

PUBLIC RECORD

Dates: 15/07/2024 - 08/08/2024

Medical Practitioner's name: Dr James GILBERT
GMC reference number: 4717872
Primary medical qualification: BM 2000 University of Southampton

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

Summary of outcome

Suspension, 8 months

Tribunal:

Legally Qualified Chair	Mr Andrew Mcloughlin
Lay Tribunal Member:	Mr Keith Moore
Medical Tribunal Member:	Dr Candida Borsada

Tribunal Clerk:	Miss Emma Saunders
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Attendance and Representation:

Medical Practitioner:	Present, represented
Medical Practitioner's Representative:	Mr Mark Sutton, KC, instructed by Clyde & Co LLP
GMC Representative:	Ms Chloe Hudson, Counsel

Attendance of Press / Public

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

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 - 05/08/2024

Background

1. Mr Gilbert qualified in 2000 at the University of Southampton. He completed postgraduate clinical training, then completed his Membership of the Royal College of Surgeons in 2003, and a Master of Education at the University of Winchester in 2008. He completed his Fellowship of the Royal College of Surgeons in general and transplant surgery in 2009 and acquired his Certificate of Completion of Specialist Training in June 2010.
2. Mr Gilbert worked as a Senior Registrar at the Oxford University Hospitals NHS Foundation Trust ('the Trust') from 1 October 2008 to 30 September 2009, under a Deanery Out Of Programme for Training scheme. Mr Gilbert worked as a Consultant Transplant and Vascular Access Surgeon at the Trust from 18 October 2010 until his employment was terminated on 20 May 2022. After this point, Mr Gilbert completed NHS "choose & book" outpatient appointments and surgical lists at The New Foscote Hospital, carrying out hernia repair surgery. He also undertook locum shifts as a Registrar in general surgery at the Brighton & Sussex Hospital from August 2022 until January 2023. From January 2023 to date, Mr Gilbert was appointed to the role of Chief Medical Officer at The New Foscote & Royal Buckinghamshire Hospitals Group. He continued to carry out NHS hernia waiting list clinics and surgeries, but also has a leadership and managerial role.
3. The allegations that have led to Mr Gilbert's hearing relate to his conduct, between August 2009 and April 2022, towards six colleagues at the Oxford Transplant Centre at Churchill Hospital which is part of the Trust. It is alleged by the General Medical Council (GMC) that Mr Gilbert behaved inappropriately towards these colleagues. It is further alleged that Mr Gilbert's behaviour was variously sexually motivated, constituted sexual harassment, constituted harassment related to race, was intimidating, racist, and an abuse of his senior position. The majority of the allegations are denied by Mr Gilbert.

4. Mr Gilbert had been excluded from work at the Trust on 14 May 2021 following concerns raised about inappropriate comments and conduct towards staff. This exclusion was lifted six weeks later and replaced with restrictions on his practice. An email was sent to 46 current and former surgical trainees in the department that invited them to contact the Freedom to Speak Up Guardian if they had any matters of concern to raise. The Trust investigated and Mr Gilbert was dismissed on 20 May 2022. The GMC opened an investigation into Mr Gilbert’s fitness to practise after receiving a referral from the Executive Assistant to the Chief Medical Officer at the Trust in June 2022.

The Outcome of Applications made during the Facts Stage

5. On 18 July 2024 the Tribunal granted the GMC’s application, made pursuant to Rule 17(6) of the GMC (Fitness to Practise Rules) 2004 as amended (‘the Rules’), for amendment of the Allegation. The Tribunal’s full decision on the application is included at Annex A.

6. A further amendment to the Allegation was agreed on 22 July 2024 in respect of paragraph 1(a)(i)(2), which was moved to paragraph 1(a)(iv), to ensure the correct date was reflected following the decision at Annex A.

The Allegation and the Doctor’s Response

7. The Allegation made against Mr Gilbert is as follows:

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

Ms A

1. On one or more occasions you behaved inappropriately towards your junior colleague, Ms A, in that:

a. you made inappropriate comments in that:

i. on a date between ~~August 2009 and February 2010~~ April 2019 and October 2019, during an operation you said to Ms A:

Amended under Rule 17(6)

1. ‘so are you a spurter? I can always tell which girls are the spurters’, or words to that effect;

To be determined

~~2. 'oh no you need to come very quickly because they need to go and they have a really big organ, a huge organ and I know how much you love big organs', or words to that effect;~~
Amended under Rule 17(6)

ii. on a date between April 2019 and September 2019 you said to Ms A, 'You're a well put together girl, you must always wear matching underwear, correct? What kind are you wearing now?', or words to that effect;

To be determined

iii. in the winter of 2019, you said to Ms A:

1. 'I enjoyed watching you walk around in your fuck me boots yesterday', or words to that effect;

To be determined

2. 'you must love the attention you get in that sexy leather jacket', or words to that effect;

To be determined

iv. on a date between August 2009 and February 2010 you said to Ms A, 'oh no you need to come very quickly because they need to go and they have a really big organ, a huge organ and I know how much you love big organs', or words to that effect;

Amended under Rule 17(6)

To be determined

b. you touched Ms A inappropriately without her consent, in that:

i. on one or more occasions between August 2009 and February 2010, you:

1. grabbed Ms A by the waist;

To be determined

2. ran your hands up and down Ms A's body from her hips to her bra line;

To be determined

ii. on one or more occasions between April 2019 and August 2022 you stood closely behind Ms A in theatre whilst she was assisting in an operation and pressed yourself against her;

To be determined

iii. on or around 9 February 2021 you traced your finger across Ms A's wrist, up her arm, over her shoulder and over her clavicle to her sternoclavicular notch.

To be determined

2. Your actions as set out at paragraph 1:

a. were sexually motivated;

To be determined

b. constituted sexual harassment as defined in Section 26(2) of the Equality Act 2010, 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

c. were an abuse of your more senior position.

To be determined

3. Between ~~August 2009 and February 2010~~ April 2019 and October 2021, you behaved inappropriately towards Ms A in that:

Amended under Rule 17(6)

a. on one or more occasions you called Ms A late in the evening and outside of work when you had no reason to do so;

To be determined

b. you would discuss with Ms A how you were:

i. in close contact with her supervisors about her clinical progress;

To be determined

ii. instrumental in national selection or words to that effect;

To be determined

iii. able to affect her career prospects;

To be determined

as a result of which Ms A felt unable to refuse to undertake extra shifts or additional unpaid work;

c. you told Ms A about how you had affected other people's career progression and implied that you could do the same to her if she, 'became a problem', or words to that effect;

To be determined

d. on one or more occasions, you made derogatory comments about a colleague, Mr B, to Ms A in that you said that Mr B was:

i. 'a terrible surgeon', or words to that effect;

To be determined

ii. 'just useless', or words to that effect;

To be determined

iii. 'never going to get anywhere', or words to that effect;

To be determined

iv. 'a complete waste...but ultimately [he's] never going to go anywhere, he's just going to be a staff grade', or words to that effect.

To be determined

4. Your actions as set out at paragraph 3 were intimidating.

To be determined

5. On a date between ~~August 2009 and February 2010~~ April 2019 and October 2021, you made an inappropriate comment about a junior colleague, Ms C, to Ms A in that you said, 'just because she looks good in tight clothes, it doesn't mean she's any good', or words to that effect.

Amended under Rule 17(6)

To be determined

6. Your actions at paragraph 5 constituted harassment related to sex as defined in Section 26(1) of the Equality Act 2010, in that you engaged in unwanted conduct related to sex 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

7. On a date in or around the winter of 2019 you said to Ms A about a patient during a ward round, 'you know how Africans clean themselves once they've gone to the toilet? They just use their hands, no wonder they always get infections', or words to that effect.

To be determined

8. On a date in or around January 2020 you said to Ms A about a junior colleague, Mr D, 'I know people like him, I used to know Africans as well....so I know these Africans, they are only interested in a good time, they only come out after the sun goes down', or words to that effect.

To be determined

9. Between ~~August 2009~~ April 2019 and April 2022 you said to Ms A:
Amended under Rule 17(6)

a. 'those two women, they love a good cat fight. Typical hysterical Bollywood women,' or words to that effect;
Admitted and found proved

b. in reference to a patient of Asian origin's weight, 'eating too many chapattis', or words to that effect;
To be determined

c. in reference to a person of African origin's weight:

i. 'eating too much rice', or words to that effect;
To be determined

ii. 'Africans don't do anything unless they are really sporty' or words to that effect.
To be determined

10. Your comments as at paragraphs 7 – 9:

a. constituted harassment related to race as defined in section 26(1) of the Equality Act 2010, in that you engaged in unwanted conduct related to race, 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

b. were racist.
To be determined

Ms E

11. On one or more occasions between April 2011 and April ~~2012~~ 2013 you behaved inappropriately whilst at work towards your junior colleague Ms E in that you:
Amended under Rule 17(6)

a. tickled her when you were alone with her without her consent;
Admitted and found proved

b. grabbed and massaged her shoulders without her consent;

Admitted and found proved

c. on one occasion in an office you:

i. sat close to her, in that Ms E was trapped against the wall and window and was unable to move away;

To be determined

ii. stared at Ms E;

To be determined

iii. said, 'I have been watching you and you're pretty perfect', or words to that effect whilst staring at Ms E's body and breasts;

To be determined

d. asked her if her underwear was a matching set, or words to that effect;

Admitted and found proved

e. touched her knees with your knees under the operating table;

To be determined

f. squeezed her thigh between your thighs under the operating table;

To be determined

g. said during operations when asking her to use the heparinised saline flush, 'Oh I didn't know you're a spurter?', or words to that effect;

To be determined

h. said that you were only inappropriate with those who would be fine with it and that you were a good judge of character, or words to that effect;

To be determined

i. said, after being told that Ms E may require XXX, 'Well, when you need [XXX], I would love to do a high thigh [XXX] for you', or words to that effect;

To be determined

j. telephoned Ms E outside of work when you had no reason to do so;

Admitted and found proved

k. behaved in a dismissive manner towards other trainees in front of Ms E;

To be determined

l. made derogatory assessments of other trainees in the presence of Ms E, in that you referred to them as:

- i. 'lazy', or words to that effect;
To be determined
 - ii. 'not team players', or words to that effect;
To be determined
 - iii. 'no good', or words to that effect;
To be determined
 - iv. 'not worth supporting', or words to that effect.
To be determined
12. Your actions as set out at paragraph 11(a) – 11(i) were:
- a. sexually motivated;
To be determined
 - b. constituted sexual harassment as defined in Section 26(2) of the Equality Act 2010, in that you engaged in unwanted conduct of a sexual nature which had the purpose or effect of violating the dignity of Ms E, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her;
To be determined
 - c. an abuse of your more senior position.
To be determined
13. Your actions as set out at paragraph 11(j) – 11(l) were intimidating.
To be determined

Mr F

14. On one or more occasions between February 2013 and November 2019, whilst at work you:
- a. you imitated an Indian accent in the presence of Mr F;
Admitted and found proved
 - b. asked Mr F, 'oh when are you leaving the country now,' or words to that effect, with reference to Brexit.
Admitted and found proved
15. Your conduct as set out at paragraph 14:

a. constituted harassment related to race as defined in section 26(1) of the Equality Act 2010, in that you engaged in unwanted conduct related to race, which had the purpose or effect of violating the dignity of Mr F, or creating an intimidating, hostile, degrading, humiliating or offensive environment for him;

To be determined

b. was racist.

To be determined

Ms G

16. Between 2 April 2014 and 18 June 2014 you behaved inappropriately whilst at work towards your junior colleague Ms G in that:

a. on 3 April 2014 during operative procedures with Ms G you:

i. touched her foot with your foot underneath the operating table;

To be determined

ii. slid your foot up the inside of her leg and rested your foot between her thighs at mid-thigh level;

To be determined

iii. leant on her shoulder and whispered in her ear;

To be determined

iv. said, in reference to a patient's genitals, 'don't be scared, it won't bite', or words to that effect;

To be determined

b. on 11 April 2014 you made inappropriate comments in that you:

i. asked if Ms G was single;

To be determined

ii. said that you 'knew what [Ms G] needed in a man', or words to that effect;

To be determined

iii. said that she 'looked great in a pair of scrubs and didn't need to go to the gym', or words to that effect;

To be determined

iv. said that you were ‘looking forward to getting [Ms G] on a night out’, or words to that effect;

To be determined

v. said that you ‘bet [Ms G] was really wild on a night out’, or words to that effect;

To be determined

c. on 29 May 2014 you made inappropriate comments in that you:

i. asked Ms G if she had a boyfriend;

To be determined

ii. said, ‘I thought you said you had a boyfriend now! You’re clearly not getting any at home if you need to touch my knees under the table’, or words to that effect.

To be determined

17. Your actions as set out at paragraph 16 were:

a. sexually motivated;

To be determined

b. constituted sexual harassment as defined in Section 26(2) of the Equality Act 2010, in that you engaged in unwanted conduct of a sexual nature which had the purpose or effect of violating the dignity of Ms G, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her;

To be determined

c. an abuse of your more senior position.

To be determined

18. On 17 June 2014 you behaved inappropriately towards Ms G in front of colleagues in the coffee room, in that you told Ms G that she wasn’t:

a. ‘operating or attending enough’, or words to that effect;

To be determined

b. ‘working hard enough’, or words to that effect’.

To be determined

19. Your actions as set out at paragraph 18 were intimidating.

To be determined

Ms H

20. Between 1 April 2015 and 30 September 2018 you behaved inappropriately whilst at work towards your colleague Ms H in that:

a. on or around 22 July 2015 you:

i. rubbed your back against Ms H's back;

To be determined

ii. said:

1. that she felt like a sporty person, or words to that effect;

To be determined

2. that you could sense she was very well in shape, or words to that effect;

To be determined

b. on a date between July 2015 and summer 2016 during a conversation with Ms H, whilst carrying out a procedure, you:

i. said you could see how professional she was in squirting, or words to that effect;

To be determined

ii. said 'I didn't realise you were a squirter', or words to that effect;

To be determined

iii. asked if she was like this as a woman, or words to the effect, in reference to your comments as described in paragraphs 20.b.i and/or 20.b.ii;

To be determined

c. on an occasion in Summer 2015 or 2016 you:

i. touched Ms H's left knee from behind;

To be determined

ii. said 'your legs are so sporty', or words to that effect;

To be determined

d. on a date during the end of 2017 and beginning of 2018, you directly approached Ms H in a corridor and:

i. put your hands underneath her jacket and touched her waist;

Admitted and found proved

ii. said, oh dear it's a bit too narrow for both of us here....but it feels incredibly nice', or words to that effect;

To be determined

e. on a date between January and September 2018, during a procedure you said to Ms H 'oh, how do you prefer it; are you letting someone stick it in or are you doing it yourself?', or words to that effect.

To be determined

21. Your actions as set out at paragraph 20 were:

a. sexually motivated;

To be determined

b. constituted sexual harassment as defined in Section 26(2) of the Equality Act 2010, in that you engaged in unwanted conduct of a sexual nature which had the purpose or effect of violating the dignity of Ms H, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

To be determined

Ms I

22. On or around 7 August 2020, you said to Ms I about a patient during an organ retrieval procedure, 'look at all that fat, this is what happens when you eat chapatti', or words to that effect.

To be determined

23. Your comment as set out at paragraph 22:

a. constituted harassment related to race as defined in section 26(1) of the Equality Act 2010, in that you engaged in unwanted conduct related to race, which had the purpose or effect of violating the dignity of Ms I, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her;

To be determined

b. was racist.

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

The Admitted Facts

8. At the outset of these proceedings, through Mr Sutton KC, Mr Gilbert made admissions to some sub-paragraphs of the Allegation, as set out above, in accordance with Rule 17(2)(d) of the Rules. There were two further admissions made on 22 July 2024 to paragraphs 11(a) and (b). In accordance with Rule 17(2)(e) of the Rules, the Tribunal announced these sub-paragraphs of the Allegation as admitted and found proved.

