PUBLIC RECORD

Dates: 19/10/2021 - 27/10/2021

Medical Practitioner's name:	Dr Peter KELLER
GMC reference number:	1569131
Primary medical qualification:	MRCS 1972 Royal College of Surgeons of England

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

Summary of outcome

Suspension, 12 months.

Immediate order imposed

Tribunal:

Legally Qualified Chair	Mr Robin Ince
Lay Tribunal Member:	Ms Sue Wadham
Medical Tribunal Member:	Dr Vivek Sen

Tribunal Clerk:	Mr Matthew Rowbotham

Attendance and Representation:

Medical Practitioner:	Not present and represented
Medical Practitioner's Representative:	Mr Kevin McCartney, Counsel, instructed by the MDU
GMC Representative:	Ms Kathryn Johnson, 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 - 25/10/2021

1. This determination will be read in private. However, as this case concerns Dr Keller's Misconduct, a redacted version will be published at the close of the hearing with those matters relating to XXX removed.

Background

2. Dr Keller qualified in 1972 with a MRCS from the Royal College of Surgeons of England. Dr Keller joined the Central Surgery XXX in 1977 and was practising there as a General Practitioner ('GP') at the time of the events. Dr Keller retired from medical practice in October 2018.

3. The allegation that has led to Dr Keller's hearing can be summarised as establishing an inappropriate and sexually motivated relationship with a vulnerable patient, Patient A, that became closer over time.

4. More specifically, in or around 2014 or 2015, Dr Keller allegedly began a relationship with Patient A which involved exchanging text messages, going out for coffee and walking a dog. Later, in or around 2016 or 2017, Dr Keller's relationship with Patient A is alleged to have become closer during which he kissed and cuddled Patient A. During this time, it is alleged that Dr Keller continued to hold consultations with Patient A in his capacity as a GP.

5. The initial concerns were raised with the GMC on 8 August 2018, via a formal referral from NHS England. This followed NHS England's own investigation into Dr Keller's case, following Dr Keller's self-referral to it on 31 May 2018.

The Outcome of Applications Made during the Facts Stage

6. The Tribunal granted the GMC's application, made pursuant to Rule 17 (6) of the General Medical Council (Fitness to Practise Rules) 2004 as amended ('the Rules'), that a date included in Schedule 1 of the Allegation be amended to more accurately reflect an occasion that Patient A was given medication. The application was not opposed by Mr McCartney on behalf of Dr Keller. The Tribunal considered that this amendment could be made without injustice to either party.

7. The Tribunal refused, in part, Mr McCartney's application on behalf of Dr Keller, made pursuant to Rule 41 of the Rules, that the whole of the hearing be held in private. Ms Johnson, on behalf of the GMC, opposed the application. The Tribunal did, however, allow her application to hold some parts of the hearing in Private. The Tribunal's full determination can be found at Annex A.

8. The Tribunal granted Mr McCartney's application on behalf of Dr Keller, made pursuant to Rule 17(2)(g) of the Rules, that there was insufficient evidence for the Tribunal to make a finding regarding Paragraph 5 of the Allegation in relation to Paragraph 1. The GMC opposed the application. The Tribunal's full reasoning can be found at Annex B.

The Allegation and the Doctor's Response

9. The Allegation made against Dr Keller is as follows:

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

1. In or around 2014 or 2015, you established inappropriate contact with Patient A outside of your doctor/patient relationship and you:

    a. engaged in text message conversations;
    b. went out for coffee;
    c. walked the dog together.

    Admitted and found proved

2. In or around 2016 or 2017, you became involved in a closer relationship with Patient A, during which you:

    a. kissed;
    b. cuddled.

Admitted and found proved

3. Despite the matters described at paragraphs 1 and 2 above, you consulted with and/or treated Patient A in your capacity as a GP at Central Surgery XXX on one or more of the dates set out in Schedule 1.

   Admitted and found proved

4. At all material times, Patient A was vulnerable due to the reasons set out in Schedule 2.

   To be determined

5. Your conduct as described at paragraph~~s 1 and~~ 2 was sexually motivated.

   In relation to paragraph 1, withdrawn following a successful 17(2)(g) application.

   Admitted and found proved in relation to paragraph 2.

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

   To be determined

The Admitted Facts

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

11. The Tribunal noted Mr McCartney's submissions that Dr Keller wished to admit Paragraph 5 in relation to Paragraph 2 of the Allegation on the basis that the interpretation of 'sexual motivation' was that Dr Keller intended to pursue a future sexual relationship and that he was not acting in a predatory way. Mr McCartney

explained that it was on this basis that Dr Keller made the admissions and maintained that this admission was accepted by the GMC.

12. Ms Johnson, on behalf of the GMC, confirmed that the GMC had put the case in relation to this allegation 'on this basis', although that it was not for the GMC to 'accept' that this was the case.

13. The Tribunal accepted Dr Keller's admission, and indicated that it would remain mindful of the basis upon which Dr Keller made it. The Tribunal also noted that at this stage of the hearing, there was no evidence before it to suggest that Dr Keller had acted in a way contrary to forming a consensual relationship with Patient A. However, the Tribunal reminded the parties that it remained open to it to find sexual motivation on a different basis to that which Dr Keller admitted when making its findings of fact, as there remained other matters to be determined.

The Facts to be Determined

14. In light of Dr Keller's response to the Allegation made against him, the Tribunal is required to determine whether Patient A, at all material times, was vulnerable.

Witness Evidence

15. The Tribunal received evidence on behalf of the GMC in the form of witness statements from the following witnesses:

- Mr C, Medical Director for Professional Standards and System improvements for NHS England Midlands, dated 10 May 2021;
- Ms B, Professional Regulations and Revalidation Specialist in the Professional Standards Team for NHS England, dated 22 April 2021;
- Dr D, GP Partner at Central Surgery XXX, dated 29 April 2021.

16. Dr Keller provided his own witness statement dated 5 August 2021.

Documentary Evidence

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

- Dr Keller's Performance Team Meetings Notes regarding his relationship with Patient A;
- correspondence between NHS England colleagues;
- the referral of Dr Keller to the GMC from NHS England, including further correspondence between NHS England and the GMC;
- Patient A's medical records;
- Dr Keller's response at the Rule 7 of the GMC Fitness to Practise Rules 2004 stage, via his representatives;
- Dr Keller's self-referral to NHS England;
- a certificate of Dr Keller's completion of a professional boundaries course.

The Tribunal's Approach

18. 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 Keller 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.

19. The Tribunal specifically noted that it had not heard oral evidence from any witness and determined that it would reach its findings based on a straightforward assessment of the documentary evidence before it. Further, the Tribunal noted that all the evidence before it was hearsay and has given this evidence such weight that the Tribunal considers appropriate. In particular, the Tribunal has taken account of the provenance of the individual pieces of evidence. For instance, as the statements of the witnesses, although hearsay, come directly from those witnesses, contain a statement of truth and have been signed, the Tribunal has given them more weight than evidence which, for instance, amounts to reports as to what a third party said to another and is therefore what could be referred to as "*double hearsay*". The Tribunal has, in any event, proceeded with caution in assessing the evidence before it.

20. After some discussion, during which Ms Johnson confirmed her earlier concession that Dr Keller's actions were not predatory, it was agreed by the parties that the Tribunal should adopt a two-stage approach to evaluating the remaining charge relating to paragraph 4, namely that the Tribunal would consider all the evidence in order to assess (a) whether vulnerability was established on either of the grounds set out in Schedule 2 and (b) if so, whether Patient A was vulnerable at the material times. The parties

confirmed that the Tribunal was not being asked to make any specific findings with regard to Patient A's motivations in entering into the relationships with Dr Keller.

Accordingly:

21. (1) The Tribunal was to first assess whether Patient A was vulnerable due to (a) XXX and/or (b) XXX.

The Tribunal was referred by Ms Johnson to both GMC and MPTS Guidance for assistance in understanding the term '*vulnerable*'. In the GMC Guidance *Maintaining a professional boundary between you and your patient* (April 2013) it states:

'*…11 Some patients may be more vulnerable than others* (and see footnote 3 below) *and the more vulnerable someone is, the more likely it is that having a relationship with them would be an abuse of power and your position as a doctor.*

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

13 Whatever your specialty, you must not pursue a personal relationship with a former patient who is still vulnerable. If the former patient was vulnerable at the time that you treated them, but is no longer vulnerable, you should be satisfied that: (i) the patient's decisions and actions are not influenced by the previous relationship between you (ii) you are not (and could not be seen to be) abusing your professional position.

