Neutral Citation Number: [2015] EWHC 3285 (Admin)

Case No: CO/3171/2015

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Cardiff Civil and Family Justice Centre
2 Park StreetCardiff

Date: 13/11/2015

Before :

HIS HONOUR JUDGE MILWYN JARMAN QC

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Between :

RAVINDU SAHAN THILAKAWARDHANA	**Claimant**
- and -	
THE OFFICE OF THE INDEPENDENT ADJUDICATOR	**Defendant**
-and-	
THE UNIVERSITY OF LEICESTER	**Interested Party**

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Mr Clive Newton QC (instructed by **Sinclairs Law**) for the**claimant**
Ms Aileen McColgan (instructed by **E J Winter & Son**) for the **defendant**
Ms Claire Darwin (instructed by **Watson Burton LLP**) for the **interested party**

Hearing dates: 9 November 2015

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APPROVED JUDGMENT

HH Judge Jarman QC :

1. In October 2013 the claimant having completed three years of course leading to a degree in medicine at the University of Leicester (the university), commenced a gap Bsc degree there. That month a friend and fellow student (referred to in the papers and in this judgment as PS) distributed some explicit photographs of a friend of the claimant which he, PS, had been sent by mistake. That led the claimant to post on the Facebook page of PS an image of a well known actor in a popular film with the words in capital letters "I will look for you, I will find you. And I will kill you." This sort of posting, known as a meme, was viewable by the Facebook friends of PS. At the same time the claimant wrote a private message to PS on Facebook containing about 170 words some of which were offensive and when taken in conjunction with the meme, could be construed as threatening. About a month later PS complained to university staff and to the police but choose not to pursue criminal proceedings. However, the university instigated disciplinary proceedings and the claimant was given a reprimand, the least serious of the possible penalties. The claimant's conduct also gave rise to the distinct question of whether, as a medical student, he was fit to practise medicine. In April 2014 a panel of the university (the panel) decided he was not so fit to practise and that decision was upheld by an appeal panel of the university (the appeal panel) in July 2014. The claimant made a complaint to the defendant, which as its name suggests is independent of the university, about the termination of his registration as a medical student, but in May 2015 the defendant decided that the complaint was not justified. The claimant now seeks judicial review of that decision.

2. The claim was made on eight grounds of challenge and permission to pursue all grounds was given by His Honour Judge Bidder QC. On the morning of the hearing I allowed an application to add a ninth ground, which alleges in summary that the defendant unlawfully failed to conclude that the appeal panel had in turn unlawfully failed to make findings or evaluate the factual context of the claimant's conduct or to explain its approach to that context. The main issues arising from the grounds are based on irrationality and failure to give adequate reasons and may be summarised, to paraphrase the skeleton argument of Mr Newton QC on behalf of the claimant, as follows:

    i) Did the appeal panel take into account the claimant's evidence relating to the nature and context of his conduct and if not was it irrational for the appeal panel not to make findings and not to give adequate reasons;

    ii) Did the appeal panel take into account all relevant mitigating circumstances and consider other sanction options and if not was that irrational or was there a failure to give reasons;

    iii) As a result of the consideration of the above matters was it irrational for the defendant to have concluded that the claimant's complaint in respect of the appeal panel decision was not justified.

3. When considering the facts of this claim, which I shall now set out in greater detail, it is important to bear in mind certain principles which govern the extent to which the court should interfere with decisions entrusted by Parliament to other bodies. Mr Newton accepts that the test to be applied is whether the decision of the defendant is

one which no reasonable decision maker possessed of expertise reasonably to be expected of the defendant would have made. It must be borne in mind that the defendant's decision makers are in general not legally qualified. Second, Mr Newton accepts that a panel determining fitness to practise must have margin of appreciation in respect of the public interest and that court will not normally interfere with evaluation of evidence and will not substitute its own judgment for that of the decision maker. However the court will consider whether the latter has taken into account all the relevant evidence or has explained any omissions. Third, as Mr Newton accepts, the focus of challenge in this claim is the decision of the defendant and not of the panel or the appeal panel, but he points out that as that involves criticism of how the defendant approached the decision of the appeal panel, the latter also needs analysis.

