

CO/3862/2019

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

IN THE MATTER OF an appeal under Section 29 of the National Health Service Reform and Health Care Professions Act 2002

B E T W E E N:

THE PROFESSIONAL STANDARDS AUTHORITY FOR HEALTH AND SOCIAL CARE

Appellant

and

(1) THE HEALTH AND CARE PROFESSIONS COUNCIL
(2) ANDREA FRANCHINI

Respondents



CONSENT ORDER

UPON the parties having agreed these terms and the statement of reasons set out in Schedule 1

AND UPON neither party being either a child or protected party and the appeal not being an appeal from a decision of the Court of Protection

BY CONSENT

IT IS ORDERED THAT:-

1. The appeal is allowed and the following decisions of the First Respondent's Conduct and Competence Committee (the CCC) on 29 July 2019 are quashed:
 - a. The finding that the Second Respondent's actions in allegations 1(d), 1(e), 1(f), 1(h), 1(j), 2(b), 2(c), 2(d) 2(e) and 3 (where appropriate) did not amount to misconduct
 - b. The findings that the risk of repetition of inappropriate touching and failure to obtain informed consent was low
 - c. The decision to impose a sanction of a caution for two years.
2. The finding of no misconduct in relation to the allegations referred to in paragraph 1.a. above is substituted with a finding of misconduct.

3. The findings that the risk of repetition of inappropriate touching and failure to obtain informed consent was low referred to in paragraph 1.b. above are substituted with findings that a risk of repetition is present.
4. The matter is remitted for reconsideration by a differently constituted panel of the CCC to determine the issue of sanction.
5. In carrying out the reconsideration referred to at paragraph 4 above the CCC is to consider the documents listed in Schedule 2 and any additional documents relied upon by either Respondent for the purpose of that reconsideration.
5. The First Respondent is to pay the Appellant's costs to be assessed if not agreed.

We consent to an order on the above terms.

Dated the 8th day of September 2020

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Second Respondent in Person

Schedule 1

1. The Second Respondent is a registered physiotherapist.
2. In a decision on 29 July 2019 in fitness to practise proceedings FTP50393, the First Respondent's CCC determined that the Second Respondent's fitness to practise was impaired and imposed a two year caution order (the Decision).
3. The Appellant appealed the decision on the following grounds:

"Ground 1: The Panel erred in failing to find misconduct in respect of all of the inappropriate touching of Service Users A and B in that:

- a) *The Panel erred in failing to acknowledge the inherent seriousness of any inappropriate touching of a service user's breasts even where it is not deliberate. The Registrant did not apologise at the time (or at any time afterwards) and he left the service users feeling violated.*
- b) *It was inappropriate to separate consideration of the touching from the wider context of lack of consent and failure to ensure that Service User A was covered. The fact that the Registrant may have been in a rush cannot excuse what was a serious violation of service user dignity.*

Ground 2: The Panel erred in finding that the risk of repetition was low in respect of the inappropriate touching in that:

- a) *Having found that the Registrant had not demonstrated that he understood or appreciated the impact of his actions it erred in failing to consider and/or acknowledge how the lack of insight impacted on the risk of repetition.*
- b) *It further erred in placing reliance on the incidents being "isolated in time" without having regard to the fact that (i) there were two very similar incidents and the Registrant repeated the misconduct even after having received a complaint about the first incident; and (ii) after the second incident he was subject to supervision requirements with female service users.*

Ground 3: The Panel erred in finding that the risk of repetition was low in respect of the failure to obtain informed consent in that:

- a) *Having found a risk of repetition of the failure to obtain consent at the impairment stage, based on an absence of evidence that the Registrant's practice had changed, and lack of recognition that the requirement of consent is an on-going process, the Panel erred in holding that the risk of repetition was low one day later at the sanction stage.*
- b) *The Panel failed to consider the issue of insight and placed undue weight on evidence of completion of one on-line learning module the evening before the last day of the hearing. There was no evidence from the Registrant of any reflection on that learning or any intention to change his practice.*

Ground 4: The panel erred in its assessment of the seriousness of the misconduct in that:

- a) *In its determination on sanction, the Panel failed to identify material aggravating factors, including:*
- i. The fundamental seriousness of any inappropriate touching of a service user's breasts;*
 - ii. The Registrant's failure to adequately consider service user dignity (particularly by failing to ensure that Service User A was covered at all times);*
 - iii. The inherent vulnerability of female service users receiving physical treatment from a male physiotherapist in a private room without a chaperone;*
 - iv. The fact that the misconduct was repeated even after a complaint had been received;*
 - v. The lack of any apology, expression of remorse or regret;*
 - vi. The lack of any evidence of insight;*
 - vii. The absence of any timely step towards remediation.*
- b) *The Panel further erred in placing undue weight on mitigating factors, including:*
- i. Compliance with interim conditions of practice when these were mandatory requirements;*
 - ii. Absence of concerns during the period of interim conditions when all of the Registrant's contact with female service users was supervised and he knew he was under scrutiny;*
 - iii. On-line learning modules that were not accompanied by any reflection and were undertaken only the day before the last day of the hearing.*

Ground 5: The Panel erred in failing to apply and/or have adequate regard to the Sanctions Policy in that:

- a) *The Panel further erred in failing properly to consider and/or apply the HCPC's Sanctions Policy. Having cited the relevant passage on conditions, it failed to address all of the relevant criteria and erred in its approach to those factors that were addressed.*
- b) *On proper analysis:*
- i. The issues were not isolated, limited or minor in nature;*
 - ii. The risk of repetition was not low (for the reasons set out above);*
 - iii. The Registrant had shown no insight; and*
 - iv. The Registrant had not undertaken appropriate or sufficient remediation.*
- c) *The Panel failed to have any regard to the guidance on absence of insight, remorse or apology.*

Ground 6: The Panel failed to give adequate reasons for its decision

- a) *Further or alternatively, the Panel failed to give adequate reasons for its decision in light of the points raised above and generally.*
4. The First Respondent accepts that the Decision was not sufficient for the protection of the public, within the meaning of s.29(4) and (4A) of the National Health Service Reform and Health Care Professions Act 2002 (as amended), and accordingly agrees that it should be quashed and the matter remitted for redetermination on the

basis of the findings substituted by this order, taking into account, amongst other things, the contents of this order.

Schedule 2

It is agreed that the documents to be placed before the CCC at the remitted hearing shall include, but are not limited to, the following:

1. The Notice of Decision dated 2 August 2019 reflecting the CCC's findings of fact, its finding on misconduct and its finding on impairment, but redacted so as to remove reference to its findings on the issue of sanction (a copy of the suitably redacted Notice is hereby appended to this Schedule as Appendix A).
2. The documents that were before the CCC at the hearing at which it made the Decision (as listed in the Index appended to this Schedule as Appendix B).
3. The transcript of that hearing, limited to (i) the fact finding stage, concluding with the delivery by the CCC of its findings of fact; and (ii) the evidence which the CCC heard in relation the issue of impairment.
4. The First Respondent's Indicative Sanctions Guidance.
5. The sealed Order of the Court in this appeal.

