

## PUBLIC RECORD

Dates: 22/07/2024 - 25/07/2024

Medical Practitioner's name: Dr Russell AUSTIN  
GMC reference number: 2791973  
Primary medical qualification: MB BS 1980 University of Western Australia

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

**Summary of outcome**

Suspension, 3 months.

**Tribunal:**

Legally Qualified Chair	Mrs Aaminah Khan
Lay Tribunal Member:	Ms Rama Krishnan Ramakrishnan
Medical Tribunal Member:	Dr Ann Wolton

Tribunal Clerk:	Mrs Anne Bhatti
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**Attendance and Representation:**

Medical Practitioner:	Present, not represented
GMC Representative:	Ms Rebecca Vanstone, 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 and Impairment - 23/07/2024

### (1) FACTS

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

### **Background**

2. Dr Austin qualified as a doctor in 1980 from the University of Western Australia. At the time of the events Dr Austin was practising as a Consultant Paediatrician at St Catherine's Hospital, Merseyside and at the Wirral University Teaching Hospital, Wirral.
3. The allegation that has led to Dr Austin's hearing can be summarised as that, on or around 17 November 2020, Dr Austin accepted instructions from Ms A, a solicitor acting for a child who was the subject of care proceedings, to act as an expert witness in a case at the Family Court XXX ('Court'). Dr Austin provided an initial expert report on 17 May 2021. However, he was subsequently required to provide an addendum report dealing with clarification questions and to provide his availability to attend an experts meeting, with other experts in the case. It is alleged that Dr Austin failed to comply with his duty as an expert witness, as he did not provide a supplemental expert report, nor his availability to attend the experts meeting, when requested to do so. It is alleged that Dr Austin did not respond adequately to communications from Ms A, her colleagues or a direct email from the Judge of the Court. It is further alleged that Dr Austin ignored two Witness Summons, which were subsequently issued, and failed to attend Court and give evidence on 15 October 2021 and 30 November 2021.
4. The initial concerns were raised with the General Medical Council ('GMC') on 10 November 2021 by Ms A. The Court did not formally sanction Dr Austin in relation to failing to comply with the two Witness Summons, which was on the face of it Contempt of Court, although there was criticism of him in the final Judgment in the case.

## The Allegation and the Doctor's Response

5. The Allegation made against Dr Austin is as follows:

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

1. On or around 17 November 2020, you accepted instruction from Ms A to act as an expert witness in a case being heard by the Family Court sitting XXX ('the Court'), and: **Admitted and found proved**
  - a. you provided a signed declaration dated 17 May 2021 which stated '*...I understand my duty as an expert witness is to the Court. I have complied with the duty and will continue to comply with it...I confirm that I am aware of the requirements of Part 25 and Practice Direction 25A...'*'; **Admitted and found proved**
    - i. you failed to comply with your duty as an expert witness in that you did not provide an addendum report dealing with clarification questions when requested to do so; **Admitted and found proved**
    - ii. did not provide your availability to attend at an experts meeting to be held between 10 September 2021 and 1 October 2021 when requested to do so between 15 June 2021 and 02 August 2021; **Admitted and found proved**
    - iii. did not respond adequately or at all to communication from:
      1. Ms A, between 26 January 2021 and 19 January 2022; **Admitted and found proved**
      2. Ms A's colleagues, between 25 March 2021 and 12 October 2021; **To be determined**
      3. Her Honour Judge Walker, on or around 24 August 2021. **Admitted and found proved**
2. On 27 September 2021, a Witness Summons ('the First Summons') was issued by the Court, and:
  - a. the First Summons ordered you to attend the Court to give evidence on 15 October 2021; **Admitted and found proved**

- b. you failed to attend the Court to give evidence on 15 October 2021.  
**Admitted and found proved**
3. On 9 November 2021, a Witness Summons ('the Second Summons') was issued by the Court, and:
  - a. the Second Summons ordered you to attend the Court to give evidence on 30 November 2021; **Admitted and found proved**
  - b. you failed to attend the Court to give evidence on 30 November 2021.  
**Admitted and found proved**

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

6. Dr Austin admitted the Allegation in its entirety at the outset of the hearing. The Tribunal determined that this was an admission by Dr Austin of the entirety of the Allegation. Therefore, in accordance with Rule 17(2)(e) of the General Medical Council (Fitness to Practise Rules) 2004 as amended ('the Rules'), the Tribunal announced these paragraphs and sub-paragraphs of the Allegation as admitted and found proved. Accordingly, the case proceeded to stage two of the hearing.

## (2) IMPAIRMENT

### Witness Evidence

7. The Tribunal received evidence on behalf of the GMC in the form of witness statement from the following witness who was not called to give oral evidence:
  - Ms A, Solicitor, XXX, witness statement dated 8 September 2022.
8. Dr Austin did not provide a witness statement to the Tribunal. Dr Austin provided a two-page reflective document, contained in an email dated 10 June 2024.

