

First-tier Tribunal Primary Health Lists

The Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care) Rules 2008

IN THE MATTER OF THE NATIONAL HEALTH SERVICE (PERFORMERS LISTS) (ENGLAND) REGULATIONS 2013

[2020] 4112.PHL VKinly

Hearing held by video link on 20, 21 and 22 April 2021
(deliberation on 23 April 2021)

BEFORE

**Ms S Brownlee (Tribunal Judge)
Ms M Harley (Specialist Member)
Dr H Freeman (Specialist Member)**

BETWEEN:

Dr Mazhar Ibrahim Khan

Appellant

-v-

NHS Commissioning Board

Respondent

DECISION

Venue: Remote hearing by Kinly Cloud Video Platform (CVP)

Representation:

Dr Khan was represented by Ms Iulia Saran, Counsel, instructed by Mr William Childs of Radcliffes LeBrasseur LLP.

Mr Andrew Hockton, Counsel, instructed by Miss Kiran Bhogal of Hill Dickinson LLP appeared for the Respondent.

The Tribunal heard oral evidence from Ms B, an ex-colleague of Dr Khan, Dr Khan, Dr Anita Houghton, Cognitive Behavioural Therapist and Dr John Hook, Consultant Medical Psychotherapist.

There were some observers present for the public hearing: Mr Richard Watson attended for professional development reasons and two observers from NHS England, Dr Hasamukh Sonigra, Deputy Medical Director for NHS England (London Regional Team) and Ms Trish Galloway, Deputy Regional Head of Professional Standards for NHS England (London Regional Team). Dr Angela

Lennox, GP and Deputy Medical Director for NHS England and NHS Improvement (London area) and Mrs Hannah De Merode, Independent Chair of the PLDP for NHS England and NHS Improvement (London area) were also in attendance during the public hearing.

The Appeal

1. This is an appeal by Dr Khan ('the Appellant'), a general practitioner, against a decision made by the Performers List Decision Panel ('PLDP') on 26 August 2020 to remove the Appellant from the Medical Performers List pursuant to Regulation 14(3)(d) of the National Health Service (Performers Lists) (England) Regulations 2013 ('the 2013 Regulations'). The Appellant appealed on 21 September 2020.
2. The Appellant was removed on the grounds of unsuitability. The right of appeal is provided under Regulation 17. It is an appeal by way of a rehearing. The Appellant submits that the decision to remove him from the Medical Performers List was disproportionate and the proportionate response would be to impose conditions on his inclusion on the list, which take into account his health.

The Hearing

3. This was a remote hearing which was not objected to by the parties. The form of remote hearing was by Kinly Cloud Video Platform ('CVP'). A face to face hearing was not held because it was not practicable and no-one requested the same. We considered that the issues in this appeal could be determined in a remote hearing. The documents that we were referred to are in the main electronic hearing bundle or the supplementary hearing bundle provided in advance of the hearing. Page references follow the pagination on the original bundles for ease of reference, given that the pagination between the main and supplementary hearing bundles was sequential.
4. There were no significant connectivity issues after all participants' connections were established on the first morning of the hearing.

The Law

5. Regulation 10(1) provides:

Where the Board consider it appropriate for the purposes of preventing any prejudice to the efficiency of the services which those included in a performers list perform..., it may impose conditions on a Practitioner's (b) continued inclusion in such a list.

6. Regulation 14 provides:

14 (3) The Board may remove a Practitioner from a performers list where any of the following is satisfied –

(b) the Practitioner's continued inclusion in that performers list would be prejudicial to the efficiency of the services which those included in that performers list can perform ("an efficiency case");

(d) the Practitioner is unsuitable to be included in that performers list ("an unsuitability case").

7. Regulation 15 provides:

15 (1) Where the Board is considering whether to remove a Practitioner from a performers list under regulation 14(3)(d), it is to consider –

(a) any information relating to that Practitioner which it has received pursuant to regulation 9;

(b) any information held by NHSLA about past or current investigations or proceedings involving or relating to that Practitioner ...; and

(c) the matters set out in paragraph (2).

(2) Those matters are –

(a) the nature of any event which gives rise to a question as to the suitability of the Practitioner to be included in the performers list;

(b) the length of time since the event and the facts which gave rise to it occurred;

(c) any action taken or penalty imposed by any regulatory or other body (including the police or the courts) as a result of the event;

(d) the relevance of the event to the Practitioner's performance of the services which those included in the relevant performers list perform, and any likely risk to any patients or to public finances;

8. Regulation 15 states that the same matters as those listed at Regulation 15(1) and (2) should be considered where the Board is considering whether to remove a Practitioner from a performers list under Regulation 14(3)(b) (an efficiency case).

