Neutral Citation Number: [2024] EWHC 243 (Admin)

Case No: CO/4638/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 7th February 2024

Before :

MR JUSTICE SWEETING

- -

Between :

Professional Standards Authority for Health and Social Care	**Appellant**
- and -	
1. General Dental Council	**Respondents**
2. Naveed Patel	

- -
- -

Benjamin Tankel (instructed by **Browne Jacobson**) for the Appellant
Alexis Hearnden instructed by **GDC Legal Department**) for the First Respondent
Charles Garside K.C. (instructed by **KLS Law**) for the Second Respondent

Hearing dates: 13 July 2023

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Approved Judgment

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MR JUSTICE SWEETING

Mr Justice Sweeting :

Introduction

1. The Second Respondent, Mr Patel, is a dentist registered with the First Respondent, the General Dental Council ("the GDC"). The GDC regulates dentists in the UK. The Appellant is the Professional Standards Authority for Health and Social Care ("the PSA"). The PSA scrutinises and oversees the work of health and care regulators, including the GDC.

2. The general duties of the GDC are set out in Section 1 of the Dentists Act 1984 ("the 1984 Act"):

> "(1ZA) The over-arching objective of the Council in exercising their functions under this Act is the protection of the public.
>
> (1ZB) The pursuit by the Council of their over-arching objective involves the pursuit of the following objectives—
>
> (a) to protect, promote and maintain the health, safety and well-being of the public;
>
> (b) to promote and maintain public confidence in the professions regulated under this Act; and
>
> (c) to promote and maintain proper professional standards and conduct for members of those professions."

3. Section 27 of the 1984 Act provides that a dentist's fitness to practise may be "impaired" by reason of misconduct or a conviction in the United Kingdom for a criminal offence. An allegation of impairment is investigated and determined by a practice committee of the GDC. If impairment is found the Committee:

> "6 […] may, if they consider it appropriate, direct—
>
> (a) (subject to subsection (7)) that the person's name shall be erased from the register;
>
> (b) that his registration in the register shall be suspended during such period not exceeding twelve months as may be specified in the direction;
>
> (c) that his registration in the register shall be conditional on his compliance, during such period not exceeding three years as may be specified in the direction, with such conditions specified in the direction as the Practice Committee think fit to impose for the protection of the public or in his interests; or
>
> (d) that he shall be reprimanded in connection with any conduct or action of his which was the subject of the allegation."

4. On 24 August 2021 Mr Patel was convicted at the Manchester Crown Court (Minshull St)of causing death by careless driving on 15 February 2019. On 27 September 2021

he was sentenced to 15 months' imprisonment suspended for 2 years with 280 hours unpaid work. He was disqualified from driving for 3 years.

5. Mr Patel appeared before the Professional Conduct Committee ("the Committee") of the GDC on 10 October 2022. He faced the following charge:

> "That being a registered dentist:
>
> 1. On 24 August 2021 you were convicted at the Crown Court at Manchester Minshull Street of causing death by careless driving, contrary to section 2B of the Road Traffic Act 1988.
>
> 2. You failed to inform the General Dental Council immediately or at all before the date of conviction that you were charged with causing death by driving without due care and attention.
>
> 3. Your conduct in relation to 2. above was:
>
> a. Misleading; and / or
>
> b. Dishonest.
>
> And that, by reason of the facts alleged, your fitness to practise is impaired by reason of conviction and misconduct."

6. The Committee found that:

   i) the first two charges were proved following Mr Patel's admissions;

   ii) charge 3a (misleading the GDC) was proved;

   iii) charge 3b (dishonesty) was not proved;

   iv) Mr Patel's fitness to practise was impaired by reason of both his misconduct and his conviction, on the grounds of public interest.

7. The Committee concluded that a reprimand was the most appropriate and proportionate sanction. The PSA disagrees. It brings this appeal because it considers that the sanction of a reprimand is not sufficient to maintain public confidence in the dental profession. The GDC shares that view and itself referred the Committee's decision to the PSA.

The Legal framework

8. The PSA may refer a case to the court where it considers that "the decision is not sufficient for the protection of the public" pursuant to Section 29(4) of the National Health Service Reform and Health Care Professionals Act 2002 ("the 2002 Act"). The statutory test follows on from the duties of the GDC set out in the 1984 Act and is whether the decision is sufficient:

> "(a) to protect the health, safety and well-being of the public;
>
> (b) to maintain public confidence in the professional concerned; and

> (c) to maintain proper professional standards and conduct for members of the profession."

9. The charges and the Committee's findings engage b) and c) of these provisions although the referral to the court related primarily to the sanction in respect of the conviction for the driving offence and its effect on public confidence, rather than the reporting failure.

10. A referral to the High Court is to be treated as an appeal. The powers of the Court are governed by both CPR 52 and section 29(7) of the 2002 Act. The court may dismiss the appeal; allow the appeal and quash the relevant decision; substitute any other decision which could have been made; or remit the case to the Committee to dispose of the case in accordance with the directions of the court. It may also make such order as to costs as it thinks fit.

11. The general approach to an appeal was considered in *Council for the Regulation of Healthcare Professionals v GMC and Ruscillo* [2005] 1WLR 717 at [70]- [77] where the Court of Appeal observed: "... 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." The imposition of a particular penalty is however an evaluative, multi-factorial decision. There is limited scope to overturn it on appeal so that an appellate court should only interfere if:

> "(1) there was an error of principle in carrying out the evaluation, or
>
> (2) for any other reason, the evaluation was wrong, that is to say it was an evaluative decision which fell outside the bounds of what the adjudicative body could properly and reasonably decide" (see *Bawa-Garba v GMC* [2019] 1 WLR 1929 at [61]).

12. Given the specialist nature and professional expertise of the tribunal the court should approach its determinations with some diffidence but may conclude, in an individual case, that it is as well placed as the tribunal to make an assessment of the impact of the conduct concerned on public confidence (see *GMC v Jagjivan* [2017] 1 WLR 4438 at [40]). A decision deriving from a conviction is more readily reviewable than a decision based solely on professional misconduct (see *Dad v GDC* [2000] 1 WLR 1538). If the decision is manifestly inappropriate, it is "wrong".

