor.

- Dr Graham's conduct involved only one individual who was adversely impacted by his actions. He invited the Tribunal to recall the distinction the complainant herself made in evidence between the two incidents in terms of seriousness and her attitude to them, describing Dr Graham's conduct in relation to the first incident as 'playful'. This, he submitted could not be ignored.

- Whilst there was some commonality between the two incidents as found proven, they were not exactly the same. Although the second incident involved more than one incident of touching, it was all part of the same incident and this should not be artificially broken down into separate elements to artificially ramp up the seriousness of the conduct as found proven.

- Dr Graham advanced little by way of a positive case in respect of the first incident given he could not recall it.

- XXX

- XXX Whilst not an excuse, it provided at least some potential context and mitigation for the first incident that the Tribunal has found proved.

- Both incidents found proved were relatively brief and lasted only seconds (Colleague A was expressly cross-examined on the point with regard to both incidents and conceded the same) and they involved touching over, rather than under clothing.

- Whilst there may be suggestions about '*predatory behaviour*', the reality was that there were years between the incidents where no such behaviour was displayed. Neither situation was deliberately orchestrated by Dr Graham. Neither incident was premeditated.

- Whilst there was an imbalance of power, this arose in every case where conduct is committed by a doctor towards somebody who is not a doctor. It was fanciful to suggest every such behaviour by a doctor therefore involved an abuse of power. The circumstances of this case cannot properly be described as a paradigm case of abuse of position, whereby, for example a doctor deliberately takes advantage of a vulnerable patient or uses his position as a doctor to commit acts of impropriety. In that regard, Dr Graham's conduct was unquestionably lower down the scale of seriousness than other cases that do involve such features. Again, he submitted that care should be taken not to 'over prosecute' cases or artificially ramp up the seriousness of them.

- Whilst the conduct involved a colleague, again it is worthy of note it did not involve a patient. It is difficult in those circumstances to extrapolate out some hypothetical wider risk to patient or public safety in that sense i.e. from the two discrete incidents found proved involving a single colleague. The description from both testimonials and especially Ms G's witness statement was a much better reflection of Dr Graham's normal behaviour towards female colleagues. That he submitted also assisted the Tribunal on the issue of future risk of repetition.

- As described in the testimonials, Dr Graham was highly thought of and has a hitherto unblemished career. Relevant authorities make clear good character is of greater value the further a doctor is into their career.

- There has been no evidence of the repetition of similar behaviour since the second incident found proved or indeed before the first incident. In that regard, in the context of his entire professional career, these two incidents could properly be described as two brief and isolated aberrations.

- The passage of time that has elapsed since the incident was a relevant significant factor. These incidents were a number of years old.

- The Tribunal could properly take the view that whilst the conduct found proved was sexually motivated, there was also some element of it being perhaps crass and ill judged e.g. the complainant's description of the first incident as 'playful'.

- Public confidence in the profession has already been maintained, by the fact that Dr Graham has undergone a rigorous disciplinary assessment of his fitness to practise, resulting in a finding of misconduct on his record, with the inevitable significant sanction which will follow. He reminded the Tribunal that this decision will be publicly available.

- Those facts in and of themselves already help to maintain public confidence, send a signal of deterrence and help to maintain standards to a very great extent. Those matters will also further reduce any perceived risk of repetition. Those features as identified will not be meaningfully enhanced by a more severe sanction of erasure, which would arguably be disproportionate and fail to balance the interests of the doctor and the relevant mitigation.

- Of the factors explicitly listed in section 97(e) of the SG as suggestive of an appropriate case for a suspension, the Doctor arguably fulfils at least three of them (namely: no evidence that demonstrates remediation is unlikely to be successful, e.g. because of previous unsuccessful attempts or a doctor's unwillingness to engage, no evidence of repetition of similar behaviour since the incident, and evidence of at least some insight at this stage, allied to not being a significant risk of repeating behaviour.)

162. Mr Rawlinson submitted that in *Wisniewska v NMC 2016 EWHC 2672* it was said that, where there are only two options for sanction such as striking off or suspension, it was critical that the available mitigation is applied when evaluating the proportionality of a suspension as well as when considering erasure. Although mitigation can reduce the length of suspension, it could also pull a case back from the brink of strike-off and mean that a suspension is proportionate. Mitigation must be assessed by the tribunal when looking at both these issues.

163. Mr Rawlinson submitted that in all the circumstances the Tribunal should impose a sanction of suspension rather than erasure. He stated that there was a balance to be struck and a countervailing public interest in the retention of experienced, competent and highly regarded Doctors upon the Register. Mr Rawlinson submitted that Dr Graham's conduct and contributions over the course of his whole career cannot simply be ignored and, for the sake of proportionality, are not and should not be effectively '*cancelled out'* by the finding of two very brief, ill-judged episodes of sexual misconduct, which on a fair analysis, falls towards the lower rather than the upper end of the scale of seriousness.

The Tribunal's Determination on Sanction

164. The decision as to the appropriate sanction, if any, to impose is a matter for the Tribunal alone, exercising its own judgement. In reaching its decision, the Tribunal has taken GMP and the SG into account and has, at all times, borne in mind the overarching objective.

165. 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 doctors, even though they may have a punitive effect. Throughout its deliberations, the Tribunal has applied the principle of proportionality, balancing Dr Graham's interests with the public interest.