9. The appeal is made under Regulation 17(2)(c). Regulation 17(1) provides that the appeal is by way of "redetermination". Regulation 17(4) provides that on appeal the First-tier Tribunal may make any decision which the Board could have made. Regulation 17(7) provides that the First-tier Tribunal may, following a request from the Practitioner or on its own initiative, review the First-tier Tribunal's earlier decision. Regulation 17(8) provides that such a review may not be made within the period of one year beginning with the date of the First-tier Tribunal's last decision on the appeal.

10. Therefore, we are required to make a *de novo* or fresh decision. This may

be informed by new information or material that was not available to the Respondent. The determination of the appeal includes consideration of the evidence provided by both sides in this appeal and the oral evidence and submissions made.

11. The Respondent bears the burden of proof insofar as any facts are in issue. The standard is the balance of probabilities. The exercise of the discretion under Regulation 14(3) requires a judgment to be made. The Respondent bears the burden of persuasion in this regard.

Background

12. Dr Khan qualified with MBBS in 1999 from the University of Mumbai. He moved to the UK in 2001 and obtained full registration with the GMC in 2002. On 9 October 2006, he became a GP and worked as a salaried GP at Heaton Medical Practice in Bradford from October 2006 until February 2010 and then he moved to another salaried GP role at Thornbury Medical Centre in Bradford and worked there until the end of 2011. At the start of 2012, Dr Khan joined Milton Keynes Village Practice as a GP partner and in February 2021, he started carrying out a weekly locum post at the Danes Camp Surgery in Northampton. Between August 2012 and August 2013, he worked as a sessional GP at the Mughal Medical Centre and also worked for an out of hours service. From August 2015 to 31 July 2018, he worked as a salaried locum GP at Heathrow Medical Centre and between May 2014 and 31 July 2018, he worked at the Otterfield Medical Centre. He started working at East Berkshire Primary Care out of hours service in August 2018 until he resigned from the post on 2 April 2019. He then took on various locum posts between 7 April and 26 November 2019.
13. Dr Khan appeared before the Medical Practitioners Tribunal between 12 and 20 May 2014. He admitted a number of facts and additional facts were found proved, relating to a sexual relationship and associated sexually motivated behaviour with a patient over approximately ten days in March 2012. The Tribunal found his fitness to practise to be impaired by reason of misconduct and he was suspended for 12 months. After a review hearing on 20 May 2015, Dr Khan returned to GMC registration, without restrictions, upon the expiry of the 12-month suspension. He was also subject to mandatory removal from the medical performers list for 12 months as a result of his suspension from the GMC register.
14. The medical director of East Berkshire Primary Care out of hours service raised concerns with the GMC in letters dated 23 May 2019 and 25 June 2019. The allegations concerned two female colleagues at the out of hours service who had raised concerns about the Appellant's behaviour towards them. Ms A provided screenshots of WhatsApp messages between Dr Khan and her. Ms B subsequently provided screenshots of WhatsApp messages between Dr Khan and her. NHS England became aware of the allegations after receiving a letter from the GMC dated 28 October 2019. As a result, the Appellant was suspended from the medical performers list and on 8 July 2020, a PDL panel decided that the case should proceed to an oral hearing to consider a proposal of removal. Dr Khan engaged with the

process through his solicitor, submitting an account on 14 July 2019, a Rule 7 response to the GMC's case examiners dated 14 April 2020, a reflective statement dated 10 June 2020 and written submissions dated 30 July 2020. Dr Houghton produced a statement which was also provided to the Respondent. Dr Khan did not attend the hearing before the PDLP, which took place on 19 August 2020. The decision was issued on 28 August 2020.

15. Dr Khan has accepted that he engaged in WhatsApp conversations with both women and that it was inappropriate to do so. He has offered an apology to both women, explaining that he now understands that he behaved inappropriately and unprofessionally, that he did not respect boundaries and that he did not uphold good medical practice.

Preliminary applications

16. Firstly, we considered the application made on behalf of the Appellant, pursuant to Rule 26(3) of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care) Rules 2008 ('the FtT Rules') – an application to hold part of the hearing in private on the basis that some of the oral evidence would concern Dr Khan's personal health and life history. There was no objection to the application. In light of the nature of the evidence, which we had read in advance, we were entirely satisfied that Dr Khan's privacy outweighed the public interest and determined it was proportionate to hold parts of the hearing in private. We also determined it was in the interests of justice to ensure anonymity remained in place for Ms A and Ms B. Throughout this decision, we will use that key, which was used throughout the oral hearing.
17. Secondly, the Appellant made an application to exclude Dr Sonigra and Ms Galloway from the hearing on the basis that they may have to provide evidence and it would be unfair for them to hear the application and submissions relating excluding Ms A's witness statement (which she provided to the GMC). We considered it unnecessary and disproportionate to exclude Dr Sonigra and Ms Galloway from the hearing, given the specific points on which they have provided witness statements. There was no real risk that their evidence would be compromised by hearing the application to exclude Ms A's witness statement, given that their evidence related solely to attempts to engage Ms A to facilitate her attendance at this hearing.
18. Thirdly, we dealt with an application to admit an amended expert report from Dr Hook. The amended report was dated 30 March 2021. The application was made pursuant to Rule 15(2)(a) of the FtT Rules. We accepted the point made by Mr Hockton, in objecting to the admission of the amended report – context was important to understand why the report had been amended, after being submitted as a final report dated 3 March 2021. To assist with context, we paid careful regard to Judge Khan's order of 17 March 2021 after a telephone case management hearing, during which Dr Hook's report dated 3 March 2021 was admitted by Judge Khan as late evidence, as well as being relied upon in support of an application to postpone the hearing. We also took into account the correspondence submitted by the Respondent in support of its opposition to the admission

