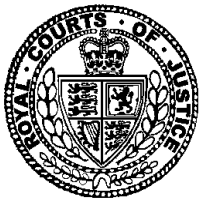

Neutral Citation Number: [2024] EWHC 2610 (Admin)

Case Nos: AC-2023-LON-000196
AC-2023-LON-000223

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 October 2024

Before:

THE HONOURABLE MR JUSTICE MORRIS

- -

Between:

PROFESSIONAL STANDARDS AUTHORITY FOR HEALTH AND SOCIAL CARE	**Appellant**
- and -	
(1) GENERAL DENTAL COUNCIL	
(2) ARTHIF DANIAL	**Respondents**

And between:

ARTHIF DANIAL	**Appellant**
- and -	
GENERAL DENTAL COUNCIL	**Respondent**

- -
- -

Michael Standing (instructed by **Browne Jacobson**) for the **Professional Standards Authority for Health and Social Care**
Benjamin Tankel (instructed by **General Dental Council in-house solicitors**) for the **General Dental Council**
Alexandra Felix KC (instructed by **Hill Dickinson**) for **Mr Danial**

Hearing dates: 31 October, 1 November 2023, 23 and 24 January 2024, 12 and 13 March 2024
Further written submissions: 18 and 23 March 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on Wednesday 16th October 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Mr Justice Morris:

Introduction

1. On 8 December 2022 the Professional Conduct Committee ('the Committee') of the General Dental Council ("GDC") found that Mr Arthif Danial ("the Registrant") had committed inappropriate and sexually motivated misconduct towards two dental nurses, and one receptionist, on four separate occasions between February and July 2020. As a result, on 12 January 2023, the Committee determined that the Registrant's fitness to practise was impaired and imposed a five-month suspension direction with review, and proceeded to impose an order for immediate suspension ("the Decision").

2. There are before the Court two distinct appeals against the Decision. First, the Professional Standards Authority for Health and Social Care "("the PSA") challenges the decision to impose a suspension order only (including a challenge to three of the findings of fact of the Committee) ("the PSA Appeal"). The respondents to the PSA Appeal are the GDC and the Registrant. Secondly, the Registrant challenges the findings of misconduct and the imposition of the sanction, seeking an order setting aside the findings and the sanction ("the Registrant's Appeal"). The respondent to the Registrant's Appeal is the GDC.

3. By subsequent application to rely on a further ground of appeal, the Registrant contends that, when imposing the five-month suspension order together with an immediate order for suspension, the Committee ought to have directed that his overall suspension be for a total of five months and that the immediate order for suspension should be terminated. This further ground of appeal arises only in the event (and as I find below) that the outcome of the two Appeals is that the Registrant remains subject to a suspension order (the "Immediate Order Issue"). It is addressed in Section 2 of the judgment (paragraphs 204 et seq below).

4. My conclusions on the PSA Appeal and the Registrant's Appeal are set out at paragraphs 202 and 203 below and on the Immediate Order Issue at paragraph 273 below.

SECTION 1: THE PSA APPEAL AND THE REGISTRANT'S APPEAL

Summary of the Parties' positions on the PSA Appeal and the Registrant's Appeal

5. The PSA contends, in summary, that the Committee failed correctly to identify the full nature of the sexually motivated conduct and failed to recognise the seriousness of that conduct. As a result, it failed to arrive at a sanction which provides sufficient protection to the public, maintains public confidence in the profession, and maintains proper professional standards and conduct for members of the profession. Erasure was the only appropriate sanction. It puts forward seven grounds of appeal, the first two of which seek to overturn findings of fact; the remaining grounds address the issue of the appropriate sanction.

6. The GDC, as regards the PSA Appeal, is neutral on the first two grounds, but supports the PSA in relation to the findings on sanction, inviting the Court to substitute the sanction of erasure or alternatively to substitute such other sanction as the Court sees fit.

7. The Registrant opposes the PSA appeal and in respect of his own appeal seeks an order setting aside the findings and thus the sanction. He further submits that the Court should address first the issue of the findings of fact, (arising on both appeals) before considering the issue of sanction.

Some factual background

8. At the material time the Registrant was a dentist working at the South Manchester Dental Emergency Centre ("SMDEC") ('the Practice'). As regards the complainants, Person 1 is a woman who was a dental nurse working at the Practice. Person 2 is a woman who was working as a receptionist at the Practice. Person 3 is a woman who was the head dental nurse working at the Practice. On 31 July 2020[1] Person 1, Person 2 and Person 3 made complaints to the Practice manager of inappropriate and sexual conduct on the Registrant's part. Person 1 complained of two such occasions in February and March 2020. Person 2 complained of conduct on 5 April 2020. Person 3 complained of conduct on 25 July 2020. On 4 September 2020 there was a disciplinary hearing at the SMDEC. The matter was then referred to the GDC who brought proceedings before the Committee. After a five-day hearing in October 2022, on 8 December 2022, the Committee found a number of allegations of fact proved. On 12 January 2023 the Committee went on to find that those findings of fact amounted to misconduct and impairment of fitness to practise. On the same date the Committee imposed the sanction of five months suspension from registration ("the Suspension Direction") and the order for immediate suspension ("the Immediate Suspension Order").

9. In this section of the judgment, I address the PSA Appeal and the Registrant's Appeal. I set out the legislative framework and relevant principles, the facts in more detail, the proceedings before the Committee, the Decision, before turning first to the appeals on the facts and then to the appeal relating to the sanction.

The legislative framework and relevant legal principles

10. The statutory framework for the GDC and the Committee is to be found in the Dentists Act 1984 ("the Act") and the General Council (Fitness to Practise) Rules Order 2006, made under the Act ("the Rules"). Other relevant material is to be found in guidance and in certain case law. Further legislative materials relevant to the issue in section 2 are set out at paragraphs 211 to 218 below.

The GDC and the Committee

11. Section 1(1ZA) of the Act provides that "the over-arching objective of the Council in exercising their functions under this Act is the protection of the public". Section 1(1ZB) expands on this, providing that: "the pursuit by the Council of their 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 professions regulated under this Act; and (c) to promote and maintain proper professional standards and conduct for members of those professions."

Fitness to practise proceedings

[1] At points in the Decision, the Committee erroneously refer to this date as 31 July 2022.

12. The procedure for determination of "fitness to practise" is divided into two stages: an investigation stage and then reference to, and consideration and determination by, the Committee. Where an investigating committee has referred an allegation to a Committee, the Committee to which the allegation has been referred must determine whether the person's fitness to practise as a dentist is impaired.: Section 27B (1) of the Act. The Committee is required to hold a hearing to consider the allegation: rule 12 of the Rules. Section 27(2) of the Act provides that: "a Person's fitness to practise shall be regarded as "impaired" for the purposes of this Act by reason only of: - (a) misconduct…" The determination of impairment of fitness to practise involves a two-stage process: first the issue of whether or not there has been misconduct (or other grounds) and, second, whether as a result of such misconduct (or other ground), fitness to practise is impaired.

Standards Guidance

13. The GDC's guidance to Dentists as to the required professional standards is "Standards for the Dental Team" ("the Standards Guidance"). It provides, inter alia:

> "6.1.2. You must treat colleagues fairly and with respect, in all situations and all forms of interaction and communication. You must not bully, harass, or unfairly discriminate against them.
>
> …
>
> 9.1: You must ensure that your conduct, both at work and in your Personal life, justifies patients' trust in you and the public's trust in the dental profession.
>
> 9.1.1: You must treat all team members, other colleagues and members of the public fairly, with dignity and in line with the law.
>
> 9.2: You must protect patients and colleagues from risks posed by your health, conduct or performance."

Sanctions and sanctions guidance

14. In summary, section 27B (6) of the Act (set out in full in paragraph 212 below) empowers the Committee to impose sanctions including to erase a registrant from the register, to suspend his registration in the register, to make registration conditional on compliance with conditions or to be reprimanded.

15. As regards the sanction of erasure, the GDC's Guidance for the Practice Committees including Indicative Sanctions Guidance ("the Practice Committee Guidance" or "the Sanctions Guidance") (Dec 2020 revision) provides, inter alia, as follows:

> "Suspension
>
> 6.21 If the PCC finds that the withdrawal of registration is necessary but that it does not need to last the five-year term that would be the minimum period for erasure, it may suspend the

Registrant. Suspension prevents the Registrant from practising as a dental professional for the length of the Suspension Order.

…

6.23 The PCC must decide whether the suspension will be lifted automatically at the end of its term or whether it would be subject to a review hearing. This must be made clear in the determination. If a review hearing is to take place, the PCC should indicate what, if any, information it would expect the registrant to be able to provide at the review hearing (for example, evidence of the successful outcome of any retraining that the dental professional has undertaken).

6.24 If the suspension is reviewed at the end of the given period, the PCC can:

• renew the suspension (for up to 12 months).

• impose conditions on registration.

• allow the registrant to return to unrestricted practice.

The registrant will be notified of the continuation of, or any changes to, the Order.

…

6.28 Suspension is appropriate for more serious cases and may be appropriate when all or some of the following factors are present (this list is not exhaustive):

• there is evidence of repetition of the behaviour.

• the Registrant has not shown insight and/or poses a significant risk of repeating the behaviour.

• patients' interests would be insufficiently protected by a lesser sanction.

• public confidence in the profession would be insufficiently protected by a lesser sanction.

• there is no evidence of harmful deep-seated personality or professional attitudinal problems (which might make erasure the appropriate order).

…

Erasure

> 6.30 The ability to erase exists because certain behaviours are so damaging to a registrant's fitness to practise and to public confidence in the dental profession that removal of their professional status is the only appropriate outcome. Erasure is the most severe sanction that can be applied by the PCC and should be used only where there is no other means of protecting the public and/or maintaining confidence in the profession. Erasure from the register is not intended to last for a particular or specified term of time. However, a registrant may apply for restoration only after the expiry of five years from the date of erasure.
>
> …
>
> 6.34 Erasure will be appropriate when the behaviour is fundamentally incompatible with being a dental professional: any of the following factors, or a combination of them, may point to such a conclusion:
>
> • serious departure(s) from the relevant professional standards.
>
> • where serious harm to patients or other Persons has occurred, either deliberately or through incompetence.
>
> • where a continuing risk of serious harm to patients or other Persons is identified.
>
> • the abuse of a position of trust or violation of the rights of patients, particularly if involving vulnerable Persons.
>
> • convictions or findings of a sexual nature, including involvement in any form of child pornography.
>
> • serious dishonesty, particularly where persistent or covered up.
>
> • a persistent lack of insight into the seriousness of actions or their consequences." (emphasis added)

16. As regards sexual misconduct, Appendix A to the Practice Committee Guidance provides additional guidance on "some particular issues that arise in fitness to practise hearings". Appendix A provides guidance in respect of sexual misconduct as follows:

> "73. Sexual misconduct encompasses a wide range of conduct from criminal convictions for sexual assault or sexual abuse (in the case of children, including child pornography) to sexual misconduct with patients or colleagues.
>
> 74. Sexual misconduct seriously undermines public confidence in the profession. The misconduct should be viewed as even more serious if:

there is an abuse of a position of trust and/or

the registrant has been required to register as a sex offender.

75. The PCC should be aware of the potential risks to patients, the wider public and to public confidence in the profession. In cases of serious sexual misconduct, the PCC may reasonably determine that there is a real prospect of current impairment, and that erasure might be the appropriate sanction."

Appeals

Appeal by a registrant

17. Section 29 of the Act makes provision for appeals by a registrant from the Committee decisions to, inter alia, this Court. By section 29(1)(b) appealable decisions include a committee decision giving a direction for suspension. Under section 29(3) (set out in full in paragraph 214 below), this Court's powers on appeal include the power to dismiss the appeal, to allow the appeal and quash the decision appealed against, to substitute its own decision, or to remit the case to dispose of the case under section 27B in accordance with the Court's directions.

Appeal by the PSA

18. Section 29 of the National Health Service Reform and Health Care Professions Act 2002 (as amended) ("the 2002 Act") provides that the decision of the Committee to impose a five-month suspension is a "relevant decision" within that section. Under section 29(4) of the 2002 Act, the PSA may refer the case to the High Court if it considers that the decision was "not sufficient (whether as to a finding or a penalty or both) for the protection of the public". Section 29(4A) provides that consideration of whether a decision is sufficient for the protection of the public involves consideration of whether it is sufficient (a) to protect the health, safety and well-being of the public; (b) to maintain public confidence in the profession concerned; and (c) to maintain proper professional standards and conduct for members of that profession. A referral is treated as an appeal: section 29(7). Under section 29(8) of the 2002 Act, the Court has the same powers as it has in respect of an appeal by a registrant under section 29(3) of the Act, including the power to substitute its own decision or to remit to the relevant committee/tribunal.

19. Both on appeal under section 29 of the Act and on a referral to the High Court under section 29 of the 2002 Act, 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 29 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) and PD52D §19.

The approach on appeal to findings of fact

20. On this issue, the parties agreed that relevant principles are set out in my judgment in *Byrne v GMC* [2021] EWHC 2237 (Admin) at §§11 to 27. The parties also referred me in particular to the cases of *Dutta v GMC* [2020] EWHC 1974 (Admin) and *Volpi v*

Volpi [2022] 4 WLR 48. In *Byrne* I referred to *Dutta* and a substantial number of other authorities, and summarised a number of principles to be derived from these authorities. I summarise relevant parts of my judgment in *Byrne*.

21. As regards the circumstances in which an appeal court will interfere with findings of fact made by the court or decision maker below (*Byrne* §§11-16):

    (1) The degree of deference shown depends on the nature of the issue below: namely primary fact, secondary fact or evaluative judgment.

    (2) In relation to findings of primary fact, the court will be very slow to interfere. It will do so in exceptional circumstances. Such exceptional circumstances have been formulated in different terms. There is little difference between the formulation "plainly wrong or so out of tune with the evidence properly read as to be unreasonable" and the formulation "no evidence to support a finding of fact or the trial judge's finding was one which no reasonable judge could have reached". I adopted (and adopt here), in the Appellant's favour, the former approach.

    (3) In respect of findings of primary fact there is little or no relevant distinction between "review" and "re-hearing". In respect of secondary fact or evaluative judgment, the court will show less deference on a rehearing (as in this case) than on a review.

22. As regard the credibility of witnesses (*Byrne* §§17-20), credibility should be tested by reference to objective facts, including contemporaneous documents. Demeanour might be a significant factor and the lower court is best placed to assess this. Where the evidence consists of conflicting oral accounts, the court may properly place reliance on the oral evidence of the complainant. There is no rule that corroboration is required. Where the complainant provides an oral account and the other person's evidence is a flat denial, it is common for there to be inconsistency and confusion in some of the detail. The task of the court is to consider whether the core allegations are true.

23. As regards the standard of proof and heightened scrutiny, the standard of proof is always the civil standard of balance of probability. However, the position is not as stated by the Committee (and supported by the parties in their submissions). There is no heightened standard of proof, and it is not the case that the more serious the allegation, the more cogent the evidence needed to prove it. Rather, where an event is inherently improbable it may take better evidence to persuade the judge that it has happened. That is a matter relating to the quality of the evidence. See *Byrne* §22, based on the House of Lords in *re B* and the Supreme Court in *Re S-B.*

24. In relation to the extent of the duty to give reasons (*Byrne* §§23 to 25), the leading case is *Southall*. The purpose of the duty is to enable the losing party to know why he has lost and to allow him to consider whether to appeal. Reasons may be set out in terms, or they might be readily inferred from the overall form and content of the decision. In most cases, particularly those concerned with comparatively simple conflicts of factual evidence, it will be obvious whose evidence has been rejected and why. The position is different where the case is not straightforward and may be described as exceptional. In such an exceptional case a few sentences dealing with the salient issues is required.

However specific reasons for disbelieving a practitioner are not required in every case where his defence is rejected.

25. As regards the specific issue of the credibility of witnesses (*Byrne* §§26 and 27), where there is a dispute of fact involving a choice as to the credibility of competing accounts, the adequacy of reasons given will vary. It may be enough to say that one witness was preferred to another. Even such limited reasons are not required in every case. Secondly there is no requirement for the disciplinary body to make a general comparative assessment of the credibility of witnesses. Thirdly an appeal court will not allow an appeal on grounds of inadequacy of reasons unless it is not possible for the appeal court to understand why the judge below reached the decision it did reach. The appeal court may seek to identify reasons for the conclusions from the underlying material, even if the judge below did not himself clearly identify those reasons.

Good character

26. I have been referred to *Donkin v Law Society* [2007] EWHC 414 (Admin), *Martin v SRA* [2020] EWHC 3525 (Admin) at §§51-54; *Khan v GMC* [2021] EWHC 374 (Admin) at §92; and *Sawati v GMC* [2022] EWHC 283 (Admin) §§53 to 56. The position can be summarised as follows:

    (1) A disciplinary tribunal must take good character evidence into account in its assessment of credibility and propensity (the probability that the person has been guilty of misconduct).

    (2) However, a tribunal is not required slavishly in its reasons to give a self-direction to that effect. It is sufficient, where the matter is raised on appeal, if the appeal court is able to infer from all the material that the tribunal must have taken good character properly into account.

    (3) One of the principal circumstances where the tribunal will be able to make such an inference is where it has been given a clear legal direction on the issue of good character from the legal qualified chair or the legal adviser.

    (4) The significance of good character should not be overstated and should not detract from the primary focus on the evidence directly relevant to the wrongdoing.

    (5) Where it is clear that good character was taken into account, decisions as to the weight to be attached to it are pre-eminently a matter for the fact finder and ought not to be disturbed unless the decision is one which no reasonable tribunal could have reached.

Sexual motivation

27. On the issue of sexual motivation I have been referred to *Basson v GMC* [2018] EWHC 505 (Admin) §§13 to 17; **GMC** *v Haris* [2020] EWHC 2518 (Admin) §§ 34, 35, 47 and 48 and *Sayer v General Osteopathic Council* [2021] EWHC 370 (Admin) §22. The following principles can be stated in summary:

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

(2) The issue of sexual motivation is one that cannot be proved by direct observation. It can only be proved by inference or deduction to be drawn from primary facts as found by the regulatory body and the surrounding circumstances.

28. 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.

29. I note further on the facts in *GMC v Haris* that Foster J found that the only reasonable inference was one of sexual motivation from the facts in that case, that the touching was of the sexual organs, the absence of a clinical justification and the absence of any other plausible reason for the touching. She added that the absence of any suggestion of accident and the absence of any consent gave further colour to the acts.

The nature of the issues in the present case

30. In the present case, it is common ground that the alleged acts of misconduct in relation to each Charge, are matters of primary fact; whether or not the conduct as found was "inappropriate" is a matter of evaluative judgment; and whether the conduct was sexually motivated is a question of inference to be drawn based on a state of mind and an issue somewhere between primary and secondary fact.

The approach on appeals to sanctions

31. In this section I consider the approach of the court in relation to an appeal against sanction in general, sanctions in cases of sexual misconduct and the issue of insight where there is denial of the allegations.

32. In relation to the approach of this court to an appeal under section 29 of the 2002 Act, I have considered, and/or been referred to, the following authorities: *Brennan v Health Professions Council* [2011] EWHC 41 (Admin) at §45; *Wisniewska v NMC* [2016] EWHC 2672 (Admin) at §20; *PSA v NMC and Judge* [2017] EWHC 817 (Admin) at §§40 to 42; *GMC v Jagjivan* [2017] EWHC 1247 (Admin) at §40(vi); *GMC v Stone* [2017] EWHC 2534 (Admin) at §53; *O v NMC* [2015] EWHC 2949 (Admin) at §§75 to 77; *Sastry v GMC* [2021] EWCA Civ 623 at §113; *PSA v HCPC and Wood* [2019] EWHC 2819 (Admin) at §73; *Alberts v GDC* [2022] EWHC 2192 at §48 and my recent judgment in *PSA v NMC and Jalloh* [2023] EWHC 3331 (Admin) at §§23 to 25. The following relevant principles emerge.

(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. For this reason, matters of personal mitigation are

of less weight. The reputation of the profession is more important than the fortunes of any individual member.

(2) In an appeal by the PSA under section 29 of the 2002 Act the approach of this Court is in principle supervisory. In general, the Court should only interfere with the judgment of the specialist adjudicator if there is an error of principle, or it fell outside the bounds of what an adjudicative body could properly and reasonably decide.

(3) However, in matters such as dishonesty or sexual misconduct, the appeal court is well placed to assess what is needed to protect the public or maintain the reputation of the profession and is less dependent upon the expertise of the tribunal.

(4) There is a need to understand from the decision how aggravating and mitigating factors have been weighed. All mitigating and aggravating factors are relevant when considering, in turn, each of the available sanctions. Mitigation must be considered when evaluating proportionality of a suspension.

(5) Matters of mitigation are likely to be of considerably less significance in regulatory proceedings than in a court imposing retributive justice.

(6) It is not enough just to make a general reference to sanctions guidance. Sanctions guidance provides an authoritative steer for the tribunal as to what is required to protect the public, even if it does not dictate the outcome. If the tribunal departs from the steer given by the guidance it must have careful and substantial case specific justification. A generalised assertion that erasure is disproportionate and that the conduct was not incompatible with continued registration is not sufficient.

(7) The way in which a healthcare professional reacts to the discovery of their misconduct is an important part of an assessment of their attitude, their insight into the wrongdoing and the effects on a victim and the sanction necessary in the public interest.

(8) Suspension might allow the registrant time to develop further insight into his behaviour. This can be a legitimate factor to take into account in favour of suspension.

