Neutral Citation Number: [2019] EWHC 3537 (Admin)

Case No: CO/2757/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/12/2019

Before :

BEFORE THE HONOURABLE MR JUSTICE HENSHAW

- -

Between :

GENERAL MEDICAL COUNCIL **Appellant**

- and –

PROFESSOR ROBERT THOMPSON WALTON **Respondent**

- -
- -

Ivan Hare QC (instructed by **GMC Legal**) for the **Appellant**
Nicholas A. Peacock (instructed by **Medical Protection Society**) for the **Respondent**

Hearing date: 5 December 2019

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE HENSHAW

Mr Justice Henshaw:

(A) INTRODUCTION

1. This is an appeal brought by the General Medical Council ("***the GMC***") under section 40A of the Medical Act 1983 ("***the 1983 Act***") against a determination of the Medical Practitioners Tribunal ("***the MPT***") on 18 June 2019 ("***the Determination***"). By the Determination, the MPT found a number of allegations proven against the Respondent ("***Professor Walton***") and suspended his registration for six months.

2. The GMC appeals on the ground that the MPT's determination is not sufficient for the protection of the public. More specifically, it contends that the MPT erred by:

    i) failing to ask itself the correct question when considering certain of the allegations made against Professor Walton, and

    ii) failing to apply the Sanctions Guidance approved for use by MPTs from 6 February 2018 ("***the Guidance***").

3. The GMC seeks an order quashing the relevant parts of the Determination and the remittal of the case to the Medical Practitioners Tribunal Service for them to arrange for the MPT to dispose of the case in accordance with the directions of this court.

4. Professor Walton opposes the appeal, contending that, applying the appropriate standard of review, no error in the Determination has been shown.

5. I have concluded that the Determination was wrong, in that the MPT asked itself the wrong question, and/or failed to address the correct question, in relation to allegations 3 and 4. Further, findings on those allegations *might* affect the question of the appropriate sanction. The case must therefore be remitted to the MPT for further disposal.

(B) THE MPT'S DETERMINATION

6. The MPT heard the GMC's case against Professor Walton from 10 to 18 June 2019. Both sides were represented by counsel.

7. The MPT issued a determination on the facts on 17 June 2019, a determination on impairment on 18 June 2019, and a determination on sanction on 18 June 2019. Together these constitute the Determination.

8. At the end of its determination on the facts, the tribunal set out the allegations against Professor Walton and its overall conclusions on them, under the heading "*The Tribunal's Overall Determination on the Facts*":

> "1. Between 2 May 2017 and 16 November 2017 while employed as a full-time Professor of General Practice at Warwick Medical School, University of Warwick ("the University") you also undertook paid private work for:
>
> (a) Summertown Health Centre ("Health Centre") for up to two days a week; ***Admitted and found proved***
>
> (b) Queen Mary University of London for one day a week. ***Admitted and found proved***
>
> 2. You:
>
> (a) were given advice by Professor Kumar that you would need to make an application to undertake private work ("the Application") on:
>
> (i) a date unknown between November 2016 and January 2017; ***Determined and found proved***
>
> (ii) 16 January 2017; ***Admitted and found proved***
>
> (b) knew you were subject to terms of employment at the University which required you to:
>
> (i) make the Application; ***Determined and found not proved***
>
> (ii) declare any conflict of interest. ***Determined and found not proved***
>
> 3. Prior to undertaking the work described at paragraph 1, you failed to:
>
> (a) make the Application; ***Admitted and found proved***
>
> (b) declare any conflict of interest. ***Determined and found not proved***
>
> 4. Your action as set out at paragraph 1 and 3 were dishonest by reason of paragraphs 2(a) and 2(b). ***Determined and found not proved***
>
> 5. On 6 October 2017, you informed Professor Frances Griffiths that you had agreed with Dr A that payment from the Health Centre could be paid directly to you, or words to that effect. ***Admitted and found proved***

> 6. On 21 October 2017, you completed the Application which requested approval for one half day per week of private work at the Health Centre. ***Admitted and found proved***
>
> 7. On 16 November 2017, you informed Professor Griffiths that you had been working at the Health Centre for one day per week during your employment at the University, or words to that effect. ***Admitted and found proved***
>
> 8. You knew that:
>
> (a) Professor Kumar had not agreed that the payment from the Health Centre could be paid directly to you; ***Determined and found proved***
>
> (b) you had been working for the Health Centre for up to two days per week during your employment at the University. ***Determined and found proved***
>
> 9. Your action as set out at paragraph 5 was dishonest by reason of paragraph 8(a). ***Determined and found proved***
>
> 10. Your actions as set out at paragraphs 6 and 7 were dishonest by reason of paragraph 8(b). ***Determined and found not proved in relation to paragraph 6. Determined and found proved in relation to paragraph 7.***"

9. The MPT's practice, reflected above, where matters are admitted is formally to find them proven (see § 17(1)(d)-(e) of the Order in Council referred to in § 11 below). I have omitted from the above quotation reference to two minor amendments which the MPT allowed to be made to the allegations.

10. The MPT went on to conclude that Professor Walton's fitness to practise was currently impaired by reason of misconduct, and that the appropriate sanction was a 6-month suspension.

(C) LEGAL FRAMEWORK

11. Section 1(1A) of the 1983 Act provides that the GMC's over-arching objective in exercising its functions under the Act is the protection of the public. The Act includes provision for cases of alleged misconduct to be brought before Medical Practitioners Tribunals, and the General Medical Council (Fitness to Practise) Rules Order in Council 2004 (2004/2608) makes more detailed provision for proceedings before such tribunals.

