Record of Determinations – Medical Practitioners Tribunal

PUBLIC RECORD

Dates: 14/10/2019 - 18/10/2019
Medical Practitioner’s name: Dr Colin GELDER
GMC reference number: 2922816
Primary medical qualification: MB BS 1984 University of London
Type of case
Outcome on impairment
New - Misconduct Impaired

Summary of outcome
Suspension, 2 months.

Tribunal:

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<tr>
<th>Legally Qualified Chair</th>
<th>Mrs Jayne Wheat</th>
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<tr>
<td>Lay Tribunal Member:</td>
<td>Miss Megan Larrinaga</td>
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<td>Medical Tribunal Member:</td>
<td>Dr Keith Dunnett</td>
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| Tribunal Clerk:                    | Mrs Rachel Horkin |

Attendance and Representation:

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<th>Medical Practitioner:</th>
<th>Present and represented</th>
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<tr>
<td>Medical Practitioner’s Representative:</td>
<td>Mr Marios Lambis, Counsel, instructed by RLB.</td>
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<tr>
<td>GMC Representative:</td>
<td>Mr Alan Taylor, Counsel instructed by GMC Legal.</td>
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Attendance of Press / Public

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

Throughout the decision making process the tribunal has borne in mind the statutory overarching objective as set out in s.1 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 - 15/10/2019

Background

1. Dr Gelder qualified in 1984 from University of London and obtained his MRCP in 1987. Dr Gelder further obtained his CCST in General Internal Medicine and Respiratory Medicine in 1998.

2. At the time of the events in question, Dr Gelder was practising as a Consultant in Respiratory Medicine, a post that he had held since March 2009 and he was Clinical lead on the Health Foundation funded RIPPLE and Making Waves project. He undertook these roles as part of his employment with the University Hospitals Coventry and Warwickshire NHS Trust ('the Trust').

3. The allegation that has led to Dr Gelder’s hearing can be summarised as, on 1 September 2017, during a shift at the Trust, Dr Gelder squeezed Nurse A’s bottom whilst she undertook a ward round. It is further alleged that Dr Gelder made an inappropriate comment to Ms B that ‘you are sexy when you are cross’, or words to that effect. These actions are alleged to have been sexually motivated.

The Allegation and the Doctor’s Response

4. The Allegation made against Dr Gelder is as follows:

   1. During a shift at University Hospitals Coventry and Warwickshire NHS Trust on 1 September 2017, you:

      a. squeezed Nurse A’s bottom whilst she undertook a ward round;

         Admitted and Found Proved

      b. made an inappropriate comment to Ms B that ‘you are sexy when you are cross’, or words to that effect.

         Admitted and Found Proved

   2. Your actions at paragraph 1 were sexually motivated.
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To be determined

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

The Admitted Facts

5. At the outset of these proceedings, through his counsel, Mr Lambis, Dr Gelder made admissions to paragraphs 1 (a) and 1 (b) of the Allegation, as set out above, in accordance with Rule 17(2)(d) of the General Medical Council (GMC) (Fitness to Practise) Rules 2004, as amended ('the Rules'). In accordance with Rule 17(2)(e) of the Rules, the Tribunal announced this paragraph of the Allegation was admitted and found proved.

The Facts to be Determined

6. In light of Dr Gelder’s response to the Allegation made against him, the Tribunal is required to determine whether Dr Gelder’s actions at paragraph 1 (a) and (b) of the Allegations were sexually motivated.

Doctor’s Evidence

7. Dr Gelder provided a witness statement dated 13 September 2019 and gave oral evidence at the hearing.

Documentary Evidence

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

- Witness statement of Nurse A, Registered Nurse at the Trust, dated 18 April 2019 and accompanying exhibits;
- Witness statement of Ms B, Ward Manager at the Trust, dated 16 April 2019 and accompanying exhibits;
- Witness statement of Ms C, Ward Manager at the Trust, dated 16 April 2019 and accompanying exhibits;
- Witness statement of Dr D, CT1 doctor at the Trust, dated 17 April 2019 and accompanying exhibits;
- Witness statement of Rev E, dated 19 April 2019;
- Witness statement of Mr F, colleague of Dr Gelder dated 23 April 2019;
- Witness statement of Dr G, Consultant Physician at the Trust dated 23 April 2019;
- The Trust Investigation Report undertaken in November 2017 and associated documents;
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- Expert report of Dr H dated 01 March 2019 and email from Dr H dated 08 March 2019;

The Tribunal’s Approach

9. 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. Dr Gelder does not need to prove anything. The standard of proof is that applicable to civil proceedings, namely the balance of probabilities, i.e. whether it is more likely than not that the events occurred.

