General Medical Council

Meeting of the s40A Panel to consider the case of Dr Andrea McFarlane

Held on 15 January 2019.

Panel members present

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

In attendance

Jim Percival, Principal Legal Adviser and Deputy General Counsel
Jennifer Richardson, Senior Legal Adviser
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 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 s40A Medical Act 1983.

The relevant decision

2 The Principal Legal Adviser confirmed that the decision was a relevant decision for the purposes of s40A.

Consideration

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

4 The Panel accepted that this was, in many respects, a well-reasoned sanction determination. The Tribunal identified a range of mitigating and aggravating factors and there is no obvious basis for criticising its identification of these factors. It regarded the facts of the case as unusual and explained why it had formed that view. It addressed the issue of insight and remediation in some detail and took some care to explain why it considered that suspension was the appropriate sanction.

5 The Panel did however consider that the Tribunal had given insufficient consideration as to whether erasure would be an appropriate sanction given the serious and persistent nature of the dishonesty. The Panel noted that the sanction determination could be considered not to have adequately reflected on the prolonged nature of dishonest conduct. There is no real recognition that in cases concerning the maintenance of public confidence and/or proper standards and conduct, matters of mitigation may be of less importance.

6 This could be considered to amount to an error of principle sufficient to give rise to a Ground of Appeal. The judgment as to whether the misconduct was or was not fundamentally incompatible with continued registration ought to have been informed by consideration of the advice and steer given in paragraph 109 of the Sanctions Guidance, and it is arguable that it was not.

7 However, the Panel noted that that Dr MacFarlane's behaviour was not predatory and that there was a genuine and special friendship between the doctor and Patient A, which developed several years before the misconduct arose. Patient A was strong minded and gained pleasure from making the gifts. The Tribunal was satisfied that Dr McFarlane had not actively sought or obtained gifts or financial payments from Patient A. No payments were accepted after 2013 and Dr McFarlane has not repeated her misconduct.

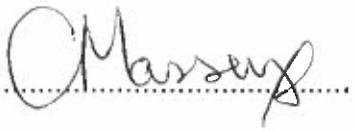
8 The Panel also took account of the fact that the review hearing at the end of Dr McFarlane's suspension will consider the degree of insight demonstrated by her.

9 Further, the Panel found no reason to believe that there is a future risk to patient safety indicated by Dr McFarlane's behaviour in this case, nor that there is a significant risk of repetition of similar behaviour.

10 The Panel therefore concluded that, whilst there may have been some aspects of the Tribunal's decision which could be questioned, there was not a sufficient basis for concluding that in all the circumstances of the case, the Tribunal's decision was "wrong" or such as could properly be considered insufficient to protect the public

given that the Tribunal had imposed a sanction of suspension for 12 months and directed a review prior to the expiry of that period of suspension.

11 Accordingly, the Panel's conclusion was that the GMC should not exercise its power to appeal the Tribunal's determination in this case.



5/2/19

Charlie Massey (Chair) **Dated**

Background

12 The Principal Legal Adviser referred to Panel to the details of the case as set out in the Tribunal's Record of Determination and summarised in the his written submission document. The key points to note were as follows:

12.1 This case concerns the determination of an MPT, which concluded on 19 December 2018, considering the matter under Part 4 of the 2004 Rules.

12.2 The allegations against Dr McFarlane, a GP, arose out of her friendship with an elderly, vulnerable (but capacitated) patient. Between 2004 and December 2008, during which time Dr McFarlane was Patient A's GP, they developed a 'special friendship'. This was not a sexual relationship, but a close and quasi-familial relationship. In a letter dated 23 November 2008, Dr McFarlane encouraged Patient A to change GP in the absence of any clinical justification for so doing; not to disclose the real reason for changing; and to provide a false explanation for the request, to suggest that it was due to excessive waiting times, rather than due to the friendship that had developed.

12.3 The letter makes clear that Dr McFarlane was conscious that their friendship gave rise to issues relating to appropriate boundaries and would be of concern to others. On 3 December 2008, Dr McFarlane sent a message to a colleague falsely stating that the patient had specifically requested transfer to her colleague, due to excessive waiting times in Dr McFarlane's list. Dr McFarlane admitted that she had not advised her colleagues of the friendship, nor of the gifts that she had received.

