Neutral Citation Number: [2023] EWHC 60 (Admin)

Case No: CO/1355/2022

IN THE HIGH COURT OF JUSTICE
KINGS BENCH DIVISION
ADMINISTRATIVE COURT
Sitting in Manchester

Wednesday, 18th January 2023

Before :

HIS HONOUR JUDGE GRAHAM WOOD KC

- -

Between :

DR EVGENIY IGOROVICH KUZMIN **Appellant**

- and –

GENERAL MEDICAL COUNCIL **Respondent**

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- -

Mary O'Rourke KC (instructed by **Gunnercooke LLP**) for the **Appellant**
Ivan Hare KC (instructed by **General Medical Council**) for the **Respondent**

Hearing date: 12th September 2022

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APPROVED JUDGMENT

His Honour Judge Graham Wood KC

Introduction

1. This court is concerned with a statutory appeal against the determination of the Medical Practitioners Tribunal (MPT) arising out of regulatory proceedings brought by the GMC against the Appellant (Dr Kuzmin) whereby Dr Kuzmin's fitness to practise was found to be impaired on the basis of facts proved, and he was suspended from practice as a GP for a period of six months.

2. The regulatory process began as long ago as 2018 before the same panel of the MPT which has made the various decisions. The sanction of suspension was finally determined on 22nd March this year. Proceedings have been extremely protracted for a variety of reasons, including judicial review challenges and Covid delays. It is regrettable that a process which has been set up with public protection as its primary purpose should take so long to resolve disciplinary matters involving healthcare professionals, especially when the circumstances which have ultimately given rise to the sanction occurred over five years ago, and in the meantime the practitioner has completed his training as a GP and is now currently in practice, subject of course to a suspension which has yet to be implemented because of this appeal.

3. I heard submissions on 12th September remotely and indicated that I would reserve my judgment to enable a full consideration of the material. I shall continue to refer to the Appellant as Dr Kuzmin and the Respondent as the GMC for ease of understanding.

Background

4. Dr Kuzmin, who is a Ukrainian national, obtained his medical qualifications in Ukraine in 1997, and practised there for a period of time before moving to the United Kingdom and achieving registration with the GMC in 2006. His initial specialism was obstetrics and gynaecology, and he obtained work in this field in the UK in the south of England practising until 2011 when he joined the GP vocational training scheme. By early 2016 he had reached the status of ST2 GP registrar in the Portsmouth deanery. His intended progression to ST3 in March 2016 was delayed following his annual review, because his e-portfolio failed to meet all the requirements of the curriculum and accordingly his ST2 training was extended for a period of six months. As an ST2 registrar he obtained work at a GP practice in Southsea in August 2016, but at the end of the six-month period a further extension was required on review, which meant that Dr Kuzmin did not achieve ST3 status until April 2017.

5. In the meantime, as part of his training, and to enable him to continue through the registrar levels, Dr Kuzmin was required to undertake some out of hours (OOH) work under supervision and he was on the deanery list as eligible for such work. Some of this should have been undertaken at an earlier point in his ST3 training, but he was able to apply for registration with the Hampshire GP out of hours service (HDOCS) in August 2016, which

was managed, principally, to enable out of hours rota sessions and specialty training for GP registrars. At this time Dr Kuzmin provided several documents to enable his registration on the system and signed a document known as an "honorary contract" in relation to out of hours training.[1] He completed two sessions of OOH work before November 2016, being approximately 36 hours. At this time he still had ST2 status, and if this status had been known he would not have been permitted to undertake such sessions. When it did become known, he was not permitted to continue access to OOH training utilising the online system.

6. At about the same time in late 2016, a GMC investigation was commenced following concerns about Dr Kuzmin's clinical performance during his time at an earlier GP practice in Porchester before he moved to Southsea. (The "first MPTS proceedings"). An Interim Orders Tribunal took place on 15th November 2016, which imposed interim conditions on Dr Kuzmin's registration. Those conditions were maintained until the final hearing arising out of the first MPTS proceedings in January 2018, when a determination was made that there had been no misconduct and that the registrant's fitness to practise was not impaired. Although the findings of the tribunal on the first MPTS proceedings are not otherwise relevant to the present proceedings, the terms of the interim conditions do have a very significant bearing on the matters which lie at the heart of the determination of the MPT which is under scrutiny on this appeal. They related to a number of aspects of the doctor's ongoing work and training, including the number of GPs in any practice in which he was employed, the level of supervision he was to maintain, the role of a clinical supervisor including formal meetings with the supervisor, and submission of a report to the tribunal from the supervisor. The most significant condition was condition 8 which I set out in full:

> "8. You must inform the following persons of the conditions listed at 1 to 7:
> a. your employer and/or contracting body
> b. your responsible officer (or their nominated deputy)
> c. your immediate line manager at your place of work, at least one working day before starting work (for current and new posts including locum posts)
> d. any prospective employer and/or contracting body, at the time of application
> e. the responsible officer of any organisation where you have, or have applied for, practising privileges and/or admitting rights, at the time of application
> f. any locum agency or out-of-hours service you are *registered* with
> g. the organisation on whose medical performers list you are included or seeking inclusion, at the time of application" [2]

7. In June 2017, and now an ST3 registrar, Dr Kuzmin wanted to pursue his OOH training requirements, and accordingly he sent an e mail to Charlotte Vann, the regional rota manager for HDOCS, in these terms:

> "Dear Charlotte
> I would be very grateful if you could allow me to resume doing OOH via HDocs.
> Please resent (*sic*) my log in name and password.
> Regards,
> Evgeniy"

[1] Bundle page 96
[2] My emphasis

8. In response to this email, Charlotte Vann contacted Dr Ben Allured the ST3 training director, and Rachel Elliott, the associate Dean for South East Hampshire, principally seeking clarification of his ST3 status:

> Dear Dr Allured,
> Please see email below from Dr Kuzmin. If you remember we were told he was StR3, we then had a query from the GMC and it transpired he had extended StR2 and we were asked to stop booking him OOH as we were not aware.
> Is he now StR3 as we have had no correspondence to advise this?
> Does he have special training needs? It might be worth him re attending the Induction in August with the new GPRs.
> Regards
> Charlotte

9. Her enquiry prompted a response from Dr Allured through Dr Elliott in which she was made aware not only that he had achieved ST3 status progression, but also that he was involved in an ongoing GMC investigation, and was the subject of interim conditions. Several of the conditions were referred to, and in particular condition 8 which is set out above. It was suggested by Dr Elliott that Dr Kuzmin was required to inform HDOCS of the conditions, and should do so before commencing any work.

10. There followed a flurry of emails, some of which touched upon the need for a further induction, but the content of which is not relevant for the purposes of this background summary. Needless to say, in the course of the exchange Dr Kuzmin provided some information about his conditions, but did not specify all of those conditions.

