Record of Determinations – Medical Practitioners Tribunal

PUBLIC RECORD

Dates: 20/05/2019 - 22/05/2019
Medical Practitioner’s name: Dr Michael WAIN

GMC reference number: 1523546
Primary medical qualification: BChir 1972 University of Cambridge

Type of case
Outcome on impairment
New - Misconduct
Impaired

Summary of outcome
Suspension, 6 months
Review hearing directed

Tribunal:

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<tr>
<td>Legally Qualified Chair</td>
<td>Mr Richard Tutt</td>
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<tr>
<td>Lay Tribunal Member:</td>
<td>Ms Jacqueline Telfer</td>
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<td>Medical Tribunal Member:</td>
<td>Dr Jeffrey Phillips</td>
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<td>Tribunal Clerk:</td>
<td>Dr Joshua Kirby</td>
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Attendance and Representation:

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<td>Medical Practitioner:</td>
<td>Not present and not represented</td>
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<td>Medical Practitioner’s Representative:</td>
<td>N/A</td>
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<td>GMC Representative:</td>
<td>Mr Terence Rigby, 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 in public.
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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 Facts - 21/05/2019

Background

1. Dr Wain qualified in 1972. Prior to the events which are the subject of the hearing Dr Wain was a GP Partner at the Whitstable Medical Practice, also known as the Estuary View Medical Centre (‘the Centre’), a position he held from 1980 until his retirement in 2015. At the date of the events in question Dr Wain was practising intermittently as a Locum GP in Kent.

2. The allegation that has led to Dr Wain’s hearing can be summarised as follows. It is alleged that on 21 September 2017 Dr Wain acted dishonestly by prescribing medication for Patient A, as set out in Schedule 1, using a prescription pad belonging to the Centre when he knew, at the time of issuing the prescription, that he no longer worked there. It is also alleged that Dr Wain acted dishonestly on 8 February 2018 because he knew, at that time, that he was being investigated by the GMC in relation to his actions in respect of the prescription referred to above, and that he failed to disclose the GMC’s investigation to his appraiser.

3. The initial concerns were raised with the GMC on 11 October 2017 by Dr C, Chairman and Partner of the Centre, who had been alerted to concerns about the prescription by a pharmacist in Norfolk.

The Outcome of Applications Made during the Facts Stage

4. The Tribunal granted the GMC’s application, made pursuant to Rule 31 of the General Medical Council (Fitness to Practise Rules) 2004 as amended (‘the Rules’), for the Tribunal to proceed to consider Dr Wain’s case in his absence. 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 Wain is as follows:

That being registered under the Medical Act 1983 (as amended):
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1. On 21 September 2017 you prescribed medication for Patient A as set out in Schedule 1 using a prescription pad belonging to Estuary View Medical Centre (‘the Centre’). To be determined

2. At the time of issuing the prescription referred to at paragraph 1 you knew that you did not work at the Centre. To be determined

3. On 8 February 2018 you:
   a. knew that you were being investigated by the GMC in relation to your actions as set out at paragraphs 1 and 2 (‘the investigation’); To be determined
   b. failed to disclose the investigation to your appraiser. To be determined

4. Your actions as described at:
   a. paragraph 1 were dishonest by reason of paragraph 2; To be determined
   b. paragraph 3b were dishonest by reason of paragraph 3a. To be determined

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

Documentary Evidence

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

   • a letter from the Centre to Dr Wain dated 4 October 2017;
   • Dr C’s Online Complaint Form, dated 11 October 2017;
   • an email version of a letter from the Centre to Dr Wain dated 18 October 2017 (this was referred to by Dr Wain in his letter to the GMC dated 13 January 2018 and a copy was therefore requested by the Tribunal and provided to it);
   • correspondence between the GMC and Dr Wain during the course of the GMC’s investigation;
   • correspondence between the GMC and NHS England regarding Dr Wain’s 2018 Appraisal and the Appraisal document the itself;
   • Dr Wain’s ‘Rule 7 Response Letter’ dated 20 September 2018;
   • emails from Dr Wain to the GMC dated 16 and 26 April 2019; and
   • a copy of Dr Wain’s completed 2019 Appraisal, dated 20 March 2019.
The Tribunal’s Approach

7. In reaching its decision on the facts, the Tribunal has borne in mind that the burden of proof rests on the GMC and that it is for the GMC to prove the Allegation. Dr Wain 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.

8. In respect of the allegations that Dr Wain acted dishonestly, the Tribunal bore in mind the test laid down by the Supreme Court in Ivey v Genting Casinos (UK) Ltd 2017 UKSC 67, namely that the Tribunal should first ascertain subjectively the actual state of Dr Wain’s knowledge or belief as to the facts before then determining whether his conduct was dishonest applying the objective standards of ordinary decent people.

9. The Tribunal also had regard to the case of Fish v GMC [2012] EWHC 1269 (Admin). An allegation of dishonesty should not be found to be established against anyone, particularly someone who has not been shown to have acted dishonestly previously, except on solid grounds.

10. The Tribunal heard that Dr Wain is otherwise a person of good character. Whilst good character is not in itself a defence to the allegation, it is nonetheless relevant to the Tribunal’s consideration of Dr Wain’s alleged dishonesty in two ways. First, Dr Wain’s good character is a positive feature which supports his credibility. Secondly, the fact that Dr Wain has not acted dishonestly in the past may make it less likely that he acted as is alleged. It is a matter for the Tribunal’s own judgement to decide what weight to give to Dr Wain’s good character and the extent to which it assists on the facts of this particular case.

