GENERAL PHARMACEUTICAL COUNCIL

FITNESS TO PRACTISE COMMITTEE

PRINCIPAL HEARING

25 Canada Square, London E14 5LQ

Tuesday 29 October 2019

Chairman: Mr Peter Wrench

Committee Members: Ms Claire Bonnet
Mr Graeme Mitchell

Committee Secretary: Ms Jas Marwaha

CASE OF:

KOTECHA, Bharatkumar
(Registration Number 2018727)

DETERMINATION

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MR DAVID ABRAHAMS, Case Presenter, appeared on behalf of the General Pharmaceutical Council.

MR BHARATKUMAR KOTECHA was neither present nor represented.

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Transcript from the Stenograph Notes of T A Reed (Wiltshire) Ltd
Tel No: 01793 764614

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# INDEX

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>DETERMINATION ON PROCEEDING IN ABSENCE</td>
<td>1</td>
</tr>
<tr>
<td>DETERMINATION ON IMPAIRMENT</td>
<td>1</td>
</tr>
<tr>
<td>DETERMINATION ON SANCTION</td>
<td>6</td>
</tr>
</tbody>
</table>

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DETERMINATION ON PROCEEDING IN ABSENCE

THE CHAIRMAN: The Committee is happy that we proceed in the absence of the registrant. Obviously, it is normal on these occasions for the Committee to withdraw and deliberate, but I think in these circumstances, given the email from the registrant's representative that has been referred to, it is difficult to imagine a clearer case of voluntary absence from the hearing. The registrant has taken a conscious decision not to attend. He has representatives and the benefit of advice, and his representative is also choosing not to attend.

There is always some potential disadvantage to a registrant in proceeding in their absence, but this is a conscious choice and that potential disadvantage has to be weighed against the obvious public interest in getting on with this case and reaching a decision, so that is what we will do.

DETERMINATION ON IMPAIRMENT

THE CHAIRMAN: This is our determination on impairment. This is a principal hearing regarding Mr Bharatkumar Kotecha, a pharmacist who was first registered with the Royal Pharmaceutical Society of Great Britain in 1973, and is currently registered with the General Pharmaceutical Council with registration number 2018727.

The registrant is not present. He does have representation through the Pharmacist Defence Association but his representative is not in attendance today. The Council is represented by Mr Abrahams, and our Legal Adviser is Mr Shipway.

We decided earlier to proceed in the absence of the registrant and gave our reasons for that at the time. In addressing other preliminary matters, the Committee decided that today's hearing should be in public, but that we would be ready to go into private session if it became necessary to discuss details of the registrant's health.
Following an application from Mr Abrahams the Committee also agreed to admit a further piece of written evidence, namely a transcript of a police interview with the registrant on 18 December 2018, on the day on which he accepted a caution.

The allegation against the registrant is as follows:

“You, a registered pharmacist,

1. On 7 November 2017 were convicted at Isleworth Crown Court of an offence of sexual assault on a female contrary to Section 3 of the Sexual Offences Act 2003;

2. Having been convicted of a criminal offence, you failed to notify that General Pharmaceutical Council within seven days of your conviction, as required by Rule 4 of the General Pharmaceutical Council (Fitness to Practice and Disqualification etc. Rules) Order of Council 2010;

3. On 18 December 2018 you received a Police Caution for failing to comply with notification requirements contrary to Section 91(1)(a) of the Sexual Offences Act 2003;

4. Having received a Police Caution, you failed to notify the GPhC within seven days of your caution as required by Rule 4 of the General Pharmaceutical Council (Fitness to Practice and Disqualification etc. Rules) Order of Council 2010.

By virtue of the matters set out above your fitness to practise is impaired by reason of:

(a) Your conviction;
(b) Your misconduct;
(c) Your police caution.”

After the allegation had been read out, Mr Abrahams highlighted to the Committee the email of 10 October 2019 from the registrant’s solicitor, in which she confirmed that the registrant admits the particulars of allegation.

On the basis of that admission, and as required by the rules, the Committee found that all the particulars of the allegation were proved.
We then went on to consider the implications of those proven facts for the registrant’s fitness to practise. But before setting out Mr Abrahams’ submissions and our decision on this, it will be helpful to summarise the background.

The registrant has been a registered pharmacist for some 46 years. In 2017 he was working as a healthcare assistant at a GP surgery in Feltham.

On 27 July, he conducted a new patient registration assessment with a 36-year-old woman, referred to in the bundle as Patient A. This assessment was conducted in a treatment room and involved routine tests, including blood pressure, urine sample and HIV checks being undertaken and recorded. At the end of the assessment the registrant asked Patient A if she would mind him giving her a breast examination, and she agreed. It was no part of the registrant’s role to conduct breast examinations, and he had no training to enable him to do so.

In subsequently convicting him of what was a serious sexual assault, the trial judge said, “You tricked her, and that is what I consider you did, into letting you fondle her naked breasts and nipples for something like two minutes.”