9. There were also a number of partial admissions made. These are reflected later in the determination when each are considered in turn as part of the Tribunal's decision.

Witness Evidence

10. The Tribunal received evidence on behalf of the GMC from the following witnesses in person:

- Ms A, who gave evidence on 15 and 16 July 2024. Her witness statement was dated 17 February 2023;
- Ms E, who gave evidence on 16 July 2024. Her witness statement was dated 14 March 2023;
- Mr F, who gave evidence on 16 July 2024. His witness statement was undated;
- Ms G, who gave evidence on 17 July 2024. Her witness statement was dated 22 November 2022 and she provided a supplemental statement dated 12 July 2024 commenting on two videos produced by Mr Gilbert;
- Ms H, who gave evidence on 18 July 2024. Her witness statement was dated 28 November 2022; and
- Ms I, who gave evidence on 18 July 2024. Her witness statement was dated 9 December 2022.

11. Mr Gilbert provided his own witness statements dated 3 July 2024 and 21 July 2024, and gave oral evidence at the hearing on 22 and 23 July 2024. In addition, the Tribunal received evidence from the following witnesses on Mr Gilbert's behalf:

- Ms J, a Band 6 theatre nurse at the Trust, who gave evidence on 24 July 2024. Her testimonial was dated 2 May 2024 and her witness statement was dated 10 May 2024;
- Ms K, a Band 6 senior theatre nurse at the Trust, who gave evidence on 24 July 2024. Her witness statement was dated 15 May 2024;
- Ms L, a Band 7 theatre sister at the Trust, who gave evidence on 24 July 2024. Her testimonial was dated 2 May 2024 and her witness statement was dated 17 May 2024;
- Dr M, who previously worked as a Surgical Registrar within the transplant team at the Trust from April to October 2020, and gave evidence on 24 July 2024. His witness statement was dated 10 May 2024;
- Dr N, Ear Nose and Throat Registrar with the East of England Deanery, who gave evidence on 24 July 2024. Her witness statement was dated 17 May 2024;
- Dr O, Consultant Anaesthetist at the Trust, who gave evidence on 25 July 2024. His testimonial was dated 24 April 2024 and his witness statement was dated 7 May 2024;
- Mrs P, Consultant Oral and Maxillofacial Surgeon at the Trust, who gave evidence on 25 July 2024. Her witness statement was dated 6 June 2024.

12. The Tribunal also received evidence on behalf of Mr Gilbert in the form of a witness statement dated 9 May 2024 from his legal representative, XXX at Clyde & Co. She was not called to give oral evidence.

Documentary Evidence

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

- Ms A's statement to the Trust dated 12 September 2021, and an accompanying brief written statement document which is undated;
- Ms E's statement to the Trust dated 9 August 2021, supplementary statement dated 9 January 2022, and an accompanying brief written statement document;
- Email correspondence between Ms E and Ms Q, Freedom to Speak Up Guardian from April 2021;
- Correspondence dated 21 May 2021 from Ms E to Prof R, Chief Medical Officer at the Trust;
- Correspondence from Mr S dated 8 January 2022 to Ms E;

- Mr F’s statement to the Trust dated 13 August 2021 and supplementary statement dated 11 January 2022;
- A written statement document dated 7 July 2014 from Ms G to the Trust, with accompanying email dated 8 July 2014 to Mr T;
- Ms G’s supplementary statement to the Trust dated 12 January 2022;
- Email correspondence between Ms H and Ms Q from April 2021;
- Ms H’s statement to the Trust dated 24 August 2021 and supplementary statement dated 8 January 2022;
- Ms H’s statement to the Trust dated 6 September 2021;
- Mr Gilbert’s Curriculum Vitae;
- Correspondence between Mr Gilbert and Ms A from September 2020;
- Nomination for Mr Gilbert for Doctor of the Year Award 2019 (Finalist) at the Trust;
- Extracts provided by Mr Gilbert of his eLogbook (‘e-log’) setting out his operation lists, and also trainee list;
- Handwritten diagram of the Oxford Transplant Centre including hallway area that connected the outpatient corridor with the Consultant offices and the renal day ward;
- Various photographs of Mr Gilbert with a number of colleagues in social settings;
- Mr Gilbert’s clinical supervisor report regarding concerns in respect of Ms G, which is undated;
- Photographs and two videos in respect of the Oxford Transplant Centre at Churchill Hospital where Mr Gilbert and his legal team were able to carry out a re-enactment of the set-up of a vascular access procedure on 24 April 2024. A previous re-enactment had been completed on 15 November 2021 as part of the Trust investigation but the recording of this was no longer available when Mr Gilbert requested it in February 2022;
- Mr Gilbert’s telephone records from October 2020 to May 2021;
- Various email correspondence with positive feedback or thanks for support to Mr Gilbert from a number of colleagues;
- A large number of positive testimonials on behalf of Mr Gilbert, which were provided for these proceedings.

The Tribunal’s Approach

14. 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. Mr Gilbert 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. If the Tribunal is unable to conclude one way or the other, then that paragraph of the Allegation is not made out.

Good character

15. The Legally Qualified Chair (LQC) stated that Mr Gilbert has no criminal convictions or adverse regulatory findings recorded against him. He is therefore to be regarded as of good character.

16. While Mr Gilbert's good character is not conclusive and does not provide Mr Gilbert with a defence, it is relevant when assessing his honesty. Further, his good character is relevant when assessing his propensity to act as alleged. It supports and should be taken into account when assessing the inherent improbability of Mr Gilbert acting as alleged against any of the complainants in accordance with the relevant case law of *Re H* [1996] AC 563 and *Byrne v GMC* [2021] EWHC 2237 (Admin).

Cross-admissibility

17. The LQC stated that the mere fact that there are a number of allegations, and a number of complainants, does not prove anything. The Tribunal needs to be satisfied that there has been no collusion, innocent or otherwise, between Ms A, Ms E, Ms G or Ms H in relation to their evidence, or potential for their evidence to have been influenced or affected sub-consciously through sharing of information. Provided it is so satisfied, it would be permissible for the Tribunal to consider the degree of similarity of some of the paragraphs of the Allegation and the evidence in relation to Mr Gilbert's behaviour against each of them and whether his alleged actions are mere coincidence in relation to:

- his alleged use of the words “squirter” and/or “spurter” contained in the Allegation at paragraphs 1, 11 and 20 - complainants A, E, and H.
- allegedly asking complainants about their underwear contained in the Allegation at paragraphs 1 and 11 - complainants A and E.
- allegedly making comments about their physical appearance contained in the Allegation at paragraphs 1, 11, 16 and 20 - complainants A, E, G and H.

- allegedly touching without consent whilst operational procedures were taking place contained in the Allegation at paragraphs, 1, 11, 16, and 20 - complainants A,E,G and H.
- allegations regarding derogatory comments about colleagues contained in the Allegation at paragraphs 3,11 and 18 - complainants A, E and G.

OR show a tendency to act in a similar way in relation to:

- the allegation made by Ms A at paragraph 1 of the Allegation regarding asking questions about underwear because Mr Gilbert admits asking Ms E whether her underwear was a matching set.
- the allegations made by Ms A,G and H regarding non-consensual physical touching, as contained at paragraphs 1, 16, 20 of the Allegation, because Mr Gilbert has accepted inappropriate touching of Ms E without her consent.

18. The LQC stated that, in summary, proof of one part of the Allegation is capable of supporting the GMC's case on others. However, this is subject to four conditions:

- Firstly, that there is a degree of similarity between the allegations that is not mere coincidence.
- Secondly, that the evidence of the complainants has not been influenced, innocently or otherwise, and whether consciously or unconsciously.
- Thirdly, that it is fair and right to treat the evidence of one complainant as supporting another complainant, or another similar allegation.
- Fourthly, and most importantly, that before finding proved the specific allegation the Tribunal is considering the Tribunal must be satisfied to the requisite standard of proof that the inappropriate behaviour occurred as alleged in that particular allegation.

Definitions

19. The LQC also provided several definitions to assist the Tribunal:

- Acting “*inappropriately*” means that the alleged behaviour was not appropriate, and that it was done deliberately and was not accidental or inadvertent.
- “*Intimidation*” is to do or say something that intends to make another person feel frightened, threatened or unsafe.
- “*Racist comments*” are comments perceived by the complainant or any other person to be motivated by hostility or prejudice based on a person's race or perceived race.
- “*Abuse of your more senior position*” means using the position of consultant surgeon in an improper manner towards another whose position is less senior.
- “*Sexual harassment*” - by virtue of Section 26 of the Equality Act 2010. Section 149(1) of the Equality Act 2010 provides that a public authority must, in the exercise of its functions, have due regard to the need to eliminate harassment that is prohibited by the 2010 Act. The GMC is a public authority for the purposes of the 2010 Act.

The MPTS is part of the GMC and is, therefore, also obliged to have due regard to the definition of harassment in the Equality Act 2010. However, section 149(9) provides that Schedule 18 (exceptions) has effect. Schedule 18, paragraph 3, states that section 149 does not apply to the exercise of a judicial function. The Tribunal is exercising a judicial or quasi-judicial function.

Therefore, the definition of sexual harassment in the Equality Act 2010 is a mechanism for defining harassment. Section 26(2) provides that a person (A) harasses another (B) if A engages in unwanted conduct of a sexual nature and the conduct has the purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

- “*Harassment*” - In *Majrowski v Guy's and St Thomas's NHS Trust* [2007] 1 AC 224, it was said that, where the quality of the conduct said to constitute harassment is being examined, courts and tribunals are well able to recognise the boundary

between conduct which is unattractive, even unreasonable, and conduct which is oppressive and unacceptable.

To cross the boundary the gravity of the misconduct must be of an order which would sustain criminal liability under section 2 of the Protection from Harassment Act 1997. This Act provides that a person who pursues a course of conduct which amounts to harassment of another, or involves harassment of two or more persons, and which he knows or ought to have known amounts to harassment, is guilty of a criminal offence. He may also be subject to a claim for damages in civil proceedings. Under the statute a course of conduct must involve, in the case of conduct in relation to a single person, conduct on at least two occasions in relation to that person. In the case of conduct in relation to two or more persons, the conduct must be on at least one occasion in relation to each of those persons. Harassing a person includes alarming the person or causing the person distress.

- “*Sexually motivated*” - it has been said judicially that a sexual motive means that the conduct was done either in pursuit of sexual gratification or in pursuit of a future sexual relationship; see *Basson v GMC* [2018] EWHC 505 (Admin). In *Arunkalaivanan v GMC* [2014] EWHC 873 (Admin) the court noted that it is important not to equate inappropriate conduct with sexually motivated conduct and that the Tribunal should consider whether there could be any other explanation for inappropriate conduct.

Fairness of the proceedings

20. Mr Sutton KC suggested that the GMC had not cross-examined Mr Gilbert in relation to the Allegation at paragraphs 1(b)(ii), 3(a), 3(c), 3(d), and 11(c)(iii). Ms Hudson on the other hand suggested that she had cross-examined fully in relation to the specific allegations and the generality of what was being asserted against Mr Gilbert and did not therefore accept that submission.

21. The LQC said that the law on this point was recently considered in the Supreme Court decision of *TUI v Griffiths* [2023] UKSC 48 where at paragraph 42 of the judgement Lord Hodge said:

“42. It is the task of a judge in conducting a trial in an adversarial system to make sure that the trial is fair. It is the task of the judiciary in developing the common law,

and the makers of the procedural rules, to formulate rules and procedures to that end. One such long-established rule is usefully set out in the current edition of Phipson on Evidence 20th ed (2022). Bean LJ quoted the previous edition, which was in materially the same terms, at the start of his dissenting judgment. At para 12-12 of the 20th edition the learned editor states:

"In general a party is required to challenge in cross-examination the evidence of any witness of the opposing party if he wishes to submit to the court that the evidence should not be accepted on that point. The rule applies in civil cases ... In general the CPR does not alter that position.

This rule serves the important function of giving the witness the opportunity of explaining any contradiction or alleged problem with his evidence. If a party has decided not to cross-examine on a particular important point, he will be in difficulty in submitting that the evidence should be rejected."...

22. Further at paragraph 69 he stated as follows:

"69. Because the rule is a flexible one, there will also be circumstances where in the course of a cross-examination counsel omits to put a relevant matter to a witness and that does not prevent him or her from leading evidence on that matter from a witness thereafter. In some cases, the only fair response by the court faced with such a circumstance would be to allow the recall of the witness to address the matter. In other cases, it may be sufficient for the judge when considering what weight to attach to the evidence of the latter witness to bear in mind that the former witness had not been given the opportunity to comment on that evidence. The failure to cross-examine on a matter in such circumstances does not put the trial judge "into a straitjacket, dictating what evidence must be accepted and what must be rejected": MBR Acres Ltd v McGivern [2022] EWHC 2072 (QB), para 90 per Nicklin J. This is not because the rule does not apply to a trial judge when making findings of fact, but because, as a rule of fairness, it is not an inflexible one and a more nuanced judgment is called for. In any event, those circumstances, involving the substantive cross-examination of the witness, are far removed from the circumstances of a case such as this in which the opposing party did not require the witness to attend for cross-examination."

Approach to the evidence

23. The LQC stated that the matters with which the Tribunal is concerned covered an extensive period, and some go back many years. He stated that the passage of time may

affect the memory of each of the witnesses, including Mr Gilbert, about what exactly happened years ago. It may even have played tricks on their memories, leading them genuinely to believe that things happened when they did not. A convincing witness may still be wrong.

24. There may also be a danger of real prejudice to Mr Gilbert because some of these events took place many years ago, in that, the longer the time since the alleged events, the more difficult it may be for him to answer the Allegation. The Tribunal should take the delay into account in Mr Gilbert's favour in each of these ways when deciding whether the GMC has proved its case, as throughout the prolonged period of these allegations Mr Gilbert was of good character.

25. The LQC reminded the Tribunal that, in approaching the evidence in this case, it is important to avoid assumptions about alleged sexual conduct. There is no typical response to alleged inappropriate sexual behaviour. People can react in many different ways. Some people may not feel able to complain at the time, whether out of shock or fear of not being believed or for some other reason. The Tribunal must not assume that the evidence of a witness is untrue because they said something different on another occasion. It is for the Tribunal to decide what the situation was in this case by considering all of the evidence. This includes any inconsistencies.

26. The LQC stated that it is often best where issues of fact are in dispute, as in this case, to begin with what is not in dispute and consider such contemporaneous documents as exist in context before making any assessment of the credibility of the witnesses. He referred to the cases of *Dutta v GMC* [2020] EWHC 1974 (Admin), *Khan v GMC* [2021] EWHC 374 (Admin) and *Joseph v GMC* [2022] EWHC 3345 (Admin) which reference the commercial case of *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm).

27. In *Dutta* the court said that that it was an error of principle to ask: “do we believe her?” before considering the documents. This does not mean that oral testimony serves no useful purpose but that its value lies in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny. Also, to gauge the personality, motivations and reliability of the testimony of the witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, (citing *Gestmin*) it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.

28. In *Khan* the court said that it is wrong for a Tribunal to begin with the question of credibility generally and without reference to the specific allegations made because in effect the Tribunal is beginning its analysis by asking “Do we believe her?”.

29. In *Gestmin* the court indicated that it is wrong to suppose the more confident another person is in their recollection the more likely it is to be accurate. The court suggested starting with the objective facts as shown by authentic contemporaneous documents, independent of the witness, and using oral evidence as a means of subjecting these to “critical scrutiny”.

