EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2016] CSIH 58
XA120/15

Lord Bracadale
Lord Malcolm
Lord Doherty

OPINION OF THE COURT

delivered by LORD BRACADALE

in the appeal

under section 29 of the National Health Service Reform and Healthcare Professions Act 2002

by

THE PROFESSIONAL STANDARDS AUTHORITY FOR HEALTH AND SOCIAL CARE
Appellant;

against

THE GENERAL DENTAL COUNCIL
First Respondent

and

ST

Second Respondent:

Appellant: Johnston QC, O'Neill Solicitor Advocate; Brodies LLP
First Respondent: Dunlop QC; Anderson Strathern LLP
Second Respondent: Duncan QC; Clyde & Co LLP

19 May 2016

Introduction

[1] On 19 May 2016 we dismissed this appeal, stating that we would give reasons in writing later, which we now do.

[2] The second respondent (the registrant) is a registered dentist who qualified in 2005. In early 2014 he took up a position in a practice in a Scottish town. As a result of certain events which occurred shortly thereafter, disciplinary proceedings were brought against him by the first respondent, the General Dental Council (the GDC). Issues of health and/or misconduct were raised. On 16 September 2015, after a hearing, the Health Committee of the GDC (the committee) found that while the registrant's fitness to practise was not impaired by reason of health, his fitness to practise was impaired by reason of misconduct. The committee directed in terms of section 27B of the Dentists Act 1984 that for a period of twelve months his registration should conditional on compliance with certain conditions (a conditions of practice order).

[3] The appellant is the Professional Standards Authority for Health and Social Care (the PSA). It derives its functions and powers from the provisions of the National Health Service Reform and Health Care Professions Act 2002 (the 2002 Act). The PSA has a number of functions in relation to the performance by the professional regulatory bodies, including the GDC, of their functions. In exercising its functions the PSA is to promote the health, safety and wellbeing of members of the public (section 25(2A) of the 2002 Act). Among the powers of the PSA is the power provided in section 29 of the 2002 Act to refer disciplinary cases to the court. In the exercise of that power the PSA referred the decision of the committee to this court on the basis that the decision was unduly lenient and that it would be desirable for the protection of members of the public for the authority to take action.

[4] There are four grounds of appeal: the case had been under-prosecuted; the sanction imposed was unduly lenient; the conditions of the conditions of practice order were not appropriate to the level of misconduct; and the reasons given by the committee were not adequate.

[5] On behalf of the PSA, Mr Johnston QC moved the court in terms of section 29(8) of the 2002 Act to allow the appeal, quash the relevant decision and remit the case to a differently constituted committee with appropriate directions.

Section 29 of the 2002 Act

[6] At the date the PSA referred this appeal to the court, section 29 of the 2002 Act provided:

> "(1) This section applies to—
> …
> (e) a direction by … the Health Committee of the General Dental Council under any of sections 27B, 27C, 36P or 36Q of the Dentists Act 1984 following a determination that a person's fitness to practise as a dentist … is impaired,
>
> (2) This section also applies to—
> (a) a final decision of the relevant committee not to take any disciplinary measure under the provision referred to in whichever of paragraphs (a) to (h) of subsection (1) applies,
> …
>
> (3) The things to which this section applies are referred to below as *"relevant decisions"*.
>
> (4) If the Authority considers that—
> (a) a relevant decision falling within subsection (1) has been unduly lenient, whether as to any finding of professional misconduct or fitness to practise on the part of the practitioner concerned (or lack of such a finding), or as to any penalty imposed, or both, or
> (b) a relevant decision falling within subsection (2) should not have been made,
> and that it would be desirable for the protection of members of the public for the Authority to take action under this section, the Authority may refer the case to therelevant court.
>
> (5) In subsection (4) (subject to subsection (5A)), the 'relevant court'–
> (a) in the case of a person who (in accordance with the rules applying to the body making the relevant decision) was, or was required to be, notified of the relevant decision at an address in Scotland, means the Court of Session,
> …
>
> (7) If the Authority does so refer a case—

(a) the case is to be treated by the court to which it has been referred as an appeal by the Authority against the relevant decision (even though the Authority was not a party to the proceedings resulting in the relevant decision), and

(b) the body which made the relevant decision is to be a respondent.

