Neutral Citation Number: [2018] EWHC 758 (Admin)

Case No. CO/2897/2017

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

(Sitting at Manchester)

Manchester Civil Justice Centre

1 Bridge Street West, Manchester, M60 9DJ

Date: Thursday, 8th February, 2018

Before:

MR JUSTICE KERR

B E T W E E N:

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DR GANESHMOORTHI ARUNACHALAM Appellant

- and –

THE GENERAL MEDICAL COUNCIL Respondent

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MR SIMON GURNEY (instructed by Stephensons Solicitors LLP) appeared on behalf of the Appellant.

MS SHARON BEATTIE (instructed by GMC Legal) appeared on behalf of the Respondent.

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J U D G M E N T

MR JUSTICE KERR:

Introduction

1 The appellant, Dr Arunachalam, represented by Mr Simon Gurney, is a doctor. He appeals against the decision of the respondent (the GMC) to uphold charges of misconduct against him and impose the sanction of erasing his name from the medical register. That occurred on 23 May 2017. The GMC has responsibility for bringing disciplinary charges against doctors who are considered to have misbehaved. The relevant statutory provisions and rules provide for a medical practitioners' tribunal (the tribunal, or the panel) to sit and determine such charges. The GMC opposes the appeal and, through Ms Sharon Beattie, speaks in defence of the panel's treatment of the evidence and its reasoning and conclusions on the charges brought. The GMC says the sanction of erasure from the medical register was fair, reasonable and justified on the evidence.

2 Although there are many grounds of appeal and the case has in some ways become unnecessarily complex, the real issue before me is whether it was wrong to erase this doctor's name from the medical register as the chosen sanction for sexually motivated misconduct towards two trainee women doctors known as Dr A and Dr B. A slightly unusual feature of this case is that the GMC itself supported the sanction of suspension rather than erasure before the tribunal.

3 Suspension is the next most serious sanction available, short of the most serious one, erasure, but suspension can only be for up to 12 months. There cannot be a two or three year suspension imposed as a sanction. Although the GMC supported suspension before the panel and the appellant's then counsel, Mr David Morris, did not argue against it, the GMC now submits that the more serious sanction of erasure was in no way wrong and that this court should not interfere by changing the decision to the one the GMC regarded as appropriate at the time.

4 I should make clear that there is no logical inconsistency in the GMC's position then and now. A regulator may advocate a particular sanction but then, on appeal, defend the decision of the independent tribunal to impose a more serious one. It does not follow that, because the parties were content with suspension before the panel, the decision to erase the appellant's name from the medical register was necessarily wrong.

5 The appellant partially denied the allegations, partially admitted them and argued through his then counsel - and argues now through Mr Gurney - that the sanction of erasure is disproportionately severe, unfair and wrong. It is said that the behaviour towards Drs A and B was at the less serious end of the spectrum of sexual misbehaviour. The appellant invites me to substitute a suspension order of up to 12 months, which would run from the date of this judgment.

6 When a doctor's name is erased, the tribunal normally imposes an immediate suspension order pending any appeal. The tribunal did so in this case. That means periods during which the doctor is suspended, in practice, long exceed the maximum of 12 months even if an appeal subsequently succeeds. Moreover, at the end of a period of suspension, the doctor concerned must be authorised to return to practice following a review process and cannot return to practice unless and until so authorised.

7 The behaviour in this case falls into two categories. In the case of Dr A, it was unwanted messages sent outside work in the summer of 2014, with an inappropriate, intimate, overfamiliar but not sexually explicit dimension. In the case of Dr B, there were at least four or five unwanted incidents of tickling her, hugging her once, kissing her on the top of the head once and inappropriately seeking her company at work, thereby making her feel uncomfortable.

The Facts

8 The appellant comes from a religious, Christian background in southern India. He is married with children. He won a scholarship, graduating in April 1993 from a medical university in Tamil Nadu. After that, he commenced clinical training in India, the UK and the West Indies. From 2000 to 2002, he completed honorary clinical research fellowships in New York. From 2002 to May 2005, he undertook a combination of clinical observerships and research fellowships in London. In May 2005, he became a specialist registrar at Guys and St Thomas's Hospital in London. Nothing untoward occurred until we come to the events starting in February 2014, when he was at Guys and St Thomas's Hospital.