12. Section 40A of the Act provides:

> "(1) This section applies to any of the following decisions by a Medical Practitioners Tribunal—
>
> (a) a decision under section 35D giving—

> (i) a direction for suspension, including a direction extending a period of suspension;
>
> …
>
> (2) A decision to which this section applies is referred to below as a "relevant decision".
>
> (3) The General Council may appeal against a relevant decision to the relevant court [the High Court] if they consider that the decision is not sufficient (whether as to a finding or a penalty or both) for the protection of the public.
>
> (4) Consideration of whether a decision is sufficient for the protection of the public involves consideration of whether it is sufficient—
>
> (a) to protect the health, safety and well-being of the public;
>
> (b) to maintain public confidence in the medical profession; and
>
> (c) to maintain proper professional standards and conduct for members of that profession.
>
> . . .
>
> (6) On an appeal under this section, the court may—
>
> (a) dismiss the appeal;
>
> (b) allow the appeal and quash the relevant decision;
>
> (c) substitute for the relevant decision any other decision which could have been made by the Tribunal; or
>
> (d) remit the case to the MPTS for them to arrange for a Medical Practitioners Tribunal to dispose of the case in accordance with the directions of the court,
>
> and may make such order as to costs . . . as it thinks fit."

13. The Divisional Court set out the approach to be taken on such an appeal in *General Medical Council v Jagjivan* [2017] EWHC 1247 (Admin); [2017] 1 WLR 4438, at §§ 39-40:

> "As a preliminary matter, the GMC invites us to adopt the approach adopted to appeals under section 40 of the 1983 Act, to appeals under section 40A of the 1983 Act, and we consider it is right to do so. It follows that the well-settled principles developed in relation to section 40 appeals (in cases including: *Meadow v General Medical Council* [2006] EWCA Civ 1390;

[2007] QB 462; *Fatnani and Raschid v General Medical Council* [2007] EWCA Civ 46; [2007] 1 WLR 1460; and *Southall v General Medical Council* [2010] EWCA Civ 407; [2010] 2 FLR 1550) as appropriately modified, can be applied to section 40A appeals.

In summary:

i) Proceedings under section 40A of the 1983 Act are appeals and are governed by CPR Part 52. A court will allow an appeal under CPR Part 52.21(3) if it is 'wrong' or 'unjust because of a serious procedural or other irregularity in the proceedings in the lower court'.

ii) It is not appropriate to add any qualification to the test in CPR Part 52 that decisions are 'clearly wrong': see *Fatnani* at paragraph 21 and *Meadow* at paragraphs 125 to 128.

iii) The court will correct material errors of fact and of law: see *Fatnani* at paragraph 20. Any appeal court must however be extremely cautious about upsetting a conclusion of primary fact, particularly where the findings depend upon the assessment of the credibility of the witnesses, who the Tribunal, unlike the appellate court, has had the advantage of seeing and hearing (see *Assicurazioni Generali SpA v Arab Insurance Group (Practice Note)* [2002] EWCA Civ 1642; [2003] 1 WLR 577, at paragraphs 15 to 17, cited with approval in *Datec Electronics Holdings Ltd v United Parcels Service Ltd* [2007] UKHL 23, [2007] 1 WLR 1325 at paragraph 46, and *Southall* at paragraph 47).

iv) When the question is what inferences are to be drawn from specific facts, an appellate court is under less of a disadvantage. The court may draw any inferences of fact which it considers are justified on the evidence: see CPR Part 52.11(4).

v) In regulatory proceedings the appellate court will not have the professional expertise of the Tribunal of fact. As a consequence, the appellate court will approach Tribunal determinations about whether conduct is serious misconduct or impairs a person's fitness to practise, and what is necessary to maintain public confidence and proper standards in the profession and sanctions, with diffidence: see *Fatnani* at paragraph 16; and *Khan v General Pharmaceutical Council* [2016] UKSC 64; [2017] 1 WLR 169, at paragraph 36.

vi) However there may be matters, such as dishonesty or sexual misconduct, where the court *"is likely to feel that it can assess what is needed to protect the public or maintain the reputation of the profession more easily for itself and thus attach less weight to the expertise of the Tribunal …"*: see *Council for the*

> *Regulation of Healthcare Professionals v GMC and Southall* [2005] EWHC 579 (Admin); [2005] Lloyd's Rep. Med 365 at paragraph 11, and *Khan* at paragraph 36(c). As Lord Millett observed in *Ghosh v GMC* [2001] UKPC 29; [2001] 1 WLR 1915 and 1923G, the appellate court "*will afford an appropriate measure of respect of the judgment in the committee … but the [appellate court] will not defer to the committee's judgment more than is warranted by the circumstances*".
>
> vii) Matters of mitigation are likely to be of considerably less significance in regulatory proceedings than to a court imposing retributive justice, because the overarching concern of the professional regulator is the protection of the public.
>
> viii) A failure to provide adequate reasons may constitute a serious procedural irregularity which renders the Tribunal's decision unjust (see *Southall* at paragraphs 55 to 56).”

14. *Jagjivan* was cited with approval by Singh LJ in *Hussain v General Pharmaceutical Council* [2018] EWCA Civ 22 § 66, and by the Court of Appeal in *General Medical Council v Chandra* [2018] EWCA Civ 1898 § 81.

