PUBLIC RECORD

Dates: 20/05/2024 - 28/05/2024

Medical Practitioner's name: Mr Mervyn HUTCHINSON

GMC reference number: 3255140

Primary medical qualification: MB BCh 1987 Queens University of Belfast

Type of case
New - Misconduct

Outcome on facts
Facts relevant to impairment not found proved

Outcome on impairment
Consideration of impairment not reached

Summary of outcome
Case concluded

Tribunal:

Legally Qualified Chair	Mr Sean Ell
Lay Tribunal Member:	Dr Amit Jinabhai
Medical Tribunal Member:	Dr Joanne Topping

Tribunal Clerk:	Mr Larry Millea

Attendance and Representation:

Medical Practitioner:	Present, represented
Medical Practitioner's Representative:	Mr Andrew Hockton, Counsel, instructed by DWF
GMC Representative:	Mr Ian Brook, 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 - 28/05/2024

Background

1. Mr Hutchinson qualified in 1987 and prior to the events which are the subject of the hearing Mr Hutchinson trained in Orthopaedics and as a specialist spinal surgeon. At the time of the events Mr Hutchinson was practising as a Consultant Spinal Surgeon at the Spire Bristol Hospital ('the Hospital').

2. The allegation that has led to Mr Hutchinson's hearing can be summarised as that between 2014 and 2018, whilst working at the Hospital, Mr Hutchinson failed to provide good clinical care to nine patients. It is also alleged that in June 2019, on being told by a colleague that he had found errors when he had carried out revision surgery on Patient A and would need to advise Patient A of his findings, Mr Hutchinson suggested that Patient A should be misled.

3. It is further alleged that in claiming remuneration for procedures carried out between 2015 and 2018, Mr Hutchinson knowingly used incorrect coding and received overpayments. It is alleged that Mr Hutchinson's conduct was dishonest.

The Outcome of Applications Made during the Facts Stage

4. At the outset of the hearing, the Tribunal were notified that the GMC had made an application, pursuant to Rule 28 of the General Medical Council (Fitness to Practise Rules) 2004 as amended ('the Rules'), to the Case Examiners seeking to withdraw allegations relating to five of the nine patients. This followed a discussion between the two experts and the production of a joint expert report. Prior to formally opening the case, Mr Brook, counsel,

on behalf of the GMC informed the Tribunal that parts of the Allegation relating to a further two patients were to be withdrawn as well.

5. Following a query from the Tribunal, the GMC also applied to delete the row of Schedule 1 of the Allegation relating to Patient L. This application was not opposed by Mr Hockton, counsel, on behalf of Mr Hutchinson, and was granted by the Tribunal as it related to a private payment and so could not fall within the scope of paragraphs 14 - 16 of the Allegation, which related to the use of incorrect insurance codes.

6. The Tribunal also granted the GMC's application, made pursuant to Rule 17(6) of the Rules to amend one of the codes presented in Schedule 1 of the Allegation in respect of Patient C. This application was not opposed by Mr Hockton, on behalf of Mr Hutchinson.

The Allegation and the Doctor's Response

7. The Allegation made against Mr Hutchinson is as follows:

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

Patient A

~~1. Between 29 October 2014 and 20 November 2017 whilst working at the Spire Bristol you consulted with Patient A and you failed to provide good clinical care in that:~~

~~a. on 2 March 2015 you inappropriately performed a T11/S1 revision decompression and fusion, L3/4 trans-foraminal lumbar interbody fusion, L2/4 decompression and reduction of listhesis ('Procedure 1') which was:~~

~~i. not clinically indicated as:~~

~~1. Patient A:~~

~~A. did not have a scoliosis;~~ Withdrawn by GMC

~~B. had a perfectly straight lumbar spine with lordosis and compensatory kyphosis;~~ Withdrawn by GMC

~~2. there was no:~~

~~A. evidence of any cauda equina problems in the capacious spinal canal;~~ Withdrawn by GMC

~~B. nerve root entrapment;~~ Withdrawn by GMC

~~C. reason to extend the fusion up to T11;~~ Withdrawn by GMC

~~ii. a bigger procedure than necessary that increased the risks to Patient A;~~ Withdrawn by GMC

~~b. on 2 April 2016 you inappropriately performed a T4/L5 fusion ('Procedure 2'):~~ Withdrawn by GMC

~~i. which was not clinically indicated as:~~

~~1. Patient A had already fused her thoracic spine and her kyphosis was not going to change as she was suffering from Diffuse Idiopathic Skeletal Hyperostosis ('D.I.S.H – Forestier's disease');~~ Withdrawn by GMC

~~2. the correct treatment would have been to remove the screws and rods down to L3/4 or if the back had fused at the lower levels to remove the metal work altogether but leave the cages;~~ Withdrawn by GMC

~~ii. and you failed to adequately carry out Procedure 2 in that you did not:~~

~~1. replace all the caps;~~ Withdrawn by GMC

~~2. fit caps on four screws between L1 and L3.~~ Withdrawn by GMC

2. You failed to discharge your duty of candour with Patient A's medical insurers in that you did not:

   a. choose the correct codes for the procedures; To be determined

   b. accurately discuss what procedures you were going to carry out. To be determined

3. On 14 June 2019 on being told by N that he had found four caps missing from the screws when he had carried out revision surgery on Patient A on 10 June 2019 and he would need to advise Patient A of his findings:

   a. you told him he could tell Patient A 'that the screws were loose' or words to that effect; To be determined

   b. on N advising you that he could not tell Patient A that, you told him that 'maybe you had meant not to put the caps on' or words to that effect. To be determined