of the amended report. The correspondence demonstrated that Dr Hook's report was considered by counsel (who is representing Dr Khan for the forthcoming GMC fitness to practise proceedings), who suggested alterations to the wording, specifically relating to the relationship between risk, return to work and workable conditions. We made an initial decision to exclude the report, as we had concerns with the manner in which Dr Hook initially indicated that his report required no further amendments, in his expert opinion (email dated 11 March 2021) in response to a query from Dr Khan's solicitor, in light of further information from Dr Khan. By way of an email dated 18 March 2021, Dr Hook was asked to consider the viability of conditions from counsel. He responded on that same day to confirm that Dr Khan was not ready for full time work at the moment and setting out a number of other considerations relating to risk reduction, return to work fitness and ability and willingness of an employer to put oversight measures in place. Dr Khan's solicitor then responded later on the same day to suggest conditions could include requirements to take certain steps before returning to practice and to then have some safeguards in place whilst back in practice. On 24 March 2021, Dr Hook responded to query the suitability of wording he was suggesting. On 25 March 2021, Dr Khan's solicitor responded with counsel's preference for the wording and asking Dr Hook if he would be prepared to use the wording from counsel. Later, on 25 March 2021, Dr Hook responded to confirm he had amended the report as suggested by counsel.

19. The Appellant submitted that some degree of consultation between experts and lawyers is entirely proper and that the expert opinions could be properly tested in cross examination and from the Tribunal as Dr Hook would be attending to provide oral evidence. The Respondent's key concern was that the report of 3 March 2021 was served as a final report with no suggestion the report was conditional or likely to be modified, beyond the indication that Dr Hook had not seen Dr Khan's GP records. The changes made to the report of 30 March 2021 were at the behest of counsel, which, in the Respondent's view, called into question the independence of Dr Hook.
20. At the beginning of the hearing, we reached the decision that it would be unfair to admit the later report of 30 March 2021. We considered the wide discretion we have at Rule 15, the fact that Dr Hook would be available for questioning against the context in which the material modifications were made to the report and the very late nature of the evidence. We also considered the observation from Lord Wilberforce in *Whitehouse v Jordan*, that while some degree of consultation between experts and legal advisers is entirely proper, it is necessary for the expert evidence presented to a court to be the independent product of the expert, uninfluenced as to form and content by the exigencies of litigation. We were concerned that the changes to the report of 30 March 2021 were overly influenced by the position of counsel to such a degree that we could not safely rely on the expert opinion of Dr Hook on the question of risk, return to work and workability of conditions. However, after hearing the oral evidence of Dr Khan, we revisited the decision and decided to admit the report dated 30 March 2021. We considered that the issues addressed in Dr Hook's reports of 3, 8 and 30 March 2021 were now even more relevant to what we had to determine

as of the date of the hearing. We considered the procedural safeguards of cross examination and the level of weight we decided to afford to Dr Hook's opinions were adequate to ensure that it was, on balance, fair to admit the later report.

21. Fourthly, the Appellant requested a postponement. The Appellant accepted that the postponement application had been made at the telephone case management hearing of 10 March 2021 and refused, but submitted that time should be afforded to Dr Khan to implement the recommendations from Dr Hook with scope for an evaluation by Dr Hooks after six months. The added benefit of a postponement would be the allow the conclusion of the fitness to practice proceedings, for which a final hearing had been confirmed to start on 2 November 2021 (listed for 8 days). Ms Saran made the point that depending on the outcome of the fitness to practise hearing, this appeal may no longer remain live. Mr Hockton opposed the application, noting that it was a renewal of an application made and refused at the telephone case management hearing. He submitted that this appeal is not parasitic on the fitness to practise proceedings and as such, the fact that a hearing will occur in the near future is not a sufficient basis to postpone this appeal hearing. He also queried the reliance on Dr Hook's opinion on evaluation of risk, noting that even Dr Hook had conceded that the future position for Dr Khan's return to practise, from Dr Hook's perspective, is uncertain as to timelines.
22. We considered the overriding objective, as we are bound to do with applications of this kind, which includes the need to avoid delay, so far as compatible with proper consideration of the issues. We took into account what had changed since the application was made and refused in March 2021. We did not consider that there was any compelling evidence to justify a delay of approximately seven months to this appeal process, in order to 'wait and see' on the outcome of the fitness to practise proceedings, as well as any further clinical evaluation of Dr Khan following the implementation of therapy, as recommended by Dr Hook. We did not consider that such a delay was necessary to facilitate the proper consideration of the issues in this appeal. We could not ignore the fact that we had a number of witnesses ready to attend and give evidence at this appeal hearing and we did not consider that the forthcoming fitness to practise proceedings or the next steps planned with Dr Khan's treatment were of such fundamental importance to our decision making that a postponement was required. We refused the application to postpone.
23. Fifthly, we considered an application from the Appellant to exclude the witness statements of Dr Angela Lennox, GP and Deputy Medical Director at NHS England and NHS Improvement (London area) and Mrs Hannah De Merode, independent chair of the PDLP for NHS England and NHS Improvement (London area). Dr Lennox and Mrs De Merode were two of the four members on the PDLP which decided to remove Dr Khan on the ground of unsuitability in August 2020. They both provided witness statements which set out their accounts of the factors they considered in reaching the decision to remove him from the medical performers list.