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

Aggravating Factors

167. The Tribunal considered the following to be aggravating factors:

- Dr Graham's inappropriate sexual behaviour was repeated over a two year period, albeit that it could not properly be described as persistent, given the absence of any evidence of what might otherwise be considered as predatory or sexually motivated behaviour directed at Colleague A in the interim period;
- There was a significant power imbalance between Dr Graham and Colleague A;
- The significant emotional impact Dr Graham's conduct had on Colleague A after the second incident in 2019;
- Dr Graham's failure to work collaboratively with colleagues.
- Dr Graham's limited insight about which further reference will be made in this determination;
- Dr Graham's lack of demonstrable remediation resulting in an ongoing risk of repetition.

Mitigating Factors

168. The Tribunal considered the following to be mitigating factors in this case:

- There have been no adverse findings against Dr Graham in a 40-year unblemished career as a medical practitioner. His conduct has not been repeated since the index events, albeit Dr Graham has not worked in a clinical setting since 2019. The Tribunal was satisfied that his misconduct was otherwise out of character;
- Dr Graham has engaged with the GMC investigation and the regulatory process;
- An absence of evidence that within the interim period Dr Graham was specifically targeting Colleague A for a sexual purpose;
- The Tribunal recognised that the incidents were brief in nature and over clothing;
- Dr Graham is an otherwise competent and valued member of the profession, as attested to by the testimonials provided by those aware of the Allegation.

169. The Tribunal has taken the above factors into account in considering the appropriate sanction under the SG. It considered each sanction in ascending order of severity, starting with the least restrictive.

No action

170. The Tribunal first considered whether to conclude the case by taking no action. Taking no action following a finding of impaired fitness to practise would only be appropriate in exceptional circumstances. The Tribunal determined that no exceptional circumstances had been advanced that would make such an outcome appropriate. Taking no action would not be sufficient, proportionate, or in the public interest to conclude this case which would otherwise enable Dr Graham to continue to practise without restriction when the Tribunal had identified an ongoing risk of repetition of his misconduct.

Conditions

171. The Tribunal next considered whether to impose conditions on Dr Graham's registration. It bore in mind that any conditions imposed would need to be appropriate, proportionate, workable, and measurable. In the light of its findings, the Tribunal determined that it would not be possible to formulate a set of appropriate or workable conditions which could adequately address Dr Graham's sexually motivated misconduct. In any event, the Tribunal concluded that a period of conditional registration would not be a sufficient, appropriate, or proportionate sanction to satisfy the public interest. Conditions would also not be practical or workable as Dr Graham has explicitly indicated that he had no intension of returning to clinical practice, albeit that his position could change over time.

Suspension

172. The Tribunal next considered whether it would be appropriate and proportionate to suspend Dr Graham's registration.

173. The Tribunal considered the SG in relation to suspension including paragraphs 91 and 92, which state:

> *'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 (i.e. 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).'

174. The Tribunal recognised that a sanction of suspension does have a deterrent effect and can be used to send a signal to Dr Graham, the profession, and the public about what is regarded as behaviour unbefitting a registered doctor. It also acknowledged that suspension is an appropriate response to misconduct which is sufficiently serious that action is required in order to maintain public confidence in the profession, but which falls short of being fundamentally incompatible with continued registration.

175. The Tribunal also had regard to paragraphs 97 of the SG which sets out some of the circumstances in which suspension may be the appropriate sanction. The Tribunal considered (a), (e), (f) and (g) to be engaged in this case:

a A serious breach of Good medical practice, but where the doctor's misconduct is not fundamentally incompatible with their continued registration, therefore complete removal from the medical register would not be in the public interest. However, the breach is serious enough that any sanction lower than suspension would not be sufficient to protect the public or maintain confidence in doctors.

…

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

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.

176. The Tribunal had regard to Dr Graham's reflective statement, which indicated some degree of insight in that it stated:

'*On the basis of the Tribunal's findings, I accept that the actions as described would obviously amount to serious professional misconduct. Any incident of sexual misconduct, is serious and undermines trust and confidence in the profession. It will undoubtedly cause patients and the wider public concern especially as the Tribunal have found that it occurred on more than one occasion. Colleagues are entitled to work in an environment free from any such behaviour.*

…
All employees should feel safe and comfortable, regardless of their role in any organisation. It concerns me, therefore, that, although I do not accept [Colleague A's] version of events, she did not feel safe and I regret the ongoing distress she has experienced. I can see how the relative imbalance of power between myself and [Colleague A] is a cause for concern and I am absolutely mortified to think that these incidents could be seen as me abusing my position as a doctor. I well understand the privileged position doctors are in and how any incident with patients and colleagues can diminish and erode trust. I well understand the added importance of behaving with the utmost propriety in such a scenario.

…

I totally recognise that using terms like sweetie, dear, buddy or mate to address anyone is outmoded in today's workplace, and can only conclude these were used on the back of very longstanding practice by many and where I would be addressed as Neil or Doc rather than the more formal Dr Graham. I now make sure that I address people by name or role. I would no longer reach out or touch a work colleague or someone I didn't know no matter how upset I thought they were.'

177. The Tribunal was in no doubt that Dr Graham's misconduct was sufficiently serious that action is required to maintain public confidence in the medical profession, and proper professional standards. The Tribunal considered that a message had to be sent to the medical

profession and the public that such behaviour was wholly unacceptable in order to uphold professional standards and public confidence.