Conduct and Competence Panel

Hearing type:	Substantive Hearing
Registrant:	Mr Andrea Franchini
Profession:	Physiotherapist
Reg No:	PH105028
Date(s):	10-11 and 15-29 July 2019
Hearing Venue:	HCPTS Tribunal Centre, 405 Kennington Road London SE11 4PT
Tribunal:	
Panel Chair:	Mr Mark Aspden
Registrant Panellist:	Ms Teresa Cook
Lay Panellist:	Mr Martin Pilkington
Legal Assessor:	Ms Susan Monaghan
Hearings Officer:	Ms Lilly Ofori (10-19 July 2019) Ms Rebecca Ayanfalu (22-26 July 2019) Ms Sophie Wing (29 July 2019)
Representation:	
HPCPC:	Ms Reka Hollos, of Kingsley Napley Solicitors
Registrant:	Present and represented by Ms Louise Price, Counsel, instructed by Thompsons Solicitors.

SUMMARY

Decision of the Health and Care Professions Tribunal, sitting as the Conduct and Competence Committee of the Health and Care Professions Council.

Allegation

Whilst registered as a Physiotherapist:

1. On or around 10 August 2016 during an appointment with Service User A you:
 - a) Asked Service User A to take her bra off
 - b) Did not cover Service User A's breasts
 - c) Did not obtain informed consent in that you did not fully explain your actions to Service User A
 - d) Massaged and/or touched around Service User A's breasts
 - e) Massaged and/or touched down between the middle of Service User A's breasts
 - f) Massaged and/or touched under Service User A's breasts on the rib cage
 - g) Massaged and/or touched Service User A's breasts
 - h) Touched Service User A's nipples with your forearms and/or upper wrists
 - i) Massaged and/or touched towards Service User A's belly button / pubic area
 - j) Rubbed up and down Service User A's arms
 - k) Leant on Service User A and/or applied pressure with your body against Service User A's body.
2. On or around 31 May 2016 during an appointment with Service User B you:

- a) Did not obtain informed consent in that you did not fully explain your actions to Service User B
 - b) Touched and / or massaged Service User B's breast
 - c) Put your hand inside Service User B's bra
 - d) Pressed your chest up against Service User B's back and / or shoulder
 - e) You breathed onto Service User B's neck and / or down her chest
3. Your actions at paragraphs 1 and/or 2 were without clinical justification
 4. Your actions at paragraphs 1 and/or 2 were sexually motivated.
 5. The matters set out in paragraphs 1 - 4 constitute misconduct.
 6. By reason of your misconduct, your fitness to practise is impaired.

Facts proved: 1(b), 1(c), 1(d), 1(e), 1(f), 1(g), 1(h), 1(j), 1(k), 2(a), 2(b), 2(c), 2(d), 2(e) and 3 in relation to 1(b), 1 (c), 1(g), 1(h), 1(j), 2(a), 2(b) and 2(c).

Facts not proved: 1(a), 1(i), 3 in relation to 1(a), 1(d), 1(e), 1(f), 1(i), 1(k) and 4 in its entirety.

Grounds: Misconduct (in relation to 1(b), 1(c), 1(g), and 2(a))

Fitness to practise impaired: Yes

Sanction: Caution (2 years)

Background

1. The Registrant is a registered Physiotherapist. At the time of the allegation, the Registrant was working at the Great Health Clinic (the Clinic) in Islington.
2. On or about 20 May 2016, Service User B attended the Clinic for a physiotherapy appointment with the Registrant in relation to a thumb injury sustained following a bicycle accident. The Clinic was contracted by Nuffield Health to provide the treatment. This was arranged through her private health insurance. No complaint is made by Service User B about the Registrant on this occasion and Service User B was happy to return for a second appointment with the Registrant on 31 May 2016.

The Registrant's conduct on that occasion forms the subject of Particulars 2, 3 and 4.

3. On 10 August 2016, Service User A attended the Clinic for a physiotherapy appointment with the Registrant to receive treatment for a neck injury. The Registrant's conduct on that occasion forms the subject of Particulars 1, 3 and 4.
4. In respect of the touching of Service Users A and B, the Registrant appeared in the Crown Court on sexual assault charges. He was acquitted on all counts.

Decision on Facts

5. In coming to its decision on facts, the Panel had regard to the submissions made by both Counsel and, in particular, all the evidence both oral and documentary. It was reminded that it is for the HCPC to prove its case and that there was no burden on the Registrant to prove anything. The standard of proof applied when considering whether the Allegation is made out is that of the balance of probabilities, i.e. whether it is more likely than not to have occurred.
6. The Panel had regard to the advice of the Legal Assessor. It took into account that the Registrant is a man of good character.
7. On behalf of the Council, the following witnesses gave oral evidence:
 - Service User A;
 - Service User B;
 - Person C (the partner of Service User A);
 - CH-B (a physiotherapist from Bespoke Wellbeing Ltd);
 - Mr T Edbrooke (Expert Witness on behalf of the Council).
8. On behalf of the Registrant, the following witnesses gave oral evidence:
 - The Registrant;
 - Mr M Henry (Expert Witness on behalf of the Registrant);
 - Mr RS (the Clinical Lead Physiotherapist at the Registrant's current employer);
 - SR (a work colleague and physiotherapist);
 - EC (a physiotherapist who was a colleague and friend of the Registrant);
 - DR (a female former service user).

9. The Panel also had regard to the numerous testimonials from colleagues and service users.
10. In relation to witnesses generally, the Panel bore in mind that an honest witness can be mistaken and that a mistaken witness is not necessarily wrong about every fact.
11. The Panel accepted in the main the evidence of Service User A. However, there were points in her evidence that were less clear as to what did or did not happen, in particular when she was lying face up, during the treatment session, with her eyes closed.
12. Person C was of assistance to the Panel and conceded that the word "chest" was used rather than "breast" by Service User A when she was describing where she was massaged.
13. The Panel accepted Ms CH-B's evidence that physiotherapists use a range of techniques and that these can vary from one physiotherapist to the next.
14. The Panel found Service User B to be a witness who gave clear, credible and reliable evidence.
15. The Panel had no reason to doubt the opinions of both experts and it had no reason to doubt the credibility of the witnesses called on the Registrant's behalf.
16. The Panel found the Registrant to be a well-qualified physiotherapist who is enthusiastic about his profession. During the course of his evidence he was demonstrative and he presented to the Panel as eager to please. The Registrant described a number of techniques that he used, including:

Pompage

17. The Registrant described Pompage as a range of manual techniques, including one that involves placing one hand at the base of the patient's skull and the other on the sternum (breast bone) to create a counter force. Photographs showing a number of these techniques were put before the Panel.

Trigger point release

18. This technique involves the application of pressure to specific tender areas (trigger points), in this case on the pectoral (chest) muscles. This is usually performed with either the fingers or the thumb. It was the agreed evidence of both experts that the trigger points for the

pectoralis major and pectoralis minor are as set out in the diagram seen by the Panel.

Palpation of the pectorals

19. The Registrant states that he palpated Service User A's pectorals. He agreed, and it was also the evidence of Mr Edbrooke, that neither palpation nor gentle mobilisation of the pectorals require the therapist to encroach on breast tissue.

Diaphragm release

20. The Registrant stated that he carried out diaphragm release techniques on Service User A because he found that her diaphragm was stiff. The Registrant told the Panel that he carried out the diaphragm release in line with the therapist's position in the photographs that were before the Panel. These show the therapist's hands below the ribcage but above the navel.

Ribcage mobilisation

21. The Registrant stated that he performed ribcage mobilisations on Service User A because he found her thoracic spine to be stiff. In carrying out this technique, he stated that he placed his hands flat between the 2nd and 6th ribs up towards the armpit.
22. Mr Edbrooke's evidence was that these mobilisations would usually be performed lower down the ribcage and, if carried out in a careful and considerate manner, the likelihood of contact with the patient's breasts would have been minimal.

