

Appeals Circular A04/21

19 March 2021

To: MPTS Associates

CC: Tribunal Clerks
Medical Defence Organisations
Employer Liaison Advisers

Khan v The General Medical Council [2021] EWHC 374 (Admin)

Learning points

- ▶ Tribunals should not assess a witness's credibility exclusively on their demeanour when giving evidence.
- ▶ Tribunals should consider all of the evidence before them before coming to a conclusion about a witness's credibility. This could include conflicts in evidence with another witness, denials of the allegations and reasons why they could not be true or admissions of lying (on oath or otherwise) on a previous occasion.
- ▶ It is open to Tribunals not to rule out the whole of a witness's evidence based on credibility; credibility can be divisible.
- ▶ Tribunals must take good character evidence into account in their assessment of credibility and propensity, where relevant. However, they are not required to give a self-direction to that effect in their reasons, if it is clear from all the material received orally and in writing, including any direction from a legally qualified Chair, that the Tribunal must have taken good character into account.

Background

This was an appeal made by Mr Khan ('K'), pursuant to section 40 of the Medical Act 1983, against a Medical Practitioners Tribunal's ('the Tribunal's') decision dated 20 July 2020 which found a number of factual allegations proved, that K's fitness to practise was impaired by reason of misconduct and erased his name from the Medical Register.

The Tribunal hearing took place between December 2019 and 20 July 2020. The allegations against K were that he had behaved in an inappropriate and sexually

motivated way (both physically and verbally) towards three female members of staff (Miss A, Miss C and Miss D) at Barnsley Hospital NHS Foundation Trust (‘the Trust’), where he worked as a consultant orthopaedic surgeon.

As well as the Tribunal proceedings and this appeal, there had also been:

- ▶ disciplinary proceedings by the Trust in 2013-2014 which led to K's dismissal for gross misconduct in February 2014 (as a result of the allegations made by Miss D);
- ▶ successful Employment Tribunal (ET) proceedings brought by K in 2015 for unfair and wrongful dismissal (by which time the allegations from Miss A and C had emerged);
- ▶ an unsuccessful application by K to the ET for reinstatement; and
- ▶ a criminal trial in the Crown Court in 2016 for the sexual assault of Miss D, of which K was acquitted.

K did not make any admissions. In respect of Miss D, he admitted innocent physical contact on one occasion when she had become distressed and he had sought to comfort her by putting his arm around her. He said that apart from that one episode, which Miss D had exaggerated and embellished, the allegations against him were completely untrue and had never taken place and that Miss A, Miss C and Miss D had been encouraged to give false evidence against him by senior Trust managers in order to get rid of him because they viewed him as a troublesome employee.

In its determination on facts the Tribunal considered each of the allegations made by Miss D, Miss A and Miss C, and:

- ▶ considered the allegations made by Miss D first (as they were made first in time). Before examining any of the evidence, the Tribunal declared her to be ‘credible and consistent’. It then found each of the allegations proved and that each incident had been sexually motivated
- ▶ said it had considered all of the evidence available to it in relation to the impact of the process followed by the Trust, and the conduct of Trust management, on the veracity, truth and reliability of the evidence of Miss A and Miss C, but it was satisfied that there was no evidence that the allegations made by them were fabricated at the behest of the Trust
- ▶ before considering any of the allegations made by Miss A in detail, it described her as a ‘confident, credible witness’. It then found all but one of Miss A’s allegations proved, and that although most of them had been sexually motivated, some of them had not been
- ▶ when considering the allegations made by Miss C, it began by saying that it had first considered Miss C’s credibility and, specifically, the extent to which it was undermined by her admission to having lied on oath in the ET proceedings about having authored the anonymous letter to the Trust (in a witness statement for, and in her evidence to, the ET, Miss C claimed to have written the letter but before the Tribunal, she admitted this evidence had been a lie). The Tribunal said it had assessed Miss C’s ‘demeanour’ in making its credibility assessment and said she had been ‘adamant’ that she had been truthful in her evidence. The Tribunal

said it was not persuaded that Miss C's admission that she lied about the authorship of the anonymous letter "was, of itself, sufficient to undermine her credibility in relation to the rest of her evidence. It was satisfied that Miss C had given a *genuine, sincere and credible account* in relation to matters other than her authorship of the letter." The Tribunal found each of Miss C's allegations proved and that all of K's conduct towards her had been sexually motivated.