178. However, the Tribunal was satisfied that these proceedings have had a salutary effect on Dr Graham and in his reflective statement he has demonstrated that he has been able to reflect, to some degree on how he conducted himself in the workplace and acknowledged that he had to change some of his behaviours. Although his reflections addressed the unacceptability of sexually motivated behaviour from a generic perspective, Dr Graham has not taken any meaningful personal responsibility for his own behaviour. However, the Tribunal was satisfied that Dr Graham has shown a willingness to change his behaviour which shows some degree of insight, albeit that is of yet incomplete. The Tribunal concluded that this had the potential to mitigate, rather than eliminate the risk of future repetition of his misconduct. Having considered 97(e) and (g), the Tribunal concluded that this supported the imposition of a period of suspension rather than erasure.

179. The Tribunal has determined that allegations of sexual misconduct can quite properly be categorised as a serious falling short of the standards required of a doctor. In contextualising the gravity of Dr Graham's misconduct, the Tribunal was mindful that the incidents in question were brief in nature and involved touching over, rather than under clothing. The Tribunal did not consider that Dr Graham had displayed what might have otherwise been categorised as predatory behaviour which would unquestionably have resulted in a sanction of erasure. In all the circumstances the Tribunal concluded that Dr Graham's sexual misconduct was towards the lower end (but not at the lowest) of the spectrum of sexual misconduct. Having regard to paragraph 97(a) of the SG the Tribunal concluded that, unacceptable as his conduct was, Dr Graham's misconduct was not fundamentally incompatible with his continued registration. Such a conclusion reassured the Tribunal that a period of suspension was an appropriate and proportionate sanction to impose.

180. In order to satisfy itself that suspension was an appropriate sanction to impose, the Tribunal then considered whether to erase Dr Graham's name from the register. The Tribunal was mindful that some of the features in the SG relevant to erasure were present in this case notably the serious departure from GMP and Dr Graham's deliberate or reckless disregard for those principles. However, having concluded that Dr Graham's misconduct was towards the lower end of the spectrum of sexual misconduct, and given the mitigating factors identified, the Tribunal was persuaded that a period of suspension would meet all three limbs of the overarching objective and was the appropriate and proportionate sanction to impose. It

considered that a period of suspension would balance Dr Graham's interests with the need to send a clear message that his behaviour was wholly unacceptable for a member of the medical profession. Imposing a period of suspension would prevent Dr Graham from returning to unrestricted practise until such time as a reviewing Tribunal considered that he was fit to do so.

181. The Tribunal therefore determined that Dr Graham's registration should be suspended for a period of 12 months. The Tribunal was satisfied that a suspension of Dr Graham's registration for this period will send a clear message to Dr Graham, the profession, and the wider public that sexually inappropriate conduct constituted behaviour unbefitting a registered medical practitioner and will be taken seriously. It will also give Dr Graham a further opportunity to develop his insight into his misconduct and remediate his failings as well as giving him time to complete any professional development needed in order to ensure that his medical knowledge is up to date should he subsequently choose to return to unrestricted practice.

182. The Tribunal determined to direct a review of Dr Graham's case. A review hearing will convene shortly before the end of the period of suspension. The Tribunal wishes to clarify that at the review hearing, the onus will be on Dr Graham to demonstrate how he has developed his insight and remediated his failings and that he is fit to return to unrestricted practice. It may therefore assist the reviewing Tribunal if Dr Graham provides:

- A further reflective statement to include how Dr Graham's insight has developed and the steps he has taken to remediate his failings;
- Evidence to demonstrate he has maintained his medical skills and knowledge;
- Dr Graham may also provide any other information that he considers will support his case in showing that his fitness to practise is no longer impaired.

Determination on Immediate Order - 05/01/2024

183. Having determined to suspend Dr Graham's registration for a period of 12 months, the Tribunal has considered, in accordance with Rule 17(2)(o) of the Rules, whether Dr Graham's registration should be subject to an immediate order.

Submissions

184. On behalf of the GMC, Mr Taylor submitted that having had regard to the Tribunal's sanction determination, it is noted that Dr Graham's position in relation to practising could change over time. Further, it is noted that a review would give Dr Graham the opportunity to demonstrate in the future that his medical knowledge and skills are up to date should he subsequently choose to return to unrestricted practice.

185. On this basis, Mr Taylor submitted that the Tribunal should impose an immediate order on the grounds that it is necessary for the protection of the public and otherwise in the public interest. He referred the Tribunal to the relevant paragraphs of the SG (172, 173 and 178) dealing with immediate orders.

186. Mr Taylor submitted that it would be plainly wrong, were Dr Graham to change his mind and go back to unrestricted practice, not to impose an immediate order, given his own indication that he has not kept his knowledge and skills up to date since October 2019.

187. On behalf of Dr Graham, Mr Rawlinson submitted that there was no objection given the circumstances to the imposition of an immediate order, although this was a matter for the Tribunal. Mr Rawlinson stated that practically, it would not have any effect because Dr Graham has no intention to return to work in any event and he has already surrendered his licence to practise.

