Neutral Citation Number: [2017] EWCA Civ 319

Case No: C1/2015/1305

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
MRS JUSTICE LANG DBE
[2015] EWHC 822 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 April 2017

Before:

Lady Justice Sharp
and
Lord Justice Lindblom

- -

Between:

The Professional Standards Authority	**Appellant**
- and -	
(1) The Health and Care Professions Council **(2) Benedict Doree**	**Respondents**

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- -

Ms Fenella Morris Q.C. (instructed by **Fieldfisher**) for the **Appellant**
Ms Jenni Richards Q.C. (instructed by **Bircham Dyson Bell**) for the **First Respondent**
Mr Bryan Cox Q.C. (instructed by **Direct Access**) for the **Second Respondent**

Hearing date: 26 January 2017

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Judgment Approved by the court for handing down (subject to editorial corrections)

Lord Justice Lindblom:

Introduction

1. This is a second appeal. It is an appeal to this court against the dismissal in the High Court of an appeal against the decision of a professional disciplinary committee.

2. With permission granted by Hallett L.J., the appellant, the Professional Standards Authority for Health and Social Care ("the Authority"), appeals against the order of Lang J., dated 31 March 2015, dismissing its appeal against the decision of a panel of the Conduct and Competence Committee ("the Panel") of the first respondent, the Health and Care Professions Council ("the Council"), on 24 July 2014, upholding a number of allegations against the second respondent, Benedict Doree, a registered prosthetist, and imposing on him a caution order for a period of five years. After hearing evidence and submissions on 8, 9, 10 and 11 April 2014, the Panel found that Mr Doree had bullied one colleague and sexually harassed another. When the hearing resumed on 24 July 2014 they concluded that his actions amounted to misconduct and that his fitness to practise was impaired, and they proceeded to impose the caution order. Their decision was referred to the court under section 29 of the National Health Service Reform and Health Care Professions Act 2002 and was accordingly treated as an appeal. Lang J. rejected that appeal on every ground.

The issues in this appeal

3. In the section 29 appeal the Council initially conceded that the reasons given by the Panel for their decision were not wholly sufficient, though not that the Panel's decision on sanction was wrong. It also conceded that some of the particular allegations as drafted were not, in the end, supported by the evidence, though not that the sanction imposed by the Panel might have been different had those allegations been amended and found proved (see paragraphs 17 and 18 of Lang J.'s judgment). However, those concessions were not made in this court. The Authority's grounds of appeal against Lang J.'s order raise four issues, and a fifth arises from those four. First, was the judge wrong to reject the Authority's submission that the Panel should either have adhered to the Council's Indicative Sanctions Policy or given good reasons for departing from it? Secondly, was she wrong to uphold the approach taken by the Panel to Mr Doree's insight into his misconduct? Thirdly, was she wrong to find that the fact that Mr Doree's misconduct had not been witnessed by any patient was a mitigating factor justifying a less severe sanction? Fourthly, was she wrong to conclude that the amendment of an allegation of misconduct to a lesser one after the evidence had been heard would have been "a gross breach of fair hearing procedure", and to reject the Authority's contention that the failure to amend the allegation was a procedural error? The fifth issue is whether the sanction imposed by the Panel was unduly lenient.

The Health and Social Work Professions Order 2001

4. The Council was established under the Health and Social Work Professions Order 2001. Under article 3(2) of the 2001 Order, its principal functions are to establish standards of education, training, conduct and performance for members of the relevant professions and to ensure the maintenance of those standards. Article 3(4) states that "[the] over-arching objective of the Council in exercising its functions is the protection of the public". Article 3(15) requires the Council to "publish any standards it establishes and any guidance it gives". Part V provides its functions relating to fitness to practise. Article 21(1)(a) requires it to "establish and keep under review the standards of conduct, performance and ethics expected of registrants … and give them such guidance on these matters as it sees fit". Under article 22, referrals may be made in respect of allegations that a registrant's fitness to practise is impaired by reason of misconduct. Article 27(b)(i) requires the Conduct and Competence Committee to consider any allegation referred to it. The principal powers of the Conduct and Competence Committee are set out in article 29. Article 29(5) provides that it may make "(a) … a "striking-off order"", or "(b) … a "suspension order"", or "(c) … a "conditions of practice order"", or "(d) … a "caution order"".

5. The relevant principles of law are well established. When a registrant appeals to the High Court against a decision of the Council, the court's function is to determine whether the Council's decision was wrong. In *General Medical Council v Meadow* [2007] Q.B. 462, Auld L.J. (in paragraph 197 of his judgment, with which Sir Anthony Clarke M.R. and Thorpe L.J. agreed) identified three factors which the court must have in mind and give appropriate weight: first, that "[the] body from whom the appeal lies is a specialist tribunal whose understanding of what the medical profession expects of its members in matters of medical practice deserves respect", second, that "[the] tribunal had the benefit, which the court normally does not, of hearing and seeing the witnesses on both sides", and third, that "[the] questions of primary and secondary fact and the overall value judgment to be made by a tribunal, especially the last, are akin to jury questions to which there may reasonably be different answers".

6. The need for the court to exercise caution when reviewing a disciplinary tribunal's decision on sanction was emphasized by Laws L.J., with whom Chadwick L.J. and Sir Peter Gibson agreed, in *Raschid and Fatnani v General Medical Council* [2007] 1 W.L.R. 1460 (in paragraphs 16 to 19 of his judgment). Laws L.J. identified (in paragraph 16) two strands in the authorities preceding the change in the appeal system brought into effect in 2003. The first strand, he said, "differentiates the function of the panel or committee in imposing sanctions from that of a court imposing retributive punishment", and the second "emphasises the special expertise of the panel or committee to make the required judgment". He cited (in paragraph 17) the Privy Council's decision in *Gupta v General Medical Council* [2002] 1 W.L.R. 1691 (see the judgment of Lord Rodger of Earlsferry, in which he referred, at paragraph 21, to the observation of Sir Thomas Bingham M.R., as he then was, in *Bolton v Law Society* [1994] 1 W.L.R. 512, at p.519, that "[the] reputation of the profession is more important than the fortunes of any individual member"). As to the second strand, Laws L.J. referred (in paragraph 18) to the decision of the Privy Council in *Marinovich v General Medical Council* [2002] UKPC 36, where Lord Hope of Craighead, giving the judgment of the Board, stressed (in paragraph 28) "… that the Professional Conduct Committee is the body which is best equipped to determine questions as to the sanction that should be imposed in the public interest for serious professional misconduct". Laws L.J. went on to say (in paragraph 19) that, as it seemed to him, "the fact that

a principal purpose of the panel's jurisdiction in relation to sanctions is the preservation and maintenance of public confidence in the profession rather than the administration of retributive justice, particular force is given to the need to accord special respect to the judgment of the professional decision-making body in the shape of the panel".

The 2002 Act

7. Under section 29(4) of the 2002 Act (as amended), the Authority may refer a case to the High Court if it considers that "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 as to any penalty imposed, or both … and that it would be desirable for the protection of members of the public for the Authority to take action under this section". Where a case is referred, it is to be treated as an appeal by virtue of section 29(7), and the court's powers on such an appeal are provided in section 29(8).

8. Here too the relevant legal principles are settled and clear. In *Council for Regulation of Health Care Professionals v Ruscillo* [2005] 1 W.L.R. 717, the Court of Appeal identified the criteria to be applied by the court in deciding whether to allow an appeal under section 29. Giving the judgment of the court, Lord Phillips of Worth Matravers M.R. said (in paragraph 73) that "[the] task of the disciplinary tribunal is to consider whether the relevant facts demonstrate that the practitioner has been guilty of the defined professional misconduct that gives rise to the right or duty to impose a penalty and, where they do, to impose the penalty that is appropriate, having regard to the safety of the public and the reputation of the profession". The role of the court, he said, is "to consider whether the disciplinary tribunal has properly performed that task so as to reach a correct decision as to the imposition of a penalty". And the "test of undue leniency in this context must … involve considering whether, having regard to the material facts, the decision reached has due regard for the safety of the public and the reputation of the profession".