10. The Tribunal carefully considered the case law with regard to sexual motivation that was provided to it. In particular, the Tribunal was cognisant of the need for proper scrutiny of all the evidence in order to determine whether a sexual motivation could be inferred.

The Tribunal’s Analysis of the Evidence

The ‘agreed’ evidence

11. The statements of Nurse A and Ms B and the evidence of the other witnesses who saw or overheard the conduct in question were agreed by Dr Gelder. They were not called to be cross examined or to be questioned by the Tribunal.

Doctor Gelder’s evidence

12. Dr Gelder’s evidence was evaluated in light of his good character which was relevant to his credibility and to the inherent unlikelihood of him having acted in the manner alleged. The testimonials attesting to his character were also considered as relevant to his credibility although they could not speak to his state of mind at the time of the events in question.

13. The Tribunal accepted Dr Gelder’s evidence that his admitted conduct was completely out of character. The key witnesses for the GMC had all made similar observations. The Tribunal further accepted Dr Gelder’s evidence that what he did was inappropriate and wrong. However, the Tribunal considered that elements of the doctor’s evidence were not credible.

14. Dr Gelder’s evidence that his recollections were ‘hazy’, that he wasn’t ‘thinking rationally’ and that he was ‘high’ and ‘off his head’ were inconsistent with him being able to clearly remember the subject matter of the ‘Grand Round’ and the email dated 6 October 2017 from Mr J that, ‘there was nothing about Colin’s manner that was any different to normal.’
15. In his evidence, Dr Gelder stated that in squeezing Nurse A’s bottom he was playing a 'practical joke' on her and that he had previously joked with Nurse A in a 'light hearted way on other occasions...’ Dr Gelder also stated that his behaviour was in retaliation to Nurse A for pretending to be angry with him the previous day. Nurse A makes no mention of interactions with Dr Gelder on the previous day in the Notes of Meeting dated 20 September 2017 and, in fact stated, ‘we see him infrequently.’

16. Following on from Dr Gelder squeezing her bottom, it is Nurse A’s evidence that she said to him, ‘The only man that can do that to me is my husband,’ to which she stated Dr Gelder replied, ‘Well he’s a very lucky man.’ Nurse A’s comments indicated to the Tribunal that she was clearly angry and deeply offended by Dr Gelder’s actions and the Tribunal did not accept Dr Gelder’s explanation that Nurse A was ‘joking back to’ him.

17. Dr Gelder asserted that there was no element of sexual motivation in his behaviour because he said at the time that it was a joke, that he was laughing and started to tell everyone immediately what he’d done. Dr Gelder said that as this all happened in plain sight and that, as he was joking, this precluded his actions from being sexually motivated. The Tribunal was of the view that sexual motivation does not have to depend on an element of secrecy. Nor does joking behaviour prevent there being a sexual element to actions or words. It therefore did not accept Dr Gelder’s evidence.

18. Dr Gelder stated for the first time in his oral evidence that he had thought that Nurse A was asleep over the drugs trolley. The Tribunal did not accept that this was a reasonable belief and, in fact it would have aggravated his actions had she been. The Tribunal considered that it is far more plausible that Nurse A was absorbed in her task and accepted Nurse A’s statement that she was, ‘concentrating on doing the drugs...’. The Tribunal was mindful of Nurse A’s reaction to Dr Gelder’s behaviour and noted that, whilst Dr Gelder laughed after having squeezed her bottom, Nurse A felt ‘dirty’ and ‘violated.’

19. In relation to Ms B, in his oral evidence, Dr Gelder said that he told her ‘You are sexy when you are cross’ as a joke in order to deflect her irritation in relation to a clinical issue that had arisen with a patient. The Tribunal preferred Ms B’s evidence which was that she not that she was joking with him but was discussing a patient with him.

20. Further, the Tribunal did not accept Dr Gelder’s assertion that there was nothing sexual about the word ‘sexy’. It took the view that, if Dr Gelder truly believed this he would have not commented, ‘I have never acted in such a way previously and such conduct is wholly inconsistent and out of keeping with the way in which I would normally conduct myself professionally and indeed personally.’
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Tribunal does not accept that Dr Gelder would have spoken to a male colleague in the same way.