4. You knew at the time of your conversation with N that:

   a. the four caps were missing; Admitted and found proved

   b. the screws were not loose. To be determined

5. Your conduct as set out paragraph 3 was dishonest by reason of paragraph 4. To be determined

Patient B

6. Between 22 December 2014 and 26 March 2018 whilst working at the Spire Bristol you consulted with Patient B and you failed to provide good clinical care in that:

   a. on 21 November 2016 you inappropriately performed an L1/S1 fusion and L5/6 trans-foraminal lumbar interbody fusion ('Procedure 1') which was not clinically indicated because Patient B required:

i. a wide central decompression at L3/4 with a laminectomy and removal of the lipomatosis from the epidural space; To be determined

~~ii. a bilateral decompression at L5/6;~~ Withdrawn by GMC

b. on 22 May 2017 you inappropriately performed a posterior lumbar fusion L2/3 and L3/4 decompression and revision L5/S1 decompression and trans-foraminal lumbar interbody fusion ('Procedure 2') which was not clinically indicated as:

i. the slight disc bulge at L5/S1 was not pressing on the dura or nerve roots; To be determined

ii. there was stenosis at L2/3 and L3/4; To be determined

iii. Patient B required a laminectomy and removal of epidural fat. To be determined

~~Patient C~~

~~7. Between 27 May 2015 and 15 October 2018 whilst working at the Spire Bristol you consulted with Patient C and you failed to provide good clinical care in that on 5 March 2018 you performed an L5/S1 decompression and fusion ('the Procedure'):~~

~~a. which was not appropriate or clinically indicated as:~~

~~i. any non-organic elements to Patient C's symptoms were not explored;~~ Withdrawn by GMC

~~ii. Patient C was not offered:~~

~~1. alternative techniques to fusion including:~~

~~A. a bone graft alone;~~ Withdrawn by GMC

~~B. a posterior fusion without a cage at the front;~~ Withdrawn by GMC

~~2. further investigations such as:~~

~~A. repeat EMG diagnostic injections;~~ Withdrawn by GMC

~~B. a psychometric assessment;~~ Withdrawn by GMC

~~3. the option of no surgery;~~ Withdrawn by GMC

~~b. and you failed to adequately carry out the Procedure in that you excised the S1/2 joints which was not necessary as this was a solidly congenitally fused level and was not a pain source.~~ Withdrawn by GMC

~~Patient E~~

~~8. Between 6 January 2016 and 11 September 2018 whilst working at the Spire Bristol you consulted with Patient E and you failed to provide good clinical care in that:~~

~~a. on 15 February 2016 you performed a right L4/5 decompression and interlaminar stabiliser ('Procedure 1') and you failed to adequately carry out the procedure in that:~~

~~i. it was not clinically indicated for an interspinous device to be used in patients who had had previous surgery;~~ Withdrawn by GMC

~~ii. you inserted the interspinous device at L5/S1 which was the wrong level;~~ Withdrawn by GMC

~~b. on 5 September 2016 you performed a right L4/5 revision discectomy and stabilisation ('Procedure 2') and you failed to adequately carry out Procedure 2 in that it was:~~

~~i. not clinically indicated to insert another interspinous device at L4/5;~~ Withdrawn by GMC

~~ii. contraindicated to insert an interspinous device in patients who had had previous surgery at the same level.~~ Withdrawn by GMC

~~Patient F~~

9. Between 12 February 2016 and May 2017 whilst working at the Spire Bristol you consulted with Patient F and you failed to provide good clinical care in that on 9 May 2017 you performed an L5/S1 decompression and trans-foraminal lumbar interbody fusion and removal of /insertion of intraspine L5/S1 L4/5 ('the Procedure') which was not appropriate or clinically indicated:

a. as Patient F:

i. was complaining of bilateral leg pain; Withdrawn by GMC

ii. had narrowing at L5/S1; Withdrawn by GMC

iii. had narrowing of the foramen; Withdrawn by GMC

iv. should have had a simple decompression on both sides at L5/S1; Withdrawn by GMC

b. as the use of an interspinous spacer at L4/5 was unnecessary as Patient F did not have spinal stenosis. Withdrawn by GMC

Patient G

10. Between 23 June 2016 and 27 February 2017 whilst working at the Spire Bristol you consulted with Patient G and you failed to provide good clinical care in that on 28 November 2016 you performed an L4/S1 decompression and fusion and interlaminar stabilisation (the Procedure') which was not appropriate or clinically indicated as:

a. Patient G:

i. had a degree of facet hypertrophy causing early spinal stenosis at L3/4; Withdrawn by GMC

ii. first should have had a caudal epidural injection; and
Withdrawn by GMC

iii. thereafter should have had a decompression at L3/4;
Withdrawn by GMC

b. there was no good rational for:

i. ~~putting in cages and metal fixation;~~ Withdrawn by GMC

ii. ~~fusing the lower two levels.~~ Withdrawn by GMC

~~Patient J~~

11. ~~Between 30 November 2016 and January 2018 whilst working at the Spire Bristol you consulted with Patient J and you failed to provide good clinical care in that:~~

a. ~~on 24 April 2017 despite the diagnosis being unclear you gave Patient J facet joint injections and nerve root block at left L4/S1 and right L3/S1 and you:~~

i. ~~injected several levels with different techniques at the same time;~~ Withdrawn by GMC

ii. ~~did not inject at different levels at different times;~~ Withdrawn by GMC

iii. ~~did not arrange for EMGs to be carried out;~~ Withdrawn by GMC

b. ~~on 9 August 2017 you gave Patient J facet joint injections at left L4/5, right S1 and right L5/S1 and a nerve root block at L5 and instead of targeting a specific nerve you:~~

i. ~~injected several levels with different techniques at the same time;~~ Withdrawn by GMC

ii. ~~did not inject at different levels at different times;~~ Withdrawn by GMC

c. ~~on 4 December 2017 you performed a right L4/5 decompression and trans foraminal lumbar interbody fusion 12mm cage ('the Procedure') which was not appropriate or clinically indicated as the osteophytes at right L4/5 were not causing nerve root impingement.~~ Withdrawn by GMC

