

# Section 29 Case Meeting

8 July 2021

157-197 Buckingham Palace Road, London SW1W 9SP



## *Members present*

Alan Clamp (in the Chair), Chief Executive, Professional Standards Authority  
Simon Wiklund, Head of Legal, Senior Solicitor, Professional Standards Authority  
Graham Mockler, Assistant Director of Scrutiny and Quality (Performance),  
Professional Standards Authority

## *In attendance*

Michael Standing of Counsel 39 Essex Chambers

## *Observers*

Colette Higham, Scrutiny Officer, Professional Standards Authority  
Seun Fagbohun, Data Administrator, Professional Standards Authority  
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*<sup>1</sup>).

#### **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.

#### **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:

- Determination of the panel dated [REDACTED]
- The Authority's Detailed Case Review
- Transcripts of the hearing dated [REDACTED] to [REDACTED]
- Counsel note dated 8 July 2021
- The Panel's Outcome to Registrant letter dated [REDACTED]
- The Panel's Investigating Panel Notice of Decision dated [REDACTED]
- The Panel's Investigating Committee Case Investigation Report
- The Panel's Final Hearing Bundle
- The Panel's Exhibits Log
- The Regulator's Code January 2016

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<sup>1</sup> CRHP v Ruscillo [2004] EWCA Civ 1356

- The Regulator's Indicative Sanctions Guidance March 2019
- The Authority's Section 29 Case Meeting Manual.

7.2 The Members were provided with a copy of a response from the Regulator to the Authority's Notification of Section 29 Meeting.

## 8. Background

- 8.1 The Registrant was employed as a [REDACTED] at [REDACTED].
- 8.2 Between [REDACTED] and [REDACTED], the Registrant had sent a number of explicit messages and photographs from a Snapchat social media platform account to Colleague A.
- 8.3 On or around [REDACTED], the Registrant set up a new Snapchat account in a name similar to that of Colleague A from which he sent sexually explicit photographs to Person C, another [REDACTED].
- 8.4 Colleague A found out about the account after having been contacted by Person C who had sent a screen shot of the Snapchat account username and asked if it was him. Person C had also been sent a sexually explicit photograph of Person B, a former colleague. The biography on the account contained false information about Colleague A's sexuality but accurate details of where Colleague A worked.
- 8.5 When Colleague A confronted the Registrant about the Snapchat account and messages, the Registrant denied responsibility and agreed with Colleague A's suggestion that it was probably Person B due to the history they had. The Registrant had told Colleague A that friends of his had received similar messages and that he had notified the police and received a crime number.
- 8.6 When Colleague A contacted Person B about the pornographic pictures sent to his account, Person B denied involvement but confirmed that he and the Registrant had previously consensually exchanged explicit pictures and messages although he had not agreed that these could be shared further.
- 8.7 In [REDACTED], Colleague A informed his team leader that he had received sexually explicit messages and photographs from the Registrant and that the Registrant had also set up a fake Snapchat account impersonating him and from which he had sent sexually explicit photographs to Person C.
- 8.8 At a meeting with the [REDACTED] of [REDACTED], the Registrant admitted to setting up the two Snapchat accounts and sending the messages.
- 8.9 Following the commencement of an independent formal investigation, the Registrant admitted that he had set up the Snapchat accounts and that he had sent messages to five different people while purporting to be Colleague A. He also informed his employer that he had been suffering from ill health. The Registrant self-referred to the HCPC on [REDACTED].

- 8.10 At the hearing before the Panel, the Registrant admitted sending the messages and pictures to Colleague A and admitted creating a Snapchat account from which he had sent explicit photographs of Person B, purporting these to be from Colleague A.
- 8.11 The Registrant admitted that his actions in relation to the fake Snapchat account were misleading but denied that his actions were dishonest. The Panel found the allegation of dishonesty not proved.
- 8.12 The Registrant also denied that his actions were sexually motivated. The Panel found that the Registrant's actions were not sexually motivated.
- 8.13 The Panel found that the Registrant's actions amounted to misconduct and that the Registrant's fitness to practise was impaired on the public component and imposed a Caution Order for three years.

## 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:

### **The Regulator's and the Panel's approach to the allegation of the Registrant's fitness to practise being impaired by his [REDACTED].**

- **Should the Regulator have obtained medical evidence in this regard?**
- **Should the Panel have directed that such evidence be obtained?**

- 9.3 The Members were concerned that the Investigating Committee (IC) had referred an allegation relating to the Registrant's health to the Panel, and therefore the Regulator would be expected to obtain an up to date medical report on the Registrant's health and the Panel would be expected to inquire into any potential future risk that the Registrant's health condition posed to the public protection. The Members acknowledged that the HCPC is unable to consider health and misconduct allegations at the same hearing pursuant to Article 26(6) of the Health Professions Order 2001 and that only the Health Committee may invite registrants to undergo a medical examination.
- 9.4 The Members noted that, in its response to the Authority, the Regulator advised that the Registrant had not given his permission for access to his medical records, and therefore a medical assessment and report was not obtained. However, that at the hearing, the Registrant's solicitor submitted an adjournment application on the basis that, in order to consider the allegation that the Registrant's fitness to practise is impaired by reason of ill health, expert evidence was required. Furthermore, in support of the adjournment application the Registrant's Solicitor submitted that the Registrant had a different diagnosis to the one made previously by his treating clinician.

