Case No: CO/4526/2014

Neutral Citation Number: [2015] EWHC 822 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31 March 2015

Before :

MRS JUSTICE LANG

- -

Between :

THE PROFESSIONAL STANDARDS AUTHORITY — **Appellant**

- and -

(1) THE HEALTH AND CARE PROFESSIONS COUNCIL

(2) BENEDICT DOREE — **Respondents**

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- -

Alexis Hearnden (instructed by **Field Fisher**) for the **Appellant**
Nicola Greaney (instructed by **Bircham Dyson Bell**) for the **First Respondent**
Paul Reid (instructed by Direct and Public Access) for the **Second Respondent**

Hearing date: 17 March 2015

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Judgment

Mrs Justice Lang:

1. The Professional Standards Authority ("the Authority") has referred to the High Court a decision of the Conduct and Competence Committee ("CCC") of the Health and Care Professions Council ("the Council"), made on 24 July 2014, in respect of a registered prosthetist/orthotist, Mr Doree.

2. The CCC found that Mr Doree had bullied one colleague and sexually harassed another, and that his actions amounted to misconduct, as a result of which his fitness to practise was impaired. It imposed a Caution Order for a period of 5 years.

3. The referral under section 29 of the National Health Service Reform and Health Care Professions Act 2002 ("the 2002 Act") was on the grounds that the sanction imposed was unduly lenient and that, if some allegations had been differently drafted or amended, the CCC would have found them proved instead of 'not proved'.

Allegations and findings

4. The amended allegations (allegation 1 was amended by deletion) were as follows:

> "Matter 1 – FTP0404026:
>
> 1. Drove your car at colleague A ~~which resulted in colleague A sustaining a soft tissue injury to his right rotor cuff.~~
>
> 2. The matters set out in paragraph 1 amounts to misconduct.
>
> 3. By reason of your misconduct your fitness to practise is impaired.
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> Matter 2 – FTP26690:
>
> Whilst registered as a Prosthetist/Orthotist, between 2009 to 2011:
>
> 1. You bullied Colleague A in that you:
>
> a. drove in an intimidating manner towards Colleague A, on a number of occasions, while he was cycling;
>
> b. repeatedly stared and/or glared at colleague A;
>
> c. repeatedly stood close to Colleague A which made him uncomfortable;
>
> d. called Colleague A various inappropriate names in front of colleagues and/or public including:
>
> i. Cock sucker;

ii. Steve's bitch;
iii. Bitch; and
iv. chicken.

e. continued to call Colleague A names even though he had expressed to you that made him uncomfortable;

f. publicly asked Colleague A if his "arse was sore from Steve" or words to that effect;

g. publicly made chicken noises and/or played chicken noises from a mobile phone application at Colleague A;

h. said to Colleague A, "You're a fucking cock sucker and would suck anyone's cock to get on that course" or words to that effect;

i. told Colleague A you had obtained a picture of his wife from a social network website and that you would be keeping that picture in your "wank bank" or words to that effect.

2. You demonstrated inappropriate sexual behaviour towards Physiotherapist B in that you:

a. said to Physiotherapist B: "My wife's called (removed) and she's a dirty slut, you're called (remove), are you a dirty slut?" or words to that effect;

b. ran over to Physiotherapist B whilst she was checking a treadmill, unzipped your trousers, lay on your back on the floor and said, "get on that and ride that baby" or words to that effect, whilst thrusting your pelvis upwards as if simulating sexual intercourse:

c. on one occasion, opened your legs and pointed at your crotch and said to Physiotherapist B to, "suck on that" words to that effect;

d. on another occasion, you pointed at your crotch and said to Physiotherapist B "sit on that" or words to that effect;

e. whenever Physiotherapist B yawned or opened to say something, you would say "Do you want something to fill that mouth" or words to that effect;

f. continued your actions in 2e) even though Physiotherapist B told you to stop;

g. unzipped your trousers, pushed Physiotherapist B's head into your crotch and thrust your pelvis towards Physiotherapist B as if simulating oral sex, on at least 3 occasions;

h. frequently entered the therapy office when Physiotherapist B was alone and massage her shoulders, grab her ponytail and start twirling it around your finger;

i. on one occasion, in front of office administration staff, you came behind Physiotherapist B while she was bent down and gestured behind her in a sexual manner as if simulating sexual intercourse;

j. took a picture of Physiotherapist B who was acting as a model in a hoist sling demonstration and had her legs apart in the hoist sling;

k. mentioned on at least 4 occasions to Physiotherapist B that when you ejaculate, you have blood in your seminal fluid;

l. discussed your daughter's 18th birthday party with Physiotherapist B and another colleague where you commented how pretty and good looking all the girls were and how they were only 17 and 18 and gestured with your hands, mimicking as if you were holding a pair of breasts.

