GENERAL OSTEOPATHIC COUNCIL

PROFESSIONAL CONDUCT COMMITTEE

Case No: 725/9124

Professional Conduct Committee Hearing

DECISION

Case of:	Mr Benjamin Sayer
Committee:	Mr Alastair Cannon (Chair) Miss Morag MacKellar OBE (Lay member) Mr David Propert (Osteopathic member)
Legal Assessor:	Mr Andrew Granville Stafford
Representation for Council:	Ms Rachel Birks
Representation for Osteopath:	Mr Paul Grant
Clerk to the Committee:	Ms Nyero Abboh and Ms Hannah Smith
Dates of Hearing:	17, 18, 19, 20 and 24 August 2020

Summary of Decision

The Registrant admitted paragraphs 1, 2, 3(a), 4 of the particulars of allegation and these were found proved by admission.

The Registrant denied the remaining factual particulars and denied that his conduct amounted to unacceptable professional conduct.

After hearing the evidence and submissions from the parties the Committee found paragraph 3(b) of the factual particulars proved. It found paragraph 3(c) not proved. It found paragraph 5 proved in relation to a non-professional personal relationship but not in relation to a sexual relationship. It found paragraph 6 proved in relation to 3(a), 3(b), and 5 in respect of the non-professional personal relationship. It found paragraph 6 not proved in relation to 3(c).

The Committee found that the facts found proved amounted to unacceptable professional conduct.

The Committee ordered that the Registrant's registration be suspended for a period of six months, with a review to take place prior to the expiry of the suspension.

Allegation and Facts (as amended)

The allegation is that Mr Benjamin Sayer (the Registrant) has been guilty of unacceptable professional conduct, contrary to section 20(1)(a) of the Osteopaths Act 1993 in that:

1. Between around 30 October 2017 and 26 April 2019, the Registrant practised at the Bodytonic Clinic in London (the Practice).

2. Between around 12 November 2018 and 30 January 2019, the Registrant provided treatment to Patient A at the Practice.

3. Subsequent to the establishment of a practitioner-patient relationship between the Registrant and Patient A, the Registrant:

a. communicated with Patient A using his personal mobile number, instead of contacting her via the Practice's patient contact system;
b. entered into non-professional personal relationship with Patient A;
c. entered into a sexual relationship with Patient A.

4. On two occasions, the Registrant met with Patient A in the treatment room at the Practice for reasons unconnected with his treatment of her.

5. The Registrant failed to hand Patient A’s treatment over to a colleague until after he had entered into a non-professional personal and/or sexual relationship with her.

6. The Registrant's actions as specified at paragraph 3a and/or 3b and/or 3c and/or 5 were sexually motivated.

Preliminary Matters

Applications to amend

1. At the outset of the proceedings Ms Birks on behalf of the Council applied to amend the factual particulars in the allegations in a number of respects. The proposed amendments are shown below with the additional words underlined and the proposed deletions struck through.

   The allegation is that Mr Benjamin Sayer (the Registrant) has been guilty of ~~U~~unacceptable ~~P~~professional ~~C~~conduct, contrary to ~~S~~section 20(1)(a) of the Osteopaths Act 1993 in that:

   1. Between around 30 October 2017 and 26 April 2019, the Registrant Mr ~~Sav~~er practised at the Bodytonic Clinic in London ("~~p~~Practice").

   2. Between around 12 November 2018 and 30 January 2019, the Registrant ~~Mr Sayer~~ provided treatment to Patient A at the ~~p~~Practice.

   3. ~~On dates unknown, but s~~Subsequent to the establishment of a practitioner-patient relationship between the Registrant and Patient A, the Registrant ~~Mr Sayer~~:

      a. communicated with Patient A using his personal mobile number, instead of contacting her via the ~~p~~Practice's patient contact system; ~~and/or~~

      b. entered into ~~an improper~~ non-professional personal relationship with Patient A; ~~and/or~~

      c. ~~engaged~~ entered into a sexual relationship with Patient A.~~;and/or~~

      ~~d met with Patient A in the treatment room on two occasions for non-professional reasons.~~

   4. On two occasions, the Registrant met with Patient A in the treatment room at the Practice for reasons unconnected with his treatment of her.

   5. ~~Mr Sayer~~ The Registrant failed to hand ~~referred~~ Patient A's treatment over to a colleague until after he had entered into a non-professional personal and/or sexual ~~in pursuance of his personal~~ relationship with her.

   ~~4.~~ 6. The Registrant's actions as specified at paragraph 3a and/or 3b and/or 3c and/or 5 were sexually motivated.

   ~~5.~~ 7. By his actions, as specified at paragraph 3a and/or 3b and/or 3c

and/or 4 and/or 5, ~~above, Mr Sayer~~ the Registrant:

a. abused his professional position; and/or
b. transgressed professional and/or sexual boundaries; and/or
c. failed to uphold the reputation of the profession.

2. Ms Birks submitted that the amendments would best reflect the case brought against the Registrant by the Council and would not prejudice the Registrant.

3. Mr Grant on behalf of the Registrant did not object to the amendments.

Legal Advice

4. The Legal Assessor reminded the Committee of Rule 24 of the GOsC Professional Conduct Committee (Procedure) Rules 2000 ('the PCC Procedure Rules') provides that:

> 'If, at any stage of the hearing, it appears to the Committee that the complaint should be amended, the Committee may, after hearing the parties and seeking advice from the legal assessor, make such amendments to the complaint as may seem necessary or desirable if it is satisfied that no injustice would thereby be caused.'

5. The Committee accepted the legal advice in full. It was satisfied that no injustice would be caused by the amendments and that, in absence of any objection from the Registrant, it would be desirable to allow them. The Committee therefore allowed the application to amend.

6. At the conclusion of the Council's case Mr Grant made an objection on a point of law to paragraph 7 of the allegation. He submitted that the allegations made in paragraph 7 were more properly matters which should be considered at the second stage of the proceedings, when the Committee considers whether the facts proved amount to unacceptable professional conduct. He contended that if the Committee was to decide at the fact stage whether the conduct was an abuse of the Registrant's professional position and a failure to uphold the reputation of the profession it would render the second stage of the process effectively nugatory.

