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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
[2020] EWHC 1906 (Admin)

Case No. CO/2750/2019

Royal Courts of Justice

Friday, 6 March 2020

Before:

MRS JUSTICE FOSTER DBE

B E T W E E N :

PROFESSIONAL STANDARDS AUTHORITY
FOR HEALTH AND SOCIAL CARE — Appellant

- and -

(1) HEALTH AND CARE PROFESSIONS COUNCIL
(2) ANDREW ROBERTS — Respondents

MR D. HOPKINS (instructed by Fieldfisher) appeared on behalf of the Appellant.

MR J ANDERSON (instructed by BDB Pitmans) appeared on behalf of the First Respondent.

MS W. HEWITT (instructed by Brabners) appeared on behalf of the Second Respondent

J U D G M E N T

MRS JUSTICE FOSTER:

Introduction

1 This is an appeal by the Professional Standards Authority for Health and Social Care (which I shall refer to as "The PSA") against a decision of the Conduct and Competence Committee of the Health and Care Professions Council (which I shall refer to as the "HCPC" or "the Panel") made on 22 May 2019, by which they decided that Mr Andrew Roberts was guilty of misconduct, but that, nonetheless, his fitness to practise as a paramedic was not impaired. Accordingly, there was no power to impose a sanction upon him.

2 The PSA has referred the decision to the High Court under s.29(1)(j) of the National Health Service Reform and Healthcare Professions Act 2002 (as amended) on the grounds that the Panel's decision was appealably wrong.

The Jurisdiction

3 It is well established that an application under s.29 is governed by CPR Part 52, accordingly and consistently, with case law:

(a) A court will allow an appeal if the appeal decision is "wrong" or "unjust because of a serious procedural or other irregularity in the proceedings in the lower court "(CPR Part 52.21(3) and see *GMC v. Meadow* [2006] EWCA Civ.390 at paras. 125 - 128);

(b) The court, as any appeal court, will correct material errors of fact and law but be very cautious about upsetting conclusions of primary fact particularly when dependent on an assessment of credibility of witnesses, whom the Tribunal has had the advantage of seeing and hearing (see *Assicurazioni Generali SPA v. Arab Insurance Group* (Practice Note: [2002] EWCA Civ 1642) *Southall v. GMC* [2010] EWCA Civ 407; [2010] 2FLR 1550), although

(c) An appeal court may draw any inferences of fact which it considers justified on the evidence (CPR 52.11(4)).

(d) An appellate court approaches Tribunal determinations about what constitutes serious misconduct or what impairs a person's fitness to practise or what is necessary to maintain public conference and proper standards in a profession with diffidence (*Fatnani and Raschi v. GMC* [2007] 1WLR 1460, *Khan v. General Pharmaceutical Council* [2016] UKSC 64; [2017] 1WLR 1693).

(e) This approach applies also to questions of sanction, which are similarly evaluative (*ibidem*, and see *Bawa-Garba* [2018] EWCA Civ. 1879); although

(f) Certain matters such as dishonesty or sexual misconduct may enable a court to assess what is needed to protect the public or maintain reputation more easily for itself and, therefore, attach less weight to the Tribunal's expertise (*Council for the Regulation of Healthcare Professionals v. The GMC and Southall* [2005] EWHC 579 Admin.; [2005] Lloyd's Rep Med 365, para.11; *Khan* at para.36).

(g) Personal mitigation is likely to be of much less significance to regulatory proceedings than to a court of criminal jurisdiction because the overriding objective

of the professional regulators is to protect the public (*Bolton v. The SRA*; *Dr Cheng Toh Yeong v. The GMC* [2009] EWHC 1923 Admin.); although, it is nonetheless relevant when deciding whether fitness to practise is impaired (*Yeong* at para.47)

(h) Regimes of regulation in the healthcare context are concerned with the practitioner's current and future fitness to practise rather than with imposing penal sanctions for things done in the past. However, in order to form a view of the fitness of a person to practise today, a panel will have to take account of the way in which the person concerned has acted or failed to act in the past (*Meadow* at paras.28 to 32).

(i) A panel has to assess the current position looking forward not back. A finding of misconduct does not necessarily mean that there is impairment of fitness to practise (*Yeong* at para.21, citing *Cohen v. The GMC* [2008] EWHC 581 Admin. paras.63 to 64; *Zygmunt v. The GMC* [2008] EWHC 2643 Admin. at para. 31.

(j) There must always be situations in which a panel can properly decide that the act of misconduct was, on the part of the practitioner, isolated and the chance of it being repeated in the future is so remote that his or her fitness to practise has not been impaired. Indeed, the rules have been drafted on this basis (see Articles 21.1, 27 and 29 in the instance case).

(k) It must be highly relevant, at least in cases involving clinical error, when determining whether a doctor's fitness to practise is impaired, that first his or her conduct which led to the charges is easily remediable; second, that it has been remedied; and, third, it is highly unlikely to be repeated (*Cohen* para.64 to 65). Nonetheless,

(l) When considering the meaning of impairment of fitness to practise a regulator is entitled to have regard to the public interest in the form of maintaining public confidence both in the profession generally and in the individual practitioner. Thus, if there is a sense that misconduct involving, for example, violation of a fundamental rule governing doctor/patient relationships by engaging in a sexual relationship may be indulged in with impunity, then the public's confidence in engaging with a particular practitioner may be undermined (*Yeong* at para.50).

(m) In such a case, such as violating the therapeutic relationship by engaging in a sexual relationship, efforts of remediation may be of far less significance than those cases, for example, involving clinical error or incompetence (*ibidem*, para.51).

(n) The court's judgment, however, even where relating to matters such as dishonesty, is still to an extent a secondary one (*PSA v. The GMC and Hilton* [2019] EWHC] 1630). And, finally,

(o) the concept of fitness to practise is ultimately a flexible one (*CHRE v. NMC and Grant* [2011] EWHC 927 and *Khan v. General Pharmaceutical Council* [2017] 1WLR 169).

The Issue

4 Against that jurisprudential background, which was not substantially in issue, the essential submission of the PSA is that the HCPC could not, properly directing themselves, reasonably hold that in all the circumstances Mr Roberts' fitness to practise was not

impaired. That is to say that they were wrong in the sense understood under s.19 read with CPR 52.

5 Further, and in any event, it is submitted that the decision itself was vitiated by serious error in that the Panel failed properly to apply the law, misunderstanding the concepts of impairment and the public interest in upholding the good name of the profession of paramedic. To an extent, of course, these submissions overlap and the essence of the dispute between the parties centred upon the approach of the Panel to the public interest in upholding and declaring standards and upon the adequacy of their treatment of it in the decision.

