NHS TRIBUNAL (SCOTLAND)

Statement of the Tribunal

In relation to the Representations of

Dr Mustafa Mustafa – Complainer

Against

Mr Saranjit Nandhra – Respondent

1. Background.

The Complainer is a registered specialist orthodontist. He undertook work for the Respondent's practice, Sayegh Orthodontics Limited, as a self-employed Associate for a period between January 2011 and 28 January 2022, when he was removed from the business with immediate effect. The termination of that business relationship was acrimonious and resulted *inter alia* in proceedings being brought by the Complainer before an Employment Tribunal, which made certain findings as to the nature and terms of the contractual relationship between the parties.

The current proceedings were first brought by the Complainer in November 2022. In terms of s.29(3) of the National Health Service (Scotland) Act 1978 ("the Act") and Regulation 8 of the National Health Service (Tribunal) (Scotland) Regulations 2004 ("the Regulations"), where Representations are made by someone other than a Health Board, the Tribunal requires to undertake a preliminary assessment in order to determine whether or not good cause has been shown which would justify the holding of an Inquiry. The Act also sets out the three statutory conditions for disqualification. These are known as the "efficiency" ground (s.29(6)); the "fraud" ground (s.29(7)); and the "suitability" ground (s.29(7A)).

In his original Representations, the Complainer alleged that the fraud and suitability grounds were established. Following a preliminary meeting on 16 December 2022, the Tribunal exercised its power under Regulation 7 of the Regulations and requested further particulars from the Complainer, which were duly provided in the form of amended Representations on 27 February 2023. Those representations also alleged that the fraud and suitability conditions for disqualification were engaged. The Complainer has not at any stage sought to establish that the efficiency ground was engaged.

At a further preliminary meeting on 17 March 2023, the Tribunal accepted the Complainer's amended Representations for Inquiry. These were duly intimated to the Respondent, triggering a process which resulted in Answers being lodged on the Respondent's behalf and culminated in an evidential hearing that took place over three days on 1 November 2023 and 24 & 25 February 2025.

Evidence was heard from the Complainer; Mr Mansour Marouf; Mr Gennaro Capuano; the Respondent; Mr Jasbir Nandhra; and Mr Phillip Sweeney. Written submissions were then exchanged in March 2025 and a hearing on these submissions took place on 2 April 2025.

The Tribunal wishes to record that there was a very lengthy and regrettable delay in concluding the hearing of evidence in this matter. The Chairman took ill in the evening following the first day of evidence and although further days were assigned in the hope of a recovery being made, he was unable to resume sitting for a period of several months. This unfortunate delay was then compounded by the ill health of the Respondent and the withdrawal from acting of his previous solicitor on the eve of further days of evidence scheduled for early December 2024. Accordingly, having heard the first day of evidence on 1 November 2023, the second and third days of evidence could not be heard until 24 and 25 February 2025. That delay was most unfortunate, but the Tribunal would like to thank parties for their forbearance and record that it has been greatly assisted by the provision of a substantial joint bundle of productions (supplemented by additional productions for each party following the appointment of new solicitors by the Respondent) and by the parties' detailed written submissions.

It should be noted that, although the parties produced a joint bundle of documents, these were not agreed documents in the sense of parties accepting that they were what they bore to be or that their contents could be taken as read. Such documents included emails and records that were not spoken to by any witness, meaning their contents could not be tested through cross examination. As such, those documents fall to be treated as untested hearsay evidence and the Tribunal has afforded them extremely limited weight, as befits evidence of that nature.

2. <u>Findings in Fact.</u>

The Tribunal was ultimately faced with five factual allegations and its decisions on each one, and its reasoning, are as follows:-

Allegation	
Allegation (a) - The respondent prevented a colleague (Mustafa Mustafa) from continuing to provide his duty of care, without providing any notices to the dentist, his patients or the Health Board.	Found not proved. This allegation relates to an alleged failure on the part of the Respondent to advise the Complainer's patients about his new working arrangements or allow the Complainer to continue treating them following his departure from the Respondent's practice. It is central to this allegation that these patients being treated by the Complainer at the time of his departure were "his" patients, as opposed to those of the practice; and that those patients had a right to be informed not only about the fact that the Complainer had left the

Respondent's practice, but also where he was going.

Although the allegation refers to notice being given to the referring dentist and the Health Board, the gravamen of the allegation lies in the failure to inform patients and the failure to allow the Complainer to continue treating them. Referring dentists are generally not informed of the transfer of care as between orthodontists in a practice, such referrals normally being made to the practice rather than to an individual. Insofar as the Health Board was concerned, it was informed of the position when courses of treatment were closed and reopened under new list numbers. This accords with the standard process for informing Practitioner Services, and is also what the Respondent told the Complainer he would be doing in his email of 28 January 2022, immediately upon the Complainer leaving the practice.

Insofar as patients are concerned, for this allegation to have any merit in the sense of some culpability attaching to it, it is fundamental that at the relevant time, the Complainer had premises from which to operate and was in a position to be able to continue treating NHS patients through the NHS scheme.