4. In order to understand the reaction to the private message which the claimant sent to PS, I set out below some of the more disturbing extracts from it, including the first and last lines:

> "you fucked up! you cock sucker, after hanging out with us lankans for the past few years, you have the balls to tell [A] not to hang out with us……When you mess with a lankan, you mess with all of us……i hope you learn a lesson from this, when you are so insincere to the people around you, your little fairy tale world will collapse eventually, i'll make sure it will. [R] has seen right through your shit for years and he knew what kind person you are, so dont even look at him. i dont want to see you on a night out in leicester, or in the UK. "

5. The director of administration of the university's medical school was asked to make a preliminary investigation into the complaint by PS, and arranged a meeting with the claimant on 18 November 2013. Immediately following the meeting, the claimant sent an email to the director, the first paragraph of which said:

> "This letter is to formally address the complaint made against myself by [PS]. I would like to reassure you that I did not intend to make any kind of threat of death or injury towards him, and have never had any intention of harming him. There was an isolated incident of conflict, and since it occurred there has been no ongoing communication between the two of us. I am a committed medical student, and I have a good ethical sense and awareness of the conduct expected of a medical student. My emotions got the best of me in the heat of the moment because of legitimate grievances at [PS]'s behaviour in the period up to the incident. The "threat" which you are referring to is an internet meme in circulation which humorously refers to a line used by an actor in a popular thriller movie. I posted it on his facebook wall, and it was taken down within minutes. As such it was meant to convey humour as well, but I appreciate that it could have been perceived seriously, but such was my upset at that moment that I did not consider this. In addition to this I sent [PS] a message outlining why I was so upset at him. I said " I don't want to see you on a

> night out, or in the UK." I understand now that in the context of the meme that was sent, that could be perceived as a further threat."

6. Shortly afterwards, a member of staff of the university was appointed as investigating officer in the disciplinary proceedings, who met with the claimant in December 2013 when the procedure for the investigation was explained. In the course of those proceedings, on 15 January 2014 the claimant sent an email to the investigating officer. There are a number of points set out in that letter, which on behalf of the claimant it is submitted that the appeal panel did not take into account. The claimant, although accepting that the meme and message could be construed as threatening, said that he meant to ridicule PS so that mutual friends would know that their relationship was over. He then realised that he had overreacted and after an hour he attempted to remove the image but PS had already taken a screenshot of it and removed it himself. He said that he was ready to apologise to PS if he confirmed that he felt threatened, but added that he had known PS for three years and they were close friends, and that PS knew that the claimant was not a character who would do him any harm. The claimant referred to the fact that PS waited a month to report the incident to the medical school, and said that he believed PS took time to plan carefully revenge by targeting the claimant's future medical career. Furthermore, the claimant and his friends decided to keep PS out of their circle because of anti social behaviour and PS was obviously frustrated by this isolation. The claimant added that he posted the meme and sent the message because, first PS tried to break up his friend and his girlfriend and, second (which the claimant said angered him "a great deal") PS sent the explicit photographs to a friend after promising that he had deleted them.

7. On 22 January 2014 the investigating officer wrote to the claimant having concluded her investigation saying that there was evidence of misconduct which could not be ignored and that a penalty of a reprimand was imposed. She continued:

> "The reason for this decision being reached is that the action of posting a public 'message' on a social media site that could be construed as threatening cannot be ignored. This was a serious act of misconduct and regardless of your subsequent remorse and recognition that your behaviour was improper an appropriate penalty is being imposed.
>
> Your account of events and the mitigation you refer to, along with your readiness to apologise to [PS] have been noted and will be taken into account within your department.
>
> The form of reprimand will be that you are asked to:
>
> 1) Arrange to attend a course of social media training. Please ask for advice on this from the medical school.
>
> 2) Apologise to [PS] for any distress caused by arranging reconciliation with him directly."

8. In February 2014 the matter was referred by a professional concerns group within the medical school and referred by the group to the school's fitness to practise committee. Dr Heney, director of undergraduate medical education at the school, met with the claimant that month and explained the process. He wrote to the claimant following the meeting noting that the claimant had previously received five warnings regarding his professionalism and had been warned that any further concerns may result in such a reference. It was stated that if the claimant needed support during this process he should contact the student support unit.