## Documentary Evidence

9. The Tribunal had regard to the documentary evidence provided by the parties. This evidence included but was not limited to:
- Correspondence between Ms A, Solicitor, XXX and Dr Austin, various dates;
  - Family Court proceedings documentation, various dates;
  - Family Court Judgment dated 14 December 2021;
  - Two witness summons for Dr Austin dated 15 October 2021 and 9 November 2021.

## Submissions

### On behalf of the GMC

10. On behalf of the GMC, Ms Rebecca Vanstone, Counsel, submitted that Dr Austin’s fitness to practise is impaired by reason of misconduct. She submitted that misconduct is not defined, however guidance from the authorities suggests that it is a word of general effect representing an act or omission that falls short of what is expected of a practitioner in the circumstances. She submitted that Dr Austin had breached the overarching objective, namely, to promote and maintain public confidence in the medical profession and to promote and maintain proper professional standards and conduct for members of the profession.
11. Ms Vanstone submitted that Dr Austin had breached paragraph 81 of Good Medical Practice dated January 2024 which stated, *‘you must make sure that your conduct justifies patients trust in you and the public’s trust in your profession’*. She referred the Tribunal to the guidance entitled *‘Providing Witness Statements or Expert Evidence as Part of Legal Proceedings’* (‘the Guidance dated 2024’).
12. In the Guidance dated 2024 it stated that it was clear from a number of high-profile court and tribunal cases that, where significant concerns arise about the quality of expert evidence, this may affect public confidence in expert opinion. It was essential that medical professionals acting as expert witnesses, maintain high standards, given the potential for justice not to be correctly served. Ms Vanstone acknowledged there was no suggestion in this case that the expert opinion initially provided by Dr Austin was anything other than of sufficient quality. She referred the Tribunal to paragraph 12.3 of the Guidance dated 2024, that states *‘You must respond promptly to requests for your*

*input. And take all practical steps to meet the agreed dates to provide statements or reports - and attend case conferences or preliminary case management hearings as required'.*

13. Ms Vanstone submitted that not complying with Good Medical Practice, breaching the overarching objective and not complying with the expert witness Guidance dated 2024, represent conduct that amounts to misconduct. She submitted that there was no suggestion that the misconduct represented any risk to patients, but she submitted, that there had been the potential for harm to the public as a result of Dr Austin's actions. In the Judgment from the Family Court, it stated that consideration was given to the instruction of an alternative expert to replace Dr Austin when he stopped engaging, however this would have caused further delay of the care proceedings and there was already some delay to those proceedings from the many attempts to engage Dr Austin and the issue of two Witness Summons.
14. Ms Vanstone submitted that from Dr Austin's non-attendance and non-engagement, that any delay arising out of that was significant in the context of the facts of that case, which were care proceedings for a child, exploring whether injuries to the child may have been caused by a parent and whether the child should be returned to the care of the parents. Ms Vanstone referred the Tribunal to correspondence dated 2 December 2021 from Ms A to the GMC following the 30 November 2021 Court hearing, which confirmed that Dr Austin had not attended and the case had been adjourned as a result. Ms A stated that they may have to consider instructing a new paediatrician to undertake the work which Dr Austin failed to complete and a direct result of this there may be further delay in the Court being able to make a final decision regarding her client who was a child in these proceedings. If this occurred, it would create an additional expense to the legal aid agency and the local authority. However, the final fact-finding hearing did subsequently proceed in Dr Austin's absence, which meant that the Court was left to determine issues without the oral evidence of a paediatrician.
15. Ms Vanstone referred the Tribunal to the Judge's comments in the Judgment dated 14 December 2021 ('Judgment'), that significant time had already been spent on trying to secure Dr Austin's attendance. The Judge stated that as a result of Dr Austin's failure to engage with the proceedings and provide his addendum report, the Judge had refused two applications by the Guardian for the instruction of an alternative paediatrician, as if allowed those applications would have delayed any decision being made about the child's future for many more months and perhaps that was the most significant and

harmful effect of Dr Austin's conduct. The Judgment stated that Public Law litigation concerns the welfare of vulnerable children and all those engaged in the process have a duty to keep that at the front of their mind but the specific legal consequence of Dr Austin's default within this hearing was clear, the parties had been denied the opportunity to put questions to him either written or oral. Ms Vanstone submitted that the GMC say that whilst there was no issue regarding Dr Austin's clinical abilities, his action gave rise to potential harm to the public interest, through damaging confidence in the profession and the maintenance of standards.

16. Ms Vanstone submitted that public confidence in the profession and the GMC's role as a regulator would be undermined if no finding of impairment was made. She referred the Tribunal to the case of *CHRE v NMC and P Grant [2011] EWHC 927 (Admin)* ('Grant') and submitted that two of the limbs of the test for impairment in that case (set out below) applied, namely (b) that the conduct brought the profession into disrepute and (c) that it breached a fundamental tenet of the profession. Dr Austin had explained in his reflections the extremely difficult time that he had been through, which the GMC acknowledged and had sympathy with. However, Ms Vanstone submitted that Dr Austin's non-engagement continued for a period of 12 months, he was given the opportunity to withdraw from his role as an expert in the family proceedings but did not formally do so, and that it appeared that he continued to work in clinical practice for at least part of the period of time that the allegation covers. In all of the circumstances, the GMC invited the Tribunal to conclude that a finding of current impairment is necessary on public interest grounds.