Sanctions for sexual misconduct

33. I have been referred specifically to two particular cases where the sanction for sexual misconduct was in issue.

34. In *Arunachalam v GMC* [2018] EWHC 758 (Admin), a doctor was found guilty of misconduct and subject to erasure for sexually motivated misconduct towards two trainee women doctors. The GMC supported suspension rather than erasure. On appeal it was argued that the sexual misconduct was at the lower end of the spectrum and there should be suspension. In the case of doctor A, there were unwanted messages sent outside work, with inappropriate, intimate and overfamiliar but not sexually explicit dimension. In the case of doctor B, there were four or five unwanted incidents of

tickling, hugging, kissing her on top of the head and inappropriately seeking her company at work making her feel uncomfortable.

35. Kerr J set out the law at §§33 to 39, including the following:

> "34 First, sexual misconduct is self-evidently always serious and often likely to lead to erasure, even for a first-time offender. …
>
> …
>
> 38…. it is not the law that in sexual misconduct cases erasure should follow unless the circumstances are exceptional. The severity of the sanction required to maintain and preserve public confidence in the profession "must reflect the views of an informed and reasonable member of the public". (emphasis added)

36. His reasoning is set out at §§58 and following:

> "58 This was undoubtedly a sexual misconduct case. Such cases are inherently serious, such that they **may well** lead to erasure, even for a first-time offender with a good clinical record. Often, maintaining public confidence in the profession and upholding high standards of behaviour by stamping out unacceptable behaviour of this kind will require erasure in a sexual misconduct case.
>
> 59 Where the victim is a colleague rather than a patient, severe sanctions in such cases are generally necessary, in addition, to protect and uphold the dignity of workers in the profession and to protect their freedom to work without being molested. The victims are usually women.
>
> 60 This was therefore always a case in which the potential for erasure loomed large, even though the appellant had a good record and had not previously offended in this or any other way. Both parties realistically recognised that in their submissions to the tribunal.
>
> 61 In other parts of the world where the culture is different, and in some isolated sectors in this country, there is still a culture which regards such behaviour as acceptable. That is completely wrong and now regularly proclaimed to be so. The days are gone when mainstream discourse was in any way split on the issue of sexual misconduct, particularly in the workplace. The mainstream in our society, reflected in our law, is now that there is virtual zero tolerance of such behaviour.

> 62 In the criminal law, where personal mitigation counts for more than in this disciplinary jurisdiction, the law encourages judges to give offenders a second chance by imposing alternatives to immediate custody, such as a suspended sentence or a community penalty. Justice is tempered with mercy. That is more difficult in this jurisdiction because the nature of the sanction is not punitive but protective of the profession and the public. To justify the second chance, it has to be weighed not just against the risk that giving it may create more victims should he fail to take it. It also has to be weighed against the risk that public confidence in the profession will be undermined."
>
> (**emphasis** added)

37. Nevertheless, Kerr J concluded, on the facts of the case, that suspension, and not erasure, was the appropriate sentence.

> "63 The reasoning in the present case reflected something of the above, although the points were not made expressly. It was not wrong in principle to take the view that the facts of this case could point in the direction of erasure rather than suspension. The response to the severity of the offending cannot easily be faulted, harsh though the sanction is. However, having said all that, after carefully considering the tribunal's decision I am quite satisfied that the tribunal did not properly evaluate the factors weighing in the balance in favour of suspension and against erasure.".

38. At §§72, and 73 he criticised the decision for the absence of any evaluation or weighing of the mitigating factors. But he also pointed out that the fact of no further offending was important mitigation.

39. Kerr J stated his conclusions as follows:

> "78 On balance, it seems to me likely that a reasonable, informed member of the public might well not take a harsher view than did the GMC of the pathetic and disgusting sexual pestering of the kind that occurred in this case. There are some who would regard erasure as appropriate; that would represent almost a complete zero tolerance approach to sexual harassment, which would mean that any transgression, even from a first-time offender, would nearly always lead to erasure.
>
> 79 In our system of justice, the law jealously guards the rights of women workers to protection against predatory, ignorant men who feel entitled to prey on female colleagues in the way that this doctor did; but our system is not so inflexible that every transgression of this kind must be met with erasure. This appellant's conduct was not at the very bottom of the scale; it was very serious, but it was not anywhere near the top of that scale. The mitigation, for what it was worth, was there. No patient's safety was endangered. The appellant was of previous

> good character. He had some insight into his offending behaviour, although it was given slight weight and came late. He had a long record of unblemished service, which included about two and a half years after the second incident without any further offending."

40. Mr Standing referred to the more recent case of *PSA v GMC and Hanson* [2021] EWHC 588 (Admin) where, on appeal against a suspension order, Chamberlain J imposed the sanction of erasure on a doctor. The doctor was a senior doctor, and the nurse was newly qualified on her own on night duty, Their physical sizes markedly different. He guided her to a room away from anyone, where there was persistent and repeated unwanted touching which was clearly sexual conduct given the actions and accompanying words, even after she asked it to stop. At §23 of his judgment, after setting out these facts, Chamberlain J relied upon the fact that the conduct, if proved to the criminal standard, would have constituted the offence of sexual assault contrary to section 3 Sexual Offences Act 2003. (*Arunachalam* is not cited in the judgment).

Denial of allegations and insight

41. As regards the relationship between contesting the charges and insight, I refer (but do not repeat here) my analysis in *Jalloh* at §§24 and 25, which in turn refers to the earlier cases of *Sayer* at §25 and *Sawati v GMC* at §§75 to 110.

The background facts in more detail

42. The Registrant was working at the Practice which is the Timperley branch of the DCO Dental Group. SMDEC is a company which provides emergency dental services in the area of South Manchester for people not registered with a dentist. Within the DCO practice at Timperley, there is a purpose-built surgery for SMDEC's use. Person 1, Person 2 and Person 3 was each employed by DCO and worked at the Timperley practice.

43. In February 2020, the first incident with Person 1 occurred. She alleges that, whilst in the SMDEC room, the Registrant put his legs either side of her and then placed his hands on her thighs. The second incident with Person 1 occurred on 5 March 2020. She alleges that, whilst in the SMDEC room, he put his arms around her. She says that she then told another nurse working a reception about this on 6 March 2020 and on 7 March 2020 told an old colleague about it on the telephone

44. On 5 April 2020, the alleged incident with Person 2 occurred. She alleges that the Registrant massaged her shoulders, hugged her and then touched or squeezed her breast. She says that she told a DCO receptionist (Person 4) about this in the car on the way home. On the next day the Registrant sent Instagram messages to Person 2. On 5 and 6 April 2020 Person 2 sent Whatsapp messages, and pictures of bruises on her arm, to Person 4. Person 2 says that sometime in June or July 2020, during a lockdown walk, she told Person 3 about the incident on 5 April 2020.

45. On 25 July 2020 the alleged incident with Person 3 occurred. Person 3 alleges that, whilst in the decontamination room, the Registrant squeezed and rubbed her arms. On the same date Person 3 messaged Person 2 about the incident.

46. Six days later, on 31 July 2020, Person 1 and Person 3 told each other about their experiences. The two of them then spoke to Person 4 together, and then Person 1 and Person 3 went to see Simon Cove, the Practice manager. On 4 September 2020 there was a disciplinary hearing at the Practice. On 10 March 2022, Person 4 signed her witness statement. On 11 March 2022 Person 1 and Person 3 signed their respective witness statements. On 14 March 2022 Person 2 signed her witness statement and subsequently provided a short supplemental witness statement.

The Tribunal proceedings

The allegations

47. The Charges against the Registrant stated as follows:

"1. On a date unknown between 1 February 2020 and on or around 5 March 2020 you:

a) Placed your legs either side of Person 1's legs

b) Placed your hands on Person 1's thighs

2. Your conduct in respect of charge 1 above was:

a) Inappropriate

b) Sexually motivated

3. On or around 6 March 2020 you put your arms around Person 1

4. Your conduct in respect of charge 3 above was:

a) Inappropriate

b) Sexually motivated

5. On or around 5 April 2020 you:

a) Massaged Person 2's shoulders and/or back

b) Hugged Person 2

c) Touched and/or squeezed Person 2's breast

6. Your conduct in respect of charge 5 above was:

a) Inappropriate

b) Sexually motivated

7. On or around 25 July 2020 you:

a) Squeezed Person 3's arms

b) Rubbed Person 3's arms

8. Your conduct in respect of charge 7 above was:

a) Inappropriate

b) Sexually motivated".

The hearing and the evidence

48. The hearing before the Committee took place on 7 days between 14 October 2022 and 12 January 2023. The fact-finding stage took 6 days, culminating in determination as to the findings of fact 8 December 2022. The Committee received written and oral evidence from the Registrant, the three complainants, and Person 4 and three character witnesses called by the Registrant. The oral evidence was heard on 18 and 19 October 2022. Each of Person 1, Person 2 and Person 3 provided written witness statements (varying in length between 4 and 8 pages each). The Registrant also provided a written witness statement running to 5 pages, addressing the specific allegations and gave oral evidence The documentary evidence included photographs of the surgery and the room, a layout plan, photographs of injuries and text messages. On 20 and 21 October 2022 the partes made submissions on the facts and the Legal Adviser gave her advice to the Committee.

49. I have considered in detail all the written witness statements of the complainant and of the Registrant and the transcripts of the oral evidence given by each of them. The Registrant's essential case is that, with the exception of Charge 5a, he denied all the allegations; certain of the events did not happen at all; others happened in different and innocent circumstances.

50. On 8 December 2022, the Committee handed down its decision on the facts. The Committee then proceeded on that date to hear the submissions of the parties in relation to stage 2, namely misconduct, impairment and sanction. At that stage the Registrant provided a further written statement dated 11 January 2023 relevant to these issues. The Legal Adviser then gave her advice to the Committee.

51. After setting out information about his personal and financial circumstances and the impact upon his mental health the statement continued:

> "I have always accepted acting unprofessionally and thus fully accept in putting myself in a compromising position, in terms of the massage I gave to a colleague. I accept this was inappropriate and I should never have done so. I also accepted this in my SMDEC disciplinary appeal in September 2020.
>
> I acknowledge that the Committee has made findings against me, but they are limited to a short period and I can assure the Committee that going forward I will ensure that my conduct is such that there can be no such allegations again; I will not put myself in such a position where such allegations can be made.

> I am also willing to take further courses on professionalism and any other courses or remedial work the GDC recommends and advises me of.
>
> This ordeal has been …. life changing. It has caused me to reflect on, not only how I speak and interact with others, but also how it may be perceived - something I did not do before, because of my generally friendly, outgoing, humble and genuine nature - something spoken by many colleagues in their testimonials and statements concerning myself.
>
> I did not feel able to express these points in the last occasion the Committee sat, due to my shock at the Determination and findings and because this severely impacted my mental health, however I should be most grateful if the Committee could take them into account now, ahead of its deliberations on impairment and sanction in this case."

52. On 12 January 2023 Ms Felix for the Registrant made some further short submissions, and the GDC responded and later that day the Committee announced its decision on stage 2 including misconduct, impairment and sanction. This was re-produced in a single Decision document; the Decision document itself contains the Committee's determination both at stage 1 and at stage 2.

The Decision

The determination in summary

53. The Decision is in two parts: the first part sets out the Committee's findings of fact in relation to the allegations; the second part sets out the Committee's decision on misconduct, impairment and sanction. In the first part, in summary, the Committee found as follows:

- Each of the factual allegations (i.e. Charges 1a and b, 3a, 5a, b and c, and 7a and b) proved;
- Charges 2a (in relation to Charge 1b), 3, 4a and b, 6a, 6b (in relation to Charges 5b and c only) and 8a and b proved;
- Charges 2a (in relation to Charge 1a) 2b, and 6b (in relation to Charge 5a) not proved.

Thus, of the eight proven factual allegations:

- Charge 1a (placing legs) was found to be neither inappropriate nor sexually motivated;
- Charge 1b (placing hands on thighs) was found to be inappropriate, but not sexually motivated;
- Charge 5a (massaging shoulder and/or back) was admitted/found to be inappropriate, but not sexually motivated.

The remaining five proven factual allegations were found to be both inappropriate and sexually motivated.

The decision on the findings of facts

54. At page 4 of the Decision document, the Committee recorded that it had accepted the advice of the Legal Adviser including that the burden of proof was on the GDC and the standard of proof was the civil standard. "The Committee also took into account that the more serious the charges, the stronger and more cogent the evidence needs to be." There is no express reference at this point in the Decision document to the issue of good character.

55. Thereafter at pages 4 to 11 the Committee set out its findings of fact in relation to the Charges. I set out these findings below, when dealing in turn with each of the grounds of appeal relating to Person 1, Person 2 and then Person 3.

The decision on misconduct, impairment and sanction

56. The second part of the Decision document deals with the issues of misconduct, impairment and sanction. I set out this part of the Decision in full here.

57. After summarising again the findings of fact, the Decision document then recorded the parties' submission:

> "Mr Micklewright submitted that the appropriate and proportionate sanction for this particular case will be one of erasure. Ms Felix submitted that the registrant had worked at a number of practices without any issues with anyone else. The proportionate sanction would be one of conditions. It would be in the public interest for a good clinician to be able to continue to serve the public. Alternatively she invited the Committee to impose a sanction of suspension."

58. The Decision document goes on to record Ms Felix's submissions in the following terms:

> "Every sexual misconduct case does not need to automatically result in erasure, as the Committee's decision relies on proportionality and judgement. She invited the Committee to consider the case on a spectrum of seriousness. She submitted that all matters found proved, apart from your touching of Person 2's breast, could all be considered to be at the lower end of the spectrum. With regard to your touching of Person 2's breast, she submitted that it was important to acknowledge the context in which this happened. The touching occurred after you had massaged and hugged Person 2, and, therefore, the Committee should consider whether you had mis-read the signs given by Person 2. Ms Felix submitted that this would bring it down to the lower end of the spectrum, and it could not be regarded as an abuse of permission. Furthermore there has been no repetition of

> the conduct since, and therefore no evidence that it will occur in the future.
>
> At the hearing today, Ms Felix made further submissions regarding the signed statement you provided to the Committee today. She submitted that your conduct was wholly out of character and at the time of the allegations your marriage was breaking up. She submitted that the Committee may wish to consider this background and also that there would be a significant impact on your financial situation if you were not able to work. She highlighted to the Committee that you would also be willing to undertake a Professional Boundaries because if the Committee was minded for you to undertake such a course.
>
> In response, Mr Micklewright submitted that the Professional Boundaries course is readily available to dental practitioners and that you have not undertaken one to date. In response to the impact on your personal and financial situation, he submitted that this should be of a secondary consideration for the Committee at the sanction staged as referenced in the case of Bolton v Law Society…"

The determination on Misconduct

59. At pages 13 to 14 of the Decision document, the Committee set out its decision on misconduct:

> "The Committee first considered whether the facts found proved against you amounted to misconduct. In doing so it had regard to the GDC publication Standards for the Dental Team (2013). The Committee considered that your actions, particularly when touching Person 2's breast, were a serious departure from, and a clear breach of the following standards:
>
> [9.1, 9.1.1. and 9.2 (as set out in paragraph 13 above)]
>
> …
>
> … The Committee has found proved that your behaviour in this case was inappropriate, sexually motivated and directed towards junior members of staff. The Committee determined, therefore, that your behaviour had fallen far short of the standards of conduct that are proper in these circumstances and this amounted to misconduct."

The determination on Impairment

60. At pages 14 the Committee set out its decision on impairment:

> "The Committee then considered whether your fitness to practise is currently impaired by reason of your misconduct.

> The Committee was mindful of its role to protect the public interest, which includes the need to maintain proper standards of conduct among dental professionals, and to protect the public, which would include any future work colleagues, from risk of harm.
>
> The Committee considered the evidence you have provided regarding your remediation. It acknowledged that attitudinal and behavioural failings are difficult to remediate, although not impossible. It also acknowledged the positive testimonials that have been provided on your behalf. However, when considering the evidence you have provided regarding the courses undertaken, the Committee noted that the majority of these were not relevant to the conduct it has found proved in this case. In particular, the Committee noted that you have not provided any written reflective statement regarding your conduct or the impact it has on your role as a dental professional and the public confidence in the profession The Committee considered that without this there was insufficient evidence that you have changed your attitude or behaviour. The Committee concluded, therefore, that you have shown limited insight into your actions and that your behaviour has not been fully remediated. It therefore determined that there is a risk that you could repeat the misconduct and that a finding of impairment is necessary in the interest of public protection.
>
> The Committee also determined that a finding of impairment was necessary in the wider public interest to maintain public confidence in the profession, upholding the reputation of the dental profession and uphold proper standards of conduct and behaviour. … It has been found proved that you have engaged in sexually motivated and inappropriate conduct towards three junior work colleagues and to date have shown limited insight into these serious failings. The Committee concluded that a reasonable and informed member of the public, fully aware of the facts of the case, would lose confidence in the profession and the dental regulator if a finding of impairment were not made in the circumstances of this case.
>
> The Committee therefore determined that your fitness to practise is currently impaired by reason of your misconduct." (emphasis added)

The determination on Sanction

61. At pages 15 to 17 of the Decision document, the Committee set out its determination on sanction as follows:

> "The Committee next considered what sanction, if any, to impose on your registration. It recognised that the purpose of a sanction is not to be punitive although it may have that effect.

> The Committee applied the principle of proportionality balancing your interest with the public interest. It also took into account the Practice Committee Guidance.
>
> The Committee considered the mitigating and aggravating factors in this case as outlined at paragraphs 5.17 and 5.18 of the Practice Committee Guidance.
>
> The mitigating factors in this case include:
>
> • Evidence of good conduct following the incident in question, particularly any remedial action (although this was limited);
>
> • Evidence of previous good character;
>
> • Evidence of remorse shown and insight (albeit limited);
>
> • Evidence of steps taken to avoid a repetition (albeit limited).
>
> The aggravating factors in this case include:
>
> • Actual harm, both mentally and physically, to work colleagues;
>
> • Breach of trust between junior and more senior members of staff;
>
> • The involvement of vulnerable individuals (the three junior work colleagues);
>
> • Misconduct repeated over a period of time;
>
> • Lack of insight." (emphasis added)

After considering, and rejecting, taking no further action, and, considering the sanctions in ascending order, the Committee rejected the sanction of reprimand, in the following terms:

> "The Committee concluded that misconduct of this nature could not be adequately addressed by way of a reprimand. It cannot be said to be at the lower end of the spectrum of misconduct and the Committee has determined that you have shown limited insight into your failings. The Committee considered that the public and the public interest would not be sufficiently protected by the imposition of such a sanction. The Committee therefore determined that a reprimand would be inappropriate and inadequate."

62. The Decision document then continued:

> "The Committee considered whether a conditions of practice order would be appropriate. The Committee noted that you have been subject to IOC conditions for the previous two years and no concerns have arisen regarding your compliance. The Committee had sight of these conditions but noted that they were general in nature and did not specifically address the conduct found proved in this case. Furthermore, the Committee considered that it would be difficult to formulate conditions to address the attitudinal and behavioural failings in this case. The Committee also considered that you have failed to show full insight into your behaviour. The Committee was of the view, therefore, that conditions would neither be workable nor appropriate to address the seriousness of the misconduct it has found." (emphasis added)

63. The Committee then turned to suspension as follows:

> "The Committee then considered whether an order of suspension would be appropriate to mark the nature and severity of the misconduct. It noted in the Practice Committee Guidance that suspension is appropriate for more serious cases when:
>
> • There is evidence of repetition of the behaviour;
>
> • The registrant has not shown full insight and poses a significant risk of repeating the behaviour;
>
> • Public confidence in the profession would be insufficiently protected by a lesser sanction;
>
> The Committee considered that these considerations were relevant in this case. The Committee determined that a period of suspension was appropriate and proportionate to mark the seriousness of your misconduct. In deciding on this sanction, the Committee noted the option of erasure but determined that such a step would be disproportionate. … The Committee also accepted that this case could be considered to be at the lower end of the spectrum of seriousness for cases involving sexual misconduct. Furthermore, the Committee determined that there is no evidence that you have a harmful deep-seated personality or professional attitudinal problems, which might make erasure the appropriate order.
>
> Accordingly, having had regard to all of the evidence, the Committee has determined to direct that your registration be suspended for a period of five months. The Committee is satisfied that this period of time is sufficient to mark the nature and extent of your misconduct, to protect the public, uphold professional standards and to maintain public confidence in the profession. In addition, the Committee considers that this will

> give you the sufficient time to develop further insight into your behaviour and fully remediate your misconduct.
>
> The Committee noted the impact that this would have on your financial situation and bore in mind the principle of proportionality. However, it considered that this was outweighed by the public interest in appropriately reflecting the seriousness of your behaviour …which involved inappropriate behaviour and sexual misconduct towards junior work colleagues.
>
> The Committee also directs that the suspension order be reviewed before its expiry. You will be informed of the date and time of that resumed hearing. That Committee will consider what action it should take in relation to your registration. The reviewing Committee may be assisted if it received your detailed written reflections on your misconduct and further evidence of your remediation regarding professional boundaries."
> (emphasis added)

64. The Committee then finally considered the issue of immediate suspension:

> "The Committee is satisfied that an immediate order of suspension is necessary for the protection of the public and is otherwise in the public interest. The Committee concluded that given the nature of its findings and its reasons for the substantive order of suspension in your case, it is necessary to direct that an immediate order of suspension be imposed on both of these grounds. The Committee considered that, given its findings, if an immediate order was not made in the circumstances, there would be a risk to public safety and public confidence in the profession would be undermined.
>
> The effect of this direction is that your registration will be suspended immediately. Unless you exercise your right of appeal, the substantive order of suspension will come into effect 28 days from the date on which notice of this decision is deemed to have been served on you. Should you exercise your right of appeal, this immediate order for suspension will remain in place until the resolution of any appeal."

The Appeals in summary

The PSA Appeal

65. The PSA advances seven grounds of appeal, the first two of which challenge the Committee's findings of fact and the remaining of which challenge the decision on sanction. I set out the first two grounds when dealing with the Appeal on the Facts below; and the remaining five grounds when dealing with the Appeal on Sanction below.

