Record of Determinations –
Medical Practitioners Tribunal

PUBLIC RECORD

Dates: 30/09/2019 – 07/10/2019
20/07/2020 – 24/07/2020
19/10/2020 – 30/10/2020
24/11/2020 – 27/11/2020
22/02/2021 – 26/02/2021

Medical Practitioner's name:	Mr Emyr CHOWDHURY
GMC reference number:	3676965
Primary medical qualification:	MB ChB 1992 University of Liverpool
Type of case New - Misconduct	**Outcome on impairment** Impaired

Summary of outcome

Erasure

Immediate order imposed

Tribunal:

Lay Tribunal Member (Chair)	Dr Matthew Fiander
Lay Tribunal Member:	Mrs Jillian Alderwick
Medical Tribunal Member:	Dr Andrew Hoyle

Legal Assessor:	Mrs Catherine Audcent (30/09/2019 – 02/10/2019) Miss Rachel Birks (03/10/2019 – 07/10/2019; 20/07/2020 – 24/07/2020; 19/10/2020 – 23/10/2020; 22/02/201 – 26/02/2021) Ms Christina (Alice) Moller (26/10/2020 – 30/10/2020) Mr Rob (Robert) Ward (24/11/2020 – 27/11/2020)
Tribunal Clerk:	Miss Evelyn Kramer (30/09/2019 – 07/10/2019; 20/07/2020 – 24/07/2020; 19/10/2020 –

	30/10/2020); 22/02/2021 – 26/02/2021) Mr David Salad (30/09/2019 – 07/10/2019) Miss Kanwal Rizvi (19/10/2020 – 30/10/2020; 22/02/2021 – 26/02/2021)

Attendance and Representation:

Medical Practitioner:	Present and represented (30/09/2019 – 07/10/2019; 19/10/2020 – 30/10/2020; 22/02/2021 – 26/02/2021) Not present and represented (20/07/2020 – 24/07/2020)
Medical Practitioner's Representative:	Mr Stephen Brassington, Counsel, instructed by Gallagher (formerly MPI Group)
GMC Representative:	Ms Kathryn Johnson, Counsel, instructed by GMC Legal

Attendance of Press / Public

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

Overarching Objective

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

Determination on Facts - 27/11/2020

Background

1. Mr Chowdhury qualified in MB ChB 1992 University of Liverpool. He completed both his Basic Surgical and the Higher Surgical training rotations within the Mersey Deanery in 1999 and 2006 respectively. Mr Chowdhury obtained his specialist surgical training in hip and knee joint replacements after completing fellowship training in hospitals in the UK and USA. Mr Chowdhury has worked for the North West Anglia NHS

Foundation Trust ('the Trust') since 2008. At the time of the events Mr Chowdhury was practising as a Consultant Orthopaedic Surgeon, specialising in hip and knee arthroplasty at Peterborough City Hospital.

2. The allegation that led to Mr Chowdhury's hearing can be summarised as follows, on 11 April 2016, Mr Chowdhury carried out a revision left total knee arthroplasty with distal femoral replacement rotating hinge arthroplasty ('the Procedure') on Patient A. It is alleged that Mr Chowdhury failed to adequately check that the correct-sided replacement prosthesis was being used prior to the Procedure commencing and that a prosthesis for a right knee, was implanted into Patient A's left leg. It is further alleged that following the Procedure, Mr Chowdhury failed to recognise or adequately report the incorrect implantation. It is also alleged that on 30 January 2017, Mr Chowdhury knowingly provided untrue information to Patient A, when he said that it was 'impossible to check' at the time of the Procedure, that the correct-sided replacement prosthesis had been implanted. It is alleged that Mr Chowdhury's actions regarding this information were dishonest.

3. During the hearing, after an adjournment, the Tribunal granted the GMC's application to expand the Allegation against Mr Chowdhury. It is additionally alleged that on 14 April 2016, Mr Chowdhury sent an email stating that up to date x-rays for Patient A showed that the correct-sided implant had been implanted and there had been a labelling error rather than the wrong prosthesis being used. It is alleged that Mr Chowdhury was not in a position to confirm the information in the email as true and that in sending the email, he was dishonest. It is also alleged that Mr Chowdhury's failure to recognise or adequately report the incorrect implantation was due to him having realised that the wrong-sided prosthesis had been implanted into Patient A. It is alleged that this was dishonest. It is further alleged that Mr Chowdhury acted dishonestly in failing to notify Patient A promptly or Patient A's GP, in a letter of 19 September 2016, of the possibility that a wrong-sided prosthesis had been implanted. It is alleged that for these reasons, Mr Chowdhury's fitness to practise is impaired by reason of misconduct.

4. The referral to the GMC was further to the local investigation commissioned by Dr C, Medical Director for the Trust into the 'Serious Incident Never Event' of the wrong-sided prosthesis being implanted into Patient A.

The Outcome of Applications Made during the Facts Stage

5. The Tribunal received an application from Ms Johnson on behalf of the General Medical Council (GMC) to amend paragraph 2 of the Allegation. Following this application and submissions from both parties, the Tribunal determined to amend the Allegation of its own volition, pursuant to Rule 17(6) of the GMC (Fitness to Practise) Rules 2004 ('the Rules'). The Tribunal's full decision is included at Annex A.

6. The Tribunal granted the application made on behalf of Mr Chowdhury by Mr Brassington, made pursuant to Rule 17(2)(g) of the Rules, that there was no case to answer in relation to paragraph 2A of the Allegation. The Tribunal's full decision on the application is included at Annex B.

7. On day five of the hearing, the Tribunal handed down a Position Statement setting out its concerns about the case brought by the GMC against Mr Chowdhury and proposed a way forward. The Tribunal's full Position Statement is included at Annex C.

8. On the following sitting day, having invited submissions from both parties on its proposed way forward, the Tribunal determined, of its own volition, to adjourn proceedings pursuant to Rule 29(2) of the Rules. The Tribunal's full decision is included at Annex D.

9. The Tribunal granted the application made on behalf of the GMC by Ms Johnson, made pursuant to Rule 34 of the Rules to adduce further witness evidence. The Tribunal also granted the GMC application, made pursuant to Rule 17(6) of the Rules to further amend the Allegation. The Tribunal's full decision on both these applications is included at Annex E.

10. The Tribunal rejected the recusal application made on behalf of Mr Chowdhury. The Tribunal's full decision on this application is included at Annex F.

11. The Tribunal determined to amend the Allegation of its own volition, pursuant to Rule 17(6) of the Rules, correcting a misspelling of prosthesis in paragraphs 3B, 3D, 3E, 3F and 3G. Both parties were contacted by email for comment during the deliberations on the facts and agreed to this amendment.

The Allegation and the Doctor's Response

12. The Allegation made against Mr Chowdhury is as follows:

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

1. On 11 April 2016, you carried out a revision left total knee arthroplasty with distal femoral replacement rotating hinge arthroplasty ('the Procedure') on Patient A and you:
   Admitted and found proved

   a. failed to adequately check that the correct-sided replacement prosthesis was being used prior to commencing the Procedure;
      Admitted and found proved

b. inappropriately implanted the wrong-sided replacement prosthesis.
Admitted and found proved

~~2. After the Procedure you failed to adequately recognise that the wrong-sided replacement prosthesis was implanted, in that you did not:~~

a. ~~consider an email or other communication sent to you on 14 April 2016, indicating that the wrong-sided replacement prosthesis was implanted;~~
~~To be determined~~

b. ~~identify that the alignment of the leg was wrong when checking the post-operative x-ray.~~
~~Admitted and found proved~~

~~2A.~~ ~~After the Procedure you failed to recognise that the wrong-sided replacement prosthesis may have been implanted, in that you did not adequately consider an email or other communication with you between 11 and 14 April 2016 indicating that the wrong-sided replacement prosthesis was implanted.~~
Amended under Rule 17(6)
Deleted under Rule 17(2)(g)

2B. After the Procedure you failed to adequately recognise that the wrong-sided replacement prosthesis may have been implanted, in that you did not identify that the alignment of the leg was wrong when checking the post-operative x-ray.
Amended under Rule 17(6)
Admitted and found proved

2C. On 14 April 2016 you sent an email to Ms B stating:
Amended under Rule 17(6)

a. "I have up to date x-rays of this patient [Patient A] that show he has the correct sided implant – left for a left revision";
Admitted and found proved

b. "There is a labelling error";
Admitted and found proved

c. "the label and not the implant is wrong".
Admitted and found proved

2D. You were not in a position to confirm the information you provided at 2C was true as:
Amended under Rule 17(6)

a. up to date x-rays did not show that Patient A had the correct sided implant;
To be determined

b. you did not know that a labelling error had occurred.
To be determined

2E. Your actions as described at paragraph 2C(a) were dishonest by reason of paragraph 2D(a).
Amended under Rule 17(6)
To be determined

2F. Your actions at paragraph 2C(b) and 2C(c) were dishonest by reason of 2D(b).
Amended under Rule 17(6)
To be determined

3A. You failed to adequately report that the wrong-sided replacement prosthesis had been implanted in that you:
Amended under Rule 17(6)
Admitted and found proved

a. delayed filling in the Datix form;
Admitted and found proved

b. did not inform:

i. your Clinical Director;
Admitted and found proved

ii. the Trust Medical Director.
Admitted and found proved

3B. Your failure to act as described in paragraph 3A was due to you having realised that the wrong-sided replacement prosthesis had been implanted.
Amended under Rule 17(6)
To be determined

3C. Your actions as described in paragraph 3A were dishonest by reason of paragraph 3B.
Amended under Rule 17(6)
To be determined

3D. You failed to promptly notify Patient A about the possibility that the wrong-sided replacement prosthesis had been implanted.
Amended under Rule 17(6)
Admitted and found proved

3E. You failed to inform Patient A on 30 August 2016, or as soon as possible thereafter of the possibility that the wrong-sided prosthesis had been implanted.
Amended under Rule 17(6)
To be determined

3F. In a letter of 19 September 2016, you failed to inform Patient A's GP of the possibility that the wrong-sided prosthesis had been implanted.
Amended under Rule 17(6)
Admitted and found proved

3G. Your actions as set out in paragraphs 3D, 3E and 3F were due to you having realised that the wrong sided replacement prosthesis had been implanted.
Amended under Rule 17(6)
To be determined

3H. Your actions as set out in paragraphs 3D, 3E and 3F were dishonest by reason of paragraph 3G.
Amended under Rule 17(6)
To be determined

4. On 30 January 2017, you told Patient A that it was 'impossible to check' at the time of the Procedure, that the correct-sided replacement prosthesis had been implanted, or words to that effect.
   Admitted and found proved

5. The information you provided to Patient A was untrue.
   Admitted and found proved

6. You knew that the information you provided to Patient A was untrue.
   To be determined

7. Your actions as described at paragraphs 4 and 5 were dishonest by reason of paragraph 6.
To be determined

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

13. At the outset of these proceedings, through his counsel, Mr Brassington, Mr Chowdhury 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. When the hearing reconvened on day 12 of these proceedings, Mr Chowdhury made a number of admissions to a number of the paragraphs of the expanded Allegation. In accordance with Rule 17(2)(e) of the Rules, the Tribunal announced these paragraphs and sub-paragraphs of the Allegation as admitted and found proved.

The Facts to be Determined

14. In light of Mr Chowdhury's response to the Allegation made against him, the Tribunal is required to determine the paragraphs and sub-paragraphs remaining.

Factual Witness Evidence

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

- Ms B, at the time of events, Assistant Co-ordinator Administrator at North West Anglia NHS Foundation Trust, in person. Witness statement dated 12 April 2019;
- Ms D, at the time of events, Healthcare Consultant conducting investigations for the Trust, in person. Witness statement dated 18 April 2019;
- Mr E, at the time of events, Senior Sales Executive for Zimmer Biomet, via video-link. Witness statement undated;
- Mr F, Consultant Orthopaedic Surgeon, via video-link. Witness statement dated 8 June 2020.

16. Mr Chowdhury provided his own witness statement, dated 7 August 2018, a supplementary statement dated 27 September 2020 and also gave oral evidence at the hearing. In addition, the Tribunal received evidence from the following witnesses on Mr Chowdhury's behalf:

- Mr G, Consultant Orthopaedic Surgeon at Peterborough City Hospital, in person. Witness statement dated 6 August 2019;

- Mr H, at the time of events, Speciality Doctor in Trauma and Orthopaedics at Peterborough City Hospital, via video-link. Witness statement dated 7 August 2019;
- Mr I, Lead Practitioner and Education lead for the Orthopaedic Operating Theatre Team at the Trust, via video-link. Witness statement dated 31 July 2019; supplementary statement dated 21 October 2020;
- Ms J, Orthopaedic Rota and Administrative Coordinator at the Trust, via video-link. Witness statement dated 9 September 2020;
- Ms K, Senior Medical Secretary to Mr Chowdhury, via video-link. Witness statement dated 25 September 2020.

17. The Tribunal also received evidence on behalf of Mr Chowdhury in the form of a witness statement from Mr L, former Clinical Team Manager at the Trust, dated 25 October 2020.

Expert Witness Evidence

18. The Tribunal also received oral and documentary evidence from Mr M, an expert witness, called by the GMC. Mr M is a Consultant Orthopaedic Surgeon with a specialist interest in hand and upper limb surgery. Mr M has also performed primary and knee revision surgery. He provided a statement, dated 28 February 2018 and two supplementary statements, dated 11 September 2018 and 7 June 2019 respectively. Mr M was called to assist the Tribunal in understanding the professional standards to be expected of a Consultant in Orthopaedics and to comment on whether Mr Chowdhury's actions in relation to Patient A fell below, or seriously below any of those standards.

Documentary Evidence

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

- Patient A's medical records and operation note dated 11 April 2016;
- Report and appendices of the local investigation, conducted by Ms D, on behalf of North West Anglia NHS Foundation Trust, dated 31 August 2017;
- Local investigation witness statements from:
  - Mr Chowdhury, dated 4 August 2017;
  - Ms B, dated 23 June 2017;
  - Mr I, dated 23 June 2017;
  - Mr H, dated 11 August 2017;
  - Mr F, dated 11 August 2017.
- Serious Incident Report and Root Cause Analysis conducted following a Datix Report about Patient A's procedure;
- Various correspondence between Mr Chowdhury, Ms B and representatives of the National Joint Registry and Zimmer Biomet dated April to October 2016;

- Correspondence from Mr E, a representative of Zimmer Biomet who provided the prosthesis and the Manufacturer's Incident Report filed;
- The Trust Policies on Duty of Candour, Management of Adverse Events and Near Misses and the Management of Serious Incidents, various dates;
- A copy of Mr Chowdhury's Curriculum Vitae;
- Trust procedure on Verification of Prostheses, Standards and Process;
- Best Practice for Knee Arthroplasty guidelines, dated July 2019;
- Datix entry generated by Mr Chowdhury about Patient A on 12 October 2016;
- Two emails confirming separate incidents of prosthesis mislabelling, various dates;
- Zimmer Biomet internal incident report, dated 29 August 2017;
- Correspondence between the GMC, Zimmer Biomet and Mr E, various dates;
- Copy of statement Mr E provided to Zimmer Biomet regarding Patient A's operations, undated;
- Labels and product brochure photographs relating to the implant used on Patient A, undated;
- Drafts of Mr E's witness statement, various dates;
- A statement from Mr I produced for the Trust, dated October 2016;
- Transcripts for all hearing days between 30 September 2019 and 30 October 2020;
- Various positive testimonials from Mr Chowdhury's current and former colleagues, various dates.

The Tribunal's Approach

20. In reaching its decision on facts, the Legal Assessor provided a draft of her advice to the parties in line with the case of *Fish* [2012] EWHC 1269. Once this had been reviewed and agreed it was read into the record. The Legal Assessor's advice was as follows:

Legal Advice

21. The Legal Assessor stated that the burden of proving disputed facts is on the GMC. There is no burden on Mr Chowdhury to disprove anything in the Allegation. The standard required is the civil standard, the balance of probabilities. The Tribunal will determine whether a disputed fact is more likely than not.

22. The Legal Assessor advised that there is no sliding scale in relation to the standard of proof, but the more serious the allegation, the more cogent the evidence may need to be to find it proved to the civil standard.

23. The Legal Assessor referred the Tribunal to the case of *Sharma v GMC* [2014] EWHC 1471, which cites *Re H Minors* [1996] AC 563 as authority for the principle that:

> *…the more serious the allegation, the less likely it is that the event occurred and hence the stronger should be the evidence before a court/Tribunal concludes that the allegation is established on the balance of probabilities.*

24. However, the Legal Assessor advised the Tribunal that the case *Re B children* [2008] UKHL 35 (‘*Re B*’) confirms that, while the seriousness of an allegation, or its consequences, may necessitate more careful consideration of the evidence, it does not affect the test to be applied. The House of Lords in *Re B* endorsed the general approach that a serious allegation will require careful analysis of evidence, taking account of inherent probabilities and other matters requiring the application of good sense.

25. Although there is no heightened standard of proof in regulatory proceedings, the inherent probability or improbability of an event is itself a matter to be taken into account in weighing the probabilities and deciding whether on balance the event occurred. The more improbable it is that the registrant would have behaved as alleged, the more cogent and credible the evidence needed to prove on the balance of probabilities that he did: *Virdee v GPhC* [2015] EWHC 169 at paragraph 36.

26. The Legal Assessor reminded the Tribunal that it should consider the entirety of the evidence heard, in the context of documents provided. Clear reasons should be given if the evidence of one witness is preferred over that of another in relation to any key issue in dispute. She said the Tribunal should:

- Analyse evidence logically to reach conclusions on any inconsistencies
- Address counsel’s submissions: *GMC v Lamming* [2017] EWHC 3309
- Make clear its findings of fact on central disputed issues.

27. In relation to the dishonesty alleged, the Legal Assessor referred the Tribunal to the case of *R v Barton & Booth* [2020] EWCA Crim 575, in which the Court of Appeal confirmed that the test for dishonesty is that set out in *Ivey v Genting Casinos (UK) Ltd* [2017] UKSC 67 (‘*Ivey*’), which expressly overruled the previous test set out in Ghosh.

28. The Legal Assessor stated that in *Ivey* the Supreme Court provided the correct test of dishonesty which is that:

a. The Tribunal of fact must first ascertain (subjectively) the state of the individual’s knowledge or belief as to the facts. The reasonableness of the belief is a matter of evidence going to whether or not he genuinely held the belief, but it is not a requirement that the belief must be reasonable, *and*

b. The Tribunal of fact must then consider whether that conduct was dishonest by the (objective) standards of ordinary decent people. There is no requirement that the individual must appreciate that what they have done was, by those standards, dishonest:

29. *Ivey* at paragraph 74 states:

> *When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest.*

30. The Legal Assessor advised that in considering *Ivey*, the Tribunal must first ascertain Mr Chowdhury's actual, genuine beliefs as a matter of evidence and then ask itself whether, given those beliefs, his conduct was objectively honest or dishonest.

31. When drawing inferences, the Tribunal must be able to safely exclude, as less than probable, any other explanations for the incident. There must be evidence that justifies the inference of dishonesty. Any absence of motive can be a relevant consideration, particularly when coupled with other factors such as the likelihood of risk of discovery: *Soni v GMC* [2015] *EWHC 364.*

32. The Legal Assessor reminded the Tribunal that a modified good character direction had been sought on behalf of Mr Chowdhury. She referred to the case of *Wisson v HPC [2013] EWHC 1036* which confirmed that good character is clearly relevant when the credibility of a doctor is in issue. The Legal Assessor stated that there is a caveat to the good character direction in this case; it needs to be modified as Mr Chowdhury has already made admissions to some elements of the Allegation: he admits instances of failing to have acted correctly. Therefore, he cannot be said to have an unblemished career.

33. In her direction to the Tribunal, the Legal Assessor advised that Mr Chowdhury is a person of good character who has no previous regulatory findings, disciplinary matters, cautions or convictions recorded against him, except for those matters admitted in these proceedings. Good character does not provide a defence, but it is an important factor capable of assisting Mr Chowdhury. The Legal Assessor advised that this is relevant to the Tribunal's considerations in two ways:

a) First, Mr Chowdhury has given evidence. Good character is a positive feature of Mr Chowdhury which the tribunal will take into account when considering whether or not this evidence is accepted as credible.

b) Second, the fact that Mr Chowdhury has no *previous* adverse regulatory findings goes to the likelihood of him now acting as alleged by GMC. It is Mr

Chowdhury's case that this is the first time he has been accused of the matters alleged. How likely is it that Mr Chowdhury would cast aside his good character in this way?

34. There are cases in which character evidence goes to the credibility of the disputed elements of the Allegation: *Donkin v Law Society* [2007] EWHC 414, *Thorneycroft v NMC* [2014] EWHC 1565. The decision on admissibility – for example of any testimonials at this stage – is for the Tribunal, not the Legal Assessor or counsel.

35. The Legal Assessor advised that judging the weight to be given to Mr Chowdhury's good character and its relevance at the Facts stages is a matter for the Tribunal, taking into account all of the evidence admissions made, law and submissions by both parties.

36. The Legal Assessor advised that the Tribunal must consider each paragraph of the Allegation separately in order to be able to make individual findings. However, if one part of the Allegation is found proved the Tribunal is entitled to take account of that when considering propensity to act as alleged in consideration of other parts of the Allegation.

37. Although it is open to the Tribunal to take into account all the evidence adduced in relation to each allegation, the Legal Assessor referred to the case of *Hanson* [2005] EWCA Crim 824, at paragraph 18, which cautions that propensity (where found) is only one relevant factor. The Tribunal must assess its significance in the light of all the other evidence in the case. Propensity cannot be regarded as a satisfactory substitute for direct evidence: *R v Mitchell* [2016] UKSC 55, at paragraph 55; the Supreme Court described propensity as an incidental issue.

38. The Court of Appeal in *Freeman & Crawford* [2008] EWCA Crim 1863 at paragraph 20 also addresses the question of cross-admissibility of evidence. The Legal Assessor reminded the Tribunal that it is not required to determine whether it is satisfied, on the evidence, to find one paragraph in the Allegation proved before it can move on to use that evidence to deal with any other paragraph in the Allegation: that approach would be too restrictive.

39. The Tribunal should reach a decision on each paragraph of the Allegation separately, but it is entitled, in determining whether or not each paragraph is proved, to have regard to relevant evidence relating to any other paragraph. It may consider the evidence in the round.

40. In relation to each finding and each alleged instance of dishonesty, the Legal Assessor advised that the Tribunal should provide clear reasoning for its decision and leave no doubt about what factors and materials were considered. Although an assessment of credibility and reliability is not required in every situation, the Tribunal should provide an adequate explanation if it concludes that what was inherently

improbable has been established: *McLennan v General Medical Council* [2020] CSIH 12 (*'McLennan'*).

41. In relation to whether or not dishonesty had been proved, the Tribunal in *McLennan* had erred in failing to make a finding on the appellant's knowledge. It had recited, but not applied, the test in *Ivey*. It had not considered the possibility of carelessness. It had not explained how ordinary decent people would have considered the appellant to be dishonest. It had been important for the Tribunal to address why the appellant might have been dishonest: at paragraph 58.

42. The Legal Assessor advised that the Tribunal is entitled to draw inferences, that is to say reach common sense conclusions based upon reliable evidence that the Tribunal accepts. It is vital to distinguish between reaching conclusions based upon reliable evidence, on the one hand, and speculation as to matters upon which there is no, or insufficient, evidence, on the other. The Tribunal must not speculate as to matters about which there is no, or insufficient evidence.

43. When considering dishonesty, a Tribunal is not always required to identify a benefit or motive for the making of any false statements: *Kefala v General Medical Council* [2020] EWHC 2480 (Admin) at paragraph 120. Dr Kefala's conduct and explanations, over time, were not consistent; the High Court said that it was not possible readily to determine the doctor's motivation.

44. However, the Tribunal should ensure that it gives adequate and clear reasons for its decisions. The reasons will be adequate if it is clear to a registrant why their account was not believed and why they had lost, taking account of their own understanding of the evidence and the arguments: *Kefala*.

45. Both Ms Johnson, on behalf of the GMC and Mr Brassington, on behalf of Mr Chowdhury, accepted the Legal Assessor's legal advice in full.

Clarification on a Matter of Evidence

46. Having retired in camera to deliberate on the Facts, a matter arose in its discussions that the Tribunal concluded, in the interests of fairness, the parties should be invited to comment on. Accordingly, the Tribunal determined to the recall parties.

47. In an email that was sent to both parties ahead of going back into session to canvas their views, the Tribunal wrote the following:

> *Whilst reviewing both the documentary and oral evidence, the tribunal has found the X-rays taken of Patient A on 14th April 2016 are time stamped between 10:49 and 10:58 hours (C2 Part 5 - page 1193 - 1198). These are patient A's first post-operative X-rays.*

The email Mr Chowdhury sent to [Ms B] *(C1 page 15) bears the time of 12:02 hours on 14th April 2016, one hour and four minutes after the time on the last X-ray.*

Mr Chowdhury's position is that he met with [Mr E] *in a busy clinic and they reviewed Patient A's post-operative X-rays together, prior to Mr Chowdhury sending the email to* [Ms B] *on 14th April 2016.*

Mr Chowdhury, in his GMC witness statement dated 7th Aug 2019 (C1 p. 200 - 220) states at pages 206-208, concerning his activities on 14th April 2016, that he reviewed patient A's X-rays with patient A on the ward round together with a junior member of the team, before sending the email to [Ms B]*.*

Out of fairness, the tribunal wishes to offer both parties the opportunity to address them on the activities that morning and the time between the X-rays and the email.

48. On behalf of the GMC, Ms Johnson submitted that she had no specific submissions to make and that it was for the Tribunal to make an evaluation of the evidence before it.

49. On behalf of Mr Chowdhury, Mr Brassington submitted that there was no evidence before the Tribunal that Mr Chowdhury had not spoken to Mr E, seen Patient A, reviewed the x-rays and sent the email to Ms B in the time between the x-rays being made available and the time of the email. He stated that there had been no cross-examination or Tribunal questioning of Mr Chowdhury on this matter. Mr Brassington submitted that this was therefore unchallenged evidence, which may well explain the brevity of Mr Chowdhury's email to Ms B, sent during a busy NHS hospital day.

50. Having raised this matter and heard the submissions of both parties, the Tribunal accepted that this point of evidence was unchallenged. The Tribunal therefore considered this matter resolved and continued with its deliberations on the facts.

The Tribunal's Analysis of the Evidence and Findings

51. The Tribunal has considered each outstanding paragraph of the Allegation separately and has evaluated the evidence in order to make its findings on the facts. The Tribunal accepted the Legal Assessor's legal advice and had regard to it throughout its deliberations.

Paragraph 2Da

52. Mr Chowdhury has already made a number of admissions relating to the Procedure and to this sub-paragraph of the Allegation. Most relevant is Mr Chowdhury's admission to paragraph 2C in its entirety. It is admitted that on 14 April 2016, Mr Chowdhury sent an email to Ms B (identified as Ms B in the Allegation) stating that, having checked up to date x-rays for Patient A, the '*correct sided implant'* had been used. Mr Chowdhury admits that in his email he stated that '*there is a labelling error'* and that '*the label and not the implant is wrong'*.

53. In her statement to the Trust, dated 23 June 2017, Ms B stated that in her role she would '*marry the* [National Joint Registry] *NJR consent forms with the NJR dataset forms for each patient and then input and submit the data to the NJR… I noticed that the paperwork for* [Patient A] *included a sticker for a right sided component, when* [Patient A] *was having revision surgery to the left side. I went to see* [Mr Chowdhury] *to discuss this'.* Under cross-examination during her oral evidence, Ms B could not recall exactly when her discussion with Mr Chowdhury took place, nor could she recall whether it took place in person. She accepted that the discussion was likely to have taken place around 12 April 2016.

54. Following this discussion, Mr Chowdhury wrote the following email to Ms B on 14 April 2016:

> *Dear* [Ms B].
>
> *I have up to date x-rays of this patient that show he has the correct sided implant –left for a left revision. There is a labelloing* [sic] *error and* [Mr E] *is going to do a Zimmer incident form for this.*
>
> *We may have to alter the label on the NJR form? If this is not possible, we may have to take advise* [sic] *but the label and not the implant is wrong.*
>
> *Em*

55. The Tribunal considered whether Mr Chowdhury was or was not in a position to confirm the information in the email dated 14 April 2016 because up to date x-rays did not show that Patient A had the correct-sided implant. The Tribunal had regard to the evidence it had heard that related to this matter and to the chronology of events.

56. First, the Tribunal reviewed the evidence before it relating to what Patient A's x-rays showed. The Tribunal received documentary and oral evidence relating to the post-operative x-rays and what happened in the days following the Procedure from a number of witnesses.

> <u>Mr M</u>

57. The Tribunal reminded itself of the evidence of Mr M, the expert witness called by the GMC. The Tribunal had some concerns about Mr M's expertise as it related to the Procedure. Over the course of his oral evidence to the Tribunal, Mr M stated '*I don't do knee replacements*' and confirmed that he had not used the specific prosthesis in issue in this case. However, the Tribunal acknowledged that Mr M's expertise stemmed from his previous experience of knee surgery. The Tribunal was concerned that in oral evidence Mr M appeared reluctant to acknowledge the limits of his own expertise. However, the Tribunal was also cautious not to attach too little weight to Mr M's evidence on that basis.

58. In his oral evidence, Mr M was questioned, and cross-examined in some depth, on whether the type of prosthesis used in the Procedure was more symmetrical than a standard knee replacement prosthesis. Mr M stated that while the distal femoral replacement prosthesis in this case was more symmetrical than a standard knee replacement prosthesis, he said that with a 'long stem' attached, it would be easier to identify whether the prosthesis was right or left sided. Under cross-examination, Mr M conceded that, even with a longer stem, the distal femoral replacement prosthesis was *'almost identical'* whether it was right or left sided. The Tribunal did not hear other clear evidence on the symmetry or asymmetry of the replacement prosthesis used in the Procedure. Taking this, and Mr M's lack of personal experience with this particular prosthesis into account, the Tribunal did not place any weight on this evidence beyond that left and right prosthesis of this type do not differ much in appearance.