The Complainer's own evidence showed that he did not have NHS premises suitable for operation, or a list number, for a period of approximately two months after leaving the Respondent's practice (he got a new list number on 22 March 2022). It is not entirely clear when the Respondent became aware of this new list number, but it is unlikely that this was immediately upon the Complainer obtaining the same. The Complainer's evidence was that he did not tell the practice his new list number, whilst the evidence of Mr Sweeney was somewhat vague and inconsistent as to when the practice found out about the list number. However, there is no doubt that the Respondent knew that the Complainer did not have a list number immediately and he could not have

known about it until 22 March 2022 at the very earliest.

That being so, for that two-month period at least, the Complainer was simply not in a position to offer NHS treatment and so patients could not have been offered the choice of the Complainer continuing with their treatment, at least without delaying that treatment.

In order to ensure continuity of care for patients, it would not have been possible for the Complainer to have taken those patients straight away. Patient choice and autonomy is a fundamental tenet within the practice of dentistry and had the Complainer been in a position to have commenced treatment of NHS patients straight away, then a failure on the part of the Respondent to advise patients of his known whereabouts may have given more force to this complaint. The Tribunal reaches no concluded view on this point. However, the circumstances were such that this was not possible and the need for continuity of care was paramount.

There was no evidence that patient care was compromised by the Respondent's actions: quite the reverse, the provision of ongoing care would have benefited patients in circumstances where the Complainer could not have continued to see them as NHS patients pending receipt of his new list number.

In the period after the Complainer obtained a list number for his new premises and after the Respondent found out that his new premises had the benefit of a list number (whenever that was), the Tribunal finds on the balance of probabilities that the Respondent and his staff did not tell patients where the Complainer was working. Although the evidence on the issue of what patients were told was not entirely clear (no patients whatsoever having been called as witnesses), based on the evidence of the Respondent, Mr Jasbir Nandhra and Mr Sweeney, the Tribunal finds that the

Respondent's staff merely advised patients that the Complainer had left the Respondent's practice. Patients were introduced to other members of the Respondent's staff who took responsibility for their care thereafter. It was left up to these patients to track the Complainer down if they wished.

In this connection, the Tribunal notes that the parties' contract, clause 11, designated such patients as patients of the practice and entitled the Respondent's practice (in a question as between the Complainer and Respondent) to continue with the treatment of the patients for whom the Complainer had been responsible. This private contractual provision does not override the requirement to give patients choice, but it is at the very least indicative that both parties viewed the patients as being those of the practice rather than the Complainer, which further reinforces the merit and appropriateness of the Respondent's approach towards patients in the present case.

Orthodontics is a lengthy process in which many functions are delegated from orthodontists to others, such as therapists. Patients are therefore used to seeing more than one practitioner during the course of treatment and it is not uncommon for orthodontists to review notes and treatment plans and to see existing patients that they had not seen previously. Accordingly, the private contractual arrangement between the parties also accords with the reality of orthodontic treatment and the Tribunal finds no tension between the Respondent's interpretation of the contract and his application of it, and the reality of everyday orthodontic practice.

Finally, for completeness, the Complainer contended that he still had his list number for the Respondent's premises and that he could have continued to see his patients there, but the Tribunal rejects this submission as being wholly unrealistic in circumstances where the Complainer's contract had been terminated with

	immediate effect and the relationship of trust and confidence between the parties had broken down irretrievably.
Allegation (b) - The Respondent conspired and encouraged the use of the log in details of another colleague (Mustafa Mustafa) to make claims under his name.	Found Proved, but found not to be a culpable act. This allegation relates to the use by the Respondent's practice of the Complainer's Unique Transmission PIN ("UTP") to process claims following his departure, without his consent. The records demonstrate that claims had been made for a period of time after the Complainer left the Respondent's practice, which would have necessitated the use of the Complainer's UTP. The Respondent did not deny that this had happened and there was ultimately no dispute that it had, albeit parties had very different views of the motives underlying this. The Complainer alleged this was done fraudulently with a view to the Respondent treating the Complainer's patients and securing income which was rightfully due to the Complainer; whereas the Respondent viewed this as being a mechanism by which the courses of treatment for patients that had been treated by the Complainer could properly be closed and re-opened / re-allocated to others within the Respondent's practice, allowing the practice (and the Complainer) to receive the income for the work which had been done and allowing the income for future patient appointments to be credited to the practice and the subsequent treating practitioner. The Respondent contended that there was no evidence of any conspiracy and nor was there any evidence that he used the Complainer's UTP himself. The Tribunal accepted those submissions, however as a director and 50% co-owner of the business, the Tribunal finds that the Respondent does bear responsibility for those practice managers in the employment of

the business who may have used the Complainer's UTP as a means of securing money for that business and, by extension, for his personal benefit.

