

Public Minutes of  
the Investigation Committee

Date of hearing: 22 July 2021

<b>Name of Doctor</b>	Dr David Rosser
<b>Doctor's UID</b>	3182602

<b>Committee Members</b>	Ms Toni Foers
	Professor Jennifer Adgey
	Mr John Anderson

<b>Legal Assessor</b>	Mr Richard Barraclough QC
<b>Panel Secretary</b>	Ms Gemma Wolstenholme

**Attendance and Representation**

<b>GMC Representative</b>	Mr Peter Horgan
<b>Doctor's attendance</b>	attended
<b>Doctor's representative</b>	Ms Fiona Horlick QC

<b>Outcome</b>	Warning
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Dr David Rosser,

- 1 At today's hearing the Investigation Committee carefully considered all the material before it including the submissions made by **Fiona Horlick, QC** on your behalf and those made on behalf of the GMC by **Peter Horgan**. It has accepted the advice of the Legal Assessor.

### Background

- 2 You were appointed as the Executive Medical Director of University Hospitals Birmingham NHS Foundation Trust ('UHB') in December 2006. In November 2015 you took up the role of Deputy Chief Executive at Heart of England NHS Foundation Trust ('HEFT'), whilst also remaining in your role at UHB. You were appointed Executive Medical Director of HEFT in March 2016. The UHB and HEFT Trusts merged in April 2018. You were then appointed as the Deputy Chief Executive for the combined Trust, which retained the name UHB and also continued in the Executive Medical Director role carried over from HEFT.
- 3 The GMC investigation into your fitness to practise was opened following the receipt of an anonymous ('the complainant') complaint, submitted on 31 October 2018.
- 4 The complainant referred the GMC to an article, dated 26 October 2018, on the online news service the Health Service Journal ('HSJ'), which covers policy and management in the National Health Service in England. The article reported on the outcome of an Employment Tribunal ('ET') hearing relating to a claim against the UHB (HEFT as was) by Dr A; a case that you had been involved in.
- 5 Following the conclusion of the investigation process, on 21 April 2021 the GMC informed you that the Case Examiners were minded to issue you with a warning.
- 6 Your legal representatives at Kingsley Napley LLP replied on your behalf that if the Case Examiners maintained the decision to conclude your case with a warning, you wished to exercise your right to an oral hearing at the Investigation Committee.
- 7 On 07 June 2021, the GMC responded to acknowledge that you were not prepared to accept the warning and decided to refer the matter to the Investigation Committee.

### GMC Submissions

- 8** Mr Horgan, on behalf of the GMC, took the Committee through the history of the case as outlined above. Mr Horgan submitted that in making your declaration to the GMC that *'to [your] knowledge Mr A [had] not been involved in any whistleblowing episode or other attempt to raise concerns within the organisation,'* you failed to take reasonable steps to ensure your declaration was correct which amounts to a failure to practise in accordance with GMC guidance, particularly, a clear and specific breach of Good Medical Practice (GMP) paragraph 71.
- 9** Mr Horgan directed the Committee to the further background of this case where Dr A had a patient referred to him urgently where the only suitable treatment option for this patient was orbital decompression. In order to carry this procedure out, Dr A was assured there would be a nurse to assist him. Nursing staff refused to help, thus putting Dr A in an impossible position, unable to perform the operation. Dr A went on to perform, in his opinion, the *'least harmful option'* for the benefit of the patient and hospital, by using non-clinical staff to assist. Mr Horgan submitted that he refers to this information as the issue concerning the availability of nursing staff is part and parcel of the disciplinary hearing.
- 10** A second incident on 30 Sep 2016, is what prompted the disciplinary proceedings against Dr A resulting in his dismissal from the Trust. Dr A together with a consultant ophthalmologist sent a letter to the divisional director on 9 Jan 2017, which highlighted the problems of lack of nursing support during operations. Mr Horgan drew particular attention to the letter which raised concerns in relation to patient's health and staffing difficulties, highlighting potential harm to patients. Mr Horgan submitted that a reading of this letter by anyone of experience clearly demonstrates an attempt to raise concerns and *'could not be mistaken for anything else'*.
- 11** Dr A was invited to a disciplinary hearing on 1 June 2017. You chaired this meeting with the Trust Director and Department Work Director. Prior to the meeting, Dr A had submitted the case to disciplinary panel that he wrote on too many occasions regarding the lack of staff and there was no reply or escalation of the problem. Mr Horgan submitted that it is clear, as chair, you read this letter and had sight of Dr A's concerns.
- 12** Mr Horgan submitted that the contents of this letter, if read properly and carefully, could only be construed as a public interest disclosure. You had been provided with this letter, confirmed you had read it and were in a position of authority directly relevant to the evidence heard at the disciplinary hearing. Mr Horgan submitted that this is in conflict with your Rule 7 response to the GMC.
- 13** Mr Horgan submitted that had you checked the material, you would have been reminded that you had very recently become aware that Dr A and a colleague had made a public interest disclosure in a letter to their Divisional Director, dated 9 January 2017. Their letter had been written, in their words, to highlight a problem they had previously highlighted to middle managers and had now occurred on too many occasions. Dr A and his colleague stated that the problem meant that a number

