

Appeals Circular A06/24

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## Learning points from recent appeals

### Facts

- ▶ [Altemimi v General Medical Council \[2024\] EWHC 1731 \(Admin\)](#) provided some general reminders in relation to fact finding:
  - ▶ In cases where the GMC allegation alleges that the practitioner spoke the words quoted or “*words to that effect*”, this does not involve any deficiency [in the allegation] or introduce any defect. That language simply allows for the substantive content to have unmistakably been the same as the quoted words alleged;
  - ▶ the tribunal finding facts unproven does not necessarily mean finding that witnesses have lied. Just because the evidence in relation to some primary facts, in the context and circumstances, did not support findings of "proved", the same does not necessarily follow for all primary facts. Conversely, just because the evidence in relation to some primary facts, in the context and circumstances, does support a finding of "proved", the same does not necessarily follow for all primary facts;
  - ▶ tribunals should have regard to the case of *Arunkalaivanan v General Medical Council [2014] EWHC 873 (Admin)* which notes that it is important not to equate inappropriate conduct with sexually motivated conduct and that the

tribunal should consider whether there could be any other explanation<sup>1</sup> for inappropriate conduct;

- ▶ where sexual harassment, as defined in the Equality Act<sup>2</sup> is alleged:
  - ▶ the tribunal should answer the statutory questions, and address the evidence as to nature and implications, impact, perception, response and reasonableness;
  - ▶ following *Pemberton v Inwood* [2018] ICR 724 (EAT)<sup>3</sup>, in order to decide whether any conduct has either violated B's dignity, or created an intimidating, hostile, degrading, humiliating or offensive environment for B<sup>4</sup>, a tribunal must:
    - consider the subjective question<sup>5</sup>:- whether the complainant perceives themselves to have suffered the effect in question. *If the complainant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect;*
    - consider the objective question<sup>6</sup>:- whether it was reasonable for the conduct to be regarded as having that effect. *If it was not reasonable for the conduct to be regarded as violating the complainant's dignity or creating an adverse environment for him or her, then it should not be found to have done so;*
    - take into account all the other circumstances;<sup>7</sup>
  - ▶ in considering whether the conduct was 'unwanted'<sup>8</sup>, the case of *Reed v Stedman* [1999] IRLR 299<sup>9</sup> stated that as to whether the conduct was 'unwelcome', there may be difficult factual issues to resolve. In general terms, some conduct, if not expressly invited, could properly be described as unwelcome. A person does not, for example, have to make it clear in advance that they do not want to be touched in a sexual manner. At the lower end of the scale, a person may appear, objectively, to be unduly

<sup>1</sup> As to this, see also *A09/20 General Medical Council v Haris* [2020] EWHC 2518 (Admin): When considering sexual motivation, a Tribunal should make a deduction from all the facts and circumstances of the case and looking at the material in the round. If there is no plausible, alternative explanation as to why the doctor engaged in conduct or actions of a sexual nature, then the tribunal is entitled to conclude that the motivation was sexual.

<sup>2</sup> S26 (1) (2) & (4) of the Equality Act 2010: **(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). ... **(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.

<sup>3</sup> At Paragraph 88.

<sup>4</sup> S26 (1)(b) of the Equality Act 2010

<sup>5</sup> S26 (4)(a) of the Equality Act 2010

<sup>6</sup> S26 (4)(c) of the Equality Act 2010

<sup>7</sup> S26 (4)(b) of the Equality Act 2010

<sup>8</sup> S26 (2)(a) of the Equality Act 2010

<sup>9</sup> At Paragraph 30

sensitive to what might otherwise be regarded as unexceptional behaviour. But because it is for each person to define their own levels of acceptance, the question would then be whether by words or conduct they had made it clear that they found such conduct unwelcome. Tribunals should therefore resolve the factual issue, ie is there anything (objectively) unexceptional about the sexualised behaviour, or anything (objectively) unduly sensitive in it being unwanted by the complainant. Where this factual issue is resolved, based on the evidence (ie nothing unexceptional or unduly sensitive) the tribunal only needs to consider whether it was "reasonable" for the complainant to consider that the effect of the practitioner's conduct was to create an intimidating, hostile, degrading, humiliating or offensive environment for them taking account of all the circumstances of the interaction.

- ▶ Where there are allegations of failure to declare fitness to practise investigations (to potential employers), questions should be interpreted taking into account their context and having regard to their purpose; in this context, the words "fitness to practise investigation" are to be interpreted widely. Where the practitioner has been received a letter advising of the GMC's investigation, there is no need for a formal invocation of the Rules to begin an 'investigation'. [Shah Shahin Ali v The General Medical Council \[2024\] EWHC 2272 \(Admin\)](#).
- ▶ [Shah Shahin Ali v The General Medical Council \[2024\] EWHC 2272 \(Admin\)](#) further provided an important reminder that tribunals should address and make a finding on specific matters of dispute (eg a conflict in an account between the practitioner and a witness), the resolution of which was material to the decision on the allegations.

### Impairment and Sanction

- ▶ When assessing seriousness in considering whether there is an abuse of the special position of trust a doctor occupies<sup>10</sup>, this is not confined to the doctor – patient relationship. Those who drafted the Guidance could have expressed the proposition in that narrower way, if that was their intention. The reference is simply to "the special position of trust a doctor occupies" and there is no reason why this should not include a doctor's abuse of the power that they have over junior colleagues. [Higgins v General Medical Council \[2024\] EWHC 1906 \(Admin\)](#).

### IOT

- ▶ [Cook v General Medical Council \[2024\] EWHC 1663 \(Admin\)](#) set out some key reminders in relation to interim orders:

<sup>10</sup> Paragraph 150 of the Sanctions Guidance states: "*Sexual misconduct seriously undermines public trust in the profession. **The misconduct is particularly serious where there is an abuse of the special position of trust a doctor occupies, or where a doctor has been required to register as a sex offender. More serious action, such as erasure, is likely to be appropriate in such cases.***"

- ▶ Whilst the IOT has a duty to give reasons for its decision (Rule 27(4)(g)), the obligation is to avoid being prolix and instead should be fairly concise. Extensive or exhaustive reasons are not required, and in fact the IOT is encouraged to be focused and succinct. A transcript of the IOT can be prepared on request, from which it is permissible for elements of the tribunal's reasoning to be inferred;
  
- ▶ as to clinical supervision conditions:
  - ▶ they are not limited to cases involving concerns in clinical practice (ie public protection). They may also be imposed on the basis of public interest and the practitioner's own interests, where for example there is a link between mental health deterioration due to workplace stress and criminal offending;
  
  - ▶ the effectiveness of clinical supervision can be undermined by repeated short term placements, therefore a condition imposing a minimum duration for locum posts may be necessary and proportionate to promote the vital objective of effective clinical supervision;
  
  - ▶ it is legitimate for an IOT to refer to "lack of information" [about the practitioner's difficulty in obtaining employment, which they purport is due to a clinical supervision condition]. This is not the same as imposing a burden upon the practitioner to prove anything. The tribunal manifestly must make a determination on all the evidence and part of that includes cognisance of gaps in the evidential landscape.

Kind regards  
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