Background Facts

6 Mr Roberts was born in 1993 and, following three science A Levels, graduated in 2014 with a specialist paramedic science qualification from the University of Hertfordshire. His first job since graduation was in the East of England Ambulance Service which began in November 2014. The hearing at the HCPC arose out of an incident which occurred on 30 April 2017 whilst working in that service in Luton. Mr Roberts and a student paramedic attended in a rapid response vehicle upon a patient in Luton at home following a 999 call. In the course of that visit, Mr Roberts attempted to communicate with the patient, whose vital signs suggested to the paramedics that he was fully conscious, but he refused to open his eyes or to cooperate with the process of helping him. Knowing the patient had been recently discharged from hospital with a suspected kidney stone and might be on strong drugs, Mr Roberts judged that assistance to transport the patient to hospital was necessary.

7 When the ambulance team arrived, in the course of handover, Mr Roberts used an extremely derogatory acronym to describe the patient's approach, one which he has always accepted was wrong, was deplorable and was racist. Outside the house and out of earshot of the patient or the public, when asked by the attending team what the patient's condition was, he said words to the effect, "Have you guys heard of the term 'DPS'?" One member replied, "Yes" and looked quite shocked. The other asked what it meant and was told it was to do with Asian patients. The enquirer said "So it's racist then?" and Mr Roberts and the other crew member said "Yes". It appears Mr Roberts may then have said, "It is just what is going on here, there is nothing wrong with him, really". It also appears that one crew member said, "Oh, waster's syndrome". By "DPS", Mr Roberts had meant "dying Paki syndrome". It appears that the colleague who knew that was what it meant explained to the other later, once the patient had been transported to hospital, what the acronym represented and that person decided to report the incident to the Trust that employed them.

8 Mr Roberts' evidence was that he was extremely shocked at himself immediately after he said it. He described his feelings of personal shame and revulsion at length, in a considered document which he wrote some time after the events in question. He referred himself very shortly after the events to the HCPC and was entirely candid and cooperative, admitting the words from the start and that they were racist. In his own words, they were deeply offensive and his conduct in uttering them was deplorable. He has always said that this is the only occasion on which he has ever used such a phrase or, indeed, made a remark of this nature and all of the evidence suggests that this is true. The case was - and was accepted by the HCPC as being - that the remark was a one-off, out of character and he felt, and still felt at the hearing, "extremely remorseful, embarrassed and ashamed of what I did".

9 Following the complaint and shortly after the incident, there was an internal inquiry. He was spoken to and throughout admitted using the term. He accepted it was a racial slur. He did not seek to defend himself from the allegation, accepting the use of the term brought the

Trust into disrepute and the profession. He is recorded by the enquirer as being "extremely open and honest during this investigation and had not sought to hide anything".

10 Part of his evidence to the internal inquiry and before the HCPC included that this language had been not uncommon from his previous placement, particularly from his mentor, and was not unknown in the service. He, however, made clear that he was horrified at his own lapse and fully accepted the deeply-offensive nature of the language.

11 At the time of this incident, the materials before the internal inquiry suggested that he recognised that he was in a state of frustration, tiredness and was lost for words, and there were particular circumstances of illness and stress in the background about which he later, before the HCPC, gave detailed confidential evidence in a private part of the hearing. The burden of Mr Roberts' case, however, was devoted to elaborating upon his acceptance of the misconduct, explaining the detailed and significant steps he had taken to seek to remediate, change, and improve and to understand and to address the factors which had precipitated his behaviour on that occasion.

The Charges

12 Before the HCPC, Mr Roberts admitted all but the last of a set of allegations that were in the following form,

> "Allegations. During the course of your employment as a paramedic for East of England Ambulance Service NHS Trust
>
> (1) On or around 30 April 2017 you attended Patient A
>
> a. referred to as Patient A as having DPS ('dying Paki syndrome') or words to that effect;
>
> b. Explained the meaning of DPS and/or confirmed that it related to Asian people;
>
> (2) your comments described in paras.(1)(a) and/or 1(b) were racist;
>
> (3) the matters described in paras.(1) to (2) constitute misconduct;
>
> (4) By reason of that misconduct your fitness to practise is impaired."

13 Mr Roberts admitted all the charges as stated except the last. He, therefore, admitted misconduct but not impairment. In any event, as is their normal practice, the Panel conducted a full hearing, hearing witnesses and from Mr Roberts, personally, and formed their own view of the evidence and submissions. They found him guilty of misconduct, but, after detailed submissions and legal advice, accepted his representative's submission that his fitness to practise was not impaired.

The Legal Framework at the HCPC

14 The regulatory regime at the HCPC is set out in Articles 21 to 29 in Part 5 of the Fitness to Practise Order 2001. The HCPC's functions are stated as including establishing and keeping under review standards of conduct, performance and ethics expected of registrants. It includes a power to establish and to keep under review arrangements to protect the public

from persons whose fitness to practise is impaired. Article 22 indicates that, where any allegation is made against the registrant to the effect that his fitness to practise is impaired by reason of misconduct, it will be referred to an investigating committee, who will investigate and, if they decide that there is a case to answer, they shall, in a case such as the present where misconduct is alleged, refer the case to the Conduct and Competence Committee of the HCPC. Under Article 31, it is of note that there is a power in the Investigating Committee to make an interim order at any time before referring the case. Articles 27 to 29 provide, relevantly, as follows:

"The Conduct and Competence Committee

27. The Conduct and Competence Committee shall

(a) …

(b) consider

(i) any allegation referred to it by the Council, Screeners, the Investigating Committee or the Health Committee …

Orders of the Health Committee and Conduct and Competence Committee 29 (1).

If, having considered an allegation, the Health Committee or the Conduct and Competence Committee, as the case may be, concludes that it is not well founded

(a) where requested to do so by the person concerned, it shall make a declaration to that effect giving its reasons: and

(b) in any other case and with the consent of the person concerned may make such a declaration …

(iii) if, having considered an allegation, the Health Committee or the Conduct and Competence Committee, as the case may be, concludes that it is well founded, it shall proceed in accordance with the remaining provisions of this Article.

iv) the Committee may

(a) refer the matter to Screeners for mediation or itself undertake mediation or

(b) decide that it is not appropriate to take any further action

(v) where a case does not fall within para.(iv) the Committee shall

(a) make an order directing the Registrar to strike the person off the register (a striking-off order)

> (b) make an order directing the Registrar to suspend the registration of the person concerned for a specified period which shall not exceed one year (a suspension order)
>
> (c) make an order imposing conditions with which the person concerned must comply for a specified period which shall not exceed three years (a Conditions of Practice Order) or
>
> (d) caution the person concerned and make an order directing the Registrar to annotate the Register accordingly for a specific period which shall be not less than one year and not more than five years (a caution order)."