3. Your actions in paragraphs 1i, 2a to 2l were sexually motivated.

4. The matters described in paragraphs 1a to 1i, 2a to 2l and 3 constitute misconduct.

5. By reason of that misconduct your fitness to practise is impaired."

5. The reason for the amendment to the first allegation, deleting the reference to a rotor cuff injury, appears to have been that, in the course of the criminal proceedings, a medical report dated 14 December 2010 in the complainant's medical records revealed that the complainant had in fact sustained a right rotor cuff injury in a previous accident. This contributed to the prosecution's decision to offer no evidence on the charge of assault occasioning actual bodily harm. Thereafter the Council also decided not to rely upon the allegation that he had sustained a rotor cuff injury in this incident.

6. The facts proved were as follows:

Case FTP04026: paragraphs 1 and 3.

Case FTP26690: paragraphs 1c, 1d, 1e, 1h, 1i, 2a, 2b, 2c, 2d, 2e, 2f, 2g, 2i, 2k, 2l, 3 (in part).

7. The facts not proved were in Case FTP26690: paragraphs 1a, 1b, 1f, 1g, 2h, 2j, and 3 (in part).

8. The CCC found that Mr Doree's behaviour fell below the standards in the Council's 'Standards of Conduct, Performance and Ethics' and in the 'Standards of Proficiency for Prosthetists/Orthotists'. It was a prolonged and sustained pattern of behaviour targeting more than one susceptible member of staff. It clearly amounted to misconduct.

9. The CCC went on to find that his fitness to practise was impaired by reason of his misconduct. Despite Mr Doree's long and unblemished career, the absence of any recurrence of such conduct, and his efforts to remediate his behaviour, his insight was limited and there remained a risk of repetition. His conduct fell below the standards expected of a health professional and thus had an adverse effect on the reputation of his profession.

10. As to sanction, the CCC was of the view that conditions of practice to address bullying and harassment would not be practical, and that suspension would be punitive and disproportionate in all the circumstances particularly where there were no issues with patient interaction. Mr Doree had been an exemplary employee and was highly commended for his work with patients. In over 20 years, no other complaints had been made against him. His behaviour may have been affected by serious family health issues at that time. The CCC heard positive testimonials from current colleagues as to his interaction with co-workers and was satisfied that the risk of repetition was low. A Caution Order would be an appropriate sanction to mark his misconduct, and to address the wider public policy issues.

Law

11. Pursuant to section 29(4) of the 2002 Act, the Authority may refer a case to the High Court where it considers that:

> "(a) a relevant decision falling within subsection (1) has been unduly lenient, whether as to any finding of professional misconduct or fitness to practise on the part of the practitioner concerned (or lack of such a finding), or as to any penalty imposed, or both
>
> …
>
> and that it would be desirable for the protection of members of the public for the Council to take action under this section."

12. Where a case is referred to the High Court, it is to be treated as an appeal (s.29(7)).

13. In *Ruscillo v Council for Regulation of Healthcare Professionals* [2004] EWCA Civ 1356, Lord Phillips MR gave the following guidance on the test of "undue leniency":

> ""73. What are the criteria to be applied by the Court when deciding whether a relevant decision was "wrong"? The task of the disciplinary tribunal is to consider whether the relevant facts demonstrate that the practitioner has been guilty of the defined professional misconduct that gives rise to the right or duty to impose a penalty and, where they do, to impose the penalty that is appropriate, having regard to the safety of the public and the reputation of the profession. The role of the Court when a case is referred is to consider whether the disciplinary tribunal has properly performed its task so as to reach a correct decision as to the imposition of penalty. Is that different from the role of the Council in considering whether a relevant decision has been 'unduly lenient'? We do not consider that it is. The test of undue leniency in this context must, we think, involve considering whether, having regard to the material facts, the decision reached had due regard for the safety of the public and the reputation of the profession."
>
> …..
>
> "75. The reference to having regard to double jeopardy when considering whether a sentence is unduly lenient is not, as we have already indicated, really apposite where the primary concern is the for the protection of the public. More apposite is this passage in …. *Attorney General's Reference (No. 4 of 1989)* (1990) 90 Cr App. R. 266:
>
> > "The first thing to be observed is that it is implicit in the section that this Court may only increase sentences which it concludes were unduly lenient. It cannot, we are confident, have been the intention of Parliament to subject defendants to the risk of having their sentences increased – with all the anxiety that this naturally gives rise to – merely because in the opinion of this Court the sentence was less than this Court would have imposed. A sentence is unduly lenient, we would hold, where it falls outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate. In that connection regard must of course be had to reported cases, and in particular to the guidance given by this court from time to time in so-called guideline cases. However it must always be remembered that sentencing is an art rather than a science; that the trial judge is particularly well-placed to assess the weight to be given to various competing considerations; and that leniency is not in itself a vice. That