The Registrant's Appeal

66. By his grounds of appeal, the Registrant makes the overall contention that the Committee's findings were procedurally flawed and/or wrong because it made errors of principle in its approach, reached findings that were not open to it as a matter of principle and the only conclusion that any reasonable tribunal could have reached on the evidence was that the facts alleged in the Charges were not proved so that there was no inappropriate or sexually motivated touching. The Registrant submits that when all of the evidence is taken into account, it is not possible to understand the reasons for the decision and the evidence does not reflect the decision on the Charges. On that basis the findings were unreasonable.

67. The grounds of appeal then illustrate this contention by reference to specific matters in relation to each of the three complainants. In her skeleton and in oral argument, Ms Felix KC put these matters in a somewhat different order. I address each of the points in turn made, in respect of each complainant in the Appeal on the Facts section.

The Appeals on the Facts

The Registrant's Appeal

68. The Registrant raises three grounds of general application and then puts forward specific grounds/arguments in respect of the findings in relation to each of Person 1, Person 2 and Person 3.

69. In response the GDC submits that this was a case of the Registrant's word against the word of each complainant. The points raised by the Registrant, both before the Committee and this Court are peripheral and were not core issues in the case.

The PSA Appeal

70. Grounds 1 and 2 of the PSA Appeal challenge certain of the Committee's findings of fact concerning, respectively, Person 1 and Person 2. These are related to findings also challenged by the Registrant. Accordingly I address these two Grounds in the course of considering the Registrant's appeal on the facts in respect of Persons 1 and 2.

71. In the following paragraphs I deal with each of Person 1, Person 2 and Person 3 in turn. In relation to each, I set out the Committee's findings in the Decision, the various grounds raised, the argument and then my discussion.

Person 1: Charges 1a and b and 3

(1) The Decision

72. In relation to Person 1, the Committee made the following findings.

Charges 1 a and b (and 2)

Findings of fact

73. As regards Charge 1a, the Committee concluded as follows:

> **"Found Proved**
>
> Person 1 told the Committee that your legs were really close to hers and that you were in her personal space. She stated that there was no clinical reason for you to do this.
>
> In your evidence you deny this charge entirely on the basis of your usual practice and state that the events in this charge did not happen.
>
> The Committee considered all the evidence before it and preferred Person 1's evidence. It noted that her oral evidence was broadly in line with her written statement and found her evidence to be reliable and credible. The Committee considered that working in a dental clinic is such that you and Person 1 would have been in greater proximity and on the balance of probabilities finds that this may have included you placing your legs either side of Person 1 on her chair. You have provided no independent memory of that day and have given evidence of your usual practice which would not have made this possible. The Committee accepts on this particular day that this incident had occurred and that your chair moved in close proximity to Person 1's and led to you placing your legs either side of Person 1's legs. It considered that the allegations made by Person 1 are not the sort that are capable of arising from a misunderstanding and that there is no credible evidence before the Committee she had a motive to lie. Accordingly, the Committee finds this charge proved.
>
> The Committee was also satisfied that there is no evidence of Person 1's account being contaminated. It notes that other than Person 1's report of the events to a work colleague at the practice on 6 March 2020, Person 1 did not discuss what had happened to her to Person 2 and 3 until 31 July 2022." (emphasis added)

74. As regards Charge 1b, the Committee concluded:

> "The Committee considered this charge separately and having considered all of the evidence carefully the Committee finds that Person 1 was clear and consistent in her evidence and finds that you placed your hands on her thighs."

Inappropriate

75. As regards Charge 2a (and whether conduct in Charge 1 was inappropriate), the Committee found as follows

> **"Found Not Proved in relation to charge 1.a**
>
> Having found that the incident was inadvertent or accidental, the Committee therefore concluded that it is not inappropriate.

> Having had sight of images of the surgery room and the positioning of the equipment contained in the room, the Committee could see reasons why you could move your chair nearer to someone which could accidently place you in a position where you are close to a colleague. It considered that on the balance of probabilities you may have inadvertently placed your legs as set out in the charge given the size and positioning of the clinic room."
>
> **Found Proved in relation to 1.b**
>
> The Committee reached a different view in relation to Charge 1.b. It considered the placing of hands onto a colleague's thighs to be intentional and is therefore inappropriate, particularly as it was not warranted or expected by Person 1 who states that she had rolled her chair back as she felt uncomfortable that you were in her personal space. The Committee therefore finds this charge proved." (emphasis added)

Sexually motivated

76. As regards Charge 2 b (and whether conduct in Charge 1 was sexually motivated), the Committee found as follows:

> **"Found Not Proved**
>
> The Committee has already found in Charge 2.a above not proved in that it did not consider your conduct in placing your legs on either side of Person 1 to be inappropriate. It therefore did not consider it necessary to consider that element in this charge.
>
> The Committee went on to consider the second element, placing your hands on Person 1's thighs. Whilst finding that you placed your hands on Person 1's thighs which was considered inappropriate and recognises that Person 2 felt uncomfortable, it could not be satisfied on the balance of probabilities that your conduct in placing your hands on her thighs was sexually motivated. The Committee heard that the touching of Person 1's thighs was momentary and cannot be satisfied there was sexual motivation albeit inappropriate." (emphasis added)

Charges 3 (and 4)

Findings of fact

77. As regards Charge 3, the Committee concluded as follows

> **"Found Proved**
>
> In Person 1's evidence she explained that she had disinfectant wipes in her hands and was wiping the surface of the bracket

> table. She was adamant in telling the Committee that you put your arm around her and that she raised them to express surprise and told you *'You could get struck off for that'.*
>
> In your evidence you said that this incident did not happen.
>
> The Committee considered that there were no inconsistencies in Person 1's account and was persuaded by her evidence. Person 1 went through the motions of what had happened to her and was found to be credible. Accordingly, the Committee finds this charge proved".

Inappropriate

78. As regards Charge 4 (and whether conduct in Charge 3 was inappropriate), the Committee found as follows:

> **"Found Proved**
>
> The Committee considered that putting your arms around Person 1 which was uninvited and unwarranted, and particularly at the workplace, is inappropriate."

Sexually motivated

79. As regards Charge 4 (and whether conduct in Charge 3 was sexually motivated), the Committee found as follows:

> **"Found Proved**
>
> The Committee has found proved that whilst Person 1 was disinfecting the bracket table in the surgery room, you had hugged her from behind to which she expressed surprise and told you that you could get struck off for that sort of conduct.
>
> The Committee considered that hugging Person 1 from behind is an affectionate type of gesture. This gesture involved intention on your behalf as opposed to a potential inadvertent touch. The gesture was not invited or expected by the recipient, and was a close embrace, affectionate in nature. The Committee was satisfied that on the balance of probabilities you deliberately and intentionally hugged Person 1 from behind which was uninvited, unwarranted and sexually motivated. Accordingly, it finds this charge proved."

(2) Person 1: the Grounds of Appeal

80. In respect of these findings concerning Person 1, the Registrant raises seven grounds. In addition PSA Ground 1 concerns Person 1. I deal with each of these points in turn

(1) Oral evidence in line with written evidence

The Registrant's case

81. The Registrant contends that it was not a proper approach for the Committee to rely simply on the fact that Person 1's oral evidence was "broadly in line with her written evidence" as a basis for finding her evidence to be reliable and credible, particularly in circumstances where the witness's written evidence largely stands as their evidence in chief. The correct approach was a thorough examination and evaluation of all the evidence upon which the GDC sought to rely, taking account also of the Registrant's good character and the need for cogent evidence. This ground is relevant to Charges 1a, 1b and 3.

The GDC case

82. The GDC submits that there is nothing in this ground. First there are good practical and public interest reasons for the approach of evidence in chief being given by way of written witness statements Secondly, although Person 1's evidence in chief was largely given in writing in advance, it is also relevant to the assessment of her credibility that her evidence was signed with a statement of truth. Further she affirmed it, on oath. She was cross-examined extensively about it. She was willing to come forward to testify in proceedings in which she had nothing to gain and which must have been difficult for her. Thirdly, in any event this is purely a question as to the weight the Committee attached to the evidence of Person 1. Questions of weight are primarily for the first instance tribunal. Finally the premise of this ground is that the Registrant apparently accepts that there was broad alignment between Person 1's written and oral evidence. It is unarguably open to a fact-finding tribunal to have regard to the level of consistency that exists between the different accounts given by a witness.

Discussion and conclusion

83. I accept the GDC's case here. In my judgment it is normal for evidence in chief to be given by witness statement. "In line with" just means that she came up to proof, that that was not fundamentally challenged and that her evidence was not undermined by cross-examination. There was a proper opportunity to cross examine. There is no reason to think that the Committee did not consider all of the evidence. Moreover consistency supports credibility. This was a matter of weight for the Committee. This ground is not made out.

(2) Person 1's evidence about the taking of X-rays

The Registrant's case

84. The Registrant contends that Person 1's evidence about how X-rays were taken was inconsistent. The Committee failed to take that into account in considering her reliability and credibility. Person 1 gave evidence that the Registrant got uncomfortably close to her when they left the room for X-rays, that there was enough space for her in the corridor to move away, but that she did not in fact move further away. In cross-examination, when asked why she did not move further way, if she felt uncomfortable. she agreed that "she had no answer for that". This evidence ought to have caused the Committee to view Person 1's evidence with caution. This ground is relevant to Charges 1a, 1b and 3.

The GDC case

85. The GDC submits that, first, there was no charge that the Registrant stood too close to Person 1 during the taking of X-rays; the Committee was not required to make any findings about it; and it forms no part of the Committee's written reasons. Secondly, Person 1's evidence was, and remained, that she *was* made to feel uncomfortable by the Registrant standing too close to her in the corridor during X-rays.

Discussion and conclusion

86. Person 1's written evidence on this issue was as follows:

> "12. I also recall on numerous occasions when working with the Registrant and on more than one shift, he would stand uncomfortably close to me in the corridor when we left the SMDEC Surgery whilst x-rays were being taken...for safety reasons both the dentist and the dental nurse are required to leave the room and so we go and stand in the corridor...
>
> ...
>
> 14. The Registrant would stand right next to me even though there was plenty of space for him to stand further away from me in the corridor...."

87. Person 1's oral evidence under cross-examination was:

> "Q: And you say – presumably the first time he stood close to you, you felt uncomfortable.
>
> A: Yes
>
> Q. So the next time you probably felt uncomfortable too on your account, did you?
>
> A. Yes
>
> Q. So on the third occasion why did you not move yourself a little further down the corridor.
>
> A. I think I used to stand in the diary of surgery 6, room 6, just because you can still see directly into the room.
>
> Q. <u>But if you were uncomfortable with him why did you not move further away?</u>
>
> <u>A. I have not got an answer for that</u>."

88. This is a relatively minor point, which did not form part of a charge. The strongest point that could be made in the Registrant's favour is that she did not have an answer for why, in that case, she did not move further away from him. That is potentially relevant but is a long way short of controverting Person 1's evidence that she was made to feel

uncomfortable. Moreover, this aspect of Person 1's evidence was but one amongst many, including how Person 1 came across as a witness before the Committee, the first-instance tribunal, upon which it based its assessment of the credibility of her account. Person 1's evidence of feeling uncomfortable remained capable of corroborating her evidence concerning Charge 1. This, if anything, might go to her credibility, but it is just one strand. Credibility (as a witness) is a matter essentially for the Committee.

(3) Person 1's evidence about the remote control for the X-ray

The Registrant's case

89. The Registrant contends that Person 1's evidence about the use of the remote control for the X-ray was inconsistent. He submits that, in initial cross-examination, she had said that it was *the dentist who took the remote control out of the room* . But then in answer to questions from the Committee she said *she* would have picked up the remote control. Then in further cross-examination by Ms Felix, Person 1 said it could be either the dentist or the nurse, and finally when the inconsistency in her evidence was put to her, she said "this is my mistake". This inconsistency further undermines the reliability and credibility of her evidence, which the Committee failed to consider. This ground is relevant to Charges 1a, 1b and 3.

The GDC case

90. The GDC submits as follows. During cross-examination, Person 1 was asked a number of questions about using a remote control for the X-ray. Contrary to what was put to the witness in the further cross-examination, the transcript does not appear to show that Person 1's evidence when first cross-examined was that *the dentist* went out with the remote control. Further, the thrust of Person 1's evidence was that anyone could operate the remote control; there is no real inconsistency in her evidence. Finally, the point about the remote control is itself only a sub-issue.

Discussion and conclusion

91. As far as the transcript appears to show, when first asked in cross-examination, Person 1 was not asked who took the remote control out of the room, but rather who it was that *operated* the remote control.

> "Q: is the x-ray in the same way as viewed by the dentist, the x-ray is taken by the dentist?
>
> A: yes"

92. The cross-examination then continues:

> "Q: and it is done by this remote control?
>
> A: it is, yes, the thing that we can see on the wall.
>
> Q: if we look at photograph 2, we can see that it has got a lead
>
> A: yes

> Q: how may times did he stand too close to you in the corridor?
>
> A: I would not be able to say a number specifically. It was a few times.
>
> Q okay. But we can see, can we not, that whoever has got remote control in their hand cannot go any further than the remote control where will that them go, right?
>
> A: Right
>
> Q So you go out of the room first?
>
> A: yes:

Whilst possibly ambiguous, in the context of the sequence of questions being asked, in my judgment the word "taken" appears to refer to the act of operating the remote control, rather than the act of physically taking the remote control out into the corridor.

Then in answer to Committee questions, Person 1 said:

> "Q...who picked up the remote and who pressed the button...?
>
> A...I would have picked up the remote and stood outside the surgery and then the dentist would press the button.
>
> Q. So ---
>
> A. Or the clinician
>
> Q. Would you hold the remote and the dentist would then just press the button with a finger, or would they just take ---
>
> A. No they would just press the button with their finger."

93. Ms Felix then asked further questions in cross-examination. Person 1 said:

> "Q. When I was asking you questions about taking X-rays, you told me that it was the dentist who went out with the remote control.
>
> A. Yes, or the nurse. Whoever. It is not unusual for the nurse to collect it whilst the dentist is positioning the patient's head and the collimator.
>
> Q. It is just that when I asked you specifically, you did not say that. You said it was the dentist.
>
> A. Yes, the dentist can take the remote as well. If it was me I usually take it out.
>
> Q. But, you see Person 1, when I was asking you questions you told us it was the dentist, not "it could be either of us".

A. I am sorry. This is my mistake." (emphasis added)

Whilst it is clear that the Committee questions and the further cross-examination was directed to the taking of the remote control out of the room, the initial question related the person who operated the remote control i.e. pressed the button, once out of the room.

94. In my judgment, this ground is not established. There is a dispute as to what she said when she was first cross-examined. It is far from clear that Person 1 meant that it was the dentist who took the remote control physically out of the room (as opposed to the dentist who operated the remote). Secondly, even if she did say or intend to say that it was the dentist who did this, this is a minor detail. Whilst I recognise that in her final answer Person 1 said she had made a mistake, by that time the questioning had become somewhat muddled and Person 1 appeared to be taking responsibility for the muddle. Ms Felix's final question was based on what appears to have been her own interpretation of Person 1's initial reference to "taken".

95. Finally I agree that the issue of who took the remote control out of the room is a sub-issue within what is already the peripheral issue (point (2) above) of why Person 1 did not move away from the Registrant when he stood uncomfortably close to her during X-rays, which as observed above was not the subject of any charge. For the reasons already given, that peripheral issue itself does not give grounds for upsetting the Committee's findings in relation to Person 1.

(4) The Committee's rejection of Person 1's evidence about Charge 1a

The Registrant's case

96. The Registrant contends that the Committee failed to take into account the fact that Person 1's evidence that the placing of his legs around hers (Charge 1a) was inappropriate and sexually motivated was not accepted, when assessing the reliability of her evidence that the touching of her thighs (Charge 1b) was equally inappropriate and sexually motivated. The Committee failed to assess how its finding the placing of the legs was inadvertent or accidental affected its assessment of her evidence that the touching of the thighs was deliberate. The two elements were one incident. There was no proper basis to conclude that the touching of the thighs was any more than part of the inadvertent placing of his legs around hers. The evidence was that it was a very tight space. He was squeezing by Person 1 and was touching her as he went past her in that confined space. This ground is relevant to Charges 1b and 3.

The GDC case

97. The GDC submits that, if Ground 1 of the PSA Appeal is successful, then this ground will fall away. In any event, the Committee unarguably took account of its own findings on inadvertence in respect of the Registrant placing his legs either side of Person 1's when it went on to consider whether the Registrant had inappropriately touched Person 1's thighs. The Committee had just found that the conduct alleged in 1(a) had occurred inadvertently. It could not but have had that in mind when it turned to consider the remainder of the allegation, not least because it was all part of a single course of events. When addressing whether the touching of the thighs was inappropriate, the Committee expressly referred back to Charge 1a by noting that there was a difference between Charge 1a and Charge 1b.

Discussion and conclusion

98. Person 1's *evidence* was that the Registrant had (a) placed his legs either side of hers; and then (b) touched her thighs, and that *both* were inappropriate and sexually motivated. The Committee found both factual allegations proved but found that the Registrant placing his legs either side of Person 1's was not inappropriate or sexually motivated, whereas the Registrant touching Person 1's thighs was inappropriate (albeit not sexually motivated). The issue here is whether the Committee should have found that the touching of the thighs was also inadvertent. In my judgment, this ground is not made out. The Committee gave cogent reasons for distinguishing Charge 1a and Charge 1b. First, it explained why the placing of the legs was or may have been inadvertent, referring to the size of the room and the positioning of the equipment. Secondly, it expressly stated that it had reached a different view in relation to Charge 1b, based on two factors: the touching of the thighs was not warranted or expected by Person 1 and the fact that Person 1 had rolled her chair back due to her discomfort at the invasion of personal space. In my judgment, there is substantial logic in the distinction. Whereas in the close quarters of a dentist's room, it is conceivable that a chair on wheels could inadvertently slide too close to that of a colleague, placing one's hands on a personal area of a colleague's body was more likely to be intentional.

(5) Inconsistency in Person 1's evidence relating to rolling back the chair

The Registrant's case

99. The Registrant further contends that the Committee was wrong to rely on Person 1's oral evidence that her response to the Registrant putting his hands on her thighs was to roll her chair backwards. That evidence was inconsistent with her written statement, which made no reference to her rolling her chair backwards. That undermined her credibility and reliability. This ground is relevant to Charge 1b**.**

The GDC case

100. The GDC submits that there was no relevant inconsistency in Person 1's written and oral evidence. During cross-examination, it was (correctly) pointed out to Person 1 that she had not mentioned in her witness statement that she had rolled her chair back. However, no further questions were put to her about this and it was not put to her that this was untrue.

Discussion and conclusion

101. There is no inconsistency arising from the fact that Person 1 did not mention rolling back her chair in her witness statement. Person 1's oral evidence supplemented and expanded upon her written evidence and both were considered by the Committee. Save for the fact that Person 1 said something in oral evidence that she had not said in her written statement, this aspect of Person 1's evidence was not shown – nor was it suggested – to be untrue. Further this part of her evidence was one small part of the material that the Committee had available to it when assessing Person 1's overall credibility. That assessment was primarily a matter for the Committee as the first instance tribunal. For these reasons, this ground is not made out.

PSA Appeal Ground 1:Charges 1a and b

102. By contrast with the previous grounds of the Registrant, the PSA contends that the Committee should have found that the placing of the legs around Person 1's legs (Charge 1a) was both inappropriate and sexually motivated and further that the placing of his hands on her mid-thighs was sexually motivated (as well as being inappropriate). This ground is relevant to Charges 1a and 1b. As regards Charge 1a, it is not plausible that this could have occurred accidentally and the Registrant did not suggest that it did. It was irrational for the Committee to conclude that the Registrant's actions were anything other than intentional and inappropriate. Moreover, the placing of the hands on the mid-thighs (Charge 1b) happened immediately thereafter and the two actions were part of the same course of conduct. It was irrational to separate the two actions. The placing of the hands on the thighs was found to be intentional and inappropriate. There were no clinical or professional reasons for the Registrar to do so and the Committee failed to make a finding as to why he did this. The fact that this was only momentary was irrelevant, because Person 1 herself moved away. On the issue of sexual motivation, the Court is entitled to drawn inferences. The only reasonable inference is that this conduct was sexually motivated. The touching of the mid-thighs with both hands, without some other justification or explanation, is an inherently sexual act.

The Registrant's case

103. The Registrant submits that the Committee's findings in relation to Charges 1a and 1b were consistent with the evidence and not wrong. The evidence was not that the Registrant placed his hands on Person 1's mid-thighs. There was no finding by the Committee that "the Registrant's usual practice would not have made this possible". The Registrant agrees that the Committee's approach of seeking to see the placing of legs and the touching of thighs as separate was artificial, but the PSA's approach of working backwards is artificial. The starting point is to consider how this single incident began, namely with the placing of the legs. It was open to the Committee to conclude that that, in the confines of the surgery, was inadvertent – that was not irrational. Moreover the momentary nature of the touching of the thighs militates in favour of it being inadvertent too. In relation to sexual motivation, what was in issue was the Registrant's state of mind. Even if Person 1 rolled back her chair, that is not probative of what the Registrant was doing. Given the Committee's findings in relation to the placing of his legs as being inadvertent, it cannot be said that the only inference was that it was sexually motivated. Nor was the touching of the thighs in the circumstances the Committee found an "inherently sexual act".

Discussion and conclusion

104. This is a challenge to the findings in relation to Charges 1a and 1b – the former should have been found to have been both inappropriate and sexually motivated; the latter should have been found to have been sexually motivated (as well as being inappropriate). There is some force in the PSA's case here, particularly since, as agreed, the two acts were really one course of conduct/one and the same act. However I am not satisfied that the Committee's conclusions here were wrong. The PSA's characterisation of the touching in Charge 1b as being "mid-thighs" does not very precisely reflect either the evidence or the charge or the Committee's findings. In her oral evidence, Person 1 described the touching, variously that it was "above the knee", "a bit further on than the knee" and on the top of the leg or possibly the outside and with the palms. She added that it was like it usually was "when you touch someone".

