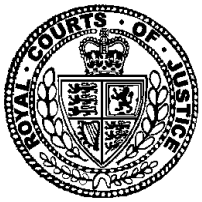

Neutral Citation Number: [2019] EWCA Civ 1172

Case No: C1/2018/1677

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT SITTING AT LEEDS
MR JUSTICE KERR
[2018] EWHC 1388 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 July 2019

Before :

LORD JUSTICE DAVID RICHARDS
LADY JUSTICE SIMLER
and
MRS JUSTICE THEIS

- -

Between :

DR ABAYOMI LUKMAN SANUSI	**Appellant**
- and -	
THE GENERAL MEDICAL COUNCIL	**Respondent**

- -
- -

The Appellant appeared in person
Jenni Richards QC and Alexis Hearnden (instructed by **The General Medical Council**) for the **Respondent**

Hearing date: 25 June 2019

- -

Approved Judgment

Lady Justice Simler:

Introduction

1. This appeal arises out of a decision of the Medical Practitioners Tribunal ("the Tribunal") made on 18 October 2017. The Tribunal found a number of allegations amounting to serious misconduct proven against the Appellant, Dr Abayomi Lukman Sanusi, including a finding of dishonesty in relation to an application for employment as a doctor, and found that his fitness to practise was impaired. At the same hearing, which the Appellant did not attend, the Tribunal imposed the sanction of erasure from the register.

2. The Appellant appealed the Tribunal's findings in relation to sanction only. At a hearing on 20 April 2018 before Kerr J the Appellant's counsel argued that the Tribunal's decision was wrong and unjust because the Tribunal should have considered adjourning at the sanction stage to enable the doctor to produce evidence of remediation, insight or remorse that might be relevant to sanction. He argued that the Tribunal's failure to do so meant no such evidence was available for consideration. In addition, certain documents sent by the Appellant to the Respondent and relevant to sanction, were not made available to or considered by the Tribunal. In these circumstances, the proceedings were procedurally unfair and the sanction imposed was wrong and disproportionate. Kerr J dismissed the appeal. His reasons for so doing are summarised below.

3. The Appellant, who now acts in person, appeals from that decision with permission to do so on two grounds (by order of Leggatt LJ dated 31 December 2018) as follows:

    i) whether the Tribunal should have notified the Appellant of its findings of misconduct and given him an opportunity to make submissions before proceeding to sanction;

    ii) whether the Judge was right to find that the process by which the sanction decision was reached was not rendered unfair by the failure of the Respondent to provide the Tribunal with evidence which the Appellant had asked to have taken into account in mitigation?

Factual background

4. The Appellant qualified as a doctor in Turkey in 2003, and arrived in the UK soon afterwards and began working as a doctor. With effect from 25 October 2010 he started work at the Friarage Hospital, Northallerton, part of the South Tees Hospital NHS Foundation (the "South Tees Trust"), as a Registrar in General Surgery.

5. In October 2012 concerns were raised in relation to the Appellant's clinical care of Patient A, a 67 year old admitted for elective repair of an incisional hernia in October 2012. No disciplinary action took place at that time. Further concerns arose in January 2014 when Patient C, a 92 year old was admitted with severe pain in the right calf. The Appellant was alleged not to have assessed Patient C's condition sufficiently when requested to do so by two colleagues and to have failed to communicate adequately with them. Internal disciplinary action was taken on this occasion and resulted in a final written warning being placed on the Appellant's file.

6. On 25 December 2014 Patient F (a 72 year old) was admitted as an emergency with severe abdominal pain and constipation. The Appellant's management of Patient F led to concerns that he failed to assess and manage the patient. Internal disciplinary action was taken once again. Although the disciplinary panel concluded that the appropriate sanction was a final written warning, the Appellant's live final written warning in respect of Patient C led to the conclusion that dismissal was appropriate.

7. By letter dated 3 July 2015, the South Tees Trust dismissed the Appellant, giving him notice to expire on 20 December 2015. On 8 July the Appellant's conduct was referred by the South Tees Trust to the Respondent. By letter dated 14 July 2015, the Respondent notified the Appellant that he was being investigated and enclosed documents arising from the referral.

8. Meanwhile on 1 July 2015 the Appellant submitted an electronic application form for employment as a Specialty Doctor in General Surgery at Rotherham NHS Foundation Trust (the "Rotherham Trust") performing the same duties as he had done with the South Tees Trust. The form asked no specific questions about written warnings or disciplinary allegations or findings, and none were disclosed by him. He gave as his reason for leaving the South Tees Trust, "*Termination of contract. Personal difficulty contributed to by personality differences with an influential consultant*." The Tribunal was later to find that the Appellant would not necessarily have known that he had been dismissed at the time the form was submitted; and that nothing recorded on the form gave the impression that he had not previously had written warnings.

9. On 30 July 2015 the Appellant attended an interview with the Rotherham Trust. The Appellant was not asked any direct questions about disciplinary warnings at interview. However, by then he had been informed of his dismissal with notice by letter dated 3 July. Dr Garner of the Rotherham Trust, who interviewed him, later gave evidence that questions were asked of the Appellant about the circumstances of his departure from the South Tees Trust and he responded that there was an ongoing investigation in relation to one incident, but had chosen to resign from his post because of the intolerable working situation with a colleague. These statements were subsequently found to be untrue by the Tribunal since, whether or not the Appellant intended to exercise his internal rights of appeal against dismissal, the internal disciplinary investigation had concluded and he had been dismissed with notice. Further, it was alleged he told Dr Garner at interview, that the investigation by South Tees Trust was mainly down to personality clashes. This too was held by the Tribunal to be untrue.

10. Dr Garner also said that the Appellant gave the impression at interview that the Respondent's investigation was a "minor formality" and that he was awaiting the "all-clear". While this was not in fact true, the Tribunal had regard to the Respondent's letter and concluded (in light of its statement that, "The majority of cases are closed with no action at the end of the investigation.") the Appellant had probably persuaded himself that the Respondent's investigation was a formality and that he would be vindicated. The formal charge relating to this aspect of the dishonesty allegations was therefore found not to be proved.

11. Although a conditional offer of employment was made by Rotherham Trust following the interview, it was subsequently withdrawn, and by email dated 8 September 2015 the Appellant was told that this was because he did not give "full details of [his] fitness to practise history and reason for leaving [his] previous role" in his application form or

at interview. Rotherham Trust indicated that they would be discussing the discrepancy further to determine whether to refer this to the Respondent. Ultimately this incident was referred to the Respondent and was the subject of a number of charges (5(a) to 5(e)). Findings of misleading and dishonest conduct were made in relation to some (though not all) of the untrue statements proved to have been made by the Appellant at interview with Dr Garner on 30 July 2015.

12. In October 2015 the Appellant commenced employment as a Specialty Doctor in breast surgery at Doncaster and Bassetlaw Hospitals NHS Foundation Trust. Both of his clinical supervisors (Dr Olubowale and Dr Kolar, both Consultant Breast Surgeons) provided positive clinical supervisor report letters to the Respondent about him.