> mercy should season justice is a proposition as soundly based in law as it is in literature.""
>
> "76. … We consider that the test of whether a penalty is unduly lenient in the context of section 29 is whether it is one which a disciplinary tribunal, having regard to the relevant facts and to the object of disciplinary proceedings, could reasonably have imposed…"
>
> "77. … In any particular case under section 29 the issue is likely to be whether the disciplinary tribunal has reached a decision as to penalty that is manifestly inappropriate having regard to the practitioner's conduct and the interests of the public."
>
> "78. … Where all material evidence has been placed before the disciplinary tribunal and it has given due regard to the relevant factors, the Council and the Court should place weight on the expertise brought to bear in evaluating how best the needs of the public and the profession should be protected. Where, however, there has been a failure of process, or evidence is taken into account on appeal that was not placed before the disciplinary tribunal, the decision reached by that tribunal will inevitably need to be reassessed.""

14. Lord Phillips gave guidance on the Court's approach if it found there had been a "serious procedural or other irregularity", such as under-prosecuting, or omission of relevant evidence, which could result in an unduly lenient decision. In such cases, the Court may not be able to decide whether or not the penalty was appropriate or not, and may have to remit the case to the Tribunal with directions on how to proceed (at [72]).

15. In *Council for the Regulation of Healthcare Professionals v Nursing and Midwifery Council & Michelle Kingdom* [2007] EWHC 1806 (Admin) and *Professional Standards Authority v General Chiropractic Council & Briggs* [2014] EWHC 2190 (Admin), the Administrative Court allowed appeals and remitted cases for re-hearing where an allegation of dishonesty had been omitted from the charge formulated by the regulator.

The Authority's grounds

16. The Authority's grounds may be summarised as follows:

    a) The Council drafted allegations 1(f), 2(h) and 2(j) in a manner which was not supported by the evidence and so they were found not proven. Alternatively, the Council should have applied to amend these allegations or the CCC should have made the amendments on its own initiative.

    b) The sanction was perverse and manifestly inappropriate. In reaching its decision, the CCC had failed to have proper regard to the relevant factors, gave

disproportionate weight to factors of limited relevance, and erred in its application of the 'Indicative Sanctions Policy' ("ISP").

c) The CCC failed to provide adequate reasons for its decision.

17. The Council was willing to consent to an order remitting the case back for re-determination, but only on the limited basis that the CCC's reasons for its decision were not sufficiently clear to demonstrate that the CCC had due regard to the safety of the public, the reputation of the profession and the need to maintain confidence in the profession, and the ISP. The Council did not concede that the decision on sanction was wrong, irrespective of the reasoning.

18. The Council's skeleton argument did not address the criticisms made of the Council's drafting of the allegations, and its failure to apply to amend them. When pressed on this issue in court, counsel had to take instructions. On taking instructions, she conceded that the allegations as drafted were not supported by the evidence. I mention this, not to embarrass counsel, but because I have concluded that this concession was wrongly made, and I consider this may be because it was made in haste, without sufficient analysis. The Council submitted that, even if the allegations had been amended, and proved, it would have made no difference to the sanction.

19. Mr Doree resisted the appeal on all grounds. He submitted that the sanction, though lenient, was not 'unduly' lenient, because of the exceptional circumstances of his case. He had a long and exemplary career, without any other complaints made against him.