Secondly, I have already concluded that the Committee was justified in finding that Charge 1a was inadvertent. In my judgment Committee was entitled to conclude that it was neither inappropriate nor sexually motivated. Given the momentary nature of the touching of the thighs, it was also entitled to find that it was not sexually motivated.

(6) The finding of inadvertence on Charge 1b was relevant to assessing the Registrant's evidence

The Registrant's case

105. The Registrant contends that the Committee failed to give recognition to its own findings that, in relation to Charge 1a, the Registrant had acted inadvertently and not deliberately, when assessing the strength of the Registrant's own evidence that he had no recollection of the event. The fact that something was accidental might be a reason why it would be forgotten. If, as the Committee concluded, it was inadvertent, there was nothing to remember it by. This ground is relevant to Charges 1a, 1b and 3.

The GDC case

106. The GDC submits, first, that the Registrant said that he could not remember this incident at all and so was not in a position to provide direct evidence about it. It was not wrong for the Committee to mention this. Secondly, the Committee drew no adverse inferences from the fact that the Registrant was unable to recall the incident. Thirdly, in any event, the fact that something is accidental is not of itself a reason why it would be forgotten. Fourthly, the Registrant placing his hands on Person 1's thighs (Charge 1b) was found to have been intentional, and this was a single course of conduct, so there was a positive reason for the first part of the course of conduct to be memorable.

Discussion and conclusion

107. The Registrant's principal evidence concerning Person 1 and Charges 1a and 1b was that he positively denied that the events had occurred at all, as recorded in the Committee's first finding in relation to Charge 1a. It is not clear to me that the Registrant himself did positively say, in his written or oral evidence, that he did not remember the event or the day. Nor did he say that he had forgotten. Nor, in fact did the Committee so find. Rather the Committee commented that the Registrant "had *provided* [i.e. to the Committee] no independent memory of that day" i.e. there was an absence of evidence from the Registrant. For this reason the premise of this ground is not established. Further even if the Registrant's evidence was that he had no recollection of the events, there is no suggestion that the Committee drew an adverse inference as to the Registrant's credibility. This was merely a comment that there was no positive evidence to contradict or weigh against Person 1's evidence about the events and their details. Finally I accept the GDC's final two submissions – there is no necessary causal link between inadvertence and memory, and in any event the placing of hands on thighs was found to be intentional. For these reasons, this ground is not established.

(7) Reliance upon the report of 6 March 2020

The Registrant's case

108. The Registrant contends that the Committee should not have placed any weight on Person 1's evidence that she had reported the events relating to Charge 3 to a work colleague at the practice on 6 March 2020, because that colleague was not called to give evidence. Person 1's own evidence of having told the colleague was inadmissible as being a self-serving statement/previous consistent statement. The Committee ought to have disregarded this evidence, as the mere statement that she said she had reported it to the work colleague had no probative value. The Committee appears, wrongly, to have considered not only that she did in fact make that report, but also the fact of her having reported it supported the reliability of her evidence. This ground is relevant to Charges 3.

The GDC case

109. The GDC submits, first, that this ground is misconceived. The Committee did not rely positively upon the 6 March 2020 report as corroborative evidence. Secondly, in any event, the evidence in question was clearly admissible. It was first-hand evidence from Person 1 about what she had told someone else. She gave the evidence on oath and it was tested in cross-examination. It was no different from any other first-hand evidence that Person 1 gave about events within her direct knowledge that occurred. The fact that the colleague was not called to give evidence goes only to the weight that the Committee could attach to it, and questions of weight are primarily for the Committee. Finally, there is no property in a witness and it would have been open to the Registrant to call the third party if he believed that she would give different evidence that supported his defence.

Discussion and conclusion

110. In the Decision, after dealing with main evidence relating to Charge 1a, and *after* finding "this charge proved", the Committee went on to address the Registrant's allegation that Person 1's evidence was "contaminated" i.e. by discussions with others, in the following terms

> "...there is no evidence of Person 1's account being contaminated. It notes that <u>other than</u> Person 1's report of the events to a work colleague at the practice on 6 March 2020, <u>Person 1 did not discuss</u> what had happened to her to Person 2 and 3 until 31 July 2022." (<u>emphasis</u> added)

111. The Committee was making the point that, between the incident complained of and the discussions with Person 3 and others on 31 July 2020, there had been no opportunity for Person 1's evidence to become contaminated, as the only other conversation she had had was with the work colleague on 6 March 2020. There was no suggestion that that discussion on 6 March 2020 itself had "contaminated" or influenced her evidence. In any event, and importantly, the Committee did not, in the Decision, positively rely upon either the fact or the content of that conversation on 6 March 2020 as corroborating or supporting Person 1's account of the events on the previous day. For these reasons I accept the GDC's first submission and on that basis alone, this ground is not made out.

It is therefore not necessary to consider the further issue as to whether Person 1's evidence of the 6 March report was admissible, or, if it was, what weight it should have been afforded. Nevertheless, in my judgment, in any event, the objection to admissibility is unfounded. Person 1's evidence about the report was part of her direct evidence concerning the events on that date. The fact that the colleague was not called merely goes to the weight to be accorded to Person 1's evidence.

Overall conclusion on Person 1: findings of fact

112. In the light of my conclusions above (and my conclusions in relation to the general points (paragraphs 146 to 162 below)) I conclude that the Committee's findings in relation to Person 1 and charges that relate to her were neither wrong nor unjust due to irregularity. The Registrant's Appeal and the PSA Appeal in relation to Person 1 fails.

Person 2: Charges 5a and b and 6

(1) The Decision

113. In relation to Person 2, the Committee made the following findings.

Charges 5 a b and c (and 6)

Findings of fact

114. As regards Charge 5a, the Committee concluded as follows:

> **"Admitted and Found Proved**
>
> The Committee found Person 2's evidence to be a little confused at times and that her memory of events may have been impacted due to the passage of time. It was clear that Person 2, remembering back to the events was upsetting for her. However, it still found Person 2 to be a credible witness.
>
> The Committee took into account your admission to this charge but notes that it is disputed to whether it was your invitation or Person 2's invitation to go into the SMDEC surgery.
>
> In Person 2's evidence she stated that you had invited her to the SMDEC room to show her something and not to carry out a massage on her. Person 2 was not expecting a massage from you and that it came as a surprise to her.
>
> In your evidence you stated that Person 2 was going to the SMDEC surgery knowing that she was going to have a massage from you.
>
> The Committee heard during Person 2's evidence that as she entered the SMDEC surgery she had sat on the chair back to front. She stated that she sat the other way and believed that the back of the chair was at her front. Person 2 stated that she does not normally sit in a chair back to front, but on this occasion she

did. Person 2 remembered leaning forward as the pressure of the massage increased. The Committee considered that the way Person 2 sat on the chair is an unusual way to sit if she did not know what was going to happen. Person 2 sat on the chair knowing that she was going to get a massage because her back would have been exposed for it to be massaged. The Committee could not be sure on the balance of probabilities that she did not consent to the massage, or led you to believe that she had consented." (emphasis added)

115. As regards Charge 5 b, the Committee concluded as follows:

> **"Found Proved**
>
> In Person 2's evidence she stated that after you carried out the massage on her neck and shoulders, you proceeded to hug her from behind.
>
> In your evidence you accepted that there was a hug albeit brief and was initiated by Person 2. You stated that after the massage Person 2 hugged you, thanked you and told you that her pain had improved.
>
> The Committee was persuaded by Person 2's evidence. It finds that she had a clear recollection about this incident. Subsequent to this incident the Committee notes that Person 2 made an early report of what had occurred to Person 4. Person 2 had informed Person 4 of what had happened shortly after in their car journey home together. Their conversation was later followed by sending text messages to each other which stated …*"Yeh it started with him like doing this massage then the next minute his hands were all around me and I was like errrm.. then he asked if he could hug me which turned into his squeezing me…"*.
>
> The Committee considered that this contemporaneous evidence supported Person 2's account to some extent.
>
> Further, the Committee was also able to draw an inference from Charge 3 above where it found proved similar conduct in that you put your arms around Person 1 from behind.
>
> Taking all the above into account the Committee finds that on a balance of probabilities you hugged Person 2. It considered that the allegations made by Person 2 are not the sort that are capable of arising from a misunderstanding and that there is no credible evidence before the Committee she had a motive to lie. Accordingly, the Committee finds this charge proved." (emphasis added)

116. As regards Charge 5c, the Committee concluded as follows:

> **"Found Proved**
>
> In Person 2's evidence she stated that you brought your arm around the front of her body and then squeezed her breast. She stated that the squeezing stopped when she said words to the effect of *"I didn't realise that's what we were doing?"* Person 2 described being in a state of shock and that you apologised and looked embarrassed.
>
> In your evidence you told the Committee that Person 2 was falling off her chair and that you went to catch her. You stated that it is possible you may have touched her breast but did not squeeze it.
>
> The Committee was persuaded by Person 2's evidence. Person 2 did not recall falling from her chair or that you tried to prevent her from falling. Whilst it heard from Person 2 that it is not difficult to accidently touch her breasts because they are large, it finds that you did squeeze and touch Person 2's breast. Person 2 had a good recollection of what had occurred and remembered saying to you *"I didn't realise that's what we were doing?"* The Committee finds that this was a continuation of a hug you gave Person 2 from behind.
>
> As set out in the charge above, Person 2 reported what had happened to her to Person 4. Their conversation was followed by sending text messages to each other. (See charge above).
>
> Taking all the above into account the Committee finds that on a balance of probabilities you touched and squeezed Person 2's breast. It considered that the allegations made by Person 2 are not the sort that are capable of arising from a misunderstanding and that there is no credible evidence before the Committee she had a motive to lie. Accordingly, the Committee finds this charge proved."

Inappropriate

117. As regards Charge 6a (and whether conduct in Charge 5 was inappropriate), the Committee found as follows:

> **"Admitted in respect of 5.a only and otherwise Found Proved in its entirety**
>
> The Committee considered that your conduct in charges 5.a, 5.b and 5.c namely: massaging Person 2's back and shoulders, hugging her and touching/squeezing her breast is clearly inappropriate. It therefore finds this charge proved."

Sexually motivated

118. As regards Charge 6b (and whether conduct in Charge 5 was sexually motivated), the Committee found as follows:

> **"Found Proved in relation to charge 5.b and 5.c only**
>
> The Committee notes that Person 2 made a disclosure to Person 4 that same afternoon on 5 April 2020 about the events that had occurred that day. WhatsApp messages were exchanged between Person 2 and Person 4 which supported the account that was given by Person 2 during her oral evidence. The Committee considered that your conduct was clearly inappropriate and sexually motivated and was supported by the reported conversation between Person 2 and Person 4.
>
> You started off massaging Person 2 (which the Committee has found not to be sexually motivated albeit inappropriate), which then led to you hugging her and touching/squeezing her breast. The Committee considered that there was a clear emerging pattern of conduct demonstrating overt sexual interest towards Person 2. Your actions, namely the hug and touching/squeezing of the breast were of an overly affectionate nature and extended beyond a greeting or expected interaction between work colleagues. The Committee finds that your conduct in relation to 5.b and 5.c was sexually motivated.
>
> **Found not proved in relation to 5.a**
>
> The Committee has found proved in Charge 5.a above that on the balance of probabilities you massaged Person 2's shoulders and/or back which she had consented to. Whilst it was admitted by you and found proved by the Committee to be inappropriate, it did not find evidence that your conduct was sexually motivated." (emphasis added)

(2) Person 2: the Grounds of Appeal

119. In respect of these findings concerning Person 2, the Registrant raises two grounds. In addition PSA Ground 2 concerns Person 2. I deal with each of these points in turn.

(1) Charge 5a consent to the massage

The Registrant's case

120. The Registrant contends that the reliability of Person 2's evidence in relation to Charges 5b and c was critically undermined by the Committee's rejection of her evidence that she did not consent to the massage, the subject of Charge 5a. Person 2's evidence was clear that she did not consent to the massage. However the Committee concluded that she was wrong about that. Consent is not a question of misunderstanding. Either Person 2 did consent, or she did not. Thus Person 2 was either not being honest or her recollection was so wrong as to make such an error. In either case, her reliability and credibility were fundamentally compromised. The Committee failed to take this into

account in assessing her evidence in relation to Charges 5b and 5c. The Committee should have treated Person 2's evidence on Charge 5b and 5 c with caution.

The GDC case

121. The GDC submits the premise for the Registrant's case is not made out. Contrary to that case, (1) Person 2's evidence was *not* that she did not consent and (2) the Committee did *not* find that Person 2 *did* consent. The suggestion that she therefore lied or was mistaken as to her memory is misconceived.

122. As to (1) Person 2's evidence did not clearly say that she did not consent; it was more nuanced than that. In any event, even if this amounted to a finding of not believing Person 2 in relation to the massage, there is a big difference between consenting to a massage and consenting to sexual touching on the breast. Such a finding does not affect the credibility of her evidence in relation to Charge 5c. As to (2) the Committee did not "find against" Person 2 on the issue of consent. The Committee did not make a positive finding that Person 2 consented to the massage. Rather it found that the GDC could not prove on a balance of probabilities that Person 2 had not consented, in circumstances where the burden of proof was upon the GDC. Further the Committee was also entertaining the possibility that, even if Person 2 had not consented, she had nevertheless led the Registrant to believe that she consented. Finally, even if the Committee *had* made an adverse credibility finding, which it did not, it would not follow from that that Person 2's evidence was critically undermined in other areas. On the contrary, the Committee expressly turned its mind to the question of Person 2's credibility. It made a finding that her memory was somewhat confused, but that she was a basically credible witness. It was open to the Committee to make such a finding in light of all of the evidence that Person 2 gave, including the evidence recited above.

Discussion and conclusion

123. First, contrary to the Registrant's submission, Person 2's evidence (in her witness statement and in her cross-examination) in relation to the massage was not clearly that she did not consent. It was more nuanced and ambivalent. Overall her evidence was that she agreed to the massage, but only reluctantly. She did not say No, but she was submissive. Her oral evidence about her attitude to the massage taking place was, again, not a case of her straightforwardly consenting/not consenting. (At paragraph 25 of her witness statement, she accepted that she had agreed to the hug the subject of Charge 5b).

124. Secondly, however, I do consider that the Committee made a positive finding that Person 2 did consent to the massage. Whilst it is the case that the Committee's initial finding on consent was expressed in the double negative i.e. the Committee was <u>not</u> satisfied that she did <u>not</u> consent, it expressly found that she sat on the chair in the way she did knowing that she was going to get a massage; and more significantly, when dealing with whether the massage was sexually motivated (under Charge 6b), the Committee expressly found that "she had consented to" it. Given this context, a finding of *not* discharging the burden that she did *not* consent amounts to a finding that she did consent. To that extent I accept the Registrant's submission. The Committee's further finding in relation to leading the Registrant to believe she had consented is ambiguous and it does not assist on this issue.

125. Thirdly, however, I do not accept that the Committee's finding of consent critically undermined her own evidence in other areas. First, that finding did not directly contradict her evidence on the issue, given its ambiguity. The finding does not call into question her honesty or that her recollection was fundamentally wrong. Secondly, there is a big difference between consenting to a massage and then consenting to touching of a sexual nature. It is not necessary to read across on credibility of her evidence because the allegations are so different. For these reasons, the Registrant's case here is not made out.

(2) Charge 5c the text message and the disclosure to Person 3

The Registrant's case

126. The Registrant contends that the Committee failed to have regard to the fact that the text message from Person 2 to Person 4 dated 5/6 April 2020 which it relied upon in relation to Charge 5b and 5c did not mention the fact that the Registrant had touched her breast. Similarly the Committee failed to have regard to the fact that when she, Person 2, subsequently disclosed the massage to Person 3 in the lockdown walk in June or July she did not mention the touching of the breast. That failure to mention in the text and in the disclosure was plainly relevant in assessing the allegation that this was a deliberate and sexually motivated touching. In paragraph 26 of her written statement Person 2 said that when the registrant hugged her, his hands were "squeezing my stomach".

127. As regards the report by Person 2 to Person 4, the witness statement of Person 4 stated that Person 2 told her that while she was at work that day the Registrant had touched her and that he had groped her front including her breast. Yet, if Person 2 had already mentioned breasts in the conversation with Person 4, it is astonishing that there was no mention of breasts in the text. This cast doubt on Person 4's statement which was made long after the event at a point in time when Person 4 knew that Person 2 was alleging that there had been touching of the breast. This ground is relevant to Charges 5b and 5c.

The GDC case

128. The GDC submits that the text message was a message which does not go into explicit factual detail. Further, the Committee clearly *did* take account of the absence of express mention of groping because, it held that the messages supported Person 2's account only "to an extent". Further, Person 2 also reported to Person 4, that day, that the Registrant had groped her breasts. Person 4 gave corroborative evidence of this. In light of the evidence of this contemporaneous report, the fact that the WhatsApp messages did not expressly mention groping has even less significance.

Discussion and conclusion

129. First, the words in the text message from Person 2 to Person 4 included the words "*his hands were all around me*". I accept the GDC's submission that that could plainly be read as a veiled reference to the Registrant groping Person 2's breasts. The message can be read as an emotionally vivid picture of someone who is trying to process a shocking incident that had happened to her earlier that day, in the context of a casual WhatsApp conversation. Secondly, and in any event, Person 2's account, in her witness statement,

of the touching of her breast is detailed. She recalled what she said in reaction and what then happened, including the Registrant's reaction. In making its finding on Charge 5c, the Committee expressly relied on her evidence and her good recollection. Having seen and heard Person 2 give evidence, it was entitled to do so. This ground is not made out.

PSA Appeal Ground 2: Charges 5a, 5b and 5c

130. Ground 2 of the PSA Appeal is that the Committee was wrong to find that giving Person 2 a massage was not sexually motivated. The PSA contends that the Committee should have found that giving Person 2 a massage was sexually motivated (Charge 5a and 6b), in circumstances where the Registrant admitted to giving the massage and that it was inappropriate. Immediately following the massage the Registrant hugged Person 2 from behind (Charge 5b), squeezed her stomach and her left breast (Charge 5c); actions which the Committee did find to be sexually motivated. The Committee found that the conduct which immediately followed showed a pattern of conduct demonstrating overt sexual interest in Person 2. The Committee should have inferred that the massage itself was equally sexually motivated. The massage facilitated the opportunity for clear sexual assaults to take place. To view it as entirely separate from those assaults was irrational. In support of the conclusion that the massage was sexually motivated, the PSA further relied upon Person 2's evidence that the Registrant appeared to be getting pleasure from giving the massage and from the Registrant's own comments suggesting that he might go round to "hers" and finish the massage. This ground relates to Charge 5a.

The Registrant's case

131. The Registrant submits that the Committee's findings that the massage was not sexually motivated cannot be said to be wrong. Rather they are consistent with the evidence; (it is the findings in respect of the hugging and the touching of the breast which are wrong). The PSA's challenge fails to take account of the Committee's findings in relation to the massage and the issue of consent. The Committee rejected Person 2's evidence that "she had no expectation that she was to receive a massage and she did not consent". The PSA, wrongly, seeks to view the initial touching (the massage) through the lens of what was found to be proved in respect to the subsequent hugging and touching. In any event the evidence which supported the Committee's finding that the massage was consensual cannot be overridden. The massage happened prior to him going out of the room.

Discussion and conclusion

132. The express reason why the Committee concluded that, whilst the hug and the touching of the breast were sexually motivated, the initial massage was not, was because Person 2 had consented to the massage. As I indicate above, this was a finding it was entitled to make. In its submissions, the PSA does not address this point or whether this is a justification for the distinction which the Committee made. The argument is the massage should have been found to have been sexually motivated.

133. Given that all three Charges in relation to Person 2 amount to a single course of conduct, and in view of the Committee's correct findings that the hug and the touching of the breast were sexually motivated, in my judgment the only inference that can be drawn is that the massage which was the first part of that course of conduct was equally

sexually motivated. To this extent, I conclude that the Committee's finding that Charge 6b in relation to Charge 5a was not proved was wrong i.e that the massage was not sexually motivated was wrong. The issue here is the Registrant's state of mind, and not Person 2's state of mind. There are two significant pieces of evidence supporting his sexually motivated state of mind; the offer to continue the massage at her home and after her son has gone to bed; and the evidence that *he* was deriving pleasure from the massage. The fact that Person 2 consented does not bear upon the Registrant's state of mind. In my judgment, the Committee's reliance upon consent as the reason for finding absence of sexually motivation is misplaced. For this reason, PSA Appeal Ground 2 succeeds.

Person 3: Charges 7a and b and 8

(1) The Decision

134. In relation to Person 3, the Committee made the following findings.

Findings of fact

135. As regards Charges 7a and b, the Committee concluded as follows:

> **"Found Proved in its entirety**
>
> Person 3 in her evidence stated that she was in the decontamination room when you came in and rubbed/squeezed your hands along her upper arms. She explained that it felt *'weird'.*
>
> In your evidence you told the Committee that you wanted to see if she would want to be included in a selfie with you and that you tapped her arms rather than squeezing/rubbing as described.
>
> The Committee found Person 3's evidence to be straightforward and matter of fact. She was clear and had a good recollection of the events**.** The Committee was also satisfied that the account it heard from Person 3 is the independent recall and there is no contamination in respect of that recall in terms of any conversation with others. It accepted her evidence and found her to be a credible witness. The Committee considered that Person 3 knew the nature and distinction of the touch that you undertook compared to the touch someone experiences when getting their attention.
>
> The Committee did not find your evidence credible. It would not have been necessary to touch Person 3 at all to ask if she wished to take part in a selfie. It is a small room and your appearance at the doorway could easily have attracted her attention. This was also in the middle of the covid pandemic when social distancing and avoidance of contact was required.