13. The Appellant left that post on 3 October 2016 and took up a position as a trainee GP in February 2017. His clinical supervising doctor was Dr Alison Roberts. She too provided a positive testimonial letter about the Appellant, describing him as a "*very reliable and punctual member of the team who has always completed all tasks set for him."* Although some areas of clinical concern were identified, she said the Appellant "*always keenly addressed concerns with on-line and other sources of learning and updates*".

The Respondent's investigation

14. The Appellant was sent a 'rule 7' letter dated 11 October 2016. This set out the draft charges to be sent to the Respondent's case examiner, who would determine whether and if so on what basis, the Respondent should proceed to the Tribunal with disciplinary allegations against the Appellant.

15. The Appellant responded in detail to the rule 7 letter, providing, in tabular form, his summary response to each allegation and a more detailed explanation. Within that document he made clear that he did not agree with the allegations relating to Patients A, C and F. He gave his own detailed account of what had occurred.

16. So far as concerns the application for employment at Rotherham Trust, he disagreed with the allegations of deliberate misleading and dishonesty, maintaining he had disclosed his situation at South Tees Trust on the application form and at the time of the interview, and although he had notice of termination of his contract by the time of the interview, he had been informed of a right to appeal and intended "*to go through the appeal process, win it (that is achieve a reversal of termination of my contract), and then submit my resignation thereby ending my relationship with South Tees with a voluntary resignation. Due to unacceptably non-forthcoming of communication from South Tees I decided to resign within the statutory period of notice. Please see attached copy of my resignation letter dated 18 August 2015. Unfortunately lack of communication from South Tees had created the suspense and uncertainty that meant I could not have discussed these details at a job interview."*

17. In relation to the allegation that his fitness to practise was impaired because of his alleged misconduct, he disagreed and responded, "*Following this process, I have reflected and improved on my communication and clinical skills. I include recent clinical supervisors' reports from most recent employment. I continue to strive to enhance my career. I am currently finishing up a dissertation on my Biomedical Research project… I plan to proceed to training in General Practice; and intend to*

continue to develop personally and professionally, delivering Gold Standard patient care to the best of my ability".

The rule 7 response concluded by explaining the stark difference between the unhappy working environment he experienced at South Tees Trust as compared with the hospitals he worked at thereafter, where he said he felt valued and had delivered quality care in collaborative and well-functioning teams.

18. The Appellant attached to the rule 7 response "reports from consultant supervisors from Doncaster and Bassetlaw". The reports attached included testimonials from Clare Rogers, Professor Linda Wyld, and Consultants, Mr Olubowale and Mr Kolar. At some point (probably on 10 August 2017) the Appellant also sent the Respondent the reference from Dr Alison Roberts, his clinical supervisor at Bellbrooke Surgery, dated 1 August 2017. He sent a number of other documents to the Respondent including patient feedback reports, appraisals and a selection of patient letters of appreciation for his care.

19. A 'rule 8' letter dated 17 January 2017 followed. This set out the draft charges the case examiner had decided should proceed to a Tribunal hearing. A further refined set of draft charges was sent to the Appellant in June 2017.

20. By letter dated 30 August 2017, sent by special delivery, the Appellant was given a Notice of Allegation. A notice of hearing letter dated 31 August 2017, (also sent by special delivery) gave notice that the hearing before the Tribunal would take place from 2 October 2017, with an estimated length of 20 days. Although this provided relatively short notice of the hearing, the notice complied with the applicable Fitness to Practise Rules 2004 and the Appellant did not seek an adjournment or make any complaint about timing. The letter of 31 August 2017 informed the Appellant of his right to be represented, to present evidence and call and cross-examine witnesses (under rule 34 of the Rules) or make representations in writing. The letter said,

> "If you do not attend, and are not represented, the Tribunal can hear and make a decision about your case in your absence, under rule 31 of the GMC (Fitness to Practise) Rules. If your fitness to practise is found to be impaired a sanction could be imposed on your registration in your absence…"

21. So far as sanctions are concerned, the letter said:

> "If the Tribunal finds that your fitness to practise is impaired, it can direct that
>
> - your name be erased from the medical register…;
> - your registration be suspended for up to 12 months…;
> - your registration be made subject to conditions for up to 3 years…"

The letter explained that the Tribunal would refer to a document containing 'Sanctions Guidance' if the sanction stage was reached and referred to a link on the website containing the Sanctions Guidance.

22. By letter dated 1 September 2017 (provided pursuant to rule 34(9) of the Rules) the Respondent's legal adviser sent witness statements to the Appellant for 17 witnesses of fact (most of which had been supplied previously, and only 11 of which were ultimately called to give evidence) and notified him that the Respondent intended to call an expert, Anthony Peel, to give evidence and be available for cross-examination. A draft index of documents was also sent by the Respondent. The Appellant was invited to submit any documents he wished to have included in the hearing bundle, and to provide a list of such documents and any witnesses he intended to call. A deadline for his response was given.

23. The Appellant did not respond directly to this request. However, he spoke by telephone to the Respondent's caseworker on 14 September 2017 seeking a short delay for his response to the 1 September letter. By email dated 18 September 2017, he sent his witness statement (dated 15 September 2017) running to 28 pages, to the Tribunal, making clear that he would not be attending the hearing because:

> "I am not legally represented as I could not afford the cost of a legal service. As much as I would have liked to read this statement to the panel myself I am unable to attend. I commenced my General Practice training programme in February 2017, and have a limited number of permitted days of absence".

24. In his witness statement, he characterised the evidence from the NHS as "*inaccurate, biased and non-representative".* He said that he had experienced significant emotional, physical and financial suffering and suggested that the evidence in his statement should be "*read together with the evidence and responses previously supplied to the GMC (including those excluded by the GMC)".*

25. In terms of his time at the South Tees Trust (where the clinical complaints arose), the Appellant described a negative culture and alleged harassment and verbal abuse by a nurse, which he said was not dealt with by the Consultant, Mr Bryan. He said this became persistent, group harassment and suggested he had been persecuted, bypassed for opportunities and ignored when patient safety concerns were raised by him.

26. In relation to the concerns raised about Patient A, he accepted that his communication could have been better overall and this would have "*ensured that I understood what was being communicated to me; and that I was neither misunderstood nor misinterpreted. I accepted and agreed with the findings of the trust investigation. I undertook remedial action by working exclusively looking after the sickest patients in the Trust Intensive Care Units at James Cook Hospital for 2 months. That was followed by a programme of extensive documentation, reflection and validation of my documentation and reflection".*

27. However, he said that he was subsequently the subject of treatment he regarded as *"undermining, passive aggression and persecution".* He said he attempted to raise these issues during the course of the disciplinary process following the concerns raised

about his care and management of Patient C, but he was "*shouted down…* [and].. *given a final written warning.*" He described the approach of the chair of the panel as "*disheartening and aggressive*"**.** In relation to the allegations concerning Patient F, he said his own actions in relation to this patient were met with resistance from others; that he was working inordinately long hours and suspected his decisions could have been affected by exhaustion; and that he was prevented from doing what he wished to do by an aggressive nurse practitioner.