The Tribunal’s Analysis of the Evidence and Findings

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

Paragraph 1

On 21 September 2017 you prescribed medication for Patient A as set out in Schedule 1 using a prescription pad belonging to Estuary View Medical Centre (‘the Centre’). Determined and found proved

12. In making this finding, the Tribunal had regard to the copy of the prescription that Dr Wain issued for Patient A on 21 September 2017. It noted that the prescription was for the medication detailed in Schedule 1, namely for 56 x 3.75mg of Zopiclone and 56 x 20mg of Omeprazole. It also noted that the prescription was
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issued from an FP10 prescription pad belonging to the Centre. Dr Wain has never disputed that he prescribed the medication for Patient A, XXX, on 21 September 2017 using a prescription pad belonging to the Centre. He has accepted in his correspondence with the GMC on a number of different occasions that he did so, notably his letter of 13 January 2018 and his other correspondence thereafter. The Tribunal therefore found this paragraph of the allegation proved.

Paragraph 2

At the time of issuing the prescription referred to at paragraph 1 you knew that you did not work at the Centre. **Determined and found proved**

13. It was not disputed that Dr Wain retired as a Partner at the Centre in the spring of 2015 and that he wrote the prescription for Patient A approximately two and a half years later, on 21 September 2017. In his correspondence with the GMC, notably his letter of 13 January 2018 and his other correspondence thereafter, Dr Wain accepts that, at the time he issued the prescription to Patient A, he knew that he no longer worked at the Centre. The Tribunal therefore found this paragraph of the allegation proved.

Paragraph 3

On 8 February 2018 you:

a. knew that you were being investigated by the GMC in relation to your actions as set out at paragraphs 1 and 2 (‘the investigation’); **Determined and found proved**

b. failed to disclose the investigation to your appraiser. **Determined and found proved**

14. In making these findings, the Tribunal first paid careful attention to the chronology of events leading up to Dr Wain’s appraisal on or around 8 February 2018. Dr Wain prescribed medication for Patient A using an FP10 pad from his previous practice, the Centre, on 21 September 2017. The Centre wrote to Dr Wain on 4 October 2017 informing him that it had been made aware that he had written a prescription on one of its pads and asking him to return any more of the Centre’s pads that he may have kept since his retirement in 2015. On 11 October 2017 Dr C at the Centre referred his concerns about the prescription to the GMC in an Online Complaint Form. On or around 18 October 2017 Dr C wrote to Dr Wain informing him that a referral to the GMC about this matter had been made.

15. The documents show that Dr Wain submitted his appraisal via the ‘Clarity’ system to his appraiser on 3 January 2018. They also show that on 8 January 2018
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the GMC wrote to Dr Wain formally notifying him of Dr C’s complaint and asking him to complete enclosed work details and email notification forms. The GMC’s letter of 8 January 2018 is unequivocal. The first line reads ‘Dr C has made a complaint about you, which we need to investigate’. Dr Wain completed the forms enclosed with that letter and returned them to the GMC on 13 January 2018 and attached a letter responding to Dr C’s complaint and providing his account of events. Dr Wain’s appraisal meeting took place less than a month later and the appraisal was signed off as ‘complete’ by Dr Wain on 8 February 2018.

16. In light of the above, the Tribunal was satisfied that on 8 February 2018, when he signed off his appraisal, Dr Wain knew that he was being investigated by the GMC in relation to his actions as set out at paragraphs one and two of the allegation and it therefore found sub-paragraph 3(a) of the allegation proved.

17. The Tribunal noted an email from NHS England – South East (‘NHSE’) to the GMC dated 27 March 2018 which stated that NHSE was ‘not aware that Dr Wain knew about the GMC investigation when he went to his appraisal and we would have expected full disclosure if that had been the case’.

18. Having had regard to Dr Wain’s 2018 appraisal form, the Tribunal was satisfied that Dr Wain did not disclose either Dr C’s complaint, its referral to the GMC, or the fact that the GMC was carrying out an investigation into it at any point on the form, despite there being a number of sections therein where it would have been appropriate for him to have done so. It is not, for example, referred to in either the ‘significant events’ or ‘complaints’ sections of the form. In the ‘Appraisee Statements and Declarations’ section of the form, Dr Wain stated that he had ‘nothing to declare’ in relation to ‘suspensions, restrictions on practice or being subject to an investigation of any kind’ since his last appraisal. Dr Wain also stated that he had not been named in any complaints in the last year. Dr Wain has accepted that he did not disclose the GMC’s investigation to his appraiser in February 2018, notably in his letter dated 14 September 2018 and in his correspondence thereafter. The Tribunal was satisfied that Dr Wain failed to disclose the investigation to his appraiser. It therefore found sub-paragraph 3(b) of the allegation proved.

Paragraph 4

Your actions as described at:

   a. paragraph 1 were dishonest by reason of paragraph 2;

Determined and found proved

19. In making this finding, the Tribunal first considered, subjectively, the actual state of Dr Wain’s knowledge/belief as to the relevant facts. Dr Wain disputes that
prescribing medication for Patient A on an FP10 belonging to the Centre when he
knew that he no longer worked there was dishonest.