Footnote 3: Some patients are likely to be more vulnerable than others because of their illness, disability or frailty, or because of their current circumstances (such as bereavement or redundancy). Children and young people younger than 18 years should be considered vulnerable. Vulnerability can be temporary or permanent.'

And in the MPTS' Sanctions Guidance (November 2020) it states:

'*…145 Where a patient is particularly vulnerable, there is an even greater duty on the doctor to safeguard the patient. Some patients are likely to be more vulnerable than others because of certain characteristics or circumstances, such as:*

a presence of mental health issues

b being a child or young person aged under 18 years

c disability or frailty
d bereavement
e history of abuse or neglect.'

The Tribunal took into account Ms Johnson's submission, with which Mr McCartney agreed, that it could find vulnerability on either or both the grounds of XXX and/or XXX.

22. Second, if the Tribunal decided that Patient A was vulnerable on either of the above grounds it was then to go on to decide whether she was vulnerable '*at all material times*'. The Tribunal noted that the parties helpfully agreed that this referred to the specific times in the periods '*In or around 2014 to 2015*' that Dr Keller '*established inappropriate contact with Patient A*' by indulging in the activities listed in Paragraph 1 (a) to (c) and/or '*In or around 2016 to 2017*' that Dr Keller '*became involved in a closer relationship with Patient A*', which the parties agreed appeared to be limited to the period November to December 2017 since this was the time identified by Dr Keller that there was a change in their relationship which gave rise to the matters alleged in paragraph 2. The Tribunal noted that Dr Keller had not given any indication as to when in the period 2014/15 he established "*inappropriate contact*" with Patient A. However, the Tribunal took account of the fact that the phrase '*At all material times'* gave it some flexibility as to interpretation of the time periods.

The Tribunal's Analysis of the Evidence and Findings

23. The Tribunal noted that, following Dr Keller's previous admissions and a successful application under Rule 17(2)(g) of the Rules, it needed to make a finding on Paragraph 4 of the Allegation only.

24. The Tribunal was mindful of the questions it must ask itself, as set out above, and the two factors, listed in Schedule 2, by which it might find that Patient A was vulnerable.

25. The Tribunal began by assessing whether Patient A was vulnerable by reason of XXX.

26. The Tribunal had regard to Dr D's witness statement, in which she notes:

XXX

It also had regard to Dr Keller's evidence to NHS England, in which it is noted:

XXX

Furthermore, it took account of Dr E's notes from 21 December 2018, during a consultation with Patient A, which recorded that:

XXX

27. The Tribunal noted, however, that it did not have any evidence directly from Patient A regarding XXX and that the statements above amounted to "*double hearsay*" evidence being what the various third parties reported that Patient A had told them, or others. XXX

28. XXX

29. The Tribunal was also mindful that it appeared that it was Patient A who had initiated, in or about 2014, contact with Dr Keller and had offered him support following the difficulties he faced XXX

30. XXX. It therefore follows that, due to such lack of evidence about XXX in this period, it could not be concluded that she was vulnerable at that time because of this factor.

31. The Tribunal therefore found Not Proved that part of paragraph 4 which alleged that "*At all material times, Patient A was vulnerable due to…[XXX]*".

32. The Tribunal went on to assess the alternative allegation in paragraph 4, namely whether, at all material times, Patient A was vulnerable by reason of XXX.

33. The Tribunal noted that, contrary to the lack of evidence about XXX during 2014/17, there was a considerable amount of information before it regarding XXX

34. In addition, the Tribunal noted a letter from Dr H, XXX

35. Moreover, the Tribunal noted a letter from Patient A dated 26 November 2014 XXX

36. Moving forward, by way of a further example, the Tribunal also had regard to a letter written by Dr I from the XXX, dated 11 November 2016, XXX

37. XXX

38. In addition, the Tribunal had regard to a letter dated 27 April 2018, in which Patient A wrote to Dr Keller requesting XXX

39. Lastly, the Tribunal had regard to an email between NHS England employees, dated 17 December 2019, XXX

40. The Tribunal therefore found that, when looking at the evidence outlined above, and as a whole, Patient A appears to have experienced XXX, before, during and after the period with which the Tribunal is concerned, 2014 to 2017.

41. XXX The Tribunal therefore concluded that Patient A was XXX therefore was vulnerable because of XXX.

42. The Tribunal was accordingly satisfied that, throughout the period 2014 – 2017, XXX, on the balance of probabilities, she was vulnerable '*at all material times*' and in particular at the times when an inappropriate relationship was established with Dr Keller in 2014/15 and when a closer relationship was formed between them from November 2017.

43. The Tribunal therefore found that, at all material times, Patient A was vulnerable XXX and therefore found Proved that part of paragraph 4 which alleged that "*At all material times, Patient A was vulnerable due to…[XXX]*".

The Tribunal's Overall Determination on the Facts

44. The Tribunal has determined the facts as follows:

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

1. In or around 2014 or 2015, you established inappropriate contact with Patient A outside of your doctor/patient relationship and you:

   a. engaged in text message conversations;
   b. went out for coffee;
   c. walked the dog together.

Admitted and found proved

2. In or around 2016 or 2017, you became involved in a closer relationship with Patient A, during which you:

   a. kissed;
   b. cuddled.

   Admitted and found proved

3. Despite the matters described at paragraphs 1 and 2 above, you consulted with and/or treated Patient A in your capacity as a GP at Central Surgery XXX on one or more of the dates set out in Schedule 1.

   Admitted and found proved

4. At all material times, Patient A was vulnerable due to the reasons set out in Schedule 2.

   Determined and found proved in relation to Patient A being vulnerable due to XXX;

   Determined and found not proved in relation to Patient A being vulnerable due to XXX.

5. Your conduct as described at paragraph~~s 1 and~~ 2 was sexually motivated.

   In relation to paragraph 1, withdrawn following a successful 17(2)(g) application.

   Admitted and found proved in relation to paragraph 2

   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 - 26/10/2021

1. This determination will be read in private. However, as this case concerns Dr Keller's Misconduct, a redacted version will be published at the close of the hearing XXX

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

The Evidence

3. The Tribunal has taken into account all the evidence received during the facts stage of the hearing, both oral and documentary. In addition, the Tribunal received testimonials on behalf of Dr Keller.

Submissions

On behalf of the GMC

4. Ms Johnson drew the Tribunal's attention to Paragraph 53 of Good Medical Practice (2013 edition) ('GMP'), which states:

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

And paragraphs 3, 5 and 5 of The GMC guidance *'Maintaining a professional boundary between you and your patient'* (April 2013), which state:

> *3 Trust is the foundation of the doctor-patient partnership. Patients should be able to trust that their doctor will behave professionally towards them during consultations and not see them as a potential sexual partner.*
>
> *4 You must not pursue a sexual or improper emotional relationship with a current patient.*
>
> *5 If a patient pursues a sexual or improper emotional relationship with you, you should treat them politely and considerately and try to re-establish a professional boundary. If trust has broken down and you find it necessary to end the professional*

relationship, you must follow the guidance in Ending your professional relationship with a patient.

5. Ms Johnson submitted that whilst Patient A may have instigated the relationship with Dr Keller, he should have made it known to her that they could not have relationship above that of a professional one. Ms Johnson submitted that Patient A could have seen other doctors at the practice, allowing Dr Keller to professionally distance himself from her. However, Ms Johnson submitted that it could be seen in Schedule 1 how many times Dr Keller saw Patient A, in particular between 2016 – 2018, at which time their relationship became closer.

6. In addition, Ms Johnson submitted that Patient A's vulnerability was a further aggravating feature. She drew the Tribunal's attention to paragraph 11 of '*Maintaining a professional boundary between you and your patient'* (April 2013), which states:

'Some patients may be more vulnerable than others and the more vulnerable someone is, the more likely it is that having a relationship with them would be an abuse of power and your position as a doctor'

7. Ms Jonson submitted that there was nothing to suggest that Dr Keller took into account Patient A's vulnerability or the effects his relationship with Patient A may have had on her. This included what may occur if their relationship was found out or came to an end. Ms Johnson submitted that Dr Keller knew Patient A lacked self-esteem and confidence, which meant it would have been difficult for her to cope with these occurrences. In addition, Ms Johnson submitted that Dr Keller failed to take into account that Patient A would not have been able to change GP surgeries due to her inability to drive or take public transport.