28. The Appellant's witness statement set out his response to the allegations concerning his application for employment with Rotherham NHS Trust. He said he had no reason or incentive to conceal information that was easily available to them as he had given permission for that information to be accessed. He said he *"found [himself] trying to be honest and open and act with integrity, and deeply regret any distress or offence caused".*

29. The Appellant's statement included a section entitled "Reflection" in which he stated that like all medical practitioners, he was fallible and that when things went wrong, he used the opportunity to learn and change his practice. He continued, "*I harbour no bitterness for being a subject of punishment for incidents that could have been completely avoided.*" He said his "*major mistake was continuing to work in an organisation where I had experienced lack of support, lack of encouragement to progress, non-existent feedback, non-acknowledgement of raised patient safety concerns; and where ultimately the dehumanising practices and a chaotic on-call and theatre setup meant confrontation was inevitable*." His reflections appear to have focussed on how he would cope in future if confronted with a poor working environment, lack of support or some form of harassment. They do not appear to include any real acceptance of personal responsibility, but rather, seem to blame others and the circumstances for the events that had occurred.

The Tribunal hearing and determinations

30. The hearing before the Tribunal started on 2 October 2017 as forewarned. The Appellant was not present, again as forewarned.

31. The Tribunal first considered whether to proceed in the Appellant's absence. For the purposes of this part of its consideration, it had regard to a redacted version of the Appellant's witness statement dated 15 September, containing only information relevant to the issue of service of the notice of hearing and allegation, and whether to proceed in the doctor's absence. That part of the statement referred to the Appellant having commenced a general practice training programme, and said he had only a limited number of permitted days of absence. The Tribunal noted that he did not request any postponement of the hearing. The Tribunal concluded that the Appellant was aware of the hearing, had voluntarily absented himself, and had not sought an adjournment. It was therefore unlikely that he would attend on a future date. The Tribunal determined that it was both fair and in the public interest for the hearing to proceed, particularly given that the allegations related back to a period from 2012 to 2015, and was satisfied that it could proceed without any injustice to the Appellant. It exercised its discretion to proceed in the Appellant's absence accordingly, and made clear that it drew no adverse inference from the Appellant's absence. There has been no appeal from this decision.

32. The substantive hearing proceeded in the Appellant's absence accordingly. The Tribunal received evidence from Mr Peel (including a report dated 14 January 2016) to the effect that the Appellant's care of all three patients (A, C and F) fell seriously below the standard expected of a reasonably competent registrar. All three complaints involved the allegation that the Appellant failed to attend the patient when asked to do so by colleagues.

33. In addition to hearing live evidence from the expert, the Tribunal heard from witnesses of fact. It found no support for the Appellant's allegations of victimisation, harassment or malicious allegations by colleagues.

34. By a decision dated 18 October 2017, many but not all of the factual allegations pursued by the Respondent were found proven by the Tribunal. It gave detailed consideration to the evidence and to the matters relied on by the Appellant in his witness statement.

35. Having made those findings, the Tribunal dealt with the questions whether the facts found proved amounted to misconduct, and if so whether that was serious; and whether, as a result of any serious misconduct found, the Appellant's fitness to practise was impaired in consequence. In considering those questions, the Tribunal directed itself to consider the Appellant's conduct at the time of the events and any relevant factors since then such as whether the matters were remediable, had been remedied and any likelihood of repetition.

36. The Tribunal concluded that each of the failures to provide good clinical care in respect of patients A, C and F individually amounted to serious misconduct. So far as the Rotherham Trust allegations were concerned, in relation to findings where the Tribunal considered that the Appellant's actions were misleading but not dishonest, it accepted that the Appellant had persuaded himself and believed that the South Tees Trust investigation was mainly down to "personality clashes" with colleagues, and that the Respondent's investigation was a formality (even though that was not in fact the case). The Tribunal concluded that the expression of a genuinely held belief, however misguided, could not amount to serious misconduct in the circumstances of this case.

37. However, the Tribunal found that the failure to disclose the fact of his dismissal, the statement that he had resigned due to an intolerable working situation with a colleague and the failure to disclose the South Tees Trust investigation were dishonest statements or omissions made "with a view to obtain work which he knew he was unlikely to obtain if he told the truth". That amounted to serious misconduct. These findings have not been challenged on appeal.

38. The Tribunal dealt with impairment in light of those findings, holding:

> "29…to date, Dr Sanusi has demonstrated a concerning lack of insight and an inability to accept responsibility for his actions. He has sought to justify his behaviour and continue to place blame on others for his actions and to minimise his role in the events. Dr Sanusi seems to see himself as a victim in the situation where others are 'out to get him'. There has been no evidence of any remediation provided to the Tribunal. He has shown limited remorse for his conduct and no insight into the

> impact that his conduct could have had on patients, or on the profession.
>
> 30. It was the view of the tribunal that given the above, it cannot be satisfied that there is no future risk of repetition at this point in time and the tribunal are concerned that, without developing insight or remediation, Dr Sanusi may place patients at risk of harm in the future"

39. As to the dishonesty findings, the Tribunal acknowledged that it was one single incident of dishonesty but found that it was serious: Dr Garner was "repeatedly and deliberately misled" by the Appellant during the interview "as to the reasons for leaving South Tees, claiming to have resigned rather than having been dismissed, for the purpose of securing employment" which was immediately withdrawn upon the discovery of his dishonesty. The Tribunal referred to the position of privilege and trust occupied by doctors in society, who are expected to act with integrity, and concluded that the Appellant's fitness to practise was impaired. Again, there is no challenge, whether substantive or procedural to any of those findings and conclusions.

40. There is nothing on the face of the decision to suggest that the Tribunal considered whether to adjourn pre-sanction stage to afford the Appellant the opportunity to make further submissions on the question of sanction.

41. In relation to the available sanction in this case, the Tribunal considered these in ascending order of gravity and by express reference to the Sanctions Guidance as follows:

> "The Tribunal bore in mind the mitigating factors in Dr Sanusi's case. The incidents all took place whilst Dr Sanusi was working in the same role at one place of employment and there is no evidence of issues with Dr Sanusi's character or performance either prior to October 2012 or since July 2015. There is also no evidence that Dr Sanusi's misconduct caused actual harm to patients, although it did pose a potential risk of serious harm. The Tribunal also had regard to two testimonials from Consultant Surgeons at Doncaster and Bassetlaw Hospitals NHS Foundation Trust, which speak of his abilities in positive terms during his employment there from 1 October 2015 to 4 October 2016. However, the Tribunal noted that, in relation to the testimonials, the authors appeared to be unaware of the nature of the allegations against Dr Sanusi or of the fact of these proceedings. This fact impacted upon the weight which the Tribunal felt able to attach to them. <u>The Tribunal understood that Dr Sanusi had been undergoing GP training since February 2017, however, no evidence has been submitted in relation to this</u>." (emphasis added by the Judge).

42. As Kerr J was subsequently to find, the Tribunal was clearly ignorant of Dr Roberts' letter,

> "which not only confirmed that the GP training was taking place, but also that it was going quite well. The Respondent was in possession of that letter…but the Tribunal was not".