> It considered that the allegation made by Person 3 is not the sort that is capable of arising from a misunderstanding and that there is no credible evidence before the Committee she had a motive to lie. Accordingly, the Committee finds this charge proved."
> (emphasis added)

Inappropriate

136. As regards Charge 8 (and whether conduct in Charge 7 was inappropriate), the Committee found as follows:

> **"Found Proved**
>
> The Committee considered that you squeezing and rubbing Person 3's upper arms which was uninvited and unwarranted, and particularly at the workplace, is inappropriate."
> (emphasis added)

Sexually motivated

137. As regards Charge 8 (and whether conduct in Charge 7 was sexually motivated), the Committee found as follows:

> **"Found Proved**
>
> The Committee heard from Person 3 that you asked her *"Do you like that?"* after you had rubbed and squeezed her upper arms. It considered that this comment along with the rubbing and squeezing of Person 3's upper arms was personal and signalled personal attraction. Asking Person 3 *"Do you like that?"* has sexual overtones and your purpose was to express sexual interest in Person 3 and therefore your conduct in Charge 7 was sexually motivated. Accordingly, it finds this charge proved."

Person 3: the Grounds of Appeal

138. In respect of these findings concerning Person 3, the Registrant raises two grounds. I deal with each in turn.

(1) Inconsistent evidence as to what Person 3 told Person 1

The Registrant's case

139. The Registrant contends that, in assessing Person 3's credibility and reliability, the Committee failed to take into account the inconsistency in Person 3's evidence as to what she had told Person 1. Her witness statement evidence was she had told Person 1 that working with the Registrant was "a bit weird"; yet her oral evidence was that she had told Person 1 that he had touched and rubbed her arms. This ground is relevant to Charges 7a and 7 b.

The GDC case

140. The GDC submits that the account given in oral evidence (which mentioned both "bit weird" and rubbing of arms) was simply a fuller account of the same conversation that Person 3 had described in written evidence.

Discussion and conclusion

141. In her witness statement and in oral evidence, Person 3's principal evidence was that the Registrant squeezed and rubbed the back of her arms. As regards what she told Person 1 on 31 July, in her witness statement Person 3 said that she told Person 1 merely that "it was a bit weird". In cross-examination, she appeared to suggest that she had not only told her it was "a bit weird", but had gone on to say that "he rubbed my arms". I accept the GDC's submission on this issue. The apparent discrepancy between her witness statement and her oral evidence was put to Person 3, but it was not put to her that she was lying about the extent of what she had told Person 1 or indeed about the rubbing of her arms. Further, the Committee assessed the relative credibility of the evidence of Person 3 and the Registrant, and gave at least four reasons for finding her evidence credible and two further reasons for finding the Registrant's evidence not credible. That assessment of credibility was, in the first place, a matter for the Committee and there is no basis for concluding that it was wrong.

(2) Inconsistent evidence of Person 1 and Person 3

The Registrant's case

142. The Registrant contends that in assessing Person 3's credibility and reliability the Committee should have taken into account an inconsistency between the evidence of Person 1 and that of Person 3. Person 3's evidence was that the Registrant had rubbed the upper part of the back of her arm. Person 1's evidence was that Person 3 had told her (Person 1) that the Registrant had massaged her *shoulder*. Person 3's oral evidence was that she would not have told Person 1 that, because that was not what happened. This ground is relevant to Charges 7a and 7b.

The GDC case

143. The GDC submits that this was not relevant to the Committee's assessment of Person 3's credibility. Person 1's memory of what Person 3 said to her is of no direct, and limited indirect, relevance to Person 3's own credibility. Secondly, Person 1's evidence about what Person 3 told her, and Person 3's evidence about what she told Person 1, were broadly consistent in that they both referred to massage, and both to the same general area of the body. In light of that, it is understandable how this slight imprecision might have crept in. Thirdly, it cannot be inferred from the fact that the Committee did not mention this that it placed no weight upon it as part of its overall assessment. Finally, even if the Committee did place no weight upon it, the discrepancy is so slight and so readily understandable as to be immaterial.

Discussion and conclusion

144. Person 3's written and oral evidence, both as to what the Registrant had done and what she had reported to Person 1 is set out above. The Registrant had rubbed the back of her arms at the top, and in her oral evidence, she went on to describe the Registrant moving both of his hands up and down the back of the top half of her arms. Person 1's

written and oral evidence was that Person 3 had told her that the Registrant had, rather, "massaged her [i.e. Person 3's] shoulder". In cross-examination Person 3 denied that that was what she had told Person 1 "because that is not what happened".

145. In my judgment, even if there is an inconsistency in the evidence of Person 3 and Person 1, it is not sufficient to call into question the Committee's detailed conclusions on the credibility of Person 3's evidence supporting Charges 7a and 7b. First, Person 3's description of the Registrant's actions (as expanded in her oral evidence) is not very different from an action described as "massage". It is quite possible, even if Person 3 did not use the word "massage", that Person 1 understood what Person 3 had described to her as "massage". Secondly, it is also possible that it was in her subsequent discussions involving Person 4 and Mr Cove that Person 3 had described the actions as "rubbing the arms". This ground is not made out.

The Registrant's grounds of appeal of general application

(1) Good character

The Registrant's case

146. The Registrant contends that, in evaluating all the evidence before it, the Committee failed to take into account, sufficiently or at all, the Registrant's good character. In the present case, there was substantial evidence of the Registrant's good character. There is no mention of the good character evidence in the determination on the facts. Good character is relevant, particularly where the dispute is about what happened or whether it happened at all. Good character goes to propensity (to behave in the way alleged) as well as to credibility. The fact that the allegation is something other than dishonesty does not make good character any less relevant. Whilst the weight to be attached to good character was a matter for the tribunal, here the determination shows that good character was not taken into account at all.

147. In relation to Person 1 good character should have been accorded considerable weight in relation to Charge 3, particularly in the circumstances of the findings in relation to Charge 1a and Charge 1b. In relation to Person 2, the massage was either consensual or it was not. A combination of the finding adverse to her evidence and the Registrant's good character leads to the conclusion that there had to be cogent evidence the other way in relation to Charge 5b and c. The Committee should have taken into account the lack of propensity to behave in that way. In relation to Person 3, the question was whether the Registrant's conduct was to get her attention or for some other reason. Considerable weight should have been given to the fact that he had not previously behaved in that way. Whilst a direction was given, the general preamble of the Committee's determination does not enable the Court to conclude that the Committee must have taken good character into account. This failure to refer to good character indicates an error in their approach. The Committee did not consider his good character and there was considerable weight to be attached to it.

The GDC case

148. The GDC submits that the Legal Adviser gave a correct good character direction as to both credibility and propensity. The Committee said that it accepted the advice of the Legal Adviser. The significance of good character evidence should not be overstated;

it should not detract from the primary focus on the evidence directly relevant to the alleged wrongdoing. The Committee was not required expressly to give itself a self direction. Where it had been given a clear direction from its legally qualified adviser, the court can infer from all the material that the Committee must have taken good character properly into account. There was a large amount of good character evidence in the bundle. It was drawn to their attention in closing submissions. Four character witnesses had given oral evidence. Moreover the Committee referred to character evidence in its decisions on impairment and sanction.

Discussion and conclusion

149. Applying the relevant principles set out in paragraph 26 above, the Committee was required to take the Registrant's good character into account in considering the charges. There is no express reference in the fact-finding part of the Decision document to the issue of good character. In this regard there is therefore no express self-direction on the part of the Committee. The issue therefore is whether I am able to infer from all the material that the Committee must have taken the Registrant's good character into account.

150. On 21 October 2022, day 5 of the hearing, the Legal Adviser gave her legal advice to the Committee. That advice included a clear "good character" direction explaining that the Registrant's good character was relevant both when considering whether to accept his evidence and secondly in relation to propensity. It was a clear and correct formulation of the law relating to good character. This, of itself, provides a strong basis for drawing the required inference: see *Khan* §92. In addition, at the fact finding stage, the Committee heard oral evidence from four witnesses attesting to the Registrant's character together with a number of further character witness statements and then substantial oral submissions from Ms Felix emphasising the significance of this good character evidence. Finally, there is express reference to the Registrant's good character in the determination on sanction. In these circumstances, I conclude that the Committee must have taken into account the Registrant's good character. On this basis the weight to be attached to good character was a matter for the Committee. It must have had it in mind as part of the overall picture, but did not consider it worth mentioning in its reasons because it attracted so little weight on the facts of this case. The primary focus of the Committee was on the evidence directly relating to each of the Charges.

(2) Need for cogent evidence

The Registrant's case

151. The Registrant submits that the Committee did not take into account, sufficiently or otherwise, the direction that it was given as to the approach to the evidence, namely "The more serious the allegation the less likely it is that the event occurred and, hence the stronger and more cogent should be the evidence before the Panel concludes that the allegation is established on the balance of probabilities." I refer to this formulation as "the cogent evidence standard"

The GDC case

152. The GDC submits that this ground is misconceived. The Committee expressly stated, before turning to its consideration of each individual allegation, that it took account of the cogent evidence standard. No court would expect the Committee to repeat that principle for each individual allegation.

Discussion and conclusion

153. In my judgment, this ground adds nothing to the Registrant's appeal on the facts.

154. First, it was common ground before the Committee, and indeed in argument before me, that the correct approach to the standard of proof is the "cogent evidence standard". The Legal Adviser so directed the Committee and the Committee expressly relied upon it in the Decision. However, for the reasons set out in paragraph 23 above, strictly this is not the correct approach. There is no suggestion here that, because the alleged events were "inherently improbable", the quality of the evidence was not sufficiently good.

155. Secondly, even if, contrary to the foregoing, there was any need for "cogent evidence", there is no basis for concluding that the Committee did not take that into consideration in making its findings of fact.

(3) Animosity towards the Registrant, discussions between complainants and on 31 July and "contamination"

The Registrant's case

156. The Registrant submits that there was evidence that both Person 1 and Person 3 had formed a very negative view about the Registrant. Moreover it was the discussion between complainants on 31 July 2020 which led to matters being brought before the GDC. The Committee failed properly to evaluate the relevance of those two factors in assessing the credibility of the allegations made by Person 1 and Person 3. The Committee wrongly treated this as a question of potential "contamination" of evidence (i.e. knowingly changing evidence in the light of being told something), rather than one going to the reliability and credibility of the witness, arising from viewing past events through a "misted lens" i.e. to exaggerate, unconsciously, the significance of innocent conduct. The Committee did not consider, in its reasoning, that the discussion between the complainants could have resulted in what were innocent acts being talked up into inappropriate and indeed sexually motivated conduct. The Legal Adviser gave directions. Moreover because of this "misted lens", there was no cross-admissibility and the Legal Adviser's direction was a direction as to cross-admissibility. In closing submissions, Ms Felix said that there is a lack of consistency in the evidence about the various conversations between the complainants. Yet nowhere in the Decision is there any evaluation of these inconsistencies. It is not apparent from the reasoning that the Committee looked at all the evidence.

The GDC case

157. The GDC submits that the Committee expressly considered this issue, in relation to each of the witnesses, and held, in respect of all of them, both that their evidence was uncontaminated and that they had no motive to lie. The Committee's findings were quintessential findings of credibility. The Registrant's appeal in this respect is nothing more than a disagreement with the merits of the Committee's decision. Secondly, GDC

does not understand the distinction which the Registrant seeks to make between an issue of "contamination" and an issue of "reliability" (which the Registrant says it is). The Committee grappled in substance with the issue of whether, as a result of the victims' conversations on 31 July 2020, they had influenced one another. Even if there were a technical legal distinction between "contamination" and "reliability", the decision of a professional tribunal is not a statute and cannot be subject to that degree of textual scrutiny. The accounts of each complainant and the Registrant were diametrically opposed to each other; and there is no room for mere misinterpretation or an event being talked up by subsequent conversations with other complainants. Each of the complainants had their own reason for not initially reporting, but when they found out it had happened on multiple occasions, they overcame their reluctance and thought it was important to report it.

Discussion and conclusion

158. First, as regards the suggestion of "animosity", the Committee heard the evidence from the Registrant on this, the high point being that he had turned down going for coffee with Person 1. In oral evidence, Person 1 denied that this had ever happened. Having heard all the evidence, including the sequence of events as to how the allegations were made, the Committee expressly found, in the case of each complainant, that she had no motive to lie. In my judgment, having reviewed the evidence, this is a conclusion which the Committee was justified in reaching.

159. Secondly, the Committee found, in relation to the evidence of Person 1 and of Person 3, that there was no "contamination". There is some ambiguity in the use of the term "contamination". The term was first used by Mr Micklewright in closing submissions to the Committee. Ms Felix responded that she did not wish to use that word, because it referred to knowing influence or even deliberate dishonesty. She made clear, as she did before this Court, that what she was referring to was "viewing things through a different lens", as a result of the complainants' discussion with each other. What was in issue was whether discussions had caused a witness to view things in a different light (and not knowingly). There was no "cross-admissibility" in relation to the allegations, not because the complainants were being deliberately dishonest but because of this unwitting influence.

160. The Legal Adviser gave a direction on this issue. She pointed out that the GDC relied upon two similarities in the allegations made by the complainants, but the Registrant was saying that the similarities were as a result of the fact they had spoken with each other. She then directed the Committee that, if it thought the allegations had been invented between them, then the similarities counted for nothing and their evidence should be rejected. She continued:

> "Even if you are satisfied that the allegations are not invented together then you should consider whether persons 1, 2 and 3 might have learned what the other was saying about Dr. Danial and have been influenced knowingly or unknowingly when making her allegations.
>
> In this case there is evidence that there were discussions of allegations between the complainants. If you conclude that this has or may have happened the similarities between the

> complainants' evidence and the evidence of the other complainants would not take the Council's case any further and you would have to take any influence of that kind into account when deciding how far you accept that complainant's evidence.
>
> However, if you are satisfied that there has been no invention or influence you should consider how likely it is that two people, independently of each other, would make allegations that were similar but untrue. If you conclude that it is unlikely, only then could you, if you think it right, treat the evidence of whichever witness you are considering, as supporting the evidence of another and vice versa". (emphasis added)

161. In my judgment, by this direction, the Legal Adviser, properly drew attention, first, to the possibility of invention (i.e. knowing) between the complainants; secondly, to knowing *or unknowing* influence arising from the discussions; thirdly, to the possible effect of such influence upon the credibility or reliability of each complainant's evidence; and fourthly, and only if influence could be ruled out, the issue of whether the evidence of one complainant provided support for the evidence of another complainant i.e. true cross-admissibility. In this way the Legal Adviser gave the Committee a clear direction which warned them of the risks of "misted eyes" - unconscious influence arising from the discussions.

162. Against this background, and in particular given the terms of the direction, in my judgment, the Committee's reference to "contamination" in the Decision encompassed not just knowing influence, but also unconscious influence. The Committee properly considered this issue and reached a conclusion which included a finding that the discussions with other complainants did not adversely influence the complainant's thinking or undermine the reliability of their evidence.

Overall conclusions on Appeals on the Facts

163. As regards the Registrant's Appeal, it is the case that there are aspects of the complainants' evidence which are not consistent and aspects which can be criticised. The overall reasoning in the Decision is brief and there are areas where there is no detailed explanation of reliability. However the reasoning is based on findings of fact, in turn based on the assessment of oral evidence. Secondly overall the complainants and their evidence come across as fair and reasonable with detailed recollection. In particular, there are parts of the complainants' evidence where they recall actual words used, having "the ring of truth". Many of the criticisms are in relation to peripheral issues. None of the detailed grounds raised have been established. For these reasons the Registrant's Appeal fails.

164. As regards the PSA Appeal on the Facts, Ground 2 succeeds and Ground 1 fails, for the reasons set out at paragraphs 133 and 103 respectively.

The PSA Appeal on Sanction

The grounds of appeal

165. The PSA advances the following five grounds of appeal against sanction.

- Ground 3: The Committee failed to have proper regard to the seriousness of the misconduct found proved.

- Ground 4: The Committee was wrong in its identification of mitigating factors, and failed to provide any indication of the weight that was placed on any of the identified aggravating or mitigating factors.

- Ground 5: The Committee was wrong to conclude that there was no evidence that the Registrant had harmful deep-seated personality or professional attitudinal problems.

- Ground 6: The Committee failed to consider the Sanctions Guidance in respect of erasure, or provide any proper reasons why this was not the proportionate sanction.

- Ground 7: The Committee was wrong to conclude that suspension and not erasure was the appropriate sanction.

166. As there is some overlap between the grounds, I deal with each parties' submission on all grounds in turn, before setting out my overall analysis and conclusion.

The Parties' cases

The PSA's case

167. In relation to *Ground 3* the PSA submits that the Committee provided no clear reasoning for its view that the facts were at "the lower end of the spectrum". That was a complete mischaracterisation. The Committee failed to have regard to a number of factors, which increased the seriousness of the conduct.

(1) The conduct could have constituted the offence of sexual assault.

(2) The victims found themselves isolated; in the case of Person 2 that isolation was engineered by the Registrant for the sole purpose of sexually motivated behaviour.

(3) Person 2 was particularly vulnerable.

(4) In the case of Person 1, the conduct continued even after she had made it quite clear that the behaviour was unacceptable.

(5) The conduct all occurred when COVID social distancing restrictions were in place.

As these are matters of inference, the Court is able to consider these matters. The case of A*runachalam* establishes the gravity which should be afforded to cases of sexual misconduct. There was an obvious and recognised risk that the Registrant would offend against further victims. The Committee did not adequately consider the importance of maintaining confidence in the profession.

168. In relation to *Ground 4* the PSA submits that the Committee was wrong to identify, as mitigating factors, "remorse and insight" and "steps taken to avoid repetition". In fact there was no remorse or insight. It is clear from the Registrant's statement of 11 January 2023 that he remained oblivious or indifferent to the feelings of the victims. The only "step taken to avoid repetition" was his statement that he would "not put himself in

such a position where such allegation can be made" . That wholly failed to recognise that the cause of the incidents and the consequences was his own acting on his own sexual desires. The only mitigating factors were his previous good character and very limited remedial action, amounting to a professional course. These should have been afforded minimal weight. The good character was no more than the absence of an aggravating factor, given the repeated behaviour. It did not diminish the seriousness of the behaviour.

169. Further the Committee provided no reasoning as to how it had weighed the aggravating and mitigating factors. Here, the aggravation far outweighed any mitigation. Coherent reasoning is required in this regard.

170. In relation to *Ground 5* the PSA submits that the Committee's finding that there was no evidence of harmful deep-seated personality or professional attitudinal problems was perverse. First there was the Registrant's initial response to the allegations. The PSA refers to what the Registrant said at the initial disciplinary hearing. Secondly, he had shown no insight, remediation or remorse and continued to blame the victims. Thirdly there was a risk that he would continue to sexually assault junior female colleagues at the workplace.

171. A professional's reaction to the discovery of their misconduct is an important part of an assessment of their attitude. The Committee paid no regard to this factor. The Committee provided no reasoning as to why it concluded that the Registrant did not have a deep-seated attitudinal problem.

172. In relation to *Ground 6* the PSA submits that the only reasons given by the Committee for its conclusion that erasure would be disproportionate were, first, the conduct was at the "lower end of the spectrum" and, secondly, that there was no evidence of a deep-seated attitudinal problem. For the reasons given in respect of Grounds 3 and 5, the Committee was wrong to rely on these factors. A generalised assertion that erasure would be disproportionate is insufficient and wrong: see paragraph 32(6) above. The Committee did not refer to the Sanctions Guidance on erasure. Here there are present five of the seven factors set out at paragraph 6.34 of the Sanctions Guidance (see paragraph 14 above) leading to a conclusion of fundamental incompatibility with being a dental professional and supporting erasure. The Committee's lack of analysis and conclusion was irrational and wrong.

173. In relation to *Ground 7* the PSA submits that, on a proper assessment, the nature and seriousness of the persistent conduct, against three victims, combined with the lack of any insight whatsoever meant that erasure was the only appropriate sanction. There was no evidence to support the Committee's finding that suspension might allow time for the Registrant to develop further insight. There was no emerging insight and no substantive steps taken to remediate.

174. Where a dentist sexually assaults three junior colleagues in the workplace and then shows no remorse, insight or acceptance of his behaviour, having initially accused the victims of colluding against him, such conduct is fundamentally incompatible with continued registration. This was potentially criminal behaviour which significantly undermines the public's confidence in the profession. The imposition of any sanction other than erasure was wrong.

The GDC's case on sanction

175. In relation to Ground 3 the GDC submits that, in addition to the points raised by the PSA, the Committee failed to take account of the inherent seriousness of cases involving sexual misconduct and of the repeat conduct suggesting a pattern of behaviour. However, on the issue of criminal offences, the GDC points out that here the Committee made no findings about what the Registrant reasonably believed as to the complainants' consent – a necessary requirement to establish the offence of sexual assault.

176. In relation to *Ground 4* the GDC disagrees with the PSA to the extent that in general good character can be weighted against evidence of repeated misconduct. On the facts of this case, it would have been open to the Committee to conclude that good character was a mitigating factor. However, here, the Committee did not properly assess whether good character was a mitigating factor nor weigh it properly int the balance (for or against the Registrant).

177. In relation to *Ground 5* the GDC identifies two further factors supporting a finding of a deep-seated attitudinal problem; the inherent seriousness of the misconduct and the large degree by which it fell below the standards to be expected of a registered professional; and the fact that similar behaviour was repeated on three occasions, suggesting a habitual pattern of misconduct.

178. In relation to *Ground 6* the GDC does not consider that the two mitigating factors were not relevant when considering the possibility of erasure. All mitigating and aggravating factors are relevant when considering each of the available sanctions. Here the Committee's error was to focus only on those two factors and not others.

