Record of Determinations – Medical Practitioners Tribunal
PUBLIC RECORD

Dates: 12/08/2019 - 14/08/2019
Medical Practitioner’s name: Dr Maximiliaan BERENDS
GMC reference number: 4277790
Primary medical qualification: Artsexamen 1995 Rijksuniversiteit te Groningen

Type of case
New - Misconduct
New - Determination by other regulator

Outcome on impairment
Not Impaired
Impaired

Summary of outcome
Erasure

Tribunal:
Legally Qualified Chair: Mr Kenneth Hamer
Lay Tribunal Member: Mr Simon Bond
Medical Tribunal Member: Dr Helen Grote
Tribunal Clerk: Mrs Sam Montgomery

Attendance and Representation:
Medical Practitioner: Not present and not represented
GMC Representative: Ms Helen Duong, Counsel, instructed by GMC Legal, represents the General Medical Council

Attendance of Press / Public
In accordance with Rule 41 of the General Medical Council (Fitness to Practise) Rules 2004 the hearing was held in public.
Overarching Objective

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

Determination on Facts - 12/08/2019

Background

1. Dr Berends qualified in 1995 at the University of Groningen, Netherlands and prior to the events which are the subject of this hearing Dr Berends worked as a General Practitioner in the Netherlands. Dr Berends has not practised in the UK since 2008. However, he is registered with the GMC but does not hold a licence to practise. At the time of the events Dr Berends was practising as a General Practitioner in a Practice in Eindhoven, Netherlands.

2. The allegation that has led to Dr Berends’ hearing before the MPTS can be summarised as substantial concerns regarding his practice as a professional following a determination on 21 November 2016 by the Regional Medical Disciplinary Tribunal in Eindhoven (the MDT). The MDT determined that Dr Berends had engaged in a personal and sexual relationship with a patient, and as a result of that determination Dr Berends was suspended for six months from 3 January 2017. It is further alleged that Dr Berends failed to disclose the determination to the General Medical Council (GMC).

3. Initial concerns were raised with the GMC on 3 January 2017 by way of an International Market (IMI) alert. The alert showed that the MDT had determined to place a period of prohibition on Dr Berends’ registration from 3 January to 3 July 2017.

The Outcome of Applications Made during the Facts Stage

4. The Tribunal determined that service was effective and to proceed in the absence of Dr Berends. The Tribunal’s full decision on the application is included at Annex A.

The Allegation and the Doctor’s Response

5. The Allegation made against Dr Berends is as follows:

1. On 21 November 2016, the Regionaal Tuchtcollege in Eindhoven determined that:
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a. there were substantial reasons concerning your practice as a professional; **To be determined**

b. as a result of its determination as set out at paragraph 1a you be suspended from the medical register for six months from 3 January 2017. **To be determined**

2. You failed to disclose the determination as set out at paragraph 1 to the General Medical Council. **To be determined**

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

a. the determination by an overseas body that your fitness to practise is impaired, in relation to paragraph 1; **To be determined**

b. your misconduct, in relation to paragraph 2. **To be determined**

Factual Witness Evidence

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

- Ms A, GMC Investigation Officer;
- Mr B, translator for Translation Empire.

Documentary Evidence

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

- The original transcript of the MDT hearing, dated 21 November 2016;
- The translated copy of the transcript of the hearing, undated;
- The press release from the Tuchtcollege website, dated 21 November 2016;
- Letter from CIBG Ministry of Public Health, Wellbeing and Sport to Dr Berends, dated 3 January 2017, with details from the BIG Register (Professions in Individual Healthcare) confirming the limitation or prohibition imposed on him;
- Translated copy of the letter from the BIG Register to Dr Berends, undated;
- IMI report, dated 3 January 2017;
- Email from Dr Berends to Ms A, dated 29 July 2018;
- Dr Berends’ work details form and Email notification form, both dated 29 July 2018;
- Email from BIG Register to Ms A, dated 13 December 2018.
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The Tribunal’s Approach

8. 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 Berend 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.

The Tribunal’s Analysis of the Evidence and Findings

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

10. The Tribunal notes the circumstances leading up to the disciplinary hearing as set out in the translated copy of the MDT Hearing transcript (the transcript). In particular it had regard to the following extracts:

‘The complaint was dealt with in an open session on the 10th of October 2016. Parties were present, defendant assisted by his authorised representative.

...