9. Mr Harrup, who was appointed as investigating officer in the fitness to practise proceedings, wrote to the claimant in early March 2014 and said that he would be contacting people to interview and would then meet the claimant. He asked the claimant to notify him of anyone whom the claimant wished him to meet and why. The next day he wrote again setting out two allegations that he was investigating. The first arose from the disciplinary penalty and he said that the evidence he was collecting in relation to that was based on file records, the result of the disciplinary records and the meeting with Dr Heney. The second related to the previous warnings and the evidence consisted of file records and the meeting with Dr Heney. Although Mr Harrup's report was not then complete, he indicated he would recommend there was what he called a fitness to practise case to answer. He set out the right of the claimant to reply to the allegations in writing and invited the claimant to meet him to discuss all matters of the investigation and any mitigation, saying it was important to form a balanced view before submitting his report. The claimant replied on 10 March copying his reply to the investigating officer in the disciplinary proceedings, but saying that he had no more facts to add to that letter.

10. Before submitting his report Mr Harrup met with Dr Heney and then with the claimant. Dr Heney indicated that in the meeting he had with the claimant, the latter presented no clear action plan to correct his failings and seemed to think that the disciplinary remand was the end of the matter. In Mr Harrup's meeting with the claimant, he informed the latter of the mitigation which he had already put in his draft report and the claimant was happy with that. In particular, the claimant emphasised that the posting of the meme was intended to ridicule PS rather then threaten him. The subsequent report set out these matters and recommended that there was a case to answer on both allegations. There were a number of appendices to the report, including, the claimant's email to Mr Harrup dated 10 March which copied in the claimant's reply to the investigating officer in the disciplinary proceedings.

11. By letter dated 20 March 2014 the director of administration wrote to the claimant enclosing a copy of Mr Harrup's report adding that the latter did not wish to call any witness at the forthcoming panel hearing which was set for 1pm 10 April 2014. The three panel members were identified and included two doctors. It was made clear that the claimant was entitled to nominate witnesses to attend the hearing, to provide a written commentary to Mr Harrup's report which would be considered by the panel, and to be accompanied at the hearing. He was asked to note that legal representatives were not permitted to attend.

12. Four minutes before the panel hearing started, the claimant sent an email to PS which said:

> "I sent you a Facebook message and posted a meme on your wall which in combination could have been interpreted as threatening. If you actually did feel threatened by me, you should know that I am not a person who would never mean you any physical harm. You've known me for three years and I believe I have never come across as threatening. I wish you had come to me straight and told me how you felt and we could have sorted things our then and there. I am sending you this email to apologise for my behaviour by which you felt threatened. I assure you that you should not in any way feel threatened by me. Hope you are well."

13. The claimant, who was unaccompanied at the panel hearing, handed a copy of that apology to the panel. He did not provide a written response to Mr Harrup's report, but accepted its accuracy and agreed that it included points made by him in mitigation in the disciplinary proceedings and to Mr Harrup. He and Mr Harrup were questioned by the panel. The next day, the director of administration wrote to the claimant informing him that the decision of the panel was that his registration as a medical student should be terminated and giving reasons. In respect of the first allegation, it was noted that the claimant accepted that his actions had been wrong and out of character, that he had been angry with PS for inappropriate behaviour, that he had not undergone social media training or apologised until minutes before the panel meeting (and the apology was conditional and critical) and that he had not arranged reconciliation. After dealing with the first allegation, the panel concluded that the claimant:

> "..had not properly accepted responsibility for your actions, had not tried to work out a plan to correct your mistakes, and lacked the necessary degree of insight, notwithstanding the opportunities for reflection which the disciplinary and fitness to practise proceedings had provided. These failings gave the Panel little confidence in your capacity to reach the standards of professionalism which would be required to enter practice."

14. The panel then went out to consider the second allegation and found that persistent disregard of warnings significantly undermined any confidence the panel might have in the claimant's ability to practise safely, before concluding:

> "The Panel reviewed its conclusions on the two allegations together and agreed that you had substantially failed to meet the standards required to recommend you to the General Medical Council [the GMC] as fit to practise; and that your conduct was not the sort which would be acceptable to the general public in a doctor. It considered whether there were any sanctions or remedial actions which could be put in place which might address the shortcomings before the completion of your course, but it concluded that your lack of insight and failure to respond in the past reflected a fundamental unsuitability for the profession of medicine which could not now be corrected.

> The Panel's decision is therefore that your registration as a student on the MB ChB programme should be terminated. Since the intercalated Bsc programme does not require you to meet fitness to practise standards, you will remain registered as a student in order to complete that course."