24. Ms Saran relied on the overriding objective, referring to the need to deal with cases fairly and justly. She submitted that it would be entirely inappropriate for the Tribunal to consider the reasons of two of the four previous decision makers – reasons which are challenged as part of this appeal. Ms Saran made the point that the detailed decision is before the Tribunal, but we should not be unduly influenced by the factors taken into account by the previous decision makers. Mr Hockton submitted that the evidence from Dr Lennox and Mrs De Merode is routine in appeals of this kind and it was relevant to the redetermination we are required to undertake as the grounds of appeal specifically refer to the apparent failures of the decision-making process. He reminded the Tribunal of its wide-ranging powers on the approach to evidence.
25. We as a Tribunal started from the point that we are a specialist Tribunal, a factor which assists both parties' positions in this application, in that we have specialist expertise which means we are properly placed to approach a previous decision which is under appeal with caution and care. In that regard, there is an argument that the evidence of Mrs De Merode and Dr Lennox is not particularly relevant to the determination we embark upon in this appeal and presents little risk of unfairness because of the care and caution we would apply to it. However, we concluded that the decision letter, which details clearly the reasons of the IPDP for reaching its decision to remove Dr Khan, is sufficient evidence to establish the relevant factors the panel considered. We concluded that the witness statements of Mrs De Merode and Dr Lennox do not add materially to the decision of 28 August 2020, noting that it was the Respondent's intention to have them read. As such, we determined that the statements did not add to the process that we undertake in this rehearing. We concluded that it was not required in order for us to exercise our specialist expertise effectively, as per the overriding objective.
26. Sixthly, we considered an application to exclude the witness statement of Ms A, who had previously provided a witness statement to the GMC as part of its fitness to practise investigation relating to Dr Khan. Ms Saran made the point that Ms A was not present to provide evidence, despite the extensive efforts of the Respondent to secure her attendance. There were serious doubts, from the Appellant's perspective, as to the witness' credibility and reliability due to differences between her first account and the account set out in his witness statement of 8 December 2019 relating to an incident between Dr Khan and Ms A in his office. Dr Khan's recollection of that incident differed from that of Ms A and he had been consistent in that. As such and having regard to the principles from *Bonhoeffer v GMC* [2001] EWHC 1585 (Admin), it would be unfair not to exclude her statement, as she was not going to be available in order that her account could be tested in cross examination. Ms Saran submitted that the prejudice caused by Ms A not being available for questions could not be surmounted by the level of weight that could be attached, if the statement remained in evidence. She stated that there was no explanation as to why she was absent from the hearing – she had simply failed to engage by responding to the Respondent's attempts at contact.

27. Mr Hockton responded by drawing our attention to the evidence from Dr Sonigra and Ms Galloway, in which they set out the attempts they had made to engage Ms A in order to secure her attendance at the hearing, but also the fact that Ms A had previously indicated she was happy for her GMC witness statement to be used in this appeal. Mr Hockton stated that this was not an appeal in which there was substantial factual dispute between the parties – Dr Khan broadly accepted the account given by Ms A. In light of the public interest, as well as the corroborative evidence (in the form of the WhatsApp messages), the steps taken to secure Ms A's attendance and the lack of factual dispute on the central issue relevant to this appeal, Mr Hockton submitted that the hearsay evidence was admissible, it remained fair to admit it and the question was one of weight to attach to it.

28. We considered this application to exclude very carefully, having regard to the decision we have to make in this appeal, the flexible and wide-ranging nature of evidence we are entitled to consider, subject to fairness principles. We considered the extent of the factual dispute between Ms A and Dr Khan. We asked the parties to review the witness statement of Ms A, overnight, in an effort to explore the possibility of agreeing redactions, bearing in mind that much of her evidence was not in dispute. The parties were able to agree a set of redactions and submitted the updated witness statement. The Appellant's primary position remained that the witness statement in its entirety should be excluded. With the redactions in place, which covered the incident which was in dispute between the parties, we concluded that the threshold for unfairness was not met and we could, with proper consideration of weight, consider the evidence of Ms A. The application to exclude her statement in its entirety was refused.