20. Dr Wain’s consistent account of events is that on 21 September 2017 he was
at a gathering XXX in London. In his letter to the GMC of 13 January 2018, and
reiterated in his correspondence thereafter, Dr Wain stated that at the gathering
Patient A, XXX, confided in him that ‘she was going through a very difficult patch in
her life […] and was just about to go on holiday’. Dr Wain went on to state that he
‘offered to help her knowing that [he] had a spare NHS prescription in [his] wallet’.
He stated that he ‘did realise that it was a prescription relating to [his] old practice,
where [he] had been a partner for 35 years’ when he did so. In his letter to the GMC
of 18 September 2018, Dr Wain stated that the ‘residual’ prescriptions that he had
when he retired ‘were always kept in a locked case’ but that, on 21 September 2017,
hid have ‘a spare prescription’ in his wallet which he issued to Patient A. In his
e-mail to the GMC of 14 April 2019, Dr Wain stated that he ‘issued a prescription to a
XXX, and this proved enormously helpful to her’. He went on to state that he
‘regret[s] using the wrong prescription, which in retrospect should have been made
out privately’.

21. Dr Wain had been a GP Partner at the Centre for approximately 35 years. The
Tribunal was therefore satisfied that Dr Wain knew at the time that he issued the
prescription using an FP10 belonging to the Centre where he had not worked for
over two years that he should not have done so. Indeed, Dr Wain now accepts that
it ‘should have been made out privately’. In his correspondence Dr Wain has referred
to his actions variously as ‘foolish’, a matter of ‘regret’ and an ‘error of judgement’.

22. Having ascertained, subjectively, the actual state of Dr Wain’s knowledge at
the time that he issued the prescription to Patient A on 21 September 2017, the
Tribunal went on to consider whether Dr Wain’s conduct would be considered
dishonest by the objective standards of ordinary decent people. In all the
circumstances, the Tribunal was satisfied that it would. Dr Wain knew when he
issued the prescription that he was no longer employed by the Centre and that, as
such, he was no longer authorised to use their FP10 pad. A prescription is a formal
and controlled document. By issuing the prescription from a pad belonging to the
Centre when he knew he no longer worked there Dr Wain was misrepresenting his
position. The Tribunal therefore found sub-paragraph 4(a) of the allegation proved.

Your actions as described at:

b. paragraph 3b were dishonest by reason of paragraph 3a.

Determined and found proved

23. In making this finding, the Tribunal again first considered, subjectively, the
actual state of Dr Wain’s knowledge/belief as to the relevant facts. Dr Wain disputes
that by not disclosing the GMC’s investigation to his appraiser on 8 February 2018 he was being dishonest.

24. In his email to the GMC of 19 April 2018, Dr Wain stated that when Dr C’s complaint was referred to the GMC in October 2017 he was ‘already well into the process of filling out [his] last years appraisal’. He stated that ‘at that time [he] asked various GP friends and colleagues for their opinions about whether [he] should log this very early stage complaint in that appraisal, given that the matter was then only in its infancy’. He went on to state that ‘the general view was that [he] should fully report the whole matter in [his] next appraisal, when the investigation process had run its course’. Dr Wain stated that this had been his intention ‘all along’. Dr Wain repeated this position in his letter to the GMC dated 18 September 2018, stating that he did not ‘mention this complaint in my 2018 Appraisal as it was then in its infancy’. In that email he reiterates that ‘GP friends and colleagues also advised [him] that they thought this was the best course of action’ and that he therefore disputed that his failure to disclose the investigation was a dishonest act. Dr Wain maintained this position in his emails to the GMC of 14 and 26 April 2019. The Tribunal noted that Dr Wain did indeed disclose the GMC investigation during his 2019 Appraisal.

25. At the time that Dr Wain submitted his appraisal to his appraiser on 3 January 2018 he had received two letters from the Centre regarding his use of a prescription pad belonging to the Centre. The second letter from the Centre, sent on or around 18 October 2017, informed him that Dr C’s complaint had been referred to the GMC, something Dr Wain says he was aware of in his letter to the GMC of 13 January 2018. Whilst Dr Wain had not been formally notified of the GMC’s investigation at the time he submitted his appraisal, he was nonetheless aware of Dr C’s complaint and he did not disclose that complaint in any of the relevant sections of the appraisal form. It was clear to the Tribunal that Dr Wain had considered whether or not the complaint should be disclosed to his appraiser as, on his own account, Dr Wain consulted with GP friends and colleagues as to whether he should do so. Whilst Dr Wain considered Dr C’s complaint to be ‘a very early stage complaint’ the Tribunal was satisfied that irrespective of the stage of the complaint, it should have been disclosed to Dr Wain’s appraiser and it was not.

26. Furthermore, at the time of Dr Wain’s appraisal meeting on 6 February 2018 and when he signed off the appraisal as being complete on 8 February 2018, Dr Wain had been formally notified by the GMC that it was investigating Dr C’s complaint and had also responded in writing to the details of it. The Tribunal was therefore satisfied that on 8 February 2018 Dr Wain knew that the investigation was taking place but made a conscious decision not to disclose it to his appraiser.