Patient K

12. Between 4 September 2017 and October 2018 whilst working at the Spire Bristol you consulted with Patient K and you failed to provide good clinical care in that:

a. on 4 December 2017 you performed a right L4/5, L5/S1 revision decompression and L5/S1 interspinous ('Procedure 1') and it was not clinically indicated or appropriate to insert an interspinous device at L5/S1 as:

i. there were no symptoms on the left side at L5/S1; To be determined

~~ii.~~ there was no nerve root entrapment; To be determined

~~iii.~~ the disc space at L5/S1 had already narrowed down; To be determined

~~iv.~~ a soft interspinous spacer would not open up the level; To be determined

~~b. on 15 October 2018 you performed a revision right L4/5, L5/S1 decompression and fusion and trans-foraminal lumbar interbody fusion ('Procedure 2') which was not clinically indicated or appropriate as:~~

~~i. there were no left sided symptoms at L5/S1;~~ Withdrawn by GMC

~~ii. the disc space narrowing at L5/S1 was a normal age-related change;~~ Withdrawn by GMC

~~iii. the foraminae were narrowed but not compressing the nerve roots;~~ Withdrawn by GMC

~~iv. the retrolisthesis was not pathological and did not need treating.~~ Withdrawn by GMC

~~Patient L~~

~~13. Between 19 December 2017 and 25 October 2018 whilst working at the Spire Bristol you consulted with Patient L and you failed to provide good clinical care~~

~~in that on 15 October 2018 you performed an L2/S1 fusion and L3/S1 decompression with an interbody fusion at L5/S1 ('the Procedure') which was not appropriate or clinically indicated as:~~

~~a. Patient L's age and multiple co-morbidities made him a poor candidate for the Procedure;~~ Withdrawn by GMC

~~b. there was spondylolisthesis at L4/5;~~ Withdrawn by GMC

~~c. there was stenosis at L3/4.~~ Withdrawn by GMC

Overpayments

14. In claiming remuneration for the procedures as outlined in Schedule 1 you:

a. used incorrect coding; To be determined

b. received overpayments. To be determined

15. You knew that you had used:

a. the incorrect coding as described at paragraph 14; To be determined

b. coding which would generate an overpayment. To be determined

16. Your conduct as set out at paragraph 14. was dishonest by reason of paragraph 15. To be determined

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

The Admitted Facts

8. At the outset of these proceedings, through his counsel, Mr Hockton, Mr Hutchinson made an admission to one sub-paragraph of the Allegation, as set out above, in accordance with Rule 17(2)(d) of the Rules. In accordance with Rule 17(2)(e) of the Rules, the Tribunal announced that sub-paragraph of the Allegation as admitted and found proved.

Witness Evidence

9. The Tribunal received evidence on behalf of the GMC from the following witness:

- Person N (Person N in the Allegation), Orthopaedic Surgeon at North Bristol NHS Trust, in person, who also provided a written witness statement dated 31 January 2023.

10. Mr Hutchinson provided his own witness statement, dated 30 November 2023.

Expert Witness Evidence

11. The Tribunal also received evidence from two expert witnesses.

12. Mr O, Consultant Orthopaedic and Spinal Surgeon, was called by the GMC. He provided an expert report dated 18 September 2020 and supplemental reports dated 16 December 2021, 7 April 2022 and 27 February 2023. He also gave in-person oral evidence to the Tribunal.

13. Mr P, Consultant Orthopaedic and Spinal Surgeon, on behalf of Mr Hutchinson, provided a written expert report dated 26 June 2023.

14. The Tribunal also received a joint expert report of Mr O and Mr P dated 3 May 2024.

15. The expert witness evidence was provided to assist the Tribunal in understanding the standards expected of a reasonably competent Orthopaedic and Spinal Surgeon and the level and appropriateness of care provided by Mr Hutchinson. In addition, the expert witness evidence was provided to assist the Tribunal in understanding the applicable coding used to claim payments for private procedures from a range of insurers.

Documentary Evidence

16. The Tribunal had regard to the documentary evidence provided by the parties. This evidence included but was not limited to medical records of the patients, various correspondence from healthcare insurance providers to the GMC, spreadsheets showing claims made and fees paid to Mr Hutchinson by healthcare insurance providers and documents pertaining to the coding in relation to the procedures carried out.

Half Time Application of No Case to Answer

17. Following the conclusion of the GMC's case, Mr Hockton, on behalf of Mr Hutchinson, made an application under Rule 17(2)(g) of the Rules, which states:

> *'17(2) The order of proceedings at the hearing before a Medical Practitioners Tribunal shall be as follows—*
> *…*
> *(g) the practitioner may make submissions as to whether sufficient evidence has been adduced to find some or all of the facts proved and whether the hearing should proceed no further as a result, and the Medical Practitioners Tribunal shall consider any such submissions and announce its decision as to whether they should be upheld;'*

Submissions

On behalf of Mr Hutchinson

18. Mr Hockton submitted that there was insufficient evidence adduced by the GMC such that the remaining paragraphs of the Allegation could be found proved, and so the Tribunal should determine that there was no case to answer in respect of those paragraphs.

