

PUBLIC RECORD

Dates: 30/05/2023 - 12/06/2023, 13/11/2023

Medical Practitioner’s name: Dr Graham WHEATLEY

GMC reference number: 3137482

Primary medical qualification: BM BS 1986 University of Nottingham

Type of case	Outcome on facts	Outcome on impairment
New - Misconduct	Facts relevant to impairment found proved	Impaired

Summary of outcome
Suspension, 6 weeks.

Tribunal:

Legally Qualified Chair	Mr Andrew Cledes
Lay Tribunal Member:	Mr John Ennis
Medical Tribunal Member:	Dr John Moriarty
Tribunal Clerk:	Ms Ciara Fogarty (30/05/2023 to 09/06/2023) Mr Josh Dayco (12/06/2023) Mrs Jennifer Ireland (13/11/2023)

Attendance and Representation:

Medical Practitioner:	Present and represented
Medical Practitioner’s Representative:	Mr Kevin McCartney, Counsel, instructed by the MDDUS
GMC Representative:	Ms Chloe Fairley, Counsel (30/05/2023 to 09/06/2023) Ms Georgina Goring, Counsel (12/06/2023) Mr Ian Brook, Counsel (13/11/2023)

Attendance of Press / Public

In accordance with Rule 41 of the General Medical Council (Fitness to Practise) Rules 2004 the hearing was held in public.

Overarching Objective

Throughout the decision making process the tribunal has borne in mind the statutory overarching objective as set out in s1 Medical Act 1983 (the 1983 Act) to protect, promote and maintain the health, safety and well-being of the public, to promote and maintain public confidence in the medical profession, and to promote and maintain proper professional standards and conduct for members of that profession.

Determination on Facts - 09/06/2023

Background

1. Dr Graham Wheatley qualified in 1986 from the University of Nottingham and prior to the events which are the subject of the hearing Dr Wheatley worked as a GP partner at the Munro Medical Centre and has been a senior partner since 2016. Dr Wheatley also served as a British Army Medical Officer and retired from this post in 2001. At the time of the events Dr Wheatley was practising as a GP and was a Royal College of General Practitioners representative on the Defence Medical Services Education Committee.

2. The allegation that has led to Dr Wheatley's hearing can be summarised as follows: Dr Wheatley's behaviour was inappropriate towards his colleague, Ms A; further it is alleged that his conduct was sexually motivated and amounted to sexual harassment as defined in the Equality Act 2010.

Events which led to the Allegation

3. Between 7 and 10 November 2021 Dr Wheatley attended the Triservice Trainers' Conference ('TSTC'). This was a 3 day conference; at the end of the last residential night a dinner was held in the Officers' Mess. This event had not taken place for 2 years due to the coronavirus pandemic. The atmosphere at the event was described as convivial with guests happy to socialise face to face after the lockdown periods. At the dinner, Dr Wheatley was seated on the top table. There were approximately 12 complimentary bottles of wine for around 10 guests at this table. There were approximately 40 people who attended the event.

4. After the main course, there was a break in which people were able to move around the room and socialise. During this break, it is alleged that Dr Wheatley appeared to be intoxicated while socialising with other guests. During jovial conversation Dr Wheatley's medals were transferred to Ms A, XXX, the medals being pinned onto Ms A's dress, high up on her chest.

5. After the final course, guests moved into the bar area. Dr Wheatley approached Ms A to retrieve his medals. It is then alleged that Dr Wheatley touched Ms A's breast whilst seeking to adjust the medals that had become unhooked. During this part of the social event Dr Wheatley was allegedly seen to be stumbling and unsteady on his feet and also slurring his words, appearing very intoxicated. Whilst in the bar area and when socialising it is alleged that Dr Wheatley put his arm around Ms A's waist and touched her bottom on one or more occasions.

The Outcome of Applications Made during the Facts Stage

6. On 2 June 2023, the Tribunal refused the GMC's application, made pursuant to Rule 17(6) of the General Medical Council (Fitness to Practise Rules) 2004 as amended ('the Rules'), to amend paragraph 1(a) of the Allegation. The Tribunal's full decision on the application is included at Annex A.

7. On 5 June 2023, the Tribunal partially granted a "half-time" application of no case to answer, made on Dr Wheatley's behalf under Rule 17(2)(g). The Tribunal's written determination can be found at Annex B.

The Allegation and the Doctor's Response

8. The Allegation made against Dr Wheatley is as follows:

1. On 9 November 2021 you engaged in inappropriate behaviour towards your colleague, Ms A, in that you:

a. ~~persistently sought her attention despite requests on one or more occasion for you to stop;~~

Deleted under Rule 17(2)g

b. put your arm around Ms A's waist on one or more occasion;

To be determined

c. placed your hand on Ms A's bottom on one or more occasion;

To be determined

d. touched Ms A's breast.

To be determined

2. Your conduct as described at paragraphs ~~1a~~ 1b– d above:

a. was sexually motivated;

Deleted under Rule 17(2)g in relation to 1(d) only. To be determined in relation to 1(b) and 1(c)

b. amounted to sexual harassment pursuant to s.26 Equality Act in that you engaged in unwanted conduct of a sexual nature, which had the purpose or effect of violating the dignity of Ms A, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

To be determined

And that by reason of the matters set out above your fitness to practise is impaired because of your misconduct. **To be determined**

Witness Evidence

9. The Tribunal received live evidence on behalf of the GMC from the following witnesses:

- Ms A, XXX, in person
- Dr B, Postgraduate Medical Dean for Defence, in person
- Dr C, Defence Primary Healthcare Dean and a Responsible Officer, in person
- Dr D, General Practitioner within the Ministry of Defence, by video link

10. The Tribunal also received evidence on behalf of the GMC in the form of witness statements from the following witnesses who were not called to give oral evidence:

- Dr E, Health Education England Northwest Regional Postgraduate Dean and a Responsible Officer
- Dr F, Army General Practitioner and Regional Clinical Director for the Ministry of Defence

11. Dr Wheatley provided his own witness statement and gave oral evidence at the hearing. The Tribunal also received evidence on behalf of Dr Wheatley in the form of witness statements from the following witnesses who were not called to give oral evidence:

- Dr G, General Practitioner within the Ministry of Defence
- Dr H, General Practitioner within the Ministry of Defence

Documentary Evidence

12. The Tribunal had regard to the documentary evidence provided by the parties. This evidence included but was not limited to:

- 14 Testimonial statements regarding Dr Wheatley dated 15 March 2023 to 17 April 2023
- Statement of Dr D dated 15 November 2021
- Minutes of a meetings between Dr E and various parties who attended the TSTC dinner
- Email sent by Dr Wheatley, subject 'Apology to Ms A', to Dr C dated 12 November 2021
- Email chains describing the complaints against Dr Wheatley, including his apology for his behaviour and his later counter complaints against Ms A and Dr C
- Timeline of Events at the 'TSTC' conference 7-10 November 2021 at Sandhurst, from the point of view of Ms A
- Dr Wheatley's CV
- Certificate of completion of a course 'Professional Boundaries in Practice' by Dr Wheatley dated 9 May 2022

The Tribunal's Approach

13. In reaching its decision on facts, the Tribunal has borne in mind that the burden of proof rests on the GMC and it is for the GMC to prove the Allegation. Dr Wheatley does not need to prove anything. The standard of proof is that applicable to civil proceedings, namely the balance of probabilities, i.e. whether it is more likely than not that the events occurred.

14. The Tribunal also received submissions from both parties and took them into account.

15. The LQC provided draft legal advice to counsel. Counsel for both parties provided verbal feedback on it. The LQC made amendments considering counsel's submissions and produced a final Legal Advice dated 6 June 2023. There were no further comments on this. The following legal directions were treated as being read into the record:

16. The burden of proving disputed facts is on the GMC. There is no burden on the doctor to disprove anything in the Allegation. The doctor is only obliged to answer the specific allegations against him and no others: *Roomi v GMC EWHC 2188*; *El-Baroudy v GMC 2013 EWHC 2894*; *Chauhan v GMC 2010 EWHC 2093*.

17. The standard required is the civil standard, i.e. the balance of probabilities. The Tribunal will determine whether a disputed fact is more likely than not to have occurred. There is no sliding scale in relation to the standard of proof, but the more serious the allegation, the more cogent the evidence may need to be, to find it proved to the civil standard. Hearsay should be given less weight than direct evidence as it will not have been tested in cross-examination.

18. The Tribunal must not speculate. In assessing the veracity and reliability of each witness's evidence, account must be taken of relevant factors such as distress, passage of time, lack of neutrality or opportunity for collusion. Accuracy of recall cannot be inferred from a high level of confidence whilst testifying, nor should the demeanour of a witness be relied on as an indicator of honesty or otherwise.