179. In relation to *Ground 7* the stance of the GDC before a tribunal can be quite strong evidence of where on the scale of offending a reasonable and informed member of the public would place the registrant's conduct. In the present case, the GDC sought erasure before the Committee. The assessment of the victims at the time is also of potential relevance. Here the immediate and instinctive reaction of one of the victims Person 1 is that the Registrant could get struck off for what he had done. Whilst the fact that suspension might allow a registrant time to develop further insight can be a legitimate factor to take into account, in the present case the evidence did not support such a conclusion.

The Registrant's case on sanction

180. In relation to *Ground 3* the Registrant submits that, on the issue of seriousness, the Committee expressly stated that it accepted the submissions which had been made to it on behalf of the Registrant. Those submissions were that erasure would not be proportionate, and in particular that not every touching, even if sexually motivated, requires erasure. They included express reference to paragraph 6.34 bullet 5 of the guidance on erasure and its terms and the discretionary nature there referred to. Thus the Committee accepted this. The most serious of the Charges was the touching of the breast of Person 2 (Charge 5c). This was no more than over clothing and was momentary, and is to be viewed in the context of the consensual massage and consensual hug. In relation to touching of Person 1's thighs, that has to be considered

in the context of the inadvertent and momentary placing of the legs in a confined space. Touching Person 3's arms was clearly at the lower end of the spectrum.

181. As regards the matters referred to by the PSA, first, the fact that the matters might be capable of amounting to criminal offences is irrelevant. Secondly, the allegation of him having isolated the complainants is not made out. In the case of Person 1, the events took place whilst the patient was in the chair. In the case of Person 2, they were doing a shift during COVID lockdown and the surgery was being staffed to deal with patients. In the case of Person 3, she was in the decontamination room when the Registrant approached her. Thirdly, Person 2 was able to manage her medical condition and the Registrant was not aware of her personal circumstances. The misconduct was not brought about by those matters, which do not go to the seriousness of the misconduct. Fourthly, in relation to Person 1, there was no further misconduct after she had told the Registrant he could be struck off. Fifthly, the events concerning Person 1 did not occur during COVID, and in any event that is not relevant to seriousness.

182. The gravity of sexual misconduct depends on the particular facts. There is no general principle that all sexual misconduct is grave. The facts of *Hanson* were different. *Arunachalam* is not authority for the proposition that any and all sexual misconduct is always so serious as to require erasure. Rather such misconduct *may* lead to erasure, thereby acknowledging that there is a spectrum of such misconduct.

183. Finally, there was no evidence that there was an obvious risk that the Registrant would offend against further victims. Rather the evidence was that he had worked with many female members of staff. There had been no incidents before or after these events. Rather the findings were out of character.

184. In relation to *Ground 4* the Registrant submits that the Committee did set out in the Decision the mitigating and aggravating factors. Whilst there is no express balancing of those identified, consideration of the Decision as a whole reveals a proper approach to the exercise of determining the sanction.

185. In relation to *Ground 5* the Registrant submits that there is no basis for asserting that the Committee was wrong to conclude that he did not have a deep-seated attitudinal problem. Neither his initial reaction, nor any lack of insight establish a deep-seated attitudinal problem. Moreover there was no evidence that he would continue to sexually assault junior female colleagues. To establish such a deep-seated attitudinal problem requires consideration of whether the unacceptable conduct is driven by some other aspect of culpability. What he said was not said at the GDC Disciplinary hearing, but rather said earlier in the practice internal disciplinary hearing. What he said then concerned the effect of the discussions held between the complainants. This contention was also advanced before the Committee as part of this defence, as he was entitled to do, albeit not in the emotive way in which the Registrant had expressed it in his disciplinary interview.

186. In relation to *Ground 6* the Registrant submits that since the PSA case is predicated on its Grounds 3 and 5, and since these are unfounded, so is Ground 6. Here, unlike the position in *Stone*, the Committee did grapple with the seriousness of the case. Here there was consideration of the objective features. The Committed did consider the Sanctions Guidance. Further, as to the factors identified at paragraph 6.34 of the Sanctions Guidance, first, their presence does not *necessarily* lead to a conclusion of

fundamental incompatibility. Secondly and in any event, as to the factors, here there was no evidence of serious harm, nor of a continuing risk of serious harm. The fact of the finding being of a sexual nature must be considered in the context of the assessment of the seriousness of that conduct. There was a finding of insight, albeit limited. The offer to undertake a boundaries course militates against a persistent lack of insight.

187. In relation to *Ground 7* the Registrant submits that every case must depend on its own facts. The Registrant was entitled to deny the allegation. There was evidence to support the Committee's conclusion that time might enable the Registrant to develop further insight and to fully remediate. He had already taken steps to attend courses and was willing to attend a boundaries course.

188. Overall, it cannot be said that the decision to suspend the Registrant was wrong.

Discussion and conclusion

189. The starting point for my consideration of the issue of sanction is the approach set out in paragraph 32(1) above and the supervisory role of the Court in an appeal under section 29, as set out in paragraph 32(2) above. In the present case, while the PSA has helpfully sought to identify distinct grounds of appeal, arising from suggested errors made by the Committee, I will address the points raised compendiously in Grounds 3 to 6. Ground 7 is a general overall submission.

Inadequacy of reasoning

190. There are number of aspects of the Committee's reasoning and analysis which are inadequate. First, the Committee made a generalised assertion that erasure "would be disproportionate". It did not expressly refer to or set out or address the relevant guidance on erasure, and in particular the factors listed at paragraph 6.34 of the Sanctions Guidance. Secondly, the Committee did not engage in an assessment of the relative weight to be attached to the aggravating and mitigating factors. Rather the Committee merely listed the factors, without more. Thirdly, the Committee gave little or no explanation for its important conclusion that there was no evidence that the Registrant has a deep-seated attitudinal problem. In particular the Committee failed to address the Registrant's initial reaction to the allegations in the course of the disciplinary hearing on 4 September 2020. At that hearing the Registrant had accused the complainants, in vehement terms, of lying and of conspiring against him. (The Registrant was not represented at that hearing and I note that, for that reason, at the fact finding stage, the Legal Adviser advised the Committee to attach limited weight to that hearing).

Sexual misconduct and seriousness

191. First, sexual misconduct is always serious misconduct. Secondly, and without detracting from the serious nature of all such misconduct, sexual misconduct nevertheless covers a very wide range of misconduct. Paragraph 73 of Appendix A to the Sanctions Guidance refers to a range *from* criminal convictions *to* sexual misconduct with colleagues. In this regard I consider that "criminal conviction" does not include conduct which "is or might be capable of amounting to a criminal offence". Appendix A proceeds on the basis that sexual misconduct with a colleague is at a different end of the range from a conviction for a sexual offence. Paragraph 75 of

Appendix A distinguishes "serious sexual misconduct". Whilst the Registrant's conduct in the present case might, in principle, have amounted to the commission of the offence of sexual assault, it is not possible nor appropriate to proceed on the basis that it did so, given the question of the Registrant's own reasonable belief.

192. Secondly, as a matter of principle, it is not the case that any sexual misconduct necessarily leads to the sanction of erasure. Whilst each case falls to be determined on its facts, it is clear from *Arunachalam* (and the Sanctions Guidance), that there is no principle that, in all sexual misconduct cases, erasure should follow or even that it should follow in all but exceptional circumstances.

193. Thirdly, considering the sexually motivated conduct in the present case, in the case of Person 3 the squeezing and rubbing of the outside of her arms was at the lower end of spectrum of sexual misconduct. Similarly in relation to Person 1, the sexual misconduct was the putting of his arms around her waist. This was preceded by the inadvertent placing of his legs around her legs and the inappropriate, but not sexually motivated, placing of his hands on her thighs which itself was momentary. This conduct too fell at the lower end of the spectrum.

194. The most serious misconduct was undoubtedly the touching of Person 2's breasts. The question is whether this takes the overall conduct to an altogether higher level. The relevant circumstances were these. First, the touching was over the clothes and appeared to be momentary. Person 2's own evidence was that the touching did not last long, that the Registrant immediately coiled back once she objected and was very apologetic and distressed and it appeared he had got caught up in the moment. She felt sorry for him. Secondly, as regards the events which preceded it, whilst I have found that the massage, as well as hug, was sexually motivated, the Committee found that Person 2 consented to the massage and her own evidence was that she agreed to the hug. Whilst the fact that I have found that the massage was also sexually motivated is an additional factor, I do not consider that it significantly aggravates the seriousness of the conduct towards Person 2, given the finding of consent. Overall, whilst the touching of the breast was clearly more serious, I consider that, given the whole range of sexual misconduct covered by the Sanctions Guidance, it did not amount to "serious" sexual misconduct and was at or towards the lower end of the spectrum.

Insight, remediation and the Sanctions Guidance on suspension

195. As regards insight and remediation there is some force in the PSA's submissions on this. However, whilst the Committee did refer to insight as a mitigating factor, throughout the determination at stage 2, it did correctly emphasise and take into account that the insight was only limited and that the Registrant's behaviour had not been fully remediated and further identified that there was a risk of repetition. Moreover and significantly, the Sanctions Guidance at paragraph 6.28 provides that, where there is absence of insight and risk of repetition, suspension is warranted. In my judgment, these factors do not, of themselves, lead to a conclusion that only erasure is sufficient.

Erasure

196. I address first "deep-seated attitudinal problems". First, in my judgment, the Committee were entitled to conclude that this was not established. As is implicit in the terms of paragraph 6.28 itself, lack of insight and failure to remediate do not of

themselves establish an underlying deep-seated personality or professional attitudinal problem; that is something different. The Registrant's response at the disciplinary hearing in September 2020 was an immediate and emotional response and does not assist in deciding whether he has or had a deep-seated problem. Neither his initial reaction, nor any lack of insight establish a deep-seated attitudinal problem. Moreover there was no evidence that he would continue to sexually assault junior female colleagues. To establish such a deep-seated attitudinal problem requires consideration of whether the unacceptable conduct is driven by some other aspect of culpability. Secondly, and in any event I note that, even if there is evidence of deep-seated attitudinal problems, this "might", but not necessarily will, make erasure appropriate (see Sanctions Guidance paragraph 6.28).

197. Secondly, as regards the Sanctions Guidance, the Committee did not expressly refer to the relevant guidance on erasure. However Mr Micklewright in his submissions to the Committee went through these provisions in detail. Ms Felix referred to the Guidance in her submissions to the Committee and in particular paragraph 6.34. The Committee "noted the option of erasure" and stated that it accepted Ms Felix's case. Whilst this could have been more clearly expressed, there is no reason to think that the Committee did not consider the guidance on erasure and in particular paragraph 6.34. Moreover, since the Committee was going "up through the levels of sanction" and decided that suspension was appropriate, it may have considered that there was no reason to assess erasure in detail.

198. Thirdly, as regards the guidance on erasure itself, paragraph 6.30 emphasises that erasure "should only be used" as a last resort i.e. where there is no other means of protecting the public and/or maintaining confidence in the profession.

199. As to the factors enumerated in paragraph 6.34, first, in relation to "serious harm", whilst the Committee listed "actual harm (both mentally and physically)" as an aggravating factor, it is not clear what it was referring to. (In the course of submissions on sanction, apart from accepting that the sexual touching caused no physical harm, the GDC said nothing further about actual harm). There was some physical harm to Person 2 in the bruising to her arms, which arose from the massage. This is accepted not to amount to serious harm. As regards psychological harm, neither Person 1 nor Person 3 gave any evidence of an adverse emotional impact upon them. Indeed Person 3 positively asserted that the incident had not impacted her life. There was evidence of psychological harm to Person 2 against a background of a history of fear and domestic abuse. This was serious for her. This evidence was given in the context of her evidence about the massage, which the Committee ultimately found to be consensual. In my judgment, overall, whilst there was harm, it was not harm of the most serious kind. Secondly as regards a continuing risk, the Registrant indicated in his evidence that he now realised that such a massage was not appropriate, even if consensual. In any event, significant risk of repeating behaviour is identified as a factor warranting suspension. Thirdly, as to "convictions or findings of a sexual nature", this was not a case of conviction. Whilst there were such "findings", in my judgment, in view of the approach to sexual misconduct set out in paragraph 191 and 192 above, it cannot be the case that *any* finding of sexual misconduct on its own warrants erasure. This factor does not override the approach set out in those paragraphs. As to persistent lack of insight, the Registrant had undertaken courses and offered to undertake a "boundaries course". This militates against the suggestion that his limited insight was continuing.

200. Moreover, and importantly, under paragraph 6.34, the ultimate question is "fundamental incompatibility" with being a dental professional; the presence of one or more of the enumerated factors "may" (but does not necessarily) point to such a conclusion. Here most of the factors relied upon by the PSA to support such a conclusion are factors which in any event also support suspension. Moreover, undermining public confidence in the professions is not synonymous with fundamental incompatibility. Paragraph 6.28 of the Sanctions Guidance provides that *suspension* might be an appropriate sanction in order to protect public confidence. The Committee did not suggest that the factors which it found warranting suspension did not undermine public confidence in the profession. In my judgment whilst the misconduct here was undoubtedly serious, it was not fundamentally incompatible with being a dental professional and an order of suspension was sufficient to maintain public confidence in the profession. The serious and aggravating features of the Registrant's conduct were appropriately addressed by an order for suspension under paragraph 6.28.

Conclusion on sanction

201. In my judgment, the Committee's approach and reasoning on the sanction contained some errors. However, in view of the nature of the sexual misconduct in this case, the Committee was entitled to conclude that suspension was the appropriate sanction. I conclude that the Committee's reasoning and ultimately its conclusion did not contain errors of principle nor fall outside the bounds of what the Committee could properly and reasonably decide. For these reasons I conclude the decision to impose a suspension order of five months was not wrong nor unjust because of any serious procedural or other irregularity.

Conclusion on Section 1

202. As regards the Registrant's appeal, in the light of my conclusion at paragraph 163 above, each of his grounds fails and his appeal is dismissed.

203. As regards the PSA appeal, whilst I have concluded that the Committee erred in finding that Charge 6b in relation to Charge 5a was not proven (Ground 2) and that finding cannot stand, in view of my conclusion in paragraph 201 above, I conclude that the Decision (i.e. a five month suspension order/direction) was neither wrong, nor unjust because of any serious procedural or other irregularity. Save to the extent indicated in paragraph 133 above, this appeal is dismissed. I will hear argument on the appropriate order to take account of my finding as to Charge 6b in relation to Charge 5a.

SECTION 2: THE TAKING EFFECT OF THE SUSPENSION DIRECTION.

Introduction

204. The final issue is whether the five month suspension direction will take effect from the conclusion of the appeal or whether the period during which the Registrant has been suspended pursuant to the Immediate Suspension Order should be deducted from the five months of the suspension direction with the effect that he is no longer suspended and is free to return to practice.

205. Until the recent decision of Mr Justice Ritchie in *Aga v General Dental Council* [2023] EWHC 3208 (Admin) (the "*Aga* case"), case authority supported the former position:

the suspension direction takes effect from the determination of the appeal and there is no deduction for time spent suspended under an immediate suspension order.

206. However in *Aga*, Mr Justice Ritchie decided that there is only one overall suspension which starts when the immediate suspension order starts and which expires at the end of the period of time specified in the suspension direction. It is wrong in law to make a suspension direction and an immediate suspension order which have the effect of increasing the length of the suspension just because the registrant appeals. The suspension direction is not to be served consecutively to the duration of the immediate suspension order.

207. The question for me is whether I agree with this analysis and whether there is powerful reason for me to depart from the decision in *Aga*. This raises an important point of principle, as it applies to many other professional regulatory regimes including those relating to doctors, nurses and others. It was first raised at the hearing in January but with agreement of parties, adjourned so as to hear full argument on important point. I have received very detailed written and oral argument concerning this issue, involving a wide ranging inquiry into a range of statutory and other materials.

The parties' contentions

208. Ms Felix submits that the analysis in *Aga* is correct and I am bound to follow it, as there is no good reason not to do so. On the basis of *Aga*, the Committee fell into error in drafting the suspension direction when at the same time it imposed an immediate order of suspension and that this Court should set aside the direction for suspension for five months and in its place direct that the Registrant shall be suspended for a total of five months, from which the duration of suspension already served by the Registrant under the Immediate Suspension Order shall be deducted.

209. Mr Tankel submits that, on the true construction of the relevant statutory provisions, it is clear that the period of suspension under the Immediate Suspension Order does not fall to be deducted from the period of the Suspension Direction – that the two "orders" are distinct; that the analysis in *Aga* is plainly wrong and for that reason I am not bound to follow the decision in that case.

210. I approach this issue as follows. First, I set out the relevant statutory provisions. Secondly, I refer to cases before *Aga* which touched upon this issue. Thirdly, I address the judgment in *Aga*. Fourthly I set out my analysis of the statutory provisions and finally I address the analysis in *Aga*.

Relevant Statutory Provisions

211. In this section I set out further relevant provisions of the Act and other relevant legislative background.

Section 27B

212. Section 27B(6) provides as follows:

> "(6) If a Practice Committee determine that a person's fitness to practise as a dentist is impaired, they may, if they consider it appropriate, direct—
>
> (a) (subject to subsection (7)) that the person's name shall be erased from the register;
>
> (b) that his registration in the register shall be suspended during such period not exceeding twelve months as may be specified in the direction;
>
> (c) that his registration in the register shall be conditional on his compliance, during such period not exceeding three years as may be specified in the direction, with such conditions specified in the direction as the Practice Committee think fit to impose for the protection of the public or in his interests; or
>
> (d) that he shall be reprimanded in connection with any conduct or action of his which was the subject of the allegation."
>
> (emphasis added)

Section 27C

213. Section 27C provides as follows:

> "27C – Resumed hearings
>
> (1) Where a Practice Committee have given a direction under section 27B(6)(b) or subsection (2)(d) or (3) of this section that a person's registration should be suspended, they may direct—
>
> (a) that the suspension shall be terminated;
>
> (b) that the current period of suspension shall be extended for such further period, specified in the direction and not exceeding twelve months, beginning with the date on which it would otherwise expire;
>
> (c) that the suspension shall be terminated and the person's registration in the register shall be conditional on his compliance, during such period not exceeding three years as may be specified in the direction, with such conditions specified in the direction as the Practice Committee think fit to
>
> impose for the protection of the public or in his interests; or
>
> (d) that the person's registration in the register shall be suspended indefinitely, if—
>
> (i) the period of suspension will, on the date on which the direction takes effect, have lasted for at least two years, and

(ii) the direction is made not more than two months before the date on which the period of suspension would otherwise expire."

(emphasis added)

Section 29

214. Section 29(1)(b) creates a statutory right of appeal against a decision of a PCC under section 27B giving a direction for erasure, suspension, or conditional registration. Section 29(1B) provides that the time limit for such appeal is 28 days beginning with the date on which notification of the decision under appeal was served. Section 29(3) provides that the powers of the High Court on appeal are:

> "(a) dismiss the appeal,
>
> (b) allow the appeal and quash the decision appealed against
>
> (c) substitute for the decision appealed against any other decision which could have been made by the Professional Conduct Committee, the Professional Performance Committee or (as the case may be) the Health Committee, or
>
> (d) remit the case to the Professional Conduct Committee, the Professional Performance Committee or (as the case may be) the Health Committee to dispose of the case under section 24, 27B, 27C or 28 in accordance with the directions of the court,
>
> and may make such order as to costs (or, in Scotland, expenses) as it thinks fit."

Section 29A

215. Section 29A provides as follows:

> **"29A.— Taking effect of directions for erasure, suspension, conditional registration etc.**
>
> (1) This section applies to—
>
> (a) a direction for erasure given by the Professional Conduct Committee under section 24(3);
>
> (b) a direction for erasure, suspension, conditional registration or variation of or addition to the conditions of registration given by a Practice Committee under section 27B or 27C; and
>
> (c) a direction for conditional registration given by the Professional Conduct Committee under section 28(6)(b).
>
> (2) A direction to which this section applies shall take effect—

(a) where no appeal under section 29 is brought against the decision giving the direction within the period of time specified in subsection (1B) of that section, on the expiry of that period;

(b) where such an appeal is brought but is withdrawn or struck out for want of prosecution, on the withdrawal or striking out of the appeal; or

(c) where such an appeal is brought and is not withdrawn or struck out for want of prosecution, on the dismissal of the appeal.

(4) In this section –

(a) a reference to a direction for suspension includes a reference to a direction extending a period of suspension and a direction for indefinite suspension." (emphasis added)

Section 30

216. Section 30 provides as follows:

"30. Orders for immediate suspension and immediate conditional registration

(1) On giving a direction for erasure or for suspension under section 24(3), section 27B(6)(a) or (b) or section 27C(2)(d) or (3) in respect of any person, the Practice Committee giving the direction, if satisfied that to do so is necessary for the protection of the public or is otherwise in the public interest, or is in the interests of that person, may order that his registration shall be suspended forthwith in accordance with this section.

(2) [deals with immediate conditional registration]

(3) Where, on the giving of a direction, an order under subsection (1) or (2) is made in respect of a person, his registration in the register shall, subject to subsection (6), be suspended or made conditional, as the case may be, from the time when the order is made until the time when—

(a) the direction takes effect in accordance with section 29A;

(b) an appeal under section 29 against the decision giving the direction is determined under section 29(3)(b) or (c); or

(c) following a decision on appeal to remit the case to a Practice Committee, the Practice Committee dispose of the case.

(4) Where a Practice Committee make an order under subsection (1) or (2), the registrar shall forthwith serve on the person in respect of whom it is made notification of the order and of his right to make an application under subsection (7)

…

(7) A person in respect of whom an order under subsection (1) or (2) is made may apply to the court for an order terminating any suspension imposed under subsection (1) or any conditional registration imposed under subsection (2), and the decision of the court on any such application shall be final.

(8) In subsection (7) "the court" —

(...)

