Record of Determinations – Medical Practitioners Tribunal

PUBLIC RECORD

Dates: 08/05/2019 - 17/05/2019
Medical Practitioner’s name: Dr Hetti HETTIARACHCHI
GMC reference number: 6147869
Primary medical qualification: MB BS 2000 University of Colombo

Type of case
New - Misconduct

Outcome on impairment
Impaired

Summary of outcome
Suspension, 2 weeks.

Tribunal:

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<th>Role</th>
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<tr>
<td>Legally Qualified Chair</td>
<td>Miss Gillian Temple-Bone</td>
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<tr>
<td>Lay Tribunal Member:</td>
<td>Dr Matthew Fiander</td>
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<td>Medical Tribunal Member:</td>
<td>Dr Janet Nicholls</td>
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<th>Role</th>
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<td>Tribunal Clerk:</td>
<td>Mr Edward Kelly</td>
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Attendance and Representation:

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<td>Medical Practitioner:</td>
<td>Present and represented</td>
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<td>Medical Practitioner’s Representative:</td>
<td>Mr Kevin McCartney, Counsel, instructed by the MDU</td>
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<td>GMC Representative:</td>
<td>Mr Ian Brook, Counsel</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.
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**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 Impairment - 16/05/2019**

**Background**

1. Dr Hetti Hettiarachchi qualified as a doctor in Sri Lanka in 1998 and came to the UK in 2006. Prior to the events which are the subject of the hearing he worked as a specialist in genitourinary medicine ("GUM") before advancing to consultant level in GUM. At the time of the events Dr Hettiarachchi was practising as a consultant in sexual health at Buryfields Central and North West London NHS Foundation Trust Sexual Health Clinic ("the Clinic") in the Guildford and Woking clinics.

2. The allegation that led to Dr Hettiarachchi’s hearing arose from his contact with two patients. Patient A attended the clinic twice in August 2017 and Patient B attended twice in September 2017. Dr Hettiarachchi in his own time and of own volition was also developing a website online containing information about sexually transmitted diseases which could assist in the recognition of symptoms and advise on appropriate treatments. He intended this to be of particular use to potential patients. Regarding both Patients, Dr Hettiarachchi retained their mobile telephone numbers and contacted them to ask each to assist in translation of information for his website into Russian and a language spoken in China.

3. Patient A made a complaint to the GMC on 11 September 2017 concerning Dr Hettiarachchi having retained and used her confidential contact details, sending her text messages, and emails. Patient A did provide him with a translation into Russian as requested. Patient A also complained that Dr Hettiarachchi had failed to inform her that he would conduct an examination of her, provide adequate information about the examination and had failed to obtain her consent. Patient A later included in her complaint an email which Dr Hettiarachchi sent her, on the 18 October 2017, asking her to consider withdrawing her complaint and encouraging her not to show that email to the GMC.

4. After attending "the Clinic" Patient B later attended a clinic in London. She told the consultant there that this was because she had received text messages from Dr Hettiarachchi. That consultant made a complaint about Dr Hettiarachchi to the GMC. Patient B completed a questionnaire in which she explained that whereas some of the text messages included information regarding her test results, the last text to her stated "I would like to have a small chat with you over a coffee or a meal. Would it be okay with you." Dr Hettiarachchi asserted this was in the context of seeking her help to provide a translation into a language spoken in China.
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B confirmed that he had asked her during the consultation about helping with translations for his website.

5. Dr Hettiarachchi changed career paths following suspension from his post at the GUM Clinic. Since 1 August 2018, he has been training to become a GP. As of 6 February 2019, he works as a GP trainee undertaking the adult psychiatry rotation at Bushey Fields Hospital.

The Outcome of Applications Made during the Facts Stage

6. At the outset of these proceedings, the Tribunal granted the application from the GMC for parts of the hearing to be in private, in accordance with Rule 41XXX of the General Medical Council ('GMC') (Fitness to Practise) Rules 2004, as amended ('the Rules'), XXX.

7. The Tribunal determined to grant Dr Hettiarachchi’s application, made pursuant to Rule 34(1) of the Rules, for redacted evidence in the statement, and medical record of Patient A to be disclosed. The Tribunal’s full determination on this application is included at Annex A.

8. The Tribunal determined to grant the GMC’s application, made pursuant to Rule 17(6) of the Rules, for paragraph 8 of the Allegation to be amended. The Tribunal’s full determination on this application is included at Annex B.

9. The Tribunal determined to grant the application from Dr Hettiarachchi, made pursuant to Rule 17(2)g of the Rules, of no case to answer in relation to paragraphs 3 and paragraph 9 of the Allegation. The Tribunal’s full determination on this application is included at Annex C.

10. The Tribunal determined to grant a further GMC application, made pursuant to Rule 17(6) of the Rules, for several amendments to the Allegation, and for it to be re-numbered. The Tribunal’s full determination on this application is included at Annex D.

The Allegation and the Doctor’s Response

The Admitted Facts

11. Following applications to amend the Allegation made pursuant to Rule 17(6) of the Rules, through Mr McCartney, Dr Hettiarachchi admitted all of the paragraphs and sub-paragraphs of the Allegation, as set out below, in accordance with Rule 17(2)(d) of the Rules. In accordance with Rule 17(2)(e), the Tribunal announced these paragraphs and sub-paragraphs of the Allegation as admitted and found proved.

Patient A
1. On 9 August 2017 you were consulted by Patient A (‘the Consultation’) at the Buryfields Sexual Health Clinic, Guildford (‘the Clinic’). Admitted and Found Proved

2. During the Consultation you carried out an intimate examination of Patient A with a female colleague present as a chaperone. Admitted and Found Proved

3. Following the Consultation you prescribed Patient A the medication set out in Schedule 1 (‘the Medication’) and subsequently met Patient A after work at a shopping centre to give them the Medication. Admitted and Found Proved

4. Between 9 August 2017 and 30 August 2017 you contacted Patient A by email and text message (‘the Correspondence’). Amended under Rule 17(6) Admitted and Found Proved as amended

5. You obtained Patient A’s telephone number from Patient A’s medical records. Amended under Rule 17(6) Admitted and Found Proved as amended

6. The Correspondence included: Amended under Rule 17(6)
   a. saying that Patient A ‘owed you a coffee’, or words to that effect; Admitted and Found Proved as amended
   b. advice to Patient A not to consume alcohol with their antibiotics; Admitted and Found Proved as amended
   c. a request that Patient A assist you with translating a patient leaflet that you had prepared; Admitted and Found Proved as amended
   d. an email saying that you felt sad when Patient A ignored you, when you had sent her a text message asking her if you could ring her about the translation she had done. Admitted and Found Proved as amended

7. Your actions as outlined at Paragraphs 6 (a), (c) and (d) were not clinically justified. Amended under Rule 17(6) Admitted and Found Proved as amended

8. On 18 October 2017 you sent an inappropriate email to Patient A in that it:
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a. asked Patient A to withdraw consider withdrawing the complaint they had made to the General Medical Council (‘GMC’) about you; Amended under Rule 17(6) Admitted and found proved as amended

b. encouraged Patient A not to disclose the email to the GMC by stating that ‘I would be very grateful if you don’t use this email against me’, or words to that effect. Admitted and Found Proved as amended

Patient B

9. In September 2017 you were consulted by Patient B at the Clinic on two occasions. Admitted and Found Proved

10. Between 18 September 2017 and 19 September 2017 you contacted Patient B by text message using their personal contact details. Admitted and Found Proved

11. At 19:10 on 19 September 2017 you contacted Patient B using WhatsApp Messenger using their personal contact details. The message: Amended under Rule 17(6)

a. was not clinically justified; Admitted and Found Proved as amended

b. included a request to ‘have a small chat with you over a coffee or a meal’, or words to that effect. Admitted and Found Proved as amended.