8. Ms Johnson highlighted that Patient A had written to Dr Keller on 27 April 2018 requesting a letter of medical evidence regarding XXX. Ms Johnson submitted that, whilst there was no evidence that Dr Keller responded to the letter, it did highlight the dangers of having a relationship between a doctor and a patient that was 'too close', where professional boundaries had become blurred.

9. Ms Johnson submitted that, given Dr Keller's inappropriate behaviour and that Patient A was vulnerable, Dr Keller's conduct did amount to misconduct.

10. With regard to impairment, Ms Johnson acknowledged that Dr Keller had provided some positive testimonials, and had attended a professional boundaries course in 2018. However, Ms Johnson submitted that the course had taken place several years ago, occurred online, and appeared to have lasted two hours.

11. Ms Johnson submitted that there is little information from Dr Keller that demonstrated he had fully remediated the issues raised in this case. She said that there is no apology from Dr Keller specifically directed at Patient A or to his colleagues at the practice. Further, there is no reflection from Dr Keller on why his relationship with Patient A was inappropriate given her vulnerability and the position he was in as her GP. In this regard, Ms Johnson submitted that Dr Keller's remediation is limited.

12. Ms Johnson submitted that it is accepted that Dr Keller is retired. However, she submitted that, given Dr Keller's limited remediation, there is a risk of him repeating his actions. Ms Johnson therefore submitted that a finding of impairment was necessary to protect patients. She also submitted that a finding of impairment was also necessary to uphold standards and maintain public confidence in the medical profession.

<u>On behalf of Dr Keller</u>

13. Mr McCartney chose to give no submissions on whether Dr Keller's actions amounted to misconduct.

14. In terms of impairment, Mr McCartney submitted that Dr Keller accepts he entered into a mutual relationship with Patient A and that he recognised at an early stage that this was inappropriate and should not have occurred. He said this was demonstrated by Dr Keller's self-referral to NHS England. Mr McCartney submitted that this showed good insight on Dr Keller's behalf.

15. Mr McCartney submitted that it was important to take into account individual circumstances when looking at the guidance set out in Ms Johnson's submissions. Mr McCartney submitted that, at the start of Dr Keller's relationship with Patient A, Dr Keller XXX. He said that Dr Keller had been offered support at this time from a female friend, Patient A. Mr McCartney submitted that it was important for the Tribunal to take into account that Dr Keller was a human being who suffers the same difficulties that affect everyone. XXX.

16. Mr McCartney also submitted that Dr Keller was a doctor who had a long career with no previous disciplinary findings against him. Mr McCartney submitted that Dr Keller's relationship with Patient A was an isolated scenario, but accepted that it had occurred over a period of 8 – 9 months as a closer relationship.

17. Mr McCartney drew the Tribunal's attention to the testimonial evidence, which stated that Dr Keller was a kind, honest and good doctor, who had integrity and sensitivity.

18. Mr McCartney further drew the Tribunal's attention to the cases of *General Medical Council v Meadow [2006] EWCA Civ 1390 (26 October 2006)* in which it was stated:

> *'…the purpose of FTP proceedings is not to punish the practitioner for past misdoings but to protect the public against the acts and omissions of those who are not fit to practise. The FPP thus looks forward not back. However, in order to form a view as to the fitness of a person to practise today, it is evident that it will have to take account of the way in which the person concerned has acted or failed to act in the past.'*

and *Cheatle v General Medical Council [2009] EWHC 645 (Admin) (27 March 2009)* which stated:

> *'…a panel must engage in a two-step process. First, it must decide whether there has been misconduct, deficient professional performance or whether the other circumstances set out in the section are present. Then it must go on to determine whether, as a result, fitness to practise is impaired.'*

19. Given the principles of these cases, Mr McCartney submitted that this Tribunal should consider the context of Dr Keller's case. This includes Dr Keller's self-referral to NHS England; that he is retired and relinquished his license in August 2018; that he has apologised for his actions; and that he has reviewed his practice with regards professional boundaries and GMP, engaging with the guidance.

20. Mr McCartney concluded by submitted that, given the context of the case and that there was no real risk of Dr Keller repeating his actions, whether it was the case that Dr Keller's misconduct was so egregious as to give rise to the need to make a finding of impairment.

The Relevant Legal Principles

21. 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.

22. In approaching the decision, the Tribunal was mindful of the Legally Qualified Chair's advice and 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 could lead to a finding of impairment.

23. The Tribunal must determine whether Dr Keller's fitness to practise is impaired as at today, taking into account Dr Keller'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. The Tribunal must also consider whether Dr Keller has exhibited remorse and/or has demonstrated insight into his actions, and whether he would, if faced with the same situations again in the future, act differently.

24. Finally, the Tribunal noted that, having considered these matters, even if it concluded that Dr Keller is not currently impaired on a personal basis by reference to the *Cohen* test outlined above, the case of *Grant* stated that there may be wider issues of public interest which required a finding of impairment in any event in order to uphold proper professional standards and public confidence in the regulator, as follows:

> *'The Committee should therefore have asked themselves not only whether the Registrant continued to present a risk to members of the public, but whether the need to uphold proper professional standards and public confidence in the Registrant and in the profession would be undermined if a finding of impairment of fitness to practise were not made in the circumstances of this case.'*

The Tribunal's Determination on Impairment

25. The Tribunal began by assessing each paragraph of the Allegation as to whether Dr Keller's conduct amounted to misconduct. When making its determination, it was mindful that Dr Keller's representative, Mr McCartney, made no submissions on the matter of misconduct and said that Dr Keller had recognised that his actions were wrong.

Paragraph 1

26. In relation to whether Paragraph 1 of the Allegation amounted to misconduct, the Tribunal had regard to the circumstances of Dr Keller's life at that time, 2014 to 2015. XXX

27. The Tribunal appreciated that Patient A had instigated the relationship with Dr Keller and that Dr Keller's actions in initially forming the relationship were not sexually motivated. Instead, it found that there were possible innocent explanations for the relationship forming and that the activities detailed in Paragraph 1 were to be expected between people who were friendly with each other in a small community.

28. Tribunal noted that Dr Keller had admitted, and the Tribunal had found proved, that his relationship with Patient A was '*inappropriate'*. The Tribunal considered that, because of this factor, Dr Keller's actions had breached GMP and the guidance set out in '*Maintaining a professional boundary between you and your patient'*. Accordingly, it found that he had fallen below the standard expected of doctors. However, given the nature and circumstances of Dr Keller's relationship with Patient A at that time, it did not consider that Dr Keller's actions were so serious as to amount misconduct. The Tribunal therefore found that Paragraph 1 did not amount to misconduct.

Paragraph 2

29. The Tribunal next considered Paragraph 2 of the Allegation. It was mindful that it had been found that Dr Keller's actions were sexually motivated, and that at all material times Patient A was a vulnerable person. The Tribunal bore in mind that such factors were always regarded as serious since they went to the core of a doctor/patient relationship and therefore had little hesitation in concluding that Dr Keller's actions outlined in Paragraph 2 amounted to serious misconduct.

Paragraph 3

30. The Tribunal noted that, during the period 2014 to 2017, Dr Keller treated Patient A on numerous occasions (as set out in Schedule 1 of the Allegation) and that in the period of their "*closer relationship*" from November 2016 to May 2017, Dr Keller was virtually the only GP that Patient A saw throughout this time. It further noted that Dr Keller saw Patient A on over ten occasions during this period, including two visits to Patient A's home. It considered that, at the time, Dr Keller would have been well aware of GMP and the guidance regarding treatment of vulnerable people, which latter indicates that, at

the time when Patient A suggested that they begin the closer relationship, he should have treated Patient A *politely and considerately'* and tried *'to re-establish a professional boundary'.* It also states that forming a relationship with a vulnerable person is likely to be an abuse of power.

31. It appeared to the Tribunal that, clinically, Dr Keller's treatment of Patient A and the records he made of their consultations in the period of their closer relationship could be considered as within the normal expectations of a GP. It found no evidence that Dr Keller specifically used his consultations with Patient A to further his own sexual motives. Nevertheless, the Tribunal was mindful that once Dr Keller had formed the closer relationship with Patient A, any contact with her could bolster the relationship. In this way, by becoming involved in a closer relationship with, and continuing to treat Patient A, it found that Dr Keller had fallen seriously below of the standards expected of a doctor. The Tribunal therefore found that Dr Keller's actions set out in Paragraph 3 of the Allegation amounted to misconduct.

