

Appeals Circular A05/23

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Learning points from recent appeals

Facts

- ▶ In cases involving allegations of inappropriate touching, where a practitioner admits the underlying factual actions/touching (ie is not challenging the honesty of a complainant) but maintains that a complainant is *mistaken* about their perception of the touching, this has the effect of narrowing the issue to one of mistake. In these circumstances, tribunals:
 - ▶ must give reasons for their findings of fact and consider whether, on the balance of probabilities, the complainant was right in their honest perception of the touching.
 - ▶ should give adequate reasons for concluding that the complainant was not mistaken, and for not accepting the practitioner's evidence.
 - ▶ are not bound to give specific reasons for rejecting the practitioner's denial of the allegation. If the complainant was not mistaken (and the tribunal give adequate reasons for this conclusion), then the practitioner's denial has to be untrue. [Sankaye v The General Medical Council \[2023\] EWHC 1213 \(Admin\)](#)
- ▶ In cases involving dishonesty, tribunals should ensure that they consider both stages of the test for dishonesty as set out in [Ivey v Genting Casinos \(UK\) Ltd 2017 UKSC 67](#) :

(1) the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or

otherwise of their belief is a matter of evidence (often in practice determinative) going to whether they held the belief; the question is whether it is genuinely held.

(2) Once their actual state of mind as to knowledge or belief as to facts is established, the question whether their conduct was honest or dishonest is to be determined by the factfinder by applying the (objective) standards of ordinary decent people.

In some cases, it may be sufficient to infer the correct application of both limbs of the test from the tribunal's substantive reasoning. However, it is preferable for a tribunal to clearly set out the test and specifically address each stage of the test. [Mian v Bar Standards Board \[2023\] EWHC 1249 \(Admin\)](#)

- ▶ The assessment of actual state of mind is critical when considering making a finding of dishonesty. The practitioner's honesty and evidence in relation to their knowledge and belief should be challenged by way of cross-examination. If it is not, then such unchallenged evidence is unlikely to form a proper basis for a finding of dishonesty. [The General Dental Council v Williams \[2023\] EWCA Civ 481](#)

Impairment and Sanction

- ▶ Tribunals should ensure that their findings in relation to impairment carry through to their assessment of sanction. If there are any apparent inconsistencies between the findings at the two stages, these should be explained. [Professional Standards Authority for Health and Social Care \(PSA\) v Nursing and Midwifery Council \(Namusisi\) \[2023\] EWHC 1230 \(Admin\)](#)
- ▶ In their decision on sanction, tribunals should ensure that:
 - ▶ their reasoning is clear and adequate enough for a reader to determine whether or not certain important issues were appreciated, and if so, how they were reasoned through.
 - ▶ they fully consider and record level of remediation and insight, including an explanation of the implications of that for public protection and reputation.
 - ▶ they consider and record all aggravating (and mitigating) factors (again at the sanction stage, even if they have been mentioned in their decision on impairment) and consider the possible seriousness of the aggravating factors
 - ▶ if departing from the Sanctions Guidance they give full reasons. If alleging that a particular sanction is disproportionate, further reasoning should be given in support of this and an indication of what level of seriousness or impact it attributed to the misconduct in question.

[Professional Standards Authority for Health and Social Care v General Medical Council \(Professor Lingam\)](#)

- ▶ When considering seriousness at sanction stage, tribunals should:
 - ▶ carefully analyse what happened and explain the significance and seriousness of that and its impact on public protection.
 - ▶ show that they appreciate the extent or importance of the factual background by setting out their reasoning, in detail, on the important factual context to ensure that seriousness is fully considered. A tribunal has a duty to interrogate where necessary to understand the issues clearly and where the facts have been admitted by the practitioner (therefore not canvassed thoroughly in evidence), the tribunal should feel bold to resolve any material issues they have by questioning, to clarify the central issues arising.

[Professional Standards Authority for Health and Social Care v General Medical Council \(Professor Lingam\).](#)

- ▶ consider the seriousness of the incident itself and ensure that they do not give disproportionate weight to the registrant working without regulatory concerns since the incident, in light of any findings they have made in relation to very limited insight and the significant risk of repetition.
[Professional Standards Authority for Health and Social Care \(PSA\) v Nursing and Midwifery Council \(Namusisi\) \[2023\] EWHC 1230 \(Admin\)](#)

Kind regards
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