#### Dr Austin

17. Dr Austin invited the Tribunal to look at his reflections again and submitted that the two key messages from that, from his point of view and as a paediatrician for 42 years, was that stress and resilience had always been part of his workplace. In fact, being under severe stress and losing his resilience he thought had a huge bearing upon this matter from his point of view. He had made apologies in his written reflections and had now retired from practice in good faith. He confirmed that he would not be giving oral evidence at the hearing, as he had included everything that he wanted to say in his written reflections. Furthermore, he confirmed, when asked by the Tribunal to clarify his future plans, that he had fully retired and would not be carrying out any future work.

## The Relevant Legal Principles

18. 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.
19. The Tribunal was reminded that it must have regard to the statutory overarching objective of the General Medical Council, which is to protect the public.
20. The Legally Qualified Chair advised the Tribunal that it was a staged process and misconduct had to be considered first and if found, to then go on to consider current impairment. Misconduct can be classed as some act or omission falling short of what would be proper in the circumstances; the standard to apply of what is proper is often found by reference to the rules and standards ordinarily required to be followed by a professional in the particular circumstances, for example the standards in Good Medical Practice dated April 2019 ('GMP').
21. The Tribunal was mindful that in this case there are also the standards to be expected to be followed by expert witnesses, set out in their professional duties, which they owe to the courts, the court's procedural rules and the GMC's separate guidance for doctors on being an expert witness.
22. It should be misconduct linked to the practice of medicine or conduct that otherwise brings the profession into disrepute, *Roylance v. The General Medical Council (Medical Act 1983) [2000] 1 A.C. 311* ('Roylance'). The Tribunal will need to consider whether the facts found proved amount to conduct that is sufficiently serious to amount to misconduct.
23. This threshold has been described in the case of *General Medical Council v Meadow [2006] EWCA Civ 1390* as being conduct which would be regarded as deplorable by fellow practitioners. However, it does not necessarily require moral turpitude, an elementary and grievous failure can also reach the threshold of serious misconduct, *Preiss v General Dental Conduct [2001] 1 WLR 1296*.
24. There needs to be conduct that was more than trivial or inconsequential. In relation to acts that could be described as negligence, it was stated in the case of *Calhaem, R (on the application of) v General Medical Council [2007] EWHC 2606 (Admin)*:



*‘Mere negligence does not constitute "misconduct" within the meaning of section 35C(2)(a) of the Medical Act 1983. Nevertheless, and depending upon the circumstances, negligent acts or omissions which are particularly serious may amount to "misconduct". A single negligent act or omission is less likely to cross the threshold of "misconduct" than multiple acts or omissions. Nevertheless, and depending upon the circumstances, a single negligent act or omission, if particularly grave, could be characterised as "misconduct"’*

25. If the Tribunal are satisfied that there has been failings or conduct which amount to misconduct that is serious, it should go on to consider impairment. The Tribunal should consider the factors arising from the case of *Cohen v General Medical Council [2008] EWHC 581 (Admin)*, which are:
- 1) Whether the misconduct is easily remediable;
  - 2) Whether it has been remedied;
  - 3) Whether there is a risk of repetition of the behaviour in the future
26. Insight was a key aspect in the determination of the issues of remediation and ongoing impairment.
27. The Tribunal considered the factors identified by Dame Janet Smith in The Fifth Shipman Report, cited in Grant. This guidance said that any of the following factors are likely to be present when a doctor’s fitness to practise is found to be impaired, that is whether the doctor:
- a. Has in the past acted and/or is liable in the future to act so as to put a patient or patients at unwarranted risk of harm; and/or*
  - b. Has in the past and/or is liable in the future to bring the medical profession into disrepute; and/or*
  - c. Has in the past breached and/or is liable in the future to breach one of the fundamental tenets of the medical profession; and/or*
  - d. Has in the past and/or is liable in the future to act in such a way that their integrity can no longer be relied upon.’*

## The Tribunal's Determination on Impairment

28. The Tribunal has considered the Allegation, all of the evidence before it and the submissions that it has heard in order to make its findings on Misconduct and current Impairment.

### Misconduct

29. The Tribunal first considered whether the facts found proved, as admitted by Dr Austin, amount to misconduct. Misconduct can be found in circumstances where there have been serious departures from expected standards of conduct and behaviour, often identified by reference to the paragraphs of GMP and where relevant, other guidance for doctors.

30. The Tribunal had regard to the following paragraphs of the GMP:

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

...