11. As a result of an apparent non-disclosure of his conditions when contact was first made with HDOCS, the GMC became further involved in relation to the question as to whether or not there had been compliance with condition 8, and an investigation was launched which has led to the present fitness to practise regulatory proceedings. Allegations were formulated, and included in the new charges. These were the subject of some amendment, but in their final form, read as follows:

> (1) On 15 November 2016 the Interim Orders Tribunal ('IOT') of the Medical Practitioners Tribunal Service, imposed an interim order of conditions ('the interim order') on your registration.
>
> (2) On 3 May 2017 the interim order was reviewed by the IOT, at which you were in attendance.
>
> (3) On or around 7 June 2017, you failed to inform HDOCS, the out of hours service, with whom you were registered, of conditions 1-7 of the interim order as required by condition 8 of the interim order.
>
> (4) You failed to provide details of the full conditions imposed on your registration by the IOT, in response to an email request made on:
>
> (a) 4 July 2017 by Dr A.
>
> (5) Your action as described at paragraphs 3 was dishonest.

The MPT proceedings

12. As I have indicated above, these became somewhat protracted. Dr Kuzmin admitted allegations 1 and 2, and therefore at the fact-finding stage, which began in July 2018,

evidence was admitted in relation to allegations 3, 4 and 5. During the course of the stage I hearing, and prior to any evidence being taken from the registrant, Dr Kuzmin, on 5th July 2018 a submission was made and rejected that the tribunal could not draw an adverse inference from Dr Kuzmin's decision not to give evidence, and the withdrawal of his statement from the consideration of the tribunal members. It was determined that in principle such an inference *could* be drawn, although this would await full submissions on the facts of the case. This decision was challenged by way of judicial review, and thus the proceedings were adjourned to enable this to take place. It was not until July 2019 that the High Court heard the challenge, concluding that it was open to the MPT to draw an adverse inference.[3]

13. Following the failure of the judicial review challenge, Dr Kuzmin decided to give evidence on the resumption of the fact-finding hearing, which was not until July 2020. On 24th of July 2020 the tribunal found the facts proved which had not been admitted (3, 4 and 5), and therefore the matter proceeded to stage II (determination of misconduct/impairment of fitness to practice) and stage III (sanction).

14. However, these next stages did not take place immediately for several reasons. First, there were delays contributed to by Covid restrictions. Then there was the availability of panel members and counsel to consider, but most significantly there was a further (second) judicial review challenge commenced on 23rd October 2020. The grounds of review relied upon mirror very closely the challenges which are pursued in this appeal, and therefore I do not intend to elaborate them. It was largely agreed that different thresholds applied to the judicial review challenge and consideration of the permission stage, to those which fall to be considered on this statutory appeal, and I will deal with the detail later in this judgment. It is not suggested that this court is bound by the rejection of that challenge. Suffice it to say it was alleged that the tribunal was perverse in its conclusion that Dr Kuzmin had been registered at the time of sending to HDOCS the relevant email (June 2017) so as to impose a duty of notification of the MPT conditions from the interim order, and was thus dishonest in not informing Charlotte Vann in that email. Dr Kuzmin also sought permission to introduce fresh evidence on the question of the status of his registration from Dr Timothy Wright, the other signatory to the honorary contract for OOH. The application for permission was considered on the papers by His Honour Judge Stephen Davies, and refused on 15th January 2021. There was no oral renewal application.

15. Thus the matter was returned to the jurisdiction of the MPT, and came on for hearing eventually on 7th March 2022. No further evidence was admitted despite the application of the registrant's counsel to rely upon that further witness, Dr Wright, which was refused. This is dealt with below at paragraph 27ff because it forms a separate aspect to this appeal. Submissions were received, and the tribunal determined at stage II that there had been misconduct, and that the doctor's fitness to practise was thereby impaired. The tribunal moved to stage III, hearing further submissions, and chose to impose the sanction of suspension of six months. It was not contended that it should be an immediate suspension (i.e. before the expiry of the period open for appealing) and following the submission of this appeal the suspension has not been effective.

[3] This was the first JR challenge. **R (on the application of Kuzmin) v GMC [2019]EWHC 2129 (Admin)**

Evidence before the MPT

16. There were four witnesses for the fact-finding stage, Charlotte Vann, the regional rota manager for HDOCS and Dr Rachel Elliott the associate dean for the Wessex deanery (referred to in the emails above) on behalf of the GMC, and Dr Kuzmin and his solicitor Mr Abeyewickreme. Only two gave live evidence, Charlotte Vann and, following his unsuccessful review challenge, Dr Kuzmin, whilst witness statements were accepted in relation to the other two.

17. Miss Vann's witness statement exhibited all the relevant email correspondence. She explained her role as the regional manager in that she dealt with the specialty registrars who were required to use the service for their out of hours of training. She also explained how her initial contact with Dr Kuzmin arose in September 2016 when he was first accessing the system and indeed completed some out of hours of training. At that time she did not appreciate that he was still at level ST2 in his GP training. A crucial paragraph in her evidence relates to the pivotal email in June 2017 and the exchanges which followed, and on which the GMC has relied both in the substantive proceedings and on this appeal and is at para 7:

> "Had I not identified the previous issue with Dr Kuzmin's training status, his login details and password could have been reset, allowing him to book out of hours shifts online with immediate effect. These shifts booked online would have been with any supervisor available from a list of sessions not with a specific named and authorised supervisor as required by the GMC conditions. He could have been invited to an induction on shift session, thus meaning that he would not have had to wait until August."

18. Miss Vann was cross-examined by counsel Ms O' Rourke QC (as she then was). After being asked questions about Dr Kuzmin's deactivation on the system and the difference between deactivation and deregistration, the following exchange occurred:[4]

> "Q Okay. Firstly, in respect of paragraph 8, you say he was still registered but he was deactivated. Surely that means he was not registered, he had become deregistered?
> A He was on our system awaiting for when he passed his ST2 so he could resume his ST3 training with us.
> Q Right. Let me put these words to you: was he registered for the purposes of undertaking shifts with HDOCS?
> A He was registered to undertake shifts with HDOCS for training. However, he never told us he had not passed his ST2 and he did shifts with us. I found out not from him, from somebody else, that he had not passed his ST2, and at that point I prevented him from booking further sessions and cancelled any he may have had booked.
> Q Right. So when you do that, you cancel his login and his password?
> A Correct, so he cannot log in, but I did that because I found out that he had not passed his ST2."

