OUTER HOUSE, COURT OF SESSION

[2023] CSOH 52

P308/23

OPINION OF LORD SANDISON

In the Petition of

SM

Pursuer

for

Judicial Review of a decision of the Senate Fitness to Practise Appeal Committee of a Scottish university intimated to the petitioner on 13 January 2023

Petitioner: Reid, Clyde & Co (Scotland) LLP
Respondent: Welsh, Brodies LLP

15 August 2023

Introduction

[1] SM was a final-year dental student at a Scottish university. He was subject to fitness to practice proceedings at the instance of the university. A Panel considering the matters raised in those proceedings decided that his studies at the university should be terminated. That decision was subsequently upheld by an Appeal Committee. In this petition for judicial review, SM seeks reduction of the decision of the Appeal Committee to uphold the determination of the Panel, on the grounds that the proceedings before the Panel were procedurally unfair and that the Appeal Committee proceeded on the basis of error of law in

upholding them, and further that the decision to terminate his studies was equally tainted by error of law, or else was simply irrational.

Background

[2] In November 2019, while first attempting his fifth year of study on the respondent's Bachelor of Dental Surgery course, the petitioner was subject to informal fitness to practise proceedings by the respondent university. Those proceedings followed a belated disclosure made by the petitioner about a police warning he had previously received in respect of possession of cannabis, but – at least so far as the respondent was concerned – were principally designed to address high recorded levels of current and historic absences by the petitioner from his course. An investigating officer was appointed, who met with the petitioner and issued a report addressing four areas: (i) poor motivation and attendance in his fifth year of study, (ii) low quality and quantity of clinical activity by him recorded on the respondent's online platform, (iii) the police warning, and (iv) the time available to remedy these issues. The matter was then resolved by the petitioner agreeing to repeat his fifth year of study, and being required – the respondent claiming that he also agreed – to achieve 100% attendance until graduation, to engage fully with his course programme, and to write a reflective essay. The advent of the COVID-19 pandemic resulted in all dental students being required to repeat the year of study they were in when teaching was suspended. When in-person classes returned in March 2021, the petitioner was advised by the respondent that he was being referred for formal fitness to practise proceedings. An initial investigation recommended his referral to the respondent's Fitness to Practise Panel in consequence of his failure to satisfy the attendance and engagement conditions which had previously been identified to him. Concerns had been formed about his continuing

absences, failure to report illnesses and absences, lack of data to assess his performance, and his failure to engage with a mentoring programme. It was acknowledged that the petitioner had been suffering from certain health conditions which had materially contributed to his perceived failings. The petitioner was provided with a copy of the investigative report. On 28 June 2021, he attended an online meeting designed to ensure that he understood the forthcoming process. A fitness to practise hearing took place online before the Panel on 8 July 2021. The petitioner was not legally represented before the Panel at the hearing, although he did have a supporter from the Students' Representative Council with him, who participated to a limited degree in the business of the meeting. Prior to the petitioner attending the hearing, the members of the Panel discussed and agreed the areas they wished to discuss with him. The petitioner was then admitted to the hearing and was invited to make an opening statement, which he did. The investigating officer summarised his report, and the members of the Panel interviewed the petitioner by asking him questions along the lines they had discussed before the hearing commenced. The Panel then deliberated in private. It concluded unanimously that the petitioner's fitness to practise was impaired on the basis of his lack of insight into professionalism and the impact of absences on clinical care and those arranging clinical teaching, his disengagement from his course from its early years, his heavy reliance on counselling as the single solution to his issues, and the existence of a query around his understanding of probity. The Panel agreed that further information, in the form of an independent psychiatric review of the petitioner, a copy of an outstanding speeding charge against him, and confirmation of his academic progress since March 2021, was needed before a final decision could be reached about the appropriate outcome.

[3] A further online meeting of the Panel took place, in essentially the same circumstances, on 25 February 2022. On this occasion the petitioner was accompanied by a

supporter from the staff of the Dental School, who spoke to her view that he was dealing satisfactorily with the issues that had previously been identified. The Panel heard an overview report which updated it on the petitioner's conduct, clinical performance and progress, and there was a further interview of the petitioner. Thereafter, the Panel concluded that the petitioner's fitness to practise "remained" impaired, on the following grounds:

(1) He had demonstrated a limited grasp of the impact his failure to attend to see scheduled patients had on those patients and his colleagues.

(2) He consistently blamed external factors and other people for the problems he experienced and notably failed to demonstrate personal responsibility.

(3) He appeared vague in regard to what was expected of him as a dental student and also in terms of what was required to attain General Dental Council registration. He had failed to engage constructively with his course's team, despite high levels of additional support offered to him.

(4) He had not made the progress in terms of demonstrating professionalism that had been hoped for. His level of insight had not improved since the last hearing.

(5) He was failing to demonstrate clinical improvement despite allowance being made for his absence level and lack of patients.

(6) His health, both mental and physical, had significantly improved and was no longer a mitigating factor.

[4] The Panel then considered sanction, and concluded unanimously that it was difficult to see how a continuation of the petitioner's studies would be beneficial given what it saw as an ongoing pattern of behaviour since early in his course and a lack of progress

demonstrated by him in both professionalism and insight, despite additional support having been offered to him, resulting in a decision to exclude him from his course.

[5] The petitioner appealed to the respondent's Senate Fitness to Practise Appeal Committee. At this stage, he sought legal advice, and set out his grounds of appeal in essentially legalistic terms. The respondent did not accept that its fitness to practise procedures were part of any legal process, as it considered the grounds of appeal suggested. On 16 June 2022 the Appeal Committee met to consider a preliminary disposal of the appeal. It decided that the hearings before the Panel had been conducted fairly and in accordance with proper procedures, and determined to refer the appeal for a full hearing, which was held on 19 December 2022. The petitioner was represented by a barrister, who presented and spoke to a skeleton argument prepared by him. The note of that meeting records the deliberations of the Appeal Committee. The Committee rejected the criticisms made of the fitness to practice procedure adopted by the respondent, concluded that the Panel's decision did not involve defective or unfair procedure and was not manifestly unreasonable, and refused the appeal.