(c) in the case of any other person, means the High Court in England and Wales." (emphasis added)

217. Further there are provisions for *interim* suspension orders. These are orders for suspension during the PCC investigation and pending a final hearing by PCC. They are to be distinguished from an immediate suspension order under section 30 made after a suspension direction.

Section 33

218. Section 33(3) and (4) provides:

"(3) Where any such direction as is mentioned in section 27C(1)(b)4, (c) or (d), (2)(b) or (d), (3) or (5)(c) is given while a person's registration is subject to conditions or suspended by virtue of a direction under this Part, his registration shall continue to be conditional or suspended throughout any period which may intervene between the time when (but for this subsection) his registration would cease to be conditional or suspended, as the case may be, and the time when—

(a) the direction takes effect in accordance with section 29A;

(b) an appeal under section 29 against the decision giving the direction is determined under section 29(3)(b) or (c); or

(c) following a decision on appeal to remit the case to a Practice Committee, the Practice Committee dispose of the case.

(4) If, on the determination of an appeal under section 29, a direction extending the current period of suspension or conditional registration for a further period takes effect after the time when (but for subsection (3)) the current period of suspension or conditional registration would have ended, that further period shall be treated as having started to run at that time." (emphasis added)

Guidance

219. Further relevant provisions of the Sanctions Guidance include the following:

> "6.27. A Suspension Order takes effect 28 days from the date the notification of the decision is served on the registrant (there is a statutory appeal period of 28 days). The PCC should therefore consider whether it is necessary, in order to protect patients and members of the public, to impose an immediate suspension in addition to the substantive order (see paragraphs 6.35- 6.38)
>
> …
>
> 6.37 When the PCC imposes suspension or erasure, it may also impose immediate suspension. This means that the registrant is suspended straightaway. The registrant is subject to the immediate suspension until either the appeal period expires or until any appeal is disposed of. If the sanction is not changed on appeal, the substantive suspension or erasure **then** comes into effect." (**emphasis** added)

Some legislative background

220. The Medical Act 1969 introduced the power of suspension into healthcare regulation for the first time. Until that point, erasure had been the only available sanction. At the same time, the power to make an order for immediate suspension was created. Section 15 of the Medical Act 1969 amended section 36 of the 1956 Act.

Other regimes for professional regulation

221. There are similar provisions for sanctions, and for immediate suspension orders in particular, in the legislation governing regulation of other provisions, including:

- For doctors, in the Medical Act 1983 for the GMC;
- For nursing, in the Nursing and Midwifery Order 2001, for the Nursing and Midwifery Council ("NMC");
- For pharmacists, in the Pharmacy Order 2010 for the General Pharmaceutical Council;
- For opticians, in the Opticians Act 198, for the General Optical Council.

222. In the case of the Nursing and Midwifery Order, the regime is the same materially as that for the GDC. There is a power of suspension with a cap of 12 months on the initial suspension period. Article 31(2) makes provision for an immediate order (called "an interim suspension order"), but additionally provides for the maximum period of duration of such an immediate order of 18 months.

Criminal appeals

223. In the case of appeals against a criminal sentence, initially the legislation provided that time spent in custody would not count towards sentence. Following the Donovan Report of 1965, in 1966 Parliament reversed the position. Now section 29 Criminal Appeal Act 1968 expressly provides that time spent in custody pending determination of an appeal does count towards the existing sentence. This is subject to a power of the Court of Appeal to give a direction to the contrary, for example, in the case of frivolous appeals.

The case law before *Aga*

224. The relationship between a substantive suspension direction and an immediate suspension order has been considered in a number of cases, before *Aga*. The following cases considered the position in relation to an immediate suspension order.

225. In *R (on the application of Ghosh) v General Medial Council* [2006] EWHC 2743 (Admin), at §27 Bean J commented on the effect of an immediate suspension order under the Medical Act 1983 as follows:

> "…I said at the beginning that the Fitness to Practise Panel's decision, given on 13 September 2005, was that Dr Ghosh would be suspended from practice for 12 months. I was dismayed to learn from Miss Rose that the effect of sections 38 and 40 of the Act of 1983 is that the period of suspension so far, pursuant to the order for immediate suspension under section 38(1), does not count towards the 12 months' suspension ordered by the Fitness to Practise Panel. This is in contrast to, for example, appeals by convicted prisoners to the Court of Appeal (Criminal Division) where time spent in custody pending appeal normally counts, though the court has a discretion (rather rarely exercised) to disallow it. If it is indeed the case that where a doctor, whose immediate suspension under section 38(1) has been ordered and who appeals to the High Court against the order for suspension imposed by the Fitness to Practise Panel, may be adding several months (or in this case, because of the unfortunate length of time it has taken to list the case, a year) to the period of suspension ordered by the Panel, this ought to be made widely known. Those responsible for keeping the provisions of the Medical Act under review ought perhaps to consider whether it should be made a matter of discretion either in the Fitness to Practise Panel or in this court, or both, as to whether the period of suspension, served pursuant to section 38(1), should count towards the substantive period of suspension ordered by the Panel. Unfortunately I do not have any power to do anything about it in this case." (emphasis added)

226. In *Kamberova v Nursing and Midwifery Council* [2016] EWHC 2955 (Admin) Dingemans J considered the interaction between an immediate suspension order and a suspension direction. There was a suspension order of 12 months. In the event, the judge allowed the appeal on the substantive sanction and remitted the issue to the

Committee. He went on to observe as follows ("interim" is a reference to an immediate suspension order):

> "44. I should note that in its determination the Committee also imposed an interim suspension order on Ms Kamberova pending the hearing of this appeal, the effect of which is that if I had dismissed the appeal today without more Ms Kamberova would have served a period of suspension of 12 months from today's date even though she has been suspended ever since the Committee's determination and, as appears from above, even before that date.
>
> 45. In these circumstances, the Committee when redetermining the issue of sanction which I remit for them to determine, should have regard both to the period of interim suspension before the Committee's determination in December 2015, and the period of suspension pending this appeal. It would be unfortunate if the effect of Ms Kamberova's success on appeal on the issue of sanction was to increase the overall length of the period of suspension."

227. In *Hill v General Medical Council* [2018] EWHC 1660 (Admin) at §63, Kerr J commented:

> "The rules also have the unfortunate consequence that time on suspension between the determination of sanction and the outcome of any appeal does not count towards the overall period of suspension. This means that the maximum of 12 months is often little more than fiction. An attempt is then made to counterbalance the unfairness of that rule which sets a price on appealing. The doctor can apply to this court to lift the temporary suspension until the appeal is heard. That would be well and good if it did not take several months for such an application to be determined."

228. The Scottish case of *Burton v The Nursing and Midwifery Council* [2018] CSIH 773 was an appeal against a 12 months suspension order. The Inner House of the Court of Session dismissed the appeal and went on to comment in a postscript to the judgment as follows ("interim" is a reference to an immediate suspension order):

> "32. If a nurse wishes to appeal against a decision of the Nursing and Midwifery Council, an interim period of suspension is imposed, ending upon the resolution of the appeal or a period of 18 months, whichever is earlier. If the appeal is unsuccessful, the interim suspension is followed by the original sanction, which might be 12 months suspension (as in the present case).
>
> 33. While accepting that the rationale underlying such an approach includes the need to protect the public, we consider that there may be an appearance of unfairness, for two reasons. First, time spent on interim suspension does not count towards the

> period of suspension ultimately imposed as a sanction; and secondly, a nurse with a valid appeal point may be discouraged from making an appeal on the view that doing so would simply prolong the unwanted absence from work. We note that in other areas of the law, where an interim sanction is imposed pending the completion of procedural steps, it is usual to have the interim period count towards the period of the final sanction, provided first, that the two are similar in nature and secondly, that the interim period is not taken into account when the final sanction is imposed. The underlying principle is that reasonable procedural steps taken by a party, such as a right of appeal, should not have an effect on the total sanction that is imposed.
>
> 34. To counter these concerns, the Nursing and Midwifery Council might wish to consider altering the relevant part of the decision letter (page 28 in the present case) to make it clear (i) that the period of interim suspension would not exceed 18 months (unless there was an extension); and also (ii) that in terms of articles 30 and 31 of The Nursing and Midwifery Order 2001 it is always open to a nurse during suspension to seek review of interim and substantive suspension orders, on the basis of such additional information thought to be relevant and appropriate. For example, the nurse might rely on the completion of a training course undertaken following upon the disciplinary hearing and decision. In that way, a nurse previously thought to have demonstrated a lack of certain skills, or a lack of insight into her situation, might be able to persuade the committee that she had developed the skills or acquired a greater appreciation of her circumstances; that she had achieved what the professional tribunals refer to as "remediation"; and that there was no need for further suspension.
>
> 35. Consideration might also be given to the question whether time spent on interim suspension should count towards any period of suspension imposed as a sanction."

229. The further Scottish case of *W v Health and Care Professions Council* [2022] CSIH 472022 SLT 1302, was an appeal against the imposition of a 12 months suspension order. There was an "interim" suspension order (i.e. immediate) imposed subject to a maximum period of 18 months. The appellant's grounds of appeal included the contention that the period of the suspension order should be reduced to take account of the period of the immediate suspension served pending the appeal. The Inner House of the Court of Session refused the appeal, holding at §36 inter alia that it was not open to the court to reduce the length of the suspension to take account of the time taken for the appeal to be determined. The appellant relied upon the observations of the Court in *Burton* and contended that on any view the period should be reduced to reflect the time he had been suspended pending determination of the appeal. The Council submitted (§27 of the judgment):

> "No deduction should be made from the period of suspension in respect of time spent pursuing this appeal. The statutory structure

> did not envisage any such deduction and it was not for the court to innovate on the terms of the 2001 Order. An interim order and a final sanction had different purposes and the distinction between the two should not be blurred by deducting from the final suspension any period arising from an interim order. The invitation of the court in Burton to consider whether there was a need for amendment of the equivalent disciplinary scheme for nurses and midwives had not been taken up. In any event it could not be said that the panel's decision was plainly wrong when it could not have known, when imposing the sanction, whether its decision would be appealed or, if so, how long it would take for the appeal to be determined." (emphasis added)

230. The Court accepted the Council's case and concluded on this issue at §36:

> "Finally, we are not persuaded that it is open to us to reduce the length of the suspension to take account of the time taken for the appeal to be determined. Article 29(11)(b) of the 2001 Order is clear that where an appeal has been taken, no order by the panel takes effect until the appeal has been disposed of. Taken on its own, that provision affords a protection to a practitioner who decides to challenge the sanction that a panel has imposed. Where, however, the imposition of a suspension order under article 29 is accompanied by the making of an interim suspension order under article 31, the prospect arises of an aggregate period of suspension significantly in excess of 12 months."
> (emphasis added)

231. The Court then continued at §§37 and 38 on this issue as follows:

> " In a postscript to its opinion in *Burton v Nursing and Midwifery Council* (above), the court at paragraphs 32-35 observed that there might be an appearance of unfairness where a period of interim suspension did not count towards the period of suspension ultimately imposed as a sanction, and that a practitioner with a valid appeal point might be discouraged from pursuing an appeal because this would prolong her absence from work. The court suggested that consideration be given to the question whether time spent on interim suspension should count towards any period of suspension imposed as a sanction. So far as we are aware that suggestion has not been taken up, and it is apparent that the court in Burton did not regard it as open to it, as a matter of interpretation of an Order similar to the Order at issue in the present case, to find that all or part of the period of interim suspension ought to be deducted from the period of suspension imposed as a sanction.
>
> It is difficult to see any basis upon which the court could hold that the panel was plainly wrong to impose a 12 month period of suspension without a deduction for time taken to determine this appeal. The panel could not know at the time of imposition

> whether an appeal would be made or, if so, how long it would take for the appeal to be determined. It would have been impossible for the panel to fix a period which took account of the possibility of an appeal. We accept that the factors to be addressed by a panel in deciding whether to make an interim suspension order are not on all fours with those applicable to the ultimate decision on sanction. The Order could nevertheless have made provision for the former to be taken into account when the panel is deciding the latter. It does not do so and it is not for the court to innovate on the statutory scheme in this regard. In the course of the hearing it was suggested that the point could be raised by a suspended practitioner in an application for review under article 30(2) of the Order. However we did not hear full argument on this suggestion and we express no view upon it. (emphasis added)

232. In *Khan v General Pharmaceutical Council* [2016] UKSC 64 the Supreme Court was considering the ambit of a review hearing following suspension. The disciplinary committee had originally imposed the sanction of removal from the register (equivalent to erasure in a GDC case). In relation to that and the relationship between an interim suspension order and *an order for erasure/removal*, Lord Wilson stated, obiter dictum, at §22 as follows:

> "22. Under article 59 of the Order a direction for removal does not take effect pending any appeal but the committee exercised its power under article 60(2) to direct that Mr Khan's entry on the register "be suspended forthwith, pending the coming into force of the direction". The direction for removal has been under appeal ever since so Mr Khan's interim suspension has also continued ever since, in other words for almost three and a half years. The period of interim suspension would not count towards the period of five years after which Mr Khan could apply for restoration to the register because the latter would begin only on the date of removal." (emphasis added)

Interim suspension orders

233. There are two further cases, dealing with an *interim* suspension order (as opposed to an *immediate* suspension order). In *Ujam v General Medical Council* [2012] EWHC 683 (Admin) Eady J considered whether the sanction of suspension was wrong. There had been an interim suspension pending consideration of the complaints. At that time the GMC guidance was not to give undue weight to an interim sanction. At §5, Eady stated:

> "There was a period, I understand, between July 2009 and February 2010 when the Interim Orders Panel had suspended the Appellant, having regard to the disciplinary complaints outstanding against him, although I was told that little was known about the reasons for this and that, in any event, there had been no evidence before the Panel in December 2010 as to why that earlier period of suspension had been imposed. Ordinarily,

> it was submitted, it would be right to assume that the Interim Orders Panel was concerned with different criteria from those later addressed by the Fitness to Practise Panel. It would be concerned with its own perception as to any risk in the intermediate period, rather than with imposing a sanction for the reasons taken into account by the later Panel. It would be undoubtedly right that the suspension it imposed should be borne in mind as part of the background circumstances, but it would certainly be inappropriate to regard it as analogous to a period of imprisonment served while on remand (which would normally be deducted from any custodial term imposed by the sentencing court)."

234. In *Adil v General Medical Council* [2023] EWCA Civ 1261 there was a 6 months substantive suspension direction and also an immediate suspension order. The Court of Appeal did not address the effects of the immediate suspension order on the suspension direction. It did consider the interaction between an *interim* suspension order made pending the tribunal hearing and the substantive suspension direction. Commenting on the GMC guidance which suggested that the length of an interim order was not of much relevance to consideration of a final suspension order, Popplewell LJ stated as follows:

> "99. As a statement of general approach this is wrong and misleading. Insofar as the purpose of the sanction is to punish the practitioner or deter him from repetition of the conduct in question, it is a matter of common fairness that account should be taken of the punitive and deterrent effect of having already been deprived of the ability to practice for a period under temporary suspension orders. To that extent there is a direct analogy with sentencing for criminal conduct in which time spent in prison on remand is automatically credited against the sentence imposed for the offence.
>
> 100. It may also be appropriate to take into account periods of interim suspension insofar as the sanction is intended to mark the gravity of the offence so as to send a message to the profession and to the public. If, for example, there were a contrite practitioner with full insight into misconduct which was sufficiently serious to warrant suspension, the necessary message could be sent to the profession and the public by the tribunal making clear that the gravity of the misconduct needed to be marked by a suspension of a stated length; but that in fairness to the practitioner, he should be allowed to return to practice immediately, or within a lesser period, by reason of his already having been deprived of the ability to do so in the period prior to the imposition of the sanction. Messages depend upon the terms in which they are sent, and tribunals ought to be able to frame their decisions in language which enables the appropriate message to be sent whilst ensuring fairness to the practitioner in question.

> 101. However where, or insofar as, the suspension is required to return the practitioner to fitness to practise, and/or to mitigate the risk of further commission of the misconduct, and/or for the continued protection of the public from harm, periods of interim suspension may have little or no relevance. In those cases the length of suspension is tailored to what is necessary for the removal of impairment, removal of risk of repetition, and maintaining the safety of the public. Time already spent suspended from practice has no direct bearing on the length of a suspension which is necessary to achieve these objectives. To give credit for time away from practice under interim suspension orders in such cases would be likely to undermine those objectives in protecting the public from harm, promoting professional standards in the profession and promoting and maintaining trust in the profession.
>
> 102. This is consistent with the decision of Dingemans J, as he then was, in *Kamberova v Nursing and Midwifery Council* [2016] EWHC 2995 (Admin) and his reasoning at [36] and [40]. We were referred to the remarks made by Eady J *in Ujam v. General Medical Council* [2012] EWHC 683 (Admin) at [5] and Silber J in *Abdul-Razzack v General Pharmaceutical Council* [2016] EWHC 1204 (Admin) at [84]-[85]. They were saying no more than the particular purposes of professional sanctions mean that there is no universal analogy with periods of imprisonment served on remand. That point is well made. It does not mean, however, that time spent suspended under interim orders should generally be ignored, and it may be required to be taken into account in favour of the practitioner within the framework of the sanctioning objectives in the ways I have suggested."
>
> (emphasis added)

***Aga v General Dental Council*: the judgment of Ritchie J**

235. In *Aga*, the appellant dentist was suspended for 9 months. He appealed against the length of that suspension and sought termination of the immediate suspension order and appealed against the GDC's "interpretation and practice relating to the effect of the interaction between the immediate suspension order and the direction for suspension on the total duration of his suspension".

236. At §§20 to 26, Ritchie J set out the relevant statutory provisions. At §24 he stated:

> **"The default position on the "taking effect" of the suspension direction**
>
> 24. The next question is: when does any suspension direction take effect? Another slightly different question is when does it start? I raise the verbal difference here because, as will be seen, it will become important." (emphasis added)

He then set out parts of section 29A and continued:

> "25. It is clear from this section that the default position is that the "taking effect" of any suspension is automatically delayed by the 28 day appeal period during which the Appellant has the right to appeal. If the dentist does enter a notice of appeal then the default position is that the start of the suspension is delayed further until the end of the appeal. Thus, without another order by the PCC, any dentist can continue practising as a dentist, despite the suspension direction, for 28 days after the PCC's decision and if the dentist enters a notice of appeal, the taking effect of the suspension is further delayed for an indeterminate period until the appeal is withdrawn or heard." (emphasis added)

He continued:

> "**The PCC's power to impose an immediate start to the suspension**
>
> 26. In addition to the default position, the PCC has power to *start* the suspension immediately. I use that word intentionally. This is contained in S.30 of the DA84 …"

He then set out parts of section 30. He omitted the references to erasure in section 30(1) and (3) and omitted section 30(2).

237. At §27 the judge commented that immediate suspension orders fill the gap between a PCC direction to suspend and the default timing of the coming into effect of the direction to suspend which does not bite until the appeal period is over. He then referred to the test for the making of an immediate suspension order in section 30(1). At §28 he pointed out that the power to make an immediate suspension order does not arise unless the PCC has first made a direction for suspension. He omitted reference to that power also arising where there has been a direction for erasure.

238. At §29 he set out paragraphs 6.21 to 6.29 and 6.35 and 6.37 of the GDC sanctions guidance in its 2016 form and in particular paragraph 6.37 dealing with an immediate suspension order. He emphasised the last sentence of paragraph 6.37 (set out in paragraph 219 above). The judge commented that the guidance creates a problem; it does not make clear whether the period of immediate suspension is deducted from the sanction period of suspension. "It may be read as implying that the full suspension take effect when the appeal is dismissed". (In my judgment that is the meaning of paragraph 6.37).

239. At §§30 to 32, the judge identified the problem and the competing submissions of the parties and stated the issue as being whether the GDC's interpretation of the interaction between sections 27B, 29A and 30 is correct.

240. At §33 he set out six tenets of statutory construction which he applied and at §34 identified the "mischief" which the legislation was intended to address; namely, misconduct and the failure to remedy it and that there is a presumption against absurdity and where a construction requires a person to do something disproportionate that interpretation is less likely to be correct.

241. At §35 he referred to the context of the relevant provisions and in particular the overarching objectives of the Act set out at section 1. He identified, additionally, "apparent unfairness in the way in which the GDC operates its disciplinary procedure as being contrary to maintaining the standards of the profession".

242. At §36, he pointed out that under section 27B(6)(b) the maximum period of suspension is 12 months and emphasised that this is an "absolute maximum". Then he continued:

> **"Taking effect of the suspension direction**
>
> 37. S.29A determines when the S.27B suspension direction usually takes effect. The plain and grammatical meaning of the words *"this section applies to*" indicate that it applies to directions for suspensions because these are specifically listed in subsection (1). The words "shall take effect" are mandatory. The timing of the taking effect is different in each of the three subsections. If there is no appeal, the taking effect is the end of the 28 days appeal period. If there is an appeal, the taking effect is the withdrawal, striking out or dismissal. What this section does is set the default date for the direction to suspend to take effect. What the section does not do is expressly state how it interacts with S.30 in relation to the duration of the suspension nor does it set any start date, a term to which I will refer below. Parliament could have made it clear how S.29A would interact with S.30 in relation to duration but did not do so in this section.
>
> **Immediate suspension**
>
> 38. S.30 creates a "taking effect" date for the suspension which is different from the default date. In my judgment the plain grammatical meaning of the words in S.30 is as follows. Subsection (1) makes it plain that the power granted to the PCC under S.30 only arises *"on giving a direction for ... suspension".* Thus the S.30 power is parasitic on the S.27B direction for suspension. That is wholly logical because the need for immediate suspension can only arise after the PCC has heard the evidence and carefully measured and analysed the evidence, found misconduct, found impairment of fitness to practise, then carefully assessed the relevant sanctions and expressly chosen suspension and the duration thereof. Once the suspension direction is made, the threshold for making a different "taking effect" date from the default one is partly opened. Then, to grant the S.30 order, the PCC must be "*satisfied that to do so is necessary*". A further assessment of the evidence is required for this necessity test. Three rationales for this necessity are expressly provided by the section: (1) it is for the protection of the public; (2) it is otherwise in the public interest; (3) it is in the interest of "*that person*", meaning the dentist/registrant. Although the section does not expressly say so, the immediacy of the taking effect is clearly intended, in the context of the

previous 3 sections, to cover the gap left by the default taking effect dates, all of which involve a gap.