Grounds

The Appeal was brought on the grounds that the findings of fact were wrong and so (consequentially) were the determinations on impairment and sanction [66-67]. This was on the basis that:

- ▶ the Tribunal failed to have any or any adequate regard to the good character of K
- ▶ the Tribunal misstated the evidence, omitted to consider other material evidence, failed to resolve significant conflicts in the evidence and/or came to conclusions on the facts which did not reflect the available evidence. This was broken down into a number of sub-grounds of appeal which included:
 - ▶ the Tribunal placed undue reliance on witnesses' demeanour in judging their credibility, in contravention of the principles in Dutta¹;
 - ▶ the Tribunal wrongly decided that Miss C was credible despite the evidence which pointed to the contrary, including her admitted lie about authorship of the anonymous letter and her failure/refusal to explain how or why this had come about;
 - ▶ the Tribunal erred in its approach to the evidence and credibility of Miss D and failed to consider or address such evidence as was said to undermine her credibility, including discrepancies in her accounts given at various times;
 - ▶ the Tribunal did not deal adequately with the evidence of two nurses at the hospital who said K had never behaved inappropriately toward them and who denied a remark attributed to one or other of them by Miss D;
 - ▶ the Tribunal failed to adequately analyse and take account of the available evidence and the inconsistencies between Miss A's evidence and that of unchallenged witnesses: a proper analysis might have led to the conclusion her evidence was unreliable;

Judgment

The appeal was heard by the Honourable Mr Justice Knowles.

- ▶ He rejected Ground 1 – failure to have any or any adequate regard to the good character of K.

He accepted that the Tribunal's reasons did not contain a self-direction on good character, and the first time K's character was mentioned was after the Tribunal had found a number of Miss D's allegations proved, and that they were sexually motivated, and had rejected K's account [87]. However, Knowles, J said it was

¹ R(Dutta) v GMC [2020] EWHC 1974 (Admin)

impossible to infer the Tribunal must have wholly left K's good character out of account, and therefore that its decision was vitiated, on the basis of:

- ▶ the agreed written directions of law which the Tribunal had;
- ▶ GMC Counsel's express acceptance of the relevance of good character in those written directions and K's Counsel's submissions on its relevance; and
- ▶ the legally qualified Chair's direction to the Tribunal as to how K's good character was to be approached [87-89].

He also said "[W]hilst a disciplinary Tribunal must take good character evidence into account in its assessment of credibility and propensity.....it is not required slavishly in its reasons to give a self-direction to that effect.....It is sufficient....if the appeal court is able to infer from all the material that the Tribunal must have taken good character properly into account... It would be simply unrealistic to suppose that the Tribunal overlooked it, given what it had received orally and in writing including, most importantly, a clear direction from its legally qualified Chair, who was a constituent member of the Tribunal." [92]

- ▶ Knowles, J then went on to consider Ground 2 in relation to each of the complainants - did the Tribunal misstate the evidence, omit to consider other material evidence, fail to resolve significant conflicts in the evidence and/or come to conclusions on the facts which did not reflect the available evidence?
- ▶ In relation to Miss C, he said "it was open to the Tribunal not to rule out the whole of Miss C's evidence simply because she had admitted to lying on oath previously..... credibility can be divisible" [106]. However, "given Miss C's proven willingness to lie on oath, the most careful and accurate scrutiny of her evidence was called for, adopting proper fact-finding methodology." He found that whilst the Tribunal said as much, its reasons betrayed significant errors of reasoning and it adopted "a fundamentally erroneous methodology in its approach to the evidence" [106].

