

Appeals Circular A02/21

10 February 2021

Seventh floor
St James's Buildings
79 Oxford Street
Manchester
M1 6FQ

0161 923 6263
enquiries@mpts-uk.org
www.mpts-uk.org

To: MPTS Associates

CC: Tribunal Clerks
Medical Defence Organisations
Employer Liaison Advisers

Professional Standards Authority for Health and Social Care v Health and Care Professions Council and Yong [2021] EWHC 52 (Admin)

Learning points

- ▶ As healthcare regulators are public authorities bound by section 149(1)(a) of the Equality Act 2010 ('the Act'), they have a duty to have due regard to the need to eliminate harassment, which is prohibited by or under the Act. Therefore, when considering cases against registrants which allege harassment, tribunals should have due regard, specifically, to the definition of harassment in section 26 of the Act.
- ▶ The definition of harassment in the Act includes where someone engages in unwanted conduct related to a relevant protected characteristic or where the conduct is of a sexual nature and the conduct has the purpose or effect of violating the other person's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for them. In deciding whether conduct has the effect referred to above, the victim's perception must be taken into account, amongst other things.
- ▶ When considering sexual motivation, tribunals should refer to the evidence which supports sexual motivation, even if it is being discounted by the tribunal. Where there is clear evidence from a witness that they perceive the Registrant to have a sexual motivation in respect of the allegations of which they are the subject, tribunals should consider that evidence and should not rely on evidence from other witnesses, in relation to other allegations, that they did not perceive the Registrant to have a sexual motivation.

Background

This was an appeal by the Professional Standards Authority for Health and Social Care ('the PSA') under section 29(4) of the National Health Service Reform and Health Care Professions Act 2002, that the written decision of the Health and Care Professions Council tribunal service ('HCPCTS's') Conduct and Competence Panel ('the Panel') following hearings in September and October 2019 ('the Decision') was not sufficient (whether as to a finding or a penalty or both) for the protection of the public.

The Decision was made by a panel of three, advised by a legal assessor and upheld allegations of misconduct by Mr Yong ('Y'), a social worker, against a number of (junior) colleagues, referred to as Workers 1 and 3-7. As a result of the misconduct, the Panel imposed a three-year Caution Order. The PSA did not appeal against the findings against Y. However, the Decision made a number of findings favourable to Y and the appeal challenged some of those favourable findings, namely:

- ▶ findings that, although the conduct proven against Y meant that he had 'behaved inappropriately...towards female Colleagues', it did not in any case mean that he had behaved "in a harassing manner" towards them.
- ▶ findings, in respect of the same conduct, that none of it was 'sexually motivated'.

The PSA invited the appeal court to find that some of Y's conduct be characterised as behaving 'in a harassing manner' and/or as 'sexually motivated' and that the matter be remitted for re-determination on sanction (which would be by a different body due to a change in the regulatory regime). Y was not present or represented at the hearing before the Panel or at the appeal.

Grounds

The PSA appealed on the following grounds:

- ▶ Ground 1: The Legal Assessor's ('LA') direction to the Panel in respect of what constituted 'in a harassing manner' as opposed to 'inappropriate' behaviour was insufficient. The PSA said that the LA failed to provide the Panel with any guidance as to how they may differentiate between the two terms and their respective gravamen, and he failed to correct the HCPC's concession (in response to the Panel's question) that the respective terms denoted conduct of equal gravamen. As a result, the Panel fell into error in finding that Y's behaviour was not 'harassing' in respect of the workers; that finding was at odds with their factual findings regarding Y's behaviour towards the workers and their responses thereto.
- ▶ Ground 2: The Panel failed to provide adequate reasons as to why they had concluded that Y's behaviour was not 'harassing'.
- ▶ Ground 3: The direction given by the LA regarding 'sexual motivation' was insufficient. The LA failed to direct the Panel to apply the correct test described in

Basson v General Medical Council¹ that a “sexual motive means that the conduct was done either in pursuit of sexual gratification or in pursuit of a future sexual relationship.” The LA also failed to direct the Panel that it was possible to find that Y’s behaviour was ‘harassing’ but not ‘sexually motivated’. The Panel fell into error in their analysis of whether Y’s behaviour had/not been sexually motivated and their finding that some allegations were proved were all inconsistent with their conclusion that Y’s conduct had not been sexually motivated.