9. Lord Phillips M.R. went on to say (in paragraph 76) that the court considered "that the test of whether a penalty is unduly lenient in the context of section 29 is whether it is one which a disciplinary tribunal, having regard to the relevant facts and to the object of the disciplinary proceedings, could reasonably have imposed", and (in paragraph 77) that "[in] any particular case under section 29 the issue is likely to be whether the disciplinary tribunal has reached a decision as to penalty that is manifestly inappropriate having regard to the practitioner's conduct and the interests of the public". As for the extent to which the council and the court "should defer to the expertise of the disciplinary tribunal", it was this court's view that "[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", but that "[where] … there had been a failure of process, or evidence is taken into account on appeal that was not placed before the disciplinary tribunal, the decision reached by that tribunal will inevitably need to be reassessed" (paragraph 78).

10. An appeal may be allowed where there has been some serious procedural or other irregularity making it impossible to determine whether the decision as to sanction was unduly lenient or not

(see the judgment of the court in *Ruscillo*, at paragraphs 79 to 83). This may be the consequence of "undercharging", where, if the case had been properly charged and the charge found proved, the penalty would not, or may not, have been unduly lenient (see, for example, *Professional Standards Authority v General Chiropractic Council and Briggs* [2014] EWHC 2190 (Admin)). It may also be the consequence of a failure to provide adequate reasons for a decision (see *Council for the Regulation of Healthcare Professionals v General Dental Council and Marshall* [2006] EWHC 1870 (Admin)).

The Panel's decision

11. The Panel had two matters before them. In "Matter 1 – FTP04026" it was alleged that on 4 May 2011, while employed at the James Cook University Hospital, Mr Doree had driven his car at "[Colleague] A" in the hospital car park, that this amounted to misconduct, and that by reason of his misconduct his fitness to practise was impaired (paragraphs 1 to 3 of the Panel's decision). In "Matter 2 – FTP26690" it was alleged that while he was "registered as a Prosthetist/Orthotist, between 2009 to [sic] 2011", he "bullied Colleague A …" (paragraph 1a to i), that he "demonstrated inappropriate sexual behaviour towards Physiotherapist B …" (paragraph 2a to l), that his "actions in paragraphs 1i, 2a to 2l were sexually motivated" (paragraph 3), that "[the] matters described in paragraphs 1a to 1i, 2a to 2l and 3 constitute misconduct" (paragraph 4), and that by reason of that misconduct his fitness to practise was impaired (paragraph 5).

12. There was, said the Panel, "a stark conflict of evidence in this case", Mr Doree having "[denied] all the allegations of fact" (paragraph 14).

13. In their "Decision on Facts", on "Matter 1 – FTP04026", the Panel found the allegation in paragraph 1 proved (paragraphs 18 to 26 of the decision).

14. On "Matter 2 – FTP26690" they found some of the facts alleged in paragraphs 1 and 2 proved, others not (paragraphs 27 to 72). They were, they said, "entirely satisfied that Mr Doree carried out the actions found proved and did so in order to bully and intimidate Colleague A in the workplace" (paragraph 48). They therefore found "the stem of allegation 1 proved" (paragraph 49). They were also satisfied that "the stem of allegation 2 is proved", concluding that the behaviour found proved "was directed towards Physio B, it is inappropriate behaviour in the workplace and had a significant sexual content" (paragraph 72). They therefore found the allegation in paragraph 3 proved to the extent that "Mr Doree's actions were sexually motivated in relation to paragraphs 2a, 2b, 2c, 2d, 2e, 2f, 2g, 2i, 2k and 2l" (paragraphs 73 to 77). The facts alleged in paragraph 1 which the Panel found proved were that Mr Doree:

> "…
> c. repeatedly stood close to Colleague A which made him uncomfortable;
> d. called Colleague A various inappropriate names in front of colleagues and/or public including:
> i. Cock sucker;
> ii. Steve's bitch;
> iii. Bitch; and

iv. chicken.

e. continued to call Colleague A names even though he had expressed to you that made him uncomfortable;

…

h. said to Colleague A, "You're a fucking cock sucker and would suck anyone's cock to get on that course" or words to that effect;

i. told Colleague A you had obtained a picture of his wife from a social network website and that you would be keeping that picture in your "wank bank" or words to that effect."

The facts alleged in paragraph 1 found not to be proved were that Mr Doree:

"a. drove in an intimidating manner towards Colleague A, on a number of occasions, while he was cycling;

b. repeatedly stared and/or glared at Colleague A;

…

f. publicly asked Colleague A if his "arse was sore from Steven" or words to that effect;

g. publicly made chicken noises and/or played chicken noises from a mobile phone application at Colleague A;

… ."

The facts alleged in paragraph 2 which were found proved were that Mr Doree:

"a. said to Physiotherapist B: "My wife's called (removed) and she's a dirty slut, you're called (removed), are you a dirty slut?" or words to that effect;

b. ran over to Physiotherapist B whilst she was checking a treadmill, unzipped [his] trousers, lay on [his] back on the floor and said, "get on that and ride that baby" or words to that effect, whilst thrusting [his] pelvis upwards as if simulating sexual intercourse;

c. on one occasion, opened [his] legs and pointed at [his] crotch and said to Physiotherapist B, to "suck on that" or words to that effect;

d. on another occasion, [he] pointed at [his] crotch and said to Physiotherapist B "sit on that" or words to that effect;

e. whenever Physiotherapist B yawned or opened [sic] to say something, [he] would say "Do you want something to fill that mouth" or words to that effect;

f. continued [his] actions in 2e) even though Physiotherapist B told [him] to stop;

g. unzipped [his] trousers, pushed Physiotherapist B's head into [his] crotch and thrust [his] pelvis towards Physiotherapist B as if simulating oral sex, on at least 3 occasions;

…

i. on one occasion, in front of office administration staff, [he] came behind Physiotherapist B while she was bent down and gestured behind her in a sexual manner as if simulating sexual intercourse;

…

k. mentioned on at least 4 occasions to Physiotherapist B that when [he ejaculates, he has] blood in [his] seminal fluid;

l. discussed [his] daughter's 18th birthday party with Physiotherapist B and another colleague where [he] commented how pretty and good looking all the girls were and

how they were only 17 and 18 and gestured with [his] hands, mimicking as if [he] were holding a pair of breasts."

The facts alleged in paragraph 2 found not proved were that he:

"…
h. frequently entered the therapy office when Physiotherapist B was alone and massage her shoulders, grab her ponytail and start twirling around with [his] finger;
…
j. took a picture of Physiotherapist B who was acting as a model in a hoist sling demonstration and had her legs apart in the hoist sling;
… ."

15. In their "Decision on Grounds and Impairment …", the Panel referred to the submissions they had heard from the Presenting Officer, Ms Hannah Eales, on behalf of the Council, and from Mr Paul Reid, counsel for Mr Doree. They noted that Mr Doree had now "accepted that the facts found proved amounted to misconduct and that his fitness to practise is currently impaired as a result of that misconduct" (paragraph 78). They continued (in paragraph 79):

"79. The Panel has found that the Registrant deliberately drove a car at a colleague, bullied a colleague by invading his personal space, name calling and use of insulting and intimidating behaviour. In addition he has demonstrated inappropriate sexual behaviour towards another colleague by the use of offensive language, vulgar, sexual innuendo and mime, and discussion of wholly inappropriate topics of a sexual nature. This behaviour was unwanted and unwarranted with a significant sexual element and clearly falls well below the standards expected of a registered professional. … ."