12.4 Between April 2008 and January 2014 Dr McFarlane received a series of gifts from Patient A which, the Tribunal found, should not have been accepted by her

(although the Tribunal found not proved the allegation that they were given as a result of Dr McFarlane's influence on Patient A).

12.5 It was admitted and found proved that the gifts were given because of the inappropriate relationship which Dr McFarlane had encouraged prior to December 2008. It was further admitted and found proved that between July 2011 and January 2013 Dr McFarlane received substantial sums of money from Patient A (amounting to over £117,000). The Tribunal found further that the doctor had failed to decline or return the payments or gifts; failed to tell her GP partners about them or raise the conflict of interest; failed to exclude herself from clinical decision making for Patient A; and indirectly encouraged Patient A to continue making payments or giving gifts. Much of this conduct was found to be dishonest.

12.6 The MPT found that the doctor's conduct amounted to serious professional misconduct and that her fitness to practise was impaired. The Tribunal noted that as a GP trainer Dr McFarlane was well aware of professional responsibilities and ethical boundaries. It considered that Patient A was a willing and active provider of gifts to Dr McFarlane and accepted that the doctor did not set out to be predatory towards Patient A. However, it decided that her failure to recognise the continued inappropriateness of the relationship and continued acceptance of gifts over a period of several years breached Good Medical Practice. The Tribunal determined that her actions fell far short of the standards of conduct reasonably to be expected of a doctor and amounted to serious misconduct. Turning to current impairment, the Tribunal was satisfied that Dr McFarlane posed no significant risk of repeating her misconduct. It accepted that she had taken some steps to address her misconduct but that the remediation was limited to her personal actions, observing that it was not satisfied that she had fully reflected upon the impact her dishonest behaviour had on the medical profession or on wider public confidence. The Tribunal's conclusion was that a finding of impaired fitness to practise was required in order to protect the public, maintain public confidence in the profession and promote and maintain proper professional standards and conduct.

12.7 The GMC submitted that erasure was the only means of protecting the public and the wider public interest. The MPT considered aggravating features, noting Patient A was vulnerable and elderly, and that in her letter of 23 November 2008, Dr McFarlane encouraged Patient A to move to another GP and to provide a false reason for doing so. The Tribunal noted that the dishonesty was not confined to a single episode but continued by default over the time she accepted gifts and failed to disclose this to her partners in the surgery. Dr McFarlane accepted large sums of money from Patient A (including at a time only three months after the death of Patient A's husband); she concealed the true nature of her relationship from her colleagues; and she was a GP trainer and as such aware of ethical and professional boundaries.

12.8 When considering mitigating factors, the Tribunal noted that no clinical harm was caused to Patient A and that there was a genuine special friendship between Dr McFarlane and Patient A, which has continued after Patient A was admitted to a care home following a stroke. Her behaviour was not predatory and in fact at times Dr McFarlane had attempted to dissuade Patient A from making gifts. Patient A was a willing benefactor, and an independent lady who had the capacity to make her own choice and who derived pleasure from making the gives to Dr McFarlane. Dr McFarlane offered to return a diamond ring, and apologised to Patient A and her family. No payments were accepted after 2013 and Dr McFarlane has not repeated her misconduct.

12.9 The Tribunal determined that there was no significant risk of repetition and Dr McFarlane posed no risk to patients. It accepted that Dr McFarlane was genuinely remorseful, though she still had some way to go before achieving full insight. Testimonial evidence was heard, which attested to her integrity and good character. Taking all the circumstances of this case into account", the Tribunal was satisfied that Dr McFarlane's misconduct, whilst serious, "is not fundamentally incompatible with her continued registration".

12.10 The MPT imposed a sanction of 12 months suspension and directed a review hearing, and also imposed an immediate order of suspension.

13 The Principal Legal Adviser also referred the Panel to the legal advice which had been provided in writing by Leading Counsel.

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

14 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.

15 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").

16 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").

17 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:

17.1 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?

17.2 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.

17.3 If the answer is yes, then the GMC may exercise its power of appeal

17.4 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).