7. All the issues raised in paragraph 7, he argued, were classically matters the Committee would consider in determining unacceptable professional conduct. On that basis, he applied to amend the factual particulars by deleting paragraph 7.

8. Ms Birks on behalf of the Council opposed the application. She submitted it was both usual and appropriate for a paragraph in the factual particulars to

be drafted in this way. There is a burden on any regulator to make it clear to the respondent the full nature and gravity of the allegations he or she faces. She referred the Committee to *PSA v NMC & Jozi* [2015] EWHC 764 (Admin) and pointed out that the courts have been critical in the past of 'undercharging'.

9. The Committee heard and accepted advice from the Legal Assessor. The Legal Assessor referred the Committee to *R (Bevan) v GMC* [2005] EWHC 174 (Admin) where Mr Justice Collins had considered the desirability of dealing with allegations of this nature at the factual stage of hearing. He had commented that it was not 'necessarily appropriate' for matters such as this, which go to the questions of misconduct which are a matter of judgment for the panel, to be considered at the facts stage.

10. The Committee decided that it was desirable to delete paragraph 7 from the factual particulars and to consider the matters alleged there when it considered unacceptable professional conduct.

11. The Committee noted neither party contended that any injustice would be caused by following that course. Ms Birks had accepted that the full extent of the matters alleged in paragraph 7 could properly be considered by the Committee at the second stage, which this case would inevitably reach given the Registrant's admission to some of the factual particulars.

12. Ms Birks also accepted that it would have been clear to the Registrant what the full nature of the allegations that were going to be made against him at the unacceptable professional conduct stage, even if paragraph 7 was deleted from the factual allegations.

13. The Committee considered that the matters it would be asked to pronounce upon, if it dealt with paragraph 7 at the first stage, are matters of professional standards which would inevitably have to be considered at the second stage in any event. These are matters of opinion and judgment which are more appropriate to that stage of the process.

14. It was therefore undesirable in the Committee's view to consider these issues at the facts stage, not least because it would be inefficient to address the same matters twice. No prejudice would be caused to the Council because, as had been accepted by the parties, all the issues in question would be relevant at stage 2 when the Committee considers, as a matter of judgment, whether the relevant conduct fell below the standards required of a registered osteopath.

Decision:

Background

15. The Registrant has been a registered osteopath since 2015.

16. Between 30 October 2017 and 26 April 2019 the Registrant practised as a self-employed associate at the Bodytonic Clinic ('the Practice') in London.

17. On or around 12 November 2018 Patient A, a female, became a patient of the Registrant's. The Council's case was that the Registrant soon developed an overly informal and flirtatious relationship with Patient A. The Council relied on a recording of a telephone conversation between the Registrant and Patient A on 24 November 2018. The call lasted 13 minutes 23 seconds. During the course of that conversation:

    the Registrant told Patient A that he knew when her birthday was having seen it on her records;

    the Registrant invited Patient A to contact him at home the following day (a Sunday, a non-working day for the Registrant) when he said it would be just him at home slouching with the dog;

    the Registrant told Patient A that he was going to give her a 45 minute appointment the next week although appointments would usually be 30 minutes;

    the Registrant told Patient A that he could come and watch her in her [redacted] class because he lives close to the studios;

    the Registrant told Patient A that he could come and 'pick her up' if she fell to pieces during the [redacted] class;

    the Registrant and Patient A had a conversation about whether she was allowed to go out on the town dancing;

    the Registrant and Patient A had a conversation about pole dancing.

18. The last occasion on which the Registrant saw Patient A to provide osteopathic care was on 29 January 2019.

19. The Council's case was that the Registrant entered into a personal relationship with Patient A at around the end of February 2019 which became later a sexual relationship.

20. On 14 March 2019 the Registrant sent a message to another practitioner at the Practice asking her to take over the care of Patient A. As a result, on 15 March 2019, Patient A had osteopathy treatment from a different practitioner at the Practice.

21. On two subsequent dates, one being the 17 April 2019 and the other being unidentified, the Council alleged that Patient A came to the Practice to meet the Registrant. The Council relied on the evidence of Ms C , a receptionist at the Practice, that Patient A arrived at around 7.30pm on 17 April 2019. She did not have an appointment that day. At around 7.45pm the Registrant invited her into his treatment room. She was still in there at 8pm when Ms C left for the day. Ms C said that this had also happened previously, although she could not remember dates and times.

22. On 26 April 2019 the principal of the Practice, Mr B, had a meeting with the Registrant. The Council's case was that during this meeting the Registrant admitted to having entered into a personal relationship with Patient A around the end of February 2019. Following this meeting the Registrant's contract with the Practice was terminated.

23. The Registrant said he had treated Patient A on approximately five occasions between 12 November 2018 and 29 January 2019. He accepted the transcript produced by GOsC of his conversation with Patient A on 24 November 2018 was accurate. He accepted the conversation could be regarded as 'flirty' though he said the purpose of it was to keep in contact with his Patient and not to flirt with her.

24. The Registrant also accepted that he called Patient A on his personal mobile phone, although he was unable to recall whether it was before or after the 24 November conversation. There was no recording of this call but the Registrant said it was a short, professional conversation. He accepted he should have used the Practice's system for this call but said that he was under pressure to make a follow-up call. He did it on a Sunday, a day when the Registrant was not working, on his own phone because he thought otherwise he would forget to do so.

25. At the last treatment on 29 January 2019 the Registrant told the Committee he had said to Patient A she was doing well and he did not need to see her again.

26. The Registrant said that around the end of February 2019, Patient A contacted him by telephone on his personal number. She invited him to 'hang out' but he declined. The Registrant also told the Committee that during this call he had told Patient A that he could not treat her again.

27. About a week later Patient A sent him a link inviting him to a performance she was in. The Registrant attended the performance which was on 7 March 2019. He said that following this he went out with Patient A, but this was on the basis that both understood he could no longer be her therapist. He admitted that he had had a sexual relationship with Patient A but maintained this only occurred after she had ceased to be his patient.

28. The Registrant said he had never tried to hide the relationship. He said that sometime around early March 2019 he spoke to Ms E, who was a more senior practitioner at the Practice and a friend of his, and advised her of his relationship with Patient A.

29. After he had started seeing Patient A she told him she still needed osteopathic treatment. He said he had made it clear he could no longer treat her and so, on 14 March 2019 he arranged for another associate at the Practice, Ms D, to start treating her.