There follow certain provisions as to the various orders that may be made which are not of relevance for the purposes of this hearing.

15 The HCPC has the benefit of written guidance entitled "The Health and Care Professions Tribunal Service Practice Note 'Finding that Fitness to Practise is impaired'" It explains, materially, that an allegation is compromised of three elements to be considered sequentially,

> "(1) whether the facts set out in the allegation are proved
>
> (2) whether those facts amount to the statutory grounds set out in the allegation (e.g. misconduct or lack of competence);
>
> (3) in consequence, whether the registrant's fitness to practise is impaired.
>
> It is important for panels to remember that the test of impairment is expressed in the present tense; that fitness to practise 'is impaired'."

16 There then follows an excerpt from the case of *Meadow* and I turn in more detail to this Practice Note later in this judgment.

The Hearing

17 The hearing took place on 20, 21 and 22 May 2019. The Panel consisted of a lay chair, Ms Carolyn Tetlow, a lay partner, Dr Timothy Ward, and a registrant member, a professional paramedic, Mr John Collins. Both the HCPC and Mr Roberts were represented and the legal assessor was present.

18 The presenting officer opened the facts very fairly, explaining that Mr Roberts had apologised for his actions and the distress that he had caused to his colleagues in the profession and reflected the remorse which he had expressed. HCPC invited the Panel to consider the allegations, if proven, would amount to misconduct and that they would be invited to consider the question of impairment, both with regard to the personal component and by reference to the public element as set out in the HCPC Practice Note.

19 The presenting officer called as her only witness, Mr Christopher Hartley, the manager who carried out the internal investigation of the incident at the Trust. He produced material from the investigation indicating how all those present had been interviewed. He was cross-examined and he explained to the Panel how fully Mr Roberts had co-operated with the investigation and had expressed his immediate shock and shame, as set out above. He also gave evidence that Mr Roberts had explained it was a phrase that he had heard, particularly, from his mentor, whilst a student paramedic in the London Ambulance Service. Mr Roberts, who gave evidence, included in that evidence that he remembered being quite shocked when he first heard the term as a trainee, aged 18, saying his reaction was "Oh my God! Did he just say that? You don't actually quite believe it. I certainly didn't".

20 Mr Roberts gave personal evidence in private, including as to how his mother had died very suddenly in surgery just as he started his new job and other matters that it is unnecessary to go into in this judgment, but which formed, on any fair view, significant personal mitigation for the time before and up to the time of the incident. He related how after the incident he went immediately to the doctor and took some steps to acquire proper medical help and a course of treatment. His evidence was that he did this, because at the time he recognised that he had had "such a poor lack of judgment, so out of character for me and how it was against my entire ethos. I sort of sat down and realised I actually have a problem here."

21 Mr Roberts explained the health and other remedial behavioural steps that he had taken since the incident and the strategies that he had acquired. His evidence before the Tribunal included, as I have stated, a long self-evaluation paper which the Tribunal considered in detail in the course of the hearing. The public evidence he gave included that he felt that he had ruined a lot of chances, ruined his reputation, and he felt that people were never going to look at him in the same way again. He was concerned, he said, that he did not want people to think they could not trust those who came out to help them, and what he had done was "just so wrong on so many levels, really." In order to address the problem, he had attended a number of courses or sessions involving training as to resilience, cultural awareness, equality and diversity in the workplace, conflict resolution, religion and belief in the workplace, handling difficult people and handling difficult situations, - this is not a complete list of the sessions which he attended.

22 In addressing the Panel, when the evidence was closed, the presenting officer dealt in terms with the HCPC's Standards, including 9.1 which provides,

> "You must make sure that your conduct justifies the public's trust and confidence in you in your profession."

She further, and in terms, emphasised that it was a fundamental tenet of being a paramedic that one should not exhibit any racist or discriminatory views and should treat all service users equally and reiterated how that might impact upon the treatment of a patient.

23 On the question of impairment, the presenting officer made clear, on behalf of the HCPC, that there were two elements to consider, one, the personal component, looking at current competence and behaviour, and two, the public component, including the need to protect service users and declaring and upholding proper standards and maintaining public confidence in the profession. In dealing with the personal element, she submitted that the reference and testimonials were accepted, as were the numerous courses undertaken and the fact that he had reflected. It was a matter for the Panel whether he had remediated his actions and learned from the behaviour and whether or not they were to find a risk of repetition was a matter for them. The presenting officer then said this:

> "Moving on to consider the public component identified in the Practice Note, I would invite the Panel to bear in mind the words said by Mrs Justice Cox in *NMC v. Grant*, she said,
>
> > 'It is essential not to lose sight of the fundamental considerations emphasised by Silber J in the case of *Kearne v. GMC*. That is the need to declare and uphold proper standards of conduct and behaviour so as to maintain public confidence in the profession.'"
>
> Cox J further added,
>
> > '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 in public confidence in the profession would be undermined if a finding of impairment were not made in the particular circumstances'.
>
> I would ask the Panel to think about this aspect of the case very carefully. The HCPC say it is very important to consider the public component of impairment and consider what message it could send to the profession if regulators did not mark racist comments, such as this, used about a patient when considering a finding of impairment. The HCPC say there is a duty on the regulator to send out a message to the wider profession of paramedics and the general public that this type of racist terminology will not be tolerated".

I can detect no error of law in what the presenting officer set out for the Panel as the important legal basis for their deliberations in the present case.

24 The presenting officer went on to say in submission,

> "The HCPC say it clearly does [bring the profession into disrepute] and it is imperative, we say, that it is duly marked with a finding of impairment on the public component. So, madam, on the basis of the personal component and the public component and the need to uphold proper professional standards and public confidence in the profession and the regulator, the Panel may feel the registrant's fitness to practise is impaired."

25 Dr Ward, a lay member, then asked an important question for clarification,

> "Are you inviting us to find impairment on the public component entirely, on the basis entirely of the allegedly offence itself or is it open to us also to consider at that point anything that the registrant may or may not have done in terms of his personal behaviour? In other words, are you saying that the public component is absolutely -- it is this offence and, therefore, it must be, or are you saying that we can consider the personal element when we are considering the public component?"

To which the presenting officer said,

> "Well, the Practice Note says that both public and personal are to be considered quite independently, so the personal component includes looking at the current competence and behaviour of the registrant, which I have addressed you on separately. The public component really does ask you just to focus your mind on the need to declare and uphold proper standards and behaviour and maintain public confidence in the profession. So what I respectfully ask you to do is to follow the Practice Note and consider both of those individually, but, of course, one may have some bearing on the other, but certainly I ask you to consider them separately in the way the Practice Note sets out."

