

PUBLIC RECORD

Dates: 23/09/2024

Medical Practitioner's name:	Dr Raisah SAWATI
GMC reference number:	7266794
Primary medical qualification:	MB ChB 2012 University of Manchester
Type of case	MPT - Preliminary

Tribunal:

Medical Tribunal Member (Chair)	Miss Debi Gould
Lay Tribunal Member:	Dr Amit Jinabhai
Medical Tribunal Member:	Dr Kate Thomas
Tribunal Clerk:	Mr Matt O'Reilly

Attendance and Representation:

Medical Practitioner:	Not present, represented
Medical Practitioner's Representative:	Mr Martin Forde KC, instructed by CMS
GMC Representative:	Ms Laura Barbour, Counsel

Attendance of Press / Public

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

Overarching Objective

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

Determination on Preliminary Matters - 23/09/2024

Application to Adduce Evidence

1. This is a preliminary MPT hearing in respect of Dr Sawati's upcoming substantive MPT hearing, due to commence on 30 September 2024. The GMC application before this Tribunal is in respect of the admission of evidence to be put before the upcoming substantive MPT hearing. The application is opposed by the defence on behalf of Dr Sawati.

Background

2. During the COVID pandemic, it remained necessary for all deaths to be certified, but due to the demands being placed on doctors at this time, the rules regarding certification were relaxed. Any doctor who had reviewed a patient's records were able to complete the death certificate and the cremation form, regardless of whether they had cared for the patient. There was no longer a requirement to examine the body of the deceased prior to completion of the cremation form.

3. At the material time Dr Sawati was working at Foundation Year 2 level with conditions on her registration that required her to be directly supervised. On 5 April 2020, she was told by Professor A, her clinical supervisor, that she was to move from Arrowe Park Hospital to Clatterbridge Hospital where she would be supervised by Professor B. Dr Sawati attended work at Clatterbridge on 6 April 2020. After she finished work that day, she returned to Arrowe Park Hospital where she attended the bereavement office to complete death certification documents.

4. It is the GMC's case that Dr Sawati should not have completed this paperwork independently as she was subject to conditions on her registration that she must be directly supervised but that she chose to do so because of the potential of her being remunerated for that work. The GMC's case is that Dr Sawati acted dishonestly.

5. It is Dr Sawati's case that she accepts undertaking the work but did not appreciate that this was in breach of the conditions.

6. This case was initially listed for hearing in June 2023, commenced but was adjourned part heard. Before the adjournment, the 2023 Tribunal heard evidence from six witnesses: Dr G, Professor B, Ms I, Professor A, Dr F and Ms E. The evidence of the first four witnesses was

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audio recorded and reduced to written transcripts. Due to human error, no recording was made on the day that Dr F and Ms E gave evidence and no transcripts of their evidence exists. Regrettably, one of the Tribunal members for personal reasons was unable to return to hear the case. Consequently, the hearing could not be completed and a new Tribunal was appointed to hear the case commencing on 30 September 2024.

Summary of submissions on behalf of the GMC

7. Ms Barbour applied to admit into evidence selected sections of the transcripts of evidence given by Dr G, Professor B, Ms I, and Professor A pursuant to Rule 34(1) of the General Medical Council (Fitness to Practise) Rules 2004 ('the Rules'). This provides that:

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

8. Ms Barbour submitted that the contents of the transcripts are relevant because they contain the earlier accounts of the witnesses about the central facts in issue. She further submitted that as they are plainly relevant evidence, they should be admitted unless there is a compelling reason not to admit them. Ms Barbour submitted that there is no such reason.

9. Ms Barbour submitted that the process by which the evidence was obtained was fair and that Dr Sawati will not be exposed to any unfairness by virtue of the Tribunal having the transcripts. She further submitted that given the passage of time, the witnesses' memories of events are likely to have deteriorated so it was in the interests of justice that the Tribunal have the transcripts. Ms Barbour further submitted that Tribunals tasked with determining allegations are regularly provided with a copy of transcriptions of evidence given in earlier hearings. Ms Barbour cited as an example, where evidence is given by a complainant in a sexual misconduct case in the Crown Court, or where there has been an interrupted hearing. Ms Barbour submitted that there could be no perceived prejudice or harm in the new Tribunal being made aware of the evidence provided during the 2023 hearing.