- ▶ Ground 4: The Panel failed to provide adequate reasons for their conclusion that Y’s behaviour was ‘inappropriate’ but ‘not sexually motivated’
- ▶ Ground 5: The Panel departed from the HCPC’s Sanctions Policy and failed to provide reasons for doing so; its factual findings precluded the use of a caution order, if the terms of the Policy were followed properly.

Judgment

Mr Justice Griffiths considered the grounds of appeal as follows and said:

- ▶ Grounds 1 and 2: ‘Harassing manner’ - the Panel did not explain in its decision what it understood by the expression ‘in a harassing manner’.

He said that on one view “it was simply a question of fact, applying the words in their ordinary meaning” [para 50]. However, it was not pointed out to the Panel that the HCPC was subject to the public sector equality duty imposed by section 149 of the Equality Act 2010². As the HCPC is a public authority bound by section 149(1)(a), it has a duty to have due regard to the need to eliminate harassment ‘that is prohibited by or under this Act’. He said: “[I]t follows that the HCPC Panel should have had due regard, specifically, to the definition of harassment in the Equality Act. However, it did not mention that definition or have any regard to it when reaching its decisions on harassment. That was an error of law.” [para 51-52].

Griffiths, J did say that it was conceivable that conduct which did not fall within the statutory definition might nevertheless have been behaviour ‘in a harassing manner’. However, “[A]ny conduct within the section 26 of the Equality Act 2010 definition³ must be harassment for the purposes of an HCPC disciplinary enquiry, given the public sector equality duty and given, indeed, the fact that section 26 conduct will amount to harassment, or to behaviour “in a harassing manner”, within the ordinary meaning of those words.” [para 54].

Applying that definition to the facts, Griffiths, J said that the Panel had found that all of the acts of misconduct were “unwanted conduct” [para 56] and were “related to a relevant protected characteristic”, namely ‘sex’ [para 57]. In respect of Workers 1 and 7, on the basis of their evidence, he found that Y’s misconduct created “an intimidating, hostile, degrading, humiliating or offensive environment” and therefore he was acting in a harassing manner [paras 58 and 81-90].

¹ [2018] EWHC 505 Admin

² See Annex for extract of the Equality Act 2010 section **149 Public sector equality duty**

³ See Annex for extract of the Equality Act 2010 section **26 Harassment**

In respect of Workers 3 and 6 he also found Y had acted in a harassing manner and said:

"The section 26 definition to which the HCPC was bound under section 149 of the Equality Act to have "due regard" depends on either the "purpose or effect" of the conduct in question. The word "or" shows that harassment cannot be displaced merely by a lack of intent on the part of the alleged perpetrator if the effect is "violating... dignity" or "creating an intimidating, hostile, degrading, humiliating or offensive environment" for the alleged victim" [para 63]; and

"[T]he statutory definition of harassment in section 26 does not depend on the motive or purpose of the alleged perpetrator" [para 78].

In respect of Worker 5, Griffiths, J said that although she did not give evidence that her perception was that Y's conduct had the purpose or effect of violating her dignity or creating "an intimidating, hostile, degrading, humiliating or offensive environment" for her, he considered that her evidence would not have been inconsistent with a finding that it created an "offensive" environment. However, bearing in mind the caution to be exercised in deciding an appeal without hearing the evidence and seeing the witnesses, as the Panel did, he did not feel able to make a finding to that effect. He did say that Worker 5 was clearly offended by the two comments made by Y, "she was, as I have said, "horrified" by the first and "disgusted" by the second. But an offensive comment does not necessarily create an "offensive environment" for the purposes of the Act. It might. But it is a matter of fact and degree whether or not it does" [para 74].