27. Having ascertained, subjectively, the actual state of Dr Wain’s knowledge at the time that he failed to disclose the GMC’s investigation to his appraiser, the Tribunal went on to consider whether Dr Wain’s conduct would be considered
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dishonest by the objective standards of ordinary decent people. In all the circumstances, the Tribunal was satisfied that it would. The appraisal process is designed to protect patients from risk of harm posed by a doctor’s conduct and performance. The Tribunal has determined that Dr Wain should have reported Dr C’s complaint and the ensuing investigation by the GMC. It was satisfied that by not disclosing the complaint and investigation he gave his appraiser the false impression that no complaints had been made about his practice and that he was not subject to any investigation by the GMC when that was not the case. The Tribunal therefore found sub-paragraph 4(b) of the allegation proved.

The Tribunal’s Overall Determination on the Facts

28. The Tribunal has determined the facts as follows:

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

1. On 21 September 2017 you prescribed medication for Patient A as set out in Schedule 1 using a prescription pad belonging to Estuary View Medical Centre (‘the Centre’). Determined and found proved

2. At the time of issuing the prescription referred to at paragraph 1 you knew that you did not work at the Centre. Determined and found proved

3. On 8 February 2018 you:

   a. knew that you were being investigated by the GMC in relation to your actions as set out at paragraphs 1 and 2 (‘the investigation’); Determined and found proved

   b. failed to disclose the investigation to your appraiser. Determined and found proved

4. Your actions as described at:

   a. paragraph 1 were dishonest by reason of paragraph 2; Determined and found proved

   b. paragraph 3b were dishonest by reason of paragraph 3a. Determined and found proved

And that by reason of the matters set out above your fitness to practise is impaired because of your misconduct. To be determined
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Determination on Impairment - 22/05/2019

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 Wain’s fitness to practise is impaired 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. In addition, the Tribunal received further documentary evidence at this stage of the proceedings in the form of a signed statement from Dr B, Dr Wain’s Responsible Officer, dated 25 March 2019.

3. Dr B’s statement confirms that Dr Wain has continued to practise since the events in question and that no further matters have arisen. It also confirms that Dr Wain has practised for over 30 years and that no other concerns about his competence or good character have been raised during that time.

Submissions on Behalf of the GMC

4. In summary, Mr Rigby submitted that the Tribunal should find that Dr Wain’s dishonest conduct amounted to serious misconduct. In the course of his submissions Mr Rigby referred the Tribunal to ‘Good Medical Practice’ (2013 edition), and submitted that Dr Wain’s dishonest conduct breached the following principles contained therein:

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

68 You must be honest and trustworthy in all your communication with patients and colleagues. This means you must make clear the limits of your knowledge and make reasonable checks to make sure any information you give is accurate.

5. Mr Rigby submitted that Dr Wain’s fitness to practise was impaired on the dates on which he acted dishonestly and that it remains impaired today by reason of his misconduct. Mr Rigby acknowledged that dishonesty is difficult to remedy, but he submitted that there is no evidence before the Tribunal that Dr Wain has tried to remedy his misconduct. He submitted that whilst the GMC accepts that Dr Wain is unlikely to repeat his dishonest misconduct, the documentary evidence contains ‘worrying’ expressions from Dr Wain that suggest he has not accepted the seriousness of his wrongdoing in issuing the prescription to Patient A. Similarly, in respect of his failure to disclose the GMC investigation to his appraiser, Mr Rigby submitted that Dr Wain’s explanations for that omission are ‘troubling’ and ‘surprising’. Notwithstanding Dr Wain’s previous and subsequent good character,
Mr Rigby submitted that a finding of impaired fitness to practise should be made in order 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

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

7. In approaching the decision, the Tribunal was mindful of the two-stage process to be adopted: first, whether the facts as found proved amount to serious misconduct, and secondly, whether any finding of serious misconduct means that Dr Wain’s fitness to practise is thereby impaired.

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

9. In making its decision, the Tribunal bore in mind the need to protect the public. This is the Tribunal’s statutory overarching objective, which includes:

   - protecting, promoting and maintaining the health, safety and well-being of the public;
   - promoting and maintaining public confidence in the medical profession; and
   - promoting and maintaining proper professional standards and conduct for members of that profession.

The Tribunal’s Determination on Impairment

Misconduct

10. The Tribunal first considered whether the facts found proved constitute serious misconduct, that is, a serious breach of the standards of conduct and behaviour expected of a doctor which would be regarded as deplorable by fellow practitioners.

11. The Tribunal found that Dr Wain acted dishonestly on two occasions. First, when prescribing medication for Patient A on 21 September 2017 using a
prescription pad belonging to the Centre where he no longer worked. Secondly, when failing to disclose the GMC’s investigation into the issuing of the prescription to Patient A to his appraiser on 8 February 2018.

12. Having had regard to the principles contained in GMP, the Tribunal was satisfied that Dr Wain’s dishonest conduct breached the following principles:

1. Patients need good doctors. Good doctors [...] are honest and trustworthy, and act with integrity and within the law.

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

66. You must always be honest about your experience, qualifications and current role.

68. You must be honest and trustworthy in all your communication with patients and colleagues. This means you must [...] make reasonable checks to make sure any information you give is accurate.

71. You must be honest and trustworthy when writing reports, and when completing or signing forms, reports and other documents. You must make sure that any documents you write or sign are not false or misleading.

a. You must take reasonable steps to check the information is correct.

b. You must not deliberately leave out relevant information.

13. Acting with honesty and integrity at all times is a fundamental tenet of the medical profession and dishonesty undermines public confidence in it. The Tribunal was in no doubt that Dr Wain’s dishonest conduct would be considered deplorable by fellow practitioners. It therefore concluded that Dr Wain’s conduct fell so far short of the standards of conduct reasonably to be expected of a doctor as to amount to serious misconduct.