30. In *Joseph* the court referred to Dutta and said at paragraph 23:

*“that the best evidence on which to base fact finding will always be objective matters shown by contemporaneous documentation. But that is not always required and may not always be available; and then substantial reliance may properly be placed on the oral evidence of a complainant, including in preference to that of a respondent. Where reliance has to be placed on witness recollection, *demeanour may in an appropriate case be a significant factor and the lower tribunal has the advantage there. And in a case where the complainant provides an oral account, and there is a flat denial from the other person concerned, and little or no independent evidence, it is commonplace for there to be inconsistency and confusion in some of the detail. Nevertheless, the task of the court below is to consider whether the core allegations are true.”*

*It should be noted, however, that Leggatt J (as he then was) observed in *Gestmin*, (cited in *Dutta*), “reliance on a witness’ confident demeanour is a discredited method of judicial decision making”.

31. The Tribunal has also had regard to the submissions from both parties, including Ms Hudson’s submissions:

- The timing of when a complaint is made is not indicative of its truthfulness.
- The chronology and methodology of the investigation provides no evidence to support any suggestion of conscious or unconscious collusion.

and Mr Sutton’s submissions:

- We believe memories to be more faithful than they are. Two common errors are to suppose (1) that the stronger and more vivid the recollection, the more likely it is to be accurate; (2) the more confident another person is in their recollection, the more likely it is to be accurate.
- Memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is even true of “flash bulb” memories (a misleading term), i.e. memories of experiencing or learning of a particularly shocking or traumatic event.
- Events can come to be recalled as memories which did not happen at all or which happened to somebody else.
- Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.
- Witnesses, especially those who are emotional, who think they are morally in the right, tend very easily and unconsciously to conjure up a legal right that did not exist. It is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active. For that reason, a witness, however honest, rarely persuades a judge that his present recollection is preferable to that which was taken down in writing immediately after the incident occurred. Therefore, contemporary documents are always of the utmost importance.

The Tribunal’s Analysis of the Evidence and Findings

32. 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.

Pooling

33. The Tribunal had, throughout its deliberations, considered whether there was a pooling of recollection between Ms E and Ms G, Ms A and Ms I, and also Ms E and Ms A. Ms E recounted speaking with Ms G at a café at work in 2014. When Ms G had asked Ms E whether she had had bad experiences with Mr Gilbert. Ms E also recalled being telephoned by Ms A in

January or February 2021 when she was told by Ms A that she had been touched by Mr Gilbert. It was accepted by Ms A that she and Ms E were close friends. Given the lack of any substantial evidence to support a pooling of recollections, the Tribunal concluded that there had been no such pooling.

Paragraph 1(a)(i)(1)

34. The Tribunal had regard to Ms A's statement to the Trust dated 12 September 2021:

“Right at the beginning [XXX] when I was his trainee, we were doing a fistula operation where the patient's arm is out and as the assistant you're sitting opposite the surgeon with the arm between you. As part of the operation, when you open up the vessel in the arm you then have to clean the vessel of blood or any clots, and you squirt in some heparinized saline. Often the assistant will do that whilst the surgeon is preparing the vessel. So I would be doing that and then he would ask “so are you a spurter? I can always tell which girls are the spurters”. I was just really shocked and didn't say anything because I didn't know what to say...He was basically implying that he could make you ejaculate as a woman and he could always tell which ones were likely to do that.”

35. In Ms A's oral evidence, she stated that this event took place in 2019, rather than between August 2009 and February 2010 as originally set out in the Allegation. The Tribunal noted the redactions and wording of the relevant paragraph in Ms A's statement to the Trust was such that it could understand why there was an error in drafting. The Tribunal found Ms A to be very clear in her oral evidence that this incident took place in 2019, XXX when she was a Registrar, as it was she who made the correction (having never seen the Allegation). This paragraph was amended under Rule 17(6) of the Rules.

36. In both his first and supplementary witness statement, Mr Gilbert denied that he made this comment to Ms A.

37. It was an agreed fact that Ms A and Mr Gilbert worked together and that he operated with her during this time period.

38. The Tribunal had regard to the cross-examination of Mr Gilbert in which he stated that Ms A was not someone that he could *“have laughter or fun with”*. He also stated that he had left this post by 30 September 2019 so it could only have taken place prior to this date.

The Tribunal noted that it therefore was considering the period between April and August 2019.

39. The Tribunal also noted that, in Mr Gilbert’s witness statement in respect of Ms E, he stated that recalled that he had said on occasion “*oh a squirter*”, knowing that this word had another meaning, and that people may find this comment funny. He also stated that he recognised that he had on the odd occasion used some innuendo within the workplace and within an operative setting. Mr Gilbert stated that he had never, however, personalised any innuendo to any individual and would never do so.

40. Throughout the allegations concerning Ms A, the Tribunal has considered the potential for a pooling of recollection as Ms A accepted in her evidence that she had spoken with friends and her partner at the time but was clear in her evidence to the Tribunal about what Mr Gilbert had said to her at the time. The Tribunal noted that Ms A and Ms E were good friends and so it could not totally discount that either of them might have mentioned it to the other. There was no evidence to prove that an actual pooling of recollection had taken place and, on balance, the Tribunal concluded there had been no such pooling. The Tribunal considered, but discounted, Ms A’s recollection being affected by an honest, imaginative reconstruction of events.

41. Having considered the evidence and the circumstances, the Tribunal noted in particular that Mr Gilbert had accepted using similar words as a double entendre and that Ms A’s recollection was clear as to the circumstances in which the words were said to her. The Tribunal concluded that, even taking into account the delay in reporting matters, it was more likely than not that Mr Gilbert said, ‘*so are you a spurter? I can always tell which girls are the spurters*’, or words to that effect. Accordingly, the Tribunal found this paragraph of the Allegation proved.

Paragraph 1(a)(ii)

42. The Tribunal had regard to Ms A’s statement to the Trust dated 12 September 2021:

“[XXX], he said to me over the operating table “you’re a well put together girl, you must always wear matching underwear, correct? What kind are you wearing now?””

43. In his witness statement Mr Gilbert denied that this took place as alleged. He stated that he never made any comments to Ms A about being well put together or asking about her

underwear. Mr Gilbert stated that he would sometimes remind colleagues in a light-hearted way to make sure that they brought spare clothing with them when they were going out as a team on organ retrievals. He said that the nature of the procedure was such that you could get soaked through your scrubs down to underwear. Mr Gilbert stated that he had also, on occasion, participated in generalised light-hearted conversation amongst staff in the theatres about underwear, including if people wear matching sets. He stated that he now realised that such conversations were inappropriate, and he was sorry for participating in them.

44. The Tribunal noted that Mr Gilbert stated that these light-hearted conversations would have taken place during clinical situations as a result of fluids splashing on clothing and those staff members needing to change.

45. The Tribunal was clear that Mr Gilbert set out that he would occasionally participate in light-hearted conversation about underwear. The Tribunal noted that the wording alleged was personalised to Ms A and not generalised. Ms A was clear in her evidence that the comments were made directly to her about her own underwear.

46. The Tribunal took account of the evidence of those members of theatre staff who have worked with Mr Gilbert for many years, including Ms K and Ms L, who gave evidence that they had never heard any discussions about underwear from Mr Gilbert even though Mr Gilbert himself admitted talking about underwear. These colleagues also accepted that words might be said that they could not always necessarily hear in the close confines of an operating theatre where surgeon and assistant are close together. The Tribunal was of the view that the theatre staff not having heard Mr Gilbert say this, did not mean that the words were not used.

47. The Tribunal also had regard to the admission made by Mr Gilbert regarding Ms E, at paragraph 11(d) of the Allegation in that he asked her if her underwear was a matching set, or words to that effect. The Tribunal considered that this demonstrated a propensity for Mr Gilbert to make such comments.

48. Having considered the evidence and the circumstances, the Tribunal concluded that it was more likely than not that Mr Gilbert said to Ms A, *'You're a well put together girl, you must always wear matching underwear, correct? What kind are you wearing now?'*, or words to that effect. Accordingly, the Tribunal found this paragraph of the Allegation proved.

Paragraph 1(a)(iii)(1) and (2)

49. The Tribunal considered each part of this paragraph separately in its deliberations.

50. The Tribunal had regard to Ms A's statement to the Trust dated 12 September 2021:

"One comment when I was a Registrar, probably in the winter to 2019, was "I enjoyed watching you walk around in your fuck me boots yesterday". They were just normal, knee high, flat leather boots that women wear in cold weather. It was nothing more than that and even if it was, it's not something you expect from a colleague at work. He also said, "you must love the attention you get in that sexy leather jacket"."

51. In his witness statement Mr Gilbert denied that this took place as alleged. He stated that he would not have used this wording. He recalled that there as an occasion when Ms A wore knee length boots, jeans, and a leather jacket to work and he made a sarcastic comment along the lines of *"good to see you have dressed up for work"*. Mr Gilbert stated that he said this as he did not think it was appropriate to dress like this in a clinical environment.

52. The Tribunal viewed saying that someone's boots were not appropriate for a work environment was not the same as the tenor of the comments that Ms A sets out; as they were pejorative and sexualised. She did not resile from those words in her oral evidence.

53. The Tribunal noted Mr Gilbert's oral evidence in which he said that it was not language he would use. He said *"I barely swear. I certainly don't use the F word. It's a word I find offensive"*.

54. The Tribunal had regard to Ms A's statement in which she said that the boots in question were flat winter boots, namely *"normal, knee high, flat leather boots that women wear in cold weather"*. It also noted that the location in which the comments were made was not specified by Ms A, whether anyone was present, and whether the two alleged comments were made at the same time.

55. The Tribunal accepted that Mr Gilbert made sarcastic comments with regard to the clothes that Ms A was wearing.

56. Having considered the evidence and the circumstances, the Tribunal considered that the GMC could not establish to the requisite standard of proof that it was more likely than not that Mr Gilbert said to Ms A, *'I enjoyed watching you walk around in your fuck me boots yesterday'*, or words to that effect. Accordingly, the Tribunal found paragraph 1(a)(iii)(1) of the Allegation not proved.

57. In terms of the *"sexy leather"* jacket at paragraph 1(a)(iii)(2), the Tribunal considered this separately and, for the same reasons as above, it found paragraph 1(a)(iii)(2) of the Allegation not proved.

Paragraph 1(a)(iv)

58. The Tribunal had regard to Ms A's statement to the Trust dated 12 September 2021:

"In the doctors' office between the door to the little hallway airlock and the ward, as the SHO I would be sorting out the paperwork and he'd be the Senior Registrar allocated to clinic... he would come in and say "oh [Ms A] I've got a great patient for you to see in clinic". I would say "that's great, I'll join very soon after finishing the paperwork". He would say "oh no, you need to come very quickly because they need to go and they have a really big organ, a huge organ and I know how much you love big organs"... When referring to their big organ, I think he was referring to their kidney transplant; the innuendo was very obvious, it was not a clever joke."

59. In his witness statement Mr Gilbert denied that this took place as alleged. He stated that he had no recollection of working with Ms A between August 2009 and February 2010. Mr Gilbert stated that at this time he was a Registrar in training and on an Out Of Programme for Training placement from the Wessex Deanery to the Oxford Deanery up to 30 September 2009. He stated that he left the Oxford transplant unit on 30 September 2009 to return to the Queen Alexandra hospital in Portsmouth. Further, Mr Gilbert stated that he was away on a family holiday XXX from 13 August to 1 September 2009 and provided photographs and a ferry ticket. He stated that he was therefore only working within the Trust's transplant department for approximately five weeks during the time specified. Mr Gilbert also provided screenshots of his surgeons e-logbook and that it showed that he participated in four vascular access operations during this period, with a consultant supervisor present.

60. Mr Gilbert stated that he would never have run through to ward areas to ask Ms A (or anyone) to come and see patients because of their organs. He stated that, if a patient had an

unusual sign or presentation that he considered useful for other colleagues to learn from, he would ask a patient if it were permissible to invite other colleagues to review the clinical finding and the patient, if happy to do so, would wait for the colleague to attend. Mr Gilbert stated that, although he had no specific recollection of doing so, he did accept that he might have said something such as *“oh, that’s a big one”* as a general comment or innuendo in a theatre setting, by way of light-hearted humour.

61. The Tribunal paid particular regard to Mr Gilbert’s comments in his witness statement in which he stated that this specific incident had not occurred but accepted that he might have said something such as *“oh, that’s a big one”* as a general comment or innuendo.

62. The Tribunal noted that, despite there being no contemporaneous record, Ms A did provide specific details as to location, the various job roles that were being undertaken, the time period, what had occurred, and what she was doing at the time. She was clear about what happened and that Mr Gilbert was the Senior Registrar allocated to the clinic. The Tribunal considered, but discounted, Ms A’s recollection being affected by an honest, imaginative reconstruction of events. As a result, the Tribunal found her evidence to be persuasive.

63. The Tribunal considered Mr Gilbert’s evidence that he had little opportunity to interact with Ms A at this time. However it was not impossible that they would have crossed paths at work in the manner described. The Tribunal was mindful that the incident amounted to a conversation of a short duration about an organ. There was evidence that Mr Gilbert had a number of operations during this relevant period and the Tribunal had regard to the contemporaneous e-logs. The Tribunal determined that there was still scope for Mr Gilbert being in clinic as there were periods when he was not listed in operations. Simply, the e-logs did not mean that the Tribunal could determine that the conversation did not take place.

64. Having considered the evidence and the circumstances, including the delay in the matter being reported and recounted, the Tribunal concluded that it was more likely than not that Mr Gilbert said to Ms A, *‘oh no you need to come very quickly because they need to go and they have a really big organ, a huge organ and I know how much you love big organs’*, or words to that effect. Accordingly, the Tribunal found this paragraph of the Allegation proved.

Paragraph 1(b)(i)(1) and (2)

65. The Tribunal considered each part of this paragraph separately in its deliberations. The Tribunal had regard to some of the points set out above regarding paragraph 1(a)(iv) of the Allegation.

66. The Tribunal had regard to Ms A's initial account:

“He would take the opportunity to grab me whenever I was passing him alone in a particularly isolated corridor in the hospital. He would grab me by my waist from behind and run his hands up and down from my hips to my bra, until I could push him off and get away. He would laugh it off and say, ‘I’m just joking’. It was frightening, and I would dread going to work when he was on call. I would try to swap out of on calls with him as much as possible. No other colleague in the department behaved in this way towards me.”

67. The Tribunal had regard to Ms A's statement to the Trust dated 12 September 2021:

“So I’d leave the office, turn right to enter that airlock to get to the clinic rooms and the first few times it happened I didn’t realise that he was waiting in that little hallway; he’d grab me by my waist, usually from behind and he’d run his hands up and down from the area of my hips to my bra line until I could eventually push him away and tell him to get off me.”

68. The Tribunal took account of Ms A's GMC witness statement dated 17 February 2023:

“I detail an incident where Mr Gilbert touched me physically in the ‘airlock.’ I can’t recall exactly when this happened, but it was definitely when [XXX] (which would have been between August 2009 and February 2010) as this was when I would have been allocated to the ward.

I confirm that this kind of incident happened more than once. I can’t recall exactly how many times it happened, but I think it was maybe two or three times, simply because I stopped going to clinic in this same way once I realised that he would be waiting in the ‘airlock.’ After that I made it very clear I was very busy on the ward and could not come to clinic.

When this happened, I felt disgusted and quite angry that Mr Gilbert felt he could do it. I was frustrated because I knew that if I said anything to someone, it was highly unlikely I would be believed as it was a very male dominated speciality. I was fairly sure it would end up being painted as ‘boys will be boys’ and that I should stop being so ‘highly strung’. This is not specific to the transplant department at Oxford; it was just what surgery in the UK was like in 2009.

Mr Gilbert’s actions/behaviour made me feel quite vulnerable. At the time I think I felt like I had to toughen up.”

69. In his witness statement Mr Gilbert denied that this took place as alleged. He stated that he was confident that he had never placed his hands on Ms A. Mr Gilbert stated that there was only a five-week period between August 2009 and February 2010 when he could have come into contact with Ms A. He had left the Oxford Transplant Unit on 30 September 2009 to return to the Queen Alexandra Hospital in Portsmouth. Mr Gilbert also stated that he was away on a family holiday from 13 August to September 2009. He stated that he had no memory of Ms A prior to her joining the transplant department XXX. Mr Gilbert stated that he did not have access to historic rotas to check whether he had ever worked with Ms A in 2009 to 2010 but that her role included a split of her time between clinical and academic work.