19. Where an event is inherently improbable, it may take better evidence to persuade the Tribunal that it has happened. That goes to the quality of the evidence. However, it does not follow, as a rule of law, that the more serious an allegation, the less likely it is to have occurred. So whilst the Tribunal may take account of inherent probabilities, there is no logical or necessary connection between seriousness and probability. Thus it is not the case that 'the more serious the allegation, the more cogent the evidence needed to prove it' (reasoning taken from Morris LJ in *Byrne v GMC EWHC 2237*).

20. Although there is no heightened standard of proof in regulatory proceedings, the inherent probability or improbability of an event is itself a matter to be taken into account

when weighing the probabilities and deciding whether or not on balance the event occurred. The more improbable it is that a registrant would have behaved as alleged, the more cogent and credible the evidence needed to prove on the balance of probabilities that he did so: *Virdee v GPhC 2015 EWHC 169*.

21. Dr Wheatley is of good character and has no disciplinary matters recorded against him. Good character is not a defence but it is an important factor capable of assisting a doctor. It is relevant to the Tribunal's consideration in two ways:

- (1) Dr Wheatley has given evidence. Good character is a positive feature which the Tribunal will take into account when considering whether or not this evidence is accepted as credible;
- (2) the fact that Dr Wheatley has no previous adverse regulatory findings, disciplinary matters, cautions or convictions goes to the likelihood of him acting as alleged by the GMC. How likely is it that Dr Wheatley would cast aside his good character in this way?

22. *Martin v SRA [2020] EWHC 3525 (Admin)* (paragraphs 51-54) "*evidence of good character is relevant to credibility and to propensity ...*". The Court cautioned against overstating the significance of such evidence; it should not detract from the primary focus on the evidence directly relevant to the alleged wrongdoing.

"Decisions as to the weight to be attached to particular parts of the evidence are pre-eminently a matter for the fact finder and ought not to be disturbed on appeal unless the decision is one that no reasonable Tribunal could have reached"

23. The decision on admissibility of any testimonials at this stage is for the Tribunal. Judging the weight to be given to a doctor's good character and its relevance at the facts stage is a matter for the Tribunal, taking account of all the evidence, the law and submissions made.

24. The Tribunal must consider each paragraph of the Allegation separately in order to make individual findings. The Tribunal, accordingly, has to reach a conclusion on each paragraph separately but it is entitled, in determining whether or not each paragraph is

proved, to have regard to relevant evidence in regard to any other paragraph and may consider the evidence in the round.

25. The Tribunal should ensure that it gives adequate and clear reasons for its decisions. The reasons will be adequate if it is clear to a registrant why their evidence was not believed and why they had lost, taking account of their own understanding of the evidence and arguments.

26. The Tribunal should not assess a witness's credibility exclusively on their demeanour when giving evidence (*Khan v GMC 2021 EWHC 374*). The Tribunal should make a rounded assessment of each witness's reliability, rather than approaching their reliability in respect of each charge in isolation from the others. Tribunals should consider all of the evidence before them before coming to a conclusion about credibility. This could include conflicts in evidence with other witnesses, denials of the allegations and reasons why they could not be true.

The meaning of "inappropriate" (paragraphs 1 (b), (c), (d))

27. The Tribunal should give this word its ordinary everyday meaning. The OED defines it as "*not suitable or appropriate in a particular situation*". It should be approached objectively so that the ordinary understanding of a reasonable person is applied.

Relevance of intoxication

28. The Tribunal can consider as direct evidence, the evidence of Dr Wheatley's intoxication as to whether he was unsteady and swaying when they consider the defence case of steadying himself when he touched Ms A on the waist and/or bottom. Intoxication is relevant as to whether he formed any sexual motivation or that he intentionally behaved in the manner alleged. An intention formed in drink remains an intention, it is no excuse to say he would not have behaved in the manner alleged but for the intoxication.

29. Even in the absence of sexual motivation or of a finding that it was an intentional act, if proved that Dr Wheatley touched Ms A's waist and/or bottom, it '*could*', subject to consideration of 26 (4) EA 2010, amount to behaviour of a sexual nature.

Sexual motivation (paragraph 2(a) in relation to paragraphs 1(b) & (c)).

30. The allegation refers to Dr Wheatley’s actions at paragraphs 1(b) and (c) as being ‘sexually motivated’. As a general starting point some actions and words can be said to be inherently or obviously sexual but others are less so.

31. The Tribunal does have significant assistance when considering sexual motivation: in *Basson v GMC 2018 EWHC 505 (Admin)*, Mostyn J said:

“... a sexual motive means that the content was done either in pursuit of sexual gratification or in pursuit of the future sexual relationship ... the state of a person’s mind is not something that can be proved by direct observation. It can only be proved by inference or deduction from the surrounding evidence”.

Section 26 of the Equality Act 2010 (paragraph 2(b) in relation to paragraphs 1(b), (c) & (d)).

32. Sexual harassment is unlawful under the Equality Act 2010. It is defined as ‘*unwanted conduct of a sexual nature*’. It can include unwanted touching. The recipient of the behaviour decides whether or not it is unwanted.

33. The Equality Act 2010 at Section 26 states:

‘ 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).’

34. Unwanted conduct can be a one-off. It does not need to be repeated to constitute sexual harassment. Sexual interaction that is invited, mutual or consensual is not sexual

harassment because it is not unwanted. If unwanted conduct is intended to violate a person's dignity or create an offensive environment, it does not matter whether it has that effect on the person.

35. If unwanted conduct is not intended to cause distress, it can still have the effect of violating a person's dignity or creating an offensive environment. The Equality Act 2010 at Section 26 (4) states:

'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'

The Tribunal's Analysis of the Evidence and Findings

36. The Tribunal has considered each outstanding paragraph of the Allegation separately and has evaluated the evidence in order to make its findings on the facts.

37. The Tribunal noted that the incidents in the Allegation were all said to have taken place during or after the dinner. The sequence of paragraphs in the Allegation is potentially misleading in that what is alleged in paragraph 1(d) was likely to have taken place before that in 1(b) and (c). The latter parts of the Allegation took place in a bar adjacent to the room where the dinner had taken place. The Tribunal noted that there were some differences between the evidence of witnesses about who was talking to whom and where people were standing. The Tribunal considered that these were not material differences and had little or no impact on the credibility of the accounts given. The evening had become informal by this point and people were moving between different groups.

38. The Tribunal was also satisfied that Ms A, Dr B and Dr D were not intoxicated. They had each consumed some alcohol but such consumption was most unlikely to have affected their ability to observe and recall events.

Paragraph 1(b)

39. The Tribunal examined the various accounts of this alleged incident provided by witness evidence. The Tribunal reminded itself of evidence provided by Ms A in which she described the interactions with Dr Wheatley that evening,

“ Throughout the night GW continued to harass me. He was extremely inebriated and would continue to seek me out whilst I was in conversations with other guests. He was very handsy and did put his hands around my waist on more than one occasion.”

40. The Tribunal accepted Ms A as a credible witness as she had given a generally consistent account which was unlikely to have been affected by excessive alcohol consumption. It rejected the alternative account given by Dr Wheatley, that any touching that took place was accidental. The Tribunal considered that Dr Wheatley did not give a positive account regarding this incident. He could not remember carrying out such an act and resorted to speculation that any such contact that had taken place must have been accidental and was caused by his drunken state. The Tribunal also noted that he had not been able to give a precise account when he had been asked to do so by Dr C soon after the dinner and instead apologised generally for any offence he might have caused due to his drunken state. In emails from him dated 12 and 15 November he had given a further account, now denying that he had been as drunk as was being alleged and seeking to transfer some of the blame for what had happened onto Ms A. The differences in these accounts adversely affect Dr Wheatley’s credibility.

41. The Tribunal preferred the evidence of Ms A. The Tribunal noted that Ms A made a complaint almost immediately after the incident.

42. The Tribunal were mindful of the age disparity and difference in status in terms of their roles between Ms A and Dr Wheatley. They considered that Ms A and Dr Wheatley were not established friends or acquaintances and were occasional work colleagues at best. His touching of her waist was inappropriate in the circumstances. The Tribunal accepted that it was unwelcome touching as per the evidence of Ms A and that it was a deliberate act by Dr Wheatley. The Tribunal was satisfied that he intended this act despite his intoxicated state.

43. The Tribunal reminded itself of the previous good character of Dr Wheatley but were satisfied that his evidence was not credible on this paragraph of the Allegation.

44. The Tribunal found that Dr Wheatley's actions at paragraph 1(b) were intentional and inappropriate. The Tribunal has therefore found paragraph 1(b) proved.