Impairment

14. The Tribunal, having found that the facts found proved amounted to serious misconduct, went on to consider whether, as a result of that misconduct, Dr Wain’s fitness to practise is currently impaired. In so doing, the Tribunal was mindful of the judgment in the case of Cohen v GMC [2008] EWHC 581 (Admin) which sets out that a finding of impaired fitness to practise does not automatically follow a finding of serious misconduct. However, it also bore in mind the judgment in the case of GMC...
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* v Nwachuku [2017] EWHC 2085 (Admin),* which notes that it would be an unusual case where dishonesty is not found to impair a doctor’s fitness to practise.

15. The Tribunal first considered its findings in light of the factors indicating that a doctor’s fitness to practise might be impaired as set out by Dame Janet Smith in the fifth report to the Shipman Inquiry, namely whether or not Dr Wain:

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.

16. There has been no suggestion that Dr Wain has or is liable in the future to pose a clinical risk to patients. However, the Tribunal was satisfied that the remaining three factors set out by Dame Janet Smith are engaged in this case. It was satisfied that Dr Wain’s dishonesty brought the medical profession into disrepute and that Dr Wain breached one of the fundamental tenets of the medical profession by acting dishonestly on two occasions.

17. In respect of the level of insight Dr Wain has shown into his misconduct, its seriousness, and its consequences, the Tribunal was of the view that Dr Wain has shown only very limited insight. At no stage has he admitted dishonesty and he has, on several different occasions, sought to minimise the seriousness of his actions.

18. In his letter to the GMC dated 13 January 2018, Dr Wain referred to issuing the prescription to Patient A as ‘foolish’, a matter of ‘regret’ and an ‘error of judgement’. Dr Wain suggested that his issuing the prescription to Patient A need not have been referred to the GMC at all and that the Centre ‘could easily have resolved this locally’. More positively, in an email to the GMC dated 13 March 2018 Dr Wain sought to reassure the Centre that ‘this error will never happen again’. However, in an email to the GMC dated 26 April 2019, Dr Wain stated that he did ‘not feel that [his] errors are very serious’ and suggested he would ‘need a pretty convincing explanation’ as to why his fitness to practise would be impaired.

19. Having had regard to Dr Wain’s 2019 Appraisal, dated 20 March 2019, the Tribunal was satisfied that Dr Wain continues to lack insight into his misconduct. In the ‘significant events’ section of the form, Dr Wain refers to the allegations against him and continues to dispute that he acted dishonestly. He states in the learning and
development box in that section that he ‘[has] no interest in the outcome of [the Tribunal’s] deliberations’. In the reflection box in this section, Dr Wain states that he ‘[has] reflected on this enough already’. Further, in the ‘Proposed PDP’ section of the appraisal form, Dr Wain refers to the GMC’s investigation as a ‘seemingly petty matter’ and reiterates that he does not ‘care about the outcome, because retirement beckons anyway’.

20. The Tribunal found these remarks and comments from Dr Wain to be particularly concerning. It was satisfied that they display a surprising level of detachment and disengagement from the seriousness of his misconduct and its consequences. Additionally, the Tribunal noted that any reflection Dr Wain has undertaken about the events in question and the GMC’s subsequent investigation appear to have focused on the effect of his actions on himself, and not on the public’s confidence in the medical profession. Further, Dr Wain’s suggestion that he has ‘reflected on this enough already’ indicates no intention on his part to reflect further on his misconduct and its consequences or further to develop his insight.

21. The Tribunal next considered, pursuant to Cohen v GMC, whether Dr Wain’s misconduct is capable of being remedied, whether it has been remedied, and whether it is highly unlikely to be repeated. The Tribunal acknowledged that dishonesty is capable of being remedied although remediation may be difficult to demonstrate. However, the Tribunal has not been presented with any evidence that Dr Wain has remedied his dishonest misconduct or attempted to do so. Notwithstanding the GMC’s acceptance that it is unlikely that Dr Wain will repeat his misconduct, given Dr Wain’s lack of insight and remediation, the Tribunal was satisfied that there remains a real risk that his misconduct might be repeated.

22. In any event, given the nature of its findings and their seriousness, the Tribunal was satisfied that, as per the judgment in the case of CHRE v NMC and Grant [2011] EWHC 927 (Admin), the need to promote and maintain public confidence in the medical profession and the need to promote and maintain proper professional standards and conduct for members of the profession would be undermined if a finding of impaired fitness to practise were not made in this case. The Tribunal therefore determined that a finding of impaired fitness to practise was necessary in order to satisfy all three limbs of its statutory over-arching objective as set out above.

23. The Tribunal has therefore determined that Dr Wain’s fitness to practice is impaired by reason of his misconduct.

**Determination on Sanction** - 22/05/2019
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1. Having determined that Dr Wain’s fitness to practise is impaired by reason of misconduct, the Tribunal now has to decide in accordance with Rule 17(2)(n) of the Rules on what 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, to reaching a decision on sanction.