The Tribunal has some concerns about the use of the UTP by third parties without the knowledge or input of the Complainer. This clearly created a risk for the Complainer. The standard letter from Practitioner Services generated when a UTP is issued makes clear that a UTP is the electronic signature of a practitioner, the use of which carries both a significant degree of responsibility and potentially liabilities. The practitioner is responsible for claims made in his name and any mistake or impropriety in these claims would be actionable against him in the first instance. However, despite this "health warning", the Tribunal also notes that the letter expressly contemplates the use of the UTP by others within the practice. Such use is commonplace within dentistry and the Complainer takes no issue with this having happened while he still worked at the Respondent's practice: the issue in this case is the use of his UTP after he left.

The Respondent terminated the parties' contract summarily in January 2022. The contract does not make any express provision which governs this position or which would have entitled the Respondent to consider that his practice could continue to use the UTP without the Complainer's consent. However, in the circumstances, the Tribunal was not satisfied that its use post-termination was a culpable act on the Respondent's part. The course adopted, although sub-optimal, was a practical means by which courses of treatment in the Complainer's name could be closed and transferred to others within the practice; or money recovered for treatment undertaken prior to the Complainer's departure. The Respondent's practice had the clinical notes on which to base claims and there was no evidence presented to the Tribunal which persuaded it that any inappropriate or incorrect claims were made. There was no suggestion of any issue having been raised by

Practitioner Services with the Complainer and there was insufficient evidence for the Tribunal to be satisfied that the Complainer had been disadvantaged financially because of the use of his UTP.

The Tribunal also considers that, from its own knowledge and experience and accepting the evidence of Mr Jasbir Nandhra on this point, there was no other sensible or practical means by which the Respondent's practice could have dealt with the transfer of patients within the practice and been paid for the work done (which in turn would allow the Complainer to be paid).

It would have been financially detrimental to both parties for this course not to have been adopted, particularly as claims that are not submitted within three months of the patient's last attendance cannot be claimed. The failure to close courses of treatment and transfer them would also have left the Complainer in the impossible position of still being responsible for these patients but with no way of treating them or accessing their records.

The Tribunal also notes that the Respondent wrote to the Complainer on 28 January 2022 (Production 13 in the Joint Bundle) advising that "SOL will organise and process the transfer of your patients". The way in which that would naturally be done was using the Complainer's UTP, and it is noted by the Tribunal that the Complainer did not demur or contact the Health Board to cancel his list number and, consequently, his UTP. In the Tribunal's opinion, the absence of any complaint by the Complainer about this course is not enough to have allowed the Respondent to continue to use the UTP, but it offers strong mitigation.

Further, clause 11 of the parties' contract indicates that the income for the patients should be paid to the practice, which might have been thought to provide an ongoing mandate for the use of the Complainer's UTP in order to effect an orderly transition and payment process. That

	view, whilst logical to some degree, would be mistaken, however, because in the Tribunal's view, no contractual arrangement between the parties could override the Complainer's fundamental and overriding duties to the Health Board when using his UTP. The responsibility for its use was his, and the circumstances in which it was used following his departure from the practice meant that he had no oversight or control of its use whatsoever. The Tribunal notes the Respondent's submission that *"the Respondent has reflected on this situation and understands that the use of the Complainer's UTP after his termination should most probably have been done with further express consent from the Complainer given he was no longer working with the Respondent's company and had left in unprecedented circumstances and without the usual notice period."* The Tribunal respectfully agrees with this submission and would therefore not endorse the approach taken by the Respondent's practice, but nor was it considered by the Tribunal to be an egregious or fraudulent act. It may be advisable for Practitioner Services to consider whether the process for closing courses of treatment and reopening them under a new list number would benefit from some modification, to make it easier in circumstances where use by a practice of a practitioner's UTP is inappropriate or impractical. In all the circumstances, the Tribunal finds as a matter of fact that the Complainer's UTP was used without his consent after he had left the practice, therefore the factual basis of this allegation is found proved. However, the Tribunal considers that, although inappropriate, this was a reasonable and understandable act on the part of the Respondent's practice and it therefore finds that this was not a culpable act or one deserving of the Tribunal's opprobrium.
Allegation (c) - The respondent exercised unlawful collection and confiscation of another	Found not proved.

colleague's earnings to the Respondent's company's financial benefit.	At the heart of this allegation is an assertion that the Health Board was due to pay money to the Complainer which the Respondent claimed and received on his behalf without then accounting to him for that money. There were two factors at play which bore on this allegation. The first was that private patients paid the Complainer for all their treatment in advance. When the Complainer left, those patients were then treated by others within the Respondent's practice despite the Complainer having received payment in advance for the full course of treatment. The second factor was that with NHS patients, payment was made at the conclusion / closure of a course of treatment. In the ordinary course, sums received by a departing Associate in advance for private treatment would be set against an Associate's share of sums received by the practice in arrears for NHS patients. A reconciliation of sorts was produced for the Tribunal, but the evidence on this, even for the Respondent on whose behalf the reconciliation was produced, was that this was not reliable. It had only been produced by Mr Sweeney at the request of the Respondent's solicitor in January 2025. What had been done, essentially, was to divide the income received from the Health Board under the NHS Scheme by the number of visits by the patient. The aim of this was to work out what the Complainer was due for treatment of NHS patients. However, this simplistic approach ignored the fact that the bulk of the work was undertaken in the assessment and treatment planning stage. On top of this, there was a degree of opacity in the sums paid to the Complainer by private patients and the stage at which their treatment had reached when he left the Respondent's practice. The reconciliation produced by the Respondent was therefore rejected by the Complainer and the Tribunal is unable to accord any significant weight to it. However, whatever the limitations of that reconciliation, there was no other

