Neutral Citation Number: [2021] EWHC 370 (Admin)

Case No: CO/3286/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24 February 2021

Before :

THE HONOURABLE MR JUSTICE MORRIS

- -

Between :

BENJAMIN SAYER	**Appellant**
- and -	
GENERAL OSTEOPATHIC COUNCIL	**Respondent**

- -
- -

Simon Butler (instructed by **BSG Solicitors**) for the **Appellant**
Peter Mant (instructed by **General Osteopathic Council**) for the **Respondent**

Hearing dates: 21 and 28 January 2021

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Approved Judgment

Mr Justice Morris :

Introduction

1. This is an appeal from a decision ("the Decision") of the Professional Conduct Committee ("the Committee") of the General Osteopathic Council ("the Council") dated 24 August 2020. By the Decision, the Committee directed that the name of Benjamin Sayer ("the Appellant") should be suspended from the register of osteopaths for a period of six months for unacceptable professional conduct. The relevant unacceptable conduct was in relation to a non-professional personal relationship with a patient ("Patient A"), which developed into a sexual relationship.

2. The appeal is brought under section 31 of the Osteopaths Act 1993 and is in respect of certain of the Committee's findings of fact, its consequent findings of unacceptable professional conduct and sanction. The Respondent to the appeal is the Council.

Some factual background

3. The Appellant has been a registered osteopath since 2015. He is now 27 years old. Between 30 October 2017 and 26 April 2019 he practised as a self-employed associate at the Bodytonic Clinic ("the Practice") in London. In summary, the undisputed chronology of relevant events is as follows:

    (1) Patient A, a female, became a patient of the Appellant on or around 12 November 2018 and was treated by him on a number of occasions thereafter.

    (2) On 24 November 2018 the Appellant and Patient A spoke on the telephone. The conversation, which was recorded, involved discussion about a number of personal matters ("the 24 November call").

    (3) On a Sunday after 24 November 2018 the Appellant telephoned Patient A from his personal mobile phone ("the Sunday call").

    (4) The last occasion on which the Appellant saw Patient A to provide osteopathic care was on 29 January 2019. The Appellant's case is that on that date the Appellant terminated what he refers to as the "patient/treatment relationship" (i.e. "the professional relationship").

    (5) On a date in late February or early March 2019, Patient A contacted the Appellant on his personal mobile phone and she suggested that they "hang out". (For want of a better description, I refer to that call as "the "hang out" call").

    (6) By the end of February 2019 at the latest, the Appellant and Patient A had embarked upon a personal relationship.

    (7) On 7 March 2019 Patient A invited the Appellant to a show in which she was to perform. The Appellant attended that performance.

    (8) On 14 March 2019 Patient A requested further treatment. The Appellant passed on the enquiry to a colleague at the Practice, asking her to treat Patient A. The Appellant sent to the colleague Patient A's clinical history and

entered the booking on the Practice's system. On the next day Patient A had osteopathic treatment from the colleague.

(9) At some stage after 14 March 2019, the personal relationship developed into a sexual relationship

(10) On 26 April 2019, the manager of the Practice, Mr B, held a disciplinary meeting with the Appellant. On that date the Appellant was dismissed from the Practice and Mr B made a complaint to the Council.

The Legislative Framework and relevant legal principles

4. The statutory framework for the Council and for the Committee is to be found in the Osteopaths Act 1993 ("the Act") and the General Osteopathic Council (Professional Conduct Committee) (Procedure) Rules 2000 ("the Rules"), made under section 26 of the Act. Other relevant materials are contained in the Council's sanctions guidance, in the Osteopathic Practice Standards and in certain case law.

The Council and the Committee

5. The Council regulates the osteopathic profession pursuant to the statutory scheme. Section 1(3A) of the Act provides that the "over-arching objective of the General Council in exercising their functions is the protection of the public". Section 1(3B) expands on this, providing that "the pursuit by the General Council of its over-arching objective involves the pursuit of the following objectives: (a) to protect, promote and maintain the health, safety and well-being of the public; (b) to promote and maintain public confidence in the profession of osteopathy; and (c) to promote and maintain proper professional standards and conduct for members of that profession." In pursuit of those objectives, one of the Council's statutory functions is the regulation of professional conduct and fitness to practise.

Fitness to practise proceedings

6. Section 20 of the Act is headed "Professional conduct and fitness to practise" and, by sub-section 20(1), applies where any allegation is made against a registered osteopath to the effect that "(a) he has been guilty of conduct which falls short of the standard required of a registered osteopath". By section 20(2), such conduct is referred to as "unacceptable professional conduct". The procedure for considering any such allegation is divided into two stages: an investigation stage (carried out by the Investigating Committee) and then reference to, and consideration and determination by, the Committee. By section 21, pending its investigation, the Investigating Committee has power to make an interim suspension order, where necessary for the protection of the public, after having given the osteopath a right to a hearing.

7. Under rules 29 to 36 of the Rules, the Committee's determination of a professional conduct case involves a two-stage process. By rules 29 and 30, the Committee must determine whether the facts alleged have been proved and then decide whether those facts amount to unacceptable professional conduct. Following announcement of its decision on those issues, the Committee then hears evidence and argument on, and proceeds to determine, the issue of sanction under rules 33 to 36.

Sanctions and sanctions guidance

8. Under section 22(4) of the Act, if there is a finding of unacceptable professional conduct, the Committee is required to impose one of the following sanctions: admonishment, a conditions of practice order, suspension from registration for a specified period or removal from the register. By section 22(9), there is power to order suspension for up to three years.

9. The Council's "Hearings and Sanctions Guidance" ("HSG") provides, inter alia, as follows:

> *"29 Both insight and remediation should be given their everyday meaning. The PCC should focus on whether there is real evidence that the osteopath has been able to look back at his or her conduct with a self-critical eye and that they have acknowledged fault, expressed contrition and/or apologised. In effect, they need to demonstrate to the PCC that there is a real reason to believe they have learned a lesson from the experience.*
>
> *…*
>
> ***Sexual Misconduct***
>
> *49. D2 of the Osteopathic Practice Standards provides that an osteopath must establish and maintain clear professional boundaries with patients and not abuse their professional standing and position of trust. Failing to establish and maintain sexual boundaries may, in particular, have a profoundly damaging effect on patients.*
>
> *50. Sexual misconduct covers a wide range of conduct spanning criminal convictions, sexual misconduct with patients, colleagues and others to breaching professional boundaries through non-consensual physical examination of patients. <u>It is an abuse of the special position of trust that a healthcare professional occupies. It seriously undermines public trust in the profession of osteopathy and can present a risk to patient safety.</u>*
>
> *51. In reaching a decision, the PCC should take account of the guidance issued by the PSA (formerly the CHRE) entitled: Clear sexual boundaries between healthcare professionals and patients: guidance for fitness to practise panels (2008), in particular, the aggravating and mitigating factors relevant to sanction.*
>
> *52. <u>Where sexual misconduct is proven</u>, especially in circumstances where there has been a breach of professional boundaries involving vulnerable patients,*

> *including those with emotional problems, physically disabled young people and people with learning disabilities, this should be regarded as very serious by the PCC, where removal from the register is likely to be considered an appropriate and proportionate sanction."*
>
> *(emphasis added)*

As regards the sanction of suspension, paragraph 71 of the HSG sets out relevant factors to be considered. This paragraph is cited verbatim at Decision §143, set out at paragraph 63 below.

Osteopathic Practice Standards

10. The Osteopathic Practice Standards ("OPS"), in force at the relevant time[1], provides, inter alia, as follows:

> *"Standard D16 – Do not abuse your professional standing. The guidance to this standard includes the following:*
>
> *1. Abuse of your professional standing can take many forms. The most serious is likely to be the failure to establish and maintain appropriate boundaries, whether sexual or otherwise.'*
>
> *2. The failure to establish and maintain sexual boundaries may, in particular, have a profoundly damaging effect on patients, could lead to your removal from the GOsC Register and is likely to bring the profession into disrepute.*
>
> *3.1. Words and behaviour, as well as more overt acts, may be sexualised, or taken as such by patients.*
>
> *3.2. You should avoid any behaviour which may be construed by a patient as inviting a sexual relationship.*
>
> . . .
>
> *3.4. It is your responsibility not to act on feelings of sexual attraction to or from patients.*
>
> *3.5. If you are sexually attracted to a patient, you should seek advice on the most suitable course of action from, for example, a colleague. If you believe that you cannot remain objective and professional, you should refer your patient to another healthcare practitioner.*

[1] D16 has now been replaced by D2 in the current edition of OPS; this accounts for the reference to D2 in the HSG as referred to in paragraph 9 above.

> *3.6. You should not take advantage of your professional standing to initiate a relationship with a patient. This applies even when they are no longer in your care.'*
>
> *Standard D17 – Uphold the reputation of the profession through your conduct. The guidance to this standard states:*
>
> *'The public's trust and confidence in the profession, and the reputation of the profession generally, can be undermined by an osteopath's professional or personal conduct."*
>
> *(emphasis added)*

Appeals

11. Section 31 of the Act makes provision for appeals from Committee decisions to, inter alia, this Court. By section 31(1) appealable decisions include a Committee decision under section 22(4)(c) to order suspension of the osteopath's registration. Under section 31(8), this Court's powers on appeal include the power to dismiss the appeal, allow the appeal and quash the decision, and, if the appeal is allowed, to substitute a different decision, or to remit the case to the Committee with directions. Under section 24(2) the Committee has the power to impose an "interim suspension order", pending an appeal under section 31.

12. On appeal the question for the Court is whether the decision of the Committee was wrong or unjust because of a serious procedural or other irregularity: see CPR 52.21(3). Further, an appeal under section 31 is a full appeal by way of re-hearing (and is thus, in principle, broader than the usual jurisdiction of "review" applicable to most appeals): see CPR 52.21(1)(a) and Practice Direction 52D paragraph 19.1.

The approach to findings of fact

13. As regards the approach of the Court on such a re-hearing, in relation to findings of fact in particular, there are a substantial number of authorities. The parties referred me to *Luthra v GMC* [2013] EWHC 240 (Admin) and, in particular the summary in *Yassin v GMC* [2015] EWHC 2955 (Admin) at §32, which in turn referred to a number of earlier leading authorities, including *Assicurazioni Generali SpA v Arab Insurance Group* [2003] 1 WLR 577, *Southall v GMC* [2010] EWCA Civ 401, and *GMC v Meadow* [2006] EWCA Civ 1390. I referred the parties to my own summary in the recent case of *Kefala v GMC* [2020] EWHC 2480 (Admin) at §§9 to 15, where I cited additionally a number of other leading authorities. Counsel agreed with most of that summary. However Mr Mant for the Council took issue with my analysis, at §14, of the appeal court's approach to findings of inferential fact, relying in particular upon *Yassin* at §32(iv). He submitted that the margin of appreciation applies to inferential findings, particularly where the inference is founded on assessment of credibility. Taking account of these submissions, I consider that the following is the correct approach (adapting and refining my summary in *Kefala*). (I remain of the view that aspects of the summary in *Yassin* (in particular at §32(iv), (v) and (vii)) do not fully accord with state of the appellate court authority on these issues).

14. First, where the appeal court is being asked to reverse findings of fact based on oral evidence, there is little, if any, difference between "re-hearing" and "review": see

Craig v Farriers Registration Council [2017] EWHC 707 (Admin) at §28; *Assicurazioni Generali* at §§13, 15 and 23. Ultimately the question for this court is whether the decision below was "wrong" or "unjust because of a serious procedural or other irregularity in the proceedings [below]".