Again, in my judgment, no issue can be taken with this explanation.

26 As will be seen, counsel for Mr Roberts, Ms Hewitt, who appears before me today, also addressed the Panel, consistently with these submissions, but, naturally, submitting it was not necessary to vindicate the public interest by finding impairment.

27 Reference was made to the Practice Note, which was endorsed by the representative for Mr Roberts, in terms of impairment; there are clearly two separate areas, "the personal component and the public component and there are separate steps."

28 Ms Hewett, for Mr Roberts, then invited the Panel to recall the well-known case law that said not every finding of misconduct must lead to a finding of impairment, saying,

> "While I accept my learned friend's submission that committees have a duty to send a message to the public that proper professional standards will be declared and upheld and you have a duty to send the message to other professionals that such behaviour will not be tolerated, I do ask you to remember that hearings like these are of themselves a very powerful message. They are reported on the HCPC's website. They are reported in the media. They are well known by other paramedics at trusts up and down the country, so a hearing in and of itself can be that powerful message you are obliged to send out, You are not obliged, as I think may have been suggested, to conclude that, in considering your duty to send that message, you must, therefore, find impairment on the public component. It is not automatic and is a matter for your collective professional judgment."

29 Ms Hewitt explained that the viewpoint must be that of a member of the public knowing all the facts, including those on the private part of the transcript. Such a member of the public, she submitted, would not believe the Tribunal had gone wrong if there was no finding of impairment. Her submission was that the public would understand why a finding of impairment might not be necessary, even on the public component. But she emphasised, finally, that it was a matter for the professional judgment of the Panel. Again, I can discern no error of law in the matters as put on behalf of Mr Roberts to the Panel.

30 The legal assessor then gave advice in relatively standard form, beginning with the burden and standard of proof and the meaning of "misconduct". She exhorted the Panel to analyse the evidence for themselves and to consider whether or not the facts had been proved, irrespective of the fact that the registrant had pleaded guilty to misconduct. She explained that a panel's judgment requires to be sufficiently detailed for readers to understand why the facts did or did not amount to misconduct. She then made reference to the Practice Note

and the process of decision making, referring to the meaning of the word "misconduct" in case law and the requirement for the element of seriousness.

31 Turning to impairment, explaining that it meant concerns about a registrant's ability to practise safely and effectively, she said this,

> "Critically, the test is expressed in the present tense, that fitness to practise is impaired. Thus, in determining whether fitness to practise is impaired, you must take into account a range of issues which, as we have already heard, essentially comprise two components: the personal component, the current competence behaviour of the individual registrant, and the public component, which is the need to protect service users, declare and uphold proper standards of behaviour and maintain public confidence in the profession. The process is not designed to punish registrants for past acts, but to consider those acts in determining whether they are fit to remain in unrestricted practice. A proportionate and risk-based approach should be adopted in dealing with fitness to practise issues. Registrants do make mistakes and not every minor error or isolated lapse in judgment indicates that a registrant's fitness to practise is impaired. You must also consider the wider public interest, including the need to declare and uphold standards and deter wrongdoing by registrants."

32 She spoke further about fairness, Article 6, and the duty to give adequate reasons. She said that it was particularly important that readers might struggle to understand why facts were found proved that amounted to a statutory ground, but that a finding of impairment did not follow. She indicated that aspect of the decision had to address the forward-looking nature of the impairment test and any consideration of the wider public interest, and mitigating and aggravating evidence and so forth.

33 At this point the Chair said that she believed neither party had addressed them on the test of impairment in *Grant*, particularly the "has in the past or is liable in the future, to"; in other words, the question of past behaviour and future risk. She invited the legal assessor and the parties to do so. The legal assessor turned to the parties to make any submissions that they wished upon it and the Chair invited them to say anything on the case of *Grant* and a quotation from that appears on page 3 of the Practice Note. The full passage containing the citation occurs immediately after a Note which explains the range of issues involved in a consideration of impairment as, essentially, comprising two components, the personal and the public. It then says, as follows:

> "As the court indicated in *Cohen*, the sequential approach to considering allegations means not every finding of misconduct, etc., will automatically result in a panel concluding that fitness to practise is impaired, as
>
> > 'there must always be situations in which a panel can properly conclude that the act … was an isolated error on the part of the practitioner and that the chance of it being repeated in the future is so remote that his or her fitness to practise has not been impaired … It must be highly relevant in determining if … fitness to practise is impaired … first the conduct which led to the charges is easily remediable, second, it has been remedied and, third, that it is highly unlikely to be repeated. It is important for

> panels to recognise the need to address the 'critically important public policy issues' identified in *Cohen* - to protect service users, declare and uphold proper standards of behaviour and maintain public confidence in the profession. This means they cannot adopt a simplistic view and conclude that fitness to practise is not impaired because, since the allegation arose, the registrant has corrected matters, "learned his or her lesson". As indicated in *Brendan v. HPC*, in cases where a panel makes a finding of impairment or imposes a sanction solely on the basis of "public" components of an allegation, it must explain the reasons for that decision. It is insufficient simply to recite that, for example, it is necessary in order to maintain public confidence in the profession.'"

34 Ms Hewitt asked if the Chair was referring to the passage about remediation, to which she answered, "Yes". She then referred to Cox J at para.74 and cited the following passage:

> 74. I … would add this. 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. … than to particular circumstances."

35 The Chair then invited any further submission that Ms Hewitt wished to make, which she did not, saying,

> "I don't think that changes my submissions because really what we say is, in terms of the invitation you are given to find impairment on the public component, in particular, our argument really is that public confidence in the profession would not be undermined if a finding of impairment were not made, because of all the facts you know about Mr Roberts. I don't know if my learned friend wants to say anything else."

The presenting officer then said,

> "Madam, my submission remains from that point also whether the need to uphold proper professional standards in public confidence in the profession would be undermined if a finding of impairment were not made in the particular circumstances. I think the HCPC submission remains it would be because of the nature of the allegation."

The Chair then said, "Yes, yes, okay. I understand, thank you very much indeed." She invited questions from her colleagues and there were none.

36 I have dwelt in some detail on the exchanges in this part of the transcript because considerable criticism was levelled at the Panel and the legal assessor by the PSA in their submissions. It is a large part of the PSA's case that the Panel did not properly understand the ramifications of the public confidence limb of impairment and, for that reason, went wrong in their conclusion in finding none. I shall return to the PSA submissions below.