Knowles, J said that "[B]y beginning with the question of her credibility generally and without reference to the specific allegations she had made [against K]..., it seems to me that the Tribunal was, in effect, beginning its analysis by asking 'Do we believe her ...?', which is the very thing which Warby J said in *Dutta*, supra, at [42] should not be done." [108]

He went on to say that although the Tribunal went on to consider Miss C's lies about the letter "its analysis was flawed because in deciding she was telling the truth about everything other than the letter it appears to have based its conclusion very significantly on her 'demeanour' and the fact she had been 'adamant' ...as well as its assessment that she was 'genuine' and 'sincere' ... All of these were subjective assessments and the latter two observations begged, to a large extent, the very question the Tribunal had to decide, namely: had the GMC proved each allegation made by Miss C on the balance of probabilities?" [109]

Knowles, J considered that the Tribunal's language showed that its reasons were "based in significant part on the twin fallacies that 'the more confident another person is in their recollection, the more likely it is to be accurate' and

‘because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth’...’Reliance on a witness’s confident demeanour is a discredited method of judicial decision making’. That must be all the more so in the case of a witness who had admitted lying on oath on a previous occasion.” [110]

He concluded that the Tribunal did not consider all of the evidence before it before coming to its conclusion about Miss C’s credibility; it did not adequately resolve or explain conflicts in evidence between Miss C and other witnesses, including K and his denials of the allegations, and reasons why they could not be true [118]. Knowles, J said “[T]he Tribunal’s general conclusion that Miss C was credible (ie, telling the truth) meant that its findings on each of her allegations against [K] were a foregone conclusion” [119]. This was not a summary of its later conclusions “[I]t was a free-standing conclusion which then coloured (and, as I have said, pre-determined) its conclusions in relation to her allegations.” [120].

- ▶ Knowles, J said similar criticisms could be made of the Tribunal’s reasoning about Miss A’s evidence and that “it does appear that the Tribunal made, at the outset, a global assessment that she was telling the truth based impermissibly on her demeanour.... this approach displays one of the errors of reasoning identified in Gestmin, supra, namely that it is wrong to suppose ‘the more confident another person is in their recollection, the more likely it is to be accurate’.”

He said that there was also a direct conflict in evidence between Miss A and another GMC witness and agreed that “how this issue was resolved had a direct bearing on Miss A’s credibility and thus that the Tribunal needed to confront it, and resolve it, as part of its assessment of Miss A’s credibility” [123]. However, the “general, globalised assessment based on Miss A’s demeanour infected the Tribunal’s assessment of her allegations” and the Tribunal used its earlier general finding of credibility as support for particular allegations [124].

- ▶ In relation to Miss D, Knowles, J said that the Tribunal had indicated her answers had been ‘consistent’ and made the bald assertion that she was ‘credible’ before it had “considered any of the evidence relating to her allegations and how they had emerged, and the evidence which tended to undermine her credibility” which “was tantamount to the Tribunal asking at the outset whether it believed her, which it should not have done” [para 125].

Knowles, J said that there was a conflict of evidence between Miss D and two other witnesses which had a bearing on the question of Miss D’s credibility because, if the Tribunal concluded that the other witnesses were telling the truth, it led to the conclusion that Miss D was someone who was prepared to embellish her account of events. This was precisely what she was accused of doing regarding the physical contact with K, which he said had been entirely innocent and non-sexual but had been embellished by Miss D [128]. However, Knowles, J said that this evidence was not properly dealt with as part of the

assessment of Miss D's credibility and when the Tribunal did deal with the alleged remark it misstated the evidence [para 129].

There was also other evidence (Miss D's inconsistent accounts) which was *capable* of showing Miss D was not credible and/or unreliable which also needed to be considered as part and parcel of the assessment of her credibility, but again the Tribunal had been wrong to find Miss D credible before considering any of the evidence [131].

- ▶ The Tribunal was given a cross admissibility direction ie, a direction that if it found the allegations of one complainant proved, and was satisfied that that established a propensity on his part to engage in unwanted sexual touching, then that propensity could be taken into account in determining whether the other complainants' allegations were proved [132].

The Tribunal did conclude that some of the facts it found proved demonstrated propensity and used this to uphold other allegations [133-135]. Knowles, J said that in light of the Tribunal's application of the cross-admissibility principle, it might have been sufficient to quash the Tribunal's determination if he had found the Tribunal's reasons flawed in respect of just one of the complainants, because that might have been said to have undermined the Tribunal's whole chain of reasoning. However, as he found its approach to the evidence of all three complainants was erroneous, he considered that the Tribunal's determination was based on a fundamentally flawed approach and that it must be quashed.

It followed that the finding of impairment and the sanction also could not stand and were also quashed and Knowles, J said this made it unnecessary for him to consider the other sub-grounds of appeal advanced by K.

Kind regards

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