	satisfactory evidence before the Tribunal as to what a "correct" reconciliation would look like. The information made available to the Tribunal generally on this subject was scant, thus the Tribunal was simply unable to make a finding one way or the other as to whether or not sums were due to the Complainer. The Respondent submits that the Complainer has repeatedly been unable to quantify what he claims is due. That the Complainer has been unable to do so is perhaps understandable, in view of the lack of information which the Respondent appears to have provided, some of which will come from records to which the Complainer has no access. The Respondent wrote to the Complainer on 28 January 2022 (production 13) confirming that the Respondent would make any residual, outstanding payments due in the usual manner. That was followed, on 29 March 2022 (production 18 in the joint bundle) with an undertaking that he would provide an accounting, but this appears never to have happened. It was Mr Sweeney's evidence that he was never asked to do this prior to January 2025. However, the onus of proof on this issue lies with the Complainer and in the absence of sufficient evidence to satisfy the Tribunal that sums are due to the Complainer, the Tribunal finds this allegation not proved. The Tribunal notes that the issue of payment allegedly due to the Complainer seemed to be a key trigger for these proceedings and indeed for the broader dispute between the parties more generally. Many of the issues in this case could have been focussed better, if not resolved, by greater dialogue and information being made more freely available by the Respondent at an earlier stage.
Allegation (d) - The respondent presented himself to the patients as an orthodontic specialist, contrary to fact, and in a deliberate attempt to persuade patients to accept him as an alternative practitioner to manage their case.	Found not proved. This allegation relates to an assertion that the Respondent is not a registered specialist orthodontist but that he held himself out as

such, for his own benefit and to the detriment of patients.

The Respondent accepts that, unlike the Complainer, he is not a registered specialist orthodontist. He is not registered as such with the General Dental Council. The Tribunal therefore had no difficulty in finding this primary fact established. However, as to the "holding out" element of the allegation, the Tribunal was not satisfied that the Respondent held himself out to patients as a specialist orthodontist.

It is well recognised that General Dental Practitioners can undertake orthodontic treatment without being on the specialist list. There was no evidence from any patient or member of staff that he did so. The Complainer gave evidence on this topic which ultimately amounted to no more than allegation and assumption.

There were documents produced in the form of a LinkedIn profile and a profile on the Invisalign website, which tended to suggest that the Respondent was a specialist orthodontist, but the Tribunal accepted the Respondent's evidence that although he bore a degree of responsibility for entries made in his name, he was not the person responsible for the specific wording of these adverts and did not know of their express terms. That is particularly so in the case of the Invisalign profile, although the Tribunal was less convinced by the LinkedIn profile given the number of contacts (125) and followers (145) the Respondent seemed to have.

Even if these profiles could have constituted "holding out", there was nonetheless no evidence to support the suggestion that any patients were misled or that the purpose of his doing so was to persuade patients to instruct him as opposed to the Complainer. The evidence of the parents of two patients led by the Complainer, that of Mr Capuano and Mr Marouf, did not support this idea and indeed the evidence of the Respondent, which the Tribunal

	accepted, was that he did not speak to these individuals or see the Complainer's patients following the Complainer's removal from the business. The Tribunal was not satisfied that there was any evidence of the Respondent presenting himself to patients as a specialist orthodontist. This allegation is accordingly not proved.
Allegation (e) - The respondent exploited the NHS emergency payment system (designed to encourage the maximum possible care), by artificially limiting the number of patients that can be seen, and attempting to solicit dentists under his control to do so.	Found Proved. It is important to set the context of this charge, all of which is within the judicial knowledge of this Tribunal. At the outbreak of the pandemic in March 2020, the Chief Dental Officer sent a letter to all dental practices ordering them to close. The only dental provision initially was in Urgent Dental Care Centres, for emergency care only. In August 2020, practices were allowed to reopen to see emergency patients and were permitted to undertake limited aerosol-generating procedures ("AGPs"). Even then, full PPE was required and surgeries had to be deep cleaned after every patient and the air allowed to settle. This made the process of seeing that limited number of patients extremely slow and laborious. By November 2020, more aspects of dentistry opened up, as practices re-mobilised. A full range of treatments was allowed from 1 November 2020, including AGPs such as the use of high speed drills. This applied to both urgent and non-urgent care, but numbers were still low to allow for appropriate precautions and socially distanced patient flow. It was therefore far from "business as usual" and patients had to be prioritised. That said, very little orthodontic work involves AGPs. Throughout the period of restrictions, NHS dentists and dental practices were supported financially by the Scottish Government. The primary purpose of this was to ensure the

viability of NHS practices throughout the pandemic and beyond. Dentists (and ultimately practices) were initially awarded top up payments of 80% of pre-Covid gross income (plus, in the case of general dental practitioners, capitation fees – but those did not apply to orthodontic practices). Because practices were not having to carry the usual outlays such as technicians' fees, many were likely to have been at least as profitable as before the pandemic, if not more so. They were being paid whether they saw patients or not.