The nature of the actions and the words used

Paragraph 1 (a) squeezed Nurse A’s bottom whilst she undertook a ward round

21. In the Tribunal’s view the act of a male squeezing a female’s bottom in most contexts has an inherently sexual element. In this instance Dr Gelder made remarks shortly afterwards that Nurse A’s husband was a ‘lucky man’ (in the context of squeezing her bottom). The Tribunal concluded that his comment had a clear sexual element which gave weight to there being a sexual motivation to Paragraph 1 (a) of the Allegation.

Paragraph 1(b) ‘You are sexy when you are cross...’

The Tribunal was of the view that an obvious common-sense interpretation of this statement is that it has an inherently sexual connotation. In the Tribunal’s view its inappropriateness could be categorised as a traditional indicia of sexual misconduct, as described in the case of Basson V GMC [2018] EWHC 505 (Admin).

22. Dr Gelder’s own evidence was that he understood that ‘the nature of the physical touching that occurred and the words used to a colleague may ordinarily be seen as having a sexual component...’

23. The Tribunal next considered the expert evidence and conclusion of Dr H contained within his email dated 08 March 2019,

‘There have been no comment [sic] in the medical literature of inappropriate work-place behaviour or sexual disinhibition caused by Fexofenadine (or Valerian). However, we know already that the potential effects of Fexofenadine could include delirium and stimulation, which may explain the symptoms previously described in my report. It is well known that drugs causing delirium and stimulation (via the pathways mentioned above) may lead to sexually disinhibition and inappropriate behaviour (I am referring to drugs such as cocaine, amphetamines, etc). Thus, a mild delirium and stimulation caused by Fexofenadine may have led to a degree of disinhibition and inappropriate behaviour, but this conclusion is more tenuous than my previous conclusion stating that Fexofenadine may have explained his symptoms of ‘mind racing, dizziness, fainting, abnormal dreams, restlessness and nausea.’ (Dr H’s emphasis is in bold)

The Tribunal accepted his conclusion. It noted that if there was an element of sexual disinhibition in the conduct of Dr Gelder it seemed to occur only over a short period of time on the morning of the 01 September 2017.
The Tribunal’s Findings

24. In all the circumstances and despite Dr Gelder’s assertion that he was not sexually attracted to either Nurse A or Ms B the Tribunal determined that it was more likely than not that his actions and words as described in paragraphs 1 (a) and 1 (b) of the Allegation were sexually motivated. It considered the comments of Mostyn J in the case in Basson to be of relevance;

‘It seems to me to be perfectly plausible that there was a fleeting aberration by this otherwise impeccably behaved doctor who said what he said and did what he did with a low grade sexual intent, and then he, over the next three weeks, banished all recollection of the event from his memory.’

25. Whilst the facts of Basson are obviously different, nonetheless the Tribunal concluded that in Dr Gelder’s self-described state, his actions and words and their effect upon the recipients were in pursuit of what could be described as an uncharacteristic and fleeting sexual gratification.

The Tribunal’s Overall Determination on the Facts

26. The Tribunal has determined the facts as follows:

1. During a shift at University Hospitals Coventry and Warwickshire NHS Trust on 1 September 2017, you:
   a. squeezed Nurse A’s bottom whilst she undertook a ward round;
      Admitted and Found Proved
   b. made an inappropriate comment to Ms B that ‘you are sexy when you are cross’, or words to that effect.
      Admitted and Found Proved

2. Your actions at paragraph 1 were sexually motivated.
   Determined and Found Proved.

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

**Determination on Impairment** - 17/10/2019
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1. The Tribunal now has to decide in accordance with Rule 17(2)(l) of the Rules whether, on the basis of the facts found proved as previously set out, Dr Gelder’s fitness to practise is impaired by reason of misconduct.

**The Evidence**

2. The Tribunal has taken into account all the evidence received during the facts stage of the hearing, both oral and documentary. In addition, the Tribunal received further evidence as follows;

3. On behalf of the GMC a statement from Professor I, Responsible Officer at the Trust.

4. In addition, the Tribunal received the following evidence on Dr Gelder’s behalf which it has read and considered. This list is not exhaustive:

   - Dr Gelder’s CV
   - Letter from Ms J
   - Numerous testimonials
   - Documents regarding Maintaining Professional Boundaries Course
   - Dr Gelder’s Reflective Essay
   - CME and Appraisal activity since September 2017
   - CPD diary from 1 September 2017 – 23 March 2018
   - Revalidation Management System document, dated 08 October 2019
   - Letters of apology to Nurse A and Ms B, dated 4 May 2018
   - Dr Gelder’s Development plan (undated)

**Submissions**

5. Full submissions were heard in public session and are therefore not set out in their entirety but are summarised below.

