PUBLIC RECORD

Dates: 08/01/2024 - 16/01/2024

Medical Practitioner's name:	Mr Graham BARKER
GMC reference number:	1643976
Primary medical qualification:	MB BS 1973 University of London

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

Summary of outcome

Erasure
Immediate order imposed

Tribunal:

Legally Qualified Chair	Mrs Helen Potts
Medical Tribunal Member:	Dr Alastair McGowan
Medical Tribunal Member:	Dr Susan O'Connor

Tribunal Clerk:	Miss Ciara Fogarty

Attendance and Representation:

Medical Practitioner:	Not present, not represented
GMC Representative:	Mr Lee Fish, Counsel

Attendance of Press / Public

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

Overarching Objective

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

Determination on Facts - 12/01/2024

Background

1. Dr Graham Barker qualified in 1973 from the University of London. At the time of the events which are the subject of the hearing, Dr Barker was practising as a Consultant Gynaecologist in private practice at a number of locations, including the Portland Hospital.

2. The substance of the Allegation is that Dr Barker entered into an inappropriate relationship with a patient, Patient A.

3. Patient A first consulted Dr Barker at the Portland Hospital in August 2015. Thereafter, she consulted him on a regular basis and they became what Patient A considered to be close friends.

4. In due course, Patient A and Dr Barker exchanged telephone numbers and they began to text and then send WhatsApp messages to one another. The WhatsApp messages started on 26 January 2017 and continued until 5 November 2021. It is alleged that some of those messages, together with the images, videos, memes and GIFs which were attached to those messages, were inappropriate and that Dr Barker's conduct in sending them was sexually motivated.

5. It is further alleged that, at one or more consultations between 2016 and February 2019, Dr Barker kissed Patient A, touched her breasts over her bra, caressed her body, and touched her in the vaginal area without gloves. It is alleged that this touching was not clinically indicated and that Dr Barker's actions were sexually motivated.

6. The initial concerns were raised with the GMC on 4 November 2021 by Patient A's then partner, who forwarded the WhatsApp messages between Dr Barker and Patient A to the GMC. In due course, Patient A prepared a written statement for these proceedings in which she exhibited the WhatsApp messages between herself and Dr Barker.

7. On 8 November 2021, Dr Barker submitted an application for voluntary erasure from the Medical Register, which was subsequently granted by the GMC. On 8 December 2021, the GMC wrote to Dr Barker to inform him that the decision to grant voluntary erasure had been revoked because it had been based on a lack of awareness of facts which were fundamentally material and relevant to the consideration of the application. Dr Barker's name was reinstated on the Medical Register to enable the continuation of the investigation into the matters which form the basis of the Allegation.

The Outcome of Applications Made during the Facts Stage

8. Dr Barker was neither present nor represented at the hearing. Mr Lee Fish, Counsel on behalf the GMC, invited the Tribunal to find, under Rules 15 and 40 of the General Medical Council (Fitness to Practise) Rules 2004 ('the Rules') and Schedule 4, Paragraph 8 of the Medical Act 1983, as amended, that Dr Barker had been properly served with notification of this hearing. Mr Fish also applied for the Tribunal to proceed to hear the case in Dr Barker's absence, pursuant to Rule 31 of the Rules. The Tribunal granted the GMC's application. The Tribunal's full decision and reasons on these matters is included at Annex A.

9. At the outset of the hearing, the Tribunal was told that the GMC did not require Patient A to attend to give oral evidence and that she had been stood down as a witness. The Tribunal indicated that it may have had questions for Patient A. It had noted that Patient A was the sole witness of fact in the case. The Tribunal considered whether to exercise its discretion under Rule 34(11) to require Patient A to attend to give oral evidence. The Tribunal, having heard the GMC's submissions, determined not to exercise that discretion. The Tribunal's full decision and reasons on these matters is included at Annex B.

The Allegation and the Doctor's Response

10. The Allegation made against Dr Barker is as follows:

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

1. Between 2016 and February 2019, you consulted with Patient A and on one or more occasion you:
   a. kissed Patient A on the lips; To be determined
   b. said to Patient A, "…I will be sad and would like to see you as much as I can and I really enjoy our talks and don't want for them to end", or words to that effect; To be determined
   c. touched Patient A:
      i. on and around: To be determined
         i. the outside of her vagina; To be determined
         ii. her vulva; To be determined

         without gloves;
      ii. on her breasts, over her bra; To be determined
   d. caressed Patient A's body with your hand(s); To be determined
   e. told Patient A that:
      i. she could text you any medical questions, especially about any sexual activity; To be determined
      ii. you would whisk her away and marry her; To be determined
      iii. she was quite the sunshine in your life; To be determined
      iv. she brightened up your days; To be determined

      or words to that effect.

2. Between 26 January 2017 and 5 November 2021, you sent Patient A one or more inappropriate WhatsApp messages, including those set out at:
   a. Schedule 1; To be determined
   b. Schedule 2. To be determined

3. Between 22 December 2017 and 17 August 2021, you sent Patient A one or more inappropriate:
   a. images; To be determined
   b. videos; To be determined
   c. memes; To be determined
   d. GIFs. To be determined

4. Your conduct as described at paragraph(s):
   a. 1c-1d was not clinically indicated; To be determined

b. 1, 2a and 3 was sexually motivated. 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

Witness Evidence

11. Patient A was the GMC's sole witness of fact. The Tribunal received a signed witness statement and supplementary statement from Patient A. As set out above, Patient A was not called to give oral evidence:

12. Dr Barker did not provide a witness statement, nor did he provide oral evidence at the hearing. Dr Barker did not provide any evidence or written submissions for consideration by the Tribunal.

Expert Witness Evidence

13. The Tribunal also received a signed witness statement from an expert witnesses called by the GMC, Dr B (LLM) FRCOG dated 28 October 2023; she was not called to give oral evidence.

Documentary and Audio-visual Evidence

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

- A list of appointments between Patient A and Dr Barker at Portland Hospital and the Shard from August 2015 to February 2019;
- WhatsApp messages between Dr Barker and Patient A, with attached photographs, videos, memes and GIFs, covering the period from January 2017 to November 2021;
- An application for voluntary erasure submitted by Dr Barker, dated 8 November 2021;
- A letter from the GMC to Dr Barker advising him that the Voluntary Erasure application had been granted in error, dated 8 December 2021;
- An email from Dr Barker to the GMC, confirming that he had retired on 13 November 2021, dated 15 February 2023;
- Patient A's medical records, detailing appointments with Dr Barker (incomplete)

- Correspondence and notes of telephone calls between Patient A and the GMC from April 2022 to October 2023, detailing the circumstances in which her witness statements were produced.

The Tribunal's Approach

15. In reaching its decision on facts, the Tribunal has borne in mind that the burden of proof rests on the GMC and it is for the GMC to prove the Allegation. The standard of proof is the civil standard which means that the Tribunal cannot find a fact proved unless it is satisfied that it is more likely than not to have occurred.

16. The Tribunal was reminded that it should have regard to the whole of the evidence before it and form its own judgment about which evidence was reliable and which was not. It was for the Tribunal to decide what weight to attach to the evidence before it, taking into account that Patient A had not been called to give oral evidence and her evidence had not, therefore, been subject to testing through cross examination or Tribunal questions. The Tribunal was reminded that it should, nonetheless, form a view of her credibility and the veracity of Patient A's evidence, taking care to explore any internal inconsistencies in that evidence and considering whether there may be reasons her account could be untrue or inaccurate.

17. The Tribunal was reminded to bear in mind the extent to which Patient A's memory may have been affected by the passage of time and that it was open to it not to rule out all of a witness's evidence based on credibility; credibility can be divisible. The Tribunal acknowledged that it was entitled to draw inferences based upon the evidence, but it must not speculate.

18. With regard to the expert evidence which it had received, the Tribunal took into account that it was not bound to accept the evidence and opinion of an expert witness.

19. The Tribunal was reminded that it should consider each paragraph of the Allegation and each sub-paragraph separately and that it should have regard to the specific wording of the Allegation. Where it was alleged that Dr Barker's conduct was 'inappropriate', the Tribunal could consider that this meant otherwise than in the manner expected of a reasonable doctor, having due regard to the expected standards of performance and professionalism required by Good Medical Practice and any other relevant guidelines.

20. When considering whether Dr Barker's touching and caressing of Patient A, as alleged in sub-paragraphs 1c and 1d of the Allegation, was 'not clinically indicated', the Tribunal was reminded that the standard to apply is that which originates in civil negligence, as set out in the case of *Bolam v Friern Hospital Management Committee* [1957] 1WLR 582. The Tribunal needs to be satisfied to the appropriate standard that the touching was not in accordance with a practice accepted as proper by a responsible body of medical opinion.

21. When considering whether Dr Barker's conduct was 'sexually motivated', the Tribunal had regard to the case of *Basson v General Medical Council* [2018] EWHC 505 (Admin) (21 February 2018), in which the High Court defined acting with sexual motivation as conduct *'done either in pursuit of sexual gratification or in pursuit of a future sexual relationship'*. The Tribunal acknowledged that whether or not a doctor's actions were sexually motivated, in the absence of any admission, will always be a matter of inference and that it should consider carefully whether there is any other plausible interpretation of Dr Barker's conduct before making a finding that his conduct was sexually motivated.

22. The Tribunal took into account that, when considering sexual motivation, it should make a deduction from all the facts and circumstances of the case, and it should look at the material in the round. It understood that the best evidence of a sexual motivation may be the behaviour itself and that where there was no plausible, alternative explanation as to why the doctor engaged in conduct or actions of an overtly sexual nature, then the Tribunal was entitled to conclude that the motivation was sexual. The Tribunal had regard to the case of *Haris v General Medical Council* [2021] EWCA Civ 763 in which it was said that a sexual motivation could be inferred from:

> "*a. The fact that the touching was of the sexual organs*
> *b. The absence of a clinical justification*
> *c. The absence of any other plausible reason for the touching*.

23. The Tribunal was told that Dr Barker had no previous convictions and no previous findings of misconduct or impairment before the Medical Practitioners Tribunal and that his previous good character should be taken into account when considering whether he was likely to have acted in the manner alleged.