10. Ms Barbour submitted that having the transcripts will provide the new Tribunal with the fullest understanding of the factual matrix, particularly the system and processes around death certification and cremation forms and the changes in the rules relating to this. She further submitted that witnesses gave evidence of conversations that took place in 2020 when they gave evidence in 2023, and their recollection of those was likely to have been better in 2023 than now. Ms Barbour submitted that the witnesses gave evidence and

assumed that their involvement was over and this would therefore reduce their memory still further.

11. Finally, Ms Barbour submitted that witness statements take many forms and often exhibit other material like an ABE transcript, a statement given to an internal investigation or even the whole of an internal investigation and that a transcript of evidence given previously was no different. Ms Barbour submitted that the evidence would help a Tribunal determine the issues of fact and as there was no unfairness caused by its admission, it should be admitted.

Summary of submissions on behalf of Dr Sawati

12. Mr Forde submitted that the hearing commencing 30 September 2024 should be conducted in the usual way. Mr Forde submitted that although Rule 34(1) can be used to admit evidence which would not ordinarily be admitted in civil or criminal courts, it was generally used to admit hearsay evidence where, for example, a witness was unable to attend a hearing to give oral evidence about a matter. It was also a means used to deal with “gaps in the evidence”. Mr Forde submitted that it should not be utilised when there are no evidential “gaps” to be filled.

13. Mr Forde submitted that as the witnesses were available to give evidence it was inappropriate to admit the transcripts of evidence they had given previously. Live evidence could be given, listened to, weighed and assessed by the Tribunal in the normal way. Mr Forde submitted that the GMC has not been allowed to admit transcripts of evidence in previous cases without the agreement of the parties. He further submitted that the Tribunal should follow the ordinary procedure which was that the witnesses would be able to read their witness statements in advance of the hearing in the usual way and then confirm their accuracy and truthfulness during the hearing. This would stand as their evidence as ordinarily occurred.

14. Mr Forde submitted that there was a very real risk of a miscarriage of justice if the transcripts are admitted. He expressed concern that Dr Sawati would not know whether the new Tribunal’s decision was based on the oral evidence given by the witnesses, or upon evidence given to the 2023 Tribunal.

15. Mr Forde submitted that the admission of the transcripts would represent a serious departure from the usual way in which hearings are dealt with where live evidence is to be called.

16. Mr Forde submitted that to rely upon Rule 34(1) in relation to the admissibility of evidence when the witnesses were available to give live evidence and to be cross-examined upon the same is bordering on an abuse of process. He submitted that the application should be rejected.

The Tribunal's decision

17. The Legally Qualified Chair advised the Tribunal that the matter should be determined in accordance with Rule 34(1) of the Rules, namely that; *"The Committee or a Tribunal may admit any evidence that they consider fair and relevant to the case before them, whether or not such evidence would be admissible in a court of law"*. It is a matter for the Tribunal's discretion. The Legally Qualified Chair reminded the Tribunal that simply because evidence is relevant it does not follow that it is admissible. The guiding principle in determining admissibility of evidence is whether to do so would be fair, balancing the interests of both sides.

18. The Tribunal considered that both parties accepted that the transcripts were hearsay evidence. Both parties also agreed that their contents were relevant to the matters in issue in the case.

19. The Tribunal considered that the starting point was that the Rules established a clear procedure to be followed in a substantive hearing, namely that any witness whose evidence was not accepted by the other party should be available for cross-examination by that party. The witness's evidence in chief was their witness statement and the party calling the witness was entitled to ask supplemental questions. The Tribunal considered that the section of the transcripts which the GMC sought to adduce contained material which could, and should, have been included in a witness statement. The Tribunal was given no reason why this had not been done.