(8) The court may—

(a) dismiss the appeal,

(b) allow the appeal and quash the relevant decision,

(c) substitute for the relevant decision any other decision which could have been made by the committee or other person concerned, or

(d) remit the case to the committee or other person concerned to dispose of the case in accordance with the directions of the court, and may make such order as to costs (or, in Scotland, expenses) as it thinks fit."

[7] There is a tension between subsection (4) and subsection (1)(e) read with subsection (3). Subsection (1) applies to "a direction" by the committee "following a determination that a person's fitness to practise as a dentist is impaired". In terms of subsection (3) such a direction is a "relevant decision". Subsection (4) contemplates the situation in which the PSA considers that a relevant decision falling within subsection (1) was unduly lenient. The reference in subsection (1)(e) to "a direction following a determination that a person's fitness to practise as a dentist is impaired" does not sit easily with the full terms of subsection (4), namely, that the authority considers that the relevant decision has been unduly lenient, "whether as to any finding of professional misconduct or fitness to practise on the part of the practitioner concerned (or lack of such a finding), or as to any penalty imposed, or both". It was with the difficulty of construction arising from that tension that the Court of Appeal wrestled in *Council for the Regulation of Health Care Professionals* v *General Medical Council and Ruscillo* [2005] 1 WLR 717, which featured in the discussion before us.

Proceedings before the committee

[8] The committee considered the case in terms of section 27B of the Dentists Act 1984.

The charges which brought the registrant before the committee were in the following terms:

> "That being a registered dentist -
> 1. You suffer from the health condition as set out in the addendum schedule 1.
> 2. Whilst working at the …Dental Practice ('the practice') between February and April 2014 you behaved inappropriately towards Colleague A in that you -
> a. told her you would like to try hard drugs;
> b. indicated you would send material of a sexual nature to her mobile phone;
> c. engaged her in conversation of a sexual nature;
> d. suggested that you wanted to look down her top;
> e. told her you were going to touch her.
> 3. In the same period and whilst working at the practice you behaved inappropriately towards Colleague B in that you remarked that if you saw her getting changed you would take photographs of her and put them on the internet.
> 4. In the same period you
> a. ordered deliveries of codeine linctus to the practice for your personal consumption;
> b. consumed codeine linctus at the practice during working hours and whilst you were at work.
> AND in relation to the matter set out at paragraph 1 your fitness to practise is impaired by reason of your adverse physical or mental health;
> AND/OR in relation to the matters set out at paragraph 2, 3 and 4 your fitness to practise is impaired by reason of your misconduct."

[9] At the outset of the hearing counsel for the registrant advised the committee that all of the heads of charge were admitted.

[10] In his opening statement counsel for the GDC provided the committee with the following narrative of the facts in the case:

> "Charge 2 concern [the registrant's] dealings with a 19 year old (as she then was) dental nurse who was assigned to him. That person is Colleague A. Charge 3 concerns his dealings with a fellow dentist, Colleague B, and by way of summary his behaviour towards both of those colleagues was, the GDC submit, wholly inappropriate and in large part sexually motivated.
> Colleague A, a female dental nurse who, as I say, at the time of these allegations was a young lady who had only been qualified for two months, was assigned to work in the Registrant's surgery. When the Registrant began behaving inappropriately towards her she in fact turned to her father for some advice who told her to keep a diary of the Registrant's behaviour and so it happens that there is a contemporaneous record of the sorts of things that he did and said to her. For the