As the pandemic moved to the re-mobilisation phase from 1 November 2020, the top up payments were increased to 85%. This figure (specified by the Scottish Government in October 2020) was originally intended to apply in the period from 1 November 2020 to 28 February 2021. The stated intention was that during this period, whilst patients could be seen, the top up payment was to apply irrespective of the number of patients seen. However, the level of payment was then to become dependent on the number of patients seen from 1 March 2021 onwards. From that date, if the throughput of patients was more than 20% of pre-pandemic levels, the practice would receive the full top up payment; if the throughput was between 10-20% of pre-pandemic levels, the practice would receive 80% of the top up; and if the throughput was less than 10% of pre-pandemic levels, the practice would get 40% of the top up.

The clear purpose of both remobilisation and the announcement that there was to be a correlation between the number of patients seen and the level of top up payments to be paid was to encourage an increase in the number of patients being seen.

In December 2020, there was a surge in Covid cases and the country went back into lockdown on Boxing Day of that year. The Chief Dental Officer wrote to all practices on 5 January 2021 advising that this tiering system would be

delayed by three months, which meant that all dentists and ultimately practices would still receive the top up payments of 85% of pre-Covid gross income until 31 May 2021, irrespective of the number of patients seen. Top up payments were then to be re-calculated according to the number of patients seen from 1 June 2021. Throughout this period, however, it is important to note that practices were not closed. They could still see just as many patients and undertake all of the treatments which were permitted when the remobilisation began on 1 November 2020.

These provisions only applied to NHS practices. They did not apply to private practices.

It is important to view the correspondence and to consider the evidence and submissions of parties in this important context.

Turning to the matter at hand, the nub of this allegation lies in emails that the Respondent wrote to colleagues within the practice on 18 and 19 January 2021. This, as set out above, was still during the period of Covid restrictions. It was alleged that these emails effectively instructed staff to stop seeing as many NHS patients because the practice was not going to get paid any more for doing so.

The relevant email of 18 January 2021 reads:
"1. Please ignore figures Samir sent to you regarding the amount of money each practice has to claim to maintain the grant. Samir gave each practice figures that needed to be claimed to maintain the grant. The grant is now guaranteed with no submissions required up till June. As things stand, each practice will need to submit X amount as of June. ***I*** *will supply the figures nearer the time.*
2- To generate a big schedule payable in February, SOL practices have been working flat out including Saturday. This is no longer necessary. No further Saturdays are to be worked as of February. We might need to restart

them second half of April_ If there are any Saturdays open in February but full, then don't cancel.
*3- After this week when all the debond claims have been sent, **I** think we should slow down on the number of patients we see daily. This is because we are still getting the grant whether we see 10 or 100 patients. We will need to delay seeing new patients and recalls. We only need to keep Renna super busy as her income is extra so book her new patients and make sure that her approvals are sent off on a timely manner.*
***4.** Katy, your primary role with your and new assistant is TC for fife and London street. Samreen is apparently struggling and needs support. Your other two duties are to deal with staff complaints , contracts such as electricity and services and to look after myself and Jas until we have mastered the Scottish system.*
***I** want to thank you all for the hard work you put in with regards to these horrendously large number of debond claims.*
***I** know it has been stressful. I am open to suggestions as to how we can make this exercise easier in the future.…".*

There was a further email exchange produced dated 19 January 2021. An email had been sent by Nick Baker on that day, which was not fully reproduced, but the Tribunal was made aware of the first line of it which read:
"*Here's a suggestion to guarantee that we all have approved cases ready to go once the 'grant' stops."*

The Tribunal was not told what this suggestion was, however in response to this email, the Respondent emailed round the practice later that evening and stated:
*" As always, **I** find that Nick is our logical and common sense voice.*
*Nick, I agree with you completely. **I** want the staff to have a chance to catch up on other business unrelated to claims in February. Also, the new patients need addressing, but **I** am open to suggestions about when we see them. Renna*

is not fully busy right now, so my priority is to get her up to speed. We have more than the number of new
patients and recalls and retainers check to get everyone busy post grant.
Nick, I agree that we need to see new patients so that we can send off approvals , and we will do this soon.
At the moment I think let's just slow down, keep expenses low and reevaluate in a few weeks. Please let me know what your options are. Thanks."

It was suggested by the Complainer that these emails represented a deliberate policy to slow down on the number of patients being seen, that was driven by the pursuit of profit rather than patient care, and that it resulted in damage to patient interests because of, for example, waiting lists increasing. In summary, the suggestion was that the Respondent was "gaming the system". The Respondent's position in response was that this policy was adopted in order to give overworked staff a much needed break and a rest following a particularly difficult period. The Respondent also submitted that this allegation must fail because of lack of specification and because there is no evidence that the Respondent treated any more or any fewer patients than was required by the scheme in place at the time.