70. It is alleged that this incident took place in an “air lock” area of the department. This was reference to a hallway area that connected the outpatient corridor with the consultants’ offices and the renal day ward. There are doors within this space leading to outdoor areas and also a doorway to a staircase that led up to transplant immunology laboratories. Ms A stated that this area was rarely used but Mr Gilbert stated that staff members would pass through this area on a regular basis in order to access the various offices and clinical areas. A plan of the area was provided to the Tribunal by Mr Gilbert and Ms A was referred to it during her oral evidence. The Tribunal accepted that the area was not particularly isolated but, nonetheless, there would be an opportunity for Mr Gilbert to behave as alleged.

71. The Tribunal found Ms A’s evidence to be detailed and consistent when she was cross-examined. She had detailed the number of occasions on which it occurred, that it would be a surprise, and how she had reacted to it happening. Her evidence was persuasive.

72. The Tribunal also noted the admission by Mr Gilbert in terms of tickling of Ms E as set out at paragraph 11(a) of the Allegation. Within Ms E’s written evidence, she described that,

“On multiple occasions I was tickled at the waist from bra to hips multiple times when alone in corridors or the anaesthetic room”. The Tribunal found that this touching in similar circumstances, albeit not determinative on its own, showed a tendency for Mr Gilbert to act in a similar way of touching without consent as supporting the allegation made by Ms A in that regard.

73. The Tribunal, in reaching this conclusion, considered the delay in reporting the matter, as well as the risk of Ms A’s memory of events playing tricks on her.

74. Having considered the evidence and the circumstances, the Tribunal concluded that it was more likely than not that Mr Gilbert touched Ms A inappropriately without her consent on one or more occasions between August 2009 and February 2010, in that he grabbed Ms A by the waist ran his hands up and down Ms A’s body from her hips to her bra line. Accordingly, the Tribunal found paragraph 1(b)(i)(1) of the Allegation proved.

75. In terms of the running hands up and down Ms A’s body, the Tribunal considered this separately and, for the same reasons as above, it found paragraph 1(b)(i)(2) of the Allegation proved.

Paragraph 1(b)(ii)

76. The Tribunal had regard to Ms A’s initial account:

“If he walked into theatre when I was assisting in an operation, he would come up behind me and stand very close, pressing against me. I could feel his breath on my neck. It was extremely unpleasant, unnerving and intimidating. Only after I repeatedly mentioned my partner, would he eventually move away. No other consultant or colleague in the department behaved in this way towards me.”

77. The Tribunal had regard to Ms A’s statement to the Trust dated 12 September 2021:

“I restarted [XXX] in April 2019... I don’t know who I was assisting, it was either [Mr U] or [Mr V], who were both Fellows there at the time, in a kidney transplant and he wandered into theatre to see what was going on. He stood so close behind me that I could feel him pressing against me, and I could feel his breath on my neck. Only when I kept mentioning my partner... would he eventually move away. I have been working in

surgery since 2009 and no other Consultant or colleague has ever done that. It's not normal."

78. The Tribunal took account of Ms A's GMC witness statement dated 17 February 2023:

"I detail an incident where Mr Gilbert came up behind me and stood very close behind me in theatre. I felt that this was deeply inappropriate. Again, I was disgusted. I perhaps actually felt much more panicked in this situation than I did in the incident in the 'airlock' as at least there was a way of escape in the 'airlock'. In theatre you can't concentrate on the procedure you're trying to help with, you can't escape, and you can't say anything as it was just his word against yours. You're also mid operation in theatre so you don't want to compromise the safety of the patient. This situation was significantly more stressful than the other one as I could look like I wasn't assisting properly whilst he was pressing up behind me."

79. In his witness statement Mr Gilbert denied that this took place as alleged. He stated that if he was present during a surgical procedure but not involved as part of the surgical team, he would stand back from the team who needed to stay sterile. Mr Gilbert stated that it would have been unusual for him to walk into theatre to observe when a transplant was being carried out under the care of another Consultant and he would have only done so if he had been asked to provide support or if he needed to ask something urgently.

80. Mr Gilbert stated that if the case was carried out by a junior with him as the named Consultant, he may have gone into theatre to observe. He stated that this could not have happened with Ms A as for all the transplants which involved the both of them, he was scrubbed in and was either performing or supervising the surgery. This means that Ms A was either assisting or he was at the other side of the table scrubbed in and teaching her how to do the case. He provided an extract from his e-logbook which showed that Ms A logged 117 operations with him, and which detailed nine transplant operations.

81. The Tribunal noted that Ms A was specific that she was assisting Mr U or Mr V at the time (as opposed to Mr Gilbert) and as to the details of where it happened. Mr Gilbert accepted in his written statement that, whilst it would be unusual for him to observe, he would do to provide support or opinion if requested. As such, the Tribunal accepted that he could well have entered the theatre in a non-operation role and this could have given the opportunity for this to have occurred.

82. There was evidence before the Tribunal about touching of the back and whether this would have maintained the sterile environment such that she would have needed to change, which does not appear to have been the case if the backs of both people touched. The other surgeon would have been on the other side of the table and so in relatively close proximity and having to go out and change would perhaps have been more notable.

83. The Tribunal concluded from the evidence that a supervising consultant coming up behind someone assisting in theatre would not be out of the ordinary but that the inappropriateness would come in the pressing up against the other person when it was not clinically required.

84. Given the evidence provided, the Tribunal accepted that Ms A had been touched and that this was without her consent. However, it was unable to conclude that it was inappropriate in nature given the supervising context in which Mr Gilbert was present. It took place in the context of theatre and Mr Gilbert needing to observe where inadvertent touching could have been misinterpreted by Ms A. The Tribunal was unable to find that the GMC had discharged the burden of proof as to the inappropriate nature of the touching on the evidence before it. Accordingly, the Tribunal found this paragraph of the Allegation not proved.

Paragraph 1(b)(iii)

85. In his witness statement Mr Gilbert admitted that he traced his finger across the areas specified but denied that he had touched Ms A when doing so. Mr Gilbert stated that he had no specific recollection of doing so, but it was his practice at the time to demonstrate an anatomical path by pointing to the relevant areas, away from the person's body. Mr Gilbert stated that the schedule on 9 February 2021 included two complex vascular access patients with occlusions of their more central veins. He stated that he would have provided teaching in relation to this to Ms A and the other trainee present. This would have involved spending time explaining how any standard access creation in the arms would run into problems as there would be hold up of the blood flow as it returned to the heart. He would have explained that to overcome this, an option would be to create a HeRO graft. Mr Gilbert stated that he had never thought that his actions or teaching methods could be misconstrued until the allegations were put to him by the Trust. He stated that his objective had been simply to impart knowledge and experience to help others in their clinical development.

86. The Tribunal had regard to Ms A's initial account:

“When describing an anatomical issue, he would run his hand over me to ‘demonstrate’ the anatomy. This would include running his hand over my arms, shoulders, legs, clavicles and neck. Once he did this in front of another junior doctor. I felt paralysed and felt I couldn’t move away, as then he would know that I had understood that what he was doing was inappropriate.”

87. The Tribunal had regard to Ms A’s statement to the Trust dated 12 September 2021 in which she stated that a new trainee was shadowing her on the day in question and so they went down to the clinic, where Mr Gilbert was. Ms A stated that:

“I was standing with my arms crossed, as I normally do, and Mr Gilbert was talking through a scan. He then started talking about the concept of blood returning back to the heart. It is not exactly a novel concept, since it’s pretty obvious what happens to the blood when it goes from a hand up to the heart, but he felt the need to reach out and trace with his finger all across from my wrist, all the way up my arm (over my clothes), over my shoulder, over my clavicle to my sternoclavicular notch and keep his finger there for a few seconds. I was genuinely so shocked I just didn’t know what to do, I felt paralysed. At one point I thought “oh my gosh, you are going to trace your finger towards my breasts” but then he didn’t and moved his finger away.

Nobody has ever done that to me in any clinic, in any clinical situation, ever. I knew I couldn’t do anything, and I felt completely powerless. It was quite humiliating because I think he was doing it to demonstrate to this new chap who had just joined the department that he could do whatever he wanted; he can even inappropriately touch the senior trainee in front of people and nobody is going to do a blind thing about it.

He didn’t say anything and just pretended like nothing had happened, and carried on talking about the patient. I didn’t say anything to him either... I was just really shocked, and I felt very humiliated by it and quite upset. On the next day, 10 February, I was furious and told [Mr W] about it. He said... please leave it with him. So I said okay. I was really upset about it and spoke to [Mr X] who is the Ward Consultant and my clinical supervisor the day after that and told me what happened. I think he spoke to [Mr W] and I think he said not to worry, they were looking into it.”

88. There was also the following reference in this statement to:

“After the clinic appointment incident (where he traced his finger up my arm), I rang Ms E who is a very good friend of mine.”

89. The Tribunal found Ms A’s account to be detailed. The alleged actions of Mr Gilbert resulted in a contemporaneous complaint being made according to Ms A’s evidence in that she told Mr W about it the next day and then spoke with Mr X the following day, who was the Ward Consultant and her clinical supervisor.

90. The Tribunal noted Mr Sutton’s submissions about inconsistency between Ms A’s initial account and in her statement to the Trust dated 12 September 2021. Whilst noting the nature of the complaint was not ‘word for word’ on each occasion, the Tribunal accepted that the detailed account given in Ms A’s statement to the Trust dated 12 September 2021. It did not represent embellishment or a material inconsistency.

91. The Tribunal paid regard to the partial admission from Mr Gilbert that he had traced his finger but had not actually touched Ms A.

92. The Tribunal accepted the GMC’s submission that there were many other ways that this educational demonstration could have been done, including by way of a diagram, by finding resources on the internet, or by seeking consent for demonstrating on a person.

93. In terms of propensity, the Tribunal noted that Mr Gilbert had admitted to inappropriately touching Ms E and that this lends some support for the Tribunal to reach a conclusion in respect of this specific paragraph of the Allegation regarding Ms A. Irrespective of this support, the Tribunal was satisfied that it was more likely than not that the incident occurred as alleged by Ms A.

94. Therefore, having considered the evidence and the circumstances, the Tribunal concluded that it was more likely than not that Mr Gilbert touched Ms A inappropriately without her consent in tracing his finger across Ms A’s wrist, up her arm, over her shoulder and over her clavicle to her sternoclavicular notch. Accordingly, the Tribunal found this paragraph of the Allegation proved.

Paragraph 2(a) - Sexually Motivated

95. The Tribunal had regard to the specific parts of paragraph 1 of the Allegation that it has found proved, namely paragraphs 1(a)(i)(1), 1(a)(ii), 1(a)(iv), 1(b)(i)(1) and (2), and

1(b)(iii). It has found that all of these were inappropriate and were directed towards Ms A. The Tribunal now had to consider whether Mr Gilbert's actions in this respect were sexually motivated, in that the conduct was done either in pursuit of sexual gratification or in pursuit of a future sexual relationship.

96. In his witness statement Mr Gilbert denied that his actions were sexually motivated.

97. The Tribunal had regard to the relevant legal principles in terms of the definition of sexual motivation, including the case of *Basson v GMC* [2018] EWHC 505 (Admin). It also considered that in *Arunkalaivanan v GMC* [2014] EWHC 873 (Admin) the court noted that it was important not to equate inappropriate conduct with sexually motivated conduct and that the Tribunal should consider whether there could be any other explanation for inappropriate conduct.

98. In respect of paragraph 1(a)(i)(1) of the Allegation, the Tribunal considered that these words were sexual innuendo, which Mr Gilbert accepts as such. The Tribunal has found that it was personalised to Ms A and not generalised in nature. The Tribunal was unable to find any other explanation for this conduct. It determined that the words were said with a view to Mr Gilbert obtaining sexual gratification as opposed to any ill-advised attempt at humour and was therefore sexually motivated. Accordingly, the Tribunal found paragraph 2 of the Allegation proved in respect of paragraph 1(a)(i)(1).

99. In respect of paragraph 1(a)(ii) of the Allegation, the Tribunal rejected Mr Gilbert's purported innocent explanation as the changing of clothes because of excess fluids during retrieval. The comments suggested that Mr Gilbert was thinking about what type of underwear Ms A was wearing. Matching underwear are personal private pieces of clothing that cover genitalia and the breasts of women in this context. The Tribunal was unable to find any other explanation for this conduct other than that the words were said with a view to Mr Gilbert obtaining sexual gratification as opposed to any ill-advised attempt at humour and was therefore sexually motivated. Accordingly, the Tribunal found paragraph 2 of the Allegation proved in respect of paragraph 1(a)(ii).

100. In respect of paragraph 1(a)(iv) of the Allegation, the Tribunal considered that these words were also sexual innuendo. The Tribunal was unable to find, within this context, any explanation for this conduct other than for Mr Gilbert's sexual gratification as opposed to any ill-advised attempt at humour. It concluded therefore that Mr Gilbert's actions were sexually

motivated. Accordingly, the Tribunal found paragraph 2 of the Allegation proved in respect of paragraph 1(a)(iv).

101. In respect of paragraph 1(b)(i)(1) and (2) of the Allegation, the Tribunal had regard to whether there was any other explanation for Mr Gilbert's actions in this respect noting that it rejected his explanation of what happened. As such, there was touching of Ms A inappropriately without her consent in a corridor when they were on their own. It determined that the actions were with a view to Mr Gilbert obtaining sexual gratification and were therefore sexually motivated. Accordingly, the Tribunal found paragraph 2 of the Allegation proved in respect of paragraph 1(b)(i)(1) and (2).

102. In respect of paragraph 1(b)(iii) of the Allegation, the Tribunal accepted Ms A's explanation that it was done to humiliate her and therefore there was another explanation for Mr Gilbert's conduct other than for his sexual gratification. It could have been an opportunity to humiliate a Registrar in front of a junior colleague. As such, the Tribunal concluded that Mr Gilbert's actions were not sexually motivated on this occasion. Accordingly, the Tribunal found paragraph 2 of the Allegation not proved in respect of paragraph 1(b)(iii).

Paragraph 2(b) - Sexual Harassment

103. The Tribunal had regard to the specific parts of paragraph 1 of the Allegation that it has found proved, namely paragraphs 1(a)(i)(1), 1(a)(ii), 1(a)(iv), 1(b)(i)(1) and (2), and 1(b)(iii). It has found that all of these were inappropriate and were directed towards Ms A. The Tribunal now had to consider whether Mr Gilbert's actions in this respect constituted sexual harassment.

104. In his witness statement Mr Gilbert denied that his actions constituted sexual harassment.

105. The Tribunal did not have to consider the actions at paragraph 1(b)(iii) as it has found no element of sexual motivation, regarding paragraph 2(a) and therefore they could not have constituted sexual harassment.

106. The Tribunal had regard to the relevant legal principles in terms of the definition of sexual harassment, which involves a course of conduct which amounts to harassment of another and which he knows or ought to have known amounts to harassment. Harassing a

person includes alarming the person or causing the person distress. It noted that Section 26(2) of the Equality Act 2010 provides that a person (A) harasses another (B) if A engages in unwanted conduct of a sexual nature and the conduct has the purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

107. The Tribunal considered the definition of sexual harassment and concluded, on the facts found proved, that Mr Gilbert's actions constituted sexual harassment as his course of conduct, on more than one occasion, created an intimidating, hostile, degrading, humiliating or offensive environment for Ms A. Accordingly, the Tribunal found paragraph 2(b) of the Allegation proved in respect of paragraphs 1(a)(i)(1), 1(a)(ii), 1(a)(iv), and 1(b)(i)(1) and (2).