Impairment

12. The Tribunal now has to decide in accordance with Rule 17(2)(l) of the Rules whether, on the basis of the facts which have been admitted and found proved as set out above, Dr Hettiarachchi’s fitness to practise is impaired by reason of misconduct.

Factual Witness Evidence

13. The Tribunal received written statements and oral evidence on behalf of the GMC from the following witnesses:

• Patient A, in person;
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- Mr C, Deputy Service Director of Central and North West London NHS Foundation Trust (‘CNWL’) Sexual Health Services since August 2018, in person;
- Patient B, by telephone link and video link.

14. Dr Hettiarachchi provided his own witness statement, dated 15 April 2019 and also gave oral evidence in person. In addition, the Tribunal received evidence from the following witness on Dr Hettiarachchi’s behalf:

- Dr D, by telephone link.

15. The Tribunal also received evidence on behalf of Dr Hettiarachchi in the form of witness statements from the following witnesses who were not called to give oral evidence:

- Ms E, nurse at the Clinic; and
- Dr F, FRCGP at NHS England-Commissioned GP Health Service.

Expert Witness Evidence

16. The Tribunal received evidence from two expert witnesses, Dr G, XXX and Dr H, XXX on behalf of Dr Hettiarachchi, report dated 10 April 2019. XXX.

Documentary Evidence

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

- Emails from Dr Hettiarachchi to Patient A, dated 28 and 30 August 2017 and 18 October 2017;
- Email from Patient A to Dr Hettiarachchi, dated 29 August 2017;
- Text from Dr Hettiarachchi to Patient A, dated 29 August 2017;
- Patient B’s written responses to Central and North West London NHS Foundation Trust (‘CNWL’), dated 15 February 2018;
- Letter from Sexual Health Services CNWL, dated 21 February 2019;
- Testimonial Letter from Dr D, dated 26 June 2018;
- Dr Hettiarachchi’s 2018 patient and colleague 360 feedback, 11 June 2018;
- Dr Hettiarachchi’s CV, June 2018;
- A language spoken in China Translation from male patient, 8 April 2019;
- Analysis of users of the website, undated;
- Website pages XXX 2019;
- Certificate of Registration, 4 September 2015;
- Email from Dr Hettiarachchi to Clinic Manager, 10 August 2017;
- Dr Hettiarachchi’s reading log, undated;
- Certificate on Maintaining Professional Ethics, 21-23 May 2018;
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- Certificate on Maintaining Professionalism, 6 December 2018;
- Certificates on Professional Boundaries in Health & Social Care and BMJ e-learning sessions in Understanding Consent and Communication Skills; 1 July 2018;
- Online complaint form from Patient A, 11 September 2017;
- Online complaint form from Barts Health NHS Trust, dated 19 October 2017;
- Buryfields Sexual Health Clinic Medical Records for Patient A, undated;
- Letter from Dr F to Dr Hettiarachchi’s representatives, dated 27 February 2019;
- Report of Dr H, 6 May 2019;
- Testimonial of Dr I, 12 March 2019;
- Testimonial of Ms J, 31 March 2019;
- Testimonial of Dr K, 4 April 2019; and
- Testimonial of Dr L, 10 April 2019.

Submissions

GMC Submissions

18. On behalf of the GMC, Mr Brook submitted that Dr Hettiarachchi’s actions amounted to serious misconduct and that his fitness to practise is currently impaired by reason of that misconduct. He submitted that Dr Hettiarachchi had repeatedly breached professional boundaries.

19. Mr Brook drew the Tribunal’s attention and quoted appropriate parts of the relevant authorities:

- CHRE v NMC and Grant [2011] EWHC 927 (Admin);
- Roylance v GMC (No 2)[2000] 1 AC 311;
- Remedy UK v GMC [2010] EWHC 1245 (Admin);
- Cohen v GMC [2008] EWHC 581 (Admin);
- Meadow v GMC [2006] EWCA CIV 1390; and

20. Specifically, Mr Brook referred the Tribunal to Dame Janet Smith’s criteria for impairment set out in her fifth Shipman report and cited in CHRE v NMC and Grant [2011] EWHC 927 (Admin):

"Do our findings of fact in respect of the doctor’s misconduct, deficient professional performance, adverse health, conviction, caution or determination show that his/her fitness to practise is impaired in the sense that s/he:

a. has in the past acted and/or is liable in the future to act so as to put a patient or patients at unwarranted risk of harm; and/or
b. has in the past brought and/or is liable in the future to bring the medical profession into disrepute; and/or

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

d. has in the past acted dishonestly and/or is liable to act dishonestly in the future.”

21. Mr Brook submitted Dr Hettiarachchi accepted in his statement that there had been a “lapse of judgement” in meeting and further contacting Patient A. He submitted that Patient B had indicated that Dr Hettiarachchi’s behaviour and communications had made her uncomfortable and caused her distress. He submitted that Patient A viewed the interactions as an invasion of her privacy and that Dr Hettiarachchi had abused the trust his patients had placed in him.

22. Mr Brook submitted that Dr Hettiarachchi had shown only limited insight into his errors of judgement, particularly in his oral evidence when he stated Patient A was being ‘unreasonable’ with her complaint. Mr Brook observed that Dr Hettiarachchi refused to accept that he was trying to persuade Patient A, rather that he was trying to explain. He submitted that, in the email dated 18 October 2017, the comment “I most humbly beg you to consider withdrawing your complaint... I am begging you for my daughter’s future...” is a very clear and direct attempt to undermine the GMC investigation and covertly manipulate Patient A to consider withdrawing her complaint to his regulator. Mr Brook submitted that this was a serious breach of Good Medical Practice. He submitted that Dr Hettiarachchi knew exactly what he was doing because he stated ”I would be very grateful if you don’t use this email against me”. This is clear indication that he understood the implications of interfering with a complainant in an investigation against him. He submitted that the email was considered, calculated and clearly articulated, detailing explanations and consequences. He submitted that all this undermined Dr Hettiarachchi’s assertion that the email was drafted in a moment of panic and resulted from a compromised state of mind but did accept Dr G’s opinion that he may have acted in a state of panic.

23. Mr Brook acknowledged that Dr Hettiarachchi has developed some insight into professional boundaries and the impact of his conduct on the profession and that he has undertaken some remediation. However, he submitted that this insight is limited and is virtually absent in relation to the email of 18 October 2018.