**GMC Submissions**

6. On behalf of the GMC, Mr Taylor submitted that Dr Gelder’s conduct represented serious professional misconduct in the exercise of his professional practise. The incidents in question happened on a hospital ward and related to two female colleagues. Mr Taylor submitted that Dr Gelder’s actions involved conduct of a morally culpable or otherwise disgraceful kind which was ‘dishonourable’. He asked the Tribunal to be mindful of Nurse A’s statement where she described feeling ‘violated’ and ‘dirty’ as a result of Dr Gelder’s actions. Mr Taylor submitted that Dr Gelder brought disgrace upon himself and brought the medical profession into disrepute.
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7. Mr Taylor submitted that to squeeze a nurses’ buttocks and to say to a female colleague, ‘You are sexy when you are cross’ would be considered deplorable behaviour by his fellow practitioners and in fact was regarded by his colleagues as deplorable as Dr Gelder was immediately excluded by the Trust following the incidents.

8. Mr Taylor invited the Tribunal to find that Dr Gelder’s insight was partial at best. He credited Dr Gelder for his admissions and his acceptance that his actions were unacceptable and inappropriate but stated that Dr Gelder did not accept that his actions had an element of sexual misconduct or gratification. Mr Taylor submitted that Dr Gelder did not appreciate the impact that his actions had upon Nurse A and Ms B and that he needs to reflect further on the impact of his actions on the wider public interest. Mr Taylor also reminded the Tribunal that they rejected a great deal of Dr Gelder’s evidence and so it cannot be found that Dr Gelder’s insight is complete.

9. Mr Taylor submitted that a reasonable and properly informed member of public would be appalled at Dr Gelder’s actions and words. Mr Taylor reminded the Tribunal of the need to uphold proper professional standards and stated that public confidence in the profession would be undermined if impairment was not found in this case.

Submissions on behalf of Dr Gelder

10. Mr Lambis stated that he did not seek to address the Tribunal on the issue of misconduct. He submitted that Dr Gelder has apologised to Nurse A and Ms B for his actions and invited the Tribunal to consider the letters of apology that were provided in evidence. Mr Lambis further asked the Tribunal to note that Dr Gelder’s apology is echoed in his reflective statement and that therein he also makes reference to the impact that his actions had on Nurse A and Ms B and also his colleagues who had to cover his workload. Mr Lambis submitted that Dr Gelder has fully and actively participated in the process and investigation both at the hospital and the GMC from its outset. He asked the Tribunal to credit Dr Gelder for his apologies, reflections and the seriousness with which he has treated this issue since it occurred. Mr Lambis stated that he did not know what more Dr Gelder could do to demonstrate his insight.

11. Mr Lambis invited the Tribunal to find that the prospect of repetition of his actions and words by Dr Gelder is ‘virtually nil’ and reminded the Tribunal that he had been under various stresses at the time of the incident. Mr Lambis stated that it was ‘self evident’ that there was no pre-meditation to Dr Gelder’s actions but either a ‘fleeting’ aberration or an opportunistic event took place. Mr Lambis asked the Tribunal to consider the opinion of XXX expert which may explain Dr Gelder’s disinhibition and uncharacteristic behaviour and conduct when reaching their decision. Regarding the issues of current impairment, Mr Lambis submitted that a well-informed reasonable observer would, in the round, consider that the overarching objective has already been met.
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The Relevant Legal Principles

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

13. In approaching the decision, the Tribunal was mindful of the two-stage process to be adopted: first whether the facts as found proved amounted to misconduct, and whether that misconduct could properly be described as serious. If so the Tribunal will need to determine if Dr Gelder’s fitness to practise is currently impaired.

14. Whilst the Tribunal must determine whether Dr Gelder’s fitness to practise is impaired today, it will take into account Dr Gelder’s conduct at the time of the events and any relevant factors since then such as whether the matters are remediable, have been remedied and if there is any likelihood of repetition. In so determining the Tribunal will have regard to each limb of the overarching objective.

The Tribunal’s Determination on Impairment

Misconduct

15. The Tribunal first considered the guidance in the case of Roylance v GMC [2001] 1 AC 311;

‘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.’