Petitioner's Submissions

[6] On behalf of the petitioner, counsel submitted that the process by which his studies came to be terminated was so fundamentally unfair that the decision complained of should be reduced. Student fitness to practise proceedings, although not court proceedings, were a particular variety of legal proceedings, and thus required to be conducted fairly and in accordance with the normal principles of natural justice: *AB* v *University of XYZ* [2020] EWHC 206 (QB). Students studying for a dentistry degree were subject to a fitness to practise procedure whilst at university. Fitness to practise proceedings in respect of such

students were expected by the General Dental Council (GDC) to be, in substance, the same as such proceedings for practising dentists. That could be seen from the GDC publications "Student Professionalism and Fitness to Practice, Standards for the dental team", both in the version of the document designed for educational providers and in the version designed for a student readership. Such proceedings were, further, subject to the same well-developed body of case law as applied to the equivalent proceedings against established professionals. Reference was made in that regard to *University of East London* v *Chuks* [2021] EWHC 3328 (QB).

[7] That body of case law established the following propositions:

[8] Fitness to practise proceedings generally followed four stages: (i) finding the facts; (ii) determining misconduct; (iii) determining impairment; and (iv) determining sanction. A finding of impairment could only be made if misconduct had been established. A sanction could only be imposed if impairment had been found. Misconduct implied some act or omission which fell short of what would be proper in the circumstances; it was a matter of judgment whether the facts proved constituted misconduct: *Roylance* v *General Medical Council* (No.2) [2000] 1 AC 311 per Lord Clyde at 331 – 334. Impairment of fitness to practice did not necessarily follow from a finding of misconduct; it was a two-stage process: *Cohen* v *General Medical Council* [2008] EWHC 581 (Admin) per Silber J at [63]. Impairment was assessed at the date of the hearing as a forward-looking exercise: *Council for Healthcare Regulatory Excellence* v *Nursing and Midwifery Council* [2011] EWHC 927, [2011] ACD 72, per Cox J at [69] – [74]. The grounds upon which the GDC could find fitness to practise impaired were prescribed in section 27(2) of the Dentists Act 1984. Sanctions fell to be approached in order of increasing severity, only passing onto the next when satisfied that the lesser sanction was inappropriate. The purpose of any sanction was not punitive but to

protect patients and the public: *Bolton* v *Law Society* [1994] 1 WLR 512 per Sir Thomas Bingham, MR at 518 – 519.

[9] Fitness to practise proceedings were subject to the normal principles of natural justice: *AB* at [83]. It was a basic rule of natural justice that a person had a right to be heard and it was a necessary component of the right to be heard that a person knew what he was expected to answer: *Kanda* v *Government of Malaya* [1962] AC 322 per Lord Denning at 337; *Strouthos* v *London Underground Limited* [2004] EWCA Civ 402, [2004] IRLR 636. The classic statement remained that of Lord Reid in *Ridge* v *Baldwin* [1964] AC 40 at 113-114:

> "the essential requirements of natural justice at least include that before someone is condemned he is to have an opportunity of defending himself, and in order that he may do so that he is to be made aware of the charges or allegations or suggestions which he has to meet."

Where a party was unrepresented, it was incumbent upon the panel to ensure that attention was drawn to documents which might assist that party and to ensure that the substance of the party's case was put to any witnesses: *R (Compton)* v *General Medical Council* [2008] EWHC 2868 (Admin) per Pitchford J at [30] – [31].

[10] Reasons provided by a decision-maker should be such as to leave the informed reader and the court in no real and substantial doubt as to what the reasons for the decision were: *Wordie Property Co. Ltd* v *Secretary of State* 1984 SLT 345 per Lord President Emslie at 348. Any statement of reasons required to be clear about what had been found and the consequences which arose from those findings: R (*AT)* v *University of Leicester* [2014] EWHC 4593 (Admin). Where reasons were given and they revealed an error on the part of the decision-maker, it was no answer to say that there was no obligation to provide reasons: *Rooney* v *Strathclyde Joint Police Board* [2008] CSIH 54, 2009 SC 73 per Lord Reed at [32]. Reasons put forward after the event, and in particular after judicial review proceedings had

been served, should be treated especially carefully: *Chief Constable of Lothian and Borders* v *Lothian and Borders Police Board* [2005] CSOH 32, 2005 SLT 315 per Lord Reed at [65]. Allowing such reasons could be wrong in principle and dangerous in practice. It was generally inappropriate in judicial review proceedings for a party to seek to rely upon documents (and to advance arguments based on those documents) which were not available to the decision maker: *Fordham, Judicial Review Handbook*, 7th ed, para 17.2.1. In the context of the present case, the affidavits lodged on behalf of the respondent and sworn by members of its staff involved in the fitness to practise proceedings concerning the petitioner should be treated with circumspection. In any event, they revealed that the respondent viewed the fitness to practise proceedings as an opportunity to gain insight into the student's understanding of his problems and the professional implications of those problems, when that was not the aim of such proceedings at all. They also revealed that the respondent's view of the proceedings bore little resemblance to the view that the GDC took about the nature of fitness to practise processes. Further, it was clear from the affidavits that it was routine for the respondent not to give formal notice of the allegations against a student referred for fitness to practise proceedings. In accordance with that settled practice, no such notice had been given to the petitioner.

[11] The decision amenable to judicial review was the final decision of the respondent, namely the appeal decision, and it was that which would have to be reconsidered in the event of success in that review: *Paton, Petitioner* [2019] CSOH 62 per Lord Ericht at [7] and [8]. However, the petitioner was entitled to, and did, complain about the appeal proceedings in the context of what had already happened at first instance, not least because his position was that those first instance proceedings involved a defective procedure endorsed at the appeal level, and resulted in a final disposal that was manifestly

unreasonable. In relation to the sufficiency of the procedural aspects of what had been done before the Panel, the court and not the Appeal Committee was the sole arbiter: R (*Osborn)* v *Parole Board* [2013] UKSC 61, [2014] AC 1115.