15. Secondly, on questions of fact, the degree to which the appeal court will show deference to the lower court will depend on the nature of the issues determined by the court below. Much will depend on the extent to which the judge below has an advantage over the appellate court. Greater deference will be shown where the conclusions are based upon the view formed of oral evidence of witnesses: see *Assicurazioni Generali* at §15**.**

16. Thirdly, in this connection, distinctions are drawn between different types or descriptions of finding: findings of primary fact (based on direct perception); findings of inferential (or secondary) fact, being findings of fact based on inferences from primary fact; and findings of "evaluative judgment". The distinction between the second and third categories is most clearly explained in the judgment of Robert Walker LJ in *Bessant v South Cone*, cited at §20 in *Assicurazioni Generali*. Evaluative judgments involve findings which take into account a number of factors, and include (but are not limited to), in particular, findings of fact based on the application of a legal standard: for example, a finding of negligence: see *Assicurazioni Generali* §§16 to 18.

17. As regards findings of primary fact, particularly founded upon the assessment of the credibility of witnesses, the appeal court will be, at least, very cautious about reversing such a finding: see *Gupta v GMC* [2001] 1 WLR 1691 at §10. In the authorities, there are differences as to the relevant degree of reluctance or caution to be adopted: from "slow to interfere" in *Gupta* through "extremely cautious" in *GMC v Jagjivan* [2017] 1 WLR 4438 at §40, to "virtually unassailable" in *Southall v GMC* supra, at §47. In the present case, nothing turns upon these differences[2].

18. As regards findings of secondary or inferential fact, as stated expressly in CPR 52.21(4), and pointed out in *Jagjivan* §40 (iv), the appeal court may draw any inferences of fact which it considers justified on the evidence. The degree of deference shown to the court below will vary depending on the nature and basis of the findings of underlying primary fact: see further paragraph 22 below.

19. As regards findings of evaluative judgment, the approach will vary depending on nature of the evaluation. In general the appeal court will not interfere unless satisfied that the conclusion below lay outside the bounds within which reasonable disagreement is possible. Where the application of a legal standard involves no question of principle, but is a matter of degree on the facts of the case, the appeal court will be reluctant to interfere with the judgment reached by the court below; and the more factors involved in the evaluative assessment, the greater the reluctance to interfere; see *Assicurazioni Generali* at §§17 to 22, citing *Todd v Adam*, *Bessant v South Cone* and *Biogen Inc v Medeva Plc* [1997] RPC 1 at 45 (which in turn disapproved of *Benmax v Austin Motor Co Ltd* [1955] AC 370 on this particular point).

[2] I consider that, in an appropriate case, there remains scope for the appeal court to interfere: see *Kefala* at §13.

20. Fourthly, as regards the giving of reasons, the purpose of a duty to give reasons is to enable the losing party to know why he has lost and to allow him to consider whether to appeal. It will be satisfied if, having regard to the issues and the nature and content of the evidence, the reasons for the decision are plain, either because they are set out in terms or because they can be readily inferred from the overall form and content of the decision: *Southall* at §54. The appellate court should resist the temptation to engage in narrow textual analysis of the reasons of the disciplinary tribunal body to enable it to claim that the court below misdirected itself: see *GMC v Awan* [2020] EWHC 1553 (Admin) at §12, citing *Phipps v GMC* [2006] EWCA Civ 397 and *Re F (Children)* [2016] EWCA Civ 546 at §§23.

21. I address the principles relating to the issue of good character in the context of professional disciplinary proceedings under Ground 4 (at paragraph 131 below).

Sexual motivation

22. As regards issues of sexual motivation, I have been referred to *Arunkalaivanan v GMC* [2014] EWHC 873 (Admin) at §§46 to 49, *Basson v GMC* [2018] EWHC 505 (Admin) at §11, *Okpara v GMC* [2019] EWHC 2624 (Admin) and *Sait v GMC* [2019] EWHC 3279 (Admin) at §§10 to 17. The following principles emerge from those authorities:

    (1) "Sexual motivation" is defined as conduct done either in pursuit of sexual gratification or in pursuit of a future sexual relationship.

    (2) Determination by this Court of issues of sexual motivation depends not on direct evidence but on inference to be drawn from the primary facts as found by the regulatory body and the surrounding circumstances.

    As regards the Court's approach to such inferential findings, there may be a distinction between inference drawn from undisputed primary facts and those drawn from primary facts, which themselves are found following an assessment of credibility of oral evidence. The Court should afford appropriate deference to the judgment of the disciplinary body, especially where that judgment was based in significant part on an assessment of the credibility of a witness. In such a case, the Court is to apply similar caution as it would to a challenge to a finding of primary fact.

The nature of the issues in the present case

23. In my judgment, in the present case, the issue of sexual motivation (under Ground 3 below) is a question of inferential fact. The issue of whether a professional relationship has terminated (under Ground 1 below) involves, in part, a determination of what constitutes a professional relationship, and how, and by what type of conduct it is formed and it may be ended. Those are questions of evaluative judgment. Whether particular conduct relevant to that evaluative judgment has occurred is a question of primary fact.

Approach of court in relation to appeal against sanction

24. In the relation to questions of sanction, I have considered, in particular, *Bolton v Law Society* [1994] 1 WLR 512 at 518E-519E, *Fatnani and Raschid v GMC* [2007] 1 WLR 1460 at §§16-20, *Yassin*, supra, at §32(ix) and *Bawa-Garba v GMC* [2018] EWCA Civ 1879 at §67. From these authorities, I draw the following propositions:

    (1) The principal purpose of sanctions in disciplinary proceedings is not punishment of the practitioner, but rather maintaining the standards and reputation of the profession as a whole and maintaining public confidence in the integrity of the profession. The second main purpose is to be sure that the offender does not have the opportunity to repeat the offence: see *Bolton* at 518F-H and *Fatnani and Raschid* at §§17-18.

    (2) It follows from the principal purpose above that particular force is to be given to the need to accord special and appropriate respect to the judgment of the disciplinary body. Nevertheless the Court will not defer to that body's judgment "more than is warranted by the circumstances": *Fatnani and Raschid* at §§18-20.

    (3) The court should not interfere with the evaluative judgment of a specialist adjudicator unless: (i) there was an error of principle in carrying out the evaluation; or (ii) it fell outside the bounds of what an adjudicative body could properly and reasonably decide: *Bawa-Garba* at §67.

Denial of allegations, insight and sanctions

25. As regards the relationship between contesting the charges and insight, I have been referred to number of authorities: including *Nicholas-Pillai v GMC* [2009] EWHC 1048 (Admin) at §19; *Amao v Nursing and Midwifery Council* [2014] EWHC 147 (Admin) at §§160 to 164; *Motala v GMC* [2017] EWHC 2923 (Admin) at §§30, 31 and 34; *Yusuff v GMC* [2018] EWHC 13 (Admin) at §§18 to 20; *GMC v Khetyar* [2018] EWHC 813 (Admin) at §49; *GMC v Awan* [2020] EWHC 1553 (Admin) at §38 and *Dhoorah v Nursing and Midwifery Council* [2020] EWHC 3356 (Admin) at §36. From these, I draw the following principles:

    (1) Insight is concerned with future risk of repetition. To this extent, it is to be distinguished from remorse for the past conduct.

    (2) Denial of misconduct is not a reason to increase sanction: *Awan* §38.

    (3) It is wrong to equate maintenance of innocence with lack of insight. Denial of misconduct is not an absolute bar to a finding of insight. Admitting misconduct is not a condition precedent to establishing that the registrant understands the gravity of the offending and is unlikely to repeat it: *Motala* §34 and *Awan* §38.

    (4) However attitude to the underlying allegation is properly to be taken into account when weighing up insight: *Motala* §34 Where the registrant continues to deny impropriety, that makes it more difficult for him to demonstrate insight. The underlying importance of insight and its relationship with denial of misconduct was usefully analysed by Andrew Baker J in *Khetyar* (at §49) as follows:

> *"Of course, no sanction was to be imposed on him for his denials as such; however, insight requires that motivations and triggers be identified and understood, and if that is possible at all without there first being an acceptance that what happened did happen it will be very rare, and any assessment of ongoing risk must play close attention to the doctor's current understanding of and attitude towards what he has done."*.

(5) The assessment of the extent of insight is a matter for the tribunal, weighing all the evidence and having heard the registrant. The Court should be slow to interfere: *Motala* §§30 and 31.

The Committee Proceedings

The allegations

26. The full charge against the Appellant (as amended) stated[3] as follows:

> *"1. Between around 30 October 2017 and 26 April 2019, the Appellant practiced at the Bodytonic Clinic in London (the Practice).*
>
> *2. Between around 12 November 2018 and 30 January 2019, the Appellant provided treatment to Patient A at the Practice.*
>
> *3.* ***Subsequent to the establishment of a practitioner-patient relationship between the Appellant and Patient A, the Appellant:***
>
> *a. communicated with Patient A using his personal mobile number, instead of contacting her via the Practice's patient contact system;*
>
> *b.* ***entered into non-professional personal relationship with Patient A;***
>
> *c.* ***entered into a sexual relationship with Patient A.***
>
> *4. On two occasions, the Appellant met with Patient A in the treatment room at the Practice for reasons unconnected with his treatment of her.*
>
> *5.* ***The Appellant failed to hand Patient A's treatment over to a colleague until after he had entered into a non-professional personal and/or sexual relationship with her.***

[3] Charges in issue in this appeal in **bold**

> ***6. The Appellant's actions as specified at paragraph 3(a) and/or 3(b) and/or 3(c) and/or 5 were sexually motivated."***
>
> *(emphasis added)*

27. The parties and the Committee proceeded on the basis that, in respect of allegation 3, the Council's case was that the practitioner-patient relationship had not come to an end at the time that the matters set out in sub-paragraphs (a) to (c) had occurred; i.e. the allegation (and ultimately the Committee finding) was that those things had occurred "before the end of the practitioner-patient relationship". Further, by way of clarification, the phone communication in allegation 3(a) is the Sunday call (and not the 24 November call). The Appellant admitted allegations 1, 2, 3(a) and 4, and denied allegations 3(b) and (c), 5 and 6.

The hearing and the evidence

28. The hearing before the Committee took place over five days between 17 and 24 August 2020. The fact finding stage took place between 17 and 19 August 2020. On 19 August 2020 the Committee announced its findings on the facts. On 20 August 2020 the Committee heard submissions and announced its decision on unacceptable professional conduct; and then proceeded to hear the evidence and some submissions on sanction. On the final day, 24 August 2020, after hearing further submissions, the Committee gave its decision on sanction and then proceeded to consider the application for an interim suspension order.

29. At the fact-finding stage of the proceedings the Committee considered documents and statements filed by both parties, listened to the recording of the 24 November call. Written statements from Mr B and from a receptionist at the Practice were agreed and admitted into evidence. The Appellant gave evidence by a witness statement dated 11 August 2020 ("the August 2020 statement") and by an earlier witness statement dated 23 June 2019 ("the June 2019 statement")[4]. In oral evidence he was examined in chief and cross-examined. In the course of his examination in chief he was taken through his witness statements and asked where appropriate, to make such amendments as he wished to make.

The facts in more detail, and relevant evidence

30. In this section I set out the facts in more detail, together with important parts of the evidence, and in particular relevant parts of the written and oral evidence of the Appellant.

31. At the relevant time, when the Appellant practised at the Practice, the Practice had a policy of requiring all communication with patients to be via a special App or its own telephone system which recorded all calls.