Thoracic Adjustment Technique

23. The Registrant stated that he performed a thoracic adjustment technique (HVLA) on Service User A because he found her thoracic spine to be stiff. In carrying out this technique, he stated that the service user had her arms crossed over her chest and that he applied quick firm pressure using his body weight directly on her. This was in line with a photograph that was before the Panel.
24. At the outset of the hearing, the Registrant made some admissions which are detailed below where relevant to the Particular.

Particular 1

25. The Panel took into account and accepted that Service User A had taken time out from work to attend the appointment and was in a hurry.

The Panel accepted Service User A's evidence that there was a lot of "chit chat", which she found to be unprofessional.

Particular 1(a)

Asked Service User A to take her bra off (NOT PROVED)

26. Service User A gave evidence that the Registrant asked her to remove her shirt, which she proceeded to do. She accepted that she asked him if she should take her bra off.
27. In evidence the Registrant stated that he remembered Service User A asking "is it okay if I take the bra off?" or words to that effect. He recalls that he said something like, "if you're fine, if you're happy".
28. The Panel accepted Service User A's evidence that she, not the Registrant, asked if she should take her bra off.
29. This Particular is therefore not proved.

Particular 1(b)

Did not cover Service User A's breasts (PROVED)

30. Service User A has consistently maintained that she removed her bra straight after taking off her t-shirt and that her breasts were exposed whilst the Registrant examined her from the back and from the front. The Panel accepted this evidence.
31. Service User A gave evidence that, having removed her bra, her breasts were exposed whilst she was sitting on the plinth. At that stage, the Registrant was behind her. The Registrant then moved from behind her, having looked at her exposed back, to face her. Her breasts remained uncovered. The Panel accepted Service User A's evidence that she had not expected him to move in front of her whilst she remained exposed. Service User A positioned herself on her front for the start of the treatment. She was then asked to move onto her back as the treatment progressed. At this point, she asked for a towel to cover herself.
32. The Panel had regard to the Registrant's evidence as to how he moved the towel up and down when performing his techniques. The Panel considered that, even on the Registrant's description, Service User A's breasts were likely to have been exposed in whole or in part for some of these techniques. However, the Panel considered that this was as a result of rushing and poor technique rather than any deliberate act by the Registrant to expose Service User A's breasts. The Panel accepted

that Service User A was exposed when the Registrant performed the thoracic adjustment technique. The Panel accepted her evidence that she was "*relieved*" that when she crossed her arms over her chest, her breasts would be covered.

33. The Panel therefore found this Particular proved.

Particular 1(c)

Did not obtain informed consent (PROVED)

34. Service User A stated that the Registrant did not tell her what her diagnosis was but simply referred to the injury as not being serious. She said he did not specify what treatment he was going to perform. The only techniques that she recalled were a discussion about acupuncture and that the Registrant would do "*some adjustments*".

35. The Registrant in evidence provided significant detail about the lengths that he went to in explaining the treatment that Service User A was about to receive. The Panel noted that the examination took place in 2016 and was not persuaded that some three years later he was able to recall in such detail what he had done given that the treatment record was so brief. The Registrant was asked on a number of occasions in evidence if these treatments were what he believed he had performed on Service User A or whether he had a specific recollection. He said, on more than one occasion during the course of his evidence, that this was what he had done but then he frequently followed up this statement with the phrase "*I think*".

36. The Panel preferred the evidence of Service User A.

37. The Panel also had regard to the form signed by Service User A prior to any conversation with the Registrant. This form states, "*I hereby give my consent for physiotherapy examination and treatment by a qualified therapist. I understand that I might have to expose part of the body to be treated if asked by physiotherapist but I have the right to decline the request*".

38. Mr Edbrooke described the ongoing process of informed consent as a "*moveable feast*" occurring throughout an appointment. He said it should be explained to the patient that the clinician is going to perform an examination, how that examination is going to be performed, and the purpose of the examination. He said that the same process should be used for consent to treatment. He stated that, if it became clear during the treatment that an intimate area has to be touched, the clinician should stop, explain why such touch is necessary and obtain

consent. Further, if an intimate area is touched accidentally, the clinician should acknowledge this and apologise to the service user.

39. The Panel was of the view that, by signing the form in advance, Service User A was not giving informed consent to either the assessment or treatment. The Panel noted that on the Registrant's evidence he undertook an assessment and nine treatment techniques in a 45-minute appointment. He said that he described a "*menu of treatment techniques*" that he was going to use. He further explained that he gave this information at the beginning of the treatment session.
40. Given that Service User A was in a hurry, the Panel considered that it was unlikely that the Registrant would have explained each technique in detail and that, at best, he gave a brief overview of the proposed treatment. Service User A accepted that she just wanted him to "*get on with it*". The Panel considered that, regardless of whether or not Service User A was in a hurry, it was the Registrant's responsibility to make sure that she understood what was proposed in terms of treatment and to fully explain in such a way that Service User A understood it. The "*menu*" of treatment options was, in the Panel's view, too much information to be provided in one block at the start of the treatment session
41. The Panel therefore concluded, on the balance of probabilities, that Service User A had not given informed consent to the techniques used by the Registrant.
42. The Panel therefore found this Particular proved.

Particular 1(d)

Massaged and/or touched around Service User A's breasts (PROVED)

43. At the outset of the hearing, the Registrant admitted that he touched the areas around Service Users A's breasts and he said that this was clinically justified. The Panel accepted the evidence of Mr Edbrooke that it would be appropriate to massage the pectoral muscles. The Panel also had regard to the clinical record which confirmed that the pectoral muscles were tender on examination.
44. The Panel concluded that such massage or touching occurred and was clinically justified.
45. This Particular is therefore proved to this extent.

Particular 1(e)

Massaged and/or touched down between the middle of Service User A's breasts (PROVED)

46. The Panel had regard to Service User A's evidence that she was lying on her back (supine) and that, by this time, her eyes were closed. She explained that she felt like the Registrant was giving her a "boob massage". The Panel also had regard to the evidence of both experts and the photograph showing a specific Pompage technique performed on an individual lying supine. The picture depicts the therapist's hand resting on the sternum with the fingers extending between the middle of the breasts. The Panel accepted the Registrant's explanation of the techniques he was undertaking. Further, even if his hand was positioned higher on the sternum as he asserts, he would inevitably have been touching between Service User A's breasts. The Panel did not find he was massaging between Service User A's breasts.

47. The Panel therefore found this particular proved to the extent that he touched (but did not massage) between the middle of Service User A's breasts but that the touching was incidental to a clinically justified technique.

Particular 1(f)

Massaged and/or touched under Service User A's breasts on the ribcage (PROVED)

48. Again the Panel had regard to the evidence of Service User A that by this time in the appointment she was feeling very uncomfortable and that she had her eyes closed.

49. The Registrant admitted at the outset that he touched Service User A's ribcage below her breasts and that such touching was clinically justified, in that he was performing a diaphragmatic release.

50. The Panel also had regard to the evidence of Mr Edbrooke and that of the Registrant as to how to undertake a diaphragmatic release. The Panel had regard to the photographs showing how this technique is undertaken. It considered that the touching under Service User A's breasts was part of a recognised technique and that this was clinically justified. The Panel accepted the Registrant's evidence that he did not massage under Service User A's breasts on the ribcage.