Submissions on Behalf of the GMC

3. In the course of his submissions Mr Rigby referred the Tribunal to the ‘Sanctions Guidance’ (February 2018 edition). In summary, he submitted that the appropriate and proportionate sanction in this case is a period of suspension. He submitted that the more severe sanction of erasing Dr Wain’s name from the Medical Register would be inappropriate and disproportionate because whilst Dr Wain acted dishonestly, his dishonesty was towards ‘the lower end of the scale’ and he is now at the very end of a long career serving the NHS and the public. Mr Rigby reminded the Tribunal that Dr Wain has continued to practise since the events in question and that there have been no further incidents of misconduct. Mr Rigby made no positive submission about the length of any suspension, although he submitted that it would be proportionate to suspend Dr Wain’s registration for a period shorter than the maximum 12 months. Mr Rigby also submitted that in light of Dr Wain’s intended retirement, a review hearing would not be necessary in this case.

The Tribunal’s Determination on Sanction

4. The decision as to the appropriate sanction, if any, to impose is a matter for the Tribunal alone, exercising its own judgement. In so doing, it has given consideration to its findings of fact, its findings of misconduct and impaired fitness to practise as well as the submissions made by Mr Rigby on behalf of the GMC. When making its decision the Tribunal paid particular attention to the ‘Sanctions Guidance’.

5. Throughout its deliberations the Tribunal bore in mind that the purpose of sanctions is not to be punitive (although they may have a punitive effect), but to protect the public. This is the Tribunal’s statutory overarching objective, which includes:

- protecting, promoting and maintaining the health, safety and well-being of the public;
- promoting and maintaining public confidence in the medical profession; and
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- promoting and maintaining proper professional standards and conduct for members of that profession.

6. In making its decision, the Tribunal had regard to the principle of proportionality, weighing Dr Wain’s interests with those of the public. In accordance with the judgment in the case of *Arunachalam v GMC* [2018] EWHC 758 (Admin), before considering what action, if any, to take in respect of Dr Wain’s registration, the Tribunal considered and balanced the mitigating and aggravating features in this case.

Aggravating Factors

7. The Tribunal considered the following to be aggravating features in this case:

- Dr Wain acted dishonestly on two occasions, namely on 21 September 2017 and 8 February 2018;
- as referred to in the Tribunal’s determination on impairment, Dr Wain has shown only very limited insight into his misconduct, its seriousness and its consequences and he continues to lack sufficient insight;
- the Tribunal has not been presented with any evidence that Dr Wain has remediated or attempted to remediate his misconduct; and
- Dr Wain was a very experienced GP and prior to these events he had been a GP Partner at the Centre.

8. The Tribunal balanced those aggravating features against what it considered to be the mitigating features in this case.

Mitigating Factors

9. In mitigation the Tribunal had regard to the following factors:

- whilst Dr Wain acted dishonestly on two occasions, they were related incidents;
- Dr Wain’s misconduct in respect of issuing the prescription to Patient A was not for personal gain;
- Dr Wain accepted the factual allegations brought against him by the GMC;
- Dr Wain has expressed regret for having issued the prescription to Patient A;
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- Dr Wain is otherwise a person of good character who had an unblemished career serving the NHS and the public for over 30 years;

- whilst Dr Wain has only shown very limited insight he has developed some insight into his wrongdoing; and

- Dr Wain has worked without incident since the events in question took place.

10. Having considered and balanced the aggravating and mitigating factors in this case, the Tribunal concluded that the mitigating factors are extensive and substantial, and must be borne in mind when considering the appropriate and proportionate sanction.

11. In deciding what sanction, if any, to impose the Tribunal considered each of the options available to it, starting with the least restrictive.

No Action

12. 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. The Tribunal determined that there are no exceptional circumstances in this case and that, given the seriousness of its findings, it would not be sufficient, proportionate, or in the public interest to conclude this case by taking no action.

Conditions

13. The Tribunal next considered whether to impose conditions on Dr Wain’s registration. In so doing, it bore in mind that any conditions imposed would need to be appropriate, proportionate, workable, and measurable. The Tribunal had regard to paragraph 82 of the Sanctions Guidance, and noted that conditions are likely to be workable where: the doctor has insight; a period of retraining and/or supervision is likely to be the most appropriate way of addressing any findings; the Tribunal is satisfied the doctor will comply with them; and the doctor has the potential to respond positively to remediation, retraining, or to their work being supervised.

14. However, in light of its findings, the Tribunal determined that it would not be possible to formulate a set of appropriate or workable conditions which could adequately address Dr Wain’s dishonest misconduct. Dr Wain has shown only very limited insight and has expressed an apparent unwillingness to reflect and remediate his misconduct. The Tribunal was therefore not satisfied that Dr Wain would comply with any conditions placed on his registration or that at the present time he would respond positively to remediation. In any event, given the seriousness of its findings,
the Tribunal concluded that a period of conditional registration would not be a sufficient, appropriate, or proportionate sanction to satisfy the public interest.

Suspension

15. The Tribunal next considered whether it would be appropriate and proportionate to suspend Dr Wain’s registration. In so doing, it bore in mind that suspension from the medical register has a punitive effect (in that Dr Wain would be prevented from practising medicine during any period of suspension) although this is not the intended effect of such a sanction (as noted at paragraph 91 of the guidance).