The 24 November call

32. On 24 November 2018, the Appellant (who was at the Practice) and Patient A spoke on the telephone. In the course of that recorded telephone conversation, the Appellant

[4] This statement was submitted in response to an earlier unsuccessful application by the Council to the Investigating Committee for an interim suspension order under section 21.

did the following: he told Patient A that he knew when her birthday was; he invited her to contact him at home the following day (being a Sunday when he would not be working); he said he could come and watch her in her ballet class "because you live close to the studio"; he said he could "pick her up" if she fell to pieces during the class; he had a conversation about whether she was allowed to go out on the town dancing; and raised and discussed the topic of pole dancing. These facts, described at §17 Decision, are not disputed by the Appellant. The Committee had the benefit of hearing the full recording of the conversation as well as reading the transcript. I have not been invited by either party to listen to the recording.

Relevant evidence

33. In cross-examination, the Appellant said that the suggestion that Patient A should telephone him at home was an "off the cuff", and "silly", remark. He agreed that contact with patients was to be done through the Practice. He vehemently denied that by suggesting he could come to watch her in a ballet class he was "sowing a seed": "*I cannot imagine anything worse than thinking that far ahead or planning that sort of thing*". He denied that talking about pole dancing was a sexualised comment, saying "*I express my constant disgust at the idea that still in this day and age we sexualise the art of pole dancing*".

The Sunday call

34. On another occasion, the Appellant telephoned Patient A from his personal mobile phone in breach of the Practice's policy. The call was made on a Sunday. The Committee found that that this call took place after the 24 November.

Relevant evidence

35. The Decision at §24 fairly summarises the Appellant's evidence in chief about this call.

> *"…the Registrant said it was a short, professional conversation. He accepted he should have used the Practice's system for this call but said that he was under pressure to make a follow-up call. He did it on a Sunday, a day when the Registrant was not working, on his own phone because he thought otherwise he would forget to do so."*

In cross-examination, he accepted that the Practice preferred osteopaths to use its in-house phones and that use of personal phones was discouraged.

29 January 2019: the last treatment

36. The last occasion on which the Appellant saw Patient A to provide osteopathic care was on 29 January 2019. The Appellant's case is that on that date the Appellant terminated what his counsel describes as the "patient/treatment" relationship. The Appellant communicated to Patient A that everything was now fine and she no longer required any treatment and therefore he did not need to see her again.

Relevant evidence

37. In examination in chief, he said that he gave her no more appointments, because she came in asymptomatic: "*There's no need to see you again*." He told her to keep doing the exercises under his exercise plan. In cross-examination, he was asked about the possibility of her requiring further treatment in the future. He said initially that a patient is a patient of the Practice. Then, he agreed that if Patient A had contacted the Practice and said that she wanted to see him for some further treatment, she would have been put in with him. They would have tried to find the right time slot for him. He agreed that she was a long standing patient of the Practice and that as at 29 January she knew she could contact the Practice if there was a recurrence of symptoms and that there was no reason to believe that she would not ask to see him as her osteopath again. He did not believe she would need further treatment. However he said it was 50/50 as to whether a discharged patient would return within a short time with a recurrence of symptoms; it depended on a number of factors.

The "hang out" call: February or early March 2019

38. On a date in late February or early March 2019[5], Patient A contacted the Appellant on his personal mobile phone and suggested that they "hang out".

Relevant evidence

39. In the August 2020 witness statement (at paragraphs 16 and 17), the Appellant said:

> *"She did ring on about 1st March. She had access to my mobile number. Patient A rang my mobile number and asked whether I would like to "hang out" with her. She said that she felt an attraction to me. I said to her that as her osteopath at the time on 1st March 2019, (yes I did believe I should not go out with her or meet her socially at that time. Why? I was taken by surprise. My reaction was no.*
>
> *She said she was disappointed when I said no to meeting and said to me, "let's just leave it" or words to that effect. She texted me a week later telling me she was in a show by her drama school… I should not have gone to the show. This I realise was inconsistent with my statement to her the week before (1st March 2019)…."*

In the June 2019 statement the Appellant said (at paragraph 14):

> *"I told her that I could not go out with her or meet her socially or words to that effect and remain her therapist as this would breach all professional boundaries and I could never treat her again. She said to me she was disappointed and we both agreed that we would both "just leave it". Looking back at this now, if she had said to me "ok, stop being my osteopath" I still would not have accepted there and then as I wanted to think it out."*

[5] The evidence as to when this call occurred was inconsistent.

40. In examination in chief, he explained that in the "hang out" call he had told Patient A that he could not treat her any further, as well as having told her later. In cross-examination, he insisted that he had told her that in the "hang out" call. However his evidence as to that call and telling her that he could not treat her was very confused. The inconsistency in his evidence about the "hang out" call was put to him. On the one hand, he was saying that if they were to embark on any social interaction, he could not see her as a patient. On the other hand his evidence was that he had rejected the invitation to see each other socially because he was her osteopath. Having considered in detail the transcript of that passage of his cross-examination, I conclude that his oral evidence in response was not consistent and unreliable.

41. Later in cross-examination the Appellant stated as follows:

> *"I should have referred as soon as she gave me that call and not when she became symptomatic… I did not see a purpose at the time to refer a healthy patient to a practitioner that they are not going to see. Obviously I understand why it is the case now."*

The personal relationship: February 2019 and 7 March 2019

42. The Appellant accepts that in February 2019 the Appellant and Patient A formed a personal relationship.

43. On 7 March 2019 Patient A sent the Appellant a link inviting him to purchase tickets for a show in which she was to perform. The Appellant attended that performance and began to see Patient A socially. In the June 2019 statement, the Appellant admitted that, in doing so, he acted "precipitately".

Patient A requests further treatment and "referral" to another practitioner: 14/15 March 2019

44. On 14 March 2019 Patient A contacted the Appellant seeking an appointment for treatment. The Appellant sent a message to another practitioner at the Practice asking her to treat Patient A.

Relevant evidence

45. The Appellant made the referral to the other practitioner by private WhatsApp message in the following terms:

> *"I am seeing a girl who comes to the Practice that I treated previously. Sounds dodge I know … but she's back in pain and I obvs can't treat her again, so wanted to see you specifically."*

After the colleague responded saying that she could see her, the Appellant messaged back that he would send her a short clinical history by WhatsApp and that he would "log on and book her in". The Council points out that no formal record was made of the transfer and the Appellant did not inform Mr B.

46. In the August 2020 statement, the Appellant stated:

> *"When Patient A said she wanted further treatment I was firm and told that I could not give her the treatment because I was now in a personal relationship with her. I referred to Kemmy and she arranged that she would see Kemmy on the 14th March 2019"*

In cross-examination, he accepted that Patient A told *him* that she needed further treatment. He agreed that it was then, and only then, that he contacted a colleague to arrange a transfer of her care. He added that he knew "*in hindsight this was a severe misjudgement and that I should have documented her discharge*". He only did it then because that was when she became symptomatic. He had told her then that he could not treat her ever again and that he would have to refer her to a colleague. He accepted that what he had done by way of protocol after having the "hang out" call was very minimal in comparison with what he should have done. But he had informed her of what her actions would mean to their professional relationship and in doing that, and referring her later on, he thought he had done what was needed.

47. On 15 March 2019, Patient A had osteopathic treatment from a different practitioner at the Practice.

26 April 2019: disciplinary meeting and dismissal by the Practice

48. On 26 April 2019 Mr B had a meeting with the Appellant. The Appellant informed Mr B that he had entered into a personal relationship with Patient A at around the end of February 2019. The Appellant was dismissed from the Practice on that date.

49. There are written minutes of that disciplinary meeting, made by Mr B. The minutes record that Mr B asked the Appellant a number of questions. The minutes state as follows:

> *"I then asked you to listen carefully to the next section and to answer clearly and concisely. I asked the following questions."*

The minutes then set out 9 numbered questions, all in the same format. Each question is set out in bold, followed by further information in normal font. In particular, the minutes stated:

> ***"7) Did you discharge the patient?*** *You confirmed yes. I then asked how? You responded by saying it was spoken about. I asked if it was documented in writing to which you responded by saying no.*
>
> ***8) Did you document notes in cliniko?*** *You confirmed no.*
>
> ***9) How did you end the therapeutic relationship?*** *You said the last treatment was on 30 January 2019. <u>It was unclear when the therapeutic relationship ended</u>."*
>
> *(<u>emphasis</u> added)*

There is a dispute as to meaning of the final underlined words in relation to question 9.

The Decision

The Committee's findings and conclusion in summary

50. In summary, the Committee found as follows:

- allegation 3(b) proved;
- allegation 3(c) not proved[6];
- allegation 5 proved in relation to non-professional personal relationship, but not proved in relation to a sexual relationship;
- allegation 6 proved in relation to allegations 3(a), 3(b), and 5 in respect of non-professional personal relationship, but not proved in relation to allegation 3(c).

The Committee found that the facts proved amounted to unacceptable professional conduct and ordered that the Appellant's registration be suspended for a period of six months. On this appeal, the Appellant challenges the Decision in relation to allegation 3(b), allegation 5, allegation 6 (in relation to allegations 3(a) and (5)) and sanction.

51. In its "Determination on the Facts", the Committee (at §§45-49 Decision), first considered the credibility of the Appellant. It considered that the Appellant was "*a person of pleasant demeanour"* and accepted that the emotion he had shown when giving evidence was genuine. However it identified *"inconsistencies and deficiencies"* in his evidence; in particular he was unable to be specific about dates of key events and found it surprising that, whilst he could not be precise about when the sexual relationship began, at the same time he could say with certainty that it was not until after 14 March 2019. It found that the Appellant was *"keen to emphasise points which assisted him and less clear about matters which caused him difficulties".* His "*expressed indignation of the sexual characterisation of pole dancing was disingenuous in the light of the actual discussion…"* Overall the Committee was *"left with the impression that [he] was not always doing his best to help the Committee"*.

The Committee's Findings of fact in detail

Allegation 3(b); personal relationship before termination of professional relationship

52. In relation to allegation 3(b), the Committee found as follows:

> *"54. A key issue for the Committee to consider in this case was when the patient/practitioner relationship ended.*
>
> *55. There were three possibilities. The Council argued that it did not end until 14 March 2019 when the Registrant*

[6] In respect of allegation 3(c), the Committee expressed concerns about the reliability of the Appellant's evidence regarding when the relationship became sexual, but found there was no positive evidence that it started prior to hand over of care on 14 March 2019 and, on this basis, concluded that the allegation was not proved (§67).

referred Patient A to his colleague. Mr Grant contended it was on 29 January 2019, when this particular episode of care had concluded. Alternatively, Mr Grant said it was, at the latest, when Patient A rang him around the end of February and invited him to 'hang out'.

56. *The evidence that the Registrant gave was that there was no standard procedure at the Practice for discharging a patient. His practice would be to verbally discharge the patient and indicate in the notes that there was no need for further appointments. Patient A's notes were not produced for the Committee to see, but the Registrant said he followed this process in her case. He said he had spoken to Patient A at the last appointment on 29 January 2019, told her she was doing well and that there was no need for further treatment. He accepted that he should have documented the discharge better.*

57. *The Registrant said if, following that, Patient A had needed more treatment she would contact the clinic either online or by phoning reception. She could request an appointment with him, which might depend on his availability, but she could have also requested an appointment with a different osteopath.*

58. *The Committee accepted Ms Birks' submission that there was no evidence that the patient/practitioner relationship ended on 29 January 2019. There was in the Committee's judgment no clean disengagement at that time. Although there may have been no immediate need for further treatment at that stage, the Committee accepted there must have been a significant probability that she would need further osteopathic treatment. Indeed, the Registrant accepted in his evidence that there was always a 50:50 chance that a client might return.*

59. *The Committee noted that the Registrant said in his statement dated 11 August 2020 (emphasis added):*

> *'She did ring on about 1st March. She had access to my mobile number. Patient A rang my mobile number and asked whether I would like to 'hang out' with her. She said that she felt an attraction to me**. I said to her that as her osteopath at the time on 1st March 2019,** (yes, I did believe I should not go out with her or meet her socially at that time. . .'*

60. *This, in the Committee's view, was a clear indication that the Registrant himself regarded the patient/practitioner relationship as being extant at the date of that call (which the Registrant said in evidence was more likely to have*

been at the end of February rather than the start of March).