15. The Court of Appeal in *Bawa-Garba v General Medical Council* [2018] EWCA Civ 1879, (2018) 163 BMLR 43 provided important further clarification of the correct approach:

> “61 The decision of the Tribunal that suspension rather than erasure was an appropriate sanction for the failings of Professor Bawa-Garba, which led to her conviction for gross negligence manslaughter, was an evaluative decision based on many factors, a type of decision sometimes referred to as *"a multi-factorial decision*". This type of decision, a mixture of fact and law, has been described as "*a kind of jury question*" about which reasonable people may reasonably disagree … . It has been repeatedly stated in cases at the highest level that there is limited scope for an appellate court to overturn such a decision.
>
> …
>
> 63… In the recent case of *R (Bowen and Stanton) v Secretary of State for Justice* [2017] EWCA Civ 2181, McCombe LJ explained (at [65]) that, when the appeal is from a trial judge's multi-factorial decision, "the appeal court's approach will be conditioned by the extent to which the first instance judge had an advantage over the appeal court in reaching his/her decision. If such an advantage exists, then the appeal court will be more reticent in differing from the trial judge's evaluations and conclusions".
>
> …

> 67 That general caution applies with particular force in the case of a specialist adjudicative body, such as the Tribunal in the present case, which (depending on the matter in issue) usually has greater experience in the field in which it operates than the courts: see *Smech* at [30]; *Khan v General Pharmaceutical Council* [2016] UKSC 64, [2017] 1 WLR 169 at [36]; Meadow at [197]; and *Raschid v General Medical Council* [2007] EWCA Civ 46, [2007] 1 WLR 1460 at [18]-[20]. An appeal court should only interfere with such an evaluative decision if (1) there was an error of principle in carrying out the evaluation, or (2) for any other reason, the evaluation was wrong, that is to say it was an evaluative decision which fell outside the bounds of what the adjudicative body could properly and reasonably decide …
>
> …
>
> 94 As we said earlier in this judgment, the Tribunal was, in relation to all those matters and the carrying out of an evaluative judgement as to the appropriate sanction for maintaining public confidence in the profession, an expert panel, familiar with this type of adjudication and comprising a medical practitioner and two lay members, one of whom was legally qualified, all of whom were assisted by a legal assessor."

16. Specifically as regards allegations of dishonesty:

i) The Court of Appeal in *Raychaudhuri v GMC* [2018] EWCA Civ 2027, [2019] 1 WLR 324 indicated that the court should be slow to find dishonesty where the MPT has decided not to do so:

> "Although I agree that the High Court had jurisdiction to hear this appeal by the GMC, I wish to express my regret that it was brought. It should require a very strong case for a court to overturn a finding of the MPT (or any comparable tribunal) that a doctor has not acted dishonestly. In the present case, as Sales LJ has observed, the MPT gave anxious consideration to whether the appellant's conduct could be regarded as dishonest. They heard the appellant, Dr De Halpert and other witnesses give evidence over several days. They were well placed to make an evaluative judgment of the nuances of how the various individuals had interacted and that judgment should have been accorded great weight, not only by the court but by the GMC in deciding whether to bring an appeal at all. The discretion given by section 40A(3) to appeal against any decision which the GMC consider not sufficient for the protection of the public is a wide one, but in my view it is a discretion to be exercised with restraint where it involves a challenge to a finding of fact in the practitioner's favour." (§ 74 per Bean LJ)

ii) Mostyn J in in *Malins v SRA* [2017] EWHC 835 (Admin), [2017] 4 WLR 85 stated: "*It is elementary, and supported by abundant authority, that if you are*

> *accused of dishonesty then that must be spelt out against you with pitiless clarity*" (§ 36). See also *Salha v GMC* [2003] UKPC 80; (2004) 80 BMLR 169 at § 14: *"It is a fundamental principle of fairness that a charge of dishonesty should be unambiguously formulated and adequately particularised"*.

17. On the other hand, the court's intervention may be appropriate where the tribunal has made an error of principle, for example by applying the wrong test (see, e.g., *General Medical Council v Chandra* [2019] EWCA Civ 1898 §§ 90-94).

(D) GROUND 1: DETERMINATION ON ALLEGATIONS 3 AND 4

18. Allegation 3(b) was that *"Prior to undertaking the work described at paragraph 1",* Professor Walton failed to make *"the Application"*, i.e. an application to undertake private work.

19. The MPT held in relation to that allegation:

> "34. In determining whether Prof Walton had 'failed', the Tribunal first considered whether he had a requirement or obligation to declare any conflict of interest prior to undertaking the work described at paragraph 1.
>
> 35. The Tribunal … was of the view that Prof Walton's private work at the Health Centre and Queen Mary may have been perceived as resulting in a possible conflict of interest, and so would need to be declared. However, it had seen no evidence that an obligation to make any such declaration arose prior to Prof Walton starting work at the University in May 2017. It could only see that the obligation would arise upon commencement of employment as a term of that employment. A new employee at the University would not be subject to the Terms of Employment until they began their role. It therefore determined that it was not a requirement for Prof Walton to have declared his private work prior to starting his role at the University." (my emphasis)

20. Thus the tribunal appears to have understood the words *"prior to undertaking the work described at paragraph 1"* in allegation 3 to mean prior to the date on which Professor Walton started work for the University of Warwick ("***the University***"). Since Professor Walton was not subject to any duties to the University under his terms of employment before he started work there, he could not (the tribunal reasoned) have been in breach of any duty to declare a conflict of interests.

21. Allegation 1, quoted earlier, was that:

> "Between 2 May 2017 and 16 November 2017 while employed as a full-time Professor of General Practice at Warwick Medical School, University of Warwick ("the University") you also undertook paid private work for …"

22. In my judgment the reference in allegation 3 to *"the work described in paragraph 1"* is clearly to the *"paid private work"* referred to in paragraph 1, and not to Professor Walton's employment with the University. That was the *"work"* referred to, as such, in allegation 1. It was also the work for which, according to allegation 2, Professor Walton was told he would need to make an application. The obvious meaning of allegation 3, read with allegations 1 and 2, is that before undertaking private work while employed by the University, Professor Walton needed to, but failed to, make an application and to declare any conflict of interest. Moreover, it makes little or no sense to treat allegation 3 as being confined to alleged failures prior to beginning work for the University, given that, as Professor Walton's counsel submitted to the MPT, *"... the allegation can only arrive, surely, once his employment starts"*.