Paragraph 4

32. The Tribunal noted that Paragraph 4 of the Allegation was, essentially, a statement of fact which did not allege any specific actions on Dr Keller's part but set out a factor that emphasised the reasons why Dr Keller should not have become involved in a relationship with Patient A and thereby enhanced the gravity of his actions. The Tribunal therefore found that, as this was a factor it had already taken into account when considering the seriousness of the other paragraphs of the Allegation, it is not a paragraph upon which it was required to make a separate finding of misconduct.

Paragraph 5

33. Lastly, the Tribunal considered Paragraph 5 of the Allegation. The Tribunal noted that it had been agreed between the parties that Dr Keller's sexual motivation was in pursuit of a future consensual relationship and was not predatory. However, The Tribunal found that, despite these factors, Dr Keller's actions were inappropriate and a serious breach of GMP. It therefore found that, because Dr Keller's conduct in forming a closer relationship with Patient A was sexually motivated, it did amount to serious misconduct.

Impairment

34. Having determined that Paragraphs 2, 3 and 5 (at all times taking Paragraph 4 into account) amounted to serious misconduct, the Tribunal went on to determine whether Dr Keller was impaired by reason of his serious misconduct. It found the test set out in *Cohen* to be helpful.

35. The Tribunal therefore first considered whether Dr Keller's misconduct could be remediated. It noted that Dr Keller had several personal issues at the time of his relationship with Patient A which he acknowledged were part of the reasons the relationship began. The Tribunal also noted that Dr Keller has had an unblemished career and that his relationship with Patient A could be considered as a one-off incident. Finally, the Tribunal considered that such conduct was not fundamentally incapable of remediation. Against that background, the Tribunal concluded that behaving in the way that Dr Keller did, was a matter that could be remediated, notwithstanding that it would not necessarily be easy.

36. The Tribunal therefore went on to consider whether Dr Keller had remediated his misconduct. The Tribunal noted that the relationship with Patient A had occurred over many years, and had become closer over the final period of eight to nine months. It noted that Dr Keller had self-referred the issue to NHS England, XXX. This gives rise to the possibility that Dr Keller did not have insight into the severity of his actions until they were discovered. Finally, the Tribunal notes that Dr Keller has been candid enough to have made some admissions.

37. However, Dr Keller has not presented any specific apology to Patient A or his colleagues at the practice nor has he provided any reflections on what effect his actions might have had, not only on Patient A, but on his colleagues and the profession generally. Further, despite attending a professional boundaries course, Dr Keller has not provided any reflection on what he learned from the course or how he would avoid the situation arising again in the future.

38. Having said that, the Tribunal was mindful that Dr Keller was aware that Patient A had responded badly to the breakup of their relationship. This included Dr Keller misinterpreting a text message from Patient A in August 2019 XXX. The Tribunal considered that Dr Keller's concern for Patient A at this time was an indication that he may be more aware of how his actions could affect a future vulnerable patient.

39. However, overall, taking all of the above factors into account, although the Tribunal accepts that Dr Keller has developed some insight, it considers that he has not demonstrated full insight or remorse. The Tribunal therefore concluded that Dr Keller has yet to sufficiently remediate his misconduct.

40. The Tribunal next considered whether there was any risk of Dr Keller repeating his actions. It noted that Dr Keller had retired and has relinquished his licence to practise medicine. It was mindful that if Dr Keller wished to return to practice, there were several safeguards in place before he could regain his license, and that this may mean it was difficult for him to return to unrestricted practice.

41. The Tribunal also noted that, following his self-referral, Dr Keller had been through several different investigatory processes, including those leading to these proceedings and those conducted by NHS England. It considered that, as Dr Keller probably would not wish to repeat such invasive processes in the future, such would provide a clear incentive not to behave in this way again.

42. However, the Tribunal was also mindful that Patient A sent Dr Keller a text message on 2 August 2019, over a year after their close relationship is alleged to have ended and well after the matter had been referred to the GMC. Dr D indicated that Dr Keller had told her that he and Patient A continued to have contact through WhatsApp, although by that time the Tribunal understands that he had moved away from the area and was no longer practising as a GP. No explanation has been provided for this continuing contact, which may in itself have been a breach of the guidance on professional boundaries in relation to a former patient. Given these considerations, the Tribunal found that, although the risk of Dr Keller repeating his misconduct was, arguably, low, the fact that Dr Keller had continued to maintain contact with Patient A led the Tribunal to conclude that Dr Keller might be susceptible to repeating his actions and therefore that there remained a risk of repetition.

43. Accordingly, having determined that Dr Keller has not yet remedied his failings and that there remains a risk of repetition, the Tribunal determined that he remains impaired on a personal basis.

44. Finally, the Tribunal went on to consider whether it should find impairment on public interest grounds. The Tribunal reminded itself that Dr Keller's actions in Paragraphs 2, 3 and 5 fell far below the standards expected of a doctor, and that part of the Tribunal's

objective is to uphold and maintain standards in the medical profession. Moreover, the Tribunal considered that, as concerns remained about patient safety, a message had to be sent the profession that Dr Keller's conduct must not be repeated. The Tribunal therefore found that a finding of impaired was required on public interest grounds on the basis of upholding proper professional standards and public confidence in the profession and in its regulator.

Determination on Sanction - 27/10/2021

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

2. Having determined that Dr Keller's fitness to practise is impaired by reason of his 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

3. The Tribunal has taken into account evidence received during the earlier stages of the hearing where relevant to reaching a decision on sanction. The Tribunal received further evidence on behalf of Dr Keller in the form of an email to NHS England from Dr Keller dated 22 June 2018 regarding his reflections on the professional boundaries course he attended.

Submissions

On behalf of the GMC

4. Ms Johnson submitted that this was a serious case in which Dr Keller had abused his professional position as a doctor when entering into a relationship with Patient A. Ms Johnson said that this was an aggravating feature of this case, and reminded the Tribunal that trust was the foundation of the doctor / patient relationship.

5. Ms Johnson drew the Tribunal's attention to paragraphs 145 and 146 of the Sanctions Guidance (November 2020) ('SG'), which state:

145 Where a patient is particularly vulnerable, there is an even greater duty on the doctor to safeguard the patient. Some patients are likely to be more vulnerable than others because of certain characteristics or circumstances, such as:

a presence of mental health issues[…]

146 Using their professional position to pursue a sexual or improper emotional relationship with a vulnerable patient is an aggravating factor that increases the gravity of the concern and is likely to require more serious action against a doctor.

Ms Johnson submitted that the circumstances of this case fall within the parameters set out in these paragraphs of SG, as Patient A was vulnerable. She said that this was therefore a further aggravating feature. Further, Ms Johnson reminded the Tribunal that Dr Keller had denied the allegation that Patient A was vulnerable, which she submitted was a significant aspect of this case.

6. Ms Johnson submitted that Dr Keller took little or no action to distance himself as the relationship developed with Patient A. He continued to see Patient A, conduct examinations and prescribed her medication, despite his knowledge of her medical history.

7. In relation to mitigation, Ms Johnson accepted that Dr Keller has had a long, unblemished career, that this Tribunal received a number of positive testimonials, and that the incidents concluded in 2017, with no evidence of any repetition since.

8. In addition, Ms Johnson submitted that Dr Keller had made some admissions to the allegation and had self-referred to NHS England. However, she noted in the Tribunal's determination at the impairment stage that it had found that Dr Keller had not demonstrated insight or remorse, nor has he apologised to Patient A or his partners at the GP practice. She said that the Tribunal had also found that Dr Keller had not sufficiently remediated his misconduct. Ms Johnsons submitted that these could also be considered aggravating features in this case.

9. When considering which sanction the Tribunal should impose in this case, Ms Johnson submitted that, whilst Dr Keller is no longer in work, taking no action would be inappropriate as this is not an exceptional case. Ms Johnson also submitted that imposing a period of conditions on Dr Keller's registration would not address the

concerns raised by this case. Additionally, conditions would not be workable as they are mostly intended to help doctors remedy issues with their medical practice.

10. Ms Johnson submitted that suspending Dr Keller's registration would also not be appropriate. She submitted that because Dr Keller had formed a sexually motived relationship with a vulnerable patient, his conduct was incompatible with continued registration.