The Decision

37 In its conclusion on the facts, after setting out the definition of misconduct in the case of *Roylance v. GMC* [1999] 1AC 311, the Panel continued, importantly, as follows, in para.23,

> "The Panel was satisfied that the registrant's use of the abbreviation 'DPS' in relation to a patient was conduct which fell far below that which was expected of a registered professional and was serious. The Panel considered that the use of the term was deplorable and could not be excused, condoned, or tolerated by society, in particular by a registered professional in a position of trust. Whilst the Panel accepted that the term was not used in the presence of the patient, it was a comment made in the workplace to colleagues and was inexcusable. Further, the registrant was employed as a senior paramedic and was responsible for mentoring students and, as such, was expected to set a good example. In using even the abbreviation, the Panel considered the registrant's conduct had fallen seriously below the expected standards."

38 In reaching its conclusions on the facts, the HCPC then set out its decision on impairment. It begins at para.25. It starts with the clear submission of the presenting officer that a finding that Mr Roberts' fitness to practise was not currently impaired would undermine both public confidence in the profession and in the regulatory process. It also set out references to the cases of *Grant* and of *Cohen,* as above, and the submission that there was a duty on the regulator to send a clear message to the public and to the profession that a finding of no impairment could send the wrong message.

38 The Panel also recalled the submissions on behalf of Mr Roberts, including to the effect that holding a regulatory hearing in respect of an individual was a powerful message in and of itself, given that the outcomes are publicised and reported and are brought to the attention of the profession. The Panel, when dealing with Mr Roberts' evidence, recorded certain telling, individual phrases from the registrant's explanation and from the written materials, such as his exchanges as to how training might help stop him from repeating what he had done. He stated, "Any intolerance makes the world worst" and "You need to own your mistakes in order to learn from them". They recorded, in particular, that they were able to explore a number of issues with him as to his personal position and his attitudes and, again, repeated the dual considerations of personal perspective and the public perspective, reflecting that the Practice Note urged that they should not take a simplistic view.

39 The Panel then found materially, for the purpose of this appeal, as follows,

> "34. In the Panel's view, the registrant has demonstrated comprehensive insight in respect of his conduct. It was satisfied that the registrant had reflected upon his use of the racist term, referred himself to his regulator of his own volition, undertaken voluntary learning in relation to his conduct and since the incident had demonstrated at some personal cost his willingness to intervene when witnessing inappropriate racist behaviour by a member of the public towards a fellow healthcare professional. His reflected pieces were in depth and appropriate and addressed the fundamental issue of his conduct. The use of the racist term appeared to have been an isolated incident and there was no suggestion that such conduct had taken place again, either before or since the incident. The registrant had recognised and addressed as far as possible what he considered to have been his unconscious bias and the

> Panel were satisfied it was very unlikely the conduct would be repeated. The Panel could not identify any other action the registrant could have taken to demonstrate to his regulator that he had addressed his misconduct and was, therefore, satisfied that his fitness to practise was not impaired on the personal component.
>
> In considering the public component of impairment, the Panel had regard to the critically-important public policy issues, which include the need to maintain confidence in the profession and the regulator and to declare and uphold proper standards of conduct and behaviour. It was conscious that members of the public and members of the profession would be shocked to learn that a paramedic had used a racist term about a patient. The Panel acknowledges that public and professional trust and confidence in the profession and the regulator could be undermined if a finding of impairment was not made. It noted the guidance in the case of *Grant* and was of the view that this misconduct had breached a fundamental tenet of the profession and brought the reputation of the profession into disrepute."

40 The Panel set out and considered the passage in *Meadow* indicating that the purpose of FTP procedures is not to punish the practitioner for past misdoing, but to protect the public against the acts and omissions of those who are not fit to practise and, therefore, looks forward but, nonetheless, takes account of the way a person has acted or failed to act in the past. The Panel characterised the conduct as a one-off, isolated incident and wholly out of character for this registrant and, although serious, was capable of being remediated and had been. The Panel stated that they were persuaded the registrant understood the need to uphold the highest standards of non-discriminatory professionalism and were confident that he would do so. They then said this:

> "38. The Panel is, therefore, confident that a reasonable and well-informed member of the public, aware of all the evidence before the Panel, would understand that, whilst the Panel in no way condones or excuses the misconduct of the registrant in using the racist term, does not underestimate its seriousness and wider impact, his remorse is genuine and is insightful and embedded. The risk of repetition is, therefore, remote. The Panel carefully balanced its obligation to send a clear message to the profession and the public that this type of conduct is completely unacceptable against the level of insight and remediation demonstrated by the registrant. In its assessment, repetition is highly unlikely. It concluded that in this case the public interest is best served by recognising the genuine efforts made by the registrant to address his misconduct and a finding of impairment on the public component was neither necessary nor proportionate.
>
> After careful consideration, taking into account all the reasons set out above, the Panel is of the view that the need to maintain public confidence and uphold proper standards would not be undermined if a finding of impairment was not made in the particular circumstances of this case. And the Panel duly declined to make one."

The Grounds of Challenge - Discussion

41 Mr David Bradly, who put his case carefully and with moderation, says, first, as set out in ground one, that there was a "failure to recognise and take account of the seriousness and nature of the misconduct admitted by Mr Roberts." The Panel, however, found, as I have set out above, that they considered the use of the term was deplorable, it could not be excused, condoned or tolerated by society, in particular by a registered professional in a position of trust. Whilst the Panel accepted the term was not used in the presence of the patient, it was a comment made in the workplace to colleagues, etc., and was inexcusable (para.23; see also para.38 where the Panel makes clear, in terms, that it no way condones or excuses the misconduct or underestimates its wider impact or seriousness).

42 In my judgement, Mr Bradly's argument does not get off the ground. It is clear beyond peradventure, in my judgment, that this Panel was very well aware of the deplorable damaging and wholly-unacceptable nature of any racist comment, particularly in the mouth of a professional. To the extent that the PSA criticises the use of the word "serious", (which by their written grounds they do, as evidence of a failure properly to appreciate the tenor of Mr Roberts' behaviour), as Miss Butler-Cole for the HCPC points out, the use of this word flows directly from the case of *Roylance*, which the Panel cite in para.20. This passage explains that the professional conduct complained of must be serious in order for a finding of misconduct to be made. The Panel is, in my judgment, by the use of this word, seeking merely to flag its reference to the appropriate test, reiterating that the conduct reached the standard of professional misconduct as set out in the cases, and that it would be quite inconsistent with its findings to hold otherwise.