Paragraph 1(c)

45. The Tribunal examined the various accounts of this alleged incident provided by witness evidence. The Tribunal reminded itself of the witness statement provided by Dr B. The Tribunal considered Dr B to be a credible and consistent witness and considered his account of the alleged incident:

'As he approached, he reached out towards Ms A with his left hand and eventually made contact with her buttock. I had a plain view of this.

I recall Ms A immediately asking him to stop. I no longer remember her exact words, but I could tell by the way she said what she said that she was shocked and that she didn't like Graham touching her buttock.

Ms A wasn't really able to move away, as she was between Graham, the wall and the bar.

I recall interjecting and saying to Graham something along the lines of 'you cannot do that sort of thing Graham'. I don't recall whether he said anything coherent in response to either myself or Ms A or anyone else in the group; he then moved away from the group.

The whole situation wouldn't have lasted any longer than a few moments, potentially a minute or so.

Ms A then moved out into the corridor only a short distance away from the bar area with [Ms I] and [Ms J]. I followed them out moments later.

I remember apologising to Ms A that this had happened to her and saying that it was wholly inappropriate what Graham did.

She was tearful, visibly distressed and shocked. I got the impression that she

was trying to process what had just happened in the context of the evening as a whole.'

46. The Tribunal considered the witness statement of Dr D.

'I saw Dr Wheatley put his hand on her bottom. He didn't keep his hand still, he moved it over her buttock cheeks, fondling them. The whole thing must have lasted 2-3 full seconds.'

47. The Tribunal noted that Dr B had not seen Dr Wheatley fondling Ms A's bottom but Dr D had. The Tribunal did not find that such inconsistencies in the description were material and found they did not undermine the central point in the evidence that deliberate touching of Ms A's bottom had occurred. Neither witness was prepared to accept that Dr Wheatley might have touched Ms A's bottom accidentally because of unsteadiness caused by drink. Dr D also said that she had remarked to Dr H that Dr Wheatley had touched Ms A's bottom.

48. The Tribunal also considered Dr H's witness statement:

'I recall seeing Dr Wheatley out the corner of my eye, speaking to one group that Ms A was with. I did not see Dr Wheatley touching Ms A's, breast, put his arms around her waist or touch her bottom, as I was talking to another group of people.'

I understand Dr [D] says in her witness statement that she immediately turned to me and said that she had seen Dr Wheatley touching Ms A's bottom.

I do not have any recollection of this exchange with her.'

49. The Tribunal considered that although witnesses had differing recollections these do not undermine the consistent evidence of the touching having taken place. The Tribunal noted that Dr H did not recall Dr D saying that Dr Wheatley had touched Ms A's bottom. However Dr H did not say that such words had not been said.

50. The Tribunal considered the evidence of Dr Wheatley. It noted he had no recollection of the incident, and the Tribunal rejected his account finding it implausible for the same reasons as set out above under the determination regarding paragraph 1(b).

51. The Tribunal has found that Dr Wheatley's actions at paragraph 1(c) were inappropriate and deliberate. The Tribunal has therefore found paragraph 1(c) proved.

Paragraph 1(d)

52. In reaching its determination the Tribunal first examined the witness accounts of this alleged incident. Ms A recalled in evidence that Dr Wheatley had pinned the medals to her chest and told the Tribunal that she had not thought the touching of her breast was deliberate. The Tribunal accepted accounts from witnesses that medals were of great sentimental value to their owners. It noted that Dr F recalled Ms A collecting them from Dr Wheatley.

53. The Tribunal reminded itself of the witness statement of Dr B, which read:

'I recall standing up from the table a while later and saw Graham, who was approximately 3-5 metres away from me at this point, pinning his medals onto Ms A's chest. I remember hearing him apologise, though I don't recall exactly what he said nor what Ms A said in response, if anything.'

54. The Tribunal considered that Dr B had not noted anything untoward in this interaction. The Tribunal reminded itself of the witness statement of Dr C which read:

'Through the corner of my eye I saw, what I believed to be, Graham's hand on Ms A's breast and so I did a double take. When I looked to see what was happening, I saw that his hands were around some medals on the right side of her chest and that Ms A didn't appear distressed. I am not sure whether he was pinning them on or taking them off, but my reaction was that the interaction was innocent, and I was not of the impression that anything untoward had taken place.'

55. The Tribunal therefore accepted that, if Dr Wheatley had touched Ms A's chest, it was in the context of adjusting or taking back the medals and that Dr Wheatley's touching of Ms A's breast was accidental.

56. The Tribunal are not satisfied that Dr Wheatley's actions at paragraph 1(d) were inappropriate. The Tribunal have therefore found paragraph 1(d) not proved.

Paragraph 2(a) in relation to 1(b) and 1(c)

57. The Tribunal had regard to the agreed legal advice as to the definition of sexual motivation, namely: *“conduct was done either in pursuit of sexual gratification or in pursuit of a future sexual relationship”*.

58. The Tribunal considered that Dr Wheatley was very intoxicated at the time the incident took place and he may have been disinhibited through alcohol. However, it had regard to the legal advice regarding intoxication; *‘An intention formed in drink remains an intention, it is no excuse to say he would not have behaved in the manner alleged but for the intoxication’*. They considered that sexual gratification can be inferred from the behaviour itself. That motive can be formed briefly in an intoxicated state, rather than being planned. The Tribunal found that the touching would not have taken place without a degree of sexual motivation.

59. The Tribunal considered that Dr Wheatley did not put forward a positive case regarding paragraphs 1(b) and 1(c) and in the absence of any clear memory had to advance a speculative account. The evidence of Ms A, Dr B and Dr D spoke of a deliberate act in which Dr Wheatley touched Ms A’s waist and/or her bottom. This amounted to an obviously sexual touching. The Tribunal rejected Dr Wheatley’s explanation.

60. The Tribunal had determined in relation to paragraphs 1(b) and (c) that Dr Wheatley had inappropriately touched Ms A’s waist and Ms A’s bottom. The Tribunal considered that it was more probable than not there was sexual motivation by Dr Wheatley.

61. Given the Tribunal’s conclusions in respect of paragraph 1(b) and 1(c) of the Allegation, the Tribunal was of the view that Dr Wheatley’s conduct was in pursuit of sexual gratification and therefore was sexually motivated. Accordingly, the Tribunal found this paragraph of the Allegation proved in respect of 1(b) and 1(c).

Paragraph 2(b) in relation to 1(b) and 1(c)

62. The Tribunal found Dr Wheatley’s actions in paragraph 1(b) and 1(c) to be of an unwanted sexual nature and accepted Ms A’s evidence of her adverse reaction to it.

63. The Tribunal reminded itself of the legal advice given. Even if unwanted conduct is not intended to cause distress, it can still have the effect of violating a person’s dignity or

creating an offensive environment. The Tribunal found that Dr Wheatley's actions had created a degrading or humiliating environment for Ms A. The Tribunal noted that even though the incident had occurred outside the workplace and was in a social setting, it was still unwelcome contact.

64. The Tribunal considered the effect Dr Wheatley's actions had had on Ms A and her perception of his conduct. The Tribunal recounted Dr B's evidence of Ms A's reaction to the touching, *'She was tearful, visibly distressed and shocked'*. The Tribunal also noted Ms A's reaction recorded in her witness statement and her timeline of events in the exhibits produced. The circumstances of the case were that the touching was inappropriate bearing in mind the absence of any close relationship between Dr Wheatley and Ms A and the public and social setting in which it occurred. It was reasonable, the Tribunal found, for the conduct of Dr Wheatley to have had the effect on Ms A which she described in her evidence.

65. The Tribunal determined that the effect of the behaviour does meet the description of paragraph 1(b) of Section 26 Equality Act and accordingly find paragraph 2(b) proved in relation to paragraphs 1(b) and 1(c) of the Allegation.

The Tribunal's Overall Determination on the Facts

66. The Tribunal has determined the facts as follows:

That being registered under the Medical Act 1983 (as amended):

1. On 9 November 2021 you engaged in inappropriate behaviour towards your colleague, Ms A, in that you:

a. ~~persistently sought her attention despite requests on one or more occasion for you to stop;~~

Deleted under Rule 17(2)g

b. put your arm around Ms A's waist on one or more occasion;

Determined and found proved

c. placed your hand on Ms A's bottom on one or more occasion;

Determined and found proved

d. touched Ms A's breast.

Not proved

2. Your conduct as described at paragraphs ~~1a~~ 1b– d above:

a. was sexually motivated;

Deleted under Rule 17(2)g in relation to 1(d)

Determined and found proved in relation to 1(b) and 1(c).

b. amounted to sexual harassment pursuant to s.26 Equality Act in that you engaged in unwanted conduct of a sexual nature, which had the purpose or effect of violating the dignity of Ms A, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

Determined and found proved in relation to 1(b) and (c) but not proved in relation to 1(d).