9 According to the later findings of the tribunal which are not and cannot be challenged, it was in February 2014 that the appellant became acquainted with Dr A. She worked under him at the hospital. At first, the relationship was entirely professional but she then gradually became uncomfortable when he started sending her regular, unwanted and unnecessary personal messages. That began from 23 May 2014.

10 Initially, Dr A attempted to manage the situation without escalating it but, after a time, she complained to the relevant NHS Trust, the employer, about messages sent to her while she was on holiday abroad from 24 June to 7 July 2014 and in particular one on 7 July, in which he offered to arrange for her to be picked up from an airport on the arrival of her return flight to this country. At that point, Dr A became disquieted and worried about her personal safety.

11 The messages were sent by text, email and WhatsApp and were described by Dr A as "deluded behaviour". She considered that, throughout the period during which they were sent, the appellant was labouring under the false impression that there was more than a professional relationship between them. The words used by the appellant in the numerous messages were in evidence before the tribunal.

12 By way of example, one sent on 6 July 2014 included the following:

> "[First name of Dr A], trust you are doing well and greatly enjoyed your holiday: likely to be one of the best you have had, I am sure. It was scintillating tennis but Roger was vanquished by Novak in the end :-((. [First name of Dr A], have a pleasant and safe flight and it will be so good to see you next week. Take care and welcome back to London!"

Although there were many messages and that is but one example, it conveys the inappropriate tone of false familiarity and intimacy, albeit never partaking of any sexual character or language.

13 As a consequence of Dr A's complaint, in September 2014 the appellant was summarily dismissed from his post at Guys and St Thomas's Hospital following a disciplinary process. He appealed against his dismissal. After his dismissal, he was able to work certain locum shifts at Queen Elizabeth Hospital in Greenwich. It was there, in November 2014, that

further incidents involving Dr B took place. Again, according to the unchallenged findings of the tribunal, on the night of 22 and 23 November 2014, the appellant was working with Dr B.

14 The appellant's behaviour made Dr B, who was unaware of Dr A's complaint, feel uncomfortable. On that night after, as is normal, exchanging telephone numbers for professional reasons, the appellant displayed behaviour towards Dr B that led to the second part of the subsequent charges against him. On at least four or five occasions, he subjected her to physical, unwanted touching, nudging, tickling; and, on one occasion, hugging her and bestowing a kiss to the top of her head.

15 In evidence before the tribunal, she explained that she had made a complaint which she discussed in December 2014 with a representative from human resources and that she thought at the time she would probably be told that the appellant had apologised. She said that, if that had been the case, she would have accepted it "as long as change was evident". However, she was told that the appellant had raised concerns about her, Dr B's, behaviour.

16 In her evidence to the tribunal, Dr B said that she felt the appellant's behaviour was "sleazy". After that, on 3 December 2014, the appellant's internal appeal against dismissal was allowed and a final written warning was substituted for the penalty of dismissal. It was found on his appeal that his previous good record had not sufficiently been taken into account by the disciplinary panel that had decided to dismiss him. He was given a second chance.

17 As a result of the complaints made by Drs A and B, the appellant was charged with misconduct. There were eight charges. The first was innocuous enough. It merely stated where he had worked. Although that was found "proved", it obviously carried no sting. More seriously, the second, third and fourth charges alleged the conduct relating to Dr A that I have just summarised, which the tribunal subsequently found proved. Indeed, it was for the most part admitted by the appellant. The fifth, sixth and seventh charges alleged the conduct against Dr B, which I have summarised in accordance with the tribunal's subsequent findings. Much of that conduct was disputed by the appellant, but found proved.

18 Finally, and importantly, the eighth charge alleged that the appellant's actions "as described above in paragraphs 2, 4, 5, 6 and 7 were sexually motivated". That charge was found proved. The appellant's conduct towards both doctors was found to have been sexually motivated. This obviously made it more serious than it would otherwise have been.

19 In October 2015, the appellant ceased to work at Guys and St Thomas's Hospital. From then until May 2017 when his name was erased from the medical register, he worked while subject to conditions on his registration as a doctor, requiring notification to the GMC of his work activities, pending the hearing of the charges. I was told that he worked continuously as a locum at various locations during the period from October 2015 up to the disciplinary hearing which began in May 2017.