of surgeons at HEFT faced a very frustrating and stressful situation on a weekly basis, and that if not addressed, it had the potential to cause patient harm.

- 14 On the 5 June 2017, the GMC Employer Liaison Advisor first became aware of concerns regarding Dr A via an email you sent. In this email you set out the allegations, the investigation findings and why at this stage it was necessary to refer Dr A to the GMC. Mr Horgan directed the Committee to your statement at the bottom of this email and there is no dispute from you that this was incorrect and misleading.
- 15 Mr Horgan explained that it is not his submission that you intended to mislead, however the email was sent in a close time frame to the disciplinary hearing therefore the details of which, including Dr A's letter relating to whistleblowing would have been fresh in your mind. On 1 August 2018, an email from you to GMC following the employment tribunal stated that your declaration on whistleblowing was erroneous and you then referred to the letter.
- 16 Mr Horgan submitted that with your wealth of knowledge, you would be expected to understand this was a public interest disclosure and clearly should have made appropriate checks prior to making that positive statement at the end of Dr A's referral email.
- 17 Mr Horgan submitted that you were in a senior role therefore it is difficult to understand you displayed any care in the referral if you didn't in fact see this as a 'whistleblowing letter'. Whether or not you knew it was whistleblowing, Mr Horgan submitted that it cannot be accepted you exercised any care in asserting that no concerns were raised. *'You did not tick the wrong box, you made a positive assertion that Dr A made no concerns, irreconcilably not taking the correct steps to ensure the referral was correct.'*
- 18 Mr Horgan submitted that you had *'professional kudos which comes with professional duties'*; that the GMC staff were misled in its acceptance of your referral without specific reference to Dr A's letter which went unanswered. Mr Horgan further submitted that your assertion you are unlikely to repeat your actions as you are no longer a Responsible Officer, is far too narrow of an approach to the issue under consideration.
- 19 Further, Mr Horgan submitted that a warning would ensure you take care in all of the documents you put your name to, whether or not as a Responsible Officer. It would highlight to the profession that such a significant error is unacceptable.
- 20 Paragraph 71 states that *'you must be honest and trustworthy when writing reports, and when completing or signing forms, reports and other documents. You must make sure that any documents you write or sign are not false or misleading.'* *'You must take reasonable steps to check the information is correct.'*

- 21 Mr Horgan submitted that your actions in failing to ensure your declaration was correct meant that you had provided a misleading and inaccurate statement at the end of your referral email to the GMC.
- 22 Mr Horgan submitted that your admitted failings were so significantly below the standard the public and the profession would expect of a doctor in your position of authority, that the public's confidence in the profession, as well as the public and profession's confidence in the GMC as regulator, would be significantly harmed if you were not issued with a warning.
- 23 Mr Horgan reminded the Committee of the purpose of warnings, as per GMC guidance is, that "warnings may also have the effect of highlighting to the wider profession that certain conduct or behaviour is unacceptable". Mr Horgan submitted that in all the circumstances and notwithstanding that you corrected your statement, that this is an appropriate case for a warning to be issued, and further that this would be proportionate.