In October 2015 complainant saw defendant twice for consultations. After the second consultation complainant asked defendant whether he was single, which defendant answered in the negative. Several days after the second consultation, complainant sent defendant a WhatsApp-message, which defendant answered. After which there was frequent contact between complainant and defendant via, among others, social media and telephone. Several times this contact was sexually explicit. From the 15th of November 2015, defendant visited complainant’s home several times, where they had sexual contact. Complainant and defendant also visited a sauna together. XXX. On the 10th of December 2015 defendant sent complainant an e-mail with the subject ‘to contemplate’ and as attachment the directive ‘Sexual contact between doctor and patient: It is not permitted, it is never permitted.’

11. The transcript further records that during the period from January to May 2016 the relationship between Dr Berends and the patient continued. Dr Berends sent the complainant a Valentine’s card and the MDT found that further sexual contact took place.

12. The Tribunal had regard to the further considerations of the MDT as set out in the transcript:
'The Board's considerations

Sexual contact and sexual verbal intimacies do not belong in a doctor-patient relationship. After all, at the least it will cloud the therapeutic relationship, but it could even cause serious damage. The Royal Dutch Medical Association (KNMG)-directive ‘Rules of conduct for doctors’ contains the following stipulation:

‘The doctor does not enter the home life of a patient any more than necessary in the context of healthcare assistance. The doctor abstains from contacts of a sexual nature within the assistance. Verbal or physical intimacies are not permitted.’

The Royal Dutch Medical Association (KNMG) has elaborated on this rule of conduct in the directive ‘Sexual contact between doctor and patient: It is not permitted, it is never permitted.’ In it is advised to follow an intentional preventive policy and to avoid ambiguity as much as possible. Doctors shall be aware of this when they are extra susceptible to starting sexual relations with their patients, for instance when they are going through a tough period in their private lives. When they notice this in themselves, they shall have to take extra precautions. Also, when a patient acts sexually inviting, the doctor is cautioned not to act on this. When doctor and patient have fallen in love, the healthcare relationship shall be ended in the correct way, followed by a cooling-off period in which there shall be no contact.

Defendant has acknowledged that an affectionate relationship formed between complainant and himself, shortly after her second consult with him. It has also been established that parties had sexual contact various times and sent each other sexually oriented messages. After all, defendant did not deny this and it is clear from the copy of the innumerable WhatsApp-messages between complainant and defendant in the period between the 1st of November 2015 until and including the beginning of April 2016, as presented by complainant and not contradicted by defendant.

It is unclear at which point the healthcare relationship between parties was ended. It is, however, clear that the affectionate and sexual relationship between defendant and complainant existed while the healthcare relationship had not been ended yet, on top of this there was no such thing as a cooling-off period. Defendant mentioned about ending the healthcare relationship that he verbally requested complainant on the 11th of November 2015 to look for another GP, but there is no proof of this and complainant has disputed this statement by defendant. Moreover, such a verbal request
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...does not equal terminating a treatment agreement, as the termination of a treatment agreement must happen by written confirmation to the patient. Furthermore, on the basis of the content of the WhatsApp-messages and the undisputed statement by complainant that she received a letter from the doctor’s surgery on the 8th of July 2016 in which the treatment agreement was terminated, it is assumed that complainant had not been deleted from the register of surgery belonging to defendant and his two colleagues in April 2016.

Defendant claims he had also made arrangements with his colleagues regarding the medical care to complainant for as long as she would remain at the surgery. Which concrete agreements these were has not become clear, despite the fact it was defendant’s duty to clarify this and to substantiate his statement with written proof. The defendant’s statement that he did not see complainant as patient, can - now the treatment agreement had not been [sic]

Defendant’s statement that he had not seen complainant as a patient again, cannot help him - as the treatment agreement had not been terminated. Furthermore, given the content of the WhatsApp-messages from the 25th of January 2016, this statement is not true, in the opinion of the tribunal.

The complaint is justified.’

13. In their determination under the heading 'The measure’ the MDT continued:

‘Defendant has indicated that he was immediately aware that the affectionate relationship did not comply with the treatment agreement. Therefore, on the 10th of September 2015, he sent complainant the directive ‘Sexual contact between doctor and patient: It is not permitted, it is never permitted.’

However, the fact that defendant was aware - and also should have been - of the content of said directive, did not make him alter his conduct. The Board determines that defendant was immediately aware that he was acting negligently and in breach of the directive, by not abstaining from contact of a sexual nature with the complainant and by allowing verbal or physical intimacies. Furthermore, when he apparently couldn’t resist his feelings for complainant, defendant neglected to terminate the treatment agreement in a correct manner and to observe a cooling-off period. Even though the Board is willing to accept as a whole - despite the lack of substantial evidence thereto - that defendant has sought help XXX and discussed the situation in the peer review group and with his colleagues, there is not enough reason at this time to believe that this received help, of which the precise nature is unknown, will ensure that defendant will be able to resist in the future. The impression exists that defendant knows exactly how his conduct should be, but is not
sufficiently capable of applying this knowledge in practice. After all, defendant apparently already XXX in December 2015, but the affectionate relationship with complainant subsequently carried on for months - albeit intermittently - while the treatment agreement was still in force. The defendant’s statement that the affectionate relationship with complainant carried on for longer than he wanted due to her threatening behaviour does not mitigate that and is furthermore not believable seeing the content of the WhatsApp-messages. There was nothing stopping defendant from terminating the treatment agreement with complainant in a correct manner, after which he could then (during a cooling-off period) calmly figure out his feelings for complainant. Taking everything into account, the Board considers the suspension of the registration of defendant in the register for the duration of six months to be an appropriate measure.