The Tribunal's Determination

188. In reaching its decision, the Tribunal has exercised its own judgement and has taken account of the principle of proportionality. The Tribunal has borne in mind that it may impose an immediate order where it is satisfied that it is necessary for the protection of members of the public or is otherwise in the public interest or is in the best interests of the practitioner. It has also considered the guidance given in paragraphs 172, 173, and 178 of the SG relating to immediate orders:

> *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.*

> *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.*
>
> …
>
> *178 Having considered the matter, the decision whether to impose an immediate order will be at the discretion of the tribunal based on the facts of each case. The tribunal should consider the seriousness of the matter that led to the substantive direction being made and whether it is appropriate for the doctor to continue in unrestricted practice before the substantive order takes effect.*

189. The Tribunal had regard to its previous determinations and the submissions made by Mr Taylor and Mr Rawlinson.

190. The Tribunal balanced the interests of Dr Graham against those of the public and determined that imposing an immediate order of suspension was necessary to protect the public and was otherwise in the public interest given the ongoing risks identified in its earlier determination.

191. This means that Dr Graham's registration will be suspended from today. The substantive direction, as already announced, will take effect 28 days from the date on which written notification of this decision is deemed to have been served, unless an appeal is made in the interim. If an appeal is made, the immediate order will remain in force until the appeal has concluded.

192. There is no interim order to revoke.

193. This concludes the case.

ANNEX A – 28/07/2023
Application under Rule 17(2)(g)

194. Following the closing of the GMC's case, Mr Rawlinson, on behalf of Dr Graham, 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;'*

Submissions on behalf of Dr Graham

195. Mr Rawlinson provided both written and oral submissions. He submitted that there was insufficient evidence to proceed with the case in relation to paragraphs 4(a), 4(b), 5, 6 and 7 of the Allegation. He referred the Tribunal to the case of: *R v Galbraith* [*1981] 1WLR 1039*, which provides:

> *'(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.'

196. Mr Rawlinson also referred the Tribunal to: *Solicitors Regulation Authority v Sheikh [2020] EWHC 3062 (Admin), Shippey [1988] Crim. L.R. 767, G and F [2012] EWCA Crim 1756; [2013] Crim. L.R. 678* and *Hedgecock [2007] EWCA Crim 3486*.

197. Mr Rawlinson reminded the Tribunal that the burden of proof was on the GMC to prove its case to the civil standard and that, at this stage, the GMC need only persuade the Tribunal that there was sufficient evidence upon which the Tribunal could find an allegation proved. He submitted that the Tribunal should first consider whether the GMC had adduced sufficient evidence so that the Tribunal *could* find the underlying facts proved and thereafter consider whether there was sufficient evidence so that it *could* conclude that the conduct complained of amounted to either a culpable failure or dishonesty.

198. Mr Rawlinson stated that, when applying the second limb of *Galbraith,* the Tribunal should also consider whether the evidence was contradictory or inconsistent. The Tribunal must assess whether it could safely draw the required inference to find the charge proved at the conclusion of the GMC case.

199. Mr Rawlinson stated that Allegations 4 and 5 are the central allegations upon which essentially the other allegations of dishonesty and Allegation 7 rest. This means that before considering Dr Graham's subjective state of mind and/or any issues of potential dishonest intent, and in order to prove its case, the GMC must establish an objective basis the for the following factual matters to be established and/or appropriate inferences to be drawn in respect of them:

- That as a matter of fact, Dr Graham himself had been "under investigation" by InHealth at some point. This must be read in conjunction with the obligation that appears on the appraisal form itself i.e. "being subject to an investigation of any kind since my last appraisal."

- That this "investigation" had taken place "since his last appraisal" (as per the terms of the obligation to declare it on the face of the appraisal form – it being axiomatic that the drafted allegation can not somehow be wider or more onerous than the obligation as stated in the form itself);

- That Dr Graham knew or had been made aware that he himself was under, or subject to, an investigation in the above terms;

- That as a matter of fact, Dr Graham then failed to disclose the above matter(s) when under a positive obligation to do so.

200. Mr Rawlinson stated that following these matters being objectively established, one further matter arises for the GMC's allegations to be capable of proof. That any such failure that may have occurred was dishonest.

201. Mr Rawlinson stated that it is in those circumstances, it was self-evident that the last question arises sequentially and only arises once the GMC established, and/or had a sufficient evidential basis to establish by inference, the other four matters.

202. Mr Rawlinson stated that the wholly subjective question as to whether Dr Graham himself thought he had been subject of an investigation, and/or the related issue(s) as to whether and why he may have thereafter failed to disclose the same, only arise at the same stage and in the same way i.e. after the GMC has directly or by inference established the above four matters. He stated that the fifth matter arises and falls to be considered principally therefore (but not solely) as part of the defence case e.g. the GMC may rely upon the fact that Dr Graham asked for various matters to be removed from the external reference form.

203. Mr Rawlinson stated that if the GMC had not directly established all of the first four matters, then, for the GMC's case to proceed any further beyond half-time, and for Dr Graham's subjective state of mind to be considered at all, they must at the very least be capable of being proved by inference.

204. Mr Rawlinson said that, absent of improper speculation it was submitted that there is simply no evidence capable of positively establishing those four matters or any associated inference to the required standard.

205. Mr Rawlinson stated that conversely, the evidence that does exist was at best weak, tenuous or points in the other direction. He stated that it was worthy to note that this was not a case that depends on the reliability or veracity of any single GMC witness. Moreover, any possible inferences that could be drawn on the evidence that could point towards guilt are either incapable of being drawn at all, or equally, less likely than the converse inference.

