Neutral Citation Number: [2023] EWHC 481 (Admin)

Case No: CO/4226/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
SITTING IN MANCHESTER

Tuesday, 7th March 2023

Before:
MR JUSTICE FORDHAM
- -

Between:

ROBERT LAMBERT-SIMPSON	**Appellant**
- and -	
HEALTH AND CARE PROFESSIONS COUNCIL	**Respondent**

- -
- -

The **Appellant** in person
Guy Micklewright (instructed by HCPC) for the **Respondent**

- -
Hearing date: 7.2.23
- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE FORDHAM

MR JUSTICE FORDHAM:

INTRODUCTION

1. This case is about social media posts which have led to a registered psychologist being suspended pursuant to Article 29(5)(b) of the Health Profession Order 2001 (SI 2002 No. 254) ("the 2001 Order"), by the Conduct and Competence Committee ("the Panel") of the Health and Care Professions Council ("HCPC"). The Appellant ("the Registrant") is a regulated professional, registered in the Practitioner Psychologist Part of the Register of the HCPC. Article 3(4) and (4A) of the 2001 Order identify the public interest objectives which the HCPC – and the Panel – are required to apply:

> ***(4) The overarching objective of the [HCPC] in exercising its functions is the protection of the public. (4A) The pursuit by the Council of its overarching objective involves the pursuit of the following objectives – (a) to protect, promote and maintain the health, safety and wellbeing of the public; (b) to promote and maintain public confidence in the professions regulated under this Order; and (c) to promote and maintain proper professional standards and conduct for members of those professions.***

2. The Panel held oral hearings over a four-day period (25-28 July 2022). It released, in three stages, what became a composite overall written Determination ("the Determination"): (i) Fact-Finding (§§5, 7-10 below); (ii) Misconduct and Impairment (§§11-12 below); and (iii) Sanction (§13 below). A public version of the Determination (28 July 2022) is in the public domain on the Health and Care Professions Tribunal Service website, under reference PYL34515.

3. This is an appeal, by way of a rehearing, which I am to allow if the Panel's decision was "wrong" or "unjust because of a serious procedural or other irregularity in the proceedings" (Civil Procedure Rules 52.21(3)). My powers (Article 38(3) of the 2001 Order) are to dismiss or allow the appeal (i) quashing the appealed decision (ii) substituting any other decision which the Panel could have made or (iii) remitting the case to the Panel with directions.

The Allegations

4. The Allegations against the Registrant – also described as "Particulars" – were as follows:

> ***As a registered Practitioner Psychologist your fitness to practise is impaired by reason of misconduct. In that:***
>
> ***(1) You posted inappropriate and/or offensive comments and/or posts on your social media account:***
>
> > ***(a) On 22 May 2019, you posted a picture of a fire-damaged van with the caption 'Look a Van-b-que on probably the busiest street in Europe. I think it was full of Asians. So it was a Korean Van-b-que' on your social media account.***
> >
> > ***(b) On or around [a given date], you responded to a comment on your photograph stating, 'Had to look good for the 87 year old kiddie diddler I saw today' on your social media account.***
> >
> > ***(c) On or around 26 February 2020, you responded to a comment on your post sharing your location at a Latin American restaurant stating that it was 'Weirdly white people good' on your social media account.***

> ***(d) On 29 February 2020, you posted 'I have decided to self-isolate. Not because of any chink based "it's got a pulse let's eat it" stuff but mainly because I really hate people' on your social media account.***
>
> ***(2) Your posts and/or comments in allegations (1)(a), (1)(c) and/or (1)(d) above were racially motivated.***
>
> ***(3) The matters set out in allegations (1)(a)-(d) and/or (2) above constitute misconduct.***
>
> ***(4) By reason of your misconduct your fitness to practise is impaired.***

The Outcome

5. At the Fact-Finding stage, the Panel found as follows. It found Allegation (1) proved – in relation to each of Particulars (1)(a), (b) and (d), but not (1)(c) – as to both inappropriateness and offensiveness. It found Allegation (2) proved, in relation to Particular (1)(d) only. Based on – and to the extent of – its Fact-Finding conclusions on (1) and (2), at the Misconduct and Impairment Stage, the Panel upheld Allegations (3) and (4). The Sanction was a Suspension Order (§13 below).

Contextual Themes

6. Describing his appeal as a quest for "fairness and proportionality", the Registrant emphasised, throughout his written and oral submissions on this appeal, the importance of "context". These were among his key themes:

i) First, these social media postings were sent and received within what was understood to be a small, private (closed) Facebook group. On this, the Panel's key findings were: (i) that the Registrant "posted the comments and pictures on his Facebook page"; (ii) that the posts "were publicly available"; and (iii) that the Registrant had "genuinely believed he had been posting to a closed group and not to anyone who might access his account on Facebook". The Panel recorded that the Registrant "maintained that he had believed he was posting to a closed group of just his friends and not the public at large"; that the Registrant "said that in light of his profession he would never have posted such comments on a public forum"; and that he said that "outside of his 22 friends he did not want anyone else to be reading his posts". To this, the Registrant adds the following point: that there was no evidence of any 'stranger' other than the complainant ("KL": §6iii below) having accessed, or having wanted to access, this Facebook page.

ii) Secondly, the social media postings need to be considered in light of the Registrant's character and (known) attitudes. As to this, the Panel recorded the Registrant's good character. The Panel also recorded that the Registrant "said he objected to being called racist as he works with people from all walks of life, his best friend is Guatemalan and his best friend growing up was a black Caribbean"; and "maintained that he was not a racist person, a term which he said he found to be abhorrent". On this appeal, the Appellant told me that he despises racism and any other form of discrimination. He emphasises that he has not, previously or since, been accused of causing offence to anyone. Linked to this, he says that the small number of 22 Facebook 'friends' in the 'group' all knew his character well. On that point, the Panel recorded the

Registrant as having acknowledged that his "sense of humour" was probably offensive "outside of anyone who knows me".

iii) Thirdly, the Allegations need to be viewed in light of KL's conduct. As the Panel explained: KL is a Consultant Clinical and Forensic Psychologist; her evidence was that she first became aware of the Registrant in November 2018 when she and the Registrant were expert witnesses in the same proceedings; KL had been able to access the Registrant's posts simply by clicking on the Facebook link that came up when Google searching under his name; KL found a number of posts which she considered inappropriate, took screen shots and subsequently made a formal complaint to the HCPC, providing the screenshots as evidence. Speaking of the Registrant's July 2020 response to the Allegations, the Panel recorded that the Registrant has stated that KL had "harassed and targeted me before and continues to do so … and … has sought to undermine my professionalism"; that "the HCPC need to be aware of her conduct and consider her motivations for raising this concern". In its Fact-Finding the Panel treated KL's evidence as relevant to its findings: (i) that the Registrant posted the comments and pictures on his Facebook page; and (ii) that the posts were publicly available. In its Determination on Sanction the Panel recorded that the Registrant "spoke of the overwhelming impact of what he described as the 'vendetta' against him by KL and these proceedings". The Registrant maintains, as he put it to me on this appeal, that KL's actions were part of a "vicious character assassination" – a "malicious witch-hunt" – "aimed at destroying" the Registrant, which the Panel "has reinforced".

iv) Fourthly, the social media postings arose out of attempted humour. I have referred to the Registrant's recorded acknowledgment about his "sense of humour" being probably offensive "outside of anyone who knows me". As the Panel recorded, the Registrant said the Allegation (1)(a) post was "meant as an 'observational joke'"; he said the Allegation (1)(b) post was "just a joke to the few people who I know, many of whom are Psychologists" and "was 'just boy humour' … aimed at only his Facebook friends and not the public at large". The Panel concluded that the Allegation 1(a) post was "clearly meant as a joke, albeit one in extremely poor taste". It concluded that the Allegation (1)(d) post was "meant to be an attempt at humour and for the benefit of a closed group of friends", and it was "in no doubt" that the Registrant "had posted these comments in an attempt at humour and that his intention had been to use race as a cheap way of getting a laugh". The Panel subsequently said that it was considering "jokes made in poor taste".