23. The same error affected the MPT's findings on allegation 4, which was that Professor Walton's action(s) as set out in allegations 1 and 3 *"were dishonest by reason of paragraphs 2(a) and 2(b)".* In other words, Professor Walton's failure to apply for permission to undertake private work, or to declare any conflict of interest, were alleged to be dishonest because (*per* allegation 2) he knew from conversations with Professor Kumar and from his terms of employment that he was required to take both those steps. The MPT concluded:

> "38. The Tribunal noted that Prof Walton, through his counsel, admitted to sub-paragraph 3.a. at the outset of the hearing, and that sub-paragraph was therefore subsequently announced as found proved. However, after reviewing the evidence, and as explained in its reasoning for sub-paragraph 3.b, the Tribunal could find no evidence that there was a requirement or obligation for Prof Walton to make such an application to undertake private work prior to starting his post at the University. In the absence of any such duty, it was not necessary to consider any failure to comply. As a result, the Tribunal determined that there was no basis on which it had to proceed to consider dishonesty.
>
> 39. It therefore found paragraph 4 of the Allegation not proved in its entirety." (my emphasis)

24. Thus by reading allegation 3 as a whole to relate only to pre-employment failures, the MPT concluded that Professor Walton could not in any relevant sense have failed either to make an application, or to declare any conflict, despite Professor Walton having admitted to the former. On that basis, the tribunal inevitably concluded that the allegation of dishonesty in allegation 4 could not be made out.

25. I consider that the tribunal's reading of allegation 3 was incorrect, and it should have proceeded to make further findings under allegation 3(b) as to whether a conflict of interests should have been declared once Professor Walton joined the University, and under allegation 4 as to whether the admitted failure to make an application (allegation 3(a)) was dishonest by reason of the proven or admitted facts referred to in allegation 2(a).

26. Professor Walton makes the point that the tribunal's finding, on allegation 2(b), that he did not know the contents of his terms of employment is probably fatal to allegation

3(b). However, I consider that that will be a matter for further consideration by the tribunal. I would only observe that allegation 3(b) *per se* may not necessarily turn on actual knowledge. The position may be different as regards the related allegation of *dishonest* failure to declare a conflict of interest, which forms part of allegation 4, and which may indeed be precluded by the tribunal's finding on allegation 2(b): though ultimately that too is a matter for the tribunal.

27. Professor Walton submits that the allegations were not clear, and that they should be interpreted in the light of (i) the evidence served in advance of the hearing by the GMC as prosecutor and (ii) the way in which the evidence and allegations were dealt with in opening submissions, during the hearing, and in closing submissions by the GMC. He contends that these matters reinforce the view that allegation 3 related only to steps Professor Walton is alleged to have failed to take before he started work with the University on 2 May 2017. He says the GMC could perhaps have made good any lack of clarity in the allegations during the hearing, but only if the basis of the allegations had been made explicit and Professor Walton had been afforded sufficient time to respond: see *Moneim v GMC* [2011] EWHC 327 (Admin).

28. In Professor Walton's witness statement for the MPT hearing, he stated that he ultimately applied for permission to undertake private work in October 2017, which was in the event towards the end of his tenure at the University, his previous understanding having been that *"After my conversation with Professor Kumar in January 2017, I thought it was within his gift to grant approval but after the meeting with Professor Griffiths on 6 October 2017 … I realised that there was a higher level of University process".* Professor Walton admitted that he had failed to make the application referred to in allegation 3(a). His answer to allegation 3(b) was not that no such declaration could have been required before he started work for the University, but rather that he did not see his private work for Summertown or Queen Mary as involving a conflict: *"Maintaining both of these external relationships was strongly in Warwick's interests".*

29. Professor Kumar's witness statement included evidence that at a meeting with Professor Walton in November 2017 *"I told him that he was employed in a full time job with the Medical School and that he was meant to disclose any outside work that he undertook".* That evidence would not naturally be read as relating solely to a failure to make a disclosure prior to beginning work with the University. Similarly, email correspondence from Professor Griffiths to Professor Walton in October 2017, relied on by the GMC before the tribunal, urged him at that stage to follow the University's procedures relating to outside work as a matter of urgency.

30. The GMC's oral opening before the MPT included reference to Professor Walton having made no application between mid January (when he spoke to Professor Kumar) and 2 May 2017 (when he started at the University), but also dealt with later events including the October emails:

> "He was due thereafter to commence his employment shortly afterwards in, as I understand it, mid-January 2017, though he actually started working for the medical school on 2 May 2017, as you will see from Graham Partridge's statement in due course.

No application was submitted between those periods – certainly the first part of 2017 – by Professor Walton regarding that ongoing paid work externally, either at Summertown or Queen Mary.

Moving things forward in terms of the material you have in the bundle to 6 October 2017, Professor Walton was invited to a meeting with Professor Frances Griffiths, the Head of Division of Health Service at the University, and Simon Crick, the Chief Finance Officer. Professor Griffiths is being called by the GMC in this case as a witness and she will say that she had become concerned in the months leading up to that meeting as to how many teaching and clinical PAs Professor Walton was performing.

Professor Griffiths sent an email to Professor Walton following that meeting on 6 October – page 66 – to confirm what she understood had been discussed in that regard: that is, that Professor Walton was conducting two PAs on his programme grant, seven PAs on research activity, and was building towards, as it is put, two PAs of teaching. When you clock those up that left him one PA short of the 12 that he was contracted for, and it was confirmed it seems that no clinical work was being conducted by him at all for the university. You will see at paragraph 2 of the email, page 66:

> "In addition to the 11 PAs above you are working a day a week as a GP in the practice that you worked at prior to moving to WMS. [Warwick] The practice is paying you for one session a week."

In fact the GMC will say that since at least April 2017, as is reflected in the job plan that is produced by Ms Morris, Professor Walton was working at Summertown across two whole days and was being paid for four sessions a week in addition to the work that he was continuing to conduct at Queen Mary, again which we say was equivalent to one whole day per week. Professor Griffiths' email continues:

> "You informed me that you agreed with Sudhesh [Professor Kumar] that this one session could be paid directly to you."