20. The Tribunal also considered that the transcripts included not only information obtained through evidence in chief but also through cross-examination. This meant that the new Tribunal would read how the witness was challenged about matters on a previous occasion and their response to that challenge. The Tribunal read the transcripts. It took into account that to understand the transcripts the Tribunal would need to have a copy of the original bundle to enable it to cross reference documents referred to, often as part of an advocate's question. The Tribunal considered this to be awkward and unwieldy. The Tribunal accepted Mr Forde's submission that transcripts of the June 2023 hearing would add a layer of confusion for the upcoming substantive Tribunal.

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21. The Tribunal also took into account that Dr Sawati had new representation and that Mr Forde might choose to adopt a different approach to cross-examination that had been previously undertaken. The Tribunal was concerned that this might cause a perception of bias or raise queries in the new Tribunal as to why a different approach was being adopted and that this could be unfair to Dr Sawati.

22. Further the Tribunal noted that only four of the witnesses had transcripts of their evidence. The Tribunal would not only read their witness statements and hear their oral evidence, it would also have that evidence repeated in the transcripts and their responses to challenge repeated. Dr Sawati had not given evidence before and so the Tribunal would not read how she dealt with matters. The Tribunal was concerned that admitting the transcripts of some witnesses might unduly emphasise that evidence in the minds of a new Tribunal which could lead to unfairness.

23. The Tribunal did not accept that this hearing was any different to many other hearings in relation to witness memory. Many witnesses have to give evidence about old events. The Tribunal considered that as the four witnesses concerned had given evidence in 2023, it was equally arguable that they would have a better memory of events having had to remember and recall it in 2023. It did not, however, follow that when they gave evidence in 2023 that their evidence would be more reliable than any evidence they will give to the new Tribunal given that it relates to events in 2020. The Tribunal also bore in mind that the witnesses would have their original witness statements to refer to upon which they could rely and also contemporaneous documentation.

24. The Tribunal considered that alternative mechanisms could be used to deal with evidence which was not dealt with adequately in their witness statements regarding systems and processes. The GMC could extract those parts of the evidence from the transcripts and produce supplementary witness statements, or the parties could agree formal admissions under Rule 34(6). Although Ms Barbour conceded both options were available and submitted that there was not enough time for this process to be undertaken giving the impending substantive hearing, she did not explain why this had not been dealt with to date. The Tribunal took into account that the witnesses were told in March 2024 that they would be giving evidence again.

25. Finally, the Tribunal considered that, regardless of the rationale given for the inclusion of the transcripts in the hearing bundle, it could have the effect of unfairly bolstering the evidence of those four witnesses who had given evidence previously. The new Tribunal might consciously or unconsciously conclude that the more times an account was repeated, the more likely it is to be true. This approach would be fundamentally incorrect.

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26. The Tribunal also accepted the submission of Mr Forde that there were usual processes and procedures to follow under the Rules and it was highly unusual to give a new Tribunal the transcripts of evidence of some of the witnesses who previously gave evidence as a means of adducing new evidence or due to concerns about memory. The Tribunal did not consider that this case had any particularly exceptional or out of the ordinary circumstances which would suggest that the transcripts needed to be adduced.

27. The Tribunal considered that the transcripts were hearsay evidence and that as all of these witnesses were going to give live evidence again, there was no reason for them to be admitted. If during the course of their evidence, any witness makes a statement inconsistent with evidence given in the transcript and Mr Forde wishes to address this, he can deal with it through putting that part of the transcript only before the Tribunal. If suggestions are made of recent fabrication, Ms Barbour will be entitled to apply to adduce any relevant section. That will be a matter for the substantive Tribunal to determine.

28. This Tribunal considered that a fair process requires that the new Tribunal makes findings based upon the evidence it will hear and see. This Tribunal considered that it would create an impression of unfairness should the new Tribunal take into account part of the oral evidence heard by the 2023 Tribunal who were unable to evaluate it through no fault of Dr Sawati's.

29. For these reasons, the Tribunal determined that it would be unfair to admit this evidence for the substantive hearing. The Tribunal therefore determined to reject the application made on behalf of the GMC.