30. In his evidence to the Committee the Registrant said he was certain his relationship with Patient A did not progress to becoming sexual until after 14 March 2019. He could not recall the specific date on which this occurred.

31. The Registrant agreed that on two occasions Patient A had come to the Practice in order to meet him, but stated that these were when she was no longer a patient of his. The visits lasted no more than 10 minutes at the end of his shift, whilst he was tidying the room for the next day. Nothing improper occurred during these two visits.

Evidence

32. The Council relied on the witness statements of Mr B, the principal of the Practice, and Ms C, receptionist at the Practice to give evidence. These statements were agreed and neither was called to give oral evidence.

33. The Registrant gave evidence on affirmation and was cross-examined by Ms Birks.

Submissions of the Parties on the Facts

34. The Council's case was that there was nothing to suggest the patient/practitioner relationship had ended prior to the 14 March 2019 when the Registrant transferred Patient A's care to a different osteopath.

35. In respect of paragraph 3(b) and 3(c), Ms Birks submitted that, in the absence of any evidence of transfer of Patient A's care prior to 14 March, Patient A remained a patient of the Registrant's. On that basis, these particulars were made out.

36. For the same reasons, Ms Birks submitted that paragraph 5 was proved. She said there was clear and compelling evidence that the Registrant entered into a non-professional personal relationship with Patient A. She further invited the Committee to draw the inference that, notwithstanding the Registrant's oral evidence, the relationship became a sexual one prior to 14 March 2019.

37. In respect of paragraph 6, Ms Birks said the Council put its case on the basis that the Registrant was sexually attracted to Patient A from the very early stages of his treatment of her, as demonstrated by the phone conversation on 24 November 2018. She contended that it was of significance that the Registrant did not use the recognised method used by the Practice to contact patients, but instead used his own phone. This enabled Patient A to contact the Registrant on his mobile which led to a sexual relationship developing.

38. Ms Birks submitted that in the circumstances the conduct in question, namely that set out in paragraphs 3(a), 3(b), 3(c) and 5, was done in pursuit of a sexual relationship and therefore sexually motivated.

39. Mr Grant on behalf of the Registrant submitted that the patient/practitioner relationship came to an end either on 29 January 2019, when Patient A had her last treatment with him, or at the latest in the phone call around the end of February 2019 when the Registrant told her that he could not treat her again.

40. Mr Grant submitted that the Committee should not find paragraphs 3(b) or 3(c) proved on the basis that the patient/practitioner relationship no longer existed when the relationship became progressively personal and then sexual.

41. In respect of paragraph 5 Mr Grant submitted that there was no evidence to show that, following the final session of treatment on 29 January 2019, Patient A would need any further osteopathic treatment. At the time she did require further treatment, in March 2019, the Registrant referred her on to a colleague.

42. In respect of paragraph 6 Mr Grant submitted that the conduct in question did not amount to sexualised behaviour, save that he said it self-evident that entering into a sexual relationship is sexually motivated.

Legal Advice

43. The Committee heard and accepted the advice of the Legal Assessor. The Committee was reminded that the burden of proving factual allegations is on the Council and the standard to be applied is proof on the balance of

probabilities. The Legal Assessor advised the Committee that before it could find that conduct was sexually motivated it must be satisfied that the conduct was done either in pursuit of sexual gratification or in pursuit of a future sexual relationship (*Basson v General Medical Council* [2018] EWHC 505 (Admin)).

The Committee's Determination on the Facts

44. At the outset of the hearing the Registrant admitted paragraphs 1, 2, 3(a) and 4 of the factual particulars. Pursuant to Rule 27(1) of the PCC Procedure Rules the Committee found those particulars proved by admission. The Committee considered the remaining allegations in light of the documents before it, the oral evidence of the Registrant and the submissions of the parties.

Credibility of the witnesses

45. The only live witness called by either party was the Registrant.

46. The Registrant came across as a person of pleasant demeanour and the Committee accepted that the emotion which was apparent at times during his evidence was genuine.

47. The Committee however agreed with Ms Birks that there were inconsistencies and deficiencies in the Registrant's evidence. In particular, he was unable to be specific about the dates on which certain key events happened and what was said in certain key conversations. The Committee accepted that inaccuracy of recall could potentially be due to the passage of time. However the Committee found it was surprising that the Registrant was able to state with certainty that the sexual relationship did not begin until after 14 March 2019, but, despite accepting that this was a defining step in the relationship, he was unable to assist the Committee with any more precision as to when this happened other than it was definitely after the 14 March and sometime before the end of March. Given the importance of this and given that the Registrant told the Committee he had discussed with Patient A the timeline of events, it was even more surprising that the Registrant could not be more precise about this.

48. Overall, the Committee found the Registrant was keen to emphasise points which assisted him and less clear about matters which caused him difficulties. The Committee felt the Registrant's expressed indignation of the sexual characterisation of pole dancing was disingenuous in light of the actual discussion that took place with the Patient A in the phone call on 24 November 2018.

49. The Committee was unfortunately left with the impression that the Registrant was not always doing his best to help the Committee.

Paragraph 1 – found proved

50. Found proved by admission.

Paragraph 2 – found proved

51. Found proved by admission.

Paragraph 3(a) – found proved

52. Found proved by admission.

Paragraph 3(b) – found proved

53. It was not in dispute that the Registrant had entered into a personal relationship with Patient A. The issue for the Committee to determine was whether the Council had proved, as alleged in particular 3(b), that relationship was a 'non-professional personal relationship'.

54. A key issue for the Committee to consider in this case was when the patient/practitioner relationship ended.

55. There were three possibilities. The Council argued that it did not end until 14 March 2019 when the Registrant referred Patient A to his colleague. Mr Grant contended it was on 29 January 2019, when this particular episode of care had concluded. Alternatively, Mr Grant said it was, at the latest, when Patient A rang him around the end of February and invited him to 'hang out'.

56. The evidence that the Registrant gave was that there was no standard procedure at the Practice for discharging a patient. His practice would be to verbally discharge the patient and indicate in the notes that there was no need for further appointments. Patient A's notes were not produced for the Committee to see, but the Registrant said he followed this process in her case. He said he had spoken to Patient A at the last appointment on 29 January 2019, told her she was doing well and that there was no need for further treatment. He accepted that he should have documented the discharge better.