24. Mr Brook submitted that Dr Hettiarachchi had brought the medical profession into disrepute and had breached fundamental tenets of the profession through his actions. He submitted that limbs (b) and (c) of paragraph 76 in Grant are each engaged in this case and that a finding of impairment should be made to maintain confidence in the profession and uphold proper standards in the profession.
Dr Hettiarachchi’s Submissions

25. On behalf of Dr Hettiarachchi, Mr McCartney directed the Tribunal to authorities which he deemed appropriate and relevant in all the circumstances of this case:

- Nandi v GMC [2004] EWQHC 2317;
- Cheatle v GMC 2009 EWHC 645 [Admin];
- Yeong v. GMC [2009] EWHC 1923 (Admin); and
- CHRE v NMC and Grant [2011] EWHC 927 (Admin);

26. Mr McCartney submitted that of particular importance is the two-step process set out by Cranston J. in Cheatle v GMC at paragraphs 21 and 22:

Paragraph 21: “There is clear authority that in determining impairment of fitness to practise at the time of the hearing regard must be had to the way the person has acted or failed to act in the past .......

Paragraph 22: “In my judgement this means that the context of the doctor’s behaviour must be examined. In circumstances where there is misconduct at a particular time, the issues becomes whether the misconduct, in the context of the doctor’s behaviour both before the misconduct and at the present time, is such as to mean that his or her fitness to practise is impaired. The doctor’s misconduct at a particular time may be so egregious that, looking forward, a panel is persuaded that the doctor is simply not fit to practise medicine without restrictions, or maybe at all. On the other hand, the doctor’s misconduct may be such that, seen within the context of an otherwise unblemished record, a Fitness to Practise Panel could conclude, that looking forward, his or her fitness to practise is not impaired despite the misconduct.”

27. Further Mr McCartney directed the Tribunal to the case of Nandi v GMC 2004 EWHC 2317, in which Collins J indicated:

"that seriousness must be given its proper weight, ie: with regard to conduct that would be regarded as deplorable by fellow practitioners."

28. Mr McCartney submitted that the Tribunal should approach this matter taking into account: the context in which the allegation arose; what was the motivation for the events which took place and what evidence was there of reflection, remediation and insight. XXX

29. Mr McCartney observed that Dr Hettiarachchi has already admitted, in his statement and in oral evidence, that he acted poorly, demonstrated poor judgement and was wrong in his actions. However, he noted that Dr Hettiarachchi’s motivation
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was to create a website which was going to be of particular assistance to people who would be attending and seeking the assistance of the Clinic, and that this is not contested by the GMC. Mr McCartney submitted that Dr Hettiarachchi’s evident enthusiasm and motivation for his project had overshadowed his judgement in relation to pursuing Patient A and Patient B for assistance. He conceded that Dr Hettiarachchi should have ‘picked up’ on the discomfort of the patients, should have been more sensitive given the context of the doctor patient relationship. He should have exercised better judgement.

30. Mr McCartney submitted Dr Hettiarachchi had very positive testimonials attesting to his positive attitude, integrity, commitment and enthusiasm as a doctor. He submitted that any finding made should take into account Dr Hettiarachchi’s unblemished career to date.

31. Mr McCartney submitted that Dr Hettiarachchi had acted unwisely, inappropriately and exercised poor judgement. However, he suggested that this conduct would not be seen as deplorable by members of the public or the profession. He submitted that Dr Hettiarachchi had demonstrated insight in his statements, through his remediation and during his oral evidence. Mr McCartney directed the Tribunal’s attention to courses Dr Hettiarachchi has undertaken including Maintaining Professional Boundaries from 21 – 23 May 2018 and Maintaining Professionalism on 6 December 2018. He noted that Dr Hettiarachchi has embraced the support of colleagues and supervisors XXX.

32. Mr McCartney submitted that not all cases where there is misconduct automatically lead to a finding of impairment and that Dr Hettiarachchi had demonstrated both insight and remediation.

The Tribunal’s Approach

33. In reaching its decision on facts, the Tribunal has borne in mind that the burden of proof rests on the GMC. Dr Hettiarachchi 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.

34. The Tribunal reminded itself that it must form its own judgment about the witness evidence heard before it, and the reliability of such witnesses, including Dr Hettiarachchi. It noted that it must decide whether to accept or reject such evidence, and where it is accepted, what weight to attach to it.

35. The Tribunal also bore in mind that it should assess and determine each paragraph and sub-paragraph of the Allegation separately. It reminded itself that while it could draw inferences from the evidence, it must not speculate as to any further evidence that has not come before it.

36. The Tribunal accepted the advice of the Legally Qualified Chair.
37. 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 then whether any finding of that misconduct, could lead to a finding of impairment.

"[Misconduct] must be linked to the practise of medicine, or conduct that otherwise brings the profession into disrepute, and it must be serious; the sort of conduct which would be regarded as deplorable by fellow practitioners" (per Auld LJ in Meadow v GMC, at paragraphs 200, 201).

Guidance on the issue of misconduct has been provided in the judgment of Elias LJ in Remedy UK v GMC, in which his Lordship concluded that a number of principles could be derived from an overview of the existing authorities.

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 outside the course of professional practice itself, but which brings disgrace upon the doctor and thereby prejudices the reputation of the profession;"

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

39. In this regard the Tribunal is reminded of the dicta of Sir Anthony Clarke M.R. in Meadow v GMC at paragraph 32:

"The purpose of FTP proceedings is not to punish the practitioner for past misdoings but to protect the public against the acts and omissions of those who are not fit to practise. The FTP Tribunal thus looks forward not back. However, in order to form a view as to the fitness of a person to practise today, it is evident that it will have to take account of the way in which the person concerned has acted or failed to act in the past."

The Tribunal’s Analysis of the Evidence and Findings

40. Dr Hettiarachchi made a number of admissions regarding the matters alleged against him. The Tribunal found no case to answer regarding allegations concerning Dr Hettiarachchi’s behaviour towards Patient A in the Clinic and that his actions in sending an email on 18 October 2017 were not dishonest. The GMC applied to amend the allegation in the light of the Tribunal’s finding no case to answer to paragraphs 3 and 9 of the allegation. The Tribunal granted the application to amend
the allegation and Dr Hettiarachchi made admissions in respect of the amended paragraphs.

Misconduct

41. The Tribunal firstly considered if the facts admitted and found proved amounted to misconduct. In so doing, it had regard for the General Medical Council’s guidance in its publication GMP and the principles set out therein, in particular, paragraphs 47, 50, 65 and 73. These state:

"47 You must treat patients as individuals and respect their dignity and privacy...

50 You must treat information about patients as confidential....

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

73 You must cooperate with formal inquiries and complaints procedures...”

42. The Tribunal considered paragraph 3 of the amended Allegation. The Tribunal acknowledged that Dr Hettiarachchi delivered medication to Patient A because the IT system had broken down. It noted that this behaviour may have been ill advised but it does not constitute misconduct.

43. Re: paragraph 4 of the Allegation. It found that Dr Hettiarachchi had been over familiar and used inappropriate language that was not proper conduct for a medical professional, specifically "I feel sad when someone ignores me". This behaviour crossed the boundary of conduct that is expected of a doctor and the Tribunal determined that this does constitute misconduct.

