

## Appeals Circular A08/21

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## Learning points from recent appeals

### Facts

- ▶ The best evidence of a sexual motivation could be the behaviour itself. It may be appropriate to draw an "irresistible" inference of sexual motivation when the only way the behaviour could be perceived was as overtly sexual and in the absence of any other plausible innocent explanation. [Haris v General Medical Council \[2021\] EWCA Civ 763](#)
- ▶ Interpreting the duty to declare proceedings, investigations etc. which may be relevant to fitness to practise in an application form is fact sensitive. Tribunals must look at:
  - ▶ the terms of the form and questions asked
  - ▶ the context of the process in which the duty arises – from the perspective of both the regulator and applicant and
  - ▶ the relevance of the particular investigation/proceedings etc. to the particular application.[Dad v General Dental Council \[2021\] EWHC 1376 \(QB\)](#)
- ▶ It is inappropriate to hold the drafting of application forms to statutory standards, or to limit the duty to declare by statutory standards of textual interpretation. The pull of the public protection dimension and the intention of the regulator will prevail over the specificity or silence of the form, to impose a duty to declare what is clearly relevant. [Dad v General Dental Council \[2021\] EWHC 1376 \(QB\)](#)

- ▶ Tribunals should carefully consider the wording of the allegation(s) against a registrant. [\*Professional Standards Authority for Health and Social Care v General Pharmaceutical Council and Ali\* \[2021\] EWHC 1692 \(Admin\)](#)
- ▶ Where the allegation against a registrant is that the words used by them were offensive and/or racist, then:
  - ▶ tribunals need to consider the meaning of the words; this is an objective test which should not take into account the registrant's intention or good character or the reaction of other audiences to those words, in other contexts. However, the registrant's intention may still be relevant to remediation and sanction.
  - ▶ tribunals should take account of the overall context and nature in which the words were spoken, but also of the cumulative impact of the language used ie consider how one or more of the individual comments might inform the meaning to be attached to the others.
 

[\*Professional Standards Authority for Health and Social Care v General Pharmaceutical Council and Ali\* \[2021\] EWHC 1692 \(Admin\)](#)
- ▶ Where the allegation against a registrant is that they used language which they had intended to be offensive or racist, then the focus would be on the registrant's intent rather than the objective meaning of the language. [\*Professional Standards Authority for Health and Social Care v General Pharmaceutical Council and Ali\* \[2021\] EWHC 1692 \(Admin\)](#)
- ▶ When considering whether to exercise the power to draw an adverse inference from silence in disciplinary proceedings, tribunals need to ensure that the four criteria in **R (on the application of Kuzmin) v GMC**<sup>1</sup> are satisfied.
  - ▶ The last criterion (that there are no other circumstances specific to the case which would make it unfair to draw an adverse inference) is only concerned with procedural unfairness.
  - ▶ Where all the criteria are satisfied, a tribunal is not obliged to draw an adverse inference; it may exercise its judgment on whether to do so and, if it decides to draw an adverse inference, on how much weight to give to this factor. These decisions should not be made after all the evidence on the allegation has been evaluated and findings made. One adverse inference which may be drawn is that the practitioner has no innocent explanation for the case against him.
  - ▶ Where a decision-maker does consider it appropriate to draw an adverse inference, that by itself cannot be determinative of the allegation in issue; any such adverse inference is one factor to be taken into account in the balance when deciding whether an allegation is proved to the civil standard.
 

[\*General Medical Council v Udoe\* \[2021\] EWHC 1511 \(Admin\)](#)

<sup>1</sup> [2019] EWHC 2129 (Admin). See also [Guidance on drawing adverse inferences in Medical Practitioners Tribunal hearings](#) and [Appeals Circular A01/20 R \(Kuzmin\) v GMC](#)

- ▶ Tribunals should evaluate the lack of any opportunity to test the registrant's case in cross-examination and not simply disregard it. [\*General Medical Council v Udoye\* \[2021\] EWHC 1511 \(Admin\)](#)

### Impairment and Sanction

- ▶ Tribunals should ensure consistency in their findings at all stages and if they have made findings to the effect that the registrant has given an untruthful account, then they should consider the impact of such a finding on motive. [\*Haris v General Medical Council\* \[2021\] EWCA Civ 763](#)
- ▶ Just because there is an absence of independent or objective evidence in relation to a potentially mitigating factor, it should not automatically be treated as an aggravating factor instead. [\*Al Nageim v General Medical Council\* \[2021\] EWHC 877 \(Admin\)](#)

### Appeals

- ▶ Appropriate deference is to be paid to the determinations of a medical practitioners tribunal in section 40 appeals, but the court must not abrogate its own duty in deciding whether the sanction imposed was wrong; that is, was it appropriate and necessary in the public interest or was the sanction excessive and disproportionate. [\*Dr Pantula Sastry, Dr Udodiri Okpara v General Medical Council\* \[2021\] EWCA Civ 623](#)
- ▶ In section 40A appeals the approach of the appellate court is supervisory in nature, in particular, in respect of an evaluative decision and whether it falls "outside the bounds of what the adjudicative body could properly and reasonably decide". [\*Dr Pantula Sastry, Dr Udodiri Okpara v General Medical Council\* \[2021\] EWCA Civ 623](#)
- ▶ Matters such as dishonesty or sexual misconduct are matters where the court is likely to feel that it can assess what is needed to protect the public or maintain the reputation of the profession more easily for itself and thus attach less weight to the expertise of the tribunal (in s40 or s40A appeals). [\*Dr Pantula Sastry, Dr Udodiri Okpara v General Medical Council\* \[2021\] EWCA Civ 623](#)

Kind regards

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