19. In relation to a potential distinction between *training* and providing services as an *employee*, a little further on this exchange takes place:[5]

> "Q Therefore, as of November 2016, he would have been unable to undertake any shifts, yes?
> A That is correct.
> Q He would in any event, previously, only have been undertaking shifts for training purposes, not as an employee and not providing services to HDOCS?
> A He would have been providing services to HDOCS. He would have been speaking to patients and giving them medical care.
> Q Right. But he was not doing that as of November because he was, you say deactivated, we say deregistered, yes?

[4] 302 in bundle D1/16 F- D1/17 B
[5] D1/17 D-F

A Yes. He had got shifts doing that and he had been in doing that."

20. Miss Vann accepted during the course of cross-examination that Dr Kuzmin never became a direct employee of HDOCS.

21. There were further significant responses in re-examination by the GMC counsel Mr Kitching, to which the court has been referred. The witness was asked about the material which a trainee doctor was required to provide to become registered on the system, and the steps which had to be taken when moving to the ST3 training stage. These were explained, and counsel moved on to ask:[6]

"Q Right. If you do not know the answer to this question, then please say so, but do you know whether Dr Kuzmin provided all of that material when he first registered in August 2016?
A He did provide that originally, yes, and attended the original induction.
Q Just moving on to the summer of 2017, was he asked to provide all of that material again?
A No. Because we had it, we would just then see if anything had become out of date, so we would double-check his GMC logon, see if he was still registered, and we would just check to see if his indemnity was still in date, because the other information would still be relevant, unless he changed his phone number or anything like that."

22. It is to be noted that during re-examination reference was made by the witness, for the first time, to a contract, and there was a short delay whilst this was produced (the "honorary contract").

23. The registration/deregistration theme was picked up by the chair of the panel in her questions to the witness:[7]

THE CHAIR: I also have some questions for you, Miss Vann, I wonder if you can help me. You were asked some questions by Mr Kitching about the process for trainees becoming registered with HDOCS.
A Yes.
Q If my understanding is correct, you have a contract with the CCG to provide training places, is that right?
A Yes.
Q The deanery gives you a list of the relevant trainees in August or July, is that correct?
A Yes. Yes.
Q What then happens?
A We would email those GPRs and say, "If you are ready to start your training …", we would send them those two documents and ask them to complete them and return them with the relevant documents that are listed in that document that we need, and we give them a date of when the induction is. We usually give them two dates and ask them to advise a day which date they would like to attend for their induction.
Q At what point in the process would you consider a doctor to be registered with you?
A Once they had returned those documents and attended their induction.
Q If it happens that that doctor then becomes ineligible to be registered with you, as in fact seems to have been the case with Dr Kuzmin because he did not go through to his ST3 year, is there a process by which he can deregister?
A No. Most of the time they would just not book any shifts and then they would contact us and say, "I didn't pass. I will be back with you probably in January", because they usually get extended by three or four months.
Q So if Dr Kuzmin wanted to deregister, in fact he cannot, is that right?
A He did not need to deregister, he just needed to have let us know that he was not going to be booking any shifts for a couple of months, and then we could have just deactivated him and reactivated him once he was ready to start again.
Q But basically, once he is registered, he is going to stay registered until when?

[6] D1/19 D-E
[7] D1/31 C-G

A Until, basically, he has either completed his ST3 training and then that is when we take them off all of our systems, once they completed all their training hours.

24. The final exchange on this issue occurred when Ms O'Rourke was allowed to re-examine:[8]

Q. …….Once his login and password are deactivated, he can do nothing with or for HDOCS, is that correct?
A If he is deactivated, he could not book any shifts until we knew he could do them again.
Q But my question was that means he can do nothing with or for HDOCS because he is deactivated, there is nothing left for him to do?
A He cannot book any training sessions, no.
Q But he does not do anything else with HDOCS so there is nothing left for him to do once he is deactivated, correct?
A He cannot book any shifts, no.
Q That is not the question, you keep saying that. I am saying there is nothing else that he is able to do with HDOCS, there is no meaning for any registration, there is no work for him to do, there is nothing for him to attend or work on, correct?
A I would not know. I am saying he is deactivated so he cannot book any shifts.
Q I am going to suggest to you in effect his registration or his work with HDOCS is suspended?
A Yes.

25. The statement of Dr Rachel Elliott was admitted unchallenged. She dealt largely with the email correspondence and did not add anything of significance. As indicated, the oral evidence, as well as the written statement of Dr Kuzmin was admitted and he made robust denials of any dishonesty, accepting that in the relevant email he had not disclosed the conditions, but maintaining that he had not intended to engage with any further work, but was merely sounding out the possibility of resuming his training. He was sure that the conditions would have been known to the deanery in any event, and he saw no need to inform HDOCS in that email. The tribunal also admitted in a statement from the doctor's solicitor which was not challenged.

26. In terms of documentary material available to the tribunal, in addition to the numerous emails and correspondence involving the managers of HDOCS and the deanery, the honorary contract, documents from the previous MPTS proceedings, and Dr Kuzmin's work details forms were considered. These forms were documents which required completion in the initial part of any GMC investigation, and they were relied upon by Dr Kuzmin to demonstrate that he had been forthcoming about his involvement with HDOCS in the details which had been provided.

The "fresh" evidence

27. This arose at the beginning of the stage II consideration, but it had already been flagged up by the Appellant's legal team in the judicial review application which predated it. HHJ Davies had refused to admit the material when considering permission, on the basis that his

[8] D1/32 D-G

determination had to be made taking into account the evidence that was before the tribunal, and questions of fresh evidence only arise on the appeal process.

28. At the outset of stage II in March 2022, Dr Kuzmin's counsel invited the tribunal to admit email correspondence with the statement from Dr Tim Wright, the clinical director of the PHL group (responsible for HDOCS) and the signatory to the honorary contract which had been produced during the course of Charlotte Vann's cross examination. The application was made principally pursuant to rule 17 (2) and rule 34 (1) of the Fitness to Practise rules and was not an invitation to the tribunal to open up the stage I investigation, so much as to rely upon material relevant to the facts which had already been proved.[9] It was asserted that the evidence touched upon questions of misconduct and impairment and was clarifying information in relation to the question of registration. In his statement,[10] Dr Wright explained the nature of the relationship between the ST3 doctors and PHL, confirming they never became employees, but were trainees of the deanery for whom HDOCS provided a training service for the completion of out of hours work, as required. He purported to deal with the question of registration, pointing out that the process of providing such training through PHL and HDOCS did not involve a *registration* process as such which could be suspended or deactivated, and it was simply a service to provide ST training for those who were eligible.