44. Re: paragraph 5. The Tribunal noted that Dr Hettiarachchi obtained Patient A’s telephone number in relation to clinical matters and subsequently went on to communicate with Patient A about his website project. The Tribunal considered that there was evidence to indicate that Dr Hettiarachchi had discussed the project with Patient A and that she had agreed to participate in the project. The Tribunal was of a view that there was a legitimate reason to obtain the number. It may have been ill advised to do so, in that it was not specifically clinically indicated for Patient A, however there was no mischief in the act of obtaining the telephone number and therefore this paragraph does not amount to misconduct.

45. Re: paragraphs 6 a and d and 7. The Tribunal found that in relation to 6 a and 6 d Dr Hettiarachchi’s behaviour amounted to misconduct because he had
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breached the doctor patient professional boundary causing Patient A a degree of distress and discomfort.

46. Re: paragraphs 6 b and c and 7. The Tribunal found that in relation to 6 b and 6 c Dr Hettiarachchi’s behaviour did not amounted to misconduct because 6 b was clinically justified, and Patient A agreed to Dr Hettiarachchi’s request regarding 6 c.

47. Re: paragraph 8. The Tribunal found Dr Hettiarachchi’s behaviour amounted to misconduct. The Email Dr Hettiarachchi sent breached fundamental tenets of GMP and the overarching objective.

48. Re: paragraph 10. The Tribunal found Dr Hettiarachchi’s behaviour did not amount to misconduct because Dr Hettiarachchi initially contacted Patient B to provide test results. Those texts were clinically justified.

49. Re: paragraph 11. The Tribunal found Dr Hettiarachchi’s behaviour did amount to misconduct because the message was not clinically justified and breached the doctor patient professional boundary. Dr Hettiarachchi’s behaviour caused Patient B such a degree of distress that she did not return to the clinic again and attended a different clinic in London.

Patient A

50. The Tribunal noted that Dr Hettiarachchi admitted to corresponding with Patient A by text and email following her attendance at the Clinic. Some of that correspondence related to his request for her to provide a translation into Russian. Phrases “you owe me a coffee” and “I feel sad when someone ignores me so I’m not going to trouble you again,” the Tribunal regarded as inappropriate, intrusive and in breach of doctor patient confidentiality. The email sent on 18 October 2017, after a complaint had been made, sought to explain why Dr Hettiarachchi had sent text messages and emails to Patient A. It advised her that he had been suspended from work. It included the following entreaty “I most humbly beg you to consider withdrawing your complaint. ….. I would be grateful if you don’t use this email against me.” It was a serious lapse of judgement, amounting to interfering with a witness and seeking to obstruct the GMC complaints procedure. Patient A’s evidence, which the Tribunal accepts is that she was uncomfortable and embarrassed. Patient A described his behaviour as ‘too overfriendly.’

Patient B

51. The Tribunal noted that Dr Hettiarachchi admitted to having corresponded with her following her consultation at the clinic and that the content was not clinically justified. The Tribunal accepted Patient B’s evidence “I don’t even know why he invite me for a coffee. For me he is a stranger and met twice and he had
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opportunities to see me half naked cos of his occupation and I see him in the clinic
and no reason. He didn’t say why. I didn’t really know the reason why”. She
explained being nervous when attending the clinic and that Dr Hettiarachchi had
tried to persuade her to help with his translation. Patient B said she tried to be polite
and told him she was too busy with exams and lacked the skills in English to assist.
The Tribunal found that Dr Hettiarachchi’s behaviour ignored her sensitivity and
caused her not to return to the Clinic but to attend a different clinic in London.

52. Regarding both patients, Dr Hettiarachchi’s actions, however well-intentioned,
caused a breakdown in Patient A and Patient B’s confidence in the medical
profession which is serious. It could have placed both patients at risk, deterring
them from seeking medical help.

Impairment

53. The Tribunal took into consideration the evidence of Dr F, Dr H and Dr G that
at that time Dr Hettiarachchi was under stress due to a variety of factors including a
new IT system which on 9 August 2017 had broken down, the anticipated reduction
in the number of consultants from 10 to 3.2 in the provision of GUM services which
led Dr Hettiarachchi to consider applying to train as a GP. XXX

54. The Tribunal found that Dr Hettiarachchi’s behaviour as set out in paragraphs
4, 6 (a) and (d), 7, 8 and 11 amounted to misconduct and went on to consider
whether, as a result of that misconduct Dr Hettiarachchi’s fitness to practise is
currently impaired.

55. The Tribunal considered that at that time in 2017, Dr Hettiarachchi had
presented a risk to patients, brought the medical profession into disrepute and that
he had breached fundamental tenets of the profession.

56. The Tribunal considered Dr Hettiarachchi insight into his behaviour, whether
his conduct was remediable, had been remedied, and the likelihood of repetition.

57. The Tribunal determined that all of the misconduct is remediable and has
been remedied. XXX

58. Dr Hettiarachchi provided evidence of his insight through his witness
statement, oral evidence and exhibits. He explained that he had attended a course
so that he could understand why he had behaved as he did. In oral evidence
Dr Hettiarachchi stated that in his distorted thinking in 2017, he believed that
because the website he was creating was a good thing for patients, it was
acceptable to ask a patient during a consultation to assist in translation for the
website. He recognised now that such behaviour jeopardised the doctor/patient
relationship and crossed the professional boundary. The Tribunal determined that
Dr Hettiarachchi’s level of insight was good in regard to the Allegation save for
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paragraph 8. Dr Hettiarachchi’s insight into his behaviour at paragraph 8 (a) is sufficient, and into paragraph 8 (b) is adequate but there is scope for improvement.

59. The Tribunal considered the likelihood of repetition to be low because Dr Hettiarachchi has developed insight, XXX and supervision. XXX. The Tribunal accepted Dr Hettiarachchi’s evidence that he is keen to avoid repetition.

60. Patients must be able to trust that the doctor patient relationship will always remain professional. They need to be sure that the information obtained in a clinical setting will not be used for any other purpose without their knowledge or consent. The Tribunal considers it necessary to send a clear message to Dr Hettiarachchi, to the profession, to patients and to the wider public. Any attempt by a doctor to usurp the GMC’s regulatory process is wholly unacceptable.

61. The Tribunal was mindful of the need to uphold proper standards and maintain public confidence in the profession and in the GMC as its regulator, and determined that these would be undermined if a finding of impairment was not made in this case. The finds Dr Hettiarachchi’s fitness to practise is impaired.

Determination on Sanction - 17/05/2019

1. Having determined that Dr Hettiarachchi’s fitness to practise is impaired by reason of his misconduct, the Tribunal has now considered what action, if any, it should impose with regard to his registration.

2. In doing so, the Tribunal has given careful consideration to all the evidence adduced at the facts and impairment stages, together with submissions made by Mr Brook, on behalf of the GMC, and Mr McCartney, on behalf of Dr Hettiarachchi. No further evidence was presented at this stage of the hearing.

Submissions on behalf of the GMC

3. Mr Brook submitted that the appropriate sanction in this case would be the imposition of a period of suspension on Dr Hettiarachchi’s registration. He submitted that this is both necessary and proportionate in order to satisfy the statutory overarching objective and maintain confidence in the profession.