v) Fifthly, the social media posting – the Allegation (1)(d) post – which was found to have been "racially motivated" for the purposes of Allegation (2) needs to be considered in the context and circumstances of the Covid-19 pandemic. The Panel recorded the Registrant as having said that this post "was at a time when he had Covid-19". It went on to record his statement that "there was a 'lot of stuff going around about where [Covid] had come from and why it happened' and that influenced what he wrote".

vi) Sixthly, the case and the Panel's findings need to be seen in the context of the Registrant's acknowledgment and acceptance. At the Fact-Finding stage, the Panel recorded: as to the Allegation (1)(a) post that the Registrant "accepted

that this post was inappropriate and said he would definitely not write something like that now"; as to the Allegation (1)(b) post that the Registrant said "he would never use such a term again and he regretted having used it"; as to the Allegation (1)(d) post that "the use of the word 'chink'" was "maybe … culturally insensitive"; that "he cringed when he read it"; that the post was "him being inappropriate and he should not have posted it"; and that "what he wrote … was wholly inappropriate". At the Impairment stage, the Panel recorded: the Registrant's "acceptance that his posts were inappropriate, although he was ambivalent about whether they were offensive"; his having "emphasise[d] that he regretted making the posts and that in hindsight he should not have made them"; that he "apologised and said he would never make such posts again and he had essentially stopped using social media"; that he "said he was aware of the importance of communicating appropriately and complying with the HCPC's guidance on social media"; that he "accepted that the posts were appalling and that his behaviour fell below the professional standards expected and he said he understood the consequences of his actions"; and that "he said that the posts did not look good, whether they involved a Psychologist or not, but that they were made worse by the fact that he was in a caring profession".

WHAT THE PANEL DECIDED

The Allegation (1)(a) Social Media Post

7. As has been seen (§4 above), Allegation (1)(a) was:

> ***On 22 May 2019, you posted a picture of a fire-damaged van with the caption 'Look a Van-b-que on probably the busiest street in Europe. I think it was full of Asians. So it was a Korean Van-b-que'***

The Registrant admitted posting this picture and caption on his social media account. The questions under Allegation (1)(a) and (2) were whether this comment and/or post was "inappropriate and/or offensive" and whether it was "racially motivated". In relation to this post, the Panel found both inappropriateness and offensiveness, but not racial motivation. The Panel reasoned as follows: comparing a vehicle crash resulting in a fire, with the potential for people to have been burnt, with a barbecue was highly inappropriate and deeply offensive; to have referred to an ethnic and racial group made it even more inappropriate and offensive; this was meant to be an attempt at humour and for the benefit of a closed group of friends; it was, however, in extremely poor taste and at the expense of an ethnic and racial group; although the post was most distasteful, reprehensible and with racist connotations, the Panel was not satisfied that in making this post the Registrant had been racially motivated; there was no evidence of any hostility towards Asians or Koreans and, in contrast to Allegation (1)(d), no use of racial terminology.

The Allegation (1)(b) Social Media Post

8. As has been seen, Allegation (1)(b) was:

> ***(b) On or around [a given date], you responded to a comment on your photograph stating, 'Had to look good for the 87 year old kiddie diddler I saw today' on your social media account.***

The Registrant admitted posting this response on his social media account. The questions under Allegation (1)(b) were whether this comment and/or post was "inappropriate and/or offensive". There was no question of this post being "racially motivated". In relation to this post, the Panel found both inappropriateness and offensiveness. The Panel reasoned as follows: on any view, the use of the phrase 'kiddy diddler' to describe someone, particularly someone the Registrant had seen on a professional basis, was wholly inappropriate and highly offensive; there was also the chance that someone might have been able to identify the person had they accessed this post, given the detail provided by the Registrant.

The Allegation (1)(c) Social Media Post

9. As has been seen, Allegation (1)(c) was:

> ***(c) On or around 26 February 2020, you responded to a comment on your post sharing your location at a Latin American restaurant stating that it was 'Weirdly white people good' on your social media account.***

The Registrant admitted posting this response on his social media account. The questions under Allegations (1)(c) and (2) were whether this comment and/or post was "inappropriate and/or offensive" and whether it was "racially motivated". In relation to this post the Panel did not find inappropriateness or offensiveness; nor racial motivation. In its reasons, the Panel described the Applicant's explanation as to what this post meant and what his intention was. The Panel recorded: that the Applicant had explained at length how he had eaten in restaurants all over the world and that in his experience Latin American food was best cooked by Latin Americans; he said he was surprised, therefore, when he went to the Latin American restaurant in Portsmouth, the food was very good and it had not been cooked by Latin Americans but rather by white people; that he said he had been on his own and got talking to the owners and asked them who had cooked the food, expecting to hear it was Latin Americans (who he wanted to thank for a nice meal); that the owners, who were white, said it was them and hence his comment on Facebook with the restaurant tagged was meant to be a compliment, not some sort of racist slur. The Panel reasoned as follows: that it considered this post to be somewhat ambiguous, with many possible interpretations; that the Applicant's account was one of them; that it could equally be a suggestion that the food in the Latin American restaurant was good enough for white people to eat, which would be inappropriate, offensive and potentially racist; that the Panel was not able to determine how this comment should be interpreted; and that, given the Registrant's potentially plausible explanation, it could not be satisfied, on the balance of probabilities, that the HCPC had proved this Allegation.

The Allegation (1)(d) Social Media Post

10. As has been seen, Allegation (1)(d) was:

> ***(d) On 29 February 2020, you posted 'I have decided to self-isolate. Not because of any chink based "it's got a pulse let's eat it" stuff but mainly because I really hate people' on your social media account.***

The Registrant admitted posting this comment on his social media account. The questions under Allegations (1)(d) and (2) were whether this comment and/or post was "inappropriate and/or offensive" and whether it was "racially motivated". In

relation to this post the Panel found inappropriateness and offensiveness; and racial motivation. The Panel's reasoning is set out at §20 below.

Misconduct

11. After making its Findings on the Facts, the Panel hearing resumed to consider evidence and submissions relating to Misconduct and Impairment. This culminated in the Panel delivering the part of the Determination dealing with these matters. The Panel concluded that the Allegation (1)(a), (b) and (d) posts represented a pattern of inappropriate and offensive behaviour over a period of time which, when considered in the round, were sufficiently serious to amount to misconduct. It reasoned as follows:

i) First, the Panel took into account the HCPC Guidance on Social Media (the "Social Media Guidance"), observing that it was not restricted or limited to social media entries available to the public at large but covered all use of social media. The Panel quoted the following passages from the Social Media Guidance:

> ***You must use all forms of communication appropriately and responsibly, including social media and networking websites.***
>
> ***When using social media you should apply the same standards as you would when communicating in other ways. Be polite and respectful, and avoid using language that others might reasonably consider to be inappropriate or offensive. Use your professional judgement in deciding whether to post or share something. Remember that comments or posts may be taken out of context, or made visible to a wider audience than originally intended.***

ii) Secondly, the Panel considered the Standards of Conduct, Performance and Ethics applicable to all HCPC registrants, identifying the following Standards which it found to have been breached in the present case.