They also found breaches of Standard 3 and Standard 13 in the Council's Standards of Conduct, Performance and Ethics, and of Standard 3.1 and Standard 9.2 in the Standards of Proficiency for Prosthetists/Orthotists. They continued (in paragraph 80):

"80. The Panel is of the view that this was a prolonged and sustained pattern of behaviour targeting more than one susceptible staff member. In all the circumstances the Panel has concluded that the Registrant's conduct clearly amounts to misconduct."

16. In considering whether Mr Doree's current fitness to practise was impaired by his misconduct – as by now he had conceded – the Panel addressed "both the personal component and the public component". As for the "personal component", they observed that Mr Doree's conduct had been "directed at two different individuals who were bullied and/or harassed", and his "actions in respect of one of those individuals were sexually motivated" (paragraph 82). Evidence given and references provided by "colleagues in his current workplace" had confirmed that there had been "no recurrence of such behaviour". He had "had a long career extending over twenty years" (paragraph 83). Turning to the question of "insight", the Panel said this (in paragraph 84):

"84. The Panel is of the view that the Registrant's insight is limited and was only apparent in his statement dated 5 July 2014 which was produced after the Panel had made its

findings of fact in April 2014. The Panel has had sight of photocopies of certificates from online courses which the Registrant has completed which include preventing sexual harassment and workplace harassment. The Panel has not seen any evidence of the learning outcomes of these courses or of reflective practice. While the Panel acknowledge that he has taken some steps to remediate his behaviour by completing these courses, they were undertaken prior to the final hearing at which he continued to deny the allegations. The Panel has concluded that taking all of these factors into account, the risk of repetition has been diminished but still remains."

As for the "public component", including "the collective need to maintain confidence in the profession as well as declaring and upholding proper standards of conduct and behaviour which the public expect", the Panel found that Mr Doree's conduct had "fallen well below the standards expected of a health professional and as such has clearly had a tangible, adverse effect on the reputation of the profession of prosthetists" (paragraph 85). Taking into account "the critically important public policy issues and the personal component", they concluded that his "fitness to practise is currently impaired and the allegations are well founded" (paragraph 86).

17. The Panel's "Decision on Sanction" is in paragraphs 87 to 94 of their decision. Before considering the appropriate sanction, they heard evidence from three witnesses on behalf of Mr Doree: Mr Paul Laverick (his then line manager at his current employer, RSL Steeper), Ms Vicky Russell (Prosthetic Services Manager at the Hull and East Yorkshire Hospitals NHS Trust), and Ms Vicky Jarvis (National Prosthetic Services Manager at RSL Steeper). They also heard further submissions from Ms Eales on behalf of the Council and Mr Reid on behalf of Mr Doree. And they took into account the advice of the Legal Assessor, Mrs Angela Hughes (paragraph 87).

18. They explained their approach to the decision on sanction in this way (in paragraphs 88 to 90):

> "88. The Panel is aware that the function of fitness to practise panels is not punitive and that the primary function of any sanction is to address public safety from the perspective of the risk the Registrant may pose to those using or needing his services in the future. In reaching its decision, the Panel must also give appropriate weight to the wider public interest considerations, which include the deterrent effect on other Registrants, the reputation of the profession and public confidence in the regulatory process. The Panel has considered the sanctions available to it in ascending order of severity and had regard to the Indicative Sanctions Policy.
>
> 89. The Panel first considered whether to take no further action and was of the view that these would not be sufficient to mark the seriousness of the Registrant's conduct and would therefore be wholly inappropriate.
>
> 90. The Panel next considered a caution. In terms of the Indicative Sanctions Policy a caution order may be appropriate where the nature of the allegation means that meaningful practice restrictions cannot be imposed but where the risk of repetition is low and thus suspension from practice would be disproportionate. The Panel is of the view that the nature of the allegation is such that it would not be possible to draft meaningful conditions which would address bullying and harassment."

19. The Panel went on to say that they had heard evidence that Mr Doree had been "an exemplary employee over the last three years and has been promoted to a Deputy Manager position and has been highly commended for his work with patients". They had "also heard that there had been no other allegations made against him in the course of his very lengthy career" (paragraph 91). They referred to the evidence they had heard about "ongoing serious health issues suffered by his wife and daughter which may have impacted on his behaviour at the time of the allegations", and accepted that "this may have caused stress to the Registrant at the time". They had also heard "further evidence … from current colleagues of the Registrant as to his interaction with co-workers", and said they were "satisfied from this that the risk [of] repetition is now low" (paragraph 92). They then set out their conclusions on sanction (paragraphs 93 to 94):

> "93. The Panel acknowledge that these were serious matters. However given the time period since the events in question and the positive testimonials from current colleagues, the Panel is of the view that a caution order would be an appropriate sanction to mark such conduct and to address the wider public policy issues. Such an order would serve as an appropriate reminder to the Registrant of the need to maintain high standards of behaviour in his professional life. The Panel is aware that a period of three years is the benchmark for a caution order. The Panel considers that a period of five years would be sufficient to address the severity of the conduct and the wider public interest.
>
> 94. The Panel is of the view that conditions of practice would not be practical, given the nature of the conduct and that suspension would be punitive and disproportionate in all the circumstances particularly where there were no issues with patient interaction."

Did the Panel err in the use they made of the Indicative Sanctions Policy?

20. In the version current at the time of the Panel's decision, the version published in December 2013, the Indicative Sanctions Policy stated in its "Introduction" that it set out the Council's "policy on how sanctions should be applied by Practice Committee Panels in fitness to practise cases". It explained its status and purpose in this way (in paragraphs 2 and 3):

> "2. The decision as to what sanction, if any, should be imposed on a registrant whose fitness to practise has been found to be impaired is properly a matter for the Panel which heard the case. Practice Committee Panels operate at 'arm's length' from the Council and it would be inappropriate for the Council to set a fixed 'tariff' of sanctions. This policy is only guidance and Panels must apply it as such. Panels must decide each case on its merits, and that includes deciding what, if any, sanction to impose.
>
> 3. This policy is intended to aid Panels in their deliberations and assist them in making fair, consistent and transparent decisions. The Council also provides further guidance to Panels on specific aspects of the adjudicative process in a series of Practice Notes."

Under the heading "The purpose of sanctions", it said that "[the] purpose of fitness to practise proceedings is not to punish registrants, but to protect the public", that "[inevitably], a sanction may be punitive in effect, but should not be imposed simply for that purpose" (paragraph 4), and that "[it] is important for Panels to remember that a sanction may only be imposed in relation to the facts which a Panel has found to be true or which are admitted by the registrant", but "[equally], it is important that any sanction addresses all of the relevant facts which have led to a finding of impairment" (paragraph 5). The guidance on "Insight and remorse" included these passages (in paragraph 11):

> "11. The primary purpose of fitness to practise proceedings is to identify and secure a proportionate measure of public protection rather than to punish. A key factor in many cases will be the extent to which a registrant recognises his or her failings and is willing to address them."

and (in paragraph 13):

> "13. There is a significant difference between insight and remorse. In deciding what, if any, sanction is required, the issues which the Panel need to consider are whether the registrant has genuinely recognised his or her failings, has taken or is taking any appropriate remedial action to address them and whether there is a risk of repetition. Those issues should be addressed by consideration of the evidence on those issues rather than focusing on the exact manner or form in which they may be explained or expressed."

In a paragraph headed "Procedure" (paragraph 16), it was emphasized that "[the] Panel Chair should carefully explain what sanction, if any, the Panel has imposed, the reasons for doing so and the consequences for the registrant in clear and direct language which leaves no room for misunderstanding or ambiguity … ". The guidance in the section dealing with "Sanctions" included this under the heading "Caution order" (in paragraphs 19 and 20):

> "19. A caution order may be the appropriate sanction for slightly more serious cases, where the lapse is isolated or of a minor nature, there is a low risk of recurrence, the registrant has shown insight and taken remedial action. A caution order should also be considered in cases where the nature of the allegation (e.g. dishonesty) means that meaningful practice restrictions cannot be imposed but where the risk of repetition is low and thus suspension from practice would be disproportionate. A caution order is unlikely to be appropriate in cases where the registrant lacks insight and, in that event, conditions of practice or suspension should be considered.
>
> 20. At the Panel's discretion, a caution order may be imposed for any period between one and five years. In order to ensure that a fair and consistent approach is adopted, Panels should regard a period of three years as the 'benchmark' for a caution order. However, as Panels must consider sanctions in ascending order, the starting point for a caution is one year and a Panel should only impose a caution for a longer period if the facts of the case make it appropriate to do so."