*73 You must cooperate with formal inquiries and complaints procedures and must offer all relevant information while following the guidance in Confidentiality.'*

31. The Tribunal noted that Ms Vanstone had referred to paragraph 81 of Good Medical Practice, in the current version, dated 30 January 2024. However, the Tribunal was of the view that this version of the guidance was not applicable in this case because the date of the misconduct was prior to this date, being in 2021. The Tribunal considered the relevant guidance to be that which was in force at the time of events, therefore considered the version of Good Medical Practice dated April 2013.
32. The Tribunal bore in mind that Dr Austin had failed to adhere to two witness summons and did not respond to numerous types of correspondence from Ms A over the course of 12 months, as well as from Ms A's colleagues and to an email sent directly by the Judge. Although Ms A had not made a formal complaint as such, she had notified Dr Austin's regulator, the GMC, to escalate matters and had obtained two witness summonses, in an attempt to make Dr Austin comply with his duties as an expert witness. The Tribunal considered that this was akin to a formal inquiry into Dr Austin's conduct as an expert

witness, which he ought to have responded to and co-operated with and therefore paragraph 73 was relevant.

33. The Tribunal bore in mind the guidance, ‘Acting as a witness in legal proceedings’ dated April 2013 (‘the Guidance dated 2013’), which stated:

*‘5 You must understand your role as a witness throughout the court process. You must cooperate with case management, making sure you meet the timescales for producing reports and going to conferences, meetings or court hearings.*

...

*18 You must understand and follow the law and codes of practice that affect your role as an expert witness. You should consider undertaking training for the role, where available (for example, from your medical defence body or your employer’s legal department). In particular, you should make sure you understand: a how to write a report that follows the procedures set out by the courts b how to give oral evidence’*

34. The Tribunal considered the Guidance dated 2013, rather than the Guidance dated 2024, which it appeared that Ms Vanstone had referred to in her submissions, as it was not in force at the time the misconduct took place. However, the key principle was present in both versions of the guidance at paragraph 5, that experts must meet the timescales for producing reports, attending conferences and hearings. In relation to the requirements placed upon doctors acting as expert witnesses, set out in the guidance above and bearing in mind the wider duties placed upon expert witnesses to cooperate with court procedures, the Tribunal was satisfied that Dr Austin’s conduct, as admitted and found proved, fell far short of the standards that are expected of an expert witness.
35. The Tribunal considered whether the misconduct was serious. The Tribunal bore in mind the Family Court Judgment dated 14 December 2021, where HHJ Walker stated:

*‘20. Dr Austin’s failure to comply with his professional obligations is unexplained and inexcusable...he has not afforded this court with the courtesy of any explanation for his failure to communicate with Ms [A] or myself. He has failed to comply with two witness summons, which I remind myself is a criminal offence for which I could (and I indeed as I have urged by those who represent the father in the course of these proceedings) to have him arrested.*

*21. As a result of his failure to engage with the proceedings since the filing of his report, I have been faced with and have refused two applications by the Guardian for*

*the instruction of an alternative paediatrician. If allowed, those applications would have delayed any decision being made about C's future for many more months, and perhaps that is the most significant and harmful effect of Dr Austin's conduct. Public Law litigation concerns the welfare of vulnerable children and all those engaged in the process have a duty to keep that at the front of their mind. But the specific legal consequence of Dr Austin's default within this hearing is clear; the parties have been denied the opportunity to put questions to him, either written or oral.*

...

*121. As I indicated to the parties, this court and the parties have already spent too much time and energy trying to ensure that Dr Austin complies with his professional obligations, without any success. I am told that he has already been paid his costs for the preparation of his report. Such sanction as I have, such as to make a wasted costs order against him, are likely to prove more problematic and to be even more time consuming.*

*122. The focus of this court has been and will continue to be C. It is my determination not to make any further sanction against Dr Austin, save that I direct that a redacted copy of this judgment should be sent to his professional body. It is also my intention to place an anonymised version of this judgment on BAILLI. All of the court appointed experts will be identified.'*

36. The Tribunal bore in mind that two Witness Summons had been directly served on Dr Austin by hand, he had been aware of them but did not respond to them. Dr Austin appeared to have acted as an expert witness prior to him accepting instructions to act as an expert witness in this case and the Tribunal considered that he ought to have therefore been fully aware of his professional duties when acting as an expert.
37. Dr Austin had ignored Ms A's repeated attempts and her colleagues' attempts to engage him. Dr Austin had ignored the Judge's direct correspondence and appeared to show disregard and disrespect to the Court process which had to be followed whilst carrying out his duties as an expert witness. As a result of Dr Austin's failure, there was delay in arranging an expert's meeting and eventually the case had to proceed without him, in a case which involved a vulnerable child in Family Court care proceedings. The course of conduct occurred on multiple occasions spanning over a period of 12 months, albeit it arose out of the same specific set of circumstances and escalated towards the end.