For reasons of public interest, the Board determines that this decision shall be published in accordance with article 71 of the BIG Act.

The decision
The Board:
- declares the complaint to be well-founded;
- imposes defendant the measure of suspension of registration in the register for the duration of six months;
- determines that for reasons of public interest, the decision, as soon as it has become irrevocable, shall be published in the Government Gazette and offered to the magazine “Medisch Contact (Medical Contact)” for publication.

Thus decided by C as chairman, D as legally qualified member, E, F and G as fellow general practitioner members, in the presence of H as secretary and declared in public on the 21st of November 2016 in the presence of the secretary.’

14. This Tribunal had regard to the letter from the CIBG Ministry of Public Health, Wellbeing and Sport to Dr Berends, dated 3 January 2017, informing Dr Berends of the decision of the MDT and the limitation or prohibition imposed upon his practice in the Netherlands, namely to suspend his registration for six months. The Tribunal also had regard to Dr Berends’ email to the GMC, dated 29 July 2018, in which he confirmed the suspension of his registration by the Dutch regulatory body.

15. Accordingly, the Tribunal found paragraphs 1.a and b of the Allegation proved:

‘On 21 November 2016, the Regionaal Tuchtcollege in Eindhoven determined that:

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a. there were substantial reasons concerning your practice as a professional;

b. as a result of its determination as set out at paragraph 1a you be suspended from the medical register for six months from 3 January 2017.’

16. As to paragraph 2 of the Allegation, the Tribunal had regard to Paragraph 75 of Good Medical Practice which requires a doctor to tell the GMC without delay if, anywhere in the world another professional body has made a finding against their registration as a result of fitness to practise procedures. The Tribunal is satisfied that Dr Berends had an obligation to inform the GMC and failed to do so. Furthermore, in his letter of 29 July 2018 Dr Berends accepted that he had failed to do so and stated:

‘I am truly sorry for an apparent failure of informing the General Medical Council on my part and do apologise for any inconvenience.’

17. Accordingly, the Tribunal found paragraph 2 of the Allegation proved:

‘You failed to disclose the determination as set out at paragraph 1 to the General Medical Council.’

The Tribunal’s Overall Determination on the Facts

18. The Tribunal has determined the facts as follows:

1. On 21 November 2016, the Regionaal Tuchtcollege in Eindhoven determined that:

a. there were substantial reasons concerning your practice as a professional; Found Proved

b. as a result of its determination as set out at paragraph 1a you be suspended from the medical register for six months from 3 January 2017. Found Proved

2. You failed to disclose the determination as set out at paragraph 1 to the General Medical Council. Found Proved

And that by reason of the matters set out above your fitness to practise is impaired because of:
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c. the determination by an overseas body that your fitness to practise is impaired, in relation to paragraph 1; **To be determined**

d. your misconduct, in relation to paragraph 2. **To be determined**

**Determination on Impairment** - 13/08/2019

1. The Tribunal now has to decide in accordance with Rule 17(2)(l) of the Rules whether, on the basis of the facts which it has found proved as set out before, Dr Berends’ fitness to practise is impaired by reason of a determination by another regulator, and by reason of misconduct.

**The Evidence**

2. The Tribunal has taken into account all the documentary evidence received during the facts stage of the hearing.

**Submissions**

3. On behalf of the GMC, Ms Duong submitted that the allegation found proved at paragraph 2 amounts to misconduct. She submitted that Dr Berends’ failure to notify the GMC, without delay, of the determination of the Regional Medical Disciplinary Tribunal in Eindhoven (the MDT) amounts to a breach of paragraph 75 of Good Medical Practice, as referred to in the Tribunal’s determination on facts. She submitted that this is significant and amounts to serious misconduct.

4. Ms Duong referred to Dr Berends’ letter to the GMC dated 28 July 2019 and the explanation given for his failure to inform the GMC of the determination of the MDT. She submitted that Dr Berends had worked in the UK and therefore should have been aware of the requirement to inform the GMC of the determination. Furthermore, Dr Berends’ email suggests that he recognised that he had a duty to do so. Ms Duong submitted that the finding made against him was for a serious matter and his failure to notify the GMC falls so far short of the standards that it amounts to misconduct and his fitness to practise is impaired.