11. Ms Johnson drew the Tribunal's attention to paragraphs 107 – 109 and 148 of SG, which state:

> *107 The tribunal may erase a doctor from the medical register in any case – except one that relates solely to the doctor's health and/or knowledge of English – where this is the only means of protecting the public.*
>
> *108 Erasure may be appropriate even where the doctor does not present a risk to patient safety, but where this action is necessary to maintain public confidence in the profession. For example, if a doctor has shown a blatant disregard for the safeguards designed to protect members of the public and maintain high standards within the profession that is incompatible with continued registration as a doctor.*
>
> *109 Any of the following factors being present may indicate erasure is appropriate (this list is not exhaustive).*
>
> > *a A particularly serious departure from the principles set out in Good medical practice where the behaviour is fundamentally incompatible with being a doctor.*
> > *b A deliberate or reckless disregard for the principles set out in Good medical practice and/or patient safety.*
> > *c Doing serious harm to others (patients or otherwise), either deliberately or through incompetence and particularly where there is a continuing risk to patients.*
> > *d Abuse of position/trust*
> > *e Violation of a patient's rights/exploiting vulnerable people*
> > *[…]*
> > *i Putting their own interests before those of their patients*

148 More serious action, such as erasure, is likely to be appropriate where a doctor has abused their professional position and their conduct involves predatory behaviour or a vulnerable patient, or constitutes a criminal offence.

12. Ms Johnson concluded by submitting that paragraph 109 of SG contained a number of aggravating features that were relevant to this case, and only a sanction of erasure would meet the overarching objective, as indicated in paragraph 148 of SG.

On behalf of Dr Keller

13. Mr McCartney submitted that Dr Keller had an unblemished career of 40 years, retiring from practice in 2018. Mr McCartney drew the Tribunal's attention to the testimonials it had received, which detailed Dr Keller's sensitivity, professionalism, kindness and integrity.

14. Mr McCartney submitted that it was important to put Dr Keller's misconduct into context. Mr McCartney reminded the Tribunal that it has been accepted that Dr Keller did not act in a predatory way and that he and Patient A entered into a mutually consensual relationship following a period of friendship. Mr McCartney maintained that this occurred at a time when Dr Keller was XXX, coping with XXX. Mr McCartney submitted that the context of the relationship should be an important consideration when applying the principle of proportionality and assessing the appropriate sanction.

15. Mr McCartney further submitted that the Tribunal found Patient A's vulnerability did not play a part in the events which occurred in Paragraphs 1 and 2 of the Allegation. He also submitted that the GMC asserted that Patient A's vulnerability was not at the top end of the scale. Further, Mr McCartney submitted that the perception of Patient A's level of vulnerability had shifted throughout the hearing. Therefore, the Tribunal should be careful what weight it placed on Dr Keller's denial of Paragraph 4 of the Allegation and the suggestion that this represents a lack of insight.

16. Mr McCartney submitted that Dr Keller's insight into his misconduct could be assessed by his actions and admissions to most of the Allegation. In addition, Dr Keller had self-referred to NHS England, apologised for his actions, had voluntary relinquished his licence to practise, and removed himself from the performer's list. Mr McCartney submitted that Dr Keller had also attended a professional boundaries course shortly after the events had concluded and provided reflections on his conduct. Mr McCartney

submitted that these reflections demonstrate that Dr Keller understood why his relationship with Patient A was unacceptable.

17. In relation to the WhatsApp messages considered in the Tribunal's determination on impairment, Mr McCartney submitted that the Tribunal did not have any context for the message. Further, he said it was to Dr Keller's credit that he had reported the message to a colleague in order to address any concerns the message raised.

18. When considering what sanction the Tribunal could impose in this case, Mr McCartney reminded the Tribunal that sanctions are not intended to punish the doctor. He submitted that the risk of Dr Keller repeating his actions was low due to his retirement. However, simply because Dr Keller was now retired, the Tribunal should not consider erasure is the most appropriate sanction. He said that Dr Keller's reputation is important and that any sanction should be proportionate to the circumstances and context of the case, not just the current position of Dr Keller.

19. Mr McCartney submitted that SG reminds the Tribunal to consider the context of a doctor's circumstances. He submitted that the Tribunal should take into account XXX and that, although he had allowed his friendship with Patient A to cross a professional boundary, he had not acted in a predatory way. In this regard, Dr Keller's actions did not justify a sanction of erasure.

20. Mr McCartney submitted that he recognised a sanction of conditions would not be appropriate for a retired doctor. Instead, a sanction of suspension would maintain standards and confidence in the medical profession; balance the Tribunal's need to send a message to the profession that Dr Keller's behaviour was unacceptable; be proportionate to the circumstances and nature of allegations; and recognise that whilst Dr Keller's actions fell below the standards expected of a doctor, they are not fundamentally incompatible with continued registration.

The Tribunal's Determination on Sanction

21. The Tribunal considered that there were the following aggravating and mitigating factors in this case.

Mitigating

- Dr Keller appears to have understood the concerns raised by the Allegation, including admitting his failings and some paragraphs of the Allegation, demonstrating some insight into his misconduct.
- Dr Keller self-referred to NHS England, demonstrating a timely development of further insight
- Dr Keller voluntarily withdrew from the performer's list and revoked his licence to practise medicine
- Dr Keller has given a general apology for his actions
- Dr Keller has appeared to show some concerns for Patient A, demonstrated by his actions when he received the WhatsApp messages (as considered in the Tribunal's determination on Impairment)
- There has been a lapse of time since the incident, with no indication that Dr Keller has repeated his misconduct, save for the issue of the WhatsApp messages, which the Tribunal considers only evidences contact between them and does not constitute any reliable evidence of an inappropriate relationship
- Dr Keller does not appear to have contacted Patient A since the WhatsApp messages, and has moved away from the location of the events.
- It is accepted that Dr Keller's relationship with Patient A was consensual, and that the earlier stages did not amount to misconduct
- XXX
- Although the reflection referred to in paragraph 3 above does little to alter the Tribunal's view in relation to the likelihood of repetition of his actions, and also noting that the evidence regarding the WhatsApp messaging is inconclusive, the Tribunal does consider that, overall, the risk of repetition is, arguably, low.

<u>Aggravating</u>

- Dr Keller has not provided sufficient evidence that he has fully reflected on the impact of his actions on Patient A, his colleagues or the medical profession. This suggested to the Tribunal that his insight is not complete.
- Patient A was vulnerable due to XXX
- Dr Keller continued to receive messages from Patient A after his self-referral, as identified in the Tribunal's consideration of the WhatsApp messages
- Dr Keller did not take timely action to stop his friendship with Patient A forming or developing, despite guidance indicating that it should not occur
- In forming a relationship with Patient A, Dr Keller abused his professional position.

- Dr Keller's actions in relation to paragraph 2 of the Allegation were sexually motivated, albeit not predatory. Bearing also in mind that the relationship was consensual, the Tribunal considered that Dr Keller's sexual misconduct was not at the higher end of the scale of misconduct.
- Patient A appeared to react badly to the ending of the relationship with Dr Keller. However, the Tribunal noted that there was little or no information on this point.
- Dr Keller continued to consult with Patient A as her GP throughout the events, which included seeing her almost exclusively during the time of their closer relationship, with two visits to Patient A's home

The decision on Sanction

22. The decision as to the appropriate sanction to impose, if any, in this case is a matter for this Tribunal exercising its own judgement.

23. In reaching its decision, the Tribunal has taken account of the Sanctions Guidance (November 2020) ('SG') and of the overarching objective. Throughout its deliberations, the Tribunal has applied the principle of proportionality, balancing Dr Keller's interests with the public interest. It has borne in mind that the purpose of sanctions is not to be punitive, but to protect patients and the wider public interest, although the sanction may have a punitive effect.

24. In coming to its decision as to the appropriate sanction, if any, to impose in Dr Keller's case, the Tribunal first considered whether to conclude the case by taking no action.

No action

25. The Tribunal noted that there were no exceptional circumstances in this case to consider.

26. The Tribunal therefore determined that although Dr Keller is retired, given the serious nature of the Tribunal's findings on impairment, it would be neither sufficient, proportionate nor in the public interest, to conclude this case by taking no action.