Paragraph 2(c) - Abuse of more senior position

108. The Tribunal had regard to the specific parts of paragraph 1 of the Allegation that it has found proved, namely paragraphs 1(a)(i)(1), 1(a)(ii), 1(a)(iv), 1(b)(i)(1) and (2), and 1(b)(iii). It has found that all of these were inappropriate and were directed towards Ms A. The Tribunal now had to consider whether Mr Gilbert's actions in this respect were an abuse of his more senior position.

109. In his witness statement Mr Gilbert denied that his actions were an abuse of his more senior position.

110. The Tribunal had regard to the relevant legal principles in terms of the definition of abuse of a more senior position, which means using a position of seniority in an improper manner towards another whose position is less senior.

111. The Tribunal found that in respect of each of these instances the facts constituted behaving in an improper manner towards Ms A. Accordingly, the Tribunal found paragraph 2(c) of the Allegation proved in respect of paragraphs 1(a)(i)(1), 1(a)(ii), 1(a)(iv), 1(b)(i)(1) and (2), and 1(b)(iii).

Paragraph 3(a)

112. The Tribunal had regard to Ms A's initial account:

“He would constantly call me late in the evening out of work, when neither of us were on call. I felt compelled to answer, as it was my consultant. I didn’t want to be thought of as rude or as a difficult junior, and I had seen how difficult he made life for trainees he didn’t like. So I had to always answer his phone calls, no matter at what time.”

113. The Tribunal had regard to Ms A’s statement to the Trust dated 12 September 2021:

“[XXX] in April 2019, he would call me late in the evening out of work when neither of us were on call and I felt compelled to answer because he was my Consultant. When he first started doing it, I thought something had happened to a patient or he couldn’t get hold of the on call Registrar and was calling around to get hold of someone because it was an emergency. But it never was an emergency and it was rarely about a patient. So I would always have to pick up because I didn’t want to be thought of as rude or as a difficult junior and I could see how once he’s pegged someone as a difficult junior... he can make their life very difficult. He will say derogatory things about them, and he will give them bad reports, so that’s why I would always answer his phone calls, no matter what time.”

114. In his supplementary witness statement, Mr Gilbert denied that this took place as alleged. He referred to his mobile telephone records for the time period, which he provided to the Tribunal (in respect of October 2020 to May 2021). He stated that he called Ms A 22 times in total and only five times after 6pm. The other calls were all during weekday working hours and would have related to operating list days or ward-based days. Mr Gilbert stated that the calls were for clinical or work-related reasons and so he denied that he called Ms A when he had no reason to do so or that he had behaved inappropriately to her. The details of the five calls after 6pm were as follows:

- 17 September 2020 at 19:50 (call time 1min 10s). Mr Gilbert stated that Ms A was on-call and he had performed a difficult living kidney transplant from the late afternoon into the early evening. He stated that he called Ms A to find out how the patient was and how the post-operative ultrasound scan appeared, as was routine to do in such a situation. He provided a screenshot of his surgical logbook and a screenshot of the on-call rota for middle grade Registrars.
- 29 October 2020 at 20:21 (call time 5min 52s) and 20:31 (call time 1min 3s). Mr Gilbert stated that he was on-call on this occasion. He stated that, whilst he did not

remember the details, he was confident that both calls would have been related to clinical issues and provided a screenshot of the Consultant rota.

- 4 March 2021 at 18:15 and 18:31. Mr Gilbert stated that Ms A had agreed to give a presentation XXX. Mr Gilbert stated that he was leading the session and had provided Ms A with material and cases to present. He stated that he rang Ms A to check that she had prepared her slides and that she was happy with everything. He stated that he recalled that Ms A had not answered but then called him back to confirm all was well with her talk preparation.

115. The Tribunal has the telephone records for October 2020 to May 2021, which Mr Gilbert was able to produce after the amendment to the Allegation. The Tribunal noted that there was an 18-month period before this to which this part of the Allegation refers.

116. The Tribunal noted that Mr Gilbert was not cross examined as to whether the level of activity demonstrated by the available telephone records was an accurate reflection of contact in the earlier period, for which Mr Gilbert was unable to obtain the relevant telephone records. The Tribunal noted that Mr Gilbert attempted to do so but only had the time period over a weekend to try to obtain any records given the change of timeframe in the amendment.

117. The Tribunal accepted that numerous telephone calls had been made by Mr Gilbert to Ms A but that the telephone records for the later part of the period were not demonstrative of the behaviour complained of by Ms A. Therefore, the GMC has not discharged the burden of proof as to the inappropriateness of the behaviour on the evidence before it. The Tribunal concluded that there was no criticism of Ms A's evidence as such but there was a lack of specific detail in the evidence to support the contention from the GMC, especially given the change in time period made. Accordingly, the Tribunal found this paragraph of the Allegation not proved.

Paragraph 3(b)(i) to (iii)

118. The Tribunal considered each part of this paragraph separately in its deliberations.

119. The Tribunal had regard to Ms A's initial account:

“He would frequently discuss in private with me, how he was in close contact with my supervisors about my clinical progress, how he was instrumental in national selection, and how he could affect my career prospects wherever they might be. He would then ‘ask’ me to help out with extra shifts or additional unpaid work.”

120. The Tribunal had regard to Ms A’s statement to the Trust dated 12 September 2021:

“He would often discuss in private with me how he was in close contact with my supervisors (my TPD [Mr Y], my AES [Mr W] and the overall Head of the Department, [Prof Z]), about my career trajectory and whether I was going to get a job there or not. He would say that he was feeding back to them on how I was doing.”

121. In his supplementary witness statement, Mr Gilbert denied that this took place as alleged. He stated that he might have mentioned to Ms A that he had had discussions with Prof Z and Mr W about her becoming a Consultant within the department but only because she was performing well and he envisaged her moving into such a position. Mr Gilbert stated that he may have also mentioned that he was involved in national selection for core trainees as part of his role as Training Programme Director. This would not, however, have had any relevance to Ms A’s career progression as she was a Registrar and she would have been seeking to move to a Consultant role. Mr Gilbert stated that he did not discuss with Ms A that he was able to affect her career prospects. Further, if extra shifts had been required, these would have been paid at a locum rate and so there was no expectation that Ms A should carry out additional unpaid work.

122. The Tribunal accepted that the matters in paragraph 1(b)(i) to (iii) were more likely than not to have been said by Mr Gilbert to Ms A. The Tribunal had to consider whether this behaviour was inappropriate.

123. The Tribunal noted that Mr Gilbert was Ms A’s clinical supervisor and part of his role would have been to report back on her progress.

124. Ms A said she felt unable to refuse helping out with extra shifts or additional unpaid work. In oral evidence, Ms A said that it was *“manipulative coercion”* and she *“could have raised it with the Deanery”*.

125. As previously stated, the Tribunal was not disputing that these matters were discussed but was not satisfied that it was inappropriate due to the lack of context and a lack

of detail about these discussions. Overall, the Tribunal concluded that there was insufficient detail to support a link between those discussions and the requests to help out with extra shifts or additional unpaid work that would mean the behaviour was inappropriate.

126. The Tribunal determined that the GMC has not discharged the burden of proof as to this alleged conduct on the evidence before it. The Tribunal was of the view that there was no criticism of Ms A as such but there was a lack of specific detail in the evidence to support the contention from the GMC. Accordingly, the Tribunal found paragraphs 3(b)(i) to (iii) of the Allegation not proved.

Paragraph 3(c)

127. The Tribunal had regard to Ms A's initial account:

“He often spoke disparagingly about other trainees... to me and other junior doctors. Often he would boast about how he had affected other people's career progression if he had disliked or disagreed with them, and implied that he could do the same to me if I 'became a problem'.”

128. The Tribunal had regard to Ms A's statement to the Trust dated 12 September 2021:

“He would often talk about other trainees who hadn't stayed on his good side and he would imply how difficult he'd made their lives or how he could make a phone call and that would be the end of their career.”

129. In his witness statement Mr Gilbert denied that this took place as alleged. He stated that he did not tell Ms A that he had affected other people's career progression and did not imply that he could do the same to her. Mr Gilbert stated that he was in regular dialogue with fellow consultants in the department, seeking to support Ms A's training and academic commitments with the ultimate aim of her becoming a consultant colleague. He provided email exchanges he had with Ms A regarding her clinical and academic workload and changes required to the rota. Mr Gilbert also provided an email that he had received from a Consultant Nephrologist on 17 November 2020 raising issues regarding the behaviour of some juniors within the transplant team, including Ms A. Mr Gilbert stated that he had met with the juniors as a group to reinforce the team's expectations regarding behaviour and then met with people individually to encourage them to focus on working as a team. He

stated that he considered this to be a professional and appropriate way to handle concerns brought to his attention.

130. The Tribunal was satisfied that these matters were discussed but was not satisfied that it was inappropriate due to the lack of context and detail in which these discussions took place. It found the email correspondence that Mr Gilbert provided in respect of how he had dealt with a number of concerns was positive as opposed to inappropriate.

131. The Tribunal determined that the GMC has not discharged the burden of proof as to this alleged conduct on the evidence before it. The Tribunal did not view the finding made as being critical of Ms A's evidence but there was a lack of specific detail in the evidence provided to support the contention from the GMC. Accordingly, the Tribunal found this paragraph of the Allegation not proved.

Paragraph 3(d)(i) to (iv)

132. The Tribunal considered each part of this paragraph separately in its deliberations.

133. The Tribunal had regard to Ms A's initial account:

"He often spoke disparagingly about other trainees... to me and other junior doctors."

134. The Tribunal had regard to Ms A's statement to the Trust dated 12 September 2021:

"Mr Gilbert also made derogatory comments about one particular chap called Mr B. He wasn't a trainee but was there for research doing his PhD. Mr Gilbert was constantly derogatory about him, saying how he was a terrible surgeon, was just useless, and was never going to get anywhere... saying that he "had told [Prof Z] many times that he was a complete waste; he supports the clinical service which is a help, but ultimately he's never going to go anywhere"."

135. In his witness statement Mr Gilbert denied that this took place as alleged. He stated that Mr B was struggling with his research and was more clinically orientated. Mr Gilbert stated that Prof Z, Professor of Transplantation and Mr B's supervisor, had informed him that Mr B was unlikely to complete the research he had been undertaking. Mr Gilbert stated that they had found a way to incorporate Mr B into the clinical rota so that he could carry out full time clinical work. Mr Gilbert stated that Mr B excelled at this, and he supported him with

references for subsequent clinical jobs. He provided a letter that he received from Prof Z dated 1 April 2022, that set out his recollection of their conversations with Mr B.

136. Within the letter, Prof Z stated that Mr Gilbert’s recollection of their discussions about Mr B agreed with his. Prof Z stated that they had had many discussions about members of their junior staff team given their respective roles. Prof Z stated that he had been disappointed with Mr B on the academic front and that he had not registered for the higher degree that was a major objective at the time of appointment. Prof Z stated that he had no memory of Mr Gilbert making any derogatory comment about Mr B during their one-to-one conversations. He stated that he would have remembered if Mr Gilbert had made any such comment. He stated that he understood that Mr Gilbert did provide Mr B with support to obtain his next post and, indeed, he himself was never asked for any reference. Whilst noting that this letter was hearsay evidence, it had not been challenged by the GMC at the hearing as not being reflective of Mr Gilbert’s view of Mr B. The Tribunal noted that Ms A’s evidence lacked a more specific time frame and location. The letter from Prof Z casts doubt upon the reliability of Ms A’s recollection.

137. The Tribunal determined that the GMC has not discharged the burden of proof as to this alleged conduct on the evidence before it. The Tribunal concluded that there was insufficient evidence to demonstrate that Mr Gilbert had been derogatory towards Mr B. Accordingly, the Tribunal found paragraph 3(d)(i) to (iv) of the Allegation not proved.

Paragraph 4

138. The Tribunal found paragraph 3 of the Allegation not proved. Accordingly, the Tribunal found this paragraph of the Allegation not proved.

Paragraph 5

139. The Tribunal had regard to Ms A’s initial account:

“Just because she looks good in tight trousers, doesn’t mean she has any clinical judgement.”

140. The Tribunal had regard to Ms A’s statement to the Trust dated 12 September 2021:

“He also made derogatory comments about other members of staff. [About Ms C] he’d often make comments that “just because she looks good in tight clothes, it does mean she’s any good”.”

141. In his witness statement Mr Gilbert denied that this took place as alleged. He stated that he had not made this comment. Mr Gilbert reiterated his denial during his oral evidence.

142. In Ms A’s oral evidence, she stated that this event did not take place in 2009 to 2010 as originally set out in the Allegation but was much later on. This paragraph was amended under Rule 17(6) of the Rules. In Mr Gilbert’s original witness statement, he stated that he did not meet Ms C until 2020. Within her oral evidence, Ms A stated that this incident took place between April 2019 to October 2021. The Tribunal noted that it would have still been possible to make a finding in terms of the later period of this time frame.

143. The Tribunal noted that Ms A’s evidence varied as to the exact words used. It heard from Ms A that the purpose of the initial account was different to Ms A’s statement to the Trust. In terms of that first account, it was prepared with a view to trying to give it anonymously as she feared *“that he would know it was me”*. The Tribunal was unconvinced by the explanation provided by Ms A.

144. The Tribunal noted that the comments from Ms A lacked specific detail in that she said, *“he’d often make comments”* but there were no other examples detailed in Ms A’s statement, no locations provided, or any more detail given. It would have assisted the Tribunal if the GMC had provided more detailed evidence to assist it (if it had been able to do so) in reaching a conclusion.

145. The Tribunal determined that the GMC has not discharged the burden of proof as to this alleged conduct on the evidence before it. The lack of specific detail in the evidence did not support the contention from the GMC. Accordingly, the Tribunal found this paragraph of the Allegation not proved.

Paragraph 6

146. The Tribunal has found paragraph 5 of the Allegation not proved. Accordingly, the Tribunal found this paragraph of the Allegation not proved.

Paragraph 7

147. In his witness statement Mr Gilbert admitted that this had taken place save that he denied that he said, “no wonder they always get infections”. He accepted that he told stories of his experiences of living in Africa that included strategies for cleaning after going to the toilet, for example using a single piece of toilet paper or a particular leaf. Mr Gilbert stated that he would never have told this story to be derogatory to African patients. He stated that he was very sorry that in recounting these life experiences he had given the impression of being racist.

148. The Tribunal had regard to Ms A’s initial account:

“You know how Africans clean themselves once they’ve gone to the toilet, right? They just use their hands, no wonder they always get infections.”

149. The Tribunal had regard to Ms A’s statement to the Trust dated 12 September 2021:

“I think it was the winter of 2019, I was the ward Registrar and he was the ward Consultant and [Dr AA], a Senior Consultant, was the ward Nephrologist. There were a couple of patients on the ward who were of African descent and Asian descent, as often there are. I think this particular patient had come in with lots of infections. I don’t think I was privy to the previous conversation, but when we were walking out of the office, in front of doctors even more junior than me, he turned to [Dr AA] and said “you know how Africans will clean themselves once they’ve gone to the toilet? They just use their hands, no wonder they always get infections.””

150. The Tribunal concluded that Mr Gilbert’s explanation as to the context in which he said this did not stand up to scrutiny as the evidence referred to a particular context, namely infections, and that would cause Mr Gilbert to say what he admits saying “you know how Africans clean themselves once they’ve gone to the toilet? They just use their hands”. The words were said in the context of a ward round in the winter of 2019. The Tribunal could conceive of no other realistic basis for the words that Mr Gilbert admitted being said other than in relation to infections. The Tribunal noted that Ms A had provided a detailed account of the event including that she had not heard all of the conversation. The Tribunal took account in reaching its conclusion, the delay in the matter being reported and recounted by Ms A. Accordingly, the Tribunal found this paragraph of the Allegation proved.

Paragraph 8

151. The Tribunal had regard to Ms A's initial account:

"I know Africans, they're only interested in having a good time when the sun goes down."