4. Mr Brook directed the Tribunal’s attention to the relevant paragraphs in the Sanctions Guidance (February 2018 edition) (“SG”) including 50, 52, 55, 91, 92, 93 and 97. He guided the Tribunal through the paragraphs relevant to its deliberations on mitigating factors, aggravating factors and determining sanction.

5. Mr Brook submitted that there were no exceptional circumstances in Dr Hettiarachchi’s case that would justify taking no action and it would not be
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appropriate to do so. In relation to the imposition of conditions or undertakings on Dr Hettiarachchi’s registration, Mr Brook submitted that conditions would not be appropriate or proportionate.

6. Mr Brook submitted due to the seriousness of Dr Hettiarachchi’s conduct that his behaviour falls within the sanction of suspension. He submitted that the public would expect behaviour of this kind to be marked with a sanction reflecting the seriousness of the misconduct.

Dr Hettiarachchi’s Submissions

7. Mr McCartney submitted that the finding of misconduct and impairment sends a clear message to the profession of the seriousness of Dr Hettiarachchi’s misconduct. He submitted that Dr Hettiarachchi has already suffered the consequences of his actions including a 6 month suspension from the Trust during the GMC investigation and 4 months from the Deanery due to a combination of suspension XXX. Mr McCartney submitted that the sanction of suspension would be disproportionate and have a significant impact on Dr Hettiarachchi, including the possible termination of his current training post.

8. Mr McCartney directed the Tribunal’s attention to further relevant paragraphs of the SG including paragraphs 20 and 70, which state:

"20. In deciding what sanction, if any, to impose the tribunal should consider the sanctions available, starting with the least restrictive. It should also have regard to the principle of proportionality, weighing the interests of the public against those of the doctor (this will usually be an impact on the doctor’s career, eg a short suspension for a doctor in training may significantly disrupt the progression of their career due to the nature of training contracts).

70. 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:

a. what the exceptional circumstances are
b. why the circumstances are exceptional
c. how the exceptional circumstances justify taking no further action."

9. Mr McCartney submitted that, in the determination on impairment, the Tribunal accepted the evidence of Dr H and Dr G, XXX.

10. Mr McCartney submitted that there was very clear evidence, as accepted by the Tribunal, of insight into his actions, full remediation and demonstration of remorse for his actions. Further, he submitted that the Tribunal have recognised that
the risk of repetition is low. He submitted that Dr Hettiarachchi accepts that his conduct was inappropriate, but noted that it was well intentioned, and meant to assist patients.

11. Mr McCartney reiterated that Dr Hettiarachchi is recognised as an excellent clinician, has a clean disciplinary record before and after the events, is extremely well thought of by fellow practitioners and patients which is evident from patient feedback and testimonials. He submitted that the regulatory objective has already been met with the finding of impairment and that any sanction would simply be punitive. Mr McCartney submitted that this is not a matter of dishonesty but rather poor judgement by a well-meaning practitioner. He submitted that the public interest has been met and the gravity of the misconduct has been marked by the Tribunal’s finding and the periods of suspension Dr Hettiarachchi has already had.

**The Tribunal’s Approach**

12. The Legally Qualified Chair gave legal advice to the Tribunal which it accepted.

13. The decision as to the appropriate sanction to impose, if any, is a matter for this Tribunal exercising its own judgement.

14. In reaching its decision, the Tribunal has taken account of the Sanctions Guidance (2018) and Good Medical Practice (2013). It has borne in mind that the purpose of a sanction is not to be punitive, but to protect patients and the wider public interest, although it may have a punitive effect.

15. The Tribunal has considered all three limbs of the overarching objective, and found pertinent to this case paragraphs b and c regarding maintaining public confidence in the medical profession and maintaining proper professional standards.

16. The Tribunal has already given a detailed determination on impairment and has taken those matters into account during its deliberations on sanction.

**Mitigating and Aggravating Factors**

17. The Tribunal first identified the mitigating factors in this case.

18. The Tribunal considered the mitigating features of this case to include: that Dr Hettiarachchi is a good doctor with an unblemished record until now; that the testimonials, patient and colleague feedback demonstrate the high regard in which he is held and patient satisfaction; that his remorse is genuine as set out in his written statement and oral evidence; that he has remediated his behaviour; there is a low risk of a repetition of such conduct; he has shown good insight into the shortcomings of his conduct save for the email he wrote; that his intentions
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throughout were good to improve advice available to patients save for the email; the
gravity of Dr Hettiarachchi’s conduct in sending the email on 18 October 2017 was a
single event; that he made full admissions to the allegation; XXX.

19. The Tribunal accept that Dr Hettiarachchi was probably so intent upon
explaining to Patient A the reasons he had acted as he did, to demonstrate he had
no ulterior motives such as seeking to establish a relationship with her, that he did
not properly consider the serious error of judgement he exercised in sending the
e-mail to Patient A during a GMC investigation into Patient A’s complaint. The
Tribunal accept that Dr Hettiarachchi was probably feeling isolated at the time of
these events, beset by stressors arising from the uncertainty of his job XXX caused
by working and living away from his home.

20. The Tribunal considered the aggravating features of this case to include: both
patients were deterred from returning to the clinic where Dr Hettiarachchi worked;
the fact that there were 2 patients who each made a complaint; he abused his
professional position and the knowledge of patient’s confidential contact details; he
sent an email seeking to persuade Patient A to consider withdrawing her complaint
and which encouraged Patient A not to show the email to the GMC; the insight
Dr Hettiarachchi showed regarding the email was satisfactory but it could be
improved and his oral evidence suggested he did not fully appreciate the seriousness
of sending that email.

21. The Tribunal gave consideration to the relevant paragraphs in GMP as
submitted by the advocates: paras 20, 25, 42, 91, 92, 93, 97 (a), (e), (f) and (g).

The Tribunal’s Determination on Sanction

22. The Tribunal considered each sanction in ascending order of seriousness,
starting with the least restrictive.

No action

23. Mr Brook submitted that this would be inappropriate given the findings made
by the Tribunal regarding impairment. Mr McCartney submitted that in considering
the appropriate sanction this was proportionate in the light of Dr Hettiarachchi’s
remorse, remediation, insight, low risk of repetition, his XXX and isolation at the
relevant time, and because he is such an excellent doctor who was well intentioned.
Mr McCartney asserted that Dr Hettiarachchi’s Article 6 right to practice should only
be interfered with insofar as it was necessary to achieve the objective of the
regulator. That objective has been achieved through the Tribunal finding
Dr Hettiarachchi’s fitness to practise is impaired and his having already experienced
suspensions from his Trust and the Deanery arising from the complaints.
Mr McCartney submitted that the circumstances of this particular case were
exceptional and accordingly the Tribunal could rely upon paragraph 70 (of the SG) to
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take no action. The Tribunal took all these matters into consideration in particular Dr Hettiarachchi’s current training position which could be jeopardised should a more severe sanction be imposed.

24. The Tribunal had regard to the serious errors of judgement, the effects of his behaviour upon the two patients, and his intention to undermine the regulatory procedure when he sent the email. Even allowing for his possible state of panic, such conduct poses a risk to the public and the standards of the profession. Consequently the Tribunal does not consider that taking no action would be proportionate in the case and that the circumstances whilst unusual are not exceptional.