20. In relation to the driving misconduct, he had been punished by being made subject to criminal proceedings (abandoned at the Crown Court, with a bindover) and disciplinary proceedings (resulting in summary dismissal in June 2011). The complaints of bullying by Colleague A and harassment by Physiotherapist B, between 2009 and 2011, were only made known to him in April 2013; there had been no prior complaints. These events took place a long time ago, and it was unduly prejudicial to Mr Doree to prolong the process any further.

21. Although Mr Doree denied the allegations, he had shown some insight and remorse. He had taken courses to improve his awareness of bullying and harassment, and moderated his behaviour in his new employment. His new employers spoke favourably of his interaction with other staff. Most importantly of all, no patient was ever affected adversely by the misconduct proved against him.

Ground (a): the drafting of the allegations

22. **Allegation 1(f)** was that Mr Doree "publicly asked Colleague A if his "arse was sore from Steve" or words to that effect".

23. The CCC was satisfied, on the balance of probabilities, that Mr Doree asked Colleague A this question, or words to that effect. However, it was not satisfied that the incident occurred publicly and so found the allegation not proved.

24. I am unable to agree with the submission that the allegation that these words were spoken "publicly" was not supported by the complainant's complaint, and therefore the Council should not have included it in the charge. In his witness statement, Colleague A said:

> "Towards the end of 2009, Benedict Doree began calling me names in public. He would make sexually explicit comments and would call me names such as "cock sucker", "Steve's bitch", referring to Stephen McMeechan, or "bitch". Benedict Doree would call me these names in front of a number of my colleagues. I recall that Benedict Doree called me names in front of [4 colleagues named]. Benedict Doree would also publicly ask me if my "arse was sore from Stephen". This occurred on a daily basis. It was humiliating to be called these things in public…." (emphasis added)

25. Thus, it is apparent that the fact that these sexually explicit remarks were made publicly in front of colleagues was a key part of Colleague A's complaint and the Council was entitled to include it. The public humiliation made the conduct more serious. The Council had to prove that his conduct was so serious as to amount to professional misconduct resulting in impairment of fitness to practise; not every offensive remark in the workplace would cross that threshold. The seriousness of the conduct was also potentially relevant to sanction. In all the circumstances, the Council had to make an exercise of judgment, as prosecutor, without being able to predict precisely how the oral evidence would develop at the hearing, or what view the panel would take of it. The Authority has the benefit of hindsight, reading the transcript of the concluded hearing, and ought to recognise that the prosecutor is not in such a favourable position.

26. The CCC found that Mr Doree had called Colleague A names such as "cock sucker", "Steve's bitch" and "Bitch" in front of colleagues and/or publicly, as alleged in allegation 1(d). However, the CCC was not satisfied that he had publicly asked him if his "arse was sore from Stephen", whilst accepting that these words were probably said by Mr Doree. On my reading of the decision, I do not consider that the CCC interpreted the word "publicly" only to mean "in the presence of members of the public". It was not satisfied that these words had been said in front of his colleagues either.

27. In my view, it would be wrong for this Court to seek to overturn these findings of fact by the CCC, made after hearing contested oral evidence from witnesses.

28. The Authority submitted that, once the CCC decided that the public element of the allegation was not made out, it should have amended the wording of the allegation on its own initiative, or invited the Council to apply to amend it. Alternatively the Council should have applied to amend the allegation. In my view, amending the charge retrospectively after the evidence had been heard and considered, in order to secure a guilty finding, would have been a gross breach of fair hearing procedure.

29. The Authority submitted that this amendment could have made because it was "minor" and would not prejudice Mr Doree. In my view, this submission was fatally undermined by the Authority's insistence that, if this allegation had been proved,

together with the others, it would or should have made a difference to the CCC's decision on sanction.

30. **Allegation 2(h)** was that Mr Doree "frequently entered the therapy office when Physiotherapist B was alone and massage her shoulders, grab her ponytail and start twirling it around with your finger".

31. I am unable to agree with the submission that the allegation that this behaviour occurred "frequently" was not supported by the complainant's complaint, and therefore the Council should not have included it in the charge. In her witness statement, Physiotherapist B said:

> "Ben also started to frequent the therapy office more regularly, where I was usually alone as my colleague was on long term sick leave. This was approximately from March 2010. He would come into the room for no particular reason and walk up behind me and begin to massage my shoulders. I would tense up as I did not like Ben touching me and felt incredibly intimidated and was very uncomfortable as he is very big in stature. He would also grab my ponytail and start twirling it around his finger, stroking it." (emphasis added).