20 As is unfortunately quite normal where disciplinary proceedings are brought before the tribunal, the hearing of the charges against the appellant did not take place until some three years after the first incident. This is due to the procedure set out in the rules and regulations, whose simplification is long overdue, combined with a lack of money and staff to handle the unnecessarily intricate disciplinary process.

21 The hearing lasted 12 days from 8 to 23 May 2017. Among other witnesses, Drs A and B gave evidence, as did the appellant. The decision was that all the charges were either both

admitted and consequently proved or, to the extent not admitted, found proved. The tribunal accepted the evidence of Drs A and B and rejected that of the appellant, except where it consisted of admissions. An important part of the tribunal's reasoning related to the eighth charge, which was that the other relevant charges were "sexually motivated".

22 The panel devoted paragraphs 64 through to 77 in its written determination to its analysis of the sexual motivation issue. First, in relation to Dr A, it considered the content of the messages, noting that they were not sexually explicit. They were, however, "inappropriate and transgressed professional boundaries". They rejected the innocent explanation that the appellant felt protective towards Dr A. They rejected his evidence that Dr A had been "infatuated" by the appellant and jealous of his family life outside work.

23 They characterised the messages as "persistent and personal harassment that made … [Dr A] feel increasingly uneasy about being around you"; noted that he had continued to send messages after being explicitly asked by Dr A to desist from doing so and concluded, after considering the issue at some length, that the factors they had identified, in all the circumstances pointed to the conclusion that the behaviour was sexually motivated.

24 In relation to Dr B, the issue was rather more straightforward in view of the findings of unwanted touching. The tribunal noted Dr B's characterisation of the conduct as "sleazy" and making her "skin crawl". In evidence which she gave to the tribunal, which included the mimicking of the appellant's voice, after considering the nature of the findings of unwanted touching, the tribunal had no difficulty in concluding that the appellant's conduct towards her was sexually motivated.

25 The tribunal went on to consider the issue of impairment, which could not be and was not seriously in dispute. Not surprisingly, it found that the findings it had made amounted to misconduct which "was serious and which could be regarded as deplorable by your fellow practitioners", such that "a reasonably well-informed member of the public could also find your behaviour deplorable". The tribunal found that the appellant's fitness to practise was impaired by reason of that misconduct.

26 The tribunal then went on to consider what sanction to impose. It began in the usual way by summarising briefly the positions of the parties. It recorded Ms Beattie's submission that the appropriate and proportionate sanction was suspension, which was necessary to maintain public confidence in the profession and promote and maintain proper standards of conduct. The tribunal then noted Mr Morris's submission. He informed the tribunal that he had been instructed not to argue against the sanction of suspension proposed by the GMC and that while suspension would be appropriate, erasure would be disproportionate.

27 The tribunal then reminded itself that the purpose of sanctions is not punitive, but protective of the public interest. It stated in paragraph 6 of its determination on sanction that it had regard to that public interest as well as to the principle of proportionality and:

> "… it weighed your interests with those of the public. It also considered and balanced the mitigating and aggravating factors in this case".

28 It then went on to list the mitigating factors in four bullet points. They were, in summary, previous good character, no subsequent episodes in the two and a half years since the last instance of misconduct, no concern about clinical competence and the provision of:

> "… a selection of testimonial references which both pre- and post-date the events in question and comment on your character and technical abilities".

29 The panel then went on to list the aggravating factors which were as follows: that "your insight is very limited"; and that, beyond accepting an "error of judgment" in respect of Dr A, there was "no evidence of regret or remorse". Further, there was no evidence of any remedial steps "beyond a reference on your CV about a professional boundaries course". Next, the tribunal noted that the appellant was in a position of authority over Dr A and Dr B at the time of the misconduct. Both doctors were junior female trainees, over whom the appellant had direct clinical line management responsibilities. The sexually motivated behaviour occurred repeatedly, including while they were off duty. Finally, the behaviour towards Dr B occurred at a time when the appellant had recently been dismissed by reason of the conduct towards Dr A.