For example, the evidence pointing to the fact that Dr Graham was not under investigation, and that he did not know about any purported investigation as nobody had told him that there was one.

206. Mr Rawlinson stated that there was not a single witness on behalf of the GMC that has stated that Dr Graham himself was ever "subject to" or "under investigation" at any stage, either formally or informally, regardless of whatever definition of the term ''investigation'' is adopted. He said that just because the matters were recorded on the internal Sentinel system, this merely denoted an incident worthy of recording, and nothing more.

207. Mr Rawlinson stated that the height of the evidence that emerged was that following somebody being suspected of accessing inappropriate material, which was later not found to have even been established, some individuals from the IT department conducted enquiries in terms of interrogating the hardware and computers to see if it could be identified who that was.

208. Mr Rawlinson submitted that the focus must be on the words being "subject to" an investigation i.e. the individual is the one experiencing it or the subject of it, rather than the fact it can be an "investigation of any kind". He said that the fact the outcome of an investigation may point towards you was distinct from you being subject to it. Further, the formality or informality of any IT investigation that took place, does not render Dr Graham "subject to" any investigation himself.

209. Mr Rawlinson stated that the balance of the evidence was such that for a person or individual to be classed as "subject to" or "under investigation" either formal, or informal, then a number of matters needed to be established as an absolute bare minimum. He said that none of them had been established to give rise to the merest possibility of such an inference being drawn.

210. Mr Rawlinson stated that there had been improper conflating of two wholly separate matters by the GMC in order to seek to establish the same: the fact of an alleged informal and time-limited IT investigation, the outcome of which potentially pointed the finger of suspicion at Dr Graham, with whether or not Dr Graham himself, at any stage was, as matter of fact, actually "subject to" or "under investigation".

211. Mr Rawlinson stated that it cannot sensibly be said that the fact that Dr Graham was ultimately suspected of some wrongdoing automatically means that he was or must have been subject to or "under investigation". He said that suspicion can arise in all sorts of circumstances short of a person themselves having been under investigation. It therefore follows that any such inference that he was under investigation is either at best equally or, in reality, less likely than the obvious inference that he was not.

212. Mr Rawlinson stated that, even if there was a view that Dr Graham was the one responsible for the conduct suggested, that does not establish that he himself had been subject to or under investigation. Neither does any purported admissions that may have been made by him, which are wholly irrelevant to the question.

213. Mr Rawlinson said that by way of example, the shadow of suspicion could have fallen on Dr Graham by the fact that the person after him in the room on the computer simply saw such material on the screen and raised the alarm, a scenario requiring absolutely no 'investigation' at all.

214. Mr Rawlinson stated that it follows that, absent any direct evidence to the effect that he was, there was simply no credible or objective basis to allow an inference to be drawn that Dr Graham was ever 'subject to' or 'under investigation' at any point during the relevant period. He stated that the allegations that depend upon such a finding should therefore be dismissed at this stage.

215. Mr Rawlinson stated that if an argument could be constructed, or an inference could be drawn that Dr Graham himself was '*subject to'* or '*under investigation',* that singularly ignores the further obligation upon him on the appraisal form, and also therefore the second matter the GMC must establish, namely, that he had been '*under*' or *'subject to'* an investigation' since his last appraisal. That, he submitted, can only be read (as a matter of common sense) with reference to the defined appraisal periods. Mr Rawlinson stated that in that regard, the evidence was clear. Whatever investigation that may have taken place, was time limited, commencing at the earliest in January 2017 after the first incident, and potentially implicating numerous individuals.

216. Mr Rawlinson stated that it was only after the second incident in July 2017 that one could seek to extrapolate out that whatever enquiries the IT team made, it somehow related to, and thereafter was only about, Dr Graham, therefore, rendering him somehow '*subject to it'*. He submitted that the uncontested evidence from Ms C was to the effect that, whatever

the extent of any enquires and IT investigation, it had for all practical purposes, finished by August 2017.

217. Mr Rawlinson stated that it followed that on any view, the GMC's own evidence was to the effect that any investigation that there may have been ran only from July 2017 to August 2017, when it then concluded. Further, that as a matter of evidence, fact and common sense:

- Dr Graham could not have been either *'subject to'* or '*under*' any investigation for the purposes of the period specified in Allegation 4a since his last appraisal (April 2016 – March 2017) as, on the GMC's own evidence, there was no investigation of any sort during that period;

- Similarly, Dr Graham could not have been either *'subject to'* or *'under'* any investigation for the purposes of the period specified in Allegation 4c since his last appraisal (April 2018 – March 2019) as again, on the GMC's own evidence, there was no investigation of any sort during that period.