29. The tribunal did not allow the admission of such evidence.[11]

Relevant determinations of the panel

30. Starting with the fact-finding determination, this is a composite document which includes in its annexes, various decisions on applications which were made during the course of the hearing. The determination on the findings of fact was announced on 24th July 2020. It is detailed and extends to 9 pages. It seems to me that the significant parts appear as follows. First in respect of the requirements of condition 8:

> "35. The Tribunal was of the view that the purpose of condition 8, as Dr Kuzmin would have known, was that he should inform all of the people and organisations to whom he did, or intended to, provide medical services and who would need to know the restrictions that had been placed on his medical practice. This was to ensure that the necessary notifications were made by the doctor to ensure that anyone he worked for was aware of the restrictions in place on his registration."

31. The tribunal dealt with the nature of the honorary contract in the context of the wording of the condition on the question of registration with an out of hours service:

> "40. The Tribunal determined that HDOCS would be included under condition 8(f) as an "out-of-hours service". The Tribunal went on to consider whether Dr Kuzmin was registered with HDOCS as at June 2017 in order to satisfy the full wording of condition 8(f). It noted the wording in paragraph 3 of the Allegation as to "with whom you were registered" and the wording "you are registered with" in condition 8(f).

[9] As discussed later, in the context of this appeal, the application is to admit the evidence in relation to the stage 1 determination which is under challenge, on Ladd v Marshall principles.

[10] With the agreement of counsel, I read this on a *de bene esse* basis.

[11] A brief summary of its reasoning is provided in the following paragraph.

> "41. The Tribunal was of the view that 'registration' with an out of hours service was a situation where there was a link between you and that service and that it has the necessary details as a prerequisite to allow you to work for them.[12] The Tribunal noted that, at the relevant time, Dr Kuzmin was on a list of Registrars provided by the Deanery who would be undertaking work via HDOCS as part of their training. It has heard that Dr Kuzmin completed the registration documentation, provided all relevant documents needed, completed an induction and received login details in August 2016. He undertook a small number of sessions with HDOCS to complete out of hours work at ST2 level and had undertaken an additional number of sessions in September 2016, which HDOCS later confirmed that he should not have done as he was not at ST3 level. At this point HDOCS suspended Dr Kuzmin's login details for the HDOCS system. The Tribunal noted that the honorary contract did not have start or end dates. It further noted Miss Vann's evidence that Dr Kuzmin, once registered, would stay registered until he had completed all of his training hours. It was therefore of the view that Dr Kuzmin registered with HDOCS in August 2016 and remained registered on 7 June 2017."

32. After referring to the evidence of Charlotte Vann in both her written statement and her oral testimony, the tribunal concluded as follows in paragraphs 48:

> "48. The Tribunal determined that Dr Kuzmin had a duty, under condition 8(f), to inform HDOCS of his interim conditions from when the order was made in November 2016. Certainly, as of 7 June 2017 when Dr Kuzmin was asking to resume work with HDOCS he should have informed them of the conditions at this time. The conditions, namely condition 6(a), (b) and (d), would have had clear relevance to Dr Kuzmin in him resuming/starting work with HDOCS. The conditions included a requirement for a clinical supervisor and that Dr Kuzmin should not start/restart work until his Responsible Officer has approved that supervisor. It would have required HDOCS to make different supervisory arrangements given those conditions."

33. And at paragraph 52:

> "52. The Tribunal concluded that Dr Kuzmin intended to start doing out of hours work for HDOCS and, at that point on 7 June 2017, the relevance of his interim conditions should have been at the forefront of his mind, particularly having regard to the fact of the IOT review hearing as recently as one month earlier. He would have been fully aware of the importance of full disclosure given his previous appearance before his regulator in 2013. The conditions should have been at least mentioned, but ideally set out in full, in his email correspondence with Miss Vann in June 2017 but this was not done. Dr Kuzmin provided the full conditions to Miss Vann by email on 11 July 2017, following further email correspondence in which Miss Vann requested conditions 1-7. The Tribunal determined that Dr Kuzmin had failed to inform HDOCS of the interim conditions 1-7 as set out at condition 8."

34. The tribunal then went on to consider the question of dishonesty (allegation 5). It is acknowledged that there is no stand-alone challenge to a finding of dishonesty, and Dr Kuzmin accepts that if he fails in his challenge to the conclusion that there was a duty to notify the conditions because of the status of his relationship with HDCOS, a determination of dishonesty was appropriate. Accordingly this court should consider how they arrived at that conclusion, the significant parts of their determination appearing at paragraphs 69 to 72.

> "69. In considering Dr Kuzmin's evidence, the Tribunal was concerned that Dr Kuzmin gave a number of different explanations, some of which were not consistent with the others. For example, Dr Kuzmin suggested that he believed that HDOCS had already been informed of the conditions by the deanery and yet he also stated that he was intending to notify HDOCS of the conditions once he had "set the wheels in motion" in relation to his registration.
> 70. The Tribunal did not accept that Dr Kuzmin believed that HDOCS had already been informed of the conditions because the content of the email of 20 June 2017 from Miss Vann was suggesting that she was not aware of the conditions (in fact she was aware by that time but not from Dr Kuzmin).
> 71. The Tribunal was also concerned that Dr Kuzmin claimed the interim conditions were not at the forefront of his mind but had attended an IOT hearing the month before and it also noted that Dr Kuzmin had a previous Fitness to Practise Panel hearing in 2013 that related to failure to disclose. In these circumstances, the Tribunal was unable to accept Dr Kuzmin's evidence that it was an oversight. The Tribunal had regard to the reason for interim conditions and that it would have been apparent to Dr Kuzmin why they should be disclosed to all those he provides medical services to, particularly given the supervision requirements.

[12] My emphasis

> 72. The Tribunal determined that Dr Kuzmin knew that he had a duty to disclose and that his failure to disclose the existence of the interim order of conditions to HDOCs was deliberate. It was of the view that this was done because he wanted to start his out of hours training quickly. In the light of this determination, the Tribunal considered that this conduct was self-evidently dishonest by the standards of ordinary decent people."

35. For the sake of completeness, in respect of the stage II determination, and the refusal to admit the further evidence at Stage II (as opposed to re-opening stage 1), the reasoning is summarised at paragraphs 27 and 28 of Annex H to the composite determination:

> "27. The Tribunal next considered whether the evidence should be admitted in respect of Rule 17(2)(k) of the Rules. In its determination on the facts the Tribunal has already set out how it interpreted "registration" with an OOH service. The Tribunal was unable to see how the further evidence relating to registration or honorary contracts would assist it in assessing whether the facts found proved amount to misconduct which is sufficiently serious as to go to impairment. It therefore determined not to admit the evidence under Rule 17(2)(k).
> 28. The Tribunal then considered whether to admit the evidence under Rule 34(1) of the Rules. Dr Wright's witness statement was predicated on Dr Kuzmin becoming an ST3 in August 2017 and as a result being unable to undertake OOH sessions until then. The Tribunal has already noted that Dr Kuzmin became an ST3 at the end of April 2017. In June 2017 he asked HDOCS to reset his login details so that he could undertake OOH sessions. His OOH sessions required supervision and his conditions required that his supervisors were approved by his Responsible Officer. HDOCS needed to know this because it meant that he could not book sessions in the normal way. The Tribunal was of the view that there was nothing in the further evidence that was relevant to these points whether considered at the fact finding or impairment stage. It therefore determined that Rule 34(1) of the Rules does not apply."