In relation to the lack of specification point, the Tribunal rejects that argument. It is tolerably clear that the allegation relates to the temporary payment arrangements introduced to ensure preservation of practices through continuity of income during the pandemic when few or no patients could be seen.

The Tribunal also rejects the Respondent's evidence that this direction was given only to give staff a break. It is clear from the terms of the email that this was being done to maximise income for the practice at the expense of NHS patient care. The sentence which reads "*This is*

because we are still getting the grant whether we see 10 or 100 patients" explains the rationale and the Tribunal was satisfied that it was financially motivated rather than driven by concern for overworked staff. In the same email it is acknowledged that this will result in delays for both new patients and recalls, which by inevitable implication would result in detriment to patient care.

Furthermore, the instruction to "*slow down on the number of patients we see daily*" amounts to an instruction to limit the number of patients being seen. The reason set out for this is not to do with any lack of available capacity: it was quite simply because the practice would not benefit further financially. That financial motivation is further evidenced by both the first and second paragraphs in the email of 18 January 2021, which make clear that the top up payment was the prime driver; and the passage in the email of 19 January 2021 which reads "*We have more than the number of new patients and recalls and retainers check to get everyone busy post grant.*" Although inelegantly phrased, the Tribunal takes this as a clear instruction to "queue" patients so that when the universal top up payment was to come to an end in June 2021, the practice would benefit from a higher number of patients being processed thereafter.

There is reference in the correspondence to staff having worked hard on debonding "*a horrendous number*" of patients. In orthodontics, "debonding" relates to the process by which claims are submitted where treatment is completed. This would have been done at that time to evidence the number of patients being seen in order to influence future top up payments. The Tribunal accepts that staff would have been working hard on these, but this was for the financial benefit of the practice. When the tiering system for payment of the top up payments was delayed, the Respondent quite deliberately instructed colleagues to slow down and to plan for an increase only in June when

the tiering system was ultimately to be implemented.

The Tribunal considered that had the need for a slowdown been to give staff a break and look after their welfare, as he said in evidence, the Respondent would have said so in these emails. However, he did not do so. Instead, he tied this slowdown squarely into the payment of the grant, thereby prioritising profit over patient care. The Tribunal rejected his and Mr Jasbir Nandhra's evidence on this point.

It should be noted that in his written submissions, the Respondent submitted that there is no evidence that any more or fewer patients were actually seen. This was a curious submission in circumstances where among other averments, the Respondent's Answers expressly aver as follows:

There was a transition period following COVID lockdown whereby there was the slowing down of patients seen within SOL….

….. Therefore, SOL had to reduce the numbers of patients attending at the practice…..

….There was no artificial limitation of patients but rather there was a limitation of the number of patients in accordance with the NHS operating procedures in place at that time. During the timeframes in which the patient numbers were reduced……

….. no emails/feedback were received by the Respondent disputing the strategy to limit patient numbers……

….. Therefore, given the support payments were made on the basis of the patient documentation submitted, the NHS were aware of SOL's patient limits and were by making payment, agreeable with them…..

	It has thus never been in dispute that patient numbers were, in fact, limited by the Respondent's practice and it is notable that the Respondent, being the party with access to information about the numbers of patients seen, did not lead any evidence about this. Rather, the issue in the case throughout was the motivation for the accepted reduction in patient numbers and in the Tribunal's view, the Respondent's instruction to reduce patient numbers did seek to exploit the NHS emergency payment system at the expense of patient care.

3. <u>Statutory Grounds for Disqualification.</u>

The Act provides (s.29(7)) that fraud occurs where the person concerned—

"(a) has (whether on his own or together with another) by an act or omission caused, or risked causing, detriment to any health scheme by securing or trying to secure for himself or another any financial or other benefit; and (b) knew that he or (as the case may be) the other was not entitled to the benefit."

Subsection 10 goes on to state—

"*Detriment to a health scheme includes detriment to any patient of, or person working in, that scheme or any person liable to pay charges for services provided under that scheme.*"

The Act also provides (s.29(7A)) that *"The third condition for disqualification is that the person concerned is unsuitable (by virtue of professional or personal conduct) to be included, or to continue to be included, in the list"*. There is no further guidance in the Act as to when this ground is engaged or what constitutes unsuitability, the only direction being that it relates to "*personal or professional conduct".*

The Tribunal first considered whether the facts found proved in Allegation (b) engaged either of these conditions for disqualification. It readily considered that they did not, whether alone or in conjunction with the facts found proved in Allegation (e). For the reasons set out above, the Tribunal is not unduly critical of the Respondent for the use of the Complainer's UTP after he left the practice, and had this been the only fact found proved, that would have concluded this Inquiry with no further finding or any need to consider disposal.