Committee's reference, that record is reproduced in the hard copy bundle at pages 47 through to 62. They are also set out in Colleague A's statement and that appears in the bundle at page 41.
Charges 2(a) to (e) are illustrative of the catalogue of his misconduct and they include the following: [the registrant]told her that he would like to try hard drugs but did not know where to find them; he told her that she was the only exception to the fact that there were no good looking people in [the town]; and he asked for her mobile phone number so that he could send her dirty pictures. It is perhaps significant to know that Colleague A later said that she simply did not know how to respond because of her inexperience and also because she was aware that [the registrant] was buying the practice and would therefore subsequently be her direct employer. He told her the same day that the two of them should go on a night out together because he was 'anyone's' after two glasses of wine.
He told her on an occasion that he could look down her top. He asked her if she knew any prostitutes in [the town] as his business partner liked to sample them. On another occasion he reached behind Colleague A, touched her back and asked her what colour bra she was wearing. He told her he was 'a dirty fucker' and on that same day caused her to back into a corner of his surgery and told her he was going to 'shove a can of alginate adhesive up her backside'.

He told her he was going to touch her and he made a lewd reference to a 14 year old female patient and when Colleague A pulled him up on it he said, 'If the grass is grown it's time to play ball.'
After about six weeks Colleague A it seems plucked up enough courage to discuss his behaviour with him but when she told him about her concerns, that he made her feel uncomfortable, he said that she should have said something and that in his last practice there was a 19 year old girl who felt uncomfortable and there were repercussions, which Colleague A took to be vaguely threatening. Meanwhile, the Registrant was also sending Colleague A a number of text messages outside of working hours and it follows, I hope, that the matters I have just recited all occurred within working hours at the time that he was working in the surgery with Colleague A. Those text messages appear in the Committee's bundle between pages 62 and 84 and I do not go through them in any detail. They simply illustrate the sort of contact which was wholly unwanted and unwarranted between the Registrant and Colleague A.
Towards the end of March the practice manager, whose statement appears at page 9 (and if I may in fact add to the identification key, the author of that statement at page 9, please, can be Colleague C) became aware of what had been going on. She spoke with Colleague A and it transpired from that conversation that the Registrant had also been behaving inappropriately to other members of staff, notably Colleague B. Colleague B's statement appears at page 83 of the bundle.
By way of background, at the …practice it was well established that the office was used by some of the staff members to get changed and it was understood by all that one knocked on the door before entering in case someone was getting changed. Colleague B was able to recall that on one occasion whilst the Registrant was working at the practice she went to the office to get changed. She understood that one of the other dentists was in the office and she asked him, presumably through

> the closed door, if he was decent and the Registrant, who was plainly nearby, told her that the other dentist was not and that she should wait. Whilst Colleague B was waiting the Registrant told her that he grew up with lots of women and that he would not bat an eyelid if he walked in on her changing. She replied in terms that she would mind a great deal and he then told her that he would take photographs of her and put them on the internet; he also suggested that he would sell them. That gives rise to Charge 3."

[11] The evidence in support of the charges included two expert medical reports, written statements from four witnesses and associated exhibits. The committee recorded that the evidence before it was agreed by both parties and accepted by the committee. The committee noted the opening made by counsel on behalf of the GDC and the admission made to all heads of charge by counsel for the registrant. The committee found each of the charges admitted and proved.

[12] In making a finding of misconduct the committee made the following statement:

> "The Committee considered that acting in the manner that it has already found proved, you placed Colleague A in a compromising position and breached her trust. You were in a position of trust and authority and your actions breached the boundaries of professionalism. The Committee further considered that the comments made to Colleague B were unacceptable and inappropriate. The nature of the comments made to both Colleague A and Colleague B were of a sexual nature and the comments made to Colleague A were particularly explicit in their nature. You accepted that your behaviour towards both colleagues was 'abhorrent'. This was a significant departure from the standards expected of a registered dental practitioner."