> ***Standard 2.7 You must use all forms of communication appropriately and responsibly, including social media and networking websites.***
>
> ***Standard 5.1 You must treat information about service users as confidential.***
>
> ***Standard 5.2 You must only disclose confidential information if: – you have permission; – the law allows this; – it is in the service user's best interests; or – it is in the public interest, such as if it is necessary to protect public safety or prevent harm to other people.***
>
> ***Standard 9.1 You must make sure that your conduct justifies the public's trust and confidence in you and your profession.***

iii) Thirdly, the Panel reiterated its finding that the Registrant had believed he was only sharing his posts with his Facebook friends, a closed group of 22 people, but continued:

> ***However, it was his responsibility to ensure that his posts were not available to all and sundry …***

It added:

> ***furthermore it was his duty to comply with the HCPC guidance on social media, whether he was posting publicly or within a closed group.***

It concluded:

> ***He failed in both regards. The posts that he made, as found proved in Particulars 1(a), 1(b) and 1(d), were all inappropriate, all offensive and, in the case of 1(d), racially motivated.***

iv) Fourthly, the Panel concluded that these three posts represented a pattern of inappropriate and offensive behaviour over a period of time and, when considered in the round, were sufficiently serious to amount to Misconduct. It reasoned as follows. In relation to Allegation (1)(a):

> ***whilst offensive and reprehensible, the post detailed in Particular (1)(a) would not, on its own, be sufficiently serious to amount to misconduct. It was clearly meant as a joke, albeit one in extremely poor taste. However, the Panel was concerned with the Registrant's overall behaviour and thus had also to take into account the other two posts found proved.***

In relation to Allegation (1)(b):

> ***In relation to Particular (1)(b), in the Panel's view it is wrong for a Registrant to ever refer to a person on social media that he has seen in a professional capacity and even more so to do it in a derogatory manner. The term he used, 'kiddy diddler' was particularly offensive and aggravated by the fact that it may have been possible to identify who he was referring to by virtue of the detail he had provided, some of which was confidential. This included the age of the client, the date he was seen by the Registrant, the type of client (paedophiliac) and the Registrant's full name as the attending clinician. The Panel considered this post would be considered deplorable by other members of the profession and the public and was sufficiently serious to amount to misconduct, whether considered in isolation or in conjunction with the other posts.***

In relation to Allegation (1)(d) (and Allegation (2)):

> ***The Panel acknowledged that the post detailed in Particular (1)(d) was made at a time when the Registrant was suffering with Covid-19 in early 2020. At that stage there was speculation within the media that the virus originated in a street market in China and it was within that context that the Registrant said he had made this post. However, it is wholly unacceptable for a professional registered with the HCPC to use racial slurs, whether in public or private, whatever the context. Furthermore, the use of the word 'chink' was aggravated by the derogatory comment that followed about if it has a pulse they would eat it. As stated above, it was this combination of racial slur and derogatory comment that resulted in the Panel concluding that the comments were racially motivated. It is wholly unacceptable to engage in such behaviour and this post would, in the Panel's view, be considered deplorable by other members of the profession. As with the post detailed in (1)(b), the Panel was satisfied that this post amounted to misconduct, whether considered in isolation or in conjunction with the other posts.***

Impairment

12. In the section of the Determination addressing Impairment the Panel found the Registrant's current fitness to practise to be impaired on both public protection and public interest grounds, for the following reasons:

i) First, the Panel explained that it was concerned with attitudinal issues, but considered them to be "capable of remedy". It said:

> ***The Panel considered that the matters found proved were capable of remedy, although it can be difficult to remedy attitudinal issues, which were apparent in this case.***

ii) Secondly, the Panel referred to the Registrant's response, including actions, acceptance and recognition. It said:

> ***The Panel was encouraged to see that the Registrant had taken and completed courses in Islamic Awareness, Cultural Awareness and Race and Ethnicity Inclusion. However, when asked what he had learned as a result of attending these courses, he was unable/unprepared to say. The Panel noted the Registrant's acceptance that his posts were inappropriate, although he was ambivalent about whether they were offensive and maintained that he was not a racist person, a term which he said he found to be abhorrent. He did emphasise that he regretted making the posts and that in hindsight he should not have made them. He apologised and said he would never make such posts again and he had essentially stopped using social media. He said he was aware of the importance of communicating appropriately and complying with the HCPC's guidance on social media. The Registrant accepted that the posts were appalling and that his behaviour fell below the professional standards expected and he said he understood the consequences of his actions. He said that the posts did not look good, whether they involved a Psychologist or not, but that they were made worse by the fact that he was in a caring profession.***

iii) Thirdly, the Panel gave this assessment of the Registrant's degree of insight:

> ***Whilst demonstrating some insight into his conduct, the Panel was concerned that the Registrant failed to mention the impact of his posts on others and instead focused on the impact of these proceeding[s] on himself.***

iv) Fourthly, the Panel expressed concerns about the Registrant's behaviour during the Panel proceedings:

> ***The Panel was also concerned about the unstable behaviour demonstrated by the Registrant during these proceedings. He repeatedly stated that he was emotionally overwhelmed by the referral and the resulting proceedings. He became very agitated when being asked perfectly proper questions by [Counsel for the HCPC]. He refused to answer most of the questions asked and on more than one occasion got up and walked out of the room. On one occasion he resorted to banging his fist on the desk and called [Counsel for the HCPC] an offensive name. This behaviour added to the concerns the Panel had about the underlying attitudinal issues identified in making the various posts.***

v) Fifthly, the Panel explained that "in all the circumstances" it "could not be satisfied that it was highly unlikely the Registrant would engage in such behaviour, as detailed in the facts found proved, in the future". Addressing "whether a finding of current impairment was warranted on the grounds of public protection", it said this:

> ***Although it could be argued that [engaging] in racially motivated behaviour might impact upon the way in which one treated particular service users, the Panel considered this to be too tenuous a leap to make when considering jokes made in poor taste. However, divulging confidential information about a person he had seen on a professional basis risked that person being identified. The Panel***

> ***considered this raised public protection issues and, given the concern that he might repeat such behaviour, the Panel concluded a finding of current impairment was therefore justified on public protection grounds.***
>
> ***The Panel was satisfied that all three posts brought the profession into disrepute and that the Registrant's behaviour breached one of the fundamental tenets of the profession, namely the need to ensure that his conduct justified the public's trust and confidence in him and his profession. Given his limited insight the Panel was concerned that the Registrant might repeat such behaviour.***

vi) Finally, the Panel addressed "whether this was a case that required a finding of impairment on public interest grounds in order to maintain confidence in the profession and also to maintain standards within the Psychologist profession". On that topic, it said this:

> ***The Registrant's behaviour fell far short of the standards expected of a registered Psychologist. He posted comments on social media that were inappropriate and offensive and, in one instance, racially motivated. Whilst the Registrant believed he was only posting to a closed group, he should have ensured that was the case. In such circumstances, the Panel considered that members of the public would be shocked and appalled and that they would have their confidence in the profession and the HCPC undermined if a finding of impairment were not made. This was particularly so given the concerns about underlying attitudinal issues that had yet to be addressed.***

Sanction

13. Having determined Misconduct and Impairment, the Panel hearing resumed to consider evidence and submissions relating to Sanction. In its subsequent Determination on Sanction, the Panel decided to make a Suspension Order for four months, to reflect the seriousness of the misconduct, to be reviewed by a panel ("the Reviewing Panel") before its expiry. It recorded that the Reviewing Panel would be assisted by the following: (1) the Registrant's continued engagement with the process; (2) a reflective piece whereby the Registrant demonstrated: (a) what he had learned from this process and the Panel's findings; (b) the potential impact of his social media posts on service users, the public, his colleagues, the wider profession and the HCPC as regulator; and (c) what he learned from the relevant courses he had already attended and from any other relevant courses he might consider attending before the order was reviewed. The Panel reasoned as follows:

i) As to the approach to Sanction, the Panel referred to the HCPC guidance found in the Sanctions Policy ("the Sanctions Guidance").

ii) Next, the Panel explained that it had in mind that the purpose of sanctions was not to punish the Registrant, but to protect the public, maintain public confidence in the profession and maintain proper standards of conduct and performance (as to which, see §1 above). The Panel explained that it was cognisant of the need to ensure that any sanction is proportionate.