5. In relation to a determination by a regulatory body, Ms Doung invited the Tribunal to approach its decision in two stages. Firstly, whether there had been a determination by a regulatory body, and secondly whether the doctor’s fitness to practise is presently impaired. Ms Duong referred to the nature of the complaint relating to an inappropriate and sexual relationship with a patient which went on for a protracted period of time. Ms Duong submitted that Dr Berends’ conduct breached paragraph 53 of Good Medical Practice which states:

‘You must not use your professional position to pursue a sexual or improper emotional relationship with a patient or someone close to them.’
6. Ms Duong also referred to the GMC’s guidance entitled ‘Maintaining a professional boundary between you and your patient’. In particular the following paragraphs:

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

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

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

7. Ms Duong submitted that the course of conduct Dr Berends engaged in, which led to the proceedings in the Netherlands, amounts to a breach of Good Medical Practice and Maintaining Professional Boundaries.

8. Ms Duong submitted that Dr Berends’ actions placed the patient at a risk of harm and he may be liable to act the same way in the future. She referred to the transcript of the MDT hearing and in particular the following extract:

‘Even though the Board is willing to accept as a whole - despite the lack of substantial evidence thereto - that defendant has XXX and discussed the situation in the peer review group and with his colleagues, there is not enough reason at this time to believe that this received help, of which the precise nature is unknown, will ensure that defendant will be able to resist in the future. The impression exists that defendant knows exactly how his conduct should be, but is not sufficiently capable of applying this knowledge in practice.’

9. Ms Duong submitted that whilst Dr Berends has been suspended from practice by the Dutch Authority and it is some time since the matters occurred there is no evidence from Dr Berends of insight or remediation. She submitted that Dr Berends’ conduct constitutes a serious breach of Good Medical Practice and he has brought the profession into disrepute. He engaged in a protracted sexual relationship with a patient which he knew was not permitted. Ms Duong submitted that all three limbs of the overarching objective are engaged and a finding of impairment is necessary 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.

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

11. The Tribunal must determine whether Dr Berends’ 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.

12. Throughout its deliberations, the Tribunal was mindful of its responsibility to uphold the overarching objective as set out in the Medical Act 1983 (as amended). That objective is:

‘a. to protect, promote and maintain the health, safety and wellbeing of the public;
b. to maintain public confidence in the profession;
c. to promote and maintain proper professional standards and conduct for members of the profession.’

The Tribunal’s Determination on Impairment

Misconduct

13. In approaching the decision in relation to the misconduct allegation, the Tribunal was mindful of the two-stage process to be adopted: first whether the facts as found proved amounted to misconduct, and that the misconduct was serious, and then whether the finding of that misconduct could lead to a finding of impairment.

14. The Tribunal has found that Dr Berends failed to notify the GMC of the determination by the MDT. In reaching its decision on whether this amounted to misconduct the Tribunal had regard to the following:

- Dr Berends last worked in the UK in 2008 and although he remains registered with the GMC he does not hold a licence to practise.
- Dr Berends’ email to the GMC, dated 29 July 2019, in which he stated:

  ‘I am afraid that I assumed that the notification of the Dutch regulatory body was sufficient in informing the GMC.’

- The letter from the CIBG Ministry of Public Health, Wellbeing and Sport, dated, 3 January 2017, in which Dr Berends was advised that information regarding the verdict and the measures imposed would be passed on to the
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authorised European Authorities through the European Information System
Internal Market (IMI).

- Evidence that the GMC was informed of the IMI report.

15. On the basis of the evidence provided the Tribunal was satisfied that, whilst
Dr Berends had a duty to inform the GMC of the determination of the MDT, his
failure to do so was not so serious as to amount to misconduct in the particular
circumstances of this case.

16. Accordingly, the Tribunal has determined that Dr Berends’ fitness to practise
is not impaired by reason of misconduct in relation to paragraph 2 of the allegation.

Determination by a Regulatory Body

17. In considering paragraph 1 of the allegation, the Tribunal has regard to
section 35C(2) of the Medical Act which states:

A person’s fitness to practise shall be regarded as “impaired” for the purposes
of this Act by reason only of –

(a) ….
(b) (e) a determination by a body in the United Kingdom responsible under any
enactment for the regulation of a health or social care profession to the effect
that his fitness to practise as a member of that profession is impaired, or a
determination by a regulatory body elsewhere to the same effect.’

18. Section 35C(3) provides that an allegation may be based on a matter that is
alleged to have occurred outside the United Kingdom.