30 At paragraph 9 of its decision on sanction, the tribunal stated in the usual way that, in deciding what sanction to impose, it would consider each of the sanctions available, starting with the least restrictive. After ruling out, not surprisingly, "no action" and "conditions", the panel went on to consider the question of suspension. In paragraphs 12-16 of the sanctions decision, it gave its reasons for rejecting that sanction. I need not set out those paragraphs, since they were the subject of submissions of the parties, to which I am coming.

31 The tribunal then turned to the question of erasure and stated at paragraph 17:

> "Having determined that imposing conditions on or suspending your registration would not be commensurate with the gravity of its findings, the tribunal determined that in the particular circumstances of the case the only proportionate sanction sufficient to maintain public confidence in the medical profession and its standards is one of erasure".

32 It then went on to give some brief reasons for that, which were essentially repetitious of the nature of the misconduct. The tribunal then stated at paragraph 20:

> "The tribunal accepted that this sanction will have an impact upon you both professionally and financially, however, it determined that, given the seriousness of its findings and the circumstances of the case the public interest, which includes the loss to the public of an otherwise competent clinician, outweighed your own interests".

The tribunal then made the usual order of immediate suspension pending any appeal.

The Law

33 As I pointed out in *Burrows v General Pharmaceutical Council* [2016] EWHC 1050 *(Admin)*, the applicable principles are now so well known that the field has been overburdened with citation of authorities. I made similar observations in *Kimmance v GMC* [2016] EWHC 1808 (Admin). This case was no exception. That said, hidden among the many unnecessary authorities were a small number that I found useful. The propositions that are of particular relevance here are as follows. By setting them out, I do not thereby mean to suggest that the many cases from which they are derived, or this case, need to be included in future authorities bundles.

34 First, sexual misconduct is self-evidently always serious and often likely to lead to erasure, even for a first time offender. Second, tribunals are masters of fact. Findings as to credibility of witnesses are virtually unassailable where the tribunal has heard oral evidence and the court has not. Third, lack of what is called "insight" tends to increase the severity of

the sanction and, conversely, proof of insight tends to mitigate it. "Insight" roughly translates as owning up, saying sorry and convincing the panel that offending behaviour will not be repeated. That is obviously more difficult if the charges are denied.

35 Fourth, an appeal is only allowed where the decision below is wrong or unjust because of a serious procedural or other irregularity. A useful way of expressing the threshold for appellate interference is found at paragraph 197 of Ward LJ's judgment in *Assicurazioni Generali SpA v Arab Insurance Group* [2003] 1WLR 577, where he said that:

> "…the appeal court conducting a review of the trial judge's decision will not conclude that the decision was wrong simply because it is not the decision the appeal judge would have made had he or she been called upon to make it in the court below. Something more is required than personal unease and something less than perversity has to be established."

36 Fifth, appropriate deference is due to the tribunal below, in view of its special expertise, especially in cases regarding professional practice, patient care or clinical errors but perhaps less so in cases of dishonesty and sexual misconduct where the court is more readily able than in clinical practice cases to judge what is necessary to protect and maintain the reputation of the profession. The degree of deference is that which is appropriate in the circumstances of the case - see *GMC v Jagjivan* [2017] 1WLR 4438 per Sharp LJ, giving the judgment of the court at paragraph 40(vi).

37 Sixth, the court can correct material errors but its judgment on application of principles to the facts is a secondary one. Seventh, as regards sanction, the court should not conduct a re-sentencing exercise substituting its view for the tribunal's. Eighth, personal mitigation counts for less than in other contexts because of the imperative need to preserve and uphold public confidence in the profession and to preserve and uphold standards of behaviour, as Sir Thomas Bingham, MR, said in *Bolton v Stone.*

38 Ninth, as Mr Justice Collins said in *Giele v GMC* [2006] 1WLR 942 at paragraph 33, it is not the law that in sexual misconduct cases erasure should follow unless the circumstances are exceptional. The severity of the sanction required to maintain and preserve public confidence in the profession "must reflect the views of an informed and reasonable member of the public".