iii) The Panel next identified aggravating and mitigating factors. The aggravating factors were identified as: repeated posts of an inappropriate and offensive nature over a period of time; and limited insight. The mitigating factors were: no previous regulatory findings; admissions to some of the matters alleged; apology and remorse; and relevant courses attended. The Panel added:

> ***In addressing the Panel the Registrant was adamant that he would never use social media again. He spoke of the overwhelming impact of what he described as the "vendetta" against him by KL and these proceedings. He said, "I have jeopardised myself on the basis I honestly believed those were private conversations. The postings are embarrassing and horrid. I cannot understand why I did it and the effect on other people is so far-reaching. I just apologise." He added, "In terms of sanctions I think my professional life is now over. I have spent my entire life helping people and that has been taken away from me."***

iv) Next, the Panel undertook the familiar discipline of the 'stepped approach' to Sanction, considering options from the least serious upwards. Starting with the option of taking no further action or mediation, the Panel reasoned as follows: in light of the seriousness of the conduct, which included a racially motivated post, this was not an appropriate case to take no further action or consider mediation; neither of these would protect the public from the risks identified by the Panel; nor would they satisfy the public interest.

v) As to the option of a caution:

> ***The Panel then considered whether to caution the Registrant. However, the Panel was of the view that such a sanction would not reflect the seriousness of the misconduct in this case nor protect the public. The Registrant's behaviour suggested some underlying attitudinal concerns that needed to be addressed before he could be allowed to return to unrestricted practice. The Panel was also of the view that public confidence in the profession, and the HCPC as its regulator, would be undermined if such failings were dealt with by way of a caution.***

vi) As to the option of imposing conditions:

> ***The Panel next considered whether to place conditions on the Registrant's registration. The Sanction[s] Guidance states that a conditions of practice order is likely to appropriate in cases where: [a] the registrant has insight; [b] the failure or deficiency is capable of being remedied; [c] there are no persistent or general failures which would prevent the registrant from remediating; [d] appropriate, proportionate, realistic and verifiable conditions can be formulated; [e] the panel is confident the registrant will comply with the conditions; [f] a reviewing panel will be able to determine whether or not those conditions have or are being met; and [g] the registrant does not pose a risk of harm by being in restricted practice.***
>
> ***As already indicated, the Panel considered the behaviour to be remediable and the Registrant had indicated that he was "more than willing to do additional courses or seek supervision" and in answer to a question about that said he was "more than willing to do whatever it takes." However, whilst many of the above factors are present in this case, the Panel was of the view that due to the limited insight shown by the Registrant it would not be possible to formulate appropriate, proportionate, realistic and verifiable conditions.***

vii) As to the option of a Suspension Order:

> ***The Panel therefore considered whether a suspension order would be appropriate. The [Sanctions] Guidance states that a suspension order is likely to be appropriate where there are serious concerns which cannot be reasonably addressed by a conditions of practice order, but which do not require the registrant to be struck off the Register. These types of cases will typically exhibit the following factors: [a] the concerns represent a serious breach of the Standards of conduct, performance and ethics; [b] the registrant has insight; [c] the issues are unlikely to be repeated; and [d] there is evidence to suggest the registrant is likely to be able to resolve or remedy their failings.***

> ***The Panel was satisfied that the concerns in this case do represent a serious breach of the Standards of conduct, performance and ethics, as detailed in its findings on misconduct… The Registrant does have insight, albeit limited. The Panel considered it was unlikely the Registrant would post such offensive material again or breach patient confidentiality, although it could not rule out the possibility entirely. There is evidence to suggest the Registrant is likely to be able to resolve or remedy his failings as indicated by his willingness to "do whatever it takes."***

viii) Finally, as to the option of Striking-Off. The Panel reasoned that a Striking-Off Order – the sanction of last resort and reserved for the most serious case where a registrant's behaviour is fundamentally incompatible with continued registration – was not justified. It was important that the misconduct was seen in context and the sanction imposed proportionate. The Registrant had made three posts on social media which he believed were only going to a closed group of his Facebook friends. Those posts were all inappropriate, as he readily acknowledged. They were also offensive which (inferentially) he also acknowledged. One was racially motivated. Whilst abhorrent, the behaviour was not fundamentally incompatible with continued registration.

THE ISSUES ON THE APPEAL

14. The Registrant's written basis of appeal was set out in 13 key paragraphs within his Grounds of Appeal, supplemented by 7 key paragraphs within his Skeleton Argument. In his own Skeleton Argument in response, Mr Micklewright for the HCPC encapsulated four distinctly identifiable issues which he suggested emerged from the Registrant's written basis of appeal. The Registrant agreed that this was a fair encapsulation, and addressed his oral submissions within that rubric. I agree with both parties and will do what they did, addressing the same four issues. I consider it appropriate to take the four issues in the following order:

The Medical Condition Issue

15. This issue, as fairly encapsulated, is whether the Panel failed properly to take into account the Registrant's medical condition (ie. autism) in its assessment of him. The Registrant's case, in essence as I saw it, is as follows. His autism was not considered, adequately or at all, by the Panel. He appeared in person. His autism was referred to obliquely in the Determination. It will have contributed to the manner in which he conducted himself at the hearing; yet this was not factored into the decision-making process. When the hearing process became literally unbearable for the Registrant, he became disconnected and walked away which was indicative of his autism; yet this appeared adversely to affect the attitude of the Panel towards him. He felt threatened and intimidated by a belligerent approach being adopted towards him. In considering the posts and his state of mind when making them, account ought properly to have been taken of his autism. He had declared it; but it was insensitively ignored. He expected a sensitivity from the Panel that was entirely lacking. The Panel's approach, and the line of questioning, indicates that he was disbelieved as to his medical condition; and after being disbelieved he was caused to feel insecure in the presence of the Panel. His autism impacted on his reluctance to answer a barrage of questions; for which reluctance he has been punished. The cross-examination of the Registrant constituted harassment and he was so overwhelmed as to ask for a break. He was

taken advantage of. The HCPC's Counsel 'went after him'. The Panel should have stepped in and protected him.

16. I cannot accept these submissions. In relation to this issue, I can find nothing "wrong" or "unjust because of a serious procedural or other irregularity in the proceedings". Everything that happened and was said at the hearings is before me by way of the comprehensive transcripts, which I have read. As the Panel recorded at the beginning of the Determination, while giving his evidence the Registrant made reference to his health and the Panel decided that all such references should be dealt with in private in accordance with Rule 10(1)(a) of the Health and Care Professions Council (Conduct and Competence Committee) (Procedure) Rules 2003 ("the 2003 Rules"). On several occasions, the proceedings continued in private pursuant to that rule, in line with that ruling, and for that reason. That reflected a proactive, protective and sensitive approach. Next, a number of breaks were taken. The Registrant was able to request a break whenever he needed one. These were all granted. That too reflected a proactive, protective and sensitive approach. At the end of Day 1 – when the Registrant was being cross-examined – he told the Panel that he felt like his "blood pressure was absolutely through the roof" and he did not feel like continuing. The Panel decided to adjourn until the next day, when cross-examination continued. That was at 3:27pm on Monday 25 July 2022. It meant finishing 90 minutes early, at the Registrant's request, by reference to his health. It was then, in the course of discussing that request and the continued arrangements for the hearing, that the Panel was told that the Registrant had indicated that he had a health condition involving a diagnosis of being on the autism spectrum. When cross-examination resumed the following morning, there was – early on – another break at the Registrant's request.