32. Mr McMeechan's witness statement reported her as saying that Mr Doree would "often" go into her office and would massage her shoulders.

33. Thus, her complaint was that he was in the habit of touching her in this unwanted manner often from March 2010 when he "started to frequent the therapy office more regularly". In my view, whilst any unwanted touching was inappropriate, the Council was entitled to take the view, when formulating the charge, that repeated unwanted touching was significantly more serious and ought to be included in the allegation. Frequency was relevant to proving that his conduct was so serious as to amount to professional misconduct resulting in impairment of fitness to practise, and was also potentially relevant to sanction. The Council, as prosecutor, had to make an exercise of judgment, without being able to predict precisely how the oral evidence would develop at the hearing, or what view the panel would take of it. It was not in the same position as the Authority which is able to be wise after the event, reading the transcript after the hearing is concluded, and identifying how things might have been done differently.

34. The CCC found that Mr Doree had acted as alleged, but that, in the absence of evidence that he had done so "frequently", the allegation was not proved. In my view, it would be wrong for this Court to seek to overturn these findings of fact by the CCC, made after hearing contested oral evidence from witnesses.

35. The Authority submitted that, once the CCC decided that the frequency element of the allegation was not made out, it should have amended the wording of the allegation on its own initiative, or invited the Council to apply to amend it. Alternatively the Council should have applied to amend the allegation. In my view, amending the charge retrospectively after the evidence had been heard and considered, in order to secure a guilty finding, would have been a gross breach of fair hearing procedure.

36. The Authority submitted that this amendment could have made because it was "minor" and would not prejudice Mr Doree. As I have already said, in my view, this submission was fatally undermined by the Authority's stance that, if this allegation had been proved, together with the others, it would or should have made a difference to the CCC's decision on sanction.

37. **Allegation 2(j)** was that Mr Doree "took a picture of Physiotherapist B who was acting as a model in a hoist sling demonstration and had her legs apart in the hoist sling".

38. The CCC found that Mr Doree was only simulating taking photographs of her in the hoist, and therefore the allegation was not proved. This was a finding of fact by the CCC, made after hearing contested oral evidence from witnesses. It would be wrong for this Court to seek to overturn it.

39. I am unable to agree with the submission that the allegation that Mr Doree actually took a photograph was not supported by the complainant's complaint, and therefore the Council should not have included it in the charge. In her witness statement, Physiotherapist B said:

> "On another occasion I was in manual handling with approximately another 15 colleagues. I was asked by a fellow physiotherapist colleague who was teaching the session if I would be a model and would be hoisted for demonstration purposes. Whilst being hoisted, I was off the ground with obviously my legs apart in the hoist sling. Ben began taking photographs on his mobile phone of me in this position to which I became very upset and categorically asked him to stop and delete them. He was laughing and I turned to Mr McMeechan and asked "Are you going to let him do this?" Ben just laughed but everyone present could see I was visibly upset. Once the session had finished, Ben came to me outside the room and stated he had deleted the photographs and grabbed and kissed the top of my head saying "I was only kidding chuckles". He could see I was visibly upset." (emphasis added)

40. On the basis of this complaint, the Council was entitled to frame the allegation against Mr Doree that he took a picture of the complainant. Although Mr Doree apparently said "he was only kidding", it was apparent that the complainant believed that he was taking actual photographs because of her concern that he should delete the photographs from his mobile phone. This indicated that she was concerned he might circulate them to a wider audience, which he could only do if they had actually been taken. Plainly, taking photographs is more likely to amount to misconduct impairing fitness to practise than pretending to take photographs, because of the risk of circulation.

41. In my view, the criticism of the Council is another illustration of the Authority being wise after the event, reading the transcript after the hearing is concluded, and identifying how things might have been done differently. At the time the Council had to draft the charge, it was reasonable for it to act upon the complaint that Mr Doree

had actually taken photographs. It was not possible for it to predict how the evidence would develop at the hearing, or the conclusions which the panel might reach.

42. The Authority submitted that, once the CCC decided that Mr Doree was only pretending to take a picture, it should have amended the wording of the allegation on its own initiative, or invited the Council to apply to amend it. Alternatively the Council should have applied to amend the allegation. In my view, amending the charge retrospectively after the evidence had been heard and considered, in order to secure a guilty finding, would have been a gross breach of fair hearing procedure.