59. Mr M also gave evidence about whether the x-rays showing a varus, rather than valgus angle confirmed that the wrong-sided replacement prosthesis had been implanted. In his first report, dated 28 February 2018, Mr M wrote the following about the 14 April 2016 x-ray:

> *3:2 Xray of the knee, taken on 14.04.2016, ie just after the first revision operation, shows a prosthesis with resection of the distal portion of femur and stems up the tibia and femur. The sutures are still in place. It can be seen that there is about 5° varus alignment of the knee, compared with the normal of 5° valgus.*

60. In the same report Mr M also wrote:

> *5:2 Revision knee implants like this, with stems in the femur and tibia are so designed as to recreate the natural angle of the knee, which is about 8° valgus (knock-kneed). The reason for this is that it is important to restore the mechanical axis of the limb with the femoral head, centre of the knee joint and centre of the ankle joint all being in a straight line when seen from the front. The angle, of about 8°, does vary somewhat being a larger angle in shorter women and a smaller angle in taller men.*

> *5:3 In Patient A's case, the wrong side femoral implant was inserted. Because the femoral stem was now pointing the wrong way, his knee ended up in significant varus (bowlegged) alignment rather than the normal slight valgus. This, in fact, was apparent on the first post-operative Xray taken after the surgery on 11.04.2016. It can be appreciated on this Xray that the leg is not in the correct mechanical alignment.*

61. Further, in his first report, Mr M said that '*it was apparent on the first post-operative Xray that the alignment was incorrect'*.

62. Mr M was robustly challenged on his evidence that Patient A's post-operative x-ray should have showed a valgus angle, a slightly 'knock-kneed' appearance, and instead was varus. It was Mr M's evidence that however varus Patient A's knee had been before was not relevant. He stated that '*it does not matter how bad the knee was before… and at the end of operation it has to be correct, which is to say the mechanical axis of the limb has to be correct, which means that there has to be a slight valgus angle between the femur and the tibia.'* He said that any angle of varus risked prosthetic loosening and failure.

63. Mr M stated that the angle was fixed between the femoral stem and femoral component in the Procedure. He said that on that basis, the only explanation for the varus angle in Patient A's post-operative x-rays was that the wrong-sided replacement prosthesis had been implanted. Mr M maintained this position throughout cross-examination and questioning from the Tribunal. The Tribunal accepted Mr M's evidence that Patient A's post-operative x-rays from April 2016 showed a slightly varus angle. However, it took into account that when reviewing these x-rays, Mr M was aware that the wrong-sided replacement prosthesis had been implanted. The Tribunal accepted that the varus angle was not immediately obvious to someone reviewing the x-rays who was unaware that the NJR form label indicated a wrong-sided prosthesis had been implanted.

64. The Tribunal noted that while he had been instructed by the GMC, Mr M was the only independent witness in this case. All of the other witness statements and oral evidence before the Tribunal was from people who worked at the Trust, had worked closely with Mr Chowdhury or who directly worked for him.

65. The Tribunal went on to consider whether the other evidence it had heard about Patient A's post-operative x-rays supported or contradicted Mr M's assessment in order to assess what weight to give his evidence.

Mr Chowdhury

66. The Tribunal had regard to the full chronology of Mr Chowdhury's evidence in relation to what Patient A's post-operative x-rays showed, whether or not the

correct-sided replacement prosthesis had been implanted and whether he was in a position to confirm that in his email to Ms B on 14 April 2016.

67. After his email to Ms B, the Datix report submitted on 12 October 2016 is the first record made by Mr Chowdhury before the Tribunal about the possibility that the wrong-sided replacement prosthesis had been implanted into Patient A. In that report, Mr Chowdhury wrote:

> *It appears that the wrong sided femoral component was implanted into the patients* [sic] *left knee arthroplasty. Patient was undergoing a revision left TKA. However it appears a right femoral component was implanted rather than the correct left femoral component.*
>
> *Reviewed patient in clinic after initial review of post operative x-rays were inconclusive. Obtained long leg x-rays which appear to suggest that the femoral component is for the right side. It is difficult to be sure as the valgus offset is only about 5 degrees but he has a varus knee arthroplasty on the long leg films. Also the NJR data form has been shown to have a label for a right femoral component, not a left. The chosen implant was checked by the Zimmer company rep, MM and then by myself and the scrub nurse. None of us noticed an error. Therefore this could be a mislabling* [sic] *error or an actual incorrect implant.*

68. In his Trust statement, dated 4 August 2017, Mr Chowdhury stated:

> *I recall* [Ms B] *showing me the National Joint Registry form and label stating that a right sided implant had been used for a left sided procedure. I had seen the patient post-operatively and asked for an x-ray. I checked the x-ray and checked the patient: he was standing with normal alignment. I checked with* [Mr H] *about whether he felt the implant could be wrong – he had had senior experience of joint replacements prior to working in Peterborough. I did not ask any of my other Consultant colleagues for their peer review at this stage because the patient was clinically well and progressing extremely well. His x-rays were not obviously wrong and he stood clinically straight…*
>
> *While the entry in the Medical Records for 15 April starts with 'W/R* [Mr H]*' I am absolutely certain that I saw the patient on the ward round that day. It is not my routine practice to check the entry in the medical records made by the junior member of the team on a ward round. With the benefit of hindsight it would have been reasonable to have checked the entry made in the Medical Record detailing my presence and the assessment undertaken specifically in the light of the possibility that a wrong sided implant had been used during the surgery…*

To summarise, I clinically reviewed the patient on 15 April and both review of the patient and the x-ray gave nothing to support the suggestion that a wrong sided prosthesis had been implanted.

69. In the Trust's report, it concluded that Mr Chowdhury had not been present at the ward round when Mr H reviewed Patient A on 15 April 2016:

5.22 The patient was discharged home on 18th April: there is no written record to evidence that Mr Chowdhury had taken any action specifically to explore whether a wrong sided implant had been inserted during the surgery while the patient remained in hospital or to record that he had reviewed the patient and the x-ray findings on 15th April (as per the witness statement from Mr Chowdhury). Review of Theatreman (the electronic system for managing operating theatre lists) shows that Mr Chowdhury had an operating list on 15th April from 08:30 to midday. The operating sheets provide evidence of Mr Chowdhury's presence for the three cases on the list.

70. In his witness statement prepared for these proceedings, dated 7 August 2019, Mr Chowdhury stated:

14 April 2016

27. On 14 April 2016, patient A underwent an x-ray of his left knee [page reference in evidence bundle]. *I reviewed patient A's x-rays with patient A on the ward round together with a junior member of the team. Unfortunately, it appears that there was no clinical record of this review of patient A. It is not my normal routine practice to check the entry in the medical records made by the junior member of the team on a ward round. With the benefit of hindsight it would have been reasonable to have checked the entry made in the medical record detailing my presence and the assessment undertaken specifically in light of the possibility that a wrong sided implant had been used during the surgery.*

28. At this time, I was not convinced the x-rays post-surgery confirmed the knee was in varus or valgus and so were equivocal. The long view of the front of the left lower limb – AP view, I thought showed the leg to be straight, neither varus nor [valgus]*. The shorter AP view of the knee does look varus, however in knee arthroplasty, we are taught that this view is unreliable to assess orientation of knee prosthesis. The more accurate view is the whole leg view. The patient was not able to stand for this but he had an excellent AP view of most of the whole of the left lower limb. It includes the top of the femoral stem and the lower end of the tibial stem. I thought it showed the prosthesis to be not in varus or* [valgus]*, hence equivocal. The sky line view is also important. The view shows the patella centred in the middle and does not show the lateral edge to be lower than the medial one. This is important*

> *as most femoral prosthesis maintain a centred patella by having the lateral side taller than the medial side. You cannot look at the prosthesis and easily determine side from its appearance. I thought the long leg AP view from the 14th April 2016, the lateral side of the femoral component looks bulkier and this is what you would expect on the lateral side of a component. This was the first time I recognised this prosthesis was difficult to assess for side on x-ray as I had never had to contemplate this question before. This left an area of doubt after the x-ray review which was tempered by my experience of the operation, the confidence of my colleagues who were in theatre and the positive opinion of the patient and his clinical review. Therefore, I was swayed to think the implant was correct but the labels for the* [National Joint Registry (NJR)] *could be incorrect. This seemed logical as three people had looked at the outer box and were satisfied. I had also understood that* [Mr I] *the inner box.*
>
> *…*
>
> *33. Both my review of the patient and the x-rays on 14 April gave nothing to support the suggestion that the wrong sided prosthesis had been implanted.*
>
> *15 April 2016*
>
> *36. There is an entry in the medical records which state "W/R* [Mr H]*" and I don't believe that I saw patient A on the ward round on this day.*

71. Mr Chowdhury did not comment on this matter in his oral evidence during the first session of this hearing. In his supplementary witness statement, dated 27 September 2020, Mr Chowdhury stated:

> *24.* ***Allegations 2D(a) and 2D(b).*** *I accept as a matter of fact, with the benefit of hindsight, that the post-operative x-rays did not show that Patient A had the correct sided implant and that I did not know for sure that a labelling error had occurred. Whilst I know now that I was wrong, I genuinely believed both these things at that time, and that is why I wrote in the email of 14 April 2016.*

72. In his oral evidence when answering Tribunal questions Mr Chowdhury stated:

> *…At the very beginning – at the very beginning – you've got two options, but I made a decision that this was obviously not a wrong-sided implant. I made a decision that this was a labelling error, because I had three or four days to go through the evidence of what we did in theatre, all the checks, discussion with people who we'd discussed with, seen the patient on the ward, seen his*

> *post-op X-rays and coming to that final conclusion. So that is after the NJR label; the NJR gives you at least two options that I can think of and I excluded one.*

73. Under cross-examination, Mr Chowdhury said he had misinterpreted the post-operative x-rays and made a serious error. He also explained that his language in the email to Ms B was firm '[b]*ecause I had done all I could to review the situation, spoken to people in theatre, checked processes, spoken to the representative, seen the patient, looked at the x-rays'*.

74. Mr Chowdhury was questioned about the meeting he had with Mr E, the company representative for the prosthesis company Zimmer Biomet. Details about this meeting were included in the evidence before the Tribunal when the GMC took a witness statement from Mr E between April and June 2020. Mr Chowdhury told the Tribunal that he had requested a meeting with Mr E following his discussion with Ms B about the issue with the NJR form. Mr Chowdhury confirmed that it was a '*very brief meeting'* , between five and ten minutes, as it took place during fracture clinic.

75. Mr Chowdhury said in his oral evidence that during the meeting with Mr E he sought to reassure himself that Mr E had not made a mistake when selecting or checking the prosthesis. Mr Chowdhury said that Mr E was '*adamant that no mistake had been made'*. It was Mr Chowdhury's evidence that he and Mr E had reviewed Patient A's post-operative x-rays together during the meeting. He also said that Mr E brought a sample femoral component with him which they looked at to see '*if there were any distinguishing features that would give us a clue when we looked at the x-ray, and we could not see any'*. Mr Chowdhury was clear in his evidence that he had not sought to compare the component with the x-rays but had looked at both with Mr E and neither identified anything '*unusual'* in the x-rays. Mr Chowdhury's evidence was that at the conclusion of his meeting with Mr E, it was agreed that Mr E would go back to Zimmer Biomet to discuss the possibility of a labelling error of the prosthesis used in the Procedure.

76. Mr Chowdhury was cross-examined about how the up to date x-rays showed categorically that Patient A had the correct-sided implant. He answered to say that:

> *I thought that the lateral and the skyline were absolutely what I would expect, and the AP view was equivocal for being 0, not varus, not valgus, but the decision that that email is based on, everything – clinical review, the patient, the review of people involved in theatres, the review of the checking process.*

77. When cross-examined further, Mr Chowdhury said that he was categorically sure that Patient A had the correct-sided implant '[b]*ecause he had a 30-degree varus deformity or a bowleg deformity, and that had been corrected completely by the post-op x-rays in April'*.

78. The Tribunal noted that Mr Chowdhury's evidence about Patient A's post-operative x-rays had evolved from his email to Ms B, to the Datix report, to his statement to the Trust, and to his evidence in these proceedings. Having initially clearly stated that the x-rays '*show* [Patient A] *has the correct sided implant – left for left revision'* in the Datix Report, dated 12 October 2016, Mr Chowdhury stated that the post-operative x-rays were *'inconclusive'*. In his statement to the Trust, 4 August 2017, the x-rays were '*were not obviously wrong'*. In his statements and oral evidence to this Tribunal, Mr Chowdhury has reiterated that any opinion he had about the x-rays being '*inconclusive'* was mitigated by the discussions he had with those who had been in theatre with him – Mr E, Mr I and Mr H.

79. In his oral evidence Mr Chowdhury told the Tribunal that the discussions he had with Mr E, Mr I and Mr H took place within a few days of the Procedure and before he sent the email to Ms B.

Mr E

80. The Tribunal accepted that it is agreed evidence that Mr Chowdhury and Mr E met to discuss Patient A's procedure before Mr Chowdhury responded to Ms B by email. It heard differing accounts of what took place at that meeting but did not consider that it needed to resolve those disputes to determine this sub-paragraph of the Allegation. Further, the Tribunal accepted that it was relevant that Mr E, though familiar with surgical settings and the relevant prosthesis in the case, is not a doctor. The Tribunal therefore concluded that despite Mr E's experience, as a non-clinician, he was not in a position to comment on what Patient A's post-operative x-rays showed.

Mr I

81. In his supplementary witness statement, dated 21 October 2020, Mr I stated:

> *2. I do remember having a conversation with Mr Chowdhury about the issue with Patient A following the surgery in April 2016. I am not able to say exactly how soon after the surgery this was as it is now more than four years later, but I think it would have been something like a week or two after the surgery.*
>
> *3. My reason for giving this timeframe is that I remember first being made aware of the issue by my manager,* [Mr L]*.* [Mr L] *and I then looked at the stickers together in the prosthesis book, and I think that was about a week after the surgery. The conversations with Mr Chowdhury then took place after that.*

> *4. I remember that Mr Chowdhury was trying to gather as much information as possible in order to work out whether it was the wrong stickers or the wrong prosthesis, or whether there was a mismatch. He wanted to be 100% sure and was concerned not to put the patient through surgery again if it was not necessary.*
>
> *5. We looked at the stickers in the prosthesis book together and we went through the checking process generally in order to look at what might have happened and whether anything had gone wrong. We did not think that anything had gone wrong with that process.*

82. In a statement for events that Mr I produced for his manager, Mr L, which he initially said was a contemporaneous record and later, when questioned, said it was written in October 2016, he wrote:

> *All stickers relating to the prosthesis were put onto the NJR form, Prosthesis book and Prosthesis reorder form, no one highlighted any discrepancies at the time of the operation*

83. Over the course of his oral evidence, Mr I settled on the view that he had only been made aware of the incident relating to the Procedure by his manager in October 2016, after Mr Chowdhury had raised the Datix report. This view was supported by the witness statement of Mr I's manager, Mr L, dated 25 October 2020, who stated that he would not have been aware of any matters relating to Patient A's Procedure until the Datix was raised in October 2016. Mr L's statement clearly sets out that he had no specific recollections of this matter but his evidence was clear that he had no interactions with Mr I about this case in the weeks following Patient A's surgery.

84. The Tribunal considered that Mr I did his best to assist the Tribunal. However, it found his evidence imprecise and somewhat careless. It determined that his evidence could not be relied upon with regard to the precise timing of his actions. It bore in mind that Mr I played a significant part in the checking process in theatre during the Procedure and was clearly embarrassed by, and remorseful for, his failings. His culpability was particularly significant given his senior roles both in theatre and in relation to the training and management of others with regard to the importance of carrying out safety checks in theatre. In these circumstances, the Tribunal was satisfied that Mr I first learnt of the possibility of the wrong-sided implant in October 2016 when informed of it by Mr L.

Mr H

85. In his witness statement, dated 7 August 2019, Mr H, who was assisting Mr Chowdhury during the Procedure stated that '[t]*here were no obvious problems encountered during the surgical procedure and there were no obvious concerns*

raised during the surgery. Overall alignment of the leg looked quite acceptable and the range of motion very good following implantation'.

86. Mr H completed a ward round on 12 April 2016 and saw Patient A. In his statement, Mr H said that he found Patient A to be comfortable at that time. On 15 April 2016, Mr H again saw Patient A during the daily ward round. Both of these reviews were documented in Patient A's medical records. The notes in the medical records from 15 April 2016 confirm that the post-operative x-rays were reviewed and were '*OK'*. Mr H stated that he could not recall whether Mr Chowdhury attended the ward round with him that day and stated that if that had been the case, he would have made a note of it. In his statement, Mr H stated:

> *I did not have any conversation with Mr Chowdhury about the possibility of whether the implant could be wrong. I did not have further involvement in the care of this patient. The first time I heard anything about the possibility of a wrong implant was when the Trust invited me to be a witness in the Trust investigation.*

87. In his statement to the Trust, dated 11 August 2017, Mr H stated that having reviewed Patient A's post-operative x-rays that [i]*t is very difficult to see a left from a right distal femoral replacement implant on an x-ray, unless you have done many… and the joint appeared to be well-aligned. In later x-rays, this had changed and joint was more varus in appearance'*.

88. In his oral evidence, Mr H further explained what he was looking for when he reviewed Patient A's post-operative x-rays of 15 April 2016. He said:

> *I did review the x-rays on 15 April and I thought it was okay, from a sense that it was properly symmetrical, there was no immediate cause for concern, there were no fractures – that's what we look for in immediate postoperative x-rays in these cases – that there are no immediate concerns… it sometimes is difficult to make out a right from a left unless you have done many; it's a very subtle sort of thing.*

89. While being questioned, Mr H was asked if his recollection of a conversation between him and Mr Chowdhury about Patient A and the possibility of a wrong-sided prosthesis being implanted, corresponded with Mr Chowdhury's. Mr H could not recall that conversation having taken place. When asked, Mr H reiterated that he was '*taken aback'* when he was informed that there was an ongoing Trust investigation into the Procedure and that he had *'no clue'* until he was contacted by the Trust Director that anything in Patient A's operation had gone wrong. Under cross-examination Mr H confirmed that he was clear that no conversation between Mr Chowdhury and himself had occurred at any point after Patient A's operation.

90. Mr H's oral evidence was consistent with the entries he had made in Patient A's medical records, for example in relation to his post-operative review of Patient A. The Tribunal was struck by the clarity of Mr H's recollections. When asked about this by the Tribunal, Mr H said that he has '*a very good memory*'. He also said that '*it was one operation that I assisted for the first time, you know. That was my first distal femur replacement and so I was like a sponge almost, absorbing almost every step of the operation that we did. So I recalled very clearly what was done so that I could do it next time if needed. That was my intention*'. The Tribunal found this to be a persuasive answer and concluded that Mr H's clear, compelling evidence could be relied on when considering what Patient A's post-operative x-rays showed and whether or not Mr Chowdhury raised the matter with him in the days following the Procedure.

Mr F

91. In relation to Patient A's post-operative x-rays, the Tribunal considered the evidence of Mr F, an Orthopaedic Consultant colleague of Mr Chowdhury's. In his statement for the Trust investigation, dated 11 August 2017, Mr F stated:

> *I recall Mr Chowdhury asking me to look at the initial post-operative x-ray for the patient concerned in this investigation in our office not long after the procedure had been carried out. The implant used was a distal femoral replacement implant – both sides of this prosthesis are virtually identical and it was absolutely not obvious on the x-ray whether it was a wrong sided implant…*
>
> *I am not sure whether I was asked to look at the patient's x-rays again at a later date – I do not recall. I remember suggesting that Mr Chowdhury should see how the patient gets on. It would not be advisable to intervene surgically again within the first three months because the inflammatory changes related to the surgery create high risks for post-operative infection.*
>
> *There is no issue with delaying further intervention after the initial surgery unless there is evidence of prosthetic loosening through loss of bone stock.*

92. In his statement to the GMC, dated 8 June 2020, Mr F stated:

> *I cannot recall the date Dr Chowdhury asked me to review this x-ray. I think Dr Chowdhury had seen the patient in clinic post operatively which prompted him to show me the x-rays and ask me what I thought. It was the initial post-operative x-ray I reviewed as there were clips in situ and the initial post-operative x-ray will always show the clips, if they have been used in the procedure.*
>
> *I cannot recall specifically the discussion we had in which Dr Chowdhury*

> *asked me to review the x-ray for Patient A. However, I'm pretty sure it must have been flagged up to him that there was some sort of discrepancy on the x-ray for him to ask me to review it as I would not routinely review his post-operative x-rays. I remember looking at the images and suggesting, as outlined in* [Mr F's statement to the Trust]*, that Dr Chowdhury should see how the patient gets on and not rush into anything… I think I suggested something along the lines of reviewing Patient A at a later date and if there is an issue do something at that point. From recollection, I think that Dr Chowdhury had seen Patient A in clinic following the surgery and thought something was a bit odd regarding the varus/valgus position, and this was the reason he had asked me to review the x-rays.*

93. In his oral evidence, when questioned on whether he could recall when he first saw Patient A's post-operative x-rays, Mr F said he could not recall. Under cross-examination, when it was suggested to Mr F that Mr Chowdhury had a clear recollection of the discussion about Patient A's post-operative x-rays taking place after 4 October 2016, Mr F said '*If* [Mr Chowdhury] *says that that is when he remembers it then that is when it was, yes, absolutely'*.

94. When questioned on this matter by the Tribunal, it reminded Mr F that in his Trust statement, he had stated *'I recall Mr Chowdhury asking me to look at the initial post-operative x-ray for the patient concerned in this investigation in our office not long after the procedure had been carried out'.* The Tribunal found Mr F's oral evidence to be evasive regarding the timing of the meeting. He was unwilling to rely on his recall of the meeting as mentioned in his Trust statement made nearer the time. The Tribunal was of the view that Mr F's evidence had shifted between his Trust statement, which was closer to the events in question and his evidence to this Tribunal. In his statement to the Trust, Mr F refers to his memory of events, saying *'I remember suggesting that Mr Chowdhury should see how the patient gets on…'* . In his oral evidence, Mr F told the Tribunal that he had given Mr Chowdhury his standard advice about not intervening in the first three months after surgery. Mr F did not accept that he might have said this to Mr Chowdhury because he first saw the x-rays in the first three months after Patient A's surgery and referred to the four years that had elapsed since the event as his explanation for this.

95. In his evidence, Mr F was clear that Mr Chowdhury did bring Patient A's post-operative x-rays to his attention because he had concerns about them. He referred to this issue in his witness statement as something being a *'bit odd regarding the varus/valgus position'*. The Tribunal noted that this comment of Mr F's accorded with Mr M's focus on the varus, rather than valgus position of Patient A's knee in the post-operative x-rays. While the Tribunal did have concerns about Mr F's evidence, he was consistent throughout his statements and oral evidence that he was only shown the post-operative x-rays of Patient A because Mr Chowdhury had a concern and wished to seek the opinion of colleagues. Mr F said that the post-operative x-

rays did not clearly show either that the correct-sided or wrong-sided replacement prosthesis had been implanted.

96. Overall, the Tribunal accepted that memories deteriorate over time and it determined that it was appropriate to place more weight on Mr F's statement to the Trust which was likely to have provided a more accurate record, having been written much closer to the events, than his more recent accounts of his discussions with Mr Chowdhury about Patient A. Therefore, the Tribunal concluded that on the balance of probabilities the meeting between Mr Chowdhury and Mr F took place within three months of the Procedure.

Sub-paragraph 2Da conclusions

97. The Tribunal considered the evidence before it and assessed whether it was more likely than not, that Mr Chowdhury, before sending the email to Ms B, had put himself in a position to confirm that the up to date x-rays for Patient A showed that he had the correct-sided implant.

98. The Tribunal first considered the evidence that directly related to what the post-operative x-rays for Patient A showed.

99. It was Mr M's evidence that the only plausible explanation for the post-operative x-rays taken in April 2016 showing a varus angle was that the wrong-sided replacement prosthesis had been implanted given the fixed angle of the prosthesis and femoral stem. The Tribunal accepted this evidence.

100. Neither Mr F nor Mr H went so far in their assessments of the post-operative x-rays. However, both were of the view that, given the type of prosthesis used, it was not possible to form a conclusive opinion about whether or not the correct-sided replacement prosthesis had been implanted from the x-rays dated 14 April 2020.

101. Mr Chowdhury's evidence on what the post-operative x-rays showed has changed over time. However, Mr Chowdhury was only categorical in his view that the x-rays showed that the correct-sided implant had been used in his email to Ms B in April 2016. Since that point, he has suggested that the x-rays alone were not definitive but that his discussions with colleagues helped him form the view that the x-rays showed a '*left for a left revision*'.

102. The Tribunal has received no evidence to suggest that the post-operative x-rays taken of Patient A following the Procedure definitively showed that the correct-sided replacement prosthesis had been implanted.

103. In all the circumstances, the Tribunal concluded that post-operative x-rays did not show that Patient A had the correct-sided implant.

104. In considering whether Mr Chowdhury was in a position to be definite in his email based on his conversations with colleagues, the Tribunal reminded itself of the evidence of Mr I and Mr H. While the evidence of Mr I changed, his final position, that he had not spoken with Mr Chowdhury or reflected on the Procedure until October 2016, was supported by his manager, Mr L's statement. Mr H who provided clear, consistent and compelling evidence was certain that he had never spoken to Mr Chowdhury about the Procedure and possible concerns about the wrong-sided prosthesis being implanted. He was clear that no conversation about the Patient A's x-rays had taken place before Patient A was discharged on 18 April 2016 and that he had attended ward rounds and reviewed Patient A without Mr Chowdhury. This is supported by Patient A's medical records. Mr H also stated that as this was the first surgery of this type he has seen and because he had not been notified of any potential issue with the prosthesis, when he checked the post-operative x-rays, he was not alert to the issue of how to identify whether the implant was right or left-sided. The Tribunal concluded that it preferred the evidence of Mr I and Mr H on this matter. It therefore concluded that it was more likely than not that Mr Chowdhury had not discussed the Procedure and the post-operative x-rays with either Mr I or Mr H before sending his email to Ms B on 14 April 2016. Indeed, the Tribunal found that Mr Chowdhury did not disclose to them the fact that Ms B had informed him that the NJR form label indicated that it was a wrong-sided replacement prosthesis.

105. The Tribunal concluded that the only discussion Mr Chowdhury had about Patient A's post-operative x-rays ahead of sending the email to Ms B at 12:02 on 14 April 2016 was with Mr E. Mr E assured Mr Chowdhury that surgery had gone well and that all the proper checks had been done. Mr E did not notice any issue with the post-operative x-rays. As at 14 April 2016, the only doctor to have reviewed the post-operative x-rays with the possibility of the wrong-sided replacement prosthesis being implanted in mind was Mr Chowdhury.

106. Taking all of the above into account, the Tribunal concluded that the evidence did not support Mr Chowdhury's version of events. It concluded that Mr Chowdhury was not in a position to confirm that the x-rays showed that Patient A had the correct-sided implant not least because the Tribunal accepted the evidence of Mr H and Mr F, that the April 2016 x-rays did not reveal an obvious sidedness to the prosthesis and because Mr M's opinion that these x-rays clearly showed a slightly varus angle was formed with the benefit of knowing that the wrong-sided replacement prosthesis had been implanted. It concluded that given the type of prosthesis and its lack of obvious sidedness, such a definitive assessment was not possible based on the x-rays alone.

107. Further, it concluded that Mr Chowdhury did not have discussions with his clinical colleagues who had been present in theatre. It could therefore not accept Mr Chowdhury's evidence that his firm language in his email to Ms B was as a result of not only an assessment of Patient A, his x-rays and a meeting with Mr E, but also his

encouraging discussions with colleagues that supported his view that Patient A did have the correct-sided implant.

108. In determining sub-paragraph 2Da, the Tribunal has taken into account that it would, in any event, have been erroneous for anyone to confirm that Patient A had the correct (left) sided prosthesis for the simple reason that he had had the wrong (right) sided replacement prosthesis implanted.

109. The Tribunal determined that it was more likely than not, that Mr Chowdhury was not in a position to confirm the information he provided to Ms B because up to date x-rays did not show that Patient A had the correct-sided implant. It therefore found sub-paragraph 2Da of the Allegation proved.

Paragraph 2Db

110. The Tribunal went onto consider whether Mr Chowdhury was not in a position to confirm the information in his email to Ms B on 14 April 2016 as he did not know that a labelling error had occurred.

111. The Tribunal had regard to the evidence it had heard relating to the possibility of a labelling error and the discussions Mr Chowdhury had about this prior to the email he sent to Ms B on 14 April 2016.

112. The Tribunal first considered that it was agreed evidence that nothing occurred during the Procedure to indicate any issue with the prosthesis, the operation or how Patient A's knee looked and moved at the conclusion of surgery.

113. It was Mr Chowdhury's oral evidence that the prosthesis was '*tracking beautifully'* and that surgery had gone well. Mr H, in his witness statement, stated that '*there were no obvious concerns raised during surgery'*. In his supplementary statement, Mr I confirmed that there was no reason to believe anything had '*gone wrong'* during the Procedure.

114. It was agreed evidence, supported by the Trust policy, that while it is ultimately the surgeon's responsibility to ensure that the correct implant is used, the checking process only requires the surgeon to check the prosthesis's outer box. It was agreed evidence of all those present at the Procedure that all the standard checks of the prosthesis were done and the checking procedure was adhered to.

115. It was a matter of fact that the replacement prosthesis had a labelled outer box, labelled inner packaging, an identification sticker (to provide the record for the NJR) and a permanent marking etched onto the underside of the prosthesis itself to indicate whether it was right- or left-sided.

