

Meeting of the s40A Panel to consider the case of Dr Brian Flavin

Held on 15 March 2019.

Panel members present

Charlie Massey, Chief Executive (in the Chair)
Colin Melville, Medical Director and Director of Education and Standards
Anthony Omo, General Counsel and Director of Fitness to Practise

In attendance

Jim Percival, Principal Legal Adviser and Deputy General Counsel
Mark Swindells, Assistant Director, Corporate Directorate (Panel Secretary)

Purpose of this note

- 1 This meeting note records a summary of the Members' consideration of the relevant decision of the Medical Practitioners Tribunal ('MPT') which considered the Doctor's case ("the decision"), and the Panel's decision on behalf of the General Medical Council as to whether or not to exercise the power to appeal the decision pursuant to section 40A Medical Act 1983.

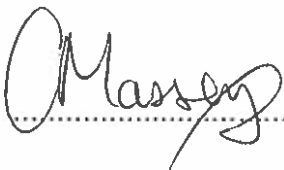
The relevant decision

- 2 The Principal Legal Adviser confirmed that the decision was a relevant decision for the purposes of s.40A.

Consideration

- 3 The Panel considered the record of the MPT's determination and the legal advice in detail.

- 4 The Panel was concerned at the uncontested instances of dishonesty in this case, which is a serious departure from *Good Medical Practice* guidance. The Panel noted, however, that the MPT found that Dr Flavin has taken steps to remediate and appears to have learnt from these events. Dr Flavin's personal circumstances at the time of these events are important context. Moreover, he has complied with the interim order and the MPT concluded that the behaviour was highly unlikely to be repeated.
- 5 The Panel could not identify any errors of either principle or approach when analysing the MPT's determination.
- 6 The Panel therefore considered whether the sanction applied was within the range that the MPT was reasonably entitled to impose. The Panel noted advice that the MPT had deliberated extensively when determining the length of sanction, with reference to relevant statute and case law, and was best placed to evaluate the evidence pertinent to this.
- 7 The Panel therefore concluded that an appeal of the MPT's determination will not be sought.



Charlie Massey (Chair)

21/3/19

Dated

Background

- 8 This case concerns the determination of an MPT, which concluded on 19 February 2019, considering the matter under Part 4 of the 2004 Rules.
- 9 At the time of the allegations, Dr Flavin was working as a Consultant in Emergency Medicine at the Royal Bournemouth & Christchurch NHS Trust.
- 10 It was alleged that Dr Flavin inappropriately provided medical care to his wife on five occasions between 31 July 2016 and 5 April 2017. On the first occasion, Dr Flavin effectively 'fast-tracked' his wife through the A&E system when she presented with a potentially broken foot. On the other four occasions Dr Flavin treated his wife, who

was not a Trust patient, at home using items removed from his workplace. On two of those occasions (4 and 5 April), he falsified medical records to show that his wife had attended the Emergency Department when she had not – thus covering up his dishonest removal of items from his workplace.

- 11** The treatment of his wife for a possible broken foot occurred on 31 July 2016. The removal of medication from the Trust and the associated dishonesty occurred on four occasions between 24 March 2017 and 5 April 2017.
- 12** At the start of the proceedings, Dr Flavin admitted the majority of the facts save for an allegation which related to his communication with a colleague which was ultimately found 'not proven'.
- 13** The MPT did not find serious misconduct in relation to either treating his wife on 31 July 2016 or the removal of dressings from the Trust, having regard to the fact that he could have acquired them outside the trust and his wife was entitled to NHS care.
- 14** The MPT found serious misconduct in relation to his:
 - 14.1** taking intravenous fluids from the Trust to treat his wife at home, without carrying out the required checks and not recording this. This put his wife's safety at risk
 - 14.2** failure to take appropriate action when her condition had not improved by the following day. He knew he should not be removing intravenous fluids and treating his wife at home.
 - 14.3** falsification of medical records and the prescribing of antibiotics to his wife which he knew she was not entitled to as she was not a Trust patient.
 - 14.4** dishonesty
- 15** In their decisions on impairment, the MPT acknowledged Dr Flavin's 'very difficult personal circumstances' and accepted his actions were not for personal gain. These allegations occurred at a time when Dr Flavin was 'living with the consequences of previously diagnosed cancer', his wife was suffering with depression, his nephew had been diagnosed with neuroblastoma and his son had complex learning difficulties. The Tribunal made favourable findings on the risk of repetition and remediation of the 'non-dishonest' misconduct. It determined that he had taken significant steps to minimise and manage stress and accepted that his misconduct was unlikely to be repeated. It was satisfied that in relation to the non-dishonest serious misconduct, the conduct had been fully remediated. It concluded that Dr Flavin had good insight and did not now present any particular risk to the public.
- 16** In relation to dishonesty, it made a finding of impairment, stating:-