The Tribunal considered that Dr Gelder’s behaviour had engaged the following standards in Good Medical Practice (GMP);

1) Patients need good doctors. Good doctors make the care of their patients their first concern: they are competent, keep their knowledge and skills up to date, establish and maintain good relationships with patients and colleagues, are honest and trustworthy, and act with integrity and within the law; (emphasis added by Tribunal)

36) You must treat colleagues fairly and with respect;

And

65) You must make sure that your conduct justifies your patients’ trust in you and the public’s trust in the profession.
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16. considering if Dr Gelder’s actions amounted to misconduct, the Tribunal were mindful of the comments of Elias J in the case of R (Remedy UK Ltd) v GMC [2010] EWHC 1245 (Admin);

"I would derive the following principles from these cases

1) Misconduct is of two principal kinds, First, it may involve sufficiently serious misconduct in the exercise of professional practice such that it can properly be described as misconduct going to fitness to practise. Second, it can involve conduct of a morally culpable or otherwise disgraceful kind which may, and often will, occur outwith the course of professional practice itself, but which brings disgrace upon the doctor and thereby prejudices the reputation of the profession.

17. The conduct, which was found to be sexually motivated, involved the squeezing of Nurse A’s bottom and inappropriately commenting to Ms B that she was ‘sexy when you are cross.’ Nurse A and Ms B were Dr Gelder’s colleagues. In behaving this way, Dr Gelder breached their trust. The Tribunal found that the conduct was an uncharacteristic incident of fleeting sexual gratification.

18. The Tribunal concluded that the conduct did breach the paragraphs in GMP it has identified.

19. It is the Tribunal’s opinion that Dr Gelder’s conduct falls into both identified categories, specifically in the exercise of professional practice and conduct of a morally culpable or otherwise disgraceful kind. It concluded that the facts found proved amounted to misconduct.

20. The Tribunal, having found that Dr Gelder’s actions amount to misconduct, then went on to consider if the misconduct was serious. The Tribunal were guided by the judgment of Collins J in the case of Nandi V GMC [2004] EWHC 2317 [Admin]

"What amounts to professional misconduct has been considered by the Privy Council in a number of cases. I suppose perhaps the most recent observation is that of Lord Clyde in Rylands v General Medical Council [1999] Lloyd’s Rep Med 139 at 149, where he described it as “a falling short by omission or commission of the standards of conduct expected among medical practitioners, and such falling short must be serious”. The adjective “serious” must be given its proper weight, and in other contexts there has been reference to conduct which would be regarded as deplorable by fellow practitioners’

The Tribunal reminded itself that Dr Gelder’s fellow professionals did find his behaviour to be deplorable as Dr Gelder was immediately excluded from work the day that the incidents took place.
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21. The Tribunal therefore in all the circumstances concluded that Dr Gelder’s conduct did fall far short of the standards of conduct reasonably to be expected of a doctor as to amount to misconduct which was serious.

Impairment

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

23. In reaching their conclusion regarding impairment, the Tribunal considered the questions as raised in the case of Cohen V GMC [2008] EWHC 581 (Admin), namely;

‘...It must be highly relevant in determining if a doctor’s fitness to practise is impaired that first his or her conduct which led to the charge is easily remediable, second that it has been remedied and third that it is highly unlikely to be repeated...’

24. The Tribunal was of the opinion that sexually motivated conduct was not easily remediable. However, it recognised the steps Dr Gelder has taken towards remediation. He attended a professional boundaries course on 17 September 2018, provided a Reflective Essay and made written apologies to Nurse A and Ms B. In his development plan, Dr Gelder has recognised his own situational risk factors, in particular his misinterpretation of the closeness of his professional relationships with some of his colleagues and has put in place actions and measures in the event that he should return to work.

25. The Tribunal acknowledged Dr Gelder’s early acceptance that his behaviour was unacceptable and inappropriate. The Tribunal were however concerned that Dr Gelder has yet to take full responsibility for his actions. He acknowledges his assertion that he may have had a reaction to ‘Pet Remedy’ is not ‘believed by everybody.’ Yet he still relies on this as an explanation, in particular in his letter of apology to Ms B and in his evidence before this Tribunal.

26. When considering the matter of remediation, the Tribunal was mindful of the judgment in Yeong v GMC [2009] EWHC 1923;

'Where a FTPP considers that the case is one where the misconduct consists of violating such a fundamental rule of the professional relationship between medical practitioner and patient and thereby undermining public confidence in the medical profession, a finding of impairment of fitness to practise may be justified on the grounds that it is necessary to reaffirm clear standards of professional conduct so as to maintain public confidence in the practitioner...'
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and in the profession. In such a case, the efforts made by the medical practitioner in question to address his behaviour for the future may carry very much less weight than in a case where the misconduct consists of clinical errors or incompetence’

The Tribunal noted that the ‘professional relationship’ was not between a medical practitioner and patient but between two medical professionals, however it nonetheless found that the remarks in this judgment were relevant to the specifics of this case.