116. In his witness statement, Mr I stated:

> *16. The checking process involves three checkers. The first is the person who is collecting the implants* [Mr E]*; the second is the scrub nurse* [Mr I]*; and the third and final checker is the surgeon* [Mr Chowdhury]*. The person collecting the implants would show them to the surgeon first and then to the scrub nurse. I was the scrub nurse for this procedure, and the representative collected the implants and showed them to Mr Chowdhury and then to me.*
>
> *17. Usually, the surgeon and I would have checked the outer label. Then the box would be opened and I would check the inner label in the second box and then the third* [unlabelled] *box would be opened.*
>
> *18. I am very strict about vigilant checking in my own practice and when I am educating others.* [Mr E] *opened the distal femoral component once Mr Chowdhury had given the go ahead. He would have removed the cellophane and opened the first box. I cannot recall if the component was checked properly by me as there were several components being opened at the same time and lots of activity preparing to cement the components in. The ultimate responsibility lies with the surgeon.*

117. Mr H, in his witness statement, stated:

> *16….Mr Chowdhury,* [Mr I] *(scrub nurse) and the company representative were involved in checking the various components. I was not involved in this aspect. There were no obvious problems encountered during the surgical procedure and there were no obvious concerns raised during the surgery. Overall alignment of the leg looked quite acceptable and the range of motion very good following implantation.*

118. It was agreed that when the procedure reached the stage where the prosthesis was required Mr E collected it and brought it into theatre with the other component parts. Mr E, Mr Chowdhury and Mr I then checked visually that the outer box for the prosthesis said 'left' as Patient A was to undergo a left total knee arthroplasty with distal femoral replacement rotating hinge arthroplasty. Mr Chowdhury told the Tribunal that these checks are not just visual and that all colleagues who checked the outer box also confirmed audibly whether the outer box said left or right. While Mr I confirmed that he could not recall checking the inner box, it was agreed evidence that all normal checking procedures were followed, including the disposal of the outer box. It was clear that the labels on the inner box were retrieved and were affixed to various forms, including the NJR form. As no issues arose at that stage, the Procedure continued to its conclusion.

119. Ms B raised the possibility of a wrong-sided replacement prosthesis being implanted with Mr Chowdhury following the Procedure because the inner label affixed to the NJR form indicated a right-sided implant, rather than a left-sided

implant for Patient A's left-sided procedure. She raised this with Mr Chowdhury between the date of the Procedure (11 April 2016) and the date of Mr Chowdhury's email to her (14 April 2016).

120. In their evidence, both Mr E and Mr Chowdhury said that they discussed the possibility of a labelling error occurring at their meeting before Mr Chowdhury sent the email on 14 April 2016. Having considered the dates of Patient A's post-operative x-rays, all dated 14 April 2016, the Tribunal inferred that it was on that same date that Mr Chowdhury met with Mr E. It was Mr E's evidence that during or shortly after his meeting with Mr Chowdhury, he contacted Zimmer Biomet and began the process of raising the possibility that there had been a labelling error of the replacement prosthesis used in the Procedure. Mr E told the Tribunal that he reassured Mr Chowdhury both that right and left sided prostheses of the type implanted did not vary greatly and that labelling errors were not unknown.

121. In his email to Ms B, Mr Chowdhury confirms this course of action, stating:

> *There is a labelloing* [sic] *error and* [Mr E] *is going to do a Zimmer incident form for this.*

122. Taking the above into account, the Tribunal considered whether Mr Chowdhury was in a position to confirm that a labelling error had occurred. The Tribunal considered the evidence before it on the unremarkable nature of the checking of the prosthesis, that all those present in theatre do not recall any issues, and that the issue was only raised by Ms B contacting Mr Chowdhury about the NJR form.

123. The Tribunal heard evidence that at least three people in theatre checked the outer packaging of the prosthesis in line with Trust policy. The Tribunal concluded that, on the balance of probabilities, the outer box did say the prosthesis was left-sided. This is supported by the evidence of all the witnesses present in theatre and supports the general view of those witnesses that surgery proceeded in an unremarkable manner with no evident issues.

124. Having concluded that the outer box of the prosthesis was labelled 'left' and it being a matter of fact that the NJR inner label said 'right', the Tribunal concluded that there was a mismatch between the labels, which amounted to a labelling error.

125. Before Ms B's discussion with him, Mr Chowdhury was of the view that surgery had gone well, all the relevant prosthesis checks had been done for a left-sided revision, Patient A's leg looked to be fully corrected and moved well at the end of surgery and no issues had been raised in theatre. Mr Chowdhury was then informed that the label on the NJR form taken from the inner packaging indicated that a right-sided prosthesis had been implanted. The Tribunal concluded that based on his experience of the surgery and there having been complete agreement at the

time that the prosthesis was a left-sided one, Mr Chowdhury became aware that a labelling error had occurred when it was brought to his attention that the NJR label indicated that a right-sided prosthesis had been implanted. The Tribunal was unable to conclude whether, at that time, Mr Chowdhury was in a position to know whether it was the inner label or the outer box labelling that was incorrect. Nevertheless, he was aware of a discrepancy and did therefore have knowledge that a labelling error had occurred.

126. Accordingly, the Tribunal concluded that Mr Chowdhury was in a position to confirm that a labelling error had occurred, because on the balance of probabilities the outer box, checked by at least three people in theatre said 'left' and the inner packaging, which Mr I does not recall checking, based on the label affixed to the NJR form said 'right'. The Tribunal determined that Mr Chowdhury was correct in stating to Ms B that a labelling error had occurred on the basis of what he knew of the procedure and the discord between that and what the NJR form showed.

127. Therefore, the Tribunal found sub-paragraph 2Db of the Allegation not proved.

Paragraph 2E

128. Following on from its findings in relation to paragraph 2Da of the Allegation, the Tribunal considered whether Mr Chowdhury's actions in stating that up to date x-rays showed that the correct-sided implant had been used when he was not in a position to confirm that to be the case was dishonest.

129. The Tribunal considered all of the evidence before it and applied the test set down in *Ivey* to determine whether Mr Chowdhury had acted dishonestly.

130. In assessing whether Mr Chowdhury had acted dishonestly, the Tribunal bore in mind his good character. It also had regard to the large volume of overwhelmingly positive testimonials from his fellow clinical colleagues and administrative staff; a number of whom had also been his patients. All of them speak to Mr Chowdhury's integrity and honesty, and many were provided by people who have known him for many years. Below are a few excerpts that demonstrated the themes of the testimonials before the Tribunal.

131. Mr N, a Consultant Orthopaedic colleague of Mr Chowdhury's at the Trust wrote:

> [Mr Chowdhury] *has always been active in the audit activities of the department and has been open and honest about discussing his complications. He has demonstrated his ability to use these occasions to reflect on and improve his personal practice, or to suggest systemic improvements in the clinical service more generally.*

132. Ms O, an Orthopaedic Specialist Nurse Practitioner and colleague of Mr Chowdhury's at the Trust wrote:

> *Mr Chowdhury in my view, regards patient safety as an important part of his consultant role…*
>
> *Mr Chowdhury is not afraid to have difficult conversations with patients.*

133. Ms P, an Orthopaedic Specialist Nurse Practitioner and colleague of Mr Chowdhury's at the Trust wrote:

> *I have always found Mr. Chowdhury honest to both patients and staff and therefore I am shocked by the allegations made. For example: - when a complication arises, such as a fracture at the time of surgery,* [Mr Chowdhury] *ensures that he spends sufficient time with the patient to discuss this in full. He ensures that these conversations happen as soon as possible. He is thorough with the discussions he has with patients and does not shy away from more difficult conversations. He is open with patients and their relatives (with patient consent) and will seek a second opinion at times e.g. complex periprosthetic fractures to ensure that the patient is receiving the best care available…*

134. The Tribunal reminded itself that given his previous good character and the positive testimonials before it, Mr Chowdhury was more likely to be a credible and honest witness and less likely to have acted as alleged. Further, the Tribunal was of the view that it was to Mr Chowdhury's credit that he had made some admissions and acknowledged his responsibility for implanting the wrong-sided prosthesis. The Tribunal took this fully into account throughout its deliberations.

135. In considering the first limb of *Ivey*, the Tribunal considered whether it was Mr Chowdhury's genuine belief that he was in a position to confirm that Patient A's post-operative x-rays showed that the corrected sided implant had been used to Ms B on 14 April 2016.

136. The Tribunal has already found that before sending the email to Ms B, Mr Chowdhury met Mr E and reviewed Patient A's post-operative x-rays. It was also unchallenged evidence that before sending his email, Mr Chowdhury reviewed Patient A with the post-operative x-rays although this was not documented in the medical records. However, the Tribunal also found that it preferred the evidence of Mr H and Mr I over that of Mr Chowdhury. It concluded that it was more likely than not that Mr Chowdhury did not have a conversation with either Mr I or Mr H to discuss the Procedure before writing the email to Ms B on 14 April 2016.

137. The Tribunal found that Mr Chowdhury's evidence in relation to what he believed at the time the post-operative x-rays showed was inconsistent and had notably changed over time from certainty to equivocation. His evidence about what led him to write the email that he did to Ms B also changed over time. Having found that two of the conversations Mr Chowdhury said had reassured him that the correct-sided implant had been implanted had not occurred, the Tribunal assessed what Mr Chowdhury's genuine belief was at the time of sending the email.

138. The Tribunal found that Mr Chowdhury's evidence that his belief was that the x-rays showed that it was the correct-sided implant was not credible. By Mr Chowdhury's own account he could not have been sure the correct-sided prosthesis had been implanted because having been told the NJR label indicated the wrong-sided prosthesis had been implanted, he sought the views of others who had been in theatre during the Procedure (Mr I, Mr E and Mr H) and who reassured him that the Procedure had been performed correctly. The Tribunal bore in mind that when Mr Chowdhury met with Mr E in his out-patient clinic and together they had reviewed the x-rays, Mr E provided some reassurance. However, the Tribunal has already found that Mr Chowdhury did not discuss the matter with Mr I or Mr H and therefore, could not have gained the any reassurance from his clinical colleagues. In spite of his good character and his propensity to be honest rather than dishonest, based on the evidence before it and its previous findings about Mr Chowdhury's position in relation to the post-operative x-rays on 14 April 2016, the Tribunal found that Mr Chowdhury did not know at that time that the post-operative x-rays showed that the correct-sided implant had been implanted. In considering whether Mr Chowdhury's belief was genuinely held, the Tribunal took into account that he was aware that the NJR label clearly stated that the prosthesis was a right-sided one and that his assessment of the x-rays would have been made with this fact very much to the fore. It therefore concluded that Mr Chowdhury's belief that he was in a position to confirm to Ms B that Patient A's x-rays showed that Patient A had the correct-sided implant was not genuinely held.

139. While the Tribunal was not required to consider whether Mr Chowdhury's belief was reasonable or not, it did consider whether there was a possible motive in Mr Chowdhury's actions in sending an email to Ms B to confirm that post-operative x-rays showed the correct-sided implant when he did not believe they did. The Tribunal considered whether Mr Chowdhury had sent the email to Ms B to give himself and Mr E more time to determine whether there was simply a labelling error with the prosthesis or whether something more serious had occurred. In line with *Kefala*, The Tribunal was not satisfied that it could identify a clear motive to explain why Mr Chowdhury wrote an email to Ms B in the terms that he used, when he was not in a position to have confirmed what Patient A's post-operative x-rays showed.

140. Having concluded that Mr Chowdhury's belief was not genuinely held, the Tribunal went on to consider whether ordinary, decent people would consider Mr Chowdhury's actions in sending the email to Ms B to be dishonest.

141. The Tribunal considered whether Mr Chowdhury's definitive email could have been the result of careless drafting. It bore in mind that Mr Chowdhury was being asked to explain to Ms B the discrepancy between the operation Patient A was scheduled to have, a revision left total knee arthroplasty with distal femoral replacement rotating hinge arthroplasty, and what the NJR form indicated, which was that the wrong-sided prosthesis had been implanted. Mr Chowdhury would have been fully aware of the importance of alerting others promptly of the possibility that Patient A had received a wrong-sided prosthesis. As a registered medical practitioner, he would have been aware of his duties under Good Medical Practice (2013) (GMP) to make accurate records. The Tribunal concluded, on the balance of probabilities, that Mr Chowdhury's email was not drafted so emphatically by mistake.

142. The Tribunal also considered what followed Mr Chowdhury's email to Ms B. Ms B was seeking to resolve the issue and appears to have (understandably) accepted Mr Chowdhury's emphatic email that up to date x-rays showed that the correct-sided implant had been used, that Patient A had a left prosthesis for a left revision and that the label and not the implant was wrong. Having sent such a definitive email to Ms B, she accepted that there was a labelling error on the NJR form and sought advice from the NJR and continued her correspondence with Mr Chowdhury and Mr E on the matter. Any possible further consideration or investigation into the possibility of the wrong-sided replacement prosthesis being implanted was halted by Mr Chowdhury's email to Ms B. It also took into account that for a considerable period, Mr Chowdhury did not tell anyone else about the matter, and neither did he submit a Datix report, actions that would, no doubt, have prompted an urgent enquiry into what had gone wrong.

143. The Tribunal considered whether it was Mr Chowdhury's intention, in sending the email, to prevent further consideration of such a possible, serious clinical error. In all the circumstances, the Tribunal concluded that Mr Chowdhury sent the email to Ms B intending to mislead her.

144. The Tribunal considered the context put forward by Mr Chowdhury in relation to his line of thinking when sending the email to Ms B on 14 April 2016. In summary, he believed that the correct checking procedure had taken place intra-operatively, the replacement prosthesis and the alignment of the leg appeared correct visually at the end of the surgery, the x-ray did not show an obvious problem in his view, his first post-surgical review of Patient A suggested that Patient A was doing well, and he felt an approach of waiting to see the outcome of the Zimmer Biomet mislabelling investigation and the patient's progress over the following three months was preferable. However, Mr Chowdhury was an experienced and well-regarded practitioner who would know and understand his duties under GMP to commence processes when there was a cause for concern about patient safety, be it that Patient A had received the wrong-sided prosthesis or that Zimmer Biomet's labelling of its prostheses was defective. It is simply implausible that such an experienced and

well-regarded practitioner would believe that it was unnecessary to alert others to these patient safety concerns.

145. The Tribunal found that Mr Chowdhury had falsely claimed to Ms B that the post-operative x-rays showed that Patient A had the correct-sided implant. It found that he was not in a position to confirm this and did not genuinely believe this to be the case as the x-rays were equivocal at best and Mr Chowdhury had not spoken with clinical colleagues who he claimed had reassured him. The Tribunal determined that ordinary, decent people, aware of the facts of this case, would view Mr Chowdhury's actions in confirming a position to Ms B that he did not believe to be true as dishonest. Further, it determined that ordinary, decent people would conclude that it was dishonest of Mr Chowdhury to take steps to effectively close down enquiries into a possible serious clinical error based on information that Mr Chowdhury knew was not accurate in his email to Ms B.

146. Taking all of the above into account, the Tribunal found paragraph 2E of the Allegation proved.

Paragraph 2F

147. Having found sub-paragraph 2Db of the Allegation not proved, the Tribunal accordingly found paragraph 2F of the Allegation not proved.

Paragraph 3B

148. Mr Chowdhury has admitted paragraph 3A of the Allegation that he failed to adequately report that the wrong-sided replacement prosthesis had been implanted in that he delayed filling in the Datix form and did not inform his Clinical Director or the Trust Medical Director.

149. The Tribunal considered whether Mr Chowdhury's failure to act as described was due to him having realised that the wrong-sided replacement prosthesis had been implanted.

150. The Tribunal has already found that Mr Chowdhury had not been able to rule out the possibility that the wrong-sided replacement prosthesis had been implanted when he sent the email to Ms B on 14 April 2016.

151. The Tribunal first considered what Mr Chowdhury knew between 14 April 2016 and when he next saw Patient A. Due to a clerical error Patient A did not return for his six-week outpatient follow-up appointment in clinic until 30 August 2016, 20 weeks later. The Tribunal was of the view that between 14 April 2016 up until 30 August 2016, the information Mr Chowdhury had about Patient A had not changed. Evidence before the Tribunal from Mr Chowdhury, Mr E and Ms B suggests that after 14 April 2016, correspondence about the possibility of a labelling error

continued and Mr E continued to engage with Zimmer Biomet to explore the possibility that the prosthesis had the incorrect information as to side on the inner label.

152. The Tribunal then considered the evidence before it relating to Patient A's follow-up appointment in clinic with Mr Chowdhury on 30 August 2016. The only documentary evidence before the Tribunal about this consultation is Mr Chowdhury's own evidence and the letter Mr Chowdhury wrote to Patient A and his GP.

153. In his statement to the Trust, dated 4 August 2017, Mr Chowdhury stated:

> *At the follow up out-patient appointment (30 August) I was aware of the concerns that had been raised and had in my mind "that I needed to exclude that this could this be a wrong side implant'? The patient went for x-rays… and while clinically I was very happy with the clinical picture and the current x-rays, I thought a long view may be helpful… Due to the lateness of the day and other patients waiting to be seen, I planned to bring the patient back the next week to check on his left knee and that would give me the necessary time to discuss the possibility of the wrong side implant…*

154. In his witness statement, Mr Chowdhury stated:

> *40. I was intending to see patient A at his pre-allocated time on 30 August 2016 and discuss the incident with him…*
>
> *41. Once I had received the second set of x-rays, I finally spoke with patient A at around 7pm. He was not my last patient and so I didn't feel it was appropriate to discuss the issue of wrong sided implant with him at that late time. I therefore asked him to return to my clinic one week later. This would allow the discussion. However, the clinic clerk left at 5 30pm on the 30th August clinic and so the urgency of this subsequent appointment was not recognised. After 5.30pm the department runs with Emergency Department patients as priority.*
>
> *42. When he failed to attend the following week, I contacted my secretary and she spoke with the patient who was then unable to attend until 4th October due to annual leave. I felt the x-rays were possibly varus and I realised there could be a varus look to the leg. I also realised there was no comment from* [Mr E] *regarding the investigation into the labels… I was very happy with the clinical picture, because the patient was happy…*

155. When first cross-examined about his delay in filling in the Datix incident reporting form in October 2019, Mr Chowdhury said:

> *…when he arrived on 30 August I knew, I knew, that I would be in trouble over this…*

156. In his supplementary witness statement, dated 27 September 2020, in relation to paragraphs 3B and 3C of the Allegation, Mr Chowdhury stated:

> *26. **Allegations 3B and 3C.** I deny these allegations. My failures in respect of allegation 3A, which I have admitted, were because I had allowed myself to become wedded to the hypothesis of a labelling error, and I had misunderstood the relevant requirements surrounding when the Datix form should be completed and when the matter should be escalated.*

157. In his oral evidence to the Tribunal in October 2020, under cross-examination, Mr Chowdhury said:

> *When Patient A walked into my clinic on 30 August and his x-rays looked different, his clinical scenario looked different, I was immediately exceedingly distressed, distressed because he now looked completely different to the way in which he had looked in April, and so, I suddenly thought number one, how on earth has he arrived 18 weeks late rather than six weeks after surgery, number two, how does he look so abnormal and number three, where is the information from* [Mr E]*. Then that is when I started to think, "Oh, my God, maybe this is not the label. Maybe this is the actual prosthesis problem that we were talking about in April." That was an increase in my stress realising that, that the patient, although he claimed to be well physically, did not look as he should have done.*

158. In her cross-examination, Ms Johnson asked:

> *Q When you say you were in such a panic when you realised what a mess this was, is that you were in a real panic on 30 August?*

Mr Chowdhury responded:

> *A Yes, because he has walked through the door, and for the first time his knee is bent, his x-rays are starting to look bent. It didn't look like that in April.*

159. The Tribunal had regard to the change in Mr Chowdhury's evidence about his impression of 30 August 2016. Previously, Mr Chowdhury had stated that he was '*happy with the clinical picture*' and that any possible unresolved issues with the prosthesis used were being investigated by Mr E and Zimmer Biomet as a labelling error had occurred. It had been Mr Chowdhury's evidence that he did not know for certain that Patient A had the wrong-sided replacement prosthesis implanted until it was removed on 22 December 2016. He said that when he saw Patient A again on 4

October 2016, his concerns about the possibility of the wrong-sided replacement prosthesis had been raised sufficiently to tell Patient A and complete a Datix form. Most recently however, Mr Chowdhury acknowledged his distress at seeing Patient A on 30 August 2016 having a knee that looked '*bent*'. This most recent evidence did not align with Mr Chowdhury's previous statements on the matter.

160. Further, the Tribunal reminded itself that on 30 August 2016, Mr Chowdhury dictated a letter to Patient A's GP which said '*I have seen this gentleman now four months post surgery and he is doing exceedingly well. He is very happy and comfortable with the knee and he does not have any particular pain*'. It was Mr Chowdhury's evidence that in stating that Patient A was '*doing exceedingly well*', he was reiterating Patient A's own view of how he was feeling. The Tribunal did not accept this evidence and found that Mr Chowdhury's writing that Patient A was '*doing exceedingly well*' was communicating to the patient's GP his purported assessment of Patient A which was in stark contrast to Mr Chowdhury's account of his concerns on 30 August 2016. Mr Chowdhury's most recent oral evidence, about his '*distress*' at seeing Patient A's condition on 30 August 2016, his reasons for his decision not to communicate with Patient A about what may have happened during the Procedure, and his decision to dictate a letter indicating a positive clinical picture to Patient A's GP were not consistent.

161. While the Tribunal reminded itself that it should not place reliance on oral evidence alone, it was satisfied that it could consider Mr Chowdhury's evidence in the round and given the inconsistencies it had identified, determine which evidence it preferred. The Tribunal was struck by the manner in which Mr Chowdhury gave his most recent evidence about 30 August 2016, it found that he appeared to be speaking candidly from a genuine recollection of the appointment. This was the first occasion when Mr Chowdhury had seen Patient A since April 2016. It concluded that Patient A's presentation on 30 August 2016 shocked Mr Chowdhury and made him realise that the NJR label was correct, and that the only explanation for Ms B having raised the discrepancy with him after the Procedure was that the patient had received the wrong-sided replacement prosthesis. The Tribunal concluded that on the balance of probabilities, given the compelling nature of his most recent evidence, Mr Chowdhury had realised as soon as Patient A walked in on 30 August 2016 that the wrong-sided replacement prosthesis had been implanted during the Procedure.

162. The Tribunal went on to consider whether Mr Chowdhury's delay in completing the Datix form and his not informing his Clinical Director and the Trust Medical Director were due to this realisation.

163. In relation to the Datix form, Mr Chowdhury, in his statement to the Trust said:

> *I did not raise a Datix at this time* [April 2016] *because the patient was clinically well and the x-ray showed an aligned joint. I would have raised the*

Datix if the situation changed and there was evidence to confirm a wrong sided implant had been used…

164. In his witness statement, Mr Chowdhury wrote:

55. I presumed that it was my responsibility to raise the Datix. I presumed it would be raised once the patient was informed. As I was preparing to do this at the six-week appointment post-surgery, this was when I was intending to raise the Datix. Once I realised that I had not seen him until 30 August 2016, I realised it was imperative to raise the Datix. I felt it had to be done after we spoke as I expected the patient to be contacted and I felt he had to find out about the incident from me first. However, this became difficult to do until the 4 October 2016.

…

59. With the benefit of hindsight, I should have raised a Datix report in April 2016, clarifying the lack of confirmatory evidence. I was not aware that this constituted a Never Event at that time, and therefore automatically a Serious Incident. It was not clear to me that the importance of timely reporting was to enable a timely investigation and ensuring that any lessons learned as result of the review are shared widely to prevent similar errors happening for other patients.

165. It was Mr Chowdhury's evidence that, at the time, he held the mistaken belief that he needed to inform Patient A before he could complete the Datix form. The Tribunal accepted that there was clear evidence from the extensive positive testimonials that Mr Chowdhury is known to provide excellent care to his patients and is known for communicating well with them. The Tribunal accepted that Mr Chowdhury in April 2016 may have delayed filling in the Datix form to give himself time to formulate what he wished to say to Patient A about what had happened during the Procedure. However, the testimonials also set out Mr Chowdhury's active involvement in audit processes, patient safety protocols and clinical governance at the Trust. The Tribunal was not persuaded, on balance, that Mr Chowdhury, as an experienced, senior Orthopaedic Consultant could have been unaware at the time of events of his duty to report such an incident by completing a Datix form and informing both his Clinical Director and his Trust Medical Director.

166. Taking the above into account, and having concluded that Mr Chowdhury had realised that the wrong-sided replacement prosthesis had been implanted on 30 August, the Tribunal made the following findings. The Tribunal found that it was not credible that Mr Chowdhury, given his seniority and engagement with Trust processes, was unaware of his duty to report what had happened during the Procedure when he had his realisation on seeing Patient A on 30 August 2016. The Tribunal concluded that it was more likely than not that it was because Mr

Chowdhury realised that the wrong-sided replacement prosthesis had been implanted in Patient A that he failed to adequately report this in that he delayed filling in the Datix form and did not inform his Clinical Director or the Trust Medical Director.

167. The Tribunal found paragraph 3B of the Allegation proved.

Paragraph 3C

168. The Tribunal went on to consider whether Mr Chowdhury acted dishonestly by failing to adequately report that the wrong-sided replacement prosthesis had been implanted once Mr Chowdhury was fully aware that Patient A had the wrong-sided replacement prosthesis.

169. The Tribunal considered Mr Chowdhury's state of knowledge and belief from 30 August 2016 onwards. The Tribunal accepted that Mr Chowdhury was under significant additional pressure during 2016 because the Trust had removed his middle grade support and it was his evidence that he was working with less experienced colleagues during the clinic on 30 August 2016 and was essentially without clinical support which could have impacted on how he dealt with Patient A.

170. The Tribunal accepted that Mr Chowdhury was '*distressed*' given Patient A's presentation at his follow-up out-patient clinic appointment. The Tribunal found that despite his distress at how Patient A presented in clinic, Mr Chowdhury did not act to report the issue having realised that Patient A had the wrong-sided replacement prosthesis implanted because he knew he would be in '*trouble*'. Further, the Tribunal had regard to the inconsistency in Mr Chowdhury's description of his own '*distress*' at seeing Patient A and the information he included in the letter to Patient A's GP that was dictated the same day.

171. Mr Chowdhury's witness statement sets out that he was planning to complete a Datix form after his appointment with Patient A on 30 August 2016, when he intended to discuss that possibility that there had a been a labelling error or a wrong-sided implant used. The Tribunal concluded that Mr Chowdhury delayed filling in the Datix form because he realised on 30 August 2016 that Patient A had the wrong-sided replacement prosthesis implanted. It concluded that Mr Chowdhury knew this on 30 August 2016 and having not taken action until after Patient A's next appointment on 4 October 2016, Mr Chowdhury had failed in his duty to report such a Never Event by delaying filling in a Datix form and by not informing his line management due to his fear of what the consequences might be for Mr Chowdhury.

172. The Tribunal therefore concluded that from 30 August 2016 Mr Chowdhury did know that Patient A had the wrong-sided replacement prosthesis implanted. It went on to consider whether ordinary, decent people would consider Mr Chowdhury to have acted dishonestly in failing to adequately report this.

173. The Tribunal concluded that Mr Chowdhury having realised that Patient A had the wrong-sided replacement prosthesis implanted and having failed to report it promptly via Datix or to his line management, in order to delay further investigation, would be considered dishonest by ordinary, decent people aware of the facts of this case. It therefore determined that Mr Chowdhury had acted dishonestly in failing to adequately report that Patient A had the wrong-sided replacement prosthesis implanted.

174. Therefore, the Tribunal found paragraph 3C of the Allegation proved.

Paragraph 3E

175. Mr Chowdhury admitted that he failed to promptly notify Patient A about the possibility that the wrong-sided replacement prosthesis had been implanted. The Tribunal considered whether Mr Chowdhury failed to inform Patient A on 30 August 2016, or as soon as possible thereafter of the possibility that the wrong-sided prosthesis had been implanted.

176. In response to this paragraph of the Allegation, in his supplementary statement Mr Chowdhury stated:

> *28. **Allegation 3E**. I deny this allegation. At the time of the consultation on 30 August 2016, the clinical picture was becoming clearer but I needed to obtain the long leg x-ray in order to consider this properly and I was still waiting to hear back from* [Mr E] *about whether there had been a labelling error. The delay in obtaining the long leg x-ray was subsequently out of my control.*

177. It was Mr Chowdhury's evidence that he was unable to inform Patient A of the possibility of the wrong-sided replacement prosthesis being implanted because of how late, busy and understaffed the clinic on 30 August 2016 was. Mr Chowdhury said that he had asked Patient A to return to clinic the following week in order to obtain further x-rays and raise the possibility of an error with the Procedure with him. This however did not occur; it was Mr Chowdhury's evidence that another clerical error, given the time of evening when he finished the consultation, prevented Patient A from returning to clinic the following week. However, there was no documentary evidence of any such clerical error and this claim is contradicted by what Mr Chowdhury told Patient A's GP regarding his intended six-month follow-up period in relation to the left knee. The Tribunal found that Mr Chowdhury decided on 30 August 2016 to send Patient A away with a six-month follow-up period and did not ask him to return the following week.

178. The Tribunal considered the letter addressed to Patient A's GP that was dictated by Mr Chowdhury, on his evidence, immediately following his consultation

on 30 August 2016 and sent out on 19 September 2016. The Tribunal noted that this was the only contemporaneous record of that consultation before it. The letter states:

> *I have seen this gentleman now four months post surgery and he is doing exceedingly well. He is very happy and comfortable with the knee and he does not have any particular pain. He says the knee is much better than previously.*
>
> *With regards to the right knee it is in gross varus and I think there is a large amount of polyethylene wear but it does not feel particularly unstable. He would again require a revision knee arthroplasty in that area which would be complicated by the previous fracture. I cannot see a previous referral for this so please send one to me and I am happy to look at the right knee for him. With regards to the left knee replacement he* [sic] *will see him in six months with x-rays prior to consultation of the left knee.*

179. In a testimonial from Mr Q, a Consultant Orthopaedic Surgeon at the Trust, he said that Mr Chowdhury '*is very meticulous in his documentation and letters'*.

180. When cross-examined about his letter to Patient A's GP, Mr Chowdhury sought to make this clarification:

> *I think that in the very last sentence either myself or whoever has written this has put left instead of right, because I am saying this is in regards to the right knee we are going to see him in six months' time…*

181. The Tribunal did not accept Mr Chowdhury's clarification about the letter he dictated on 30 August 2016. It found that as the letter was the most contemporaneous record of the consultation, it was more likely that Mr Chowdhury had informed Patient A that he would need to be reviewed again in six months to review his progress with his left knee and consider x-rays, which was separate to Mr Chowdhury's consideration of the need to operate on Patient A's right knee.

182. Further, the Tribunal was not satisfied that in saying Patient A was '*doing exceedingly well'* in the letter, Mr Chowdhury was repeating Patient A's own view as it is clear that is reflected in the second sentence of the letter. The Tribunal found that Mr Chowdhury was representing to Patient A's GP what he purported to be his own view when he wrote that Patient A was '*doing exceedingly well'*. The Tribunal noted that this documented assessment was entirely different to what Mr Chowdhury had told the Tribunal about what he thought and felt about Patient A's presentation on 30 August 2016. In the Tribunal's assessment, Mr Chowdhury decided on 30 August 2016 to mislead Patient A and Patient A's GP into believing that everything was going well with Patient A's left knee.