15. The claimant appealed against that decision. In written grounds of appeal running to some 60 paragraphs, prepared with the assistance of solicitors, he summarised the grounds as follows:

> "i) there have been procedural errors,
>
> ii) the decision was and remains disproportionate and unfair; and
>
> iii) as a consequence of the above, and for the reasons spelt out below, the decision was and remains unlawful."

16. In a letter dated 2 June 2014 to the claimant concerning the appeal panel hearing the procedure was summarised and reference was made to the university's regulations governing student discipline (the regulations) which applied to the appeal and the website address where they might be found. It was stated that the appeal panel would consider all the written evidence that was before the panel and also any further evidence deemed appropriate and that the claimant could submit any further statement, evidence or any information about any mitigating factors beforehand. It was also stated that he may be accompanied by a friend or representative and nominate witnesses. The appeal panel consisted of the Senior Pro-Vice-Chancellor, a reader in the department of English and an external member who was a consultant at University Hospital Leicester. The claimant attended the hearing on 27 June alone and confirmed he was content to do so. He was invited to expand upon his grounds of appeal and did so. He was then asked questions by the appeal panel and invited to make final comments, which he did. The appeal panel then retired to consider its decision.

17. That was communicated to the claimant by letter dated 4 July 2014. The appeal panel rejected the first ground, that in effect the matter had already been dealt with in the disciplinary proceedings, pointing out that the purpose of fitness to practise proceedings was not to come to a disciplinary judgment but to a judgment of an appropriate professional body as to a person's fitness to practise a chosen profession. It was anticipated that there may be circumstances where the outcomes of these two distinct set of proceedings may differ. The appeal panel considered that as there was a possibility that the claimant was confused as to whether he was able to communicate with PS whilst proceedings were ongoing, it should place no weight on the lateness of the apology, which it accepted was unreserved. Further, although the appeal panel thought it right that the panel had regard to the history of warnings, as those warnings went no further in the claimant's case they were disregarded by the appeal panel which expressly made its determination soley on the basis of what was termed the offensive message. In this regard, the appeal panel used the term message to apply to the meme and to the private message and to both, but it is clear in my judgment from a fair reading of its decision as a whole that the difference was

understood. The appeal also considered a medical report not previously relied upon by the claimant, because he said of cultural reticence, to the effect that he had had a history of depression. However as medication had ceased in 2012, and whilst noting the ongoing effects of depression, the appeal panel did not regard that evidence as providing strong mitigation for his conduct in sending the meme and the message. No complaint is now made on behalf the claimant in respect of any of these conclusions.

18. The focus of complaint is made upon the passage in the decision letter which deals with what was described as the offensive message. In the opening line under that subheading it was noted that following "provocative behaviour" of PS of which the panel was aware, the claimant admitted that he posted an offensive Facebook message. The words in the meme, referred to as the headline, were then set out. The appeal panel went on to say this:

> "With regard to the Facebook message, it is argued on your behalf that you did not intend to cause the recipient to feel under any threat and that they would be treated by the recipient as putting him the belief that he was under any serious threat. This is supported by the statement that [PS] did not refer the matter to the police…This latter point is factually incorrect. In Dr Harrup's…report it states quite clearly that PS did seek advice from the police and that he chose not to press the charges….The fact that he reported to the police and the University indicates strongly that PS did feel threatened by the message.
>
> It is argued that the [panel] appeared to have made the decision it did on the mistaken belief that you had issued a threat to kill without going on to consider whether there was any intention on your part or whether [PS] could reasonably belief that he was under any such threat. The Appeal Panel found this very hard to follow. In addition to the words quoted above the message, which contained seriously obscene language which, in our view, adds menace to the words, are statements such as "When you mess with a Lankan, you mess with all of us" and "I don't want to see you on a night out in leicester (sic), or in the UK." The Panel found it impossible to see how this could be taken in any other way than a threat of violence. While it is conceivable that [PS] might not have thought that he was actually going to be killed, it is abundantly clear to us that any recipient of such a message would have a real and justified fear that he would be subjected to violence. We find the sending of this message to be completely unacceptable behaviour and such that it renders the send of it unfit to practise medicine."

19. In its conclusion the appeal panel said:

> "We are aware that in determining that you were not fit to practise medicine the original panel took into account both this conduct and the previous professional warnings which had been issued. The Appeal Panel disregarded the latter issues. It

> nevertheless concluded that the original outcome was not unsafe in part and under Regulation 11.165 confirms the decision… This is because the Appeal Panel is under no doubt that the posting of the Facebook message is, of itself, conduct of a type which should inexorably leads to a finding of unfitness to practice."

