

COUNCIL FOR HEALTHCARE REGULATORY EXCELLENCE

NOTE OF CASE MEETING ON 6 JUNE 2004

AT 11 STRAND, LONDON WC2

Re: Mr Duncan John MacDonald

PRESENT: Jane Wesson (Chair)
Professor Kieran Walshe
Professor Norma Brooke

IN ATTENDANCE: Professor Julie Stone (Deputy Director)
Briony Mills (Fitness to Practice Officer)
Len Murray, Associate, Baker & McKenzie (Legal Adviser)
Andrew Hill, Associate, Baker & McKenzie
Cecilia Fletcher, Associate, Baker & McKenzie

Definitions

In this note, the following abbreviations will apply:

Case meeting of council members	the meeting
Professional Conduct Committee	PCC
General Dental Council	GDC
Mr Duncan John MacDonald	Mr MacDonald
Katherine June Davies	Mrs Davies
NHS Reform and Health Care Professions Act 2002	the Act
Temporomuscular joint dysfunction	TMJ
Serious professional misconduct	SPM

The PCC's Decision

The meeting considered whether the decision of the PCC of the GDC on 15 April 2005 finding Mr MacDonald guilty of serious professional misconduct ("SPM") and imposing a 4 month suspension on his registration, should be referred to the High Court under section 29 of the Act.

Documents

The following documents were before the meeting:

- (a) Transcript of the hearing dated 14 and 15 April 2005
- (b) Exhibits before the PCC hearing
- (c) Determination of the PCC dated 15 April 2005
- (d) Report prepared by Baker & McKenzie dated 3 June 2005

Conflicts of Interest

The Chair informed the meeting that the members convened had no apparent conflicts of interest and no conflicts of interest were registered.

Matters noted by the meeting

The meeting noted the matters set out below:

Background to PCC's findings

1. The charge of SPM concerned Mr MacDonald's actions during his period as a locum dental practitioner in an Exeter surgery where he worked between 6 October and 20 November 2003. After completing his locum tenure, Mr MacDonald handed in a prescription to a local pharmacy for 50 20mg tablets of the drug temazepam. The unusually high dosage of the self prescription, coupled with the fact that it had been prescribed by a dentist, was of concern to the dispensing pharmacist; who considered it usual to prescribe 28 tablet strips at a time. When Mr MacDonald arrived to collect his prescription he was detained, and subsequently searched and arrested by police. On searching Mr MacDonald's house, the police found 56 20mg temazepam tablets issued for Mrs Davies, but only recovered 40 of those.
2. During his police interview, Mr MacDonald stated that he had been self-prescribing over the course of about 9 or 10 weeks. Under cross-examination before the PCC, there was some confusion as to the number of times Mr MacDonald had in fact self-prescribed. On questioning from the PCC, Mr MacDonald clarified that he thought he may have self-prescribed on 'about 3 occasions' (court transcript page 30).
3. Mr MacDonald's evidence as to his excessive dosage was accepted by the PCC. In particular, during police interviewing, Mr MacDonald explained that he would take one or two tablets in the evening before going to bed, one tablet in the morning and sometimes one during the course of his working day, which by his own admission was a heavy dosage. During cross-examination, Mr MacDonald sought to re-interpret his evidence, asserting that he had been confused during the police interview and that he meant that he took one tablet either at night or in the morning or during the day.
4. Mr MacDonald explained in his evidence to the PCC that the reason for his self prescribing temazepam was to alleviate the pain associated with his suffering of TMJ, which was brought on by stress. TMJ sufferers grind their teeth. The PCC found that Mr MacDonald's self-

prescription was for a dental purpose, on the basis that a dental purpose could mean any dental purpose and the sole purpose of the prescription need not have been dental.