Conditions/ Undertaking

25. Both advocates submitted neither of these sanctions are appropriate. The Tribunal having considered paragraphs 50, 52, 55 and 61 of the Sanctions Guidance accept that neither of those sanctions would be inappropriate.

Suspension

26. On the basis of the gravity of Dr Hettiarachchi’s conduct in sending the email on 18 October 2017, the Tribunal considers nothing less than a suspension would be proportionate. They would be inclined to impose a suspension for 6 months. The Tribunal has borne in mind that Dr Hettiarachchi engaged with the hearing process, and has given an honest account to the Tribunal. It accepts Dr Hettiarachchi’s commitment to the medical profession, and all the mitigation outlined above.

27. The Tribunal recognises that Dr Hettiarachchi has excellent clinical skills to offer to the public and has made every effort to continue to augment them. Dr Hettiarachchi is regarded as a good clinician by those he has worked with previously and currently. He enjoys using his technical skills to devise improvements in whichever area of medicine he is in. The public benefit enormously from his diligence, enthusiasm, and usual good practice. Until 2017 there had been no complaints against him. His level of remorse and remediation are accepted. The Tribunal does not wish to jeopardise his training to become a GP and are mindful of paragraph 20 of the SG. Having considered the unusual circumstances of this case, the Tribunal impose a suspension of 14 days.

Review hearing directed

28. The Tribunal considered whether it would be appropriate to direct a review hearing in Dr Hettiarachchi’s case. The Tribunal had regard to paragraph 163 of the SG which states:
“163. It is important that no doctor is allowed to resume unrestricted practice following a period of conditional registration or suspension unless the tribunal considers that they are safe to do so.”

29. The Tribunal determined that in the particular circumstances of this case it is not necessary to direct a review hearing in this case. A review is not necessary to maintain standards in the profession, for public protection or in the public interest. A period of suspension is necessary to mark the gravity of the misconduct. There is no need for a review given the low risk of repetition and because Dr Hettiarachchi has sufficient insight.

Immediate Order

30. The Tribunal determined that an immediate order is not necessary, proportionate or in the public interest. It accepted that an immediate order to protect the public is unnecessary.

31. The effect of the foregoing direction is that, unless Dr Hettiarachchi exercises 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.

32. That concludes this case.

Confirmed
Date 17 May 2019 Miss Gillian Temple-Bone, Legally Qualified Chair
Defence application to disclose redacted evidence

Dr Hettiarachchi’s Submissions

1. On behalf of Dr Hettiarachchi, Mr McCartney made an application under Rule 34(1) of the General Medical Council (‘GMC’) (Fitness to Practise) Rules 2004, as amended (the Rules) to admit into evidence the fully un-redacted statement from Patient A, and Patient A’s medical records in respect of the Buryfields Central and North West London NHS Foundation Trust Sexual Health Clinic (‘the Clinic’).

2. Mr McCartney submitted that the Tribunal is entitled to have relevant information before it to assist it in reaching its determination on facts. He stated that the information contained within the redactions goes directly to assisting the Tribunal to consider Patient A’s understanding of the process at the Clinic. Mr McCartney submitted that the redacted material assists with background and context of the evidence, including Patient A’s familiarity with the Clinic procedure and how many times she had attended the clinic.

3. Further Mr McCartney submitted that the evidence would go to establishing the credibility and reliability of Patient A’s recollection of events and may address inconsistencies in her statement. It would be both fair and proper to admit the evidence, and be prejudicial to Dr Hettiarachchi’s case to refuse the application. The Tribunal can exercise its own professional judgement as to what material is relevant and what is not.

GMC Submissions

4. On behalf of the GMC, Mr Brook submitted the GMC has disclosed the evidence to the Tribunal which it deemed necessary to assist the Tribunal to make its findings on facts. He had applied the test of whether the redacted evidence assists the case of Dr Hettiarachchi or undermines the GMC case. The GMC opposed the application for the redacted material to be placed before the Tribunal.

Tribunal Approach

5. The Tribunal accepted the advice of the Legally Qualified Chair (‘LQC’). She advised that the Tribunal must balance the probative value of the material within the document with the possible prejudice that may arise from viewing it. She acknowledged that there may be information within the document which is not relevant to the Allegation, however she advised that the Tribunal will exercise its professional independent judgement as to what weight to attach to disclosed evidence.
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6. The LQC directed the Tribunal’s attention to Rule 34(1) which states:

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

Tribunal Decision

7. In reaching its decision, the Tribunal has borne in mind the principle of being fair to both parties and that it should only admit evidence if it is relevant. It also noted the submissions from both parties.

8. The Tribunal recognised that as an experienced panel it would be able to dismiss from its mind any information that is not relevant to the Allegation. Moreover it would be able to attach appropriate weight to the relevant information in the document.

9. The Tribunal considered whether it would be fair to admit the redacted paragraphs of Patient A’s statement. It took account of the evidence before it and apparent inconsistencies.

10. The Tribunal determined that the historical medical notes of Patient A’s attendance at the Clinic were material to the Tribunal’s understanding of the argument Dr Hettiarachchi was advancing. It will attach the appropriate weight to the evidence disclosed.

11. Therefore, the Tribunal has determined to grant Dr Hettiarachchi’s application under Rule 34(1) to admit the un-redacted statement and medical notes within the GMC bundle.

ANNEX B – 08/05/2019

Application to Amend Allegation

GMC Submissions

1. On behalf of the GMC, Mr Brook made an application under Rule 17(6) of the General Medical Council (‘GMC’) (Fitness to Practise Rules) 2004 as amended (‘the Rules’) for the following amendment to be made to the Allegation:

8. On 18 October 2017 you sent an inappropriate email to Patient A in that it:
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a. asked Patient A to withdraw the complaint they had made to the
General Medical Council ('GMC') about you;

Amend to:

8. On 18 October 2017 you sent an inappropriate email to Patient A in
that it:

a. asked Patient A to withdraw consider withdrawing the complaint
they had made to the General Medical Council ('GMC') about
you;

2. Mr Brook submitted that this amendment was for the purpose of adding
clarity to the Allegation and that there was no injustice to Dr Hettiarachchi to grant
the application.

Dr Hettiarachchi’s Submissions

3. On behalf of Dr Hettiarachchi, Mr McCartney submitted that he did not oppose
the application and agreed that it adds clarity to the Allegation.

Tribunal Decision

4. The Tribunal determined that there was no injustice to Dr Hettiarachchi to
grant the application and it was in the public interest in improving clarity to amend
the Allegation in accordance with Rule 17(6) of the Rules.

ANNEX C – 14/05/2019

Application for no case to answer for paragraphs 3 and 9 of the Allegation

Dr Hettiarachchi’s Submissions

1. On behalf of Dr Hettiarachchi, Mr McCartney made a submission of no case to
answer, under Rule 17(2)(g) of the General Medical Council’s (Fitness to Practise)
Rules 2004 (the Rules), in relation to paragraphs 3 and paragraph 9 of the
Allegation, in regard to paragraph 8.

