

Appeals Circular A08/23

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Learning points from recent appeals

Facts

- ▶ In cases involving sexual misconduct with a patient, the tribunal should explore the issue of vulnerability (or the practitioner's *perception* of vulnerability) [Professional Standards Authority for Health and Social Care v General Medical Council \(Onyekpe\) \[\[2023\] EWHC 2391 \(Admin\)\]](#):
 - ▶ where the GMC **does not** allege that the patient was vulnerable, the tribunal should reach its own fully considered conclusion (as to vulnerability) rather than accepting the GMC's concession;
 - ▶ the tribunal should look at whether the evidence shows that the patient was vulnerable, and/or whether the practitioner perceived the patient to be vulnerable; the tribunal should make a finding on vulnerability and explain it.
- ▶ A reminder that a tribunal can make amendments to the allegations at the hearing, bearing in mind the primacy of the public interest, if the amendment can be made without injustice [Professional Standards Authority for Health and Social Care v General Medical Council \(Onyekpe\) \[\[2023\] EWHC 2391 \(Admin\)\]](#)
- ▶ Where a practitioner contends that the patient's credibility and reliability is affected by a mental health condition, the tribunal should not speculate as to the effect of that condition on the matters alleged. The practitioner ought to adduce evidence to support their submission that the condition should be treated as undermining the patient's evidence. [Metastasio v General Medical Council \[2023\] EWHC 1918 \(Admin\)](#)

- ▶ [Shabir v General Medical Council \[2023\] EWHC 1772 \(Admin\)](#) reiterated some key principles which tribunals should take into account when considering inherent probability:
 - ▶ the fact that a practitioner would be placing their career at risk by behaving in a particular way does not mean that they did not in fact do so (*Arunkalaivanan v General Medical Council [2014] EWHC 873 (Admin)*);
 - ▶ the tribunal has to weigh the inherent improbability of the practitioner acting as alleged, against the relative improbability of the witness/victim fabricating the allegations and putting themselves through the ordeal involved in doing so (*Byrne v General Medical Council [2021] EWHC 2237 (Admin)*);
 - ▶ the tribunal is not required to make a separate 'standalone' finding on inherent probability. The tribunal is required to consider the evidence, to do so critically, to do so with the burden and standard of proof in mind and to consider the strengths and weaknesses of the evidence. It will be sufficient for a tribunal to record its detailed assessment of the credibility and reliability of the evidence on which the GMC relied, principally that of the victim, it does not necessarily have to write the words 'cogent' or 'cogency'.
- ▶ It is unlikely that a witness can be found to be consistent, reliable and credible where they abandon all but one of their allegations, including the most serious (as in the case of *Casey v General Medical Council [2011] NIQB 95*). However, in cases involving other types of inconsistency (eg in the witness's account, or raising the issue of sexual motivation only after the practitioner denied matters (as in *Shabir v General Medical Council [2023] EWHC 1772 (Admin)*), a tribunal can accept the witness's overall account of events. A tribunal is entitled to conclude that a witness was largely consistent on the key elements of the allegations and should explain its reasoning on this issue. [Shabir v General Medical Council \[2023\] EWHC 1772 \(Admin\)](#)
- ▶ A reiteration that when giving decisions on matters of fact, the tribunal's reasons should be given, if in the circumstances of the individual case, fairness requires it (*Gupta v GMC [2002] 1 WLR 1691*) and in exceptional cases, a practitioner is entitled to understand the basis on which their case has been rejected (*Southall v General Medical Council [2010] 2 FLR 1550*) [Shabir v General Medical Council \[2023\] EWHC 1772 \(Admin\)](#)

Impairment and Sanction

- ▶ [Professional Standards Authority for Health and Social Care v Social Work England MDR \[2023\] EWHC 2125 \(Admin\)](#) provided a reminder of principles which tribunals should take into account when considering sanction:
 - ▶ when assessing seriousness and the impact on the protection of the health, safety and well-being of the public, honesty and integrity are fundamental in relation to qualifications and the system of applying for medical positions (*General Medical Council v Theodoropoulos [2017] 1 W.L.R. 4794*);
 - ▶ the imposition of one sanction rather than another is an evaluative one and is multifactorial (*Bawa-Garba v General Medical Council [2018] EWCA Civ 1879*)

- ▶ the reputation of the profession is more important than the fortunes of any individual [practitioner]. When considering suspension, the consequence for the practitioner and their family may be deeply unfortunate and unintended, but that does not make suspension the wrong order if it is otherwise right (*Bolton v Law Society [1994] 1 W.L.R. 512*)
- ▶ the absence of any previous interim restrictions on practice should not be given any weight by the tribunal at the substantive hearing. The tribunal is bound to make its own findings of fact and reach its own conclusions on the basis of the evidence before it.
- ▶ In cases where a practitioner pursues a sexual relationship with a vulnerable former patient (abuse of professional position), erasure may be appropriate even where:
 - ▶ the practitioner did not use their professional status to pursue the relationship;
 - ▶ there was no element of grooming behaviour.

[Metastasio v General Medical council \[2023\] EWHC 1918 \(Admin\)](#)

IOT

- ▶ [Cook v General Medical Council \[2023\] EWHC 1906 \(Admin\)](#) set out some useful reminders in relation to IOTs:
 - ▶ the IOT should not seek to decide the credibility or merits of a disputed allegation, nor make any findings as to whether the allegations are or are not established; that is a matter for any later substantive hearing (*Perry v Nursing and Midwifery Council [2013] 1 WLR 3423 and R (George) v The General Medical Council [2003] EWHC 1124 (Admin)*)
 - ▶ when assessing risk, the IOT has the ability to raise matters that have not been advanced in the parties' submissions. However, if it does so, the IOT must ensure that in making its decision, it examines the issues in the round and against the background facts and evidence; particularly when the issue has a significant bearing on their decision as to the type of order to impose.
 - ▶ the IOT should ensure that their reasoning is adequate and that the relevant party can understand why they 'lost'. However, lengthy or elaborate reasons are not required; on the contrary, they are positively discouraged by the (Imposing Interim Orders) guidance.

Kind regards
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