43 Nor is it a point of criticism, in my judgement, that the PSA noted the isolated nature of the incident. It will always be relevant in seeking to determine whether a case is of the kind that merits impairment (whether under the personal or under the public considerations) whether or not the misconduct derives from an isolated incident or not. The fact that an incident is isolated may be helpful to a panel when seeking to determine whether or not it is evidence of a deep-seated attitudinal problem or is something else, such as evidence of a momentary lapse that is not reflective of true attitude or approach.

44 Mr Bradly placed considerable reliance on the use of the phrase "isolated error" as an illustration of the Panel's abject failure to appreciate that this case was one of those cases that might evidence deplorable deep-seated attitudes rather than a simple one-off clinical error. In other words, this was a case that, by its very subject matter, required a finding of impairment no matter what. The logical extent of his submission was that the public interest in this case required such an approach in order for the decision making to be lawful. I do not agree.

45 None of this derogates from the proposition that there may, in health regulation, be isolated incidents of such significance and profundity that they require a finding of impairment. It must be the case - indeed it has always been the law - that grave conduct of a single instance may be sufficient for a finding of impairment or sanction by removal from a register. This is so whether the default is described as an error - perhaps more apposite to clinical error - or whether it is described in other terms more apposite to, for example, sexual misdemeanour or dishonesty. Whether an isolated incident does require such a finding is, as all of the cases make clear, an exercise of evaluation and judgement. It is wrong to extrapolate from this that the isolated nature of the incident is irrelevant.

46 To that extent the submission may be understood as bat the response of this Panel in these circumstances was not reasonably open to it and must be overturned. That is not a conclusion that I share. Mr Bradly argued that the Panel failed to appreciate the seriousness, in part because they failed to take into account the fact that there might have been an impact

on the patient's treatment. However, it is clear that this was put to Mr Roberts in cross-examination. "The crew to whom he handed over might have believed the description implied that the patient was being over dramatic or difficult?" Mr Roberts agreed, "It could have a massive impact. It could mean they wouldn't carry on any treatment regimes. It could mean they won't give him any pain relief that was in the scope of their practice to give." Mr Bradly also argued, as his second ground, that the Panel ignored relevant case law guidance when deciding on impairment.

47 I accept the submission for the respondents, the Panel was not obliged to set out detailed case law in its determination. Correctly, it referred to the cases of *Grant* and *Cohen* to which it had been referred by the HCPC's representative and to the Practice Note which itself includes extracts from them.

48 I agree with the PSA however that a fuller reference to the case law by the Legal Assessor might have been desirable. It may have been helpful to the Tribunal to see the nuanced treatment in the case law of the tension between the public interest and private interests of registrants. However, the terms of the decision make it perfectly clear that the Panel were very much aware of the need to consider, at the forefront, the obligation to declare standards and protect the public interest as a matter to be considered separately from the interests of the registrant. Given that the essential issue was that which was plainly isolated by the presenting officer, and, indeed, by Dr Tim Ward in his question, it is clear, in my view, that all had firmly in mind the possibility that, purely as a matter of declaration of standards in the public interest, and irrespective of the steps taken on the personal front by Mr Roberts, impairment was an option open to them. Commendably, Ms Hewitt dealt with the point head on before the Panel, arguing that this particular incident was unusually a case where the public interest could be vindicated without a finding of impairment. Accordingly, whilst I accept a more careful exegesis of the case law might have been desirable, it would, in fact, have added little on the facts of this case. The important issue, which was well in mind, may be plainly seen from the transcript, the exchanges, and the decision itself. I reject the submission.

49 As stated by Miss Butler-Cole in her skeleton argument, the PSA relies in particular on the cases of *Grant* and *Yeong*, but does not identify any principles from those cases which the Panel failed to appreciate. It is clear however:

(a) *Yeong* says personal remediation is relevant to deciding whether fitness to practise is impaired (para.47).
The Panel took this approach.
(b) *Yeong* says a panel

> "is entitled to have regard to the public interest in the form of maintaining public confidence in the medical profession generally and in the individual medical practitioner when determining whether particular misconduct of that medical practitioner qualifies as misconduct which currently impairs the fitness to practise of that practitioner." (para.50).

The Panel did consider clearly the two aspects of public confidence, noting expressly the absence of a finding of impairment in a case such as this had the potential to undermine public confidence, but that there were particular circumstances, namely, Mr Roberts' remorse and insight, that would reassure a member of the public.

(c) *Yeong* says errors of clinical competence are different from misconduct governing fundamental rules, thus:

> "Where a medical practitioner violates such a fundamental rule governing the doctor/patient relationship as the rule prohibiting a doctor from engaging in a sexual relationship with a patient, his fitness to practise may be impaired if the public is left with the impression that no steps have been taken by the GMC to bring forcibly to his attention the profound unacceptability of his behaviour and the importance of the rule he has violated. The public may then, as a result of his misconduct and the absence of any regulatory action taken in respect of it, not have the confidence in engaging with him which is the necessary foundation of the doctor/patient relationship. The public's confidence in engaging with him and with other medical practitioners may be undermined if there is a sense that such misconduct may be engaged in with impunity." (para.50)

Here the Panel expressly noted the potential risk, but took the view that Mr Roberts had identified and understood the profound unacceptability from an early stage. This was not a case where a finding of impairment was required to avoid a sense that racist misconduct could be engaged in with impunity. It is plain in my judgement that the regulator underlined what Mr Roberts himself declared from the start, namely, his action was deplorable and wholly unacceptable. The ordeal of a public hearing would have forcibly brought it to his attention. A wholesale reassessment of his approach, personally and within his career, was undertaken and consequential remedial steps voluntarily engaged in *before* he came before his regulator. The informed public would not, in my judgment, have the sense that this sort of behaviour could be engaged in with impunity and, accordingly, the Panel could properly find that the public interest was served and did not require the finding of impairment. Further,

(d) *Yeong* says,

> "where a [Panel] considers that fitness to practise is impaired for such reasons, and that a firm declaration of professional standards so as to promote public confidence in that medical practitioner and the profession generally is required, the efforts made by the practitioner to address his problems and to reduce the risk of recurrence of such misconduct in the future may be of far less significance than in other cases, such as those involving clinical errors or incompetence." (para.51)

Nothing in this passage suggests the risk of recurrence is irrelevant when considering any aspect of the public interest, nor, as a matter of logic and common sense, should it. The passage speaks to likely weight given the circumstances.

50 The HCPC submits that it is relevant that the Panel could not identify any other action the registrant could have taken (para.34) and submits that this was one of those rare, singular cases where the public interest was properly served without a finding of impairment. There is some force in the HCPC's submission in responding to the grounds of appeal that, if, as a matter of law, a finding of impaired fitness to practise was wrong on these facts, that comes close to imposing a blanket rule requiring a finding of impairment to follow any finding of misconduct that has racial connotations. As I set out earlier, that was the logical conclusion of the submissions made by Mr Bradly. In my judgement, that is not the law.