[13] The committee went on to find that the registrant's fitness to practise was currently impaired by reason of his misconduct. While recognising that the misconduct was remediable, the committee noted that the issues identified were more difficult to remedy than clinical deficiencies. The committee had concerns about the level of insight which the registrant demonstrated with regard to the impact of his behaviour on his colleagues as well as any potential detrimental effect on patients. While appreciating that by the time of the

hearing the registrant might have gained an awareness of these issues, the committee considered that he did not have full insight.

[14] The committee considered that the steps which the registrant had taken to address his misconduct were still in the early stages and had not at that stage remedied the behaviour to a sufficient extent that the risk of repetition was removed. The committee noted that the misconduct was not a single isolated incident but rather a course of conduct. The committee considered that the misconduct by violating colleague A's personal boundaries and her trust and by the comments made to colleague B the registrant had breached fundamental tenets of the profession and had brought the profession into disrepute.

[15] In coming to its decision on sanction the committee recognised that the purpose of a sanction was not to be punitive, although it might have that effect, but rather to protect patients and the wider public interest. The committee took into account the GDC's Guidance for the Professional Conduct Committee. The committee applied the principle of proportionality, balancing the public interest with the interests of the registrant. Using the lists set out in paragraphs 5.17 and 5.18 of the Guidance the committee identified the mitigating and aggravating factors which they considered to be present in the case of the registrant. They identified the mitigating factors as:

- evidence of the circumstances leading up to the incident in question;
- evidence of the good conduct following the incident in question, particularly any remedial action;
- evidence of some remorse shown;
- evidence of steps taken to avoid a repetition;
- time elapsed since the incident.

They identified the aggravating factors as:

- actual harm or risk of harm to a patient or another;
- premeditated misconduct;
- breach of trust;

- the involvement of a vulnerable individual;
- misconduct sustained repeated over a period of time;
- attempts to cover up the wrongdoing;
- lack of insight.

In addition, the committee considered that the consumption of benzodiazepine by the registrant was an aggravating factor.

[16] The committee then considered the range of sanctions available to it and came to focus in particular on a choice between the imposition of a period of conditional registration and a suspension order. The committee had regard to the seriousness of imposing a period of suspension and the steps that the registrant had taken so far to remediate the misconduct. It came to the conclusion that in all the circumstances of the case and taking into account all the evidence adduced, it would be disproportionate to impose a period of suspension. The committee considered that the public would be suitably protected and the public interest upheld through the imposition of conditions of practice. In addition it considered that suspension would not enable the registrant to address the issues which the committee had identified.

Ground of appeal 1: Under-prosecution

[17] In support of this ground of appeal Mr Johnston first explored the question whether within the scheme of section 29 of the 2002 Act the PSA had power to refer a case of under-prosecution. He submitted that the PSA did have power to refer a case on the basis that the charges did not reflect the gravity of the allegations. Secondly, in the registrant's case that power had been properly exercised and the court should find that the charges should have contained (a) further particulars in relation to the conduct complained of; and (b) an allegation of sexual motivation.

The extent of the power to refer to the court

PSA

[18] Mr Johnston relied on the judgment of the Court of Appeal in *Council for the Regulation of Health Care Professionals* v *General Medical Council and Ruscillo* (*supra*) as highly persuasive authority that it was open to the PSA to refer to the court a case of under-prosecution. In addition, he relied on two subsequent cases (*R (Council for the Regulation of Health Care Professionals)* v *General Medical Council and Dr Mahesh Rajeshwar* [2005] EWHC 2973 (Admin) and *R (Council for the Regulation of Health Care Professionals)* v *Nursing and Midwifery Council and another* [2007] EWHC 1806 (Admin), 98 BMLR 60) in which the decision in *Ruscillo* was followed in the Administrative Court.