19. Section 35(C)(9) provides:

“…regulatory body” means a regulatory body which has the function of
authorising persons to practise as a member of health or social care
profession…’

20. The Tribunal notes from the IMI report provided to the GMC that the
Regionaal Tuchtcollege Eindhoven is the ‘Authority/court that adopted the decision’
in relation to Dr Berends’ conduct in the Netherlands. The Tribunal is therefore
satisfied that the decision of the MDT is a decision by a regulatory body responsible
for the regulation of a health or social care profession in the Netherlands.

21. In reaching a determination as to whether the decision of the MDT is a
finding to the effect that Dr Berends’ fitness to practise is impaired, the Tribunal had
regard to the tests laid down by Dame Janet Smith in the fifth report to the Shipman Inquiry relating to findings of impairment:

'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 practice 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 likely 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.’

22. The Tribunal considers that Dr Berends’ conduct is serious. He pursued a sexual relationship with a patient in the context of his employment as a General Practitioner. The MDT’s transcript clearly sets out the grave view the MDT took in relation to Dr Berends’ behaviour and the potential impact upon the complainant:

‘Sexual contact and sexual verbal intimacies do not belong in a doctor-patient relationship. After all, at the least it will cloud the therapeutic relationship, but it could even cause serious damage.’

23. It is also clear from the determination of the MDT that Dr Berends breached The Royal Dutch Medical Association (KNMG) – directive ‘Rules of conduct for doctors’. The directive provides that ‘Sexual contact between doctor and patient: it is not permitted, it is never permitted.’ The MDT determined that it was in the public interest to suspend Dr Berends’ registration for a period of six months.

24. This Tribunal is in no doubt that the course of conduct Dr Berends engaged in, which led to the proceedings in the Netherlands, breached professional boundaries. The relationship was protracted, continuing for several months, and Dr Berends was well aware that his actions were in breach of the KNMG-directive rules.

25. The determination of the MDT is consistent with three of Dame Janet Smith’s criteria, for a finding of impairment namely:

- a patient suffering an unwarranted risk of harm;
- of a doctor bringing the profession into disrepute;
- a doctor breaching one of the fundamental tenets of the profession.
Dishonesty does not arise in this case.

26. Whilst Dr Berends has been suspended from practice by the MDT and it is some time since the matter occurred there is limited evidence from Dr Berends of insight or remediation. There has been little engagement with the GMC and Dr Berends has not provided any evidence of remorse, reflection or remediation. In the circumstances this Tribunal determined that the risk of repetition of such behaviour remains.

27. The Tribunal was mindful of the overarching statutory objective of the GMC, of the need to uphold proper professional standards and maintain public confidence in the medical profession. The Tribunal considers that public confidence in the profession would be undermined if a finding of impairment were not made in this case.

28. Accordingly, the Tribunal has determined that Dr Berends’ fitness to practise is impaired by reason of a determination by an overseas regulator.

**Determination on Sanction - 14/08/2019**

1. Having determined that Dr Berends’ fitness to practise is impaired by reason of a determination of a regulatory body, the Tribunal now has to decide in accordance with Rule 17(2)(n) of the Rules on the appropriate sanction, if any, to impose.

**The Evidence**

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

**Submissions**

3. On behalf of the GMC, Ms Duong submitted that the most appropriate and proportionate sanction in this case is one of erasure.

4. Ms Duong accepted the mitigating factors in this case to be that the patient had initiated the contact with Dr Berends which led to the improper sexual relationship. She also acknowledged that Dr Berends had previously admitted the allegation to the MDT and, since the events, XXX and discussed his actions with his colleagues under peer review.

5. Ms Duong reminded the Tribunal of the aggravating factors noted in the Tribunal’s impairment determination, namely that this case involved a protracted sexual relationship with a patient over the course of some months. She stated that Dr Berends
was a senior practitioner and submitted that there is limited insight in this case. Dr Berends has not provided the Tribunal with any evidence of remediation. She drew the Tribunal’s attention to the seriousness of the issues the MDT were faced with, in that it was their view that this case involved a vulnerable patient. Further, she stated that Dr Berends had admitted to the MDT that he knew his actions were wrong but continued to pursue the relationship.

6. She drew the Tribunal’s attention to paragraph 55 of the Sanctions Guidance (2018) (‘SG’) which states:

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

d. abuse of professional position
(see paragraphs 142–150), particularly where this involves:
... 
i. vulnerable patients.’

7. Ms Duong referred to paragraphs 142 and 143 of SG which state:

‘143 Doctors must not use their professional position to pursue a sexual or improper emotional relationship with a patient or someone close to them.’