The Tribunal rejected suspension on the basis that there was:

> "no evidence of any meaningful insight, acknowledgement of fault, or steps taken towards remediation and, to date, the Tribunal has not received any evidence upon which could properly conclude that there is any real prospect of remediation in the future." [33]

43. As to erasure, the Tribunal set out paragraphs 108 and 109 of the Sanctions Guidance. These make clear that a blatant disregard for the safeguards designed to protect members of the public and maintain high standards within the profession that is incompatible with continued registration as a doctor may mean erasure is appropriate. The guidance states that where dishonesty is present, especially where it is persistent and/or covered up, erasure may be appropriate.

44. At paragraphs 26 and 27 the Tribunal held:

> "26. Further, Dr Sanusi's misconduct was not limited to clinical failings, but extended to dishonest conduct which, although not persistent or covered up, was serious because it involved lying in an attempt to obtain employment as a surgical registrar performing the same duties for which he had been dismissed by his previous employer only four weeks earlier. A doctor who engages in dishonest conduct will invariably be at risk of erasure, and all the more so where the doctor does not engage with the hearing and acknowledge his dishonesty, show the potential for remediation or show any development of insight. The Tribunal was of the view that, in the circumstances, Dr Sanusi's proven misconduct is fundamentally incompatible with continued registration.
>
> 27. The Tribunal took into account the impact that erasure will inevitably have upon Dr Sanusi. In particular, it is noted from Dr Sanusi's statement dated 15 September 2017, that he had embarked upon a GP training programme in February 2017. However, it concluded that the need to protect patients and the public interest outweighed Dr Sanusi's personal interests. It determined that erasure was the only sufficient sanction which would protect patients, maintain public confidence in the profession and send out a clear message to Dr Sanusi, the profession and the public that his misconduct constituted behaviour unbefitting of a registered doctor. The Tribunal therefore directs that Dr Sanusi's name be erased from the Medical Register".

The appeal heard by Kerr J

45. The Appellant appealed against the Tribunal's decision in relation to sanction only and was, as already indicated, legally represented. Counsel on his behalf contended that the sanction decision was unjust and wrong for the following reasons:

(a) It was accepted before Kerr J, on the Appellant's behalf, that the Tribunal was justified in proceeding with the hearing on 2 October 2017 in the Appellant's absence but submitted that the Tribunal should have considered adjourning at the sanction stage and/or 'pausing' to allow the doctor to either produce further documentary evidence as to remediation, insight or remorse, and/or to attend to give evidence of this at the sanction stage;

(b) the failure to take either step meant that the hearing proceeded without any further material (by way of evidence or submissions) directed to remediation, insight or remorse; and

(c) the sanction imposed was therefore unfair and disproportionate in these circumstances.

46. Kerr J dismissed the appeal. He found the following:

(a) the Appellant "did not understand that attending the Tribunal hearing should take priority over his training" and although he appreciated the nature and extent of the hearing, he did not appreciate the peril of erasure. He did not seek legal advice, citing financial constraints.

(b) The Appellant provided the Respondent with a "substantial number of documents over a considerable period". Although some documents he provided were sent to the Tribunal, many were not sent by the Respondent to the Tribunal. Kerr J found the following material (referred to as "the Missing Material"), was available to the Respondent, having been provided by the Appellant, but not sent to the Tribunal:

(i) appraisal documents going back to 2014;

(ii) a tool for assessment and peer review dating back from October 2015;

(iii) an appraisal for February 2016;

(iv) certificates of courses completed over the years;

(v) expressions of appreciation from former patients;

(vi) the results of clinical evaluation exercises undertaken by supervising doctors while working at Friarage Hospital;

(vii) the results of a patient feedback exercise involving an interpersonal skills questionnaire;

(viii) the letter from Dr Roberts dated 1 August 2017.

(c) Those Missing Materials "did not go before the Tribunal and were therefore not available to the Tribunal when it later evaluated the available sanctions and considered the question of mitigating circumstances."

47. On the question of adjourning before dealing with sanction, the Judge concluded that there was no basis for criticising the decision of the Tribunal not to adjourn and contact the Appellant before proceeding to consider sanction. He acknowledged some differences in approach to this question in other cases: for examples of cases where such an adjournment was regarded as necessary, he referred to *Sukal* and *Lawrance;* and where it was not, *Faniyi* and *Held*). However following *Adeogba*, he held that in the context of the disciplinary jurisdiction exercised by Medical Practitioners Tribunals in the case of doctors, it will rarely be unfair for a tribunal to proceed straight to the question of sanction, rather than pausing to invite attendance from a registrant who has, up to that point, voluntarily absented himself.

48. Although he found procedural unfairness in the failure by the Respondent (and/or the Tribunal itself) to ensure that the Tribunal had all the Appellant's documents available to it, particularly in light of the clear statement by the Appellant in his witness statement (as highlighted above) that certain documents had been excluded from the material provided, Kerr J held on the facts of this particular case, that the failure to ensure that the Tribunal had sight of all of this material was not reasonably capable of affecting the outcome.

The statutory provisions and approach to appeals

49. The Medical Act 1983 ("the Act") establishes the role of the General Medical Council and sets out a detailed regime for investigating and disciplining doctors where there are allegations of professional misconduct against them.

50. Section 1(1A) of the Act provides that the overarching objective of the General Medical Council in exercising its functions is the protection of the public. It achieves that by (among other objectives) promoting public confidence in the medical profession and promoting and maintaining proper professional standards and conduct for members of that profession. The Medical Practitioners Tribunals are established as a committee of the General Medical Council under s.3 of the Act but operate independently of it.

51. Section 35D of the Act sets out the functions of a Medical Practitioners Tribunal to consider allegations against a person that are referred to it. The procedure to be adopted in considering such allegations is set out at paragraph 17 of the General Medical Council (Fitness to Practise) Rules Order of Council 2004 (SI 2004/2608) (referred to as "the Rules"). Paragraph 17 (9) of the Rules provides that, "at any stage before making its decision as to sanction or warning, the Medical Practitioners Tribunal may adjourn for further information or reports to be obtained in order to assist it in exercising its functions". Where a practitioner is absent, paragraph 31 of the Rules provides for a tribunal to proceed to consider and determine the allegation if satisfied that all reasonable efforts have been made to serve the practitioner with notice of the hearing in accordance with the Rules.

52. Section 40 of the Act provides a doctor affected by a determination of a Medical Practitioners Tribunal with a right of appeal to the High Court, including as regards any sanction imposed by the Tribunal as follows:

> "(1) The following decisions are appealable decisions for the purposes of this section, that is to say –
>
> (a) a decision of a Medical Practitioners Tribunal under section 35D above giving a direction for erasure, for suspension or for conditional registration or varying the conditions imposed by a direction for conditional registration;
> …
>
> (7) On an appeal under this section from a Medical Practitioners Tribunal, the court may –
>
> (a) dismiss the appeal;
>
> (b) allow the appeal and quash the direction or variation appealed against;
>
> (c) substitute for the direction or variation appealed against any other direction or variation which could have been given or made by a Medical Practitioners Tribunal; or
>
> (d) remit the case to the MPTS for them to arrange for a Medical Practitioners Tribunal to dispose of the case in accordance with the directions of the court,
>
> and may make such order as to costs (or, in Scotland, expenses) as it thinks fit."