51 In respect of the public component, the Panel identified the relevant considerations and rightly recognised public confidence could be undermined, as is already set out. Express reference was made both to *Grant* and to *Yeong*. Of most significance, in the current

context, is the emphasis given in *Grant* to the wider public interest considerations and that case reiterates the accepted proposition that they are of fundamental importance. Importantly, where, absent a finding of impairment, further steps may not be taken, nor a sanction imposed, the court in *Grant* (at para.75) accepted a submission that such amounted to:

> "a complete acquittal, because there is no mechanism to mark cases where findings of misconduct had been made even where that misconduct is serious and has persisted over a substantial period of time. In such circumstances, the relevant panel should scrutinise the case with particular care before determining the issue of impairment."

52 It is submitted that the Panel did not fall foul of that guidance if and to the extent that the absence of a finding of impairment is properly characterised as a "complete acquittal". The Panel were well aware that this was a corollary of the finding.

53 I agree that the Panel did not fall into error. I confess, I have some difficulty with the concept of "complete acquittal" in the context of a healthcare regulatory process. I am conscious that the court was echoing a submission of counsel and not seeking to characterise, after careful submission and thought, the nature of a finding in such a context. Given the recognition that a sanction and, indeed, a finding of impairment is not an instrument of punishment but rather a mechanism for public protection (and, in an appropriate case, for the proper support and/or furtherance of the profession) the characterisation is not a very happy one. The obligation, as a professional, to submit to a process of, usually, public regulation is a significant burden: any phrase such as "complete acquittal" would not be apt to describe a public hearing in the course of which a finding of misconduct is made.

54 I am informed that it is not the practice of the HCPC to publish a finding of misconduct or other statutory grounds, absent a finding of impairment. That does not derogate from the value in vindication of the public interest of such a finding. The fact of a disciplinary hearing is publicly available and posted on the website. The nature of the charge also. It seems to me inevitable, were a practitioner asked when seeking a job or other position, whether there had been any findings against him or her, he or she would be obliged to disclose a finding of misconduct, irrespective of no later finding of impairment. I do not accept in any event, that the approach of the Panel, addressed as it was by Ms Hewitt on the salutary nature of the public disciplinary hearing upon the registrant, fell into error in this manner in this case.

55 It is worth noting before leaving these cases that the present matter was by no means a *Yeong* case. Dr Yeong carried on a sexual relationship with a patient over almost two years and disclosed to her confidential patient material. Further, he tampered with medical records in connection with the breach and only in cross-examination accepted that his failing to maintain proper records might have compromised a patient's care. In that case, the Panel accepted a degree of insight into the wrongdoing, but was concerned it was not fully developed. It was against that background that the observations concerning violation of fundamental rules were made by Sales J, as he then was, at para.50.

56 Similarly, in *Grant*, although the point is taken as a matter of principle, the court was there reflecting in the context of postulated serious misconduct persisting over a substantial period of time (see para.75).

57 I accept the submission on behalf of the respondents that it is apparent here that the Panel considered a finding of impairment, by reference to the "personal component" was not the central issue, in light of the considerable remediation that had taken place. They, nonetheless, went on to consider what they recognised was the rather more difficult exercise of determining what the public interest required - that is to say, whether, notwithstanding, the public interest might require a finding of impairment.

58 In my judgement, the decision was reached on the basis of a correct understanding of the legal principles and a careful weighing of the relevant considerations. Having regard to the totality of the evidence, it was not the decision that the HCPC's presenting officer had contended for, but it was not, in my judgement, wrong. It was a decision that was open to the Panel.

59 In seeking to persuade me that the Panel had gone wrong Mr Bradly also brought together a number of matters of judgement which he said evidenced error. These included a failure to have adequate regard to the public interest, according the wrong weight to remediation, or to one or other allegation and failing to have regard to the seriousness of the misconduct. The substance of all of those complaints has been addressed above. There is nothing in the manner in which they are expressed under Ground 3 of his case which changes my view that this was a decision that the Panel were entitled to reach. This was not a result the HCPC contended for of course, however, they supported it before me and I have held they were correct to do so.

Conclusion

60 The essence of the submission on behalf of the PSA was, in effect, short, namely, the Panel struck the balance wrongly. I disagree. The Panel did not fail to mark Mr Roberts' wrongdoings: it failed to impose a finding that offered an opportunity to impose a sanction and for the reasons given, it was entitled to do so.

61 Before leaving this judgment, it should be said, and should be said clearly, that generally speaking, any conduct of a professional person of a racist nature is likely to result in a finding of impaired fitness to practise. However, there is no rule that such a result *must* follow. The very fact that it did not in the current case does not mean, as I have stated, that this Panel's views must be characterised as unlawful. Necessarily, it struck me that there was an element of teleological approach in the PSA's submissions. It is, however, wholly understandable that the super-regulator might be concerned to examine very carefully any decision where an element of racism arose in which the registrant's registration was found not to be impaired.

62 Similarly, it is appropriate for the PSA to do as Mr Bradly sought to take further before me, namely to probe the manner in which a panel approaches a case which presents evidence of what *might* have been deep-seated unacceptable and irremediable personality traits or behaviours incompatible with practice. (Such cases may be, and very often in the case law are, exemplified by violation of the therapeutic relationship through sexual behaviour or dishonesty). It was, in my judgement, precisely this issue which troubled the Panel and it was for this reason important that the Panel recorded and took well into account the opportunity they had had of probing and examining Mr Roberts in evidence, personally.

63 Rightly, there is thoroughgoing repugnance for racially-offensive language and attitudes. At the heart of a worthwhile society must come respect for others. Such behaviour may well be indicative of an attitude that is wholly incompatible with professional practice. In such a

case, the public interest may only be vindicated by impairment and significant sanction. Such cases call always for the utmost caution on the part of the regulator. Where there is a matter as delicate and abhorrent as a racial slur, it will be rare that anyone who allows themselves to trespass into this repugnant territory will not be considered impaired going forward. However, this was a different and a very unusual case and the appeal is dismissed.

Are there any applications?

MR ANDERSON: My Lady, yes, there is an application by the HCPC for its costs of defending this appeal.

MRS JUSTICE FOSTER: Yes.

MR ANDERSON: You will hopefully have a costs schedule that was filed with the court, but I have got a slightly updated version to hand up, which simply reflects the costs of today on top of what you already have.

MRS JUSTICE FOSTER: Yes. I am just checking, Mr Anderson, whether or not it is yours that I have. I have a couple. I have the second respondent. You were the first respondent, were you not?