152. The Tribunal had regard to Ms A's statement to the Trust dated 12 September 2021:

"...probably around January 2020... I said it was all on the rota and he said he could see who wasn't doing the locum shifts and it was Mr D (I think Mr D is of [XXX] origin). I just said that I thought he was working very hard and Mr Gilbert said "no, he's not, he's just not a team player". I replied that I didn't think that was fair, he just had a lot on and so he wasn't doing any shifts.

Mr Gilbert then said "no, no Ms A, I know people like him, I used to know Africans as well. I used to go to university with an African and he was a really nice guy, great to hang out with, we used to chat about sports all the time, but he was useless when it came to expecting him to actually do anything. He'd turn up hours late for lectures or not at all. We'd go out for dinner and he would turn up hours later. So I know these Africans, they're only interested in a good time, they only come out after the sun goes down." I've never heard anything like that in my life, it was just so horrific. I was very upset and I left the room. The following week I think I told [Mr W] about it and then I told Mr D about it."

153. In his witness statement Mr Gilbert denied that this took place as alleged. He stated that he did not say this in reference to Mr D. Mr Gilbert accepted that he had had conversations in the workplace about his experiences of living in Africa, including in relation to time keeping. He stated that he had connections with Africa since childhood, that his closest friend was from XXX, and that he had spent six months living in Africa with missionaries and local tribal communities when undertaking volunteer work in 1992, 1993 and 1998. Mr Gilbert stated that he believed he had shared stories of being in a part of Africa with his XXX best friend and going out in the early evening. Mr Gilbert said that his friend said he would be with them in 15 minutes but arrived some four hours later. Mr Gilbert stated that he never recounted these experiences to imply any laziness in people from Africa or Mr D, an individual who he had always valued.

154. The Tribunal noted that there was specific detail in Ms A's account, including that the context in which the comments were being made, namely about someone not doing their share on the locum shift rota. The comments were said to have been made in a short time frame around January 2020, and that Ms A had reported the comments to Mr W. The Tribunal considered that Ms A was specific about the circumstances, but Mr Gilbert does not address these specifics in his response.

155. The Tribunal note that Mr Gilbert has set out in his evidence that he has made a comment about his friend from XXX having poor time keeping. The Tribunal was of the view that there was an implied criticism in this comment and, ties in with the detailed recollection of what Ms A says that Mr Gilbert said about Mr D. The Tribunal considered that the comments alleged by Ms A were more likely than not to be a specific example of the type of comments that Mr Gilbert accepts he would make.

156. Having considered the evidence and the circumstances, including the delay in the matter being reported and recounted by Ms A, the Tribunal concluded that it was more likely than not that Mr Gilbert said to Ms A about a junior colleague, Mr D, *'I know people like him, I used to know Africans as well....so I know these Africans, they are only interested in a good time, they only come out after the sun goes down'*, or words to that effect. Accordingly, the Tribunal found this paragraph of the Allegation proved.

Paragraphs 9(b) and 9(c)(i) and (ii)

157. The Tribunal considered each part of this paragraph separately in its deliberations.

158. The Tribunal had regard to Ms A's statement to the Trust dated 12 September 2021:

"He would make really politically incorrect comments... He would often do that in the context of an Asian person "eating too many chapattis," or an African person "eating too much rice," or not getting so much activity because "Africans don't do anything unless they are really sporty"."

159. In his witness statement Mr Gilbert denied that this took place as alleged. He stated that, whilst he had general conversations about diet within different cultures, he denied that had said this in reference to a specific patient's weight.

160. The Tribunal noted the submission from Mr Sutton that these comments could have been a pooled recollection with Ms I. It has previously noted that Ms A said she spoke to friends including Ms E but there was no evidence before the Tribunal that Ms A had spoken to Ms I about this.

161. The Tribunal noted that Ms A, under cross-examination, reaffirmed that she had heard what she had recounted. She said that it was appropriate to talk about diet sometimes but the words used were not restricted to professional observations relating to diet. Ms A was clear that Mr Gilbert was being pejorative in the comments that were being made.

162. The Tribunal had regard to the specific wording of these paragraphs of the Allegation, including that they were made *“in reference to a patient of Asian origin’s weight”* and *“in reference to a person of African origin’s weight”*.

163. The Tribunal determined that it could make a common-sense inference about these comments in that they were about eating too much and inactivity, and were related to weight. The Tribunal noted that Mr Gilbert accepts that he would have had general comments and discussions about diet. The Tribunal found that there was a correlation with its findings in terms of these comments in respect paragraph 8 of the Allegation partly in the context of Mr Gilbert’s experiences of Africa. The Tribunal took account in reaching its conclusion, the delay in the matter being reported and recounted by Ms A.

164. Having considered the evidence and the circumstances, the Tribunal concluded that it was more likely than not that Mr Gilbert said to Ms A:

[9(b)] in reference to a patient of Asian origin’s weight, ‘eating too many chapattis’, or words to that effect;

[9(c)] in reference to a person of African origin’s weight:

[i] ‘eating too much rice’, or words to that effect;

[ii] ‘Africans don’t do anything unless they are really sporty’ or words to that effect.

165. Accordingly, the Tribunal found paragraphs 9(b) and 9(c)(i) and (ii) of the Allegation proved.

Paragraph 10(a) - Harassment related to race

166. In his witness statement Mr Gilbert stated that this was denied.

167. The Tribunal had regard to Ms A's comments in respect of paragraph 8 that "*I've never heard anything like that in my life, it was just so horrific. I was very upset and I left the room*". In Ms A's oral evidence regarding paragraph 8, she said that she was very upset by this comment.

168. The Tribunal noted that Ms A's evidence was that she was sufficiently offended by these comments such that she reported them to two colleagues. The Tribunal found this to be a course of conduct that created an offensive environment for Ms A to work in and which the Tribunal accepted had caused her distress as the result of pejorative comments being used.

169. Accordingly, the Tribunal found paragraph 10 of the Allegation proved in respect of paragraphs 7 to 9 (paragraphs 7, 8, 9(a), 9(b), and 9(c)(i) and (ii)).

Paragraph 10(b) - Racist

170. In his witness statement Mr Gilbert stated that this was denied.

171. The Tribunal had regard to the relevant legal principles, in that "*Racist comments*"- are comments perceived by the complainant or any other person to be motivated by hostility or prejudice based on a person's race or perceived race.

172. The Tribunal considered whether the actions of Mr Gilbert came within this definition as a matter of fact. The Tribunal took account of Ms A's views that she found the comments to be racist.

173. Having considered the evidence and the circumstances, the Tribunal concluded that the comments at paragraph 7 to 9 of the Allegation were motivated by prejudice based on a person's race or perceived race. It was clear that it was not motivated by hostility. The Tribunal considered the comments to be low-level racist comments in terms of seriousness without seeking to undermine that these were nonetheless racist comments. Accordingly, the Tribunal found this paragraph of the Allegation proved.

174. Throughout its deliberations concerning allegations made by Ms A the Tribunal considered why she did not raise her concerns earlier. Back in 2009 Ms A said that she knew what was likely to happen if she had, in that she would be considered a problem. Ms A told the Tribunal that she wanted to “*get on*” and did not feel safe to report. She also made the concession that a different matter of concern that had been raised to Mr Gilbert had been handled well. In 2019 Ms A stated that she did not escalate her concerns as she did not feel safe to mention it as she felt she would be punished and was in fear of the consequences if she mentioned anything. The Tribunal did not accept that Ms A’s recollection had been subject to imaginative reconstruction in the intervening years. The Tribunal accepted Ms A’s explanations as to the reason for the delay in reporting matters. Ms A had given detailed consistent evidence in the main and had been diligent in correcting timeframes when giving evidence before the Tribunal.

Paragraph 11(c)(i) to (iii)

175. The Tribunal had regard to Ms E’s statement to the Trust dated 9 August 2021:

“I noticed he was watching me whilst I was doing the ward round and then later that day. I was cornered in what was then the doctors’ office, which is a very small narrow rectangle room with a desk along one wall. There is hardly enough room for a person to sit in the chair and someone to walk behind them.

After the ward round, he came into the room while I was checking blood results on the computer. He sat in the chair next to me, trapping me against the window, the wall and him to my left. He sat so close that it made me feel very uncomfortable. He did not look at the computer but just looked at my face and my body.

He said “I’ve been watching you and you’re pretty perfect aren’t you?” - whilst looking at my breast area and my body. I was so shocked I didn’t say anything. I just sat there pretending he wasn’t there and continued to check blood results on the screen until he went away. I could not physically move away due to the logistics of the room and the position he had put himself in next to me, and I just did not know what to do. I was in shock so I can’t remember anything else that he said afterwards. I do remember his comment very very clearly, including the set up of the room at the time. That has stuck in my mind.

I realised when he left, I had been holding my breath as I was so emotionally uncomfortable. I have been trying to remember when it happened and I think it was between three to six months after [XXX] April 2011, so perhaps July or August. I think it was the summer because I can remember exactly what I was wearing at the time; [XXX].

This was the first event that erased all doubt in my mind that inappropriate comments or touching had been clumsy. I realised at that point everything was deliberate.”

176. The Tribunal took account of Ms E’s GMC witness statement dated 14 March 2023:

“I mention an incident involving Mr Gilbert that took place in the doctor’s office. I remember this incident clearly. It was a very narrow, long room, almost only the width of two doors. It was oblong shaped and much longer than it was wide. Along one wall there were desks and computers and three or four chairs. On the narrow side of the oblong was the door and the window was situated on the other opposite side to the door. There was a metre or less space between the desk and the wall, so you could barely get past an office chair.

I was sat at the computer at the very end of the room, which was furthest away from the door, next to the window. I was going through patient bloods at the time. It was probably mid-afternoon; anywhere between 14:00 and 16:00. I recall exactly what I was wearing at the time.

When I was sat in the doctor’s office, I was alone. Mr Gilbert came in and sat in the chair next to me which completely trapped me against the wall and window because of the narrowness of the room. He sat really close to me and it felt really uncomfortable. I was already uncomfortable from that moment. He just started staring at me in a really predatory way, very closely. It didn’t feel professional. He said to me words to the effect of “I’ve been watching you and you’re pretty perfect” whilst looking at my body and my breast area.

He stayed there like that for a really long time. I didn’t know what to say or do as I was at work and I didn’t expect it and was not prepared. I felt like a deer in headlights. I felt like I couldn’t move or breathe. I don’t think I said anything or moved at all. I just stayed there until he eventually went away. I then felt really shocked that it had happened. That was the moment that things really started so it is very memorable for

me. As a younger person back then I remember blaming myself and feeling like it must be my fault and wondering whether I needed to dress differently.”

177. In his witness statement Mr Gilbert stated that he admitted that he sat close to Ms E and complimented her on her work. He denied that he stared at Ms E’s body and breasts. Mr Gilbert stated that he had not intended for Ms E to feel trapped and was not intentionally staring at her. He provided the Tribunal with a photograph of the relevant doctor’s office and explained the layout, including a worktop with three to four chairs along one side of the room with a number of computers that the doctors would occupy when doing administrative jobs. Mr Gilbert stated that, due to the narrow layout of the room, you could only really get out if someone in a chair got up out of the chair and moved and so it was a claustrophobic space especially if nearest to the window.

178. Mr Gilbert explained that, as a duty Consultant, it was customary to sit down with the ward-based doctors daily to go through all the blood results and immunosuppression drug levels for each individual patient, which would have been handwritten onto an A3 sheet from a computer in the room. He stated that his memory of Ms E during her time in transplant was one of a very high calibre, organised trainee who always had everything written down neatly with her knowing every detail about each patient. Mr Gilbert stated that he did not deliberately sit in a way that trapped Ms E against the wall and window and was very sorry that this was her perception. He stated that he did not remember calling her “*perfect*” and that if he had said something along these lines, it would have been a reference to her running of the ward and her clinical work as these were always exemplary. This assessment would have also been reflected in his Educational Supervisor Report for Ms E at the end of her placement. Mr Gilbert stated that he had used words such as “*phenomenal*”, “*fantastic*”, “*perfect*” to men and women, in the workplace as a way of providing feedback. These comments have been about the work undertaken and not about an individual’s body or appearance.

179. The Tribunal noted Ms E’s oral evidence in which she said that she was sat in the chair at a computer closest to the window, and that Mr Gilbert wheeled his chair right up to her so that she had no space to move. The Tribunal had regard to the photograph of the room provided by Mr Gilbert. The Tribunal noted that Ms E described chairs on wheels but the ones in the photograph were not on wheels but appreciated that these may have changed in the intervening years.

180. The Tribunal noted that it was not inappropriate for Mr Gilbert to enter the room and to look at the computer screen for the clinical purpose of looking at these readings. It would be inappropriate if Mr Gilbert positioned himself in the manner alleged, stared at her and/or said the alleged comment about Ms E's body.

181. The Tribunal noted that Ms E said that Mr Gilbert was not looking at the computer screen so that he was not face on to the desk. She also said that the way that Mr Gilbert had placed his chair was such that it was physically difficult, if not impossible, for her to be able to move away. The Tribunal noted Mr Gilbert's account, but preferred the account of Ms E given her detailed account of how the set of circumstances came to arise and her description as to what had actually occurred. The Tribunal determined that, as a result of Mr Gilbert's movement towards Ms E whilst she was working on a computer closest to the window, she was trapped in that there was no space to move.

182. Having considered the evidence and the circumstances, the Tribunal concluded that it was more likely than not that Mr Gilbert sat close to Ms E on one occasion in an office, in that Ms E was trapped against the wall and window and was unable to move away. Accordingly, the Tribunal found paragraph 11(c)(i) of the Allegation proved.

183. In terms of paragraph 11(c)(ii) of the Allegation, the Tribunal accepted Ms E's evidence that she was stared at without any proper justification. The Tribunal noted that this incident had then made her question all of her previous interactions with Mr Gilbert and had a profound effect on her. The Tribunal did not consider that this would have had that effect upon Ms E in the routine circumstances set out by Mr Gilbert.

184. Having considered the evidence and the circumstances, the Tribunal concluded that it was more likely than not that Mr Gilbert stared at Ms E on one occasion in an office. Accordingly, the Tribunal found paragraph 11(c)(ii) of the Allegation proved.

185. Although not specifically cross-examined in relation to paragraph 11(c)(iii), the Tribunal noted the detailed account that Mr Gilbert had provided. The Tribunal concluded that it was not unfair to assess this paragraph on what both witnesses had said. The Tribunal accepted Ms E's evidence in this respect too. Having considered the evidence and the circumstances, the Tribunal concluded that it was more likely than not that Mr Gilbert said, '*I have been watching you and you're pretty perfect*', or words to that effect, whilst staring at Ms E's body and breasts, on one occasion in an office. Accordingly, the Tribunal found paragraph 11(c)(iii) of the Allegation proved.

186. The Tribunal considered but rejected the notion that Ms E had honestly embellished her recollection of the circumstances she had described by, for instance, actively imagining this incident. She had given a detailed and measured account of the circumstances, including a description as to how she had felt and what she had thought at the time.

Paragraph 11(e)

187. The Tribunal had regard to Ms E's statement to the Trust dated 9 August 2021:

“He would be repeatedly touching my knees with his knees under the fistula operating table. The fistula table is small, only about a foot wide, and it is covered by a drape like a massive tablecloth to keep it sterile. When doing the procedure, I would sit opposite the Consultant, and our legs would be hidden beneath the drape. I was initially never sure if the contact with James Gilbert’s knee was deliberate. I first thought it was an accident or he just did not realise he was doing it.”

188. In his witness statement Mr Gilbert stated that he admitted that this may well have occurred inadvertently but denied that this constituted acting inappropriately towards Ms E. Mr Gilbert stated that, during vascular access operative procedures, there was a high probability that knees would touch underneath the operating arm board. The vascular access procedures required a surgeon and an assistant to sit opposite each other across a narrow arm board that was positioned to the side of an operating table. He provided several re-enactment images to the Tribunal. Mr Gilbert stated that the patient would be lying on a table with their arm out on the board and the procedure being undertaken was usually at the wrist or elbow area of the patient. Mr Gilbert stated that it was almost impossible not to touch the knees or legs of the person opposite and he recognised that this has happened on a several occasions with a wide range of people over the years of undertaking these procedures. Mr Gilbert stated that he was very sorry if Ms E, or any other colleagues who have had their knees knocked by him during surgeries, had felt that this was deliberate or sexually motivated. He stated that this had never been the case.