38. Dr Austin had been given an opportunity by the Judge and his instructing solicitor Ms A, to raise his personal circumstances, however he had not provided any explanation at the time. The Judge had the option of dealing with this matter as a contempt of court whereby Dr Austin's failure could have resulted in imprisonment, but the Judge chose not to take that route. The Tribunal was of the view that the Court and the public put their trust in Dr Austin to act professionally during proceedings as an expert witness.
39. Considering all of the above, the Tribunal determined that the misconduct was serious and Dr Austin's conduct fell far below the standards that would be expected of an expert witness. Furthermore, other members of the medical profession would consider it to be deplorable conduct. The Tribunal was mindful of Dr Austin's very difficult personal circumstances that he was dealing with at the time of the misconduct and the stress that he was experiencing. However, this did not detract from the seriousness of the conduct in the circumstances, given that he was still working in his clinical role at the time, did not have to accept the instructions and could have explained his circumstances when given the opportunity to do so.
40. The Tribunal concluded that Dr Austin's conduct fell far short of the standards of conduct reasonably to be expected of a doctor as to amount to misconduct.

#### Impairment

41. The Tribunal having found that the facts found proved amounted to misconduct, went on to consider whether, as a result of that misconduct, Dr Austin's fitness to practise is currently impaired.
42. The Tribunal was of the view that Dr Austin's misconduct was of a type that was remediable and if remediated, it would be possible in future for Dr Austin to comply again with his expert duties.
43. The Tribunal went on to consider whether the misconduct had been remedied. It considered Dr Austin's reflection document dated 10 June 2024, sent by email to the GMC. The reflection document highlighted the difficulties Dr Austin had had in his personal life for the last few years, it also stated:

*'The future*

*1. To try and get out of the fog*

*[XXX]*

*4. The Space with Retirement I hope will alter my current perception of life*

*5. I am not looking for sympathy but some understanding of how my performance has been affected by work/life pressures over the past 4 years*

*6. At some stage later this year I would like to be able to offer home based Teleclinics but on my terms and in a completely flexible manner*

*I apologise that I have not been functioning on all cylinders and have taken my time in writing the above. The Tribunal I know is necessary and I will appear by video link please. I do not contest what has happened'*

44. The Tribunal bore in mind that Dr Austin in his submissions to the Tribunal stated that he had retired from being a doctor in the NHS and his retirement date was 31 August 2024. Further, he clarified that he was not intending to carry out any work as a doctor in future, including working in Teleclinics.
45. The Tribunal considered that the Family Court proceedings had proceeded without Dr Austin's input. Whilst the GMC had been provided with reasons for why the misconduct had occurred, the reasons had not been provided at the time during the Family Court proceedings. The Tribunal noted that the reflective document provided by Dr Austin was completed relatively recently, in June 2024, and was the only evidence of Dr Austin's reflections before it. It noted that Dr Austin stated in that document that the reflections were very difficult to write.
46. The Tribunal was of the view that Dr Austin's reflective document was brief and focused on his own circumstances, rather than reflecting upon the wider impact of his conduct. XXX. Whilst Dr Austin had apologised in the reflection document, the apology did not acknowledge the impact the misconduct had on the child and family in the court proceedings, the court proceedings themselves, on public confidence in the profession and the reputation of the profession. Furthermore, he did not make reference to his duty to the Court. In addition, Dr Austin had not stated in the reflective document what he would do differently if presented with similar circumstances in the future.

47. The Tribunal bore in mind that Dr Austin decided not to give oral evidence during the hearing and therefore the evidence before the Tribunal regarding the extent of the reflection undertaken, development of insight and other remediation, was limited.
48. The Tribunal also took into consideration that Dr Austin had been working in a substantive role as a Consultant Paediatrician during the misconduct, although he had periods of annual leave during that time. When Ms A had attempted to contact Dr Austin's secretary to try and speak with him, the secretary had notified Ms A on occasions that he was working in his clinic. It appeared that Dr Austin had been functioning in his substantive role as a Consultant Paediatrician. The Tribunal was of the view that Dr Austin ought to have appreciated the seriousness of his conduct when he received two witness summons to give evidence during the proceedings and failed to do so. In the three years since the misconduct Dr Austin has not demonstrated what steps he has taken to remediate the misconduct. Whilst he has apologised in his reflections, this was only sent to the GMC at a relatively late stage on 10 June 2024. The Tribunal acknowledged that Dr Austin has made full admissions to the Allegation and had not sought to contest matters.
49. The Tribunal considered all of the above and concluded that Dr Austin has only shown limited insight into the misconduct and limited remediation. There would be further steps required in order to develop fuller insight and adequately remediate, including reflecting upon the impact of the misconduct upon the parties in the Court proceedings, the Court process, the public and the reputation of the profession.
50. The Tribunal concluded that due to Dr Austin's lack of remediation and limited insight the risk of repetition was real. Although Dr Austin had stated that he had retired, the Tribunal did not have regard to this when assessing the risk of repetition, given that intentions can change.
51. In relation to the test in Grant, set out above, the Tribunal considered that Dr Austin had brought the profession into disrepute and had breached a fundamental tenet of the medical profession in not complying with his duties as an expert witness in court proceedings.
52. In relation to public interest, the Tribunal was of the view that it was in the public interest that expert witnesses behave professionally, comply with their duties as an expert witness and attend court when required. It was damaging to the reputation of the

profession for witness summons to not be complied with. Furthermore, Dr Austin's misconduct was not consistent with promoting and maintaining the proper professional standards and conduct expected of him. His actions amounted to serious breaches of the standards set out in GMP.