MR ANDERSON: That is right, my Lady.

MRS JUSTICE FOSTER: And I have the appellant's. Perhaps, if I were to have your perfected copy that would----

MR ANDERSON: Yes. (Handed)

MRS JUSTICE FOSTER: I am grateful, thank you. Are there any observations on this?

MS HEWITT: No, save to say that I will be making a like application, your Ladyship.

MRS JUSTICE FOSTER: Yes.

MR HOPKINS: My Lady, if I may make some points of principle rather than as to the statement of costs----

MRS JUSTICE FOSTER: Yes.

MR HOPKINS: My Lady, you found at the end of your judgment that it was wholly understandable that the super regulator might wish to consider very carefully any decision of a subordinate regulator, which did not lead to a finding of impairment in these types of circumstances.

MRS JUSTICE FOSTER: Yes.

MR HOPKINS: My Lady will be familiar with the cases of *Baxendale-Walker* v. *The Law Society*.

MRS JUSTICE FOSTER: Yes.

MR HOPKINS: And, without wishing to take your Ladyship to those cases in detail at this point, I would make the point that it was the PSA's duty to refer this case to the High Court and I would ask that the court on this occasion, for the reasons you gave at the end of your judgment, does not award costs against the PSA. It was discharging its statutory function in

bringing this case to appeal for the important reasons you identified, my Lady, at the end of your judgment. So I would ask that the court does not make any award of costs against the PSA.

MRS JUSTICE FOSTER: I hear what you say. I believe my finding was that it was important for the PSA to consider very carefully a case of this nature for the reasons that I gave. In my judgment, it is clear that there was no error in this Tribunal's decision. I do not believe that it was the duty of the PSA to take this matter to this court. Considering it carefully, it would not have involved, in my judgment, bringing it beyond careful consideration outside of litigation. So, whilst I understand what you say, and I am very familiar with the case of *Baxendale-Walker* and the regulatory function, I do believe that it is an appropriate occasion on which to grant costs. Do you have anything to say about those costs?

MR HOPKINS: Yes, my Lady. If I could then, on the statement of costs for the first respondent, again, I do not wish to take an inordinate amount of time on this, my Lady----

MRS JUSTICE FOSTER: No.

MR HOPKINS: -- but, as to the first page, I would just point out that the total hours afforded for letters out and emails amounts to some 8.7 hours, more than a day's work, which seems excessive, I would submit.

MRS JUSTICE FOSTER: Do you want to do it all at once and then we can get some answers on the points?

MR HOPKINS: I will just point out a couple of points.

MRS JUSTICE FOSTER: Yes.

MR HOPKINS: Essentially, the submission, my Lady, is that the overall costs are beyond what is reasonable to have charged and I just take that as one example. Over the page, as well, under "attendance at hearing", I note that the hours for travel and waiting time have been charged at the full rate rather than, as I often would expect, half that rate for travel time and waiting.

Finally, again, there is just one representative example, my Lady. In the schedule of work done on documents, the very last item, statement of costs, there is a total of 2.6 hours claimed which seems surprising and rather excessive. As such, my Lady, I invite you to reduce the overall costs by some 20/30 per cent.

MRS JUSTICE FOSTER: Mr Anderson.

MR ANDERSON: My Lady, thank you. My Lady, so far as the correspondence is concerned, I do not believe that it is in the court bundle, but there was a letter of 17 September sent by my instructing solicitors to the PSA. I can hand that up. It was an attempt to narrow the issues that would need to be considered. It is quite a detailed letter and would have taken some

time in preparation. Effectively, it was inviting a narrowing of the issues on the appeal (Handed)

MRS JUSTICE FOSTER: Thank you.

MS HEWITT: Your Ladyship, I would invite you to look at the last sentence first of that, because it is quite clear----

MRS JUSTICE FOSTER: The last sentence of the letter?

MS HEWITT: Of the letter, because that makes it quite clear the position that both respondents have taken throughout.

MRS JUSTICE FOSTER: What, asking them to go away, you mean?

MS HEWITT: Essentially, saying that "There is no merit in this. Before we incur any further costs, would you like to consider, in the light of these representations, whether this should go further?"

MRS JUSTICE FOSTER: I see what you mean.

MS HEWITT: And, really, that letter encapsulated, your Ladyship, all of the points made by both myself and Miss Butler-Cole QC.

MRS JUSTICE FOSTER: (pause) What stage were you at on 17 September, how far had it advanced at that point?

MR ANDERSON: That, my Lady, was before skeleton arguments, my Lady.

MS HEWITT: I can say that the proceedings had been issued. I believe, but I will be corrected, that Mr Bradly had provided a skeleton argument and authorities.

MR HOPKINS Yes, it was immediately after the provision of skeleton arguments.

MS HEWITT: And, in fact, your Ladyship will see that both of the respondents only put in skeleton arguments last week, because there had been some thought that, perhaps, costs could be saved even up until that stage.

MR ANDERSON: I am very grateful.

MR ANDERSON: My Lady, otherwise, by way of general observations, I submit that the costs that have been incurred are not unreasonable. They are not that dissimilar to the costs incurred by the appellant - of course, it is not a question of looking to see whether they are exactly the same - so we would invite you to award costs in the sums that are sought.

MRS JUSTICE FOSTER: Yes. I have not done a comparison. Are they in roughly the same amount?

MR ANDERSON: The costs of the appellant come to a total of £21,666 and the costs that are sought for the HCPC come to £25,220.

MRS JUSTICE FOSTER: Yes. It is all in the bracket, is it not?

MR ANDERSON: Yes.

MRS JUSTICE FOSTER: Is there anything else that you would like to say?

MR HOPKINS: No, my Lady.

MRS JUSTICE FOSTER: I will make the orders for costs in the amounts asked. They seem to me in the way of things in applications of this nature, and I note what is said in the letter in September, and I am afraid you have lost on every point.

MR HOPKINS: My Lady, does that deal with the second respondent's application as well?

MRS JUSTICE FOSTER: It does.

MR HOPKINS: I am grateful.

MS HEWITT: I am grateful.

MRS JUSTICE FOSTER: I am conscious that I think there is one of the principles that I set out at the beginning for which I have not included a reference. You will be aware that in the usual way the transcript will come first to me and I will make good that omission. If there is anything that you can think of now that you would wish to draw to my attention that strikes you as an error----

MS HEWITT: Not an error, my Lady. The Health and Care Professions Order is 2001.

MRS JUSTICE FOSTER: Oh, I am very grateful. Thank you. That is very helpful. Thank you all very much indeed again.

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This transcript has been approved by the Judge.