‘142 Trust is the foundation of the doctor-patient partnership. Doctors’ duties are set out in paragraph 53 of Good medical practice and in the explanatory guidance documents Maintaining a professional boundary between you and your patient\(^32\) and Ending your professional relationship with a patient\(^33\).’

8. She submitted that no action would not be appropriate in this case as there are no exceptional circumstances, and that this would not be in the public interest. Further, she submitted that Dr Berends has had limited engagement with these proceedings and therefore conditions would not be appropriate, proportionate or workable.

9. Ms Duong stated that, given the lack of evidence of remediation and limited insight, coupled with the risk of repetition, suspension would not be appropriate or proportionate in this case. She submitted that had Doctor Berends engaged with these proceedings and provided evidence of remediation and insight to this Tribunal, the GMC’s position in relation to sanction could have been different.

10. She drew the Tribunal’s attention to paragraph 109 of the SG which lists factors that may indicate that erasure is appropriate. She concluded by submitting that the only appropriate and proportionate sanction in this case is to erase Dr Berends’ name from the medical register.
The Tribunal’s Determination on Sanction

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

12. In reaching its decision, the Tribunal has taken account of the SG. It has borne in mind that the purpose of a sanction is not to be punitive, but to protect patients and maintain public confidence, although it may have a punitive effect.

13. Throughout its deliberations, the Tribunal applied the principle of proportionality, balancing Dr Berends’ interests with the public interest. It has taken account of the overarching objective, which includes the protection of the public, the maintenance of public confidence in the profession, and promoting and maintaining proper professional standards and conduct for members of the profession.

14. The Tribunal also had regard to the decision in R (on the application of Alhy) v General Medical Council [2011] EWHC 2277 (Admin) where it was held that a panel does not need to give reasons for imposing a sanction different from that imposed by a body from another country, and that the panel’s task is to impose an appropriate sanction in accordance with the GMC’s statutory purpose and GMP.

15. The Tribunal first considered the mitigating and aggravating factors of this case.

16. The Tribunal considered the following mitigating factors:

- The patient had initiated the contact with Dr Berends which led to the improper relationship;
- Dr Berends attended and was represented at the MDT hearing and admitted the allegation concerning the improper sexual relationship;
- Dr Berends XXX and spoke to his peers about his conduct;
- The Tribunal were not aware of any prior disciplinary proceedings nor were they aware of any further incidents since the 2016 decision.

17. The Tribunal considered the following aggravating factors:

- The case involved a vulnerable patient which involved Dr Berends using his professional position to pursue a sexual relationship;
- The Tribunal considered this to be an abuse of his professional position;
- At the time of the events Dr Berends was a senior practitioner with 15 years’ experience;
- The patient was already a patient of the practice and consulted Dr Berends for medical treatment prior to the start of the relationship;
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- The protracted sexual relationship continued for some months and there was no ‘cooling off’ period (as mentioned in the MDT decision) once the patient relationship had ceased;
- The MDT found there was a risk of repetition.

No action

18. In reaching its decision as to the appropriate sanction, if any, to impose in Dr Berends’ case, the Tribunal first considered whether to conclude the case by taking no action. Taking no action following a finding of impaired fitness to practise would only be appropriate in exceptional circumstances.

19. The Tribunal determined that the seriousness of its findings required the imposition of a sanction. It determined that there were no exceptional circumstances and it would therefore not be in the public interest to conclude this case by taking no action.

Conditions

20. The Tribunal next considered whether it would be appropriate to impose conditions on Dr Berends’ registration. It bore in mind that any conditions imposed should be appropriate, proportionate, workable and measurable. Given the serious nature of these findings and the fact that Dr Berends has not engaged with the GMC, the Tribunal determined that conditions would not be appropriate or workable in this case.

Suspension

21. The Tribunal then went on to consider whether a period of suspension would be an appropriate and proportionate sanction to impose on Dr Berends’ registration.

22. The Tribunal accepted that suspension has a deterrent effect and can be used to send a signal to the doctor, the profession and the public about what is regarded as behaviour unbefitting of a registered doctor.

23. In determining the sanction to impose on Dr Berends’ registration, the Tribunal bore in mind the MDT’s determination that Dr Berends’ conduct was in breach of the Royal Dutch Medical Association (KNMG directive). The Tribunal notes, in particular, the following passage from the MDT decision:

‘The Board determines that defendant was immediately aware that he was acting negligently and in breach of the directive, by not abstaining from contact of a sexual nature with the complainant and by allowing verbal or physical intimacies. Furthermore, when he apparently couldn’t resist his feelings for complainant, defendant neglected to terminate the treatment
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agreement in a correct manner and to observe a cooling-off period. Even though the Board is willing to accept as a whole - despite the lack of substantial evidence thereto – XXX and discussed the situation in the peer review group and with his colleagues, there is not enough reason at this time to believe that this received help, of which the precise nature is unknown, will ensure that defendant will be able to resist in the future. The impression exists that defendant knows exactly how his conduct should be, but is not sufficiently capable of applying this knowledge in practice.’