53. The Tribunal bore in mind that whilst no harm had been caused to patients and therefore there was no risk to patient safety, the Tribunal was of the view that harm was caused to the public, and to the parties in the family case, as it resulted in a delay and increased costs in those proceedings.
54. The Tribunal considered that a finding of impairment was necessary to promote and maintain public confidence in the medical profession, and to promote and maintain proper professional standards and conduct for members of the profession. The Tribunal determined that public confidence in the medical profession would be undermined if there were no finding of impairment in this case.
55. The Tribunal has therefore determined that Dr Austin's fitness to practise is impaired by reason of misconduct.

#### **Determination on Sanction - 25/07/2024**

1. Having determined that Dr Austin'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**

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

#### **Submissions**

##### On behalf of the GMC

3. Ms Vanstone, on behalf of the GMC, submitted that the appropriate sanction would be a period of suspension from the Medical Register with a review hearing. Ms Vanstone reminded the Tribunal that it was required to assess the mitigating and aggravating



factors in the case. She submitted that it may be a mitigating factor that Dr Austin had shown some insight as he had offered an apology. She submitted that Dr Austin had no previous findings of impairment. Furthermore, Dr Austin had personal difficulties during the period of the misconduct. She submitted that there had been a lapse of time of two years since the incident and no suggestion had been made of any similar behaviour since. Turning to potential aggravating factors, Ms Vanstone submitted that an aggravating factor was Dr Austin's lack of insight in that there had been no real acknowledgment by him of the impact of his actions on those in the care proceedings and upon public confidence in the profession. She submitted that the Tribunal could find that an aggravating factor was his failure to work collaboratively with others.

4. Ms Vanstone reminded the Tribunal to consider the least restrictive sanction first. However, she invited the Tribunal to find that the seriousness of the misconduct required a period of suspension, with a review. She submitted that any lesser sanction would not ensure that proportionate and appropriate weight was given to the wider public interest. She submitted that the Sanctions Guidance, dated 5 February 2024 ('SG'), confirmed that taking no action will only be appropriate in exceptional circumstances, and it stated that those cases are likely to be very rare. It was the GMC's position that notwithstanding Dr Austin's difficult personal circumstances, that this was no such case.
5. Ms Vanstone submitted that conditions were not workable, as Dr Austin had retired from clinical practice. Furthermore, conditions were not appropriate given the seriousness of the misconduct and the Tribunal's earlier findings in this case. She submitted that, as Dr Austin had now retired, conditions would not be practical and workable. Secondly, because this is a case where the public interest, rather than protection of the public, is the main concern, it would be difficult if not impossible, to come up with appropriate conditions that adequately deal with the misconduct and that essentially go beyond anything more than requiring Dr Austin to comply with his professional duties.
6. Ms Vanstone referred the Tribunal to paragraphs 92, 93 and 97 of SG. She submitted there had been a serious departure from GMP and a sanction lower than a suspension would not be sufficient to protect the public. There was no evidence that remediation was unlikely to be successful and no evidence of repetition of similar behaviour since the incident. Dr Austin had retired, which may impact upon any future risk the Tribunal may identify. However, she submitted that Dr Austin's retirement does not impact upon the need for an appropriate and proportionate sanction to uphold the public interest and mark the misconduct that had been found. She submitted that a suspension with a

review would allow Dr Austin time for further insight to be developed and for adequate remediation to be undertaken.

#### Dr Austin

7. Dr Austin submitted that he was in agreement with what had been proposed by the GMC. He submitted that he was not going to practice again. He would be happy to look at his reflections in more detail if that was what was required of him. Dr Austin acknowledged that he had never been a good reflector. He stated that he would remediate further for a review hearing if required. However, he queried the purpose of a review hearing in the circumstances. Dr Austin submitted that as he was stopping medico-legal practice '*full-stop*' and in terms of his clinical practice he had no ambition to go back. Dr Austin stated that it may be easier for him to deregister and understood that he could do that himself. He submitted he could look to do things on a voluntary basis but would be guided by the Tribunal's decision on sanction.