57. The Registrant said if, following that, Patient A had needed more treatment she would contact the clinic either online or by phoning reception. She could request an appointment with him, which might depend on his availability,

but she could have also requested an appointment with a different osteopath.

58. The Committee accepted Ms Birks' submission that there was no evidence that the patient/practitioner relationship ended on 29 January 2019. There was in the Committee's judgment no clean disengagement at that time. Although there may have been no immediate need for further treatment at that stage, the Committee accepted there must have been a significant probability that she would need further osteopathic treatment. Indeed, the Registrant accepted in his evidence that there was always a 50:50 chance that a client might return.

59. The Committee noted that the Registrant said in his statement dated 11 August 2020 (emphasis added):

> 'She did ring on about 1st March. She had access to my mobile number. Patient A rang my mobile number and asked whether I would like to 'hang out' with her. She said that she felt an attraction to me. **I said to her that as her osteopath at the time on 1st March 2019**, (yes, I did believe I should not go out with her or meet her socially at that time. . .'

60. This, in the Committee's view, was a clear indication that the Registrant himself regarded the patient/practitioner relationship as being extant at the date of that call (which the Registrant said in evidence was more likely to have been at the end of February rather than the start of March).

61. The Committee also noted Mr B's record of his conversation with the Registrant on 26 April 2019. This was exhibited to Mr B's statement and was not challenged. Mr B recorded the answers of a number of questions he put to the Registrant, including the following (emphasis added):

> 'How did you end the therapeutic relationship? You said the last treatment was on 30th January 2019. **It was unclear when the therapeutic relationship ended.**'

62. This fact that it was said to be 'unclear' during this conversation as to when the therapeutic relationship ended detracts from the position taken by Mr Grant that the patient/practitioner relationship definitively concluded on 29 January 2019.

63. The other key point, in the Committee's view, was that on 14 March 2019 the Registrant referred Patient A on to a colleague. The very fact that he was making a referral of a patient indicates that a clinical relationship was persisting.

64. The Committee was therefore satisfied that the patient/practitioner relationship was persisting when the Registrant entered into a non-professional personal relationship with Patient A which, on his own account, was on or about 7 March 2019. The Committee therefore found paragraph 3(b) proved.

Paragraph 3(c) – found not proved

65. The allegation the Committee had to consider was whether the Council had proved that, during the period of the practitioner/patient relationship, the Registrant had entered into a sexual relationship with Patient A.

66. It was not in dispute that the Registrant had had a sexual relationship with Patient A. He told the Committee that his personal relationship with Patient A started following his attendance to watch her performance on 7 March 2019. He said, however, that the relationship had not become a sexual one until after 14 March 2019, which is when he referred Patient A to his colleague for treatment.

67. Although the Committee had concerns about the evidence given by the Registrant as to when the relationship became sexual, there was no positive evidence to show that the sexual relationship had started prior to the hand over on 14 March 2019. The Committee concluded, therefore, that the Council had failed to prove the sexual relationship had begun before 14 March 2019.

68. Accordingly it found paragraph 3(c) not proved.

Paragraph 4 – found proved

69. Found proved by admission.

Paragraph 5– found proved in part

70. Particular 5 alleged that the Registrant failed to hand Patient A's treatment over to a colleague until after he had entered into a non-professional personal and/or sexual relationship with her.

71. The Committee found, in its consideration of paragraph 3, that the patient/practitioner relationship continued until 14 March 2019, which was the date of the hand over. The Committee also found (on the basis set out in paragraphs 78 and 79 below) that the Registrant was attracted to Patient A and was pursuing a relationship from the phone call on 24 November 2018 onwards. The Committee was therefore satisfied that, once he entered into a personal relationship with Patient A, he was under a duty to hand over her care and he failed to do so.

72. The Committee however found, at paragraph 3, that it could not be satisfied to the requisite standard of proof that the sexual relationship began before the hand over on 14 March.

73. Therefore, the Committee found paragraph 5 proved in relation to a non-professional personal relationship but not in relation to a sexual relationship.

Paragraph 6 – found proved in part

74. Paragraph 6 alleged that the Registrant's actions as set out in paragraphs 3(a), 3(b), 3(c) and 5 were sexually motivated. The Committee considered each part of this allegation separately.

75. The Registrant admitted the allegation at paragraph 3(a), namely that there was an occasion on which he contacted Patient A on his mobile phone. Mr B emphasised in his evidence that osteopaths at the Practice should not use their own mobile to contact a patient. Indeed, the Registrant accepted that he should not have done so.

76. He told the Committee the reason for doing so was that it was a Sunday and he was not at work. He remembered that he had forgotten to follow up with Patient A up on her treatment, as the Practice required him to do. He decided to use his own mobile as he was concerned that if he left it until the Monday he would forget about it. He said this was a short call. He could not remember exactly when the call took place.

77. The phone log shows Patient A phoned the Practice on 24 November 2018 and spoke to reception. The purpose of the call was to speak to the Registrant. The fact that Patient A was calling to speak to the Registrant on his work number suggests she may not have had his mobile number at that time.

78. It was later the same day that the conversation took place which was recorded. The Committee had a transcript of this call and also listened to the audio recording. The Committee accepted Ms Birks' submission that this was a flirtatious conversation. Although there was discussion of Patient A's condition, the Committee was in no doubt that the tone of this call was not professional. A number of personal matters were discussed, as set out in paragraph 17 above, which the Committee considered to be of a suggestive nature. Significantly, those comments came from the Registrant rather than Patient A. To put it colloquially, the Committee was left with the overall impression that the Registrant was 'chatting up' Patient A during this call.

79. The Committee noted that in his oral evidence, though not in his written statements, the Registrant says he made this call from the Practice reception within earshot of the receptionists and no more than five metres

away from the directors. However, the Committee noted that the log of calls exhibited to Mr B's statement, which was not contested, indicated that this call had been made from a numbered extension not in a reception area but from Room 1 at Stratford. The evidence of this log therefore did not appear consistent with the Registrant's oral evidence.

80. The Registrant accepted in his evidence that Patient A was an attractive woman. Having listened to the recording of the phone call, the Committee was unable to accept the Registrant's evidence that he was not by this stage attracted to her.