39 Finally, in considering the available sanctions in ascending order of gravity, as provided in the relevant sanctions guidance, it is essential that the tribunal must evaluate the mitigating features as well as the aggravating features and balance them against each other when considering whether the sanction of suspension is appropriate. It is an error of law to leave that exercise to the final stage of considering erasure since, once suspension has been ruled out, the case is effectively over since erasure remains the only available sanction; see e.g. *Wisniewska v Nursing and Midwifery Council* [2016] EWHC 2672 (Admin), where Mr Justice Hayden, at paragraphs 15-16, also emphasised:

> "the importance of coherent reasoning and particularly the need to demonstrate the weight given to mitigating factors in demonstrating a proportionate sanction".

Submissions of the Parties

40 The first ground of challenge is that the sanction of erasure was disproportionate and too severe. Mr Gurney submitted that this was a case where there was no clinical concern or

risk to patients and that the issue was therefore the maintaining of public confidence and upholding proper standards of conduct. He submitted that erasure was not the only means of achieving those aims and should only be imposed where no lesser sanction could achieve them. A suspension, he argued, would have been a sufficient sanction to reflect the seriousness of the misconduct.

41 He referred me to the relevant passages in the sanctions guidance. He said the case fell within paragraph 86 of that guidance under the heading of suspension:

> "Suspension will be an appropriate response to misconduct that is so serious that action must be taken to protect members of the public and maintain public confidence in the profession. A period of suspension will be appropriate for conduct that is serious but falls short of being fundamentally incompatible with continued registration …".

42 Mr Gurney submitted that a reasonable and informed member of the public with knowledge of the facts would not regard suspension here as an insufficient or too lenient sanction; that it would not diminish public confidence in the profession to see it imposed and indeed that a member of the public would most likely consider erasure excessive and disproportionate. The sanction of suspension would, he argued, have been sufficient to send a message to the profession that behaviour of this kind is unacceptable. He also referred me to the recognised deterrent effect of a suspension, alluded to in paragraph 85 of the sanctions guidance.

43 Mr Gurney submitted that the GMC's position before the tribunal below was a good indicator of what a reasonable, informed member of the public would think and that that was a relevant factor to consider. He took me to passages in the transcript in which Ms Beattie had offered assistance to the tribunal concerning the passages in the guidance dealing with erasure, should they request it of her. They did not, he pointed out.

44 As to the sanctions guidance paragraphs dealing with erasure, Mr Gurney accepted that, of the indicia of erasure listed at (a) to (j) under paragraph 103, those at (b) and (j) were present but the others were not. At 103(b), reference is made to a "deliberate or reckless disregard for the principles set out in *Good medical practice* and/or patient safety". At (j), reference is made to a "[p]ersistent lack of insight into the seriousness of their actions or the consequences". Mr Gurney emphasised that other indicia of erasure not present in this case, but listed under paragraph 103, are often much more serious.

45 Those factors just mentioned, which he concedes are present, are, he argued, engaged in very many cases - indeed, nearly every case - in which a finding of impairment is made. In short, Mr Gurney said that the appellant should have a second chance. He criticised a passage in the tribunal's decision in which, at paragraph 14 of the sanctions decision, when considering and rejecting suspension, the tribunal had said that it:

> "… recognises that on one view it might be said that your sexually motivated conduct towards Dr A and Dr B was at the lower end of a spectrum of sexually motivated conduct".

46 He submitted, in his second ground of challenge, that that was inconsistent with the tribunal's rejection of suspension as an appropriate sanction and that it was a correct observation from which, however, the tribunal drew the wrong conclusion. The unwanted messages, he emphasised, sent to Dr A were neither threatening nor sexually explicit,

though they were, he accepted, highly inappropriate. As to Dr B, the position was more serious but the touching was not under her clothing or of her private parts. He noted that she, for her part, would have accepted an apology from him.

47 He made other criticisms of the tribunal's reasoning. The most serious was a failure to engage with and balance the mitigating features against the aggravating ones. It was insufficient, Mr Gurney argued, merely to list the mitigating features. An evaluation of them was simply not there. He pointed out that the passages dealing with rejection of suspension as an appropriate outcome comprised an evaluation of the aggravating features, but did not mention the mitigating features at all.