It goes on at the foot of page 66:

> "Subsequent to our meeting I had the opportunity to mention our meeting to Sudhesh. Sudhesh is not aware of you having formally applied to do the external work (the one clinical session a week that is paid to you by your practice). There is a process for gaining University approval for this. Please could you confirm you have done this. If you have not done this then you need to apply urgently."

> You will hear from Professor Kumar on behalf of the GMC, today in fact, and he will confirm that not only was he unaware of any application having been made – because at that stage it hadn't been made – but at no point had he agreed that any such earnings could be paid directly to Professor Walton without the need for any application. " (Day 1/5-7)

31. During the cross-examination of Professor Walton, he was asked questions about the position in January 2017 after he had received the University's offer letter, including whether at that stage he had looked at the proposed terms of employment or logged on to the University's website to see whether there was anything about retaining outside work.

32. Professor Walton was also cross-examined about an email he received from Professor Kumar dated 16 January 2017. Professor Walton had enquired whether it would be possible, were he to take up the post at the University, for him *"to keep my earnings from my practice as my two days a month consultancy which would form part of my employment contract at Warwick"*. Professor Kumar's response included the following:

> "It is an application you need to make under 'private outside work' where you would state it would not interfere with your academic duties. If you applied I can't think of a reason for me to object so you can expect it will be approved. However see the point below, it is the very essence of what we are creating – a joined up clinical academic post and this would fall outside those arrangements.
>
> Also you should be aware that this would not obviate the need to provide input to the Coventry Health Centre …"

33. The cross-examination on this topic included the following passages:

> "Q The impression you had from the previous conversation that you had been given the green light is being corrected, isn't it?
>
> A He also then goes on to say – I didn't know what he meant by the first sentence of this,
>
> > "It is an application that you need to make under 'private outside work'."
>
> I had no idea what that meant. So yes I did understand that there might be something else to be done; presumably some formality which needed to be gone through when I arrived […] But of course he then goes on to say,
>
> > "If you applied, I can't think for a reason for me to object so you can expect it will be approved."

I assumed there was some formal ratification that needed to be done when I arrived.

Q So you seized upon the part where he says

"I can't think of a reason for me to object"

But you didn't understand and therefore ignored did you the part where he said you need to make an application?

A I didn't understand it, that is correct. I didn't ignore it; I knew that something had to be done.

Q Why not email him back straightaway and say what do you mean an application needs to be made? what is this 'private outside work'?

A I thought it was a formal ratification which would be done when I started there.

Q Sorry, you thought that this was a formal ratification?

A No. I thought there would need to be a formal ratification at some stage in the future. […]

Q You couldn't have been in any doubt though could you Professor Walton after that email that there was a formality to undertake in order to get the permission you were looking for?

A Yes, that is correct.

Q At that stage what steps did you take to investigate how those formalities would be met?

A I took no steps at that stage.

Q Why not?

A Again, it is one of the many administrative errors I have made […]

Q Did you ask anyone at that stage if not Professor Kumar? Anyone at the university at that stage?

A I think it is probably fair to say that I didn't expect anything needed to be done at that stage. I felt that he had given me verbal permission ourselves but he had followed that up with an email and nothing further needed to be done at that stage; that some administrative work needed to be done when I actually arrived in Warwick.

Q Did you go back to the terms of employment perhaps and have another look at those which you hadn't read previously? Did you go onto the university website and have a look at those to see whether there was anything that may refer to this private outside work section that has been referred to by Professor Kumar?

A No.

Q No. You just proceeded with this presumption again to use that term you had been given the green light?

A Yes, and bear in mind in previous employment that was how things were done; by verbal agreement.

…

Q Just beneath that, paragraph 17,

> "My impression of Professor Kumar's position [you say] during the telephone call in January [just to go back to that] was that ratification of my one day a week working at Summertown was a formality and I genuinely thought he was happy for me to keep my income from there."

What did you mean by that phrase "ratification was a formality"?

A As I mentioned earlier in that there was something else that needed to be done which would be done; which would be an administrative procedure which would happen when I arrived in Warwick.

Q Something else that you needed to do?

A No, not necessarily.

Q Because to cut forward to paragraph 35 of your statement. This is the only time I think I am going to go back and forth in time. But you refer to the email that you received from Professor Griffiths on 9 October 2017, a few days after the first of those meetings you had on the 6th in which she underlined the process of gaining university approval to that work. What you say towards the end of that paragraph is,

> "This was the first time I had understood the formality of the process for applying."

It is not right to say though you had understood there would be a formality for applying.

A Yes I think that is correct.

> Q You had been told about that when you spoke to Professor Kumar back in January.
>
> A Yes.
>
> Q It is just you hadn't done anything about it.
>
> A I hadn't but then nor had the administrative team at Warwick." (Day 3/31-34)

34. Professor Walton submits that use several times of the phrase "*at that stage*" in the questions and answers quoted above supports the view that allegation 3 related only to alleged inaction on Professor Walton's part prior to taking up his post on 2 May 2017. I do not consider that to be a fair reading of the passage as a whole. In particular, the last four questions and answers address steps Professor Walton could have taken but did not take following his arrival at Warwick.

35. The position following Professor Walton's arrival at Warwick was also the subject of questions from the tribunal itself:

> "Q Was there any discussion with Professor Griffiths as your line manager about your outside work or your Queen Mary work and the transfer of it etcetera, etcetera.
>
> A It is possible that she said that at the meeting which we have described in some detail.
>
> Q I am talking about in any period leading up to the October.
>
> A I don't think so.
>
> Q Okay, thank you. Talking of Queen Mary, you have explained to us that it was only at a later stage when you were first offered and accepted the appointment that you discovered that you had to continue to have an employment contract with Queen Mary in order to carry on with your […] and we have looked at that letter and what the nature of that employment contract was. When you discovered that you had to go down that road and when they then issued you with the fractional contract, did you tell anybody at Warwick or discuss it with anybody at Warwick that you had discovered this new requirement?
>
> A Not specifically, and it is a major administrative error which I made really. In fact I remember very clearly, and it came out in Sudesh's testimony, that I had organised a meeting the week that I arrived with Sudesh. My intention was to discuss it all with him then but he was rushing off to another meeting. I didn't do it; there were other things to talk about and then I was wrapped up in doing my work. Clearly, it is obvious I should have done. I was quite clear to everyone that I was still working at Queen Mary of course.