And that by reason of the matters set out above your fitness to practise is impaired because of your misconduct.

Determination on Impairment - 12/06/2023

67. The Tribunal now has to decide in accordance with Rule 17(2)(l) of the Rules whether, on the basis of the facts which it has found proved as set out before, Dr Wheatley's fitness to practise is impaired by reason of misconduct.

The Evidence

68. The Tribunal has taken into account all the evidence received during the facts stage of the hearing, both oral and documentary. The Tribunal has already received several testimonials from colleagues and employers, in support for Dr Wheatley.

69. The Tribunal also received further evidence, which included, but was not limited to:

- A statement from Professor K, Medical Director, Dr Wheatley's Responsible Officer;
- Dr Wheatley's CV;

- Certificate of Completion by Dr Wheatley of ‘Professional Boundaries in Practice’ course dated 9 May 2022;
- Certification of Completion by Dr Wheatley of ‘DISC analysis to understand and improve communication and team working’ dated 25 August 2022;
- Certificate of Completion by Dr Wheatley of ‘Professionalism: fulfilling your duty as a doctor’ dated 9 December 2022;
- Various Reflective Statements made by Dr Wheatley including on the courses attended.

Submissions

On behalf of the GMC

70. Ms Fairley, Counsel, submitted that Dr Wheatley’s fitness to practise is currently impaired by reason of misconduct. She referred the Tribunal to the relevant case law and to the relevant paragraphs of Good Medical Practice (2013 edition) (GMP).

71. Ms Fairley reminded the Tribunal of Dr Wheatley’s reflective statement where he acknowledged the difference in status between himself and Ms A. She submitted that a colleague is entitled to feel safe in a work related environment and expect not to be the subject of unwanted sexualised contact. She submitted that, whilst Dr Wheatley was intoxicated, it does not excuse his behaviour. Conduct towards a colleague that constituted touching an intimate part of their body without their consent in a sexually motivated manner clearly amounts to serious misconduct.

72. Ms Fairley acknowledged that Dr Wheatley has shown some insight and has undertaken appropriate courses and produced reflective statements, which illustrated that he had addressed his issues, modified his approach to alcohol consumption and developed a clearer understanding of boundaries. She submitted this may go some way to addressing the risk of repetition. However, she reminded the Tribunal that in his evidence, Dr Wheatley attempted to minimise his behaviour. She submitted there is an absence in Dr Wheatley’s statements of reflection on the impact that his conduct had had on Ms A.

73. Ms Fairley reminded the Tribunal of Dr Wheatley’s counter-complaint made in response to Ms A and submitted that this was not a ‘heat of the moment’ response, but a considered one. She submitted the Tribunal may consider this to have been a demeaning

counter-complaint which may have compounded feelings of distress and humiliation for Ms A.

74. Ms Fairley submitted that, although Dr Wheatley has presented some insight and undertaken courses in an attempt to remediate his conduct, he does not have full insight at this stage. She submitted Dr Wheatley's conduct towards Ms A on the evening of the 9 November 2021 plainly constituted serious misconduct. As the Tribunal was aware, doctors occupy a position of privilege and trust in society and are expected to uphold proper standards of conduct.

75. Ms Fairley submitted that in line with the test set out in *Grant*, it was necessary for the Tribunal to make a finding of impairment in order to uphold public confidence in the profession. She also said that the Tribunal should consider if the need to uphold and maintain proper professional standards and the need to maintain public trust in the profession would be undermined if a finding of impairment was not made.

On behalf of Dr Wheatley

76. Mr McCartney, Counsel, submitted that Dr Wheatley has explored his professional responsibilities in relation to maintaining boundaries with colleagues and patients within his personal and work life. The courses Dr Wheatley had completed after engaging with NHS England addressed common areas of risk and his reflection spoke of a fundamental change in his approach to use of alcohol on social occasions. Mr McCartney submitted that Dr Wheatley has properly applied himself after the incident.

77. Mr McCartney did not seek to argue that the conduct found proved by the Tribunal did not constitute misconduct.

78. Mr McCartney submitted that Dr Wheatley readily recognised the gravity of his conduct and had demonstrated this through his reflective statements and his completion of courses. He argued that there was no risk of repetition of his conduct.

79. Mr McCartney submitted that Dr Wheatley was not absent of insight simply because he contested the allegations. He submitted that it was open to the Tribunal to look to Dr Wheatley's contest of the allegations, however, insight was not dependent upon his having accepted the allegations.

80. Mr McCartney noted that the Tribunal were being invited to make a finding of impairment on the basis of public interest. He submitted that the finding of sexual misconduct could be described as being at the very lowest end of the scale in terms of these types of cases. Mr McCartney acknowledged that there was public interest in maintaining standards. He reminded the Tribunal that the incident was of a momentary nature based on what the Tribunal had found proved and asked the Tribunal to recognise the context in which the conduct arose.

81. Mr McCartney reminded the Tribunal to look forward as it must do when considering current impairment. He invited the Tribunal to find no risk of repetition. He submitted that if the Tribunal was to make a finding of impairment, it should be restricted to public interest. Mr McCartney submitted that Dr Wheatley's conduct related to a single and very short-lived incident in which he had had far too much to drink.

The Relevant Legal Principles

82. The Tribunal reminded itself that at this stage of proceedings, there is no burden or standard of proof and the decision of impairment is a matter for the Tribunal's judgement alone.

83. In approaching the decision, the Tribunal was mindful of the two-stage process to be adopted: firstly whether the facts as found proved amounted to misconduct and whether the misconduct was serious; and then secondly whether the finding of that misconduct was so serious that it could lead to a finding of impairment.

84. The Tribunal must determine whether Dr Wheatley's fitness to practise is impaired today, taking into account Dr Wheatley's conduct at the time of the events and any relevant factors since then such as whether the matters are remediable, have been remedied and any likelihood of repetition.

85. The Tribunal was also mindful of the need to protect the public and uphold public confidence in the medical profession by upholding proper standards of conduct and behaviour. When considering the public interest in this case, the Tribunal took into account the submissions of both parties with regard to the case of *Yeong v The General Medical Council [2009] EWHC 1923 (Admin) (28 July 2009)* which states:

‘Where a FTPP considers that the case is one where the misconduct consists of violating such a fundamental rule of the profession [...] thereby undermining public confidence in the medical profession, a finding of impairment of fitness to practise may be justified on the grounds that it is necessary to reaffirm clear standards of professional conduct so as to maintain public confidence in the practitioner and in the profession.’

21. The Tribunal also had regard to paragraph 76 of the judgment in *CHRE v NMC & Paula Grant [2011] EWHC 927 (Admin)*.

The Tribunal’s Determination on Impairment

Misconduct

86. In determining whether Dr Wheatley’s fitness to practise is currently impaired by reason of misconduct, the Tribunal first considered whether the facts found proved amounted to misconduct.

87. The Tribunal considered its previous determination, whereby it found that Dr Wheatley’s conduct in putting his arm around Ms A’s waist and placing his hand on Ms A’s bottom were sexually motivated. In light of these, the Tribunal also found that Dr Wheatley’s actions amounted to sexual harassment pursuant to s.26 Equality Act in that he engaged in unwanted conduct of a sexual nature, which had the purpose or effect of violating the dignity of Ms A, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

88. The Tribunal also considered that the following paragraphs of GMP are engaged in this case.

‘1 *Patients need good doctors. Good doctors... establish and maintain good relationships with patients and colleagues, are honest and trustworthy, and act with integrity and within the law.*

...

36 *You must treat colleagues fairly and with respect.*

37 *You must be aware of how your behaviour may influence others within and outside the team.*

...

65 *You must make sure that your conduct justifies your patients' trust in you and the public's trust in the profession.'*

89. The Tribunal considered the key aspects of the Allegation individually to address whether Dr Wheatley's conduct amounts to serious misconduct. It considered that the paragraphs of the Allegation found proved in this case amounted to serious misconduct individually and cumulatively.

Impairment

90. Having found that the facts found proved amounted to serious misconduct, the Tribunal went on to consider whether, as a result of that conduct, Dr Wheatley's fitness to practise is currently impaired.

91. In determining whether a finding of current impairment of fitness to practise is necessary, the Tribunal looked for evidence of remediation and insight, and the likelihood of repetition, balanced against the three elements of the overarching statutory objective.

92. The Tribunal had regard to paragraph 76 of the judgment in the case of *CHRE v NMC & Paula Grant [2011] EWHC 927 (Admin)*, in which Mrs Justice Cox set out the helpful and comprehensive approach of Dame Janet Smith in her 5th Shipman Report to determining issues of impairment. At paragraph 25.67 of the Shipman Report, she identified the following as an appropriate test for panels considering impairment of a doctor's fitness to practise.