51. The Panel therefore finds this particular proved to the extent that he touched (but did not massage) under Service User A's breasts on the ribcage as part of a clinically justified and accepted technique.

Particular 1(g)

Massaged and/or touched Service User A's breasts (PROVED)

52. The Panel had regard to the evidence of the friend of Service User A that was given at the Crown Court, which is documented in the bundle before the Panel, and in particular the statement she made to the police shortly after the appointment in question. Her statement recorded that *"she told me that he had massaged her chest area and around her breasts"*. The Panel had previously noted that, at the time of this touching as asserted by Service User A, she was feeling very uncomfortable and she had her eyes closed.
53. The Panel accepted the Registrant's description of the Pompage techniques and it also had regard to the photographs of such techniques. These included the technique as previously described, as well as techniques where the therapist has their hands positioned on the top of the shoulders with their fingers extending down the chest. The Panel also had regard to the techniques described as ribcage mobilisation. It concluded that Service User A's breasts were touched but that the touching was unintentional and would have been incidental to the manual techniques being performed. The Panel accepted the Registrant's evidence that he did not massage Service User A's breasts.
54. The Panel therefore found this particular proved to the extent that the Registrant touched (but did not massage) Service User A's breasts but that such touching was unintentional.

Particular 1(h)

Touched Service User A's nipples with your forearms and/or upper wrists (PROVED)

55. Service User A described in oral evidence how she considered that it was the wrist of the Registrant that touched her nipples briefly, on one occasion during her treatment.
56. The Registrant denied that he touched her nipples. The Panel considered the techniques used by the Registrant and the fact that it had already concluded that, at times, Service User A's breasts were partially uncovered. It concluded that in those circumstances the Registrant could have accidentally touched the nipples of Service User A. The Panel considered that there was no direct evidence that the Registrant deliberately touched Service User A's nipples.

57. The Panel therefore concluded that this Particular is proved to the extent that the touching of the nipples was with the inside of the wrist and was accidental given the nature of the techniques being performed.

Particular 1(i)

Massaged and/or touched towards Service User A's belly button/pubic area (NOT PROVED)

58. The Panel accepted Service User A's evidence that she was touched in the middle of her breasts. The Panel also accepted the Registrant's explanation as to what techniques he performed.

59. The Panel found that during Pompage the base of the practitioner's hand would be at the top (known anatomically as the base) of the sternum but the fingers would be facing downwards in the direction of the breast tissue area. This is recognised as an appropriate physiotherapy technique and accepted as such by both experts. Further, the Panel was also provided with a photograph to demonstrate this technique.

60. At the time the Registrant was performing this technique, Service User A stated that her eyes were closed and that she felt the Registrant's hands were moving towards her belly button. Even on her testimony there was no evidence that the Registrant's hands were moving towards her pubic area.

61. The Panel therefore concluded that there was no evidence to demonstrate that the Registrant massaged and/or touched towards Service User A's belly button or pubic area.

62. This Particular is therefore not proved.

Particular 1(j)

Rubbed up and down Service User A's arms (PROVED)

63. The Registrant, at the outset of the hearing, admitted that he rubbed Service User A's arms up and down. He said she was shivering and he said that his response was a human reaction.

64. The Panel concluded that this touching did not have any clinical justification and that it was the Registrant's instinctive response because Service User A was shivering. The Panel concluded that the rubbing up and down of the arms was inappropriate in a professional setting. To this extent, this particular is proved.

Particular 1(k)

Leant on Service User A and/or applied pressure with your body against Service User A's body (PROVED)

65. The Registrant admits this Particular in that he was carrying out a thoracic adjustment technique. The experts accepted that this technique is recognised and was clinically justified.
66. The factual dispute is whether the adjustment was carried out with Service User A's breasts exposed, as she says it was, or whether it was carried out with them covered by a towel, as the Registrant asserts. The Panel accepted that Service User A was uncovered for this technique but that the technique itself is well recognised and was justified.
67. The Panel therefore finds this particular proved in that the Registrant leant over Service User A and that there was a clinical justification for doing so.

Particular 2

68. The Panel accepted the evidence of Service User B. She did not embellish her evidence. She answered in a straightforward manner. When there were matters that she did not recall, she said that she did not remember.
69. Following the second appointment with the Registrant on 31 May 2016, Service User B contacted her insurer on 09 June 2016. Her insurer contacted Nuffield Health, who started an investigation of her complaint. Service User B spoke to an administrator at Nuffield Health on 13 June 2016.

Particular 2(a)

Did not obtain informed consent (PROVED)

70. It was submitted on the Registrant's behalf that Service User B has changed her account from a case of inadequate communication to one of inappropriate touching. However, the Panel considered the documentation from Nuffield Health in relation to Service User B's complaint. This included the record of the phone conversation between Service User B and the administrator that took place on 13 June 2016. This states "*The Physiotherapist used a cream that made the patient's skin tingle to perform hands on treatment, post treatment the patient could tell how far down the breast the physio had gone and she did not think that this was necessary*". Further, the Nuffield Health investigation

report, completed in June 2016, confirmed that Service User B reported that she *“came for problem for their thumb but part of the treatment included massage below her collar bone and on to her breast.”* The Panel therefore concluded that the original complaint was about more than inadequate communication.

71. Service User B gave evidence that at the beginning of her second appointment with the Registrant, she believed that he explained that he would be assessing and treating her hand and forearm but that he had not explained beyond that point.
72. The Registrant accepted that there was no record of consent having been obtained in Service User B's clinical records during the second appointment.
73. The Panel accepted the evidence of both experts that, when verbal consent is given, the correct practice is to document it as such in the treatment record. The Panel heard from SR, a physiotherapist who had observed the Registrant in practice. She described his normal practice of obtaining informed consent. This was broadly consistent with the Registrant's account of his practice. The Panel considered the number of techniques that the Registrant had undertaken on Service User B, which consisted of ten different techniques. The Registrant stated that he explained the techniques in one block prior to treatment. The Panel considered this to be inadequate. Further, the clinical record does not describe the treatment that the Registrant says he provided or the further assessment of Service User B's left shoulder. In addition, for the reasons given in relation to Service User A, the Panel does not consider the form signed in advance of any treatment to be informed consent.
74. This Particular is proved.

Particular 2(b)

Touched and/or massaged Service User B's breast- (PROVED)

75. The Panel accepted Service User B's description of where she was touched. This description was recorded by Nuffield Health, when Service User B complained to them, as *“The Physiotherapist used a cream that made the patient's skin tingle to perform hands on treatment, post treatment the patient could tell how far down the breast the physio had gone and she did not think that this was necessary”*. The Panel accepted this record to be a brief summary of the telephone

conversation but that, even so, it clearly identifies the breast as having been touched.

76. The Panel also accepted the evidence of Service User B that she was touched within an inch of her nipple.

77. The Panel also had regard to the techniques the Registrant used. It considered that some techniques the Registrant admitted he performed, if carried out carelessly, would have resulted in his hand touching the breast. The Panel found that the Registrant touched (but did not massage) Service User B's breast while carrying out manual techniques and that, whilst there was no clinical justification for this, it was incidental to the treatment.