43. The Authority submitted that this amendment could have made because it was "modest" and would not prejudice Mr Doree. As I have already said, in my view, this submission was fatally undermined by the Authority's assertion that, if this allegation had been proved, together with the others, it would or should have made a difference to the CCC's decision on sanction. If that was so, it was potentially prejudicial to Mr Doree.

44. My conclusion on this ground of appeal is that I am not satisfied that there was any "serious procedural or other irregularity" of the type identified by Lord Phillips in *Ruscillo* and the other authorities cited above.

Ground (b) - perversity/flawed decision-making

45. The Authority presented its case under a number of different heads. To avoid repetition, I propose to deal with them together.

46. First, the Authority submitted that the sanction imposed was perverse and manifestly inappropriate, as no panel properly directing itself to the objectives of upholding proper standards of conduct, protecting the public and upholding public confidence in the profession, could have concluded that a caution was a sufficient penalty. If the CCC had properly performed its task, it would have suspended Mr Doree or struck him off.

47. Second, the Authority submitted that the CCC failed to have proper regard to the seriousness of the incident involving the car and the persistent sexual harassment of Physiotherapist B, despite her protests. Mr Doree minimised or denied his misconduct, indicating a lack of insight or remorse, and a continuing risk of repetition. He potentially exposed patients to risk; this could be inferred from the fact that Physiotherapist B did not want to go to work and his comments about young females (allegation 2l).

48. Third, the Authority submitted that the CCC did not have proper regard to the ISP, which advised that a caution order was unlikely to be appropriate where the registrant lacked insight.

49. Fourth, the Authority submitted that the CCC gave disproportionate weight to the personal and professional references in support of Mr Doree, and to the effect on Mr Doree of his family's ill-health.

50. In my judgment, the CCC had a difficult task to perform in determining the appropriate sanction in this case, which it grappled with carefully and conscientiously. It plainly did have regard to the objectives of upholding proper standards of conduct, protecting the public, and upholding public confidence in the profession: see paragraph 88, which has to be read together with the findings at paragraphs 79 to 86. It recognised the seriousness of the misconduct: this is apparent from paragraphs 79, 80, 85, 89 and 93.

51. The CCC was advised by its legal assessor, in accordance with the ISP, that it was not the purpose of sanction to be punitive, it was to protect the public and the public interest, even though a particular sanction might have a punitive effect. The CCC was aware that the car episode involving Colleague A had already resulted in criminal proceedings and summary dismissal.

52. The CCC concluded that suspension would be "punitive and disproportionate in all the circumstances, particularly where there were no issues with patient interaction". The ISP advises at paragraph 32 that registrants should not be suspended for short periods of less than a year. In accordance with the guidance in the ISP, it considered the available sanctions in ascending order of severity, and so did not go on to consider striking off, but it can be assumed that it would have rejected that option for the same reasons.

53. The ISP confirms the principle, at paragraph 4, that the purpose of fitness to practise proceedings is not to punish registrants but to protect the public and give effect to the wider public interest, as set out in paragraph 6. At paragraph 9, it advises panels to apply the principle of proportionality, asking the questions:

    a) Is the sanction an appropriate exercise of the panel's power?

    b) Is it a suitable means of attaining the degree of public protection identified by the panel?

    c) Does it take account of the wider public interest issues, such as maintaining public confidence in the profession?

    d) Is the least restrictive means of attaining that degree of public protection?

    e) Is it proportionate in the strict sense, striking a proper balance between the protection of the public and the rights of the registrant?

54. The evidence showed that:

    a) Mr Doree, now aged 49, has been practising as a student and qualified prosthetist since age 19.

    b) Aside from these matters, there have been no other complaints against him, before or since.

    c) There were no criticisms of his conduct towards members of the public. The evidence was that he was dedicated and professional in his dealing with patients, and he was well-liked by them. He was a highly-regarded prosthetist. Former patients and colleagues wrote to the CCC to praise his work and his personal

dealings with them. He received a positive appraisal in March 2011, and was informed that he was to be promoted to Deputy Branch Manager. The promotion took effect in May 2011.

d) In June 2011, after his dismissal, he joined RSL Steeper as Senior Prosthetist, which involved a lengthy commute from his home in Cleveland to Hull. The Council's interim order required a senior manager from Mr Doree's employer to report every 3 months on "his professional and personal conduct in regards to his working colleagues". These reports, and the evidence from his managers and colleagues to the CCC, stated that Mr Doree's work was exemplary and he was a valued and hardworking employee. He was professional and committed with his patients; he had a good rapport with them and he was caring. There was no inappropriate behaviour towards colleagues; he was courteous and professional towards them. He supervised a young female graduate trainee who described him as helpful and supportive, always willing to give his time and expertise even when busy. There was no suggestion of any inappropriate behaviour towards her.