[12] Reduction of the Appeal Committee decision, if otherwise appropriate, should only be refused where it was plain and obvious that the outcome on reconsideration would be the same; it was not appropriate for the court to speculate as to what the outcome might have been had a fair process been followed: *McHattie* v *South Ayrshire Council* [2020] CSOH 4, 2020 SLT 399 per Lord Boyd of Duncansby at [51]; *Kaagobot Ltd* v *City of Edinburgh Council* [2023] CSOH 10, 2023 SLT 243 per Lord Richardson at [161]; *Shaffar-Roggeveen* v *University of Edinburgh* [2023] CSOH 44 per Lord Lake at [23].

[13] Turning to the substantive grounds of complaint advanced, the first was that the proceedings faced by the petitioner had been manifestly unfair. What fairness required would depend upon the particular circumstances. In the present case, a student had had his studies terminated in the final year of a degree course which was a pre-requisite to admission to a recognised profession. That effectively permanent denial of entry to the dental profession was a greater sanction than any which the GDC could impose upon a practising dentist, since such a dentist erased from the register by the GDC could apply for re-registration after five years in terms of section 28 of the 1984 Act. Given the grave consequences of the respondent's decision, the court should be astute to ensure that the process by which the decision was reached was conspicuously fair.

[14] There were six aspects of the process by which the petitioner's studies were terminated which caused concern. Individually, they were serious enough, especially the first, fifth and sixth; cumulatively, their effect was overwhelming.

[15] First, the petitioner complained that he was given no proper notice of the allegations he was facing, and was instead left to work out for himself what those allegations were. In the formal fitness to practice proceedings, it had become clear at the investigative stage that he had been under the impression that the respondent's concern was still the police warning he had received for possessing cannabis, but that had turned out not to be the case. Equally, reliance had been placed on absences from his course in previous years of study without any indication that that was one of the matters to be addressed by the proceedings. Members of the Panel themselves appeared unclear as to exactly what matters they were and were not dealing with, resulting in the scope of the enquiry growing continuously as the proceedings went on. The suggestion that no clear notice of the allegations faced by the petitioner had ever been given to him appeared to be factually correct in light of the content of the affidavits from some of the respondent's academic staff who had participated in the proceedings and which the respondent had chosen to lodge. Lack of such notice was inconsistent in principle with the common law requirements of fairness, in particular in the context of a process which could result in the imposition of such a significant sanction. The GDC would always provide formal notice of the allegations a dentist faced. The fact that proceedings had been going on since November 2019 did not remedy the defect in circumstances where the matters being looked into changed over time.

[16] Secondly, the primary (and possibly only) reason for instigating fitness to practise proceedings against the petitioner were concerns over the state of his health and the impact of that on his studies and fitness to practise. That was significant, since physical or mental ill-health was a distinct ground upon which fitness to practise could be impaired (section 27(2)(c) of the 1984 Act), separate from misconduct (section 27(2)(a)) and from deficient professional performance (section 27(2)(b)). The distinctions were important.

Where fitness to practise was found to be impaired solely upon the ground of adverse physical or mental health, the sanction of erasure could not be imposed on a registered dentist (section 27B(6)). The respondent's position that the petitioner's health was only one aspect of the matters to be looked into simply underlined his complaint about lack of clarity.

[17] Thirdly, the conduct of the Panel hearings had been unfair. Without proper notice of the allegations, the petitioner had been invited to make a statement. He was then questioned by the members of the Panel. No evidence had been presented. The content of the report recommending the instigation of the fitness to practise proceedings had been accepted without comment.

[18] Fourthly, given the lack of legal representation, the Panel had an enhanced duty to ensure that the petitioner's position was presented and the evidence against him tested. No evidence was led against him. This was compounded at first instance because the petitioner could not reasonably have anticipated that his studies might be terminated.

[19] Fifthly, no findings in fact had been made. It was impossible for the court, or the petitioner, to be clear what had been accepted, and why. Both the Panel and the Appeal Committee gave every impression of having skipped over finding facts or considering misconduct. There were apparent disputes as to factual matters, for example in relation to whether the petitioner had promptly reported that he was going to have to be absent on various occasions. The reasons given by the Panel in February 2022 as to why it considered the petitioner's fitness to practise to be impaired might provide a basis in fact for finding his such impairment, but were an impermissible mix of what might be findings in fact and an assessment of the significance of such facts. That was not good enough in what ought to have been a process conducted in distinct stages, in accordance with standard practice in fitness to practise proceedings. "Impairment" in a fitness to practise context had a specific

meaning. It was impossible to ascertain what had been found in fact allowing such a conclusion to be arrived at. In any event, fitness to practise could only be found to be impaired after a fitness to practise hearing. There had been no previous finding of impairment so the petitioner's fitness to practise could not "remain" impaired as the Panel had stated. The initial concerns in 2019 had been resolved informally without any finding of impairment. That basic point had been ignored by both the Panel and the Appeal Committee. That alone vitiated their decisions.

[20] Sixthly, the reasons provided for the conclusions arrived at, and in particular the sanction imposed, were inadequate. No reference was made to the substance of the GDC document "Student professionalism and fitness to practise. Standards for the dental team. Guidance for students.", which made it clear that expulsion from the BDS course would be a rare outcome of student fitness to practice proceedings, and would require to be the consequence of a decision that that was the only way to protect patients and the public, because of behaviour completely incompatible with continuing on the course or eventually practising as a dentist. Whilst the document was mentioned by the Panel, there was nothing to suggest that any regard was had to the substance of it. The reasoning on sanction was entirely inadequate. No reasons were provided which properly explained why lesser sanctions were discounted. Little regard appeared to have been had to the petitioner's state of health. Given the severe sanction, clear and cogent reasoning was required. The petitioner was of an age at which it was recognised that character is less likely to be fixed, the possibility of change is greater and judgment may not have fully developed. A parallel was drawn with the "Sentencing Young People: Sentencing Guideline" dated January 2022. At the petitioner's age, it simply could not be said, particularly having regard to the health difficulties he had had over recent years, that there was no possibility of him ever being able

to enter the dental profession safely. It was also relevant to acknowledge that, assuming the respondent did not prevent a person obtaining a degree, it was the GDC which granted entry to the profession and thereafter monitored fitness to practise.