In relation to the facts found proved under Allegation (e), in making its decision, the Tribunal concluded that the rules around remobilisation and the payment of top up payments were poorly designed and constructed, such that they left the door open for exploitation by the unscrupulous. The top up payment of 85% was intended to act as a safety net to ensure preservation of practices and continuity of income. It was not intended to act as a lavish gift

or an invitation to be unethically abused for financial advantage. The clear intention behind remobilisation was to encourage practices to speed up seeing and caring for patients, in order to begin to tackle the backlog of patients awaiting care and to meet ever-increasing patient needs. The Tribunal recognises that the approach of the Respondent complied with the letter of the rules in force at that time, but in the Tribunal's opinion it plainly did not comply with the spirit of the provision of NHS services during the pandemic or, indeed, the dentist's primary obligation to put patient care first. Instead of endeavouring to increase or even maintain the number of patients being seen, during a period in which there was no change in the ability of his practice to do so, the Respondent chose to prioritise profit over patient care and "*slow down on the number of patients*". In its judgement, the Respondent's deliberate approach displayed a complete lack of concern for delivery on behalf of the NHS and / or for patient care. It was a conscious decision to adopt a tack which he knew would be detrimental to patients' interests for no reason other than to benefit his practice financially. The Tribunal considers that this amounted to exploitation of the system at the expense of both the NHS and patient care.

The National Health Service exists to provide high-quality healthcare that is free at the point of need, ensuring that all patients receive timely, effective, and compassionate treatment, regardless of their financial means. It aims to improve the health of the nation by delivering comprehensive care, reducing health inequalities, and using public funds efficiently to benefit the greatest number of patients.

The Respondent has undermined this purpose in two significant ways. First, he has incurred a financial cost to the NHS – drawing funds from the NHS without providing the expected volume or quality of care, thus diverting resources from other patients and services. Second, he has imposed a broader systemic burden – by reducing the availability of appointments, increasing waiting times, and ultimately impacting the overall health outcomes of the population the NHS is designed to serve.

In considering the statutory grounds for disqualification, the Tribunal first considered whether the fraud ground is engaged. After careful analysis, the Tribunal concluded that it is not. For this ground to be engaged, section 29(7) of the Act would require (a) an act or omission by the Respondent; (b) that has caused or risked causing detriment; (c) to a health scheme; (d) by securing or trying to secure for himself or another a financial benefit; which (e) he knew he / the other was not entitled to. In its analysis, the Tribunal considered that each of limbs (a) to (d) was satisfied. However, the Tribunal concluded that it could not say that the Respondent had secured a benefit to which he / his practice was not entitled. Whilst it has found that the Respondent exploited the system and that both the NHS and patient care suffered as a result, because the rules allowed the Respondent to do what he did, the Tribunal did not feel able to hold that the benefit derived was one to which the Respondent was not entitled. Accordingly, the fraud ground is not made out.

In relation to the suitability ground, the Tribunal considered that it has a wide discretion. Looking at dictionary definitions of the word "unsuitable", words and phrases such as "unfit", "unseemly", "not acceptable" and "not fitting or appropriate" appear. The Respondent's emails displayed a deliberate intention to limit the number of patients to be seen, in order to create a reservoir of patients who could be seen after the top up payment

was limited. The purpose of this was to be able to claim as much as possible once the tiering system came into effect, while in the meantime getting paid for doing as little as possible contrary to the purpose and spirit of the remobilisation process. This policy was at odds with the primary obligation of dentists to put patients interests first and contravened the spirit of rules that were designed to support dentists in doing what they could to maintain their practices and attend, so far as possible, to patient needs during the pandemic for the ultimate benefit of patients. Ongoing orthodontic patients would require regular appointments to monitor and influence progress. Reducing patient contact would therefore be detrimental to those patients who were mid-treatment. In the Tribunal's judgement, the Respondent exploited the system and artificially reduced the number of patients being seen for personal gain / the benefit of his practice, to the detriment of patients and the NHS which was paying the top up payments. That is conduct of a professional nature which the Tribunal considers to fall within the scope of the suitability ground for disqualification, notwithstanding that the rules permitted the unscrupulous to exploit them.

4. Sanction.

Where any of the grounds for disqualification are established, the Tribunal is directed to disqualify the Respondent from inclusion in the list (s.29B(2) of the Act). Disqualification can be conditional or unconditional. However, the Act provides that the Tribunal shall not make a disqualification if it is of the opinion that it would be unjust to do so.

In considering sanction, the Tribunal considered the available sanctions in ascending order, starting with no order at all on the grounds that an order would be unjust. The Tribunal saw no reason not to disqualify the Respondent in this case. It considered his conduct to be deliberate and calculated. It damaged the NHS and patients alike. It was motivated by self-interest. The Tribunal had no material before it that persuaded it that disqualification would be unjust. There was no mitigation offered: indeed the Respondent sought to justify his actions by reference to staff welfare, an explanation which the Tribunal rejected. In the circumstances, an order for disqualification is appropriate.