81. The transcript of the call shows that the Registrant invited Patient A to phone him the next day when he would be at home. However, the Registrant told the Committee in evidence that this was not an invitation Patient A could have acted on because she did not in fact have his personal number. That again indicates that, as at 24 November 2018, Patient A did not know the Registrant's mobile number.

82. She clearly would have had his number after he phoned her on his mobile. Therefore, the Committee concluded that the mobile phone call referred to in paragraph 3(a) must have been after the conversation on 24 November 2018.

83. This was significant, given the flirtatious nature of the conversation on 24 November. It was also significant that the Registrant used his own mobile phone to make the call in question when he knew he should not have done. The Committee concluded, in light of these two things, that this mobile phone call was made in pursuit of a future sexual relationship and therefore was sexually motivated.

84. The Committee considered whether the facts proved at 3(b) were sexually motivated. The Committee agreed with Ms Birks that the events in question were a progression towards the sexual relationship which ultimately developed. Having found that the Registrant entered into a non-professional personal relationship, and not long after it became sexual, the Committee was in no doubt that this was sexually motivated.

85. Because the Committee did not find paragraph 3(c) proved there was no need to consider that in relation to the allegation of sexual motivation in this paragraph.

86. The Committee found, at paragraph 5, that the Registrant had failed to hand over Patient A's care to a colleague until after he had entered into a non-professional personal relationship with Patient A.

87. The Committee considered that, from the phone call on 24 November 2018 onwards, the Registrant was attracted to Patient A and was hoping their relationship would develop into a sexual one. In those circumstances, the Registrant should have handed over the care of Patient A to another practitioner.

88. The Committee considered the most probable explanation for the Registrant not handing over care earlier than he did was because he wished to maintain contact with Patient A, albeit in a legitimate clinical setting, but with a view to a potential future sexual relationship.

89. This failure to hand over Patient A's treatment to another practitioner earlier than he did was an act of omission rather than commission. Nonetheless, the Committee concluded the failure to do so until after their personal relationship developed was sexually motivated.

90. The Committee therefore found paragraph 6 proved in relation to 3(a), 3(b), and 5 in respect of the non-professional personal relationship. It found paragraph 6 not proved in relation to 3(c).

Submissions on Unacceptable Professional Conduct ("UPC")

91. Ms Birks on behalf of the Council submitted that the facts found proved amounted to unacceptable professional conduct. She said that unacceptable professional conduct is synonymous with misconduct, a term used by other healthcare regulators. With reference to the case law, she submitted that misconduct is a falling short of the standards to be expected of a registered osteopath, and the falling short must be a serious one.

92. Ms Birks referred the Committee to a number of authorities including:

> *Nandi v GMC* (2004) in which Mr Justice Collins referred to misconduct as 'conduct which would be regarded as deplorable by fellow practitioners.'
>
> *Spencer v GOsC* (2010) where it was held that, whilst the conduct should be serious in order to amount to misconduct, it is not necessarily of such gravity that the lowest powers of sanction would be unavailable. At paragraph 23 of the judgment Mr Justice Irwin said that 'Whether the finding is misconduct or unacceptable professional conduct there is in my view an implication of moral blameworthiness, and a degree of opprobrium is likely to be conveyed to the ordinary intelligent citizen.'
>
> *R (Shaw) v General Osteopathic Council* (2015) in which the approach in *Spencer* v GOsC was endorsed. Mr Justice Kerr said at

paragraph 47: 'A charge of unacceptable professional conduct does entail conduct that, to some degree, is morally blameworthy, and would convey a degree of opprobrium to the ordinary intelligent citizen. That is because under Section 20(1) (a) it is conduct, i.e. human behaviour, which is being measured. It has to be unacceptable, i.e. it was to fall short of the standard required of a registered osteopath.'

93. Ms Birks submitted that the Registrant's conduct in this case would be regarded by fellow professionals as deplorable, would carry an implication of moral blameworthiness and would convey a degree of opprobrium to an ordinary intelligent citizen.

94. Ms Birks referred the Committee to the Osteopathic Practice Standards ('OPS') effective from 1 September 2012 to 1 September 2019. She submitted that the following standards were of relevance in this case:

Standard D16 – Do not abuse your professional standing. The guidance to this standard includes the following:

'1. Abuse of your professional standing can take many forms. The most serious is likely to be the failure to establish and maintain appropriate boundaries, whether sexual or otherwise.'

2. The failure to establish and maintain sexual boundaries may, in particular, have a profoundly damaging effect on patients, could lead to your removal from the GOsC Register and is likely to bring the profession into disrepute.

3.1. Words and behaviour, as well as more overt acts, may be sexualised, or taken as such by patients.

3.2. You should avoid any behaviour which may be construed by a patient as inviting a sexual relationship.

. . .

3.4. It is your responsibility not to act on feelings of sexual attraction to or from patients.

3.5. If you are sexually attracted to a patient, you should seek advice on the most suitable course of action from, for example, a colleague. If you believe that you cannot remain objective and professional, you should refer your patient to another healthcare practitioner.

> 3.6. You should not take advantage of your professional standing to initiate a relationship with a patient. This applies even when they are no longer in your care.'
>
> Standard D17 – Uphold the reputation of the profession through your conduct. The guidance to this standard states: 'The public's trust and confidence in the profession, and the reputation of the profession generally, can be undermined by an osteopath's professional or personal conduct.'

95. Ms Birks also referred the Committee to guidance published by the Council for Healthcare Regulatory Excellence entitled 'Clear sexual boundaries between healthcare professionals and patients: guidance for fitness to practise panels' ('the CHRE Guidance'). She drew the Committee's attention to the following passages from the CHRE Guidance:

> 'Healthcare professionals must not display sexualised behaviour towards patients or their carers. This is because the healthcare professional/patient relationship depends on confidence and trust. A healthcare professional who displays sexualised behaviour towards a patient or carer breaches that trust, acts unprofessionally, and may, additionally, be committing a criminal act. The abuse of patients is also highly damaging in terms of confidence in healthcare professionals generally and leads to a diminution in trust between patients, their families and healthcare professionals.'
>
> 'Boundaries are key to establishing therapeutic relationships. They recognise the separateness of clients and therapists, validate their uniqueness, and foster the safety necessary for client disclosure. Since clients assume a position of vulnerability in therapy by disclosing intimate information and see therapists as experts… boundaries determine the context for power, authority, trust, and dependence. Ideally, the boundaries make it possible for the client to express anything, including feelings toward the therapist, knowing the therapist will not act on these. Boundaries are derived from social, cultural, political, philosophical, clinical, ethical, legal and theoretical considerations, as well as the therapist's personal limitations and choices. They vary depending on the therapist, client, relationship, setting and time.'