61. The Committee also noted Mr B's record of his conversation with the Registrant on 26 April 2019. This was exhibited to Mr B's statement and was not challenged. Mr B recorded the answers of a number of questions he put to the Registrant, including the following (emphasis added):

> *'How did you end the therapeutic relationship? You said the last treatment was on 30th January 2019.* ***It was unclear when the therapeutic relationship ended.****'*

62. This fact that it was said to be 'unclear' during this conversation as to when the therapeutic relationship ended detracts from the position taken by Mr Grant that the patient/practitioner relationship definitively concluded on 29 January 2019.

63. The other key point, in the Committee's view, was that on 14 March 2019 the Registrant referred Patient A on to a colleague. The very fact that he was making a referral of a patient indicates that a clinical relationship was persisting.

64. The Committee was therefore satisfied that the patient/practitioner relationship was persisting <u>when the Registrant entered into a non-professional personal relationship with Patient A which, on his own account, was on or about 7 March 2019.</u> The Committee therefore found paragraph 3(b) proved". (<u>emphasis</u> added)

Allegation 5: failure to hand over

53. In relation to allegation 5, after reciting the charge, the Committee found as follows:

"71. The Committee found, in its consideration of paragraph 3, that the patient/practitioner relationship continued until 14 March 2019, which was the date of the hand over. The Committee also found (on the basis set out in paragraphs 78 and 79 below) that the Registrant was attracted to Patient A and was pursuing a relationship from the phone call on 24 November 2018 onwards. The Committee was therefore satisfied that, once he entered into a personal relationship with Patient A, he was under a duty to hand over her care and he failed to do so.

72. The Committee however found, at paragraph 3, that it could not be satisfied to the requisite standard of proof

that the sexual relationship began before the hand over on 14 March.

73. Therefore, the Committee found paragraph 5 proved in relation to a non-professional personal relationship but not in relation to a sexual relationship."

Allegation 6: sexual motivation

54. As regards allegation 6, the Committee found as follows:

"74. Paragraph 6 alleged that the Registrant's actions as set out in paragraphs 3(a), 3(b), 3(c) and 5 were sexually motivated. The Committee considered each part of this allegation separately. "

55. Then, specifically as regards allegation 6 in relation to allegation 3(a), it stated as follows:

"75. The Registrant admitted the allegation at paragraph 3(a), namely that there was an occasion on which he contacted Patient A on his mobile phone. Mr B emphasised in his evidence that osteopaths at the Practice should not use their own mobile to contact a patient. Indeed, the Registrant accepted that he should not have done so.

76. He told the Committee the reason for doing so was that it was a Sunday and he was not at work. He remembered that he had forgotten to follow up with Patient A up on her treatment, as the Practice required him to do. He decided to use his own mobile as he was concerned that if he left it until the Monday he would forget about it. He said this was a short call. He could not remember exactly when the call took place.

77. The phone log shows Patient A phoned the Practice on 24 November 2018 and spoke to reception. The purpose of the call was to speak to the Registrant. The fact that Patient A was calling to speak to the Registrant on his work number suggests she may not have had his mobile number at that time.

78. It was later the same day that the conversation took place which was recorded. The Committee had a transcript of this call and also listened to the audio recording. The Committee accepted Ms Birks' submission that this was a flirtatious conversation. Although there was discussion of Patient A's condition, the Committee was in no doubt that the tone of this call was not professional. A number of personal matters were discussed, as set out in paragraph 17 above, which the Committee considered to be of a

suggestive nature. Significantly, those comments came from the Registrant rather than Patient A. To put it colloquially, the Committee was left with the overall impression that the Registrant was 'chatting up' Patient A during this call.

79. The Committee noted that in his oral evidence, though not in his written statements, the Registrant says he made this call from the Practice reception within earshot of the receptionists and no more than five metres away from the directors. However, the Committee noted that the log of calls exhibited to Mr B's statement, which was not contested, indicated that this call had been made from a numbered extension not in a reception area but from Room 1 at Stratford. The evidence of this log therefore did not appear consistent with the Registrant's oral evidence.

80. The Registrant accepted in his evidence that Patient A was an attractive woman. Having listened to the recording of the phone call, the Committee was unable to accept the Registrant's evidence that he was not by this stage attracted to her.

81. The transcript of the call shows that the Registrant invited Patient A to phone him the next day when he would be at home. However, the Registrant told the Committee in evidence that this was not an invitation Patient A could have acted on because she did not in fact have his personal number. That again indicates that, as at 24 November 2018, Patient A did not know the Registrant's mobile number.

82. She clearly would have had his number after he phoned her on his mobile. Therefore, the Committee concluded that the mobile phone call referred to in paragraph 3(a) must have been after the conversation on 24 November 2018.

83. This was significant, given the flirtatious nature of the conversation on 24 November. It was also significant that the Registrant used his own mobile phone to make the call in question when he knew he should not have done. The Committee concluded, in light of these two things, that this mobile phone call was made in pursuit of a future sexual relationship and therefore was sexually motivated."

(emphasis added)

56. As regards allegation 6 in relation to allegations 3(b) and (c), the Committee founds as follows:

> *"84 The Committee considered whether the facts proved at 3(b) were sexually motivated. The Committee agreed with Ms Birks that the events in question were a progression towards the sexual relationship which ultimately developed. Having found that the Registrant entered into a non-professional personal relationship, and not long after it became sexual, the Committee was in no doubt that this was sexually motivated.*
>
> *85. Because the Committee did not find paragraph 3(c) proved there was no need to consider that in relation to the allegation of sexual motivation in this paragraph."*
> *(emphasis added)*

57. Finally, as regards allegation 6 in relation to allegation 5, the Committee found as follows:

> *"86. The Committee found, at paragraph 5, that the Registrant had failed to hand over Patient A's care to a colleague until after he had entered into a non-professional personal relationship with Patient A.*
>
> *87. The Committee considered that, from the phone call on 24 November 2018 onwards, the Registrant was attracted to Patient A and was hoping their relationship would develop into a sexual one. In those circumstances, the Registrant should have handed over the care of Patient A to another practitioner.*
>
> *88. The Committee considered the most probable explanation for the Registrant not handing over care earlier than he did was because he wished to maintain contact with Patient A, albeit in a legitimate clinical setting, but with a view to a potential future sexual relationship.*
>
> *89. This failure to hand over Patient A's treatment to another practitioner earlier than he did was an act of omission rather than commission. Nonetheless, the Committee concluded the failure to do so until after their personal relationship developed was sexually motivated.*
>
> *90. The Committee therefore found paragraph 6 proved in relation to 3(a), 3(b), and 5 in respect of the non-professional personal relationship. It found paragraph 6 not proved in relation to 3(c)."*
> *(emphasis added)*

Unacceptable professional conduct

58. Having made these findings of fact, the Committee proceeded to determine whether the matters found proved amounted to "unacceptable professional conduct": Decision §§100 to 105. It found that the Appellant's conduct in acting in a sexually motivated

way whilst still in a professional relationship constituted a serious breach of appropriate professional and sexual boundaries, and fell seriously short of the standard required of an osteopath. In particular the Committee found clear breaches of standards D16 and D17 of the OPS.

Sanction

Evidence and submissions on sanction

59. At §§106 to 114 Decision, the Committee set out the evidence received at the sanction stage. The Council called no further evidence. The Appellant gave evidence himself and called Ms Julie Stone a legally qualified medical ethicist and a former lay member of the Council. She had provided the Appellant with a course of training on boundaries, ethics and professionalism, comprising 12 hours of one-to-one sessions and 24 hours of self-directed learning. She set out a detailed report. Her view was that the Appellant was naïve, rather than predatory. He had shown genuine remorse, regret and shame. There had been a growth in his emotional intelligence during the training. The Appellant's own evidence comprised a reflective statement and a reflective patient diary which highlighted his approach to particular ethical issues. He said he accepted the Committee's findings and it was clear to him now that he was wrong to consider that he had acted properly. He realised the gravity of his mistakes and assured the Committee that they would not be repeated.

60. At §§115 to 127, the Decision set out the parties' submissions on sanction. The Council submitted that there was no evidence that the Appellant had addressed standard D16 and questioned whether the Appellant had demonstrated true insight. It invited the Committee to consider whether the Appellant's behaviour was predatory. Mr Grant for the Appellant suggested a conditions of practice order would be appropriate and that one of the Appellant's employers had indicated she would be prepared to act as his supervisor. Ms Stone had confirmed she would also be happy to continue to provide further training.

Determination on Sanction

61. In its determination on sanction (at §§129 to 157), the Committee first accepted (at §130) that the Appellant had an undergone a thorough session of learning and further accepted (at §131) Ms Stone's evidence that the Appellant had shown a willingness to learn, thus demonstrating a capacity to reflect and progress. §131 Decision continued:

> *"However he had disputed the more serious allegations which the Committee had found proved. The Committee was therefore not sure that the Registrant had acknowledged his misconduct and processed his behaviour sufficiently to show full insight. In the absence of full insight, the Committee was unable to conclude that the Registrant had fully remediated his actions."*
> *(emphasis added)*

The Committee then took into account mitigating factors and aggravating factors. Contrary to the Council's suggestion, it did not feel the conduct in question was predatory (§135).

62. It then considered, in turn, the possible sanctions. As regards admonishment, it concluded at §138:

> "… *in view of the nature and seriousness of the Registrant's conduct, an admonishment would not be an appropriate sanction. It would be insufficient to maintain public confidence in the profession and uphold professional standards*"
>
> *(emphasis added)*

As regards conditions of practice, the Committee took the view that there were no discrete areas of the Appellant's practice that could be addressed by conditions. It would not be possible to formulate workable or practicable conditions that would adequately address the misconduct in this case. It concluded (at §142):

> *"a conditions of practice order would not be appropriate in light of the serious nature of the Registrant's conduct and would not adequately address the public interest concerns in this case"* *(emphasis added)*

A suspension order

63. At §§143 to 151, the Committee then turned its attention to a suspension order and concluded as follows.:

> *"143. The HSG states that a suspension order is appropriate for more serious offences and where some or all of the following factors are apparent:*
>
> *a. There has been a serious breach of the Osteopathic Practice Standards but the conduct is not fundamentally incompatible with continued registration.*
>
> *b. Removal of the osteopath from the Register would not be in the public interest, but any sanction lower than a suspension would not be sufficient to protect members of the public and maintain confidence in the profession.*
>
> *c. Suspension can be used to send a message to the registrant, the profession and the public that the serious nature of the osteopath's conduct is deplorable.*
>
> *d. There is a risk to patient safety if the osteopath's registration were not suspended.*
>
> *e. The osteopath has demonstrated the potential for remediation or retraining.*

f. The osteopath has shown insufficient insight to merit the imposition of conditions or conditions would be unworkable.