19. Mr Hockton submitted that in relation to the alleged overpayments (paragraphs 2 and 14 - 16) no factual evidence had been adduced by the GMC. He submitted that the Tribunal had no evidence of any complaint from the insurers or evidence from the insurers or from the Hospital to support the Allegation, nor any evidence in relation to any systems or mechanisms which were in place regarding the invoicing or processing of these payments.

20. Mr Hockton submitted that the only evidence provided in support of these allegations was that of Mr O, who accepted that he was not an expert in the use of these codes. The Tribunal should therefore put out of its mind all of Mr O's evidence in relation to coding, in view of his very clear concession as to his area of expertise. Furthermore, he submitted, Mr O conceded that the codes contained in the hearing bundle to which extensive references had been made, were codes which could not be safely relied upon as being applicable at any given time or place. He submitted that the codes suggested by Mr O, when compared to those accepted by the insurers for procedures carried out by Mr Hutchinson, demonstrate that a more nuanced approach is required in identifying what codes are accurate or appropriate to use, adding that the Tribunal had received evidence that such codes also had to be pre-approved by insurers.

21. Mr Hockton submitted that in relation to Patient A (paragraphs 3 - 5), the alleged dishonesty is based on the premise that Mr Hutchinson unintentionally left off the caps from the four screws and wished to conceal the fact that this was an unintentional act on his part. He submitted that this is wholly undermined by the agreement of the expert witnesses to the effect that it is accepted that the caps were left off deliberately and that this did not amount to an error on the part of Mr Hutchinson. He submitted that this was done intentionally to promote bone growth and so the alleged motivation for dishonesty falls away.

22. He submitted that Person N was not called as an expert witness and that his evidence was demonstrably inconsistent and therefore could not be relied upon. In particular, Person N conceded in his oral evidence that his witness statement was wrong in saying that the screws were broken and Mr Hockton submitted that his evidence was unreliable. He submitted that in relation to Person N 's evidence, it was conceded in answer to questions put to him by the Tribunal during his oral evidence that the conversation took place in a side room at Bristol Royal Infirmary some three years after the operation in question, without the operation notes being provided to Mr Hutchinson.

23. In respect of the outstanding clinical allegations (paragraphs 6 and 12), Mr Hockton submitted that Mr O conceded that insofar as he maintained any criticism of Mr Hutchinson, the standard of care was below, but not seriously below, that to be expected. Mr O also made it clear that in relation to all these procedures, there was a spectrum of opinion between consultants and that he was at the 'conservative end' of things, but that others might be more 'interventionist'. Mr O accepted that both Mr P, the defence expert and Mr Hutchinson represented reasonable bodies of Consultant Surgeons.

24. In respect of Patient B, Mr Hockton submitted that Mr O was taken to correspondence leading up to the operation in November 2016 which made it clear that Mr Hutchinson had discussed with the patient the very procedure which Mr O felt ought to have been conducted. That correspondence indicated that the patient expressed a preference for the procedure which was done, which Mr Hutchinson carried out in accordance with the patient's wishes. He submitted that the remaining care of Patient B did not, according to Mr O, fall seriously below the standard expected.

25. Mr Hockton submitted that in relation to Patient K's care, there was a range of views as to the use of the device in question, but at worst Mr O stated that this was below but not seriously below. He submitted that the standard of care provided by Mr Hutchinson therefore did not meet the threshold of a *"failure"* in respect of both Patient B and Patient K.

26. Mr Hockton submitted that, for the above reasons, the Tribunal should determine that a reasonable Tribunal taking the evidence at its highest could not find the outstanding allegations proved and that there was therefore no case to answer in respect of all the outstanding paragraphs of the Allegation.

On behalf of GMC

27. On behalf of the GMC Mr Brook, counsel, submitted that the GMC was neutral on this application. Mr Brook informed the Tribunal that Mr Hutchinson would be entitled to a good character direction.

The Tribunal's approach

28. The Tribunal reminded itself that, at this stage, its purpose was not to make findings of fact but to determine whether sufficient evidence, taken at its highest, had been presented by the GMC such that a properly directed Tribunal, could find the relevant paragraphs proved to the civil standard. The Tribunal considered the submissions made by both Mr Hockton and Mr Brook. It also took account of all the evidence presented to it including the opening note provided on behalf of the GMC, setting out the evidence on which it relied for each paragraph of the Allegation.

29. The Tribunal had particular regard to the case of *R v Galbraith* [1981] 1 WLR 1039, which sets out the test for the Tribunal to apply:

> *(1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case.*
>
> *(2) The difficulty arises where there is some evidence but it is of a tenuous character; for example, because of inherent weakness or vagueness, or because it is inconsistent with other evidence.*
>
> *(a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case.*

(b) Where, however, the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury. [...] There will always [...] be borderline cases. They can safely be left to the discretion of the judge.'

The Tribunal's Determination

30. The Tribunal identified that there were three substantive areas to which the remaining paragraphs related. These were: the dishonest use of incorrect coding to receive insurance overpayments; Mr Hutchinson's clinical competency in respect of Patient B and Patient K; and, dishonesty arising out of Mr Hutchinson's conversation with Person N.