24. The Tribunal was reminded of the need to give adequate reasons for its decisions and findings.

The Tribunal's Analysis of the Evidence and Findings

25. The Tribunal has considered each outstanding paragraph of the Allegation separately and has evaluated all of the evidence in order to make its findings on the facts.

26. The Tribunal took into account that whilst it was required to consider each outstanding paragraph of the Allegation separately, there was no requirement upon it to consider them in the order in which they were set out in the Allegation. The Tribunal determined that it would be appropriate to consider the outstanding paragraphs in the same order in which the GMC had approached them in its submissions. It determined that it would first consider Paragraphs 2 and 3; it would then consider Paragraph 1; and lastly it would consider Paragraph 4.

Paragraph 2(a)

27. The Tribunal first considered paragraph 2(a) of the Allegation.

28. The Tribunal took into account the written statement of Patient A in which she sets out the circumstances in which she and Dr Barker first began to communicate by text and later WhatsApp. It noted, from Patient A's evidence, that she had initially asked Dr Barker for his mobile number to enable her to text him with medical questions and to arrange repeat 'refills'. Patient A and Dr Barker were already in text communication by early 2016.

29. In due course, the communication moved to WhatsApp. The Tribunal was provided with a log of WhatsApp messages between Dr Barker and Patient A, with attached images, memes, videos and GIFs, covering a period of almost four years from 26 January 2017 to 5 November 2021. In her witness statement, Patient A explains that earlier texts from before this period were no longer available. The Tribunal noted that Patient A's last consultation with Dr Barker had taken place in February 2019 and that the WhatsApp messages between them had continued until November 2021, when Patient A's then partner had become aware of them and had been sufficiently concerned about them to contact the GMC.

30. The Tribunal accepted Patient A's account of the circumstances in which she and Dr Barker had first begun to communicate by WhatsApp. It noted that Patient A spent extended periods outside the UK. The Tribunal did not consider that it was inherently inappropriate for a Doctor in private practice to communicate with a Patient by WhatsApp in such circumstances provided that the communication was for clinical reasons. However, the Tribunal noted, from the log of WhatsApp messages that, as early as January 2017, Patient A

and Mr Barker were sending messages of a personal nature which had no clinical benefit for Patient A.

31. The Tribunal considered the nature, content and tone of the WhatsApp messages exchanged between Patient A and Dr Barker. It considered the messages set out in Schedule 1 in the context of the WhatsApp log and the evidence as a whole. The Tribunal did not consider that it was required to make specific findings in relation to each of the messages listed in Schedule 1; it was sufficient for it to make reference to those messages in the WhatsApp log which highlighted the overall nature, tone and content of the communication between Dr Barker and Patient A.

32. The Tribunal found that Dr Barker's messages were flirtatious in nature and that the content was at times overtly sexual. It highlighted the following messages as examples of this:

- On 28 January 2017, Dr Barker referred to Patient A as:

  '"XXX"

- On 11 February 2017, Dr Barker suggested, in response to Patient A informing him that she was going to be taking a long haul flight and raising the question of deep vein thrombosis:

  "Could you get a fellow passenger to massage your legs during the flight"

  He had then gone on to ask her:

  'Are you a member of the Mile High Club?'

  and to provide an explanation that:

  'Wikipedia said it is some thing to do with the vibration in the plane and said it happened in 18th century ballooning as well'

  and

  "Long flights are so boring. You need something to pass the time. And a little exercise will stimulate the blood flow and prevent clots."

- On 26 September 2017, Dr Barker wrote:

  'I am saving up to be Jewish. I have had the operation too'

  ….

  'Pencil sharpened'

'No lead in it'

- On 18 October 2017, when asked by Patient A if she could telephone him, Dr Barker had responded:

  "Not face time as I am naked and just getting dressed"

- On 27 March 2018, Dr Barker had written:
  "Are you getting much Schnitzel?"
  "Wiener schnitzel? Or just a Wiener?" "It's a very small sausage in the USA" …
  "Falukorv"…
  "Kielbasa"

- On 19 July 2021, Dr Barker had written:

  "The French are not on their knees but in the 69 position"

33. The Tribunal was in no doubt that each of the messages set out above was highly inappropriate in the context of a relationship between a doctor and a patient. The messages were flirtatious, overtly sexual, and had no clinical value to Patient A. In relation to the comments on 26 September 2017, above, the Tribunal considered these to be objectively racist in addition to being overtly sexual.

34. Whilst the Tribunal noted that Patient A frequently responded to Dr Barker's messages in a similar vein, it considered that it was for Dr Barker as a registered professional to set appropriate boundaries and to moderate his communication and conduct and that he had failed to do so.

35. The Tribunal further considered that some of Dr Barker's communications with Patient A pointed to attitudes which supported the objectification of women. It highlighted the following messages as examples of this:

- On 4 June 2018, Dr Barker had written:
  "Tennis is the only interest especially Miss Sharapovas legs and Serenas biceps"
  "I will be at the Portland Hospital for high class ladies like your good self"

- On 3 April 2019, Dr Barker had written:

"So as it is warm in California why do many ladies there need big layers of insulating fat?"
"Some look like an oil tanker from behind"

36. The Tribunal considered that the fact that the messages may have been an attempt at humour did not detract from the underlying offensiveness of the comments. Such comments were unbefitting of a medical practitioner and had no place in the context of communications between a doctor and patient.

37. Accordingly, the Tribunal found paragraph 2(a) of the Allegation proved

Paragraph 2(b)

38. The Tribunal went on to consider the two messages set out in Schedule 2 of the Allegation.

- On 24 February 2017, Dr Barker had written:

  "let's pull all the illegal Muslims into Mexico where they are all Roman Catholic xxx"

- On 27 September 2017, Dr Barker had written:
  "Fuck the Jews"

39. The Tribunal determined that the language used by Dr Barker was offensive, objectively and blatantly racist, hostile and derogatory. The Tribunal considered that fact that the statements were made in the context of a private communication between a doctor and patient to be particularly revealing and suggestive of a deep-seated attitudinal issue. The Tribunal had no doubt that the messages were inappropriate.

40. Accordingly, the Tribunal found 2(b) of the Allegation proved.

Paragraph 3

41. The Tribunal next examined the images, videos, memes and GIFs which had been sent by Dr Barker between 22 December 2017 and 17 August 2021 as part of his WhatsApp correspondence with Patient A.

Paragraph 3(a)

42. The Tribunal examined the images Dr Barker had sent. These included:

- a photograph of a man (presumably Dr Barker) wearing a Christmas jumper, sent on 27 December 2017;
- a photograph of a fairground ride in Barcelona, sent on 26 July 2018; and
- a photograph of a spoof hospital notice board referring to the mother of a new-born baby as '*Holy Mary'* with the comment *"Joseph partner not father of the baby. Three men also in attendance. ?Trafficking*", sent on 23 December 2018

43. The Tribunal considered that none of the images was inherently offensive or objectionable. However, for a doctor to send a patient a photograph of himself or his holiday constituted a breach of proper boundaries between a doctor and patient and was, therefore, inappropriate.

44. Accordingly, the Tribunal found paragraph 3(a) of the Allegation proved.

Paragraph 3(b)

45. The Tribunal considered the videos Dr Barker sent to Patient A. These included:

- a video of a Donald Trump look-alike bouncing around on a large ball and having a toddler-like tantrum, sent on 3 February 2018;
- a video of a Ferrari land roller-coaster, sent on 26 July 2018;
- a video of a man apparently looking out of an aeroplane window which transpires is in fact a toilet seat, sent on 2 January 2021;
- a video of two men surfing, with the caption '*Red Bull v Beer'* in which one of the men's trousers come down revealing his buttocks, sent on 7 January 2021; and
- a video of a man streaking naked across a cricket pitch, sent on 17 August 2021.

46. The Tribunal considered that, of the five videos, only the one of the Ferrari land roller-coaster had a sexual undertone to it, by reason of the phallic shape of the roller-coaster. None of the other images was inherently offensive or distasteful. However, the Tribunal considered for the same reasons as set out at paragraph 3(a) above, that it was a breach of proper boundaries for a doctor to send a patient material of this nature, whether in humour or not. Therefore, the Tribunal concluded that, in that context, the images were inappropriate.

47. Accordingly, the Tribunal found paragraph 3(b) of the Allegation proved.

Paragraph 3(c)

48. The Tribunal examined and considered the memes Dr Barker had sent to Patient A.

49. On 7 April 2020, Dr Barker sent a meme depicting a woman on all fours, wearing a mini skirt and high heels, and displaying her perineum to a web camera on a laptop behind her. The meme has the caption *'When Your Gynaecologist Works From Home'.* The Tribunal considered this meme to be highly inappropriate, overtly sexual, and suggestive of attitudes which support the objectification of women.

50. The Tribunal next considered a meme, which the GMC submitted from the log of WhatsApp messages was an image that had been sent by Dr Barker to Patient A on 7 January 2021, with the caption '*Never make a woman mad. They can remember stuff that hasn't even happened yet*.' The Tribunal found this meme offensive and suggestive of misogynistic attitudes.

51. The Tribunal next examined a meme sent by Dr Barker to Patient A of a pub sign with a picture of Prince Andrew and the caption '*The Duke of York, under 18s welcome*'. The Tribunal considered this meme inappropriate, offensive and an example of crass and distasteful humour about relationships with minors.

52. The Tribunal had no doubt that each of the above memes was inappropriate for a doctor to send to anyone, particularly a patient. The Tribunal accepted that Dr Barker had no doubt sent the memes in an attempt at humour. However, the Tribunal considered that this did not detract from the inherent distastefulness of the images and the underlying attitudes to which they pointed. The Tribunal considered that such memes had no place in the communication between a doctor and his patient.