53. Appeals under s.40 are governed by CPR Pt 52 and proceed by way of re-hearing. However, it is well-established that they are re-hearings without hearing again the evidence and a court will only allow an appeal if the decision of the Tribunal is wrong or unjust because of a serious procedural or other irregularity in the proceedings below. The appellate court will correct material errors of fact and law but will be cautious about any challenge to findings of primary fact, particularly where the findings of a tribunal depend on an assessment of the credibility of the witnesses.

54. Moreover an expert tribunal such as this is to be accorded a measure of respect to determinations made by it as to whether conduct is serious misconduct or impairs a person's fitness to practise, and as to what is necessary to maintain public confidence and proper standards in the profession, and the appropriate sanction.

The appeal

The first issue: adjournment before dealing with sanction

55. Kerr J concluded that there was no basis for criticising the Tribunal for not adjourning and/or contacting the Appellant before proceeding to consider sanctions. He distinguished the decisions in *Sukul v BSB* [2014] EWHC 3532 (Admin) and *Lawrance v GMC* [2015] EWHC 586 (Admin) as fact specific decisions made in relation to disciplinary regimes in which the rules were not necessarily to the same effect as those of the General Medical Council; or on the basis that the reasoning in those cases had been overtaken by *Adeogba*. He concluded that, in the context of the disciplinary

jurisdiction exercised by Medical Practitioner Tribunals in the case of doctors, it will rarely be unfair for a tribunal to proceed straight to the question of sanction, rather than pausing to invite attendance from a registrant who has, up to that point, voluntarily absented himself: [41] to [43].

56. The Appellant challenges those conclusions. In writing (in a number of documents produced by him) and in his oral submissions, the Appellant advances several arguments, all of which we have considered carefully. His primary contention, in summary, is that as a matter of equity, fairness, due process and procedure, the Tribunal should have paused briefly before embarking on the sanctions stage of the process, to consider whether an adjournment was necessary in the interests of justice and/or should have contacted him to enquire whether he wished to attend or make written representations before the draconian step of erasure was taken. That is what happened in the not dissimilar regulatory cases of *Sukul v BSB* and *Lawrance v GMC*. In both cases the courts concluded that the disciplinary tribunal should have afforded an opportunity for the appellant to make representations as to sanction following findings of professional misconduct, and the same principles should be applied in his case.

57. In *Sukul*, which concerned a barrister acting for a lay client in a criminal appeal, the appellant was found to have created a false document with the intention of misleading his client and the Court of Appeal. The tribunal had proceeded in Mr Sukul's absence and disbarred him. On appeal, it was recognised that the allegation was serious but it was argued on Mr Sukul's behalf that it was by no means inevitable that he would have been disbarred. The Divisional Court (Laws LJ with whom Cranston J agreed) held at [34]:

> "It cannot be said, to take the matter shortly, that this was necessarily at the top range of offences covered by the table under "Common circumstances" item C [a reference to the sentencing guidance for breaches of the Bar Code of Conduct]. I make it clear that I would not hold that disbarment was necessarily the wrong sentence here but it seems to me that there is plainly an argument as to whether or not it was. In the circumstances for my part I think it right that the tribunal should have afforded an opportunity for this appellant to make representations as to sanction once they had found him guilty of the professional charges before them. Such an opportunity should properly have been provided, notwithstanding all the negative features of this appellant's previous communications with the BSB or the Tribunal".

58. A similar argument was advanced in *Lawrance v GMC*. Dr Lawrance, a GP, attended on the first day of the Medical Practitioners Tribunal hearing of her case but felt unable to cross examine the General Medical Council's witnesses. The matter was adjourned briefly in the hope that Dr Lawrance would secure legal representation for the following day. The following day, having failed to obtain legal representation, she attended and made submissions to the effect that continuing with the hearing would be unfair and unjust. She then left. The tribunal proceeded in her absence finding her guilty of misconduct (including dishonesty) and concluding that her fitness to practise was impaired. Erasure was ordered. On appeal, Dr Lawrance argued that the tribunal

should not have proceeded in her absence. That submission was rejected by Collins J but he held:

> "…I have no doubt that the panel ought to have considered before imposing any sanction, particularly as they clearly had erasure in mind, whether attempts should have been made to contact the appellant to enable her to put forward any mitigation" (paragraph 39).

59. In further support of his contention that there should have been an adjournment or enquiry pre-sanction stage, the Appellant relies on the fact that he demonstrated no intention to frustrate the process. Rather there had been full engagement by him throughout the lengthy investigation and he was effectively prevented from attending the hearing because of his GP commitments. He was an unrepresented litigant and a balance therefore had to be struck between the need to avoid procedural or substantive injustice on the one hand and the requirement to maintain judicial impartiality on the other; but here an adjournment might more readily have been granted to him as an unrepresented litigant who had misunderstood the procedural requirements and was as a consequence, not in a position to complete the presentation of his evidence. Furthermore, he relies on the fact (as he alleges) that the Respondent wilfully or otherwise introduced a procedural irregularity into the proceedings by withholding documents relevant to the Tribunal's consideration of sanction.

60. These submissions are resisted by the Respondent. Ms Richards QC and Ms Hearnden contend that Kerr J was right to reach the conclusions he did. Reliance is placed on *GMC v Adeogba* [2016] EWCA Civ 162, [2016] 1 WLR 3867 (recently affirmed in *GMC v Hayat* [2018] EWCA Civ 2796) where guidance was given on the approach to be adopted to questions of adjournment or proceeding in the absence of a registrant. Ms Richards contends that the guidance given applies equally to an adjournment at a later stage and to the extent that there is conflict between the principles established in *Adeogba* and the approach adopted in *Sukul* and *Lawrance* (which are accepted as offering some support for the Appellant's position), the approach in *Adeogba* should apply and is to be preferred. She referred in argument to *Faniyi v Solicitors Regulation Authority* [2012] EWHC 2965 (Admin) and *Held v General Dental Council* [2015] EWHC 669 (Admin) where the approach adopted to questions of adjournment before proceeding to sanction, was similar to that in Adeogba, and appeals based on (or raising questions of) refusal or failure to adjourn at the sanction stage, failed.

61. Ms Richards emphasises that a practitioner can choose whether or not to attend a tribunal hearing or whether to send a legal representative. The Appellant elected to do neither. That was his choice, but one which should not permit him to complain later that he was not given a final opportunity to respond to the findings made against him. Hearings are listed with a view to working through all of the relevant stages in one go (facts, misconduct, impairment and sanction). She contends the interests of justice do not require a Medical Practitioners Tribunal to adjourn mid-hearing to try to contact the doctor or allow a final opportunity to make representations, even where erasure is at stake. If that were routinely necessary it would constitute a significant organisational burden of the sort decried by the Court of Appeal in *Adeogba*, and would be contrary to the administration of justice.

62. Having reflected on all the Appellant's submissions, I do not accept them, and have concluded that the Respondent is correct. My reasons are as follows.