The PCC's findings

5. The PCC made a number of findings in relation to Mr MacDonald. In particular:
 - (a) Mr MacDonald's practice of self prescribing was in clear breach of the GDC's ethical guidance *Maintaining Standards*.
 - (b) The quantities of temazepam in the prescriptions were excessive, which are usually prescribed in packets of 28 tablets, and that Mr MacDonald was taking these without medical supervision, and that such quantities had the potential of putting him in a position where he may have been a danger to himself, his patients and the public.
 - (c) Mr MacDonald had prescribed for his partner, Mrs Davies, on one occasion, without recording her medical history or diagnosis, the clinical findings or the prescription itself.
 - (d) These actions were inappropriate, an abuse of his professional position and amounted to SPM.
 - (e) The PCC had before it details of Mr MacDonald's previous appearance before a PCC in 1997 which resulted in his subsequent erasure from the Dentists' Register. Mr MacDonald had been found guilty of SPM for complaints amounting to the inefficient running of his practice and clinical failings in respect of one patient. The PCC noted that the actions leading to erasure were different in nature from those actions which brought Mr MacDonald before the PCC in April 2005.

Undue leniency

6. As a preliminary issue, the meeting expressed concern that no specific charge had been made against Mr MacDonald for his failure to take into account Mrs Davies' medical history, or to record any clinical findings or his prescription for her. This may have precluded the PCC from giving proper consideration to the implications of Mr MacDonald's conduct. The meeting considered this led in part to the underlying issues in the case not being sufficiently

investigated. The meeting also considered whether potentially this matter had been under-prosecuted.

7. The meeting considered the evidence that was before the PCC which appeared to demonstrate Mr MacDonald's possible addiction to temazepam. In particular, the meeting noted the excessively high dosages of temazepam that Mr MacDonald had obtained and that he said in his evidence to the police he took on a daily basis. The meeting also considered the letter from Dr Evans (Mr MacDonald's GP) dated 11 May 2004. Dr Evans had been Mr MacDonald's GP since April 1994.
8. This letter described Mr MacDonald as having had symptoms of anxiety and depression since he consulted with his GP on 1 December 2003. The letter describes how Mr MacDonald continued to be prescribed certain anti-depressant drugs as well as temazepam. Dr Evans records that at the date of the letter temazepam was still being prescribed but the dosage was being reduced. Dr Evans referred only to the first incident of self-prescribing by Mr MacDonald. He may therefore have been unaware of the other incidents and Dr Evans states that in summary Mr MacDonald has been suffering from a depressive illness with insomnia as a feature. In Dr Evans' view, in the initial phase of the illness Mr MacDonald self-prescribed temazepam.
9. The meeting also noted the submission of Mr MacDonald's counsel, recorded at page 48 of the transcript, in which he quoted from *Maintaining Standards* and commented that misuse of drugs, particularly if this involves an abuse of a dentist's prescribing powers, may lead to a charge of SPM. Mr MacDonald's counsel put forward the argument that if the PCC were to find that there were bona fide reasons for the prescribing of the temazepam then this would not be a case involving misuse of drugs. The meeting noted that Mrs Davies' evidence was not necessarily convincing that she was also using temazepam (she said in evidence that she did not like to take these pills) and that Mr MacDonald may have been using some or all of the tablets he prescribed for her.
10. The meeting noted that the GDC had not referred Mr MacDonald's case to the Health Committee before the PCC stage was reached and did not appear to consider whether it would be appropriate for the case to be dealt with by the Health Committee. In the absence of any reference to the *Crabbie* judgment, the meeting considered that the PCC may have implicitly taken into account the fact that there had been a previous conduct case in respect of Mr MacDonald in deciding to pursue the allegations as a conduct case rather than referring the

matter to the Health Committee. Apart from this, the meeting also did not consider further Mr MacDonald's previous erasure from the register. Given the matters noted by the meeting that might suggest possible addiction by Mr MacDonald, together with Mr MacDonald's apparent lack of recognition of this issue, the meeting considered that it may have been appropriate for the PCC to have referred the case to the Health Committee. However, having not done so, the PCC should have properly considered the possibility of addiction particularly in relation to the appropriate sanction to protect the public.

11. The meeting considered that the PCC may not have considered the available evidence as to the underlying reasons why Mr MacDonald had been prescribing, or may have failed to give proper weight to this evidence. Instead, the PCC made an unsustainable finding that the prescribing was for a dental purpose. On this basis, imposing a 4 month suspension may have been unduly lenient as this sanction would allow Mr MacDonald to return to practice at the end of this period without addressing the underlying issue that he may be dependent on temazepam.