#### **The Tribunal's Determination on Sanction**

8. The Tribunal had regard to the submissions made by parties, but was not bound by them. The decision as to the appropriate sanction, if any, is a matter for the Tribunal's own independent judgement.
9. The Tribunal received legal advice from the Legally Qualified Chair and was reminded that the main reason for imposing any sanction is to protect the public and that sanctions are not imposed to punish doctors, even though they may have a punitive effect. Throughout its deliberations, the Tribunal applied the principle of proportionality, balancing Dr Austin's interests with the public interest.
10. In reaching its decision, the Tribunal took account of the SG and the statutory overarching objective which includes the protection of the public, the maintenance of public confidence in the profession, and the promoting and maintaining of proper professional standards and conduct for members of the profession. The Tribunal was aware that the overarching objective was to be considered as a whole, not giving excessive weight to any one limb. The Tribunal was given legal advice that it should consider the least restrictive sanction first before moving on, if necessary, to the other sanctions moving up the hierarchy, having regard to the SG.

11. The Tribunal bore in mind that exceptional circumstances, which are required to take no action, are unusual, special and uncommon, so such cases are likely to be very rare. It was held in the case of *GMC v Rezk [2023] EWHC 3228* that a finding that a doctor has been a diligent, conscientious and professional doctor on a training programme which he was completing in an exemplary fashion was not '*unusual, special or uncommon*'. Nor was the fact that the doctor was dealing with the stress and strain of working in intensive care unit during the height of the COVID pandemic, as many other doctors were in that position, nor was the fact that if suspended he would lose his training position. However, each case turns on its own facts and whether there were exceptional circumstances would be for the Tribunal to assess.
12. Before deciding what action, if any, to take in respect of Dr Austin's registration, the Tribunal considered and balanced the aggravating and mitigating factors present in this case.

#### Aggravating factors

13. The Tribunal identified the following aggravating factors in this case. Dr Austin's misconduct related to family care proceedings involving a vulnerable child, and any delay to those proceedings could have been significant. Furthermore, Dr Austin did not demonstrate sufficient or timely development of insight and has provided no evidence of remediation.

#### Mitigating factors

14. Having identified the aggravating factors in this case, the Tribunal determined that the mitigating factors present were that Dr Austin was a man of previous good character, with no previous findings of impairment, with a 42 year long, unblemished career. Dr Austin had shown some insight in that he had offered an apology in his reflective document and admitted the Allegation in full at the outset of the hearing. Further mitigating factors were his difficult personal circumstances and the pressures of work, which combined, placed him under particular stress.
15. The Tribunal balanced the aggravating and mitigating factors and was of the view that they were of equal weight.

No action

16. The Tribunal first considered whether to conclude the case by taking no action. It noted that taking no action following a finding of impaired fitness to practise would only be appropriate in exceptional circumstances. The Tribunal was of the view that taking no action was inappropriate due to the serious nature of Dr Austin's misconduct, the Tribunal's findings in respect of impairment and the absence of any exceptional circumstances. The Tribunal acknowledged that Dr Austin had difficult personal circumstances around the time of the misconduct. However, the Tribunal considered that these were insufficient to meet the high threshold of exceptional circumstances, which would warrant no action being taken following a finding of impairment. The Tribunal concluded that it would neither be appropriate, nor proportionate, to conclude this case by taking no action as that outcome would not meet the public interest concerns in this case.

Conditions

17. The Tribunal next considered whether to impose conditions on Dr Austin's registration. The Tribunal had regard to the relevant sections of the SG regarding imposing conditions, in particular paragraphs 81, 82 and 84. The Tribunal was mindful that the concerns in this case were limited to Dr Austin's medico-legal work and there had been no concerns raised regarding his clinical practice. It was of the view that if Dr Austin had continued to undertake medico-legal work then it may have been possible for the Tribunal to formulate appropriate and workable conditions, albeit they would have been narrowly focused upon his lack of communication in his medico-legal practice.

18. However, Dr Austin has now retired from working as a doctor and does not intend to carry out any future medio-legal work. In these circumstances, the Tribunal agreed with the submission of Ms Vanstone, that conditions would not be workable or practical, as Dr Austin would not be able to put appropriate conditions, such as supervision, into effect.

19. The Tribunal determined that conditions would not be sufficient, appropriate, proportionate or in the public interest, given the seriousness of the misconduct and its findings regarding impairment. Furthermore, conditions would not be sufficient to promote or maintain either public confidence in the medical profession or proper professional standards and conduct for members of the medical profession.

Suspension

20. The Tribunal then went on to consider whether imposing a period of suspension on Dr Austin’s registration would be proportionate and sufficient to satisfy the overarching objective.
21. The Tribunal considered paragraphs 91, 92, 93, 97(a), 97(e) and 97(f) of the SG to be particularly relevant to its consideration of suspension:

*‘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...*

...

*97 Some or all of the following factors being present (this list is not exhaustive) would indicate suspension may be appropriate.*

*a A serious departure from Good medical practice, but where the misconduct is not so difficult to remediate that complete removal from the register is in the public interest...*

...