17. One of the subsequent private sessions was triggered by the Registrant saying he was "not … a big user of social media" using it "really on odd occasions" and referring to the "odd and weird behaviour that I have". When the Panel – again proactively, protectively and sensitively – continued in private session, the Registrant was invited by the Panel's lay member to "explain a little bit more". He then gave information which was the only 'non-public' paragraph within the eventual Determination. The information has been fully ventilated at this appeal. The Registrant accepted that there is no necessity for keeping it private. What the Panel recorded was:

> ***The Registrant said, "I am a bit strange, I am autistic and see the world through a different lens. I am in my own world a lot of the time, I have no friends, I had my partner and that is it, I am completely isolated."***

The Panel included that passage in the (non-public) Determination. It did so, precisely because this was part of the factual and evidential picture in the context of the Registrant's behaviour. The Panel plainly did consider the possibility that autism may have contributed to the Registrant's conduct. At no point within the transcript including within any question asked or contention advanced, nor within the Determination, can I find an indication that the Panel disbelieved the Registrant's claim to be autistic. Nothing suggests that the Panel in any way held any aspect of this against him. There was no 'harassment' or 'barrage' of questions in the cross-examination. There was no failure to protect the Registrant. I asked for his help as to whether he was pointing to anything in the transcript or the Determination said to indicate: his being disbelieved about being "autistic"; or his being 'harassed'; or where he should have been 'protected'. In response, no passage was identified. The

Registrant was plainly self-aware. He was able to speak to the Panel about autism. He did so in the closed session. He was asked on several occasions about the posts which were the subject of the Allegations. He did not, at any stage, link his conduct to autism. He did not adduce any expert evidence. The Panel needed to address the case in light of the evidence which it had. The Panel was well aware of what the Claimant said about his autism. But it was fully entitled – indeed, correct – to be concerned, when it reached the topic of Impairment, about the behaviour it had seen first-hand (see §12iv above). Even then, this was an aspect – described in measured and appropriate terms – which added to the concerns that the Panel described.

The Special Measures Issue

18. This issue, as fairly encapsulated, is that it was procedurally unfair for KL to have the benefit of special measures, as it created an inference that was adverse to the Registrant's case. The Registrant did not develop any oral submissions on this point. He maintained what he had said in writing, which I have just encapsulated. In relation to this issue, I can find nothing "wrong" or "unjust because of a serious procedural or other irregularity in the proceedings". Special measures had been the subject of a ruling by a differently constituted panel on 29 June 2022, applying Rule 10A in the 2003 Rules. That is an express Rule, serving the public interest and the interests of justice, which provides for certain measures – well understood and familiar throughout the justice system – where there is a "vulnerable witness". The Panel was well aware of that Rule and those arrangements and in due course referred to them at the beginning of the Determination. They were described at the beginning of the hearing. They were of course conspicuous in the way in which the hearing arrangements were made and that evidence was given. The Registrant was acting in person. KL gave evidence by live-link, and the cross-examination of KL was by Counsel. The important point about "no adverse inference" against the Registrant is expressly addressed when such special measures arrangements are made. This is important, and familiar. At the beginning of Day 1 Counsel for the HCPC stated in open hearing that KL would be giving evidence remotely and the room would need to be set up, telling the Panel that "in due course" they would receive "legal advice" from the Legal Assessor "not to hold special measures against Dr Lambert-Simpson in any way". When the time came for the Legal Assessor to give that advice, prior to the Panel's deliberation on Fact-Finding, the Legal Assessor said in open session (emphasis added):

> ***One witness, as you know, attended for the HCPC and gave oral evidence. It is for you as a Panel to consider her credibility and reliability. No inference adverse to the Registrant should be drawn by the fact the witness gave evidence over a live telephone-link rather than being physically present. It is not uncommon for witnesses to give evidence in this way. When considering her evidence, it is important to focus on what is actually alleged in this case and the issues that you have to decide. You may consider her evidence to be particularly relevant when deciding whether the posts were publicly available or not, whatever the Registrant's understanding of the status of the posts.***

The Panel recorded in the Determination that it accepted the advice of the Legal Assessor. There is nothing in the transcripts and nothing in the Determination which reflects or indicates anything approaching an adverse inference being drawn from the special measures.

The Racial Motivation Issue

19. This issue, as fairly encapsulated, is that the Panel erred in finding that the post in Allegation (1)(d) was "racially motivated", in that the Panel needed to find that the Registrant was motivated by racism and on the evidence it could not be so satisfied.

20. The Panel's reasoning (see §10 above) on the Allegation (1)(d) social media posting – in finding inappropriateness, offensiveness, and racial motivation – was as follows:

> ***In evidence, when asked if he thought the use of the word 'chink' was racist, the Registrant said, "I don't know, maybe it was culturally insensitive." He said that he cringed when he read it, but it was at a time when he had Covid-19 and there was a "lot of stuff going around about where it had come from and why it happened" and that influenced what he wrote. He accepted it was wholly inappropriate. He added that he had been to rural China and had a poor experience as he came back with health issues dysentery. He said his post was not racially motivated but was just him being inappropriate and he should not have posted it. He said he objected to being called racist as he works with people from all walks of life, his best friend is Guatemalan and his best friend growing up was a black Caribbean.***
>
> ***The Panel was in no doubt that the word 'chink' was a racial slur used to describe Chinese people. It was a wholly inappropriate word to have used and clearly offensive to right-minded people. Furthermore, referring to the Chinese as people who will eat anything that has a pulse is derogatory, inappropriate and offensive. The Panel thus found Particular (1)(d) proved on the basis that the post was both inappropriate and offensive.***
>
> ***The Panel then considered whether these comments were racially motivated. Unlike Particular (1)(a), in (1)(d) the Registrant had used a combination of a blatantly racist description with a highly derogatory remark, depicting all Chinese people effectively as uncivilised, who will eat anything. The Panel was in no doubt that the Registrant had posted these comments in an attempt at humour and that his intention had been to use race as a cheap way of getting a laugh. That behaviour, in the Panel's view, suggested his actions were racially motivated and the Panel therefore found Particular (2) proved in relation to (1)(d).***

21. Mr Micklewright for HCPC accepts that "racially motivated" – as charged in Allegation (2) and found in relation to the Allegation (1)(d) social media post – is primarily about "personal motivation" and what the individual had "in mind". He also accepts that the Allegation that the social media post was "racially motivated" contrasts with an allegation that a practitioner has "used antisemitic words" in a speech, as was alleged of the registered pharmacist in Professional Standards Authority for Health and Social Care v General Pharmaceutical Council (Ali) [2021] EWHC 1692 (Admin). On both points, I agree. The Ali case was one in which the panel had taken account of what it considered was the pharmacist's "intention". That was an error of approach (see §23), because 'using antisemitic words' called for an "objective" test "based on the words used" (§21) and did not depend on intention (§21). As Johnson J pointed out, that case would have been very different if the allegation had been framed differently, as it could have been, by reference to "intention" (§25). The present case stands in sharp contrast. This case would have been different if Allegation (2) had been that the Registrant "used racist words". That would have called for an objective test based on the words used. Allegation (2) was not framed in that way. It is framed in terms of "racial motivation". That means what was forbidden in Ali was necessary in this case: the Panel needed to consider the Registrant's subjective state of mind.