183. In the Tribunal's assessment, although Mr Chowdhury realised he had implanted the wrong-sided prosthesis, he decided to keep this knowledge from Patient A and Patient A's GP. There is no independent evidence that Mr Chowdhury asked Patient A to return the following week as he claims. To the contrary, Mr Chowdhury's letter to the GP is plain. He intended not to review Patient A in regard to his left knee for six months. Further, had Mr Chowdhury arranged, as he claimed, to see Patient A in seven days, it is likely that he would have included this in his letter.

184. The Tribunal found that Mr Chowdhury had a duty, particularly having been made aware of the possibility of the wrong-sided replacement prosthesis being implanted in the days following the Procedure to notify Patient A promptly of this possibility. Mr Chowdhury admits and accepts that he failed in this duty up until 30 August 2016 but denies any failing from 30 August 2016 to 4 October 2016 when he next saw Patient A, on the basis that in the clinic on 30 August 2016, a clinical error regarding the purported seven day review appointment and Patient A being on holiday prevented him being informed until 4 October 2016. The Tribunal has already found that on 30 August 2016, Mr Chowdhury had realised that Patient A had the wrong-sided replacement prosthesis implanted but did not tell him. Therefore, it follows that Mr Chowdhury failed in his duty to inform Patient A about this as soon as possible.

185. The Tribunal found paragraph 3E of the Allegation proved.

Paragraph 3G

186. Mr Chowdhury admitted paragraph 3D of the Allegation that he failed to promptly notify Patient A about the possibility that the wrong-sided replacement prosthesis had been implanted. Mr Chowdhury also admitted paragraph 3F of the Allegation that in a letter of 19 September 2016, he failed to inform Patient A's GP of the possibility that the wrong-sided prosthesis had been implanted. The Tribunal also determined that Mr Chowdhury failed to inform Patient A on 30 August 2016, or as soon as possible thereafter of the possibility that the wrong-sided prosthesis had been implanted.

187. The Tribunal went onto consider whether Mr Chowdhury's failure to inform either Patient A or Patient A's GP about the possibility that the wrong-sided replacement prosthesis had been implanted was because he had realised that the wrong-sided replacement prosthesis had been implanted.

188. The Tribunal has already set out its reasoning for its conclusion that from 30 August 2016 onwards, Mr Chowdhury had realised that Patient A had the wrong-sided replacement prosthesis implanted.

189. The Tribunal therefore found that Mr Chowdhury's actions in not informing Patient A or Patient A's GP about the possibility that the wrong-sided replacement prosthesis had been implanted were prompted by his realisation on 30 August 2016 that this was the case – that Patient A did have a wrong-sided prosthesis.

190. Accordingly, the Tribunal found paragraph 3G of the Allegation proved.

Paragraph 3H

191. The Tribunal considered whether Mr Chowdhury had acted dishonestly by not informing Patient A or Patient A's GP that the wrong-sided replacement prosthesis had been implanted.

192. In applying *Ivey*, the Tribunal considered Mr Chowdhury's state of knowledge and belief. The Tribunal had already concluded that on 30 August 2016, Mr Chowdhury realised that Patient A had the wrong-sided replacement prosthesis implanted. It therefore concluded that Mr Chowdhury knew that Patient A had the wrong-sided replacement prosthesis implanted and did not inform Patient A or Patient A's GP until October 2016, despite his realisation in August 2016. The Tribunal concluded that Mr Chowdhury's decision not to inform Patient A or Patient A's GP about this was taken in order to prolong the period that both Patient A and Patient A's GP were unaware of the serious clinical error that Mr Chowdhury knew had occurred. This is consistent with Mr Chowdhury delaying for some weeks his submission of a Datix form (which he did not submit until 12 October 2016) and not informing his line management. The Tribunal concluded that Mr Chowdhury took this decision on 30 August 2016 in order to mislead both Patient A and Patient A's GP into continuing to believe, for the time being at least, that Patient A's surgery had been performed without issue.

193. The Tribunal concluded that Mr Chowdhury took the decision to mislead Patient A and Patient A's GP by not informing them that he had realised that the wrong-sided replacement prosthesis had been implanted during the Procedure. The Tribunal considered whether ordinary, decent people would view Mr Chowdhury's actions in so doing to be dishonest. The Tribunal considered that ordinary, decent people would conclude that Mr Chowdhury had acted dishonestly in deciding not to inform Patient A or Patient A's GP that Patient A had been implanted with the wrong-sided replacement prosthesis.

194. The Tribunal therefore found paragraph 3H of the Allegation proved.

Paragraph 6

195. Mr Chowdhury has admitted paragraph 4 of the Allegation that on 30 January 2017, he told Patient A that it was 'impossible to check' at the time of the Procedure, that the correct-sided replacement prosthesis had been implanted. He also admitted

paragraph 5 of the Allegation that the information he provided to Patient A about this was untrue.

196. The Tribunal considered whether Mr Chowdhury knew that the information he provided to Patient A was untrue when he told him that it was 'impossible to check' at the time of Procedure that the correct-sided replacement prosthesis had been implanted.

197. The Tribunal reminded itself that by 30 January 2017, Mr Chowdhury had seen Patient A in clinic on 4 October 2016 and 3 November 2016, and submitted a Datix form on 12 October 2016.

198. In his letter written to Patient A's GP, reporting on the 4 October 2016 consultation appointment, he told the GP that he (Mr Chowdhury) had informed Patient A that it is likely that a wrong-sided component was used and that he had apologised. He stated that the way forward was for him (Mr Chowdhury) to investigate and that he would keep Patient A and his GP informed.

199. In his letter written to Patient A's GP, of 9 November 2016, Mr Chowdhury told the GP that, having reviewed Patient A's implants with his colleagues, '*there may be a loosening of the fixation pin between the femoral and tibial component…'* and '*The polyethythene spacer may be too small or the component may be causing this'*. He suggested that the only way forward was to explore surgically the knee replacement. The Tribunal noted that the colleagues he reviewed the implants with were Mr F and the Clinical Director for Orthopaedics at the Trust.

200. The Tribunal also took into account that Mr Chowdhury had seen Patient A in clinic in 30 January 2017 for a post-surgical review following the replacement on 22 December 2016 of the wrong-sided component with a correct-sided one.

201. The Tribunal then considered the letter Mr Chowdhury dictated on 30 January 2017. In it, Mr Chowdhury stated:

> *This gentleman has done exceedingly well post surgery…*
>
> *The surgery from 22nd December confirmed that he had a right femoral component on a left limb and explained the change in the shape of the leg with time. This was exchanged to a left component and I am glad to say that* [Patient A] *has not suffered any complications post surgery… I have apologised again for the complication of the wrong component, that is being investigated currently.*
>
> *I have explained to* [Patient A] *why I think that has occurred and why it was impossible to check at the time of surgery.*

202. The Tribunal considered what Mr Chowdhury knew about what had happened during the Procedure by 30 January 2017. It is a matter of agreed evidence that normal checking processes were adhered to during the Procedure. It is also agreed evidence that nothing of note happened during the Procedure and that Patient A's knee, following the implantation of the prosthesis moved well and appeared to be well-aligned. It is agreed evidence that Mr Chowdhury, in the days after the Procedure, was made aware of a possibility that the wrong-sided replacement prosthesis had been implanted by Ms B. It was accepted by the Tribunal that, it was more likely than not that the outer box of the prosthesis said 'Left' and a matter of fact that the inner label, affixed to the NJR form, said 'Right'. Therefore, the Tribunal accepted that Mr Chowdhury was correct in confirming to Ms B that there had been a labelling error. There was no evidence before the Tribunal to suggest that between his discussion with Ms B and 4 October 2016 Mr Chowdhury had informed Patient A about the labelling error. The Tribunal concluded that on 30 August 2016, Mr Chowdhury realised that Patient A had the wrong-sided replacement prosthesis implanted. The Tribunal found that Mr Chowdhury had failed to inform Patient A or Patient A's GP about this realisation and in so doing, had been dishonest. By January 2017, Mr Chowdhury had removed the prosthesis from Patient A's left knee and had seen that it was etched with the letter 'R' indicating that it was a right-sided prosthesis.

203. In his witness statement, Mr Chowdhury stated that:

> *93. I honestly never lied to the patient over the incident. To know there was a wrong implant used, someone had to recognise the disparity between the labels and the boxes. This did not occur and I know that I performed the required checks for the hospital… In December 2016 I identified that the wrong-sided implant had been placed although, on 30 January 2017, I was still ignorant of how the human error had occurred, as I was under the impression that all the correct checks had been performed intra-operatively*.

204. In his oral evidence to the Tribunal in October 2019, when cross-examined on this, Ms Johnson asked:

> *…*
>
> *MS JOHNSON: I am not quite sure how I exactly phrased it last time but the question is this: you saying to the patient that it is impossible to check at the time must be untrue because it was possible to check by looking at the marking.*

Mr Chowdhury responded:

> *A I see what you are saying; right. It is possible to check whether it is a left or right implant, you are absolutely right. Was I lying to the patient when*

> *I said it was impossible for me at the time? No, I was not lying because, as I have said before, I would have to go out of my normal practices to want to turn that implant over or something would have to happen to show there was a problem, then I would have to look at the implant. It may be a fine point but this is the importance of this. Never ever at any time did I have any need or desire to lie to the patient. I provided the information to the patient at the earliest opportunity, it was not as quick as I would have liked, but no-one was forcing me or pushing me down the line to do so and I did all those things myself out of my own bat, so I had no reason to lie to the patient after the surgery. I genuinely felt, when I met him on 30 January 2017, I genuinely did not know why I had made that mistake other than realising that there was a symmetry that I had not expected before and that there was a universality in the connection but that was after the event, that was not at the time.*

Ms Johnson stated:

> *Q I suggest you did have a reason to lie to the patient, because you believed then, and you believe now, that it was a labelling issue on the outer box.*

Mr Chowdhury responded:

> *A No, that is not true. When I saw the patient in April 2016 I was aware there were two options: there was a labelling error or there was an implant failure. As I have explained before, the only way to 100% know would be to operate, that is the clearest and most accurate way of knowing and I would not operate in the first six weeks so I looked and pursued the error with the label. That was based on, as I said before, the clinical picture of the patient, the clinical appearance of the patient, the skyline view, the general AP view, all reassured me or did not distract me from thinking that there was a definite problem…*

205. Under cross-examination, it was suggested to Mr Chowdhury that in the letter of 30 January 2017 that he had written that it was 'impossible to check' because he did not want to admit how easily the situation could have been avoided if Mr Chowdhury had checked the implant itself. In response, Mr Chowdhury said:

> *Yes. I think it is quite unfair because this is not the way that the process was either during the time in the surgery or afterwards because again I never had any element of trying to remove any facts from the patient and no way did I want to mislead the patient, so I informed him that I can confirm we have done the wrong side and I can confirm because it is marked on the underside. How did it happen? I do not know, I am not sure but I think it is because we have all been misled with the outer box. It never went into my mind to start saying well, of course, we could have done this, we could have done that, we*

> *could have done the other. That was not going through my mind at the time. That sort of process came up when we sat down twelve months later and said how has this happened? That is when I forensically looked at it.*

206. It was put to Mr Chowdhury in cross-examination that the emphasis in the letter of 30 January 2017 that it was 'impossible to check' at the time of the Procedure was because Mr Chowdhury believed there had been a labelling error. In response he said:

> *I have no information other than what we did that day and my comment is purely about what we did that day. It does not consider any reflections a second after that operation, it is what we did that day and that day I did my normal routine practice which does not include me looking at the implants and looking for a laser etching, so I was telling the truth. As far as I was concerned I was telling the truth because I was not doing anything different.*

207. The Tribunal did not accept Mr Chowdhury's evidence from his statement that on 30 January 2017, he was '*still ignorant of how the human error had occurred, as I was under the impression that all the correct checks had been performed intra-operatively*'. The Tribunal was satisfied that in the days following the Procedure, Mr Chowdhury was notified of the possibility that the correct checks had not been performed effectively because the NJR label bore the word 'Right' and this had not been noticed in theatre which suggested that there was labelling error and that therefore the possibility that the wrong-sided prosthesis had been implanted could not be ruled out. The Tribunal therefore concluded that Mr Chowdhury could not plausibly claim to still be ignorant about what had gone wrong during the Procedure in January 2017.

208. The Tribunal found Mr Chowdhury's explanations in his oral evidence, both in chief and in cross-examination, for telling Patient A that it was impossible to check at the time of surgery were wholly unconvincing. He was unable to provide a plausible explanation for what he told Patient A. For example, when asked by Mr Brassington, '*Why then did you tell the patient, or why did you summarise your conversation with the patient as being an explanation as to why it was impossible to check at the time of surgery?*', Mr Chowdhury answered:

> *That comment related to the surgery of 11 April 2016 and does not relate to any other time. It was a reflection on what I had experienced at the time of that surgical procedure and no other time. The surgical procedure had gone exceedingly well from beginning to end and there were no issues at any point during that surgical procedure that worried me. Of course, after the surgical procedure that was different but during the surgical procedure I was able to perform the plans that I had decided to do, I had been able to perform the surgical procedure in the way that I wanted to do it and it had all gone together successfully without any complication or minor irritation throughout.*

> *At no point did I feel that anything had gone wrong. At no point during the surgical procedure did anybody associated with that procedure feel alarmed or raise any alarm at any time during that surgical procedure, which meant that I was able to concentrate on the things that I do not normally do which in this particular case would be the removal of the lower half of the femur and ensure the neurovascular structures were left intact and the other thing I would not normally do would be to now cement a new shaft in place, which was the new things.*
>
> *Then the final thing that was new was dialling in the rotation of the prosthesis which you do not normally do in that method for the secondary revision procedure. Then once I had completed everything the knee looked valgus and the knee moved in an excellent range of motion and in particular the patella femoral joints, that is the kneecap in other words, I am sorry, the kneecap joints, it was tracking beautifully down the middle of the prosthesis. Usually if there is a mal-alignment or a rotational abnormality of the femoral prosthesis, the femoral piece we have replaced, if that is mal-aligned in terms of the varus or valgus bend or if it is rotated abnormally then you will get a malfrac of the patella, the patella may even dislocate, but it was all absolutely beautifully down the line, it all worked lovely, so I was reassured completely. I was happy to close up and nobody around me felt any concern. It felt at the time like a normal surgical procedure. That is why I felt at the time it was not possible to do anything different.*

209. In cross-examination, Mr Chowdhury accepted that it was possible at the time of the Procedure to have checked. When asked how it was possible, Mr Chowdhury responded:

> *Because you can do all those things. There can be an alarm with the outer box, there can be an alarm with the inner box, there can be alarm with the NJR, there can be alarm by looking at the underside of the implants. Okay. That is how it is possible. What I am saying is I did not think it was possible at the time and it is not a lie, this. I did not think it was possible at the time because I did not do anything different and for me to do something different I would have to have been jolted out of my normal pathway.*
>
> *For example, I do not pick up the implant routinely and check them because with a secondary revision of the knee, which is a resurfacing procedure, the left femoral component will not sit on the right hand side because you have got this six degree valgus cut, the stem goes up the middle of the thigh bone and if it is the left knee the component will be sitting this way. If you put a right knee on it will be pointing this way and so when you put the stem up the middle it will catch on one side, it will not reduce on the opposite side, there will be a gap. With the resurfacing type of knee replacement you*

> *cannot put a left knee replacement on a right side and you cannot put a right side on the left because it will not fit down on the cut surface. Also it looks different. You will see immediately the asymmetry is on the wrong side because with these resurface secondary type procedures they have a longer outer edge than an inner edge on the left. If you put the wrong one on it will not sit down because the valgus is pointing varus now, not outside, but also the long flange will now be on the inside of the knee and not the outside of the knee, so that cannot happen.*
>
> *Where the mistake happened with this surgical procedure which I was not aware of until after it happened was I did not appreciate that there was a universal joint that will allow you to put a left and a right distal femoral replacement on the end of the artificial femur; mistake number one. Mistake number two, I did not appreciate until after I had done the surgery that that prosthesis looks very symmetrical when you glance, when you look at it.*

210. In the Tribunal's assessment, Mr Chowdhury's suggestion in oral evidence that on 30 January 2017 when he wrote in the letter '*it was impossible to check at the time of surgery'* this was only a reflection of what he believed in April 2016 during the Procedure was not plausible.

211. Mr Chowdhury told the Tribunal that he tends to dictate his clinic letters of any out-patient consultation in clinic before the next patient. The Tribunal found that Mr Chowdhury had a duty to keep accurate records of his consultations with Patient A and, in this regard, the Tribunal reminded itself of Mr Q's testimonial where he wrote that Mr Chowdhury '*is very meticulous in his documentation and letters'*. The Tribunal took into account Mr Chowdhury's duty to be open and honest with Patient A in line with GMP and the Trust's Duty of Candour policy. The Tribunal found that the meaning of that sentence in the letter was perfectly plain and clear relating as it does to what was possible at the time of surgery.

212. The Tribunal did not accept that Mr Chowdhury was referring to his state of mind on 11 April 2016 or his usual practice when he told Patient A and subsequently wrote to Patient A's GP that it was '*impossible to check at the time of surgery'* whether the correct-sided prosthesis had been implanted. The Tribunal concluded that Mr Chowdhury knew that this was untrue because he knew in the days after the Procedure that something must have gone wrong because the NJR form said a 'Right' implant had been used for a left-sided procedure. Further, on 22 December 2016 he had removed the wrong-sided implant and confirmed by checking the etching that it was in fact a right-sided prosthesis when a left-sided one had been required. Mr Chowdhury therefore knew that if he, or any other colleague in theatre that day had correctly checked the outer box, inner packaging and component itself, it would have been clear that the wrong-sided prosthesis was being used.

213. The Tribunal concluded that Mr Chowdhury sought to minimise his responsibility to Patient A and his GP for the serious clinical error that occurred during the Procedure by suggesting that it was 'impossible to check' at that time whether the correct-sided replacement prosthesis had been implanted. It determined that Mr Chowdhury knew that the information he provided to Patient A on 30 January 2017 was untrue.

214. Accordingly, the Tribunal found paragraph 6 of the Allegation proved.

Paragraph 7

215. In considering whether Mr Chowdhury's actions were dishonest and applying the test of *Ivey*, the Tribunal reminded itself of its findings. The Tribunal had already found that Mr Chowdhury knew that he provided information to Patient A that was untrue when he said that it was 'impossible to check' at the time of the Procedure that the correct-sided replacement prosthesis has been implanted.

216. The Tribunal also had regard to Mr Chowdhury's previous actions in relation to his communications with Patient A up until 30 January 2017. The Tribunal had already found that Mr Chowdhury had behaved dishonestly by failing to inform Patient A or Patient A's GP about his realisation on 30 August 2016 that the wrong-sided replacement prosthesis had been implanted. The Tribunal concluded that Mr Chowdhury, having already acted dishonestly in failing to inform Patient A that there had been a serious clinical error, when he had a duty to do so, was more likely to have again acted dishonestly by suggesting to Patient A that it was 'impossible to check' at the time of the Procedure that the correct-sided replacement prosthesis has been implanted.

217. Taking the above into account, the Tribunal considered whether ordinary, decent people would consider Mr Chowdhury's actions in providing Patient A with information that he knew to be untrue was dishonest. The Tribunal concluded that ordinary, decent people would consider Mr Chowdhury's actions, in seeking to minimise the seriousness of the clinical error for which he bore ultimate responsibility, by providing information he knew to be untrue to Patient A, to be dishonest.

218. The Tribunal therefore found paragraph 7 of the Allegation proved.

The Tribunal's Overall Determination on the Facts

219. The Tribunal has determined the facts as follows:

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

1. On 11 April 2016, you carried out a revision left total knee arthroplasty with distal femoral replacement rotating hinge arthroplasty ('the

Procedure') on Patient A and you:
Admitted and found proved

a. failed to adequately check that the correct-sided replacement prosthesis was being used prior to commencing the Procedure;
Admitted and found proved

b. inappropriately implanted the wrong-sided replacement prosthesis.
Admitted and found proved

~~2. After the Procedure you failed to adequately recognise that the wrong-sided replacement prosthesis was implanted, in that you did not:~~

a. ~~consider an email or other communication sent to you on 14 April 2016, indicating that the wrong-sided replacement prosthesis was implanted;~~
~~To be determined~~

b. ~~identify that the alignment of the leg was wrong when checking the post-operative x-ray.~~
~~Admitted and found proved~~

~~2A. After the Procedure you failed to recognise that the wrong-sided replacement prosthesis may have been implanted, in that you did not adequately consider an email or other communication with you between 11 and 14 April 2016 indicating that the wrong-sided replacement prosthesis was implanted.~~
Amended under Rule 17(6)
Deleted under Rule 17(2)(g)

2B. After the Procedure you failed to adequately recognise that the wrong-sided replacement prosthesis may have been implanted, in that you did not identify that the alignment of the leg was wrong when checking the post-operative x-ray.
Amended under Rule 17(6)
Admitted and found proved

2C. On 14 April 2016 you sent an email to Ms B stating:
Amended under Rule 17(6)

a. "I have up to date x-rays of this patient [Patient A] that show he has the correct sided implant – left for a left revision";

Admitted and found proved

b. "There is a labelling error";
Admitted and found proved

c. "the label and not the implant is wrong".
Admitted and found proved

2D. You were not in a position to confirm the information you provided at 2C was true as:
Amended under Rule 17(6)

a. up to date x-rays did not show that Patient A had the correct sided implant;
Determined and found proved

b. you did not know that a labelling error had occurred.
Not proved

2E. Your actions as described at paragraph 2C(a) were dishonest by reason of paragraph 2D(a).
Amended under Rule 17(6)
Determined and found proved

2F. Your actions at paragraph 2C(b) and 2C(c) were dishonest by reason of 2D(b).
Amended under Rule 17(6)
Not proved

3A. You failed to adequately report that the wrong-sided replacement prosthesis had been implanted in that you:
Amended under Rule 17(6)
Admitted and found proved

a. delayed filling in the Datix form;
Admitted and found proved

b. did not inform:

i. your Clinical Director;
Admitted and found proved

ii. the Trust Medical Director.
Admitted and found proved

3B. Your failure to act as described in paragraph 3A was due to you having realised that the wrong-sided replacement prosthesis had been implanted.
Amended under Rule 17(6)
Determined and found proved

3C. Your actions as described in paragraph 3A were dishonest by reason of paragraph 3B.
Amended under Rule 17(6)
Determined and found proved

3D. You failed to promptly notify Patient A about the possibility that the wrong-sided replacement prosthesis had been implanted.
Amended under Rule 17(6)
Admitted and found proved

3E. You failed to inform Patient A on 30 August 2016, or as soon as possible thereafter of the possibility that the wrong-sided prosthesis had been implanted.
Amended under Rule 17(6)
Determined and found proved

3F. In a letter of 19 September 2016, you failed to inform Patient A's GP of the possibility that the wrong-sided prosthesis had been implanted.
Amended under Rule 17(6)
Admitted and found proved

3G. Your actions as set out in paragraphs 3D, 3E and 3F were due to you having realised that the wrong sided replacement prosthesis had been implanted.
Amended under Rule 17(6)
Determined and found proved

3H. Your actions as set out in paragraphs 3D, 3E and 3F were dishonest by reason of paragraph 3G.
Amended under Rule 17(6)
Determined and found proved

4. On 30 January 2017, you told Patient A that it was 'impossible to check' at the time of the Procedure, that the correct-sided replacement prosthesis had been implanted, or words to that effect.
Admitted and found proved

5. The information you provided to Patient A was untrue.
   Admitted and found proved

6. You knew that the information you provided to Patient A was untrue.
   Determined and found proved

7. Your actions as described at paragraphs 4 and 5 were dishonest by reason of paragraph 6.
   Determined 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

Determination on Impairment - 23/02/2021

1. The Tribunal now has to decide in accordance with Rule 17(2)(l) of the Rules whether, on the basis of the facts which it has found proved, Mr Chowdhury's fitness to practise is impaired by reason of misconduct.

The Evidence

2. The Tribunal has taken into account all the evidence received during the facts stage of the hearing, both oral and documentary. In addition, the Tribunal received a number of documents on behalf of Mr Chowdhury:

- A statement of personal reflections, dated February 2021;
- A certificate of attendance on a Maintaining Professional Ethics course run by the Clinic for Boundaries Studies, dated 12 January 2021;
- An updated Personal Development Plan, dated February 2021;
- Two Datix reports, dated June 2019 and October 2020.

Submissions

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

3. Ms Johnson provided written submissions to the Tribunal. Ms Johnson referred the Tribunal to the relevant authorities and reminded it that a finding of impairment was one for its own independent judgment. Ms Johnson submitted that Mr Chowdhury's fitness to practise is impaired by reason of his misconduct. Throughout her submissions, Ms Johnson referred the Tribunal to a number of paragraphs in Good Medical Practice (2013) (GMP).

4. Ms Johnson submitted that Mr Chowdhury had not made Patient A his first concern contrary to paragraph 1 of GMP and he had instead put his '*own position*' first, in an attempt to protect himself from scrutiny and criticism. She submitted that Mr Chowdhury's dishonesty was a breach of paragraph 65 of GMP, and a breach of a fundamental tenet of the profession.

5. Ms Johnson also submitted that Mr Chowdhury had failed in his duty to contribute to, and comply with, systems set up to protect patients including reporting adverse incidents. Ms Johnson referred the Tribunal to paragraphs 49 and 55 of GMP and submitted that Mr Chowdhury, while now accepting that his behaviour was arrogant, had failed to work in partnership with Patient A throughout his treatment. Ms Johnson reminded the Tribunal that even after performing revision surgery on Patient A and replacing the wrong-sided replacement prosthesis with a correct-sided implant, Mr Chowdhury further misled Patient A. Mr Chowdhury said that there was nothing that could have prevented the error in implanting the wrong-sided prosthesis. She submitted that this was an aggravating factor. Ms Johnson further submitted that Mr Chowdhury had misled Patient A, Patient A's GP and Ms B, the NJR co-ordinator in his correspondence with them.

6. Ms Johnson submitted that Mr Chowdhury's dishonesty was sustained for a period of over nine months. She submitted that for those nine months and the years that followed, Mr Chowdhury had sought to cover up his errors. She submitted that Mr Chowdhury's actions amount to very serious misconduct.

7. Ms Johnson submitted that the Tribunal is entitled to consider how Mr Chowdhury behaved during these proceedings. She stated that a doctor is entitled to challenge the allegations against him but that this Tribunal had made adverse findings against Mr Chowdhury and had not accepted his account of events in a number of significant ways. She submitted that his personal statement of reflections, produced for the impairment stage, was contrary to the position Mr Chowdhury had adopted for many years. She submitted that it may well be to Mr Chowdhury's credit that he is '*finally starting to accept*' his actions. However, she submitted that by accepting his dishonest conduct now, it follows that Mr Chowdhury had previously failed to act with frankness and honesty before the Tribunal. She submitted that Mr Chowdhury's motivation was, as it had always been, to protect himself. She submitted that Mr Chowdhury tells the truth now because he knows '*he has reached the end of the line and knows his career is at risk*'.

8. Ms Johnson submitted that, at most, it can be said that Mr Chowdhury is only just beginning to develop insight and remediate his misconduct. Ms Johnson invited the Tribunal to make a finding of current impairment on the basis of the seriousness of its findings of fact and in order to protect the public, to uphold appropriate standards of behaviour and to maintain public confidence in the profession.

On behalf of Mr Chowdhury

9. In oral submissions, Mr Brassington accepted the authorities and approach to impairment Ms Johnson had invited the Tribunal to take. Mr Brassington submitted that were it possible for Mr Chowdhury to admit misconduct and current impairment of his fitness to practise on the basis of the facts he had admitted and facts the Tribunal had found proved, he would.

10. Mr Brassington referred the Tribunal to Mr Chowdhury's reflections and submitted that following his attendance on the Maintaining Professional Ethics course and his reading of the Tribunal's determination on the facts, Mr Chowdhury had begun to understand his failings including his failure to act with courage. Mr Brassington submitted that Mr Chowdhury had digested his failure to seek help and recognised that arrogance on his part, in dismissing the possibility that he had made a clinical error, began the downward spiral that culminated in these proceedings. Mr Brassington submitted that Mr Chowdhury had been on a painful, difficult and harrowing journey of reflection in order to understand his many failures. Regarding current impairment, Mr Brassington suggested that Mr Chowdhury has insight, although it may have come too late and be poorly developed. Mr Brassington submitted that Mr Chowdhury's reflections provide an indication of the likelihood of repetition for such discreditable conduct. He submitted that there was a vanishing possibility of repetition.

11. Mr Brassington did not accept Ms Johnson's submission that Mr Chowdhury's reflections and his acceptance that he had acted dishonestly were because he knows his career is at risk. He submitted that the easier position for Mr Chowdhury to adopt would have been to accept the adverse findings of the Tribunal, without acknowledging that the findings were true. Mr Brassington submitted that for Mr Chowdhury to come before his regulator following such a determination and acknowledge that it is true and correct was the first act of courage he had demonstrated. Mr Brassington acknowledged that Mr Chowdhury should have accepted his failures from the outset but invited the Tribunal to give some credit to him for his full acceptance of his dishonesty, his reflections and insight now. Mr Brassington reminded the Tribunal of Mr Chowdhury's previous 28 years as a good surgeon with an unblemished career, who has provided good and useful service to his patients. He also submitted that Mr Chowdhury, having practised without restriction since the GMC opened its investigation, had not repeated his misconduct.

12. Mr Brassington referred the Tribunal to the two Datix reports which he submitted were relevant to these proceedings. He submitted that they demonstrated that Mr Chowdhury had properly undertaken his duty of candour and was following correct procedures when issues occurred during surgery. Mr Brassington submitted that in his reflections, Mr Chowdhury has attempted to modify his practice to avoid any further clinical errors, but that he has accepted that the real insight he needed to develop was into his dishonest conduct. Mr Brassington submitted that Mr Chowdhury was now before the Tribunal ashamed, humbled and prepared to accept findings of misconduct and impairment.