78. This Particular is proved.

Particular 2(c)

Put your hand inside Service User B's bra (PROVED)

79. The Panel accepted Service User B's evidence as to where she was touched. The Panel also accepted the nature of the techniques used by the Registrant. The Panel considered that this touching needs to be seen in the context of the techniques being carried out. The touching was described by Service User B as "*not long at all*" and "*over quite quickly*". The Panel found that the placing of the Registrant's hand inside Service User B's bra occurred while carrying out manual techniques and that, whilst there was no clinical justification for this, it was incidental to the treatment.

80. This Particular is proved.

Particular 2(d)

Pressed your chest up against Service User B's back and/or shoulder (PROVED)

Particular 2(e)

Breathed onto Service User B's neck and/or down her chest (PROVED)

81. This Particular was admitted at the outset of the hearing by the Registrant. The technique is acceptable and requires the physiotherapist to stand behind, and be in contact with, the service user. The Panel found that the technique was clinically justified and was not critical of how it was performed. However, by the time the technique was performed on Service User B, she was in a state of anxiety and, as such, the Panel considered that she had not

understood what was involved with this technique. The Registrant accepted that his body touched the service user. Further, the Panel also accepted that it is inevitable that the service user would hear and feel the breath of the physiotherapist given their close proximity.

82. Therefore, the Panel found these Particulars proved in so far as the technique was clinically justified, and that hearing and feeling the Registrant's breath was as a result of the close proximity required for the technique.

Particular 3

Your actions at paragraphs 1 and /or 2 were without clinical justification (PROVED in part)

83. For the reasons already set out above the Panel concluded that there was a clinical justification for certain techniques being carried out and that, for these techniques, any touching was either accidental or incidental to the technique being carried out on Service Users A and B.

84. In respect of Particular 1(b), the Panel concluded that there was no clinical justification for not ensuring that Service User A's breasts were covered at all times. It was clear from the evidence of Service User A that she was feeling uncomfortable. The Registrant had a responsibility to ensure that she was properly covered at all times.

85. In respect of Particular 1(c), the Panel considered that there was no clinical justification for not obtaining informed consent for the treatments being provided. It was inadequate for the Registrant to simply reel off a list of techniques without ensuring that Service User A understood what was going to happen next.

86. In relation to Particulars 1(g) and 1(h) as previously found, the Panel concluded that, although without clinical justification, the touching was incidental and/or accidental.

87. In relation to Particular 1(j), the Panel accepted that there was no clinical justification for rubbing Service User A's arms and it was not appropriate in a professional setting.

88. In respect of Particular 2(a), the Panel considered that there was no clinical justification for not obtaining informed consent for the treatments being provided and that it was inadequate to simply reel off a list of techniques without ensuring that Service User B understood what was going to happen next.

89. In respect of Particulars 2(b) and (c), the Panel found that there was no clinical justification for touching Service User B's breast but that the touching was more likely to be as a result of poor technique and the Registrant's failure to adequately explain what he was doing.

90. In respect of Particulars 2(d) and (e), the Panel found that there was no criticism of the Registrant and that the technique was clinically justified.

Particular 4

Actions at 1 and/or 2 were sexually motivated (NOT PROVED)

91. Service User A formed the view fairly soon into the appointment that the Registrant was over-familiar in his style of communication. The Registrant was aware that Service User A was in a hurry. The Panel accepted that, when the Registrant walked around to the front of Service User A during the initial assessment, she felt vulnerable but did not say anything. The Panel also accepted that, as the treatment progressed, it became more difficult for her to raise concerns. The Panel considered that, at times, Service User A's evidence was less than clear as to where the Registrant's hands were, as opposed to where she thought they were. The Panel found that non-verbal cues were present but not picked up by the Registrant. Service User A said that she was feeling cold and she had to tell the Registrant. In addition, the receptionist noticed that Service User A was shivering and her teeth were chattering and that she quickly left the Clinic after her appointment.

92. The Panel accepted Service User B's evidence of how she felt after her appointment and that she went home to shower and also spoke to her husband.

93. The Panel carefully considered whether the conduct of the Registrant was sexually motivated. It had regard to the case of *Basson v GMC* cited to it by the Legal Assessor. The Panel took into account the Registrant's good character and the numerous testimonials from service users and colleagues. The Panel found the evidence of DR, a female former service user of the Registrant, particularly helpful.

94. The Panel also took into account that the Registrant was acquitted of sexual assault of Service Users A and B in the Crown Court. The Panel was aware and accepted that the test for sexual motivation is different as, indeed, is the burden of proof to be applied in these proceedings.

95. The Panel has had the opportunity of seeing the Registrant give evidence. He is an enthusiastic character who repeatedly sought to

demonstrate techniques physically to the Panel. He presented as committed to his profession. It was also apparent in the manner that he gave his evidence that he was eager to agree with points put to him.

96. On the balance of probabilities, the Panel accepted that, as a result of miscommunication, Service User A misinterpreted the Registrant's actions. This was compounded by her feeling of being irritated by the Registrant's over-familiarity and, in her view, excessive small talk as well as her increasing level of anxiety as the treatment progressed. It also had regard to his good character. It decided that there was nothing in the evidence to suggest that he was seeking sexual gratification or a personal relationship with Service User A.

97. The Panel therefore concluded that the Registrant's actions in respect of Service User A were not sexually motivated.

98. The Panel also considered whether the Registrant's actions towards Service User B were sexually motivated. The Panel considered that it was to the Registrant's credit that the complaint of Service User B was disclosed to the Police by the Registrant during his interview regarding his contact with Service User A. It also had regard to his good character. The Panel considered that the Registrant's incidental and/or accidental touching of Service User B's breast was as a result of poor clinical practice. However, it decided that there was nothing in the evidence to suggest that he was seeking sexual gratification or a personal relationship with Service User B.

99. The Panel therefore concluded that the Registrant's actions in respect of Service User B were not sexually motivated.

Decision on Grounds

100. On the basis of the facts found proved, the Panel went on to consider whether those facts amounted to misconduct. It took into account the submissions made by Ms Hollos on behalf of the HCPC and those of Ms Price on the Registrant's behalf.

101. Ms Hollos submitted that the facts found proved by the Panel amounted to misconduct. She referred the Panel to a number of the HCPC Standards of Conduct, Performance and Ethics (2016). She submitted that the Registrant's fitness to practise is impaired. She said that the conduct had been repeated and the public and the profession would expect a finding of impairment.

102. Ms Price submitted that the findings of the Panel demonstrated a lack of competence, rather than conduct which was so far short of the expected standards as to amount to misconduct. Ms Price submitted that if the Panel found the conduct did amount to misconduct, then a finding of current impairment was not required in the circumstances.
103. The Panel also had regard to the advice of the Legal Assessor. It also took into account the guidance provided by the HCPTS.
104. In considering this matter, the Panel exercised its own judgement. The Panel also took into account the public interest, which includes protection of service users, maintenance of public confidence in the profession, and the declaring and upholding of proper standards of conduct and behaviour.
105. The Panel did not accept Ms Price's submission that the findings of the Panel demonstrated a lack of competence. On the contrary, the evidence submitted by the Registrant in terms of his experience, and his testimonials, demonstrate that he is an able practitioner.
106. The Panel considered whether the facts found proved, either individually or collectively, amounted to misconduct.
107. The Panel considered it was entirely inappropriate for the Registrant to not ensure that Service User A's breasts were covered at all times (particular 1(b)), irrespective of whether he was in a hurry due to the service user's lack of time. The Panel concluded that such actions were a serious falling short of the standards expected of the Registrant and amounted to misconduct.
108. The Panel considered that in relation to informed consent (particulars 1(c) and 2(a)), in respect of each service user the conduct was a serious falling short of the standards expected of a registered Physiotherapist and amounted to misconduct.
109. In respect of Service User B (particulars 2(b), 2(c), 2(d), and 2(e), and 3 where relevant), the Panel decided that, in isolation, these did not meet the threshold required to amount to misconduct. However, the Panel noted that the Registrant had a meeting with Nuffield Health in June 2016 regarding the complaint of Service User B. The meeting note recorded that the Lead Governance Physiotherapist at Nuffield Health informed the Registrant that his handling (touching) of and communication with Service User B had been criticised. The Registrant

treated Service User A in August 2016. In the context of the previous complaint, the Panel found that the touching of Service User A's breasts (particulars 1(g) and 3 (in relation to 1(g)), albeit unintentional, was a serious falling short of the standards expected of a registered Physiotherapist and amounted to misconduct.