Conditions

27. The Tribunal next considered whether it would be sufficient to impose conditions on Dr Keller's registration. It has borne in mind that any conditions imposed would need to be appropriate, proportionate, workable and measurable.

28. The Tribunal noted that Dr Keller was retired, and was unlikely to return to medical practice. Further, there was evidence before the Tribunal that it would be practically difficult for Dr Keller to return, given that he had relinquished his licence and removed himself from the performer's register. Therefore, the Tribunal considered that imposing conditions would, in any event, not be workable, as there would not be a way for Dr Keller to comply with them.

29. The Tribunal therefore determined that it would not be sufficient to direct the imposition of conditions on Dr Keller's registration.

Suspension

30. The Tribunal then went on to consider whether suspending Dr Keller's registration would be appropriate and proportionate. It had regard to paragraphs 91 - 93 of SG, 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 (ie for which erasure is more likely to be the appropriate sanction because the tribunal considers that the doctor should not practise again either for public safety reasons or to protect the reputation of the profession).*
>
> *93 Suspension may be appropriate, for example, where there may have been acknowledgement of fault and where the tribunal is satisfied that the behaviour or incident is unlikely to be repeated. The tribunal may wish to see evidence that the doctor has taken steps to mitigate their actions*

31. The Tribunal also noted paragraph 97 of the SG, the relevant parts of which state:

> *97 Some or all of the following factors being present (this list is not exhaustive) would indicate suspension may be appropriate.*
>
> > *a A serious breach of Good medical practice, but where the doctor's misconduct is not fundamentally incompatible with their continued registration, therefore complete removal from the medical register would not be in the public interest. However, the breach is serious enough that any sanction lower than a suspension would not be sufficient to protect the public or maintain confidence in doctors*
> >
> > *e No evidence that demonstrates remediation is unlikely to be successful, eg 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.*

32. The Tribunal considered that the key question it had to decide was whether Dr Keller's misconduct was "*fundamentally incompatible with [his] continued registration*". Having taken full regard to the the mitigating and aggravating circumstances, the Tribunal concluded that Dr Keller's misconduct was not so incompatible, particularly noting that: their relationship was at all times consensual; the closer phase of the relationship between Dr Keller and Patient A did not develop into full intimacy; neither Patient A's vulnerability nor Dr Keller's sexual misconduct were at the higher end of their respective scales; and Dr Keller did not seek to cover up his actions but self-referred to NHS England. In addition, he has developed some insight and has accepted that what he did was wrong.

33. Accordingly, the Tribunal was led to an initial finding that Suspension would be the appropriate and proportionate sanction.

34. Having made that initial conclusion, the Tribunal nonetheless went on to consider whether erasure would be appropriate, as argued by Ms Johnson. It noted her submissions that the following factors in paragraph 109 of SG to be present.

> *109 Any of the following factors being present may indicate erasure is appropriate*
>
> *a A particularly serious departure from the principles set out in Good medical practice where the behaviour is fundamentally incompatible with being a doctor.*
> *[…]*
> *d Abuse of position/trust*
> *[…]*
> *e Violation of a patient's rights/exploiting vulnerable people*
> *[…]*
> *i Putting their own interests before those of their patients*

35. The Tribunal accepted that a sanction of erasure was arguably appropriate based solely on the factors outlined above. However, The Tribunal remained of the view that Dr Keller's behaviour was not fundamentally incompatible with continued registration bearing in mind the mitigating factors and the context of this case, and therefore concluded that erasure would be disproportionate.

36. The Tribunal therefore determined that suspending Dr Keller's registration was sufficient to meet the concerns of the public and uphold standards in the medical profession. It considered that suspension would send a message to fellow doctors that Dr Keller's behaviour was unacceptable.

37. When considering the length of Dr Keller's suspension, the Tribunal was mindful that, notwithstanding that his misconduct was ultimately not incompatible with continued registration, it was nonetheless serious and could, absent the mitigating factors, have led to erasure. The Tribunal therefore determined to suspend Dr Keller's registration for a period of 12 months.

38. The Tribunal next considered whether a review would be required towards the end of Dr Keller's suspension. The Tribunal noted that Dr Keller is retired. It had previously considered the difficulties Dr Keller would face in attempting to return to practise. It would therefore serve no benefit to review Dr Keller's progress. The Tribunal consequently determined that a review of Dr Keller's case would not be necessary.

Determination on Immediate Order - 27/10/2021

1. Having determined to suspend Dr Keller's registration, the Tribunal will now consider, in accordance with Rule 17(2)(o) of the Rules, whether Dr Keller's registration should be subject to an immediate order.

Submissions

On behalf of the GMC

2. Ms Johnson submitted that it would be appropriate to make an immediate order.

On behalf of Dr Keller

3. Mr McCartney submitted that given Dr Keller is not working, there is no objection to Ms Johnson's submission.

The Tribunal's Determination

4. The Tribunal had regard to the seriousness of Dr Keller's misconduct. It noted that Mr McCartney did not oppose the imposition of an immediate order on Dr Keller's behalf. It therefore found that an immediate order of suspension was necessary to mark the seriousness of Dr Keller's conduct and protect the public.

5. This means that Dr Keller's registration will be suspended from when notification is deemed to have been served. The substantive direction, as already announced, will take effect 28 days from the date when written notice of this determination has been served upon Dr Keller, 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.

6. The interim order of conditions currently imposed on Dr Keller's registration will be revoked when the immediate order takes effect.

Confirmed
Date 27 October 2021 Mr Robin Ince, Chair

ANNEX A – 27/10/2021

Application to Exclude the Public from the Proceedings

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

2. At the outset of the hearing, Mr McCartney, on behalf of Dr Keller, made an application under Rule 41 of the General Medical Council (Fitness to Practise Rules) 2004 as amended ('the Rules') for the public to be excluded from the proceedings. The Tribunal determined that the application should, in any event, be heard entirely in private.

Evidence

3. The Tribunal noted the entirety of the evidence to be considered at the facts stage that was available to it. It had particular regard to the public and confidential hearing information sheets, Dr Keller's witness statement and the details of Dr Keller's meetings with NHS England.

Submissions

On behalf of Dr Keller

4. Mr McCartney submitted that matters relating to XXX, XXX should remain in private. In addition, Mr McCartney submitted that issues relating to XXX, should also remain in private.

5. However, Mr McCartney submitted that other matters, not currently considered as private, may also lead to the identification of Patient A, through a triangulation of the information. This included reference to the location of the events in the Allegation and the allegation that Dr Keller walked a dog with Patient A. He submitted that Dr Keller and Patient A lived in a small community and that the material to be considered (such as that contained in Dr Keller's witness statement) could be sufficient for members of that community to identify Patient A.

6. Mr McCartney submitted that, if the Tribunal did not determine to hold the entirety of this hearing in private, then it should give consideration to holding parts of the hearing in private.

On behalf of the GMC

7. Ms Johnson indicated that the GMC opposed Mr McCartney's application in relation to holding the entire hearing in private, although it had no objection to holding part of the hearing in private. She submitted that hearings should only be held in private on the rarest of circumstances, and not doing so would undermine the concept of open justice and public confidence in the profession.

8. However, Ms Johnson submitted that the GMC was already concerned that Patient A could be identified and had already taken steps to ensure she had been anonymised. XXX

9. In addition, Ms Johnson noted that XXX, had already been made confidential, and that she was content for these to be discussed in private.

10. In relation to the location of the events, Ms Johnson submitted that the GP's surgery referred to had 12,000 - 13,000 patients and was the only one serving that community. She said that this meant there would be a significant number of female patients visiting the surgery. Ms Johnson therefore submitted that there did not appear to be any further details that could lead to the revelation of the identity of Patient A.

11. In relation to the specific allegation that Dr Keller walked a dog with Patient A, she submitted that the GMC considered this allegation did not have sufficient unique features which would lead to the identification of Patient A.

Tribunal's Decision

12. The Tribunal had regard to Rule 41 of the Rules, in particular the considerations outlined in Rule 41(6), which reads as follows:

> *(6) Subject to paragraph (5), the Committee or Tribunal may, where they are considering matters under paragraph (3)(a) or (b), hold a hearing in public where they consider that to do so would be appropriate, having regard to-*
>
> > *(a) the interests of the maker of the allegation (if any);*
> > *(b) the interests of any patient concerned;*
> > *(c) whether a public hearing would adversely affect the health of the practitioner; and*
> > *(d) all the circumstances, including the public interest.*

13. The Tribunal noted that there was already information in the public domain XXX. However, the Tribunal was mindful that any further references to these matters could lead to a situation where there was sufficient information to more easily identify Patient A.