[19] At paragraphs 80 to 82 of the judgment in *Ruscillo* the court stated:

> "80. …The Disciplinary Tribunal should play a more proactive role than a judge presiding over a criminal trial in making sure that the case is properly presented and that the relevant evidence is placed before it.
>
> 81. If, as in the case of Dr Ruscillo, the Council is led to believe that a case has been 'under-prosecuted' or that relevant evidence has not been put before the Tribunal with the consequence that the Tribunal's decision is flawed, the Council should, in the first instance, make inquiries of the relevant healthcare regulatory body as to what occurred. The GMC accepts that where such inquiries are made in such circumstances it is right that the body in question should cooperate with the Council and make available any material that was not before the Disciplinary Tribunal. The GMC expresses concern, however, that such material should not be placed in the public domain without careful consideration being given to all the consequences of this course. We share this concern. Complainants are often reluctant to undergo the publicity attendant on providing evidence in disciplinary proceedings. In such circumstances, careful arrangements are often reached between those acting for the parties designed to avoid witnesses being exposed to publicity or having to undergo the stress of giving evidence. Such arrangements should not be disturbed without good reason.

> 82. At the same time there will be cases where it is in the public interest that additional evidence should be placed before the court on a reference under section 29. This may be necessary to ensure that a practitioner does not escape the sanctions that his conduct has made essential if patients are not to be exposed to risk".

[20] Subsection 29(4) was not confined to sanction; it was directed at a decision. It referred to findings of professional misconduct or fitness to practice, or lack of such findings. These fell within the scope of what the PSA might consider in deciding whether to refer a case to the court. This court should adopt the construction of section 29(4)(a) set out in paragraph 67 of *Ruscillo*:

> "If the Council considers that –
>
> (a) a relevant decision falling within subsection (1) has been unduly lenient, whether because the findings of professional misconduct are inadequate, or because the penalty does not adequately reflect the findings of professional misconduct that have been made, or both…"

The court held that that reading of the subsection accorded with the scheme of section 29 and was not in conflict with its language.

[21] Mr Johnston submitted that the width of that approach was consistent with the overriding purpose of Part 2 of the Act which dealt with the duty of the PSA to promote the interests of users of healthcare and other members of the public.

[22] The second aspect of the section 29(4) test was whether the PSA considered it was desirable to make the reference for the protection of the public.

GDC

[23] Mr Dunlop QC on behalf of the GDC submitted that it was not open to the PSA to refer a case of under-prosecution. Its power to refer was limited to sanction. Subsection 29(4) required consideration of a "relevant decision". In terms of subsection (3)

the things to which section 29 applied were referred to "below" as "relevant decisions". "Below" included subsection (4). In terms of subsection (1)(e) section 29 applied to a direction of the health committee of the GDC under any of sections 27B, 27C, 36P or 36Q of the Dentists Act 1984 following a determination that a person's fitness to practise as a dentist … was impaired. It was therefore an essential requirement of the power to refer the case in terms of subsection (4) that there had been a finding of impairment. There required to be a decision in circumstances in which there had been a finding of impairment and the committee had made a direction or had declined to make a direction (subsections (1)(e) and (2)(a)). It was not open to the PSA to refer to the court a case in which no finding of misconduct had been made. The power to refer was restricted to sanction. The PSA could not refer a case of under-prosecution.

[24] Mr Dunlop further submitted that there was no reference in subsection 29(1)(e) to sections 27 or 27A of the Dentists Act 1984; the reference was to a direction made under sections 27B or 27C. Sections 27 and 27A provided for action in response to an allegation by the registrar who was required to refer the allegation to the investigating committee which was then to investigate the allegation and determine whether it ought to be considered by a practice committee. It was the registrar and the investigating committee which decided to prosecute. Because the duties of these bodies under section 27 and section 27A did not come within the purview of the PSA, it was not open to the PSA to complain about what the registrar or the investigating committee did. Section 27B made provision for the duties of the practice committees; only the duties of the practice committees were open to consideration by the PSA.