- ▶ Grounds 3 and 4: "sexual motivation"(in relation to Workers 1 and 7) - the Panel's reasoning and conclusion on the question of "sexual motivation" did not distinguish between particular allegations but approached it on a broad brush basis which did not engage with the facts of any of the allegations. He said that the Panel "did not refer to the evidence which supported sexual motivation, which was necessary even if it was being discounted: indeed, if it was being discounted, it was even more necessary to refer to it and explain that." [para 91]

Griffiths, J said that there was unchallenged evidence in respect of Worker 1, coupled with the circumstances of the case, which "lead irresistibly to the conclusion that Y had a sexual motivation in saying what he did". The Panel's exoneration of Y from this motive on the basis that "the Registrant misread his audience and that the jokes he made were often inappropriate" was not relevant to that allegation. There was no suggestion that Y's propositions to Worker 1 were a joke: Worker 1's evidence was not to that effect and did not support it. Likewise, "the Panel's reliance on evidence of other workers, in relation to other allegations, that they "did not perceive the Registrant to be making a sexual advance towards them", was inadequate in the context of his misconduct towards Worker 1, who gave evidence, apparently accepted by the Panel, that she did have that perception" [para 96].

In relation to Worker 7, Mr Justice Griffiths said that whilst it was theoretically possible that Y meant only to be friendly in making the alleged comment and when he gave Worker 7 an unexpected and unwelcome hug, the Panel was satisfied that

“separately and together these were acts of misconduct which impaired his fitness to practice. This does not seem to me to be consistent with an innocent motive in either case. The evidence of Worker 7 puts the matter beyond doubt, given that her evidence was the only evidence before the Panel on these allegations and.....was generally accepted by them. Her evidence was unequivocally that there was “definitely a sexual undertone to [Y’s] comment” and his physical contact “was a sexual threat”. She was in a very good position to judge this; no-one from whom the Panel heard was in a better position. The Panel did not refer to or engage with her evidence about this at all. This was plainly wrong. In my judgment, on the primary facts they found, and the uncontradicted evidence they heard, a finding that Mr Yong’s misconduct towards Worker 7 was sexually motivated ought to have been made” [para 100].

Findings of sexual motivation were added in respect of both Worker 1 and 7.

► Ground 5: sanction – the sanction of a caution order could not stand.

The HCPC Sanction’s Policy indicates:

“A caution order is likely to be an appropriate sanction for cases in which:

- the issue is isolated, limited, or relatively minor in nature;
- there is a low risk of repetition;
- the registrant has shown good insight; and
- the registrant has undertaken appropriate remediation.”

Mr Justice Griffiths said that the word ‘and’ which links the bullets points "suggests that all the bullet-point elements must ordinarily be present if a caution order is likely to be an appropriate sanction" [para 103]. He said that in Y's case none were present and therefore, even on the basis of the Panel's findings, the sanction could not stand. However, given the added findings he had made that Y had acted in a harassing manner and (in the case of Workers 1 and 7) had a sexual motivation, "the basis upon which the Panel determined its sanction has on any view ceased to be appropriate and must be reconsidered" and that the importance of these additional aggravating matters was obvious [para 106].

The question of sanction was remitted to Social Work England (as the relevant statutory body) for reconsideration [para 107-108].

Kind regards
Tribunal Development Section
0161 240 7292
tribunaldevelopmentsection@mpts-uk.org

Annex: Extracts of Equality Act 2010:

26 Harassment

- (1) A person (A) harasses another (B) if—
- (a) A engages in unwanted conduct related to a relevant protected characteristic, and
 - (b) the conduct has the purpose or effect of—
 - (i) violating B's dignity, or
 - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
- (2) A also harasses B if—
- (a) A engages in unwanted conduct of a sexual nature, and
 - (b) the conduct has the purpose or effect referred to in subsection (1)(b).
- (3) A also harasses B if—
- (a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
 - (b) the conduct has the purpose or effect referred to in subsection (1)(b), and
 - (c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.
- (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
- (a) the perception of B;
 - (b) the other circumstances of the case;
 - (c) whether it is reasonable for the conduct to have that effect.
- (5) The relevant protected characteristics are—
- age;
 - disability;
 - gender reassignment;
 - race;
 - religion or belief;
 - sex;
 - sexual orientation.

149 Public sector equality duty

- (1) A public authority must, in the exercise of its functions, have due regard to the need to—
- (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act (...)
- (2) A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1).