13. The approach to sanctions in cases involving convictions for serious offences was considered by Newman J. in *Council for the Regulation of Health Care Professionals v GDC v Fleischmann* [2005] EWHC 87. It will include an assessment of the gravity of the offending taking into account [51]:

> "the penalties set by Parliament for offences under the Act, the rationale for the creation of the offences, the guidance from the Court of Appeal and the proceedings in the Crown Court, including the sentence imposed."

14. The exercise will now also involve considering any applicable Sentencing Council guidelines. In *Fleischmann,* Newman J. said [54]:

> "…as a general principle, where a practitioner has been convicted of a serious criminal offence or offences he should not be permitted to resume his practice until he has satisfactorily completed his sentence. Only circumstances which plainly

> justify a different course should permit otherwise. Such circumstances could arise in connection with a period of disqualification from driving or time allowed by the court for the payment of a fine. The rationale for the principle is not that it can serve to punish the practitioner whilst serving his sentence, but that good standing in a profession must be earned if the reputation of the profession is to be maintained." (my emphasis)

15. This principle was referred to elsewhere in the judgment in *Fleischmann* [52] as reflecting an expectation that a practitioner should only return to practise following conviction for a serious offence where they had "paid their debt to society" (see also *Bolton v Law Society* (1994) 1 WLR 512, 518 F−G where the Court of Appeal had earlier used the same phrase to describe circumstances in which a criminal penalty had been "satisfied").

16. The Committee was required to follow the Sanctions Guidance (the "GDC Guidance" published by the GDC (G*uidance for the Practice Committees including Indicative Sanctions Guidance (effective 1 October 2016) (December 2020 revision*) unless there was good reason to depart from it (*R v Islington Borough Council ex p. Rixon* [1996] EWHC 399 (Admin)). This guidance makes specific reference to *Fleischmann*, incorporating, at paragraph 10 of Appendix A, the "general principle" set out by Newman J. The principle is expressly stated, at paragraph 11 of the GDC Guidance, to apply to suspended sentences:

> "The general principle is not only applicable to sentences of immediate imprisonment, but also to the suspended period of any sentence of imprisonment, as well as the duration of any Community Order that may have been imposed by the criminal court." (my emphasis)

17. The statement of principle in *Fleischmann* did not itself set out any tariff or provide a formula for determining when a practitioner "had satisfactorily completed his sentence". In *Chandrasekera v Nursing & Midwifery Council* [2009] EWHC 144 (Admin) [63] it was described as "a useful general rule" which "was sensible in most cases".

18. In the present case the PSA suggested that the timing of the disciplinary proceedings, about twelve months before the expiry of the period of suspension of the sentence of imprisonment, meant that a suspension from practice of twelve months would have been an appropriate outcome at the point at which the matter came before the Committee. Had such a suspension been imposed Mr Patel would not have resumed practice prior to the "completion" of his sentence.

19. Whilst the rationale of that approach is clear it might be thought to produce an anomalous result in some cases if applied generally. If, for example, in this case the sentence had been one of immediate custody, the position at the hearing date would likely have been that no more than half the sentence would have been served in prison followed by release on licence. The expiry of the licence period and thus "completion" of the sentence, would then only have been only some three months away. The anomaly might be greater still if a suspended sentence involved a relatively short custodial sentence suspended for a lengthy period (up to the two-year maximum). The general public might well conclude that a case in which the court felt able to suspend a custodial sentence was less serious than one in which only immediate custody was appropriate

and that the professional sanction would likewise reflect such a distinction. It follows, in my view, that *Fleischmann* cannot be applied as if it were a rule; both it and the "general principle" derived from it in the GDC Guidance must bend to the overarching requirement to impose a sanction which is just, proportionate and only that which is necessary to maintain public confidence.

20. In *Linda Opare v The Nursing and Midwifery Council* [2019] EWHC 1851 (Admin) Lane J. made a similar observation at [30] in relation to the comparative position between a suspended and an immediate custodial sentence where the point at which the sentence is "completed" falls to be considered:

> "In any event, I accept Ms Dongray's submission that the panel did not err in its consideration of the *Fleischmann* principle. It noted that this was a "general principle". So far as the wording used by the panel is concerned, it was, in my view, appropriate for the panel to refer to the suspended sentence as still being in force at the time that it took its decision and that it would continue until March 2020. Of course, if the appellant had received an immediate sentence of 26 weeks and had served the required period in respect of that immediate sentence before appearing before the panel then she would, in that regard, have completed her sentence. In that respect, receiving a suspended sentence might be said to put somebody in a different and anomalous position vis-à-vis someone who had received an immediate sentence. But the point, however, is that this is a general principle which, as Newman J himself recognised, can bow to the particular circumstances of a particular case."

21. The position is further complicated by the fact that although there are provisions in the GDC Guidance for review, renewal and revocation, the period of suspension imposed by the Committee may not exceed 12 months. An earlier hearing date in the present case would have meant that a suspension could not have been entirely co-extensive with the suspended prison sentence (at least without a subsequent renewal). In the case of *Khan v General Pharmaceutical Council* [2016] UKSC 64, the Supreme Court decided that the review power could not be used as a method of imposing a sanction of suspension of more than a year.

22. Equally, *Fleischmann* does not suggest that suspension falls away as an available sanction just because a criminal sentence has been "completed" nor that the date of completion of a sentence necessarily sets a cap on the period of suspension. That would incentivise delay and fetter the Committee's powers. It must remain a sanction open to the Committee where appropriate even if the criminal sentence is complete. In many cases, no doubt, a suspension running concurrently with the period or part of the period over which the criminal penalty is served or is to be completed may be appropriate. That will follow the general principle in *Fleischmann* and meet public expectations. In other cases, an approach fitted to the particular circumstances will be required.

The Driving Offence and Sentence

23. The offence of causing death by careless driving did not exist before 2006. It was created by way of an amendment to the Road Traffic Act 1988, contained in the Road Safety Act 2006. It followed a Home Office review of offences involving bad driving. The consultation which formed part of that review demonstrated strong public support for the proposal to introduce such an offence.