> Q But there was no discussion about the fact that rather than getting an honorary contract which is what you thought you were going to get you had to have an employment contract?
>
> A Which is what I thought I was going to have, yes.
>
> …
>
> THE CHAIR: Professor Walton, just one more from me I think. In January you have been told by email from Professor Kumar that there is an application that needs to be made in relation to your outside work. At that point you are doing one day per week for Summertown. You know at that point and you told us in evidence that you thought you didn't need to do anything at that point but when you joined Warwick you would need to do something at that point.
>
> A Something would happen, yes.
>
> Q By the time you joined Warwick your payment from Summertown has doubled and you are also now in receipt of payments from Queen Mary that previously you hadn't anticipated. Why didn't you do something when you joined Warwick at that point? You knew something was going to need to happen when you joined Warwick; why didn't you do something?
>
> A I should have done I freely admit it. It is an error on my behalf. I should have – I am not sure what I should have done but I should have done something, yes. I guess part of the reason was I wasn't sure how long these things would continue; the transition of the grants, Summertown. Did they want me to continue or not." (Day 3/64-65)

36. The GMC's oral closing submission clearly indicated that it regarded inaction following Professor Walton's arrival at Warwick as being within the scope of allegation 3:

> "… it is admitted at 3(a) that he failed to make the applications or submit the application forms in relation to that work. That is the FP10As, but it is not admitted at 3(b) that there was a failure to declare a conflict of interest. Now the interpretation I invite the tribunal to take of that is this. The failure in relation to conflict of interest was not a failure to declare that there was a conflict of interest. It was the failure to submit the forms concerning the conflict of interest that may have arisen in relation to that work. In that respect, he failed. It was incumbent on him, in my submission, to return both forms even if he felt there was no actual conflict of interest. In failing to do so it was, in my submission, dishonest because what he was doing was failing to declare in a formal sense the precise work that he was doing in those forms and it was dishonest, if not before January

> 2017 in my submission it became dishonest after he had these exchanges by telephone and email with Professor Kumar after January 2017 and certainly after he commenced work at Warwick in April 2017, by which point it was evident that he knew that the sessions at Summertown had doubled since his conversation with Professor Kumar and that he was being paid and continued to work at Queen Mary. The issue, therefore, was certainly loud and clear at that stage and still neither form or none of the three forms was submitted." (Day 4/6-7)
>
> "It doesn't account for the fact that, having received the advice both by telephone and by email from Professor Kumar, Professor Walton did nothing thereafter, he accepts, to obtain permission or find out how to obtain permission. He didn't look at his terms of employment, as you have heard. He didn't go on to the medical school website. He didn't make any enquiry of anyone for the next nine to ten months about how to obtain that permission. In my submission, that is because it suited him not to do so. He knew that Warwick was unlikely to agree to the work he was conducting externally, as I say, especially when his sessions at Summertown doubled in or around April." (Day 4/9)

37. This was consistent with the GMC's written closing, § 22 of which said:

> "Thus we invite you to conclude that it was incumbent on Prof W to return *both* forms and his failure to do so was dishonest, if not before January 2017, it was after this exchanges with Prof Kumar in January 2017 and certainly after he commenced work at Warwick in April 2017."

(Professor Walton's start date at Warwick was in fact 2 May 2017 rather than in April 2017.)

38. There is no indication that the tribunal's line of questioning, or the GMC's approach in closing, referred to in §§ 35-37 above, gave rise to any objection on behalf of Professor Walton.

39. Professor Walton submits that, taken together, the materials summarised above show that the GMC did not clearly put to him a case that he had dishonestly failed to fulfil any obligation than arose on or after, as opposed to before, he started work with the University. He reminds the court that allegations of dishonesty must be clearly alleged and put, and submits that the GMC cannot in this regard rely on questions posed by the tribunal: the process is, he says, prosecutorial rather than inquisitorial.

40. However, I consider that the essential question I have to address on this appeal is a slightly different one, namely whether the tribunal erred in construing the scope of the allegations made against Professor Walton as quoted in § 8 above. In that context, the relevance of the course of the proceedings is whether or not they demonstrate (as Professor Walton suggests) that allegations 3 and 4 should be read as being limited to pre-employment events. In my judgment they do not. The terms of the allegations are clear in themselves, for the reasons I have set out earlier, and the course of proceedings

is consistent with their extending to alleged post-employment failures: the case presented by the GMC encompassed both. I would in any event be disinclined to accept the submission that that case was not put with sufficient clarity, but to the extent that Professor Walton could have any complaint in that regard, the remedy is for him to have a full opportunity to address that case in resumed proceedings before the MPT following remittal.

41. Professor Walton submits that the court should not order remittal to the MPT unless the GMC can show that an additional finding of dishonesty on allegation 4 *"would have had a material impact on the seriousness of Professor Walton's conduct"*. The GMC's skeleton argument in this court argues that *"Had the MPT found dishonesty, this would plainly have had a material impact on the assessment of the seriousness of Professor Walton's conduct".* Professor Walton disputes this, and says the tribunal has already taken full account of his conduct (including financial benefit).

42. The court will allow an appeal if it concludes that the MPT's decision was *"wrong"*, and section 40A(6) of the 1983 Act provides that the court *"may"* then quash the decision and remit the case to the MPTS to arrange further disposal of the case. In my view the key question is not whether additional findings *"would"* impact on sanction, but whether they might do so. In addition, even if sanction were unaffected, additional findings might serve the public protection objective of the disciplinary process: it is notable that section 40A(3) allows the GMC to appeal if it considers the decision insufficient for the protection of the public *"whether as to a finding or a penalty or both"*.