[21] The second ground upon which the petitioner sought reduction of the decision complained of was that it was vitiated by error of law. There was a substantial degree of overlap with the first ground. The respondent had demonstrably misunderstood and misapplied the fitness to practise process. The fact that notice had not been given to the petitioner of the allegations he faced, not by accident but as a matter of routine, was an example of the errors of law as to the basic common law standards of fairness into which the respondent had fallen.

[22] The third ground upon which the petition proceeded was that the decision complained of was irrational. This was in substance the first ground by another name, and was not insisted upon as an independent ground of challenge.

[23] If the court was persuaded that the decision was unlawful, there was no proper basis on which to withhold the remedy of reduction. That would involve the court speculating as to what the outcome of a fair process might have been. That was not appropriate. It could only ever be in rare and exceptional circumstances that, having found a decision to be unlawful, withholding a remedy would be appropriate and consistent with the rule of law: *McHattie*.

Respondent's Submissions

[24] On behalf of the respondent, counsel moved the court to refuse the prayer of the petition. None of the grounds of review was made out. The review was of the procedures before, and the decision of, the Appeal Committee, not of the original Fitness to Practise

Panel decision. The proceedings of the Appeal Committee had been conducted fairly. The petitioner knew and had been given information in relation to the concerns that had led to his referral to the Panel. The petitioner's representations had been considered and taken into account by the Committee. Having taken into account all (and only) relevant factors, the Committee had reached a decision it was entitled to make. The decision complained of was not premised on any error of law, and was clearly one that the Committee, acting reasonably, was entitled to reach.

[25] The fitness to practise proceedings concerning the petitioner took place against the background that the respondent had an obligation to the GDC to assess that fitness during the BDS course. The petitioner had been made aware of this throughout that course. All students on any course where fitness to practise formed an essential element were informed at the beginning of their course (and reminded every year thereafter) of the School Code of Professional Conduct and Fitness to Practise.

[26] The GDC document "Student professionalism and fitness to practise. Standards for the dental team. Guidance for students.", which had been provided to the petitioner, expressly stated:

> "Student fitness to practise, put simply, is meeting certain requirements during your training relating to clinical/technical and academic work, professional behaviour, health. This is a key part of managing the risks to patient safety during training and helping you develop the professional attributes required for registration with the GDC.
>
> Training providers are responsible for determining the fitness to practise of individual students. The GDC does not have any direct authority to deal with or advise on individual cases of fitness to practise or disciplinary issues of students."

[27] It was against the background of managing risks to patient safety and complying with the requirements of the relevant professional body that the Panel had made its decision. The respondent's published procedure for determining fitness to practise expressly stated

that "Where a student has failed to comply with a School Code of Professional Conduct and Fitness to Practise, the student may be required to leave the programme of study". The procedure required informal resolution to be attempted if at all possible before turning to more formal measures. The informal resolutions that had been tried with the petitioner, in an attempt to get him to comply with the requirements of his course, had not worked. He continued to have a large number of unexplained absences, and had failed to demonstrate clinical progress notwithstanding that he was in the final year of the dentistry course. It had been made clear to him at a meeting on 11 February 2021 that his attendance continued to be a matter of serious concern.

[28] Formal fitness to practise procedures had then been commenced and an investigation report had been compiled and sent to the petitioner. It plainly set out the concerns of the School attended by the petitioner within the university in relation to his fitness to practise, which turned on lack of communication, unexplained absences (including a lack of insight into how the absences were problematic in the context of a clinical programme), and failure to demonstrate clinical progress. It was also clear that the School regarded the petitioner's health conditions to be a mitigation rather than a cause for concern.

[29] The petitioner had attended a pre-hearing meeting with the Head of Administration of the School on 28 June 2021. At that meeting, it had been explained to him that the purpose of the pre-hearing meeting was to ensure that he knew what to expect at the hearing which had been scheduled for 8 July 2021. The procedures had been explained and the petitioner was given a chance to ask any questions that remained outstanding, and took the opportunity to do so.

[30] The Panel had been convened. It was clear from the recorded content of the petitioner's lengthy opening statement that he had been aware of the concerns of the School.

The questioning which followed was exclusively related to matters included in the investigation report. It included queries about the petitioner's absence record in earlier years of his course. The petitioner was expressly asked if he had read the guidance from the GDC on giving notice and explanations for absences and the petitioner confirmed that he had done so. The petitioner had also been expressly asked at the end of the hearing if he felt that he had been given a fair hearing, and he confirmed that he agreed that the hearing had been fair. The views formed by the Panel in consequence of the hearing were views that it was entitled to reach on the material before it.

[31] When the petitioner appealed the Panel's decision, the Senate Fitness to Practise Appeals Committee first considered the appeal under its preliminary disposal procedure on 16 June 2022 and determined that:

> "In summary, the panel was satisfied that the appellant had been informed of the matters to be addressed, that the extent and depth of the questioning by the panel had been appropriate and that full account had been taken of the appellant's physical and mental health. Recognising that the final decision would prevent the appellant from continuing in their chosen profession, the panel was not able to establish with sufficient confidence, firstly, the extent of the additional support provided to the appellant during the periods of remediation and, secondly, that all possible routes for the appellant to retrieve his position had been exhausted.
>
> The Committee considered the possible outcomes available to it under the Procedure for determining Fitness to Practise ... The option to refer the matter back to the Fitness to Practise Panel was rejected as no defective procedure had been found in the conduct of the hearings that required correction by a reconvened panel. The Committee decided that the only option was to refer the matter to a full hearing of the Senate Fitness to Practise Appeals Committee in order to explore the matters noted in the preceding paragraph through discussion with the appellant and the School."