16. The Tribunal acknowledged that a sanction of suspension does have a deterrent effect and can be used to send a signal to Dr Wain, the profession, and the public about what is regarded as behaviour unbefitting a registered doctor. The Tribunal also acknowledged that suspension is an appropriate response to misconduct which is sufficiently serious that action is required in order to protect members of the public and to maintain public confidence in the profession but which falls short of being fundamentally incompatible with continued registration (as at paragraph 92 of the guidance). Further, it acknowledged that suspension may be appropriate, for example, where there has been an acknowledgement of fault and where it is satisfied that the behaviour is unlikely to be repeated (paragraph 93).

17. Having had regard to all the circumstances of this case, the Tribunal was satisfied that Dr Wain’s misconduct did constitute a serious breach of the standards to be expected from a doctor and that any sanction lower than a period of suspension would not be sufficient to protect the public or to maintain the public’s confidence in the profession (paragraph 97 of the guidance). Hence its determination that concluding the case by taking no action or imposing conditions on Dr Wain’s registration would be neither appropriate nor proportionate. Nevertheless, the Tribunal was satisfied that Dr Wain’s misconduct is not fundamentally incompatible with his continued registration because of the mitigating factors the Tribunal has identified and set out above.

18. The Tribunal therefore determined that a period of suspension would be an appropriate and proportionate sanction which would fulfil the statutory overarching objective. It was satisfied, in light of the mitigating factors it has identified above and its view that Dr Wain’s misconduct was not fundamentally incompatible with his continued registration, that erasing his name from the Medical Register would, at this time, be disproportionate and punitive.

19. In making this decision, the Tribunal had regard to the judgments in the cases of Ali Abbas v GMC [2017] EWHC 51 (Admin) and Atkinson v GMC [2009] EWHC 3636 (Admin). The former states that:
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[...] in the context of deciding what sanction is appropriate, a finding of dishonesty is of particular significance, especially if it is persistent and combined with a lack of insight [...] plainly, the individual circumstances of the case must be considered and there can be no universal or inflexible rules in this context.

Nicol J then cites the following passage from Atkinson v GMC, which the Tribunal found to be particularly apposite in this case:

[...] erasure is not necessarily inevitable and necessary in every case where dishonest conduct by a medical practitioner has been substantiated. There are cases where the panel, or indeed the court on appeal, have concluded in the light of the particular elements that a lesser sanction may suffice and it is the appropriate sanction bearing in mind the important balance of the interests of the profession and the interests of the individual. It is likely that for such a course to be taken, a panel would normally require compelling evidence of insight and a number of other factors upon which it could rely that the dishonesty in question appeared to be out of character or somewhat isolated in its duration or range, and accordingly there was the prospect of the individual returning to practice without the reputation of the profession being disproportionately damaged for those reasons.

20. Whilst Dr Wain has only shown very limited insight into his misconduct thus far, the Tribunal was satisfied that, given Dr Wain’s otherwise good character and lengthy, unblemished career, his dishonesty appears to have been entirely out of character. It was isolated in its duration and range. Whilst there remains a real risk that his misconduct might be repeated, any such risk is low.

21. The Tribunal has taken into account the impact that a period of suspension may have upon Dr Wain, his patients, and others who rely upon his contribution to medicine. However, in all the circumstances the Tribunal concluded that Dr Wain’s interests are outweighed by the need to promote and maintain public confidence in the medical profession and the need to promote and maintain proper professional standards and conduct for members of that profession. Acting with honesty and integrity at all times is a fundamental tenet of the medical profession and the Tribunal was satisfied that a period of suspension is necessary to send a clear message to Dr Wain, the profession, and the wider public, that dishonesty, even at ‘the lower end of the scale’, constitutes behaviour unbefitting a registered doctor.

22. The Tribunal therefore determined that Dr Wain’s registration should be suspended for a period of six months. It considered that a suspension of this length would give Dr Wain adequate time to reflect on his misconduct, its seriousness and its consequences and fully to develop his insight.

23. Whilst noting the GMC’s submission that a review hearing is not required in this case because of Dr Wain’s expressed intention shortly to retire from practice, the
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Tribunal nevertheless determined to direct a review of Dr Wain’s case in order to allow it to fulfil the statutory overarching objective. A review hearing will therefore convene shortly before the end of the period of suspension, unless an early review is sought. The Tribunal wishes to clarify that at the review hearing, the onus will be on Dr Wain to demonstrate that he has developed insight into and remedied his misconduct. It may therefore assist the reviewing Tribunal if Dr Wain were to provide:

- evidence that he has developed sufficient insight into his misconduct, its seriousness and its consequences;
- evidence that he has remedied his misconduct;
- evidence that he has maintained his medical skills and knowledge during the period of his suspension.

24. Dr Wain will also be able to provide any other information that he considers will assist.

Determination on Immediate Order - 22/05/2019

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

Submissions

2. Mr Rigby submitted that an immediate order would be disproportionate in this case and not making an immediate order would allow Dr Wain to discharge his duties to his patients and to make adequate arrangements for the period of his suspension.

The Tribunal’s Determination

3. In reaching its decision the tribunal referred to the relevant paragraphs of the ‘Sanctions Guidance’. It exercised its own judgement and had regard to the principle of proportionality.

4. The Tribunal has already determined that Dr Wain’s dishonest misconduct was at ‘the lower end of the scale’. There has been no suggestion that Dr Wain has or is liable in the future to pose a clinical risk to patients. Having considered all the circumstances, the Tribunal was satisfied that the need to maintain public confidence in the profession has been clearly marked by its substantive sanction of the suspension of his registration for a period of six months. The Tribunal therefore concluded that the imposition of an immediate order would be disproportionate and unnecessary pending the substantive order of suspension taking effect.
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5. This means that Dr Wain’s registration will be suspended 28 days from when notice of this decision is deemed to have been served upon him, unless he lodges an appeal. If Dr Wain does lodge an appeal he will remain free to practise unrestricted until the outcome of any appeal is known.