96. Ms Birks invited the Committee to find that by his conduct the Registrant had abused his professional position; had transgressed professional boundaries; and had failed to uphold the reputation of the profession.

97. Mr Grant on behalf of the Registrant agreed that Ms Birks had accurately summarised the approach the Committee should take. He pointed out that the Registrant had made many acknowledgements of his failings, but accepted that this contrition was not directly relevant at this stage of the hearing. In light of the Committee's findings on fact he did not wish to make any further submissions.

Legal Advice

98. The Committee took advice from the Legal Assessor. He reminded the Committee that the Osteopaths Act defines 'unacceptable professional conduct' as conduct which falls short of the standard required of a registered osteopath. It was a matter for the judgment of the Committee to determine whether the facts proved, collectively or individually, fell so far short of the standards required of an osteopath as to justify a finding of unacceptable professional conduct.

99. The Legal Assessor reminded the Committee that whilst it may have regard to OPS, a breach of the provisions of the OPS does not automatically constitute unacceptable professional conduct.

The Committee's Findings on UPC

100. The Committee considered whether the facts found proved in paragraphs 1, 2, 3(a), 3(b), 4, 5 (which was proved in part) and 6 (which was proved in part) amounted to unacceptable professional conduct. The Committee took into account the submissions from both parties and the advice of the Legal Assessor which it accepted.

101. The Committee considered that the facts proved collectively demonstrated a serious departure from the standards required of an osteopath. The Committee had found that the Registrant acted in a sexually motivated way towards Patient A whist he was still in a practitioner/patient relationship with her. That was a serious breach of appropriate professional and sexual boundaries.

102. Professions rightly require a high standard of conduct from their members. The Registrant developed a sexual attraction for a patient which resulted in a non-professional personal relationship developing whilst there was still a patient/practitioner relationship. It is self-evident that boundaries are important in a therapeutic relationship, and breaching them carries a risk of harm to patients. Both the public and fellow members of the profession would view this with a degree of moral opprobrium.

103. The Committee considered there had been a clear breach of Standards D16 and D17 in the OPS in respect of the guidance outlined above in paragraph

94 which was detailed by Ms Birks. It was cognisant of the fact that a breach of the OPS or the CHRE Guidance does not automatically constitute unacceptable professional conduct. However, in this case there had been a clear and significant transgression of both appropriate personal and professional boundaries.

104. The Committee agreed with Ms Birks that by his conduct the Registrant had abused his professional position, transgressed professional boundaries, and had failed to uphold the reputation of the profession. Having regard to the overarching objective, the Committee was of the opinion that a finding of unacceptable professional conduct was justified on the grounds it was necessary to protect the public, maintain confidence in the profession and promote proper standards of conduct.

105. In the Committee's judgment the conduct of the Registrant fell seriously short of the standard required of an osteopath. It therefore found that the facts proved amounted to unacceptable professional conduct.

Evidence at the Sanction Stage

106. The Council called no further evidence at the sanctions stage.

107. The Registrant called Ms Julie Stone, a legally qualified medical ethicist, who gave evidence on affirmation. Ms Stone is a former lay member of the Council of GOsC and chaired the GOsC working group tasked with drafting the current version of the OPS. She is a former Deputy Director of CHRE in which role she was Executive Lead for its 'Clear Sexual Boundaries' project.

108. Ms Stone provided the Registrant with a course of training on boundaries, ethics and professionalism between 6 November 2019 and 11 March 2020. She told the Committee the training involved 12 hours of one-to-one sessions and 24 hours of self-directed learning. She set out in detail in her report and her oral evidence the areas that had been covered which included professional ethics and the responsibilities incumbent on healthcare professionals, particularly in light of the power imbalance between practitioner and patient and the vulnerabilities of specific patient groups.

109. Ms Stone told the Committee that she had had a 'deep dive' into issues around professional boundaries with the Registrant. This did not just include sexual boundaries but went into much wider issues, looking at the importance of boundaries generally for maintaining trust in the therapeutic relationship. The training explored the general reasons for the prohibition on personal relationships with patients. In answer to questions Ms Stone told the Committee that that there was no doubt in her mind that a

personal, much less a sexual relationship, with a patient or indeed an ex-patient was never appropriate.

110. When Ms Stone started working with the Registrant he came across, in her view, as a naïve character rather than a predatory character. Ms Stone said what she did not doubt was that the Registrant personally believed he had acted ethically in the circumstances. In her view, although the Registrant's ethical sensibility was in place, there was naivety in his approach to the relationship in question and how he should have acted in the circumstances that arose. It was in her view a case of building on some insight to the development of much deeper insight around the issues of not only boundaries but professionalism more generally.

111. Ms Stone said her teaching had brought the Registrant to understand with absolute clarity what was required. She had witnessed genuine remorse, regret and shame on his part. She told the Committee that during her training there was a growth in the Registrant's emotional intelligence about communication style and getting the approach right between empathy with a patient and not being overly friendly. She said by the end of the training they had fully flushed out areas where there needed to be growth in the Registrant's learning.

112. The Registrant also gave evidence. He referred to a Reflective Statement he had written before the hearing. He said in that statement that over the past year or so he had had time to reflect on his actions. He had educated himself as to proper standards of conduct and behaviour through reading articles, research papers and most specifically through his one-to-one sessions with Ms Stone. Through undertaking this training, he fully understood the gravity of his actions and he said he had learnt hugely valuable lessons through the course of the investigation.

113. The Registrant also produced to the Committee a Reflective Patient Diary which highlighted his approach to particular ethical issues that had arisen in his day-to-day practice.