The Relevant Legal Principles

13. The Legal Assessor reminded the Tribunal 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 judgment alone.

14. In approaching the decision, the Legal Assessor advised the Tribunal to be mindful of the two stage process to be adopted: first whether the facts as found proved amounted to misconduct that was serious, and then whether that serious misconduct could lead to a finding of impairment.

15. The Legal Assessor advised that the Tribunal must determine whether Mr Chowdhury's fitness to practise is impaired today, taking into account Mr Chowdhury'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.

16. In considering whether Mr Chowdhury's fitness to practise is currently impaired, the Legal Assessor advised the Tribunal to apply the test as set out by Dame Janet Smith in the Fifth Shipman Report as quoted in *CHRE v NMC and Grant* [2011] EWHC 927 (Admin) (`*Grant*´):

> *Do our findings of fact in respect of the doctor's misconduct, deficient professional performance, adverse health, conviction, caution or determination show that his/her fitness to practise is impaired in the sense that s/he:*
>
> *a. has in the past acted and/or is liable in the future to act so as to put a patient or patients at unwarranted risk of harm; and/or*
>
> *b. has in the past brought and/or is liable in the future to bring the medical profession into disrepute; and/or*
>
> *c. has in the past breached and/or is liable in the future to breach one of the fundamental tenets of the medical profession*
>
> *d. has in the past acted dishonestly and/or is liable to act dishonestly in the future.*

17. The Legal Assessor reminded the Tribunal that Mr Chowdhury was entitled to deny the allegations and put the GMC to proof. Taking denials of allegations as evidence of further dishonesty should be approached with caution and of course the Tribunal may think recent acceptance of dishonesty may be relevant to insight, remediation and risk of repetition.

18. The Tribunal accepted the legal advice provided by the Legal Assessor.

The Tribunal's Determination on Impairment

Misconduct

19. In considering whether Mr Chowdhury's actions amounted to misconduct that was serious, the Tribunal first noted which of the facts found proved related to Mr Chowdhury's clinical errors and which referred to his dishonest conduct. The Tribunal considered that Mr Chowdhury was entitled to deny the allegations and limited its consideration of misconduct to the facts found proved.

Clinical Failings

20. The Tribunal noted that it had identified a number of clinical failings in Mr Chowdhury's treatment of Patient A during and after the Procedure. The Tribunal considered that paragraph 15 of GMP was relevant:

> **15** *You must provide a good standard of practice and care…*

21. The Tribunal has already accepted that there was a labelling error which contributed to the implantation of the wrong-sided replacement prosthesis during the Procedure. The Tribunal accepted that Mr Chowdhury's clinical failings did amount to him falling short of the expected standards and behaviours of a doctor. However, the Tribunal did not accept that such a falling short was serious enough to amount to misconduct. Further, the Tribunal noted that Mr Chowdhury has put in place a number of additional processes in theatre to ensure that such errors with implants do not occur again. Accordingly, the Tribunal found that Mr Chowdhury's clinical failings did not amount to misconduct.

Dishonesty

22. The Tribunal went on to consider Mr Chowdhury's dishonest conduct and whether it amounted to misconduct that was serious.

23. The Tribunal concluded that Mr Chowdhury had repeatedly been dishonest to avoid scrutiny of his own behaviour.

24. The Tribunal reminded itself that Mr Chowdhury's repeated dishonesty involved:

- His misleading email to Ms B, which the Tribunal found limited further consideration or investigation into the possibility of the wrong-sided replacement prosthesis being implanted;

- His failure to promptly fill in the Datix form which delayed urgent enquiry;
- His failure to inform his Clinical Director and the Trust Medical Director which also delayed urgent enquiry;
- His failure, prior to 30 August 2016, to notify Patient A of the possibility of the wrong-sided replacement prosthesis being implanted;
- His failure, from 30 August 2016, to notify Patient A of his realisation that the wrong-sided replacement prosthesis had in fact been implanted;
- His failure, from 30 August 2016, to notify Patient A's GP that the wrong-sided replacement prosthesis had been implanted;
- His decision to provide information to Patient A which he knew was not true when he stated that it was impossible to check prior to Patient A's revision surgery that the correct-sided replacement prosthesis had been implanted.

25. The Tribunal considered that Mr Chowdhury's dishonesty was particularly serious because:

- it was repeated;
- it persisted over time;
- it continued when Mr Chowdhury became aware on the 30 August 2016 that a wrong-sided replacement prosthesis had in fact been implanted; and
- of the number of people to whom Mr Chowdhury was dishonest.

26. The Tribunal was referred to a number of paragraphs of GMP by Ms Johnson. In reviewing GMP itself, the Tribunal considered that the following paragraphs were of relevance:

> **23** *To help keep patients safe you must:…*
>
> > **c** *report adverse incidents involving medical devices that put or have the potential to put the safety of a patient, or another person, at risk…*
> >
> > **e** *respond to requests from organisations monitoring public health.*
>
> **24** *You must promote and encourage a culture that allows all staff to raise concerns openly and safely.*

27. The Tribunal considered that, in dishonestly responding to Ms B's enquiry about the NJR Form and in failing adequately to report firstly the possibility and subsequently the reality of the wrong-sided replacement prosthesis having been implanted, Mr Chowdhury had breached the above paragraphs of GMP. Further, in successfully convincing Ms B that there was simple labelling error, rather than a

possibility that a wrong-sided replacement prosthesis had been implanted, Mr Chowdhury had prevented appropriate action being taken, both in terms of rectifying his clinical error in Patient A's case and by preventing any consideration of processes that were not adequate to ensure safe clinical care.

28. The Tribunal also considered that paragraphs 49 and 55 were relevant:

> **49** *You must work in partnership with patients, sharing with them the information they will need to make decisions about their care, including:*
>
> > **a** *their condition, its likely progression and the options for treatment, including associated risks and uncertainties*
> >
> > **b** *the progress of their care, and your role and responsibilities in the team…*
>
> **55** *You must be open and honest with patients if things go wrong. If a patient under your care has suffered harm or distress, you should:*
>
> > **a** *put matters right (if that is possible)*
> >
> > **b** *offer an apology*
> >
> > **c** *explain fully and promptly what has happened and the likely short-term and long-term effects.*

29. The Tribunal was of the view that Mr Chowdhury had clearly failed to act in partnership with Patient A, given his decision, despite multiple opportunities, not to raise the possibility of or realisation that the wrong-sided replacement prosthesis had been implanted. The Tribunal considered that Mr Chowdhury's failure to notify Patient A of the clinical error and the subsequent inaction, represented a fundamental breach of GMP. It considered that Mr Chowdhury had removed Patient A's right to make informed decisions about his treatment by not informing him of the risks and potential harms that having the wrong-sided replacement prosthesis implanted could cause.

30. Having acted dishonestly both in what Mr Chowdhury had told Patient A and colleagues and in correspondence, the Tribunal noted that he had also breached the following paragraphs of GMP:

> **65** *You must make sure that your conduct justifies your patients' trust in you and the public's trust in the profession.*
>
> **68** *You must be honest and trustworthy in all your communication with*

patients and colleagues. This means you must make clear the limits of your knowledge and make reasonable checks to make sure any information you give is accurate.

31. Taking all of the above into account, the Tribunal was certain that Mr Chowdhury's actions would be considered deplorable by fellow practitioners and would be alarming to members of the public. The Tribunal concluded that, given the seriousness of his dishonest behaviour, which amounted to grave breaches of GMP, Mr Chowdhury's conduct had fallen so far short of the standards of conduct reasonably to be expected of a doctor as to amount to misconduct that was serious.

Impairment

32. The Tribunal, having found that the facts found proved amounted to serious misconduct, went on to consider whether, as a result, Mr Chowdhury's fitness to practise is currently impaired.

33. In considering the issue, the Tribunal first applied the test set out in *Grant*.

34. The Tribunal took into account that Mr Chowdhury's dishonest actions included misleading Ms B, who was responsible for ensuring accurate information was provided to the NJR. In providing false information to the NJR co-ordinator and his subsequent inaction, including delaying the Datix form, Mr Chowdhury impeded processes designed to learn from mistakes, in order to safeguard patients. The Tribunal concluded that Mr Chowdhury's behaviour had put patients at risk of harm.

35. In considering the rest of the limbs of *Grant*, the Tribunal had regard to the duties of a doctor registered with the GMC as set out in GMP. It noted that all doctors have a duty to:

- make the care of their patients their first concern;
- work in partnership with patients; and
- be honest and open and act with integrity.

36. The Tribunal has already considered that Mr Chowdhury's behaviour had prevented patient safety processes and had removed Patient A's right to make informed decisions about his treatment. The Tribunal found that Mr Chowdhury's behaviour had breached three fundamental tenets, had risked bringing the profession into disrepute and included dishonesty. The Tribunal concluded that Mr Chowdhury has in the past acted in the way described in all four limbs of *Grant*.

37. The Tribunal went onto consider what Mr Chowdhury was liable to do in the future in accordance with *Grant* and in doing so considered Mr Chowdhury's insight, whether his dishonesty was remediable, had been remedied and what the likelihood of repetition was.

38. The Tribunal considered Mr Chowdhury's level of insight into his misconduct. It bore in mind Mr Chowdhury's recent reflective document demonstrated that he has now accepted that his behaviour was dishonest and had reflected on its seriousness. The Tribunal noted that in his personal statement of reflections, regarding his actions from 30 August 2016 onwards, Mr Chowdhury stated that he had not acted as a '*mature, reliable and competent doctor'*, that he '*broke the code of trust between clinicians'*. He stated that he had learned from his mistakes and failings in relation to his duty of care to Patient A, Patient A's GP, his Clinical Lead and Medical Director to ensure that '*such a level of dereliction of duty'* would not be repeated. The Tribunal accepted that Mr Chowdhury had examined the events that occurred and how he could have handled each situation differently. The Tribunal considered that it is to Mr Chowdhury's credit that he now accepts and admits that his behaviour was dishonest and that he is not merely accepting the Tribunal's findings.

39. The Tribunal, having reviewed Mr Chowdhury's reflections, had concerns about the depth and breadth of his insight. It found that the reflections were somewhat superficial, and that Mr Chowdhury appeared to have largely externalised responsibility for his dishonesty, blaming it in part on stress, instead of taking full accountability for the role he played. The Tribunal was concerned that Mr Chowdhury had not fully understood the impact of his dishonest behaviour in misleading Patient A, Patient A's GP and his colleagues. The Tribunal was of the view that Mr Chowdhury continues to lack understanding and has not fully accepted the seriousness of his dishonest behaviour, nor the impact of his actions on patient safety or the reputation of the profession. It remained troubled that Mr Chowdhury has neither acknowledged nor taken ownership of the calculated choices that he made to be repeatedly dishonest. Instead he suggested:

- in relation to April 2016 '*I was conducting a charade misleading myself, the patient, the NJR co-ordinator and this was wholly dishonest',*
- in relation to August 2016 '*this was another example of my inability to face the facts and address the issues ahead';*
- in his further reflections '*it is important to recognise that the base trigger for these behaviours is stress… My stress and vulnerability prevented me from challenging difficult choices. Instead, it led me to avoid tackling difficult issues head on'.*

The Tribunal therefore considered that Mr Chowdhury's insight is poorly developed.

40. The Tribunal reminded itself that dishonesty is difficult to remediate. It took into account that Mr Chowdhury, up until this stage of proceedings, had maintained his stance that he had not acted dishonestly. The Tribunal received evidence and reflections on the Maintaining Professional Ethics course that Mr Chowdhury had undertaken. The Tribunal acknowledged that Mr Chowdhury, in frankly admitting his

dishonesty, has demonstrated that he has some insight into his behaviour which is a necessary step towards remediation.

41. The Tribunal was also referred to Mr Chowdhury's recent appropriate use of the Datix forms. The Tribunal was not persuaded that evidence of Mr Chowdhury appropriately using adverse incident reporting systems could be attributed any weight in terms of remediation since the errors reported were not Mr Chowdhury's. Given the serious nature and range of Mr Chowdhury's dishonesty, the evidence provided to date was not sufficient to demonstrate successful remediation of his misconduct.

42. The Tribunal, having concluded that Mr Chowdhury's insight and remediation were insufficient, could not be satisfied that there was not a risk of Mr Chowdhury repeating his dishonest conduct.

43. The Tribunal concluded that all three limbs of the overarching objective were engaged in this case and warranted a finding of impairment. Taking Mr Chowdhury's actions together, he had put patients at risk, had damaged public confidence in the profession and had failed to maintain proper professional standards and conduct.

44. Taking all of the above into account, the Tribunal determined that Mr Chowdhury's fitness to practise is impaired by reason of misconduct.

Determination on Sanction - 26/02/2021

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

The Evidence

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

- Further testimonials in support of Mr Chowdhury from colleagues, patients and friends, various January and February 2021 dates;
- Examples of the emails sent by Mr Chowdhury's solicitors requesting testimonials, which included a 'summary' of the Tribunal's decision, which in fact comprised paragraph 219 of the Tribunal's determination on the facts;
- Confirmation from five of the testimonial authors dated 24 February 2021 that when they wrote their testimonials they were aware that Mr Chowdhury had accepted that he behaved dishonestly;
- Patient Feedback Forms from 2018 and 2019.

Submissions

3. Prior to hearing submissions on sanction, parties and the Tribunal discussed which version of the Sanctions Guidance it was appropriate to have regard to. Mr Chowdhury's hearing first commenced in September 2019, when the most recent version of the Sanctions Guidance was that published in February 2018.

4. Ms Johnson, on behalf of the GMC, submitted that she was content to refer to the February 2018 Sanctions Guidance. Mr Brassington, on behalf of Mr Chowdhury, stated that he did not a have a view as to which version of Sanctions Guidance should be used and submitted that it made no difference to the submissions of either party. Parties agreed that there were no differences between the 2018 and 2020 versions of the Sanctions Guidance when considering the paragraphs they intended to refer the Tribunal to.

5. It was agreed by parties and the Tribunal to refer to the 2018 Sanctions Guidance.

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

6. Ms Johnson provided written submissions and referred the Tribunal to relevant paragraphs of the Sanctions Guidance (February 2018) ('the SG'). She submitted that the appropriate and proportionate sanction in this case was one of erasure. Ms Johnson invited the Tribunal to identify mitigating and aggravating factors as part of its deliberations.

7. Ms Johnson made reference to the Tribunal's determination at the impairment stage that Mr Chowdhury's insight was poorly developed, and she submitted that this lack of insight is an aggravating factor. She submitted that Mr Chowdhury has not demonstrated the timely development of insight and that he failed to tell the truth during the hearing. Therefore, his remediation has been limited to ensuring the surgical error is not repeated rather than reflecting on his dishonest conduct. She highlighted to the Tribunal that there was no reflection from Mr Chowdhury that his dishonesty led him to mislead the Trust in its initial investigation, mislead the panel during the progress of this case and mislead a large number of colleagues and professionals.

8. Ms Johnson referred the Tribunal to the bundle of testimonials that had been produced by Mr Chowdhury for this stage of proceedings. Ms Johnson highlighted that Mr Chowdhury's previous unblemished career is a mitigating factor and she observed that he has the support of many colleagues. However, she submitted that those colleagues appear not to know the full picture about the extent of the dishonesty that Mr Chowdhury now admits, as not all of them refer to having seen Mr Chowdhury's February's reflective statement or being aware of his having reversed his position regarding dishonesty.

9. Ms Johnson further submitted that all but three of the authors said they have only seen a summary of the determination on facts. Ms Johnson submitted that it is accepted many professionals have provided testimonials that demonstrate Mr Chowdhury is a good surgeon and he has worked for many years building up his expertise. However, she submitted that the dishonesty here is particularly serious. It was repeated and persistent and so limited weight should be given to his clinical expertise.

10. Ms Johnson noted that a number of the testimonials authors have confirmed that they are aware of the very recent admission of dishonesty, but stated that one would expect a change of opinion from the testimonial authors in light of the admissions Mr Chowdhury had now made about his dishonesty. She submitted that, on the contrary, the vast majority of the authors remain surprised at the allegations that have been found proved and maintained their view of Mr Chowdhury as a man of honesty and integrity. She submitted that only limited weight should be given to the testimonials.

11. In considering sanction in ascending order of restrictiveness, Ms Johnson submitted that it would not be appropriate for the Tribunal to conclude the case with no action, and this is not a case where undertakings have been agreed. She further submitted that an order of conditions would not be appropriate in the circumstances of this case, given the nature of the misconduct that has been found.

12. Ms Johnson reminded the Tribunal that suspension could be appropriate if it was satisfied the doctor has insight and does not pose a significant risk of repeating behaviour. However, she submitted that Mr Chowdhury's insight remains limited. She told the Tribunal that his acceptance of responsibility has come two years after this Tribunal was first seized of this case and over three years since the Trust investigation was concluded.

13. Ms Johnson submitted that Mr Chowdhury's misconduct is so serious that it is fundamentally incompatible with continued registration, and that only erasure will protect the public and achieve the aims of the overarching objective.

<u>On behalf of Mr Chowdhury</u>

14. In his submissions, Mr Brassington first invited the Tribunal to reconsider a number of findings it had made in its determination on impairment. Mr Brassington submitted that the Tribunal's analysis of Mr Chowdhury's insight and remedial work at the impairment stage was an unfair characterisation and criticism of the reflective document. Mr Brassington submitted that although Mr Chowdhury's reflective piece may have come late in the process, it was not superficial. He submitted that Mr Chowdhury had begun by acknowledging his dishonest behaviour and expressed remorse for his actions demonstrating clear acceptance of full responsibility. He explained Mr Chowdhury felt vulnerable and frightened at the consequences of his actions and was undoubtedly under stress. He reiterated that Mr Chowdhury has not shied away

from his dishonesty but set out to explain why he conducted himself in a dishonest fashion following his attendance on a highly regarded Maintaining Professional Ethics course for the purpose of gaining insight. He submitted that Mr Chowdhury had attempted to explain to the Tribunal how he fell so short of his own standards.

15. Further, Mr Brassington invited the Tribunal to reconsider their assessment of the Datix forms provided at the impairment stage, in particular, the Datix form from June 2019. He submitted that the circumstances were almost identical to those of this case and demonstrated that Mr Chowdhury had performed his duty of candour in informing the patient and appropriately made his senior colleagues aware of the issue.

16. Mr Brassington then referred the Tribunal to the testimonials provided on behalf of Mr Chowdhury and submitted that the analysis by the GMC in relation to them should be rejected. Mr Brassington highlighted that the testimonials echoed Mr Chowdhury's extraordinary good character and his invaluable contribution to the NHS. Mr Brassington submitted that the authors of these testimonials were entitled to have their opinions, notwithstanding the findings and recent admissions of dishonesty. He submitted that the testimonial authors express their views on Mr Chowdhury's positive influence and hardworking nature, as the majority have worked with him over a large number of years. Mr Brassington submitted that it is of note that all of the testimonials speak to how out of character Mr Chowdhury's actions in relation to Patient A appear to be. He submitted that appropriate weight should be given to the testimonials when considering sanction.

17. Mr Brassington reminded the Tribunal that the imposition of a sanction is to achieve the overarching objective in protecting the public and that proportionality governs that decision. He submitted that any decision must weigh the competing interests of Mr Chowdhury and the public. He submitted that the public interest is a two-way street. He submitted that if Mr Chowdhury was erased, the public would be deprived of the skills and service of an otherwise competent surgeon.

18. Mr Brassington submitted that public interest could be protected by an order of suspension in this case. He submitted that suspension would send the appropriate signal to the public and patients that acts of dishonesty are unacceptable. He reminded the Tribunal of its finding that Mr Chowdhury is at the beginning of his remediation. He submitted that a 12 month suspension followed by a review would allow Mr Chowdhury to continue that journey and rectify the wrongs of his poor decision-making.
Mr Brassington submitted that this would give Mr Chowdhury the opportunity to persuade the GMC and the MPTS that he can return to practice and do that which he is clearly skilled at.

The Relevant Legal Principles

19. The Legal Assessor reminded that Tribunal that the decision as to the appropriate sanction, if any, to impose in this case is a matter for the Tribunal exercising its own judgment.

20. The Legal Assessor advised the Tribunal to take the SG into account, noting that while the 2018 and 2020 versions of the SG do not differ in any significant way, it had been encouraged to consider the 2018 version when making its determination on sanction. She reminded the Tribunal that it should, in particular, have regard to the section on dishonesty in the SG.

21. The Legal Assessor reminded the Tribunal to first identify mitigating and aggravating features and bear in mind the overarching objective throughout its deliberations.

22. The Legal Assessor reminded the Tribunal itself that the main reason for imposing any sanction is to protect the public and that sanctions are not imposed to punish or discipline doctors, even though they may have a punitive effect. The Legal Assessor advised the Tribunal to apply the principle of proportionality, carefully balancing Mr Chowdhury's interests with the public interest.

23. The Tribunal accepted the legal advice provided by the Legal Assessor.

The Tribunal's Determination on Sanction

24. The Tribunal has already set out its decisions on the facts and impairment which it took into account, along with the submissions of both parties, during its deliberations on sanction. In his submissions, Mr Brassington invited the Tribunal to reconsider a number of its findings in its determination on impairment. The Tribunal gave careful consideration to Mr Brassington's submissions and concluded that it was satisfied with its analysis as set out in its determination on impairment. Before considering what action, if any, to take in respect of Mr Chowdhury's registration, the Tribunal considered and balanced the aggravating and mitigating factors in this case.

<u>Aggravating Factors</u>

25. The Tribunal first considered paragraphs 50-56 of the SG. It reminded itself of its concerns regarding the depth and breadth of Mr Chowdhury's insight, as it had set out in its previous determination. The Tribunal noted that, in line with paragraph 52c of the SG, Mr Chowdhury had not demonstrated `*the timely development of insight*', having only admitted his dishonest behaviour after the Tribunal announced its determination on the facts. The Tribunal considered paragraph 52d and noted

that Mr Chowdhury had '*fail[ed] to tell the truth in the hearing'* until stage two of these proceedings.

26. The Tribunal remained concerned that Mr Chowdhury, in his statement of personal reflections, had not sufficiently reflected on the impact of his dishonesty on others. It noted that while Mr Chowdhury had referred to the impact of his dishonesty on Patient A in reference to August 2016, he had not reflected on how his behaviour had obstructed Patient A's fundamental right to make informed decisions about his own treatment. Mr Chowdhury has provided no real reflection on his further dishonesty to Patient A in January 2017. The Tribunal remained concerned that it had no reflection before it as to why Mr Chowdhury had chosen to continue to mislead Patient A, even after his revision surgery had been completed. Further, Mr Chowdhury did not appear to have fully reflected on the impact of his dishonesty on his colleagues, some of whom were required to give evidence to this Tribunal, on the Trust as a whole, and on the reputation of the profession.

27. The Tribunal considered paragraph 55 of the SG:

> **55** *Aggravating factors that are likely to lead the tribunal to consider taking more serious action include:*
>
> > **a** *a failure to raise concerns (see paragraphs 133–135)*
> >
> > **b** *a failure to work collaboratively with colleagues (see paragraphs 136–138)*

and went onto consider paragraphs 133 and 136 of the SG under the heading '*Cases that indicate more serious action is likely to be required':*

> **133** *All doctors have a responsibility to promote and encourage a culture that allows all staff to raise concerns openly and safely. Doctors' duties to raise concerns are set out in paragraphs 24–25 of Good medical practice...*
>
> **136** *Doctors are expected to work collaboratively with colleagues to maintain or improve patient care. These duties are set out in paragraphs 35–37 of Good medical practice.*

28. The Tribunal was of the view that it was an aggravating factor that Mr Chowdhury had failed to raise concerns and had failed to promote and encourage a culture that allows all staff to raise concerns openly and safely, having already found that Mr Chowdhury had breached paragraph 24 of GMP.

29. The Tribunal noted that Mr Chowdhury had failed to work collaboratively with Patient A's GP as Patient A's GP was not made aware of the possibility that the wrong-sided replacement prosthesis had been implanted despite Mr Chowdhury

knowing that it had. The Tribunal concluded that this was a further aggravating factor.

30. The Tribunal has already acknowledged that dishonesty, particularly persistent dishonesty, is difficult to remediate. The Tribunal considered paragraph 128 of the SG:

> **128** *Dishonesty, if persistent and/or covered up, is likely to result in erasure.*

It considered that Mr Chowdhury's dishonesty, having occurred repeatedly over a period of nine months was persistent. Further, it considered that Mr Chowdhury had sought to cover up his clinical failings and that he had been dishonest with Patient A and Patient A's GP and had dishonestly avoided informing his seniors and reporting his clinical error using the Datix system. It identified this as an aggravating factor.

31. The Tribunal had regard to paragraph 129 of the SG:

> **129** *Cases in this category are those where a doctor has not acted in a patient's best interests and has failed to provide an adequate level of care, falling well below expected professional standards (set out in domains one and four of Good medical practice on knowledge, skills and performance, and maintaining trust). Particularly where there is a deliberate or reckless disregard for patient safety or a breach of the fundamental duty of doctors to 'Make the care of [your] patients [your] first concern' (Good medical practice, paragraph 1).*

The Tribunal has already found that Mr Chowdhury had breached a fundamental duty of doctors in removing Patient A's right to make informed decisions about his own treatment. The Tribunal considered that Mr Chowdhury had not acted in Patient A's best interests and had not made Patient A's care his first concern. It was clear to the Tribunal that this was an aggravating factor.

<u>Mitigating Factors</u>

32. Having considered the aggravating factors, the Tribunal went on to identify the mitigating factors in this case and considered paragraphs 24-49 of the SG.

33. The Tribunal had regard to paragraph 25a of the SG:

> **25** *The following are examples of mitigating factors.*
>
> > **a** *Evidence that the doctor understands the problem and has insight, and of their attempts to address or remediate it. This could include the doctor admitting facts relating to the case, apologising to the patient (see paragraphs 42–44), making efforts to prevent behaviour*

recurring, or correcting deficiencies in performance or knowledge of English.

34. The Tribunal acknowledged that Mr Chowdhury had made some admissions at the outset of these proceedings and, had at the impairment stage, admitted his dishonesty. The Tribunal accepted that Mr Chowdhury does have some limited insight into his misconduct. He has engaged with coaching through the Maintaining Professional Ethics course and sought to set out his reflections on his dishonesty. The Tribunal considered paragraph 46 of the SG which refers to when a doctor is likely to have insight. It acknowledged that Mr Chowdhury does now accept that he should have behaved differently. It was satisfied that Mr Chowdhury's insight, though poorly developed, was a significant mitigating factor.

35. The Tribunal also considered paragraph 42 of the SG, and acknowledged that Mr Chowdhury had made 'unreserved' apologies in his personal statement of reflections. The Tribunal identified that these were relevant mitigating factors.

36. The Tribunal reminded itself, in line with paragraph 25b and 25e of the SG that Mr Chowdhury had a previously unblemished career of 28 years. Further, Mr Chowdhury has been practising without restriction since these events and there is no evidence of any concerns having been raised about Mr Chowdhury before or since. The Tribunal identified this as a mitigating factor.

37. The Tribunal was invited by Mr Brassington to consider the impact that stress had on Mr Chowdhury's behaviour. It considered this in line with paragraph 25d of the SG. The Tribunal acknowledged that in his reflective statement, Mr Chowdhury referred to his stress and vulnerability at the time and after the events in question. The Tribunal has not had the opportunity to explore these issues directly with Mr Chowdhury since his admission of dishonesty. In any event, the Tribunal did not accept that such matters could be mitigating factors in a case of such serious dishonesty.

38. The Tribunal had regard to the testimonials produced on behalf of Mr Chowdhury for this stage of the hearing. It considered, in line with paragraph 34 of the SG, what weight, if any, to give them. The Tribunal accepted that the testimonials provided were consistently positive about many relevant considerations, including Mr Chowdhury's honesty, integrity and probity. The Tribunal accepted that the testimonial authors were made aware of its findings, and a number of those contacted during the course of stage two confirmed that Mr Chowdhury had made them aware that he had accepted that he had behaved dishonestly before they wrote the testimonials. It also took into account that a number of those providing testimonials had read the Tribunal's determination on facts. The Tribunal was satisfied that it could attribute considerable weight to the testimonials that clearly spoke to Mr Chowdhury's good and honest character as well as his skills as a

clinician. The Tribunal accepted that, with the exception of Mr Chowdhury's dishonest behaviour in relation to this case, he has been honest.

39. The Tribunal, having carefully considered the aggravating and mitigating factors identified in this case, went onto consider each sanction in ascending order of severity, starting with the least restrictive.

No action

40. 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 determined that there are no exceptional circumstances in this case and that, given the seriousness of its findings, it would not be sufficient, proportionate, or in the public interest to conclude this case by taking no action.

Conditions

41. The Tribunal next considered whether to impose conditions on Mr Chowdhury's registration. The Tribunal concluded that the circumstances in which conditions are usually appropriate and workable do not apply to this case. Further, the Tribunal noted that the SG provides that in cases of dishonesty, it is difficult to identify any conditions that could be appropriate, proportionate, workable, and measurable. In light of Mr Chowdhury's dishonest behaviour, the Tribunal determined that it would not be possible to formulate appropriate and workable conditions, nor would imposing conditions sufficiently mark the seriousness of his dishonest conduct. Neither Ms Johnson nor Mr Brassington sought to persuade the Tribunal that conditions would be appropriate in this case.

Suspension

42. The Tribunal had considered paragraphs 91-98 of the SG. The Tribunal accepted that suspension does have a deterrent effect and can be used to send a signal to the doctor, the profession, and the public about what is regarded as behaviour unbefitting a registered doctor. The Tribunal noted the SG provides that suspension may be appropriate where there is an acknowledgement of fault and it is satisfied the conduct will not be repeated. The Tribunal has already found that given Mr Chowdhury's limited insight and the amount of further remediation required, there remains a risk that he will repeat his dishonest conduct.

43. The Tribunal considered paragraphs 97a of the SG:

> **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.*

44. The Tribunal considered its previous findings, the mitigating and aggravating factors it has identified and the relevant sections of the SG to determine whether or not a period of suspension would uphold the overarching objective. The Tribunal concluded that in considering suspension it was also required to determine whether or not Mr Chowdhury's dishonesty is fundamentally incompatible with continued registration.