### **Defence Submissions**

- 24 Ms Horlick said that the purpose of a warning is fully set out in paragraphs 11 and 14 of The General Medical Council's Guidance on Warnings (March 2021) further, that a warning will be appropriate if there is evidence to suggest that the practitioner's behaviour or performance has fallen below the standard expected to a degree warranting a formal response by the GMC. A warning will therefore be appropriate where there has been a *'significant departure'* from Good Medical Practice.
- 25 Ms Horlick explained that after the first incident, Dr A wrote the concerns letter regarding the nursing staff. She submitted this was a background letter which had no relation to the incident that brought Dr A to the GMC's attention. That letter post-dated incident one and was part of the material sent to the GMC, it was available to them at the time and had no material effect on the investigation.
- 26 Ms Horlick submitted that you made a mistake which you have accepted and asked the Committee to focus on the fact that this is a single inadvertent error which was corrected by provision to the GMC all at the same time. Ms Horlick submitted that this is very much in contrast to the wealth of evidence you have today from a wide range of sources. That testimonial material covers your career from a range of angles. Ms Horlick submitted that you are responsible for a large wealth of documents, which provided strong evidence that this was an isolated error.
- 27 Ms Horlick advised the Committee that you relinquished your role as RO in 2018 in circumstances not connected to this case. She said that you had held significant leadership roles in difficult and trying circumstances and that you had displayed real commitment to staff, that you are an exemplary leader embodying the very best of a public servant.

- 28** Ms Horlick discussed Paragraph 10 of the Guidance on Warnings, which emphasises not that the warning is to send a message to the wider public or profession, rather it is to indicate to the doctor that the departure should not be repeated. Ms Horlick submitted that as per the Guidance on Warnings, a warning would be appropriate when the concerns are sufficiently serious that, if there were a repetition, it would likely result in a finding of impaired fitness to practise and that there would be a need to record formally the particular concerns (because additional action may be required in the event of any repetition). There is however 'no prospect of repetition in this case'.
- 29** Ms Horlick submitted that when we look at your position, a stark warning with no context could have the effect of undermining the important work of the Trust you run.
- 30** Ms Horlick submitted that you have shown complete insight coupled with the testimonial evidence that you are quick to acknowledge your errors and quick to amend them. She said that this was clearly an isolated incident in a previous unblemished career and that you have demonstrated rehabilitative and corrective steps. Therefore, Ms Horlick strongly suggested that a warning is not appropriate when looking at the overall evidence.
- 31** Ms Horlick submitted that this warning has the potential to distort your previously good character and profession. Ms Horlick referred to Paragraph 26 of the Guidance and to the principle of proportionality. Her submission was that issuing a warning would have a disproportionate effect on you, given your internal and public standing as Chief Executive, which would be to the detriment of patients, staff and the NHS.
- 32** Ms Horlick submitted that if a warning were to be imposed, the wording of the warning needs adjustment. Ms Horlick submitted that the word '*misleading*' might imply to the public that this was deliberate act and intended to be misleading, and further submitted that your actions should be properly explained as non-deliberate.
- 33** In summary, Ms Horlick's submission was that in all the circumstances, your conduct did not fall below the standard expected to a degree requiring a warning and further that a warning would be disproportionate.

### **Committee Determination**

- 34** The Committee is aware that it must have in mind the GMC's role of protecting the public, which includes:
- a. Protecting, promoting and maintaining the health, safety and well-being of the public
  - b. Promoting and maintaining public confidence in the medical profession, and
  - c. Promoting and maintaining proper professional standards and conduct for members of that profession.