Issues

29. We consider the core issues to be:

1. Are any of the grounds made out under Regulation 14(3) of the National Health Service (Performers Lists) (England) Regulations 2013?
2. If so, should the discretion to remove the Appellant from the medical performers list be exercised?

30. We also considered and made findings on each of the eight allegations set out in the agreed schedule of issues, included in the main hearing bundle.

Evidence

31. The Tribunal had in evidence before it a main hearing bundle consisting of 462 pages of documentary evidence which included the appeal, response and directions made prior to the final hearing, the parties' further evidence, witness statements, the 2013 Regulations, the NHS England framework for managing performers concerns and the decision of the PDLP. In addition to the main hearing bundle, we had the following documents (using the descriptions given to the bundles/documents by the parties which submitted them):

- (a) A supplementary hearing bundle relating to preliminary issues for determination which consisted of 104 pages;
- (b) An additional documents bundle which ran to 236 pages;
- (c) The Appellant's skeleton argument (9 pages);
- (d) The Appellant's authorities bundle (83 pages);
- (e) The Respondent's skeleton argument and supporting documents (relating to the preliminary issues) (80 pages);
- (f) The Respondent's authorities bundle (114 pages); and
- (g) Two additional cases submitted by the Respondent, relating to the preliminary issues: (1) *Whitehouse v Jordan* [1981] 1 WLR 246 (1980); and (2) *GMC v Stone* [2017] EWHC 2534 (Admin).

The Appellant's position

32. The Appellant broadly accepted the factual background. However, it remained Dr Khan's position that it would be disproportionate to remove him from the medical performers list on the basis of unsuitability. In the alternative, he argued that the most appropriate response would be to consider the facts as supporting some form of regulatory action on the grounds of efficiency, due to his ongoing health concerns, which influenced his decision making at the material time. As a result, Dr Khan asks us to consider conditions on his continued registration on the medical performers list in order to meet the risk he currently presents – risk which he accepts is ongoing.

The Respondent's position

33. The Respondent's position remains as it was at the time of the original decision making – namely, that in light of the nature of the incidents involving Ms A and Ms B, coupled with the previous incident involving Dr Khan having a sexual relationship with a patient, for which he faced regulatory action from the GMC, the decision to remove him on the grounds of suitability was a reasonable one.

The Tribunal's conclusions with reasons

34. We have considered all the evidence and submission which were before us, after hearing legal argument and reaching decisions on the preliminary matters raised by the parties. If we do not refer to any particular part of the evidence or submission in our reasoning, it should not be assumed that we have not considered them.

Allegations 1 and 2

35. Allegation 1 is that Dr Khan sent WhatsApp messages to Ms A using the WhatsApp messaging service from 12 March 2019 onwards. Dr Khan accepted this. Therefore, we found it proved.

36. Allegation 2 is whether the WhatsApp messages to Ms A were inappropriate in content. During questioning and as set out in his earlier responses to NHS England, Dr Khan accepted they were inappropriate in content. As

such, we found this allegation proved.

Allegation 3

37. Allegation 3 concerns Dr Khan's behaviour towards Ms A, as described in her witness statement dated 9 December 2019 and her account of 3 April 2019, which were admitted in evidence, in a redacted form, on the second day of the hearing. Dr Khan accepted that he was attracted towards Ms A. He explained, in his evidence, that while there may have been a sexual relationship at some point with Ms A, this was not his sole intention in engaging in conversations with her, most of which took place over WhatsApp. In cross examination, Dr Khan did not accept that his decision to develop a relationship with Ms A was sexually motivated.
38. We considered the evidence of Dr Khan on this point carefully. He stated that he was attracted to Ms A and face to face, she appeared fond of him, smiling at him and contacting him when his work system crashed to make a joke. He explained a time when Ms A came into his consultation room and sat in front of him and shared information about her personal life in a friendly way. Dr Khan thought he read cues that she was fond of him too. He explained how he could see now, from her text messages, there were not many from her in response to his. He stated that he was sure some had been deleted. Dr Khan was unable to support this point further as he explained how he had deleted his WhatsApp messages with Ms A and Ms B a short time after the matters came to light in April 2019 as his son sometimes used his phone. He did not think Ms A was disturbed by his messages. He was very fond of Ms A in every way and began to like her a lot and love her. He accepted that he was trying to develop a personal relationship with her as he fancied her. He accepted that he praised Ms A's looks in the messages and he was excited as he believed she liked him and he could end up in a relationship with her – he read the messages now and accepted that they are hugely embarrassing, but he did not see anything sexual in them. He explained that he misinterpreted her kindness and her respect for him and upon reflection there was a power imbalance between a younger female receptionist and an older male doctor. Professional boundaries between colleagues had not been covered in the course which Dr Khan completed after his relationship with a patient in 2014. At the time of the messaging of Ms A, he did not appreciate that he was crossing professional boundaries and there was a power imbalance – he accepted that he knew that now.
39. Dr Khan stated that he was pursuing a relationship and it could have turned sexual if the feelings were mutual. He explained that she had come to his consultation room and explained some personal issues she was having and he had touched her hand in an effort to reassure her. He accepted that they also shared a hug and it was mutual – with both of them leaning their upper torsos towards one another to an extent where their bodies touched. Dr Khan was asked to clarify the submissions made on his behalf by his solicitor on 14 April 2020 (in relation to the fitness to practise investigation). He confirmed that he must have read the letter before it was submitted. The significance of this is that the letter sets out that Dr Khan accepted that he