24. The judge's sentencing remarks are indicative of both the circumstances and seriousness of the offence in this case:

> "On 15th February 2019 Mr Eyre was driving to a routine appointment when he pulled out to cross the Broadway. You were driving your Range Rover at grossly excessive speed. When you saw Mr Eyre pull out you did not brake but tried to avoid the collision by swerving and you smashed into him causing a head injury which led to his death. Fortunately, there was evidence from your motor car about your driving because of the onboard computer. Five seconds before impact your Range Rover was travelling at 60 miles per hour in a 40 miles per hour limit, a limit that was set to deal with the hazards of the road. You describe it as being like a dual carriageway. It could not be further from the truth. At trial the prosecution through Mr Hall put their case on this basis, that you were speeding and only decreased your speed marginally before the collision in order to take the bend, rather than as you said in your evidence to slow down because you realized that you were speeding. Having heard all of the evidence, I find that it is a proper inference from all of the evidence that Mr Hall's suggestion to you was correct. If you were genuinely trying to reduce your speed there would have been a much more marked reduction in your speed. To drive at the speed that you did along that road at that time of day with those inherent hazards of which you were aware because you were familiar with the road was truly careless and as I have already said at grossly excessive speed with little regard for other road users. The hazards were such that unexpected events were likely or possible to occur and drivers are expected to drive with sufficient care in order that they are able to react and deal and manage with unexpected events. You did not do so and when Mr Eyre unexpectedly pulled out your driving was such that you were unable to react and manage the situation."

25. In relation to mitigating and aggravating features the judge said:

> "The offence is aggravated because of your two speeding convictions. In April 2018, just ten months before this collision, you were driving at 72 miles per hour in a 60 miles per hour area in a Range Rover and in October 2018, four months before this collision, you were driving at 57 miles per hour in a 50 mile per hour area in an Audi motor car, so you were driving with six points in your licence at the time. Turning to the mitigation in your case, I have read and take account of the character references provided, I have read the pre-sentence report, Mr Myers' written sentencing note and what he has submitted in court today. I do not accept that you are genuinely remorseful for the offence for which you were convicted. I accept that you regret the consequences but that is different to genuine remorse for your actions. It was clear in the way you gave evidence and in what you said that you do not accept any responsibility whatsoever for causing the death of this man or for the way that you drove. You categorically and repeatedly stated during your evidence that you did not consider the way you drove was careless at all and you denied in the clearest of terms any responsibility for Mr Eyre's death and you blamed him entirely. There is mitigation in your case. You are 32 years old and you are well thought of in your community, by your patients and your family. I note that there may be professional consequences following your conviction and sentence for this offence.."

26. In giving her reasons for setting the disqualification period at 3 years the judge said:

> "I have concluded that you have no real insight into the potential consequence of driving at speed and the public needs to be protected from your driving."

27. The judge concluded that the offence fell into the middle of the three categories set out in the sentencing guidelines then in force. This category had a starting point of 36 weeks custody with a range of a high-level community order to two years custody. There is considerable overlap between the categories, catering for the wide range of factual circumstances likely to be encountered in sentencing for an offence of this nature. The custodial period identified by the judge was also the starting point for the highest category of offending. In directing the attention of the sentencer to the custody threshold test, the guideline indicated that a custodial sentence was to be reserved as a punishment for the most serious offences. The judge suspended the sentence, applying the Sentencing Council's imposition guideline, because "there is a realistic prospect of rehabilitation and because the risk that you pose can be managed in the community." She must nevertheless have regarded this offence as very serious, and rightly so in my view.

The Committee's Decision

28. The Committee set out its decision and reasons as follows:

> "The Committee was aware of the general principle expressed in the case of *Fleischmann* and reflected in the GDC guidance that where a registrant has been convicted of a serious criminal offence they should not be permitted to resume unrestricted practice until they have completed their sentence. Only circumstances which plainly justify a different course should permit otherwise. The rationale for the principle is that good standing in a profession, must be earned if the reputation of the profession is to be maintained. Not only have you already been practising for over a year since your conviction without any apparent adverse effect on the reputation of the profession, but it is the Committee's view that there are a number of factors in this case which justify a departure from that general principle. Those factors are the nature of the offence itself in terms of a lack of any criminal intent, the significant lapse of time since the incident in question and the good standing in the profession earned by you through the quality of your work, including your charitable dental work as reflected in your testimonials. In any event a reprimand will remain on your record as a clear personal and professional rebuke until after you have completed your sentence. In this case the Committee considers that a reprimand is adequate to maintain confidence in the profession and uphold standards, and therefore a suspension order would be disproportionate.
>
> Accordingly, the Committee has determined that the appropriate and proportionate sanction is one of a reprimand."

The Grounds of Appeal

29. There are six grounds of appeal. The first is that the Committee failed to properly assess the seriousness of the offence and hence the appropriate sanction. Grounds two to six might be regarded as being largely subsumed within ground one since they isolate particular features of the Committee's decision which are said to have contributed to the overall error in assessment. I therefore consider each of these grounds before

returning to Ground 1 and the principal complaint, that the sanction imposed was inappropriate and unduly lenient.

30. **Ground 2 – Insight.** The sentencing judge reached conclusions about the defendant's lack of insight which were expressed in trenchant terms in her sentencing remarks. It was argued that the Committee had not properly taken into account the judge's findings and that, at best, the Committee should have decided that Mr Patel was slow to develop insight and had only done so when convicted following a contested criminal trial; at worst the Committee should have found that his insight had developed no further than it had done at the time of trial. In either case, it was said, Mr Patel's degree of insight was relevant to the question of public confidence and thus to the level of sanction so that the Committee should have given reasons for departing from the views expressed by the judge. It was suggested that although that Mr Patel had expressed regret for his own predicament, he had not demonstrated any real insight into his offending.