e) The managers at RSL Steeper provided updating evidence to this Court, in February 2015, praising the quality of his work and care for patients. He has now been promoted to Deputy Manager. According to Vicky Jarvis, National Prosthetic Services Manager, he has "forged good working relationship with his patients and colleagues" and there have been no complaints about him.

f) Mr Laverick, Prosthetic Service Manager, said:

> "Ben continues to have a positive impact here in Hull, which began when he first came here in June 2011. His work record and conduct continue to be exemplary, and all around him whether staff or patients, speak very highly of him. Ben has been absolutely devastated by the whole tribunal process, which has also taken a toll on his health. He has not taken the sanction lightly as it is for 5 years, a lengthy period, which he has taken very seriously and treats with great respect. He regularly asks to meet with management, NHS staff and others to ensure his conduct remains to the correct standard and does not engage in banter at work. All his colleagues speak highly of him, and as his Manager, I am happy to confirm this."

55. In my view, the CCC was entitled not to draw the inference that Mr Doree might harass female patients, as there was no suggestion of any unprofessional behaviour by him towards patients. In that context, it is relevant to note that Mr Doree's behaviour towards his female colleague occurred in the context of a workplace culture of teasing and banter, sometimes sexual, which in his case, crossed the line into unacceptable harassment. Mr McMeechan, the manager, said that staff who had been there a long time had a "*Carry on* film sense of humour". However, there was no evidence to suggest that this workplace culture extended into relations with their patients, who were disabled and sometimes vulnerable.

56. The CCC had the advantage of seeing and hearing Mr Doree and the other witnesses give evidence and be cross-examined. It was in a better position than the Authority or

this Court to assess the risk of repetition. In the light of the time which had passed, and the positive reports on his progress, it considered the risk of repetition to be low.

57. The CCC was also in a better position than the Authority or the Court to assess the extent of his insight. It considered his insight to be "limited", not non-existent as the Authority suggested. The Authority said that his expressions of remorse and his willingness to undertake training courses on bullying and harassment were meaningless because he still persisted in his plea of 'not guilty' to the charges against him. However, the CCC gave careful consideration to these factors, at paragraph 84, in reaching its conclusions on insight.

58. In my view, the Authority may be taking too simplistic a view of Mr Doree's state of mind. Experience shows that there are multiple reasons why people deny their guilt. It seems to me that the courses are likely to have been valuable to him as a guide to future conduct, demonstrating to him how victims may experience so-called teasing and banter as bullying and harassment. Mr Laverick's description of the effect of the tribunal process upon him is credible.

59. On a fair reading of the decision, at paragraph 92, I do not consider that the CCC gave excessive weight to the submission that Mr Doree "went off the rails" in 2011, because of the stress caused by the severe illness of his wife and daughter.

60. In my judgment, the CCC was justified, on the evidence before it, in concluding that suspending Mr Doree from practice, or striking him off the register, would be punitive and disproportionate, and that it was not required in order to meet the objectives of upholding proper standards of conduct, protecting the public, and upholding public confidence in the profession.

61. The only other sanctions available were a Caution Order or a Conditions of Practice Order.

62. The CCC concluded that it was not possible to draft meaningful conditions of practice which would address bullying and harassment, which is obviously correct. I explored with counsel at the hearing whether conditions requiring ongoing reports from his managers to the Council and attendance at further training courses on bullying and harassment would have been appropriate. The Authority did not consider such conditions of practice to be necessary or appropriate in his case.

63. In relation to a Caution Order, the ISP states:

> "***Caution Order***
>
> *A caution order must be for a specified period of between one year and five years. Cautions appear on the register but do not restrict a registrant's ability to practise. However, a caution may be taken into account if a further allegation is made against the registrant concerned.*
>
> 19. A caution order may be the appropriate sanction for slightly more serious cases, where the lapse is isolated or of a minor nature, there is low risk of recurrence, the registrant has

> shown insight and taken remedial action. A caution order should also be considered in cases where the nature of the allegation (e.g. dishonesty) means that meaningful practice restrictions cannot be imposed but where the risk of repetition is low and thus suspension form practice would be disproportionate. A caution order is unlikely to be appropriate in cases where the registrant lacks insight and, in that event, conditions of practice or suspension should be considered.
>
> 20. At the Panel's discretion, a caution order may be imposed for any period between one and five years. In order to ensure that a fair and consistent approach is adopted, Panels should regard a period of three years as the 'benchmark' for a caution order. However, as panels must consider sanctions in ascending order, the starting point for a caution is one year and a Panel should only impose a caution for a longer period if the facts of the case make it appropriate to do so."