20. By a form dated 15 July 2014 the claimant, with the assistance of his solicitors, made complaint to the defendant on the grounds that the panel decision was beyond it powers, improperly constituted and imposed a penalty that amounted to unreasonable double punishment and that the penalty was disproportionate, unreasonable, irrational, and a breach of equity. On the 16 March 2015 a representative of the defendant sent to the claimant what was described as a complaint outcome explaining that the decision of the defendant was that the complaint was not justified. Shortly after that, the claimant's solicitors wrote to the defendant with further comments and included a letter from PS dated 28 March 2015 saying that having spoken to the claimant who apologised sincerely and explained what happened, it was clear that he did not pose a threat to his life or person at that time. PS confirmed that he had known the claimant for three years previously as a friend and that he had not come across as a violent person. PS also stated that in reporting the matter he intended the claimant should be reprimanded but had he known how seriously the comments would be taken he might have thought twice about raising a complaint. He expressed the view that it was unfair that the claimant had lost his medical career four years into his degree. By letter dated 8 May 2015, the defendant's deputy adjudicator reviewed these matters and made amendments to the complaint outcome, but indicated that those did not affect the decision and that the final decision was that the complaint was not justified. A copy of the outcome, which ran to 15 pages, was attached.

21. At section 2 of the outcome, it was stated that the purpose of the defendant's review was to decide whether a complaint is justified, partly justified, or not justified. It was further stated that the defendant had considered whether the university applied its regulations properly and followed its own procedures correctly and whether any decision by the university was reasonable in all the circumstances.

22. In section 3, reference was made to non statutory guidance (the guidance) called Tomorrow's Doctors and Medical Students: Professional Values and Fitness to Practise issued by the GMC which gives advice to universities on how to deal with fitness to practise cases, and to a number of paragraphs in the guidance. Paragraph 14 requires that students must be aware that their behaviour including in their personal lives may have an impact on fitness to practise and that their behaviour must at all times justify the trust which the public places in the medical profession. Examples of unacceptable behaviour are given which include aggressive violent or threatening behaviour, bullying or abuse. Paragraph 89 provides a number of possible outcomes from no sanction to expulsion and paragraph 90 emphasises that the purpose of sanctions is to protect patients and the public rather than to punish the student. Decision makers are advised to consider all options starting with the least severe. However paragraph 117 provides that the sanction of expulsion should be applied if the student's behaviour is "fundamentally incompatible with being a doctor."

23. At paragraphs 39 and 40 of the outcome, a contention of the claimant that PS should have been interviewed during the fitness to practise proceedings was considered by the defendant, but it was concluded that the university was obliged to consider whether, objectively, the contents of the meme and message amounted to evidence that the claimant's fitness to practise was impaired. Accordingly, whether PS actually felt in fear for his safety was a less important factor than whether such content was aggressive, violent or threatening and whether it was likely to undermine the need to maintain trust in the profession. Comments, attributed to Mr Harrup, that the claimant lacked insight into his poor professional behaviour, were noted. Accordingly the defendant was not persuaded that PS's letter would have made a material difference or that the university should re-open its investigation.

24. As Mr Newton points out, in Mr Harrup's report such those comments were correctly attributed to Dr Heney rather to himself and may well have referred in part at least to the previous warnings, which the appeal panel in the event disregarded. However, in my judgment it is reasonably clear that those comments were noted by the defendant in the context of whether PS should have been interviewed in the fitness to practise proceedings. Whilst this omission is referred to in the claimant's grounds of challenge in the present claim, the key importance of such omission was there said to be that it left unchallenged the relevant evidence of the claimant as set out in emails to the investigating officers. In my judgment nothing turns upon this mistake on the part of the defendant in the present claim.

25. The final conclusions of the defendant so far as relevant to the challenges now made were set out in paragraphs 41 to 45 of the outcome, in essence that it was reasonable for the appeal panel:

i) to note that PS felt sufficiently concerned at the time to raise the issue with the university and the police and to conclude that "any recipient" of such a message would have a real and justified fear of violence;

ii) to conclude that the meme and the message amounted to behaviour which was completely unacceptable in the context of fitness to practise;

iii) to view the meme and the message objectively to determine whether together they were likely to undermine the trust of a reasonable member of the public in the profession, regardless of whether members of the public saw the same and regardless of whether PS felt threatened;

iv) to regard the posting of itself as sufficiently serious to lead to the conclusion that the claimant is not fit to practise as a doctor and it was therefore unnecessary for detailed consideration to be given to lesser sanctions.