had sought a personal relationship with Ms A, including having romantic and sexual feelings for her. In that letter, he denied that his behaviour towards Ms A, in the meeting in the consultation room, was sexually motivated. In cross examination, Dr Khan accepted that in the grand scheme of things, he was looking for a sexual relationship as well as a personal one.

40. We considered the redacted witness statement of Ms A and the redacted account from 3 April 2019. We found Ms A's evidence, when read alongside the particular WhatsApp messages she sent to Dr Khan, to support the position that Ms A was uncomfortable with the attention from Dr Khan. We took into account her position as a receptionist, who was, at the time, in her early twenties. We had no doubt that the relationship between Ms A and Dr Khan, a relationship which Dr Khan pursued in the context of work and through a number of WhatsApp messages, was because he wished to pursue a personal, sexual relationship with Ms A due to his accepted attraction to her, physically and emotionally. This much can be inferred from the content of the WhatsApp messages.
41. We concluded that it was more probable than not that Dr Khan was sexually attracted to Ms A and his behaviour was motivated by his sexual attraction towards her. We have no doubt that his actions, in messaging Ms A and in hugging her in the consultation room were inappropriate and motivated by his attraction to her.

Allegations 4 and 5

42. Allegation 4 is that Dr Khan sent WhatsApp messages to Ms B using the WhatsApp messaging service during 2018 and 2019. Again, this was accepted by Dr Khan and we found it proved.
43. Allegation 5 is whether the WhatsApp messages to Ms B were inappropriate in content. During questioning and as set out in his earlier responses to NHS England, Dr Khan accepted they were inappropriate in content. As such, we found this allegation proved.

Allegation 6

44. Allegation 6 is whether Dr Khan's behaviour towards Ms B was inappropriate. Dr Khan accepted that as he saw it, in looking back, his behaviour has been unprofessional.
45. We heard oral evidence from Ms B. She explained that the WhatsApp messages from Dr Khan made her feel more uncomfortable as time went on and she felt awkward and was not sure how to respond. She stated that she would start to get anxious and had palpitations when she had to go to work and be in the same room as Dr Khan. Ms B set out the background to her working relationship with Dr Khan. He had joined the centre in August 2018 and she developed a good working relationship with him, but she believed that he crossed boundaries and he started to do that in early 2019. She explained that she tried to look for the best in everyone. She had a gut instinct that something was wrong, but she was trying to see the best in

Dr Khan and looking back at it, she wished she had trusted her instincts and followed through on them. She reiterated that the WhatsApp messages were unprofessional and did not accept that she was flirting with him. She was trying to keep the relationship professional, explaining that if you're going to work with someone, you do not want to make it more intentionally difficult for yourself. She was being friendly and trying to think of the good and understanding that Dr Khan may have been stressed by matters in his personal life. She explained that when she looks at the WhatsApp messages now, she can see how she was very bothered by them and gave the example of using emojis when she felt awkward and didn't know what to say. Ms B explained how she discussed the issue with her husband and he helped her compose messages in response to Dr Khan in an effort to communicate the message that she wanted to have a professional relationship with him. She spoke with her husband about it in February and March 2019 as she thought the behaviour was becoming more persistent and crossing the professional boundary line.

46. Ms B accepted that Dr Khan would praise her work and in meeting, he would acknowledge the hard work she was putting in and he never asked her for favours. She explained that upon reflection, she felt that he was very much liked by the CEO, who listened to Dr Khan's advice and recommendations. This was confirmed by Dr Khan's evidence – that he had a good working relationship with the CEO, who would call upon him for input. Ms B felt that Dr Khan could have abused his power in the relationship she had with him and that if he had helped her with something, she would have felt indebted to him. She considered that if he had helped her with career progression, it would have been a situation where he would have felt she was indebted to him.