53. Accordingly, the Tribunal found paragraph 3(c) of the Allegation proved.

Paragraph 3(d)

54. The Tribunal considered a GIF sent by Dr Barker to Patient A on 31 December 2020. The GIF was a short New Year's animation about the impact of the Coronavirus vaccination on the virus. The Tribunal noted, from its own experience, that this was a GIF which was

widely circulated at the relevant time. It considered that there was nothing inherently inappropriate about the GIF and that, in the context of the relationship between a doctor and patient, it was an acceptable attempt at humour. Accordingly, the Tribunal found paragraph 3(d) of the Allegation not proved.

Paragraph 1

55. The Tribunal then went on to consider paragraph 1 of the Allegation. It is alleged that, on one or more occasions, during consultations between Dr Barker and Patient A in the period between 2016 and February 2019, he kissed her, touched her on or around the outside of her vagina and her vulva without gloves, caressed her body, and touched her breasts over her bra. He is further alleged to have made certain comments to her.

56. The Tribunal took into account that Patient A was the GMC's sole witness of fact and that her witness statement was the only direct factual evidence before it which spoke to this paragraph of the Allegation. The Tribunal considered Patient A's written statement in the context of all the material which was available to it, including the record of appointments between Patient A and Dr Barker and the log of WhatsApp messages and attachments. It noted that appointments between Patient A and Dr Barker had been frequent. It further noted that within the WhatsApp messages between Patient A and Dr Barker, there were comments which supported the Allegation set out in Paragraph 1. The Tribunal determined to have careful regard to these in its consideration of each of the sub-paragraphs of Paragraph 1.

57. The Tribunal considered whether Patient A had any motive to lie but could find none; it noted that in many respects she had spoken positively of Dr Barker and she had recognised her own part in encouraging the relationship and the benefits she perceived she had obtained from it. The Tribunal determined that it would carefully explore any inconsistencies in Patient A's account when considering each of the sub-paragraphs of Paragraph 1.

Paragraph 1(a)

58. Patient A's evidence, as set out in her witness statement, is that Dr Barker first kissed her on the lips at a consultation in early 2016. Patient A had become tearful and had asked Dr Barker if she could hug him. He had hugged her in response and had then kissed her on the lips. Patient A described the kiss as 'delicate and loving' and wrote that it had not lasted

more than a couple of seconds. She had reciprocated the kiss. They had kissed again at the next appointment and it was recurrent after this.

59. The Tribunal had regard to Patient A's description of that first kiss. It noted that she had been candid in admitting that she had reciprocated the kiss. It further took into account the flirtatious tone of the WhatsApp communication, which had been mutual. It noted, in particular, that the WhatsApp messages contained direct references to kisses, as follows:

- On 1 February 2017:
  Patient A:
  'I owe you lots of smooches'

- On 20 October 2017

Patient A:
'I owe you LOTs of kisses'
''But only if you want them of course

Dr Barker:
'I am only here to help you X'
…….
'I will stand by ready to help you'

Patient A:
'Oh'
'I'd love a massage'
'I'd love a kiss'
'And your hands on my body
'Makes me tingle'

And

- On 4 November 2017,

Patient A:
'Kisses to you, dear doctor'

60. The Tribunal considered that there were repeated references to kisses within the WhatsApp messages, which were concurrent with periods when Patient A was seeing Dr Barker regularly for consultations. In the context of the evidence, taken as a whole, the

Tribunal was satisfied that Patient A's account of being kissed by Dr Barker was reliable. It concluded that it was more likely than not that Dr Barker had kissed her on the lips as alleged.

61. Accordingly, the Tribunal found paragraph 1(a) of the Allegation proved.

Paragraph 1(b)

62. The Tribunal considered paragraph 1(b) of the Allegation. Patient A, in her witness statement, writes that, immediately following Dr Barker's first kiss on the lips, she had anticipated that he would apologise and say that he could no longer be her doctor. He had instead asked, '*Why not*?' Patient A had again reiterated that she should perhaps get another doctor, to which he had responded to say something on the lines of*, 'It is up to you, but I will be sad and would like to see you as much as I can' and 'I really enjoy our talks and don't want for them to end'.'*

63. The Tribunal considered that this statement was consistent with Patient A's overall account of the relevant consultation and the detail in which she described it. Further it was consistent with the WhatsApp messages where it was clear that Dr Barker enjoyed his communication with Patient A and at no time sought to curtail it

64. The Tribunal was satisfied that Dr Barker was more likely than not to have made the alleged comment.

65. Accordingly, the Tribunal found paragragh 1(b) proved.

Paragragh 1(c) (i) and (ii)

66. Patient A, in her witness statement, writes that at about the fourth appointment following the initial kiss, '*things first became more sexual in nature'*. She describes an occasion in around the autumn of 2016 where she attended Dr Barker complaining of a recurring UTI, accompanied by pain in the lower abdomen, bacterial vaginosis and candida. Dr Barker had conducted an internal examination of Patient A's vagina; it was not alleged that this examination had been in any way inappropriate.

67. Patient A, in her statement, then explains what happened next:

''37. After the examination, he removed his gloves and continue to touch me on the outside of my vagina, around my vulva. This was no longer a clinical examination – I gathered this from the way he was moving his hand and caressing me. I don't recall whether Dr Barker said anything before he removed his gloves.

38. I recall feeling afraid to show Dr Barker that I wasn't enjoying what he was doing, as I was concerned that he wouldn't want to see me as a patient anymore and that he wouldn't be so fast to react when I needed something, such as a referral, prescription, or insurance document.

39. I don't recall whether it was in this initial incidence, or whether this happened in some of the future instances, but he would touch my breasts over my bra, caress me with his other hand and kiss me.

40. This would never last more than a couple of minutes.

41. We wouldn't engage in such sexual activities at each appointment, though every time we did, I feel it got progressively more sexual. Some visits it would just be a kiss and a hello, while others would involve caressing and kissing. I believe there were at least another 10 further instances where something similar to this happened. It never progressed beyond him touching my breasts and kissing me, while caressing my vulva without gloves on.

42. While I didn't enjoy it, it wasn't painful, nor would I consider the experience awful.''

68. The Tribunal again had regard to the candid nature of Patient A's evidence and the detail of her account. It could find no evidence of any motive for her to have lied about the matter. It noted that the touching was alleged to have taken place immediately after Dr Barker had conducted an intimate vaginal examination of Patient A. Patient A had not suggeted that the vaginal examination had been inappropriate or that it had not been clinically indicated. There was nothing to suggest that she had embellished or exaggerated her account. She had not described Dr Barker's conduct as forceful or coercive. She had not suggested that the sexual relationship had progressed beyond the touching described above. She had recognised her own part in the relationship and, on her own account, had been flattered by the attention and '*went along with it for the security it provided me*'. She writes in her statement:

"*I think I was just happy that someone understood what I was going through medically and that they wanted to help me, and I saw it as a compliment that Dr Barker was willing to risk his medical career for me by engaging in this 'affair' of sorts.* "

The Tribunal considered that Patient A account was wholly credible and internally consistent.

69. The Tribunal next considered whether there were any references to such alleged touching within the WhatsApp messages between Patient A and Dr Barker and highlighted the following:

- On 11 February 2017:
  Patient A:
  'You surgeons have a certain way with women's bodies'
  'I should know better but I don't'
  …
  How strange it is that I went crazy over that speculum that time…
  You have to do that again.

and

- On 23 February 2017
  Patient A:
  'You're the best'
  'You're sweet and thoughtful'

  Dr Barker:
  'And you are 'awesome' with a lot of talent'
  ….

  Patient A:
  Will you be at the Portland on Monday?
  …
  You'll have to examine me
  …
  Unless you are tired of me, that is

  Dr Barker:

'See you then! When someone is tired of [Patient A] they are tired of life'

Patient A
….
'And pretty please please examine me properlyyy (sic)'

Dr Barker
'Of course'

70. The Tribunal concluded that it could properly draw an inference from these messages that Dr Barker had touched Patient A in the manner alleged. In drawing this inference, it took into account the flirtatious nature of the WhatsApp communication more generally, in addition to the overt sexual references contained therein. It was satisfied on the basis of all the evidence before it that it was more likely than not that Dr Barker had touched Patient A in the matter alleged in Paragraphs 1(c)(i) and (ii).

71. Accordingly, the Tribunal found paragraphs 1(c) (i) and (ii) of the Allegation proved.

Paragraph 1(d)

72. The Tribunal took into account Patient A's evidence (as set out at 1(c)above) that *'some visits it would just be a kiss and a hello, while others would involve caressing and kissing'*. It had regard to Patient A's use of the word '*caress'* and gave it its ordinary dictionary meaning of *'to touch or stroke gently or lovingly'*.

73. It was satisfied, for the same reasons as set out in its decision on 1(c) above that it was more likely than not that Dr Barker had caressed Patient A's body as alleged.

74. Accordingly , the Tribunal found paragraphs 1(d) of the Allegation proved.

Paragraph 1(e) (i)

75. In her witness statement, Patient A describes how she first exchanged mobile numbers with Dr Barker having asked him if she could text him with medical questions or requests for 'refills'. She goes on to describe Dr Barker's response in the following terms:

Dr Barker responded: "You certainly may – in fact, do text me about whatever you like, and especially about any sexual activity should you not mind all too much" or words to that effect. I however saw that as a conditional factor to being allowed to text Dr Barker at all.'

76. The Tribunal noted that, from Patient A's account, it appeared that this conversation had taken place before any kissing or touching had occurred. Patient A had attended the consultation for the clinical reason that she was experiencing pain during sex. The Tribunal considered that, in those circumstances it was quite likely that, when asked whether she could contact him with medical questions, Dr Barker had indicated that she could contact him '*especially about any sexual activity*' or words to that effect. The Tribunal considered that, in that context, it would not have been an inappropriate statement for a doctor to make.

77. Accordingly, the Tribunal found Paragraph 1(e)(i) of the Allegation proved as a matter of fact but noting that this was not a pejorative finding.

Paragraph 1 (e) (ii) (iii) (iv)

78. The Tribunal considered that it was appropriate to consider sub-paragraphs 1(e)(ii), (iii) and (iv) together. Dr Barker is variously alleged to have told Patient A that he would whisk her away and marry her; that she was quite the sunshine in his life; and that she brightened up her days, or words to that effect.