As for a "Conditions of Practice Order", the guidance (in paragraph 21) was that "[conditions] of practice will be most appropriate where a failure or deficiency is capable of being remedied and where the Panel is satisfied that allowing the registrant to remain in practice, albeit subject to conditions, poses no risk of harm or future harm". The guidance on a "Suspension Order" (in paragraph 31) was that "[if] the evidence suggests that the registrant will be unable to resolve or remedy his or her failings then striking off may be the more appropriate option", but that "where the registrant has no psychological or other difficulties preventing him or her from understanding and seeking to remedy the failings then suspension may be appropriate". As to a "Striking Off Order", the guidance (in paragraph 38) was that "[striking] off should be used where there is no other way to protect the public, for example, where there is a lack of insight, continuing problems or denial".

21. The version of the Indicative Sanctions Policy published in September 2015 – more than a year after the Panel's decision in this case – states in paragraph 3 that "[where] a Panel deviates from this policy, its written determination should provide clear and cogent reasons for doing so". We were not told why this change to the guidance was thought to be necessary. But in any event it does not affect the question of whether in this case the Panel fell into error in the use it made of the guidance current at the time of its decision.

22. The Council's Practice Note "Drafting Fitness to Practise Decisions" of August 2012 says, in its "Introduction" that "Practice Committee Panels have a legal duty to provide reasons for their decisions …", and that "[beyond] that legal duty, Panels have an obligation to explain the decisions they reach and the reasons for them, as part of the open and transparent processes which [the Council] seeks to operate". Under the heading "What should a decision include?", the Practice Note says that a panel's decision "should include", among other things "any sanction that was imposed, why it was appropriate and, if it does not accord with [the Council's] Indicative Sanctions Policy, the specific circumstances of the case which justify that deviation".

23. Lang J. saw no merit in the Authority's submission that the Panel had disregarded the Indicative Sanctions Policy. In her view it was more likely that, "after considering the [Indicative Sanctions Policy] and seeking to apply it to the instant case, [they] concluded that a Caution Order was the only suitable sanction". Even though this case "did not fit precisely within the guidance at paragraph 19", the Panel were, she said, "not bound to apply the guidance rigidly". She supported that observation by referring to paragraph 2 of the Indicative Sanctions Policy (paragraph 66 of the judgment). She also rejected the submission that the Panel's reasons were inadequate. Their reasons were, she said, "lengthy and detailed", and she found them "intelligible and sufficient to enable the parties to know why they won or lost, and for the Authority to consider whether the sanction was too lenient" (paragraph 71).

24. For the Authority, Ms Fenella Morris Q.C. submitted that the judge was wrong to reject the Authority's contention that the Panel either should have adhered to the guidance in the Indicative Sanctions Policy or, if it had good reasons for departing from the guidance, it ought to have stated those reasons fully and clearly (see, for example, the decision of the House of Lords in *R. (on the application of Munjaz) v Mersey Care NHS Trust* [2006] 2 A.C. 148, and the decision of the Court of Appeal in *Southall v General Medical Council* [2010] EWCA Civ 407). The purpose of the Indicative Sanctions Policy was to assist panels in making decisions

that are "transparent" as well as "fair" and "consistent" (paragraph 3). It stressed the need for a panel to give reasons to explain the sanction imposed (paragraph 16). The Council's Practice Note also requires reasons to be stated for any "deviation" from the guidance in the Indicative Sanctions Policy. The interests of maintaining public confidence in the Council's regulation require a panel either to follow that guidance or to give adequate reasons for not following it. A failure to do that would amount to a serious procedural error. In this case the Panel had found Mr Doree guilty of "prolonged and sustained" misconduct involving two colleagues (paragraph 80 of their decision). At least some of the allegations were, as the Panel acknowledged, "serious" (paragraph 93). This was not a case of a "lapse" that was "isolated or of a minor nature" (paragraph 19 of the Indicative Sanctions Policy). The Panel also found that Mr Doree had shown only limited "insight", having for a very long time denied all the allegations against him (paragraph 84 of the decision). In these circumstances, Ms Morris submitted, the guidance in the Indicative Sanctions Policy was clearly against the imposition of a caution order, rather than a more onerous sanction. Had they adhered to the guidance, the Panel could not properly have imposed a caution order. But even if they were entitled to depart from the guidance, they had failed to state any good reasons for doing so.

25. I cannot accept that argument.

26. As was submitted by Ms Jenni Richards Q.C. for the Council and by Mr Bryan Cox Q.C. for Mr Doree, the guidance provided by the Council in the Indicative Sanctions Policy is just that; it is guidance. It does not have the force of statute or regulation. It is guidance of the kind contemplated by article 3(15) of the 2001 Order, published by the Council to indicate the general approach to be taken by panels to the imposition of sanctions. And as the title of the document makes plain, the guidance is not intended to be prescriptive; it is "indicative". Any doubt about that is dispelled as soon as one reads the "Introduction". The Council deliberately refrained from setting any "tariff" for sanctions, stated emphatically that the policy is "only guidance", and enjoined panels to "decide each case on its merits" – a principle which, it took care to add, "includes deciding what, if any, sanction to impose" (paragraph 2). The explicit purpose of the guidance was not to dictate to panels how they must proceed, but "to aid [them] in their deliberations and assist them in making fair, consistent and transparent decisions" (paragraph 3).

27. The guidance provided by the Council in the Indicative Sanctions Policy is not akin to the code of practice considered in *Munjaz*. That code of practice had been prepared under section 118 of the Mental Health Act 1983, which required the Secretary of State to prepare it, consult upon it, and lay it before Parliament. As Lord Bingham of Cornhill said (in paragraph 21 of his speech), the code did "not have the binding effect which a statutory provision or a statutory instrument would have", but was "guidance which any hospital should consider with great care, and from which it should depart only if it [had] cogent reasons for doing so". Lord Steyn described the code of practice as "a very special type of soft law", which "[derived] its status from the legislative context and the extreme vulnerability of the patients which it serves to protect" (paragraph 44). He referred to the dictum of Sedley J., as he then was, in *R. v Islington London Borough Council, ex parte Rixon* (1996) 1 C.C.L.R. 119, at p.123J-K, that local authorities may only depart from the Secretary of State's guidance under section 7(1) of the Local Authority Social Services Act 1970 for good reason (paragraph 46). Lord Hope of Craighead said that although there was "no statutory obligation" to comply with it, the code "[could not] be

divorced from its statutory background, from the process of consultation and from the parliamentary procedure that must be gone through before it is published under section 118(6) as "the code as for the time being in force"" (paragraph 68). By contrast, the guidance in the Indicative Sanctions Policy has no specific statutory provenance and status. It is guidance provided in a wholly different context, but also of a wholly different nature and effect. This is not to say, of course, that a panel is at liberty to disregard it, or that they need not give adequate reasons for departing from it (see, for example, *Attorney-General of Hong Kong v Ng Yuen Shiu* [1983] 2 A.C. 629, P.C.). In this case, however, the Panel made neither of those errors.