14. The Tribunal was also mindful that any discussions regarding XXX would already normally be heard in private.

15. Given these matters, the Tribunal gave significant consideration to the suggestion that this hearing may be easier to facilitate were it held entirely in private. However, in doing so, it would not serve the public interest in ensuring that hearings are held in public where possible. The Tribunal concluded that it could carefully balance the need to hold the hearing in public, whilst ensuring that any further mention of the matters referred to by Mr McCartney was not made publicly, so as not to facilitate any further identification of Patient A.

16. The Tribunal therefore refused Mr McCartney's application in part, and determined to hold the hearing in public, except when the following matters are being considered:

    1. XXX
    2. XXX
    3. XXX

ANNEX B – 21/10/2021

Application under Rule 17(2)(g)

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

2. At the end of the GMC case, Mr McCartney, on behalf of Dr Keller, made an application under Rule 17(2)(g) of the Rules, which states:

    'The practitioner may make submissions regarding whether sufficient evidence has been adduced to find some or all of the facts proved, and the MPT shall consider and announce its decision as to whether any such submission should be upheld.'

3. Mr McCartney submitted that his application was in relation to paragraph 5 of the Allegation (which stated that: "*Your conduct as described at paragraphs 1 and 2 was sexually motivated*" insofar as it related to Paragraph 1 (sexual motivation in relation to Paragraph 2 having previously been admitted and found proved by the Tribunal).

Submissions

On behalf of Dr Keller

4. Mr McCartney submitted that the nature of Dr Keller's relationship with Patient A was different between 2014/2015 and 2016/2017 and that this is acknowledged in the different wordings of the Allegation at Paragraphs 1 and 2:

> *1. In or around 2014 or 2015, you established inappropriate contact with Patient A outside of your doctor/patient relationship and you:*
>
> *a. engaged in text message conversations;*
>
> *b. went out for coffee;*
>
> *c. walked the dog together.*
>
> *2. In or around 2016 or 2017, you became involved in a closer relationship with Patient A, during which you:*
>
> *a. kissed;*
>
> *b. cuddled.*

5. In addition, Mr McCartney contrasted the wording of Paragraph 1, in which Dr Keller's relationship with Patient A is described as '*inappropriate contact*', with that of Paragraph 2, where his relationship was described as '*closer'*. Mr McCartney submitted that this demonstrated that the GMC recognised that these were two distinct periods in the development of the relationship between Dr Keller and Patient A. Mr McCartney submitted that Dr Keller had explained, in his account to NHS England, that his closer relationship with Patient A had developed in late 2017, and that this was consistent with Dr Keller's response to the Allegations.

6. Mr McCartney drew the Tribunal's attention to the case of *Soni v The General Medical Council [2015] EWHC 364 (Admin)* which provided guidance with regard to reliance upon inferences to establish the state of mind alleged.

> *61[…] the principle must nonetheless apply that before an inference could properly be drawn, the Panel had to be able safely to exclude, as less than probable, other possible explanations for Mr Soni's conduct.*

67[…] There was in my judgment no direct evidence, and no basis for a safe inference,[…] on which the Panel could reasonably reject the alternative explanations.

68[…]With all respect to the Panel, I am afraid it must have confused grounds for suspicion with evidence sufficient to prove, on the balance of probabilities, a serious allegation against a professional man.

69 I also conclude that no future Panel could be in any different position if the case were remitted. Any future Panel, before it could infer dishonesty, would have to consider whether the evidence showed other possible explanations, and if so whether it could safely conclude that those other explanations were less probable than deliberate dishonesty.[…]

7. Mr McCartney submitted that the GMC's case is that, simply because Dr Keller had admitted that his actions set out in Paragraph 2 of the Allegation were sexually motivated, so his actions in Paragraph 1 must also have been sexually motivated. Mr McCartney submitted that such an approach fails to recognise that the GMC must adduce sufficient evidence upon which the Tribunal could make a safe conclusion about the motivation of Dr Keller's actions. Mr McCartney concluded that there was no other evidence which, either directly or by inference, could allow the Tribunal to safely prove the allegation.

8. Further, Mr McCartney submitted that Dr Keller's actions set out in Paragraph 1 did not, in themselves, give rise to an inference of sexual motivation.

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

9. Ms Johnson submitted that Dr Keller's actions set out in Paragraph 1 should not be viewed in a vacuum, but instead should be seen as a build up to his actions in Paragraph 2. In this way, Ms Johnson submitted the Tribunal could take a view that his actions in the earlier period were sexually motivated.

10. Ms Johnson submitted that there were inconsistencies in Dr Keller's account of his relationship with Patient A. She submitted that in Dr Keller's first account, his self-referral to NHS England, he describes the relationship as an *'intense friendship'* that was *'in no way physical'*. However, in later accounts, Dr Keller described the relationship as deeper, that it could have been an affair and *that the physical nature was kissing and cuddling.* She submitted that these inconsistencies should be taken into account by the Tribunal when assessing the state of the relationship at the stage described in Paragraph 1 and whether Dr Keller's actions were sexually motivated.

11. Given these two factors, Ms Johnson submitted that this is not a case where no inferences could be drawn, as there was sufficient evidence to do so and that this evidence was not of a tenuous nature.

Legal Advice

12. The Tribunal acknowledged the written and/or oral submissions of Mr McCartney and Ms Johnson.

13. The Tribunal had regard to Rule 17 (2)(g), as set out above, and the case of *R v Galbraith [1981] 1 WLR 1039*, in which Lord Lane CJ stated:

> *"If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty - the judge will stop the case. 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. Where the judge concludes that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, on a submission being made, to stop the case. Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witnesses reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence on which the jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury."*

14. The Tribunal noted that this authority had been applied by the courts to disciplinary proceedings, recently in the case of *Solicitors Regulation Authority v Sheikh [2020] EWHC 3062 (Admin)* where Davis LJ held that the key question at the half-time stage is whether, on one possible view of the evidence, there is evidence upon which a reasonable tribunal (not all reasonable tribunals) could find the matter proved when making the final adjudication. If the answer is yes, then there is a case to answer.

15. The Tribunal approached its decision making by asking itself the following questions

    1. *Has the GMC presented any evidence upon which the Tribunal could find that allegation or element proved?*

    If not, then the answer is straightforward. The burden of proof has not been discharged and there is no case to answer in respect of that allegation or element.

    Where the GMC has presented some relevant evidence, then the Tribunal will move on to address the following questions:

    2. *Is the evidence so unsatisfactory in nature that the Tribunal could not find the allegation or element proved?*

3. *If the strength of the evidence rests upon the Tribunal's assessment of the reliability of a witness, is that witness so unreliable or discredited that the allegation or element is not capable of being proved?*

In addressing these questions, the Tribunal took note of the burden and standard of proof, remembering that it is for the GMC to prove the facts alleged and that the requisite standard of proof is the balance of probabilities If either questions 2 or 3 were answered in the affirmative, then again there is no case to answer in respect of that allegation or element.

16. The Tribunal also bore in mind that it had to concentrate solely upon the evidence produced to it by the GMC, which included: Dr Keller's interviews to NHS England in June and July 2018 and his response to the Rule 7 letter. However, it did not include Dr Keller's statement dated 18 August 2021 notwithstanding that it had been disclosed in the hearing bundle.

17. Otherwise, the Tribunal took account of the Legally Qualified Chair's advice, which was read into the record, and which included reference to the cases of: *Re B (Children) (Care Proceedings: Standard of Proof) (CAFCASS intervening) [2008] 3 WLR 1: [2009] 1 AC; Basson v GMC [2018] EWHC 505 (Admin); Haris v GMC [2021] EWCA Civ 763 and Arunkalaivanan v GMC [2014] EWHC 873 (Admin*). It noted that these authorities confirmed that, when considering the issue of alleged sexual motivation of a Doctor:

- what was in a Doctor's mind, whether in relation to an alleged sexual motivation or in relation to belief or knowledge of facts, was not something that could be proved by direct observation but could only be proved by inference or deduction from the surrounding evidence;
- a Tribunal had to examine all the evidence and the circumstances of the case, including the facts, the history, the Doctor's explanations and any evidence as to his character, and then consider whether the alleged state of mind could reasonably be inferred from the evidence;
- a Tribunal had to decide whether the conduct was done either in pursuit of sexual gratification or in pursuit of a future sexual relationship (the Tribunal noted that the GMC bases its case on the latter alternative); and
- that a Tribunal could consider a number of factors including, but not limited to:

(i) The character of the conduct (i.e. is it overtly sexual, e.g. the touching of sexual organs); and
(ii) The plausibility of any alternative explanation for the conduct (in particular taking account of the guidance as set out in the case of *Soni* above).