79. Patient A, in her written statement, writes that that these were statements made by Dr Barker. The specific context and timing of these comments is not fully explained. The Tribunal considered that these statements were consistent with the flirtatious tone of the WhatsApp exchanges, and to the terms of affection used by Dr Barker of Patient A such as:

'"XXX"

80. The Tribunal did not consider that Patient A had any motive to lie about these statements. It concluded that it was, therefore, more likely than not that Dr Barker had made the alleged comments.

Accordingly, the Tribunal found paragraph 1(e)(ii) (iii) (iv) of the Allegation proved.

Paragraph 4

Paragraph 4(a) in relation to 1(c) and 1(d)

81. Having found that Dr Barker had touched Patient A in the manner alleged in Paragraphs 1(c) and (d), the Tribunal went on to consider whether that touching was not clinically indicated, as alleged in Paragraph 4(a).

82. The Tribunal took into account that it had found that Dr Barker had touched Patient A on or around the outside of her vagina and her vulva immediately following what was accepted to have been a clinically appropriate vaginal examination. However, it also noted that Dr Barker had removed his gloves before so doing.

83. The Tribunal took into account the evidence of the expert witness, Dr B, who writes in her witness statement that:

> *'I have been working in Obstetrics and Gynaecology since 1999 and have never yet met a colleague who would consider touching a patient's external genitalia without wearing gloves to be clinically indicated.'*

84. The Tribunal further took into account that it had found that Dr Barker had touched Patient A's breasts over her bra. It again had regard to the expert evidence of Dr B that:

> *'I cannot identify any clinical situation where it would be clinically indicated to touch a patient on her breast, over her bra. I am aware of a few instances where the examining doctor has touched a patient in this way inadvertently, when the doctor moves aside at the end of an examination and the patient sits up suddenly. However, this is not the same as a clinical indication for this sort of touching.'*

85. Finally, the Tribunal reminded itself that it had found that Dr Barker had caressed Patient A's body with his hands. It had regard to Dr B's evidence that:

> *'Examination of various body parts may include different sorts of pressure or stretch. However, the definition of 'caress' is 'touch or stroke gently or lovingly'. I would not consider techniques of clinical examination to meet the definition of caress'.*

86. The Tribunal accepted the evidence of the expert. It could identify no situation in which the conduct described in Paragraphs 1(c) and (1(d) of the Allegation would be clinically indicated.

87. Accordingly, the Tribunal found Paragraph 4(a) of the Allegation proved in relation to 1(c) and 1(d).

Paragraph 4(b) in relation to paragraph 1

88. Having concluded that Dr Barker's conduct as described in Paragraphs 1(c) and 1(d) was not clinically indicated, the Tribunal went on to consider whether Dr Barker's conduct as described at Paragraph 1 as a whole was sexually motivated. The Tribunal reminded itself that, in order to find that the conduct was 'sexually motivated', it must satisfy itself that it was *"conduct done either in pursuit of sexual gratification or in pursuit of a future sexual relationship."* It acknowledged that whether or not Dr Barker's conduct was sexually motivated was a matter which could only be proved by inference or deduction from the surrounding evidence.

89. The Tribunal reminded itself that it had found that Dr Barker had kissed Patient A on the lips; he had touched the outside of her vagina and vulva without wearing gloves; he had touched her breasts over her bra; and he had caressed her body with his hands. The Tribunal had found that there had been no clinical indication for the touching.

90. In the absence of a clinical indication for Dr Barker's conduct, the Tribunal carefully considered whether there could be any other plausible interpretation of that conduct before making a finding that it was sexually motivated. It had regard to all the facts and circumstances of the case, looking at the material in the round.

91. The Tribunal reminded itself that the best evidence of a sexual motivation may be the behaviour itself and that where there was no plausible, alternative explanation as to why the doctor engaged in conduct or actions of an overtly sexual nature, then the Tribunal was entitled to conclude that the motivation was sexual.

92. The Tribunal had regard to the case of *Haris v General Medical Council* [2021] EWCA Civ 763 in which it was said that a sexual motivation could be inferred from:

"a. The fact that the touching was of the sexual organs
b. The absence of a clinical justification
c. The absence of any other plausible reason for the touching.

93. The Tribunal concluded that this was such a case. It could find no other plausible reason for Dr Barker to have touched and caressed Patient A in the manner described in Paragraphs 1(c) and 1(d) other than that it was sexually motivated. It could likewise find no other plausible reason for Dr Barker to have kissed Patient A on the lips. The Tribunal considered that such a finding was consistent with the nature, tone and content of the WhatsApp communications between Dr Barker and Patient A which were at times overtly sexual. It concluded that Dr Barker engaged in such conduct both in pursuit of sexual gratification and in pursuit of a future sexual relationship.

94. The Tribunal next considered whether the statements made by Dr Barker, as set out in Paragraphs 1(b) and 1(e) of the Allegation and as found proved by the Tribunal, were also sexually motivated. The Tribunal reminded itself that, in relation to Paragraph 1(e)(i), it had made no pejorative finding and concluded that Dr Barker's conduct as described in that sub-paragraph was not sexually motivated.

95. The Tribunal considered that the statements made by Dr Barker, as set out in Paragraphs 1(b) and 1(e)(ii)(iii) and (iv) of the Allegation, and as found proved by the Tribunal, were of a similar nature to one another and that it could therefore properly consider these together. The Tribunal considered that none of these statements was overtly sexual. However, the statement at 1(b) was made immediately after Dr Barker had first kissed Patient A and the statements at 1(e)(ii)(iii) and (iv) were made at a time when the relationship had already become sexual.

96. Seen in the context of the totality of the evidence, the Tribunal concluded that these statements were made in pursuit of a future or ongoing sexual relationship and that they could therefore be properly described as sexually motivated.

97. Accordingly, the Tribunal found paragraph 4(b) of the Allegation proved in respect of Paragraph 1 in its entirety save for in respect of sub-paragraph 1(e)(i).

Paragraph 4(b)in relation to 2(a) and 3(a) (b) and (c)

98. Having found paragraphs 2 and 3 of the Allegation proved to its satisfaction, the Tribunal went on to consider whether the conduct described in paragraphs 2(a) and 3 (a) (b) and (c) was sexually motivated, as alleged at Paragraph 4(b). It reminded itself that it had found sub-paragraph 3(d) not proved.

99. The Tribunal considered that it would be appropriate to consider Paragraph 4(b) in relation to Paragraphs 2(a) and 3 together, in that the sending of the images, videos and memes formed part of the same communication as the WhatsApp messages and were attachments to those messages.

100. The Tribunal has found that Dr Barker sent Patient A inappropriate WhatsApp messages, images, memes and videos. The nature and tone of that communication was often flirtatious, and the Tribunal has found that several of the messages and memes, and one of the videos, were overtly sexual in content. The Tribunal has further found that the communication was ongoing at a time when Dr Barker was touching Patient A's external genitalia, without wearing gloves, during her consultations with him.

101. The Tribunal carefully considered whether Dr Barker's conduct in sending those messages, memes, and video was sexually motivated in the sense that it was done either in pursuit of sexual gratification or in pursuit of a future sexual relationship. It took into account that the communication had spanned a period of almost four years and that it had continued long after Dr Barker had ceased seeing Patient A in February 2019. It noted that while overt sexual references in the WhatsApp communications had been more frequent in the earlier part of the communication, they had continued beyond the time period of Patient A's face-to-face consultations with Dr Barker. In particular, Dr Barker had sent inappropriate and overtly sexual memes to Patient A in the latter period of their communication.

102. The Tribunal carefully considered whether there was an alternative explanation for Dr Barker to have sent the messages to Patient A. It took into account that within the log of WhatsApp messages, there were a large number of messages which related to clinical matters. However, it remained the case that there were also a significant number of messages which had no clinical value and which, in some cases, were overtly sexual. The Tribunal asked itself whether these could be characterized as simply inappropriate and crass attempts at humour but which were not otherwise sexually motivated. The Tribunal was, however, unable to conclude that, seen in the context of the evidence as a whole, there could be any other plausible explanation other than that the conduct was sexually motivated. The Tribunal considered that, from the face of the messages, it could properly be inferred

that Dr Barker derived sexual gratification from his communication with Patient A and enjoyed the flirtatious tone of their communication.

103. Accordingly, the Tribunal found paragraph 4(b) of the Allegation proved in respect of 2(a) and 3(a) (b) and (c).

The Tribunal's Overall Determination on the Facts

104.The Tribunal has determined the facts as follows:
Between 2016 and February 2019, you consulted with Patient A and on one or more occasion you:

1.
- a. kissed Patient A on the lips; ***Determined and found proved***
- b. said to Patient A, "…I will be sad and would like to see you as much as I can and I really enjoy our talks and don't want for them to end", or words to that effect; ***Determined and found proved***
- c. touched Patient A:
  - i. on and around: ***Determined and found proved***
    - i. the outside of her vagina; ***Determined and found proved***
    - ii. her vulva; ***Determined and found proved***

    without gloves;
  - ii. on her breasts, over her bra; ***Determined and found proved***
- d. caressed Patient A's body with your hand(s); ***Determined and found proved***
- e. told Patient A that:
  - i. she could text you any medical questions, especially about any sexual activity; ***Determined and found proved***
  - ii. you would whisk her away and marry her; ***Determined and found proved***
  - iii. she was quite the sunshine in your life; ***Determined and found proved***
  - iv. she brightened up your days; ***Determined and found proved***

  or words to that effect.

2. Between 26 January 2017 and 5 November 2021, you sent Patient A one or more inappropriate WhatsApp messages, including those set out at:
   - a. Schedule 1; ***Determined and found proved***
   - b. Schedule 2. ***Determined and found proved***

3. Between 22 December 2017 and 17 August 2021, you sent Patient A one or more inappropriate:
   a. images; ***Determined and found proved***
   b. videos; ***Determined and found proved***
   c. memes; ***Determined and found proved***
   d. GIFs. ***Not proved***

4. Your conduct as described at paragraph(s):
   a. 1c-1d was not clinically indicated; ***Determined and found proved***
   b. 1, 2a and 3 was sexually motivated. ***Determined and found proved***
   c.