“69. However, the Tribunal considered that dishonesty, when proved against a medical practitioner, is difficult to remediate. It felt that, whilst the period of time to which the Allegation related was fairly short, Dr Flavin had taken property of the Trust to treat his wife after he had been told by Dr Hassan that he should not do this again; his actions generally demonstrated a pattern of behaviour. The Tribunal was particularly concerned that Dr Flavin had falsified the records to show that his wife had attended the Emergency Department when she had not done so. Doctors are expected to be honest and trustworthy, and to make sure their conduct justifies the public’s trust in the medical profession. Any finding of dishonesty has a negative impact on that trust and is in breach of the second limb of the overarching objective - to promote and maintain public confidence in the medical profession.

70. The Tribunal considered that the third limb of the overarching objective was also engaged – to promote and maintain proper professional standards and conduct. Doctors should not be dishonest and it is necessary to mark the Tribunal’s disapproval to the serious misconduct found. It accepted that there were degrees of dishonesty and the context within which the dishonesty occurred is relevant. The Tribunal was satisfied on the basis of all the evidence before it, that Dr Flavin before the events of March and April 2017 and currently was honest, and had no more propensity to be dishonest than any other doctor. The Tribunal appreciated the strain caused by Dr Flavin’s personal circumstances at the time of the events. However, the significant remediation achieved to date had to be balanced against the likely undermining of the need to uphold proper professional standards and public confidence in the medical profession if a finding of impairment was not made.”

- 17** The MPT imposed a sanction of 1 month suspension and did not direct a review. It determined that 1 month was a sufficient period of suspension. In reaching this decision, it took into account that it would not be in the public interest for patients to be deprived of the services of an otherwise good doctor for a lengthy period. It also took into account that Dr Flavin has demonstrated insight and has remediated, and so a lengthy period was not required for him to develop in any of these areas. Dr Flavin has remediated as much as possible and taken active steps to avoid repetition of his misconduct, including moving to Ireland to rely upon his support network there and reducing his financial obligations.”

The General Medical Council’s power to appeal pursuant to s.40A.

- 18** With effect from 31 December 2015, the General Medical Council acquired the power to appeal to the High Court (or equivalent courts in Scotland and Northern Ireland where relevant) against relevant decisions of a Medical Practitioners Tribunal (“MPT”) if it considers that the decision is not sufficient (whether as to a finding or a penalty or both) for the protection of the public.
- 19** The basis upon which the GMC will consider whether or not to exercise this power to appeal is described in “Appeals by the GMC pursuant to s.40A of the Medical Act 1983 (“s.40A appeals”) – Guidance for Decision-makers” (“the Guidance”).

- 20** Decisions concerning the exercise of the s40A power to appeal were originally delegated by the Council to the Registrar. However, following recommendations from Sir Norman Williams' Review Council agreed that decision-making in prospective appeals involving decisions of Medical Practitioners Tribunals be delegated to a three person Executive Panel comprising: the Chief Executive and Registrar as Chair; the Medical Director and Director of Education and Standards; and the Director of Fitness to Practise (or their nominated Deputies if not available) ("the Panel").
- 21** As the Guidance makes clear, when considering whether to bring a s.40A appeal in a particular case, it will be necessary to consider the following questions:
- 21.1** Based on their assessment of all of the information held, and in the particular circumstances of the case, and having regard to the factors set out in the Guidance, does the Panel consider that the MPT's decision is not sufficient to protect the public?
- 21.2** If the Panel is of the view, on its assessment of all the information held, in the particular circumstances of the case, that there are grounds to consider that the MPT's decision is not sufficient, it will consider whether exercising the power of appeal would further, rather than undermine, the achievement of the over-arching objective.
- 21.3** If the answer is yes, then the GMC may exercise its power of appeal
- 21.4** In considering that question the Panel will be required to consider and weigh a number of competing factors (including its assessment of the prospects of success of the appeal, and the nature and importance of the issues which would be aired).