28. Ms Morris also referred to the decision of the Supreme Court in *R. (on the application of Lumba) v Secretary of State for the Home Department* [2012] 1 A.C. 245. I cannot see how that decision assists us. There too the nature of the policy in question – the Government's policy for the detention of foreign national prisoners on completion of their sentences of imprisonment – was very different from the guidance with which we are concerned here. And we are not concerned with any arguable breach of an individual's "basic public law right to have his or her case considered under whatever policy the executive sees fit to adopt provided that the adopted policy is a lawful exercise of the discretion conferred by the statute …", or of the "correlative right to know what that currently existing policy is, so that [he] can make relevant representations in relation to it" (see the judgment of Lord Dyson, at paragraph 35). As I have said, it is in my view beyond dispute that the Panel made their decision on sanction in this case conscious of, and, for the reasons they gave, in accordance with the guidance in the Indicative Sanctions Policy. That guidance was not unpublished. It was in the public domain, and its content was clear.

29. I see no basis in the relevant jurisprudence for the contention that it was incumbent on the Panel to "adhere" to the guidance in the Indicative Sanctions Policy if that concept is intended to mean anything more than having proper regard to the guidance and applying it as its own terms suggest, unless the Panel had sound reasons for departing from it – in which case they had to state those reasons clearly in their decision.

30. That the Panel did have proper regard to the Indicative Sanctions Policy, and that they did apply it as its own terms suggest, is, in my view, absolutely clear. In this sense they plainly did "adhere" to the guidance it contains. They clearly had it well in mind when deciding what sanction it would be right to impose in Mr Doree's case. They expressly referred to it in paragraphs 88 and 90 of their decision, in the section headed "Decision on Sanction". There is nothing in their conclusions under that heading, in paragraphs 87 to 94, to suggest that they had misunderstood the guidance, or that they misapplied it. Indeed, those eight paragraphs of the decision seem to me to reflect an impeccable application of the relevant considerations arising from the Indicative Sanctions Policy, including the guidance on caution orders in paragraphs 19 and 20. The Panel did not act inconsistently with the guidance, and cannot sensibly be said to have departed from it. And they gave clear, adequate and, in my view, cogent reasons to explain how they had applied it in determining the appropriate sanction in the particular circumstances of this case, in the light of the evidence and submissions before them.

31. Although the guidance in paragraph 19 of the Indicative Sanctions Policy referred to cases in which it "may" be appropriate to impose a caution order, it did not seek to be comprehensive or specific in describing all the circumstances in which this may be a suitable sanction. It did not

say that a caution order will only be appropriate if "the lapse is isolated or of a minor nature, there is a low risk of recurrence, the registrant has shown insight and taken remedial action". It acknowledged that caution orders may "also" be appropriate, and "should be considered", in cases of a relatively serious kind, such as a case of "dishonesty", where it is not possible to impose "meaningful practice restrictions" but nevertheless "the risk of repetition is low" and "suspension from practice would be disproportionate". It indicated circumstances in which a caution order was "unlikely" to be appropriate, such as where the registrant "lacks insight". But it did not attempt to define the gravity of the misconduct that may properly be dealt with in this way, or the degree of "insight" the registrant would have to demonstrate to avoid a sanction that was more severe. To have done that would have been inimical to the general discretion accorded to a panel – indeed, as paragraph 3 of the Indicative Sanctions Policy made plain, their duty – to deal with each case on its own, individual merits.

32. The guidance in paragraph 20 referred to the length of time for which a caution order may be imposed, in the range between one and five years, making it clear that the "benchmark" was a period of three years, and that a caution order should only be imposed for a longer period "if the facts of the case make it appropriate to do so". It is implicit that a caution order imposed for the maximum period of five years must be reserved for the most serious cases properly capable of being dealt with in this way.

33. Aware, as they obviously were, of the inherent flexibility of the guidance in the Indicative Sanctions Policy, the Panel adopted a suitably flexible approach to its application, fitting the sanction to the particular circumstances of the case before them. They approached their decision on the appropriate sanction in this case against the background of their findings that although Mr Doree had some "insight", it was only "limited", and that "the risk of repetition" had been "diminished but still remains" (paragraph 84), and also their recognition of the "critically important public policy issues" involved (paragraph 86). They concluded, however, that it "would not be possible to draft meaningful conditions which would address bullying and harassment" (paragraph 90); that Mr Doree had been "an exemplary employee over the last three years" and there had been "no other allegations against him in the course of his very lengthy career" (paragraph 91); that "the risk of repetition is now low" (paragraph 92); that these were indeed "serious matters", but that a caution order, for the maximum period of five years, would be an "appropriate sanction to mark such conduct and to address the wider public policy issues" and "sufficient to address the severity of the conduct and the wider public interest" (paragraph 93); and that "suspension would be punitive and disproportionate in all the circumstances particularly where there were no issues with patient interaction" (paragraph 94).

34. Put simply, the Panel's conclusion was that in the particular circumstances of this case, and in the light of the guidance in the Indicative Sanctions Policy, the most appropriate sanction here was a caution order for the maximum period of five years. This conclusion is, in my view, unassailable, and it does not betray any – let alone any serious – procedural irregularity. On the contrary, the sanction imposed by the Panel was, in the circumstances, a sanction countenanced by the guidance, and, for the reasons they gave, a sanction they were perfectly entitled to impose. The judge was in my view right to conclude that it was.

Did the Panel err in its approach to Mr Doree's insight?

35. Lang J. rejected the Authority's contention that the Panel's conclusions on "insight" and the "risk of repetition", in paragraph 84 of their decision, were flawed. As she said, the Panel "had the advantage of seeing and hearing Mr Doree and the other witnesses give evidence and be cross-examined", and were in "a better position than the Authority, and the court, to assess the risk of repetition" (paragraph 56 of the judgment), and "to assess the extent of his insight" (paragraph 57). They "considered his insight to be "limited", not non-existent as the Authority suggested". They had given "careful consideration" to his expressions of remorse and his willingness to undertake courses on bullying and harassment, which the Authority said were meaningless because he had persisted in maintaining his innocence of the charges against him (ibid.). The judge went on to say that the question for the Panel was "whether [Mr Doree] had sufficient insight for a Caution Order to be the appropriate sanction". They had "made an exercise of judgment which [they were] entitled to make, on [their] findings overall". In accordance with the guidance in the Indicative Sanctions Policy, they had "considered and rejected the alternatives of conditions of practice or suspension, in favour of a Caution Order" (paragraph 64).

36. Ms Morris submitted that, in the circumstances, the Panel could not reasonably be satisfied as to Mr Doree's insight. In considering a registrant's insight or remorse, having rejected his earlier evidence as to his innocence of the allegations laid against him, a professional disciplinary committee is not entitled to rely on a written statement produced by him only at the misconduct stage, without hearing further oral evidence from him which can be tested by cross-examination or other questioning. Having regard to the public interest, the question of whether a registrant has insight, and, if so, how much, is essential to the decision on sanction, not least because insight is vitally relevant to an assessment of the risk of repetition. Generally, said Ms Morris, a professional disciplinary committee should not accept that a registrant has shown real and sufficient insight and remorse if he has only admitted his guilt after his misconduct has been found proved. This is all the more so when he has not given evidence to demonstrate how genuine his insight and remorse truly are, and submitted to cross-examination or questioning by the professional disciplinary committee on that evidence. There is a difference, submitted Ms Morris, between a case in which an admission and apology emerge "unpressured" and a case where they come only after counsel's advice has been taken in the light of the professional disciplinary committee's decision on the facts (see the judgment of Beatson J., as he then was, in *R. (on the application of Henderson) v General Teaching Council for England* [2012] EWHC 1505 (Admin), at paragraphs 52 to 54). Despite having been bound over in the Crown Court on the allegation of assaulting Colleague A by driving his car at him, Mr Doree had maintained his innocence on the same allegation before the Panel. Indeed, he had denied all the charges he faced, accepting his guilt only after the Panel's adverse findings of fact. He did not give oral evidence to the Panel after they had made their findings of fact. And they did not explore his reasons for having initially denied his guilt and only seeking to persuade them of his insight and remorse at that stage. This was, Ms Morris submitted, a very clear example of a registrant's lack of insight. The judge ought to have concluded that the Panel's mistaken approach to this question led them to impose an unduly lenient sanction.