48 He therefore argued that the same vice was present here as in the *Wisniewska* case. It was impossible, he said, to determine what weight had been given to each of the mitigating features. Had the tribunal done so, they would have found real force in those mitigating features. The testimonials were powerful in the appellant's favour. So was the absence of any other wrong conduct during the appellant's long period of service before these incidents and the two and a half year period after them.

49 He made other, less weighty points which he will, I hope, forgive me for not setting out in detail here for I considered them less important than those I have already summarised. I do not think that, taken on their own, they could be decisive of the appeal.

50 For the GMC, Ms Beattie submitted as follows. She pointed out that the GMC had not positively submitted to the tribunal below that erasure was an inappropriate sanction. It had carefully left that sanction open to the tribunal. She submitted that this was a case in which the appellant clearly lacked insight. His very limited insight in this case, she pointed out, consisted merely of withdrawing an allegation that the text messages he had sent to Dr A had been prompted by professional concerns about her performance. That was very slight insight indeed and came very late.

51 Ms Beattie pointed out that counsel for the appellant below, Mr Morris, had accepted before the tribunal that the appellant had made allegations against his accusers and that he was their line manager at the time of the misconduct. The insight he had shown was limited by his failure to own up to the sexual motivation of his conduct and the other denials which the tribunal had rejected.

52 Ms Beattie also pointed out that the conduct towards Dr A had persisted, even after the appellant had been told to desist from it. She said the position before the tribunal was that both parties - Mr Morris included - recognised the reality that this was very much a potential erasure case.

53 As regards the decision on sanctions, Ms Beattie submitted that at paragraph 20 the tribunal had acknowledged the impact that erasure would have upon the appellant. This reflected a submission that had been made on his behalf, which appears in a passage in the transcript to which I was taken, concerning the financial impact that erasure would have, which would create difficulties in funding his daughter's private education and would or could require the sale of a lighting business in which the appellant was interested.

54 The tribunal, Ms Beattie submitted, accepted the impact upon the appellant of those factors which the sanction of erasure would have. She argued that they therefore could not have considered that matter only after deciding to impose the sanction of erasure. She submitted that paragraph 20 was part of their decision making process and that it was merely what she

called a "drafting point" that it came in the part of the decision which came after the passage rejecting suspension.

55 Ms Beattie emphasised that, in her submission, the listed mitigating as well as aggravating features were borne in mind, as was made clear in paragraph 6 of the decision. They did not require repetition. It was sufficient that they were identified. As regards the comment that the sexual misconduct was at the low end of the spectrum, Ms Beattie argued that that was a point in favour of the appellant and that there was no inconsistency between that remark and the finding that erasure was necessary.

56 In short, in all the circumstances, Ms Beattie argued that the tribunal's conclusion had taken account of all the circumstances; it was that nothing short of erasure would sufficiently protect the public interest and suffice to uphold standards of conduct. That conclusion was properly open to it and this court should accordingly, in the usual way, not interfere. She also pointed out that cases of sexual misconduct are not confined to cases in which the victim is a patient of the guilty doctor, rather than a colleague.

Reasoning and Conclusions

57 Those then were, in brief, the submissions made to me. I now come to my reasoning and conclusions, having carefully considered those submissions against the facts of the case.

58 This was undoubtedly a sexual misconduct case. Such cases are inherently serious, such that they may well lead to erasure, even for a first time offender with a good clinical record. Often, maintaining public confidence in the profession and upholding high standards of behaviour by stamping out unacceptable behaviour of this kind will require erasure in a sexual misconduct case.

59 Where the victim is a colleague rather than a patient, severe sanctions in such cases are generally necessary, in addition, to protect and uphold the dignity of workers in the profession and to protect their freedom to work without being molested. The victims are usually women.

60 This was therefore always a case in which the potential for erasure loomed large, even though the appellant had a good record and had not previously offended in this or any other way. Both parties realistically recognised that in their submissions to the tribunal.

61 In other parts of the world where the culture is different, and in some isolated sectors in this country, there is still a culture which regards such behaviour as acceptable. That is completely wrong and now regularly proclaimed to be so. The days are gone when mainstream discourse was in any way split on the issue of sexual misconduct, particularly in the workplace. The mainstream in our society, reflected in our law, is now that there is virtual zero tolerance of such behaviour.