'Do our findings of fact in respect of the doctor's misconduct...show that his/her fitness to practise is impaired in the sense that s/he:

a. has in the past acted and/or is liable in the future to act so as to put a patient or patients at unwarranted risk of harm; and/or

- b. has in the past brought and/or is liable in the future to bring the medical profession into disrepute; and/or*
- c. has in the past breached and/or is liable in the future to breach one of the fundamental tenets of the medical profession; and/or...*
- d. has in the past acted dishonestly and/or is liable to act dishonestly in the future.'*

93. In the present case, the Tribunal considered that limbs (b) and (c) are engaged.

94. In relation to insight and remediation, the Tribunal considered that Dr Wheatley has shown some insight into his actions. He had resigned his position immediately with GPEC. It also considered the relevant courses that Dr Wheatley had undertaken and the detailed reflections he had provided. The Tribunal noted that these reflections were detailed and analytical and focused on the prevention of recurrence. The Tribunal was, however, concerned that Dr Wheatley did not fully appreciate the effect of his actions towards Ms A and how his conduct affected her specifically and members of the public generally. The Tribunal noted that – after he had apologised within a very short time after the dinner for any upset he had caused to Ms A, he shortly thereafter made a complaint directly against her when it was clear that his conduct was going to be investigated. Although the Tribunal considered that there is a low risk of repetition in this case, it cannot be satisfied that Dr Wheatley's remediation is complete.

95. The Tribunal reminded itself that this is a case of sexual misconduct, whereby Dr Wheatley had acted inappropriately towards Ms A with his actions being sexually motivated and amounting to sexual harassment. Nevertheless, the Tribunal considered that Dr Wheatley's misconduct fell at the lower end of the spectrum of gravity in terms of sexual misconduct cases. It noted that Dr Wheatley was heavily under the influence of alcohol at the time, there had been a single incident, and that he had immediately withdrawn his hand when he was asked to do so.

96. The Tribunal was satisfied that the misconduct which it had found was remediable, had been substantially remedied and that the likelihood of repetition was very low.

97. Nonetheless, the Tribunal determined that the public expects doctors' conduct to justify its trust in them and expects doctors to maintain respectful relationships with colleagues and treat them fairly. Where doctors fail to do so in a significant way, the public's trust in the profession is undermined and a finding of impairment of fitness to practise is required.

98. Therefore, the Tribunal determined that Dr Wheatley's fitness to practise is currently impaired by reason of misconduct in order:

'...

b. to promote and maintain public confidence in the medical profession; and

c. to promote and maintain proper professional standards and conduct for members of that profession.'

Determination on Sanction - 13/11/2023

99. Having determined that Dr Wheatley's fitness to practise is impaired by reason of misconduct, the Tribunal now has to decide in accordance with Rule 17(2)(n) of the Rules on the appropriate sanction, if any, to impose.

The Evidence

100. The Tribunal has taken into account evidence received during the earlier stages of the hearing, where relevant, to reaching a decision on sanction.

101. The Tribunal also received further evidence, which included, but was not limited to:

- Certificates of Completion for various courses, dated 3 July 2023 to 6 November 2023;
- Various Reflective Statements made by Dr Wheatley including on the courses attended, dated between 3 July 2023 and 6 November 2023; and
- Development and Restoration Plan – A framework to demonstrate remediation in relation to professionalism, dated 25 October 2023.

Submissions

102. On behalf of the GMC, Mr Brook submitted that the appropriate sanction in this case was one of suspension. He referred the Tribunal to the Sanctions Guidance (Nov 2020) ('the SG') and to the Tribunal's own determinations throughout his submissions.

103. Mr Brook acknowledged that Dr Wheatley has taken steps to address his conduct. He submitted that Dr Wheatley has undertaken appropriate courses, produced reflective statements and he has modified his approach to alcohol consumption. Mr Brook commented that, whilst there has been some insight into the effect of his misconduct demonstrated, it is only in the most recent documents that Dr Wheatley has acknowledged the effect upon Ms A herself.

104. Mr Brook submitted that the SG acknowledges that sexual misconduct seriously undermines the public trust in the profession and falls within the category of cases where more serious action is likely to be required. He submitted that a sanction of suspension is therefore necessary to promote and maintain public confidence in the medical profession and to promote and maintain proper professional standards and conduct for members of that profession. He made no specific submissions as to the appropriate length of sanction but stated that a lengthy suspension was not considered necessary in this case given the Tribunal's impairment determination. He submitted that if the Tribunal did determine to impose an order of suspension, it would be appropriate to impose a review.

105. On behalf of Dr Wheatley, Mr McCartney submitted that a short suspension would be appropriate in this case. He referred the Tribunal to the testimonial evidence, which was positive and showed that Dr Wheatley is a highly regarded and well-liked doctor, who is committed to the profession.

106. Mr McCartney submitted that Dr Wheatley's behaviour arose at a social situation, not in the context of seeing patients, and followed excess alcohol consumption. He reminded the Tribunal that this was at a social function, which was one of the first that Dr Wheatley had attended since the restrictions imposed by the pandemic had been lifted and that this influenced his alcohol consumption. He submitted that Dr Wheatley recognises he had far too much to drink that night, and that he uses strategies to ensure that he does not drink to excess at such events now or in the future and does not cause offence by unwanted touching.

107. Mr McCartney submitted that Dr Wheatley has now looked at his actions from the perspective of Ms A and considered how he got himself into this position that resulted in the findings made against him. He submitted that the additional focused reflections should reduce even further, if not entirely remove, any risk of repetition particularly when looked at in the context of Dr Wheatley's many years in the profession and his clean disciplinary history.

108. Mr McCartney did not suggest that taking no action was appropriate in this case, nor was it a case in which conditions could be formulated. He submitted that any sanction the Tribunal imposes should have no greater restriction on Dr Wheatley's ability to practise his chosen profession than is necessary to achieve the regulatory objective. He stated that Dr Wheatley is a GP with a large number of patients who benefit from his care and professional expertise. He submitted that the Tribunal should therefore balance what action is necessary to uphold the overarching objective, with the need for the public to have the services of a GP. He submitted that there is no public protection issue in this case and that a short period of suspension would meet the overarching objective with there being no purpose in a review at the conclusion of that suspension.

The Relevant Legal Principles

109. The Tribunal reminded itself that the decision as to the appropriate sanction to impose, if any, was a matter for it alone, exercising its own judgment. In reaching its decision on sanction, the Tribunal had regard to the SG, reminding itself that it was guidance and could be departed from with good reason. It bore in mind that the purpose of a sanction is not to be punitive, but to protect patients and the wider public interest, although it noted that any sanction imposed may have a punitive effect. It reminded itself that in deciding what sanction, if any, to impose, it should consider the sanctions available, starting with the least restrictive.

110. Throughout its deliberations, the Tribunal had regard to the overarching objective, which includes the protection of the public, the maintenance of public confidence in the profession, and the promotion and maintenance of proper professional standards and conduct for members of the profession. It applied the principle of proportionality, balancing Dr Wheatley's interests with the public interest.

The Tribunal's Determination on Sanction

111. The Tribunal first identified what it considered to be the aggravating and mitigating factors in this case.

Aggravating factors

112. The Tribunal took into account that this case involved sexual misconduct, which is inherently serious. It acknowledged that this took place in a social setting but involved a more junior work colleague.

Mitigating factors

113. The Tribunal acknowledged that Dr Wheatley has no previous findings made against him and is previously of positive good character. It noted that the testimonials submitted to the Tribunal all speak highly of him.

114. The Tribunal also took into consideration Dr Wheatley's full cooperation with the GMC throughout the investigation. It noted that there has been no repetition of his misconduct in the two years since the incident, nor have any other concerns been raised in that time. There have been and are no concerns about Dr Wheatley's clinical abilities or practice.

115. The Tribunal had regard to the additional remediation and reflection that Dr Wheatley has undertaken since the hearing commenced in May 2023. Further, he has now explicitly expressed regret for his conduct towards Ms A. It was satisfied that Dr Wheatley has worked on the concerns raised by this Tribunal in its determination on impairment, and that he has now addressed those concerns.

116. The Tribunal balanced the aggravating and mitigating factors throughout its deliberations and went on to consider each sanction in order of ascending severity, starting with the least restrictive.

No action

117. The Tribunal first considered whether to conclude the case by taking no action. It noted that taking no action following a finding of impaired fitness to practise would only be appropriate in exceptional circumstances.