Reply by PSA

[25] In reply Mr Johnston submitted that the contention that there was a requirement for a finding of impairment in order to operate subsection (4)(a) was not consistent with the wording of that subsection which in terms contemplated the making of no such finding. If there required to be a finding of impairment the PSA would be unable to refer to the court a case in which there was no such finding, That would create a serious gap in the protection which the statute afforded to the public. The argument had been rejected in *Ruscillo* at paragraphs 44-46. There the Court of Appeal had observed that the submission that the scheme of section 29 was one of which permitted an appeal only against the sentencing exercise involved in disciplinary proceedings but not against a finding of whether professional misconduct had been established created a problem in respect that the mischief against which section 29 was aimed occurred just as much where a disciplinary tribunal wrongly concluded that conduct did not amount to professional misconduct as where the tribunal imposed too lenient a penalty. In addition, section 29(4)(a) made express provision for the PSA to have regard to the lack of a finding of professional misconduct when considering whether a decision which fell within subsection (1) had been unduly lenient. Recognising that section 29(4)(a) raised problems of construction, the court noted that it was quite clear that in some circumstances a failure to find professional misconduct where professional misconduct should have been found was a relevant consideration in deciding whether a reference should be made to the High Court. It would be anomalous if, under section 29(4), no regard could be had to an erroneous failure to find professional misconduct.

Was there under-prosecution in this case?

PSA

[26] In submitting that in the present case there had been under-prosecution, Mr Johnston advanced two propositions. First, the charges had failed to specify matters which ought to have been included. The details of the registrant's conduct towards each of colleagues A and B had not been fully specified. Conduct towards a third female colleague had formed no part of the charges and no evidence in relation to it had been before the committee. Had these matters been the subject of specific charges before the committee and they had been found to have been proved the committee would have been obliged to have specific regard to the terms of the charges when considering sanction. Secondly, sexual motivation ought to have been specifically alleged. Motivation should have been specifically included in the charge if it was to be relied on against the registrant. Sexual misconduct was to be viewed seriously and should have been included in the charge.

GDC

[27] Mr Dunlop submitted that the committee had said in terms that it considered all of the evidence agreed by both parties. This was not a case where an allegation had not been put before the committee. All the evidence that was available had been put before the committee; it had been agreed and had been taken into account by the committee.

The registrant

[28] Mr Duncan QC on behalf of the registrant submitted that various matters, including all of the more serious allegations, had been canvassed in the opening submissions of the GDC. The charges had been admitted. The registrant was cross-examined without objection in relation to the details. The charges expressly included sexual motivation. Submissions

made by counsel before the committee, but not accepted by the committee, should not be relied on.

Discussion and decision on under-prosecution

[29] The charges, which we have set out above, were clear and succinct. They were supported by the statements lodged. At the outset of the hearing counsel for the registrant advised the committee that all the heads of charge were admitted. Counsel for the GDC then in the course of his opening submission gave the committee a full narrative of the facts supporting the charges. At a later stage the registrant himself gave evidence in which he accepted that his conduct had been wholly inappropriate and that his comments were of a sexual nature. The committee stated that it fully considered all the evidence before it. Having done so the committee made the statement quoted above in which it found the following proved: the registrant had placed colleague A in a compromising position and breached her trust; the comments made to colleague B were unacceptable and inappropriate; the nature of the comments made to both colleagues were of a sexual nature and the comments made to colleague A were particularly explicit in their nature; the registrant had accepted that his behaviour towards both colleagues had been "abhorrent". There is no indication in the determination that the committee accepted the submission of counsel for the registrant that sexual attraction motivation had not been squarely placed in the charges. On the contrary, it is perfectly clear from the findings that it accepted that there was sexual motivation.

[30] We are also satisfied that the committee (i) had before it, and took account of, all the material evidence concerning the registrant's conduct towards colleagues A and B; and (ii) proceeded on the basis that the registrant's conduct towards those colleagues was sexually

motivated in respect of charges 2(b) - (e) and 3. We accept that the committee did not have before it any allegation or evidence relating to alleged conduct of the registrant towards a third female colleague. However, having seen the terms of that allegation we are content that even if that conduct had been charged and proved it is very unlikely to have made any material difference to the committee's approach towards the registrant or to its disposal of the case. It follows that, on the facts, the case for allowing an appeal on the ground of under-prosecution has not been established. We are satisfied that each of the three cases of under-prosecution to which Mr Johnston referred us is readily distinguishable from the registrant's case.