31. However, as Mr Garside KC observed on Mr Patel's behalf, the Committee was assessing the issue some 12 months after the sentencing hearing. It had heard from Mr Patel in person and reached findings on what were, essentially, factual questions in relation to insight and remorse. Mr Garside pointed to the continuing professional development course which Mr Patel had undertaken on the 4th of January 2022, the reflective learning self-assessments which he had completed as part of that course and Mr Patel's witness statement of the 13th of September 2022, all of which, he submitted, amply demonstrated genuine remorse and understanding. The Committee referred expressly to the fact that it had had regard to Mr Patel's Personal Development Portfolio, Continuing Professional Development (CPD) certificates and further testimonial letters and references in reaching its conclusions.

32. The material part of the Committee's conclusions was:

> "In respect of your conviction, the Committee notes that this was for a serious offence. You have apologised and you are deeply remorseful for your actions. You have reflected on the accident fully and have attended relevant courses. The Committee is satisfied that you have shown adequate insight and the risk of repetition is low."

33. I consider that the Committee was entitled to reach that view on the material before it. It gave reasons for the decision it reached on the issue. It involved an assessment which the Committee was best placed to make and with which this court should be slow to interfere.

34. **Ground 3 – Undue weight given to mitigation and family impact. Failure to consider a shorter period of suspension**. The PSA submitted that the Committee had given undue weight to personal mitigation including the impact of a suspension order on Mr Patel's family. The GDC Guidance requires mitigation to be considered at the sanctions stage and a decision taken as to the extent to which it should influence the sanction to be applied; "this will depend upon the individual circumstances of each case and should always be balanced against the primary aims of sanctions: the protection of patients; the maintenance of public confidence in the professions; and the promotion of appropriate standards and behaviour in the professions." (see GDC Guidance paragraph 5.15).

35. However, as the GDC Guidance recognises, in cases involving conviction "the allegation of impairment is made by virtue of the conviction itself" (Appendix A to the GDC Guidance). The negative effect of a conviction, for a serious offence, on public confidence in the profession is essentially a consequence of the fact of conviction. The role of personal mitigation is likely to be more muted in those circumstances given that the role of the regulator is to maintain public confidence rather than punish.

36. In *Bolton* [519 B] the Court of Appeal observed:

> "Because orders made by the tribunal are not primarily punitive, it follows that considerations which would ordinarily weigh in mitigation of punishment have less effect on the exercise of this jurisdiction than on the ordinary run of sentences imposed in criminal cases."

37. The PSA also relied on similar comments made in *Fleischmann*, where Newman J said [56]:

> "...I recognise that the variety of circumstances presented by individual cases must be weighed but, where grave and serious offences are under consideration, personal factors, such as character, previous history and the practitioner's livelihood as a dentist, will invariably be insufficient to produce a result different from that which would have applied had the individual been an applicant for registration. Had an application been received from Mr Fleischmann during the currency of his Community Rehabilitation Order, only six months after its imposition, it is inconceivable it would have been accepted."

38. The PSA submitted that, applying this approach, an application for registration during the currency of a suspended sentence for causing death by careless driving was highly unlikely to be successful, not least because until the suspension period had elapsed it would not be possible to know whether the custodial term would have to be served in full or in part. In addition, it was argued, the mitigating factors relied upon by the Committee fell squarely with the personal factors which Newman J. identified as being invariably "insufficient". The apparent logic of this argument must be tempered by the fact that at this point in his judgment Newman J. was dealing with the sanction of erasure. The point being made, in the context of a case which raised an issue of public protection, was that the question of fitness to practise should be answered by reference to a common test as between registration and erasure. As Newman J. observed: "The protection of the public will not be served by the application of a different standard at erasure from that which is applied when considering registration" [56].

39. Nevertheless, there appears to me be force in the PSA's general observation that the Committee must have given considerable weight to personal mitigation in order to have arrived at its conclusion as to the appropriate sanction in circumstances where such mitigation could only be afforded a reduced role. Further, insofar as the mitigation relied upon was the effect of suspension upon Mr Patel's family there appears to have been little evidence to support or quantify this or to suggest that it went beyond what must invariably accompany suspension in most cases.

40. The PSA also relied, under this ground, on a failure by the Committee to consider a period of suspension shorter than 12 months. However, I note that the Committee was urged to do so by Mr Garside at the hearing if it concluded that suspension was a

necessary sanction. In those circumstances I do not consider it would be safe to assume that the Committee members did not turn their minds to shorter periods even if that is not stated in the decision. Both the GDC and the PSA had of course submitted at the hearing before me that the appropriate period would have been close to or at the maximum that could be imposed (reflecting the arguments advanced in relation to the application of the principle in *Fleischmann*).

41. **Ground 4: reliance upon absence of evidence of public concern.** The Committee was required to assess the effect of conviction on public confidence in the profession and the sanction it was necessary to impose to preserve confidence.

42. As Swift J. explained in *Adil v GMC* [2023] EWHC 797 (Admin) [35] this is an objective exercise: "The application of a standard such as paragraph 65 of Good Medical Practice, in substance whether conduct had tended to diminish public trust and confidence in a profession, requires a tribunal such as this one to apply its own expertise to assess whether, objectively, the conduct found to have occurred had that effect on ordinary, reasonable members of the public. In some cases, specific evidence relevant to public trust and confidence may be available. But because the matter is an objective standard applied by an expert tribunal, such evidence is neither necessary for such a conclusion nor, when available, need not be determinative of the conclusion the tribunal may reach."

43. Although the Committee asked itself, correctly, whether a reasonable and informed member of the public would lose confidence in the dental profession and its regulation if Mr Patel was allowed to continue to practise after his conviction and failure to inform the GDC, it appears to have answered that question, to a significant extent, by reference to the absence of evidence of public concern. It identified as a mitigating factor that "you have continued to work for over three and a half years without any evidence of public concern that you should be doing so even after your conviction and sentence more than a year ago." It noted that Mr Patel had continued to practise and had "been doing so for over a year without any apparent adverse comment"; adding "you have already been practising for over a year since your conviction without any apparent adverse effect on the reputation of the profession".