47. She explained that she did not want to enter into a relationship with him and she did not flirt with him during the course of the WhatsApp conversations. She explained how she would use an emoji or remind Dr Khan of his family in response to something she considered awkward or unprofessional. As an example, she referred to an exchange of messages which Dr Khan sent over a period of two minutes. He sent them in response to Ms B referring to Dr Khan concentrating on himself and his kids and saying the rest would sort itself out. Dr Khan replied (at page C35 of the bundle):

'Ur so wrong/This has been ongoing for the past 6 years/I have never felt this way./And I wasn't looking for comfort elsewhere either. Just go on with my life/So it's got nothing to do with my present life. Tbh [Ms B] even if home life was good I would have felt the same about u/Honest answer/Something in u/Why r u so good?/In every way/so smart extremely pretty intelligent humble honest and more/she will let me spend some time but she decides where/it's all obvious. I just go on my own/So back to the plan. Are u willing to come with me?'

Ms B responded:

'That doesn't sound fair.....have you tried couple counselling etc'.

48. We noted the WhatsApp exchange between Dr Khan and Ms B (at page C36 of the bundle), in which Dr Khan texted 'I miss u [Ms B]/Sorry I cant [sic] be professional with u', to which Ms B responded by sending an emoji of a woman slapping her face. At page C54, Dr Khan has texted Ms B to ask her to go on a conference with him. Ms B responded to let him know that she would give him her ticket if he wanted to go to an international conference. Dr Khan texted 'I don't wanna go alone lol/Up to u. Sorry prob asking for too much at this stage from u/U can have a go st [sic] me'. Ms B texted back 'Me – Maz = professional [followed by a laughing and crying face emoji] Maz see that line. It's the professional line'. Dr Khan responded 'Come on' to which Ms B responded 'Keep that line there'. Dr Khan then responded 'Ur joking aren't u/U serious?/[Ms B] and a downcast face emoji. Ms B responded with 'We do need to keep everything professional/True?', to which Dr Khan countered 'I keep saying Ill [sic] try/I cant [sic] though/I slip'. We took these as three of many examples of Dr Khan's unprofessional contact with Ms B, which, on our reading and her explanation, made her feel awkward.
49. Ms B explained that when she would tell Dr Khan of the need to keep things professional, he would say she was stubborn or needed to change her mind. She stated that it made her feel irritated and a sense of awkwardness with the situation and as time went on, she started to feel more anxious. She thought they had a good working relationship and needed to focus on making the centre a good place to work.
50. We did not accept the proposition, put to Ms B in cross examination, that she had flirted with Dr Khan. Furthermore, we did not accept the assertion from Dr Khan that the relationship with Ms B was based on admiration and was a platonic one. We consider, from the tone and content of the WhatsApp messages Dr Khan sent to Ms B, that he was attracted to her. At one point, he makes reference to how stunning she is and how she should have considered modelling, calling her drop dead gorgeous, referring to the fact that he kept staring at her, her lips, eyes and smile and calling her gorgeous on a number of occasions. Notably, he also, at one point, observed that every time he tried to come close to anyone, they called it quits and that he would wait for her. We have concluded, that it was more likely than not that Dr Khan was attracted to Ms B, was aware that his contact was inappropriate and unprofessional, but pursued it as he wished to have some form of personal relationship with Ms B.

Allegation 7

51. Allegation 7 required us to consider whether Dr Khan's behaviour in relation to Ms A and Ms B was repetitive in nature and fell below the standard of behaviour expected of a GP. We took into account the fact that for part of the time, Dr Khan's contact with both women overlapped and, as he explained in his evidence, did so at a time when he was feeling isolated, lonely and with no one to whom he could talk. We noted the similarities between his contact with both women – sending them a number of messages commenting on their appearance, how they made him feel and sharing details of his personal life and difficulties with them. We concluded

that there were sufficient similarities in his course of conduct towards both women to demonstrate they were a repetition of behaviour. Furthermore, in considering the evidence which was before us of Dr Khan's previous relationship with a patient; a relationship which started after Dr Khan retrieved the patient's telephone number from the practice at which he worked and reached out to the patient, demonstrates a repetition of behaviour – namely engaging in telephone contact with women to whom he has an attraction, telling them of his feelings for them and making it clear that he will wait for them.

52. We noted the evidence of Dr Khan, in cross examination, when he eventually accepted that the text messages he sent to both women demonstrated serious breaches of good medical practice. We have no doubt, having regard to the matters accepted by Dr Khan, as well as the matters we have found proved that they demonstrate a falling below the standard of behaviour expected of a GP.

Allegation 8

53. Allegation 8 is the crux of this appeal, which is a determination of this core question as of the date of the hearing. We are asked to make a decision, based on our findings and the admissions of Dr Khan in relation to allegations 1 to 7, as to his suitability to remain on the medical performers list. It is worth noting that suitability concerns a lack of the necessary characteristics for continued inclusion on the medical performers list – such as integrity and insight of the practitioner. We took into account the statutory framework to guide our approach to decision making on this ultimate question from the agreed schedule of issues in this appeal. As a matter of law, conditions cannot be imposed on a person considered to be unsuitable, However, conditions can be imposed on a practitioner in an efficiency case, provided that conditions can be formulated which can meet the inefficiency considered to be engaged in the practitioner's continued presence on the medical performers list. In the exercise of judgment, in this regard, it is fair and proportionate to firstly consider whether efficiency grounds are engaged in this appeal.