2. Mr McCartney relied on the authorities of:

- Malhar SONI v GMC [2015] EWHC 364;
- Ivey v Genting Casinos (UK) Ltd [2017] UKSC 67; and
- R v Galbraith [1981] 2 All ER 1060.
3. Mr McCartney rehearsed Galbraith, which states:

“How then should the judge approach a submission of ‘no case?’

(1) ‘If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case.

(2) The difficulty arises where there is some evidence but it is of a tenuous character for example because of inherent weakness or vagueness or because it is inconsistent with other evidence:

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

(b) Where however the prosecution case is such that its strength or weakness depends on the view to be taken of a witness’ 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.”

4. Mr McCartney submitted that the Tribunal needs to objectively assess the evidence which has been presented by the GMC and determine whether there is sufficient evidence that it is more likely than not that Dr Hettiarachchi failed to obtain consent. Regarding paragraph 3 of the Allegation, he submitted that it was Patient A’s oral evidence that she accepted that it is possible that she misinterpreted Dr Hettiarachchi’s meaning when he said he was “going to get a nurse to examine you”. Patient A accepted that this could mean either Dr Hettiarachchi was going to get a nurse who would conduct the examination or that he was getting someone so that he could carry out the examination.

5. Mr McCartney submitted that it seemed unlikely if not implausible that Patient A did not understand it was Dr Hettiarachchi who would be conducting the examination because she had seen Dr Hettiarachchi, as the consulting doctor, on more than one occasion previously. Mr McCartney stated that when the nurse was preparing Patient A for the examination, it would be apparent that she was in fact a nurse and would not be conducting an examination and that they had an informal conversation. Patient A had an opportunity to specify prior to the start of the examination that she did not consent to a male practitioner carrying out the examination. The Tribunal’s attention was drawn to the medical record for Patient A on 9 August 2017. There is a tick in the box next to the question “Investigations/examination explained and client agreed.”
6. Patient A accepted that she did not raise any objections to the examination either when registering at the Clinic, while waiting, while being prepared, during the examination, directly after the examination or when she returned a week later to have another intimate examination from Dr Hettiarachchi. Patient A also stated that she was satisfied with the treatment from Dr Hettiarachchi and that he had resolved her medical compliant.

7. Mr McCartney submitted that Dr Hettiarachchi had no reason to believe that Patient A did not understand that he was carrying out the examination and that implied consent had, in fact, been given. He submitted that there was insufficient evidence from the GMC to be able to find this point proved, even when taken at its highest.

8. In respect of paragraph 9, in regards to paragraph 8 of the Allegation, Mr McCartney submitted that there is no evidence of dishonesty in the email. He accepted that the email could be considered inappropriate and wrong, but that does not mean it was dishonest. He submitted that there was no attempt at fraud, trickery, deception or manipulation but rather that Dr Hettiarachchi had requested that Patient A “consider withdrawing her complaint”. He submitted that, taking into account the GMC expert, Dr G states that the email is more likely to have been written as a result of panic or stress as opposed to dishonesty.

9. In all the circumstances, Mr McCartney submitted that the Tribunal should find that there is no case to answer for paragraphs 3 in its entirety and 9 in relation to 8.

GMC Submissions

10. On behalf of the GMC, Mr Brook submitted that the Tribunal should dismiss the application. Mr Brook stated that consent can be implied, and there are circumstances where this is evident. He referred to the appropriate authorities as listed above. He submitted it is the duty of a doctor, particularly in areas of sexual health and intimate examinations, that clear consent is obtained. He stated that it is Patient A’s evidence that she did not consent to being examined by Dr Hettiarachchi and that she had understood his explanation that he was getting a nurse “to examine her” as indication to her that it would not be Dr Hettiarachchi. Whether it was deliberately misleading or inadvertently misleading, he submitted that there is a case to answer here and that sufficient evidence had been adduced that could assist the Tribunal in making a finding. Further, Mr Brook submitted that Patient A was very clear that the word chaperone was never mentioned to her because if that word had been used she would have understood.

11. Mr Brook submitted that Patient A gave evidence that she did not feel she could stop the examination once it had started and did not want to cause trouble by objecting. He submitted that, the evidence is, Dr Hettiarachchi came around the
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curtain where Patient A was reclined and after a brief discussion with the nurse began the examination with no further consultation with Patient A. On the basis that Patient A did not give consent for Dr Hettiarachchi to undertake the examination, that his explanation of a chaperone was misinterpreted by Patient A and that Patient A did not want a male clinician to examine her, Mr Brook submitted that it is clear that Dr Hettiarachchi failed to obtain consent for himself to undertake the examination. He submitted that the wording utilised by Dr Hettiarachchi could most reasonably be interpreted exactly as Patient A had; that he was getting a nurse to perform the examination.

12. In relation to paragraph 9, Mr Brook submitted that there was a clear and covert attempt to get Patient A to withdraw her complaint. This was done in a manipulative manner. He submitted that Dr Hettiarachchi had attempted to tug on the heartstrings of Patient A. This was an attempt to go behind the investigation of his regulator and subvert proceedings against him. Mr Brook submitted that this was powerful evidence and a strong indication of dishonesty.

13. Therefore, Mr Brook submitted that the Tribunal should dismiss the application from Mr McCartney and continue to consider the Allegation in its entirety.

The Tribunal’s Approach and Legal Advice

14. Rule 17(2)(g) states:

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

15. Regarding inferences that may be properly drawn from the evidence the case of Malhar SONI v GMC [2015] EWHC 364 is relevant. The Tribunal must be mindful that when drawing inferences, it has been able to safely exclude, as less than probable, any other possible explanations.

16. In this instance the Tribunal must consider the case put on behalf of the GMC and whether, taken at its highest, this Tribunal could properly find the facts alleged to be proven. Regarding inferences to be drawn from the evidence, the Tribunal would have to be satisfied that it could safely conclude that other explanations were less probable than that which is alleged in paragraphs 3 and 9 of the Allegation against Dr Hettiarachchi, on which a submission of no case is sought.

Tribunal Decision

17. The Tribunal accepted the advice of the Legally Qualified Chair.
18. The Tribunal reminded itself that, at this stage, its purpose was not to make findings of fact but to determine whether sufficient evidence existed such that a Tribunal, correctly advised as to the law, could properly find the relevant paragraphs proved to the civil standard. The Tribunal considered Mr McCartney’s submissions and those of Mr Brook on behalf of the GMC. It took account of the evidence presented, both oral and documentary, in reaching its decision.

19. The Tribunal considered the evidence regarding Dr Hettiarachchi’s conduct towards Patient A regarding; the examination, his explanation for it, who would conduct it, and the obtaining of her consent. The context was that Patient A had attended the Clinic before and seen Dr Hettiarachchi. He had proposed to examine her then, in 2016, but she had declined because she had no symptoms. On this occasion she had a symptom and she had accepted the need to be examined. Dr Hettiarachchi had taken her history and had explained the need for an examination. Patient A in evidence accepted that was correct. Patient A asserted that she expected an examination but thought a female nurse would examine her.