63. In my judgment the authorities relied on by the Appellant are to be treated with considerable caution in light of *GMC v Adeogba*. In *Adeogba* Sir Brian Leveson PQBD, gave guidance on the approach, in a regulatory context, to proceeding in the absence of a registrant. The Court of Appeal was concerned with joined appeals, brought by the General Medical Council against two decisions of the High Court which held that (differently constituted) tribunals were both wrong to proceed in the absence of the regulated individuals. Dr Adeogba did not attend because he had returned to Nigeria and "failed to access the only mechanisms available to the GMC to communicate with him". Dr Visvardis refused to participate in the process until his (outstanding) concerns had been addressed. In both cases, the Court of Appeal allowed the General Medical Council's appeal.

64. The Court of Appeal approved the use in this different context of criteria governing continuing with a criminal trial in the absence of a defendant (as set out in cases including *R v Jones* [2003] 1 AC 1) as a useful starting point. The criteria include (but are not limited to) (i) the nature and circumstances leading to the defendant being absent and whether the absence is deliberate or voluntary; (ii) whether an adjournment might result in the defendant attending; (iii) the likely length of any adjournment; (iv) the extent of the disadvantage to the defendant in not being able to give an account of events having regard to the nature of the case against him; (v) the general public interest; and (vi) the effect of delay on the memories of witnesses.

65. However, the Court highlighted the differences between a criminal trial and the hearing of disciplinary allegations by a professional regulator (whose objective is the protection of the public) and made clear that the analogy between criminal prosecution and regulatory proceedings could not be taken too far given the important regulatory objective in play, namely the "fair, economical, expeditious and efficient disposal of allegations made against medical practitioners", and the absence of any available means to enforce attendance by a registrant in contrast to those available to enforce attendance by a defendant in a criminal trial. Other important differences were also emphasised as follows:

> "19. …First, the GMC represent the public interest in relation to standards of healthcare. It would run entirely counter to the protection, promotion and maintenance of the health and safety of the public if a practitioner could effectively frustrate the process and challenge a refusal to adjourn when that practitioner had deliberately failed to engage in the process. The consequential cost and delay to other cases is real. Where there is good reason not to proceed, the case should be adjourned; where there is not, however, it is only right that it should proceed.
>
> 20 Second, there is a burden on medical practitioners, as there is with all professionals subject to a regulatory regime, to engage with the regulator, both in relation to the investigation and ultimate resolution of allegations made against them. That is part of the responsibility to which they sign up when being admitted to the profession…"

66. Sir Brian Leveson made clear (at paragraph 23) that the Medical Practitioners Tribunal must be satisfied that all reasonable efforts have been taken to notify the practitioner of the hearing (consistently with rule 31), but once so satisfied,

> "discretion whether or not to proceed must then be exercised having regard to all the circumstances of which the Panel is aware with fairness to the practitioner being a prime consideration but fairness to the GMC and the interests of the public also taken into account; the criteria for criminal cases must be considered in the context of the different circumstances and different responsibilities of both the GMC and the practitioner."

67. Applying those principles to the facts of Dr Adeogba's case, he continued:

> "61 … the judge appears to have put emphasis on the fact that this was the first hearing and that an adjournment was unlikely to be highly disruptive or inconvenient to attending witnesses. To suggest that the practitioner must be allowed one (or perhaps more than one) adjournment is to fly in the face of the efficient despatch of the regulatory regime. In addition, an adjournment was highly disruptive: the members of the Panel, the legal assessor, the staff and the accommodation had been set up… Organising another hearing would have been both disruptive and inconvenient. No regulatory system can operate on the basis that a failure to attend should lead to an adjournment on the basis that the practitioner might not know of the date of the hearing (rather than having disengaged from the process or even adopted an 'ostrich like attitude'): any culture of adjournment is to be deprecated…
>
> 63. The system simply could not operate efficiently or effectively and although attendance by the practitioner is of prime importance, it cannot be determinative."

68. I consider that those considerations apply with equal, if not greater, force to adjournments part way through a hearing, including, if it is reached, immediately before consideration of sanction. In my judgment there is no general obligation on the Medical Practitioners Tribunal to adjourn or to provide a registrant with the opportunity to make submissions in mitigation of sanction once adverse findings have been made against him or her.

69. To my mind, the approach adopted in *Sukul* and *Lawrance* inadequately recognises the nature and objective of the regulatory system in play and the significant disruption caused by the culture of adjournment sanctioned by it. This is underlined by the statistics cited by Sir Brian Leveson in *Adeogba*, showing that hearings in the absence of a medical practitioner are now relatively common: out of 488 cases which proceeded to the Medical Practitioners Tribunal in 2014 and 2015, 146 proceeded in the absence of the medical practitioner. The regulatory system cannot operate on the basis that a failure to attend should lead inevitably to an adjournment mid hearing before dealing with sanction. If the approach in *Sukul* or *Lawrance* is justifiable at all, it can only be

on the basis of the particular facts involved. That said, it is difficult to discern from the reports of those cases what particular facts or circumstances (beyond the seriousness of the consequences for the practitioner involved, which will apply in most cases) led to the conclusion that an adjournment before dealing with sanction was necessary in the interests of justice.

70. It seems to me that in a case where a registrant chooses not to attend a tribunal hearing (for good or bad reason) he or she must be taken to appreciate that if adverse findings are made, they will not be in a position to address the Medical Practitioners Tribunal on matters of mitigation in any changed circumstances flowing from those adverse findings and will be entirely reliant on any written submissions or representations made by the registrant in advance of the hearing. As Leveson J (as he then was) expressed the point (in *Elliott v Solicitors Disciplinary Tribunal & another* [2004] EWHC 1176 (Admin)):

> "those who fail to attend lose the right to participate and explain, and they do so at their peril. As [was] conceded, if, without more, a solicitor deliberately absented himself it would not be feasible to argue that he was entitled to a rehearing".

71. The position is likely to be different where there is unchallenged medical evidence that a registrant, who has otherwise engaged fully in the disciplinary process, is taken ill and so is not fit to attend the hearing or part of it (as was the case in *Brabazon-Drenning v United Kingdom Central Council for Nursing Midwifery and Health Visiting* (2001) HRLR 6); or where there is some other compelling reason justifying an adjournment. In such circumstances careful consideration of the public interest and the interests of fairness to the registrant and the General Medical Council will have to be weighed in exercising the discretion whether to proceed or not, in light of the justification advanced for an adjournment.

72. However, this is not such a case. The Appellant was given notice of the investigation and was fully aware of the disciplinary allegations he faced from at least January 2017 (the rule 8 letter). He was afforded the opportunity to respond, and did so in full.

73. The Appellant elected not to attend the Tribunal hearing in favour of continuing with his GP training; and did not send a legal representative on his behalf. It was conceded on his behalf below that he did not actually request leave, but simply assumed that leave would not be granted. While it may be true that he did not fully appreciate that attendance at the hearing should take precedence over his training, that factor cannot outweigh the public interest considerations, particularly in circumstances where he had been properly notified of the hearing and that it would deal with all relevant stages: facts, misconduct, impairment and sanction. This is not a case where the hearing took an unexpected course. These were serious allegations and although not given any specific warning of the potential consequences of not attending, the Notice of Hearing letter drew attention to the sanction of erasure as a possibility and provided a link to the Sanctions Guidance publicly available on the relevant website. The Guidance makes clear that in cases of alleged dishonesty, erasure is always a possibility. It should not have come as a surprise to him in those circumstances that the Tribunal considered erasure as a possible sanction, having made findings of dishonesty in this case.