144. The Committee considered that paragraphs b, c, d, e, f were all engaged in this case.

145. To check the logic of its reasoning the Committee went on to consider whether the sanction of removal would be appropriate.

146. The Committee did not consider that the Registrant's conduct was fundamentally incompatible with continued registration.

147. The Committee accepted that sexual misconduct often attracts a sanction at the highest end of the scale. However, in the absence of a predatory or grooming element to the behaviour, or issues relating to patient vulnerability, the Committee was satisfied that in the spectrum of sexual misconduct this was at the lower rather than the higher end.

148. The Committee therefore determined that an order removing the Registrant from the register would not be appropriate or proportionate.

149. The Committee reached the conclusion that, given the nature and seriousness of the unacceptable professional conduct demonstrated by the Registrant, a suspension order was the appropriate and proportionate sanction.

150. The Committee considered the appropriate length of the suspension order, which can be up to a maximum of three years. The Committee bore in mind the need to appropriately mark the seriousness of the conduct in order to maintain confidence in the profession whilst not imposing a lengthy suspension that would be unduly punitive. The Committee noted that the Registrant relies on his osteopathic practice as his source of income.

151. Taking all factors into consideration the Committee considered the appropriate length of suspension should be six months. This will allow sufficient time for the Registrant to appropriately reflect on his behaviour. Anything less would be insufficient to send out an appropriate message to the public and the profession."

(emphasis added)

Consideration of interim suspension order

64. Then, at §§154 to 163, the Committee considered the Council's application for an interim suspension order under section 24(2) of the Act and the Council's guidance on such orders. The Council submitted that such an order was necessary for the protection of the public, given the Committee's findings. The Committee refused the application. The Committee had to be satisfied that such an order was necessary to protect members of the public and took account of the fact that, since the complaint, the Appellant had been practising for 16 months without any further concerns. At §160 the Committee referred back to its findings (at §143 and 144) that, in relation to paragraph 71 d of the HSG, there was a risk to patient safety. However at §161 it explained that that finding referred to "*a notional risk to the safety of patients in the sense of confidence in the profession"* and found that *"there was in this case no evidence of patient harm*" and that "*the lack of actual patient harm" w*as a highly relevant factor. At §162, the Committee concluded that, since the behaviour was not predatory, there was no evidence of grooming, and there were no issues regarding vulnerable patients, "*the risk was not sufficiently actual or real as to justify the imposition of an interim suspension order".*

The Appeal

The Grounds of appeal

65. The Appellant contends as follows:

(1) It was wrong and unjust of the Committee to conclude that the Appellant had entered into a non-professional personal relationship with Patient A after 29 January 2019 (allegation 3(b)).

(2) It was wrong and unjust of the Committee to conclude that the Appellant had failed to hand Patient A's treatment over to a colleague [until] after he had entered into a non-professional personal relationship (allegation 5).

(3) It was wrong and unjust for the Committee to conclude that the Appellant's actions were sexually motivated (allegation 6).

(4) The Legal Assessor failed to give a character direction to the Committee.

(5) For the reasons given in the previous grounds, the finding of professional misconduct is wrong and unjust in all the circumstances.

(6) For the reason given in the previous grounds, the sanction imposed by the Committee is wrong and unjust in all circumstances.

As regards Ground 1, the essence of the case is that the Committee was wrong to conclude that the *professional* relationship had not ended until March 2019. As regards Ground 6 the Appellant now seeks to argue additionally that, in any event, the sanction imposed by the Committee was wrong and disproportionate in all the circumstances.

General observations

66. Before turning to consider the grounds of appeal, I make the following general observations. I have considered in some detail the evidence before the Committee

and in particular the transcripts of the Appellant's oral evidence at the hearing. This gives me an understanding of the evidence heard by the Committee and to some extent a flavour of the tone and manner of the evidence. However I recognise that the Committee had the advantage of seeing and hearing the evidence being given, and was thus able to assess demeanour – which goes to, but is not decisive, of the credibility and reliability of the Appellant.

67. As regards the assessment of the Appellant as a witness, the Committee was entitled to reach the views that it did on credibility and reliability. From my consideration of the transcripts alone, the content of the Appellant's oral evidence was at times inconsistent and unclear. In my judgment, the Committee's finding at §49 that the Appellant was "not always doing his best to help" is a finding by the Committee that his evidence was not wholly reliable and that some of the Appellant's answers in oral evidence were not accepted by the Committee. Furthermore, in view of the particular answer he gave about pole dancing which I set out above, and albeit without the benefit of hearing the recorded conversation, I can understand the Committee's finding (at §48) that this answer was disingenuous.

Ground 1: termination of the professional relationship (allegation 3(b))

The Appellant's case

68. The Appellant contends that the only issue for the Committee was when the "patient/treatment" relationship had ended. In essence the Appellant had terminated that relationship on 29 January 2019 and did not form a personal relationship with Patient A until the end of February 2019.

69. The Committee's conclusion (at §58 Decision) that there was no evidence that the relationship had ended on 29 January 2019 was perverse and wrong. The Appellant had provided such evidence.

(1) The burden of proof was on the Council to establish that the relationship had not ended on 29 January 2019. There was no evidence to undermine what was being said by the Appellant.

(2) There was no evidence to support the Committee's finding that there was "no clean disengagement at that time".

(3) The fact that Patient A might need to return for future treatment is not evidence of the relationship not having ended on 29 January 2019.

(4) The Committee had evidence from the Appellant himself that he had terminated the relationship on 29 January 2019. Thereafter Patient A could have procured treatment from any other practitioner. He took no positive action thereafter regarding her ongoing treatment.

(5) As regards the "hang out" call, the Decision at §§59 and 60 ignored the Appellant's evidence (recorded at §26 Decision) that during that call he had told Patient A that he could not treat her again.

(6) The Appellant had notified Mr B on 26 April 2019 that the relationship had ended on 30 January 2019. The last sentence of paragraph 9 of the minutes (set out at paragraph 49 above) records Mr B's comment, and not what the Appellant had said at that meeting.

(7) The Appellant did not "refer" Patient A to a colleague in March. Rather the Appellant notified the Practice that he could not see her and that she would need to be seen by a colleague. That does not amount to a referral.

It is not purely a matter for the Committee to set the standard as to when the professional relationship has ended. As a matter of law, the contract or duty of care ends when the treatment has ended. It is wrong to assert that the professional relationship continued, after the treatment had ended.

The Council's case

70. The Council submits that there is a proper evidential basis that the patient/practitioner relationship was persisting and had not ended on 29 January 2019 nor by the time of the "hang out" call.

71. First, there is the undisputed fact that the professional relationship had been established and treatment was ongoing until January 2019.

72. Secondly, on his own evidence the Appellant did not do anything to end permanently that relationship. Further, in cross-examination, he accepted that there was a significant likelihood that he might have to see Patient A again. Whilst there was evidence that "treatment" had ended, that does not amount to evidence of the end of the professional relationship.

73. Thirdly, as regards the "hang out" call, at §§59 and 60 Decision, the Committee effectively rejected the Appellant's evidence that he told her in that call that he could not treat her. Rather the evidence establishes that, in that call, he said that he could not "hang out" with Patient A because he was still her osteopath.

74. Fourthly, the events on 14 March 2019 support the Committee's conclusion that the professional relationship had not ended before then.

75. Fifthly, the Appellant admitted in the disciplinary interview on 26 April 2019 that the position was unclear. The last sentence of the relevant part of the minutes is a record of what the Appellant had said.

76. As regards the Appellant's arguments:

(1) The Appellant, in his own evidence, described what he did in March as a "referral". Mr B also used the term referral and emphasised the absence of formal handover in his complaint to the Council.

(2) The Council's case - accepted by the Committee - was that the absence of an immediate need for further treatment was not sufficient to bring to an end the patient/practitioner relationship. The relationship is not properly described as a "patient/*treatment*" relationship, as suggested. The Appellant's evidence was not that he terminated the patient/*practitioner* relationship on 29 January

2019. He said that he told Patient A that she was now fine and did not require further treatment. There was no suggestion that this meant she could not see him again in the future, if the clinical need arose.

Discussion and conclusions

77. The key (and indeed only) issue on this ground is when the "practitioner/patient" relationship (i.e. the professional relationship) between the Appellant and Patient A ended: on 29 January 2019 (or in the "hang out" call); or, rather, on or around 14 March 2019. The Committee correctly identified this issue: Decision §§54 and 55.

78. As I explain below, there is no clear finding in the Decision as to when the "non-professional personal relationship" (i.e. the "personal relationship") commenced. However for the purposes of the Committee's finding on allegation 3(b), and thus Ground 1, that issue is not relevant, since its analysis here is predicated on the assumption that the Appellant "entered into" the personal relationship after 29 January 2019/the "hang out" call, but before 14 March 2019.

79. First, I agree with the Council's submission that, in principle, there is a distinction between treatment and the professional relationship. The end of a treatment or a course of treatment is not necessarily the end of the professional relationship between healthcare professional and patient. At the heart of the patient/practitioner relationship (as distinct from a personal or other non-professional relationship) is a need for absolute trust and confidence. Boundaries are required to maintain that trust and prevent abuse of power.

80. However, in my judgment, there may be a difference between an ongoing relationship with a health practitioner that a patient sees on a regular basis – such as a GP and a dentist – and a health practitioner that a patient sees for a treatment in relation to a specific issue – for example, a sports injury with a physiotherapist, or, perhaps, in some cases, an osteopath for a back problem. In the former case it will be relatively easy to establish that the professional relationship does not end when a particular treatment or course of treatment is completed. By contrast, in the latter case, the position seems to me to be less clear – even if there remains a possibility that at some stage some patients may come back for treatment. There may need to be clearer guidance from the profession and/or the individual practice as to what is meant by the professional relationship; when it starts, what is to be done by way of recording its termination and handing over and what is to be done when a patient comes back for treatment.

81. Secondly, as indicated above, it is a matter for the specialist tribunal – here, the Committee – to use its expertise in addressing the nature and duration of the professional relationship and this Court is reluctant to interfere with that assessment.

82. I turn to consider the Committee's reasons at §§58 to 63. As regards the position as at 29 January 2019, the date that *treatment* ended, the Appellant's evidence was that he told her he did not need to see her again. Whilst there was no evidence that on that date the professional relationship as a whole ended, equally there was no evidence that it was continuing. At §58, the Committee relied upon the fact that there was no formal disengagement and upon the Appellant's evidence in cross-examination about the 50/50 prospect of her returning for further treatment and of her asking for, and

being seen specifically by, him: see paragraph 37 above. Nevertheless, looked at purely as at that point in time, it was not clear that the professional relationship would continue or that Patient A would return for further treatment. It was equally likely that she would not return. Nor, as far as I am aware, did the Practice (or the Council) have in place formal guidance on disengagement, or on criteria for terminating the professional relationship. In my judgment, if the evidence had been confined to what happened on 29 January 2019 and had matters stood as they were as at that date, then there would have been substantial force in the Appellant's argument that the professional relationship had come to end with the last treatment.

83. However, on the facts of this case, the evidence of what happened thereafter is decisive: namely relating to the "hang out" call and the events of 14 March 2019.