26. In determining whether those were conclusions to which no reasonable decision maker possessed of expertise reasonably to be expected of the defendant could come, regard must be had to the statutory framework which confers powers upon the defendant to undertake the decision making process. There is no dispute in the present claim as to such framework. The defendant is a designated operator under Part 2 of the Higher Education Act 2004 and has a duty to review student complaints in accordance with the Rules of Students Complaint Scheme, the relevant version of which came into force in March 2013. Rule 6.1 provides that the review of the

complaint will decide whether it is justified, partly justified or not justified and rule 6.4 provides that in deciding whether a complaint is justified the reviewer may consider whether the higher education authority properly applied its regulations and followed its procedures and whether or not a decision of such an authority was reasonable in all the circumstances.

27. Ms McColgan for the defendant cited a number of authorities to emphasise the role of the defendant in reviewing such complaints, and her submissions were adopted by Ms Darwin for the university as interested party. In *R (Maxwell) v Office of the Independent Adjudicator* [2011] EWCA Civ 1236 [2012] PTSR 884, Mummery LJ with whom the other members of the Court of Appeal agreed, reviewed three decisions of that court on such a role and at paragraph 23 drew from them a number of general points which included:

i) The review involves conducting, in accordance with a broad discretion, a fair and impartial review of the complaint on the materials before it, also drawing on its own experience of higher education;

ii) It is not the function of the defendant to determine the legal rights and obligations of the parties or to conduct a full investigation into the underlying facts;

iii) The courts will be slow to interfere with the review decisions when they are adequately reasoned. They are not required to be elaborately reasoned, the intention being that the defendant's operation should be more informal, more expeditious and less costly that legal proceedings.

28. In *R (Burger) v Office of the Independent Adjudicator* [2013] EWCA Civ 1803, Hallett LJ, with whom the other members of the Court of Appeal agreed said at paragraph 50:

> "The OIA was set up to provide speedy, effective and cost effective resolution of student's complaints. It was not set up as a court or a tribunal or other judicial body. Any court asked to review its decisions, must, therefore, act with caution. One must look to the nature of the complaint before the OIA and how the OIA responded in far more general terms than might be the case when reviewing a decision of a judge. Here the OIA did its very best with a very far ranging series of complaints made by the appellant. It followed rational and fair procedures and gave adequate reasons for its decisions and recommendations. It addressed the substance of the complaints. Even if no errors had been made the result would have been the same."

29. As to the adequacy of reasons, I was referred to *R (C) v Financial Services Authority* [2013] EWCA Civ 677, in which the decision of *South Bucks District Council v Porter (No 2)* [2004] UKHL 3[2004] 1 WLR 1953, well known in planning law, was in turn cited. The principle, which is not disputed, is that reasons for a decision must be intelligible and adequate and may be stated briefly, the degree of particularity depending entirely on the nature of the issues falling for decision.

30. In making his submissions Mr Newton was content to deal with the nine grounds of challenge broadly in three categories which reflected the main issues as identified in his skeleton argument and as paraphrased above. In my judgment that was a helpful approach because the grounds are somewhat lengthy and, as Mr Newton accepted, overlapping to a large extent. I adopt a similar approach here and do not set out the grounds in full.

31. I accept that the appeal panel dealt in its decision letter very shortly with the context of the sending of the meme and message and did not repeat all the points relied upon by the claimant in his email of 10 March. Mr Newton says that the claimant, at the time unrepresented, made a mistake in saying to Mr Harrup and to the panel that the report accurately set out all the mitigation he relied upon. It is the case that the body of the report, whilst emphasising that the claimant maintained that his posting of the meme and the sending of the message was intended to ridicule rather than threaten PS, did not repeat all the points which the claimant had set out in his email of 10 March. However, that email was appended to the report. It is clear that the appeal panel had a copy of the report because it is expressly referred to in its decision letter. Moreover it is clear that the appeal panel expressly took into account what was termed the provocative behaviour of PS because that is the first matter referred to in the decision letter when dealing with the offensive message. Mr Newton is critical of the brevity of the reference and relies upon it as showing the appeal panel did not take all the mitigation into account. I do not accept that submission. The appeal panel had to deal with a number of issues, including medical evidence that was not before the panel, and dealt with the offensive message briefly, as in my judgment it was entitled to do given that the sending and the content of the same were not disputed.