62 In the criminal law, where personal mitigation counts for more than in this disciplinary jurisdiction, the law encourages judges to give offenders a second chance by imposing alternatives to immediate custody, such as a suspended sentence or a community penalty. Justice is tempered with mercy. That is more difficult in this jurisdiction because the nature of the sanction is not punitive but protective of the profession and the public. To justify the second chance, it has to be weighed not just against the risk that giving it may create more victims should he fail to take it. It also has to be weighed against the risk that public confidence in the profession will be undermined.

63 The reasoning in the present case reflected something of the above, although the points were not made expressly. It was not wrong in principle to take the view that the facts of this case could point in the direction of erasure rather than suspension. The response to the severity of the offending cannot easily be faulted, harsh though the sanction is. However, having said all that, after carefully considering the tribunal's decision I am quite satisfied that the tribunal did not properly evaluate the factors weighing in the balance in favour of suspension and against erasure.

64 This was, in my judgment, another case in which, to borrow the language used by Hayden J in *Wisniewska,* there is a lack of coherent reasoning and the tribunal has failed to show the weight it gave to mitigating factors in demonstrating the proportionality of the sanction. Looking at the list of mitigating features set out in the decision, the tribunal sets them out and says that it took them into account. The tribunal must therefore have taken account of them in some way, but it is quite impossible to say from the decision what weight it gave to those features.

65 During the hearing, I repeatedly asked Ms Beattie where in the decision there is any reference to the tribunal's evaluation of the mitigating features it set out in its list. She repeatedly answered using the verb "identify", saying correctly that the mitigating features had been identified. The tribunal, she argued, had clearly taken into account because it stated in the decision that it had done so, but she was not able to point to any passage in the decision where the mitigating features were evaluated and weighed in the scales against the aggravating features. That is because there is no such passage in the decision. This is not a mere drafting point. It is a failure of approach which means the decision should not stand unless obviously correct, despite the failure.

66 As Mr Gurney correctly pointed out, the reasoning in the part of the decision concerning whether suspension is appropriate, contains no mention at all of the mitigating features. It does not touch upon them. Rather, it consists of an evaluation of the aggravating features, albeit that the description of them and of the appellant's conduct is characterised as sexual misconduct towards the bottom end of the scale.

67 This is not mere linguistic criticism or an excessively legalistic approach to the drafting but shows, in my judgment, that the tribunal did not properly balance the mitigating features against the aggravating ones at the stage of considering suspension. Among them were two and a half years of trouble free service since the allegations and many years of the same, before they were made. That was attested to in the various testimonials, which were not solicited just for the purpose of the disciplinary proceedings, but included many glowing appraisals created in a context that had nothing to do with the proceedings.

68 At paragraph 9 of its decision on sanctions, the tribunal stated:

> "In deciding what sanction, if any, to impose the tribunal considered each of the sanctions available starting with the least restrictive".

69 It is therefore fair to read the parts of the decision dealing with specific sanctions as comprising its consideration of those sanctions. After completing that exercise and rejecting suspension, the tribunal went on to consider erasure. The opening words of that section of the decision in paragraph 17 are: "[h]aving determined". The sentence begins:

> "*Having determined* [my emphasis] that imposing conditions on or suspending your registration would not be commensurate with the gravity of its findings, the tribunal

determined that in the particular circumstances of your case the only proportionate sanction sufficient to maintain public confidence in the medical profession and its standards is one of erasure".

70 It is inescapable that the tribunal had already determined that suspension was not appropriate at that stage. Thus, it is not surprising that the section dealing with erasure is really just an announcement of the decision to impose that sanction, with a few brief reasons.

71 Ms Beattie pointed to the passage near the end of that section in which the tribunal stated at paragraph 20 that it recognised the impact, professional and financial, on the appellant, albeit that it did not mention any impact on his family. That passage reads like an afterthought, rather than as part of a balancing exercise. The adverse impact on the appellant and his family which the sanction of erasure would involve, was not among the list of mitigating features set out earlier in the decision. Indeed, it is not really a mitigating feature so much as an aspect of proportionality.