[31] Since there has not been under-prosecution it is not necessary to decide whether s.29 empowers the PSA to refer a case to the court on that ground. Nonetheless, we have considered carefully whether we should express a view on the point. For the following reasons we have decided that it is not appropriate to do so. First, we are very conscious that the construction of s. 29 is not free from difficulty: that much is evident to us from the language of the section, from the judgment of the Court of Appeal in *Ruscillo*, and from the submissions which we heard. Since any opinion we expressed would be *obiter*, we are hesitant to venture a view upon the construction of a provision of a United Kingdom statute which has recently been construed by the Court of Appeal of England and Wales with the benefit of extensive argument. Second, we are not persuaded that there is any pressing need for us to provide such guidance. Section 29 has been the subject of amendment: with effect from 31 December 2015, subject to transitional provisions, the version of subsection 29(4) in force in respect of this appeal has been replaced by new subsections 29(4) and (4A) (substituted by General Medical Council (Fitness to Practise and Over-arching Objective) and the Professional Standards Authority for Health and Social Care (References to Court)

Order 2015/794, Part 2, art.18(3)). Any future cases are likely to be brought under the new provisions. In the whole circumstances we prefer to reserve our opinion on the construction issue until an occasion arises where its resolution is required for the disposal of an appeal.

Ground of appeal 2: Sanction

Submissions

PSA

[32] Mr Johnston submitted that the conditions imposed by the committee did not address the risk to public protection presented by the registrant's conduct: the committee had had reservations as to the level of the registrant's insight; there was continuing concern as to the possibility of repetition; there had been risk to patients; there had been a breach of trust; and the registrant had brought the profession into disrepute.

[33] In the light of these considerations suspension was the appropriate sanction and the reasons given by the committee for rejecting it were unsound. An impartial observer could not be confident that the committee had properly taken into account the public interest and the reputation of the profession. The committee had placed insufficient weight on the aggravating factors. The result was a manifestly inappropriate outcome.

GDC

[34] Mr Dunlop supported the submission that the sanction was unduly lenient.

The registrant

[35] Mr Duncan submitted that as all the relevant material was before the committee the court should give due respect to the decision of the committee. The committee had been

thorough in its analysis. It had taken a discriminating approach to the question of insight. It had carefully considered the question of suspension. Its reasons for rejecting suspension and imposing the conditions of practice order were not open to criticism.

Discussion and decision on sanction

[36] The task of the committee was to impose a penalty which was appropriate having regard to the safety of the public and the reputation of the profession (*Ruscillo* para 73). Parties were agreed that in coming to a conclusion as to whether the sanction was unduly lenient the test to be applied was whether the committee had reached a decision as to penalty that was manifestly inappropriate having regard to the practitioner's conduct and the interests of the public (*Ruscillo,* para 77).

[37] In making a finding of impairment of fitness to practise the committee bore in mind that its primary function was not only to protect patients but also to take account of the wider public interest, which included maintaining confidence in the dental profession and the GDC as a regulator, and upholding proper standards and behaviour. In its analysis of the various factors pointing towards impairment of fitness to practise it is clear that the committee considered remediation to be an important consideration. It concluded that in the case of the registrant remediation was an ongoing process. While the misconduct was remediable, the nature of the issues involved made them more difficult to remedy than clinical deficiencies. While insight was developing, the committee considered that at the time of the hearing the registrant did not have full insight. The steps which he had taken to address his misconduct were still in the early stages. As at the date of the hearing, there had not been sufficient remediation to remove the risk of repetition. This reflects a cautious approach on the part of the committee. When it came to consider sanction the committee

revisited the ongoing process of remediation. It is in this context that the statement of the committee that suspension would not enable the registrant to address the issues identified by the committee should be understood.