31. The Tribunal considered each of these areas in turn when reaching its decision.

Paragraphs 2, 14 - 16 of the Allegation

32. The Tribunal considered that the main evidence provided by the GMC in support of these paragraphs was that of Mr O, the GMC's expert witness. The Tribunal noted that Mr O fairly acknowledged in his oral evidence that he was not an expert in insurance coding and he merely gave his opinion, when asked by the GMC, as to which codes he considered to be the most applicable. The Tribunal noted that Mr O accepted that the codes he used may not be the one used by all the insurers and that codes changed over time. Different insurers may differ in the codes they attribute to procedures. There may also be local agreements between hospitals and insurers as to which codes to use, which Mr O would not be aware of.

33. The Tribunal noted that there was no direct evidence from the various insurers to say that the codes used by Mr Hutchinson were incorrect. There was, however, correspondence from the various insurers to the hospital setting out which codes should be used in respect of a number of patients. The GMC relied upon Mr O's opinion to argue that those agreed codes were incorrect.

34. At its highest the GMC's case relies on the opinion of Mr O as to which codes he would have personally used, and that the codes relied upon carry caveats as to the nuances and differences in the application of these codes over time and by different parties. Mr O's

opinion was also formed without access to all the contemporaneous codes used by insurers at the time of the alleged dishonesty. Furthermore, the Tribunal had received evidence in the form of correspondence between Mr Hutchinson and the insurers discussing the applicable coding in relation to procedures, and that Mr Hutchinson had proceeded to use the agreed coding and received payments accordingly. No reasonable Tribunal could prefer Mr O's opinion over clear instructions from an insurer as to which code to use.

35. Given Mr O's acceptance that he is not an expert on the use of insurance codes, the absence of any direct evidence from the Insurers as to the validity of the codes used and the absence of any evidence as to who had generated the codes and relevant invoices, the Tribunal was of the view that a properly directed Tribunal could not find allegations 14-16 proven due to an absence of evidence. The Tribunal noted that Mr O in his evidence alluded to issues with picking codes that the insurers would agree to and also a position statement by AXA clarifying what code needed to be used in respect of the procedures, potentially indicating that there were other surgeons using 'incorrect' codes for that procedure.

36. The Tribunal determined that in the absence of any evidence from the insurers there was no basis on which a Tribunal properly directed could determine what the correct codes and payments should be. Therefore, the Tribunal granted Mr Hockton's application under rule 17(2)(g) in relation to paragraphs 2 and 14-16 of the Allegation, in that there is no case to answer.

Paragraphs 6 and 12 of the Allegation

37. The outstanding paragraphs related to two patients and the Tribunal noted that both expert witnesses agreed that although they would not have performed the procedures undertaken Mr Hutchinson's care was below but not seriously below the standard to be reasonably expected of a competent Orthopaedic and Spinal Surgeon.

38. There was initially a difference of opinion between the expert witnesses in relation to Patient B. In his first expert report, Mr O had categorised the care as seriously below, but he moderated this to significantly below in the joint expert report. However, in his oral evidence Mr O accepted that it fell just below the standard expected, in agreement with Mr P. Mr O also accepted that there was a variety of approaches by different surgeons and that the approach taken by Mr Hutchinson could be considered acceptable by a reasonable body of surgeons. Mr O accepted that both Mr P, the defence expert and Mr Hutchinson represented

reasonable bodies of Consultant Surgeons. Mr O conceded that he himself was at the more conservative end of the spectrum.

39. In respect of Patient B, the Tribunal took into account the correspondence leading up to the operation in November 2016 which made it clear that Mr Hutchinson had discussed with the patient the very procedure which Mr O felt ought to have been conducted and that the correspondence indicated that the patient expressed a preference for the procedure which was done, and carried out in accordance with the patient's wishes. As such the Tribunal was of the view that a properly directed Tribunal could not find, taking the evidence at its highest, that Mr Hutchinson had 'failed to provide good clinical care' to Patient B.

40. In respect of Patient K, Mr O accepted that the device used was not one he had himself used. He accepted that there was evidence that the way in which Mr Hutchinson had used the device was not contraindicated. At worse, Mr O opined that the use was below but not seriously below the expected standard. The Tribunal agreed with the submission made to it by Mr Hockton that a properly directed Tribunal taking the evidence at its highest could not conclude that the threshold of a "failure" in respect of both Patient B and Patient K was met.

41. Accordingly, the Tribunal concluded that, taking the evidence at its highest, a properly directed Tribunal could not find either paragraph 6 or 12 proven. The Tribunal therefore granted Mr Hockton's application under Rule 17(2)(g) in respect of both paragraphs.

Paragraphs 3 to 5 of the Allegation

42. The GMC rely on the evidence of Person N to prove these paragraphs of the Allegation. Person N stated to the Tribunal that Mr Hutchinson had asked him to lie to Patient A as he had forgotten to put caps on four screws during a prior operation on the patient. Both experts agreed that it would be acceptable for Mr Hutchinson to have left the caps off intentionally for the reasons Mr Hutchinson had given in his statement.

43. The Tribunal noted that a key part of Person N's evidence is what was said about the screws. It is alleged that Mr Hutchinson made a suggestion that the patient should be told that the screws were loose. In his witness statement, Person N had stated that both the rods and screws were broken. In his oral evidence he changed this to say the screws were not broken and he would not have said they were. Person N stated to the Tribunal that he had not focussed on the wording of his statement and that part of his evidence in particular,

given that he believed there was no reason for the caps to have been left off intentionally and that the issue for the Tribunal was Mr Hutchinson asking him to "lie".

