

Section 29 Case Meeting

05 August 2021

157-197 Buckingham Palace Road, London SW1W 9SP



Members present

Alan Clamp (in the Chair), Chief Executive, Professional Standards Authority
Mark Stobbs, Director of Scrutiny and Quality, Professional Standards Authority
Kisha PUNCHIHEWA, Head of Legal, Senior Solicitor, Professional Standards Authority

In attendance

Alexis Hearnden of counsel, 39 Essex Chambers

Observers

Michael Hannah, Scrutiny Officer, Professional Standards Authority

This meeting was held virtually in light of the current pandemic.

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 Counsel 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 23 August 2021.

6. The relevant decision

6.1 The relevant decision is the Determination of the Panel following a hearing which concluded on [REDACTED].

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:

- Approved Judgement from the High Court of England and Wales dated [REDACTED]
- Sealed order from the High Court of England and Wales dated 25 [REDACTED]
- Determination of the panel dated [REDACTED]
- Transcripts of the hearing dated [REDACTED]
- Regulator's Investigation Committee Bundle
- Regulator's Investigation Committee decision
- Regulator's hearing Bundle
- Registrant's hearing Bundle
- The Regulator's Code
- The Regulator's Indicative Sanctions Guidance

¹ CRHP v Ruscillo [2004] EWCA Civ 1356

- The Authority's Section 29 Case Meeting Manual
- Counsel's Detailed Case Review dated 3 August 2021

7.2 The HCPC response was shared with the decision makers before the meeting

8. Background

- 8.1 The Registrant was employed as a [REDACTED].
- 8.2 The Registrant attended the home of a patient who had cut her hand. The patient was a vulnerable young woman with a series of complex health issues. The Registrant engaged in flirtatious behaviour with the patient and then retained her mobile number so that he could text her afterwards. The texts sent included texts of a sexual nature with the expressed intention of meeting up. The misconduct came to light when the patient subsequently reported matters to another paramedic. The Registrant was subject to internal disciplinary processes and was dismissed by his employer for gross misconduct.
- 8.3 The first substantive hearing in relation to these allegations took place in [REDACTED] which resulted in a six-month suspension with review. The Authority referred the matter to the High Court on the grounds of under-prosecution because the Regulator had limited the allegations to the text messages, thereby failing to bring the gravity of the misconduct to the attention of the [REDACTED] Panel. Allegations about the vulnerability of the client, the conduct at the consultation, the nature of the texts and the dishonesty to the employer were not included. The original Panel's determination was quashed by the High Court and remitted for re-pleading and a full re-hearing. Prior to the High Court Hearing, the review hearing of the substantive hearing took place. At this hearing the Registrant was found not impaired.
- 8.4 The allegations at the remitted panel hearing were that, in [REDACTED], the Registrant acted inappropriately during a consultation in that he knew the patient was vulnerable but nevertheless made inappropriate comments to her. That following the consultation, he retained the patient's telephone number for his own personal use and, between [REDACTED] and [REDACTED] breached professional standards by contacting her by text and/or social media, sending messages that were explicit in nature, and that during an investigation conducted by [REDACTED], he was misleading or dishonest by denying knowing that the patient was vulnerable and suggesting that she drove the communications.
- 8.5 The Panel found the bulk of the alleged facts proven. It accepted the Registrant's evidence that he was not acting in a predatory manner and that, instead, he acted in the way he did towards Patient A because she reminded him of a previous partner and, further, because of his mental state at the time. The Panel determined that the facts proven amounted to misconduct, but that the Registrant's fitness to practise was not impaired.

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:

Was the initial under-prosecution corrected?

9.3 As the matter had been remitted for a re-hearing by the High Court, the Members considered whether the initial under-prosecution had been corrected.

9.4 The Members felt that the Regulator had put appropriate allegations before the Panel on this occasion and that the Panel had made an appropriate finding of misconduct. The under-prosecution had therefore been corrected.

Was the Panel's assessment of impairment correct?

9.5 The Panel found that the facts proven amounted to misconduct, but that the Registrant's fitness to practise was not impaired for several reasons.

9.6 Regarding the health, safety and well-being of the public, the Panel found that the Registrant had shown insight, significant remorse and had undertaken abundant remediation since the misconduct. In addition, the Panel considered that the dishonesty that had been found did not reveal any deep-seated attitudinal failings.

9.7 Regarding the wider public interest grounds, the Panel considered that the Registrant had been subject to protracted proceedings and under scrutiny since the misconduct in [REDACTED] which, in the Panel's judgement, meant that the severity of the matter had been duly marked.