[32] The full Appeal Committee hearing took place on 19 December 2022. The petitioner had been represented by counsel and his solicitor was in attendance. All of the relevant material was available to, and considered by, the Appeal Committee. Full argument on the grounds of appeal had been presented by counsel on behalf of the petitioner. A statement

was made on behalf of the School. The Appeal Committee then questioned both parties' representatives before the petitioner's counsel made a closing statement. He had confirmed expressly, when asked, that the proceedings had been carried out fairly and in accordance with the published procedure. Having considered the material before it and the arguments made to it, the Appeal Committee made a number of determinations and dismissed the appeal, noting that "the disposal by the School Fitness Practise Committee did not involve defective or unfair procedure or [sic] was not manifestly unreasonable". It had followed the correct procedures, acted fairly, and reached a decision it was entitled to reach.

[33] In relation to procedure, the Committee noted that there had been attendance meetings prior to the fitness to practise referral at which the causes for concern were discussed with the petitioner, that detailed investigations had been conducted in advance of the fitness to practice proceedings in which the issues had been worked through with him, that the invitations to the meetings which the petitioner had been asked to attend, including the investigation interviews, listed the concerns to be discussed, that it had been explained to the petitioner on several occasions that his fitness to practise was not being called into question as a result of his health, but because he appeared to have failed to acknowledge and address the consequences of being ill, and that prior to his appeal, the petitioner had not given any indication that he found the concerns unclear.

[34] While the Committee had acknowledged that some aspects of the fitness to practise documentation could have been clearer, it had decided that that documentation had set out both the concerns to be addressed and the reasoning for the decisions taken throughout the procedure. The Committee was satisfied that the documentation had been sufficiently clear for the petitioner to engage in discussion of the issues and to understand the impact that poor attendance, and poor management thereof, was likely to have on his ability to complete

his programme.

[35] In relation to the first ground upon which the petitioner sought reduction, namely the fairness of the proceedings, the matters advanced were either irrelevant or not made out on the facts. It was necessary to bear in mind that fitness to practise proceedings of the kind in question here had as their primary purpose the determination of whether a student was likely to be sufficiently capable of practising in a manner that was unlikely to pose a risk in their chosen profession if and when they qualified. These were not misconduct proceedings. They did not necessarily involve allegations of wrongdoing at all, but were rather a review of whether the student was suitable for the career to which their chosen course was intended to lead. Fitness to practise panels carried out an important safeguarding function and they did not exist for the purpose of punishing wrongdoing. For that reason, care had to be taken in reading across too many of the procedural requirements in a disciplinary setting, where the purpose of the hearing was often entirely different. Further, while the GDC documentation pertaining to student fitness to practise was clear that such fitness would encompass professional attitudes and behaviour, health, and clinical or technical performance and meeting learning outcomes, it did not purport to go further in relation to matters of procedure than identifying key elements which should be present in the fitness to practice processes of educational institutions providing dental education and training. Beyond those key elements (none of which were relevantly claimed to have been breached in the present case), such an educational institution was free to adopt and apply its own fitness to practise procedures, and it was no valid criticism of such procedures that they did not mirror the process which would be adopted by the GDC (or other professional regulatory bodies) in considering the fitness to practise of an established member of the profession. The respondent in the present case had developed, promulgated and applied its own fitness to

practise procedures and could not be criticised, whether by reference to the GDC's own processes or otherwise, for having done so.

[36] On the general issue of procedural fairness, the following propositions were advanced:

[37] Natural justice required an opportunity to be heard and an unbiased decision-maker. What was necessary to constitute procedural fairness would differ from tribunal to tribunal and would have to depend on the nature of the particular tribunal: *R* v *Local Government Board ex parte Arlidge* [1915] AC 120 at 132. Very often, and in particular in this case, all that was required was that information about the gist of the case to be met should be provided: *R (Doody)* v *Secretary of State for the Home Department* [1994] 1 AC 531, per Lord Mustill at 560G. There was no obligation on a Fitness to Practise Panel or an Appeal Committee to behave as if it were a court, particularly in relation to how notice was given of allegations: *Rashid* v *Oil Companies International Marine Forum* [2019] EWHC 2239 (QB) at [78]. There was no general entitlement to reasons at all (particularly in an academic rather than judicial setting), let alone reasons in any particular format: *R (Institute of Dental Surgery)* v *Higher Education Funding Council* [1994] 1 WLR 242. Any right to reasons that might be established would be satisfied if, having regard to the issues and the nature and content of the evidence, the reasons for the decision were plain, either because they were set out in terms or because they could readily be inferred from the overall form and content of the decision, and a decision-making tribunal did not need expressly to set out in its decision every point that was encountered at a hearing: *Joseph* v *General Medical Council* [2022] EWHC 3345 (Admin) at [66]; *Eagil Trust Co Ltd* v *Pigott-Brown* [1985] 3 All ER 119 at 122.

[38] In relation to the suggestion that there had been no proper notice of the allegations, by the time of the fitness to practice hearing in July 2021, the school had been trying to assist

the petitioner to engage properly with his course in order to make progress for almost two years. His first absence management meeting had been triggered on 3 September 2019, and an alert about his clinical performance had been raised shortly afterwards. The petitioner had been given a copy of the investigation report in advance of the hearing before the Panel on 8 July 2021, and that document had set out clearly and at length what the concerns leading to the hearing were. While some of those concerns related to the way in which the petitioner had dealt with his health issues insofar as they bore upon his engagement with his course, it was clear that the health issues in themselves did not constitute the reason for the matter going to the Panel. The petitioner had attended a pre-hearing meeting with a senior official where he had had the chance to discuss any questions or uncertainties that he had about the upcoming hearing. Prior to the hearing, the Panel members had discussed amongst themselves the ground they wanted to cover at the hearing, but all of that had been squarely within the scope of the investigation report and was unexceptionable. The petitioner had lodged his own documentation to be referred to at the hearing, had given a relevant opening statement which demonstrated that he knew he was there to discuss a lack of academic and practical progress on his course which rendered it necessary for the School to consider whether he was fit to practise as a dentist, and had participated in the questioning from the Panel. He had had every opportunity to participate in proceedings and engage with the Panel, and he did so. He was aware that the Panel had been convened to discuss and consider his fitness to practise. Given his involvement with the School in relation to that matter since 2019, he was well aware of the basis of the concerns and why the Panel had been convened, given his failure to improve matters when given the opportunity to do so by the attempt to resolve the issues informally.