44. These observations appear to be predicated upon the assumption that in a case of this type evidence of an adverse public reaction to the fact of conviction could be expected or that the absence of such evidence indicated that it was not to be regarded as a matter of concern to a reasonable and informed member of the public. Given the repetition of the same point at three places in the Committee's decision it is one which appears to have informed the conclusion that a lesser sanction than suspension was appropriate notwithstanding the general starting point in *Fleischmann*. I agree with the PSA's submissions that in the circumstances of this case it would be surprising to find evidence of the kind which the Committee identified as absent and that it was not appropriate to attach any significant weight to the fact that there was no such evidence. This appears, in my view, to have improperly coloured the view which the Committee came to in making the objective assessment required.

45. **Ground 5: reliance upon inapposite factors in support of reprimand.** The GDC Guidance required that "The sanction chosen should always be the least severe sanction which deals adequately with the identified issues whilst protecting the public interest." A reprimand is the lowest sanction which can be applied. The Guidance suggests that

it may be appropriate where the misconduct or level of performance is at the lower end of the spectrum. The Committee was not, in this case, considering a practice failure or misconduct in the context of clinical practice but the effect of a criminal conviction (and a failure to notify) on public confidence. A conviction for causing death by careless driving was not, on any view, conduct at the "the lower end of the spectrum" of driving offences nor, I consider, likely to be regarded as such by the general public.

46. Mr Tankel, in his submissions on behalf of the PSA, drew attention to the following passages in the Committee's decision which, he argued, indicated that the Committee had taken the wrong approach to the penalty imposed in the Crown Court and the punitive effect of suspension from practice:

> "... the Committee acknowledged the condign punishment imposed by the criminal court and recognized that its role is to impose the least restrictive sanction which will adequately address the public interest in maintaining public confidence in the profession and upholding proper standards…"
>
> "...You do not need any further punishment added to that imposed by the criminal court."
>
> "A suspension order would be extremely punitive, in that you would be unable to practise your profession and its punitive effects would be very widespread in that your many patients would need to find alternative treatment, something which would be very difficult for some of them, and your charitable dental work would at least temporarily cease. The punitive impact would undoubtedly be felt also by your family".

47. The GDC Guidance makes clear that "The purpose of imposing a sanction is not to punish the registrant but to protect patients and the wider public interest" notwithstanding that it may have an incidental punitive effect. Although the Committee referred to this principle, its approach to implementing it was, in my view, flawed. The fact that Mr Patel had received a severe punishment in the criminal court was not in itself a reason to consider applying a lesser sanction nor was the fact that the regulatory sanction might be punitive in operation. The seriousness of the offence, reflected in the sentence imposed, was a measure of the impact on public confidence that it was likely to have. As Mr Tankel submitted "the fact that Mr Patel had been given condign punishment by the criminal court was a reason *for*, not *against*, imposing a suspension coterminous with the criminal sentence." Equally the punitive effect of a sanction articulated in terms of its inevitable effect on any dental practice was not a factor to which substantial weight could be attached in a conviction case. A period of suspension (or erasure from the Register) is bound to have an impact on a practitioner's patients but that must be balanced against the wider public purpose of the sanction and effective regulation (see *Giele v GMC* [2006] 1WLR 942 at [27]).

48. The Committee sought to support its decision to impose a reprimand by considering paragraph 6.9 of the GDC Guidance which provides that:

> "A reprimand may be suitable where most of the following factors are present (this list should not be taken to be exhaustive):

• there is no evidence to suggest that the dental professional poses any danger to the public;

• the dental professional has shown insight into his/her failings;

• the behaviour was an isolated incident;

• the behaviour was not deliberate;

• the dental professional acted under duress;

• the dental professional has genuinely expressed remorse;

• there is evidence that the dental professional has taken rehabilitative/corrective steps;

• the dental professional has no previous history."

49. The Committee concluded that, with the exception of the reference to duress, all of these features were present. Whilst the factors set out at paragraph 6.9 may be readily applicable in a case involving misconduct in a clinical context, they are, at best, an uncertain guide to any assessment of the seriousness of criminal offending (which appears to be the purpose for which the Committee was considering them). Since Mr Patel's fitness to practise was found to have been impaired on public confidence grounds the question of whether he posed any danger to the public as a dentist did not arise. In so far as the conviction was concerned, one of the reasons for suspending the sentence was that the risk he posed to the public as a driver could be managed in the community, not that there was no risk. It is debatable whether the "behaviour", driving significantly above the speed limit, could be regarded as not deliberate but, in any event, it was not an isolated incident, there having been two earlier occasions on which he had been caught speeding. If rehabilitation was to be taken into account, then, under the principle in *Fleischmann*, this arguably required that the sentence should have been served or a departure from that principle properly justified.

50. The more telling criticism is not that the Committee misapplied the factors identified in paragraph 6.9 but that had it undertaken an appropriate analysis they would not have fallen to be considered at all or regarded as supporting the imposition of a reprimand. Whilst it is true that the Guidance requires the panel to commence its consideration with the least restrictive sanction, it was required under paragraph 10 of Appendix A to the GDC Guidance to approach a conviction in accordance with the "general principle", derived from *Fleischmann,* that there should be no return to unrestricted practise until the completion of the sentence. That could not be achieved by a reprimand. The starting point ought to have been consideration of suspension, unless there were circumstances plainly justifying a different course. If there were such circumstances, then a reprimand might be appropriate but this was not the route the Committee took. This is the issue addressed in the next ground.

51. **Ground 6: unjustified departure from the general principle in Fleischmann**. Mr Tankel submitted that the principle identified in *Fleischmann* is inherently sound and has been applied in a number of reported cases, albeit at first instance. The Committee should have applied it unless there was a good reason not to. The Committee sought to

justify adopting a different course but appears to have accepted that suspension would otherwise have been required.

52. Mr Garside submitted, on Mr Patel's behalf, that by characterising *Fleischmann,* in the course of the appeal, as establishing a "minimum but not a maximum threshold" the PSA was, in effect, seeking to elevate the principle to a rule of law which applied in all conviction cases so that, with limited exceptions, suspension would be the outcome. He pointed out that *Fleischmann* was a case of deliberate acts over a period of time which involved a high degree of moral turpitude. Many of the other cases in which it had been applied involved some connection with professional practise or featured convictions for offences of a very different nature. He noted that Newman J. had contemplated exceptions when setting out the principle. He submitted that the Committee had not been obliged to apply *Fleischmann* in a mechanistic way and the decision it reached was within the range of justifiable outcomes. The proper approach was in any event that set out in *Bawa-Garba* so that the court should be slow to interfere with the decision of an experienced committee in making an evaluative judgment.