114. The Registrant said he accepted the Committee's findings and it was clear to him now that he was wrong to consider that he had acted properly. He recognised the danger he had brought not only to himself but the public and the profession. He realised the gravity of his mistakes and assured the Committee they would not be repeated. He told the Committee he was dedicated to the profession and could not envisage doing anything else.

Submissions on Sanction

115. Ms Birks on behalf of the Council referred the Committee to the GOsC's Hearing and Sanctions Guidance 2019 ('HSG'). She reminded the Committee of the requirement to act in accordance with the overarching objective which is the protection of the public, maintenance of confidence in the profession and promoting proper standards of conduct and performance.

116. Ms Birks said there was no evidence that Ms Stone had specifically addressed standard D16 of the OPS in her training with the Registrant, which was the important standard in this case. The weight the Committee gave to her evidence should reflect that and the fact that during her sessions the Registrant had not accepted he had acted in a sexually motivated way to Patient A during the practitioner/patient relationship. For the same reasons, she questioned whether the Registrant had demonstrated true insight into his conduct.

117. Ms Birks said it was accepted on behalf of the Council that the Registrant was of good character and there had been no repetition of any concerns. She accepted that he had taken remedial steps by undergoing training with Ms Stone but said this should be seen in light of the limitations referred to in the previous paragraph.

118. So far as aggravating factors were concerned, Ms Birks said the Registrant had by his conduct abused his professional position and the findings in the case amounted to sexual misconduct. She also invited the Committee to consider whether the Registrant's behaviour was predatory.

119. On behalf of the Registrant, Mr Grant pointed out this was a single episode and there was no evidence of any effect on Patient A. He relied on Ms Stone's view of the Registrant's underlying professionalism. He also pointed out that Ms Stone had made it clear in her written report that the areas of teaching and learning with the Registrant included exploring guidance on boundaries in the current OPS.

120. Insight, he submitted, is the expectation that the Registrant will be able to stand back and accept that with hindsight they should have behaved differently. Mr Grant took the Committee through the Registrant's written statement, pointing out passages which demonstrated the Registrant's acceptance and recognition of his failings.

121. Mr Grant also emphasised the effect these proceedings had had on the Registrant. He has no other source of income and to deprive him of his ability to work would, he contended, be penal.

122. Mr Grant also referred the Committee to a number of character references and testimonials from colleagues and patients which spoke highly of the Registrant. He pointed out that one of the testimonials was from Mr B, the principal of the Practice, who had referred the complaint to the GOsC.

123. The Registrant has two current employers, both of whom were aware of the GOsC investigation and had provided testimonials.

124. Mr Grant invited the Committee to find the Registrant's conduct was naïve rather than predatory or rapacious. This was a consensual relationship with someone who was not a vulnerable patient. The Registrant's mistake was not to hand over the care of Patient A when he became attracted to her. He now, Mr Grant submitted, clearly understands, through the learning he has done with Ms Stone, where the demarcation between a professional and a personal relationship lies.

125. This was, submitted Mr Grant, a young man who had made a mistake but had learned his lesson.

126. Mr Grant suggested a conditions of practice order would allow the Registrant to continue practising whilst providing protection for the public and patients. He referred the Committee to the GOsC's guidance on Formulating Conditions of Practice Orders which states that conditions take two forms. They may be restrictive and prevent an osteopath from practising in a certain way or on a particular category of patient; or they may address deficiencies in practice and require the osteopath to undergo additional training or other improvement activity. He submitted that a restrictive conditions order would be appropriate in this case.

127. Mr Grant produced to the Committee an email from Ms F, one of the Registrant's current employers, saying she would be prepared to act as his supervisor and implement any necessary measures to enable him to continue practising at her clinic. He also produced an email from Ms Stone confirming she would be happy to continue providing further training to the Registrant in the event that a condition of continuing practice would be to undergo such training.

Legal Advice

128. The Committee heard and accepted the advice of the Legal Assessor. He reminded the Committee that, having found that the Registrant's actions amounted to unacceptable professional conduct, it was required to impose a sanction. The available sanctions are set out in Section 22 of the Osteopaths Act 1993. The Legal Assessor reminded the Committee that it should take into account the guidance in the GOsC's Hearing and Sanctions

Guidance 2019 ('HSG'). The purpose of imposing a sanction was not to punish a registrant but to protect the public, maintain confidence in the profession and promote proper standards of conduct and behaviour.

Determination on Sanction

129. The Committee took into account the submissions of the parties. The Committee considered the available sanctions from the bottom upwards on the scale of seriousness. It bore in mind that the sanction imposed must be proportionate, weighing the Registrant's interests with the public interest.

130. The Committee accepted that the Registrant had undergone a thorough session of learning with Ms Stone, although it noted that this appears to have been at the instigation of his legal adviser rather than something he had sought out on his own initiative.

131. The Committee accepted Ms Stone's evidence that the Registrant had demonstrated a willingness to learn and this was encouraging in that it showed a capacity to reflect and progress. However, he had disputed the more serious allegations which the Committee had found proved. The Committee was therefore not sure that the Registrant had acknowledged his misconduct and processed his behaviour sufficiently to show full insight. In the absence of full insight, the Committee was unable to conclude that the Registrant had fully remediated his actions.

132. The Committee considered what might be the aggravating and mitigating factors and in doing so reminded itself of the CHRE guidance.

133. The Committee considered that the following were mitigating factors.

- Previous good character.
- No evidence of any further concerns arising subsequent to the incidents in question.
- Evidence of steps taken to avoid a repetition and appropriate training/CPD.
- Fully engaged with the process.

134. The Committee identified the following as aggravating factors, over and above the nature and gravity of the factual findings themselves.

- An abuse of his professional position.
- Sexual misconduct.

135. The Committee considered, as it was invited to do by Ms Birks, whether the behaviour was predatory. The Committee did not feel the conduct in question fitted in to what would be commonly understood as predatory behaviour and therefore did not consider that this was an appropriate way of characterising the Registrant's actions.

136. The Committee had regard to the references and testimonials submitted on the Registrant's behalf, which were fulsome, very complimentary and from a range of different people. They demonstrated he is valued as a practitioner. As Mr Grant observed, these referees include his past and current employers, including the complainant. The Committee bore in mind that none of the authors would, however, have known of the Committee's findings at the time they were writing the references and testimonials.