22. I have been able to consider the transcripts of the Panel hearing. These are the key features regarding the Allegation (1)(d) post and 'racial motivation':

i) First, when giving his evidence in chief the Registrant was asked by the Panel Chair:

> ***THE CHAIR: If I can just go to Particular (2) where it states that three of the Particulars in (1) are racially motivated, you have explained (1)(a) and you have explained (1)(c) but the comment at (1)(d) is also racially motivated. It is the comment "I have decided to self-isolate, not because", et cetera et cetera. THE REGISTRANT: Yes. THE CHAIR: What do you say regarding that being racially motivated or do you have an explanation as to what you were intending?***

The Registrant's response was:

> ***THE REGISTRANT: Only it came from China. I don't know. I mean, it is not – I don't – you know, I am between a rock and a hard place here because if I say I am not a racist, that means I am a racist, according to the race and racism training I did so I would just say that it is culturally insensitive for sure but I don't – Listen, I am already in the minority myself so I don't think, you know, I – in fact, I am well aware of that and there is prejudice and everything else that goes with that so I don't – I work with people from all walks of life, and I always have done, and I don't see any of them differently but, like I have said, you know, those comments, if she hadn't looked them up, nobody ever would have seen them outside of my 22 friends. Am I glad they are not out there anymore? Absolutely.***

ii) Secondly, in the HCPC Counsel's cross-examination of the Registrant, there were these exchanges:

> ***Q. Chink is a racial slur, is it not? A. No comment. Q. You know that. A. No comment. Q. You know it is a disgusting thing to say. A. No comment. Q. Also, it is clear that what you are saying there is racist because you follow it immediately with an implication that Chinese people will eat anything with a pulse. A. No comment…***
>
> ***Q. Here you are saying, "not because of any Chink, basically if it has got a pulse, let us eat it, but mainly because I really hate people". Why did you say that? A. No comment.***

iii) Thirdly, after cross-examination and during further questioning by the Panel, there was this question from the Chair, with this response:

> ***Q. Thank you. Can I just ask you about (1)(d), which is the comment about, "not because of any Chink based if it's got a pulse let's eat it", when you were giving that evidence, you said, "Is it racially motivated? I do not know; maybe culturally insensitive". Is there anything further you wish to say about that particular comment? A. I cringe when I hear it. I wrote it at a time when I had Covid. It is not a nice thing to say, and I do not really like hearing it, so it was at a time when there was not – there was a lot of stuff going around about – a lot of public opinion on where it came from and what had happened and all of that stuff. It was just wholly inappropriate.***

iv) Counsel for the HCPC's oral submissions to the Panel included this:

> ***Finally, allegation (1)(d) in which he says, "I've decided to self-isolate not because of any Chink based, it's got a pulse, let's eat it stuff, but mainly because I really hate people". The word Chink is a racial slur. It is a contemptuous use of the word in a racist way, and that submission, I submit it is contemptuous, and I have submitted it is racist; that submission is underlined by what follows on directly from the original slur, a reference to Chinese people eating anything with a pulse; "if it's got a pulse let's eat it". The nature of that comment, again in my***

> ***submission is obvious on the face of it. I attempted to explore that with Dr Lambert-Simpson in his evidence, and he simply refused to engage with me. He became combative and abusive when challenged, and you may wish to consider those responses when you come to consider the credibility of these explanations.***

v) The Registrant's own oral submissions to the Panel included this:

> ***In terms of (1)(d), I cringe when I read that, but I have actually been to China, and I have actually eaten in rural China, and I did come back with dysentery, so I have a very poor experience of being in China.***

vi) The Legal Assessor gave the Panel this advice:

> ***It is alleged that some of the Registrant's posts on social media were racially-motivated. There is no definition of racially-motivated, and it is a matter for the Panel's judgement. To assist however, according to Section 28 of the Crime and Disorder Act 1998: "An offence is racially or religiously aggravated if at the time of committing the offence or immediately before or after doing so, the offender demonstrates towards the victim of the offence hostility based on the victim's membership or presumed membership of a racial or religious group or the offence is motivated purely or partly by hostility towards members of a racial or religious group, based on their membership of that group." Racial group means a group of persons defined by reference to race, colour, nationality, including citizenship or ethnic or national origins.***

23. The Registrant's case on this issue in this appeal, in essence as I saw it, is as follows. The Panel's finding on "racially motivated", which "tipped the balance" so far as "seriousness" and ultimately sanction was concerned, was "wrong". This issue is the "essential question" in the appeal.

i) This Court is in a position to look at the words and context for itself, to see whether any hostility was present. The Panel was obliged to consider (a) the words in their context and (b) the question of personal motivation. This Court is in just as good a position to consider those matters.

ii) The Registrant accepts and acknowledges that the phrases used in Allegation (1)(d) were "ill-advised" and "inappropriate". The Registrant openly admitted, to the Panel, to cringing when he read them. The words are "so inappropriate that I can barely bring myself to read them". The word "chink" was "arguably culturally insensitive". It "can be offensive". It "can be a slur". This was a "potential racial slur". But it needs to be considered "in context" and it is "entirely realistic" to regard it as "slang". It was "ill-advised and puerile" but "never racist". With "hindsight" it was "a poor way to express myself". "At worst", these were "badly chosen words to describe the Chinese in the vernacular". This was, so far as the Registrant was concerned, "banter among friends". The Registrant takes full responsibility. He accepts, unreservedly, that the words he used were indelicate, unprofessional, inappropriate, derogatory, in bad taste, ill-chosen, ill-advised and unacceptable.

iii) All of this is, however, "a long way from establishing any racist intent". The Panel's conclusion on "racial motivation" cannot logically be sustained. It is "wholly perverse". The phrase "racially motivated" required the Panel to be satisfied that the Registrant was "actually motivated by racism". There was no intent or evidence of intent. He had never been racially motivated. The posting

was never motivated by "dislike" or "racist attitudes" towards any ethnic group. "Chink" was not a word "aimed at anyone". It was not "designed to hurt anyone". He had "no axe to grind" with anyone including the Chinese. There is not a shred of evidence of any "hostility" towards the Chinese. What the Panel had was a series of words, and an assurance by the Registrant that he never had any such intent at all. He never intended to offend anyone and there is not a single strand of evidence that he did intend to offend anyone. There was no element of hate speech. There was no proof that anyone was offended. This action cannot fairly result in a professional person of repute "forever being labelled as a racist". That is an abomination. The Registrant knows, and his friends know, that it could not be further from the truth. His character and good name have been "decimated" and "desecrated".

iv) The Registrant had no history of any such personality traits. There was no history of racist or discriminatory conduct. There was no corroborative evidence. The Registrant despises all forms of racism. He is vehemently and vociferously opposed to any form of racism, sexism, ageism or religious bigotry. The notion that he has ever been labelled a racist is anathema to him. Racism is everything of which he does not approve. He regards any form of prejudice to be entirely unconditionally abhorrent. That is the "unfettered truth". His reticence in answering questions – saying "no comment" – was only because he was appalled at the suggestion of any hostility. There was no intentional racism, which the Registrant has always categorically, openly and unreservedly stated that he deplores.

v) In the present context, where this content was being posted (so far as the Registrant was aware) to a closed group, it was "nothing more than a harmless term". The post was "private" and "within a group of friends". Those friends knew who the Registrant was. They understand his total lack of malice or intolerance in what he said. They knew how the Registrant despises any racism or other discrimination. They knew this to be harmless banter among friends. The recipients – the 22 Facebook friends – were never offended. The words used were wholly in jest. They were jocular with no harm intended. No offence was ever intended by what were "tongue in cheek" remarks.

vi) The Registrant was – moreover – unwell at the time, having himself caught the Covid virus. And Covid was engulfing the country. There was an abundance of theories about the source of the pandemic.

vii) Even if the Panel were right to characterise this as a combination of a "blatantly racist description" with a "highly derogatory remark" (depicting all Chinese people effectively as uncivilised he will eat anything), the Panel's findings still did not support its conclusion that the post was "racially motivated". The Panel reasoned that the Registrant had posted these comments "in an attempt at humour" and that his "intention had been to use race as a cheap way of getting a laugh". But that motivation – attempted humour and the intention to use race as a cheap way of getting a laugh – could not and did not constitute a "racial motivation". The Panel's conclusion did not follow from, and was not supported by, its reasons.