218. Mr Rawlinson stated that in those circumstances, paragraphs 4(a) and 4(b) fall without further consideration.

219. Mr Rawlinson submitted that the evidence regarding the third strand that was required to be established is equally clear: the GMC has simply not established a proper, objective basis for drawing inferences to the effect that Dr Graham '*knew or had been made aware of*' any purported investigation. Furthermore, Mr Rawlinson submitted that not a single witness for the GMC has given evidence even close to that effect. He stated that there was no evidence that he knew the incident had been recorded on Sentinel, the incident reporting software used, nor was he ever sent a single document pertaining to any such investigation or actions that may have taken place, much less made aware of any outcome. Mr Rawlinson reminded the Tribunal of Ms C's evidence during cross-examination:

> *'Q You simply don't know, and cannot positively say, that he (Dr Graham) was ever informed of an investigation, is that fair?*
>
> *A Yes it is'*

220. Mr Rawlinson stated that the only live witness that could potentially have done so was Dr F. His evidence got nowhere even close to such a suggestion to be remotely capable of founding such an inference. Mr Rawlinson reminded the Tribunal that the GMC's case was opened specifically on the basis that Dr F's evidence would. Nevertheless, Dr F himself and on his own uncontested evidence, was singularly unaware as to whether there had even been '*an investigation'* into Dr Graham, or the extent of any enquiries that were made, and that he had no knowledge at all of what they entailed. Mr Rawlinson submitted that the height of his evidence was that he was told that InHealth had *"come to know"* or *"become aware"* that Dr Graham had allegedly seen inappropriate material on a computer. He was then asked to have a word with him, which he did.

221. Mr Rawlinson stated that ultimately, Dr F had agreed with the explicit suggestion put to him in cross-examination that he could not have told Dr Graham that he (Dr Graham) was under investigation, as Dr F himself did not know whether he had been or not.

222. Mr Rawlinson stated that the suggestion or inference that Dr F could ever have somehow explicitly or implicitly told Dr Graham or made him aware of the existence of such an 'investigation' when he did not know anything at all about the fact, nature or extent of it himself, was simply not born out by the evidence. He submitted that such a proposition defies common sense and, in the round, the potential drawing of such an inference was nothing short of fanciful. Further, there was not a shred of evidence to permit or allow any such inference to be drawn. On that basis, Mr Rawlinson submitted that paragraphs 4, 5, 6 and 7 should be dismissed in their entirety.

223. Mr Rawlinson said that even if the GMC had somehow adduced some evidence that was capable of allowing the first three inferences to be properly drawn i.e. that Dr Graham was as a matter of fact under/subject to an investigation, that this had occurred since his last appraisal period, and that he somehow knew that. The GMC again failed at the next hurdle, that there is insufficient evidence to establish that Dr Graham was in fact under any positive obligation to disclose what had arisen, either in the appraisal document itself or to his Responsible Officer.

224. Mr Rawlinson stated that it was worthy of note that not a single GMC witness has given evidence to that effect.

225. Mr Rawlinson reminded the Tribunal that Dr B had described the area as one of '*greyness, with room for interpretation*' in these particular circumstances, a sentiment with

which Ms C effectively then agreed. She stated in her evidence that her only expectation was that Doctors would disclose "*serious incidents*" during the course of their appraisal, which on any view, this is not.

226. Mr Rawlinson submitted that the GMC has again mistakenly conflated two separate issues that arose from the evidence: the apparent need for InHealth to disclose certain matters on an external reference form, with the wholly separate matter regarding any positive, individual obligation upon a doctor to state on the appraisal form that have '*something to declare'* concerning whether they have been "*subject to an investigation of any kind".*

227. Mr Rawlinson stated that the most striking feature of the evidence was that even the person to whom any purported disclosure ought to have been made for the purposes of paragraphs 4, 5 and 6 namely the appraiser, Dr E. He did not say, and did not even infer, that Dr Graham was ever positively obliged to disclose the matters in these particular circumstances. Mr Rawlinson stated that after being cross-examined in those terms, and even in re-examination by the GMC, Dr E maintained that position.

228. Mr Rawlinson submitted that, yet again, there was no objective basis to support the drawing of the inference the GMC sought. In those circumstances, given the insufficiency of the evidence, the drawing of any such inference would be wholly impermissible, based, as it would be, upon evidence that itself is the very definition of ambiguous, self-contradictory, weak or tenuous.

229. Mr Rawlinson submitted that in all the circumstances, paragraphs 4, 5, 6 and 7 should be dismissed at this stage.

Submissions on behalf of the GMC

230. At the outset of the application Mr Taylor conceded that there was insufficient evidence to establish a case to answer in relation to paragraph 4(c) of the Allegation.

231. Mr Taylor provided both written and oral submissions. He stated that the issue in relation to Mr Rawlinson's submissions was whether there was sufficient evidence that Dr Graham was subject to an investigation of any kind, and whether he knew that he had been under investigation by InHealth.

232. Mr Taylor referred the Tribunal to the case of *R v Galbraith (1981) 1 WLR 1039.* He stated that notwithstanding *Galbraith*, the authorities are clear that the criminal and regulatory jurisdictions are different, and in the GMC's submission the Tribunal should be slow to throw out charges in relation to which the Doctor's evidence which has not been tested. He submitted that there was evidence upon which the Tribunal could find paragraphs 5 to 7 of the Allegation proved. There was, he submitted, a *prima facie* case.

233. Mr Taylor stated that it was important to note that the appraisee is required to declare investigations of any kind, not merely formal investigations. The investigation carried out by InHealth was an informal investigation in which the IT department sought to establish that it was Dr Graham who had been accessing inappropriate material. In the event, he submitted that Dr Graham did not deny that he had been responsible when spoken to by Dr F, and in early April 2018 he advised Ms I XXX which he felt may have influenced his actions in accessing inappropriate material.

234. Mr Taylor submitted that there was an investigation, albeit informal, as a result of which Dr F was requested to have a word with Dr Graham to alert him to the fact that InHealth were aware that he had been accessing inappropriate material on work computers.

