

Appeals Circular A09/20

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Learning points from recent appeals

Evidence

- ▶ A Tribunal cannot accept opinion evidence from a witness who is not impartial. However, the fact that a witness has conducted an internal enquiry into, and applied their expertise to reach (objective) conclusions about, the registrant's conduct or behaviour does not make that witness partial. A Tribunal can admit and assess expert evidence if it considers that the witness is well qualified to tender opinion evidence (for example given their position and experience) but should still approach the issues in a discriminating manner. *K v Nursing and Midwifery Council* [2020] CSIH 40, 2020 WL 03841232

Facts

- ▶ The Court of Appeal confirmed that the test for dishonesty is that set out in *Ivey v Genting Casinos*, which expressly overruled the test in *R v Ghosh* *R v Barton & Booth* [2020] EWCA Crim 575
- ▶ In relation to each instance of dishonesty, a Tribunal should provide clear reasoning for their decision and leave readers in no doubt about what factors and material were considered. An assessment of credibility and reliability is not required in every situation. *McLennan v General Medical Council* [2020] CSIH 12
- ▶ When considering dishonesty, a Tribunal is not required to identify a benefit or motive for the making of any false statements. *Kefala v General Medical Council* [2020] EWHC 2480 (Admin)

- ▶ A Tribunal should direct itself to consider the terms of the charge(s) which the registrant is facing and ask itself whether the evidence demonstrates that the registrant's behaviour amounts to what is alleged in the actual language of the charge. The Tribunal should assess the events as a whole, if the language of the charge requires it to do so. *R (on the Application of the Chief Constable of Dyfed Powys Police) v Police Misconduct Tribunal and PC Simon England* [2020] EWHC 2032 (Admin)
- ▶ When considering the evidence of all witnesses, a Tribunal should identify whether there are any disputes of fact and if so, make clear their findings in relation to those factual disputes, the reasons for them and ensure that those findings address the specific language of the charge(s). *R (on the Application of the Chief Constable of Dyfed Powys Police) v Police Misconduct Tribunal and PC Simon England* [2020] EWHC 2032 (Admin)
- ▶ When considering whether touching is sexual, a Tribunal should take account of how the conduct made the alleged victim feel and take care not to give weight to factors which are only relevant to the registrant's state of mind or intention (such as medical evidence, other problems or stresses being suffered by the registrant at the time of events) rather than whether the touching was sexual or not. *R (on the Application of the Chief Constable of Dyfed Powys Police) and Police Misconduct Tribunal and PC Simon England* [2020] EWHC 2032 (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. *General Medical Council v Haris* [2020] EWHC 2518 (Admin)
- ▶ A Tribunal should ensure that it gives adequate and clear reasons for its decision(s). The reasons will be adequate if it is clear to the registrant why their account was not believed and why they had lost, taking account of their own understanding of the evidence and the argument(s). *Kefala v General Medical Council* [2020] EWHC 2480 (Admin)

Impairment and Sanction

- ▶ The question of impairment of fitness to practise (of a registered medical practitioner) is not limited to conduct in a specific capacity. Though the conduct has to be linked to the medical profession, it could occur outwith medical practice if it was conduct that would bring disgrace upon the doctor and thereby prejudice the reputation of the profession. That conduct could also be the subject of investigation by another regulatory body. *Ogunsanya and Taylor Wood Solicitors v General Medical Council* [2020] EWHC 1500 (QB)
- ▶ When considering the assessment of harm, evidence relevant to both reputational harm and actual harm suffered should be taken into account. *R*

(Chief Constable of the West Midlands) v Panel Chair (Police Misconduct Panel)
[2020] EWHC 1400 (Admin)

- ▶ While Tribunals are entitled to take admissions and expressions of guilt into account as mitigation, they must also consider the purpose of imposing a disciplinary sanction, including the maintenance of public confidence in, and reputation of, the police service. *R (Chief Constable of the West Midlands) v Panel Chair (Police Misconduct Panel)* [2020] EWHC 1400 (Admin)
- ▶ A Tribunal should address each alleged incident in a systematic and structured way to ensure that it has a full appreciation of the seriousness of the conduct of the registrant and a proper foundation upon which to make the important assessments of culpability and harm that are required at the outcome stage *R (on the Application of the Chief Constable of Dyfed Powys Police) v Police Misconduct Tribunal and PC Simon England* [2020] EWHC 2032 (Admin)
- ▶ A Tribunal should ensure that it considers the true gravity of the case and that when considering insight and remediation, they consider whether the doctor demonstrates that they understand the gravity of their behaviour. *General Medical Council v Haris* [2020] EWHC 2518 (Admin)

IOT

- ▶ When reviewing an interim order, Tribunals must consider whether it remains justified, proportionate and in the public interest. Tribunals should take account of the gravity of the allegations, the evidence, the risk of harm to the public, the reasons why the case has not been concluded and the prejudice to the practitioner if the interim order was continued. *General Pharmaceutical Council v Kellest* [2020] 6 WLUK 456

Kind regards
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