Admonishment

137. Paragraph 63 of the HSG states that an admonishment is the lowest sanction that can be applied and may therefore be appropriate where the failing or conduct is at the lower end of the spectrum.

138. The Committee concluded that, in view of the nature and seriousness of the Registrant's conduct, an admonishment would not be an appropriate sanction. It would be insufficient to maintain public confidence in the profession and uphold professional standards.

Conditions of practice order

139. The Committee went on to consider a conditions of practice order. It took into the GOsC's guidance on Formulating Conditions of Practice Orders.

140. The Committee took the view that there were no discrete areas of the Registrant's practice that could be addressed by conditions.

141. Whilst the Committee considered it was positive that the Registrant's employer was prepared to offer supervision, the Committee concluded that it would not be possible to formulate workable or practicable conditions that would adequately address the misconduct in this case.

142. Moreover, the Panel was of the view that a conditions of practice order would not be appropriate in light of the serious nature of the Registrant's conduct and would not adequately address the public interest concerns in this case.

Suspension order

143. The HSG states that a suspension order is appropriate for more serious offences and where some or all of the following factors are apparent:

> a. There has been a serious breach of the Osteopathic Practice Standards but the conduct is not fundamentally incompatible with continued registration.
>
> b. Removal of the osteopath from the Register would not be in the public interest, but any sanction lower than a suspension would not be sufficient to protect members of the public and maintain confidence in the profession.
>
> c. Suspension can be used to send a message to the registrant, the profession and the public that the serious nature of the osteopath's conduct is deplorable.
>
> d. There is a risk to patient safety if the osteopath's registration were not suspended.
>
> e. The osteopath has demonstrated the potential for remediation or retraining.
>
> f. The osteopath has shown insufficient insight to merit the imposition of conditions or conditions would be unworkable.

144. The Committee considered that paragraphs b, c, d, e, f were all engaged in this case.

145. To check the logic of its reasoning the Committee went on to consider whether the sanction of removal would be appropriate.

146. The Committee did not consider that the Registrant's conduct was fundamentally incompatible with continued registration.

147. The Committee accepted that sexual misconduct often attracts a sanction at the highest end of the scale. However, in the absence of a predatory or grooming element to the behaviour, or issues relating to patient vulnerability, the Committee was satisfied that in the spectrum of sexual misconduct this was at the lower rather than the higher end.

148. The Committee therefore determined that an order removing the Registrant from the register would not be appropriate or proportionate.

149. The Committee reached the conclusion that, given the nature and seriousness of the unacceptable professional conduct demonstrated by the

Registrant, a suspension order was the appropriate and proportionate sanction.

150. The Committee considered the appropriate length of the suspension order, which can be up to a maximum of three years. The Committee bore in mind the need to appropriately mark the seriousness of the conduct in order to maintain confidence in the profession whilst not imposing a lengthy suspension that would be unduly punitive. The Committee noted that the Registrant relies on his osteopathic practice as his source of income.

151. Taking all factors into consideration the Committee considered the appropriate length of suspension should be six months. This will allow sufficient time for the Registrant to appropriately reflect on his behaviour. Anything less would be insufficient to send out an appropriate message to the public and the profession.

152. The Committee directed that a Committee of the PCC shall review the suspension order at a review hearing before the end of that period. The following information would likely assist the Committee at the review hearing:

- a further reflective piece from the Registrant reflecting on the potential impact of sexually motivated conduct on the public confidence in osteopathy and upon fellow professionals;

- information from the Registrant as to steps he has taken to keep his knowledge up to date.

Decision on sanction

153. The Committee therefore ordered that the Registrant's registration be suspended for a period of six months with a review to take place prior to the expiry of the suspension.

Interim order

154. The order of suspension will not come into effect for 28 days or, if an appeal is made, until that appeal is heard or otherwise determined.

155. Ms Birks on behalf of the Council applied for an interim suspension order. She submitted that such an order was necessary for the protection of the public, given the findings made by the Committee in this case.

156. Mr Grant opposed the application. He said that if an interim order was imposed it would effectively extend the period the Registrant was suspended to seven months, which would be wrong and unfair. Further he

submitted that such an order was not necessary to protect the public on the facts of this case.

157. The Committee heard and accepted the advice of the Legal Assessor who referred it to Section 24(2) of the Osteopaths Act and the GOsC's guidance on Interim Suspension Orders.

158. There is only one statutory ground under which the Committee may impose an interim suspension order, and that is where it is satisfied that it is necessary to do so in order to protect members of the public.

159. The Committee took into account the fact that the Registrant had been practising since the complaint was made without any further concerns having arisen. That is a period of 16 months.

160. The Committee bore in mind that, at paragraphs 143 and 144 above, it had found that paragraph d of the HSG on suspension orders was engaged, namely that there is a risk to patient safety if the osteopath's registration were not suspended.

161. Whilst there is a notional risk to the safety of patients in the sense of confidence in the profession, the Committee bore in mind that there was in this case no evidence of patient harm. In approaching this issue on the basis of risk assessment, which it is required to do, the Committee considered the lack of actual patient harm to be a highly relevant factor.

162. At paragraph 146 above the Committee had concluded that the Registrant's conduct was not fundamentally incompatible with continued registration. At paragraph 147 it had given careful consideration to the nature of the behaviour and concluded it was not predatory; there was no evidence of grooming; and there were no issues regarding vulnerable patients. The Committee therefore did not consider the risk was sufficiently actual or real as to justify the imposition of an interim suspension order.

163. The Committee therefore rejected Ms Birks' application for an interim suspension order on the Registrant's registration.

Under Section 31 of the Osteopaths Act 1993 there is a right of appeal against the Committee's decision.

The Registrant will be notified of the Committee's decision in writing in due course.

All final decisions of the Professional Conduct Committee are considered by the Professional Standards Authority for Health and Social Care (PSA). Section 29 of the NHS Reform and Healthcare Professions Act 2002 (as amended) provides that the PSA may refer a decision of the Professional Conduct Committee to the High Court if it considers that the decision is not sufficient for the protection of the public.

Section 22(13) of the Osteopaths Act 1993 requires this Committee to publish a report that sets out the names of those osteopaths who have had Allegations found against them. The Registrant's name will be included in this report together with details of the allegations we have found proved and the sanction that that we have applied today.