53. Notwithstanding these submissions I do not ultimately think there was much between the parties as to the role of the *Fleischmann* principles, their incorporation into the GDC Guidance and the need for them to be considered in Mr Patel's case. The central question was whether it was consistent with the proper application of the principles to impose a lesser sanction than suspension in Mr Patel's case.

54. The features which the Committee identified as justifying a departure from the general principle were: "... the nature of the offence itself in terms of a lack of any criminal intent, the significant lapse of time since the incident in question and the good standing in the profession earned by you through the quality of your work, including your charitable dental work as reflected in your testimonials."

55. Mr Tankel submitted that none of these factors whether viewed individually or in the round "plainly justified" a different course. As far as the offence was concerned it did not require a criminal intent so this factor was "built in" to the offending but did not prevent an assessment of Mr Patel's culpability by reference to all of the factors identified by the judge. I agree that isolating a feature of the offence which would be common to every case, however serious or otherwise, was not a clear justification for departing from the principle in *Fleischmann.*

56. As to the lapse of time; the offence was committed on the 15th of February 2019 with the prosecution case commencing in November of that year. Mr Patel contested the matter. It did not come to trial until the summer of 2021. Mr Patel was convicted on the 24th of August. Throughout that period, of over two years, he failed to inform the GDC that he had been charged and was awaiting trial. He only did so when he was convicted. He was sentenced on the 27th of September 2022. Notwithstanding the failure to notify it was not suggested that this would have been a case requiring an interim measure had the GDC been aware of the criminal proceedings. The fitness to practise hearing took place in October of 2022. Mr Tankel submitted that holding the disciplinary hearing within about a year of the conclusion of the criminal proceedings could not be regarded as dilatory or unusual. The Appellant's notice in the present proceedings was filed on the 6th of December 2022 with the hearing of this appeal taking place on the 13th of July 2023.

57. The principle in *Fleischmann* can only be engaged once there has been a conviction and sentence. The 1984 Act refers to impairment by reason of a conviction, which is the matter the Committee had to assess. At the time of the hearing Mr Patel was still subject to the suspended sentence order imposed by the Crown Court and was disqualified from driving. It may be that the age of the predicate offence will have some impact on an objective assessment of a conviction on public confidence but it is difficult to see how on the facts of the present case this could be regarded as a factor which plainly justified a departure from *Fleischmann.* The Committee was considering the matter a year after conviction and during the operational period of the sentence imposed.

58. Mr Patel's good standing as a dentist was a mitigating feature, but the role of personal mitigation was limited. He had, at the age of 32, established a dental practice, was well thought of and had no other blemishes on his practising record. This is likely to be the position in many conviction cases; it was not exceptional or a matter which plainly justified a departure from *Fleischmann.*

59. **Ground 1: failure to consider the seriousness of the offence.** Mr Garside's submission was that the starting point was the definition of the offence of careless driving set out in s.3ZA of the Road Traffic Act 1998. Unlike the offence of dangerous driving, it involved falling below the standard expected of a competent and careful driver rather than far below it. Since causation (of death) was an objective matter there was no implication from the conviction that Mr Patel foresaw the death or that a reasonable person would have foreseen the events that occurred. He suggested that "it is difficult to accept that many people who drive have never been guilty of careless driving". Whether or not that is the case it is clearly possible to distinguish between offences which involve a momentary lapse with unintended fatal consequences and an accident that results from driving at grossly excessive speed in a built-up area. The sentencing guidelines set out categories of varying seriousness, attracting different starting points by reference to the characteristics of the driving which leads to a fatal accident and features which aggravate it, such as previous relevant convictions. The judge, in her sentencing remarks, explained carefully why this was a serious offence of its type. It merited a custodial sentence and, since that sentence was suspended, a significant unpaid work condition.

60. Both Mr Tankel for the PSA and Ms Hearnden, on behalf of the GDC, submitted that the Committee could not have arrived at a reprimand as an appropriate sanction had it properly assessed the seriousness of the criminal offence and the application of the guidance at paragraph 10 of Appendix A. I agree. An offence which results in a sentence of imprisonment whether immediate or suspended should normally be regarded as a serious criminal offence for the purpose of the guidance. Any doubt about that in this case could quickly be dispelled by reading the judge's sentencing remarks. Suspension from practise (in a case not requiring erasure) was the starting point in accordance with *Fleischmann* and the GDC Guidance. It was "the least severe sanction" (see the GDC Guidance at paragraph 6.5). It was then necessary to consider whether there were circumstances plainly justifying a different course and, if not, the appropriate period of suspension. The factors identified by the Committee did not in my view justify any different course being taken for the reasons discussed above.

Conclusion

61. I conclude that the sanction imposed was not sufficient to maintain public confidence and was "wrong". The appeal is therefore allowed pursuant to CPR 52.21(3). A number of further matters then arose as to the consequences of allowing the appeal. The parties each made additional written submissions.

Sanction and Consequential Orders

62. Mr Garside submitted that it would be open to me to "allow" the appeal without disturbing the existing sanction of a reprimand. By this he meant that the court "could properly give a judgment in favour of the Appellant but make no other order save as to costs", which he accepted Mr Patel should pay. This would involve a judgment stating, "what the result of the appeal might have been but nevertheless refusing to quash the decision in the circumstances as they now are." He acknowledged that there was no power to make an order quashing the decision but "retaining the sanction rather than the type of sanction, imposed originally".

63. Both the PSA and the GDC submitted that that if the appeal test was satisfied the decision could not be permitted to stand.

64. The statutory basis for the reference to the High Court is that the decision was "not sufficient". Section 29(8)(b) of the 2002 Act provides that the court may either dismiss the appeal or "allow the appeal and quash the relevant decision" (my emphasis). The choice is binary and the consequence of allowing the appeal is that the decision should be quashed. The statutory scheme does not permit the outcome suggested by Mr Garside.

