

Appeals Circular A05/24

22 August 2024

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

Learning points from recent appeals

Facts

- ▶ [Dutta v General Medical Council \[2024\] EWHC 1217 \(Admin\)](#) provided some general reminders in relation to evidence:
 - ▶ Tribunals should be wary of reaching findings based only on selective parts of the evidence. A tribunal must explain why it reached its findings with reference to evidence which supports the allegation, but also deal with any evidence which suggested the contrary and explain why that was rejected in favour of the other evidence;
 - ▶ in cases where witnesses are not called because their evidence is agreed between the parties [because their evidence is about their state of belief, as opposed to facts], it is unfair for a tribunal to reject that evidence on the grounds that the witnesses were not cross examined. There is no basis for the wholesale rejection of such evidence, and this constitutes a material irregularity.
- ▶ Where there are disputed allegations of sexual misconduct and a practitioner ('A') and complainant ('B') give conflicting accounts of events, the tribunal should not simply prefer one account to another. The tribunal first needs to assess whether the GMC have discharged the burden of proof that the events as described occurred by considering whether to accept that B's evidence is *sufficiently credible in itself* and when compared with all the other evidence. If B's evidence is *insufficiently credible*, there is no need to go further. If B's evidence is

sufficiently credible, the tribunal then needs to consider whether the evidence from B and all the other evidence is to be preferred over A's evidence. [Roach v General Medical Council \[2024\] EWHC 1114 \(Admin\)](#).

- ▶ [Cascioli v Nursing and Midwifery Council \[2024\] EWHC 1109 \(Admin\)](#) highlighted that when a registrant adduces evidence from a medical expert submitting there was a medical condition providing an alternative innocent explanation for the conduct [other than dishonesty] it is for the tribunal, not the medical expert, to decide if the registrant had been dishonest. The tribunal has to determine that issue in light of all the evidence, by reference to the test set out in *Ivey v Genting Casinos [2017] 3 WLR 1212* and is free to accept or reject the expert evidence in the usual way when reaching its decision on the issue.

Impairment and Sanction

- ▶ Where a tribunal considers that a practitioner's behaviour amounts to misconduct because Good Medical Practice ('GMP') has been breached:
 - ▶ as to "*you must not pursue a sexual or improper emotional relationship with a patient*": '*pursue*' can include continuing. It does not matter whether the doctor uses their position to initiate a relationship with a patient that did not exist before; or whether the sexual relationship already existed before the patient became a patient of the doctor. Both are prohibited;
 - ▶ as to "*good medical professionals act with integrity*": a reminder of the case of *Wingate v Solicitors Regulation Authority [2018] EWCA Civ 366* which stated that '*integrity*' is a useful shorthand to express the higher standards which society expects from professional persons and which the professions expect from their own members ... The underlying rationale is that the professions have a privileged and trusted role in society. In return they are required to live up to their own professional standards;
 - ▶ lack of integrity does not need to be specifically pleaded within the GMC's charges for a tribunal to make such a finding about the practitioner's actions at impairment stage, where it was clearly founded on the facts. [Itrat Khan v GMC \[2024\] EWHC 1330 \(Admin\)](#).
- ▶ [Professional Standards Authority for Health & Social Care v Nursing and Midwifery Council \(Haward\) \[2024\] NIKB 33](#) set out some general reminders in relation to sanction:
 - ▶ The Sanctions Guidance is an authoritative steer for tribunals as to what is required to protect the public, even if it does not dictate the outcome; it is an authoritative steer as to the application of the principle of proportionality. If the tribunal departs from the steer given by the Guidance, it must have careful and substantial case-specific justification (*Professional Standards*

Authority v Nursing and Midwifery Council and Jalloh [2023] EWHC 3331 (Admin));

- ▶ when a registrant lied to various agencies (police, coroner, court, probation etc) and maintained their dishonesty for a number of years following the single incident of misconduct, it is fundamentally wrong for the tribunal to consider as a mitigating factor that the incident occurred a number of years ago. While the incident may have occurred years prior, the dishonesty maintained by the practitioner cannot be described as a 'single incident' and it is wholly wrong of the tribunal to characterise it as such.

Kind regards

Tribunal Development

0161 240 7292

tribunaldevelopmentsection@mpts-uk.org