Public Protection

12. The meeting considered that patient and public protection issues were raised by the possibility that Mr MacDonald was dependent on temazepam and/or was treating patients whilst taking large doses of temazepam. The meeting noted in particular the evidence from Mr MacDonald that was before the PCC as to the amount of temazepam Mr MacDonald required in order to complete a working day. The meeting considered the patient and public protection issues arising from Mr MacDonald practising under the influence of temazepam. Mr MacDonald himself gave evidence that whenever he prescribed temazepam for a patient he would warn the patient not to operate machinery the next day. When questioned on this, Mr MacDonald accepted that dental surgery required operating machinery and he continued to treat whilst taking temazepam.
13. The meeting noted that the PCC had referred to the testimonials in support of Mr MacDonald and that there had been no complaints from patients during the period he had been restored to the register. Although there had not been direct harm to patients to date, there was a risk of this if the potential underlying reasons for Mr MacDonald's conduct were not addressed.
14. The meeting considered the fact that the PCC had accepted Mr MacDonald's evidence that his use of temazepam was for a dental purpose. However the meeting considered that although

the PCC accepted this, the fact that Mr MacDonald's use of temazepam was said to be to alleviate symptoms of TMJ was not conclusive that he did not suffer from an addiction. For example, the PCC placed reliance on Mr MacDonald self-prescribing temazepam to help him stop grinding his teeth. However, in this instance the PCC did not go further and consider whether Mr MacDonald's stress and anxiety was causing this physical symptom and the implications of this on why he had been self-prescribing temazepam.

15. The meeting considered that the PCC had not adequately considered public protection issues arising from Mr MacDonald's possible addiction to temazepam. These issues were not addressed by a suspension of 4 months which allowed Mr MacDonald to return to practice without supervision and without any conditions on his registration.

Whether other sanctions would better protect the public

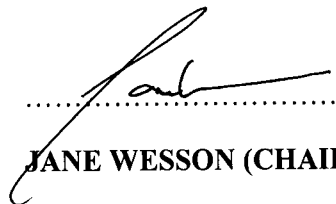
16. The meeting considered whether other sanctions available to the PCC might better protect the public. The options available to the PCC were suspension for a period of up to 12 months or erasure from the register. The PCC could also have given an admonition or postponed judgment. However, none of these sanctions would have addressed the undue lenience and public protection issues identified by the meeting.
17. The meeting considered whether the PCC should have imposed suspension for a period longer than 4 months. The meeting considered that because the GDC could not hold a resumed hearing at the end of the period of suspension and/or impose conditions, suspension for a longer period would not address the public protection issues.
18. If the PCC had found that the temazepam Mr MacDonald obtained was not for a dental purpose (a finding the meeting considered that the PCC should have made on the evidence before it) and had taken into account properly the matters in the material before the PCC indicating that Mr MacDonald may be dependent upon the drug, then without having satisfied itself of the true extent of Mr MacDonald's dependency, the PCC could not have reasonably imposed a sanction that allowed Mr MacDonald to remain on the register and which allowed him to return to practice without establishing his fitness to do so. Given the constraints on the sanctions available to the PCC because of the GDC's statutory scheme, in particular that it was not possible to direct that there be a resumed hearing or to impose conditions on Mr MacDonald's practice, the meeting therefore considered that erasure was the sanction the PCC should have imposed that would have provided appropriate protection to patients and the

public. However, given that this case involves a potentially incorrect finding, the meeting acknowledged that an alternative sanction to erasure would be to remit the case to the PCC with directions from the High Court particularly in relation to the PCC's finding on the purpose for which the temazepam was obtained.

Conclusion

The meeting concluded that:

1. It had jurisdiction under section 29(4) of the Act to consider whether or not to refer this case to the High Court.
2. Based on the matters noted at paragraphs 1 to 18 above, the PCC's decision was unduly lenient as to the penalty imposed and it would be desirable for the protection of members of the public for the Council to take action under section 29 of the Act.
3. The section 29 criteria had been fulfilled and the meeting's view is that it should exercise its discretion to refer this case to the High Court.


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JANE WESSON (CHAIR)

14.6.05
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DATED