65. As to the reimposition of a sanction; the primary position of the GDC and PSA was that I should now remit the matter to the Committee for reconsideration of sanction in accordance with the court's directions; alternatively, that I should, pursuant to section 29(8)(c), "substitute for the relevant decision any other decision which could have been made by the committee..." .

66. The potential substitution of a decision by the court, gave rise to two other questions which were the subject of the later written submissions:

    i) First, whether "any other decision" means a sanction other than the one imposed by the Committee, so that the court would be precluded from imposing a reprimand.

    ii) Secondly, whether substituting a decision which "could have been made" by the Committee precluded the court from taking into account matters which could not have been before the Committee such as the further elapse of time.

"Any other decision"

67. Mr Garside submitted that the words "any other decision" referred to decisions "other than those specifically listed in sections 29(8)(a) and (b) and not to a decision of the same type as that originally reached." As I read section 29(8)(c) it follows on from 29(8)(b) and does no more than set out the first of the alternative courses open to the

court where it has allowed an appeal. The "relevant decision" here is a direction by the Committee under s.29(1)(e) of the 2002 Act to reprimand Dr Patel.

68. The correct approach of the Court to a reference under s 29, was considered by the Court of Appeal in *Ruscillo*. At that time s 29(4)(a) provided that the question was whether the decision was unduly lenient. The statutory test is now insufficiency rather than "undue leniency". In *Ruscillo* [54-70] the Court of Appeal rejected the argument that an appeal would lie to attack the findings of the disciplinary tribunal even where it was not contended that the sanction imposed was inappropriate: "If the Court decides that the decision as to the penalty was correct it must dismiss the appeal, even if it concludes that some of the findings that led to the imposition of the penalty were inadequate" [70]. The premise of this conclusion was that an appeal was against a decision to direct a penalty which was unduly lenient. The court grappled with the difficulties of construction which it identified in the statutory wording as it then stood. Under the amended section 29(4) of the 2002 Act the PSA may refer a case to the court where it considers that "the decision is not sufficient (whether as to finding or a penalty or both) for the protection of the public." (my emphasis).

69. Although the PSA expressed its agreement with the submissions made by the GDC there was, I think, a difference of approach as to whether an appeal could succeed where the penalty was found to be correct (or where there was no contention that the sanction was insufficient in the first place).

70. The PSA submitted, by reference to *Ruscillo*, that "If the Court decides that the decision as to the penalty was correct it must dismiss the appeal, even if it concludes that some of the findings that led to the imposition of the penalty were inadequate."

71. In contrast the GDC argued, relying on the 2002 Act as amended, that "Section 29(4) makes clear that insufficiency of public protection - whether attributable to finding or penalty or both – will result in the appeal being allowed. Therefore, even if the court were to hold the view that a committee got to the right penalty via the wrong route the appeal would still be allowed and the decision quashed."

72. This appears to accord with PSA's practice guideline to section 29 which says : "The insufficiency for the protection of the public of a decision usually relates to the insufficiency of the sanction (or lack of sanction) imposed by the fitness to practise panel. However, a decision can be insufficient for public protection as a result of a finding that was made (or not made) by the final fitness to practise panel before it considered sanction. For example, either a failure to make a finding that one of the statutory grounds of impairment of fitness to practise has been established, or a failure to make a finding that the registrant's fitness to practise is currently impaired can be insufficient for public protection."

73. However, the statutory scheme as it relates to the GDC identifies the "relevant decision" that may be referred to the court, as the "direction" made "following a determination that a person's fitness to practice is impaired" or, under s. 29 (2)(a), a decision not to take any disciplinary measure where such a determination has been made. The focus is plainly on the sufficiency or otherwise of the sanction after impairment has been found.

74. I have of course reached the view that the decision was wrong because the penalty was insufficient to maintain public confidence. However, the question of whether a decision

must be quashed if the penalty itself was not insufficient has some bearing on the arguments advanced as to the court's power to substitute any "other" decision.

75. On behalf of the GDC, Ms Hearnden observed that it would have been possible for the statute to have said that the court had the power to substitute for the Committee's direction "any decision" which could have been made by the Committee. The addition of the word "other" must have been intended to serve some purpose and requires to be considered, rather than disregarded, in interpreting the statute. Her submission, with which the PSA agreed, was that the natural meaning was that it gave the court "the power to substitute one of the other available sanction decisions, i.e. erasure, suspension or conditions, under section 27B(6) of the Dentists Act 1984". It followed that the court could not quash the decision and impose the "same" penalty.

76. If this interpretation applied generally the court would only have the power to correct a category error in relation to penalty rather than, for example, increasing a period of suspension or varying conditions imposed. Ms Hearnden's submission however was predicated on the relevant decision being a reprimand. Since there are no degrees of reprimand it followed that "any other decision" must, in the context of a reprimand, involve a different penalty.

77. Taking the GDC's two submissions together produces an anomalous result if a decision (a direction as to penalty here) must be quashed where a finding is "insufficient" but the penalty itself is not because it is acknowledged to be, or found to be, the right outcome. In such a case the court could quash the decision but could not reimpose the same, sufficient, penalty.

78. That anomaly does not arise on the PSA's argument that insufficiency of sanction rather than findings is the appropriate test notwithstanding that its practice guidance might be thought to suggest otherwise.

79. Mr Garside's argument was that the court has an original jurisdiction as to sanction so that whatever the basis for concluding that the relevant decision was not sufficient, a reprimand by the court was not the "same" penalty as the reprimand directed by the Committee. As a matter of interpretation this would, I consider, involve either ignoring the word "other" or treating "any other" as synonymous with "another", so that the statute was simply providing that the court had power to substitute a decision within the parameters of the jurisdiction exercised by the Committee. Neither approach, in my view, sits easily with the statutory language nor the observation that this result, had it been intended, could have been achieved by simply omitting the word "other".

80. The course suggested by the PSA and GDC, of remitting the matter, provides a pragmatic solution since both agree that once remitted it would be open to Mr Patel to argue that a reprimand is, in the circumstances as they are now, an appropriate sanction to maintain public confidence and, equally that the sanction of a reprimand would still be available to the Committee if that argument was accepted.