189. The Tribunal noted that Mr Gilbert admitted that this may well have occurred inadvertently but denied any inappropriate behaviour. The Tribunal had heard evidence from a number of witnesses, being surgeons or theatre staff, that this was an occupational hazard and that the knocking of the knees would occur when the surgeon and assistant were working either side of the arm board. It took place in the context of theatre and Mr Gilbert

needing to concentrate on the procedure and the inadvertent touching could have been misinterpreted by Ms E.

190. Given the evidence provided, the Tribunal was unable to find that the GMC had discharged the burden of proof as to the inappropriate nature of the touching on the evidence before it. Accordingly, the Tribunal found this paragraph of the Allegation not proved.

Paragraph 11(f)

191. The Tribunal had regard to Ms E's statement to the Trust dated 9 August 2021, of which the first part is quoted above regarding paragraph 11(e) of the Allegation, it continued:

"... But he then became increasingly brazen and my thigh was squeezed very deliberately between his thighs, so it was absolutely clear that he knew exactly what he was doing, especially when you consider the sexual comments he often made in theatre.

I did not want to say anything or show I was concerned, because I wanted to stay on his good side and because I also had the patient to consider. I could not show that I was being distracted and I was instead concentrating fully on the operation. It was more likely to happen when I was operating and James Gilbert was watching, because he then would have time to do it rather than when he was focusing on doing the operation himself. So it was potentially affecting my performance as I was operating on a patient, which is another issue."

192. The Tribunal took account of Ms E's GMC witness statement dated 14 March 2023:

"I describe an incident where Mr Gilbert touched my knees with his knees under the fistula operating table and deliberately squeezed my thigh between his thighs. We were operating on a patient's arm at the time. We were sat opposite each other either side of the operating table and the patient's arm was between us on the table. One person sits at the crook of the patient's armpit looking towards the head and the other person sits looking down towards patient's feet so you can operate on the arm sitting in the middle.

At first, I didn't know whether it was deliberate when he touched my knees with his knees, but it happened many times. It was a constant occurrence. I would say it happened 70-80% of the time. It was probably less frequent at the beginning. At times I was not sure whether he was doing it on purpose or not, but he got bolder as the year went on. He would make a joke and then clap your knee between his thighs. I would have to turn 90 degrees to avoid being touched, so my shoulders were not facing where I was trying to operate. This put me in a suboptimal position to operate or assist. This would be quite uncomfortable/painful. I have short legs so when he did this he would have been anywhere between a third to half way up my leg, above my knee.

It is also important to note that the table was draped with a sterile drape so nobody could see underneath the table. This meant that nobody could see what he was doing to you. You could have the scrub nurse sat right next to you and she wouldn't have a clue."

193. In his witness statement Mr Gilbert denied that this took place as alleged. He stated that he would not have deliberately squeezed Ms E's thigh between his thighs and did not recall this having happened inadvertently.

194. The Tribunal determined that it was physically possible that Mr Gilbert could have squeezed Ms E's thigh, given the close proximity on the arm table. It also concluded that it was possible that no one else would have seen it taking place given the evidence it has heard about the layout of, and the location of various people in, the theatre. The Tribunal preferred the evidence of Ms E because she had provided a consistent and detailed account of what she had experienced which described the actions of Mr Gilbert. On that basis, the Tribunal concluded that this was not a mere inadvertent or accidental touching but a deliberate act by Mr Gilbert which was inappropriate in the circumstances.

195. The Tribunal considered but rejected the notion that Ms E's recollection had honestly embellished the circumstances she had described by, for instance, actively imagining this incident.

196. Having considered the evidence and the circumstances, the Tribunal concluded that it was more likely than not that Mr Gilbert behaved inappropriately whilst at work towards his junior colleague Ms E in that he squeezed her thigh between his thighs under the operating table. Accordingly, the Tribunal found this paragraph of the Allegation proved.

Paragraph 11(g)

197. The Tribunal had regard to Ms E's initial account:

"There were sexual references during operations eg. whenever he wanted you to use the heparinised saline flush to flush the fistula lumen, he would ask "Oh, I didn't know you're a spurter?" whilst looking at you and essentially referring to female ejaculation and implying he had just made you orgasm... He would frequently joke "Oh I'm being inappropriate again aren't I?""

198. The Tribunal had regard to Ms E's statement to the Trust dated 9 August 2021:

"There were sexual references during operations eg whenever he wanted you to use heparinised saline flush to flush the fistula lumen, he would ask "Oh, I didn't know you're a spurter?" whilst looking at you and essentially referring to female ejaculation to imply that he had just made you orgasm. I didn't know what it meant to start with and had to look it up and then realised what he meant, which was disturbing. There are specific stages in the operation and you have to use a blood thinning saline solution to avoid blood clotting. Very often it would squirt everywhere."

199. In his witness statement Mr Gilbert denied that this took place as alleged. He stated that he recalled that he had said on occasion "oh a squirter", knowing that this word had another meaning, and that people may find this comment funny. Mr Gilbert stated that, when doing a vascular access operation, blood and fluid can squirt out of vessels and syringes at various stages. He stated that he recognised that he had, on the odd occasion, used some innuendo within the workplace and within an operative setting. Mr Gilbert said he only became aware of the term following him watching a TV programme in 2015. Mr Gilbert stated that he had never, however, personalised any innuendo to any individual and would never do so. He stated that the theatre scrub nurse for the vascular access operations would sit right next to either the surgeon or the assistant and so was very much involved with all conversations that are taking place and would hear all that is being said. He referred to the re-enactment photographs of the surgery set up for vascular access procedures.

200. The Tribunal took into account that other theatre staff did not overhear words such as this but that it was feasible that something could be said in a low voice that would not be overheard. The Tribunal noted that Mr Gilbert accepted that he would have used words of

this nature but painted them as some form of ill-judged innuendo which were not personalised. The Tribunal did not accept that this was the case. It appreciated the effect that the words had on Ms E upon having looked up what the word “*spurter*” meant and her concern that it was directed to her. The Tribunal accepted the evidence of Ms E that it was a comment made personally to her during the course of a surgical procedure.

201. The reaction of Ms E in looking up the words used indicate to the Tribunal that it was a personalised question relating to a sexual innuendo addressed to Ms E. Having considered the evidence and the circumstances, the Tribunal concluded that it was more likely than not that Mr Gilbert behaved inappropriately whilst at work towards his junior colleague Ms E in that he said during operations when asking her to use the heparinised saline flush, ‘*Oh I didn’t know you’re a spurter?*’, or words to that effect. Accordingly, the Tribunal found this paragraph of the Allegation proved.

202. The Tribunal considered but rejected the notion that Ms E’s recollection had honestly embellished the circumstances she had described by, for instance, actively imagining this incident.

Paragraph 11(h)

203. The Tribunal had regard to Ms E’s initial account:

“On one occasion I decided to raise that his inappropriateness may be detrimental to his career in an attempt to address his behaviour in a non-confrontational manner. His reply was that he was only ever inappropriate with those he knew it would be fine with and that he was a good judge of character.”

204. The Tribunal had regard to Ms E’s statement to the Trust dated 9 August 2021, which reiterated the wording in her initial account.

205. In his witness statement Mr Gilbert stated that he admitted that a conversation took place with Ms E where she said something along the lines of that he could judge who he could have a laugh with. He stated that he did not mean that he would be inappropriate with people to try and make them feel uncomfortable. He stated that he meant that he knew there were some people he felt he could be more relaxed with to ease the intensity of the role that he was working in and the long working hours.

206. The Tribunal accepted the detailed account given by Ms E as to how she contemplated approaching a conversation with Mr Gilbert (her senior) about this inappropriate behaviour and that her recollection of that was retained by her as an accurate account and recall of his response.

207. The Tribunal had regard to the relevant legal principles, including the definition of acting “*inappropriately*”.

208. The Tribunal accepted what Ms E says but was not satisfied to the requisite standard that the conversation itself by Mr Gilbert constituted inappropriate behaviour. Therefore, the Tribunal determined that the GMC has not discharged the burden of proof in this respect on the evidence before it. Accordingly, the Tribunal found this paragraph of the Allegation not proved.

Paragraph 11(i)

209. Ms E explained in her statement to the Trust that, XXX she had suffered XXX and then, six months later, developed XXX. Ms E said that the majority of diagnostic possibilities did not carry a good prognosis and that it was highly likely that she would progress to XXX. She stated that she still had one or two projects that she needed to finish with Mr Gilbert. She felt she needed to call him to let him know the gravity of her ill health and that she would not be able to complete the projects for the foreseeable future. Ms E stated:

“I explained my health issues and he would have known how serious it was. When I said that I may need [XXX], his response was one that I will never forget. He said: “Well, when you need [XXX], I would love to do a high thigh [XXX] for you”. He was saying it purely for the sexual meaning. He couldn’t even claim there was any appropriate medical meaning to it because a [XXX] would be carried out on [XXX] first before having to move to the thigh. I don’t recall saying anything in particular in response other than trying to get off the phone quickly and politely.”

210. In his witness statement Mr Gilbert denied that this took place as alleged. He stated that he did not recall all of the details of this conversation, but he did remember Ms E telling him during a telephone conversation that she was experiencing XXX. Mr Gilbert stated that he recalled that, in an attempt to provide some light heartedness and to cheer her up with humour, he offered to XXX should she ever need XXX. Mr Gilbert stated that he would never have suggested that it should be a high thigh XXX as, not only would that be inappropriate

and insensitive, but he had also never XXX nor does that terminology exist in XXX. He stated that he is very particular about medical language and would not have used such an odd term. Mr Gilbert stated that, on the very rare occasion that he has had to XXX in a patient's leg, he had XXX and had done so in the mid-thigh adductor region. He stated that, in 11 years, he had done around 400 XXX procedures and only seven had been mid-thigh XXX. Mr Gilbert also stated that he had never regarded the process of XXX as being at all sexual.

211. The Tribunal had regard to Ms E's oral evidence, in which it was put to Ms E that she had a high level of sensitivity at that time. Ms E disputed this and said that it had become more serious to her as time has progressed.

212. The Tribunal accepted the evidence of Ms E. Ms E said that she would never forget what Mr Gilbert had said to her due to the particular circumstances in which this conversation took place and her health concerns. The Tribunal noted Ms E's evidence that the way it was said was *"purely for the sexual meaning"*.

213. The Tribunal noted that, on previous occasions, Ms E had been reluctant to attribute comments or behaviours, such as the squeezing of her thigh, as having a sexual connotation whereas in this instance she indicated that she was clear that the words used were *"purely for the sexual meaning"*. Her evidence was measured, it was in a specific context and showed her gradually changing view as to the nature of the comments being made by Mr Gilbert.

214. The Tribunal considered the mention of *"thigh"* in terms of a XXX by Mr Gilbert and a discussion of the technicalities. Both witnesses, accepted in one way or another, that it would be rare to carry out XXX around the thigh region.

215. The Tribunal noted Mr Gilbert's response that it was in an attempt to be light heartedness and to cheer her up with humour. Mr Gilbert said in cross-examination that he had remembered Ms E's comments about her health and that he had offered to do XXX *"out of care"*. The Tribunal determined that Mr Gilbert's evidence was inconsistent as to why he would mention XXX in the conversation, that is *"out of care"* on the one hand or *"light-heartedness to cheer her up"* on the other. The Tribunal further noted that, if XXX was for *"care"* purposes, then Mr Gilbert would surely have referred to XXX given the rarity of an intervention in the thigh or leg.

216. The Tribunal did not accept that this conversation amounted to a purely clinical conversation as it accepted what Ms E said. The Tribunal considered that the location of XXX

and the way he said it, as described by Ms E, was such that the language used was clearly innuendo of a sexual nature.

217. Having considered the evidence and the circumstances, the Tribunal concluded that it was more likely than not that Mr Gilbert behaved inappropriately whilst at work towards his junior colleague Ms E in that he said, after being told that Ms E may require XXX, ‘*Well, when you need [XXX], I would love to do a high thigh [XXX] for you*’, or words to that effect. Accordingly, the Tribunal found this paragraph of the Allegation proved.

218. The Tribunal considered but rejected the notion that Ms E’s recollection had honestly embellished the circumstances she had described by, for instance, actively imagining this incident.

Paragraph 11(k) and (l)(i) to (iv)

219. The Tribunal considered each part of these sub-paragraphs separately in its deliberations.

220. The Tribunal had regard to Ms E’s statement to the Trust dated 9 August 2021, in which she stated:

“I had witnessed his dismissive manner toward other trainees and he would deliberately vocalise derogatory assessments of other trainees. It is difficult to remember specific words from so many years ago, but I do recall his criticisms of two trainees in particular, saying they were lazy or were not team players.

I felt that to survive, I needed to keep on his good side by tolerating all behaviour and interacting as if it were normal in order to not be labelled as a trainee who was “not worth supporting” or “no good”. These were common descriptors he used for other trainees.”

221. In his witness statement Mr Gilbert denied that this took place as alleged. He stated that he had always had an approach of trying to support all trainees equally and fairly. He stated that he had had to consider a trainee’s personal circumstances and may well have tailored support and a training experience for particular trainees where he felt that was appropriate. For example, Ms E refers to a specific trainee and states that he made derogatory comments to suggest that this trainee was less important than Ms E. Mr Gilbert

stated that he had no memory of such a conversation but did remember that Ms E had had a very difficult time personally. Mr Gilbert stated that, as a clinical and educational supervisor, he was very mindful of Ms E's wellbeing and arranged for the relevant trainee to cover more of the workload at that time. This did not mean that other trainees were less valuable but rather that, at that specific point in time, the needs of Ms E were more of a priority given that none of the other trainees had been through the experience that she had. Mr Gilbert stated that, at the end of their placement, Ms E and the relevant trainee presented him with a "thank you" card and a Starbucks Coffee mug that he used daily at the Trust up until his suspension.

222. The Tribunal was of the view that there was a lack of specific detail as to who the trainees were, when it was said, and whether there was anyone else present. It noted that the reference in Ms E's statement was contained in two paragraphs, much of the original content having been redacted.

223. In respect of paragraphs 11(1)(iii) and (iv) of the Allegation, the Tribunal concluded that it was unclear from Ms E's evidence whether the terms "not worth supporting" or "no good" were words, or words to the effect, that had actually been uttered by Mr Gilbert as opposed to Ms E's own interpretation of what was actually said.

224. The Tribunal determined that the GMC has not discharged the burden of proof as to this alleged conduct on the evidence before it. The Tribunal was of the view that there was no criticism of Ms E's evidence as such but there was a lack of specific detail in the evidence to support the contention from the GMC. Accordingly, the Tribunal found paragraphs 11(k) and (l)(i) to (iv) of the Allegation not proved.

Paragraph 12(a) - Sexually Motivated

225. The Tribunal had regard to the specific parts of paragraph 11(a) to (i) of the Allegation that it has found proved, namely paragraphs 11(a), (b), (c)(i) to (iii), (d), (f), (g) and (i).

226. The Tribunal now had to consider whether Mr Gilbert's actions were sexually motivated, in that the conduct was done either in pursuit of sexual gratification or in pursuit of a future sexual relationship. The Tribunal considered each part of this paragraph separately in its deliberations.

227. In his witness statement Mr Gilbert denied that his actions were sexually motivated. He accepted that some of his actions were inappropriate and that he had reflected on how he previously interacted with colleagues.

228. The Tribunal had regard to the relevant legal principles in terms of the definition of sexual motivation, including the cases of *Basson* and *Arunkalaivanan* as referred above.