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

Determination on Impairment - 15/01/2024

105. 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, Dr Barker's fitness to practise is currently impaired by reason of misconduct.

The Evidence

106. The Tribunal has taken into account all the documentary evidence received during the facts stage of the hearing. In addition, the Tribunal received a further bundle of documents on behalf of the GMC at the impairment stage. This bundle included information about previous patient complaints regarding Dr Barker's conduct. These complaints were managed at a local level and did not result in any finding of misconduct and impairment before the Medical Practitioners Tribunal.

Submissions

107. On behalf of the GMC, Mr Fish reminded the Tribunal that at this stage of the hearing there is no burden or standard of proof. The matter of impairment is one for the Tribunal's judgement alone.

108. Mr Fish said that the Tribunal should adopt a two-stage approach, first considering whether the facts found proved amount to misconduct and if so, then considering whether that misconduct leads to a finding of impaired fitness to practise.

109. Mr Fish submitted that Dr Barker's actions amount to misconduct and that his fitness to practise is currently impaired by reason of it. He referred the Tribunal to paragraphs 53 and 65 of Good Medical Practice (2013) ('GMP'), which state that:

> ***53*** *You must not use your professional position to pursue a sexual or improper emotional relationship with a patient or someone close to them.*
>
> …
>
> ***65*** *You must make sure that your conduct justifies your patients' trust in you and the public's trust in the profession.'*

110. He submitted that the Tribunal's factual findings demonstrated that Dr Barker had breached the duties set out in each of these paragraphs.

111. Mr Fish submitted that the misconduct was serious. He submitted that Dr Barker had abused his professional position, pursuing an inappropriate emotional relationship with a patient that was sexually motivated. Mr Fish submitted that Dr Barker's misconduct fell so far below the standard expected of a doctor as to amount to misconduct.

112. Mr Fish reminded the Tribunal of the case *of Roylance v General Medical Council (Medical Act 1983)* [1999] UKPC 16 (24th March, 1999) in which the following was observed,

> *'Misconduct is a word of general effect, involving some act or omission which falls short of what would be proper in the circumstances. The standard of propriety may often be found by reference to the rules and standards ordinarily required to be followed by a medical practitioner in the particular circumstances.*

113. Mr Fish then made submissions on the issue of impairment. He submitted that Dr Barker's fitness to practice is currently impaired. He told the Tribunal that Dr Barker had provided no evidence of insight or remediation. He submitted that the findings of fact were so serious that a finding of impairment was necessary to maintain public confidence in the medical profession.

114. Mr Fish drew the Tribunal's attention to the material contained in the GMC's stage two bundle. He indicated that the bundle contained details of previous concerns of inappropriate touching and sexual comments which had been raised in relation to Dr Barker's practice. These included:

- a brief reference to a complaint in 2003, in which a patient alleged that Dr Barker had been 'kissy and cuddly' during a consultation;
- details of a complaint in 2012, in which a patient alleged that, during a consultation at London Bridge Hospital, Dr Barker had: rubbed her arm and hugged her when entering the consultation room; rubbed her thigh following an examination; and had made a follow up call to her following the consultation;
- a brief reference to two patient complaints in 2013 about his written communication style; and
- details of a complaint in March 2018, in which a patient alleged that Dr Barker had made inappropriate comments during a consultation at London Bridge Hospital in 2017.

115. Mr Fish highlighted that Dr Barker had disputed these allegations and that no factual findings had been made in respect of them. Mr Fish further highlighted that the outcome of the internal investigations was that Dr Barker was advised to have a chaperone present with him when conducting all consultations, not simply intimate examinations.

116. In the interests of fairness, Mr Fish referred the Tribunal to a positive testimonial provided on Dr Barker's behalf in 2019 when he was suspended internally in relation to the 2018 complaint. Mr Fish reminded the Tribunal that there had been no finding of misconduct or impairment in relation to these matters by a Medical Practitioners Tribunal. He submitted, however, that this material tells the Tribunal that prior to his interactions with Patient A , Dr Barker had at the very least been the subject of complaints that he had behaved inappropriately with patients in the past and had not observed appropriate professional boundaries.

117. Mr Fish submitted that, in line with the guidance provided by Dame Janet Smith in the Fifth Shipman Report, as adopted by the *High Court in CHRE v NMC* and *Paula Grant* [2011] EWHC 297 Admin, it was necessary for the Tribunal to make a finding of impairment not only to protect patients, but in order to uphold public confidence in the profession. He submitted that the first three limbs of the Grant test were relevant. He said that the Tribunal should consider if the need to uphold and maintain proper professional standards and the need to

protect patients and maintain public trust in the profession would be undermined if a finding of impairment were not made.

The Relevant Legal Principles

118. The Tribunal reminded itself that at this stage of proceedings, there is no burden or standard of proof and the decision of impairment is a matter for the Tribunal's judgement alone.

119. In approaching the decision, the Tribunal was mindful of the two-stage process to be adopted: first whether the facts found proved amount to misconduct, and then whether Dr Barker's fitness to practise is impaired by reason of that misconduct.

120. The Tribunal must determine whether Dr Barker's fitness to practise is impaired today, taking into account Dr Barker's conduct at the time of the events and any relevant factors since then such as whether the matters are remediable, whether they have been remedied and whether there is any likelihood of repetition.

121. The Tribunal was reminded of the definition of 'misconduct' as set out in the case of *Roylance v General Medical Council* (No.2) [2000] 1 AC 311 (cited above) and of the judgement *Nandi v General Medical Council* [2004] EWHC 2317 (Admin) in which Mr Justice Collins emphasised the need to give the question of '*serious misconduct' proper weight, observing that in other contexts it has been referred to as "conduct which would be regarded as deplorable by fellow practitioners."*

122. The Tribunal was reminded of the need to have regard to the provisions of *Good Medical Practice* and other relevant guidance when considering the question of misconduct. The Tribunal was referred to the GMC supplemental guidance '*Maintaining a professional boundary between you and your patient*' (25 March 2013). The Tribunal was reminded that a breach of the principles of *Good Medical Practice* does not, in and of itself, establish misconduct and, whether it does, is a matter for the judgment of the Tribunal having regard to all the circumstances of the case.

123. The Tribunal reminded itself that if it found that the facts found proved amounted to misconduct it must then go on to determine whether Dr Barker's fitness to practise is currently impaired by reason of that misconduct. The Tribunal acknowledged that there is no statutory definition of impairment, but was assisted by the guidance provided by Dame Janet

Smith in the Fifth Shipman Report, as adopted by the *High Court in CHRE v NMC* and *Paula Grant* [2011] EWHC 297 Admin in which she identified 4 questions that should be specifically considered in determining whether a doctors' fitness to practise is impaired:

> *a. 'Has in the past acted and/or is liable in the future to act so as to put a patient or patients at unwarranted risk of harm; and/or*
>
> *b. Has in the past and/or is liable in the future to bring the medical profession into disrepute; and/or*
>
> *c. Has in the past breached and/or is liable in the future to breach one of the fundamental tenets of the medical profession; and/or*
>
> *d. Whether the registrant has in the past acted dishonestly and/or is liable to act dishonestly in the future.'*

124. The Tribunal acknowledged that this was not a case in which dishonesty had been alleged.

125. The Tribunal reminded itself that it must have regard to all three limbs of the statutory objective when considering the question of impairment.

The Tribunal's Determination on Impairment

Misconduct

126. In determining whether Dr Barker's fitness to practise is impaired by reason of misconduct, the Tribunal first considered whether the facts found proved amount to misconduct.

127. The Tribunal considered that its findings about Dr Barker's conduct fell into three broad areas:

- Dr Barker kissed Patient A on the lips; he touched her external genitalia without wearing gloves; he touched her breasts, over her bra; and he caressed her body with his hands. There was no clinical indication for that touching and his conduct was sexually motivated.

- Dr Barker sent Patient A inappropriate WhatsApp messages, images, videos and memes which were flirtatious and, at times, misogynistic or overtly sexual. He sent those messages and attachments for his own sexual gratification and in pursuit of a future sexual relationship.
- Dr Barker sent Patient A WhatsApp messages which were objectively and blatantly racist, hostile and derogatory.

128. The Tribunal was in no doubt that Dr Barker's conduct in each of those three areas, taken individually and together, amounted to misconduct and that the misconduct was serious. Dr Barker had a responsibility to recognise the imbalance in power which exists in the relationship between a doctor and his patient and to maintain clear boundaries in that relationship. He failed to do so. He instead abused the trust placed in him by patients and the public and used his professional position to pursue a sexual and improper emotional relationship with Patient A. He abused his position as a doctor to touch Patient A on the most intimate parts of her body for no other reason than for his own sexual gratification. The Tribunal considered that this was an abuse of trust of the most serious kind.

129. The Tribunal took into account that Dr Barker's conduct was persistent and continued over an extended period of time. His sexual misconduct occurred in the context of both face-to-face contact and through his WhatsApp commnications with Patient A. That WhatsApp communication spanned a period of well in excess of four years. He engaged in the use of flirtatious and overtly sexual language and sent her blatantly and overtly sexual images. The Tribunal considered that those messages and images were wholly inappropriate in the context of communication between a doctor and a patient and demonstrated a wholesale disregard of proper professional boundaries. In addition, his messages and the attached images betrayed misogynistic views and a tendency to objectify women.

130. Furthermore, in the context of his WhatsApp communication with Patient A, Dr Barker made comments which were objectively and blatantly racist, hostile and derogatory toward identified racial groups. Those comments were unsolicited by Patient A. The Tribunal considered those comments to be wholly abhorrent and evidence of deep-seated attitudinal issues which have no place in the practice of medicine. The Tribunal had no doubt that fellow practitioners would consider Dr Barker's conduct 'deplorable'.

