

Section 29 Case Meeting

19 March 2021

157-197 Buckingham Palace Road, London SW1W 9SP



Vaibhav Borse

Members present

Antony Townsend (in the Chair), Deputy Chair, Professional Standards Authority
Mark Stobbs, Director of Scrutiny & Quality, Professional Standards Authority
Simon Wiklund, Head of Legal, Professional Standards Authority

In attendance

Michael Standing, 39 Essex Chambers, Legal Advisor

Observers

Briony Alcraft, Scrutiny Team Co-ordinator, Professional Standards Authority

1. Definitions

1.1 In this meeting note, standard abbreviations have been used. Definitions of the standard abbreviations used by the Authority, together with any abbreviations used specifically for this case, are set out in the table at Annex A.

2. Purpose of this note

2.1 This meeting note records a summary of the Members' consideration of the relevant decision about the Registrant made by the regulator's Panel, and the Authority's decision whether or not to refer the case to the court under Section 29 of the Act.

3. The Authority's powers of referral under Section 29 of the Act

3.1 The Authority may refer a case to the relevant court if it considers that a relevant decision (a finding, a penalty or both) is not sufficient for the protection of the public.

3.2 Consideration of whether a decision is sufficient for the protection of the public involves consideration of whether it is sufficient:

- to protect the health, safety and well-being of the public
- to maintain public confidence in the profession concerned, and
- to maintain proper professional standards and conduct for members of that profession.

3.3 This will also involve consideration of whether the Panel's decision was one that a disciplinary tribunal, having regard to the relevant facts and to the object of the disciplinary proceedings, could not reasonably have reached; or was otherwise manifestly inappropriate having regard to the safety of the public and the reputation of the profession (applying *Ruscillo*¹).

4. Conflicts of interest

4.1 The Members did not have any conflicts of interest.

5. Jurisdiction

5.1 The Legal Advisor confirmed that the Authority had jurisdiction to consider the case under Section 29 of the Act. Any referral in this case would be to the High Court of Justice of England and Wales and the statutory time limit for an appeal would expire on 22 March 2021.

6. The relevant decision

6.1 The relevant decision is the Determination of the Panel following a hearing which concluded on 25 January 2021.

6.2 The Panel's Determination which includes the charges and findings is set out at Annex B.

7. Documents before the meeting

7.1 The following documents were available to the Members:

- Determination of the Panel dated 25 January 2021
- The Authority's Detailed Case Review
- Transcripts of the hearing dated 20-25 January 2021
- Counsel's Note dated 19 March 2021
- Final Hearing Bundle
- Case Examiner Decision document
- GMC Boundaries Guidance
- The Authority's Section 29 Case Meeting Manual.

¹ CRHP v Ruscillo [2004] EWCA Civ 1356

8. Background

- 8.1 The Registrant was employed as a consultant on a geriatric ward at an NHS Hospital at the time of the events. He faced allegations in relation to his behaviour towards two female FY2 doctors, namely that in relation to colleague A he sexually harassed her between February and July 2018. This was alleged to have taken place despite him having been warned by his employer about his behaviour towards junior colleagues and Colleague A on at least one occasion, and continued after Colleague A had told him that she was not interested in a personal relationship with him.
- 8.2 In relation to colleague B, it was alleged that, in March 2018, the Registrant behaved inappropriately towards her by making unsolicited comments to her about his personal and relationships status, commenting that she was pretty and subsequently sending Facebook friend requests and unsolicited Facebook messages.
- 8.3 The Registrant admitted the charges, and the Panel found his actions amounted to misconduct. It nonetheless concluded that the Registrant's fitness to practise was not impaired, and went on to impose a warning.

9. Applying Section 29 of the 2002 Act

- 9.1 The Members considered all the documents before them and received legal advice.
- 9.2 The Members discussed the following concerns about the decision:

Under-prosecution

- 9.3 The Members' first concern related to the GMC Case Examiners' decision not to include dishonesty allegations in relation to the Registrant's denials during the employer investigation. The Members noted that under *Misra*² it may be oppressive to charge mere denials as dishonest when subsequently the facts are found proven. They also noted that the Authority had not been provided with the Case Examiners' bundle and therefore the Members could not be sure what evidence the Case Examiners actually had that might suggest the Registrant's dishonesty went beyond mere denials.
- 9.4 However, the Members considered that the evidence from Dr Peter Collins suggested that when the Registrant was asked about the messages received by Colleague A he gave an inaccurate account, stating that he did not recognise the number the messages had been sent from. Further there was a suggestion the Registrant had claimed he had received messages from the same source. Subsequently during the Trust investigation the Registrant admitted that he had sent these same messages from his own WhatsApp account.
- 9.5 The Members considered that this course of conduct went far beyond simple denial, akin to "*acts which amount to a dishonest cover up of misconduct*" and that the GMC could have brought dishonesty allegations applying the reasoning

² *Misra v General Medical Council* [2003] UKPC 7

set out in the Authority's appeal in *Dalton*³ if proof of that dishonest cover up would “*substantially increase the culpability of the Registrant.*”

- 9.6 The Members concluded that the fact that this was an express decision not to formulate such a charge by the Case Examiners meant that this was potentially not a “*final decision of a relevant committee*” within the meaning of section 29 of the National Health Service Reform and Health Care Professions Act 2002, and therefore likely to be outside the Authority's jurisdiction under s29 of the 2002 Act.
- 9.7 However, the Members noted that despite being a feature of the Registrant's behaviour, and the relevant evidence being before the Panel, his dishonesty or lack of candour was not referred to at any point during the hearing or in the Panel's decision. Nor did the Panel examine the Registrant on the matter. The Members considered that this dishonesty was a serious aggravating factor into which the Panel had failed to sufficiently inquire and did not take into account during its analysis on impairment. Therefore, this may have had a material impact on the Panel's ultimate decision.