37. I cannot accept that argument, for three reasons.

38. In the first place, I do not accept that, in principle, a professional disciplinary committee may only reasonably find that a registrant has shown insight or remorse after he has himself given oral evidence to demonstrate it, and has made himself available for cross-examination or other questioning on that evidence – even if it has rejected his evidence on some or all of the allegations he faced. Whether a registrant has shown insight into his misconduct, and how much insight he has shown, are classically matters of fact and judgment for the professional disciplinary committee in the light of the evidence before it. Some of the evidence may be matters of fact, some of it merely subjective. In assessing a registrant's insight, a professional disciplinary committee will need to weigh all the relevant evidence, both oral and written, which provides a picture of it. This may include evidence given by other witnesses about the registrant's conduct as an employee or as a professional colleague, and, where this is also relevant, the quality of his work with patients, as well as any objective evidence, such as specific work he has done in an effort to address his failings. Of course, there will be cases in which the registrant's own evidence, given orally and tested by cross-examination, will be the best evidence that could be given, and perhaps the only convincing evidence. And such evidence may well be more convincing if given before the findings of fact are made. But this is not to say that in the absence of such evidence a professional disciplinary committee will necessarily be disabled from making the findings it needs to make on insight, or bound to find that the registrant lacks it.

39. Secondly, as Ms Richards submitted, in this case the Panel did not simply accept without question that Mr Doree had demonstrated insight and remorse, and that the risk of his misconduct being repeated was low. They did not find that he altogether lacked insight. Nor did they find that his insight was complete, or that such insight as he had was fully or timely demonstrated. They did not make the kind of error that occurred in *Henderson*. They not only found that Mr Doree's insight was "limited". They also observed that it had only emerged in a written statement produced "after [they] had made [their] findings of fact". They took into account the evidence they had been given about the "online courses" he had undertaken on "preventing sexual harassment and workplace harassment". But they had doubts, because, as they said, they had "not seen any evidence of the learning outcomes of these courses or of reflective practice", and, although Mr Doree had "taken some steps to remediate his behaviour by completing these courses, they were undertaken prior to the final hearing at which he continued to deny the allegations". It was by "taking all of these factors into account" that they came to the view that "the risk of repetition has been diminished but still remains" (paragraph 84 of the decision). These findings informed their conclusion, in the light of the further evidence they had heard from "current colleagues" of Mr Doree "as to his interaction with co-workers" in the course of the last three years, that the "risk of repetition was now low" (paragraph 92). Taken together, their findings and conclusions on insight and the risk of repetition in the particular circumstances of this case are, in my view, coherent, consistent with the guidance in paragraphs 11 and 13 of the Indicative Sanctions Policy, and clearly explained. They are, I think, both reasonable and realistic.

40. Thirdly, therefore, the submission that the Panel's decision on sanction was rendered unduly lenient by an erroneous approach to the question of Mr Doree's insight is, in my view, mistaken. The Panel's approach to this question was correct. There was, again, no serious procedural irregularity. And, as the judge accepted, the Panel were entitled to find and conclude

as they did on the evidence before them. Their relevant findings and conclusions are unimpeachable.

The absence of patients as a "mitigating factor"

41. Lang J. noted that there had been "no criticisms of [Mr Doree's] conduct towards members of the public", and that "[the] evidence was that he was dedicated and professional in his dealing with patients, and he was well-liked by them …", and was "a highly-regarded prosthetist" (paragraph 54 c) of the judgment). In her view, the Panel were "entitled not to draw the inference that Mr Doree might harass female patients, as there was no suggestion of any unprofessional behaviour by him towards patients". There had been, she said, a "workplace culture of teasing and banter, sometimes sexual, which in his case … crossed the line into unacceptable harassment", but "there was no evidence to suggest that this workplace culture extended into relations with their patients, who were disabled and sometimes vulnerable" (paragraph 55).

42. Ms Morris submitted that Lang J. was wrong to confine her conclusions here to unprofessional behaviour "towards" patients. And she was also wrong to regard the fact, if it was a fact, that no patients had witnessed Mr Doree's misconduct as a mitigating factor, justifying a lesser sanction – which is what the Panel's conclusion in paragraph 94 of their decision implies. Ms Morris pointed to the evidence the Panel had heard about the alleged incident in paragraph 2b of Matter 2 – the "treadmill" incident – which they had found proved. In his evidence to the Panel on 8 April 2014 the Prosthetic Branch Manager at the hospital, Mr McMeechan, said Physiotherapist B had told him that this incident had happened "while she was giving walking training, teaching patients how to walk again" (transcript p.20, line 28). Even if patients were merely present when an incident occurred, Ms Morris submitted, this would be an aggravating factor. And the absence of patients did not necessarily make the case less serious. At best, its effect should be neutral (see the judgment of Kerr J. in *O v Nursing and Midwifery Council* [2015] EWHC 2949 (Admin), at paragraphs 40 and 80). The reputation of the profession, and public confidence in it, requires registrants to maintain a high standard of behaviour at all times, whether or not patients are present. The provision of health care should be a "co-operative endeavour". Poor – or dysfunctional – professional relationships can affect the care provided to patients. Misconduct affecting colleagues may be no less serious than failings in clinical care (see the decision of the Privy Council in *Roylance v General Medical Council (No.2)* [2000] 1 A.C. 311). Again, Ms Morris contended, the judge's errors undermined her conclusion that the sanction imposed by the Panel was not unduly lenient.

43. That argument is, in my view, untenable. It seems to depend on a misreading of paragraph 94 of the Panel's decision and a misunderstanding of the relevant part of Lang J.'s judgment.

44. I do not take the words "particularly where there were no issues with patient interaction" in paragraph 94 of the Panel's decision as being intended to minimize the seriousness of Mr Doree's misconduct. The Panel were not, in truth, counting as mitigation the absence of any evidence that his misconduct had, directly or indirectly, caused any harm to patients or affected his or his colleagues' performance of their professional duties, or their dealings with, and the

provision of care to, members of the public. They were simply acknowledging, rightly, that aggravating considerations of that kind were not present here.

45. I do not think Ms Morris's argument is assisted by the fact that the Panel found the "treadmill" incident proved. The allegation in paragraph 2b of Matter 2 – that Mr Doree "ran over to Physiotherapist B whilst she was checking a treadmill, unzipped [his] trousers, lay on [his] back on the floor and said, "get on that and ride that baby" or words to that effect, whilst thrusting [his] pelvis upwards as if simulating sexual intercourse" – did not assert that any patient or member of the public had witnessed what happened or was present at the time. Nor was this suggested in the evidence on which the Panel based their finding that it was "more likely than not that this incident occurred" (paragraphs 57 to 59 of the decision) – the evidence of Physiotherapist B herself on 9 April 2014 (transcript p.5, line 28, to p.6, line 12) and that given on the same day by Ms Rix, a Senior Physiotherapist (transcript p.29, lines 10 to 30).

46. In any event, it cannot sensibly be suggested that the Panel neglected any of the factors relevant to the public interest in this case. They were fully alive to those considerations, both in gauging the seriousness of Mr Doree's misconduct and in determining the appropriate sanction. They took into account "the public component" (in paragraphs 82 and 85 of their decision), "the collective need to maintain confidence in the profession as well as declaring and upholding proper standards of conduct and behaviour which the public expect" and the "tangible, adverse effect [of Mr Doree's conduct] on the reputation of the profession of prosthetists" (paragraph 85), "the critically important public policy issues" (paragraph 86), the need for any sanction "to address public safety from the perspective of the risk the Registrant may pose to those using or needing his services in the future" and also the need to "give appropriate weight to the wider public interest considerations, which include the deterrent effect on other Registrants, the reputation of the profession and public confidence in the regulatory process" (paragraph 88), "the wider public policy issues" and "the wider public interest" (paragraph 93).