- 35** The Committee has concluded that by your actions you were in breach of Paragraph 71 of GMP. The Committee accepts, although there is no definition of 'significant' in the Medical Act or in the Fitness to Practice Rules, your actions are significant by reason of your seniority and position. Reporting responsibilities of any Responsible Officer are key to patient protection, the profession and for the GMC to operate as a responsible regulator.
- 36** The Committee considered the Responsible Officer guidance on GMC referrals and determined that your behaviour in failing to check your referral was reckless, your actions amounted to a significant departure from GMP. This is compounded by lack of discussion with an Employment Liaison Advisor and if you had followed guidance correctly, you should have identified Dr A's patient safety concerns. This is to safeguard your role and the role of the GMC to ensure that there are no malicious reasons for a doctor's referral.
- 37** The Committee must be satisfied that the particular conduct, behaviour or performance approaches, but falls just short of, the threshold for the realistic prospect test. The realistic prospect test requires a genuine possibility of a finding of impaired fitness to practise, justifying action on the doctor's registration. The Committee is satisfied that the realistic prospect test in this case is not met. However, the failures are sufficiently serious that if there were repetition, this could well result in a finding of impairment of your fitness to practise. Repetition of your behaviour could affect patient and public confidence in the profession and the reputation of the profession. Therefore, for the reasons above, the test for issuing a warning is met.
- 38** In deciding whether to issue a warning the Committee must apply the principle of proportionality, and balance the interests of the public with those of the practitioner. The Committee considered the aggravating and mitigating factors and whether it would be proportionate to issue you with a warning today.
- 39** The Committee determined that Dr A's letter clearly constituted a public interest disclosure which is now accepted by you also. The date of your referral was important, occurring shortly after the disciplinary hearing, of which you were the chair. You did not correct this until the employment tribunal was progressing over a year later. Your assertion that the letter had no immediate material affect to the proceedings shows a lack of insight on your part.
- 40** The Committee determined you have developing insight, but that this appears to be limited by the qualified apologies in your solicitor's letters in 2020 and 2021. It also had regard of the positive testimonials, however the Committee noted that there had been no material remediation other than the apology given and testimonials provided.
- 41** The Committee took into account the explanation that your actions were at a time of heavy workload and it is agreed on both sides that there was no intent to your

actions. The Committee accepts that this is a single incident and has seen before it a wealth of testimonials that attest to your usual professionalism and good character.

- 42** Although the Committee did not regard your failure to be 'deliberate', as a doctor, you are expected to understand and to follow the proper referral process. The Committee noted that paragraph 71 of GMP states that you 'must' make sure that any documents you write, or sign are not false or misleading and you 'must' take reasonable steps to check the information is correct. In all the circumstances, the Committee does not consider there is no risk of repetition. Further, as part of the regulator's role it is necessary to highlight to the wider profession that such conduct is not acceptable, and to serve as a reminder to you that there is to be no repetition of your actions, a warning today would be appropriate.
- 43** The Committee has balanced your interest, in particular the effect a warning may have on your current position with the public confidence in the profession and the regulatory process. The Committee has determined that a warning would be proportionate to maintain public confidence, to promote standards expected of a doctor and to send a message to the wider profession that this conduct is unacceptable.
- 44** The warning will be documented as follows:

*'On 5 June 2017 you referred Dr A to the GMC in your role as Responsible Officer for the Heart of England NHS Foundation Trust (HEFT). You concluded your referral email by declaring that:*

*'To my knowledge Mr A has not been involved in any whistleblowing episode or other attempt to raise concerns within the organisation.'*

*You failed to take reasonable steps to ensure your above declaration to the GMC was correct. Had you done so, you would have been reminded that you had very recently become aware that Dr A and a colleague had made a public interest disclosure in a letter to their Divisional Director, dated 9 January 2017. Their letter had been written, in their words, to highlight a problem they had previously highlighted to middle managers and had now occurred on too many occasions*

*Dr A and his colleague stated that the problem meant that a number of surgeons at HEFT faced a very frustrating and stressful situation on a weekly basis, and that if not addressed, it had the potential to cause patient harm.*

*Given the above, your declaration at the end of your referral email to the GMC, was misleading, albeit unintentional, and incorrect.*

*Your conduct as outlined above does not meet with the standards required of a doctor. It risks bringing the profession into disrepute and it must not be repeated. The required standards are set out in Good Medical Practice and associated guidance.*

*In this case, the following in paragraph 71 of Good Medical Practice is particularly relevant:*

*'71 You must be honest and trustworthy when writing reports, and when completing or signing forms, reports and other documents. You must make sure that any documents you write or sign are not false or misleading.*

*a You must take reasonable steps to check the information is correct.'*

*Whilst this failing in itself is not so serious as to require any restriction on your registration, it is necessary in response to issue this formal warning.*

*This warning will be published on the List of Registered Medical Practitioners (LRMP) in line with our publication and disclosure policy, which can be found at [www.gmc-uk.org/disclosurepolicy](http://www.gmc-uk.org/disclosurepolicy).*

**45** You will be notified of this decision in writing within the next two working days.

That concludes the determination of the Investigation Committee in this case.