81. This leads on to the further question of whether, in exercising a power to substitute a sanction, the role of the court was limited, as Mr Tankel put it, to considering "what the decision ought to have been at the time it was made".

A decision "which could have been made"

82. Mr Garside drew attention to the fact that the appeal was taking place some four years after the index offence and that Mr Patel had not been responsible for any delay in the disciplinary proceedings (notwithstanding his failure to inform the GDC of the charge and pending trial). Applying the logic of the decision in *Fleischmann* and the GDC Guidance, Mr Patel had, he argued, "paid his debt to society" so that to impose any kind of a suspension now would be more punitive than protective of the reputation of the profession of dentistry. If it was not open to the court to leave the Committee's decision as to sanction undisturbed, he submitted that a reprimand remained, at this stage, the appropriate sanction.

83. As an ancillary point he drew attention to section 1A of the Dentists Act which provides:

> "When exercising their functions under this Act, the Council shall have proper regard for— (a) the interests of persons using or needing the services of registered dentists or registered dental care professionals in the United Kingdom..."

84. Whilst acknowledging the public interest in effective regulation he argued that a period of suspension would deprive Mr Patel's patients of the services of a dentist providing NHS dentistry and that this factor taken together with the completion of the criminal sentence weighed heavily against suspension.

85. I agree with the submissions of both the PSA and the GDC that suspension would have been appropriate when the matter was before the Committee even allowing for its conclusion that by the time of the disciplinary hearing Mr Patel had developed insight into his conduct as a driver. However, that raises the question of whether it would be artificial to reconsider sanction without taking into account the further period of time that has elapsed since the disciplinary hearing where, as a result, the suspension period of the criminal sentence has run its course and Mr Patel has completed the unpaid work requirement.

86. Mr Tankel, on behalf of the PSA, acknowledged as much by observing that this "...gives rise to a fresh question as to what if any sanction is required now, in order to maintain public confidence in the profession."

87. Ms Hearnden, on behalf of the GDC, noted that the passage of time meant that the suspended sentence would have elapsed but submitted that a suspension of 9-12 months was nevertheless justified given the seriousness of the misconduct.

88. Mr Tankel argued, in his further written submissions, that it would add substantial complexity to appeals if the court were to take into account fresh arguments about mitigating and aggravating circumstances (including the elapse of time) and that the reference in the statute to "a decision that could have been made" was essentially a backward looking exercise taking into account the matters before the Committee; thus the court should impose a sanction of suspension of the length that might have been appropriate when the matter was before the Committee.

89. On the basis of his research, he was aware of only one previous case in which a similar issue had arisen: *Council for the Regulation of Healthcare Professionals v (1) GMC and (2) Leeper* (CO/1752/2004); where the Judge proposed quashing the decision and remitting the case with a direction to be noted against the doctor's registration rather

than imposing a suspension in circumstances where he had found that suspension would have been the appropriate sanction. I agree with Mr Tankel that this case should be treated with caution given that it is not clear whether such a proposal was adopted or whether there would be any statutory power to implement it.

90. The Court of Appeal faced a somewhat similar situation in *Bolton* having decided that the Divisional Court should not have quashed a suspension order of two years made by the Solicitors' Disciplinary Tribunal. At page 520 of the judgment Sir Thomas Bingham MR said:

> "In the present circumstances, however, a real question arises as to what should be done now, having regard to the time which has elapsed in the course of these proceedings, none of it due, I should say, to the disciplinary tribunal itself, or to either of these parties. The fact, however, is that, as a result of the various stays that have been granted in the course of these proceedings, the order of suspension has never taken effect and- it would, in my judgment, be oppressive to reinstate the tribunal's order 2 ½ years after the order was made, and 16 months after the Divisional Court quashed it. The Law Society acknowledge the force of this contention and are more concerned in this appeal to allay misunderstanding and obtain a clear statement of practice and principle than to achieve the suspension of Mr. Bolton from practice."

91. Mr Tankel's concerns as to the effect on the appeal process of considering material other than that before the Committee are catered for within the rules which confine the appeal to a review unless the court otherwise orders. Equally it is clear from the discussion of fresh evidence in *Ruscillo* that it may be necessary in disciplinary cases to admit further evidence to ensure that the public interest is protected. Whilst the Court of Appeal had in mind that a practitioner should not escape essential sanctions it is not difficult to envisage circumstances in which the public interest might allow further material to be admitted which went to a reduction in the severity of the penalty. In any event the impact of the elapse of time in a case such as the present is inescapable because it intersects with the principle in *Fleischmann.* In point of fact Mr Patel has now completed the sentence imposed by the criminal court. I do not consider that s.29 of the 2002 Act precludes that factor being considered. The words "any other decision which could have been made" relate, in my view, to the form of the sanction rather than the material which informed it.

92. In all the circumstances I propose to remit the matter to the Committee with a direction that it consider what sanction is required in order to maintain public confidence it should take into account the fact that Mr Patel has completed his sentence. That may well go to the length of any suspension that is imposed but it will also allow Mr Patel to argue that a reprimand is now sufficient in a forum in which it is accepted by the PSA and the GDC that he is entitled to do so rather than before me where that is not accepted.

Costs

93. Although the appeal has succeeded, I adopt the reasoning of Chamberlain J. in *PSA v GMC, Hanson* [2021] EWHC 1288 (Admin) in concluding that the GDC should not be subject to a costs order in favour of the PSA. Not only has the GDC not offered any opposition to the appeal it referred the case to the PSA in the first place and has

supported the PSA's position, echoing its concerns that the sanction imposed was overly lenient.

94. As was conceded, Mr Patel is to be regarded as the unsuccessful party and should meet the PSA's costs. I propose to summarily assess costs subject to any argument that may be advanced on Mr Patel's behalf to the contrary and in any event having afforded him the opportunity of making written submissions, if he wishes to do so, in relation to the amount of costs that he should be ordered to pay.

95. For these reasons:

i) I quash the Committee's decision and remit the matter to the Committee with the direction referred to above.

ii) I refuse the PSA's application for a costs order against the GDC.

iii) I shall make an order that Mr Patel pay the PSA's costs of the appeal.