- 9.5 The Members were concerned that, in response to this adjournment application the Regulator simply withdrew the allegation related to the Registrant's health on the basis that evidence from the Registrant's current employment suggested that there was no longer any evidence of impairment due to ill health.
- 9.6 The Members were concerned that the Panel (or a Health Committee) had a duty to satisfy itself that it had all the required evidence before it, particularly at the point a non-restrictive sanction was being contemplated. However, in relation to the Registrant's health, the only evidence the Panel had was a letter dated [REDACTED] from the Registrant's treating clinician. Moreover, that letter gave one diagnosis whereas the Registrant's Solicitor had submitted that the Registrant now suffered from a different condition. The Members considered that it appeared the HCPC had withdrawn the charge with the Panel's agreement without due consideration for any future risk posed by the Registrant's ill-health and the need for consideration by the Health Committee and this constituted a significant procedural irregularity given the referral by the IC.
- 9.7 The Members were concerned that although the allegation relating to the Registrant's health was withdrawn without any further investigation, the [REDACTED] letter was taken into account by the Panel as providing mitigation. The Members questioned how apparent ill-health, which now appeared to have been denied and was unproved, could have been accepted as either an explanation for or mitigation of the Registrant's misconduct. The Members considered that, either the Panel accepted the diagnosis made by the Registrant's treating clinician, or the new self-diagnosis, and decided that neither presented a current or future risk. However, there was no impartial evidence as to the impact of either condition on fitness to practise, and therefore, in the Members' judgement, the absence of an up to date medical report meant the risk of repetition could not be adequately assessed. In conclusion, the Members felt that, once the health allegation was referred by the IC, the Regulator ought to have obtained an up to date medical report. Moreover, that the Panel should have queried why such evidence had not been furnished by the Regulator and, furthermore, that it had been the Panel's responsibility to consider whether a referral to the Health Committee was required in order that an up to date medical report could be requested.

**Should the Registrant have faced a charge relating to dishonestly denying his misconduct when initially challenged? Did the Panel err in its application of the Ivey test, or provide inadequate reasons for its decision?**

- 9.8 The Members were concerned with whether the Registrant's initial denial when accused by Colleague 1 that he had not created the Snapchat account - could amount to dishonesty, and therefore whether the Registrant should have faced a charge relating to this denial. The Members noted that it may be oppressive to allege a mere denial as being dishonest, although it may be intentionally misleading and perhaps lacking in integrity.
- 9.9 However, the Members noted that the Registrant did not merely deny that he had created the Snapchat accounts, but that he went further by stating that he and his friends had also received messages from the account and that he made

a complaint to the police about those messages. Therefore, although the initial denial by the Registrant to Colleague A would unlikely amount to dishonesty, concocting a story may have amounted to a dishonest cover-up.

- 9.10 The Members noted that it was important to consider whether these were factors that increased the culpability of the Registrant. Although the Registrant lied about receiving pictures from the account, the fact that he made a future admittance in full may counter-balance the potential increased culpability.
- 9.11 The Members nonetheless concluded that dishonesty in relation to the denial fabrications should have been charged and, if it had, the outcome of the Panel could well have been different.