27. The Tribunal accepts that Dr Gelder disputed that his actions were sexually motivated as he was entitled to do. The Tribunal noted that Dr Gelder has listed the people and parties who were affected by his actions in his Reflective Essay but has not demonstrated he understands the impact of the conduct on the reputation of the profession and of public confidence in the profession. Also, whilst Dr Gelder has apologised to Nurse A and Ms B he has not specifically indicated why he is sorry, or why they would have been caused upset. The Tribunal concluded that he was yet to fully understand the impact of his actions on those affected by them. The Tribunal also considered that, whilst Dr Gelder attended the professional boundaries course in September 2018, he does not appear to have progressed his understanding of the impact of his actions in the time between attendance at the course and at this hearing. In these circumstances the Tribunal is not satisfied that Dr Gelder’s insight into his misconduct is fully developed.

28. The Tribunal were satisfied that the specific circumstances in which these events took place were unlikely to happen again. Dr Gelder has recognised that he was under significant personal, family and professional stresses at the time of the incident. In his Reflective Essay he has demonstrated realisation that he did not have an appropriate work/life balance and, should he return to work, has a plan to address this. The Tribunal has acknowledged from the outset that the misconduct found was uncharacteristic and could be categorised as a one-off incident. It took account of the many positive character testimonials presented to it, many of which express shock upon finding out about the allegations.

29. Whilst Dr Gelder, by his actions, has brought the medical profession into disrepute and breached a fundamental tenet of the profession, it concluded that a repetition of the conduct was unlikely.

30. The Tribunal went on to consider the public interest. It had regard to the case of CHRE v NMC & Paula Grant [2011] EWHC 927 [Admin]

‘The Tribunal should consider whether the need to uphold proper professional standards and public confidence in the profession would be undermined if a finding of impairment were not made.’
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31. Further the Tribunal considered the case Bolton v Law Society [1994] 1 WLR 512 in which it was said that;

‘The reputation of the profession is more important than the fortunes of any individual member.’

32. Where sexual motivation has been found, involving a breach of the trust of two work colleagues and where insight is still developing, the Tribunal concluded that a finding of impairment was necessary despite the low risk of repetition. This is in order to satisfy the relevant limbs of the overarching objective, to promote and maintain public confidence in the medical profession and to promote and maintain proper professional standards and conduct for the members of that profession. The Tribunal considered that public confidence would be undermined if a finding of impairment were not made.

33. Accordingly, Dr Gelder’s fitness to practise is impaired by reason of his misconduct.

Determination on Sanction - 18/10/2019

1. Having determined that Dr Gelder’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.

Submissions

2. Full submissions were heard in public session and are therefore not set out in their entirety but are summarised below.

GMC submissions

3. On behalf of the GMC, Mr Taylor submitted that the main reason to impose sanctions is to protect the public. Whilst this is not a case in which public safety is at risk, public confidence in the medical profession and proper professional standards must be maintained.

4. Mr Taylor invited the Tribunal to find that the references and testimonials are of little assistance as they are over a year old and do not take into account the Tribunals findings regarding sexual motivation.

5. Mr Taylor submitted that Dr Gelder has expressed regret for his actions and has apologised to the two female colleagues involved. However, Mr Taylor argued expressions of regret and apology are different to having insight and that Dr Gelder’s insight is limited as he challenged the allegation of sexual motivation and continually
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asserted a version of events that the Tribunal did not accept (namely that there was a pharmacological reason for his behaviour). Mr Taylor stated that there are shortcomings in Dr Gelder’s Reflective Essay regarding the impact that his actions had on Nurse A and Ms B and he has not demonstrated understanding of the impact of his conduct on the public and on the medical profession therefore his insight is limited and still developing. Mr Taylor reminded the Tribunal that it has previously stated its concerns regarding this specific matter.

6. Mr Taylor further submitted that, although Dr Gelder’s misconduct was brief in terms of time, it involved two female colleagues and his actions betrayed the trust that his colleagues had placed in him.

7. Mr Taylor submitted that suspension was the most appropriate sanction in this case and reminded the Tribunal that, in order for them to reach this sanction it would have to accept his submission that to take no action or to impose conditions upon Dr Gelder’s registration would be insufficient to reflect the gravity of the misconduct.

8. Mr Taylor took the Tribunal to the relevant paragraphs of the Sanctions Guidance (SG), which he submitted demonstrated that suspension was the appropriate sanction.