[39] Similarly, the petitioner had known of the purpose of the hearing on 25 February

2022. In advance of that hearing, he had prepared a relevant and substantial opening statement, and at the hearing had spoken to his fitness to practise and otherwise participated fully in the hearing. At both the 8 July 2021 and 25 February 2022 hearings, the petitioner was expressly asked by the Panel whether he was satisfied that he had been given a fair hearing and he had answered that he was so satisfied. Formal decision letters setting out the reasons for the Panel's decision on each occasion had been issued.

[40] The petitioner had been represented by a solicitor and counsel at the Appeal Committee hearing. He had been advised ahead of the initial Fitness to Practise Panel hearing that he should bring along with him a representative, and had done so. He had at no point indicated that he wanted to bring a legal representative to that hearing. That he chose not to be legally represented on that occasion was not a procedural failing on the part of the Panel. The Appeal Committee was aware that the petitioner had not had legal representation before the Panel when weighing up the various factors relied upon by him and reaching its decision.

[41] The factual basis of the referral had been set out in the investigation report. The petitioner did not seek to challenge any of it, at any stage. All he had sought to do was to provide explanations for those factual circumstances, all of which were taken into account by the Panel. There had been no obligation on the Panel formally to present findings in fact. The determination of the Panel as to the petitioner's fitness to practise was clear, and the decision letter of 15 July 2021 had set out in bullet points reasons which explained that decision. The reference to the petitioner's fitness to practice "remaining" impaired was, when read in context, a reference to that fitness when he had been referred to the fitness to practise process and at the time the decision in question had been reached. Similarly, a decision letter of 3 March 2022 set out the reasons which made it clear why the decision at

the hearing on 25 February 2022 was reached.

[42] There was no general requirement for the Panel to give reasons at all, let alone reasons in a particular format. The petitioner had been informed in terms that the Panel had unanimously determined that the bullet-pointed reasons in the letter of 3 March 2022 had led it to determine that the petitioner had demonstrated a pattern of behaviour which was inconsistent with safe clinical practice. Given that, by that time, the respondent had taken all reasonable steps to assist the petitioner both informally and formally to rectify the issues that had been raised with him on a number of occasions, it had been open to the Panel to reach that decision. The Appeal Committee was entitled to reach the view that the decision of the Panel betrayed no error of law that would entitle it to interfere with that decision.

[43] The second ground of review, namely that the Panel and Committee had proceeded in error of law on the basis that the respondent's fitness to practise proceedings were not thought by it to be subject to the common law requirements of procedural fairness, was simply incorrect as a matter of fact. The respondent's position was, and always had been, not that those requirements had no application to the proceedings, but rather was simply that the proceedings were not a formal court process, and that the nature of the requirements of fairness did not apply to them as if they were such a process. The particular requirements of fairness were not set in stone and did not apply identically to every decision-making body. The Appeal Committee was satisfied that the petitioner had been treated fairly and that the decision to exclude him from further study had been taken in the context of a prolonged period of additional academic and pastoral support that had not resulted in any material change in behaviour patterns in the two years since the first referral. There was no merit in this ground of appeal.

[44] The third ground of review advanced, that of irrationality, was wholly unspecified

by the petitioner. The decision of the Appeal Committee was evidently a decision that it was entitled to reach in all the circumstances.

[45] The only remedy sought by the petitioner, namely reduction of the decision of the Appeal Committee as set out in the letter of 13 January 2023, should be refused. Even if one or more of the grounds of review was made out to the satisfaction of the court, there was nothing in the petitioner's argument that could or should cause it to think that there was any purpose in remitting the matter to the Appeal Committee. While it was accepted that refusal of a remedy was only appropriate in exceptional circumstances, in the present case there was nothing to suggest that, even if the grounds of review were well-founded and a different procedural approach had been adopted, the Appeal Committee might have reached a different decision: cf *Amid* v *Kirklees Metropolitan Borough Council* [2001] EWCA Civ 582 per Sedley LJ at [17], [20] and [21], followed in this court in *Kaagobot* at 165. For example, setting out findings of fact in a separate document would not change the lack of progress made by the petitioner on the practical elements of his course, nor his failure properly to engage with how his behaviour affected others. It would not change the extent to which the respondent could feel confident about his suitability to perform dental procedures on patients. Where what was under consideration was a decision regarding the fitness of a student to practise in a profession, the expertise of those dealing with such determinations regularly, including their determination of the scale of the severity of the behaviour in question in any given case, should be afforded particular respect in accordance with the established practice of showing deference to expert tribunals: cf. *Department for Work and Pensions* v *Information Commissioner* [2016] EWCA Civ 758, [2017] 1 WLR 1 at [34]; *Fatnani and Raschid* v *General Medical Council* [2007] EWCA Civ 46, [2007] 1 WLR 1460 at [18] – [19]; *Murnin* v *SLCC* [2012] CSIH 34, 2013 SC 97 at [31]. The Panel and the Appeal Committee, being comprised of

specialists, were best placed to make the judgments and the consequent decisions that they made. It could not properly be said that the fundamental elements of natural justice (i.e. the right to be heard by an impartial tribunal) had been undermined to the prejudice of the petitioner. Absent a particularly significant error on the part of the respondent, there was no practical purpose or benefit in causing the additional time and cost of remitting the appeal back to the Appeal Committee. Remedies in judicial review were entirely discretionary on the part of the court, and in the circumstances of this case, it would be inequitable to reduce the Appeal Committee decision.