64. The Authority submitted that Mr Doree's case did not fit within this guidance, because he lacked insight. As I have already said, the CCC had considered the degree of insight which Mr Doree evidenced, and decided that he had some insight but it was limited. The question for the CCC was whether he had sufficient insight for a Caution Order to be the appropriate sanction. It made an exercise of judgment which it was entitled to make, on its findings overall. As advised in the ISP, it had considered and rejected the alternatives of conditions of practice or suspension, in favour of a Caution Order.

65. On the CCC's own findings, his misconduct was not "isolated or of a minor nature", and the CCC sought to address that by imposing a five year Caution Order, the longest possible period, and two years beyond the benchmark. The presence of the Caution Order on the public register, and the fact that it can be taken into account if a further allegation is made, will operate as a deterrent, as Mr Laverick's evidence indicated.

66. I cannot accept the Authority's submission that the CCC disregarded the ISP. It seems much more likely that, after considering the ISP and seeking to apply it to the instant case, it concluded that a Caution Order was the only suitable sanction. Even though Mr Doree's case did not fit precisely within the guidance at paragraph 19, the CCC was not bound to apply the guidance rigidly. Paragraph 2 of the ISP states:

> "The decision as to what sanction, if any, should be imposed on a registrant whose fitness to practise has been found to be impaired is properly a matter for the panel which heard the case. Practice Committee Panels operate at 'arm's length' from the Council and it would be inappropriate for the Council to set a fixed 'tariff' of sanctions. This policy is only guidance and Panels must apply it as such. Panels must decide each case on its merits, and that includes deciding what, if any sanction to impose."

67. In my judgment, the CCC did decide this case on its merits, having proper regard to the ISP. In reaching my conclusions, I have taken into account that the CCC has been entrusted with the statutory function of determining sanction. As Laws LJ said in *Raschid v General Medical Council* [2007] 1 WLR 1460, at [19]:

> "the fact that a principal purpose of the panel's jurisdiction in relation to sanctions is the preservation and maintenance of public confidence in the profession rather than the administration of retributive justice, particular force is given to the need to accord special respect to the judgment of the professional decision-making body in the shape of the panel."

68. Under section 29, it is not enough for the Authority to show that the sanction was lenient - leniency may be appropriate in the circumstances of the case. The sanction must be shown to be unduly lenient. In my judgment, the sanction imposed by the CCC was not unduly lenient, applying the guidance in *Ruscillo*. The CCC reached a reasonable decision, having regard to the evidence, the objects of disciplinary proceedings, and the sanctions available to it.

69. Finally, I agree with the Council that, even if allegations 1(f), 2(h) and 2(j) had been proved, the CCC's decision would most probably have been the same. Whilst not wishing to minimise their seriousness, these incidents were not significantly different from the others which were proved, nor did they represent a significant increase in the extent of the bullying/harassment.

Ground (c) - failure to give adequate reasons

70. Failure to provide adequate reasons for a decision was held to be a serious irregularity leading to a remittal in *Council for the Regulation of Health Care Professionals v. General Dental Council & Marshall* [2006] EWHC 1870 (Admin) because the Judge was unable to determine whether or not the sanction was appropriate.

71. However, in this case, I do not find the reasons to be inadequate, bearing in mind that they are the reasons of a regulatory panel (comprising of health practitioners and a lay member, with a legal assessor), which is not expected to give reasons to the same standard as a court. The CCC was not required to set out every point, and in fairness, its Decision ought to be read as a whole. The CCC was not required to itemise each objective of the regulatory process, and set out how each objective was met. It was entitled to give its reasons in the round. The reasons were lengthy and detailed. I found them intelligible and sufficient to enable the parties to know why they won or lost, and for the Authority to consider whether the sanction was too lenient.

Conclusion

72. For the reasons I have given, the Authority's appeal is dismissed.