110. The Panel considered that, in respect of the other findings it made, the incidental and/or accidental touching of both service users and the lack of clinical justification (particulars 1(d), 1(e), 1(f), 1(h), 1(k) and 3 where relevant) was a falling short of the standard expected of a registered Physiotherapist, but not a serious falling short such that it would amount to misconduct.
111. The Panel did not accept Ms Hollos' submission that the unprofessional rubbing of Service User A's arms (particular 1(j)) was a serious falling short of the standard expected of a registered Physiotherapist. It considered that, whilst this was ill-advised and not professionally justified, it did not pass the threshold of a serious falling short such that it amounted to misconduct.
112. The Panel had regard to the HCPC Standards of Conduct, Performance and Ethics (2016) and it considered that the Registrant has breached the following:

1.1 You must treat service users and carers as individuals, respecting their privacy and dignity.

1.4 You must make sure that you have consent from service users or other appropriate authority before you provide care, treatment or other services.

113. The Panel found that the proved findings referred to above are a serious falling short of the standards of conduct expected of a registered Physiotherapist and amounted to misconduct.

Decision on Impairment

114. The Panel took into account that the purpose of these proceedings is to protect the public against the acts and omissions of those who are not currently fit to practise. In approaching this task, the Panel applied its own professional judgment. The Panel had regard to the practice note issued by the HCPTS. The Panel took account of the case of the

CHRE v Grant [2011], which reminds panels of the need to consider the public interest. In particular, the Panel noted paragraph 74;

"In determining whether a practitioner's fitness to practise is impaired by reason of misconduct, the relevant Panel should generally consider not only whether the practitioner continues to present a risk to members of the public in his or her current role, but also whether the need to uphold proper professional standards and public confidence in the profession would be undermined if a finding of impairment were not made in the particular circumstances."

115. The Panel also considered the case of *Cohen-v- GMC [2008] EWHC 581 (Admin)*. At paragraph 65 of Cohen Silber J. states:

"...it must be highly relevant in determining if a doctor's fitness to practice is impaired that first his or her conduct which led to the charge is easily remediable, second that it has been remedied and third that it is highly unlikely to be repeated".

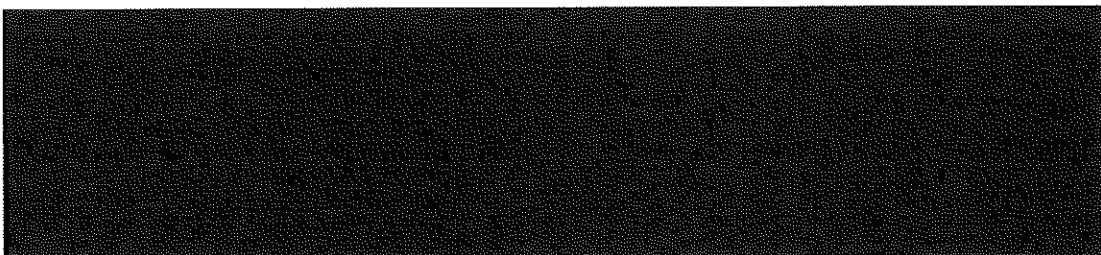
116. The Panel first considered the personal component of impairment.

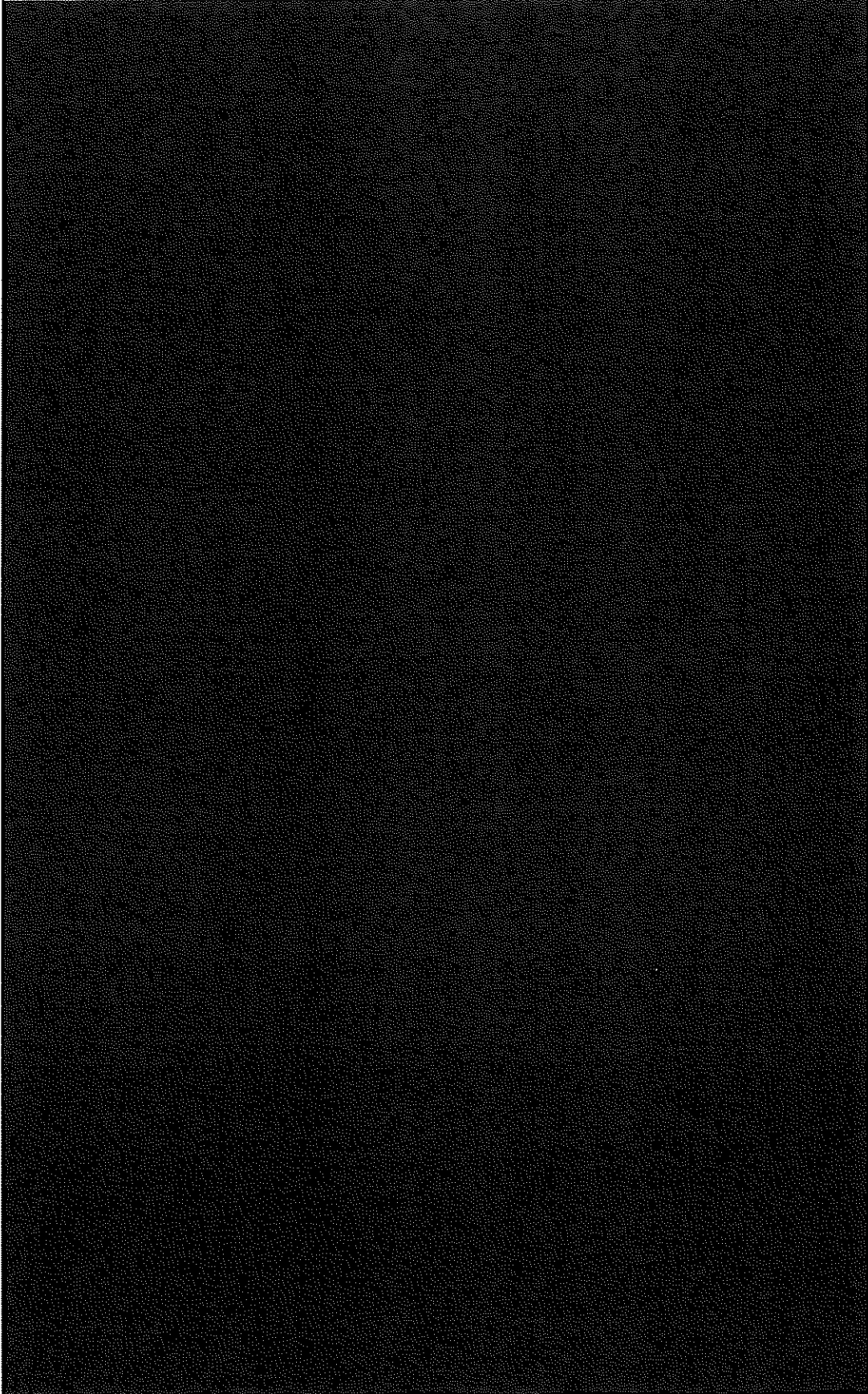
117. The Panel accepted that both Service User A and Service User B were upset by the Registrant's behaviour when he performed the treatments. The level of ongoing distress caused by their experience was apparent when both service users gave oral evidence to the Panel. The Panel found that this was caused by the Registrant's poor technique. However, he did not demonstrate that he has understood or appreciated the impact of this poor technique on Service User A and Service User B.