Nature of this appeal and other legal considerations

36. There is substantial but not total agreement between counsel as to how this court should approach an appeal under section 40 of the Medical Act 1983, which is a statutory appeal providing the doctor with a right to challenge the decision of the MPTS without permission. The principles were first clarified in detail in **Ghosh v General Medical Council [2001] 1 WLR 1915**, which was an appeal to the Judicial Committee of the Privy Council from a decision of the Professional Conduct Committee of the GMC. It was held that the powers of intervention of the appellate court were not limited to a review of the original tribunal, to which deference was to be afforded, but was by way of a *rehearing*.

37. Most recently, the Court of Appeal has reconsidered the approach in two linked appeals, in **Sastry and Okpara v General Medical Council [2021] EWCA Civ 623** and confirmed the jurisdiction of the court was appellate and not supervisory. In the WLR headnote, the ratio is summarised in these terms:

> "…the court was entitled to substitute its own decision for that of the tribunal; that, thus, the appellate court should decide whether the sanction imposed was appropriate and necessary in the public interest or was excessive and disproportionate and, in the latter event, the appellate court should substitute some other penalty or remit the case to the tribunal for reconsideration; that although appropriate deference was to be paid to the determinations of the tribunal in section 40 appeals, the court should not defer to the judgment of the tribunal more than was warranted by the circumstances nor abrogate its own duty in deciding whether the sanction imposed was wrong; that although the distinction between a rehearing and a review might vary depending on the nature and facts of the particular case, it was there for a good reason, and to limit a section 40 appeal to what was no more than a review would undermine the breadth of the right conferred on a medical practitioner by section 40 and impose inappropriate limits on the approach which should be adopted by the appellate court…."

38. There was some disagreement between counsel about the degree of deference afforded, and in particular whether the apparent drawing back from a more deferential approach in previous cases, was "resetting the bar" and thus enabling the court to substitute its own view once an error of law/fact, or some procedural failure was identified; it was pointed out that whilst the Court of Appeal was dealing with general principles, the case was essentially concerned with *appeals against sanctions* which were imposed for proven misconduct. Reference was made to paragraphs 102 and 103 of the judgment of the court given by Nicola Davies LJ:

> "102. Derived from *Ghosh* are the following points as to the nature and extent of the section 40 appeal and the approach of the appellate court: (i) an unqualified statutory right of appeal by medical practitioners pursuant to section 40 of the 1983 Act ; (ii) the jurisdiction of the court is appellate, not supervisory; (iii) the appeal is by way of a rehearing in which the court is fully entitled to substitute its own decision for that of the tribunal; (iv) the appellate court will not defer to the judgment of the tribunal more than is warranted by the circumstances; (v) the appellate court must decide whether the sanction imposed was appropriate and necessary in the public interest or was excessive and disproportionate; (vi) in the latter event, the appellate court should substitute some other penalty or remit the case to the tribunal for reconsideration.
> 103. The courts have accepted that some degree of deference will be accorded to the judgment of the tribunal but, as was observed by Lord Millett at para 34 in *Ghosh* , "the Board will not defer to the Committee's judgment more than is warranted by the circumstances". In *Preiss [2001] 1 WLR 1926, at para 27* , Lord Cooke stated that the appropriate degree of deference will depend on the circumstances of the case. Laws LJ in *Raschid and Fatnani [2007] 1 WLR 1460* , in accepting that the learning of the Privy Council constituted the essential approach to be applied by the High Court on a section 40 appeal, stated that on such an appeal material errors of fact and law will be corrected and the court will exercise judgment but it is a secondary judgment as to the application of the principles to the facts of the case (para 20). In *Cheatle [2009] EWHC 645 (Admin)* Cranston J accepted that the degree of deference to be accorded to the tribunal would depend on the circumstances, one factor being the composition of the tribunal. He accepted the Appellant's submission that he could not be "completely blind" to a composition which comprised three lay members and two medical members.

39. In the circumstances, it is said by Mr Hare KC that an appellate court should still be extremely cautious of upsetting primary findings of fact, and it is only in circumstances where the error may arise from a failure to consider proportionality or public interest in the context of *sanction* that the court should be quick to step in. I agree with this proposition and accordingly appropriate deference and regard must be had, when applying the considerations of CPR 52.21 (3), to the tribunal's determination.

40. Because this is an appeal in which the Appellant wishes to rely on fresh evidence, i.e. the statement of Dr Tim Wright, any route to admission would require the exercise by the court of its discretion under CPR 52.21 (2) (b) whereby evidence which was not before the lower "court" is inadmissible. It seems to me that this is essentially the approach invited by the Appellant, notwithstanding that the grounds of appeal appear to plead an error of law in excluding the evidence at stage II, and paragraph 33 and 34 of the skeleton argument of the Appellant which were pursued with less enthusiasm before the court.

41. The special grounds which formally permitted an appellate court to exercise a discretion to admit further evidence prior to the coming into force of CPR, which were based on the principles set out in **Ladd v Marshall [1954] 1 WLR 2318** have not been incorporated into CPR 52.21, but it is accepted unequivocally that the principles still apply. They are that such evidence could be admitted if (1) the evidence could not have been obtained with reasonable diligence for use of the trial; (2) the evidence must be such that if given it would probably have an important influence on the result of the case, though it may

not be decisive; (3) the evidence must be such, as is presumably to be believed though it need not be incontrovertible.

42. In the context of regulatory healthcare appeals, the application of the test was reaffirmed in the case of **General Medical Council v Adeogba [2016] EWCA Civ 162** as being consistent with the overriding objective.