The Tribunal then considered whether conditional disqualification would be appropriate or suffice in the case. It reminded itself of the provisions of Section 29C of the Act, which provides:

(1) The functions of making disqualifications under section 29B include making a conditional disqualification, that is, a disqualification which is to come into effect only if the Tribunal determine (on a review under section 30) that the person subject to the inquiry has failed to comply with any conditions imposed by them.
(2) Conditions may be imposed by virtue of subsection (1) with a view to-
(a) removing any prejudice to the efficiency of the services in question;
(b) preventing any acts or omissions within section 29(7)(a);
(c) ensuring that the person~
(i) performs, undertakes to provide or assists in providing only services specified (or of a description specified) in the condition;
(ii) undertakes an activity (or course of activity) of a personal or professional nature, or refrains from conduct of a personal or professional nature, so specified (or of a

description so specified), (as the case may be).

Sub-paragraphs (2)(a) and (b) relate to the efficiency and fraud grounds. In relation to sub-paragraph (2)(c), the Tribunal did not consider that any conditions would be appropriate in this case. The Respondent has not displayed clinical failings which would be remediable or shown a lack of judgement in relation to which he has insight. Rather, in a time of national need, he has exploited a government scheme, putting profit and self-interest above patient care and the interests of the NHS. The Tribunal considered this to be conduct which renders the Respondent unsuitable for continued inclusion in the list and it did not consider that conditional disqualification would be adequate or appropriate.

5. Conclusion, Expenses and Order.

In summary, in respect of Allegation (e), the Tribunal finds the suitability ground for disqualification to be engaged and it disqualifies unconditionally the Respondent from inclusion in the list of Lothian Health Board and all other lists on which he is included, pursuant to Section 29(8) of the Act.

In relation to expenses, at the hearing on submissions, the Complainer's representative, a lay person, stated that he and the Complainer were presenting the case in the public interest and they did not wish to claim expenses in the event of success. The Respondent's solicitor submitted that expenses should follow success.

The Tribunal has discretion to award expenses in terms of Regulation 21(1)(g). In the present case, the Tribunal notes that the Complainer expressly does not seek any award of expenses. The Tribunal had regard to the fact that although the Complainer has been successful in that the Tribunal has made an Order for disqualification, many of the allegations made by the Complainer were found not proved. There was accordingly an element of divided success, despite the outcome. In all of the circumstances, the Tribunal adopts the course proposed by the Complainer as being the just one and finds no expenses due to or by either party.

The remain matter for consideration is that of suspension pending appeal.

Section 32B of the Act reads (so far as relevant):

*32B.- **Suspension pending appeal.***
(l) Where, on disposing of a case under section 29B , the Tribunal make a disqualification, they may, if they consider that either of the conditions mentioned in section 32A(2A) is satisfied, direct that section 32A(3) shall apply …..
(2) A direction under subsection (1) above shall cease to have effect-
(a) where no appeal against the disqualification is brought, at the end of the period for bringing an appeal, and
(b) where an appeal against the disqualification is brought, when the appeal process has been exhausted.

Insofar as relevant, Section 32A provides:

32A.- **Applications for interim suspension.**
(2A) The conditions for giving such a direction are-
(a) that it is necessary to do so in order to protect persons who are, or may be, provided with
primary medical services, pharmaceutical care services or services under this Part, section 17C arrangements or a pilot scheme to which the case in question, or the case to which the review in question, relates; or
(b) that it is otherwise in the public interest to do so.
(3) A person to whom this subsection applies shall-
(a) be deemed to have been removed from any relevant list in which his name is included. and
(b) be disqualified for inclusion in any relevant list in which his name is not included.

In short, these provisions give the Tribunal the power to suspend the Respondent pending appeal if it is necessary to protect patients or if it is in the public interest to do so.

Commonly, an order for suspension pending appeal will be justified where the sanction of unconditional disqualification is considered appropriate for the protection of the public. In this case, there is no element of protection of the public, given that the circumstances giving rise to the sanction were specific to the pandemic and no longer exist. Accordingly, the Tribunal was of the opinion that the only grounds for suspending pending appeal might be public interest grounds.

In a broader regulatory context, Courts have held that (at least where interim orders are concerned), it would be rare for an interim order to be justified in the public interest alone. Although the word “necessary” doesn’t feature in the statutory wording applicable to many regulators, the Courts have held that there is an element of necessity implicit in this, as well as desirability. Although this case is at the stage of final determination, the Tribunal considered that in order to find suspension pending appeal to be justified, it would have to be of the opinion that the public would be outraged to learn that the Respondent was being permitted to continue with his NHS practice pending an appeal. In this case, the Tribunal has acknowledged that the Respondent did not breach the letter of the rules regarding payment which were in place at the time of the pandemic, albeit he breached the spirit of them. Whilst the public may be outraged that the Respondent exploited those rules to the detriment of patient care and the NHS, the Tribunal considered that informed members of the public would consider this to be a highly unusual case in which an appeal is possible and where the appeal court may conceivably take a different view to that of the Tribunal. In the circumstances, the Tribunal concluded that the high bar for imposition of an order for suspension pending appeal has not been met. There is accordingly no requirement to convene a further hearing with the Respondent and his solicitor in terms of Section 32C(1) of the Act.

That concludes this Inquiry.