Decision

Nature of Student Fitness to Practice Proceedings

[46] It is necessary first of all to determine the extent, if any, to which the respondent's fitness to practise procedures required to correspond or at least approximate to those of the GDC in relation to registered dentists, since a substantial portion of the petitioner's criticisms of the respondent's procedures turns on claimed discrepancies between the two forms of process. In this connection the GDC itself states in its relative publication directed at students and noted at paragraph [26] above that it "does not have any direct authority to deal with or advise on individual cases of fitness to practise or disciplinary issues of students." That makes it clear that, at least so far as the GDC is concerned, the conduct of student fitness to practise proceedings is for the educational institution in question and not for it. Certain basic or "key" elements of student fitness to practise procedure are identified in the GDC's relative publication for education providers, but the consequence of failure on the part of a provider properly to provide for any of those elements in its own relevant procedures would be a matter for discussion and resolution between the GDC and the

education provider, and would not give rise to any relevant ground of complaint on the part of a student against the provider.

[47] The question of what proper procedures in the context of student fitness to practise proceedings may be cannot, in any event, simply be surrendered to the views of the GDC or the education provider, but is a matter over which the court must, if asked to do so, exercise its own supervision. In that context, one requires to consider whether there is any reason why the law ought to require student fitness to practise proceedings to conform or at least approximate to such proceedings in the context of registered members of a profession which the student aspires to enter. It is difficult as a matter of principle to see why that should be the case. Fitness to practise proceedings against an established member of a profession will generally turn on his or her ability or willingness to behave in a way acceptable to the requirements of the profession in question. In many though not all cases, the lack of such ability or willingness is likely to be demonstrated by misconduct of some kind. In that context it makes sense to proceed in the familiar structured way of fact-finding followed by a determination of whether misconduct has occurred before passing to the question of whether impairment has in consequence been established and then determining sanction. In the context of student fitness to practise procedures, the question in issue is whether the student is meeting various requirements in the course of his or her training which are deemed necessary in order to satisfy the criteria for entering into the relevant profession in the first place. The answer to that question need not, as it did not in the present case, involve any issue of misconduct at all, but rather requires an overall consideration of both matters of fact (for example, how many absences from classes or clinics actually occurred) and matters of impression or opinion (for example, the degree to which the student is engaging with his course of study or demonstrating insight into his position), all feeding

together into a rather more wide-ranging and holistic determination of fitness of practise than might typically be the case in fitness to practise proceedings against an established professional. A rigid requirement to proceed in set stages of procedure in that specific context might well hinder or even prevent an appropriate decision being made, and cannot be said to be a legal requirement in the student context. It follows that criticisms made of the respondent's fitness to practise procedures or their outcomes which are based simply on their claimed deviation from what would have been the GDC's procedures or outcomes in the case of fitness to practise proceedings against registered dentists cannot be sustained. That the respondent did not see its own procedures as being essentially disciplinary in nature is, likewise, not a valid ground of complaint.

Procedural Fairness

[48] In relation to the procedural fairness of the proceedings before the Fitness to Practise Panel and the Appeal Committee, that is a matter for the court rather than for the Panel or Committee themselves. The court will first examine (if the matter is a live one in the case) whether what happened before the Committee, and if necessary before the Panel, was in accordance with the relative internal rules of the respondent. In the present case, no suggestion was made that the petitioner's case was conducted otherwise than in accordance with those rules. The next stage will be for the court to consider whether those rules require to be supplemented by some common law principle of procedural fairness. In this context, the principal ground of complaint in the present case was the lack of any succinct and formal statement of the grounds of concern which caused the petitioner to be referred for the fitness to practise proceedings which ultimately led to the termination of his studies. That lack requires the court to consider whether the minimum procedural standards of the

common law have nonetheless been met, it being a cardinal principle of procedural fairness that a person facing proceedings which may lead to an adverse outcome for him is entitled to be informed of the matters to be dealt with at such proceedings in such a way as to enable him to identify, in a way proportionate to what is at stake, at least the material issues and to make any meaningful contribution to their discussion and resolution as he may wish to advance. That is how I understand the reference in *Doody* to the "gist" of the case. Neither the petitioner nor the respondent in this case takes any issue with that being the applicable principle of law; the dispute between them lies in its application to the facts.

[49] Although the point can be, and was, made on behalf of the petitioner that he was not provided with any document setting out as such the bases on which his fitness to practise might be found to be impaired, and had to deduce that for himself from the material with which he was provided, that circumstance cannot in itself determine the answer to the question of whether adequate notice was given. Rather, the focus must be on what material actually was provided to the petitioner, and whether that provided him with the requisite information. In that regard, it will be recalled that the petitioner participated in the investigation which preceded the panel hearing and was provided with a copy of the resultant report which provided the basis for the fitness to practise hearing. He was, further, invited to a pre-hearing meeting at which he was given the opportunity to raise any concerns he might have. Although strictly irrelevant to the question of whether, objectively, fair notice was or was not given, the fact that the petitioner was able to provide a pertinent opening statement to the Panel and – to a lesser extent – the fact that he did not suggest until after receiving legal advice that there was any issue of fair notice with the proceedings, tend further to suggest that this issue is more theoretical than real. While it can be said that at times questions were asked of the petitioner during the Panel hearings which might not

have been very clearly heralded in the pre-hearing documentation (the issue of historic absences in earlier years of his course being one such example) it is not possible to see a way to concluding that those questions or the answers given to them fed in any very material way into the decisions of the Panel as to the petitioner's fitness to practise or as to the sanction it decided to impose. In summary, notwithstanding that the fitness to practise process was a relatively serious form of proceeding capable of leading to significant adverse consequences for the petitioner, thus entailing a relatively high degree of scrutiny on the part of the court as to its procedural fairness, there is no basis, even in that context, upon which it can properly be said that no adequate notice of the essential subject-matter to which it was directed was given to him. The wider complaints about the procedure adopted by the Panel are, likewise, difficult to reconcile with what admittedly actually happened. The petitioner was given the opportunity to put before the Panel such documentation as he wished it to see, and to address the Panel as he saw fit. He took the opportunity of doing so, and cannot be said that his contributions missed the point of the hearings. On the contrary, they were highly pertinent to the issues raised, even though they did not in their substance ultimately persuade the Panel that the concerns which had been expressed about his fitness to practise were invalid. There may be circumstances, particularly where a person without legal representation is facing potentially serious implications in consequence of some quasi-judicial proceedings, where those in charge of the proceedings either do or ought to appreciate that matters are developing in a way which risks substantive injustice being done. In such a case the law may require them to take positive ameliorative action by way of adjournment or otherwise. However, nothing of the sort occurred in this case. The petitioner was given a real and effective opportunity to take part in and influence the outcome of the fitness to practise proceedings, and took that opportunity. His lack of

success in persuading the Panel of the merits of his case was due to the substance of that case, not any procedural failing in the way he was permitted to present it. This ground of criticism of the proceedings cannot, accordingly, be sustained.