44. The Tribunal noted the circumstances of the conversation between Person N and Mr Hutchinson when Patient A was discussed, which took place in the side room of a hospital three years after Mr Hutchinson had operated on the patient and without access to the full, relevant records. The Tribunal also noted that Person N was not called as an expert witness and that there was evidence from two experts that was contrary to Person N's firmly-held belief that the caps could only have been left off by mistake and therefore that Mr Hutchinson needed to conceal this.

45. Given the concessions made by Person N about the evidence in his witness statement, the Tribunal considered his evidence as to his recollection of the conversation to be so unreliable that a properly directed Tribunal could not determine there was a reasonable basis upon which a finding of what was said could be made. Further given the expert evidence there was no discernible motivation for Mr Hutchinson to have asked Person N to lie for him to the patient, nor could a properly directed Tribunal reasonably infer dishonesty from the totality of the evidence adduced by the GMC.

46. The Tribunal therefore granted Mr Hockton's application under Rule 17(2)(g) in respect of paragraphs 3-5 of the Allegation.

The Tribunal's Overall Determination on the Facts

47. The Tribunal has determined the facts as follows:

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

Patient A

~~1. Between 29 October 2014 and 20 November 2017 whilst working at the Spire Bristol you consulted with Patient A and you failed to provide good clinical care in that:~~

~~a. on 2 March 2015 you inappropriately performed a T11/S1 revision decompression and fusion, L3/4 trans-foraminal lumbar interbody fusion, L2/4 decompression and reduction of listhesis ('Procedure 1') which was:~~

~~i. not clinically indicated as:~~

~~1. Patient A:~~

~~A. did not have a scoliosis;~~ Withdrawn by GMC

~~B. had a perfectly straight lumbar spine with lordosis and compensatory kyphosis;~~ Withdrawn by GMC

~~2. there was no:~~

~~A. evidence of any cauda equina problems in the capacious spinal canal;~~ Withdrawn by GMC

~~B. nerve root entrapment;~~ Withdrawn by GMC

~~C. reason to extend the fusion up to T11;~~ Withdrawn by GMC

~~ii. a bigger procedure than necessary that increased the risks to Patient A;~~ Withdrawn by GMC

~~b. on 2 April 2016 you inappropriately performed a T4/L5 fusion ('Procedure 2').~~ Withdrawn by GMC

~~i. which was not clinically indicated as:~~

~~1. Patient A had already fused her thoracic spine and her kyphosis was not going to change as she was suffering from Diffuse Idiopathic Skeletal Hyperostosis ('D.I.S.H – Forestier's disease');~~ Withdrawn by GMC

~~2. the correct treatment would have been to remove the screws and rods down to L3/4 or if the back had fused at the lower levels to remove the metal work altogether but leave the cages;~~ Withdrawn by GMC

~~ii. and you failed to adequately carry out Procedure 2 in that you did not:~~

~~1. replace all the caps;~~ Withdrawn by GMC

~~2. fit caps on four screws between L1 and L3.~~ Withdrawn by GMC

~~2. You failed to discharge your duty of candour with Patient A's medical insurers in that you did not:~~

a. ~~choose the correct codes for the procedures~~; Deleted under Rule 17(2)(g)

b. ~~accurately discuss what procedures you were going to carry out~~. Deleted under Rule 17(2)(g)

~~3. On 14 June 2019 on being told by N that he had found four caps missing from the screws when he had carried out revision surgery on Patient A on 10 June 2019 and he would need to advise Patient A of his findings:~~

a. ~~you told him he could tell Patient A 'that the screws were loose' or words to that effect~~; Deleted under Rule 17(2)(g)

b. ~~on N advising you that he could not tell Patient A that, you told him that 'maybe you had meant not to put the caps on' or words to that effect~~. Deleted under Rule 17(2)(g)

4. You knew at the time of your conversation with N that:

a. the four caps were missing; Admitted and found proved

b. ~~the screws were not loose~~. Deleted under Rule 17(2)(g)

5. ~~Your conduct as set out paragraph 3 was dishonest by reason of paragraph 4~~. Deleted under Rule 17(2)(g)

~~Patient B~~

~~6. Between 22 December 2014 and 26 March 2018 whilst working at the Spire Bristol you consulted with Patient B and you failed to provide good clinical care in that:~~

~~a. on 21 November 2016 you inappropriately performed an L1/S1 fusion and L5/6 trans foraminal lumbar interbody fusion ('Procedure 1') which was not clinically indicated because Patient B required:~~

~~i. a wide central decompression at L3/4 with a laminectomy and removal of the lipomatosis from the epidural space~~; Deleted under Rule 17(2)(g)

~~ii. a bilateral decompression at L5/6;~~ Withdrawn by GMC

b. on 22 May 2017 you inappropriately performed a posterior lumbar fusion L2/3 and L3/4 decompression and revision L5/S1 decompression and trans-foraminal lumbar interbody fusion ('Procedure 2') which was not clinically indicated as:

i. ~~the slight disc bulge at L5/S1 was not pressing on the dura or nerve roots~~; Deleted under Rule 17(2)(g)

ii. ~~there was stenosis at L2/3 and L3/4~~; Deleted under Rule 17(2)(g)

iii. ~~Patient B required a laminectomy and removal of epidural fat~~. Deleted under Rule 17(2)(g)