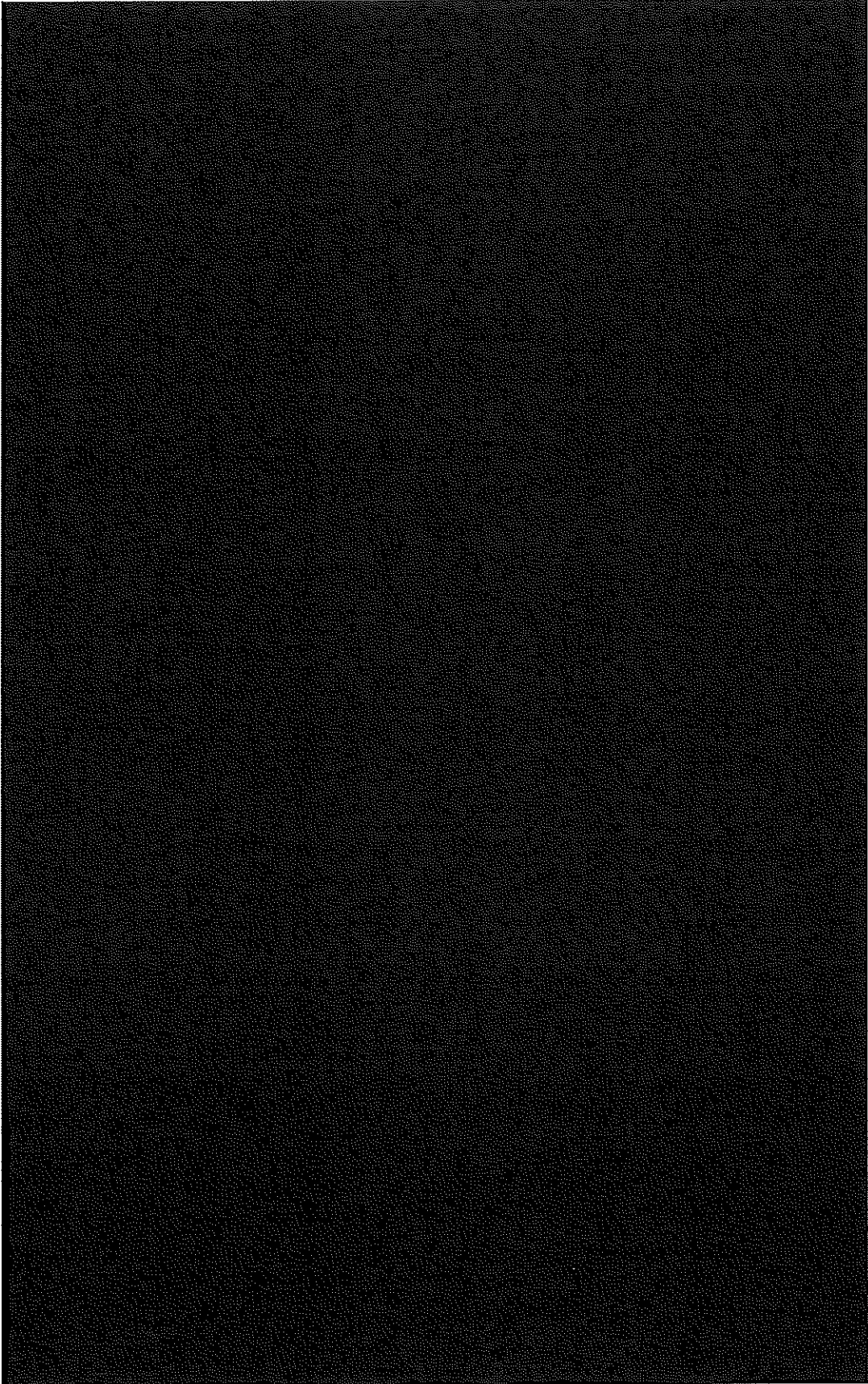
118. The Panel noted that the two complaints were made within a short period of time and that no complaint(s) had been made prior to the events in question, nor since. The incidents appear to be isolated in time. The Panel took into account the numerous testimonials provided by the Registrant both from practitioners and service users who spoke positively of his skills and his ability. Four witnesses gave supportive oral testimony on the Registrant's behalf, including a female former service user. In all the circumstances, the Panel considered that the risk of the Registrant inappropriately touching a service user's breast again was low.

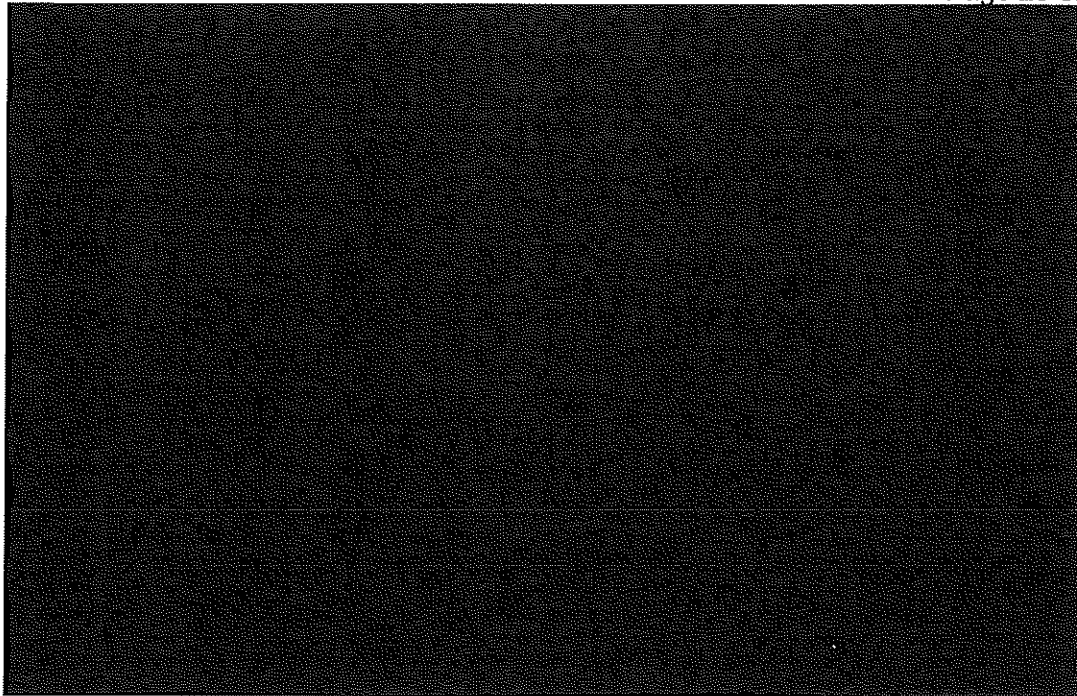
119. With regards to consent, the Panel heard evidence from SR that the Registrant's practice in relation to Service Users A and B was his usual practice at that time. It was not adequate to simply list at the outset what he was going to do and take this as informed consent for the remainder of each session. This was too much detail and too much information to give a service user at the outset of treatment. The Registrant should have continued to explain what he was doing throughout the sessions to the service users. The Panel has heard no evidence that his practice has changed, nor that he has recognised the requirements of consent as an ongoing process, described by Mr Edbrooke as a "*moveable feast*". The Panel therefore concluded that there is a risk of repetition in relation to the Registrant's practice with regard to informed consent.
120. The Panel therefore concluded that the Registrant's fitness to practise is currently impaired on the personal component of impairment.
121. In respect of the public component, the Panel was of the view that the public would be concerned that the Registrant fell far short of the standards expected of him. His misconduct undermined public confidence in the profession and failed to uphold proper standards of conduct and behaviour. The Panel considered that if the Registrant had taken the time to explain to Service Users A and B what he was doing, they would not have been surprised and left concerned by what had happened. Informed consent is an ongoing process.
122. The Panel concluded that a finding of current impairment was required to uphold public confidence in the profession. By making such a finding, the Panel is sending a clear message to the profession and the public that the misconduct found in this case was unacceptable, and undermined the public's trust in the Physiotherapy profession.
123. The Panel therefore concluded that the Registrant's fitness to practise is currently impaired on the public component of impairment.