The grounds of appeal and issues that arise

43. There are eight separate grounds of appeal pursued as follows:

> *1. The determination of the MPT to suspend the Appellant's registration for a period of 6 months was based on a wrong and perverse conclusion, namely that he had breached a condition imposed upon him by an Interim Orders Tribunal (IOT) when the condition upon which the MPT based its conclusion was inapplicable in all his circumstances.*
> *2. The MPT erred in law in its stage 1 finding that the Appellant was under any relevant professional duty or obligation by reason of condition 8 of the IOT conditions imposed in May 2017 in that he was neither registered with nor employed by any Out of Hours (OOH) body in June and July 2017 and consequently could not have been under any professional duty or obligation to inform any such body of IOT imposed conditions.*
> *3. The MPT erred in its finding of dishonesty in that the Appellant's omission to inform the OOH body with which he would be undertaking training sessions was not within his contemplation given the inapplicability of condition 8 of those conditions on a strict interpretation (as was required by a disciplinary charge).*
> *4. The MPT wrongly and perversely misinterpreted and/or misconstrued the evidence of Charlotte Vann on the question of the Appellant's status with regard to OOH training/ sessions and consequently reached a perverse conclusion in respect of charge 3 and its breach by the Appellant.*
> *5. The MPT wrongly and perversely refused to admit and consider at stage 2 the evidence of Dr Wright and in so doing reached a perverse conclusion on the question of impaired fitness to practise.*
> *6. The MPT failed to correctly understand and apply the burden of proof which was on the MPT in respect of charge 3 and 5 and condition 8 and specifically the duty on the MPT to prove employment by or registration with an OOH provider.*
> *7. The MPT wrongly reversed the burden of proof and required the Appellant to prove he was not employed or registered and when he attempted to do so wrongly refused to admit or consider the evidence on the false and perverse premise that as he was an ST3 trainee by June 2017 condition 8 applied to him when on a strict construction of the conditions in the conditions bank and what was condition 8 his status as an ST3 trainee was irrelevant.*
> *8. The MPT erred in law and reached a perverse and contrived outcome on the key questions of registration and professional obligation or duty coming within condition 8 such that the Appellant did not receive the fair hearing to which he was entitled.*

44. However, sensibly, Ms O'Rourke KC on behalf of Dr Kuzmin has distilled her argument, and the issues for the court, into two separate areas. The first is in relation to the finding of the tribunal in respect of his registration (or employment) with HDOCS. If there was no basis in fact or law for this finding, then the appeal should succeed. This would be on the premise of there being no duty on Dr Kuzmin to notify his conditions if he did not come within any of the subparagraph requirements of condition (8). This area is further broken down into three points, namely the interpretation of condition eight, the sufficiency of the evidence of Ms Vann, and the question as to whether or not the decision was a perverse one. The second area is in relation to the further evidence which was precluded by the tribunal. Although this is not pursued as a separate challenge implicating a failure at stage II, it is nevertheless said that this court has a power to admit the statement as fresh evidence and to decide the appeal on such a basis.

Respective submissions

Appellant

45. Ms O'Rourke, who has been involved in all the regulatory hearings, and in the High Court challenge processes, expanded her skeleton argument in oral submissions. She referred to her chronology and in particular the key dates. She reminded the court that in establishing the facts, the burden lay throughout on the GMC, and submitted that the height of the GMC evidence was that the doctor's registration with the out of hours service was suspended, and nowhere within any of the documentation was there a definition of that state of affairs. It was also to be noted that the original position of the GMC had been to rely on *employment* and registration, and not simply the latter, at the outset of the hearing there had been an amendment to the allegations to remove the reference to employment. The removal of that reference would have excluded any reliance on 8(a) and (d).

46. It was submitted that despite the evidence of Charlotte Vann that there was no active registration which could have been utilised in the June 2017, when it is said that the doctor was under a duty to provide the disclosure of his conditions, the tribunal nevertheless contrived, perversely, to find that as at that date he was an ST3 trainee, and eligible to undertake the necessary OOH sessions and therefore under such a duty. This ignored the wording of condition 8 (f) because the doctor's status at that time was no more than one of being eligible to be clear to apply to HDOCS for OOH training - this was confirmed by the fact that he was not cleared to be eligible until August 2017.

47. Even if the tribunal was entitled to regard suspended registration (the height of the GMC case) as equivalent to registration, because this is not a concept which was defined anywhere, the tribunal should have found, submitted Ms O'Rourke, that the GMC had not discharged the burden of proof.

48. In reality Dr Kuzmin was taken off the list of eligible trainees at the relevant time, regardless of how this was defined, and as the GMC witnesses agreed, he was required to "*go through a lot of hoops*" to become eligible again. Miss Vann's evidence had been

inconsistent, it was submitted, but in any event there was no evidence to contradict her concession that he had been "off the list" when he asked for his login details.

49. Ms O'Rourke submitted that in paragraph 41 of its determination on the facts[13] the tribunal purported to define registration, and in so doing made an error of law. There was no basis for the finding that registration was satisfied, and thus the duty to report the conditions, because a *link* existed between HDOCS and the doctor. Insofar as the GMC had placed any reliance on the honorary contract as establishing a contractual relationship between Dr Kuzmin and HDOCS, she maintained the argument that this contract was either void or voidable, in that he could not have been fully registered as at November 2016, it was reasonable to regard the contract as having terminated.

50. In respect of the evidence of Dr Wright, Ms O'Rourke submitted that if it was to be admitted as fresh evidence on this appeal, it clearly satisfied the test in **Ladd v Marshall**. His evidence only became relevant during the course of re-examination of Ms Vann when reference was made to the honorary contract, and it could not have been anticipated that it was required at the outset of the fact finding hearing. Further it was evidence which was hugely important, not least in paragraph 10 where he explained that the concept of suspended registration was meaningless. Further, counsel did not abandon completely her original argument that it was open to the tribunal to have admitted this evidence at stage II of the disciplinary process to correct the clear errors in their conclusion at stage I, and it was erroneous to have excluded it; insofar as this appeal was a rehearing, if such was considered to be an error, the court could provide its own assessment of the evidence. It was clearly supportive, and undermined the primary case of the GMC.

Respondent

51. On behalf of the GMC, Mr Hare KC also relied upon his skeleton argument, and began his oral submissions by reminding the court that although the test for a judicial review was different and required the consideration as to whether there was an arguable case, His Honour Judge Davies addressed the very point pursued on this appeal in relation to the tribunal's determination about the nature of the HDOCS registration scheme, concluding that such findings were not matters of law because there was no legal definition as to what out such an of hours registration scheme meant. It would be a mistake, he submitted, to be drawn into an acknowledgement that there was a legal question for the tribunal to resolve, when essentially this appeal was about whether or not the tribunal's factual finding that Dr Kuzmin had not complied with condition 8 was sustainable, applying the appropriate legal test for a regulatory healthcare appeal as defined in **Ghosh** and subsequent authorities, and affirmed in **Sastry**. He divided his submissions into four sections, namely (1) the nature of the decision, (2) the documentary evidence before the tribunal, (3) the oral evidence before the tribunal, and (4) the alternative basis for the tribunal's decision set out in paragraph 47 of the determination.