45. The Tribunal considered Mr Chowdhury's insight, remediation and remaining risk of repetition. A suspension could uphold the first strand of the overarching objective, namely to protect and promote the heath, safety and wellbeing of the public, as it would give Mr Chowdhury the opportunity to develop his insight and reduce the risk of repetition. However, the Tribunal has already concluded that Mr Chowdhury's dishonest conduct had breached three fundamental tenets of the profession. The Tribunal could not be satisfied that, having knowingly and deliberately breached such core duties of the profession, a period of suspension was the appropriate and proportionate sanction in this case. Given the seriousness of the persistent and repeated dishonesty in this case, the Tribunal concluded that a suspension would not be sufficient to uphold the two other limbs of 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. A suspension could damage confidence in the profession and the system of regulation. The Tribunal concluded that, in the circumstances, a period of suspension would not protect the public interest.

Erasure

46. Accordingly, the Tribunal considered that the following further paragraphs of the SG were engaged:

> **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…

> **d** Abuse of position/trust (see *Good medical practice*, paragraph 65: *'You must make sure that your conduct justifies your patients' trust in you and the public's trust in the profession')…*
>
> **h** *Dishonesty, especially where persistent and/or covered up (see guidance below at paragraphs 120–128).*
>
> **i** *Putting their own interests before those of their patients (see Good medical practice paragraph 1: – 'Make the care of* [your] *patients* [your] *first concern' and paragraphs 77–80 regarding conflicts of interest)…*

47. The Tribunal was of the view that Mr Chowdhury's persistent and covered up dishonesty demonstrated a deliberate and calculated disregard for the principles set out in Good Medical Practice. Mr Chowdhury's conduct did not justify his patients' trust in him and the public confidence in the profession. The Tribunal considered that Mr Chowdhury had abused his position in a series of attempts to cover up his errors and had in so doing put himself above his care of Patient A and Patient A's right to make informed decisions about his own treatment. Accordingly, the Tribunal concluded that Mr Chowdhury's dishonesty did amount to misconduct that was fundamentally incompatible with continued registration.

48. The Tribunal concluded that, in the circumstances, erasure was the only appropriate sanction 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.

49. The Tribunal weighed Mr Chowdhury's interest and accepted the significant impact that its decision will have on him. However, the need to uphold the overarching objective outweighs Mr Chowdhury's own interest in this case, the sanction is not being imposed to be punitive, but the Tribunal accepts that its effect will be punitive. The Tribunal considered the potential impact upon patients if a competent and well-regarded doctor is removed from the register. However, so serious was Mr Chowdhury's repeated and persistent dishonesty that no lesser sanction than erasure would maintain proper professional standards and maintain public confidence in the medical profession.

50. The Tribunal therefore determined to erase Mr Chowdhury's name from the Medical Register.

Determination on Immediate Order - 26/02/2021

1. Having determined to erase Mr Chowdhury's name from the medical register, the Tribunal has considered, in accordance with Rule 17(2)(o) of the Rules, whether his registration should be subject to an immediate order.

Submissions

2. On behalf of the GMC, Ms Johnson referred the Tribunal to the relevant paragraphs of the Sanctions Guidance (February 2018) ('the SG') and submitted that an immediate order of suspension would be appropriate in this case given the seriousness of Mr Chowdhury's misconduct that has led to his erasure. She submitted that an immediate order was required to uphold public confidence and also to protect the public as the Tribunal had found that there is a risk that Mr Chowdhury will repeat his misconduct.

3. On behalf of Mr Chowdhury, Mr Brassington made no submissions on the matter of the imposition of an immediate order.

The Relevant Legal Principles

4. The Legal Assessor reminded the Tribunal that the order of erasure will not take effect for 28 days, or if there is an appeal, until the appeal has been determined.

5. The Legal Assessor referred the Tribunal to Section 38 of the Medical Act 1983 which provides that '*On giving a direction for erasure or a direction for suspension under section 35D(2) in respect of any person the Medical Practitioners Tribunal Service, if satisfied that to do so is necessary for the protection of members of the public or is otherwise in the public interest, or is in the best interests of that person, may order that his registration in the register shall be suspended forthwith*'.

6. The Legal Assessor advised the Tribunal to have regard to paragraphs 172-178 of the SG in determining whether an immediate order was required in this case.

7. The Tribunal accepted the legal advice provided by the Legal Assessor.

The Tribunal's Determination

8. The Tribunal has taken account of the relevant paragraphs of the SG, in particular paragraphs 172, 173 and 178 which state:

> **172** *The tribunal may impose an immediate order if it determines that it is necessary to protect members of the public, or is otherwise in the public interest, or is in the best interests of the doctor. The interests of the doctor include avoiding putting them in a position where they may come under pressure from patients, and/or may repeat the misconduct, particularly where this may also put them at risk of committing a criminal offence. Tribunals*

should balance these factors against other interests of the doctor, which may be to return to work pending the appeal, and against the wider public interest, which may require an immediate order.

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

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

9. The Tribunal considered the seriousness with which it viewed Mr Chowdhury's misconduct, its findings on impairment and the sanction it has imposed. The Tribunal has already found that Mr Chowdhury's actions are fundamentally incompatible with continued registration, that his insight is limited and that there remains a risk of repetition. Accordingly, it determined that an immediate order of suspension is necessary to protect members of the public and to uphold public confidence in the profession.

10. Mr Chowdhury's erasure from the medical register will take effect 28 days from when notice is deemed to have been served upon him, unless he lodges an appeal in the interim. If Mr Chowdhury lodges an appeal, the immediate order for suspension will remain in place until such time as the outcome of any appeal is determined.

11. There is no interim order to revoke.

12. That concludes the case.

Confirmed
Date 26 February 2021 Dr Matthew Fiander, Chair

ANNEX A – 02/10/2019

Application to amend the Allegation under Rule 17(6)

1. Following discussions in session between the Tribunal and the parties on day 1 of this hearing regarding the wording of paragraph 2 of the Allegation, on day 2 of this hearing, Ms Kathryn Johnson, Counsel, on behalf of the General Medical Council (GMC), made an application to amend the Allegation pursuant to Rule 17(6) of the GMC (Fitness to Practise) Rules 2004 ('the Rules').

Submissions

2. Ms Johnson proposed the following amendments to paragraph 2 of the Allegation:

> ~~2. After the Procedure you failed to adequately recognise that the wrong-sided replacement prosthesis was implanted, in that you did not:~~
>
> ~~a. consider an email or other communication sent to you on 14 April 2016, indicating that the wrong-sided replacement prosthesis was implanted;~~
> ~~**To be determined**~~
>
> ~~b. identify that the alignment of the leg was wrong when checking the post-operative x-ray.~~
> ~~**Admitted and found proved**~~
>
> 2. After the Procedure you failed to adequately recognise that the wrong-sided replacement prosthesis may have been implanted, in that you did not consider an email or other communication sent to you on 14 April 2016, indicating that the wrong-sided replacement prosthesis was implanted.
>
> 3. After the Procedure you failed to adequately recognise that the wrong-sided replacement prosthesis may have been implanted, in that you did not identify that the alignment of the leg was wrong when checking the post-operative x-ray.

3. Ms Johnson submitted that taking the Tribunal's comments from the previous day into account, these changes better reflected the GMC's case. Ms Johnson submitted that these changes could be made without injustice to either party.

4. Mr Brassington did not oppose the application from the GMC to amend paragraph 2 of the Allegation.

The Tribunal's Proposed Wording

5. During the course of its deliberations on this application, the Tribunal, of its own volition, invited parties to consider some further amendments to the Allegation. It proposed to maintain the numbering of the original paragraphs of the Allegation and therefore suggested that the new paragraphs should be set out at 2A and 2B. It proposed further changes to paragraph 2A, as follows:

> 2A. <u>After the Procedure you failed to recognise that the wrong-sided replacement prosthesis may have been implanted, in that you did not adequately consider an email sent to you or other communication with you between 11 and 14 April 2016 indicating that the wrong-sided replacement prosthesis was implanted.</u>

6. The Tribunal proposed these changes on the following basis: it noted that, with regard to the original wording of sub-paragraph 2a, there appeared to be no specific evidence that an email or other communication had been sent to Mr Chowdhury on 14 April 2016. Rather, it understood the GMC case in regard to this sub-paragraph had always been that that there was an email or other form of communication sent to Mr Chowdhury between the date of the Procedure, 11 April 2016, and the date of his response on 14 April 2016.

7. The Tribunal suggested removing the word 'adequately' from the stem of paragraph 2 of the Allegation. It was the Tribunal's understanding that the GMC's case was that the term 'adequate' related to Mr Chowdhury's consideration of the email or other communication rather the adequacy of his recognition that the wrong-sided replacement prosthesis was implanted.

Further submissions

8. After taking instruction on the Tribunal's further proposed amendments to paragraph 2A of the Allegation, Ms Johnson submitted a further proposed amendment as follows:

> 2. After the Procedure you failed to adequately recognise that the wrong-sided replacement prosthesis:
>
> > a. may have been implanted, in that you did not adequately consider an email or other communication with you between 11 April 2016 to 14 April 2016, indicating that the wrong-sided replacement prosthesis was implanted;

b. was implanted, in that you did not identify that the alignment of the leg was wrong when checking the post-operative x-ray.

9. Mr Brassington made no further submissions on amending the Allegation.

Tribunal's Decision

10. The Tribunal had regard to the submissions of both parties and accepted that Legal Assessor's advice. It was mindful of the overarching objective and the test set out in Rule 17(6):

(6) Where, at any time, it appears to the Medical Practitioners Tribunal that—

(a) the allegation or the facts upon which it is based and of which the practitioner has been notified under rule 15, should be amended; and

(b) the amendment can be made without injustice,

it may, after hearing the parties, amend the allegation in appropriate terms.

11. The Tribunal determined to maintain its own proposed wording of paragraph 2A of the Allegation as set out above. It considered that this wording most accurately represented the GMC case. The Tribunal was satisfied that its own amendment to paragraph 2A and the GMC's proposed amendment to paragraph 2B would not cause injustice to either party.

12. Following these amendments, paragraph 2 of the Allegation now reads as follows:

2A. After the Procedure you failed to recognise that the wrong-sided replacement prosthesis may have been implanted, in that you did not adequately consider an email or other communication with you between 11 and 14 April 2016 indicating that the wrong-sided replacement prosthesis was implanted.
Amended under Rule 17(6)
To be determined

2B. After the Procedure you failed to adequately recognise that the wrong-sided replacement prosthesis may have been implanted, in that you did not identify that the alignment of the leg was wrong when checking the post-operative x-ray.
Amended under Rule 17(6)
Admitted and found proved

13. Mr Brassington confirmed that the amended paragraph 2B of the Allegation was admitted by Mr Chowdhury.

ANNEX B – 02/10/2019

Application under Rule 17(2)(g)

1. At the end of the GMC case, Mr Brassington, Counsel, on Mr Chowdhury's behalf, made an application under Rule 17(2)(g) of the Rules, which states:

> *"the practitioner may make submissions as to whether sufficient evidence has been adduced to find some or all of the facts proved and whether the hearing should proceed no further as a result, and the Medical Practitioners Tribunal shall consider any such submissions and announce its decision as to whether they should be upheld".*

2. This application related to the amended paragraph 2A of the Allegation:

> 2A. After the Procedure you failed to recognise that the wrong-sided replacement prosthesis may have been implanted, in that you did not adequately consider an email or other communication with you between 11 and 14 April 2016 indicating that the wrong-sided replacement prosthesis was implanted.

Submissions on Mr Chowdhury's behalf

3. Mr Brassington reminded the Tribunal that in these proceedings the burden of proof remains with the GMC and that the standard of proof is on the balance of probabilities. Further, he reminded the Tribunal that the principle case law for a 17(2)(g) application is *R v Galbraith* [1981] 73 Cr App R 124 (`*Galbraith*'). He submitted that the Tribunal consider both limbs of *Galbraith* and to substitute references to both 'judge' and 'jury' to itself as the decisionmaker in these proceedings:

> 'Lord Lane LCJ said: 'How then should the judge approach a submission of 'no case'?
>
> (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case.
>
> (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example, because of inherent weakness or vagueness or because it is inconsistent with other evidence.

> (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case.'

4. Mr Brassington submitted that there was no case to answer when considering paragraph 2A of the Allegation. He submitted that rather than there being a deficit of evidence presented by the GMC, the evidence is all one way and is against the GMC's case. Mr Brassington told the Tribunal that Mr Chowdhury accepted that there was a communication with him which suggested that the wrong-sided replacement prosthesis may have been implanted. However, Mr Brassington submitted that the GMC has to establish that there was a failure by Mr Chowdhury to recognise the possibility that the wrong prothesis may have been implanted. Mr Brassington submitted that Mr Chowdhury did consider this possibility and that he called for early x-rays to review Patient A's limb to establish whether this was the case.

5. Mr Brassington submitted that whilst Mr Chowdhury was wrong about the x-ray he reviewed, this mischief was admitted and captured by paragraph 2B of the Allegation. Mr Brassington further submitted that the GMC's expert witness, Mr M had accepted in cross-examination that it was appropriate for Mr Chowdhury to wait until x-rays had been obtained before taking action or escalating the matter to management. In closing, Mr Brassington submitted that the GMC had no evidence to show that Mr Chowdhury failed to consider the possibility of a wrong-sided prosthesis having being implanted and so paragraph 2A of the Allegation should be deleted.

GMC Submissions

6. Ms Johnson, Counsel, on behalf of the GMC, submitted that there is a case to answer for paragraph 2A of the Allegation. Ms Johnson accepted the legal precedent referenced by Mr Brassington. She submitted that Mr Chowdhury's email response to Ms B on 14 April 2016 demonstrated that he had given inadequate consideration to the concerns raised. His email response was very definite:

> 'I have the up to date x-rays of this patient that show he has the correct sided implant – left of left revision. There is a labelloing [*sic*] error and [Company Representative] is going to do a Zimmer incident form for this.
>
> We may have to alter the label on the [National Joint Registry] form? If this is not possible we may have to take advise [*sic*] but the label and not the implant is wrong'

Ms Johnson submitted that Mr Chowdhury's email shows that he dismissed the possibility that the wrong implant may have been used and clearly stated that there was a labelling error.

7. Ms Johnson told the Tribunal that it was accepted that Mr Chowdhury did take some action in calling for an x-ray of Patient A. However, she submitted that considering the evidence of Mr M, it would have been appropriate for Mr Chowdhury to discuss the best course of action with his colleagues which he did not do. Ms Johnson submitted that Mr Chowdhury failed to adequately consider the information provided to him by Ms B and that his mind was closed to the possibility that the wrong-sided implant had been used. She further submitted that by not being open to the possibility that the wrong-sided implant had been used and concluding there had been a labelling error, Mr Chowdhury failed to adequately consider that the wrong-sided replacement prosthesis had been implanted into Patient A.

The Relevant Legal Principles

8. The Legal Assessor advised the Tribunal that Mr Brassington's submissions with regard to the legal test and, in particular, the case of *Galbraith* were correct. The Tribunal accepted this advice.

Tribunal's Decision

9. The Tribunal had regard to the email sent by Mr Chowdhury on 14 April 2016 referenced by both parties which is set out above. It determined that this email was clear and that Mr Chowdhury had reviewed the x-rays and only then provided his response to Ms B to the effect that there had been a labelling error as opposed to a wrong-sided prosthesis having been implanted.

10. The Tribunal noted the evidence of Mr M, that Mr Chowdhury should have reported the matter promptly to his Clinical Director and the Trust Medical Director following receipt of the communication from Ms B. However, it also had regard to Mr M's further evidence that it was reasonable of Mr Chowdhury to await the outcome of his review of the x-rays before involving colleagues. The Tribunal accepted Mr Brassington's submission that Mr Chowdhury's interpretation of the x-rays was wrong (as admitted in paragraph 2B of the Allegation) but that this is a separate issue as to whether he adequately considered the communication from Ms B.

11. The Tribunal noted that although Mr Chowdhury believed that there was a labelling error, he nevertheless acted to order and review the x-rays of Patient A as a result of the communication received.

12. The Tribunal determined that there was no evidence before it that Mr Chowdhury did not adequately consider the communication received from Ms B about the possibility of a wrong-sided prosthesis being used. It therefore determined there was no case to answer for paragraph 2A of the Allegation.

ANNEX C – 04/10/2019

Tribunal's position statement

1. On day 3 of this hearing, Mr Chowdhury gave oral evidence. He was questioned by Mr Brassington, his Counsel and cross-examined by Ms Johnson, Counsel, on behalf of the GMC. At the end of day 3, the Tribunal retired into camera to formulate its questions for Mr Chowdhury. On day 4, a new Legal Assessor took over. The Tribunal's discussions continued into day 4 of this hearing, at which point, the Tribunal came to the conclusion that it was unable to formulate its questions for Mr Chowdhury without further understanding the rationale for how the GMC had put its case.

2. The Tribunal was mindful of the over-arching objective which guides these proceedings. In considering its questions for Mr Chowdhury, the Tribunal considered the evidence it had seen and heard so far and became concerned that its questions would be constrained by the limited Allegation in this case, which did not appear to cover the full extent of the regulatory concerns arising from Mr Chowdhury's actions. This had the potential to prevent the Tribunal from properly performing its regulatory duty to protect the public, maintain public confidence in the medical profession and uphold proper professional standards and conduct for members of that profession.

Legal advice received by the Tribunal

3. At this point the Tribunal sought legal advice from the Legal Assessor on whether there was any applicable case law regarding a situation in which the Tribunal considered that the Allegation before it did not contain paragraphs, relating to areas of evidence it has seen and heard, which could potentially have been alleged. The Legal Assessor's advice, which was subsequently repeated in session in the presence of both parties has been summarised below.

4. The Legal Assessor confirmed that she had been asked to give legal advice on the matters outlined above. She referred the Tribunal to two cases, *Professional Standards Authority for Health and Social Care v Nursing and Midwifery Council* [2015] EWHC 764 (Admin) ('*Jozi*') and *Ruscillo v CHRE* [2004] EWCA Civ 1356 ('*Ruscillo*'). She advised the Tribunal to pay particular attention to paragraphs 25, 27, 33, 34 of *Jozi*.

> *25. Citation of one case will suffice for present purposes. That is the decision of Sullivan J in R (on the application of Council for the Regulation of Health Care Professionals) v General Medical Council and Rajeshwar [2005] EWHC 2973 (Admin), which was given on 8 December 2005. At paragraph 7,*

Sullivan J said that the appellant's case there was that the first respondent "undercharged" the case against the second respondent. It was submitted in that case that the first respondent should have alleged that the second respondent's conduct was sexually motivated and/or indecent and not simply incompetent and/or inappropriate. The point was conceded on behalf of the GMC in that case but not by the second respondent. At paragraph 10 Sullivan J said that, for whatever reason, it was clear that the question whether indecency and/or a sexual motivation should be included in the charge by way of amendment was not addressed by the GMC following receipt of two witness statements. At paragraph 11, Sullivan J, so far as material, said:

"I am satisfied that whatever the evidential position may have been prior to the receipt of the two witness statements, once those two witness statements had been obtained any reasonable assessment of the totality of the available evidence could have led to only one conclusion; that it was appropriate to allege a sexual and/or indecent motivation by way of amendment. I emphasise the word 'allege' as it is only fair to emphasise that the second respondent has consistently denied that he had any such motivation. However, the only proper course for the GMC was to put Ms S and Ms B's allegations and the second respondent's denial before the Panel for its consideration."

27. As paragraph 18 of his judgment, Sullivan J said that that case fell squarely within the reasoning of the Court of Appeal in Ruscillo at paragraph 72, which I have already quoted. He continued that in that case there had been a serious procedural irregularity. There was no doubt in his view that the GMC should have amended the charge so as to allege indecency and/or a sexual motivation, but it simply failed to give any consideration to that issue. As a result, that issue was not considered by the panel. In my judgment, the facts of the present case are analogous to that one.

33. The third ground of appeal is that in this respect the Committee itself failed to intervene, despite the insufficiency of the evidence. I have already accepted that there was an insufficiency of evidence in this regard. I remind myself of what the Court of Appeal said is the role of a disciplinary tribunal in cases of this kind at paragraph 80 of its judgment in Ruscillo. Such a tribunal must be more proactive than might be the case, for example, of a trial judge in a criminal case.

34. I accept this submission also. Again, the ground of appeal has been conceded on behalf of the first respondent, but I make it clear again that I have reached an independent judgment. I am satisfied that ground 3 is well made also.

The Legal Assessor also advised the Tribunal to pay particular attention to paragraph 80 of *Ruscillo*:

> *80. The procedures for disciplinary proceedings under the various statutes referred to in section 29(1) of the Act are not identical. In general they involve a preliminary investigation of conduct of the practitioner of which complaint has been made. If it is decided to bring disciplinary proceedings, a charge will be proffered which alleges the facts relied upon as demonstrating professional misconduct. Admissions may be made by the practitioner, facts may be agreed and evidence may be called. The disciplinary tribunal will be faced with an act or omission, or more typically a course of conduct, which it is alleged constitutes professional misconduct. The disciplinary tribunal should play a more proactive role than a judge presiding over a criminal trial in making sure that the case is properly presented and that the relevant evidence is placed before it.*

5. The Legal Assessor reminded the Tribunal that it should have consideration of all three limbs of the over-arching objective set out in paragraph 1B of the Medical Act 1983.

> *(1B) The pursuit by the General Council of their over-arching objective involves the pursuit of the following objectives—*
> *(a) to protect, promote and maintain the health, safety and well-being of the public,*
>
> *(b) to promote and maintain public confidence in the medical profession, and*
>
> *(c) to promote and maintain proper professional standards and conduct for members of that profession.*

6. The Legal Assessor advised the Tribunal not to speculate and reminded it that there may be many reasons why the Allegation was drafted in the way that it was. She further advised that it was open to the Tribunal, if there were concerns about the scope of the Allegation, taking into account the judgments of *Jozi* and *Ruscillo*, to reconvene the hearing in session to put specific points to the GMC and to invite an explanation.

7. The Tribunal confirmed that it had accepted the legal advice offered by the Legal Assessor in camera. The Tribunal formulated three questions for the GMC on the matters which arose from its discussions.

8. Following legal advice being repeated in session, parties were invited to comment. On behalf of the GMC, Ms Johnson responded and advised that a further authority, *Professional Standards Authority v General Chiropractic Council, Cameron Briggs* [2014] EWHC 2190 (Admin) may assist the Tribunal. Mr Brassington did not

disagree that it would be appropriate to consider this additional authority. Parties agreed that it would be preferable to hear the specific concerns of the Tribunal before commenting on the appropriateness of the legal advice.

9. Following the request from parties, the questions formulated by the Tribunal for the GMC were read out by the Chair in open session as follows:

> 1. Patient A was not informed of the possibility of a wrong-sided implant for some months. What is the GMC's rationale for not bringing any allegation regarding this?
>
> 2. What is the GMC's rationale for only alleging dishonesty in relation to paragraphs 4 and 5 of the Allegation?
>
> 3. Has the GMC considered where the responsibility lies for ensuring that the error which affected Patient A was rectified as quickly and effectively as possible?

10. After seeking instructions, on behalf of the GMC, Ms Johnson responded to the Tribunal's questions. Ms Johnson told the Tribunal that taking its first and third questions together, it was the GMC's case that responsibility rests with Mr Chowdhury. She further explained that the consequence of not raising the Datix and therefore, the rationale for not informing the patient was the mischief that was covered by paragraph 3 of the Allegation. Regarding the Tribunal's second question, Ms Johnson told the Tribunal that the GMC took the decision, based on the evidence, that it would be appropriate only to allege dishonesty relating to 30 January 2017 as detailed in paragraphs 4 to 6 of the Allegation. Ms Johnson told the Tribunal that she assumed that its consideration of possible further dishonesty related to the email sent by Mr Chowdhury on 14 April 2016.

11. Having listened to the response from Ms Johnson, the Chair confirmed that while the email was relevant to its concerns about whether it would be appropriate to have a further allegation of dishonesty in the case, it was not the only evidence the Tribunal had identified. The Tribunal considered the answers provided by the GMC but these did not allay its significant concerns it had that its regulatory duty to protect the public may not be properly discharged.

12. The Tribunal again reminded itself of the over-arching objective and the guidance from caselaw provided by the Legal Assessor. It considered this extract of *Ruscillo*, paragraph 80, to be particularly relevant:

> *The disciplinary tribunal should play a more proactive role than a judge presiding over a criminal trial in making sure that the case is properly presented and that the relevant evidence is placed before it.*

The Tribunal considered the issue of fairness to both Mr Chowdhury and GMC and considered that at this point in time it would be inappropriate to simply amend the Allegation of its own volition, because of the potential unfairness to Mr Chowdhury. The case is already underway, the GMC has closed its case and Mr Chowdhury is part way through his evidence. Given the concerns that remain following the answers provided by the GMC, the Tribunal determined to set out those concerns in writing.

The Tribunal's concerns

13. The Tribunal noted that Mr Chowdhury admitted in his written evidence and confirmed in his oral evidence that he decided not to inform Patient A of the possibility that a wrong-sided prosthesis may have been implanted:

> *"I thought long and hard about whether, on the evidence available to me and the best interests of the patient, I should mention the possibility of a wrong sided implant may have been used… I made a carefully considered decision that it was in the patient's best interest to withhold this information until such a time as the explanation for the apparent label mismatch had become clearer."*

It noted that it is Mr Chowdhury's case that he did not inform Patient A about the wrong-sided prosthesis until 4 October 2016.

14. The Tribunal considered the relevance of paragraph 25 of *Jozi* which quotes J Sullivan in the case of *Council for the Regulation of Health Care Professionals) v General Medical Council and Rajeshwar* [2005] EWHC 2973 (Admin):

> *"I am satisfied that whatever the evidential position may have been prior to the receipt of the two witness statements, once those two witness statements had been obtained any reasonable assessment of the totality of the available evidence could have led to only one conclusion; that it was appropriate to allege a sexual and/or indecent motivation by way of amendment."*

15. In considering the totality of the evidence before it and the relevant paragraphs of Good Medical Practice ('GMP'), the Tribunal questioned whether it may have been appropriate to allege that Mr Chowdhury had failed to promptly notify Patient A about the possibility that the wrong-sided prosthesis had been implanted thereby breaching paragraphs 55 and 49a, b and c of GMP as follows:

> *55. You must be open and honest with patients if things go wrong. If a patient under your care has suffered harm or distress, you should:*
>
> *a. put matters right (if that is possible)*
>
> *b. offer an apology*

> *c. explain fully and promptly what has happened and the likely short-term and long-term effects.*

> *49. You must work in partnership with patients, sharing with them the information they will need to make decisions about their care, including:*

> *a. their condition, its likely progression and the options for treatment, including associated risks and uncertainties*
>
> *b. the progress of their care, and your role and responsibilities in the team*
>
> *c. who is responsible for each aspect of patient care, and how information is shared within teams and among those who will be providing their care.*

16. The Tribunal noted that there is only one incident of alleged dishonesty in this case which relates to what Mr Chowdhury said to Patient A on 30 January 2017. It was concerned that there were some features of this case where on a number of occasions it may have been appropriate to allege dishonesty. It may therefore have been appropriate for a pattern of dishonest conduct to have been alleged.

17. The Tribunal took into account that the GMC had alleged three failures by Mr Chowdhury to adequately report that the wrong-sided replacement prosthesis had been implanted, in that he delayed filling in the Datix form, and did not inform his Clinical Director or the Trust Medical Director. The Tribunal questioned whether it would have been appropriate to allege dishonesty in relation to these failings. This concern was prompted by a number of matters contained in the evidence including the content of Mr Chowdhury's email from 14 April 2016:

> *'We may have to alter the label on the [National Joint Registry] form? If this is not possible we may have to take advise [sic] but the label and not the implant is wrong'*

18. The Tribunal has taken into account the expert's evidence as to Mr Chowdhury's interpretation of the x-rays on 14 April 2016 and questioned whether it would have been appropriate to allege dishonesty in relation to Mr Chowdhury's subsequent actions.

19. The Tribunal further noted the apparent discrepancy between Mr Chowdhury's statement relating to 30 August 2016 and the letter which was issued to Patient A's GP about the same appointment. In his statement, at paragraph 41, he states:

> *'Once I had received the second set of x-rays, I finally spoke with patient A at around 7pm. He was not my last patient and so I didn't feel it was appropriate to discuss the issue of wrong-sided implant with him at that late time. I therefore asked him to return to my clinic one week later. This would allow the discussion. However, the clinic clerk left a 5 30pm on the 30th August clinic and so the urgency of this subsequent appointment was not recognised. After 5.30pm the department runs with Emergency Department patients as priority'.*

In contrast, Mr Chowdhury's letter to Patient A's GP, written following the appointment on 30 August 2016, did not suggest any specific failure of the operation and it indicated that in relation to Patient A's left knee he would see Patient A in six months with x-rays for review. Again, the Tribunal questioned whether it would have been appropriate to allege dishonesty.

The Tribunal's proposed way forward

20. For the reasons set out above, the Tribunal is minded to adjourn these proceedings and give case management directions.

21. The Tribunal invites submissions from parties on its proposed manner of proceeding, the potential duration of any adjournment and suggestions for any case management directions.

ANNEX D – 07/10/2019

Determination on adjournment under Rule 29(2)

1. On day 5 of this hearing, the Tribunal handed down a Position Statement (Annex C) regarding the way forward for this case. This statement explained the Tribunal's concerns that it may have been appropriate for the Allegation to include further paragraphs regarding Mr Chowdhury not informing Patient A of the possibility that a wrong-sided prosthesis may have been implanted before 4 October 2016 and dishonesty relating to a number of occasions as set out in Annex C. It explained that it was minded to adjourn these proceedings and give case management directions. The Tribunal invited parties to make submissions on its proposal to adjourn and their preferences regarding when to reconvene on day 6, the last scheduled day of this hearing.

2. Parties responded regarding timetabling and sought clarification from the Tribunal about its proposal to adjourn. The Chair clarified the Tribunal's position and confirmed that the Tribunal was asking the GMC to reconsider its position with regard to the Allegation in the light of the Tribunal's Position Statement. He stated that the Tribunal was mindful of potential unfairness to Mr Chowdhury in the event

that the current Allegation were to be amended or paragraphs added to it at this stage of the hearing, but emphasised that the Tribunal must properly discharge its duty as set out in the over-arching objective. The Tribunal released Mr Chowdhury from his oath in order to avoid any unfairness which would be caused if he could not discuss the case with his legal team.