*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.’*

22. The Tribunal considered that all of these paragraphs applied in this case. A suspension in this case would send a signal to Dr Austin, the profession and the public about what is regarded as behaviour unbecoming a registered doctor. Whilst serious, Dr Austin's conduct was not fundamentally incompatible with continued registration. Dr Austin had acknowledged fault, as he had apologised and admitted the Allegation in its entirety at the outset of the hearing.
23. The Tribunal was satisfied that several of the factors in paragraph 97 of the SG, which indicate that a suspension may be appropriate, applied in this case, namely (a), (e) and (f). Dr Austin's conduct was not so difficult to remediate that complete removal from the register is in the public interest. Furthermore, there was no evidence before the Tribunal that demonstrated remediation was unlikely to be successful. In addition, there had been no repetition of similar behaviour in the two and a half years since the misconduct occurred.
24. In considering the sanction of suspension, the Tribunal weighed the doctor's interests against the public interest. The Tribunal determined that the seriousness of Dr Austin's misconduct was such that the public interest would only be met by a period of suspension. Taking all of the evidence, submissions and the SG into account, the Tribunal was satisfied that a period of suspension would appropriately mark the seriousness of Dr Austin's misconduct and send a message to the profession and the public that this behaviour is unacceptable.
25. The Tribunal considered whether erasure from the Medical Register would be an appropriate sanction in this case. However, the Tribunal concluded that an order of erasure would be wholly disproportionate and was not in the public interest. Dr Austin's misconduct was not fundamentally incompatible with continued registration, it was possible to be remediated and it was not the only means of protecting the public. Having considered the relevant part of the SG on erasure, the Tribunal's view, that suspension was the appropriate and proportionate sanction to impose in this case, was reaffirmed.
26. Having determined to suspend Dr Austin's registration, the Tribunal went on to consider the length of that suspension. It bore in mind that no clinical concerns had been raised against Dr Austin and there was no risk to patient safety. The Tribunal was mindful that it had found Dr Austin's fitness to practise was impaired on public interest grounds alone. The misconduct was in relation to Dr Austin's non-compliance with his duties as an

expert witness, including not responding to two Witness Summons and his communication skills. It was the view of the Tribunal that the length of suspension was to mark the public interest rather than to allow time for Dr Austin to develop further insight. The Tribunal considered the seriousness of his conduct and balanced the mitigating and aggravating factors, set out above, when deciding what length of suspension would be proportionate in the circumstances.

27. The Tribunal determined to suspend Dr Austin's registration from the medical register for a period of three months. It was satisfied that such a period adequately marked the seriousness of Dr Austin's misconduct, marked the public interest and upheld the overarching objective to promote or maintain public confidence in the medical profession and proper professional standards and conduct for members of the medical profession. The Tribunal was of the view that a longer period of suspension would be disproportionate and a longer period than necessary to address the public interest, given the mitigating factors in the case.
28. The Tribunal considered whether to direct that a review hearing take place before the three-month period of suspension expired. The Tribunal was mindful that it is important that no doctor is allowed to resume unrestricted practice following a period of suspension unless the Tribunal considers that they are safe to do so. The Tribunal determined not to direct a review of Dr Austin's case on the basis that the suspension imposed in this case was for a relatively short period and for the purpose of marking the public interest. Furthermore, as there were no clinical concerns in relation to Dr Austin's practice and he had now retired, the Tribunal was of the view that it was not necessary or appropriate to impose a review hearing in this case.

#### **Determination on Immediate Order - 25/07/2024**

84. Having determined to suspend Dr Austin's registration, the Tribunal has considered, in accordance with Rule 17(2)(o) of the Rules, whether Dr Austin's registration should be subject to an immediate order.

#### **Submissions**

##### On behalf of the GMC

85. Ms Vanstone, Counsel did not make any submissions on an immediate order.

Dr Austin

86. Dr Austin submitted that an immediate order was not necessary. He submitted that he was not planning on appealing the Tribunal's decision. He submitted that he was due to retire on 31 August 2024. He submitted that he had five more clinical tasks to complete this week and if an immediate order was imposed, he would not be able to complete the outstanding tasks that he needed to address.

**The Tribunal's Determination**

87. In reaching its decision, the Tribunal has exercised its own judgement. The Tribunal has borne in mind that it may impose an immediate order where it is satisfied that it is necessary for the protection of members of the public, is in the public interest, or is in the best interests of the practitioner.

88. The Tribunal had regard to the following paragraph of the SG in relation to immediate orders:

*'173 An immediate order might be particularly appropriate in cases where the doctor poses a risk to patient safety. For example, where they have provided poor clinical care or abused a doctor's special position of trust, or where immediate action must be taken to protect public confidence in the medical profession.'*

89. The Tribunal noted that there are no patient safety concerns and that there are no issues regarding Dr Austin's clinical practice. The Tribunal was of the view that it was not necessary to impose an immediate order on Dr Austin's registration. The Tribunal determined that immediate action did not need to be taken to promote public confidence in the medical profession or satisfy the public interest.

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

91. The Tribunal bore in mind that there is no interim order to revoke.



92. That concludes this case.