9.8 The Members were concerned about the Panel's assessment of impairment on the public interest grounds and felt that the Panel had conflated impairment and sanction in that they had considered matters relevant to sanction when assessing impairment. In particular, the Panel took into consideration that the Registrant had been subject to proceedings for a period of [REDACTED] since the misconduct took place.

9.9 The Members felt that the Panel, in not making a finding of impairment on public interest grounds, failed to mark the seriousness of misconduct that was sexually motivated and involved a vulnerable patient. The Members noted that the Panel gave weight to the fact that no sexual relationship materialised, but they considered that this was a false distinction; the Registrant had acted in a way that was wholly inappropriate and the finding of no impairment on public interest grounds essentially led to a complete acquittal (noting the NMC Scheme) and thereby failed to uphold proper professional standards and the public confidence in the profession.

9.10 Further, in the Members' opinion, the misconduct before this Panel was different in nature to other cases where panels had taken account of a 'rigorous process' in that the misconduct in this case was more serious and had a greater impact on the patient. Although the Registrant may have shown insight, he nevertheless carried out the misconduct, which was serious and a finding of impairment on public interest grounds should have marked this.

- 9.11 The Members were concerned that the Panel had taken account of the [REDACTED] Panel's determination and sanction. The [REDACTED] Panel's determination was quashed by the High Court because the true extent of the Registrant's potential misconduct was not before that Panel and, therefore, that determination was void.
- 9.12 The Members noted the importance of a finding of impairment in marking the seriousness of the misconduct and upholding professional standards, as well as maintaining public confidence in the profession. Moreover, the previous finding of impairment by the [REDACTED] Panel had been quashed and, therefore, the effect of this panel's decision was to acquit the Registrant of more serious allegations: there will now be nothing on the Registrant's record to mark the serious findings of this panel which the Regulator failed to put before the [REDACTED] Panel.
- 9.13 The Members went on to consider whether a sanction would have been imposed, had a finding of impairment been made.
- 9.14 The Member's acknowledged that this was a hypothetical exercise at this point but noted that it was right to say that the registrant had demonstrated insight, remorse and remediation. Nevertheless, the Members felt that the Panel should have made a finding of impairment and then considered the SG in order to reach a decision on whether to impose a sanction.

Conclusion on insufficiency for public protection

- 9.15 The Members concluded that the Panel's finding of no impairment on public interest grounds was insufficient for public protection in the following respects.
- 9.16 First, the Panel had failed to mark the seriousness of the misconduct in its analysis of impairment. Secondly, it had inappropriately taken account of the length of the proceedings, which had been ongoing for [REDACTED]: although this time had allowed the Registrant to develop insight and remediate, this was not relevant to the significant public interest concerns about his inappropriate behaviour towards a vulnerable patient and his dishonesty.
- 9.17 Thirdly, the Panel had taken account of the suspension imposed by the [REDACTED] Panel, which was irrelevant at impairment stage, because it had been quashed by the High Court.
- 9.18 Finally, there was nothing to mark the seriousness of the allegations which the Regulator failed to put before the [REDACTED] Panel. This meant that the Panel failed to uphold the proper professional standards or confidence in the profession.

10. Referral to court

- 10.1 Having concluded that the panel's Determination 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 The Members noted that it was unlikely that the behaviour would be repeated and that the failures by the Panel were not the Registrant's fault. It was concerned that pursuing an appeal based on what might be perceived to be an academic approach to the question of impairment could be considered to be disproportionate. Against this, there were real concerns about the Panel's approach to impairment which had been clearly wrong.
- 10.4 Taking into account those considerations, along with advice on the prospects of success, the Members agreed, on balance, that the Authority should not exercise its power under Section 29 and refer this case to the High Court of Justice of England and Wales.

11. Learning points

- 11.1 The Members agreed that the learning points set out at Appendix C should be communicated to the Regulator.



Alan Clamp (Chair)

23/8/21

Dated

12. Annex A – Definitions

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

The Authority	The Professional Standards Authority for Health and Social Care
The Panel	A Conduct and Competence Panel of the Health and Care Professions Council
The Registrant	[REDACTED]
The Regulator	Health and Care Professions Council
HCPC	Health and Care Professions Council
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 [REDACTED]
The Court	The High Court of Justice of England and Wales
The Code	Health and Care Professions Council’s Standards of Conduct, Performance and Ethics (effective from 26 January 2016)
The SG	Health and Care Professions Council’s Sanctions Policy (last updated March 2019)