3. The hearing adjourned to allow Ms Johnson to take further instructions on the Tribunal's proposition to adjourn the hearing. The hearing resumed on day 6 with submissions made by both parties.

Submissions on behalf of the GMC

4. Ms Johnson submitted that it was the GMC's position, given that this was the final day listed for this case, not to oppose an adjournment should the Tribunal seek to adjourn of its own volition.

5. She submitted that, should an adjournment take place, a fairly lengthy period of time would be required for the GMC to assess whether further allegations should be brought against Mr Chowdhury and for the Rule 7 process to be completed. She further submitted that the GMC would ask that a date for these substantive proceedings to continue be set in at least five months' time which would give the GMC eight weeks to review the case before going through the Rule 7 process if required. Ms Johnson additionally submitted that such a length of time would allow Mr Chowdhury's representatives time to prepare their case in response, which might include instructing their own expert or serving further evidence on the GMC.

Submissions on behalf of Mr Chowdhury

6. Mr Brassington acknowledged that it was the final day listed for these proceedings. He submitted that he did not have clarity on why an adjournment was being sought and by whom, indicating that there may be opposition from Mr Chowdhury's representatives depending on who was seeking the adjournment of the case and why.

7. Mr Brassington submitted that if the hearing were to adjourn, he would not consider it appropriate that a further listing be made for the substantive matters in this case. Mr Brassington submitted that it would be likely that preliminary legal matters would need to be dealt with first. He further submitted that in the circumstances where an application for recusal could be made, this should take place in a preliminary hearing.

8. Mr Brassington submitted that this is an unusual situation, where a registrant, who is in the middle of his evidence is facing an expansion of the allegations against him.

Clarification from the Tribunal

9. Following submissions from parties, the Tribunal retired into camera for further discussions and subsequently requested parties to return to hear its clarification in open session. On behalf of the Tribunal, the Chair set out that the decision to adjourn, should it be taken, would be of the Tribunal's own volition given that the GMC has not made an application to adjourn.

10. After the Tribunal's clarification, it invited further submissions from both parties.

Further submissions

11. Mr Brassington submitted that there should not be an adjournment of these proceedings. He submitted that it was unfair to Mr Chowdhury, who was part way through his evidence, to widen the charges against him. Mr Brassington submitted that Mr Chowdhury was prepared to meet the charges against him which were set out previously during the Rule 7 proceedings. He reminded the Tribunal that it had already had confirmation from the GMC, after the Tribunal had provided it with three questions the Tribunal wished to ask, that on its review of the evidence, it had brought the charges it found to be appropriate.

12. Mr Brassington submitted that his opposition was predicated on what the Tribunal set out in its Position Statement and that the evidence, which was available to the Tribunal before the hearing commenced, had not changed. Mr Brassington further submitted that the Tribunal is compelling the GMC to reconsider its case.

13. Mr Brassington submitted that this intervention by the Tribunal was grossly unfair to Mr Chowdhury in that the Tribunal was directing the GMC to review the Allegation. He contended that it was clear from the tone of the Position Statement that the Tribunal was of the view that the Allegation should be wider than at present and that it would seek to widen the Allegation of its own volition, if the GMC declined to do so.

14. The Chair confirmed that Mr Brassington's assertion that the Tribunal would seek to widen the scope of the Allegation of its own volition was incorrect: the Chair reiterated that the Tribunal's Position Statement sets out that the Tribunal is of the view simply that it may have been appropriate to have brought further allegations and that further review was required by the GMC. The Tribunal will give further careful consideration to Mr Chowdhury's case taking into account the GMC's review.

15. Ms Johnson did not make further submissions at this point beyond agreeing with Mr Brassington that the most appropriate way forward was for two separate listings to be scheduled to consider first any legal argument, and second for the

continuation of the substantive matters of the hearing. Mr Brassington submitted that the legal argument could extend to any amendment to the Allegation, an abuse of process argument and an application for the Tribunal to recuse itself. Five days would therefore be needed for any potential legal argument.

The Relevant Legal Advice

16. The Tribunal accepted the advice of the Legal Assessor that under Rule 29(2) of the General Medical Council (Fitness to Practise Rules) 2004 as amended ('the Rules'), it has the power to adjourn these proceedings at any point.

Tribunal's Decision

17. In making its decision on whether to adjourn of its own volition, the Tribunal had regard to the over-arching objective and its regulatory duty to protect the public. The Tribunal carefully balanced these interests against any potential unfairness to Mr Chowdhury in adjourning these proceedings. Whilst the Tribunal acknowledged that a delay to these proceedings is regrettable for Mr Chowdhury, the Tribunal gave greater weight to its role in upholding the over-arching objective of protecting the public when determining these matters.

18. The Tribunal wishes to confirm that the timing of the raising of the prospect of adjournment, proposed during Mr Chowdhury's evidence, was informed by its evolving analysis of the evidence presented during the hearing. Tribunals do not arrive at hearings having fully analysed all of the evidence. Tribunal Members do not meet one another until the hearing convenes on day 1.

19. The Tribunal determined that in light of its Position Statement set out in Annex C, an adjournment of this hearing would enable the GMC to complete a thorough review of this case and evaluate the appropriateness of the Allegation brought against Mr Chowdhury. It determined that such a review would enable the Tribunal to ensure that its regulatory duties to protect the public were properly discharged.

20. For these reasons, the Tribunal determined to adjourn this hearing. The Tribunal will reconvene for a five day listing in Spring 2020 to hear any legal argument raised by the GMC's review of the case.

21. The Tribunal considers it to be important to list a further ten day period for the hearing at this stage so as to avoid unnecessary delay. This will be at least three months after the five days required for legal argument.

22. The hearing is therefore adjourned part heard.

ANNEX E – 21/07/2020

Applications to amend the Allegation under Rule 17(6) and to adduce further evidence under Rule 34

1. Having determined to adjourn of its own volition on 7 October 2019, the Tribunal has reconvened in the case of Mr Chowdhury to hear legal argument from Ms Kathryn Johnson, Counsel, on behalf of the GMC and Mr Stephen Brassington, Counsel, on behalf on Mr Chowdhury (who was not present when the hearing reconvened).

2. In light of the exceptional circumstances relating to the ongoing Covid-19 pandemic, this reconvened hearing was conducted remotely via Skype for Business.

3. On day seven of this hearing, Ms Johnson made:

a) an application to further amend the Allegation pursuant to Rule 17(6) of the GMC (Fitness to Practise) Rules 2004 ('the Rules'); and

b) an application to adduce further evidence pursuant to Rule 34 of the Rules.

The Existing Allegation

1. On 11 April 2016, you carried out a revision left total knee arthroplasty with distal femoral replacement rotating hinge arthroplasty ('the Procedure') on Patient A and you:
   Admitted and found proved

   a. failed to adequately check that the correct-sided replacement prosthesis was being used prior to commencing the Procedure;
      Admitted and found proved

   b. inappropriately implanted the wrong-sided replacement prosthesis.
      Admitted and found proved

~~2. After the Procedure you failed to adequately recognise that the wrong-sided replacement prosthesis was implanted, in that you did not:~~

   a. ~~consider an email or other communication sent to you on 14 April 2016, indicating that the wrong-sided replacement prosthesis was implanted;~~
      ~~**To be determined**~~

~~b. identify that the alignment of the leg was wrong when checking the post-operative x-ray.~~
~~Admitted and found proved~~

~~2A. After the Procedure you failed to recognise that the wrong-sided replacement prosthesis may have been implanted, in that you did not adequately consider an email or other communication with you between 11 and 14 April 2016 indicating that the wrong-sided replacement prosthesis was implanted.~~
Amended under Rule 17(6)
Deleted under Rule 17(2)(g)

2B. After the Procedure you failed to adequately recognise that the wrong-sided replacement prosthesis may have been implanted, in that you did not identify that the alignment of the leg was wrong when checking the post-operative x-ray.
Amended under Rule 17(6)
Admitted and found proved

3. You failed to adequately report that the wrong-sided replacement prosthesis had been implanted in that you:
   Admitted and found proved

   a. delayed filling in the Datix form;
      Admitted and found proved

   b. did not inform:

      i. your Clinical Director;
         Admitted and found proved

      ii. the Trust Medical Director.
         Admitted and found proved

4. On 30 January 2017, you told Patient A that it was 'impossible to check' at the time of the Procedure, that the correct-sided replacement prosthesis had been implanted, or words to that effect.
   Admitted and found proved

5. The information you provided to Patient A was untrue.
   Admitted and found proved

6. You knew that the information you provided to Patient A was untrue.
   To be determined

7. Your actions as described at paragraphs 4 and 5 were dishonest by reason of paragraph 6.
   To be determined

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

Submissions

4. The Tribunal received skeleton arguments and heard oral submissions from both Ms Johnson and Mr Brassington in relation to both applications. The submissions of Ms Johnson and Mr Brassington are a matter of record, the following paragraphs provide a summary.

Submissions on behalf of the GMC – Rule 17(6) Application

5. On behalf of the GMC, Ms Johnson, in her skeleton argument, stated that having been asked to reconsider its position by the Tribunal, the GMC now seeks to amend the Allegation by adding a further 11 paragraphs to the Allegation. The proposed additions are as follows:

~~2A. After the Procedure you failed to recognise that the wrong-sided replacement prosthesis may have been implanted, in that you did not adequately consider an email or other communication with you between 11 and 14 April 2016 indicating that the wrong-sided replacement prosthesis was implanted.~~
Amended under Rule 17(6)
Deleted under Rule 17(2)(g)

2B. After the Procedure you failed to adequately recognise that the wrong-sided replacement prosthesis may have been implanted, in that you did not identify that the alignment of the leg was wrong when checking the post-operative x-ray.
Amended under Rule 17(6)
Admitted and found proved

2C. On 14 April 2016 you sent an email to Ms B stating:

a. "I have up to date x-rays of this patient [Patient A] that show he has the correct sided implant – left for a left revision";

b. "There is a labelling error";

c. "the label and not the implant is wrong".

2D. You were not in a position to confirm the information you provided at 2C was true as:

a. up to date x-rays did not show that Patient A had the correct sided implant;

b. you did not know that a labelling error had occurred.

2E. Your actions as described at paragraph 2C(a) were dishonest by reason of paragraph 2D(a).

2F. Your actions at paragraph 2C(b) and 2C(c) were dishonest by reason of 2D(b).

3A. You failed to adequately report that the wrong-sided replacement prosthesis had been implanted in that you:
Admitted and found proved

a. delayed filling in the Datix form;
Admitted and found proved

b. did not inform:

i. your Clinical Director;
Admitted and found proved

ii. the Trust Medical Director.
Admitted and found proved

3B. Your failure to act as described in paragraph 3A was due to you having realised that the wrong-sided replacement prothesis had been implanted.

3C. Your actions as described in paragraph 3A were dishonest by reason of paragraph 3B.

3D. You failed to promptly notify Patient A about the possibility that the wrong-sided replacement prothesis had been implanted.

3E. You failed to inform Patient A on 30 August 2016, or as soon as possible thereafter of the possibility that the wrong-sided prothesis had been implanted.

3F. In a letter of 19 September 2016, you failed to inform Patient A's GP of the possibility that the wrong-sided prothesis had been implanted.

3G. Your actions as set out in paragraphs 3D, 3E and 3F were due to you having realised that the wrong sided replacement prothesis had been implanted.

3H. Your actions as set out in paragraphs 3D, 3E and 3F were dishonest by reason of paragraph 3G.

6. Ms Johnson submitted that the GMC's proposed amendments to the Allegation allow the Tribunal to consider whether Mr Chowdhury's actions were dishonest from the outset and to therefore discharge the regulatory duty it referred to when setting out its concerns about the case. Ms Johnson submitted that even if the application to amend the Allegation is granted at this stage of proceedings it does not follow that all the additional paragraphs will be found proved.

7. Ms Johnson submitted that as this case is not scheduled to reconvene to hear further substantive matters until October, Mr Chowdhury will have ample time to prepare his response to the additional paragraphs of the Allegation. She submitted that taking this timeframe into consideration, the application can be granted without injustice.

8. In her oral submissions, Ms Johnson adopted her written submissions and did not seek to repeat them. Ms Johnson accepted that the GMC's case was previously presented in a much more limited way. She submitted that having received the case law the Tribunal referred to which focused on '*undercharging*' and having heard its concerns, the GMC reviewed the case and then sought to apply to amend the Allegation.

9. Ms Johnson did not agree with Mr Brassington's written submission that the GMC was directed by the Tribunal to add paragraphs to the Allegation. She submitted that if the Tribunal had made up its mind, it would simply have made the amendments of its own volition.

10. In her oral submissions, Ms Johnson responded to Mr Brassington's written submissions that there has been a procedural irregularity in these proceedings as the GMC did not follow the Rule 7 process as it was indicated would be necessary in October 2019. Ms Johnson stated that the decision was taken after the hearing, and communicated to Mr Chowdhury's representatives in March 2020, that the Rule 7

process was not considered to be necessary. Ms Johnson submitted that this was because the amendments to the Allegation, whilst widening the dishonesty, did not allege anything new as dishonesty was already alleged in this case. She submitted that the additions to the Allegation are a further particularisation of the matters already referred to.

11. Ms Johnson submitted that given the way the application to amend had arisen, it was unlikely that a Case Examiner would not have referred the matter back to this Tribunal for its continued consideration. Ms Johnson submitted that Mr Brassington has not set out how Mr Chowdhury has been disadvantaged by the Rule 7 process not being followed in relation to the amendment to the Allegation, nor had he identified the specific prejudice Mr Chowdhury faced.

12. Ms Johnson responded to Mr Brassington's written submission that it was now too late to make an application to amend the Allegation. Ms Johnson accepted that the concerns the Tribunal raised at the last hearing did come at an unusual stage. Ms Johnson submitted that the timing perhaps demonstrated that the determining factors for the Tribunal arose out of Mr Chowdhury's oral evidence in chief and cross-examination. Ms Johnson then reminded the Tribunal of a number of parts of Mr Chowdhury's evidence under cross-examination and submitted that it was possible that such exchanges may have raised further questions for the Tribunal. Ms Johnson submitted that the Tribunal's intervention, while unusual given its timing, was not inexplicable.

13. Ms Johnson reminded the Tribunal in her oral submissions that the GMC was making two applications and that these applications should be considered separately.

<u>Submissions on behalf of the GMC – Rule 34 Application</u>

14. Alongside the proposed additions to the Allegation, in her skeleton argument, Ms Johnson requested that the Tribunal grant the GMC's application to adduce further evidence in the form of two witness statements from:

a) Mr E, at the time of events, Senior Sales Executive for ZimmerBiomet, the medical device company; and

b) Mr F, Consultant Orthopaedic Surgeon at Peterborough City Hospital at the time of the events in question;

and their associated exhibits.

Ms Johnson acknowledged that this application necessitated a reopening of the GMC's case.

15. In her skeleton argument, Ms Johnson set out the chronology of events and why the additional statements were relevant to the GMC's case. She submitted that Mr E's statement confirms that he met with Mr Chowdhury within 7 days of Patient A's operation on 4 April 2016 and that at the conclusion of their meeting, '*…we were pretty sure there was an issue'* and that a revision operation was discussed. Ms Johnson submitted that Mr E's statement confirms that Mr Chowdhury was aware that the wrong-sided implant had been used or at the very least realised that there was a high likelihood that it had been. Ms Johnson submitted that this undermined Mr Chowdhury's evidence to the Tribunal and that as such there were a number of elements requiring further consideration about Mr Chowdhury's actions and honesty, including whether he attempted to cover up his error. Ms Johnson submitted that Mr E is a key witness and that it is in the public interest for the Tribunal to hear from him.

16. Ms Johnson submitted that Mr F's statement was relevant as it describes a discussion he had with Mr Chowdhury about Patient A's operation '*not long after the procedure had been carried out'* which has not been raised in evidence previously. She submitted that both the evidence of Mr E and Mr F are '*relevant to a central issue in this case'*.

17. In her oral submissions, Ms Johnson set out the chronology of correspondence between the GMC, Mr E and his employer. She submitted that Mr E's employer had previously prevented him from engaging with these proceedings. Ms Johnson reminded the Tribunal of the contents of Mr E's statement and submitted that it was relevant that Mr Chowdhury had made no mention of his meeting with Mr E days after Patient A's operation. Further, she submitted that Mr E's evidence is that revision surgery for Patient A was discussed. Ms Johnson submitted this discussion of revision surgery is important because if that was already in Mr Chowdhury's mind, he must have been alive to the possibility that the wrong-sided implant had been used. Ms Johnson submitted that Mr F's witness statement confirms that he reviewed Patient A's initial post-operative x-ray and knew it was that particular x-ray because there were '*clips in situ'*. Ms Johnson reminded the Tribunal that this does not accord with Mr Chowdhury's evidence.

18. Ms Johnson submitted that the contents of the two witness statements contain important and relevant evidence that go directly to the concerns raised by the Tribunal at the last hearing as set out in the Position Statement (Annex C).

19. In addressing both applications, Ms Johnson submitted that it would be in the public interest for the Tribunal, having raised concerns, to grant both the application to amend the Allegation and the application to adduce further evidence. She submitted that whilst these applications are made at an unusual stage, the substantive hearing is not due to reconvene for several months which gives Mr Chowdhury ample opportunity and time to prepare and consider his response to the new evidence.

Submissions on behalf of Mr Chowdhury – Rule 34

20. Regarding the GMC's application to adduce further evidence under Rule 34, on behalf of Mr Chowdhury, Mr Brassington submitted in his skeleton argument that the GMC is too late to do so and admitting the evidence would create an unfairness towards Mr Chowdhury. He submitted that both witnesses were known to the GMC prior to the commencement of the hearing, neither produced witness statements nor were summonsed by the GMC to give evidence. Mr Brassington submitted that the GMC could have taken either or both of these actions but decided to take neither. Mr Brassington submitted that it '*is simply unjust to allow the GMC to shift ground in such a fundamental respect at the direction of the Tribunal'*.

21. In his oral submissions, Mr Brassington stated that it was appropriate to consider the applications in reverse order and first made his submissions on the application to adduce further evidence. Mr Brassington submitted that the first question for the Tribunal to consider was whether it was prepared to admit fresh evidence. He submitted that the new evidence should not be admitted and that the reasons for this were twofold. He submitted that admitting new evidence would be unfair to Mr Chowdhury. He submitted that the GMC had been aware of and had contact details for both Mr F and Mr E since its investigation began.

22. Mr Brassington submitted that Mr Chowdhury has been prejudiced by the subsequent GMC investigation which he submitted the Tribunal had '*directed'* based on the three questions it set out in its Position Statement (Annex C). Mr Brassington submitted that following the opening and closing of the GMC case, as well as the live evidence given by Mr Chowdhury, the GMC had now sought to take statements and adduce further evidence which changes the shape of the case. Mr Brassington submitted that this goes against due process.

23. Regarding Mr E's statement, Mr Brassington submitted that it was not relevant for the Tribunal to consider Mr E's employer's reluctance to engage with the GMC. He submitted that employers are not responsible for witnesses of fact and that based on the correspondence before the Tribunal, if Mr E was an important witness, he could have been summonsed by the GMC.

24. Mr Brassington submitted that nothing prevented the GMC from taking a statement from Mr F before the substantive hearing commenced in September 2019. He submitted that as a doctor, Mr F has a duty to comply with GMC investigations and was unlikely to have been a reluctant witness. Mr Brassington submitted that the GMC had provided nothing to explain the omission of Mr F's evidence before his statement was sought after the last hearing.

25. Mr Brassington submitted that the GMC has closed its case and a case had been prepared in response to it by Mr Chowdhury. Mr Brassington submitted that

the GMC sought additional evidence at the direction of the Tribunal and that this was not an appropriate way for the GMC to prosecute its case. He submitted that there would be no purpose for the Rule 7 process or trial preparation if so. He submitted that this amounted to a denial of process and was unfair.

26. Mr Brassington submitted that the GMC had addressed the Tribunal in '*attractive terms*', providing it with justification for granting the applications with reference to Mr Chowdhury's evidence. He submitted that this was speculative and that it was not possible to know what was in the Tribunal's mind when it decided to intervene while Mr Chowdhury was giving evidence. Mr Brassington submitted that the information before the Tribunal had not changed over the course of the hearing and that having already intervened to amend the Allegation, the timing of its second intervention remained inexplicable.

Submissions on behalf of Mr Chowdhury – Rule 17(6)

27. Mr Brassington, in his skeleton argument, submitted that the application to amend the Allegation is opposed. Any additions to the Allegation could not be made without unfairness and injustice to Mr Chowdhury. Additionally, Mr Brassington submitted that the GMC had failed to follow the Rule 7 procedure which, he submitted, Ms Johnson indicated would be followed when the hearing adjourned in October 2019.

28. Mr Brassington submitted that prior to the substantive hearing commencing, the Allegation brought by the GMC in its case against Mr Chowdhury has remained '*essentially unaltered*'. He submitted that the Allegation sent as part of the Rule 7 notice issued to Mr Chowdhury has formed the basis of all preparation for this case as it remained basically the same when the formal Notice of Hearing was subsequently issued.

29. Mr Brassington submitted that any additions to the Allegation are sought only because of the Tribunal's intervention and lack of acceptance of the GMC's indication that the Allegation put before the Tribunal had been given '*anxious consideration*' and appropriately reflected its case. Mr Brassington submitted that '*the Tribunal sought to direct the GMC to add allegations of dishonesty against Mr Chowdhury*'. Mr Brassington submitted that the timing of the Tribunal's interventions were '*inexplicable*' and that the additions to the Allegation proposed by the GMC have been formulated to '*appease*' the Tribunal, this having been previously deemed by the GMC to be unnecessary.

30. Mr Brassington submitted that it is too late for the GMC or the Tribunal to add to the Allegation, particularly given the timing of the Tribunal's interventions while Mr Chowdhury was giving evidence. He also submitted that there was no change in the available evidence before the Tribunal to warrant additions to the Allegation. Mr Brassington submitted that the GMC indication that following the Rule 7 process

would take up to six months has led to a significant delay in these proceedings progressing. However, he submitted that the GMC has not followed such a procedure nor has it explained why it has not done so.

31. In his oral submissions, Mr Brassington reminded the Tribunal of Rule 17(6). He submitted that an amendment can only be made if it can be made without injustice and that the injustice in this case was so obvious and rank that the amendment should not be permitted. He reminded the Tribunal of his written submissions including that the GMC had at no point sought to amend the Allegation prior to the hearing commencing. Mr Brassington submitted that the GMC's additions resulted from the Tribunal's intervention and that the widening of the Allegation was done under Tribunal pressure that the GMC failed to resist.

32. Mr Brassington reminded the Tribunal that it had already amended the Allegation on day two of these proceedings. He submitted that it was difficult to conceive of a more unfair circumstance than Mr Chowdhury being left in '*purdah*' while giving evidence only to have the charges against him changed. He submitted that this was a clear and fundamental violation of trial preparation. Mr Brassington submitted that there was no change in the evidence available to the Tribunal to warrant any change to the case.

33. Regarding Rule 7, Mr Brassington submitted that as the GMC had not gone through that process, Mr Chowdhury had been denied the opportunity to persuade the Case Examiners, who had not '*invited or directed*' that additions be made to the Allegation, who could consider if it were appropriate and fair to do so, rather than having to persuade the Tribunal that '*sought the additions*'. Mr Brassington submitted that the result is prejudice and injustice for Mr Chowdhury.

34. Mr Brassington submitted that to characterise these applications as unusual is a grave understatement. He submitted that it cannot be fair, in the circumstances, to grant the application for amendment to the Allegation.

35. In response to a question from the Tribunal about the overarching objective, Mr Brassington submitted that although relevant, it did not entitle the GMC to disregard procedural fairness.

The Relevant Legal Principles

36. The Legal Assessor reminded the Tribunal of the Rules and tests it must apply when considering the two applications before it. She advised that the Tribunal consider both applications with regard to the other, as the applications are closely intertwined.

37. Rule 17(6) of the Rules states:

> *(6) Where, at any time, it appears to the Medical Practitioners Tribunal that—*
>
> > *(a) the allegation or the facts upon which it is based and of which the practitioner has been notified under rule 15, should be amended; and*
> >
> > *(b) the amendment can be made without injustice,*
>
> *it may, after hearing the parties, amend the allegation in appropriate terms.*

38. Rule 34(1) of the Rules states:

> *(1) The Committee or a Tribunal may admit any evidence they consider fair and relevant to the case before them, whether or not such evidence would be admissible in a court of law.*

39. The Legal Assessor reminded the Tribunal of the cases of *Professional Standards Authority for Health and Social Care v Nursing and Midwifery Council* [2015] EWHC 764 (Admin) (`*Jozi'*) and *Ruscillo v CHRE* [2004] EWCA Civ 1356 (`*Ruscillo'*) which it was referred to October 2019. In particular, paragraph 80 of *Ruscillo*, which states:

> *The disciplinary tribunal should play a more proactive role than a judge presiding over a criminal trial in making sure that the case is properly presented and that the relevant evidence is placed before it.*

40. In considering the Rule 34 application, the Legal Assessor referred to the case of *Professional Standards Authority v Nursing and Midwifery Council, Lembethe, Mkhize* [2019] EWHC 3326 (Admin) (`*Lembethe, Mkhize'*). The Legal Assessor noted that there were some important differences in that case but that she had brought this case to the Tribunal's attention because there were some relevant parts of the judgment as it referred to a late application made by the NMC in the middle of witness cross-examination to admit further evidence.

41. The Legal Assessor referred to paragraph 57 of that judgment:

> *57. Nevertheless, in my judgment, the Panel's decision not to admit the email was wrong for these reasons:*
>
> *i) The email was not merely relevant. It was crucial (and potentially conclusive) evidence on the central question before the Panel, namely, whether the BLS certificate was submitted to the Agency in January 2017.*

ii) It would have been unfair to admit the email without giving the Registrants time to consider and address it, including by obtaining expert evidence if they wished. But if the Panel had admitted the email and adjourned the hearing, there would be no prejudice to the Registrants' ability to challenge the email.

iii) Adjourning the hearing would have given rise to a different type of prejudice, namely the costs and inconvenience that would flow from having to attend, and pay legal representatives to attend, a further hearing, as well as the ongoing stress for the Registrants of having such proceedings hanging over them. But this prejudice to the Registrants had to be weighed against the public interest in very important evidence of dishonesty being considered by the Panel. In my judgment, the public interest in the Panel considering this crucial piece of evidence substantially outweighed any prejudice to the Registrants that would have flowed from the hearing being adjourned.

iv) In advising the Panel that the crucial issue was fairness, the legal assessor did not draw any distinction between the prejudice to the Registrants if (a) the email was admitted and the hearing continued immediately or (b) the email was admitted and the hearing was adjourned to give the Registrants time to consider and address the email.

v) Nor is there any indication in the Panel's decision that they recognised that any prejudice to the Registrants that would flow from admitting the email would be quite different depending on whether the Panel adjourned the hearing. The Panel concluded that it would be unfair to admit the email because the late disclosure meant the Registrants had been unable to take steps, such as obtaining expert evidence, to seek to challenge its authenticity. However, their conclusion failed to address the fact that the unfairness to which the Panel referred would not arise if they adjourned the hearing to give the Registrants time to consider and address the email. They did not address the NMC's application to adjourn, if necessary, at all.

vi) The Panel were advised that they should give particular weight to fairness to the Registrants. In giving this advice, the legal assessor did not mention that, first and foremost, the function of the Rules is to protect, promote and maintain the health and safety of the public. Nor did the legal assessor advise the Panel of the need to balance fairness to the Registrants against the important public interest in the Panel reaching a correct determination on the charges of dishonesty.

vii) The Panel failed to give due weight to the public interest or to balance it against such prejudice to the Registrants as would have arisen if the email had been admitted and they had been given time to consider and address it.

42. The Legal Assessor advised that the Tribunal should consider, if it does identify unfairness, whether that unfairness can be mitigated.

43. The Legal Assessor advised that the Tribunal should consider what impact not going through the Rule 7 process has and again whether any unfairness to Mr Chowdhury in that situation can be mitigated.

Response to the Legal Advice

44. Following the legal advice provided by the Legal Assessor, Ms Johnson submitted that it was appropriate for the Tribunal to consider the Rule 17(6) application first and then to consider the Rule 34 application as the new evidence presented by the GMC is only relevant to the additional paragraphs of the Allegation proposed. Ms Johnson submitted that the evidence she had drawn to the Tribunal's attention in her submissions demonstrated that amendments to the Allegation could be made without the additional evidence of Mr E and Mr F.

45. Following the legal advice provided by the Legal Assessor, Mr Brassington submitted that the applications must be dealt with separately. He submitted that the Tribunal must first consider the application to adduce further evidence and then consider the application to amend the Allegation. He submitted that the applications must be dealt with sequentially in this order. In responding to the case of *Lembethe, Mkhize*, Mr Brassington submitted that in that case, an adjournment and more time would have mitigated the unfairness identified. Mr Brassington submitted that additional time could not remedy the situation Mr Chowdhury has been placed in as the ground of the case against him would shift. He reminded the Tribunal that each case turns on its own facts and that the Tribunal is required to enter into a balancing exercise.

46. In response to these comments, the Legal Assessor repeated her advice that the applications before the Tribunal are closely associated and to consider the applications in isolation would mean they are not evaluating the whole picture. Mr Brassington maintained his objection to this advice. Ms Johnson did not offer further comment.

The Tribunal's Decision

47. The Tribunal accepted the legal advice it received from the Legal Assessor and acknowledged that there were aspects of both applications that overlapped and therefore neither could be considered in isolation. In its deliberations, the Tribunal first considered the GMC's application to adduce further evidence.

Application to adduce further evidence under Rule 34

48. The Tribunal had regard to the statements and exhibits of both Mr E and Mr F, as well as the written and oral submissions of both parties.

49. The Tribunal reminded itself that evidence can be adduced at any time in any stage of proceedings if it is fair and relevant.

50. The Tribunal first considered whether the new evidence before it was relevant. The Tribunal noted that it was the GMC's submission that this new evidence was only relevant to the additional paragraphs of the Allegation proposed. The Tribunal did not accept this submission. It noted, having read the statements and exhibits of Mr E and Mr F, that the evidence materially added to the chronology of events in this case. It considered that such evidence was clearly relevant to its future consideration of the facts in this case.