131. The Tribunal determined that Dr Barker's conduct breached paragraphs 53 and 65 of GMP, which provide:

…

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

…

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

132. The Tribunal further considered that he breached paragraphs 3, 4 and 5 of the guidance *Maintaining a professional boundary between you and your patient* (25 March 2013)*:*

'3 *Trust is the foundation of the doctor-patient partnership. Patients should be able to trust that their doctor will behave professionally towards them during consultations and not see them as a potential sexual partner.*

Current patients

4 *You must not pursue a sexual or improper emotional relationship with a current patient.*

5 *If a patient pursues a sexual or improper emotional relationship with you, you should treat them politely and considerately and try to re-establish a professional boundary. If trust has broken down and you find it necessary to end the professional relationship, you must follow the guidance in Ending your professional relationship with a patient.'*

133. The Tribunal was satisfied that those breaches were serious. The Tribunal considered that sexual misconduct and the use of racist language by a doctor is always serious and can have a devastating impact on individuals, teams, and on patient safety.

134. Accordingly, the Tribunal was in no doubt that Dr Barker's actions amounted to misconduct.

Impairment

135. The Tribunal having found that the facts found proved amounted to misconduct, went on to consider whether, as a result of that misconduct, Dr Barker's fitness to practise is currently impaired.

136. In determining whether a finding of current impairment of fitness to practise is required, the Tribunal considered whether there was any evidence that Dr Barker had insight into his misconduct or that he had taken steps to remediate it such that it was highly unlikely to be repeated. The Tribunal considered that sexual misconduct of the type found by the Tribunal is difficult to remediate. The Tribunal concluded that it had been provided with no evidence of any remediation, insight, or remorse by Dr Barker.

137. In considering whether Dr Barker was likely to repeat his misconduct, the Tribunal had regard to the previous internal complaints against Dr Barker with which it had been provided. It took into account that the substance of those complaints was disputed by Dr Barker and that they had not been tested in any tribunal or court of law. The Tribunal considered that while it could, therefore, give little weight to the substance of those complaints, it was nonetheless entitled to take into account the fact of those earlier complaints and to give weight to evidence of Dr Barker's responses to those complaints.

138. The Tribunal noted that, in respect of the complaint in 2012, Dr Barker had been spoken to about the level of familiarity he exhibited with his patients. His answer to this was that this is how he conducted his practice and had done for many years. He was advised that this may well be considered inappropriate in some circumstances and was verbally advised to have a nurse chaperone present at all consultations, including history taking. It is reported that he adhered to this advice in the year following the incident and thereafter had a chaperone present only for intimate examinations.

139. In response to the 2018 complaint, concerning the use of inappropriate language, Dr Barker was reportedly spoken to about the patient's feelings of vulnerability within the consultation with Dr Barker. Dr Barker is reported as responding that he did not feel that any 'modern women' feel vulnerable in a consultation. It was suggested to him that gynaecology consultations are intimate consultations and that many women naturally feel uncomfortable and vulnerable attending. The Tribunal noted that, in response to the 2018 complaint, Dr Barker is reported to have produced a reflection which was 'long and wide-ranging in content'. He was again advised to have a chaperone present for the duration of all consultations.

140. The Tribunal did not have the benefit of seeing Dr Barker's reflection into the 2018 complaint. However, the Tribunal took into account that, at the time Dr Barker was spoken to in early 2018 about his use of inappropriate language with another patient, his WhatsApp communication with Patient A was ongoing. Indeed, some five days after the matter was discussed at a meeting at which Dr Barker was present on 22 March 2018, he sent Patient A the following WhatsApp message:

"Are you getting much Schnitzel?"
"Wiener schnitzel? Or just a Wiener?" "It's a very small sausage in the USA" …
"Falukorv"…
"Kielbasa"

141. Further, the Tribunal took into account that it appeared that, in his consultations with Patient A, Dr Barker had failed to heed earlier advice about having a chaperone present for the duration of all consultations.

142. The Tribunal considered that this was evidence of deep-seated attitudinal issues by Dr Barker and a blatant disregard for the attempts of others to highlight and address concerns about his practice. The Tribunal considered that, were he to remain in practice, he would be highly likely to repeat sexual misconduct of the type found proved by the Tribunal.

143. The Tribunal noted there was one positive testimonial supporting Dr Barker from a Consultant Anaesthetist colleague. The Tribunal noted, however, that that colleague had worked with Dr Barker in a surgical setting and could not, therefore, speak to Dr Barker's conduct during consultations with patients. The Tribunal, therefore, gave little weight to the testimonial.

144. The Tribunal had regard to paragraph 76 of the judgment in *CHRE v NMC & Paula Grant [2011] EWHC 927 (Admin)*, in which Mrs Justice Cox set out the helpful and comprehensive approach of Dame Janet Smith in her 5th Shipman Report to determining issues of impairment. The Tribunal determined limbs (a), (b) and (c) were engaged and that Dr Barker:

a. 'Has in the past acted and/or is liable in the future to act so as to put a patient or patients at unwarranted risk of harm; and/or

b. Has in the past and/or is liable in the future to bring the medical profession into disrepute; and/or

c. Has in the past breached and/or is liable in the future to breach one of the fundamental tenets of the medical profession….

145. The Tribunal considered that sexual misconduct of the type found proved can have a devastating impact on individuals and patient safety and wellbeing. It can cause a patient and their loved ones serious psychological, emotional or physical harm which can persist long after the misconduct takes place. Patients have a right to be treated with dignity and respect and to receive medical care without fear of abuse. Sexual misconduct damages and undermines the trust that patients have in their doctors and that the public has in the profession.

146. The Tribunal further considered that Dr Barker's use of racist, hostile and derogatory language, directed at specific racial groups, was highly damaging to public confidence in the profession. The Tribunal considered that the public would be appalled that a medical practitioner would make such comments and would expect a regulator to take action to speak out against such conduct in the strongest terms and to promote and maintain proper professional standards and conduct for members of the profession.

147. Taking into account all of the above, the Tribunal determined that a finding of impairment is necessary in relation to each of the three limbs of the Overarching Objective:

'a. to protect and promote the health, safety and wellbeing 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.'

Determination on Sanction - 15/01/2024

148. Having determined that Dr Barker'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

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

Submissions

150.On behalf of the GMC, Mr Fish submitted that erasure is the only appropriate sanction.

151. He referred the Tribunal to the Sanctions Guidance (SG) (November 2020), and reminded the Tribunal to have regard to the overarching objective and to ensure that public confidence in the profession is maintained. He emphasised the importance of the reputation of the profession.

152. Mr Fish submitted that the Tribunal should consider the available sanctions in ascending order. He said that there were no exceptional circumstances which would justify the Tribunal taking no action. He said that undertakings would be inappropriate and none had been offered. Mr Fish submitted that Dr Barker's misconduct was too serious for the Tribunal to impose conditions. Furthermore, he submitted that, in light of the complete lack of engagement from Dr Barker, conditions would not be appropriate. He reminded the Tribunal that Dr Barker's employer had previously required him to have a chaperone present for the duration of any consultations and Dr Barker had not complied with this requirement.

153. Mr Fish set out the GMC's position on the mitigating and aggravating factors in the case. By way of mitigation, Mr Fish reminded the Tribunal of the positive testimonial Dr Barker had received in 2019.

154. Mr Fish outlined the aggravating features of the case. He submitted that the following factors, as set out in the SG, were relevant:

> *'51 It is important for tribunals to consider insight, or lack of, when determining sanctions. It is particularly important in cases where the doctor and the GMC agree undertakings or the tribunal imposes conditions. The tribunal must be assured that this approach adequately protects patients, in that the doctor has recognised the steps they need to take to limit their practice to remediate.*
>
> *52 A doctor is likely to lack insight if they:*
> *a refuse to apologise or accept their mistakes*

b promise to remediate, but fail to take appropriate steps, or only do so when prompted immediately before or during the hearing
c do not demonstrate the timely development of insight
d fail to tell the truth during the hearing (see paragraph 72 of Good medical practice)

55 Aggravating factors that are likely to lead the tribunal to consider taking more serious action include:

[…]
c discrimination against patients, colleagues and other people
d abuse of professional position (see paragraphs 142–150), particularly where this involves:

[…]
ii predatory behaviour (see paragraphs 147–148)

e sexual misconduct (see paragraphs 149–150)'

155. Mr Fish submitted that it was open to the tribunal as to whether it considered Dr Barker's behaviour to constitute predatory behaviour. He reminded the Tribunal that Dr Barker's misconduct took place over an extended period of time and was repeated on a number of occasions.

156. Mr Fish referred the Tribunal to those paragraphs of the SG which specifically relate to the sanction of erasure (paragraphs 107 to 111). He submitted that the following factors were present which may indicate erasure is appropriate:

'109 a A particularly serious departure from the principles set out in Good medical practice where the behaviour is fundamentally incompatible with being a doctor.
d Abuse of position/trust (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').
e Violation of a patient's rights/exploiting vulnerable people (see Good medical practice, paragraph 27 on children and young people, paragraph 54 regarding expressing personal beliefs and paragraph 70 regarding information about services). '

157. Mr Fish further referred the Tribunal to those paragraphs of the SG which apply where the matters before the Tribunal relate to abuse of professional position (paragraphs 142 to 148) and sexual misconduct (paragraphs 149 to 150).

158. Mr Fish reminded the Tribunal of its findings on impairment and that it had found Dr Barker's insight was lacking and that he had not demonstrated any remorse or remediation. He submitted that the Tribunal had identified a risk of repetition and noted that Dr Barker's misconduct occurred over an extended period of time.

159. Mr Fish concluded by submitting that erasure is the only appropriate sanction in this case.

The Tribunal's approach

160. The Tribunal reminded itself that there is no burden or standard of proof at the sanction stage and that the appropriate sanction is a matter for the Tribunal's own independent judgement having regard to the Overarching Objective and the Sanctions Guidance.

161. The Tribunal took into account that the main purpose of imposing a sanction is to protect the public. Its purpose is not to punish, although it may have a punitive effect. When imposing a sanction, it must be proportionate and the Tribunal must impose the least restrictive sanction necessary to meet the Overarching Objective.