[38] In setting the period of the order at 12 months the committee again stressed the importance of continuing remediation:

> "The committee is of the view that 12 months would allow you time to address the areas identified as being deficient and provide the required information to the GDC… The committee recognised the steps that you have taken to address your health and misconduct. The committee was encouraged by the foundation for your remediation of the misconduct and considered that any future reviewing committee would be a assisted by evidence of your continuing with all these steps."

The committee went on to indicate that it would hold a review before the end of the period of the order to see how well the registrant had complied with it and at that stage would consider what further steps the registrant had taken to remediate his conduct. At that stage various disposals, including the making of a new order, would be available to the reviewing committee. As Lord Malcolm commented in the course of the hearing, the committee was effectively placing the registrant on probation.

[39] The committee considered the question of suspension, as it would have been bound to do, given the nature of the misconduct and its finding that the registrant had brought profession into disrepute. The committee made a judgement that it would be disproportionate to impose a period of suspension and that the public would be suitably protected and the public interest upheld through the imposition of conditions of practice.

[40] We reject the assertion that that judgement resulted in a manifestly inappropriate outcome. We consider that it is appropriate to show respect to the expertise of the committee as a professional decision-making body. In our opinion all relevant material was

before the committee and that it gave due consideration to the relevant factors. We agree with the observation at paragraph 78 of *Ruscillo*:

> "Where all material evidence has been placed before the disciplinary tribunal and it has given due consideration to the relevant factors, the Council and the court should place weight on the expertise brought to bear in evaluating how best the needs of the public and the profession should be protected."

We were advised that the lay chair was highly experienced and that both the dentist member and the dental nurse member were very experienced members of standing in their professions.

[47] In our view the sanction imposed by the committee cannot be said to be unduly lenient.

Ground of appeal 3: the conditions were not appropriate to the level of misconduct

[41] We can deal briefly with the question as to whether the conditions were adequate; there was little discussion of the matter before us. Mr Johnston submitted that the conditions of practice imposed on the registrant, most of which related to the provision of information, were not adequate to address the failures on the part of the registrant and the issues of public protection.

[42] Mr Duncan submitted that the conditions were adequate to monitor the progress of the registrant. They provided a list of requirements which the registrant would require to meet if he was employed as a dentist. The committee would have the opportunity of reviewing progress and could modify the conditions as it thought appropriate.

[43] In our opinion the conditions were appropriate to provide monitoring of the registrant by the GDC; they included a requirement to continue his remediation through a personal development plan; the progress of the personal development plan would be

monitored; when working the registrant required to be under supervision. The conditions were subject to review. In our view this ground of appeal is not well founded.

Ground of appeal 4: inadequacy of reasons

[44] Again, we can deal with this ground of appeal briefly. Mr Johnston submitted that the reasons given by the committee were inadequate. They failed to explain how the imposition of conditions of practice would satisfy the needs to ameliorate risks to patients and colleagues and to preserve the public interest were inadequate.

[45] Mr Duncan submitted that the decision of the committee was set out in considerable detail and with conspicuous care. There had been no requirement for the committee to go any farther than it did in explaining its reasoning.

[46] In our view the committee carried out a careful analysis at each stage of the process. We are satisfied that when the decision of the committee is read as a whole the informed reader would be in no real or substantial doubt as to the reasons for the committee's decision (*South Bucks District Council* v *Porter* [2004] 1 WLR 1953; *Uprichard* v *Scottish Ministers* [2011] CSIH 59, LJC (Gill) at para [26]; *Wordie Property Co Ltd* v *Secretary of State for Scotland* 1984 SLT 345, LP (Emslie) at p 348). We are also satisfied that the committee's reasons were adequate. This ground of appeal is not well founded.

Disposal

[47] For all these reasons, in terms of section 29(8)(a) of the 2002 Act we dismissed the appeal. We reserved the question of expenses.