235. Mr Taylor stated that as far as InHealth were concerned, they considered that they were conducting an investigation, by reason of:

- The Sentinel report for the January 2017 incident stated: The information has been passed to IT for investigation and notes in the Investigation Details section that IT investigated;

- The Sentinel report for the July 2017 incident, which refers to a previous incident that had been closed following investigation, before setting out in the Investigation Details section ,the nature of the second incident investigated;

- Mr M's email dated 18 August 2017, referring to around a week's worth of investigation time between three engineers;

- Ms C's email to Dr B dated 28 October 2019, in which she stated: The result of our investigation was that there was a high index of suspicion that the doctor accessed inappropriate material, but there was no hard evidence.

- In her live evidence Ms C explained that every incident reported on Sentinel had an associated investigation, and she stated that this investigation fell into paragraph 6.2 of the Incident Reporting Policy;

- Ms I also referred to investigation of the two incidents;

- Dr B's note dated 8 December 2021, in which he wrote: "*I am told that there was an investigation in 2017 relating to a member of staff having inappropriately accessed [inappropriate] material from InHealth facilities. Circumstantial evidence suggested that Dr Graham might be implicated. The investigation was not conclusive. However, Dr Graham did not declare this investigation to me in my role as RO for his entire scope of practice*."

236. Mr Taylor submitted that it was clear that these incidents were investigated, albeit informally and that Dr Graham had been under investigation by InHealth in relation to incidents which occurred on 16 January 2017 and 10 July 2017. This was evidence that Dr Graham knew that he had been under investigation.

237. Mr Taylor said that it was accepted that Dr Graham was not approached about his accessing of inappropriate material until early August 2017, which is when Dr F spoke to him about it. Mr Taylor stated that it was open to the Tribunal to draw a reasonable inference as to the state of Dr Graham's knowledge.

238. Mr Taylor said that as a matter of common sense, Dr Graham must have realised that he had been under investigation as how else would InHealth have suspected that he was responsible for accessing the sites, unless they had investigated the matter. How else would Dr F have been requested to have a word with Dr Graham, unless there had been some sort of investigation resulting in a high index of suspicion that Dr Graham was responsible? In addition, Dr Graham signed off his 2016-2017 appraisal on 4 August 2017, having been spoken to by Dr F. However, he submitted the previous year's (2015-2016) external reference form from InHealth dated 20 February 2016, thereby avoiding disclosure of the incidents newly brought to his attention.

239. Mr Taylor said that it was open to the Tribunal to draw the inference that Dr Graham submitted the 2015-2016 external reference form, because he did not wish to declare the incidents of accessing inappropriate material in his 2016-2017 appraisal, and so he must have known that he had been under investigation of some kind in relation to these incidents.

240. Mr Taylor stated that by 11 April 2018, Dr Graham, who signed off his 2017-2018 appraisal on 24 April 2018, approached Ms I asking for a reference to compete his appraisal and suggested that this should not be included in 'incidents'.

241. Mr Taylor stated that according to Ms I, Dr Graham came to see her and, because of XXX, asked if the incidents would have to form part of his appraisal reference or if they could be removed. Dr Graham was requesting InHealth to exclude reference to the incidents in the external reference form for his 2017-2018 appraisal.

242. Mr Taylor said that again, it was open to the Tribunal to draw the inference that Dr Graham did not wish to declare the incidents of accessing inappropriate material in his 2017-2018 appraisal and so he must have known that he had been under investigation of some kind in relation to these incidents. Again, how else would InHealth have suspected him of accessing the material unless they had investigated the matter.

243. Mr Taylor stated that it was open to the Tribunal to take into account the following:

- During his disciplinary hearing, Dr Graham told the Trust that: "*At the time of my meeting with RA in February 2018, I was aware of a complaint. Notwithstanding this, he did not disclose the nature of the complaint or allegations at his appraisal or in the appraisal form*";

- In his meeting with the Trust on 14 January 2020, Dr Graham told the Trust that he took the question [in the appraisal form] to mean a formal investigation not just a complaint, despite the form clearly referring to being subject to an investigation of any kind;

- The account given by Dr Graham in his witness statement, dated 19 May 2023, relating to his meeting with Ms I in April 2018 is inconsistent with what he told the Trust on 14 January 2020.

Mr Taylor stated that such matters had not been tested in evidence.

244. Mr Taylor said that in relation to paragraph 7 of the Allegation, this was somewhat different to paragraphs 4 to 6, in that it related to Dr Graham's failure to disclose to his RO that he had been under investigation by InHealth in 2017.

245. Mr Taylor said that the points in relation to the investigation and Dr Graham's knowledge of it apply having liaised with InHealth. Dr B clearly understood that Dr Graham had been subject to an investigation which he ought to have disclosed to him in his role as RO for his entire scope of practice. Further, Dr B was clear in his oral evidence that the incidents should have been disclosed to him.

246. Mr Taylor submitted that there was a sufficiency of evidence to find paragraphs 5 to 7 of the Allegation proved and for the Tribunal to determine whether these paragraphs should be found proved having heard all the evidence, including that of the doctor and Professor N.

The Tribunal's Approach and Legal Advice

247. The Tribunal reminded itself that, at this stage, its purpose was not to make findings of fact but to determine whether sufficient evidence, taken at its highest, had been presented by the GMC such that a properly directed Tribunal, could find the relevant paragraphs proved to the civil standard. The Tribunal considered the submissions made by both Mr Rawlinson and Mr Taylor. It also took account of all the evidence and submissions presented to it.