Decision on Sanction

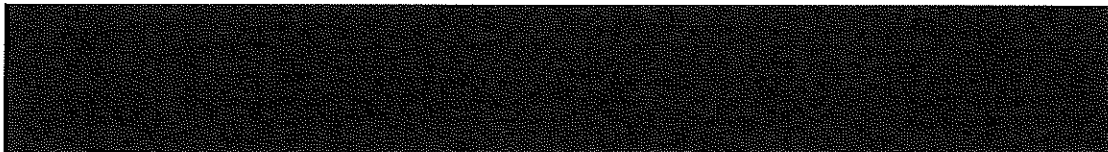








Order



Right of Appeal

You may appeal to the High Court in England and Wales against the Panel's decision and the order it has made against you.

Under Article 29(10) of the Health and Social Work Professions Order 2001, any appeal must be made within 28 days of the date when this notice is served on you. The Panel's order will not take effect until the appeal period has expired or, if you appeal, until that appeal is disposed of or withdrawn.

EXHIBITS LOG

Additional documents which are submitted either by the Registrant or the HCPC during the hearing must be logged on this form.

Case Details	
Date of Hearing:	10 – 29 July 2019
Name of Registrant and FTP Number	FTP51191 - Franchini
Hearings Officer	Lilly Ofori

Document Name (e.g Exh1, Exh2...)	Number of Pages
1. R1 – Witness Statement of Andrea Franchini	24
2. R2 – Registrant's bundle	78
3. R3 – Registrant's addendum bundle	72
4. R4 – Witness statement – Amaral	2
5. R5 – Images of Physiotherapy treatments	4
6. R6 – Reference – Treasure	1
7. R7 – Reference – Morrissey	1
8. R8 – Reference – Soriente	1
9. R9 – Reference – Russomando	1
10. R10 – Reference - Selvarajah	1
11. R11 – Reference – Selvarajah	1
12. R12 – Patient notes for Service User A	2

health & care professions tribunal service	The fitness to practise adjudication service of the Health and Care Professions Council.
13. "Manual Therapy Solutions" – PowerPoint presentation	2
14. R14 - Reference – Selvarajah	1
15. R15 – Witness statements and service user feedback	40
16. H2 – Labelled diagrams of the torso	4
17. H3 – Witness statements	16
18. H4 – HCPC closing submissions	16
19. SU1 – Body Map for Service User A laying on her front	1
20. SU2 – Amended body map for Service User A on her front	1
21. SU3 - Body Map for Service User A laying on her back	1
22. SU4 - Body Map for Service User B laying on her front	1

A. Notices

Notice of Allegation date 17 April 2018	A1 - A4
Certificate of Registration dated 17 April 2018	A5

B. Case Summary

Case Summary	B1 - B8
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C. Witness Statements

Signed Witness Statement of Service User B	C1 - C7
Signed Statement of Service User A	C8 - C18
Signed Witness Statement of Person C	C19 - C32
Signed Witness Statement of Ms Clare Henson-Bowen	C33 - C39
Final Expert Report by Tim Edbrooke	C40 - C69
Signed Witness Statement of Ms Subagarey Pathmanathan	C70 - C71

D. Exhibits

Exhibit 1 Letter from Met Police received 10.09.17 to Amaka Rapu enclosing MG5	D1 - D8
Exhibit 2 CPS Exhibit 2 Service User A Redacted patient notes	D9 - D10
Exhibit 3 Letter from Met Police to Amaka Rapu dated 15.11.17 enclosing Service User A's statement	D11 - D16
Exhibit 4 Statement from Service User A's husband in relation to alleged assault on 10.08.16	D17 - D19
Exhibit 5 Statement from Service User A's work colleague in relation to alleged assault on 10.08.16	D20
Exhibit 6 Letter to Louise Simpson from Met Police received 23.04.18 enclosing MG11 Statement of Clare Henson-Bowen	D21 - D23
Exhibit 7 CPS Exhibit 1 Appointment Notes by Clare Henson-Bowen	D24 - D26
Exhibit 8 Record of Police Interview with Registrant 26.08.16	D27 - D62
Exhibit 9 Service User B's witness statement dated 27.09.16	D63 - D68
Exhibit 10 Record of Second Police Interview with Registrant 10.01.17	D69 - D84
Exhibit 11 Root Cause Analysis Investigation Report dated 15.06.16	D85 - D97

D. Exhibits (cont...)

Page 4 of 4

Appendix A Investigation Report Appendix A Chronological Timeline of Events	D98 - D100
Appendix B Investigation Report Appendix B Phone Conversation by NH Fusion Administrator and Client	D101
Appendix C Investigation Report Appendix C Investigator phone discussion with Service User B	D102
Appendix D Investigation Report Appendix D Investigation Meeting with Physiotherapist A	D103 - D109
Appendix E Investigation Report Appendix E Service User B's clinical records	D110 - D112
Appendix F Investigation Report Appendix F Incident Decision Tree	D113
Appendix G Investigation Report Appendix G Fishbone CDPSP Analysis	D114 - D116
Exhibit 12 Fitness to Practise Concern Form dated 17.08.16	D117 - D129
Exhibit 13 Victim Impact Statement by Service User A 05.06.18	D130 - D133
Exhibit 14 Letter from Met Police to Louisa Simpson dated 14.06.18 enclosing Person C's statement	D134 - D140
Exhibit 15 Text Message Screenshots - Person C	D141 - D147
Exhibit 16 Photo within messages of the Registrant's details obtained for Clare Henson-Bowen	D148
Exhibit 17 AXA Records of dates of Physiotherapist Appointments for Service User B	D149 - D158
Exhibit 19 Documents from the defence for the consideration of Tim Edbrooke, Expert Witness	D159 - D284
Exhibit 18 R v Franchini trial transcripts 29.06.17 - 06.07.17	D285 - D669