43. In the present case the MPT has already taken into account, when considering impairment and sanction, its finding that Professor Walton was dishonest on more than one occasion, so that his misconduct could not be described as isolated. However, as the GMC points out, a finding against Professor Walton on allegation 3(b) and/or 4 would relate to an ongoing failure and might be viewed more seriously.

44. I express no view on whether remittal would or would not be likely to result in additional findings of misconduct, or of dishonesty, against Professor Walton, nor as to whether any such findings would impact the sanction the MPT has to date decided to impose. It is sufficient for present purposes that remittal could result in one or more of those things occurring.

45. By taking this course, the court is not seeking to substitute any findings of its own for those of the MPT in relation to dishonesty (still less, issues of clinical competence), nor its own view on sanction for the tribunal's own multi-factorial assessment. Rather, it is quashing the determination and remitting it to the tribunal to the extent that it is affected by an erroneous failure to address material parts of the allegations that (properly construed) have been made against Professor Walton.

46. Finally under this heading, the GMC pointed out that the MPT did not consider whether the conduct alleged in allegation 1 was itself dishonest, that also forming part of allegation 4. That observation appears to be correct, though because I do not read the GMC's Grounds of Appeal as raising this additional point, I do not consider it appropriate to make a finding on it.

(E) GROUND 2: SANCTIONS GUIDANCE

47. The Guidance has been said to provide an "*an authoritative steer for tribunals as to what is required to protect the public, even if it does not in any particular case dictate the outcome*": see *General Medical Council v Khetyar* [2018] EWHC 813 (Admin) § 21 per Andrew Baker J, who added:

> "As part of Guidance at the heart of which is the principle of proportionality (weighing the public interest against the individual interests of the particular doctor), such advice is an authoritative steer in particular as to the application of that principle. Again, of course, it remains advice and not prescription: tribunals must ultimately judge each case on its own merits, and are entitled in principle to depart from that steer. Doing so, however, requires careful and substantial case-specific justification. A "*generalised assertion that erasure would be a disproportionate sanction and that the doctor's conduct was not incompatible with his continued registration*", where the Guidance gives a clear steer towards erasure, properly considering what it says about important features of the case in question, will be inadequate and will justify the conclusion that a tribunal has not properly understood the gravity of the case before it: see *GMC v Stone* [2017] EWHC 2534 (Admin) at [53]." (§ 22)
>
> and:
>
> "The steer provided by para.109 of the Guidance is that erasure may be appropriate if any one of the factors listed is present. That does not mean erasure must follow whenever para.109 applies; it does, though, mean a tribunal ought to consider erasure very seriously when para.109 does apply, especially if it does so on multiple grounds, in which case powerful case-specific reasons ought to be required if a decision against erasure is to be justified." (§ 55(1))

48. The Court of Appeal stated in *Professional Standards Authority v Health and Care Professions Council and Doree* [2017] EWCA Civ 319, [2017] Med LR 301 that a Panel applying the Health and Care Professions Council's Indicative Sanctions Guidance should have proper regard to it, and apply it as its own terms suggest:

> "… unless the Panel had sound reasons for departing from it – in which case they had to state those reasons clearly in their decision." (§ 29)

49. The GMC submits that the MPT does not refer to the Guidance in its determination on sanction, although it was referred to in some detail by counsel for both parties. It says the seriousness of the MPT's findings on dishonesty (even without the factual error addressed above under Ground 1) and lack of insight indicate that consideration of the sanction of erasure was required. As Mostyn J stated in *Khan v General Medical*

Council [2015] EWHC 301 (Admin) (quoted in *General Medical Council v Nyamasve* [2018] EWHC 1689 (Admin)):

> "6. The decisions from this court have demonstrated that a very strict line has been taken in relation to findings of dishonesty. This court and its predecessor, the Privy Council, has repeatedly recognised that for all professional men and women, a finding of dishonesty lies at the top end of the spectrum of gravity of misconduct; see Tait v Royal College of Veterinary Surgeons [2003] UKPC 34 at paragraph 13.
>
> …
>
> 8. In cases of proven dishonesty, the balance can be expected to fall down on the side of maintaining public confidence in the profession by a severe sanction against the doctor concerned. See Nicholas-Pillai v GMC [2009] EWHC 1048 (Admin) per Mitting J at [27] where he stated:
>
> > "That sanction will often and perfectly properly be the sanction of erasure, even in the case of a one-off instance of dishonesty."
>
> 9. Where proven dishonesty is combined with a lack of insight (or is covered up) the authorities show that nothing short of erasure is likely to be appropriate."

50. Paragraph 109 of the Guidance states, so far as potentially material:

> "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* where the behaviour is fundamentally incompatible with being a doctor.
>
> b A deliberate or reckless disregard for the principles set out in *Good medical practice* and/or patient safety.
>
> …
>
> h Dishonesty, especially where persistent and/or covered up (see guidance below at paragraphs 120–128).
>
> j Persistent lack of insight into the seriousness of their actions or the consequences."

51. Paragraphs 120-128 set out further guidance for tribunals when considering dishonesty, including at § 128:

> "Dishonesty, if persistent and/or covered up, is likely to result in erasure (see further guidance at paragraph 120-128)."