### **Was the panel wrong in its conclusion as to sexual motivation?**

- 9.12 The Members were concerned by the Panel's finding that the Registrant's conduct was not sexually motivated.
- 9.13 The Members acknowledged that this was a difficult question, but posed the question, if it was not sexually motivated, in the absence of any evidence to explain the behaviour or the Panel's finding as to another reason, what motivation other than a sexual one was possible? Moreover, the Panel appeared to have justified its finding on the basis that there did not appear to be any chance of a sexual relationship and the Members questioned what relevance the probability of there being a sexual relationship had to the question of the Registrant's motivation in sending the messages.
- 9.14 The Members also noted that, in the [REDACTED] letter, the Registrant's treating clinician referenced increased sexual promiscuity as a symptom of the Registrant's diagnosed condition.
- 9.15 The Members acknowledged case law that suggested in order for conduct to be found sexually motivated, it could have been done in pursuit of sexual gratification, and that this could be interpreted broadly. That is, the motivation does not necessarily have to be to have a physical relationship, rather if the Registrant gets sexual gratification from knowing that people are seeing the messages he sent, that in itself may amount to sexual motivation. With regard to this, the Members noted that Colleague 1 had allegedly been informed that the Registrant had sent messages to multiple people from the account; however, there was no direct evidence before the Panel from Colleague 1 on this point.
- 9.16 As an alternative to sexual motivation, the Members noted the Panel's reference to attention seeking behaviour, which the Panel considered resulted from increased risk-taking symptoms related to what was, in the Panel's judgement, the Registrant's [REDACTED] at the time the messages were sent. However, the Members felt that, even if it is accepted that the conduct resulted from lowered inhibitions, a question still needs to be asked as to how lowered inhibitions manifest; that is, is sexual motivation a manifestation of lowered inhibitions?
- 9.17 Despite the concerns about the Panel's finding as to sexual motivation, the Members reminded themselves that they should show deference to the Panel's assessment and, as already identified, the Panel did not have an up-to-date

medical report on the Registrant's ill-health impacting on sexual motivation or the potential future risk of repetition of this type of behaviour.

- 9.18 The Members concluded that this discrete concern, and others, resulted from a wider procedural issue related to not obtaining an up-to-date medical report. That is, the Members were unable to explore whether, or not, the conduct could have been sexually motivated because neither the Regulator nor the Panel obtained up-to-date evidence on the Registrant's health, and therefore what behaviour might result from the Registrant's ill-health.

**Was the Panel's assessment of the risk of repetition when considering impairment adequate, given the absence of up-to-date medical evidence?**

- 9.19 The Members were concerned that impairment by reason of ill-health had been charged, yet the Panel found that, despite not having an up-to-date medical report, there was no risk of repetition.
- 9.20 However, the Members noted that they simply do not know how the outcome would have been affected had a report been obtained. The Members agreed that the information that was before the Panel was not adequate to properly reach a conclusion as to any impairment by reason of ill-health, or the risk of misconduct occurring in the future due to ill-health.
- 9.21 The Members concluded that this stems from a wider procedural issue in not considering a transfer to the Health Committee or obtaining an up-to-date report. The Members could not properly consider whether the Panel's assessment was inadequate because the Panel did not ask for further evidence on this.

**Conclusion on insufficiency for public protection**

- 9.22 The Members concluded that the panel's decision to impose a caution order was insufficient for public protection in the following respects:
- The health allegation was referred properly by the IC, however, the Panel agreed to the withdrawal of the allegation without seeking up-to-date evidence on the Registrant's health or considering whether referral to the Health Committee was required.
  - In addition, the Registrant's refusal to co-operate with the Regulator by previously refusing to give permission to obtain his records in order to instruct a medical report went unchallenged.
  - Therefore, the Panel, in failing to ask for the medical report, or query why one had not been produced by the Regulator, failed in its responsibility to ensure that they had the requisite information before them.
- 9.23 The Members noted that the Registrant's solicitor had made an adjournment application on the basis that up-to-date medical evidence was required. However, the panel still failed to ensure that they had this information.
- 9.24 The Members concluded that the decision was insufficient by reason of serious procedural irregularity.

## 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 considered that they do not know what, if any, future risk the Registrant presents. The allegation had been properly referred to the Panel, and the Registrant wanted an up-to-date medical report, therefore there is a strong argument that the Panel should have sought one. Moreover, the Registrant's failure to co-operate with a health assessment at an earlier stage in the investigation should have been explored. However, the Members acknowledged the deference due to the Panel and that it did have at least some medical evidence, namely the [REDACTED] letter, and positive testimonial evidence from the Registrant's current employment. This evidence appeared to support a finding of no current impairment in relation to ill-health and the Members felt that, in lieu of up-to-date medical evidence, they could not establish whether the outcome would have been substantially different.
- 10.4 In conclusion, the Members agreed that the Authority should not exercise its power under Section 29 to 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)

06/09/21

Dated

## 12. Annex A – Definitions

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

<b>The Authority</b>	The Professional Standards Authority for Health and Social Care
<b>The Panel</b>	A Conduct and Competence Committee of the Health and Care Professions Council
<b>The Registrant</b>	██████████
<b>The Regulator</b>	The Health and Care Professions Council
<b>Regulator’s abbreviation</b>	HCPC
<b>The Act</b>	The National Health Service Reform and Health Care Professions Act 2002 as amended
<b>The Members</b>	The Authority as constituted for this Section 29 case meeting
<b>The Determination</b>	The Determination of the Panel sitting between ██████████ ██████
<b>The Court</b>	The High Court of Justice of England and Wales
<b>The Code</b>	HCPC Standards of Conduct, Performance and Ethics January 2016
<b>The ISG</b>	HCPC’s Indicative Sanctions Guidance March 2019