Failure to properly particularise the conduct

- 9.8 The Members next discussed the way in which the GMC had formulated the charges, specifically the fact that the charge relating to the Registrant's behaviour towards Colleague A was drafted in a general way referring to a course of conduct. They considered that this did not sufficiently particularise factors such as the Registrant's concerning use of anonymous online profiles and his attempts to escape detection. Nor did it touch on the Registrant's conduct in making fabricated accusations about Colleague A. This appeared to seriously downplay the Registrant's conduct and gave an inadequate picture to the public about the extent of his malicious behaviour.
- 9.9 The Members therefore concluded that the charges against the Registrant were not sufficiently particularised to reflect the seriousness of the Registrant's conduct and that this failure may have been a factor affecting the Panel's approach to impairment.

Seriousness of the misconduct/reasons for no impairment

- 9.10 The Members discussed the Panel's approach at impairment stage and, particularly, its assessment of the seriousness of the Registrant's conduct. The Panel had not addressed whether a finding of impairment might be required to uphold public confidence in the profession, particularly in the light of the seriousness of the conduct.
- 9.11 The Members considered that the Panel gave very brief and cursory reasons for its lack of public interest impairment finding, providing little information as to why it had considered the Registrant's behaviour to be deplorable at the misconduct stage, but no so deplorable as to warrant an impairment finding or which facts specifically it had taken into account in reaching this finding. They considered that the Panel did not grapple with the aggravating features of the Registrant's behaviour, such as the protracted period over which the events

³ *PSA v NMC & Dalton* [2016] EWHC 1983 (Admin)

occurred, the repetition, the abuse of position of power against junior vulnerable victims, the unpleasant nature of the messages, the use of fake email addresses, the involvement of third parties and false accusations against Colleague A. The Members considered this was borderline criminal behaviour. The Registrant had taken no notice of warnings by the Police. In addition, the Members considered his understanding of the impact of his actions on third parties and the effect he had had on the team in the hospital to be poor.

- 9.12 The Members considered that the reasons the Panel gave were largely a duplication of the matters considered in respect of public protection and the risk of repetition. Too much weight was placed on the personal factors.
- 9.13 The Members next considered that although the case did not reach the sanction stage, the Panel failed to pay any regard to the relevant passages in the GMC's Sanctions Guidance when considering the seriousness of the Registrant's conduct, and whether the lack of an impairment finding prevented the Panel imposing the sanction that would ordinarily be anticipated. The Members noted that whilst the guidance focuses on both predatory and sexually motivated behaviour and abuse of position of trust in relation to patients, there is less focus on these behaviours with peers. However, they considered it is clear that Panels are expected to treat such behaviour very seriously:

"Sexual misconduct seriously undermines public trust in the profession. The misconduct is particularly serious where there is an abuse of the special position of trust a doctor occupies..... More serious action, such as erasure, is likely to be appropriate in such cases".

- 9.14 The Members could see no reason why a consultant abusing his position of trust by displaying inherently wrong behaviour towards junior colleagues should not be treated seriously by the Panel. The Members considered that poor relations between colleagues were likely to impact negatively on the care provided to patients. The Panel's failure to consider this and explicitly address the seriousness of the Registrant's behaviour was a serious omission.
- 9.15 The Members therefore concluded that the Panel had erred in making its finding of no impairment and in doing so prevented a sanction being imposed that was necessary to address all three limbs of public protection.

Conclusion on insufficiency for public protection

- 9.16 The Members concluded that although there was a basis for the Panel's conclusion on impairment in relation to public protection, the Panel had failed to give sufficient reasons for its findings in relation to maintaining standards and public confidence in the profession. The seriousness of the sexually motivated conduct required a finding of impairment on these grounds. They considered that a member of the public would not consider a warning to be an appropriate outcome in a case involving a doctor abusing his professional position and causing considerable distress to a junior colleague in a sustained course of unacceptable and dishonest conduct. Further, they considered that the way the

warning was phrased did not give an adequate picture of the seriousness of the conduct involved.

- 9.17 The Members therefore concluded that the Panel's decision to find the Registrant's fitness to practise not impaired was insufficient for public protection.

10. Referral to court

- 10.1 Having concluded that the Panel's decision was insufficient for public protection, the Members moved on to consider whether they should exercise the Authority's discretion to refer this case to the relevant court.
- 10.2 In considering the exercise of the Authority's discretion, the Members received legal advice as to the prospects of success and took into account the need to use the Authority's resources proportionately and in the public interest.
- 10.3 Taking into account the above considerations, along with advice on the prospects of success, the Members agreed that the Authority should exercise its power under Section 29 and refer this case to the High Court of Justice of England and Wales.



Antony Townsend (Chair)

14/10/21

Dated

11. Annex A – Definitions

11.1 In this note the following definitions and abbreviations will apply:

The Authority	The Professional Standards Authority for Health and Social Care
The Panel	A Medical Practitioners Tribunal of the General Medical Council
The Registrant	Dr Vaibhav Borse
The Regulator	The General Medical Council
Regulator's abbreviation	GMC
The Act	The National Health Service Reform and Health Care Professions Act 2002 as amended
The Members	The Authority as constituted for this Section 29 case meeting
The Determination	The Determination of the Panel sitting on 20-25 January 2021
The Court	The High Court of Justice of England and Wales