24. The Tribunal were of the view that Dr Berends’ conduct was a serious breach of paragraph 53 of GMP which states:

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

25. The Tribunal also considered the following paragraphs of the SG:

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

... d. abuse of professional position particularly where this involves vulnerable patients.’

‘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 (see paragraphs 24–49).’

26. The Tribunal also considered the following paragraphs of the SG which are factors that indicate more serious action is likely to be required:

‘143 Doctors must not use their professional position to pursue a sexual or improper emotional relationship with a patient or someone close to them.’

‘146 Using their professional position to pursue a sexual or improper emotional relationship with a vulnerable patient is an aggravating factor that increases the gravity of the concern and is likely to require more serious action against a doctor.’

27. The Tribunal has carefully considered the factors in paragraph 97 of the SG which indicate where suspension may be appropriate. As stated in the Tribunal’s
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determination on impairment, there is limited evidence from Dr Berends of insight and remediation and there is a risk of repetition. The Tribunal concluded that this was a serious case of a breach of trust and abuse of a doctor’s professional position which involved a number of breaches of GMP. The Tribunal considered that suspension would not be sufficient to maintain the overarching objective.

Erasure

28. Having determined that suspending Dr Berends’ registration would be an insufficient sanction, the Tribunal determined to erase his name from the medical register.

29. The Tribunal had regard to paragraph 109 of the SG which states:

‘109 Any of the following factors being present may indicate erasure is appropriate (this list is not exhaustive).

a. A particularly serious departure from the principles set out in Good medical practice...

b. A deliberate or reckless disregard for the principles set out in Good medical practice and/or patient safety.

... d. Abuse of position/trust (see Good medical practice, paragraph 65: ‘You must make sure that your conduct justifies your patients’ trust in you and the public’s trust in the profession’).

e. Violation of a patient’s rights/exploiting vulnerable people (see Good medical practice...’).

30. The Tribunal bore in mind that Dr Berends’ misconduct concerned a protracted sexual relationship with a patient. It considered that this undoubtedly undermines public trust in the medical profession and also undermines the upholding of proper professional standards and conduct.

31. The Tribunal has not had the benefit of hearing from Dr Berends during the course of these proceedings. Nevertheless, the Tribunal is satisfied that Dr Berends is fully aware of this hearing and the possible sanctions that could be imposed upon him. The Tribunal note that Dr Berends received the GMC’s Notice of hearing dated 28 June 2019, which drew his attention to the MPTS proceedings, the SG, and the possible sanction that the Tribunal could impose.

32. Bearing in mind both the mitigating and the aggravating factors in this case and the seriousness of these matters, the Tribunal determined that erasure was the most appropriate and proportionate sanction to impose in order to protect the
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public, maintain public confidence in the medical profession and declare and uphold the proper standards of conduct and behaviour.

33. Accordingly, the Tribunal determined that Dr Berends’ name should be erased from the medical register.

Determination on Immediate Order - 14/08/2019

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

Submissions

2. On behalf of the GMC, Ms Duong submitted that the Tribunal should impose an immediate order. She submitted that, given the Tribunal’s determination that there is a risk of repetition, it is necessary to impose an immediate order in the wider public interest, including the need to uphold public confidence in the profession.

3. In response to the Tribunal’s observation that Dr Berends does not currently hold a licence to practise in the UK, Ms Duong submitted that the GMC maintains the application for an immediate order on public interest grounds given the seriousness of the underlying misconduct in this case; namely a protracted sexual relationship with a patient which led to Dr Berends’ suspension in the Netherlands. Ms Duong accepted that an immediate order is not necessary for the protection of the public in the light of Dr Berends having no licence to practise in the UK.

The Tribunal’s Determination

4. The Tribunal considered that, given the seriousness of the case and the Tribunal’s findings, an order may be appropriate in the public interest.

5. However, in an email to the GMC sent on 29 July 2018 Dr Berends stated that he had not worked in the UK for the past ten years and is not intending to work in the UK in the foreseeable future. Moreover, Dr Berends has provided a completed ‘Work Details Form’, dated 29 July 2018, which contains a declaration of truth. In that form Dr Berends states that he is currently working in a GP practice in the Netherlands and has done so since 28 May 2008 and that he is the senior partner in that practice. Dr Berends goes on to confirm in the form that he has done no other work for the past ten years and is not registered with any locum agencies. The Tribunal has no reason to doubt the information provided.