20. The medical record shows that Dr Hettiarachchi indicated the need for an examination and that Patient A had agreed. Patient A accepted there was the possibility that she did not understand Dr Hettiarachchi’s meaning when he told her he was getting a nurse. Patient A did not specify at any point that she wanted a female clinician only. It is unrealistic for a doctor to take the history of a patient, explain the need for an examination and then get another doctor to do the examination. If the patient had an objection, they could have raised it either at reception or when the doctor took the history and advised about the need for an examination. It is implicit in the actions of Dr Hettiarachchi that having taken a history and advised about the need for an examination that he would be conducting it. That a misunderstanding may have arisen thereafter, prior to his actually examining her, is not evidence that he “failed” as set out in subparagraphs 3a, 3c and 3d.

21. It is possible that Patient A did give consent. It is possible that she misunderstood. It is possible that she didn’t give consent and that he didn’t appreciate that. The Tribunal cannot exclude any of these possibilities. Taking Patient A’s evidence as to what Dr Hettiarachchi said to her at its highest the Tribunal could not find on a balance of probabilities that Dr Hettiarachchi did, in fact, failed to inform Patient A about the examination, failed to provide adequate information and failed to obtain her consent to his conducting the examination. The Tribunal determined that on a balance of probabilities, it is not possible to find that Dr Hettiarachchi failed to obtain consent and did not lead Patient A to believe that a female colleague would be carrying out the examination as set out in subparagraph 3b.
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22. The next issue for the Tribunal to determine at this stage is in relation to the allegation in paragraph 9, whether Dr Hettiarachchi’s conduct as admitted to in paragraphs 8a and 8b was dishonest. Dishonesty is a state of mind which, unless admitted, can only be inferred from conduct. In many cases a tribunal is very well placed, with its experience of the world and common sense, to determine what is dishonest by ordinary decent standards.

23. The Tribunal heard evidence that Dr Hettiarachchi was very stressed, and this may have affected his judgement. Dr Hettiarachchi did not suggest that Patient A should make a false statement or suggest that she is incorrect. He asked her to consider withdrawing her complaint. This is a request to withdraw a complaint, not to change or embellish her account. He did not dispute her position, but tried to explain his motives. It is clear that Dr Hettiarachchi attempted to put emotional pressure on Patient A. Dr Hettiarachchi did not lie to Patient A in his email. It could be considered unwise, placing Patient A in a difficult position. The content of the email contained no untruths but it was intended to persuade Patient A not to pursue her complaint to the GMC. The Tribunal do not find this to be characterised as dishonest. Interference with a witness is a serious matter.

24. The Tribunal accept that there is no case to answer and have reached the conclusion that Dr Hettiarachchi’s conduct both in writing and sending the email was not dishonest.

25. Therefore, the Tribunal determined to grant the application from Mr McCartney, in accordance with Rule 17(2)g of the Rules, that there is no case to answer for paragraphs 3 and 9.

ANNEX D — 15/05/2019

Application to Amend Allegation

GMC Submissions

1. On behalf of the GMC, Mr Brook made an application under Rule 17(6) of the General Medical Council (‘GMC’) (Fitness to Practise Rules) 2004 as amended (‘the Rules’) for the following amendment to be made to the remaining paragraphs of the Allegation (see Annex C):

Patient A

3. On 9 August 2017 you were consulted by Patient A (‘the Consultation’) at the Buryfields Sexual Health Clinic, Guildford (‘the Clinic’).
4. During the Consultation you carried out an intimate examination of Patient A with a female colleague present as a chaperone.

4. Following the Consultation you prescribed Patient A the medication set out in Schedule 1 (‘the Medication’) and subsequently met Patient A after work at a shopping centre to give them the Medication.

5. Between 9 August 2017 and 30 August 2017 you contacted Patient A by email and text message (‘the Correspondence’).

6. You obtained Patient A’s telephone number from Patient A’s medical records.

7. The Correspondence:
   a. was:
      i. of a personal nature;
      ii. not clinically justified;
   b. included:
      i. saying that Patient A ‘owed you a coffee’, or words to that effect;
      ii. advice to Patient A not to consume alcohol with their antibiotics;
      iii. a request that Patient A assist you with translating a patient leaflet that you had prepared.

8. On 18 October 2017 you sent an inappropriate email to Patient A in that it:
   a. asked Patient A to withdraw the complaint they had made to the General Medical Council (‘GMC’) about you;
   b. encouraged Patient A not to disclose the email to the GMC by stating ‘I would be very grateful if you don’t use this email against me’, or words to that effect.

Patient B

10. In September 2017 you were consulted by Patient B at the Clinic on two occasions.

11. Between 18 September 2017 and 19 September 2017 you contacted Patient B by text message using their personal contact details.
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12. On 19 September 2017 you contacted Patient B using WhatsApp Messenger using their personal contact details. The message:

   a. was:
      i. of a personal nature;
      ii. not clinically justified;

   b. included a request to ‘have a small chat with you over a coffee or a meal’, or words to that effect.

The Proposed amended Allegation (paragraphs renumbered chronologically):

Patient A

1. On 9 August 2017 you were consulted by Patient A (‘the Consultation’) at the Buryfields Sexual Health Clinic, Guildford (‘the Clinic’).

2. During the Consultation you carried out an intimate examination of Patient A with a female colleague present as a chaperone.

3. Following the Consultation you prescribed Patient A the medication set out in Schedule 1 (‘the Medication’) and subsequently met Patient A after work at a shopping centre to give them the Medication.

4. Between 9 August 2017 and 30 August 2017 you contacted Patient A by email and text message (‘the Correspondence’).

5. You obtained Patient A’s telephone number from Patient A’s medical records.

6. The Correspondence included:
   a. saying that Patient A ‘owed you a coffee’, or words to that effect;
   b. advice to Patient A not to consume alcohol with their antibiotics;
   c. a request that Patient A assist you with translating a patient leaflet that you had prepared;
d. an email saying that you felt sad when Patient A ignored you, when you had sent her a text message asking her if you could ring her about the translation she had done.

7. Your actions as outlined at Paragraphs 6 (a), (c) and (d) were not clinically justified.

8. On 18 October 2017 you sent an inappropriate email to Patient A in that it:
   a. asked Patient A to consider withdrawing the complaint they had made to the General Medical Council ('GMC') about you;
   b. encouraged Patient A not to disclose the email to the GMC by stating that 'I would be very grateful if you don’t use this email against me’, or words to that effect.

Patient B

9. In September 2017 you were consulted by Patient B at the Clinic on two occasions.

10. Between 18 September 2017 and 19 September 2017 you contacted Patient B by text message using their personal contact details.

11. At 19:10 on 19 September 2017 you contacted Patient B using WhatsApp Messenger using their personal contact details. The message:
   a. was not clinically justified;
   b. included a request to 'have a small chat with you over a coffee or a meal’, or words to that effect.

2. Mr Brook submitted that this amendment was for the purpose of adding clarity to the Allegation and that there was no injustice to Dr Hettiarachchi to grant the application.

Dr Hettiarachchi’s Submissions

3. On behalf of Dr Hettiarachchi, Mr McCartney submitted that he did not oppose the application and agreed that it adds clarity to the Allegation.
4. The Tribunal determined that there was no injustice to Dr Hettiarachchi and granted the application as it was in the public interest in improving clarity to amend the Allegation in accordance with Rule 17(6) of the Rules.