Submissions on behalf of Dr Gelder

9. On behalf of Dr Gelder Mr Lambis submitted that, on the one hand, the duty of the Tribunal is to impose a sanction that properly reflects the seriousness of the allegation that brought the individual before it. At the same time the Tribunal must ensure that the sanction is not only proportionate to the allegation but fundamentally takes account of the particular circumstances of the individual who appears before the Tribunal.

10. Mr Lambis made the Tribunal aware of a number of personal circumstances that were present in Dr Gelder’s life at the time of the conduct which included;

- XXX
- XXX
- XXX
- XXX
- His clinical director’s decision to take away his community work.

11. Mr Lambis submitted that the misconduct was a terrible blemish on an otherwise exemplary career. Mr Lambis reminded the Tribunal that the allegations were now historic and asked it to consider Dr Gelder’s conduct and behaviour since the incident. Mr Lambis submitted that Dr Gelder actively participated in the hospital investigation and in the regulatory process. Dr Gelder made admissions at the outset
of both proceedings which, Mr Lambis argued should count in his favour even if he did not accept sexual motivation. Mr Lambis drew the Tribunal’s attention to the nature and calibre of Doctor Gelder’s reflection, insight and remediation and whilst it is not at the level the Tribunal would ‘ideally’ like to see it, it has commenced. Mr Lambis reminded the Tribunal that they have previously accepted the negligible possibility of repetition.

12. Mr Lambis asked the Tribunal to consider the fact that the letters of apology written to Nurse A and Ms B pre-dated Dr Gelder’s attendance at the ‘Maintaining Professional Boundaries’ course and asked it to remember that when he wrote the apologies he had not been accused of sexually motivated conduct.

13. Mr Lambis reminded the Tribunal that sanctions are not meant to be punitive in nature but stated that Dr Gelder is pragmatic enough to understand that it would be inappropriate to take no action in this case and accepted this is not a case that can be dealt with by conditions but that it goes nowhere near erasure.

The Tribunal’s Determination on Sanction

14. The decision as to the appropriate sanction to impose, if any, in this case is a matter for this Tribunal exercising its own judgment. In reaching its decision, the Tribunal has referred to the SG. It has borne in mind that the purpose of sanctions is not to be punitive, but to protect the public and the wider public interest, although sanctions may have a punitive effect.

15. Throughout its deliberations, the Tribunal has applied the principle of proportionality, balancing Dr Gelder’s interest with the public interest, recognising that the reputation of the profession is more important than that of an individual member. It has taken account of the statutory overarching objective.

16. The Tribunal has already given a detailed determination on impairment and it has taken those matters into account during its deliberations on sanction. The Tribunal first considered the aggravating and mitigating factors in this case.

Aggravating Factors

17. The Tribunal identified the following aggravating factors;

- The conduct, which consisted of squeezing Nurse A’s bottom and commenting to Ms B that she was ‘sexy when cross’ was found to be sexually motivated.
- It breached the trust of two female colleagues.
- It breached the standards identified in GMP.
- Dr Gelder has not developed insight into the full impact of his actions upon his colleagues nor upon the reputation of the profession.
Mitigating Factors

18. The Tribunal identified the following mitigating factors;

- This was an isolated incident in the context of an otherwise exemplary career.
- Dr Gelder’s actions were completely out of character, as attested to in the many positive testimonials.
- The conduct took place over a very short period of time.
- The sexual gratification was found to be fleeting.
- The conduct was at the lower end of the spectrum of cases involving sexual misconduct.
- There was a low risk of repetition.
- Dr Gelder accepted his actions (albeit not the sexual motivation) were inappropriate and wrong from the outset.
- Dr Gelder engaged with the Trust investigation and fully co-operated with his regulator.
- Dr Gelder expressed a wish to apologise to both Nurse A and Ms B from the outset and, when able to, he wrote an apology to both of them.
- Dr Gelder has started to remediate, for example by attending the ‘Maintaining Professional Boundaries’ course, which lead to the production of a Reflective Essay and a development plan.

19. The Tribunal also took account of the difficult personal circumstances of Dr Gelder which were present at the time of the misconduct.

No action

20. In coming to its decision as to the appropriate sanction to impose, the Tribunal first considered whether to conclude Dr Gelder’s case by taking no action. The Tribunal reminded itself that there should be exceptional circumstances to justify a Tribunal taking no action where a finding of impairment has been made. The Tribunal considered paragraphs 68 and 70 of the SG:

‘Where a doctor’s fitness to practise is impaired, it will usually be necessary to take action to protect the public (see paragraphs 14–16). But there may be exceptional circumstances to justify a tribunal taking no action.’