51. The Tribunal concluded that the evidence of Mr E and Mr F was relevant to its consideration of the paragraphs of the Allegation that have already been admitted and found proved; the paragraphs of the Allegation still to be determined; and to the amendment sought by the GMC.

52. Having concluded that the evidence was relevant to this case, the Tribunal went on to consider whether adducing it would cause any prejudice to Mr Chowdhury and whether it is possible to mitigate any prejudice that adducing the evidence may cause.

53. The Tribunal considered that the GMC did not know what it would find when it decided to review Mr Chowdhury's case following the concerns raised by the Tribunal. Having conducted a review of the evidence in this case, the GMC has sought to amend the Allegation, adduce further evidence and broaden the scope of its case.

54. The Tribunal was of the view that were it to grant this application, Mr Chowdhury and his representatives would have sufficient time before the substantive hearing is listed to resume in October 2020, to address the new evidence and respond to it. The Tribunal considered that it would be open to Mr Chowdhury to give further evidence, either in a supplementary statement or orally.

55. Further, the Tribunal considered that if the GMC is permitted to adduce this evidence and by necessity reopen its case, it would be open to either party to recall previous witnesses and take further statements. The Tribunal considered that if it were to allow the application to adduce further evidence, Mr E and Mr F could both be called to give oral evidence which would allow their evidence to be tested under cross-examination.

56. The Tribunal was mindful of the requirements of the overarching objective to protect the public interest, which includes this Tribunal proactively ensuring that all relevant evidence is taken into account, in order to prevent a case from being under-prosecuted.

57. The Tribunal noted that granting the application to adduce further evidence was not a determinative decision regarding the facts of this case. In the break before the hearing reconvenes, both parties will be afforded the opportunity to review the new evidence and adapt their cases accordingly. The Tribunal has not yet determined whether the GMC has proved its case against Mr Chowdhury on the balance of probabilities nor has it decided what weight could be attached to the new evidence to be adduced.

58. The Tribunal acknowledged the financial and personal impact of its decision upon Mr Chowdhury, but determined that the evidence before it was relevant and that for the reasons considered above, any prejudice in granting the application could be mitigated. It therefore determined that it would be fair to grant the application on behalf of the GMC to adduce further evidence under Rule 34.

Application to amend the Allegation under Rule 17(6)

59. Having granted the application to adduce the evidence of Mr E and Mr F, the Tribunal went on to consider whether to grant the GMC's application to amend the Allegation. The Tribunal reminded itself that amendments to the Allegation can only be made where there it does not cause an injustice to the practitioner.

60. The Tribunal acknowledged that the paragraphs of the Allegation the GMC is seeking to add do increase the seriousness of the GMC's case against Mr Chowdhury.

61. The Tribunal noted that dishonesty was always alleged in this case, but that the dishonesty was linked to a single aspect of the case against Mr Chowdhury. The Tribunal accepted that the GMC's application seeks to broaden the scope of the dishonesty in this case.

62. The Tribunal considered Mr Brassington's submission that the evidence before the Tribunal was the same throughout the hearing and therefore the Tribunal's intervention should have come earlier. The Tribunal did not accept this. As was set out in Annex D, ahead of convening, Tribunal Members review the papers but they do not fully analyse them, neither discussing with other Tribunal Members, nor forming any conclusions about the evidence provided. Tribunal Members consider the case as the hearing proceeds, and it was therefore necessary and not inexplicable that the Tribunal intervened when it perceived that there may have been undercharging in this case, in order to meet the public interest.

63. The Tribunal considered the GMC's indication at the last hearing that the Rule 7 procedure would be followed and Mr Brassington's submission that by not proceeding with this process, significant unfairness had been brought against Mr Chowdhury. The Tribunal reminded itself that the Case Examiners in the Rule 7 process is required to apply the 'Realistic Prospect' test. The Tribunal noted that the Case Examiners has already determined that there was a realistic prospect of impairment by reason of misconduct being found in this case. Further, it noted that the Case Examiners had already given consideration to the dishonesty alleged against Mr Chowdhury.

64. The Tribunal identified no prejudice in the application not being referred to the Case Examiners. The amendment sought by the GMC is not a new allegation rather an expansion of the existing allegation of dishonesty following Mr Chowdhury having inappropriately implanted the wrong-sided replacement prosthesis. The Tribunal noted that the proposed amendment by the GMC does not change the Allegation that Mr Chowdhury's fitness to practise is impaired by reason of misconduct. The amendment sought by the GMC gives further particularisation to the core allegation is made.

65. In considering Mr Brassington's submission that the Case Examiners would have been impartial in a way that the Tribunal would not be in considering the paragraphs of the Allegation the GMC was seeking to add, the Tribunal makes clear that it is and has always been impartial. The Tribunal acknowledges that the timing of its intervention means that much of the evidence has already been heard. However, the Tribunal did not, at any point, direct the GMC to amend its case. Nor did it assert that it would make any amendments to the Allegation itself, if the GMC did not review and amend the case. The GMC responded to the Tribunal's concerns, which were appropriately raised, and has now sought to make additions to the Allegation. The Tribunal noted that this was never a foregone conclusion, nor have any facts, beyond those already admitted and found proved, been determined.

66. The Tribunal considered the amendment sought by the GMC. It concluded that, on the basis that dishonesty was already alleged it this case, it was a fair characterisation to see the amendments suggested as a further particularisation of the facts to be determined in this case. As such, the Tribunal determined that it was appropriate for it to consider the application.

67. The Tribunal considered the overarching objective, in particular the public interest. The Tribunal noted that, to discharge its statutory duty, it is required to ensure that the case against a registrant, particularly where the Allegation is serious, is adequately prosecuted. As long as the registrant is given sufficient notice, time and opportunity to prepare and present their case in response then any prejudice is mitigated and no injustice is caused.

68. Taking all of the above into account, the Tribunal noted the remedies for any prejudice that might arise against Mr Chowdhury in granting the application to amend the Allegation could be addressed in the same way as set out above in the application to adduce further evidence. The Tribunal was satisfied that before the substantive hearing reconvenes, Mr Chowdhury and his representatives will have time and opportunity to reconsider his case and address the new paragraphs of the Allegation. Witnesses who have given evidence can be recalled, Mr Chowdhury can give further evidence and the two new witnesses can attend to give oral evidence.

69. The Tribunal acknowledged the financial and personal impact of its decision upon Mr Chowdhury but was satisfied that it could grant the application to amend the Allegation without injustice to Mr Chowdhury. Therefore, the Tribunal determined to grant the application on behalf of the GMC to amend the Allegation under Rule 17(6).

Conclusion

70. The Tribunal determined to accede to both applications made by the GMC to adduce further evidence and to amend the Allegation. Accordingly, paragraphs 2 and 3 of the Allegations are now as follows:

~~2. After the Procedure you failed to adequately recognise that the wrong-sided replacement prosthesis was implanted, in that you did not:~~

~~a. consider an email or other communication sent to you on 14 April 2016, indicating that the wrong-sided replacement prosthesis was implanted;~~
~~To be determined~~

~~b. identify that the alignment of the leg was wrong when checking the post-operative x-ray.~~
~~Admitted and found proved~~

~~2A. After the Procedure you failed to recognise that the wrong-sided replacement prosthesis may have been implanted, in that you did not adequately consider an email or other communication with you between 11 and 14 April 2016 indicating that the wrong-sided replacement prosthesis was implanted.~~
Amended under Rule 17(6)
Deleted under Rule 17(2)(g)

2B. After the Procedure you failed to adequately recognise that the wrong-sided replacement prosthesis may have been implanted, in that you did not

identify that the alignment of the leg was wrong when checking the post-operative x-ray.
Amended under Rule 17(6)
Admitted and found proved

2C. On 14 April 2016 you sent an email to Ms B stating:

a. "I have up to date x-rays of this patient [Patient A] that show he has the correct sided implant – left for a left revision";

b. "There is a labelling error";

c. "the label and not the implant is wrong".

Amended under Rule 17(6)

2D. You were not in a position to confirm the information you provided at 2C was true as:

a. up to date x-rays did not show that Patient A had the correct sided implant;

b. you did not know that a labelling error had occurred.

Amended under Rule 17(6)

2E. Your actions as described at paragraph 2C(a) were dishonest by reason of paragraph 2D(a).
Amended under Rule 17(6)

2F. Your actions at paragraph 2C(b) and 2C(c) were dishonest by reason of 2D(b).
Amended under Rule 17(6)

3A. You failed to adequately report that the wrong-sided replacement prosthesis had been implanted in that you:
Admitted and found proved
Amended under Rule 17(6)

a. delayed filling in the Datix form;
Admitted and found proved

b. did not inform:

i. your Clinical Director;
Admitted and found proved

ii. the Trust Medical Director.
Admitted and found proved

3B. Your failure to act as described in paragraph 3A was due to you having realised that the wrong-sided replacement prothesis had been implanted.
Amended under Rule 17(6)

3C. Your actions as described in paragraph 3A were dishonest by reason of paragraph 3B.
Amended under Rule 17(6)

3D. You failed to promptly notify Patient A about the possibility that the wrong-sided replacement prothesis had been implanted.
Amended under Rule 17(6)

3E. You failed to inform Patient A on 30 August 2016, or as soon as possible thereafter of the possibility that the wrong-sided prothesis had been implanted.
Amended under Rule 17(6)

3F. In a letter of 19 September 2016, you failed to inform Patient A's GP of the possibility that the wrong-sided prothesis had been implanted.
Amended under Rule 17(6)

3G. Your actions as set out in paragraphs 3D, 3E and 3F were due to you having realised that the wrong sided replacement prothesis had been implanted.
Amended under Rule 17(6)

3H. Your actions as set out in paragraphs 3D, 3E and 3F were dishonest by reason of paragraph 3G.
Amended under Rule 17(6)

ANNEX F – 24/07/2020

Determination on Application for Recusal

1. Following the Tribunal's decision to grant the GMC's applications to adduce further evidence and to amend the Allegation (set out in Annex E), Mr Brassington, on behalf of Mr Chowdhury, made an application that the Tribunal should recuse itself.

Submissions

2. The Tribunal received skeleton arguments and heard oral submissions from both Mr Brassington and Ms Johnson in relation to the recusal application. The submissions of Ms Johnson and Mr Brassington are a matter of record, the following paragraphs provide a summary.

On behalf of Mr Chowdhury

3. Mr Brassington submitted that the Tribunal should recuse itself and reminded the Tribunal of the relevant legal principle for recusal was as set out in *Porter v Magill* [2002] 2 AC 357 ('*Porter v Magill'*) (set out below).

4. Mr Brassington rehearsed the chronology of these proceedings that he submitted was relevant to his application. He submitted that the Tribunal's previous actions, on day two of this hearing, in intervening and amending the Allegation of its own volition and declining the GMC's own proposed amendment, set the tone for this case.

5. Mr Brassington submitted that the Tribunal, as a Tribunal of law and fact, had taken on a dual role during the proceedings; becoming investigator/prosecutor and judge. He submitted that the Tribunal, having repeatedly rejected the GMC's rationale for putting the case the way it had, determined to adjourn of its own accord to allow the GMC time to conduct a thorough review of its case. Mr Brassington submitted that the Tribunal had placed inappropriate pressure on the GMC. As a result of the GMC's review, Mr Brassington submitted that each area questioned by the Tribunal in its Position Statement (Annex C) had led to a new paragraph of the Allegation being brought against Mr Chowdhury by the GMC. He submitted that the GMC had been left with no option but to accede to the Tribunal's '*direction'*.

6. Mr Brassington submitted that in taking such action, the Tribunal had `*descended into the arena in such a fundamental respect that any fair-minded observer would be concerned that there was a potential for bias'*. He further submitted that the comment that the application for amendment was not a `*forgone conclusion'* (as stated by the Tribunal in Annex E) would be greeted with incredulity and a fair-minded and informed observer would `*immediately conclude that the issues of amendment had been prejudged'*. Mr Brassington submitted that a Tribunal which had taken on a dual role as investigator/prosecutor and judge could not be impartial.

7. Mr Brassington responded to the case law referenced by Ms Johnson in her skeleton argument. He submitted that the case of *R v Stubbs; R v Davis; R v Evans* [2019] 1 All ER 581(`*Stubbs'*) was of little assistance, as the circumstances of that

case were very different to those before this Tribunal. He submitted that while the principles may apply, the actions of this Tribunal in descending into the arena and '*directing'* charges be added to the Allegation was entirely different to the judge in *Stubbs* who had made previous adverse judgements against a defendant.

8. In response to Ms Johnson's reference to the case of *Muscat v Health Professions Council* [2008] EWCA 2798 (Admin) ('*Muscat'*), Mr Brassington submitted that the consideration of bias, in the hostile questioning of the appellate was analogous to this case, but noted that it involved a single instance of hostility by a single committee member. He submitted that the unfairness in this case is much wider. Mr Brassington submitted that a fair-minded observer would be bound to observe, in their consideration of hostility, that the transcripts of this case demonstrate the repeated interruptions by the Tribunal. He particularly referenced the Tribunal Chair intervening, during Mr Brassington's questioning and cross-examination of witnesses. He also referred to the Tribunal not allowing his intervention during its questioning of Mr G. He submitted that Ms Johnson did not experience such interruption.

9. Mr Brassington submitted that in her skeleton argument, Ms Johnson, in saying that the Tribunal did not act as investigator and prosecutor ignored the actuality and chronology of events in this case. He submitted that the amendments sought and suggested by the Tribunal have been carried out by the GMC in exact effect.

10. Mr Brassington submitted that it was conceded by all that this case must, in essence, restart. He submitted that the Tribunal should adopt a pragmatic approach, as set out by Waller L.J. in the case of *Mahfouz v PCC* [2004] EWCA Civ 431 ('*Mahfouz'*). He submitted that given the unique circumstances of this Tribunal, '*[n]o possible complaint of apparent bias could be made if a fresh Tribunal were conveyed* [sic] *to hear the resumed case'*. He submitted that the new and existing allegations would be fully litigated and that there would be no prejudice to the GMC or any risk to the overarching objective if a new Tribunal was convened to sit on this case.

11. In response to Ms Johnson's oral submissions, Mr Brassington made some additional submissions. He submitted that while the Tribunal had provided the GMC with no parameters for its review, it had set out each and every area where further dishonesty could be alleged. Mr Brassington submitted the Tribunal has acted far beyond the '*proactive'* role it occupies as set out in *Professional Standards Authority for Health and Social Care v Nursing and Midwifery Council* [2015] EWHC 764 (Admin) ('*Jozi'*) and *Ruscillo v CHRE* [2004] EWCA Civ 1356 ('*Ruscillo'*). Mr Brassington submitted that it is rare to suggest actual bias in an application for recusal and that he was not doing so. He submitted that the Tribunal must consider whether there could be a perception of bias by a fair-minded and informed observer of this case.

12. Mr Brassington accepted, when asked by the Legal Assessor, that his skeleton argument contained an incorrect paragraph and therefore the definition of the test for bias from *Porter v Magill*. He accepted that the test is as set out in paragraph 103 of *Porter v Magill*, namely:

> *The question is whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.*

On behalf of the GMC

13. Ms Johnson submitted that the GMC oppose the application for recusal. Ms Johnson also referred the Tribunal to the test in *Porter v Magill*. In referring to the case of *Stubbs*, Ms Johnson submitted that the facts of *Stubbs* are very different but that the principle does have relevance. She submitted that *Stubbs* was a case where a judge had previously made an adverse decision against the litigant, that was not sufficient to demonstrate bias. In that case, it was held that:

> *The fair-minded and informed observer did not assume that because a judge had taken an adverse view of a previous application or applications, he would have pre-judged, or would not deal fairly with, all future applications by the same litigant.*

14. Ms Johnson referred the Tribunal to the relevant paragraphs of *Muscat* in her skeleton argument and submitted that it was a relevant case as it refers to the judgment of *Ruscillo*. She submitted that *Muscat* confirms the role of a disciplinary Tribunal is to be more proactive than a Crown Court judge and to ensure the case is properly presented and the relevant evidence is placed before it. Further, she submitted that the case of *Muscat* held that a judge is entitled to express a provisional view of the evidence even if that view is wrong.

15. Ms Johnson submitted that there can be no criticism of the manner in which this Tribunal has conducted itself. She submitted that given the case of *Ruscillo*, the Tribunal was entitled to take proactive action, as it did in its intervention in raising the concerns that it had, as well as in its questioning of a number of witnesses. Ms Johnson reminded the Tribunal that it had granted Mr Brassington's application of no case to answer pursuant to Rule 17(2)(g) in respect of paragraph 2A of the Allegation demonstrating it was prepared to make decisions against the GMC. Ms Johnson submitted having amended this paragraph of its own volition, the Tribunal then determined there was no case to answer for it. Ms Johnson rejected Mr Brassington's submission that the Tribunal's actions in amending the Allegation of its own volition on day two of these proceedings '*set the tone*' for what then occurred.

16. In response to Mr Brassington's reference to possible hostility by the Tribunal and the relevance of *Muscat*, Ms Johnson submitted that there were a number of

occasions as documented in the transcript where she had raised objection to Mr Brassington's cross-examination of GMC witnesses as well as in his supplemental questioning of Mr Chowdhury and had been over-ruled by the Tribunal who allowed Mr Brassington to continue. She submitted that this demonstrated an even-handed approach by the Tribunal.

17. Ms Johnson submitted that the Tribunal had not become the investigator/prosecutor and judge of this case. She submitted that the Tribunal set out no parameters for the GMC's review nor were any suggestions made about new witnesses or allegations. Ms Johnson reminded the Tribunal of her earlier argument that if the Tribunal had already made a decision about the case, it would simply have amended the Allegation of its own volition. Ms Johnson submitted that the GMC did have options when the Tribunal adjourned for it to review its case. She submitted that the GMC took its own decision to obtain further evidence and following receipt of that evidence, determined to make an application to amend the Allegation.

18. Ms Johnson submitted that the Tribunal had set out that it has an '*open mind*' and that it remains for the GMC to prove its case. She submitted that the Tribunal has made clear its expectation that the case will restart and what this will mean for the calling, recalling and testing of evidence for both the GMC and Mr Chowdhury. Ms Johnson submitted that all the case law referred to endorses the Tribunal taking a proactive approach and that is what this Tribunal has done.

19. Ms Johnson referred to the case of *Mahfouz* and submitted that in that case there were concerns raised by the appellate and that the pragmatic approach taken was recusal. She submitted that such an approach was not required in this case. Ms Johnson submitted that the Tribunal has acted in a way that is positively endorsed by the authorities. She submitted that taking a proactive role does not mean that any issues have been determined. She submitted that the case is still to be determined and will be determined in the usual way. Ms Johnson submitted that given the circumstances of this case, it was not appropriate for the Tribunal to recuse itself.

The Relevant Legal Principles

20. The Legal Assessor advised the Tribunal to take account of the skeleton arguments provided by both parties and to have regard to their oral submissions as well as their answers to questions.

21. The Legal Assessor advised that the Tribunal was being asked to recuse itself from this case as there could be a perception of bias by a fair-minded and informed observer which could impact on Mr Chowdhury receiving a fair hearing.

22. The Legal Assessor referred to the relevant test set out in the case of *Porter v Magill* and reminded the Tribunal that both parties had referenced it as follows:

> *The question is whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.*

23. The Legal Assessor also referred to the case of *Gillies v Secretary of State for Work and Pensions* [2006] UKHL 2 (`*Gillies´*) and its elaboration on the fair-minded and informed observer, as set out in paragraph 17 of that judgment:

> *the observer is neither complacent nor unduly sensitive or suspicious when he examines the facts that he can look at. It is to be assumed too that he is able to distinguish between what is relevant and what is irrelevant, and that he is able when exercising his judgment to decide what weight should be given to the facts that are relevant.*

24. The Legal Assessor reminded the Tribunal that the test was not whether the Tribunal itself thinks it is biased or that there is a risk of bias. The test is whether the fair-minded and informed observer would conclude there was a real possibility of bias. The Legal Assessor advised that the Tribunal take all of the circumstances of this case into account, including the procedural position the case has reached and what information the fair-minded and informed observer has.

25. The Legal Assessor noted that the Tribunal had been referred to a number of other cases. She advised that such cases can be taken into account but that all cases turn on their own facts. She advised that if the Tribunal applied anything from the cases referenced by parties, it should be clear in its determination what it has applied and why. She cautioned the Tribunal not to depart from the test set out in *Porter v Magill*.

26. In relation to the case of *Mahfouz*, the Legal Assessor advised that the Tribunal should first identify whether there was an issue, whether the fair-minded and informed observer would consider it a real possibility for Mr Chowdhury not to have a fair hearing, and only then to consider whether to take a pragmatic approach. There is no need to take a pragmatic approach unless the Tribunal identifies an issue.

The Tribunal's Decision

27. The Tribunal accepted the legal advice provided by the Legal Assessor. Throughout its deliberations, the Tribunal took account of the skeleton arguments and oral submissions from both Mr Brassington, in support of the application for recusal and Ms Johnson, in opposition to it.

28. The Tribunal applied the test set out in *Porter v Magill* and determined to consider a number of questions raised regarding whether a fair-minded and informed observer would consider that there was a real possibility of bias by this Tribunal.

Would a fair-minded and informed observer consider that the Tribunal had adopted a dual role of investigator/prosecutor and judge?

29. The Tribunal had regard to Mr Brassington's submission that, in intervening to raise its concerns about possible undercharging by the GMC, it had taken on a dual role as investigator/prosecutor and judge.

30. The Tribunal considered the chronology and transcripts of this case. It also considered its own actions and all of its written determinations. The Tribunal did not accept that it had placed any pressure on the GMC to take any specific actions beyond encouraging a thorough review for possible undercharging. The Tribunal was of the view that its initial questions to the GMC in relation to how the case had been brought were approached with caution. It asked:

> 1. Patient A was not informed of the possibility of a wrong-sided implant for some months. What is the GMC's rationale for not bringing any allegation regarding this?
>
> 2. What is the GMC's rationale for only alleging dishonesty in relation to paragraphs 4 and 5 of the Allegation?
>
> 3. Has the GMC considered where the responsibility lies for ensuring that the error which affected Patient A was rectified as quickly and effectively as possible?

31. In receiving answers to those questions from Ms Johnson on behalf of the GMC, the Tribunal was not satisfied that due consideration had been given to the matters it had raised. Accordingly, it set out its concerns in more specific terms and proposed an adjournment as a way forward.

32. The Tribunal noted that in both its Position Statement (Annex C) and its determination on adjournment (Annex D), it had not sought to make directions to the GMC about the case brought. The Tribunal determined on day six of the hearing to adjourn of its own volition to, as set out in paragraph 19:

> *…enable the GMC to complete a thorough review of this case and evaluate the appropriateness of the Allegation brought against Mr Chowdhury. It determined that such a review would enable the Tribunal to ensure that its regulatory duties to protect the public were properly discharged.*

33. The Tribunal has, in order to uphold the overarching objective, in line with *Ruscillo*, proactively sought to raise its concerns with both parties, with fairness to both in mind. The Tribunal was clear that the purpose of the adjournment was for the GMC to thoroughly review its case and to evaluate whether the Allegation it had brought against Mr Chowdhury was appropriately charged. The Tribunal did not know whether the GMC would review its case, or what, if any, conclusions it might reach on the basis of that review.

34. Having considered both its interventions as documented in the transcripts and its written determinations, the Tribunal is clear that a fair-minded and informed observer will see that at no stage has it made enquiries about the GMC's investigation. Neither had it made any statements about the nature of the GMC's prosecution of the case, rather, it aired its concerns as the evidence before it evolved in the form of open questions to which it did not know the answer. The Tribunal did not suggest that the GMC obtain new evidence. The GMC's decision to do so in taking statements from Mr E and Mr F were not prescribed by the Tribunal, nor was it inevitable that statements would be adduced and allowed into evidence. The Tribunal was satisfied that its actions throughout this hearing have been supported by relevant case law. Further, the Tribunal was satisfied that it has acted at every stage with the overarching objective to protect the public in mind, whilst balancing the interests of Mr Chowdhury.

35. The Tribunal was satisfied that a fair-minded and informed observer would, having regard to the particular facts and circumstances of this case, not conclude that the Tribunal had acted beyond its remit. A fair-minded and informed observer, with knowledge of the case law including *Ruscillo* and *Jozi* would consider that a disciplinary Tribunal should take proactive steps to ensure the case before it is properly presented and would consider that is what this Tribunal had done. The Tribunal concluded that a fair-minded and informed observer would not consider that the Tribunal had acted in dual roles as investigator/prosecutor and judge in this case and thus remains impartial.

<u>Would a fair-minded and informed observer consider that the Tribunal had predetermined its decision on the application to amend the Allegation?</u>

36. The Tribunal considered Mr Brassington's submission that the issue of amending the Allegation had be prejudged.

37. The Tribunal had regard to the chronology of events in this case. It accepted that it had heard the majority of the live evidence in the case and that its intervention had arisen at an unusual time. However, the Tribunal also had regard to the caution with which it had raised its concerns, first in its Position Statement and then in its case management directions as set out in Annex D.

38. The Tribunal was satisfied that the fair-minded and informed observer would consider that it had raised its concerns about the GMC's case appropriately. The Position Statement makes clear that the Tribunal had a concern about the appropriateness of the Allegation before it and therefore sought clarification from the GMC. The Tribunal did not make any suggestions about a way forward for the case beyond the possibility of adjourning. The Tribunal did not know what the GMC response to its questions would be. Nor did it know, if the GMC did review its case, what its subsequent actions would be.

39. The Tribunal considered whether a fair-minded and informed observer would consider that in raising its concerns, the Tribunal had already formed a view and prejudged any subsequent applications from the GMC. The Tribunal noted that it had set out no expectation that the GMC should seek to amend the Allegation. It is clear that there is no evidence to suggest that the Tribunal had prejudged that application. The Tribunal therefore concluded that a fair-minded and informed observer would not conclude that it had predetermined any applications made by the GMC.

40. The Tribunal again had regard to its interventions in relation to the Allegation as set out in the transcripts and to its written determinations, which the fair-minded and informed observer would have access to. The Tribunal has not set out any provisional views of the evidence before it. The Tribunal noted its questions to the GMC and the concerns it set out in the Position Statement. The Tribunal considered that in producing those documents, it had not formulated a provisional view on the evidence and the facts of the case. It had only expressed a provisional view that the GMC should consider whether it had brought the case in full. In making its interventions, the Tribunal was careful, and balanced the unfairness to Mr Chowdhury with its need to uphold the overarching objective throughout. The Tribunal noted that, had it gone further and set out a provisional view of the evidence before it at any point, this would not have been grounds for any consideration of possible bias in any event, as is set out in the case of *Muscat* in paragraph 64:

> *64. Second, a judge and indeed a member of a disciplinary tribunal is quite entitled to express a provisional view of some evidence based on his or her understanding of it even if that understanding is wrong without there being any possibility of that member being regarded as being biased.*

41. In considering *Muscat*, the Tribunal remained satisfied that it had not gone so far as setting out any provisional view of the evidence before it. The Tribunal considered that it had approached the evidence before it with an open mind and would continue to do so. The Tribunal concluded that a fair-minded and informed observer, knowing the facts as set out above, would not conclude that the Tribunal had demonstrated possible bias in the manner in which both the Position Statement and determination on adjournment were produced. Accordingly, a fair-minded and

informed observer would not conclude that the Tribunal's approach for the rest of these proceedings would be any different. The observer would conclude that the Tribunal would continue to have an open mind and that the conclusions it did reach about the evidence and the case as a whole would only come at the appropriate time, when all evidence had been heard and tested and submissions on the facts concluded.

42. Taking the above into account, the Tribunal was satisfied that a fair-minded and informed observer would not conclude that the Tribunal had predetermined matters relating to the proposed and subsequently granted amendments to the Allegation.

Would the fair-minded and informed observer consider there had been hostility displayed by the Tribunal?

43. In his oral submissions, in reference to the case of *Muscat*, Mr Brassington submitted that in that case a single incident of hostility by the committee member was the focus for a consideration of possible bias. He submitted that there were multiple instances in this case where he had been interrupted by the Tribunal during his questioning and cross-examination. He submitted that to a fair-minded and informed observer, it could be considered evidence of possible bias and would at least be a concern to note such interruptions when compared to the lack of any similar interruption faced by Ms Johnson.

44. The Tribunal considered this submission and reviewed the transcripts in order to assess whether a fair-minded and informed observer would, having had sight of those records, concluded that the Tribunal had acted, at times, with hostility towards Mr Brassington.

45. The Tribunal considered that a fair-minded and informed observer reviewing the transcripts of this case would see the Tribunal intervening when both Counsel were questioning witnesses and that a number of these interventions were considered by both parties to have been useful clarifications and additions. The Tribunal was satisfied that, taken in the round, a fair-minded and informed observer would not mistake active management of the hearing by the Tribunal for hostility.

46. Therefore, the Tribunal concluded that as a fair-minded and informed observer would not consider that the Tribunal had displayed hostility to Mr Chowdhury's representative, they accordingly would not consider that demonstrated any possible bias.

Should the Tribunal take a pragmatic approach and recuse itself?

47. The Tribunal took into account all of its previous considerations when considering whether, in accordance with *Mahfouz*, it would be appropriate to take a '*pragmatic*' approach and recuse itself.

48. The Tribunal considered and accepted the legal advice that such a course of action would only be appropriate if it had determined that there was the real possibility of perceived bias in any of the matters it had already considered. The Tribunal noted that it had not identified any real possibility. Accordingly, the Tribunal accepted that it need not consider a '*pragmatic*' approach to the recusal application before it because it had not reached the conclusion in its consideration of any of the above matters that could amount to a fair-minded and informed observer concluding that there was a real possibility that this Tribunal was biased.

Conclusion

49. The Tribunal considered its deliberations on all the matters set out above alongside the other relevant factors it was advised by the Legal Assessor to consider. The Tribunal concluded that a fair-minded and informed observer:

a) knowing all the facts and circumstances of this case; and

b) being aware of the relevant case law; and

c) having regard to Annex E which sets out the steps proposed by the Tribunal to ensure that Mr Chowdhury can continue to have a fair hearing,

would not conclude that there was a real possibility that this Tribunal was biased.

50. Accordingly, the Tribunal determined to reject Mr Brassington's application for the Tribunal to recuse itself.