6. There is no interim order to revoke.

7. That concludes this case.

Confirmed

Date 22 May 2019

Mr Richard Tutt, Chair
Application to Proceed in Dr Wain’s Absence

1. Dr Wain was neither present nor represented at the hearing. Mr Rigby therefore made an application, pursuant to Rule 31 of the Rules, for the Tribunal to proceed to consider Dr Wain’s case in his absence.

Service

2. Mr Rigby first invited the Tribunal to find, in accordance with Rules 15 and 40 of the Rules, that all reasonable efforts had been made to serve Dr Wain with notice of this hearing.

3. In considering whether notice of this hearing had been properly served on Dr Wain, the Tribunal had regard to the GMC’s Notice of Allegation, sent to Dr Wain’s registered address by Special Delivery on 9 April 2019. That letter was also sent to Dr Wain’s email address on the same date. The Tribunal noted that Dr Wain replied by email to the GMC the same day, confirming receipt of the GMC’s Notice of Allegation.

4. The Tribunal also had regard to the MPTS Notice of Hearing, dated 12 April 2019, sent to Dr Wain’s registered address by Special Delivery. The MPTS Notice of Hearing was also sent to Dr Wain’s email address on the same day. The Tribunal was satisfied that both the hard copy and electronic copy of the Notice of Hearing contained, amongst other things, details of the date, time, and location of this hearing. The Tribunal noted that Dr Wain replied by email to the MPTS on 12 April 2019 confirming receipt of the Notice of Hearing and stating that he would not be attending the hearing.

5. The Tribunal was therefore satisfied that all reasonable efforts had been made to inform Dr Wain of these proceedings, and that notice of this hearing had been properly served upon him in accordance with the Rules.

Proceeding in Absence

6. In considering whether to proceed with the case in Dr Wain’s absence, the Tribunal took into account the submissions made by Mr Rigby on behalf of the GMC but exercised its own judgement. In accordance with the principles in R v Jones [2002] UKHL 5 and GMC v Adeogba & Visvardis [2016] EWCA Civ 162 it bore in mind that although it has the discretion to proceed to consider the case in the doctor’s absence, that discretion should be exercised with the utmost care and caution having regard to all the circumstances of which it is aware, with fairness to the practitioner being a prime consideration, but also taking into account fairness to the GMC and the overall fairness of the proceedings. The Tribunal bore in mind that in
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making its decision it must balance Dr Wain’s interests against those of the GMC and the wider public interest.

7. In making its decision, the Tribunal bore in mind the need to protect the public. This is the Tribunal’s statutory overarching objective, which includes:

- protecting, promoting and maintaining the health, safety and well-being of the public;
- promoting and maintaining public confidence in the medical profession; and
- promoting and maintaining proper professional standards and conduct for members of that profession.

8. In all the circumstances, the Tribunal was satisfied that Dr Wain is aware of these proceedings and that he has voluntarily absented himself from them. A GMC telephone note of 16 November 2018 confirms that Dr Wain was alerted on that date to the fact that the allegations of dishonesty had been referred to an MPT hearing. During that telephone conversation Dr Wain said he ‘would not be taking part or attending the MPT hearing’.

9. At the Listings Teleconference for the hearing on 30 November 2018, Dr Wain advised the MPTS that he would not be attending the hearing or be legally represented. Dr Wain’s likely non-attendance at the hearing was re-confirmed to the MPTS in his email of 12 April 2019, in response to its Notice of Hearing, and again reiterated in his email of 16 April 2019 to the GMC in which he stated as follows:

‘I would like to apologise to the Tribunal for not attending your proceedings on 20/5/19. I feel this would be a stressful experience that would probably prove of little gain to me. The main reason for non attendance of course is that, at 71 years of age, I am at the end of a long career in medicine (from 1972) – which has been unblemished until the recent incident in question. As my retirement is very close now, I feel a certain philosophical detachment regarding the planned deliberations.’

10. The Tribunal noted that there has been no application for an adjournment from Dr Wain and there has been no indication that he would attend a hearing on an alternative date. It also noted that Dr Wain is not legally represented and there has been no indication that he wishes to seek representation or to be represented at the hearing. Dr Wain has also provided the Tribunal with written representations about the alleged facts of this case.

11. The Tribunal was satisfied that whilst there may be some disadvantage to
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Dr Wain in not being able to give his account of his current fitness to practise and make relevant oral submissions, he has nevertheless provided the Tribunal with written representations which it can give careful consideration to. In any event, the Tribunal was satisfied that any disadvantage to Dr Wain arising out of his non-attendance at today’s hearing was outweighed by the public interest in the fair and expeditious disposal of these proceedings. In addition, it noted in various items of correspondence that Dr Wain has himself expressed a wish that the proceedings be concluded as soon as possible.

12. The Tribunal therefore determined to exercise its discretion in accordance with Rule 31 and to proceed to consider Dr Wain’s case in his absence. It was satisfied that it was in the interests of justice to do so.

Schedule 1

56 x 3.75mg Zopiclone tablets
56 x 20mg Omeprazole tablets