54. Dr Khan's position is that he accepts that efficiency grounds continue to be engaged in this case. The argument for this is underpinned by the considerable oral evidence we heard from Dr Khan as to his personal history and his current health. We also heard oral evidence from Dr Houghton and Dr Hook on these issues, as well as an assessment of foreseeable risk and steps which could be undertaken, if any, to meet that risk to such an extent that workable conditions could be put in place.

PARAGRAPHS 55 TO 64 IN PRIVATE – NOT FOR PUBLICATION

65. We attached limited weight to the reasons for Dr Hook's changes to his report. However, we concluded that we could properly rely on the evidence he provided as to the extent of Dr Khan's difficulties and the fact that he undoubtedly has significant work to complete in order to get to a point where he presents with minimal and manageable risk, in the context of returning

to work for the NHS. Where we found it difficult to attach weight to Dr Hook's evidence was on his change in position between 3 and 30 March 2021 and in providing clear evidence as when and what conditions might be appropriate for Dr Khan's continued position on the medical performers list.

66. Furthermore, we had real concerns with the evidence from Dr Khan. He is currently demonstrating limited insight into the significance of the incidents in early 2019. At various points in his evidence, as well as in the line of questioning to Ms B, Dr Khan suggested that he misread Ms B in some way, that she was being flirtatious with him or that she encouraged him. We do not accept that – Ms B was a credible and impressive witness who remained consistent in her account under sustained questioning. We found her account of how she tried to manage Dr Khan's approaches and inappropriate contact to be entirely credible and we accepted the obvious impact the incident had on her. We have concluded that Dr Khan attempted, at various points in his oral evidence, to minimise the seriousness of his actions and to apportion blame for any misunderstanding on Ms A and Ms B. We have no doubt that Dr Khan's ongoing and currently untreated health issues contribute, at least in some part, to why he cannot fully accept responsibility for his behaviour and a clear and unambiguous understanding of how inappropriate his behaviour was, the impact it had on both women and the imbalance in the power between him and both women. We have also concluded that this limited insight, contributed to by his ill health, places him at real risk of repetition of the incidents of 2019. He clearly needs to complete focused work on his remediation, which will be aided a great deal by access to appropriate therapeutic intervention through engaging constructively with his GP and securing his family's support by speaking openly about the difficulties he is facing. We, as a Tribunal, saw the impact that Dr Khan's ongoing ill health is having on him in how he provided his oral evidence. He clearly has serious health issues to work through and we hope he is able to work on them over the coming 12 months and more, with the support of his family.
67. We have concluded that Dr Khan's failures to adhere to appropriate professional boundaries with Ms A and Ms B clearly engages efficiency considerations. We first considered whether there were any workable conditions which could be put in place to prevent any prejudice to the efficiency of services, pursuant to Regulation 10(1)(b) of the 2013 Regulations. We concluded that there was not. We carefully considered the evidence before us, which included an unclear position as to what conditions would be appropriate, even in the foreseeable future (of within the next 12 months). We carefully worked through whether there were any conditions which could meet the risk which Dr Khan currently poses and which could stand as a proportionate response to the seriousness of the matters accepted by Dr Khan and found proved by the Tribunal. We concluded that there were not.
68. We paid regard to the wider public interest in a case of this kind, in which risk is currently ongoing, pending, at the very least, completion of a period of therapy and a full re-evaluation by a suitably placed expert. Furthermore, we considered that the incidents were serious and clearly prejudice the

efficient delivery of service to such an extent that this renders Dr Khan's continued presence on the medical performers list inefficient, within the definition at Regulation 14(3)(b) of the 2013 Regulations. As part of our consideration of removal under Regulation 14(3)(b), we took into account, as we are obliged to do so, past and current investigations relating to Dr Khan. We noted the circumstances surrounding his suspension from the GMC register for 12 months and the link which Dr Hook made between Dr Khan's ill health, as well as the past misconduct relating to a patient and the incidents from 2019, involving Ms A and Ms B.

69. We took full account of the impact of this decision on Dr Khan's career and his clear commitment to his work as a GP, as well as his current serious ill health. Notwithstanding that, we have concluded that he is also unsuitable to be included on the Respondent's medical performers list at this time, as the underlying health concerns which Dr Khan has cannot be treated efficiently. We have concluded that removal, on the grounds of inefficiency and unsuitability is the necessary, proportionate and reasonable response to the facts which have been admitted and found proved, taking into account Dr Khan's previous history, current health, ongoing risk and the public interest in the maintenance of NHS England's medical performers list.

Decision

The appeal is dismissed.

The Respondent's decision of 26 August 2020 to remove the Appellant from its performers list under Regulation 14(3) of the National Health Service (Performers Lists) (England) Regulations 2013 is confirmed.

Tribunal Judge S Brownlee

First-tier Tribunal (Health, Education and Social Care)

Date issued: 14 May 2021