The Tribunal's Determination on Sanction

162. The Tribunal had regard to its findings of fact and to its determination at the impairment stage. It determined that it would first identify any aggravating and mitigating factors present. It had regard to the submissions made by the GMC and all the evidence before it.

Aggravating factors

163. The Tribunal considered that Dr Barker had not presented any evidence of insight, remediation, or remorse. It considered that Dr Barker's misconduct was persistent and prolonged. Further, he had previously demonstrated a blatant disregard for the attempts of others to highlight and address concerns about his practice.

164. The Tribunal considered that Dr Barker's decision not to engage with these proceedings was not a passive act. It noted that he had taken swift action to try to have his

name removed voluntarily from the Medical Register when he became aware of a possible referral to the GMC but thereafter had disengaged from proceedings.

165. The Tribunal had regard to paragragh 55 of the SG and the aggravating factors set out therein which are likely to lead to the Tribunal taking more serious action. The Tribunal reminded itself that a finding of sexual misconduct is in itself a serious matter. The Tribunal determined that Dr Barker had abused his professional position to pursue a sexual and improper emotional relationship with Patient A. Dr Barker had a responsibility to recognise the imbalance in power which exists in the relationship between a doctor and his patient and to maintain clear boundaries in that relationship. The Tribunal considered that this was an abuse of trust of the most serious kind and determined it an aggravating factor.

166. In considering the racist language used by Dr Barker, the Tribunal considered that the holding of such views by Dr Barker was evidence of deep-seated attitudinal issues. Whilst the Tribunal had no evidence before it that Dr Barker had actually discriminated against others, it considered that the holding of such attitudes and the use of such language was in itself an aggravating factor.

Mitigating factors

167. In relation to mitigating factors, the Tribunal noted there was one positive testimonial supporting Dr Barker from a Consultant Anaesthetist colleague. The Tribunal noted, however, that that colleague had worked with Dr Barker in a surgical setting and could not, therefore, speak to Dr Barker's conduct during consultations with patients. The Tribunal, therefore, gave little weight to the testimonial.

Sanction

168. The Tribunal considered each of the available sanctions in turn, starting with the least restrictive.

No action

169. The Tribunal considered that there were no exceptional circumstances which would justify it taking no action. The Tribunal had identified that Dr Barker presented an ongoing risk to patient safety and any sanction which did not restrict his practice would be wholly

inadequate. Further the Tribunal considered that taking no action would be insufficient to address the very serious nature of Dr Barker's misconduct.

Conditions

170. The Tribunal considered whether it would be appropriate to impose conditions on Dr Barker's registration. The Tribunal reminded itself that in order for conditions to be imposed, it must be able to formulate conditions which are appropriate, proportionate, workable and measurable.

171. The Tribunal considered the SG at paragraph 81 which describes the type of case where conditions may be appropriate. None were pertinent to this case.

172. The Tribunal further had regard to paragraph 82 of the SG which states:

'Conditions are likely to be workable where:

a. the doctor has insight

…c. the tribunal is satisfied the doctor will comply with them'

173. The Tribunal considered that sexual misconduct and deep-seated attitudinal issues are inherently difficult to remediate. Further, there was no evidence before it that Dr Barker had developed any insight into his misconduct or that he had sought to remedy it. Indeed, the evidence was that he had failed to follow the previous advice of colleagues when previous complaints had been raised about his practice. The Tribunal determinined that conditions were not workable. The Tribunal also considered that conditions were inappropriate and insufficient to address the serious nature of Dr Barker's misconduct.

174. The Tribunal was also of the view that conditions were insufficient to promote and maintain public confidence in the medical profession, and to promote and maintain proper professional standards of conduct for the members of the profession.

Suspension

175. The Tribunal next considered whether suspension would be an appropriate and proportionate sanction. It acknowledged that suspension would only be appropriate where

the misconduct was not so serious as to be fundamentally incompatible with continued registration.

176. The Tribunal had regard to paragraphs 91, 92, 97(a) (e) of the SG which state:

> ***91*** *Suspension has a deterrent effect and can be used to send out a signal to the doctor, the profession and public about what is regarded as behaviour unbefitting a registered doctor. Suspension from the medical register also has a punitive effect, in that it prevents the doctor from practising (and therefore from earning a living as a doctor) during the suspension, although this is not its intention.*
>
> ***92*** *Suspension will be an appropriate response to misconduct that is so serious that action must be taken to protect members of the public and maintain public confidence in the profession. A period of suspension will be appropriate for conduct that is serious but falls short of being fundamentally incompatible with continued registration (i.e. for which erasure is more likely to be the appropriate sanction because the tribunal considers that the doctor should not practise again either for public safety reasons or to protect the reputation of the profession).*
>
> ***97*** *Some or all of the following factors being present (this list is not exhaustive) would indicate suspension may be appropriate.*
>
> ***a*** *A serious breach of Good medical practice, but where the doctor's misconduct is not fundamentally incompatible with their continued registration, therefore complete removal from the medical register would not be in the public interest. However, the breach is serious enough that any sanction lower than a suspension would not be sufficient to protect the public or maintain confidence in doctors.*
>
> ***e*** *No evidence that demonstrates remediation is unlikely to be successful, eg because of previous unsuccessful attempts or a doctor's unwillingness to engage.'*

177. The Tribunal recalled its finding that Dr Barker had demonstrated no insight or remorse and had taken no steps to remediate his conduct.

178. Accordingly, the Tribunal concluded that suspension was insufficient to satisfy the three limbs of the overarching objective and that the seriousness of Dr Baker's misconduct was fundamentally incompatible with continued registration.

Erasure

179. Having found that suspenciaion was insufficient, the Tribunal considered whether it would be appropriate and proportionate to erase Dr Barker's name from the Medical Register.

180. The Tribunal had regard to paragraphs 108 and 109 (a) (b) (d) (i) (j) of the SG, which provide:

> ***108.*** *Erasure may be appropriate even where the doctor does not present a risk to patient safety, but where this action is necessary to maintain public confidence in the profession. For example, if a doctor has shown a blatant disregard for the safeguards designed to protect members of the public and maintain high standards within the profession that is incompatible with continued registration as a doctor.*
>
> ***109*** *Any of the following factors being present may indicate erasure is appropriate (this list is not exhaustive).*
>
> ***a*** *A particularly serious departure from the principles set out in Good medical practice where the behaviour is fundamentally incompatible with being a doctor.*
>
> ***b*** *A deliberate or reckless disregard for the principles set out in Good medical practice and/or patient safety.*
>
> ***(…)***
>
> ***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').*
>
> ***(…)***
>
> ***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).*

j Persistent lack of insight into the seriousness of their actions or the consequences.'

181. The Tribunal considered that each of the above factors was present and concluded that Dr Barker's conduct was misconduct of the most serious kind and was fundamentally incompatible with continued registration. The Tribunal reminded itself of its observation at the impairment stage as to the devastating and long-lasting impact which sexual misconduct by a doctor can have on individuals and on patient safety and wellbeing. It reminded itself of the way in which sexual misconduct by a doctor damages and undermines the trust that patients have in their doctors and that the public has in the profession.

182. The Tribunal further reminded itself of the highly damaging nature of Dr Barker's use of racist, hostile and derogatory language, directed at specific racial groups. The Tribunal considered that the public would be appalled that a medical practitioner would make such comments and would expect a regulator to take action to speak out against such conduct in the strongest terms and to promote and maintain proper professional standards and conduct for members of the profession.

183. The Tribunal concluded that in the circumstances, erasure was the only appropriate and proportionate sanction. The Tribunal concluded no lesser sanction than erasure was sufficient to uphold the overarching objective: to maintain public confidence in the medical profession; and to uphold proper professional standards and conduct for members of the profession.

184. Accordingly, the Tribunal directs that Dr Barker's name be erased from the Medical Register.

Determination on Immediate Order - 16/01/2024

1. Having determined to erase Dr Barker's name from the Medical Register, the Tribunal has considered, in accordance with Rule 17(2)(o) of the Rules, whether Dr Barker's registration should be subject to an immediate order.

Submissions

185. On behalf of the GMC, Mr Fish submitted that, in accordance with paragraph 172 of the SG, an immediate order is necessary to protect members of the public and is otherwise in the public interest.

186. Mr Fish informed the Tribunal that Dr Barker was currently subject to an interim order which would need to be revoked.

The Tribunal's Determination

4. In reaching its decision, the Tribunal had regard to its previous determinations and the submissions made by Mr Fish.

5. The Tribunal considered paragraphs 172,173 and 178 of the SG to be relevant. These provide:

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.

187. The Tribunal considered that Dr Barker's misconduct was misconduct of the most serious kind. The Tribunal considered that the public would be rightly concerned if he were permitted to continue in unrestricted practice during the period before the taking effect of the substantive decision or any appeal period.

188. The Tribunal balanced the interests of Dr Barker against those of the public. The Tribunal determined that an immediate order of suspension was necessary to protect the public and was otherwise in the public interest.

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

190. The interim order currently in place is hereby revoked.

191. That concludes this case.

ANNEX A – 12/01/2024

Service of Notice of the Hearing

192. Dr Barker is neither present nor represented at this hearing.

193. Mr Fish, Counsel, on behalf of the GMC, provided the Tribunal with documents relating to the notification of service of these proceedings on Dr Barker. These included email correspondence between Dr Barker and the GMC about its investigation. The Tribunal was provided with a copy of the GMC Notice of Allegation, dated 27 November 2023, and sent to Dr Barker's email address. The Tribunal was also provided with a note of a telephone call from a member of GMC staff confirming that Dr Barker had called to confirm receipt of the GMC's email of 27 November 2023 with attached documents.

194. The Tribunal was also provided with a copy of the Medical Practitioner's Tribunal Service (MPTS) Notice of Hearing which was attached to the same email on 27 November 2023 and posted to Dr Barker's GMC registered address by Royal Mail Special Delivery on the 29 November 2023. Royal Mail Track and Trace documentation confirmed that this letter was delivered on 30 November 2023.