Tribunal's Decision

18. The Tribunal first asked itself the following question: *Has the GMC presented any evidence upon which the Tribunal could find that allegation or element proved?* It first considered whether the actions described in Paragraph 1 of the Allegation alone (namely engaging in text message conversations, going out for coffee and walking the dog together) could lead the Tribunal to draw an inference that Dr Keller was sexually motivated when he carried them out in 2014/15. It noted that the evidence before the Tribunal was that: Dr Keller and Patient A lived in the same town and socialised in the same circles; Patient A had XXX offered support to him (by initially obtaining his mobile telephone number, which was how contact was established in 2014); and they developed a friendship, discussed personal matters and lent each other emotional support which resulted in the activities listed in Paragraph 1.

19. Taking these activities by themselves, the Tribunal considered that these actions arguably were equally, if not more, commensurate with the situation of friends wishing to offer support to each other XXX and that such activities would not be uncommon in a close community. It therefore was drawn to the conclusion that, on their own, Dr Keller's actions, as set out in Paragraph 1, would not be regarded as conduct that was overtly sexual in nature and therefore were not capable, by themselves, of proving the allegation that they were sexually motivated.

20. The Tribunal next considered whether there was sufficient evidence before it from the fact (as admitted by Dr Keller) that, as his actions in Paragraph 2 (kissing and cuddling Patient A) were sexually motivated, it was possible to draw an inference of sexual motivation in relation to his earlier actions in 2014 and 2015. It noted that the evidence before the Tribunal in relation to this later period was that: having described the initial phase of their relationship in 2014/15, in his interview on 6 June 2017 Dr Keller then said that about 8 months before the interview (and therefore in or about November 2016) their relationship became "*deeper*" and could have been considered as an "*affair*" on an emotional level; in his Rule 7 response, he stated that Patient A had told him in 2016/17 that she had developed "*feelings*" for him after which their relationship became closer

(described by Dr Keller as "*love*") and which involved physical kissing and cuddling, but did not progress further because of XXX and the difficulties of arranging meetings; in her discussions with Dr D, Patient A said that Dr Keller was very supportive to her so that she felt loved and had encouraged her to be more independent; and in his self-referral to NHSE on 31 May 2017, Dr Keller stated that their "*fairly intense emotional friendship…probably crossed the line but was in no way physical*" and that the relationship had ended as they realised their relationship was "*unsustainable*".

21. The Tribunal noted that, as in 2014/16, the evidence suggests that Patient A was the one who initiated the further development in their relationship in November 2016 and would comment that the lack of initiation by Dr Keller (in both 2014 and 2016) is arguably not commensurate with someone who has a sexual motivation in developing such a relationship. Furthermore, as a general observation, the Tribunal notes that the mere fact that two people are friendly and supportive to each other for a period of time without developing a sexual relationship does not preclude that couple from subsequently developing that side of the relationship in the future. In addition, the concession by the GMC that it accepts that Dr Keller was not "predatory" appears to the Tribunal to diminish, if not negate, the argument that he must have had a sexual motivation in 2014/15. Finally, the Tribunal considers that, as argued by Mr McCartney, the evidence points to a clear distinction between the nature of the relationship in 2014/15 and 2016/17, which makes it difficult for any adverse inferences to be drawn between them. In particular, it considers that Mr McCartney's submission that the development of their relationship in 2016 did not take place in a vacuum as argued by Ms Johnson since there was a clear history of prior association in 2014/15 has merit. The Tribunal is therefore led to the conclusion that, as there are other explanations for Dr Keller's actions in 2014/15 (namely friendship and support, which were acknowledged by Patient A to Dr D) which appear, on their face, to be equally plausible, it would not be safe to conclude that they were less probable than them being sexually motivated as suggested by the GMC. Accordingly, the Tribunal considers that the GMC has not presented any evidence upon which the Tribunal could find that there was a reasonable inference of a sexual motivation in relation to the actions described in Paragraph 1.

22. The Tribunal noted Ms Johnson's submission that there appeared to be inconsistencies in Dr Keller's accounts of the physicality of his relationship with Patient A. The Tribunal acknowledges that this, potentially, is capable of being a factor in this case but considered that, by itself, such a possible discrepancy would not have any significant adverse effect on the other evidence before it which points towards there being no

sexual motivation. Moreover, the Tribunal considers that Mr McCartney's argument (that there is some uncertainty as to precisely what Dr Keller meant in his initial self-referral when he stated "*although it was in no way physical*", especially bearing in mind that the apparent inconsistency relates to paragraph 2 and to a different time period, and not in relation to Paragraph 1) also has merit.

23. Accordingly, for the reasons stated above, the Tribunal concluded that, taking the evidence at its highest, no reasonable Tribunal would be able safely to conclude that Dr Keller's actions in Paragraph 1 were sexually motivated. It therefore determined to grant Mr McCartney's application and to withdraw that part of Paragraph 5 of the Allegation which refers to Paragraph 1.

SCHEDULE 1

Date	Extract
22.1.13	XXX
22.3.13	XXX
5.4.13	XXX
21.5.13	XXX
9.7.13	XXX
23.7.13	XXX
15.11.13	XXX
22.11.13	XXX
29.11.13	XXX
6.12.13	XXX
10.1.14	XXX
14.1.14	XXX
17.1.14	XXX
24.1.14	XXX
14.2.14	XXX
21.3.14	XXX
2.5.14	XXX
10.6.14	XXX
19.8.14	XXX
23.9.14	XXX
30.9.14	XXX
3.10.14	XXX
10.2.15	XXX
27.2.15	XXX
9.5.15	XXX
5.6.15	XXX
31.7.15	XXX
11.8.15	XXX
~~15.8.15~~ 15.9.15 Amended under rule 17(6)	XXX
27.10.15	XXX

30.10.15	XXX
6.11.15	XXX
4.12.15	XXX
11.12.15	XXX
15.12.15	XXX
8.1.16	XXX
9.2.16	XXX
1.3.16	XXX
4.3.16	XXX
1.4.16	XXX
19.4.16	XXX
26.4.16	XXX
21.6.16	XXX
1.7.16	XXX
12.7.16	XXX
9.9.16	XXX
25.10.16	XXX
1.11.16	XXX
2.11.16	XXX
11.11.16	XXX
18.11.16	XXX
25.11.16	XXX
9.12.16	XXX
13.12.16	XXX
10.1.17	XXX
13.1.17	XXX
31.1.17	XXX
3.2.17	XXX
10.2.17	XXX
24.2.17	XXX
28.2.17	XXX
24.3.17	XXX
31.3.17	XXX
31.3.17	XXX
21.4.17	XXX
28.4.17	XXX

12.5.17	XXX
16.5.17	XXX
24.5.17	XXX
26.5.17	XXX
30.5.17	XXX
13.6.17	XXX
16.6.17	XXX
4.7.17	XXX
6.7.17	XXX
7.7.17	XXX
18.7.17	XXX
21.7.17	XXX
1.8.17	XXX
22.8.17	XXX
25.8.17	XXX
8.9.17	XXX
22.9.17	XXX
26.9.17	XXX
29.9.17	XXX
3.10.17	XXX
5.10.17	XXX
26.10.17	XXX
27.10.17	XXX
7.11.17	XXX
21.11.17	XXX
24.11.17	XXX
28.11.17	XXX
5.12.17	XXX
8.12.17	XXX
15.12.17	XXX
19.12.17	XXX
22.12.17	XXX
29.12.17	XXX
12.1.18	XXX
5.2.18	XXX
15.2.18	XXX

20.2.18	XXX
23.2.18	XXX
27.2.18	XXX
27.2.18	XXX
2.3.18	XXX
9.3.18	XXX
20.4.18	XXX
24.4.18	XXX
4.5.18	XXX
11.5.18	XXX
22.5.18	XXX

SCHEDULE 2

1. XXX

2. XXX