84. First, as regards the "hang out" call, having reviewed the evidence, in my judgment the Committee was justified in relying (at §§59 and 60) upon paragraph 16 of the August 2020 statement (set out at paragraph 39 above) as clear evidence that at that time the Appellant still regarded himself as "her osteopath" and thus that the professional relationship was subsisting. First, at no point did he resile from that statement, despite being given the opportunity to do so. Secondly paragraph 17 of that statement supports this account. Thirdly it is also supported by paragraph 14 of the June 2019 statement. He did not resile from those further statements either. Fourthly, what he said in oral evidence about the "hang out" call was inconsistent and confused: see paragraph 40 above. In my judgment, the Committee was entitled not to accept that, in that call, he had told her he could not treat her again (and thus to reject the evidence it recorded at §26 Decision). Indeed that contradictory evidence is an example supporting the Committee's findings of the Appellant being "less clear about matters which caused him difficulties" and "not always doing his best to help".

85. Secondly, the events of 14 March 2019 reinforce the conclusion that, prior to that date, the professional relationship had not ended. When, in March, Patient A needed further treatment, on the Appellant's own evidence, she approached *him*. At that stage he had to tell her he could not treat her. She did not contact the Practice. She therefore considered that the Appellant was still her osteopath. If the Appellant had, as he contends, previously told her that he could no longer treat her, she would not have contacted him for treatment. He then referred her to the colleague, via a private WhatsApp message without informing the Practice director; and it was he, the Appellant, who booked her into the system and provided handover of the clinical details. In my judgment, the Committee's reliance upon these events (at §63 Decision) was fully justified.

86. Finally, as regards the minutes of the 26 April 2019 meeting with Mr B, at §61 Decision the Committee referred to the final words of the answer to question 9 ("it was unclear when the therapeutic relationship ended") and, at §62, went on to place some reliance upon the fact "*it was said to be "unclear" during this conversation …*". In my judgment, absent further evidence from Mr B, this last sentence of his minutes is not sufficiently clear to support the conclusion that in that meeting *the Appellant said* that it was unclear when the professional relationship had ended. First, those words are, at the least, equally (if not more) consistent with recording Mr B's own opinion. Secondly, it is the case that where, in those minutes, Mr B records what was clearly an answer from the Appellant, he uses the word "you"; by contrast, the relevant sentence merely states, in the passive form, "it was unclear". The "non-

bold" parts of the minutes do contain observations which are other than answers from the Appellant. Thirdly, and significantly, at §62, the Committee itself does not go so far as to conclude that the emphasised words were words spoken by the Appellant. Rather it also uses the passive "it was said", suggesting that it was not sure whether the Appellant had said those words. To that extent, if and in so far as the Committee placed reliance upon those emphasised words, it was wrong to do so. Nevertheless this error does not detract from the overall force of the Committee's reasoning.

87. In my judgment, the Committee's finding that allegation 3(b) was proved was not wrong, for the reasons it gave at §§59 and 60 and 63. Ground 1 therefore fails.

Ground 2: failure to hand over (allegation 5)

The Appellant's case

88. The Appellant contends that the Committee was wrong to conclude that the Appellant had failed to hand Patient A's treatment over to a colleague until after he had entered into a non-professional personal relationship with her. The Committee accepted that the treatment had ceased on 29 January 2019. The Committee concluded that the personal relationship started towards the end of February 2019. It also accepted that the Appellant had arranged for Patient A to be seen by a colleague on 14 March 2019. It was therefore wrong of the Committee to conclude that the Appellant had failed to hand over Patient A to a colleague until after February 2019. The Committee accepted the Appellant's evidence that he had not only informed Patient A that he could not treat any longer, but also handed Patient A over to a colleague when Patient a contacted the Practice for an appointment on 14 March 2019. Since the treatment ended on 30 January 2019, the Appellant was under no duty to hand treatment over to a colleague.

89. Whilst accepting that Ground 2 stands or falls with the argument on Ground 1, the Appellant points out the oddity of §71 Decision where the Committee appears to suggest that the personal relationship had started as early as the 24 November call. That suggestion is inconsistent with the Committee's analysis and findings in relation to allegation 3(b) where the issue was whether the professional relationship had terminated before the personal relationship began.

The Council's case

90. The Council submits that the Appellant's arguments on Ground 2 are based on the contention that he stopped treating Patient A on 29 January 2019, and therefore, add nothing in substance to the arguments on Ground 1.

91. As regards the reference to the 24 November call at §71 Decision, the allegation and finding was that there was a failure to hand over *by* the end of February *at the latest*. The finding that the failure was from the earlier date of 24 November is not inconsistent with that finding. The Council accepts and submits that, both in relation to allegation 5 and allegation 6 (in relation to allegation 5), the point at which the Appellant should have handed over was following the flirtatious conversation on 24 November. It was plainly open to the Committee to find that the Appellant was attracted to Patient A and "pursuing" a relationship from that date, based on the tone and content of the 24 November call. Having made this finding, the Committee was

right to conclude that the Appellant had a duty to hand over the patient's care, which he did not do until 14 March 2019.

92. In any event, any inconsistency between §71 and the findings on allegation 3(b) does not give rise to any basis for undermining the Decision. If the Appellant fails on Ground 1, Ground 2 must also fail. Even if the Appellant succeeds on Ground 1, the Council can still succeed on Ground 2.

Discussion and conclusions

93. In light of my conclusion on Ground 1 that the Committee was correct to find that the professional relationship did not terminate until 14 March 2019 and on the basis, common to the parties, that the Appellant had entered into a personal relationship with Patient A by the end of February 2019 at the latest, Ground 2 is bound to fail. As discussed above, the Committee was entitled to find that, in the "hang out" call, the Appellant neither terminated the professional relationship nor in any way handed over Patient A to a colleague. On the basis of those findings, the Committee was correct to find that the Appellant did not hand over Patient A to a colleague until after he had entered into the personal relationship.

When did the Appellant enter into the personal relationship with Patient A?

94. However, as Mr Butler pointed out in argument, the Committee's reasoning in §71 Decision is not easy to understand. It raises the issue of when the Appellant "entered into" the personal relationship as that term is referred to in allegation 5. This is important when it comes to consider Ground 3 i.e. the further allegation that the failure to hand over was sexually motivated (allegation 6 in relation to allegation 5). Nevertheless because it first arises at §71 Decision, I address the issue here.

95. At §71 the Committee finds, in the second sentence, that the Appellant was *pursuing* a personal relationship from 24 November call onwards and then, in the final sentence, that once he *entered into* a personal relationship he was under a duty to hand over. This can be read as an implicit finding that the Appellant had *entered into* the personal relationship from 24 November onwards. However, if it is, it is not consistent with other aspects of the Decision, when read in context of the charges and the arguments. The Committee's findings as to when the personal relationship commenced are not clear. The position is as follows.

96. First, it is important to note that the relevant charges advanced by the Council and upon which the Committee was required to adjudicate concerned events by reference to the point where the Appellant had *"entered into"* a non-professional relationship with Patient A: see the precise terms of allegations 3(b) and 5 (and consequently, allegation 6 in so far as it relates to those two allegations).

97. Secondly, the Council's position, as recorded in the Decision (§19 and also §22) was that the Appellant *entered into* the personal relationship "at around the end of February 2019". However, the Council also argued[7] that earlier on, from the time of the 24 November call, the Appellant was "taking steps with a view to embarking upon" a personal relationship. Mr Mant, in argument, in similar vein, maintained that

[7] Transcript, day 1 at 16A-C.

from that time onwards the Appellant was "pursuing" a personal relationship. There thus appears to be a distinction to be drawn between "pursuing/seeking to embark upon", and "entering into", the personal relationship.

98. Thirdly, the Committee made no clear finding of its own view as to when the personal relationship commenced, and in particular, no clear finding, in response to the charges, as to when the Appellant "entered into" that relationship. Contrary to the possible implication in §71, at §§64 and 84 the Committee appears to have concluded that he "entered into the relationship" some time at or after the end of February: see in particular §84, where, given the Committee's finding that the sexual relationship had not been shown to have started before 14 March and that it had started "not long after" the personal relationship had been entered into, the implication is a finding that the personal relationship had not been entered into earlier than the end of February 2019.

99. In my judgment, on these findings, it cannot be concluded that the Committee found that the Appellant "entered into" the personal relationship earlier than the end of February 2019. This has potential consequences for the next ground, Ground 3.

100. I accept that the allegation is failure to hand over *until after* he entered into the personal relationship, and in principle that does not exclude a duty to hand over earlier than the point at which he had "entered into" the personal relationship. However it is clear that the gravamen of the charge is the failure to hand over once the personal relationship was established i.e. there would be no "failure" if hand over had taken place at the point that the personal relationship was entered into. Both allegation 3(b) and allegation 5 refer expressly to "entered into".

Ground 3: Sexual motivation (allegation 6 in relation to allegations 3(a) and 5)

The Appellant's case

101. The Appellant submits that the Committee's finding that the Appellant's actions in the Sunday call and in failing to hand over were sexually motivated was contrary to the weight of the evidence.

The Sunday call

102. The Committee was wrong to rely, in reaching its conclusion on the Sunday call, on the 24 November call, as that call was not sexually motivated. There is no evidence to support the Committee's conclusions at §§80 to 83 Decision. It was never put to the Appellant that in the 24 November call he was hoping that the relationship would develop into a sexual one.

103. The evidence of the 24 November call did not demonstrate an established sexual motivation. It was Patient A who telephoned the Appellant. There was no evidence of sexual behaviour; there was no intimacy or physical pleasure during the telephone call. The content and words used during the telephone call are not of a sexual nature and would most definitely not lead to a conclusion that it was sexually motivated. In cross-examination, he vigorously denied that the call appeared to be him sowing the seeds of what might be possible with Patient A: see paragraph 33 above. Conduct which is inappropriate is not necessarily sexually motivated. In fact the Committee

concluded that the 24 November call was not sexually motivated. It was therefore wrong to conclude that the Sunday call, updating the patient in respect of treatment, was sexually motivated.

Failure to hand over

104. As regards the failure to hand over Patient A, the Appellant did not have any contact with Patient A at the Practice or treat Patient A after 29 January 2019. When Patient A contacted the Practice for treatment on 14 March 2019 the Appellant made sure that she was seen and treated by a colleague.

105. The Committee's conclusion that the failure to hand over Patient A sooner was sexually motivated is extraordinary. There was no evidence to support the Committee's conclusion at §88. The final conclusion (at §89) that the failure to do so until after their personal relationship developed was sexually motivated was even more astonishing. Patient A did not require any more treatment after 29 January 2019. There was no need for the Appellant to ensure that Patient A was treated by a colleague.

106. For the period from February 2019 onwards, it cannot be said that the Appellant was insisting on maintaining contact *through the Practice* in circumstances where, from the end of January 2019 onward, he had no contact with Patient A professionally. In any event he could stay in contact with her because of the personal relationship which had been established by that time.

107. In so far as the Committee appears to be relying on a suggestion that failure to hand over occurred earlier, namely from after the 24 November call, there was no finding that he had entered into the personal relationship by then.

The Council's case

108. The Council submits that the Committee's finding that the Appellant's conduct in respect of allegations 3(a), 3(b) and 5 was sexually motivated was properly based on the evidence and cannot, on any view, be regarded as unreasonable. The facts that the Appellant admitted being attracted to Patient A, and that a sexual relationship did in fact develop, provide a strong basis (among others) for inferring that earlier conduct in their relationship was sexually motivated. The Appellant does not identify any grounds for challenging the finding that the personal relationship was sexually motivated (allegation 3(b)).

The Sunday call

109. The finding that the Sunday call was sexually motivated was, properly, based on the following analysis. First, the Committee found that the 24 November call was flirtatious and sexually motivated. Secondly the Sunday call must have taken place after the 24 November call. Thirdly, the Appellant knew that he was not allowed to call patients from his mobile phone. Fourthly, by calling her, he had a private means of communication. Patient A obtained the Appellant's mobile phone number from the Sunday call, and the implication is that he made that call for that purpose. Further the Council relies upon the Committee's finding that the Appellant was not seeking to assist when giving oral evidence.