~~Patient C~~

~~7. Between 27 May 2015 and 15 October 2018 whilst working at the Spire Bristol you consulted with Patient C and you failed to provide good clinical care in that on 5 March 2018 you performed an L5/S1 decompression and fusion ('the Procedure'):~~

~~a. which was not appropriate or clinically indicated as:~~

~~i. any non-organic elements to Patient C's symptoms were not explored;~~ Withdrawn by GMC

~~ii. Patient C was not offered:~~

1. alternative techniques to fusion including:

A. a bone graft alone; Withdrawn by GMC

B. a posterior fusion without a cage at the front;
Withdrawn by GMC

2. further investigations such as:

A. repeat EMG diagnostic injections; Withdrawn by GMC

B. a psychometric assessment; Withdrawn by GMC

3. the option of no surgery; Withdrawn by GMC

b. and you failed to adequately carry out the Procedure in that you excised the S1/2 joints which was not necessary as this was a solidly congenitally fused level and was not a pain source. Withdrawn by GMC

Patient E

8. Between 6 January 2016 and 11 September 2018 whilst working at the Spire Bristol you consulted with Patient E and you failed to provide good clinical care in that:

a. on 15 February 2016 you performed a right L4/5 decompression and interlaminar stabiliser ('Procedure 1') and you failed to adequately carry out the procedure in that:

i. it was not clinically indicated for an interspinous device to be used in patients who had had previous surgery; Withdrawn by GMC

ii. you inserted the interspinous device at L5/S1 which was the wrong level; Withdrawn by GMC

b. on 5 September 2016 you performed a right L4/5 revision discectomy and stabilisation ('Procedure 2') and you failed to adequately carry out Procedure 2 in that it was:

i. not clinically indicated to insert another interspinous device at L4/5; Withdrawn by GMC

ii. ~~contraindicated to insert an interspinous device in patients who had had previous surgery at the same level.~~ Withdrawn by GMC

~~Patient F~~

9. ~~Between 12 February 2016 and May 2017 whilst working at the Spire Bristol you consulted with Patient F and you failed to provide good clinical care in that on 9 May 2017 you performed an L5/S1 decompression and trans-foraminal lumbar interbody fusion and removal of /insertion of intraspine L5/S1 L4/5 ('the Procedure') which was not appropriate or clinically indicated:~~

a. ~~as Patient F:~~

i. ~~was complaining of bilateral leg pain;~~ Withdrawn by GMC

ii. ~~had narrowing at L5/S1;~~ Withdrawn by GMC

iii. ~~had narrowing of the foramen;~~ Withdrawn by GMC

iv. ~~should have had a simple decompression on both sides at L5/S1;~~ Withdrawn by GMC

b. ~~as the use of an interspinous spacer at L4/5 was unnecessary as Patient F did not have spinal stenosis.~~ Withdrawn by GMC

~~Patient G~~

10. ~~Between 23 June 2016 and 27 February 2017 whilst working at the Spire Bristol you consulted with Patient G and you failed to provide good clinical care in that on 28 November 2016 you performed an L4/S1 decompression and fusion and interlaminar stabilisation (the Procedure') which was not appropriate or clinically indicated as:~~

a. ~~Patient G:~~

i. ~~had a degree of facet hypertrophy causing early spinal stenosis at L3/4;~~ Withdrawn by GMC

ii. ~~first should have had a caudal epidural injection; and~~ Withdrawn by GMC

iii. ~~thereafter should have had a decompression at L3/4;~~ Withdrawn by GMC

b. ~~there was no good rational for:~~

i. ~~putting in cages and metal fixation;~~ Withdrawn by GMC

ii. ~~fusing the lower two levels.~~ Withdrawn by GMC

~~Patient J~~

11. ~~Between 30 November 2016 and January 2018 whilst working at the Spire Bristol you consulted with Patient J and you failed to provide good clinical care in that:~~

a. ~~on 24 April 2017 despite the diagnosis being unclear you gave Patient J facet joint injections and nerve root block at left L4/S1 and right L3/S1 and you:~~

i. ~~injected several levels with different techniques at the same time;~~ Withdrawn by GMC

ii. ~~did not inject at different levels at different times;~~ Withdrawn by GMC

iii. ~~did not arrange for EMGs to be carried out;~~ Withdrawn by GMC

b. ~~on 9 August 2017 you gave Patient J facet joint injections at left L4/5, right S1 and right L5/S1 and a nerve root block at L5 and instead of targeting a specific nerve you:~~

i. ~~injected several levels with different techniques at the same time;~~ Withdrawn by GMC

ii. ~~did not inject at different levels at different times;~~ Withdrawn by GMC

c. ~~on 4 December 2017 you performed a right L4/5 decompression and trans-foraminal lumbar interbody fusion 12mm cage ('the Procedure') which was not appropriate or clinically indicated as the osteophytes at right L4/5 were not causing nerve root impingement.~~ Withdrawn by GMC

~~Patient K~~

12. ~~Between 4 September 2017 and October 2018 whilst working at the Spire Bristol you consulted with Patient K and you failed to provide good clinical care in that:~~

~~a. on 4 December 2017 you performed a right L4/5, L5/S1 revision decompression and L5/S1 interspinous ('Procedure 1') and it was not clinically indicated or appropriate to insert an interspinous device at L5/S1 as:~~

~~i. there were no symptoms on the left side at L5/S1~~; Deleted under Rule 17(2)(g)

~~ii. there was no nerve root entrapment~~; Deleted under Rule 17(2)(g)

~~iii. the disc space at L5/S1 had already narrowed down~~; Deleted under Rule 17(2)(g)