The registrant pleaded guilty to sexual assault, after initially trying to argue that he had been conducting a medical examination, despite having no training to do so.

The Certificate of Conviction shows that the registrant was sentenced on 30 November 2017 to 20 months' imprisonment, suspended for 24 months. He was also required to pay £5,000 compensation, plus costs and a victims’ surcharge. He was required to sign the Sex Offenders Register for 10 years.

The Judge said this about the sentence:

“I am just, but only just, persuaded that the right course in your case is to suspend the sentence, and the sentence of imprisonment will be suspended for two years. It may be thought by some that it is unduly lenient to suspend your sentence. I do so on the basis that, albeit a little late, you have accepted your guilt, have expressed remorse, are now 67, are of good character, have achieved much and are now not yourself in the best of health. However, I think the psychological damage you have done to your victim should be
reflected in a compensation order, and I order you to pay £5,000 to your victim…”

Having been convicted, the registrant then failed to notify the GPhC, as he was required to do so under rule 4 of the Fitness to Practise Rules. The matter only came to the Council’s attention over 12 months later, when the police informed them of the caution that the registrant accepted, for failing to comply with the requirement for annual notification as a registered sex offender.

The purpose of this annual notification is to confirm that the details held on the register remained correct. Once again, the registrant failed to notify the GPhC that he had received a caution.

That sets out the background to the proven facts.

The conviction and the caution are distinct gateways to impairment of fitness to practise under the rules. Misconduct may also be such a gateway, if it is serious professional misconduct, involving a serious falling short of what was expected.

The first task for the Committee is to consider whether the registrant’s failures to report to the Council his conviction and caution are in this category. Mr Abrahams submitted that they were, highlighting the importance of candour in a regulated professional. The Committee agrees. There is a clear duty on a registered pharmacist to notify events such as a conviction and caution to the Council within seven days. The purpose is to enable the Council to take any necessary action to protect the public and to protect public confidence in the profession.

The registrant’s failure to notify his conviction meant that the Council had no knowledge of it, and so were unable to consider what action might be necessary. It was fortunate that in the following year the Police notified the Council of the caution the registrant received, but he once again failed in his duty to the Council.
The Committee is satisfied that other members of the profession would see these failures as falling seriously short of what is expected of fellow pharmacists. This misconduct needs to be weighed, together with the conviction and caution, in considering whether the registrant's fitness to practise is currently impaired. We need to consider these matters in the light of the fitness to practise criteria which are set out at rule 5(2) of the rules.

They say that, in relation to evidence about the conduct or behaviour of a registrant, the Committee must have regard to whether or not that conduct or behaviour:

(a) presents an actual or potential risk to patients or the public;
(b) has brought or might bring the profession of pharmacy into dispute;
(c) has breached one of the fundamental principles of pharmacy; or
(d) shows that the integrity of the registrant can no longer be relied upon.

Mr Abrahams submitted that all four of these limbs are engaged here, and we agree. The sexual assault clearly involved serious actual harm to a patient, and there must be a risk of repetition of such harm if the registrant were permitted to return to unrestricted practice. There is also risk in the subsequent failure to be candid with the regulator, and in the failure to comply with the requirements of the Sex Offenders Register.

It is difficult to imagine behaviour which more squarely brings the profession into disrepute than abusing the trust of a patient in the way that the registrant did. It is obviously in breach of the fundamental principles of the profession.

The Committee is also satisfied that the particulars of allegation, when taken together, mean that the registrant's integrity cannot be relied upon. He simply cannot be trusted to behave as a registered pharmacist should, in his treatment of patients or in his responsibilities to his regulator. The Committee's conclusion is that the registrant's fitness to practise is indeed impaired.
He himself has indicated through his representative that he accepts this is the case. Both the protection of the public and public confidence in a properly regulated profession require that we make that finding, so that is our determination.

DETERMINATION ON SANCTION

THE CHAIRMAN: The background has been set out in our earlier determination. This is a pharmacist who committed a serious sexual assault on a patient in the course of a professional consultation. He failed to report his conviction for that assault to the GPhC. His sentence included a requirement to sign the Sex Offenders Register for 10 years. The registrant failed to make his first annual notification as a registered sexual offender. He accepted a caution for that offence. He then failed to report his caution to the GPhC.

In his submission to us on sanction, Mr Abrahams highlighted the specific guidance to the Committee’s on sexual misconduct which is contained in the Council’s Good Decision Making Guidance. We will set out some key points from that guidance which says:

“Sexual misconduct, whatever the circumstances, undermines public trust in the profession and has a significant impact on the reputation of pharmacy professionals, and in some circumstances can present a significant and immediate risk to patient safety.”