74. Although I do not consider that the outcome would have been any different had he not done so, in this case the Appellant did in fact take the opportunity (in his statement of 15 September 2017 which was available to the Tribunal in un-redacted form), in addition to setting out his case on the facts, to include a section headed "Reflection" relevant to questions of insight, which included the following statement on sanction:

> "I have had to learn tough lessons, suffer remarkably, and continue to do so. I can only hope that the impact already caused are not underestimated or overlooked. Further sanctions can only amount to a repeat infliction of further punishment for events I have already been severely punished and crushed to the limit. It is hard to disembowel a man and demand he feel no pain."

75. The Appellant accordingly made submissions on sanction, albeit briefly, and knew that the hearing would proceed in his absence and that sanction would be addressed. The mere fact that erasure was a realistically possible sanction here does not militate in favour of an adjournment.

76. Finally, an adjournment would have been highly disruptive: reconstituting the same panel of three members, together with the legal assessor, and any other members of staff on a future date would have been difficult, disruptive and inconvenient, and no doubt, costly. It would have run counter to the need to ensure the fair, economical and efficient disposal of the allegations made in this case.

77. There was no good reason not to proceed to the consideration of sanction in this case and I can see nothing wrong in the way in which the Tribunal proceeded in the Appellant's absence.

78. Although regrettably not done sooner, I note and commend two amendments that have been made by the General Medical Council (as of 17 September 2018) to the standard letters sent to registrants (or their representatives) facing Fitness to Practise hearings so that the position is now even clearer than it was previously. First, a specific warning is given:

> "If your client does not attend the hearing, the Tribunal may proceed in their absence and without their involvement. You should be aware that the Tribunal could impose a sanction, without seeking further representations, which could severely restrict your client's ability to practise. Your client will not have the opportunity to advance a defence or demonstrate insight and remediation, which could influence the Tribunal's decisions."

Secondly, registrants are now provided in advance of the hearing with a written indication of the General Medical Council's proposed submissions on the appropriate sanction outcome in the particular case (albeit noting that it may be subject to change) and directed to the Sanctions Guidance. Although these changes were not in place in time for the Appellant, that does not affect the outcome in his case. He was clearly notified of the hearing and what would be addressed. He was made aware of the Sanctions Guidance. Significantly, he took a deliberate decision not to attend the hearing, thereby depriving himself of the right to participate and explain, at his peril.

There was no justification for any adjournment or for a rehearing on the question of sanction. This ground accordingly fails.

The second issue: was the Judge right to find that the process by which the sanction decision was reached was not rendered unfair by the failure of the GMC to provide the Tribunal with evidence which the Appellant had asked to have taken into account in mitigation

79. Kerr J held that the failure to place before the Tribunal mitigation documents (including the letter from Dr Roberts) sent by the Appellant to the Respondent (the Missing Materials) amounted to a procedural irregularity in this case, the fault for which lay with the Respondent. That conclusion is not challenged by the Respondent and indeed, was the subject of a narrow concession at the hearing before the Judge. The result was, as Kerr J found, the Tribunal was ignorant of certain material relevant to mitigation. Nonetheless, having considered whether the Missing Materials *"would or might have made a difference*" he concluded that they would not have done so, holding (at [69]):

> "…The Tribunal's decision on sanction would still have had to reflect the gravamen of the main findings. The absence of insight and appreciation of the seriousness of his misconduct, the difficulty in showing the required "remediation" in the case of dishonesty and the overriding need to preserve public confidence in the profession, lead me to conclude that no harm was done by what went wrong in the present case and that the decision to erase Dr Sanusi's name from the medical register must therefore stand…"

80. The Appellant contends that Kerr J was wrong to decide that the sanction given by the Tribunal was not rendered unfair by the failure to consider the evidence in the Respondent's possession. In fact, it is his contention that the Respondent deliberately concealed the relevant evidence. Whether or not this is so, he submits the result of the procedural irregularity was to leave the Tribunal ignorant and unable to make an informed decision on the question of sanction. Although at times the Appellant's submissions (both oral and in writing) went further and suggested that had all documents been presented to the Tribunal, it would not have found him to have been dishonest nor reached the conclusion that he deliberately lied in order to obtain employment, he recognised that there has been no appeal against those findings and the grounds of appeal are limited to the question of sanction.

81. The Appellant submits that both the Respondent (and Tribunal) failed to comply with the duty of candour incumbent upon them, as indeed the Judge found. However having done so it was an error for the Judge to conclude that even had the Tribunal had sight of the relevant evidence, the same decision would have been made. The case should have been remitted to the Tribunal because the material withheld, which touched on the issue of the Appellant's fitness to practise and his probity, could have had an important influence on the decision as to sanction. To conclude otherwise means that the discretion entrusted to the Tribunal was "*truncated, eroded and hampered*".

82. For its part, the Respondent rejects any contention that it deliberately misled the Tribunal or sought in any way deliberately to conceal documents. It accepts however that because, in this case the Appellant's witness statement expressly said that it should

be "*read together with the evidence and responses previously supplied to the GMC*", the Respondent should have alerted the Tribunal to the need to investigate what if any further material, previously supplied, should be made available for the hearing. The failure to respond to that statement meant that the Tribunal was left in a position where it was ignorant of certain material relevant to mitigation, as was conceded on this narrow basis before Kerr J.

83. Notwithstanding the procedural irregularity however, Ms Richards submits that Kerr J's assessment that the Missing Materials were not reasonably capable of affecting the outcome of erasure in this particular case was correct.

84. I am in no doubt that there was a procedural failing in this case and agree with the Judge that as a matter of natural justice and fairness, both the General Medical Council and a Medical Practitioners Tribunal dealing with a case of serious misconduct should take reasonable steps to ensure that all relevant mitigation material provided by an absent registrant is available for consideration by the panel when it comes to deal with sanction. That obligation is not however unlimited. It does not require extensive trawls through the archives, nor extend to sifting through large quantities of unindexed or uncategorised documentation provided by a registrant to determine what if any relevance it may have. The obligation extends only to reasonable searches for material that is objectively viewed as relevant. It must not be forgotten that doctors have their own obligations under the Code of Conduct to cooperate with their regulator, as emphasised in *GMC v Adeogba* (see especially [20]). Here, of course, both the Respondent and the Tribunal should have been on notice that material previously supplied to the Respondent had (in the words of the Appellant in his witness statement) been "excluded by the Respondent", but he asked that it be read by the Tribunal.