32. I accept that the paragraph in the decision letter as to the intention of the claimant and the belief of PS is not entirely clear. It is not clear whether the appeal panel's comment that the claimant's argument before the panel in this context was very hard to follow refers to whether the panel was mistaken or to the claimant's intention or the belief of PS or all or some of these matters. Moreover the appeal panel found it conceivable that PS might not have thought he was going to be killed but had earlier in the decision letter indicated that the fact that PS reported the matter to the police indicated strongly that he did feel threatened. Towards the end of this paragraph the belief of "any recipient" was referred to. In my judgment, it is tolerably clear by this that the appeal panel was referring to an objective view of whether the meme and the message was threatening, and it must be remembered that the claimant in his emails accepted that they could be perceived seriously and as a threat.

33. It is true that the appeal panel made no express finding as to the claimant's intention or PS's belief other than that set out above, but it my judgment it did not need to. The paragraph referred to ended with a sentence that it was the sending of the message which rendered the claimant unfit to practise medicine. The conclusion repeated that the posting of the message was "of itself" conduct of a type which inexorably led to such a finding. Those words are important in my judgment and reasonably convey that it was the act, rather than the subjective intention of the sender or the subjective belief of the recipient, upon which the appeal panel based its conclusion. The reason it did so in my judgment is also reasonably clear from the decision letter, namely that its function was not to operate in a punitive manner, but to exercise a professional judgment whether the claimant was fit to practise medicine. As the defendant

observed in its outcome, factors such as the belief of PS are less important in the latter exercise than in the former.

34. I next turn to the proportionality of the sanction. Mr Newton repeats the points he relies upon in the first main issue as showing that the sanction was disproportionate, but for the reasons set out above I do not accept those points. There are however, he submits, numerous other reasons why the appeal panel's approach to sanction is irrational. As he points out, this was dealt with in the decision letter of the appeal panel in just two sentences. There is no reference to the guidance or to the process of starting with the least severe sanction. However, there was an express reference to regulation 11.165 which provides that the appeal panel shall determine one of the outcomes set out, the first of which is to confirm the panel decision, but the second of which is to substitute a lower penalty.

35. It is clear in my judgment from the decision letter that in the professional judgment of the appeal panel, one member of which was a hospital consultant, the posting and sending of the meme and message led inexorably to a finding of unfit to practise. Mr Newton complains that no consideration was given to the likelihood of repetition or counselling and that it is impossible to know from the decision letter the reasons of the appeal panel as to such matters. I do not accept that submission. The panel had clearly considered whether there were any sanctions or remedial actions which could be put in place which might address the shortcomings before the completion of the claimant's course, but concluded that the fundamental unsuitability for the profession could not be corrected. The appeal panel, in contrast, had regard only to the meme and the message but it clearly considered the decision of the panel. In my judgment it is unlikely that the appeal panel did not also consider other sanctions, as express reference was made to regulation 11.165. The reasoning, albeit brief, is adequate. As paragraph 117 of the guidance states, expulsion should be applied if the student's behaviour is considered to be fundamentally incompatible with continuing on a medical course or eventually practising as a doctor. In my judgment it is sufficiently clear from the decision letter of the appeal panel that this is the conclusion to which it came.

36. It follows that in my judgment it has not been shown that the approach of the defendant to the decision of the appeal panel was irrational. In particular, I am satisfied that the defendant was entitled to conclude that the appeal panel had viewed the meme and the message objectively to determine whether together they were likely to undermine the trust of a reasonable member of the public in the profession, regardless of whether members of the public saw the same and regardless of whether PS felt threatened. It was also entitled to conclude that the appeal panel had acted reasonably in regarding the posting of itself as sufficiently serious to lead to the conclusion that the claimant is not fit to practise as a doctor and it was therefore unnecessary for detailed consideration to be given to lesser sanctions.

37. That may be seen by some as an outcome which is harsh, as apparently PS now sees it. That however is not the test I must apply. The test I must apply is whether the decision is one to which no reasonable decision maker possessed of expertise reasonably to be expected of the defendant could have come. Adopting the cautious approach which I must, I cannot be satisfied that that high hurdle has been reached in this case, particularly as it involves professional judgement as to fitness to practise medicine.

38. Accordingly the claim is dismissed.