The Guidance then says:

“The GPhC believes that some acts of sexual misconduct will be incompatible with continued registration as a pharmacist or pharmacy technician. Removal from the register is likely to be the most appropriate sanction in these circumstances, unless there is evidence of clear mitigating factors that cause a Committee to decide that such a sanction is not appropriate.”

There is then a list of four factors indicating that misconduct will be particularly serious, and that list includes three which apply in this case; namely, there is a conviction for a serious sexual offence; there is an abuse of the special position of
trust that a registrant has; and the registrant has been required to register as a sex offender, or has been included on a barred list.

The guidance clearly indicates that removal may well be the appropriate outcome in this sort of case. But our Legal Adviser has been clear that we should, as always, ensure that any sanction we impose is the minimum necessary properly to protect the public and maintain public confidence in the profession. We should consider the possible sanctions in ascending order of seriousness.

We also need to weigh any relevant aggravating and mitigating factors. Mr Abrahams said that the aggravating factors were clear in the nature of the sexual assault and the breach of trust it had entailed. We agree. As for mitigation, there was an account of a number of medical conditions set out in a letter to the Committee from the registrant's son, and some accompanying medical documentation. However, as Mr Abrahams has pointed out, there has never been any suggestion that health issues played any part in causing the registrant to commit a sexual assault. It may be, as the registrant suggested to the police, that his (Redacted) issues might have played a part in his failure to comply with the notification requirement which led to his caution. However, the Committee finds that the caution is a relatively minor part of the overall allegation against the registrant. It is the serious sexual assault on a patient which is key.

As to other potential mitigating factors the Committee notes, as did the sentencing judge, that the registrant was previously of good character and has had a long and otherwise blameless career. The Committee also noted that the registrant made an application in March 2019 for voluntary removal from the register. The Registrar refused that application in June 2019, on the basis that it would not be in the public interest while the current proceedings remained outstanding.

Following a finding of impaired fitness to practise it is open to a Committee to take no action or to issue a warning to a registrant. We are satisfied that neither could
be seen as a proportionate response to the risk to the public, and public confidence in the profession, which we have found in this case.

The next most serious sanction is the imposition of conditions of practice. This would not meet the gravity of the public interest concerns in this case, and could not provide an effective response to the serious doubts which have been raised as to the registrant's integrity.

Next on the scale is suspension, for a maximum period of 12 months. As of today, the registrant remains subject to the suspended sentence of imprisonment. That may well expire within a limited period of suspension. However, the registrant will remain subject to the requirement to sign the Sex Offenders Register for a further eight years. Given that, and given the seriousness of the sexual assault and the fundamental breach of trust that it involved, the Committee is satisfied that suspension, even for the maximum period of 12 months, would be a disproportionately light response.

In the Committee's view, this case falls squarely within the category of particularly serious cases of sexual misconduct, as described in the Good Decision Making Guidance. The registrant's behaviour has been incompatible with continued registration. There is no realistic alternative to removal from the register, and that is the sanction we impose.

MR ABRAHAMS: Thank you, sir. I have one further application to make, which is that in this case the Council does apply, under Article 60 of the Pharmacy Order, for interim measures, on the grounds that that is otherwise in the public interest. So just to recap, the purpose of that is to ensure that the sanctions apply from today rather than waiting for the 28 days from notification, which is the normal appeal period. And of course, without interim measures, there is potential that the registrant might appeal, and then the sanction would not come into effect until the appeal has been dealt with.

I bear in mind at this point that the registrant has been subject to an interim suspension order since January of this year. By operation of Article 56(10) you are required to revoke that order now that you have found that the registrant's fitness to practice is currently impaired. But I would submit that, given the seriousness of the sexual assault conviction reflected in the sanction imposed, this is a case which
very clearly in the public interest * that interim measures should be put into effect from today, and that is my application.

THE CHAIRMAN: Thank you. As you would expect, the Committee did give some consideration to this when we were considering sanction. We are certainly minded to agree that in the public interest interim measures are necessary in this case. I will check with Mr Shipway.

THE LEGAL ADVISER: Indeed, sir. It is Article 60(2) of the Pharmacy Order which applies here. Where the Fitness to Practise Committee has given a direction to remove the entry of the registrant from the Register, the Fitness to Practise Committee may, if it is satisfied that to do so is necessary for protection of members of the public, or is otherwise in the public interest, or is in the interest of the registrant, order that the entry of the registrant be suspended forthwith, pending the coming into force of the direction in 28 days. You have heard the application that it is in the public interest so to do, and if you take that view then you may make such an immediate order.

THE CHAIRMAN: Thank you. Then we do. The removal will take immediate effect.

MR ABRAHAMS: If the Committee could, under Article 56(10), revoke the previous interim suspension order.

THE CHAIRMAN: Indeed. We revoke the interim order.

MR ABRAHAMS: I am grateful. Thank you, sir.

THE CHAIRMAN: It only remains for me to say thank you very much to everyone who has helped with today’s hearing.