52. In relation to the nature of the decision, he submitted that starting point was that unlike registration with the GMC as a doctor, which was a formal legal process, there was no

[13] See paragraph 31 above

definition of "registration" within HDOCS or even within the conditions bank, although the latter made it clear that it had nothing to do with the formal aspect. Accordingly when considering what registration meant, a flexible approach was required, and this is what the tribunal did in paragraph 41 of their decision, which was not attempting to lay down a legal definition, but setting out those matters which were considered to be relevant to the doctor's status. The tribunal considered the purpose of condition 8, which was the approach invited on this court, avoiding getting bogged down in differences between the meaning of deactivation and deregistration.

53. Dealing with the documentary evidence, Mr Hare reminded the court that the tribunal considered all of the statement of Charlotte Vann, (paragraphs 7 and 8 being particularly important), the relevant emails, and the honorary contract, as well as the work details form completed in November 2016 by the doctor.[14] It was highly pertinent that this listed under the "*current work*" section, HDCOS, that is a place where Dr Kuzmin provided out of hours work.

54. In respect of the oral evidence, it was submitted that the tribunal clearly considered the evidence holistically, an approach which was invited on this court, bearing in mind that appropriate deference was to be afforded to the tribunal in finding facts. He made reference to several sections in the evidence of Charlotte Vann (principally those sections set out earlier in this judgment) and in particular noted that the deanery list made it clear not only the ST status of the doctor, but also the entitlement to be included in the OOH process, with Ms Vann confirming that Dr Kuzmin remained on the system at all times, but that it was only his login which had been deactivated. If this evidence was considered in the round, it could not be said that the tribunal's conclusion was either incorrect, perverse, or contained any errors of law.

55. On the fourth point, the alternative basis for finding that the condition had not been complied with, he reminded the court of paragraph 47 of the determination.[15]

> "47. Had it been necessary to consider whether any of the other sub-paragraphs of condition 8 would have applied in this situation, the Tribunal determined that there was a relationship between HDOCS and Dr Kuzmin that could be described as contractual and that HDOCS could be a 'contracting body' within the meaning of condition 8(a) and 8(d)."

56. There was a definition of a contracting body within the glossary to the conditions bank, viz:

> *"An organisation or individual with which a doctor has a contract to provide services in, or in relation to, any area of medicine. For example, a general practitioner (GP) may have a contract with National Health Service (NHS) England to provide primary care services to a group of patients, and a private doctor may have a contract with an individual patient to provide medical services directly to them."*

Mr Hare submitted that this would have been sufficient to bring the doctor within condition 8, even if the tribunal had been wrong in relation to "registration".

[14] Bundle p 257 ff
[15] Bundle page 28

57. Counsel addressed the evidence of Dr Wright, dealing with two points, First in respect of the exclusion of such evidence by the tribunal at stage II in March 2022, he stood by the reasoning provided by the tribunal at paragraphs 23 to 29 of the relevant determination. Essentially it was an attempt by the doctor to revisit a factual finding, and the tribunal was entirely correct in its procedural approach. On the question as to whether or not the material should be admitted as fresh evidence on this appeal, he submitted that applying the **Ladd v Marshall** test, confirmed in **Adeogba**, it was relevant that on the first limb, Dr Kuzmin was aware of Ms Vann's evidence, and any potential shortcomings in respect of registration, and it would have been open to him at stage 1 to have called Dr Wright at that point, being aware of his role as a signatory to the honorary contract. No satisfactory explanation was provided as to why he was not called at the original hearing. It could not be said that the evidence was presumptively credible, or that it would have had an impact on the outcome of the case. He submitted that paragraphs 10 and 11 of Dr Wright's statement did not negate the findings of the tribunal which were based upon a broad assessment of the evidence, and in particular whether there had been compliance with condition 8.

Discussion

58. As this appeal is to be dealt with as a rehearing, and not a review, I have approached it by considering the entirety of the evidence which was before the MPT and the manner in which the panel arrived at its conclusions at the fact-finding stage (and in relation to one minor aspect the impairment/sanctions stage), giving appropriate deference to the experienced tribunal. In this respect I agree with the interpretation placed upon the recent authority of **Sastry** advanced by counsel for the Respondent, Mr Hare KC, that there has been no diminishing in the respect afforded to the fact-finding tribunal, although a slightly less deferential approach might be appropriate when any question of sanction is the subject of an appeal. It is unlikely that an appellate court will interfere with a decision in such circumstances in the absence of an obvious error, or a clear perversity, with the tribunal arriving at a conclusion which is wholly unsupported on the evidence.

59. Whilst the appeal in this case alleges perversity, and in the numerous grounds relied upon appears to suggest that the conclusion was unsupported by the evidence, in reality the appeal has now been focussed far more narrowly, and in particular on the interpretation of the notification duty or responsibility that was imposed on the registrant by virtue of condition 8, in the context of his out of hours arrangement with HDOCS.

60. Central to the Appellant's case is the assertion that the process of enabling trainee registrars to undertake out of hours work as part of their ST3 training was not a registration process at all, simply an online facility by which the training was managed. It is for this reason that he has sought to rely upon the evidence of Dr Tim Wright. The argument before the MPT, pursuing a theme which was developed in cross-examination of the principal witness Charlotte Vann, and repeated in this court, is that if Dr Kuzmin was not formally registered with HDOCS at the time that he sent the relevant email seeking his login details, and as matter of strict interpretation of condition 8 (f), which is how it should be approached

there was no requirement to let the agency know about his conditions. In simple terms, he did not come within the ambit or scope of the condition.

61. In my judgment, however, the challenge to the determination of the MPT is without foundation, for several reasons.

62. First, it is important not to lose sight of the fact that condition 8 provides a very broad spectrum of entities, agencies and individuals to be notified of the conditions imposed on the doctor's registration, and was clearly intended to be expansive or inclusive, rather than restrictive or exclusive. In other words the purpose behind the condition was to ensure that *any* of these bodies or individuals with whom Dr Kuzmin was likely to be in contact for the purposes of fulfilling his professional responsibilities or completing his training was made aware that his registration was not unrestricted, and that concerns had been noted in a regulatory process which required to be addressed. It is axiomatic that an order for conditions was one of the lesser of the sanctions which could have been imposed at the interim orders stage, bearing in mind that it would have been open to the IOT to suspend, even though no finding of impairment of fitness to practice had been made, on the basis of the need to protect the public, maintain confidence in the protection and uphold professional standards and on the basis of a *prima facie* case of misconduct. It is for this reason that I agree with the submissions of counsel for the GMC, Mr Hare KC, that this MPT, dealing with a case based upon a breach of those conditions in separate proceedings, was not wrong to concentrate on the purpose which lay behind the imposition of the conditions, and the notification requirement, taking a broader rather than a restrictive approach to the registrant's duty. The tribunal was quite correct, in my judgment, to express its view in paragraph 35 that Dr Kuzmin would have known the very broad basis of the purpose of condition 8 to inform "*all the people and organisations to whom he did, or intended to provide medical services*" of those restrictions.