~~iv. a soft interspinous spacer would not open up the level~~; Deleted under Rule 17(2)(g)

~~b. on 15 October 2018 you performed a revision right L4/5, L5/S1 decompression and fusion and trans-foraminal lumbar interbody fusion ('Procedure 2') which was not clinically indicated or appropriate as:~~

~~i. there were no left-sided symptoms at L5/S1;~~ Withdrawn by GMC

~~ii. the disc space narrowing at L5/S1 was a normal age-related change;~~ Withdrawn by GMC

~~iii.~~~~the foraminae were narrowed but not compressing the nerve roots;~~ Withdrawn by GMC

~~iv. the retrolisthesis was not pathological and did not need treating.~~ Withdrawn by GMC

~~Patient L~~

~~13. Between 19 December 2017 and 25 October 2018 whilst working at the Spire Bristol you consulted with Patient L and you failed to provide good clinical care in that on 15 October 2018 you performed an L2/S1 fusion and L3/S1~~

~~decompression with an interbody fusion at L5/S1 ('the Procedure') which was not appropriate or clinically indicated as:~~

a. ~~Patient L's age and multiple co-morbidities made him a poor candidate for the Procedure;~~ Withdrawn by GMC

b. ~~there was spondylolisthesis at L4/5;~~ Withdrawn by GMC

c. ~~there was stenosis at L3/4.~~ Withdrawn by GMC

~~Overpayments~~

14. ~~In claiming remuneration for the procedures as outlined in Schedule 1 you:~~

a. ~~used incorrect coding~~; Deleted under Rule 17(2)(g)

b. ~~received overpayments~~. Deleted under Rule 17(2)(g)

15. ~~You knew that you had used:~~

a. ~~the incorrect coding as described at paragraph 14~~; Deleted under Rule 17(2)(g)

b. ~~coding which would generate an overpayment~~. Deleted under Rule 17(2)(g)

16. ~~Your conduct as set out at paragraph 14. was dishonest by reason of paragraph 15~~. Deleted under Rule 17(2)(g)

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

48. Mr Hutchinson admitted and the Tribunal found proved paragraph 4(a) of the Allegation. As paragraph 4(a), related solely to a factual matter and carried no culpability, there is no basis upon which a finding of misconduct could be made on that paragraph alone.

Determination on Revocation of Interim Order - 28/05/2024

1. Following the Tribunal's determination on the facts, where no facts relevant to impairment were found proved, the Tribunal received submissions on whether the interim order of conditions currently in place on Mr Hutchinson's registration should be revoked.

Submissions

2. On behalf of the GMC, Mr Brook submitted that he was instructed to apply for the interim order of conditions in place to be revoked.

3. On behalf of Mr Hutchinson, Mr Hockton agreed that the interim order should be revoked.

The Tribunal's Determination

4. The Tribunal considered that the interim order of conditions had been imposed on Mr Hutchinson's registration as a result of the GMC investigation into the matters before this Tribunal, and was not made aware of any other reason or purpose for the imposition of these conditions to continue.

5. Given its finding that there were no facts relevant to impairment found proved and that Mr Hutchinson's fitness to practise was not impaired, the Tribunal determined that it would be appropriate to revoke the interim order of conditions with immediate effect and would be in the public interest to do so.

6. The interim order is hereby revoked.

7. That concludes this case.

SCHEDULE 1

Schedule 1 (*Amended under Rule 17(6))

Patient	Date of injection/ procedure	Code used	Code which should have been used	Payment received	What should have been paid
A	21/01/2015 02/03/2015 02/04/2016	A5770 and 25120 V3350 V4100	A5750 and 25120 V2652 V2652 or V2430	£693.00 £2926.00 £2500.00	£255.00 £2280.00 £2280.00
B	12/01/2015 21/11/2016 28/12/2016	V3350 V3350, V4100 and V2560 V3350	V3362 V2501 and V3362 V4140 and V2500	£1848.00 £2940.00 £1848.00	£1320.00 £2448.00 £1218.00
C	08/06/2015 08/01/2018 05/03/2018	*A~~V~~5770 A5771 V3350	A5750 or A5752 A5750 or A5751 V3362	£249.00 £300.00 £1725.00	£167.00 £167.00 £1370.00
D Dr Hutchinson consulted with the	07/09/2015	V2560 and V5484	V5484	£1350.00	£450.00

patient between 18 June 2015 and November 2018 whilst working at the Spire Bristol.					
E	01/08/2016 05/09/2016	A5770 and 25120 V2652 and V5484	A5751 and 25120 V2543 and V5484	£400.00 £1850.00	£300.00 £1550.00
H Dr Hutchinson consulted with the patient between 23 January 2015 and 3 April 2017 whilst working at the Spire Bristol.	08/08/2016 17/10/2016	A5770 V3350	A5750 V3362	£373.50 £1725.00	£332.50 £1370.00
I Dr Hutchinson consulted with the patient between 25 October 2016 and 4 September 2017	08/03/2017	V3350	V3362	£1725.00	£1463.00

whilst working at the Spire Bristol.					
~~L~~	~~15/10/2018~~	~~V3350~~	~~V3362~~	~~£1950.00~~	~~£1520.00~~
	Withdrawn by GMC				
M Dr Hutchinson consulted with the patient between 19 March 2018 and 13 August 2018 whilst working at the Spire Bristol.	02/07/2018	V4140 and V4100	V4140 and V2652 or V4140 and V3362	£2725.00	£1725.00