110. As regards the 24 November call itself, there were no specific allegations in relation to this telephone conversation, but the Committee's findings in this regard did influence its decision on sexual motivation for allegations 3(a) and 5. Evidence of sexual behaviour or intimacy or physical pleasure is not a prerequisite for a finding of sexual motivation. It is sufficient that the behaviour was in pursuit of a future sexual relationship (see *Basson* cited above). Given the tone and content of the conversation (which included references to pole dancing among other things) the Committee's conclusion that the Appellant appeared to be "chatting up" Patient A cannot be criticised. Having listened to the audio recording of the conversation, and heard oral evidence from the Appellant, it was better placed than the Court to make that assessment.

Failure to hand over

111. As regards failure to hand over, the Appellant seeks to challenge the finding of sexual motivation in respect of the failure to hand over care, on the grounds that he did not provide any treatment after 29 January 2019. However, the Committee's decision (at §87) was based on the fact that the Appellant was *pursuing* a non-professional relationship from the date of the 24 November call. His decision not to hand over care *at this time* enabled him to maintain contact and further the relationship. It is implicit that the Committee found that there was a *duty to hand over at that point in time* and that he did not do so between then and January out of sexual motivation. The Committee's finding that this was sexually motivated was not unreasonable in the context of its other findings and the background facts.

112. As regards the complaint that it was not put to the Appellant that the failure to hand over was sexually motivated, it cannot seriously be suggested that the proceedings overall were procedurally unfair. This finding cannot have taken the Appellant by surprise. Indeed, sexual motivation in respect of the failure to hand over was expressly included as part of the charge against the Appellant.

Discussion and conclusions

113. The Committee found, and the Appellant does not now dispute, that entering into the personal relationship was itself sexually motivated (allegation 6 in relation to allegation 3(b)).

Sexual motivation for the Sunday call (allegation 6 in relation to allegation 3(a))

114. First, this allegation, and the finding, related specifically to the Sunday call, and not to the 24 November call. It is the Sunday call which was alleged to have been sexually motivated.

115. Secondly, however, the Committee relied, for its conclusion (at §83) in relation to that call, upon the 24 November call. In my judgment, it was justified in doing so. I do not accept that the Committee found that the 24 November call was not sexually motivated. Whilst there was no express finding that the 24 November call was sexually motivated, that was not alleged in the charges and was not in issue. The Committee relied, and was entitled to rely, on its findings that the 24 November call was flirtatious and that he was chatting her up (§§78, 83 Decision). The Committee did not accept the Appellant's explanation of this call. Indeed his evidence (referred

to in paragraph 33 above) is not credible. The Committee had the benefit of hearing the tone of the call – but even without that benefit, the contents clearly support the Committee's finding of chatting up, and thus are capable of amounting to "pursuit of a future sexual relationship" (see paragraph 32 above).

116. Thirdly, the Committee also relied (at §83) upon the fact of making the Sunday call from his personal mobile, when he knew that he should not have done. In his evidence, the Appellant accepted that (see paragraph 35 above). The Committee's reasoning here was appropriate, particularly in the context of its findings in relation to the 24 November call. Moreover, the Committee could legitimately have also relied upon the fact that this was a call made on a Sunday and from his home. The Committee did not accept his explanation that it was a professional call.

117. In my judgment, the Committee's finding on this part of allegation 6 was sound and this part of Ground 3 fails.

Sexual motivation for failure to hand over (Allegation 6 in relation to allegation 5)

118. The Committee's finding here is more problematic. I start by reminding myself that this was a finding of inferential fact. The question is whether this inferential finding of the Committee was wrong.

119. The Committee's finding at §89 is premised on the Committee's view (at §88) that the Appellant failed to hand over earlier; "probably" because he wished to maintain contact with Patient A "albeit in a legitimate clinical setting" with a view to a future sexual relationship. A fair reading of §87 Decision suggests that he should have handed over at the point of, or immediately, following the 24 November call. (This appears to be consistent with the implicit finding in §71 in relation to allegation 5 itself).

120. Two periods of time fall to be considered: the period from about the end of February 2019, and the period before that date. As regards the later period, by that time, it is clear the Appellant had *established* a personal relationship with Patient A and had direct personal contact with her through their personal mobile telephones. In respect of that period, and for those reasons, the Committee's reasoning at §88 is hard to understand. The Appellant would have had no need to maintain contact through the "legitimate clinical setting", when, by that time, personal contact had to be established.

121. Rather, the Committee's reasoning appears to be directed towards the earlier period, when the Appellant might not have had personal contact and wished to maintain professional contact "to pursue" the personal, and ultimately, sexual relationship. However in order for that reasoning to be justified, the Committee had to find that the duty to hand over had arisen by that time. The allegation as to handing over was effectively that he was required to hand over either when or before he had "entered into" the personal relationship: see allegation 5.

122. Mr Mant submitted that, by 24 November, the Appellant was *pursuing* a personal relationship, and on that basis he was effectively under an obligation to hand over at that point in time. Indeed that is what the Committee effectively found at §87. But,

as indicated above, allegation 5 (and allegation 3(b)) are framed by reference to the point in time at which the Appellant had "entered into" the personal relationship.

123. If in fact it had been found (or even alleged) that the Appellant *entered into* the personal relationship on 24 November, then failure to hand over between 24 November and the end of January when the treatment ended might have, justifiably, been found to have been sexually motivated. However, as set out in paragraphs 97 to 99 above, it was neither so alleged nor found. What is more, such an allegation or finding is not consistent with the Committee's approach to, and reasoning, in respect of allegation 3(b).

124. Whilst I make full allowance for the need to avoid close textual analysis, the confusion here arises from a fundamental inconsistency in the Committee's underlying reasons addressing the specific charges. The essence of its finding in allegation 3(b) is that the Appellant had entered into the personal relationship *at* around the end of February and thus ought to have terminated the professional relationship by then. By contrast the implication of its finding in allegation 5 and allegation 6 (in relation to allegation 5) is that he was required to terminate the professional relationship as early as the 24 November call, and was in breach by continuing treating her up until 29 January 2019.

125. I have considered whether the Committee's finding at §89 is nonetheless justified by reference to paragraph 3.5 of Standard D16 of the OPS (set out at paragraph 10 above). That supports the proposition that there is or might be a duty to hand over once an osteopath is sexually attracted to a patient; and thus in the present case, regardless of when the personal relationship was "entered into", the Appellant was under such a duty once he started "chatting her up" in the 24 November call. However, first, the Committee did not address its mind to such a contention; and secondly, the charge itself did not make such an allegation, but was expressly directed to the point in time when the Appellant had "entered into" the personal relationship, and not at the earlier point where he "found himself attracted".

126. For this reason, in so far as there is an implicit finding that there was a failure to hand over following the 24 November call which was sexually motivated, in my judgment that finding was wrong.

127. However, I turn back to the position in the later period, and the failure to hand over once the personal relationship had been "entered into". I ask myself whether the Committee's inferential finding that the failure to hand over *then* was sexually motivated was nonetheless justified, taking account of the fact that pursuant to CPR 52.21(4), I am permitted to draw such inferences as I consider to be justified. Whilst I disregard the Committee's "probable explanation" at §88, nevertheless I have concluded that the Committee's ultimate finding was not wrong.

128. First, the Appellant has now accepted that entering into the personal relationship by the end of February 2019 at the latest was sexually motivated see paragraph 113 above. Secondly, as I have found, the Committee's finding of a failure to hand over was justified. In my judgment, it is a proper inference to draw from these facts that the reason for not handing over to a colleague when he should have done was because of the pursuit and/or entering into of that personal relationship; and further that, because the entering into of personal relationship was itself sexually motivated, the

specific conduct in failing to hand over was also sexually motivated. Having found that he did fail to hand over, the Committee was entitled to find, in the context of the sexually motivated personal relationship, that that particular element of his conduct was also sexually motivated. Alternatively even if the *basis* upon which the Committee made its inferential finding was flawed, I myself make that inferential finding of fact, pursuant to CPR 52.21(4). For these reasons, this part of Ground 3 also fails.

Ground 4: character direction

The Appellant's case

129. The Appellant contends that the Legal Assessor failed to give a good character direction to the Committee. It is standard practice to give a such a direction in professional disciplinary proceedings such as the present. That is particularly so where the only evidence before the Committee was that of the Appellant. The Appellant is a man of absolute good character and has no other reprehensible conduct alleged, admitted or proven, other than the allegations before the Committee. The Appellant was entitled to both the credibility and propensity limbs of the good character direction. Failure to give a good character direction is relevant to the assessment of credibility. There was therefore not a fair hearing and not a fair assessment of the Appellant. This was a serious procedural irregularity and thus the overall findings of fact were unjust.

The Council's case

130. The Council submits that there is no general requirement to give a "good character" type of direction to a specialist healthcare regulatory panel. The impact of good character on credibility and propensity would be clear and obvious to a specialist panel without the formality or necessity of a direction. The Appellant was represented by an experienced advocate who, when making submissions on the legal advice to be given, did not request such a direction (or raise any concern about the advice that was given by the Legal Assessor). In any event, it is far from clear that a direction would have been appropriate in this case, certainly as regards propensity. Further, even if a good character direction should have been given, this did not amount to a "serious" procedural irregularity and, even if it did, it would not be "unjust" to maintain the Decision.

Discussion and conclusions

Relevant legal principles on "good character"

131. I have been referred to *Inayatullah v GMC* [2014] EWHC 3751 (Admin) at §§32 (citing *Fish v GMC* [2012] EWHC 1269 (Admin) and *Gopakumar v GMC* [2008] EWCA Civ 309) and §§46 to 48. I also take account of the position under criminal law and of the provisions of CPR 52.21. I derive the following propositions:

    (1) Disciplinary proceedings are not directly analogous to a criminal trial with a judge and jury. It is not the function of the legal assessor to give "directions" to the members of the panel; rather it is to give advice.

(2) In many cases which come before a professional disciplinary body, the professional is likely to be of previous good character (not least because of the high standards required by the profession itself) and the disciplinary body will be aware of this.

(3) As a matter of criminal law, a good character direction has two limbs: a direction as to the relevance of good character to a defendant's credibility; and a direction as the relevance of good character to the likelihood of the defendant having committed the offence charged (i.e. propensity). In criminal cases, even if, wrongly, the judge has failed to give a good character direction, on appeal the distinct question remains whether, as a result of this failure, the conviction is unsafe.

(4) In professional disciplinary proceedings, on the authorities, there is no rule or, even standard practice, that in every case a good character direction should be given by the legal assessor. There may be cases where it is appropriate to give such a direction; for example where dishonesty is a central issue. The question in each case is whether on the facts of the particular case such a direction should be given.

(5) Even if there is a failure to give a good character direction, then a separate question arises as to whether the disciplinary body's findings should be set aside. That in turn involves the questions under CPR 52.21(3) whether the failure is a "serious irregularity" and even if it is, whether the decision was "unjust". This might be seen as akin to the question, in criminal proceedings, whether the conviction is "unsafe".