248. The LQC reminded the Tribunal of the principles of the test to be applied in these circumstances, which include that set out in the case of *Galbraith*, as detailed above, and directed the Tribunal to consider this test in its deliberations.

Tribunal Decision

249. The Tribunal was mindful that it was required to assess the sufficiency of the evidence taken at its highest and not to make any determination as to the facts.

Paragraph 4

250. The Tribunal first considered if Dr Graham had been subject to an investigation of any kind at InHealth between 1 April 2016 and 26 January 2019.

251. The Tribunal noted that it was a matter of fact that the IT department at InHealth had conducted enquiries and had interrogated the hardware and computer systems after it emerged that someone had allegedly accessed inappropriate material on its system. It also noted that the investigations had proved inconclusive, and no person had been positively

identified. However, the outcome had potentially pointed the finger of suspicion at Dr Graham.

252. Ms B in her oral evidence confirmed that any formal or informal investigation into the accessing of inappropriate material would not have been conducted by the IT department at InHealth as this did not fall within its remit.

253. The Tribunal noted that the recording of improper use of a computer had been recorded on Sentinel. However, there was no evidence to show that Dr Graham knew that the incident had been recorded, nor that he was ever sent any documents pertaining to any such investigation or actions that may have taken place, nor was he made aware of the outcome of the investigation. In any event, Dr Graham did not have access to Sentinel.

254. The Tribunal had regard to Dr F's evidence. He stated that he was unaware as to whether there had ever been an investigation into Dr Graham, or the extent of any enquiries that were made, and he had no knowledge at all of what they entailed. Dr F said that he was told that InHealth had "come to know" or "become aware" that Dr Graham had allegedly seen inappropriate material on a computer. He was then asked to have a word with him, which he did. Dr F stated that he would certainly not have told Dr Graham that he was under investigation, as he himself did not know whether he had been or not.

255. The Tribunal also had regard to Ms C's evidence. She stated that she could not positively say that Dr Graham was ever informed of an investigation into the improper use of a computer.

256. The Tribunal considered that for a person or individual to be considered as "subject to" or "under investigation" whether formally or not, there must have been sufficient evidence of relevant factors such as an investigation process and procedures to follow. The Tribunal noted that the evidence before it indicated that Dr Graham was not sent anything in writing to make him aware of any investigation.

257. Noting Mr Rawlinson's submissions, the Tribunal concluded that there was no witness on behalf of the GMC who confirmed that Dr Graham was ever subject to or under investigation, or been informed of such, at any stage while working at InHealth, either formally or informally. The Tribunal also noted that no witness could identify who, if anyone, had been the responsible / appointed person for any investigation at InHealth. All witnesses confirmed that it had not been their role or responsibility to conduct an investigation of any

type into this matter. In addition, no witness said that they explicitly told Dr Graham about an investigation.

258. The Tribunal therefore determined that, taking it at its highest, there was insufficient evidence adduced by the GMC which could enable a properly directed Tribunal to determine that Dr Graham had anything to declare in relation to "suspensions, restrictions on practice or being subject to an investigation of any kind" in his annual appraisal. As such, the Tribunal granted the application under Rule 17(2)(g) in respect of paragraphs 4a and 4b of the Allegation.

259. In relation to paragraph 4(c) of the Allegation, the Tribunal has regard to Mr Rawlinson's submissions and Mr Taylor's concession on behalf of the GMC that Dr Graham had no case to answer. Having done so the Tribunal concluded that a properly directed Tribunal could not find the facts of this paragraph proved. It therefore found that there was no case to answer in respect of paragraph 4(c) of the Allegation.

Paragraph 5

260. Given the rationale for the Tribunal's determination regarding paragraph 4 of the Allegation, the Tribunal also granted the application under Rule 17(2)(g) in respect of paragraph 5 of the Allegation.

Paragraph 6

261. In the absence of there being sufficient evidence of a case to answer that Dr Graham knew that his declaration referred to at paragraphs 4a, 4b and 4c of the Allegation were untrue, the Tribunal concluded that that there was insufficient evidence upon which a properly directed Tribunal could concluded that Dr Graham's actions were dishonest as alleged. Given the rationale for the Tribunal's determination regarding paragraph 5 of the Allegation, the Tribunal therefore also granted the application under Rule 17(2)(g) in respect of paragraph 6 of the Allegation.

Paragraph 7

262. In respect of paragraph 7, the Tribunal had regard to its reasons in respect of paragraph 4 of the Allegation. It noted that a failure to disclose an investigation amounted to a duty on Dr Graham. However, the Tribunal noted that there was no evidence or any GMC

witness who could confirm that Dr Graham was ever subject to or under investigation at any stage while working at InHealth either formally or informally. Dr Graham had not been informed of any investigation.

263. The Tribunal therefore determined that, taking it at its highest, there was insufficient evidence adduced by the GMC which could enable a properly directed Tribunal to determine that, having concluded that Dr Graham had not been notified that he was under investigation, Dr Graham failed to disclose to his Responsible Officer that he had been under investigation by InHealth in 2017. As such, the Tribunal granted the application under Rule 17(2)(g) in respect of paragraph 7 of the Allegation.