24. I cannot accept these submissions. In relation to this issue, I can find nothing "wrong" or "unjust because of a serious procedural or other irregularity in the proceedings". My reasons, accepting the submissions of Mr Micklewright, are as follows:

i) The Panel's 'underpinning reasoning' in support of its conclusion was clear. It identified that the word "chink" was a "racial slur" used to describe Chinese people, which was "wholly inappropriate" and "clearly offensive to right minded people". It then identified the reference to the Chinese as uncivilised people who will eat anything that has a pulse as "derogatory, inappropriate and offensive". It was satisfied that the Registrant had used a "combination" of a "blatantly racist description" with a "highly derogatory remark". He had done this "in an attempt at humour" with his "intention" being "to use race" as a "cheap way of getting a laugh". Each of these descriptions was, in my judgment, fully justified. The Panel had contrasted this social media post with Allegation (1)(a) (§7 above). The Registrant had every opportunity in the hearing before the Panel: to explain what the words, in their context, meant; and to explain what was in his mind when he posted those words. The Panel was rightly anxious to hear what he had to say. The Panel Chair put this point squarely – in light of the explanation he had given in relation to other posts – and returned to it to put it to the Registrant again.

ii) The Panel's 'underpinning reasoning' (§24i above) was fully capable of supporting the conclusion derived from it: that the Allegation (1)(d) social media posting was "racially motivated". This "use" of "race", with a "blatantly racist description", constituting a "racial slur", used in "combination" with a "highly derogatory remark", is unmistakeably – knowingly and consciously – hostile towards the relevant racial group. True, this was believed to be a closed private group, where no third party and no member of the relevant racial group would see or hear what was said. True, this "use" of "race" was "an attempt at humour" and a "cheap way of getting a laugh". The Panel – which expressly recognised these truths – did not think, individually or in combination, that they inhibited the finding of "racially motivated". In my judgment, the Panel was fully justified – indeed, objectively correct – about that.

iii) When I asked Mr Micklewright for his encapsulation of when an "inappropriate" and/or "offensive" communication will be "racially motivated", his answer was that there are really two elements: (i) that the act in question (here, the posting of the content) had a purpose behind it which at least in significant part was referable to race; and (ii) that the act was done in a way showing hostility or a discriminatory attitude to the relevant racial group. I have found that encapsulation helpful. I also agree with Mr Micklewright that the Panel's findings involved being satisfied as to these elements. This combination was a racial slur (blatantly racist) and a well-known racist trait (highly derogatory), in "combination". The intention to try and get a "laugh" does not in any way detract from the fact that this was entirely or in significant part a purpose referable to race; nor from the fact that this was done in a way showing hostility and/or a discriminatory attitude. The Registrant could provide no explanation, other than descriptions of regrets and cringing and his protestations that he was not racist and everybody knew it.

iv) There is good reason in principle, in my judgment, why this analysis of "racially motivated" should apply. Suppose someone in a private group of social workers thinks it will make other social workers laugh, to "use" disability, with a "combination" of a "blatantly" discriminatory "slur" and a "highly derogatory remark" about people with a disability. Suppose someone in a private group of police officers thinks it will make other police officers laugh, to "use" gender identity, with a "combination" of a "blatantly" discriminatory "slur" and a "highly derogatory remark" about people with a gender identity. No person with the disability, or gender identity, was ever supposed to hear what was said. The rest of the group were supposed to laugh. It was supposed to be funny. In my judgment, it is appropriate and important that a regulatory supervisory authority should be able to see in this a serious "attitudinal" problem. There is a hostility in this behaviour. There is a hostility in the state of mind of the person communicating. Attitudes matter. The relevant hostility can thrive in attempted 'humour', as it can in 'ridicule'. The 'private' context may be relevantly – indeed may be especially – revealing.

v) In Professional Standards Authority for Health and Social Care v Health Care Professions Council (Roberts) [2020] EWHC 1906 (Admin) a racist comment was made by a paramedic during a handover with an ambulance team, using an extremely derogatory acronym. It was accepted to be a "racial slur" (§9) and "deeply offensive" (§10). In that case, there was a finding of no impairment. This was in light, in particular, of the paramedic's response (§§8-11). But it was not – for one moment – because this was meant to be a 'private' comment between colleagues, which no member of the relevant racial group had overheard or was intended to hear; or because it was attempted 'humour'. Indeed, in her judgment in Roberts, Foster J emphasised the importance of addressing evidence of what may be deep-seated "personality traits" which may be "incompatible with the practice" (§62). She referred to the thoroughgoing repugnance for racially offensive "language" and "attitudes" (§63). A firm resolve and preparedness to address 'attitudinal' concerns must, in my judgment, strongly feature – in the public interest – wherever regulatory authorities operate within the field of anti-discrimination. In the present case, the Panel hit the nail on the head when – during the section of the Determination on Sanction – it said the Registrant's behaviour "suggested some underlying attitudinal concerns", which it went on to say "needed to be addressed before he could be allowed to return to unrestricted practice".

vi) In confronting this "racially motivated" unacceptable and offensive language the Panel did not say they were "labelling" the Registrant as "a" racist, still less "forever". The same could be said of Roberts, where the comment made was racist. Here, the Panel was clear, and careful, as to what it found. Its finding was made, in light of all the evidence, including from the Registrant. It was not persuaded by strong protestations from the Registrant as to his stance on racism and discrimination; nor his assertions about what his 22 Facebook friends know and think about him. Nor am I. However, the Panel did not find the conduct to be incompatible with registration. It did not find the evidenced attitudinal concerns to be irremediable. What the Panel was then looking for

was insight; and for the issue to be addressed. All of which takes me to the final issue.

The Sanction Issue

25. This issue, as fairly encapsulated, is that the sanction of suspension was wrong given the Registrant's acceptance that the social media posts were inappropriate, and his assurances about his future behaviour, and the appropriate sanction was a caution order (Article 29(5)(d) of the 2001 Order). On this issue, the essential question for me to determine is whether the sanction was appropriate and necessary in the public interest: see Sastry v General Medical Council [2021] EWCA Civ 623 [2021] 1 WLR 5029 at §§105, 108.

26. The essence of the Registrant's case on this issue, as I saw it, was as follows.

i) The sanction which was entirely appropriate in all the circumstances, and which gave the correct signal, was a caution order. That would have been a proper "punishment". Given the Registrant's exemplary record, his honesty and diligence, his apology and unhesitating acceptance of responsibility, and his genuine assurances; given that the social media posts were in private and not a threat; and given than only one of three allegations of racial motivation was proven: the draconian sanction of a suspension order depriving the Registrant of his livelihood was wrong and unjustified. No adequate consideration was given to the relevant circumstances. The sanction was grossly excessive. The options of a caution order, or alternatively conditions of registration, were available. They were not fairly considered. If fairly considered, they would have been perfectly adequate to protect the public and public confidence, in circumstances where nobody was subjected to any racism, and the HCPC would have been being seen to take action.

ii) The sanction is perverse and wholly disproportionate. The public, whose protection is key, were never at risk. This was an isolated incident, never repeated before or since. The Registrant responded immediately, appropriately and correctly. In the real world – rather than the closeted world of the Panel – there was no genuine risk at all. This was self-evident and obvious. To describe the Registrant as having "limited insight" is baseless and offensive. He knows and understands what is offensive, what racism means, and what is unacceptable to a wider public. The sanction was avoidable and entirely inappropriate in a case where the social media group was private, where the Registrant has shown genuine remorse and given an absolute assurance, and where KL's complaint was dubious in nature and pursuit. The public is not at risk of the Registrant using any language that could conceivably offend. The sanction of suspension should be replaced with a caution order. A caution would achieve every possible legitimate objective, giving notice to the Registrant, and ensuring no repetition thus protecting the public.

iii) The suspension order, although expressed to be a four-months order, was the short end of the wedge. It opened the gates to being extended on an ongoing basis. That susceptibility to ongoing extension demonstrates the draconian potential effect. The fresh evidence before the Court of what subsequently happened when the Review Panel considered the suspension on 14 November

> 2022, is evidence illustrating the potential effect of the sanction. The suspension order was extended for a further five months, simply repeating the "conditions" on which the original four-month suspension order was imposed. The November 2022 extension replicated those same conditions, notwithstanding that they had been met. The Registrant's reflective piece was unreviewed and unread by the Review Panel. The four-month suspension period becomes an irrelevance given the almost inevitability of ongoing extension.