47. With those considerations in mind, the Panel noted the evidence that Mr Doree had been "an exemplary employee over the last three years", had been "promoted to a Deputy Manager position" and had been "highly commended for his work with patients" (paragraph 91). And they gave significant weight, as they were entitled to do, to the evidence they had heard from his colleagues "as to his interaction with co-workers" (paragraph 92) and to "the positive testimonials from current colleagues" (paragraph 93).

48. The judge's observations in paragraphs 54 c) and 55 of her judgment were, I believe, correct. She did not misconstrue what the Panel were saying in paragraph 94 of their decision. Her focus was not too narrow. She saw that the Panel's findings and conclusions on Mr Doree's misconduct and impaired fitness to practise went to his behaviour with colleagues, and not his conduct towards, or any implications for, patients. She did not, however, regard this as a "mitigating factor". Nor did the Panel. And the sanction they imposed cannot for that reason be said to have been unduly lenient. However, the fact that – as the Panel put it in paragraph 94 – "there were no issues with patient interaction" was clearly relevant to the decision on sanction. It was relevant because, as the Indicative Sanctions Policy said, "[the] primary purpose of fitness to practise proceedings is to identify and secure a proportionate measure of public protection rather than to punish" (paragraph 11). Clearly with that principle in mind, the Panel took the view that in Mr Doree's case "suspension would be punitive and disproportionate in all

the circumstances particularly where there were no issues with patient interaction" (paragraph 94 of the Panel's decision). I do not think that conclusion can be faulted. It seems to me to be entirely secure. Once again, there was no serious procedural irregularity.

Should the allegations have been amended?

49. The Panel found the primary allegations against Mr Doree proved. They did so despite finding some of the specific allegations of fact not proved (see paragraphs 13 and 14 above).

50. They found, among other things, that on 4 May 2011 Mr Doree had deliberately driven his car at Colleague A in the hospital car park, as was alleged in paragraph 1 on Matter 1 (paragraphs 18 to 26 of the decision), but not that he had driven towards Colleague A "in an intimidating manner … , on a number of occasions, while he was cycling", as was alleged in paragraph 1a on Matter 2 (paragraphs 32 and 33 of the decision). They found that he had asked Colleague A if his "arse was sore from Steven", or words to that effect, but not that he had done so "publicly", as was alleged paragraph 1f on Matter 2 (paragraphs 41 and 42 of the decision). They found that on more than one occasion he had entered the therapy office when Physiotherapist B was alone and massaged her shoulders, grabbed her pony tail and twirled her hair around his finger in a sexually motivated way, but not that he had done this "frequently", as was alleged in paragraph 2h on Matter 2 (paragraphs 61 to 63 of the decision). They found that he had "simulated" taking a photograph of Physiotherapist B on his mobile phone while she was in a hoist sling in front of colleagues, despite being asked by her to stop, and later that day told her he had deleted the photographs, grabbed her and kissed the top of her head saying "I was only kidding chuckles" – but not that he had actually taken a photograph, as was alleged in paragraph 2j on Matter 2 (paragraphs 64 to 67 of the decision).

51. The Council did not apply to the Panel to amend any of those particular allegations to allegations which, on their findings of fact, they had effectively found to be proved. Nor did the Panel themselves decide to do this. It is clear from the transcript of proceedings on 24 July 2014 that the possibility of amending the allegations was not raised by the Panel of their accord, or mentioned as a possibility by the Legal Assessor – who confirmed her advice that their "acceptance of misconduct and impairment related to all of the facts as proved" (transcript, p.7, lines 11 and 12).

52. Lang J. saw nothing to criticize in the fact that the Panel had neither sought to have the allegations recast by the Council nor done so themselves. On each of the allegations in question, the judge said that "amending the charge retrospectively after the evidence had been heard and considered, in order to secure a guilty finding, would have been a gross breach of fair hearing procedure" (paragraphs 28, 35 and 42 of her judgment). She rejected the Authority's submission that the amendments, all of them "minor" or "modest", could have been made without unfairness to Mr Doree. Again on each allegation, she concluded that this submission was "fatally undermined" by the Authority's assertion that, "if [the] allegation had been proved, together with the others, it would or should have made a difference to [the Panel's] decision on sanction" (paragraphs 29, 36 and 43 of the judgment), adding, on the allegation in paragraph 2j on Matter 2, that "[if] that was so, it was potentially prejudicial to Mr Doree" (paragraph 43). But she also agreed with the Council "that, even if allegations 1(f), 2(h) and 2(j) had been

proved, [the Panel's] decision would most probably have been the same". She added that "[whilst] not wishing to minimise their seriousness, these incidents were not significantly different from the others which were proved, nor did they represent a significant increase in the extent of the bullying/harassment" (paragraph 69).

53. Before us, Ms Morris submitted again that the Panel, before making their decision on sanction, ought themselves to have amended the allegations to conform to their relevant findings of fact, or invited the Council to apply to make such amendments. The Panel's failure to do this was, she contended, a serious procedural error, which led them to impose an unduly lenient sanction. Its effect was to diminish both the number and the gravity of the findings they had to take into account when deciding what sanction to impose.

54. A professional disciplinary committee is entitled to make necessary amendments to the allegations before it, so as to avoid "undercharging" (see, for example, the judgment of Otton L.J. in *Gangar v General Medical Council* [2003] H.R.L.R. 24, P.C., at paragraph 15, and the recent first instance decisions in *R. (on the application of Ireland) v Health and Care Professions Council* [2015] 1 W.L.R. 4643 and *Professional Standards Authority for Health and Social Care v Nursing and Midwifery Council and Jozi* [2015] EWHC 764 (Admin)). Ms Morris relied in particular on the decision of Beatson J. in *R. (on the application of the Council for the Regulation of Health Care Professionals) v Nursing and Midwifery Council and Kingdom* [2007] EWHC 1806 (Admin). In that case a registered nurse faced allegations that she had falsified documents relating to her qualifications, but dishonesty had not been specifically alleged in the charge before the professional conduct committee, which made no finding of misconduct on any of the charges. Beatson J. concluded that the failure to charge the registrant properly was "a serious procedural error". If the issue of dishonesty had been on the charge sheet and decided against the registrant, the finding that there had been no misconduct would, he said, "undoubtedly have been unduly lenient" (paragraph 31). He rejected the submission that the committee "could not reconsider or amend the charge once the facts were proved" (paragraph 32). Though he saw force in the submission that amending the charges once the facts were proved would have involved "delay, … inconvenience and … double jeopardy", he observed that, "as was said in [*Ruscillo*] and in other cases involving this jurisdiction, double jeopardy is in the nature of the procedure" (paragraph 33). He remitted the case to a differently constituted committee, with a direction that it amend the charges to include an allegation of dishonesty.

55. Ms Richards did not argue that a retrospective amendment to allegations, after the evidence of a registrant's alleged misconduct had been heard and considered, would always be procedurally unfair. Nor did she defend the judge's view that in this case such amendments would have been, as the judge put it, "a gross breach of fair hearing procedure". She submitted, however, that in this case the Panel, having considered the evidence before them, were not obliged in law to proceed only on the basis of allegations tailored to their findings of fact. It would have been open to them at that stage to canvass the possibility of amendments being made to the allegations to match their relevant findings of fact, and, if satisfied that such amendments could be made without unfairness, to proceed on the basis of the allegations as amended. But this is not to say that they committed any procedural error, let alone a serious one, by neither seeking nor making such amendments, or that their conclusions as to misconduct and fitness to practise

were invalidated by their not having done so, or that the sanction they imposed on Mr Doree was for that reason unduly lenient.

56. I accept those submissions of Ms Richards. There will no doubt be cases where a late amendment of the allegations faced by a registrant will be justified, even after the evidence has been heard and findings of fact have been made. But in the particular circumstances of this case I cannot accept Ms Morris's submission that the Panel fell into error.