118. The Tribunal was satisfied that there were no exceptional circumstances in Dr Wheatley’s case which could justify it taking no action. Further the Tribunal considered that concluding the case by taking no action would be insufficient to protect the public interest and would not mark the seriousness of Dr Wheatley’s misconduct.

Conditions

119. The Tribunal next considered whether it would be appropriate to impose conditions on Dr Wheatley’s registration. It bore in mind that any conditions imposed should be appropriate, proportionate, workable and measurable. The Tribunal noted that conditions may be workable where a doctor has insight into their misconduct, is likely to comply with conditions, and where a doctor is likely to respond positively to remediation or retraining. The Tribunal considered that while Dr Wheatley does have insight into his misconduct, this was not a case in which retraining would sufficiently address the issues of the case.

120. The Tribunal further considered that no workable or measurable conditions could be formulated which would address the seriousness of Dr Wheatley’s misconduct. It concluded that conditions would be insufficient to maintain public confidence in the profession or to promote and maintain standards for members of the profession.

121. The Tribunal also noted that neither counsel suggested that conditions were appropriate in this case.

Suspension

122. The Tribunal then went on to consider whether a period of suspension would adequately maintain public confidence in the profession and uphold proper standards for its members. In considering whether to impose a period of suspension on Dr Wheatley’s registration, the Tribunal had regard to paragraphs 91, 92, 93 and 97(a), (e), (f) and (g) of the SG which provide:

‘91 *Suspension has a deterrent effect and can be used to send out a signal to the doctor, the profession and public about what is regarded as behaviour unbefitting a registered doctor. ...*

92 *Suspension will be an appropriate response to misconduct that is so serious that action must be taken to protect members of the public and maintain*

public confidence in the profession. A period of suspension will be appropriate for conduct that is serious but falls short of being fundamentally incompatible with continued registration (i.e. for which erasure is more likely to be the appropriate sanction because the tribunal considers that the doctor should not practise again either for public safety reasons or to protect the reputation of the profession).

- 93** *Suspension may be appropriate, for example, where there may have been acknowledgement of fault and where the tribunal is satisfied that the behaviour or incident is unlikely to be repeated. The tribunal may wish to see evidence that the doctor has taken steps to mitigate their actions.*

...

- 97** *Some or all of the following factors being present (this list is not exhaustive) would indicate suspension may be appropriate.*

a *A serious breach of Good medical practice, but where the doctor's misconduct is not fundamentally incompatible with their continued registration, therefore complete removal from the medical register would not be in the public interest. However, the breach is serious enough that any sanction lower than a suspension would not be sufficient to protect the public or maintain confidence in doctors.*

...

e *No evidence that demonstrates remediation is unlikely to be successful, e.g. because of previous unsuccessful attempts or a doctor's unwillingness to engage.*

f *No evidence of repetition of similar behaviour since incident.*

g *The tribunal is satisfied the doctor has insight and does not pose a significant risk of repeating behaviour.'*

123. The Tribunal had regard to the factors it has identified as aggravating and mitigating Dr Wheatley’s misconduct, and its assessment of the scale of his misconduct. It was satisfied that this case fell within the ambit of paragraphs 91 to 93 of the SG as set out above. It considered that the matters listed above from paragraph 97 of the SG fitted this case.

124. The Tribunal noted the submissions of Mr McCartney regarding Dr Wheatley’s inebriated state. It accepted that Dr Wheatley was intoxicated at the time of the incident. However, it did not accept that this excused his conduct in any way and therefore it attached little weight to this submission.

125. Overall, the Tribunal decided that this case was not one where Dr Wheatley’s misconduct is ‘*fundamentally incompatible with continued registration*’ and therefore it considered that erasure would not be appropriate or proportionate, nor would it be in the public interest. Erasure would deny the public of an otherwise competent and well-regarded doctor.

126. In light of the above, the Tribunal determined that a period of suspension would be an appropriate and proportionate sanction when considering Dr Wheatley’s interests alongside the public interest. The Tribunal took into account the impact that this sanction may have upon Dr Wheatley. However, in all the circumstances the Tribunal concluded that his interests are outweighed by the need to maintain public confidence in the profession and to declare and uphold proper standards of conduct and behaviour.

127. The Tribunal determined therefore that an order of suspension was required in this case. It then went on to determine the length of the suspension.

Length of Suspension

128. In determining the length of the suspension, the Tribunal had regard to paragraphs 99 to 102 of SG and the table following paragraph 102.

129. The Tribunal has set out its rationale for imposing a suspension in the wider public interest in order to maintain confidence in the profession and mark proper professional standards.

130. The Tribunal considered the aggravating factors in this case and acknowledged that this was a serious departure from the principles set out in GMP.

131. The Tribunal also had regard to the mitigating factors of the case in considering the length of the suspension. The Tribunal was satisfied that the likelihood of Dr Wheatley repeating his misconduct was low. He has expressed regret and remorse for how he behaved. The Tribunal acknowledged that Dr Wheatley has accepted the Tribunal's concerns regarding his insight and used the period between sittings of this hearing to work on his insight and remediation. It had regard to its own assessment that Dr Wheatley's misconduct was not at the higher end of a scale of cases of a similar nature. The Tribunal also considered the effect that suspending Dr Wheatley's registration would have on the public, given the well-known pressures facing GP practices nationwide.

132. Taking all these elements into account, the Tribunal was satisfied that imposing a period of six weeks' suspension was appropriate and proportionate. In the Tribunal's view this would be sufficient to satisfy the need to promote and maintain public confidence and to send out a clear message to the profession that this type of conduct is unacceptable, in order to maintain proper professional standards. A reasonable and well-informed member of the public or the profession would be satisfied that this was a proportionate response to Dr Wheatley's behaviour.

133. Accordingly, the Tribunal determined to suspend Dr Wheatley's registration for a period of six weeks.

Review

134. Paragraphs 163 and 164 of the SG deals with review hearings and states:

163 *It is important that no doctor is allowed to resume unrestricted practice following a period of conditional registration or suspension unless the tribunal considers that they are safe to do so.*

164 *In some misconduct cases it may be self-evident that, following a short suspension, there will be no value in a review hearing.'*

135. For all the reasons set out above, the Tribunal is satisfied that a review following a short suspension of six weeks would serve no useful purpose, given there are no clinical concerns, and Dr Wheatley has made significant efforts to remediate and shown a good level

of insight. In the circumstances, the Tribunal determined that it is not necessary to direct a review hearing.

Determination on Immediate Order - 13/11/2023

136. Having determined that Dr Wheatley's registration should be suspended for a period of six weeks, the Tribunal has considered, in accordance with Rule 17(2)(o) of the Rules, whether his registration should be subject to an immediate order.

Submissions

137. On behalf of the GMC, Mr Brook submitted that an immediate order was not sought in this case. He stated that there was no interim order in place.

138. On behalf of Dr Wheatley, Mr McCartney agreed that an immediate order was not necessary.

The Tribunal's Determination

139. In reaching its decision, the Tribunal considered the relevant paragraphs of the SG and exercised its own independent judgement. In particular, it took account of paragraphs 172, 173 and 178, which state:

172 *The tribunal may impose an immediate order if it determines that it is necessary to protect members of the public, or is otherwise in the public interest, or is in the best interests of the doctor. The interests of the doctor include avoiding putting them in a position where they may come under pressure from patients, and/or may repeat the misconduct, particularly where this may also put them at risk of committing a criminal offence. Tribunals should balance these factors against other interests of the doctor, which may be to return to work pending the appeal, and against the wider public interest, which may require an immediate order.*

173 *An immediate order might be particularly appropriate in cases where the doctor poses a risk to patient safety. For example, where they have provided poor clinical care or abused a doctor's special position of trust, or where*

immediate action must be taken to protect public confidence in the medical profession.

...

178 *Having considered the matter, the decision whether to impose an immediate order will be at the discretion of the tribunal based on the facts of each case. The tribunal should consider the seriousness of the matter that led to the substantive direction being made and whether it is appropriate for the doctor to continue in unrestricted practice before the substantive order takes effect.'*

140. The Tribunal determined that, as there were no clinical concerns in this case, an immediate order was not necessary to protect members of the public or otherwise in the public or Dr Wheatley's interests.

141. This means that Dr Wheatley's registration will be suspended 28 days from the date on which written notification of this decision is deemed to have been served, unless he lodges an appeal. If Dr Wheatley does lodge an appeal he will remain free to practise unrestricted until the outcome of any appeal is known.