27. I cannot accept these submissions. In my judgment, the sanction of the four-month suspension order was appropriate and necessary in the public interest, for the reasons which the Panel gave (§13 above) with which I agree. The Panel carefully and systematically, through the stepped approach, considered – fairly and fully – all less intrusive sanctions in sequence. The Panel applied the Sanctions Guidance. It correctly identified the purpose of sanctions. This was not a "punishment". The Panel correctly identified the need for proportionality. It identified the relevant aggravating and mitigating circumstances. The Panel gave cogent and convincing reasons why neither a caution nor conditions of registration were an appropriate and sufficient sanction. It did so, in circumstances where a key feature of the case was the limited degree of insight – convincingly and justifiably identified – given the attitudinal concerns and the need to address them. Regard was also, properly and appropriately, given the nature and implications of the findings as a whole, and the Allegation (1)(b) confidentiality concerns.

28. By virtue of Article 30(1) of the 2001 Order, the Suspension Order (imposed pursuant to Article 29(5)(b)) would need to be reviewed by a Review Panel before expiry of its four-month period, and the Review Panel could further extend it, for up to 12 months at a time (Article 30(5)). That consequence was understood by the Panel. Also understood by the Panel was the suspensive nature of any appeal to this Court (Article 29(9) and (11)), absent an "Interim" Suspension Order imposed on grounds of necessity for the protection of the public or in the public interest (Article 31(2)). In fact, an 18 months "Interim" Suspension Order was imposed by the Panel in this case, designed to take effect if an appeal were pursued, as it has been. That too was appropriate and necessary in the public interest. I accept that – subject to the effect of an appeal to this Court – the Suspension Order stood to be extended by the Review Panel. Such a decision would itself be susceptible to an appeal. I do not accept that the "fresh evidence" of what happened before the Review Panel in November 2022 is relevant evidence for the purposes of illustrating the implications of a suspension order as being amenable to further extension. Those implications are clear from the statutory scheme. Nor in any event do I accept that the fresh evidence of the November 2022 review decision demonstrates an "inevitable" extension, with the "replication" of an "identical" set of "conditions", notwithstanding their previous "fulfilment". The Review Panel's determination of 14 November 2022 gave a cogently reasoned basis for the further extension, in circumstances where the Review Panel concluded: that the Registrant was showing "some insight" but remained largely focused on the impact that the Determination has had "on him", focusing on his erroneous perception of what was found proved; that his fitness to practise remained impaired; and that an extension of five months to the Suspension Order was the appropriate sanction. What the Panel had previously identified (§13 above) as

assisting a Review Panel – which were not "conditions" – were not, after consideration, assessed as adequately fulfilled. But nor were they simply "replicated".

CONCLUSIONS

29. For the reasons which I have given, I do not uphold this appeal on any of the issues raised. I add that Mr Micklewright assisted me – in accordance with his ethical duties as Counsel – in exploring whether there were any further grounds or points which could properly be put forward on behalf of the Registrant as a litigant in person. (I interpose, in response to a query raised by the Registrant having seen this judgment in draft, that this involved no "conflict" but the discharge of a professional ethical duty.) I am satisfied that no viable ground or point has been overlooked. In my judgment, there was nothing "wrong" or "unjust" in the Panel's decisions contained within the Determination; and the sanction was appropriate and necessary in the public interest. None of these conclusions turns on a latitude afforded to the Panel, since I agree with the Panel's impugned conclusions on an objective correctness standard. The appeal will be dismissed.

CONSEQUENTIALS

30. Having circulated this judgment as a confidential draft, I am able to deal here with any consequential matter arising. As to costs, I will order that the Registrant is to pay the HCPC's costs of this appeal; except that the HCPC is to pay the Registrant's costs (if any) of the application to vary directions, which HCPC at one stage made and then withdrew. These are all costs following the event. I will order that all costs be the subject of detailed assessment if not agreed. I decline the HCPC's invitation summarily to assess the costs: claimed by it in the sum of £35,202.06; and by the Registrant in the sum of £5,000.

31. That leaves an issue – raised by Mr Micklewright – which concerns the Review Panel's determination of 14 November 2022, purportedly extending the four-month Suspension Order by five months (see §28 above). What happened was this. The four-month Suspension Order was imposed by the Panel, pursuant to Article 29(5)(b) of the 2001 Order, on 28 July 2022 (§13 above). By virtue of Article 30(1), the Suspension Order would need to be reviewed by a Review Panel before expiry of its four-month period, and the Review Panel could further extend it, for up to 12 months at a time (Article 30(5)). But by virtue of Article 29(9) and (11), an appeal to this Court is suspensive. That means the Suspension Order would not take effect until the appeal is determined. Recognising that, the Panel imposed an 18 month Interim Suspension Order, to take effect pending any appeal (§28 above). The Registrant did, of course, appeal. The HCPC became aware of the appeal. However, the suspensive nature of the appeal was overlooked. The Review Panel's November 2022 hearing and determination ensued. The five month extension was ordered to take effect from 28 November 2022, with the Suspension Order now expiring on 28 March 2023, unless further extended in the meantime. What now happens about all this?

i) Mr Micklewright says the Review Panel should never have conducted a review or made an order, because there was an appeal, and the position should have been governed by the Interim Suspension Order. The Registrant does not dispute this, but he points out that this is not how the HCPC acted. He says there has been a lack of due diligence, an injustice and an abuse of process.

ii) Mr Micklewright says this Court, on this appeal, "must … quash the order of 14 November 2022". But the Review Panel's Order is not the subject of this appeal. I am an appeal court dealing with an appeal. Mr Micklewright has not identified what jurisdiction I have to make such a quashing Order. There is no claim for judicial review.

iii) The Registrant says "the overall suspension needs to be quashed with immediate effect". In my judgment, that could not be right. The appeal has failed. The Suspension Order must now take effect, subject to a review in accordance with the statutory scheme. The real question that remains, in my judgment, is when that review should now take place.

iv) If the four month Suspension Order now commences on the date of my judgment and order dismissing the appeal, it would expire four months later on 6 July 2023, unless further extended in the meantime. But the HCPC's defaults have led the Registrant up the garden path, with a Suspension Order recorded against him throughout, believing that it would now expire on 28 March 2023 unless extended in the meantime.

v) In my judgment, securing a just and fair outcome – while protecting the public and the public interest – are all fully achievable, within the scope of my appellate powers. In the special circumstances of this case, I propose to Order that the Interim Order will take effect so as to expire on 28 March 2023 unless extended in the meantime. I am empowered by Article 38(3) to substitute any decision which the Panel could have made. Whether the Suspension Order continues after 28 March 2023 will be a matter for a Review Panel, considering such facts and circumstances as it considers relevant and appropriate, and with the Registrant able to engage with that review, as was already envisaged. However, since I am conscious that this is adopting a middle course not sought by either party, I will grant the parties liberty to apply.

32. I will Order as follows. (1) The appeal is dismissed. (2) Subject to paragraph (3) below, the Interim Order imposed by the Conduct and Competence Panel on 28 July 2022 shall take effect so as to expire on 28 March 2023, to be reviewed before that expiry by a Review Panel. (3) The parties shall have liberty (i) to apply by 4pm on Friday 10 March 2023, in writing on notice, to vary or discharge paragraph (2) and (ii) to respond to any such application by 4pm Monday 13 March 2023, such application to be dealt with on the papers by Fordham J. (4) The Appellant is to pay the Respondent's costs of this appeal, except that the Respondent is to pay the Appellant's costs (if any) of the Respondent's application to vary directions, all such costs be the subject of detailed assessment if not agreed.