39. The plain words then go on to state that the PCC "*may order that his registration is suspended forthwith*". But it adds the caveat *"in accordance with this section*". Subsection (3) sets out that the immediate suspension order takes effect "*from the time when the order is made."* Thus, the words express that the start of the PCC's suspension decision will be "*forthwith"* if the immediate order is made. Nothing is said about the suspension being of a different kind of suspension or being a different beast under S.30, as distinct from the suspension made in the direction under S.27B. The use of the word "order" instead of "direction" needs some thought. The thrust and effect of the GDC's submissions is that the immediate suspension order is a different power and hence a different sanction from the direction for suspension (the substantive one) and so the duration of the each is unaffected by the other. The thrust of the Appellant's submission is that they are both the same sanction, suffered by the same dentist and once the suspension first takes effect, time starts to run or should be treated as running towards the end point of the suspension.

40. The end date for the immediate order is dealt with as follows: "*until the time when "(a) the direction takes effect in accordance with section 29A; (b) an appeal under Section 29 …is determined under section 29(3)(b) or (c); or …"*. Two points arise here. The use of the reference back to S.29A indicates that Parliament expressly intended for the immediate order to fill the gap left by S.29A for appeals. The default "taking effect" provisions are maintained in force awaiting their trigger dates at the end of the appeal period or the appeal itself (by failure). The second is that the reference to the S.29(3) provisions tie the end of the immediate order to the date when an appeal is successful (allowed or the appellate court substitutes its own decision in place of the PCC decision).

41. I note that nothing is said in S.30 about empowering the PCC to make the immediate suspension order as a cumulative suspension or a different suspension in addition to the direction for suspension. Nor would this be the ordinary understanding of the Section, in my judgment, because the S.30 power is wholly parasitic on the S.27B decision to apply suspension as the sanction. The S.30 power is not free standing. No express words were inserted to state that the time served under the immediate suspension was to be added to the carefully measured and titrated final sanction passed by the PCC under S.27B, after considering the aggravating factors, the mitigating factors, the remediation and the insight of the registrant. S.30 is circumspect in referring only to the ending of the immediate suspension. It does not

> purport to alter the length of the main suspension by its express words.
>
> 42. Once the immediate suspension order has expired, because the appeal has been dismissed (struck out or withdrawn) what happens? For this we return to S.29A, the default "taking effect" provision. It sets out at subparagraph (2) that the original direction "*shall take effect" ... (b) on withdrawal or striking out ... or (c) ...on the dismissal of the appeal*". So, once the appeal is dismissed the PCC's original direction for suspension **"takes effect".** The word used is not "starts". Nor does any section say that the suspension **starts** then. This is at the root of the grammatical analysis of the interaction between the Sections. It has led to confusion because "takes effect" has been interpreted as "start" for the purposes of determining the duration of the directed suspension after the end of an appeal.
>
> 43. From this analysis I conclude that the Sections do not deal expressly with the issue of whether the period of suspension served under an immediate order is to be deducted from the period of suspension served under a direction or whether one follows the other in full. Thus, I shall look at the legal and factual context and the purpose of the Sections and the consequences of the various proposed interpretations for assistance."
>
> (**emphasis** added)

243. At §§44 to 55 the judge addressed the case law on interpretation. He addressed *Ujam* at §45, citing §5 of *Ujam* and observing that it concerned an interim suspension order, rather than an immediate suspension order. He observed here that "these are two wholly different things". At §46 he cited §§39 and 40 of *Kamberova,* pointing out, correctly, that in fact the case concerned an immediate suspension order – and noting that it was a remitting case. At §47 he addresses *Adil*, setting out §96 to 101, and that the case concerned the interaction between *interim* suspension order and suspension directions and that the case is not directly relevant. At §48, after identifying distinct issues arising as between interim and immediate suspension orders, he commented that:

> "The relevance of the judgment in *Ujam* to the issues I have to decide is that if time spent on interim suspension has some relevance to the determination of the final sanction then time spent on immediate suspension after the final sanction cannot be irrelevant to the duration of the final sanction."

244. At §49, the judge considered whether the GDC was correct in its submission that, although the Courts had raised concerns about the potential unfairness of the provisions, they had concluded that their effect is clear and that any unfairness is a matter of Parliament. First, after setting out §27 of *Ghosh*, he commented at §50 that he was not bound by Bean J's comments on whether there was power to do anything about it, as they were not the ratio of that decision.

245. At §51, he addressed §63 of *Hill*, commenting that in that case there was no ground of appeal based on the interpretation of the Act and "the comments of "Bean J[2] were "en passant and obiter". At §52 he addressed §§32 to 35 of *Burton*, commenting that this was not the ratio of the case and not provided after full legal argument on the interpretation of the relevant provisions. At §53 he set out §§37 and 38 of *W v. Health and Care Professions Council* (but not §36). At §54 he commented as follows:

> "The reliance on this obiter dicta does not take the Respondent's arguments forwards with any substance in my judgment. Firstly, the matter was not fully argued before the Court of Session. Secondly, interpretation of the relevant acts was not addressed. I respectfully agree that the direction for suspension can and should include words to the effect that any immediate order of suspension should be set off against the duration of the direction for suspension."

246. At §55 he addressed the case of *Sharma v GDC* where Ouseley J considered an appeal against a sanction of practice conditions for 12 months duration. The conditions had been in place for 10 months under an immediate order. The appeal was dismissed but at §32 in discussion at the end of the judgment, he ordered that the substantive sanction would end after 12 months despite dismissing the appeal in substance.

247. At §56, the judge concluded his review of the case law, by commenting that

> ".. the current practice of the Respondent in interpreting the Sections as imposing consecutive suspension periods has been the subject of considerable judicial adverse comment but has not yet been the subject of full argument". (emphasis added)

248. The judge then turned to deal with the substantive grounds of appeal in turn, before returning to the current issue. At §§90 and 91 he described the process of an appeal and pointed out that if there is no immediate suspension order, then any suspension direction will start if and when the appeal is lost. Then from §92 onwards, the judge sets out his substantive reasoning as follows:

> "92. The problem which has been identified is the effect of an immediate suspension order when an appeal is dismissed. If the GDC's interpretation of the Sections is correct, for this Appellant, he will have served 4.5 months of suspension already and will then have to serve another 9 months if the appeal is dismissed. That is a total of 13.5 months. In my judgment, such an interpretation breaches the statutory ban on any suspension being over 12 months and is in effect a punishment for appealing which is contrary to established principle. The effects of the interaction of the Sections does not permit for a longer duration of suspension. Parliament fixed the maximum duration in S.27B(6)(b) of 12 months and did not legislate for that to be ignored or breached by the interaction between Sections 29A and 30. The latter are subservient to the former. I consider that the

[2] a typographical error for Kerr J

GDC's interpretation of the Sections drives a coach and horses through the statutory 12 month maximum on the PCC's power to impose suspensions which cannot have been the intention of Parliament.

93. I consider that GDC's interpretation of the Sections is unfair to the Appellant. It effectively increases the PCC's carefully measured and titrated sanction just because he has appealed. I do not consider that professional conduct and standards are maintained by such an approach, which results in registrants considering that they are being treated unfairly in relation to appeals because their sanction is increased by the very act of appealing. Therefore, I consider that this interpretation is contrary to one of the main objectives of the Act. Furthermore, in my judgment it is contrary to natural justice to penalise an appellant just for the act of appealing (not the substance of the appeal), when the right to appeal is provided by statute.

94. Taking into account the wording of the Sections, the purpose of the Act, the context and the objectives of the Act, the consequences of the various possible constructions and the case law, in my judgment there is a difference between the words "takes effect" and "start". In the Sections the legislators used the words "takes effect" so as to distinguish between the ending of the effect of the immediate order for suspension and the commencement of the effect of the direction for suspension. However, there was only one suspension and it only started once.

95. That suspension could have started either when it took effect: (1) by default under S.29A after 28 days or at the end of an unsuccessful appeal, or (2) when, under S.30 an order for immediate suspension was made. In this case (2) applied and the suspension started immediately.

96. In my judgment, after a final hearing, when a direction for suspension is made and an immediate order for suspension is made, there is only one suspension made under the Act. The Sections do not expressly state that a suspension starts only when the direction for suspension "takes effect", so I do not consider that the express words determine when the suspension starts. In my judgment, applying a normal and sensible interpretation of the words "takes effect" in S.29A, in accordance with the 12 month maximum in S.27B(6)(b), and to match the true context in which a S.30 order is made, which is parasitic, the Appellant's suspension started when the immediate suspension order took effect.

97. For all of these reasons I consider that the correct construction of the Sections in the context of this appeal is that: (1) the start of the suspension was when it actually started, namely when the immediate suspension order took effect. (2)

> When the immediate suspension order ceases to have any effect (when the order on this appeal is made) then the direction for suspension will "take effect". The change over from the order having the effect to suspend to the direction having the effect to suspend makes no difference to the suspension, it remains exactly the same. In my judgment the end of the suspension occurs after 9 months of suspension have been served and it does not matter which piece of paper had the effect of causing the suspension.
>
> 98. In any event, I consider that the only correct and lawful way for the PCC to pass a direction for suspension, when they may be going on to consider an immediate suspension order, is to ensure that it is worded so as to credit any time served under any immediate order for suspension against the duration of the direction for suspension.
>
> 99. Thus, in my judgment, the proper interpretation of S.29A, after an appeal like this, when it is determined that the sanction was not wrong and when a direction order then "takes effect", does not result in the suspension starting again. It means that the suspension already in place under the immediate order continues under the directions order and expires at the time which has been determined by the PCC, in this case 9 months from when it started.
>
> 100. Thus, in law I consider that the PCC fell into error when drafting the sanctions direction at the same time as passing an immediate suspension order. In my judgment it is wrong in law for the PCC to impose a suspension direction and to ignore the soon to be made immediate suspension order in the light of the effects of the latter. It is wrong and unjust to make a direction for suspension and an immediate suspension order which together have the effect of increasing the length of the suspension, beyond the statutory maximum, just because the dentist appeals. So, I set aside the direction for suspension for 9 months because, in conjunction with the immediate suspension order made by the PCC, without clear wording of set off, it was being interpreted by the GDC as effectively becoming a suspension of 13.5 months, which is more that the statutory maximum and wrong in principle." (emphasis added)

249. At §101 he made clear that he was making no ruling on interim suspension orders and at §§102 and 103 he stated his conclusions on the case, applying his reasoning, setting aside the 9 month suspension direction and directing that the appellant be suspended for 9 months, from which the served period of the immediate suspension order was to be deducted.

The position on precedent

250. In *R v Greater Manchester Coroner, Ex parte Tal* [1985] QB 67, para 81 the Divisional Court said that that a judge of the High Court "will follow a decision of another judge of first instance, unless … *convinced* that that judgment *is wrong*, as a matter of judicial comity". In *Willers v Joyce* (No.2) [2016] UKSC 44, [2018] AC 843, Lord Neuberger addressed the application of the doctrine of precedent applicable to courts of co-ordinate jurisdiction in the following terms:

> "So far as the High Court is concerned, puisne judges are not technically bound by decisions of their peers, but they should generally follow a decision of a court of co-ordinate jurisdiction *unless there is a powerful reason for not doing so*. And, where a first instance judge is faced with a point on which there are two previous inconsistent decisions from judges of co-ordinate jurisdiction, then the second of those decisions should be followed *in the absence of cogent reasons to the contrary*."

251. As regards the position of a judgment of a Scottish court of co-ordinate (or superior) jurisdiction addressing the same issue under the same legislation, I have been referred to no relevant authority. However, I proceed on the basis that the doctrine of precedent does not strictly apply; and that such decisions are persuasive only.

252. Taking the approach most favourable to the Registrant, I approach the issue on the basis that I should follow the decision of Mr Justice Ritchie unless there are powerful reasons not to do so, and further I conclude that if I consider that decision to be wrong then this amounts to a powerful reason not to follow.

My analysis of the statutory provisions

253. In my judgment, the issue is a question of statutory construction of section 29A and 30 in particular. That requires, in the first place, an analysis of the words used in the statute and their meaning. The intention of the legislation is to be taken from statutory language in the first place. I have been referred to Hansard and much debate about the purpose of the legislation and the legislative history. Both the substantive sanction of a suspension direction and the power to make an immediate suspension order were first introduced in the Medical Act. Prior to that the only available sanction was erasure and there was no power of an immediate suspension order.

254. The Act describes a substantive suspension and an immediate suspension in different terms. The former is "a direction" by the Committee; the latter is an "order" of the Committee. Section 30 itself makes a clear distinction between a section 27B(6) "direction" and a section 30(1) "order". I maintain this distinction in my analysis.

255. First, much turns on the words "take effect" in sections 29A and 30 of the Act. The words "take effect" must mean the same wherever they appear in the statute. The word "start" does not appear in the statute. In my judgment, as a matter of language "take effect" means "begin". (The Collins dictionary refers to "produce results, work, begin, come into force" and "starts to produce the results that are intended." The Longman dictionary defines the concept as "to start to produce results".) The words "take effect" in section 29A(2) and in section 30(3)(a) have the same meaning and have the same

meaning for both an erasure direction and a suspension direction. In each case the words mean "commence" or "begin" or "start".

256. Secondly, section 30(3) identifies two "times" – the time when the immediate order is made, and a later time as specified in sub-sub-sections (a) to (c). These words make it clear that the immediate suspension order and the suspension direction run consecutively. *Aga* on the other hand suggests that the immediate suspension order and the suspension direction run concurrently. However if you put a full stop after the words "when the order is made" in section 30(3), that would be the effect of the decision in *Aga*. *Aga* gives no meaning to the following words "… until the time when…" On the approach in *Aga*, once an immediate suspension order is made, there is no meaning to the rest of section 29A or to the rest of section 30(3).

257. Thirdly, leaving to one side *Aga,* the existing state of the authorities provide strong support for this conclusion. §22 of *Khan* is a clear statement of principle from the Supreme Court and one which applies with equal force to the case of a suspension direction, as it does to erasure. Although obiter, this statement is highly persuasive. Further §36 of *W* is part of the ratio of a decision of the Inner House of the Court of Session. Whilst the ratio of a judgment of the Scottish court of appeal on UK wide legislation may not strictly be binding precedent on the English High Court, it too is highly persuasive. Other cases (*Ghosh, Hill* and *Burton*) provide a consistent line of authority, even if the observations are obiter.

258. Fourthly, there is no reason in principle why an immediate suspension order cannot be for a longer duration that an underlying substantive suspension direction. This is established by the terms of Article 31(2) of the Nursery and Midwifery Order which expressly allows for an immediate suspension order (18 months) to be longer than the maximum period of a substantive suspension direction (12 months). Moreover that provision in the legislation assumes that, but for this specific 18 month limit, an immediate suspension order could continue indefinitely (and certainly longer than the 12 month maximum for the suspension direction). The NMC has legislated for the situation through a parliamentary statutory instrument. Parliament has chosen not to impose a cap in the case of other professions, including dentists.

259. Fifthly, further in other situations the Act does make express provision to set off a period of temporary suspension against the term of a substantive suspension direction. Section 33 of the Act provides that, in specified circumstances, a period spent on immediate suspension should be effectively set off against a further period of substantive suspension. Where a registrant is suspended under a suspension direction and then there is a review hearing and the suspension is extended under section 27C(1)(b), that extended period of suspension is prima facie subject to all the same rules relating to when time starts running i.e. under section 29A. There can arise a situation where there is a gap between the end of the initial period of the suspension direction and the start of the extended period of supervision (because there is a right of appeal against a section 27C extension). In that gap period, section 33(3) provides that the suspension shall continue. However section 33(4) goes on to set off the time suspended during "the gap" against the period of the second suspension. Thus, for example, take a 12 month initial suspension direction. After 11 ½ months a further 12 months extended suspension is made. There is then 28 days in which to appeal against the extended suspension direction and therefore, by virtue of section 29(1B) and 29A(2)(a) the extended suspension does not start until after 12 ½ months. However

section 33(3) continues the suspension for two weeks between 12 and 12 ½ months and those two weeks are then deducted from the 12 months of the further extension under section 33(4). Therefore only 11 ½ months will be served under the second extension. By contrast, there is no similar "set off" provision in respect of an appeal period for the first suspension direction. This argument was not made in *Aga*.

260. Finally, the effect of the Registrant's case here and any case where the period of the immediate suspension order exceeds the period of a suspension direction (with a review direction) is that the registrant in question will be able to immediately return to work without going through the process of a review hearing. That would frustrate the risk assessment undertaken by the Committee that the Registrant should not return to work without satisfactory evidence of remediation. The purpose of the substantive suspension direction is to allow for remediation.

261. For these reasons, as a matter of statutory construction and in the light of the previous case law, I conclude that the period of suspension under an immediate suspension order does not fall to be deducted from the period of a suspension direction.

The analysis in *Aga*

262. I have reached a different conclusion from that in *Aga*. In view of the applicable approach to precedent, I conclude that the decision in *Aga* is wrong for the following reasons.

263. By way of preliminary, I observe that the issue was raised late in the case and Ritchie J did not have the benefit of oral argument. By contrast, I have received seven sets of written submissions and a full day of oral argument.

264. First the issue of the relationship between a suspension direction under section 29A and an immediate suspension order is a question of statutory interpretation (for this Court). It is not a question of judgment or discretion for the Court, nor a matter of "the current practice of the [GDC]" or other regulators (as suggested at §§3, 30. 56 and 102). Further whilst fairness in the operation of the disciplinary procedure is necessarily required (not least by virtue of CPR 52.21(3)). I do not agree that this forms part of the express objectives of the Act, either expressly or impliedly, as suggested §35 of the judgment.

265. Secondly, the central element of Ritchie J's construction of the statutory provisions is that there is a distinction to be drawn between the suspension direction *starting* and it *taking effect*. At the heart of his analysis is, first, that there is only ever one suspension and, secondly, the words "take effect" (at least in some cases) means something different from "start"(but not in others). I do not agree. In my judgment the words "take effect" where they appear in sections 29A and 30 mean "start" or "commence". The words used are not merely "have effect" (or "are effective" or "are in force or in operation"). Moreover, the *Aga* judgment does not give a consistent meaning to the words "take effect". For example, within §97 of the judgment itself, the reference to "took effect" in (1) means "start", yet the reference to "take effect" in (2) means "have effect/ are in force". The *Aga* judgment makes numerous references to the word "start", seeking to distinguish it from "take effect" (see §§43, 94-97); yet that word does not appear at all in the statutory provisions.

266. Thirdly, *Aga* does not address the position in relation to erasure and the fact that the immediate suspension order provisions apply to erasure in the same way as they apply to a suspension direction. In *Aga* it is accepted that in the case of erasure, the dentist is not struck off until the end of, and following on after, the immediate suspension order has ended. On the other hand, it finds that a suspension direction effectively commences from the date of the immediate suspension order. It is notable that the *Aga* judgment omits the references to erasure in section 30(1) and (3).

267. Fourthly, at §39 the *Aga* judgment expressly notes that "the use of the word "order" instead of "direction" needs some thought". In fact at no point thereafter does the judgment address the clear distinction made in the Act between a direction for suspension and an order for immediate suspension. That distinct terminology used in the words of the statute means that it is not the case there is only ever "one suspension" (which is central to the analysis in *Aga* at §§94 and 96). Whilst the concern about a registrant being suspended from practice for more than the 12 month maximum for an initial suspension direction is understandable, it is based on the premise that there is only one suspension and that the direction and the order are one and the same thing.

268. Fifthly, *Aga* does not address the different purpose of a suspension direction and an immediate suspension order. The former is intended to give the registrant the opportunity to remediate his conduct and re-establish fitness to practise; the latter is a measure for the protection of the public pending appeal.

269. Sixthly, as regards the previous case authorities, whilst it is the case that some of the passages supporting the GDC's interpretation are obiter and whilst there are judicial observations as to the apparent unfairness of that interpretation, those cases all suggest that the solution to the problem lies with Parliament to legislate. Significantly the *Aga* judgment did not refer to the important §36 of *W v Health and Care Professions Council*. Secondly, whilst the case of *Khan* is cited elsewhere in the *Aga* judgment, there is no reference to the important §22, an obiter dictum of the Supreme Court.

270. Finally, if *Aga* is correct, then whenever there is an immediate suspension order, every suspension direction is in practice for a period less that the amount specified in the direction itself. This will inevitably be the case where there is an appeal, but it will also be the case where there is no appeal (because of the 28 days allowed to appeal). The effect, on the *Aga* basis, is that there is only ever one suspension and the suspension direction runs from the first day of the order under section 30 and either section 29A has no meaning or the suspension direction runs for 28 days less that ordered under the direction.

271. For these reasons I conclude that the decision on this issue in *Aga* is wrong and I decline to follow it.

Other considerations

272. At the close of the argument, I heard extensive submissions on the operation of section 30(7) and the power to apply to terminate an interim suspension order. Given my decision not to remit, no such application has arisen in the present case.

Conclusions on Section 2

273. In the light of my conclusions in paragraphs 261 and 271 above, I find that the period of suspension under an immediate suspension order does not fall to be deducted from the period of a suspension direction. It follows that the five month suspension direction made by the Committee will take effect from the dismissal of the Registrant's appeal.

Concluding observations

274. I shall hear the parties as to the form of the order, costs and any other consequential matters that may arise.

275. Finally I am grateful to counsel for their assistance and for the detail and quality of the argument placed before the Court.