6. In the circumstances, the Tribunal considered that there was no realistic prospect of Dr Berends returning to UK practice. Whilst the Tribunal recognises the need to maintain public confidence in the medical profession and promote and to
promote and maintain proper professional standards of conduct for members of the profession, it is not satisfied that an immediate order is required in the particular circumstances of this case.

7. This means that Dr Berends’ registration will be erased from the Medical Register 28 days from when notice of this decision is deemed to have been served upon him unless he lodges an appeal. If Dr Berends does lodge an appeal he will remain free to practise unrestricted until the outcome of any appeal is known.

8. There is no interim order to revoke.

9. That concludes this case.

Confirmed
Date 14 August 2019 Mr Kenneth Hamer, Chair

ANNEX A – 12/08/2019
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Application on Service and Proceeding in the Absence of the Doctor

Service

1. Dr Berends is neither present nor legally represented at this hearing. The Tribunal has considered the submission made by Ms Duong, Counsel, on behalf of the GMC, that notification of this hearing has been properly served upon Dr Berends.

2. Ms Duong provided the Tribunal with a copy of a Service bundle which included a letter from the GMC to Dr Berends, dated 20 June 2019, confirming the hearing date and providing notice of the allegation. The letter was also emailed to Dr Berends. As no response was received from Dr Berends a further letter was sent by the GMC to Dr Berends’ registered address in the Netherlands on 25 June 2019. This was successfully delivered on 28 June 2019 and signed for by ‘Berends’.

3. Ms Duong drew the Tribunal’s attention to a copy of the Notice of Hearing dated 28 June 2019, sent by the Medical Practitioners Tribunal Service, in accordance with the Fitness to Practise Rules 2004 (the Rules). This was successfully delivered to Dr Berends’ registered address on 2 July 2019 and was signed for by ‘Berends’. The Notice was also successfully emailed to Dr Berends.

4. Ms Duong referred to an MPT attendance form completed by Dr Berends, indicating that he would not be attending the hearing, which appears to have been faxed to the GMC on 3 July 2019. Furthermore, in an email, dated 5 August 2019, Dr Berends confirmed that he would not be attending the hearing.

5. Having considered the evidence before it, the Tribunal was satisfied that notice of this hearing has have been made in accordance with Rules 15 and 40 of the GMC’s (Fitness to Practise Rules) Order of Council 2004, as amended (‘the Rules’), and paragraph 8 of Schedule 4 to the Medical Act 1983, as amended.

Proceeding in absence

6. Having been satisfied that notice was properly served upon Dr Berends, the Tribunal then considered whether to proceed with this hearing in his absence, in accordance with Rule 31 of the Rules. The Tribunal is aware that the discretion to proceed in the absence of a doctor should be exercised with the utmost care and caution, balancing the interests of the doctor with the wider public interest.

7. Ms Duong invited the Tribunal to proceed with the hearing in Dr Berends’ absence. She submitted that Dr Berends is aware of the hearing today and it is therefore fair and in the interests of justice to proceed in his absence. Ms Duong submitted that Dr Berends has waived his right to attend the hearing and has voluntarily absented himself. In support of this submission Ms Duong drew the
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Tribunal’s attention to the most recent email from Dr Berends indicating that he does not wish to attend the hearing. Ms Doung submitted that there is no indication that if the hearing was adjourned Dr Berends would attend a future hearing. Furthermore, Dr Berends has made no application for an adjournment. Ms Duong submitted that, given the concerns in this case, it is in the public interest to proceed with the hearing today.

8. The Tribunal has balanced Dr Berends’ interests with the public interest in deciding whether to proceed in his absence.

9. The Tribunal was satisfied that all reasonable efforts have been made to serve Dr Berends with notice of this hearing in accordance with the rules, and therefore Dr Berends is aware of the hearing today. The Tribunal reminded itself of the cases of R v Hayward, Jones and Purvis QB 862, CA; R v Jones (Anthony [2003] 1 AC 1, HL; and General Medical Council v Adegeoba [2016] EWCA Civ 162. It was also satisfied that Dr Berends is aware of the allegation against him and the potential outcome of the hearing. The Tribunal had regard to Dr Berends’ email to the GMC of 5 August 2019 confirming that he does not wish to attend. In the circumstances the Tribunal considers that Dr Berends has voluntarily absented himself from proceedings and waived his right to be present or represented. The Tribunal considers that no purpose would be served by an adjournment as there appears to be little prospect of Dr Berends attending a future hearing. The Tribunal therefore considered it would be in the interests of patient safety and in the public interest to proceed in Dr Berends’ absence.