57. The allegations against Mr Doree were drafted by the Council on the strength of the material available to it at the time. Framed as they were, they did not constitute "under-prosecution". Once the evidence had been given before the Panel, some of them were made good, others not. That will often be so. As Lang J. said when considering the allegations in paragraphs 1(f) and 2(h) on Matter 2 (in paragraphs 25 and 33 of her judgment), the Council had "had to make an exercise of judgment, as prosecutor, without being able to predict precisely how the oral evidence would develop at the hearing, or what view [the Panel] would take of it". But the Authority had "the benefit of hindsight, reading the transcript of the concluded hearing, and ought to recognise that the prosecutor is not in such a favourable position" (paragraph 25). As for the allegation in paragraph 2(j), the Authority's criticism of the Council was, said the judge, "another illustration of the Authority being wise after the event, reading the transcript after the hearing is concluded, and identifying how things might have been done differently". When the Council was drafting the allegation, it could not predict how the evidence would come out at the hearing, or what conclusions the Panel would reach (paragraph 41).

58. I do not think that this issue is to be resolved by determining whether the amendments suggested by Ms Morris would have been "modest" – either in the sense that only a few words in the allegations would have had to be changed or substituted to achieve them, or, as the Authority maintained before Lang J., in the sense that no real prejudice would have been suffered by Mr Doree if they had been made. I can see the force of the submission, accepted by the judge, that if the amendments would truly have been "modest" in either sense, it can hardly have been a serious procedural error by the Panel not to seek them or make them. But the crucial question for us, I think, is whether it can be said that if the allegations had been amended to fit the Panel's findings of fact, and had then been found proved, this might have made a significant difference to the Panel's conclusions on misconduct and fitness to practise, or led them to impose a more severe sanction than they did. In my view, it is not realistic to think that this might have been so.

59. It would not have been so if the allegation in paragraph 1a on Matter 2 – the allegation that Mr Doree "drove in an intimidating manner towards Colleague A, on a number of occasions, while he was cycling" – had been amended to exclude the words "on a number of occasions". As the Panel recorded the evidence of Colleague A, he "was not able to positively identify Mr Doree or his vehicle on any occasion when he alleged that he was placed in danger by a large grey car being driven dangerously" (paragraph 32 of the decision). In finding that the Council had failed to prove this allegation (paragraph 33), they did not accept that Mr Doree had done this only once, rather than "on a number of occasions". They did not accept that he had done it at all. So, plainly, the amendment of the allegation to exclude the words "on a number of occasions" would have made no difference.

60. And in my view the judge was right to conclude that even if the allegations in paragraph 1(f) and paragraph 2(h) and (j) of Matter 2 had been proved, the Panel's decision "would most probably have been the same" (paragraph 69 of the judgment). I see no reason to think that the decision might not have been the same. This is not a case in which any of the primary allegations as to misconduct and impaired fitness to practise in Matter 1, and as to sexual motivation, misconduct and impaired fitness to practise in Matter 2, rested solely or mainly on the specific allegations of fact that we are considering here.

61. On Matter 1, the Panel found proved the allegation that Mr Doree had driven his car at Colleague A (paragraphs 18 to 26 of the decision), that this clearly amounted to misconduct (paragraphs 78 to 80), and that his fitness to practise was impaired (paragraphs 81 to 86). On Matter 2 they found proved both "the stem" of the allegation that he had "bullied Colleague A" (paragraphs 27 to 49) and also "the stem" of the allegation that he had "demonstrated inappropriate sexual behaviour toward Physiotherapist B" (paragraphs 50 to 72), that his actions towards Physiotherapist B were "sexually motivated" (paragraphs 73 to 77), and again, that what he had done clearly amounted to misconduct (paragraphs 78 to 80) and that his fitness to practise was impaired (paragraphs 81 to 86) (see paragraphs 11 to 15 above).

62. On Matter 2, the two main allegations were each composed of a number of particular allegations of fact, most of which the Panel found proved. The specific allegations of Mr Doree's bullying of Colleague A that they found proved included repeatedly encroaching on Colleague A's "personal space" so as to make him feel uncomfortable (paragraphs 35 and 36 of the decision); calling him offensive names, including "cock sucker" and "Steve's bitch" in front of colleagues (paragraphs 37 and 38); persisting in calling him names after being asked to stop (paragraphs 39 and 40); and telling him that he had obtained a picture of Colleague A's wife from a social network website and would be keeping that picture in his "wank bank", or something to that effect (paragraphs 46 and 47). The Panel were in no doubt that Mr Doree had acted "in order to bully and intimidate Colleague A in the workplace" (paragraph 48). As for his sexual harassment of Physiotherapist B, the specific allegations they found proved included asking her whether she was a "dirty slut" (paragraphs 53 to 56); the allegation of what he done in the treadmill incident (paragraphs 57 to 59); on at least three occasions, unzipping his trousers, pushing her head into his crotch and thrusting his pelvis towards her as if simulating oral sex, and on another occasion, in the presence of "office administration staff", simulating sexual intercourse behind her (paragraph 60); and discussing his daughter's 18th birthday party with her and another colleague, commenting how pretty the 17 and 18 year-old girls were and miming holding a pair of breasts (paragraphs 70 to 72). The Panel were satisfied that all this behaviour was directed to Physiotherapist B, and was not merely "inappropriate … in the workplace" but also had a "significant sexual content" (paragraph 72), and was "sexually motivated" (paragraph 77).

63. In these circumstances I cannot accept that the addition of further findings adverse to Mr Doree on the amended allegations for which the Authority contends might have so changed the picture of his misconduct and impaired fitness to practise as to make a difference to the Panel's decision on sanction. The specific allegations of fact found proved on all three of the main charges in this case were a sufficient basis for that decision. And it cannot be said that a more severe sanction would have been justified by adding to the Panel's findings on the allegation of bullying in paragraph 1 of Matter 2 a further finding that Mr Doree had asked Colleague A if

his “arse was sore from Steven”, though not “publicly”, and to their findings on the allegation of sexual harassment in paragraph 2 further findings that more than once, though not “frequently”, he had behaved in a “sexually motivated way” towards Physiotherapist B in the therapy office, and that he had pretended to take a photograph of her while she was in the hoist sling with her legs apart. Those particular allegations, though serious in themselves, would not have taken the proven misconduct and impairment of fitness to practise in this case to a higher level of seriousness when viewed overall.

64. In my view, therefore, the Panel’s decision in this case was not vitiated by “undercharging” so that the sanction they imposed was “unduly lenient”. They were entitled, and right, to proceed as they did – on the basis of the allegations which the Council had chosen to bring against Mr Doree, without amendment. There was no serious procedural irregularity in their taking that course.

Was the sanction unduly lenient?

65. The final issue for us arises from each and all of the previous four. And it follows from the conclusions I have reached on those other four issues that the appeal must also fail on this.

66. In my view the judge was clearly right to conclude that the sanction imposed by the Panel was not “unduly lenient” in the sense well established in the authorities. The Panel’s decision was not wrong. In the particular circumstances of this case, the imposition of a caution order for the maximum period of five years was an appropriate sanction, having regard to Mr Doree’s misconduct and the impairment of his fitness to practise, and giving due weight to the protection of the public and the wider public interest.

67. As Ms Richards pointed out, a caution order is not an insignificant sanction. The caution order imposed on Mr Doree will appear on his online register entry for five years, with a link to the Panel’s decision – so any prospective employer will have access to it. And it may be taken into account if a further allegation is made against him.

Conclusion

68. For the reasons I have given, I would dismiss this appeal.

69. I would only add this. The more fully the appeal was argued, the clearer it became that it raises no novel point of principle, and no proper basis for this court, on a second appeal, to interfere with the Panel’s decision.

Lady Justice Sharp

70. I agree.