And;

‘Exceptional circumstances are unusual, special or uncommon, so such cases are likely to be very rare. The tribunal’s determination must fully and clearly explain:’
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(a) what the exceptional circumstances are

(b) why the circumstances are exceptional

(c) how the exceptional circumstances justify taking no further action.’

21. The Tribunal has determined that there are no exceptional circumstances in this case. Taking no action would be not be appropriate, proportionate or in the public interest considering the seriousness of the misconduct.

Conditions

22. The Tribunal next considered whether it would be sufficient to impose conditions on Dr Gelder’s registration. It has borne in mind that any conditions imposed would need to be practical, appropriate, proportionate, workable and measurable.

23. The Tribunal gave weight to all the aggravating features in this case but in particular the serious nature of sexually motivated conduct. It therefore determined that conditions would not be an appropriate, sufficient or proportionate response and would not adequately address the public interest in this case.

Suspension

24. The Tribunal then went on to consider whether a period of suspension would be an appropriate and proportionate sanction to impose on Dr Gelder’s registration. It considered the most relevant paragraphs of the SG to be:

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’

93) ‘Suspension may be appropriate, for example, where there may have been acknowledgement of fault and where the tribunal is satisfied that the behaviour or incident is unlikely to be repeated. The tribunal may wish to see evidence that the doctor has taken steps to mitigate their actions’
And

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.

f) No evidence of repetition of similar behaviour since incident.

25. The Tribunal gave weight to some of the mitigating factors namely the conduct being completely out of character, the fleeting nature of the sexual motivation and the conduct being at the lower end of the spectrum. It concluded that in all the circumstances, whilst serious, this was not conduct that was fundamentally incompatible with continued registration.

26. The Tribunal considered that the aggravating factors identified meant that this was undoubtedly a serious case. It therefore determined that it was both necessary and proportionate to impose a period of suspension.

27. In all the circumstances, but giving particular weight to the mitigating factors it has identified, the Tribunal determined to suspend the doctor’s registration for a period of two months.

28. The Tribunal considered that a suspension of two months would afford Dr Gelder time to further reflect, particularly on the finding of the sexual motivation. However, the tribunal determined not to order a review given this was an uncharacteristic isolated incident, at the lower end of the spectrum of cases involving sexual misconduct and there being a low risk of repetition.

29. The Tribunal acknowledged that part of protecting the public interest was not to deprive the public of an otherwise good doctor and took account of this when deciding the length of the suspension.

30. Whilst the Tribunal were fully aware there are absolutely no issues of clinical concerns in this case, it was reassured by both the development plan and Dr
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Gelder’s plans for any possible return to work as they were comprehensive, workable and realistic.

31. The effect of the foregoing direction is that, unless Dr Gelder exercise’s his right of appeal, his registration will be suspended 28 days from the date on which written notice of this decision is deemed to have been served upon him. A note explaining his right of appeal will be sent to him.

Determination on Immediate Order – 18 October 2019

1. Having determined to suspend Dr Gelder for a period of two months, the Tribunal has considered, in accordance with Rule 17(2)(o) of the Rules, whether Dr Gelder’s registration should be subject to an immediate order.

Submissions

2. Mr Taylor submitted that is not a case in which public safety is an issue and nor is an immediate order in the public interest.

3. Mr Lambis advised that he does not seek to make a submission to the Tribunal regarding an immediate order.

The Tribunal’s Determination

4. In reaching its decision the Tribunal referred to the relevant paragraphs of the SG. It exercised its own judgement and had regard to the principle of proportionality. It also took into account the submissions made by Mr Taylor and comments of Mr Lambis.

5. The Tribunal considered the seriousness of the matter and whether it would be appropriate to immediately suspend Dr Gelder’s registration. It has previously determined there are no issues of patient safety arising in this case. It is not therefore necessary for the Tribunal to impose an immediate order of suspension in order to protect the public.

6. The Tribunal found that the public interest would not be undermined by the order not coming into force immediately having regard to the circumstances and findings in this case. The public interest has already been met by virtue of the substantive sanction. The Tribunal therefore determine that the public interest would not be undermined by Dr Gelder remaining in unrestricted practice pending the commencement of the substantive period of suspension.

7. There is no interim order to revoke.

8. That concludes this case.
Confirmed
Date 18 October 2019

Mrs Jayne Wheat, Chair