72 What is absent from the decision, as I have said, is any evaluation or weighing of the mitigating features set out in the bullet points. Thus, for example, there was no discussion of the point made that the appellant did not offend further between November 2014 and 2017 while he was undertaking certain locum duties and subject to notification requirements. In a fairly and fully reasoned decision, that point would have been weighed and seen to have been weighed against the finding of "limited insight" leading to the conclusion that the tribunal lacked confidence that the appellant would not reoffend in the same way.

73 The only clue in the decision as to the weight the tribunal gave to the mitigating features is that we know they did not, in the tribunal's judgment, taken together and cumulatively, outweigh the aggravating features that pointed in the direction of erasure. We do not know why that is so; nor whether one mitigating feature weighed more heavily than another. The decision is therefore flawed by an error of approach.

74 I therefore accept that Mr Gurney's third ground of challenge, as argued before me, is made good. It follows that the court should reconsider and revisit the sanction in this case. To do that, I must consider whether the tribunal was, despite the error, correct to decide that maintaining public confidence in the profession and the standards of behaviour requires nothing less than erasure or whether it would be disproportionate.

75 What would a reasonable and informed member of the public think? I bear in mind that a reasonable and informed member of the public would not underestimate or trivialise the seriousness of unwanted sexual conduct, even at the relatively low level that was present here. He or she would not overlook the affront to the dignity of workers, especially women workers, which it offers; nor the suffering it causes, particularly when authority is abused. To call it, as Dr A did - see paragraph 15 of the findings of fact - "deluded behaviour" seems quite generous to the appellant.

76 On the other hand, it does seem to me that the stance of the GMC itself, when presenting the case below, is quite strong evidence of where on the scale of offending a reasonable and informed member of the public would place the appellant's conduct. Ms Beattie, no doubt on instructions from the GMC, pointedly did not advocate erasure and indicated that she would not refer the tribunal to passages in the sanctions guidance relevant to erasure unless asked to, which she was not.

77 It is also of relevance that Dr B, for her part, would have been prepared to accept an apology if only the appellant had had the wisdom to offer one. If that had been done in the case of both Drs A and B, there might well have been no disciplinary proceedings at all. The fact that such an outcome is within the contemplation of at least one of the victims as acceptable is a factor of some relevance to whether restoration of public confidence in the profession demands nothing less than outright erasure.

78 On balance, it seems to me likely that a reasonable, informed member of the public might well not take a harsher view than did the GMC of the pathetic and disgusting sexual pestering of the kind that occurred in this case. There are some who would regard erasure as appropriate; that would represent almost a complete zero tolerance approach to sexual harassment, which would mean that any transgression, even from a first time offender, would nearly always lead to erasure.

79 In our system of justice, the law jealously guards the rights of women workers to protection against predatory, ignorant men who feel entitled to prey on female colleagues in the way that this doctor did; but our system is not so inflexible that every transgression of this kind must be met with erasure. This appellant's conduct was not at the very bottom of the scale; it was very serious, but it was not anywhere near the top of that scale. The mitigation, for what it was worth, was there. No patient's safety was endangered. The appellant was of previous good character. He had some insight into his offending behaviour, although it was given slight weight and came late. He had a long record of unblemished service, which included about two and a half years after the second incident without any further offending.

80 In the circumstances, I am clear that the decision was flawed and cannot stand. I have the power to remit the matter to the same or a differently constituted tribunal or to substitute a different sanction. In the unusual circumstances of this case, I am persuaded after reflection to substitute the sanction of suspension which both parties plainly considered appropriate when the case was argued before the tribunal.

81 There is no reason to suppose that they do not still regard it as appropriate. Ms Beattie did not say before me that the GMC's view of the seriousness of the offences had changed. That point seems to be decisive against the need for a remission to meet the justice of the case. A remission would subject the appellant to a further, probably prolonged, period of uncertainty during which he would be unable to practise, as he has been since May 2017; and thereafter followed by at least a likely extra year of suspension.

82 I do not think justice would be served by that outcome. I will set aside the decision of the panel and substitute a period of suspension of the maximum of 12 months, which will run from the date of my order. In practice, that means the appellant will have been unable to work as a doctor for a total period of over 20 months, some eight months more than the maximum suspension that the tribunal below could have imposed.