85. I have given anxious consideration to the question whether the availability of the mitigation material could have made any difference to the sanction outcome here. The threshold for "a no difference" outcome, in other words, concluding that a fair procedure would or could have made no difference is high, as is well established: see *R v Chief Constable of Thames Valley Police, ex parte Cotton* [1998] IRLR 344, and *R (Smith) v North Eastern Derbyshire Primary Care Trust* [2006] 1 WLR 3315 where May LJ, said (at 3321A):

> "Probability is not enough. The defendant would have to show that the decision would inevitably have been the same…"

86. The finding of serious and deliberate dishonesty made by the Tribunal has not been appealed. Honesty and integrity are of fundamental importance in relation both to the performance of a doctor's duties and to the system for applying for medical positions. Findings of dishonesty lie at the top end of the spectrum of gravity of misconduct and where there is a finding of deliberate dishonesty coupled with a lack of insight, the case law recognises that in practical terms, a finding of erasure may be inevitable: see *GMC v Theodoroupoulos* [2017] EWHC 1984 (Admin); [2017] 1WLR 4794 (Lewis J at paragraphs 35 to 40), which helpfully summarises the importance of honesty in the medical profession from a regulatory perspective.

87. There is no doubt that evidence of the Appellant's performance and compliance with conditions, both of which are touched on by Dr Alison Roberts, in her GP supervisor's report letter, is potentially relevant to sanction. That testimonial apart, I am satisfied

by the evidence provided by the Respondent that the Tribunal had before it, in addition to the letters of Mr Olubowale and Mr Kolar (both expressly referred to by the Tribunal in its determination, and considered by the panel in the context of sanction), the supportive letters on his behalf from Dr Clare Rogers, dated 6 October 2016, and Ms Lynda Wyld, Reader in Surgical Oncology, dated 12 October 2016.

88. The remaining Missing Materials listed by Kerr J (see paragraph 47 above) are not obviously relevant to mitigation or sanction, and having considered them, I do not read them as adding anything to the evidence already before the Tribunal. The same is equally true of the additional material, mostly contained in the Portfolio Bundle produced by the Appellant for the purposes of this appeal, but which was not placed before the Judge or the Tribunal. I mean no disrespect to him in saying that. True it is that the Portfolio Bundle contains a reference from Dr Clare Spencer, the Appellant's Training Programme and Educational Supervisor (dated 7 February 2018) which indicates awareness (but no more) of "a GMC case pending while I was his education supervisor"; but it otherwise sheds no light on remediation, insight or mitigation more generally, and concludes by expressing the view that the Appellant then worked at the level expected of a GP in ST1. In any event, all of the additional material (including the Portfolio Bundle) was in existence and in the Appellant's possession, and had he wished to rely on it before the Tribunal, it was for him to say so. He did not, and there being no good reason to permit him to rely on it now in the circumstances, the consequence is that it cannot be relied on at this late stage.

89. I agree with Kerr J that the letter from Dr Roberts constitutes an exception to the other Missing Materials. Further, as he identified, the Tribunal's ignorance of Dr Roberts' letter led it to state wrongly that there was no evidence about any GP training undertaken by the Appellant. The only question is whether in light of the findings made by the Tribunal as to the Appellant's lack of insight and proven misconduct, the letter from Dr Roberts might realistically have made a difference to the decision as to sanction.

90. In her letter, Dr Roberts describes the Appellant as very reliable and punctual, completing all tasks set for him. She describes his skills as a GP having improved. She refers to him receiving "fewer complaints" and to the reflection and learning from these complaints as having involved his communication skills. She states, "*any clinical areas that have caused some concern he has always keenly addressed with online and other sources of learning and updates*". She expresses the hope that he will continue to use the skills practised regarding reflection and making a change of practice if required, over the rest of his training scheme and in his future career.

91. As I have indicated, Dr Clare Spencer's report (referred to above) exceptionally makes reference only to the existence of the Respondent's investigation, but it was not before the Respondent or Tribunal. There is nothing in the report from Dr Roberts, or indeed the other references supplied to the Tribunal, that indicates knowledge by the author of the existence, nature or extent of the disciplinary charges faced by the Appellant. The reports appear to have been written in complete ignorance of the Tribunal proceedings. Unsurprisingly therefore, there is nothing in any of the reports, but specifically, nothing in Dr Roberts' report that addresses the charge of deliberate dishonesty or identifies any acknowledgment of wrong, reflection, insight or willingness to learn, demonstrated by the Appellant in relation to it (recognising the greater difficulty in showing remediation in relation to findings of dishonesty). Similarly, there is nothing in her letter or the

other references that evidences any acknowledgement by the Appellant of the failings found in respect of his care and management of patients at South Tees Trust or that he placed those patients at risk of harm.

92. It is significant that the Tribunal found that the Appellant deliberately lied to obtain employment which, he must have known, he was otherwise unlikely to secure. Although his dishonesty was not persistent or covered up, the Tribunal found it to be serious because it involved an attempt to obtain similar employment to that which he had recently been dismissed from. At paragraph 26 (set out in full above) the Tribunal referred to the Appellant's failure to acknowledge his dishonesty, show the potential for remediation or show any development of insight, as increasing the already present risk of erasure. The Tribunal's critical conclusion in the circumstances was that his proven misconduct was "*fundamentally incompatible with continued registration*".

93. The Tribunal properly balanced the impact of erasure on the Appellant against the need to protect patients and the public interest, finding that the latter considerations outweighed the former. It determined that erasure was the only sufficient sanction.

94. In my judgment, there is nothing in the letter of Dr Roberts (or the other missing material) that could be regarded as relevant to the assessment that the Appellant's dishonesty (and other proven misconduct) was incompatible with continued practice. As stated, there is nothing which acknowledges dishonesty, demonstrates meaningful insight into his dishonesty or a willingness or ability to learn from his mistakes; and nothing that could be said to outweigh the strong public interest in protecting patients and maintaining public confidence in the profession.

95. I bear firmly in mind also that matters of "mitigation are likely to be of considerably less significance in regulatory proceedings than to a court imposing retributive justice, because the overarching concern of the professional regulator is the protection of the public": see *GMC v Jagjivan & Anor* [2017] EWHC 1247 (Admin) (Sharp LJ at [40(vii)]).

96. In agreement with Kerr J therefore I do not consider that there is any realistic prospect that the Missing Materials (and in particular the letter from Dr Roberts) might have led the Tribunal to impose a different sanction. In light of the conclusions it had reached as to serious misconduct including serious dishonesty, and impairment, together with his lack of insight into his dishonest conduct, the sanction of erasure was, in practical terms, inevitable. The Appellant's dishonest conduct affected the integrity of the system of job applications which is fundamental to the protection of the public.

97. For these reasons, ground two also fails.

Conclusion

98. For all these reasons, if my Lord and my Lady agree, the appeal should be dismissed.

99. There was no obligation on the Tribunal to adjourn consideration of the Appellant's case immediately before the sanction stage and nothing in the particular circumstances that leads to the conclusion that the Tribunal was wrong to proceed to sanction as it did. Although there was a procedural irregularity resulting in the Tribunal being ignorant of material relevant to mitigation, given the gravamen of the Tribunal's main findings,

there is no realistic possibility that the missing materials might have led the Tribunal to a different sanction outcome. Erasure was inevitable in light of the Tribunal's earlier findings, which have not been challenged.

Mrs Justice Theis DBE:

100. I agree.

Lord Justice David Richards:

101. I also agree.