Application to the facts

132. Applying these principles to the facts of this case, I conclude as follows. First, there was no requirement here for the Legal Assessor to have given a "good character" direction when advising the Committee prior to its consideration of the findings of fact. Secondly, it was open to the Appellant's legal representative to ask for such a direction or to make submissions based on good character. He did not do so. That may have been because he assumed that the Committee would take character into account in any event. Thirdly, I agree that, in any event, it would not have been appropriate to have given the "propensity direction" in the present case. The Appellant had accepted in evidence that he had "overstepped the boundaries" in his conduct with Patient A and that, not only had it been "overfriendly" but inappropriate and unprofessional[8]. On the other hand, I do not think that the fact that the relationship became sexual later on was of itself a reason not to give the propensity direction. Finally, even if a "credibility" direction could or should have been given, I do not consider that the failure to do so was a "serious" procedural irregularity, in the context of the entire proceedings. The Committee was able to assess the Appellant's credibility based on the content and manner in which he gave his oral evidence, when considered against other aspects of the evidence. It did not make its findings on the basis of preference of conflicting oral account i.e. who was more likely to be telling the truth – a situation where good character might be of particular relevance. Finally even if it were a procedural irregularity which could be regarded as "serious", it

[8] Transcript, day 2 page 15C-D (even if he did not accept that his conduct was sexually motivated).

would not have been such as to render the decision "unjust". There was ample basis for the Committee to doubt the reliability of some of the Appellant's evidence and its findings of fact remain otherwise sound. For these reasons, Ground 4 fails.

Ground 5: professional misconduct

The parties' cases

133. The Appellant submits that, on the basis that the findings of fact challenged cannot stand, it follows that the finding of misconduct (i.e. unacceptable professional conduct) equally cannot stand. The Council submits that Ground 5 add nothing to the earlier grounds. The Council accepts that it might be necessary to reconsider unacceptable professional conduct if the Court were to determine that some or all of the challenged findings of fact were wrong.

Discussion and conclusions

134. It is agreed this ground stands or falls with the outcome in relation to the previous grounds. Since I have concluded that Grounds 1 to 4 fail, it follows that there is no basis to impugn the finding of unacceptable professional conduct. The Committee's findings were not wrong and Ground 5 fails.

Ground 6: sanction

The Appellant's case

135. The Appellant submits that since the findings of fact and of misconduct cannot stand for the reasons given under the previous grounds, then the sanction imposed by the Committee equally cannot stand. In any event, the sanction imposed by the Committee was disproportionate in all the circumstances. The imposition of a 6-month suspension order was unduly punitive on the facts of the case. Whilst no application to amend the grounds of appeal was made by the Appellant, I allowed him to advance this contention. In argument before me, Mr Butler expanded upon this argument, submitting as follows.

136. First, the Committee accepted that the Appellant had undergone a thorough session of learning from Ms Stone and that the Appellant had demonstrated a willingness to learn and a capacity to reflect and progress: Decision §131.

137. Secondly, the Committee did not consider, as suggested by the Council, that the Appellant's behaviour was predatory: Decision §135.

138. Thirdly, the Committee was wrong to conclude (at §131) that because the Appellant had disputed the more serious allegations, it could not be satisfied that the Appellant had acknowledged his misconduct sufficiently to show full insight. The Appellant was perfectly entitled to dispute the allegations. The Committee fell into error in concluding that the Appellant had therefore not shown full insight. The only reason that the Committee did not find "full" insight was the denial of the allegations. This was a fundamental error leading to an unfair and wrong decision.

139. Fourthly, at §144, the Committee expressly found that there had not been a serious breach of the OPS; yet at §149 it relied upon "the seriousness" of the conduct.

140. Fifthly, the conclusion that there was a risk to patient safety was unfounded when it had never been suggested that there would be a risk to patient safety if the Appellant was not suspended. The Committee's findings, in refusing an interim suspension order, are fundamentally inconsistent with what is effectively found at §144 d. Whilst in oral argument Mr Butler seemed to suggest that a conditions of practice order was appropriate, in final written submissions his contention was that, on the facts in the present case, admonishment was the correct sanction.

The Council's case

141. The Council submits that the Court should not interfere with the evaluative judgment on sanction of a specialist panel. The Appellant has identified no error of principle and the decision to suspend did not fall outside the bounds of reasonableness. A suspension of 6 months duration was at the lower end of the range of possible suspensions, and was necessary to uphold professional standards and maintain public confidence.

142. First, as regards insight, it was plainly relevant that the Appellant denied all of the most serious allegations against him, and in particular the sexual motivation in respect of all conduct prior to the end of the professional relationship. Full admission is not necessarily a condition precedent for insight. However here the Committee did not treat it as such. It properly took into account the denials in considering whether the Appellant had insufficiently processed his behaviour to establish "full insight". §131 Decision must be read in the light of the findings on credibility and not seeking to assist. The Committee assessed the sufficiency of insight. It found that he had some insight but not full insight. A disciplinary body is entitled to say, on the facts of any particular given case, that denial does prevent full insight.

143. In any event, even if the Committee were wrong about insight, the rest of the decision on sanction is warranted. The primary basis for the imposition of the sanction was not risk of repetition but because of the inherent seriousness of the misconduct which required to be marked, by reference to the public interest considerations.

144. Secondly, it is clear from consideration of the Decision, when read as a whole, the Committee treated the misconduct as serious. That is the primary reason for suspension. There is no positive finding that it was not a serious breach. On the Appellant's case, unless the reasoning in §138 as regards admonishment was outside the bounds of reasonable decisions, then the Committee had to impose the sanction of suspension (because a conditions of practice order is not being sought). The failure to mention, at §144 Decision, sub-paragraph (a) of §143 appears to be no more than a typographical error. That sole omission cannot be taken to override the numerous references to the seriousness of the conduct. Sexual misconduct is inherently serious in all cases and will often lead to removal from the register. It was within that context that the Committee found that the conduct here was at the lower end of such sexual misconduct.

145. Thirdly, the finding of risk to safety was not unreasonable in the absence of full insight. The Committee had in mind indirect risk to patient safety through impact on public confidence: see Decision §161. Even if this is not the sort of patient harm envisaged by the Guidance, any error was not material given that all the other criteria for suspension were met. The primary reason for imposing a suspension order was not

to protect patients from direct harm, but to maintain public confidence and proper standards and conduct for the profession. It was on that basis that the Committee rejected admonishment as an appropriate sanction and one of the bases on which it rejected a conditions of practice order. A sanction that might otherwise be considered harsh may be necessary to maintain public confidence. The reputation of a profession is more important than the fortunes of any individual member.

Discussion and conclusions

146. The starting point for my consideration of Ground 6 is the approach to a challenge to sanction set out in *Bolton*: see paragraph 24(1) above. The purpose of the imposition of a sanction has three aspects: first, protection of the public (from the risk of repetition of the misconduct in question); secondly maintaining professional standards and thirdly maintaining public confidence. The second and third aspects are the "public interest" considerations. I turn to address the three specific criticisms made of the Committee's reasoning.

Insight

147. First, as regards insight, the Committee recognised that the Appellant had done a substantial amount of work in that area and that the position was promising for the future. Moreover, it does appear that the reason why it concluded that he had not shown "full" insight, was the fact that he had disputed the more serious allegations. This might seem to be an unduly stringent line to take. However, taking account of the relevant principles set out in paragraph 25 above, in my judgment, as a matter of analysis, the Committee was entitled to take into account the fact that he had denied the allegations in considering the extent of the insight he had shown. This is particularly the case given his denial of the sexual motivation behind his conduct. The assessment of insight was principally a matter for the Committee, particularly since it had had the benefit of hearing the Appellant in person at both stages. The Committee was also entitled in this regard to take account of their conclusions in relation to his credibility. For these reasons, I conclude that the Committee did not err in its conclusion at §131 Decision.

Seriousness

148. Secondly, as regards "seriousness", the Committee found clearly, at a number of points, that the Appellant's conduct was "serious" (see §§138, 142 and 149 Decision). Any sexual misconduct is, relative to other forms of misconduct, inherently serious: see HSG §§50 and 52, given the importance of trust between an osteopath and patient, in the particular context of what is necessarily a physical relationship. As regards §§143 and 144 Decision, it does appears that by omitting reference to sub-paragraph a of paragraph 71 HSG (i.e. at §143), the Committee did not find that there was a serious breach *of the OPS*. This might appear to be somewhat at odds with its other findings. (On the other hand, it is inherent in paragraph 71 HSG that misconduct can be "serious" without being a serious breach of the OPS). Nevertheless, this omission does not amount to a positive finding that the Appellant's conduct was not serious or not sufficiently serious to warrant consideration of suspension as a sanction. What is more paragraph 71 HSG emphasises that it is not necessary for all the listed factors to be present, in order to warrant suspension. I do not accept the Appellant's argument on this point.

Risk to patient safety

149. Thirdly, however, in my judgment, the Committee did fall into error in finding (at §§143 d and 144) that "there is a risk to patient safety" if the Appellant's registration were not suspended. The Committee's reasoning here is weak and confused. It is clear from reading those paragraphs, in conjunction with §§160 and 161 that the finding of risk to patient safety was confined wholly to "a notional risk to the safety of patients in the sense of confidence in the profession". There was "no evidence of actual patient harm"; and for this reason the Committee decided not to make an interim suspension order. First, in my judgment, paragraph 71d HSG is really addressed to the risk of actual harm to patients if the registrant is allowed to continue to practise. By contrast, it is sub-paragraphs b and c of paragraph 71 that address issues of public confidence in the profession. Secondly, in any event, the Committee did not adequately explain how it is said that any effect on confidence in the profession gives rise to a risk to the safety of patients, notionally or otherwise – either in general or in this specific case.

Overall assessment of sanction

150. However the error in relation to risk to patient safety was an error of factual assessment of only one of the relevant factors; it was not an error of principle. In my judgment it is not sufficient for this Court to interfere with the overall evaluative judgment on sanction made by the Committee, the specialist professional adjudicator.

151. First, the Committee's principal purpose in imposing the sanction in this case was to maintain public confidence in the profession and to uphold professional standards (see §§138 and 150 Decision), rather than protection of the public from future risk from the Appellant. Whilst I understand that the Appellant will consider this sanction of 6 months suspension from practice to be unduly punitive, that is not the principal purpose of the imposition of the sanction in cases such as the present; the maintenance of public confidence in the profession is the paramount consideration and ultimately takes precedence over the consequences for the individual which may be unfortunate and somewhat punitive: see *Bolton* supra, at 519 D-E.

152. Secondly, in any case of sexual misconduct, removal from the register falls for consideration: see HSG §§50 and 52. The Committee recognised this at §§145 to 147. In the present case, the Committee - in my view properly - recognised that the sexual misconduct fell at the lower end of the scale of *sexual misconduct* and for that reason concluded that removal would not be proportionate (§§147 and 148). Something less than removal was required. It had concluded that neither admonishment nor a conditions of practice order was sufficient, as neither would satisfy the "public interest" purpose of the sanction: §§138 and 142. It concluded in these circumstances, that the appropriate sanction was suspension. Moreover, the lower end of the spectrum is, in my judgment, further reflected in the fact that the Committee chose to impose a period of suspension at the lower end of the range of possible periods of suspension. In reaching this conclusion, at §151, the Committee balanced the competing considerations, taking account of the impact upon the Appellant personally.

153. Whilst I recognise that the Committee took a firm line on the question of insight and erred in relation to risk to patient safety, nevertheless I conclude that the Committee's

reasoning and ultimately its conclusion, did not fall outside the bounds of what the Committee could properly and reasonably have decided. Accordingly Ground 6 fails.

Conclusion

154. For the reasons set out at paragraphs 87, 93, 117, 128, 132, 134 and 153 above, each of the grounds fail and this appeal is dismissed.

155. Finally I am grateful to counsel and solicitors for the helpful manner in which this appeal has been conducted, not least in the circumstances of the Covid-19 pandemic.