142. There was no interim order to revoke.

143. That concludes the case.

ANNEX A – 02/06/2023

Application to amend the Allegation

144. On day 3 of the hearing, Ms Fairley, on behalf of the GMC, before closing the GMC factual case, made an application under Rule 17(6) of the General Medical Council ('GMC') (Fitness to Practise Rules) 2004 as amended ('the Rules') for the particulars of paragraph 1(a) of the Allegation to be amended. Rule 17(6) states:

'Where, at any time, it appears to the Medical Practitioners Tribunal that—

(a) the allegation or the facts upon which it is based and of which the practitioner has been notified under rule 15, should be amended; and

(b) the amendment can be made without injustice, it may, after hearing the parties, amend the allegation in appropriate terms

Submissions on behalf of the GMC

145. Ms Fairley stated that the proposed amendment was for the purpose of adding clarity to paragraph 1a of the Allegation. Ms Fairley submitted that there had been sufficient evidence in the witness statement of Ms A that Dr Wheatley did persistently seek her attention whilst Ms A attempted to divert his attention. In her witness statement Ms A states;

'I didn't mention anything to Graham throughout the evening, other than when trying to divert his attentions to get him to leave. I remember trying to send him away on at least four separate occasions, though don't recall the details.'

146. She submitted therefore, that aspect of the Allegation had been evidenced before the Tribunal hearing commenced. Ms Fairley acknowledged that during cross-examination in her live evidence Ms A accepted she did not verbally ask Dr Wheatley to stop. This led to her application.

147. Ms Fairley submitted that there would be no injustice to Dr Wheatley were the Tribunal to grant the application, and that the amendment should read:

1. On 9 November 2021 you engaged in inappropriate behaviour towards your colleague, Ms A, in that you:

- a. persistently sought her attention ~~despite requests on one or more occasion for you to stop;~~

Submissions on behalf of Dr Wheatley

148. Mr McCartney, Counsel, on behalf of Dr Wheatley strongly opposed this late application because, in his submission, amending the wording in this paragraph of the Allegation would cause injustice to Dr Wheatley.

149. Mr McCartney submitted that the purpose of clear pleadings is to allow the accused and his representatives to be aware of how the case was to be put, to make decisions to cross examine and advance their case within the parameters of the case pleaded. He submitted that there may often be situations where an amendment can be made, and which does not give rise to injustice. He stated that this is not one of those occasions.

150. Mr McCartney asked the Tribunal to consider paragraph 1(a) of the Allegation. He submitted that the case had been opened and advanced by the GMC based on the paragraph's original wording. He emphasised that, as a result of cross examination, Ms A had conceded she had not asked Dr Wheatley to stop. He submitted that this had a material effect upon the Allegation as the GMC's case currently is that Dr Wheatley continued the alleged inappropriate behaviour towards Ms A despite being requested to stop. He submitted that should the Allegation be amended, it would change the nature of the case as it altered the nature of what is said to be inappropriate.

151. Mr McCartney submitted that the amendment would not be appropriate, and it does not meet the test that the Allegation could be amended without causing injustice. He argued that cross examination would have been undertaken in a very different way had the application for the Allegation to be amended been made earlier. He submitted that, on the basic premise that the accused is entitled to know the case they must meet, it would amount to a different case now being put. He concluded that that defence would have conducted cross examination differently and therefore it must give rise to injustice.

Tribunal's Decision

152. In reaching its decision, the Tribunal had regard to the overarching objective, paragraph 17(6) of the Rules and submissions provided by both parties.

153. The Tribunal carefully reviewed the wording of paragraph 1(a) of the Allegation. They considered that the application submitted by the GMC had arisen from Ms A's witness evidence. In cross examination Ms A accepted that she did not verbally request Dr Wheatley to stop the unwanted attention. The Tribunal considered that to amend the Allegation based on evidence heard in cross examination risks injustice.

154. The Tribunal considered paragraph 17(6) of the Rules. It considered the submissions made by Mr McCartney and conceded that the direction of the case would change should the Allegation be amended. Therefore, injustice would be harder to avoid.

155. The Tribunal considered the LQC's legal advice (which was also agreed with the parties) which outlined that, in similar applications in the Crown Court, the later the amendment is made the more likely it is to cause injustice. In this case the application was made late. Mr McCartney had put Dr Wheatley's case to the witnesses, in particular Ms A, based on the charges as then worded. If the amendment had been sought earlier (for example immediately after Ms A had been cross examined) then she could have been further questioned in accordance with the amended Allegation and the risk of injustice would have been diminished. Therefore, there is a clear risk of injustice. If the Tribunal were to agree the amendment, it would be a significant change in the wording and alter substantially an important part of the Allegation in paragraph 1(a). The Tribunal determined that the amendment could not be made without injustice to Dr Wheatley.

156. The Tribunal therefore determined to refuse Ms Fairley's application for the amendment to paragraph 1(a) of the Allegation.

ANNEX B – 02/06/2023

Application under Rule 17(2)(g)

157. At the close of the GMC's case, Mr McCartney, on behalf of Dr Wheatley, made an application under Rule 17(2)(g) of the General Medical Council (Fitness to Practise Rules) 2004 as amended ('the Rules') that there was no case to answer in respect of paragraphs 1(a) and 1(d), and no case to answer in respect of 2(a) and 2(b) as they related to 1(a) and 1(d) of the Allegation.

158. The Allegation is as follows:

That being registered under the Medical Act 1983 (as amended):

1. On 9 November 2021 you engaged in inappropriate behaviour towards your colleague, Ms A, in that you:

b. persistently sought her attention despite requests on one or more occasion for you to stop;

To be determined

c. put your arm around Ms A's waist on one or more occasion;

To be determined

d. placed your hand on Ms A's bottom on one or more occasion;

To be determined

e. touched Ms A's breast.

To be determined

2. Your conduct as described at paragraphs 1a – d above:

a. was sexually motivated;

To be determined

b. amounted to sexual harassment pursuant to s.26 Equality Act in that you engaged in unwanted conduct of a sexual nature, which had the purpose or effect of violating the dignity of Ms A, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

To be determined

And that by reason of the matters set out above your fitness to practise is impaired because of your misconduct.

Submissions

Submissions on behalf of Dr Wheatley

159. Mr McCartney referred the Tribunal to the test to be applied from the case of *R v Galbraith* [1981] 73 Cr App R 124 (*'Galbraith'*). In *Galbraith*, Lord Lane CJ said:

'How then should the judge approach a submission of 'no case'?

(1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case.

(2) The difficulty arises where there is some evidence but it is of a tenuous character, for example, because of inherent weakness or vagueness or because it is inconsistent with other evidence.

(a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case.

(b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness' reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury.'

160. Mr McCartney submitted that paragraph 1(a) would fall under the first limb of *Galbraith*. Mr McCartney reminded the Tribunal that in cross examination Ms A accepted that she did not make repeated requests for Dr Wheatley to stop. Mr McCartney submitted on that basis that it must follow that there is no evidence for that charge to proceed any further. He submitted that if the application is granted it follows paragraph 2(a) and 2(b) as they applied to 1(a) would simply fall away because paragraph 1(a) would go no further.

161. Mr McCartney then drew the Tribunal's attention to allegation 1(d). He submitted that the evidence had not established that there was inappropriate behaviour by Dr Wheatley in respect of touching Ms A's breast. He submitted furthermore that there was no

evidence from which sexual motivation could be inferred. Mr McCartney reminded the Tribunal of Ms A's witness statement which states:

'During one of these times when Graham came over to the bar, he reached out to his medals that were attached to my dress on my chest, and in doing so touched my boob. I don't recall whether he said anything before he reached out, but I understood from the situation that he was looking to adjust the medals that had come unhooked.'

162. Mr McCartney argued that Ms A understood from the situation that what Dr Wheatley had intended to do was to adjust the medals that had become unhooked as per her witness statement. He reminded the Tribunal that in cross examination, although Ms A had considered any contact during this incident to be inappropriate, she had also accepted that she did not think the touching of her breast was deliberate. Mr McCartney reminded the Tribunal of further evidence presented by the GMC from Dr C. His witness statement stated:

'Through the corner of my eye I saw, what I believed to be, Graham's hand on Ms A's breast and so I did a double take. When I looked to see what was happening, I saw that his hands were around some medals on the right side of her chest and that Ms A didn't appear distressed. I am not sure whether he was pinning them on or taking them off, but my reaction was that the interaction was innocent, and I was not under the impression that anything untoward had taken place.'

163. Mr McCartney submitted that any contact was accidental and not deliberate, Dr Wheatley had a legitimate purpose of adjusting the medals that had become unhooked. In his submission, Mr McCartney said this does not meet the criteria of 'inappropriate'. Mr McCartney submitted that paragraph 2(a) could not apply to paragraph 1(d) in this instance as there was consistent acceptance that the touching was accidental and therefore could not be sexually motivated.