52. In the present case, the Guidance was cited to the MPT by both the GMC and Professor Walton. Before retiring to consider its determinations, the tribunal indicated that *"[w]e have regard to the GMC Sanctions Guidance and our attention has been drawn to that guidance in submissions".*

53. When considering impairment, the MPT said:

> "16. The Tribunal considered that Prof Walton's dishonesty was serious and constituted a breach of a fundamental tenet of the profession, namely acting with honesty and integrity. The public must have confidence that doctors will at all times act with honesty. Prof Walton did not do this.
>
> 17. The Tribunal took into account that Prof Walton repeatedly asserted that he would behave differently if faced with similar situations in the future. The Tribunal had no reason to doubt Prof Walton's apparent insight into his own personal shortcomings in terms of administration. However, this does not explain his conduct in relation to the findings of dishonesty and he has continued to deny that he acted dishonestly. It considered that, though possible, dishonest conduct is difficult to remediate. Given his denial of dishonesty, at present there is no evidence before the Tribunal to indicate that Prof Walton has reflected on, or taken steps to remedy, his misconduct. Indeed, Prof Walton has not asserted that he has undertaken any remediation. In those circumstances, the Tribunal could not be satisfied that there is no risk of repetition of his dishonest conduct."

54. As to sanction, the MPT said:

> "11. The Tribunal carefully considered and balanced the aggravating and mitigating factors in Prof Walton's case.
>
> 12. The Tribunal noted that Prof Walton has an otherwise unblemished record, his dishonest conduct took place over one and a half years ago and there has since been no repetition. Prof Walton has fully engaged with the GMC investigation and with this hearing. There is an extensive amount of overwhelmingly positive testimonial evidence which attest to Prof Walton's otherwise good character. The evidence suggests that Prof Walton is a highly skilled academic and clinician who is eminent in his field. The misconduct took place in the context of an environment in which Prof Walton's line management appeared to be unstructured and it was unclear what was covered in his induction.
>
> 13. However, the Tribunal has already found that Prof Walton's conduct was a clear departure from a number of

principles of GMP, and that acting dishonestly is a serious matter which undermines the trust in the medical profession. Prof Walton was dishonest on two occasions, albeit in relation to common circumstances, namely his external earnings from private outside work. Prof Walton benefitted financially from his dishonest actions. The Tribunal has already found that, given his denial of dishonesty, there is no evidence before the Tribunal to indicate that Prof Walton has reflected on, or taken steps to remedy, his misconduct.

…

Suspension

…

20. The Tribunal took into account that Prof Walton was dishonest on more than one occasion, so his misconduct cannot be described as isolated. However, it noted the instances of his dishonesty were in relation to common circumstances, namely his external earnings from private outside work. It was not persuaded that the dishonesty was persistent such that it necessitated or warranted erasure from the Medical Register.

21. In its previous determination, the Tribunal stated that it could not be satisfied that there is no risk of repetition of his dishonest conduct. It took into careful consideration the testimonials provided on Prof Walton's behalf. It was of the view that these provided a wealth of good quality evidence of Prof Walton's otherwise good character, the majority of the authors of the testimonials being aware of the allegations. The testimonial evidence satisfied the Tribunal that Prof Walton's dishonest conduct was wholly out of character. It was of the view that, based on the evidence, it would be likely that Prof Walton would revert back to his usual good character should similar circumstances arise in the future. As such, it was satisfied that the risk of repetition was minimal.

22. Having had regard to the circumstances of this case, the Tribunal was satisfied that Prof Walton's misconduct is not fundamentally incompatible with continued registration. It was of the view that erasing Prof Walton's name from the Medical Register would be disproportionate, punitive and not in the public interest.

23. The Tribunal determined that a period of suspension would be an appropriate and proportionate sanction that would protect the public confidence in the medical profession and promote and maintain proper standards and conduct for the members of the profession. At the same time, a period of

> suspension would also mark the gravity with which the Tribunal viewed such misconduct."

55. The GMC submits that the MPT thereby not only failed to go through paragraph 109 of the Guidance, but also did not grapple with the factors mentioned in it, instead providing no more than a "*generalised assertion that erasure would be disproportionate sanction*" (see *General Medical Council v Stone* [2017] EWHC 2534 (Admin) § 53 per Jay J).

56. I am not persuaded by that submission. The MPT did in my judgment consider, in the passages quoted above, the substance of paragraph 109 of the Guidance, which had been fully cited to it. The tribunal specifically took account when addressing impairment of its findings that Professor Walton's dishonesty was serious and constituted a breach of a fundamental tenet of the profession, namely acting with honesty and integrity; and that he had continued to deny that he acted dishonestly. When addressing sanction the tribunal specifically took account of its findings that his conduct was a clear departure from a number of principles of *Good Medical Practice*; that acting dishonestly is a serious matter which undermines the trust in the medical profession; that he was dishonest on more than one occasion, so that his misconduct could not be described as isolated; that given Professor Walton's denial of dishonesty, there was no evidence before the tribunal to indicate that he had reflected on or taken steps to remedy his misconduct; and that, conversely, it was not persuaded that the dishonesty was persistent such that it necessitated or warranted erasure from the Medical Register. In my view the MPT did give proper consideration to the substance of the relevant matters set out in paragraph 109.

57. If on remittal the MPT makes further findings in relation to allegations 3 and 4, then the question of sanction will need to be reconsidered in any event. However, on the basis of the tribunal's current findings in relation to the allegations, the GMC's challenge to its conclusions as to sanction does not succeed.

(F) CONCLUSIONS

58. As a result, the GMC's appeal will be allowed on Ground 1 and dismissed on Ground 2. I shall hear counsel as to the appropriate relief, but my provisional view is that I should:

    i) quash the MPT's factual findings in respect of allegations 3(a), (b) and 4;

    ii) remit the matters of fact in respect of paragraphs 3(a), (b) and 4, impairment and sanction to the MPT to be determined in light of this judgment; and

    iii) quash the MPT's determinations on impairment and sanction.

59. Element (iii) appears appropriate on the basis that the result of (i) and (ii) may or may not lead to a need for the MPT to reconsider its findings on impairment and/or sanction; and in case they do, it is necessary to quash the determinations on impairment and sanction.

60. I am grateful to both parties' counsel for their helpful written and oral submissions.