63. That is not to say that the tribunal was unaware of what had to be proved if they were to find that the doctor had failed to comply with the reporting requirement. In paragraph 28 and 29 of their determination, they acknowledged the advice received by the legal assessor that it was necessary to find the existence of a professional duty or an obligation which required an interpretation of condition 8 so as to give rise to that duty or obligation.

64. Second, although Ms O'Rourke KC sought to portray the first sentence of the tribunal determination in paragraph 41 (see paragraph 31 of this judgment) as an attempt by the tribunal to provide a definition of "*registration*" which was wrong as a matter of law, in my judgment this places an unnecessary gloss on what was no more than an assessment of the evidence, and a preface to what followed in the balance of the paragraph. Even if it was an attempt at a definition, it seems to me that it was an entirely appropriate one, where the tribunal was attempting to approach the question generally and purposively, in view of the fact that "*registration*" was not defined anywhere within the honorary contract, which clearly was regarded as important, or indeed in any of the other documents. If one reads on to the rest of that paragraph, the tribunal makes it clear what evidence was being relied upon to come to the conclusion that the doctor effectively had the status of "*registration*" for all intents and purposes.

65. In my judgment, elevating the concept of registration to a more formal process, or attributing a similar process to that which might be expected for a doctor's GMC registration, which is the effect of counsel's submission, is adopting an overly legalistic and unnecessary approach. The tribunal was right to focus on the fact that Dr Kuzmin had previously completed the registration documentation and done all that was necessary to work out of hours, in other words to undertake his training requirements. Suggesting that registration meant something else is tantamount, in my judgment, to dancing on the head of a pin.

66. Third, it is clear to me that the tribunal placed significant store by the evidence of Charlotte Vann, and the replies which she gave to the various questions which were asked of her. In these circumstances they were relying on the doctor's status on the system as someone who could resume work as soon as he was provided with the necessary login details without having to undertake any further process of registration. Being "deactivated" according to the witness, meant little more than not being able to book shifts. She was unequivocal in her responses to questions from the chair of the panel:

> "A He did not need to deregister, he just needed to have let us know that he was not going to be booking any shifts for a couple of months, and then we could have just deactivated him and reactivated him once he was ready to start again.
> Q But basically, once he is registered, he is going to stay registered until when?
> A Until, basically, he has either completed his ST3 training and then that is when we take them off all of our systems, once they completed all their training hours."

67. I can see no basis for equating an ineligibility to undertake out of hours training because the necessary ST3 status had not been completed, with a *de facto* deregistration, as is implicit in the arguments advanced by the Appellant, and in my judgment the tribunal was quite correct to conclude, as it did in paragraph 45, that Dr Kuzmin remained registered throughout 2016 (from August) until 2017, and was so registered in June when he requested login details to allow him to continue.

68. Fourth, the work details form, in which the doctor acknowledged that HDOCS out of hours training was a service which he was expected to be in a position to provide, was properly regarded as significant and relevant to the question of registration. The finding in paragraph 46 that Dr Kuzmin regarded himself as registered and able to work (undertake training) in this capacity was germane. It is correct that a mindset on the part of the registrant that there was no bar to him continuing to undertake out of hours work would not be sufficient to give rise to a duty or an obligation to disclose his conditions if that duty did not actually exist, *ie* if he was wrong about his status, but I do not interpret the tribunal as reversing the burden of proof, or applying a subjective test when making reference to the work details form. It was part of the matrix of evidence which they considered, in conjunction with the oral testimony of Miss Vann and the honorary contract.

69. I deal with the question of the alternative ground upon which Dr Kuzmin was found not to have complied with the conditions, namely that he came within the scope of 6 (a) and (d) because HDCOS was a contracting body for whom he provided services. Whilst I

acknowledge that the question of employment was no longer one before the tribunal, it seems to me that the answer here lies in the definition of a contracting body referred to by Mr Hare KC. In simple terms, Dr Kuzmin came squarely within that definition. Whilst there was little challenge to this proposition by Ms O'Rourke QC, her argument that this was a contract which was either void or voidable, and that it could not have been enforced against or by the doctor because his status was not that of an ST3 (if I understand it correctly – it was not advanced in any great detail), in my judgment fails on the premise that a contractual arrangement remained, even if there was an absence of qualification, because as soon as the doctor achieved the appropriate status, he was able to continue with his training. It has never been suggested that it was necessary to enter a new "honorary contract" and it seems to me that a contractual relationship subsisted keeping the doctor within the definition. In any event this would only become pertinent if the tribunal came to the wrong conclusion in relation to the primary condition requirement that was breached. In my judgment, it did not.

70. It is unnecessary to deal separately or in detail with the individual grounds of challenge, because of the way in which the issues were crystallised as indicated above. Insofar as any challenge is maintained by the Appellant that the refusal to admit Dr Wright's evidence was wrong or perverse, it seems to me that the tribunal had very limited scope so to do, once the fact-finding stage had been concluded. It is not said that the rules were incorrectly applied, nor is the reasoning challenged, and in my judgment ground 5 is without substance on a stand-alone basis.

71. The real question here is whether or not this meets the test for the admission of fresh evidence on appeal, applying the principles in **Ladd v Marshall**, and the overriding objective. In my judgment a less than convincing argument is advanced as to why Dr Wright's evidence could not have been secured for the fact-finding stage. Although the honorary contract may not have been a document produced by way of disclosure, and giving the registrant the benefit of doubt that he would not have been aware of the details of the contractual arrangement himself for the provision of out of hours services, by way of training and the signatory to the contract, once the document was produced, the witness's potential relevance would have become obvious. Thus, I am not satisfied that the first limb of the **Ladd v Marshall** test is satisfied.

72. Even if it is, in my judgment it flounders on the second limb. There is a lack of specificity in Dr Wright's observations in the paragraphs relied upon; it was not a central to the finding of the tribunal that the process of registration was akin to that required of any GP or other doctor through the GMC process, and for reasons already explained, the decision was based upon a broader interpretation of the wording in clause 8 and the duty to provide information about the conditions. In my judgment it is unlikely to have impacted on the outcome, even if it had been admitted.

73. Accordingly, I exclude it for the purposes of this appeal.

Conclusion

72. In the circumstances this appeal must be dismissed. I invite the parties to agree the terms of any consequential order. If there is no agreement, particularly in relation to costs, I am happy to receive short written submissions and then consider whether or not a further remote hearing is required on the hand down of this judgment.

GWKC

28th September 2022