164. Mr McCartney further argued that paragraph 2(b) in relation to 1(d) could also not apply. He asked the Tribunal to carefully consider the words of the Allegation. He submitted if the Tribunal accepted the evidence that the touching was innocent and accidental when trying to adjust the unpinned medals it would be, in his submission, unsustainable to find the conduct to be of a sexual nature. Mr McCartney drew the Tribunal's attention to Dr E's report

in which she set out a definition, including examples, of sexual harassment for the purposes of her report taken from the gov.uk website:

‘Bullying and harassment is behaviour that makes someone feel intimidated or offended. Harassment is unlawful under the Equality Act 2010.

Sexual harassment occurs when a person engages in unwanted conduct of a sexual nature that has the purpose or effect of violating someone’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them.

Sexual harassment includes a wide range of behaviour, such as:

- *sexual comments or jokes*
- *displaying sexually graphic pictures, posters, or photos*
- *suggestive looks, staring or leering*
- *propositions and sexual advances*
- *making promises in return for sexual favours*
- *sexual gestures*
- *intrusive questions about a person’s private or sex life, and discussing your own sex life*
- *sexual posts or contact on social media*
- *spreading sexual rumours about a person*
- *sending sexually explicit emails or text messages*
- *unwelcome touching, hugging, massaging, or kissing*
- *criminal behaviour, including sexual assault, stalking, indecent exposure, and offensive communications.’*

Submissions on behalf of the GMC

165. On behalf of the GMC, Ms Fairley submitted that in respect of paragraph 1(a) and therefore 2(a) and 2(b) insofar as they refer to 1(a), the GMC made no positive submissions to resist the application. She submitted that the GMC acknowledged that Ms A had made it clear in her oral evidence that she did not verbally request Dr Wheatley to leave her alone and in cross examination accepted Mr McCartney’s suggestion that Dr Wheatley may not have understood the devices she had used to send him away. Ms Fairley submitted that

because of that context, the GMC did not actively resist the submission made by Mr McCartney in respect of paragraph 1(a).

166. Ms Fairley resisted Mr McCartney's submissions in relation to paragraph 1(d). While she did not resist his submissions in respect of paragraph 2(a) of the Allegation as it related to paragraph 1(d), she did resist his submissions in relation to paragraph 2(b) as it related to 1(d). She submitted that in relation to paragraph 1(d) there were two aspects which did not appear to be contentious. The first was that the medals were pinned to Ms A's chest; and the second was that Dr Wheatley's hand touched Ms A's breast. Ms Fairley submitted that there was clear evidence that the touching of Ms A's breast was inappropriate, notwithstanding Ms A's acceptance in her evidence that the touching of the breast may have been a consequence of Dr Wheatley seeking to adjust the medals which were pinned to her chest. Ms Fairley submitted that the circumstances of the touching were significant. She drew the Tribunal's attention to the witness statement of Ms A's which read:

'I think Graham was adjusting my medals/touching my boob for about 10 seconds. He was drunk and so it wasn't just a quick readjustment.'

167. Ms Fairley submitted the touching of the breast was not fleeting as it occurred for around 10 seconds. She reminded the Tribunal that in cross examination Ms A did not accept that the physical adjustment of the medals was reasonable and described it as '*not normal behaviour*'. Ms Fairley submitted the GMC did not agree that it could be appropriate behaviour. She reminded the Tribunal of Ms A's position that it was unreasonable to adjust anything on a lady's chest without any warning or permission. She reminded the Tribunal that in her live evidence Ms A stated she was shocked by this contact and felt that if Dr Wheatley had been concerned about the medals becoming unhooked it would have been appropriate to ask Ms A to secure them herself.

168. Ms Fairley submitted there is evidence upon which the Tribunal can conclude that the touching was inappropriate and so it is an action which calls for an explanation. She conceded that if the evidence suggested that the touching was accidental the motivation may not have been sexual and accordingly paragraph 2(a) could not apply to paragraph 1(d). However, she stated that a woman's breast area is an intimate area and so it followed that the touching of the breast is intimate by nature. Therefore, Ms Fairley asked the Tribunal to consider the effect the touching had on Ms A: it was not fleeting and had been described as

lasting for 10 seconds. She submitted that this contact - given it was touching of Ms A's breast - was sexual in its nature and amounted to unwelcome touching. Therefore, the GMC submitted that in respect of paragraph 2(b) in its relation to 1(d), there is evidence before this tribunal on which the tribunal could conclude that it amounted to sexual harassment.

Further submissions on behalf of Dr Wheatley

169. In response to the GMC submissions, Mr McCartney made further submissions.

170. Mr McCartney opposed the GMC submission that there was no reason for Dr Wheatley to physically adjust the medals on Ms A's chest. He referred to Ms A's evidence and he reminded the Tribunal of the evidence in Dr F's witness statement which stated:

'I recall standing up from the table a while later and saw Graham, who was approximately 3-5 metres away from me at this point, pinning his medals onto Ms A's chest. I remember hearing him apologise, though I don't recall exactly what he said nor what Ms A said in response, if anything.'

171. Mr McCartney submitted that in relation to the collection of the medals, the circumstances were relevant. He stated that Ms A's evidence is that it took place before the presentation. Mr McCartney submitted that Dr F's evidence is that it took place after the presentation. Mr F also recalled Dr Wheatley apologising for the accidental touching.

172. Mr McCartney rejected the GMC's submission that any contact with an intimate area such as the breast would give rise to it being sexual in nature. Mr McCartney stated this was a '*bold proposition*' and must be misconceived. He stated that it cannot be automatic that if there was any accidental contact with an intimate area then it must be sexual in nature. He submitted that it would mean that any time anybody accidentally bumped into somebody or was involved in some other legitimate purpose and had non deliberate contact with an intimate area then that would result in it being considered sexual in nature. In his submission that could not be right.

173. Finally, Mr McCartney submitted that during the 10 seconds the incident took place Dr Wheatley accidentally touched Ms A's breast for a brief time and not the full duration.

The Relevant Legal Principles

174. The Tribunal applied the test of *Galbraith* (set out above) and reminded itself that Rule 17(2)(g) of the Rules provides:

‘the practitioner may make submissions as to whether sufficient evidence has been adduced to find some or all of the facts proved and whether the hearing should proceed no further as a result, and the Medical Practitioners Tribunal shall consider any such submissions and announce its decision as to whether they should be upheld’.

The Tribunal’s Decision

Paragraph 1(a)

175. The Tribunal bore in mind that the GMC did not oppose the application that there was no case to answer in respect of paragraph 1(a) of the Allegation. The Tribunal were required to carefully consider the wording of paragraph 1(a), the previous Rule 17(6) application and the case of *Galbraith*. The Tribunal considered that there was some evidence that Dr Wheatley sought Ms A’s attention and this attention was unwelcome. However, they considered there was no evidence that she had asked him to stop.

176. It had been conceded by the GMC that there was no evidence to support the allegation that Ms A had asked Dr Wheatley to stop and therefore the first limb of *Galbraith* applied. The Tribunal determined that, in the absence of any evidence to support paragraph 1(a) of the Allegation, there could be no case to answer.

177. Accordingly, the Tribunal allowed the application made under Rule 17(2)(g) in respect of paragraph 1(a) and therefore paragraphs 2(a) and 2(b) also fall away in relation to paragraph 1(a).

Paragraph 1(d)

178. In relation to paragraph 1(d) of the Allegation the Tribunal considered that there was some evidence that Dr Wheatley had touched Ms A’s breast. It concluded that there was some evidence that this might be inappropriate by its nature. The Tribunal did not consider this evidence to be tenuous.

179. Accordingly, the Tribunal refused the application under Rule 17(2)g in respect of paragraph 1(d).

180. The Tribunal bore in mind that the GMC did not oppose the application that there was no case to answer in respect of paragraph 2(a) of the Allegation as it applied to 1(d). The Tribunal also bore in mind the submission of Ms Fairley, conceding that accidental touching was unlikely to show sexual motivation. Accordingly, the Tribunal considered that paragraph 2(a) is not engaged in relation to 1(d).

181. Accordingly, the Tribunal allowed the application made under Rule 17(2)(g) in respect of paragraph 2(a) as it relates to paragraph 1(d).

182. The Tribunal had regard to the effect the touching of the breast had on Ms A. Ms A had stated that she did not think the touching was deliberate, but it had made her uncomfortable. The Tribunal considered there was some evidence of inappropriate touching which may engage Section 26 of the Equality Act 2010. The Tribunal considered Ms A's distress after the incident and considered that it may amount to sexual harassment. Applying the *Galbraith* test, the Tribunal therefore determined that there was sufficient evidence for it to conclude that there was a case to answer.

183. Accordingly, the Tribunal refused the application under Rule 17(2)(g) in respect of paragraph 2(b) of the Allegation where it related to paragraph 1(d).