195. The Tribunal had regard to the case of *General Medical Council v Adeogba* [2016] EWCA Civ 162 which makes clear that, in terms of service, the GMC's only obligation is to communicate with a doctor at the registered address they have provided. The Tribunal was satisfied that the GMC had done this.

196. The Tribunal considered the service bundle provided by the GMC, together with Mr Fish's submissions. Having considered all of the evidence before it, the Tribunal was satisfied that notice of the hearing had been properly served in accordance with Rules 15 and 40 of the General Medical Council (Fitness to Practise) Rules 2004 (as amended) ('the Rules') and paragraph 8 of Schedule 4 to the Medical Act 1983 (as amended). The Tribunal further noted that Dr Barker had confirmed that he had had actual notice of the hearing in that he had telephoned the GMC on 27 November 2023 to confirm receipt of their email of the same date.

Proceeding in Dr Barker absence

197. The Tribunal went on to consider whether it would be appropriate to proceed with this hearing in Dr Barker absence pursuant to Rule 31 of the Rules. The Tribunal was conscious that the discretion to proceed in the absence of a doctor should be exercised with the utmost care and caution, balancing the interests of the doctor with the wider public interest.

198. Mr Fish invited the Tribunal to proceed in Dr Barker's absence. Mr Fish submitted that Dr Barker is aware of these proceedings. Dr Barker has not engaged in these proceedings. He has not requested an adjournment and there was no indication that an adjournment would result in his attendance at a future hearing. Mr Fish submitted that the Tribunal could properly find that Dr Barker had voluntarily absented himself from the hearing.

199. The Tribunal noted that any decision to proceed in Dr Barker's absence would inevitably result in some prejudice to him, including that it may not necessarily have all the information which Dr Barker may wish to advance either at the fact finding or at subsequent stages of the hearing. However, the Tribunal considered that any such prejudice must be balanced against other factors including the statutory overarching objective and the public interest. The Tribunal took into account that the public interest included ensuring that hearings should take place within a reasonable time of the events to which it relates and the fair, economic, expeditious and efficient disposal of the hearing, weighed against any prejudice to Dr Barker.

200. The Tribunal took into account that Dr Barker has not at any stage challenged the GMC's evidence; he has not produced a witness statement of his own; and he has produced no written submissions for the Tribunal's consideration. The Tribunal concluded that he had voluntarily absented himself from the hearing. The Tribunal could find no evidence to suggest that, were it to adjourn, Dr Barker would attend a future hearing. The Tribunal balanced fairness to Dr Barker with fairness to the GMC and the public interest and determined to proceed in the absence of Dr Barker. It acknowledged that, in his absence, it was incumbent on the Tribunal to ensure that the hearing is as fair as the circumstances permit, taking reasonable steps to test and to expose weaknesses in the GMC's case and to raise such points on behalf of Dr Barker as the evidence permits.

201. Therefore, in accordance with Rule 31, the Tribunal has determined to proceed in Dr Barker's absence.

ANNEX B – 12/01/2024

Rule 34(11) - Whether to require Patient A to attend to give oral evidence

202. At the outset of the hearing, the Tribunal was told that the GMC did not require Patient A to attend to give oral evidence and that she had been stood down as a witness. The Tribunal indicated that it may have had questions for Patient A. It had noted that Patient A was the sole witness of fact in the case.

203. Mr Fish submitted that the GMC had complied with Rule 34(9) of the Rules. Dr Barker had been informed, in a letter dated 27 November 2023, that he should inform the GMC by 11 December 2023 if he required any GMC witness to give oral evidence at the hearing or if he had any objections to any of the documents in the draft hearing bundles and draft witness schedule; he had not done so. This was consistent with a lack of engagement by Dr Barker throughout. Mr Fish submitted that Dr Barker had not challenged any aspect of the GMC's case or any evidence upon which the GMC intended to rely. Dr Barker had not required Patient A's attendance to give oral evidence and it was the GMC's position that she should, therefore, be treated as an agreed witness and, having stood her down, the GMC did not intend to call her. Mr Fish submitted that, in those circumstances, it was not necessary for the GMC to make an application for Patient A's written statement to be admitted into the evidence.

204. The Legally Qualified Chair drew Mr Fish's attention to Rule 34(11) of the Rules which states:

> *34(11) A Committee or Tribunal must receive into evidence a signed witness statement containing a statement of truth as the evidence-in-chief of the witness concerned, unless—*
> *(a) the parties have agreed;*
> *(b) a Case Manager has directed; or*
> *(c) the Committee or Tribunal decides, upon the application of a party or of its own motion, that the witness concerned, including the practitioner, is to give evidence-in-chief by way of oral evidence;*

205. Mr Fish accepted that the Tribunal could exercise its discretion to require Patient A to give oral evidence. He further accepted that Patient A's evidence was only 'agreed' to the

extent that she was not being required to give oral evidence; it remained for the GMC to prove its case.

206. In the absence of an application by the GMC to admit Patient A's statement, the Tribunal carefully considered whether to exercise its discretion under Rule 34(11) to require Patient A to give oral evidence. The Legally Qualified Chair advised that many of the factors, which would be relevant when considering an application to admit the written statement of an absent witness, would also be relevant to the Tribunal's consideration of whether to call Patient A to give evidence.

207. The Legally Qualified Chair cited the cases of *NMC v Ogbonna* [2010] EWCA Civ 1216, *R (Bonhoeffer) v GMC* [2011] EWHC 1585 (Admin), *Shaikh v GPhC* [2013] EWHC 1844 (Admin), *Thorneycroft v NMC* [2014] EWHC 1565 (Admin), and *El Karout v NMC* [2019] EWHC 19 (Admin) and set out the questions which the Tribunal might consider helpful to ask itself when considering whether Patient A should be called. These included:

- Whether the statements are the sole or decisive evidence in support of some or all of the charges;
- The nature and extent of the challenge to the contents of the statements;
- Whether there is any suggestion that the witness had reasons to fabricate her allegations;
- The seriousness of the allegation, taking into account the impact which adverse findings might have on the Doctor's career and reputation;
- Whether there was a good reason for the non-attendance of the witness; and
- The steps taken by the GMC to secure the witness's attendance.

208. The LQC advised that the overriding consideration would be the duty of the Tribunal to ensure the proceedings are fair and it should consider fairness in the round, having regard to all the facts and circumstances of the case.

209. The Tribunal had regard to the legal advice. It noted that the GMC had taken steps to secure Patient A's attendance and she had indicated in her witness statement that she was willing to give oral evidence. While there was subsequently some suggestion of reluctance on her part, this was to be expected given the nature of the Allegation. She had been stood down by the GMC. There was nothing to suggest that she would not attend to give evidence if asked to do so.

210. The Tribunal accepted that an allegation of sexual misconduct is one of the most serious allegations which a medical practitioner can face. It accepted that Patient A was the sole and decisive witness in relation to paragragh 1 of the Allegation; there were no other witnesses who could speak to events which took place during consultations between Patient A and Dr Barker. The Tribunal took into account, however, that it had the benefit of extensive WhatsApp messages between Patient A and Dr Barker covering a period of almost four years, from which inferences might be drawn about the nature of their relationship and an assessment made as to the reliability of Patient A's witness statement. It also had copies of emails and notes of telephone calls between Patient A and the GMC which provided background to the circumstances in which her witness statement and supplementary statement had been taken. Dr Barker had had the opportunity to object to the inclusion of the material and to Patient A's written statement but had chosen not to do so. He had not sought to cross examine Patient A. There was nothing to suggest that Patient A had fabricated her evidence which appeared to be consistent with the content of the WhatsApp messages; the Tribunal determined that it would take care to highlight where there were any inconsistences between her written statement and the nature and content of the WhatsApp messages.

211. Taking into account all of the above, the Tribunal determined that Dr Barker could have a fair hearing notwithstanding the absence of Patient A. Accordingly, the Tribunal determined not to exercise its discretion under Rule 34(11) to require Patient A's attendance to give oral evidence. It determined that, in due course, it would have proper regard to the weight it could give her statement in circumstances where the Tribunal had not had the opportunity to ask questions of her.

SCHEDULE 1

Date	Message
28 January 2017	“XXX”
6 February 2017	“xxx”
11 February 2017	“are you a member of the mile high club?” "I do not think it will get full membership, but it was probably a lot better than the in flight movie or the travel magazine" "Long flights are so boring. You need something to pass the time. And a little exercise will stimulate the blood flow and prevent clots"
14 February 2017	In response to a message stating “Happy Valentines” you wrote “you too”
23 February 2017	“And you are awesome with a lot of talent”
24 February 2017	"when someone is tired of Patient A they are tired of life"
24 February 2017	“Viagra”
13 April 2017	“I was very impressed with your singing”
26 September 2017	“Pencil sharpened” “No lead in it now”
18 October 2017	“not face time as I am naked and just getting dressed”
20 October 2017	“I am only here to help you X” “I will stand by ready to help you”
29 October 2017	“go down? On him?”
24 November 2017	“you are so Royal my darling. I am typing this on one knee” “xxx”
22 December 2017	“I would like to put my arms around you too”
5 March 2018	“Not tired. Looking forward to seeing you”
27 March 2018	“Are you getting much Schnitzel?”

	"Wiener schnitzel? Or just a Wiener?" "It's a very small sausage in the USA" "Falukorv" "Kielbasa"
1 April 2018	"Happy Easter Babe"
4 June 2018	"Tennis is the only interest especially Miss Sharapovas legs and Serenas biceps" "I will be at the Portland Hospital for high class ladies like your good self"
12 December 2018	"Naughty but nice"
24 December 2018	"Lovely to see you. Santa Claus is coming tonight xx"
3 April 2019	"So as it is warm in California why do many ladies there need big layers of insulating fat?" "Some look like an oil tanker from behind"
12 August 2019	"Very sorry to miss you xx"
7 September 2019	"Be careful of Grimaldis…Prince Albert is obese and may try to overfeed you"
29 July 2021	"The French are not on their knees but in the 69 position"

SCHEDULE 2

Schedule 2

24 February 2017	"let's pull all the illegal Muslims into Mexico where they are all Roman Catholic xxx"
27 September 2017	"Fuck the Jews"