Were the Fitness to Practise Proceedings based on the petitioner's health?

[50] The further criticism that the proceedings and the findings of unfitness made against him had as their basis the petitioner's health, rather than any wider cause for concern about his fitness to practise, is similarly ill-founded. Although it may well have been the case that the petitioner's various health issues caused or materially contributed to the absences which were in turn one of the main causes for the initiation of the fitness to practise proceedings, both informal and formal, the focus of those proceedings was not on his health but on the consequences of his conditions for the management of his professional obligations towards patients and colleagues. It may be added that, by the conclusion of the Panel stage of proceedings, medical evidence had been adduced which concluded that the petitioner's health had improved so as no longer to render it a mitigation for any of the failings in his professionalism which had by then been identified. Finally, to the extent that the complaint that the proceedings turned on the petitioner's state of health is designed to draw an unfavourable comparison between the respondent's processes and outcomes and those which would be engaged in GDC fitness to practise proceedings against registered dentists, I have already concluded that no such comparison is apt, at least in itself, to represent a valid complaint about the former.

Was the Panel obliged to make findings in fact?

[51] In relation to the criticism that the Panel did not make findings in fact, much of the force of that suggestion is similarly lessened by my conclusion that the respondent's fitness to practise processes did not require to mirror those which would be applied by the GDC in respect of registered dentists. The respondent's "Procedure for Determining Fitness to Practise" document, at paragraphs 36.7.16 and 36.8.12, which respectively governed the proceedings before the Panel and Appeal Committee, requires that the Panel's or Committee's "decision and the reasons for the decision, with reference to any findings in fact, shall be provided in writing to the student by email ….". That procedure plainly contemplates (by the inclusion of the word "any") that there may or may not be formal findings in fact in any particular case. Obvious examples of where findings in fact may not be required are where there are no material facts in dispute, or where any facts in dispute do not factor into the decisions made. In the present case, it appears that very little, if anything, that the Panel considered as relevant to its decisions was in substantial dispute. Equally, I have little doubt that the facts upon which the Panel proceeded in concluding that the petitioner's fitness to practise was impaired clearly emerge from its statement recorded in paragraph 3 above. Read in the context of the preceding investigatory report and the discussions which took place at the hearings, that passage more than adequately makes clear, in general terms at least, the essential facts upon which the Panel's conclusions were reached. In the context of proceedings of the kind in question, a mixed statement of the facts upon which the Panel proceeded and the conclusions which it reached on the basis of those facts is unobjectionable. The Panel's reference to the petitioner's fitness to practice "remaining" impaired is nothing more than an indication that it considered that that fitness had been impaired at the start of the fitness to practice proceedings (thus justifying their

commencement) and that that impairment persisted at the time those proceedings concluded. It does not infer any misunderstanding on the part of the Panel that a separate finding of impairment had previously been made against the petitioner.

Adequacy of reasons

[52] In relation to the adequacy of the reasons given by the Committee and Panel, I reject the respondent's submission that no reasons required to be given. Standing the relevant terms of the respondent's own fitness to practise procedures set out in the preceding paragraph, reasons were undoubtedly required from both bodies. The reasons given – which were produced as an integral part of the respondent's fitness to practise procedures, and are not an artefact of the subsequent legal proceedings – leave an informed reader in no real or substantial doubt about the basis for the decisions taken, thus passing the applicable legal test. As already noted, the essentially undisputed factual background disclosed behaviours and attitudes on the part of the petitioner which, to say the least, seriously called into question his suitability to continue on his course. The health difficulties which previously had provided some degree of mitigation for him had resolved without apparent improvement in the matters in concern. Most if not all of the ways available to divert him from the path he was treading had already been tried, and had failed. The Panel decided that his exclusion from his course was the appropriate way to deal with the situation which thus presented itself. That was a matter for it to decide in the first instance, and for the Appeal Committee to approve or reject on review. In this aspect of the case, I cannot substitute any view of my own for theirs save where theirs was thoroughly unreasonable. Given the lengthy history of the petitioner's unsuccessful attempts to make satisfactory progress on the final year of his course, despite opportunities and assistance being afforded

to him, the decision that was made, far from being at the irrational or unreasonable end of the spectrum, appears when matters are viewed objectively to have been very much an option available to the Panel to choose and for the Committee to endorse.

Refusal of remedy

[53] The petitioner's case, whether presented in terms of supposed breaches of procedural fairness, error of law or irrationality, or as a combination of all of these, accordingly fails. In these circumstances it is neither necessary nor indeed possible to decide whether any remedy which might otherwise have been available to him on account of some procedural defect would nonetheless have been withheld on the basis of the apparent inevitability in any event of the ultimate outcome. Counsel for the petitioner submitted, on the basis of the relative authorities cited at paragraph 12 above, that the refusal of such a remedy could only occur in exceptional circumstances, and counsel for the respondent accepted that. I entirely agree. Only where the court is quite persuaded that whatever defect had emerged in the procedure being examined could have made no conceivable difference to the outcome would it be appropriate even to consider the refusal of a remedy otherwise due. Such circumstances are likely to arise very rarely indeed.

Conclusion

[54] For the reasons stated, I shall sustain the respondent's second and third pleas in law, repel the petitioner's pleas, and refuse the prayer of the petition.