229. The Tribunal was clear that it must not to equate inappropriate conduct with sexually motivated conduct and should consider whether there could be any other explanation for inappropriate conduct. It was unable to find any other explanation for Mr Gilbert's actions other than for his sexual gratification, as opposed to any ill-advised attempt at humour, given the nature of the facts found proved. The Tribunal concluded that Mr Gilbert's actions were sexually motivated. Accordingly, the Tribunal found paragraph 12(a) of the Allegation proved in respect of paragraphs 11(a), (b), (c)(i) to (iii), (d), (f), (g) and (i).

Paragraph 12(b) - Sexual Harassment

230. The Tribunal had regard to the specific parts of paragraph 11(a) to (i) of the Allegation that it has found proved, namely paragraphs 11(a), (b), (c)(i) to (iii), (d), (f), (g) and (i).

231. The Tribunal now had to consider whether Mr Gilbert's actions in this respect constituted sexual harassment.

232. In his witness statement Mr Gilbert denied that his actions constituted sexual harassment. He accepted that some of his actions were inappropriate and that he had reflected on how he previously interacted with colleagues.

233. The Tribunal had regard to the relevant legal principles in terms of the definition of sexual harassment, which involves a course of conduct which amounts to harassment of another and which he knows or ought to have known amounts to harassment. Harassing a person includes alarming the person or causing the person distress. It noted that Section 26(2) of the Equality Act 2010 provides that a person (A) harasses another (B) if A engages in unwanted conduct of a sexual nature and the conduct has the purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

234. The Tribunal had regard to Ms E's evidence of the impact on her of Mr Gilbert's behaviour, including:

"I spent some time torturing myself as to whether I had somehow "led him on"."

...

"If I saw him coming I would move into another room to get away from him."

...

"I felt like a deer in headlights. I felt like I couldn't move or breathe. I don't think I said anything or moved at all. I just stayed there until he eventually went away. I then felt really shocked that it had happened."

235. The Tribunal considered the definition of sexual harassment and concluded, on the facts found proved, that Mr Gilbert's actions constituted sexual harassment as his course of conduct, on more than one occasion, created an intimidating, hostile, degrading, humiliating or offensive environment for Ms E. Accordingly, the Tribunal found paragraph 12(b) of the Allegation proved in respect of paragraphs 11(a), (b), (c)(i) to (iii), (d), (f), (g) and (i).

Paragraph 12(c) - Abuse of more senior position

236. The Tribunal had regard to the specific parts of paragraph 11(a) to (i) of the Allegation that it has found proved, namely paragraphs 11(a), (b), (c)(i) to (iii), (d), (f), (g) and (i).

237. The Tribunal now had to consider whether Mr Gilbert's actions in this respect were an abuse of his more senior position.

238. In his witness statement Mr Gilbert denied that his actions were an abuse of his more senior position. He accepted that some of his actions were inappropriate and that he had reflected on how he previously interacted with colleagues.

239. The Tribunal had regard to the relevant legal principles in terms of the definition of abuse of a more senior position, which means using the position of consultant surgeon in an improper manner towards another whose position is less senior.

240. The Tribunal concluded that the behaviours complained of were carried out by Mr Gilbert in his capacity as a Consultant Surgeon and addressed to Ms E in her more junior Registrar role. They were improper and therefore inappropriate. The Tribunal found that in respect of each of these instances the facts constituted behaving in an improper manner

towards Ms E. Accordingly, the Tribunal found paragraph 12(c) of the Allegation proved in respect of paragraphs 11(a), (b), (c)(i) to (iii), (d), (f), (g) and (i).

Paragraph 13 - Intimidation

241. The Tribunal had regard to the specific parts of paragraph 11(j) to (l) of the Allegation that it has found proved, namely paragraph 11(j) only.

242. In his witness statement Mr Gilbert stated that this was denied.

243. The Tribunal had regard to the relevant legal principles in terms of the definition of “intimidation”.

244. The Tribunal considered whether Mr Gilbert’s actions, in calling Ms E outside of work when he had no reason to, were intimidating. It had regard to Ms E’s initial account in which she said out that the calls were sporadic at first but then increased in frequency. She said that she ended up answering his calls as she felt she needed to or would be blacklisted if she ignored the call. Ms E said *“I felt that I had to remain polite, laugh at his jokes etc. I had to do what I needed in order to survive in the department”*. The Tribunal appreciated that this situation was not ideal but concluded that it did not amount to intimidation. The Tribunal noted that Ms E had set out that the conversations were often *“just general chit chat”*. The Tribunal was unable to find, on the evidence before it, that it was more likely than not that Mr Gilbert’s actions were intimidating. Accordingly, the Tribunal found this paragraph of the Allegation not proved.

Paragraph 15(a) - Harassment related to race

245. The Tribunal did not find any relevant evidence to this paragraph of the Allegation within Mr F’s statement to the Trust dated 13 August 2021 or his supplementary statement dated 11 January 2022, save for the comment in the first statement that: *“[Mr Gilbert] has been a very good colleague and we had fun together”*.

246. The Tribunal had regard to Mr F’s undated GMC witness statement:

“It is not easy to recall this memory specifically, but I do remember that he would try to imitate accents etc. When this happened, I used to feel awkward.”

247. In his witness statement Mr Gilbert denied that his conduct constituted harassment related to race. He stated that he had always shared a humorous two-way working relationship with Mr F, and he got just as much teasing from Mr F as he did from Mr Gilbert. This included some teasing from Mr F that Mr Gilbert needed to bulk up and work out as well as two-way conversations in a range of accents or voices such as imitating the Budweiser adverts and saying, “*what’s up?*”. Mr Gilbert stated that Mr F had been to his home and spent time with his family, and he had been to Mr F’s home too. Mr Gilbert provided the Tribunal with photographs of a skiing holiday that he went on with several colleagues in March 2019, including Ms H and Mr F. Mr Gilbert stated that he had kept in touch with Mr F for a short while after Mr F moved XXX and that Mr F had encouraged him to consider moving there to work. In terms of paragraph 14(b) of the Allegation, which was admitted, Mr Gilbert stated that he could not remember asking Mr F ‘*oh when are you leaving the country now*’ but accepted that he teased Mr F about Brexit and the English test for UK citizenship that Mr F was completing. Mr Gilbert stated that he was very sorry if any of the things he said caused hurt and offence to Mr F; it was never his intention.

248. The Tribunal also had regard to Mr Gilbert’s response in his witness statement regarding paragraph 14(a) of the Allegation, which he admitted. Mr Gilbert admitted that he had imitated an Indian accent whilst at work. He stated that he had also imitated other accents such as Australian or regional accents from within the UK. Mr Gilbert stated that he did not do this with the intention of offending anyone. He said that he would often joke together with Mr F and with Mr W. Mr Gilbert stated that he was mortified that his actions had caused offence and had reflected upon his past behaviour.

249. The Tribunal found Mr F’s oral evidence in cross-examination to be informative. Mr F told the Tribunal that the comments were comic, foolish and banter. He said that they never mimicked anyone to be derogatory or racist and the comments were intended to be humorous and not racially pejorative. Mr F made it clear that he did not take offence from the comments by Mr Gilbert.

250. The Tribunal had regard to the relevant legal principles in terms of the definition of harassment, which involves a course of conduct which amounts to harassment of another and which he knows or ought to have known amounts to harassment. Harassing a person includes alarming the person or causing the person distress. It noted that Section 26(1) of the Equality Act 2010 provides that a person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic (in this instance race), and the conduct

has the purpose or effect of violating B’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

251. The Tribunal considered the definition of harassment and concluded, on the facts found proved, that Mr Gilbert’s actions did not constitute harassment. The comments were not offensive to Mr F, he would say similar comments to Mr Gilbert and Mr W that were “*comic and foolish*”. The Tribunal concluded that there was no harassment caused to Mr F as his dignity was not violated and it did not create an intimidating, hostile, degrading, humiliating or offensive environment for him. Accordingly, the Tribunal found this paragraph of the Allegation not proved.

Paragraph 15(b) - Racist

252. The Tribunal had regard to Mr F’s written and oral evidence, as set out in respect of paragraph 15(a) above.

253. In his witness statement Mr Gilbert denied that his conduct was racist. He stated that he accepted that, on reflection, he should not have imitated an Indian accent or made jokes about Brexit. Mr Gilbert stated that he never intended to be offensive or insulting and he denied that his conduct was racist.

254. The Tribunal determined that there was no evidence that the comments made were perceived by Mr F (or the other person present) to be motivated by hostility or prejudice based on a person's race or perceived race. Accordingly, the Tribunal found this paragraph of the Allegation not proved.

Paragraph 16(a)(i)

255. The Tribunal had regard to Ms G’s statement initial statement to the Trust dated 7 July 2014:

“On Thursday 3rd April I was in theatre with Mr James Gilbert, as verified by theatre records. I was assisting him in a Left Upper Arm PTFE graft operation (patient [X] 9.10am to 11.43am). This was the first operation on the list. I was seated at the patient’s head and Mr Gilbert was the other side of the fistula table. Theatre staff were present in the room as well as the anaesthetist. The patient was having a general anaesthetic. The operation had started. At the first use of the diathermy, Mr Gilbert

was feeling for the foot pedal with his feet. He started pressing his right foot on my right foot, saying out loud “Is that your foot or the pedal? Is that your foot or the pedal?” He then moved his foot up my right leg and along the lower inner part of my right thigh and repeated “Is that your foot or the pedal.” I replied “my foot”. I knew immediately that this was inappropriate behaviour. I was simply too shocked to react and didn’t feel empowered to speak up at that time.”

256. The Tribunal took account of Ms G’s GMC witness statement dated 22 November 2022:

“I describe an incident whereby on 3 April 2014 Mr Gilbert pressed his foot on my foot whilst we were in theatre. It was the first case of the day and the patient was lying face up on the table with their left arm out. I was seated at the patient’s head end and both me and Mr Gilbert were seated either side of the patient, almost like a dining table except the table was very narrow. We were in close proximity to each other.

I was meant to assist whilst Mr Gilbert took the lead. There was a pedal that was sitting underneath the table. The surgeon would press on the pedal at the same time as using a handheld device called a diathermy. Mr Gilbert was doing this. He put his foot on my right foot. He kept saying “is that the pedal or your foot?”, I answered ‘it was my foot’. He then slid his foot up the inside of my leg in between my legs, and it came to rest on the stool in between my thighs. I would say it was placed at the lower inner part of my right thigh, around mid-thigh level.

I felt that this was completely inappropriate, and I was completely shocked by it. It was his theatre/domain and I was the new person. I just completely didn’t expect it and I felt frozen and in a vulnerable position. It was my first day in a new job and I just wanted it to go well. I didn’t say a word and just made it through the operation.”

257. In his witness statement Mr Gilbert denied that this took place as alleged. He stated that he had no recollection of this happening on this specific occasion, but it was possible that he inadvertently touched Ms G’s foot with his foot underneath the operating table during a vascular access procedure. It was denied that this constituted behaving inappropriately towards Ms G. Mr Gilbert referred to the limited space under the arm board during vascular access procedures and that it was common to accidentally touch the other person’s foot or knee. He stated that he would not have done this intentionally. Mr Gilbert stated he also would never have done this in the way that Ms G stated. Ms G says that this

occurred during the first procedure of the day on 3 April 2014, during a left upper arm graft procedure. He provided the theatre list for 3 April 2014 which confirmed that the first patient had a left upper arm graft PTFE. Mr Gilbert also provided an operation note and care note for the first patient which sets out that monopolar diathermy was used. He stated that Ms G said that he said “*is this your foot or the pedal?*” but there would have been no foot pedal present as the foot pedal is only used for bipolar diathermy.

258. Within Ms G’s oral evidence under cross-examination, she said that she was absolutely clear that a pedal was present on the floor even if it was not needed. She then said that she suspected that there was no pedal. Ms G told the Tribunal that other people were present, but she could not be sure if other people saw what happened as it was under the table.

259. The Tribunal had regard to the theatre list for the day, in which the first procedure for the day was “*Left Upper Arm PTFE*” and, within the operation records, there was a circle around “*Yes*” for Diathermy - Monopolar. The site was “*RIGHT THIGH*”. The documentary evidence shows that the pedal was not in use in the operation. The Tribunal has heard from Ms L, that if the pedal was not in use, then it would have been wrapped around the back of the diathermy machine.

260. The Tribunal also took account of the evidence of Mrs P, who was asked by the Trust’s Case Investigator to provide a clinical opinion regarding allegations that had been made about Mr Gilbert’s conduct as part of the Trust disciplinary investigation. She attended the re-enactment of an allegation at Churchill Hospital on 15 November 2021, of which a recording was not retained by the Trust, and then asked to comment on the further re-enactment undertaken by Mr Gilbert’s representatives at Churchill Hospital on 24 April 2024. Within Mrs P’s ‘*Clinical Advisor’s Response*’ dated 25 November 2021, she was asked to consider the movement of the legs under the operating table/arm board set up. She stated that it would seem to be unlikely that it would happen without theatre staff being aware that there was something untoward going on. She suggested that it would seem more plausible and possible that the described ‘foot’ may have been Mr Gilbert’s knee. Mrs P also stated that she agreed with Mr Gilbert that the documents showed that the monopolar approach was used in this operation rather than the bipolar approach, and that there was no evidence that a foot pedal was used or required in that case.

261. The Tribunal had regard to two videos provided by Mr Gilbert’s legal representatives, in which he (1) explained vascular access procedures and (2) demonstrated moving his foot in

the manner alleged. A number of photographs were also provided including of the arm board attached to the main operating table, a foot pedal and the diathermy instrument operated by the foot pedal, a handheld diathermy instrument and of the view under the arm board.

262. Ms G was asked by the GMC to look at these two videos and provide her comments. These are included in her supplemental statement dated 12 July 2024. Within that statement, Ms G reiterated that Mr Gilbert was using a diathermy pedal and that, when moving his foot, Mr Gilbert only raised his foot by extending his leg at the knee upwards until his leg was almost straight. She stated that they were at slight diagonals to each other, and that Mr Gilbert's right foot was touching the inside of her right leg in between her things.

263. The Tribunal noted that Mr Gilbert admitted that it was possible that he inadvertently touched Ms G's foot with his foot underneath the operating table during a vascular access procedure but denied any inappropriate behaviour. The Tribunal has heard evidence from a number of witnesses that this was an occupational hazard and that the knocking of the knees or touching of feet would occur when the surgeon and assistant were working either side of the arm board.

264. Looking at the matter in the round, the Tribunal was unable to find that the GMC had discharged the burden of proof as to the inappropriate nature of the touching on the evidence before it. Accordingly, the Tribunal found this paragraph of the Allegation not proved.

Paragraph 16(a)(ii)

265. The Tribunal had regard to the various associated evidence and documentation, as set out in respect of paragraph 16(a)(i) above.

266. In his witness statement Mr Gilbert denied that this took place as alleged. He stated that he would not do such a thing and it would be physically very difficult to do this. Mr Gilbert stated that he was 6 ft 1 inches tall and that he would have to move his entire body backwards, including the stool, to slide his foot up the inside leg of the person assisting him. He stated that this movement away from the operating table would be very noticeable to the other people who would be sitting in close proximity, such as the scrub nurse and circulating practitioner. Mr Gilbert stated that it would also be very difficult to do whilst concentrating on carrying out a procedure on a small area of a patient's arm, whilst wearing his surgical

loupes. He referred to the re-enactment video in terms of his movement whilst set up for a vascular access procedure.

267. The Tribunal considered the photograph provided, including the set-up of the arm board and the layout of the operating theatre. It has heard from a number of theatre staff that here would not have been much opportunity for movement within this set up, including from Mrs P who told the Tribunal that there could be slight movements to re-adjust and that a surgeon may move if experiencing back pain or similar.

268. The Tribunal considered whether it was more likely than not that this sliding of the foot took place as alleged. Ms G was insistent that it was the foot rather than Mr Gilbert's knee and about the way in which he carried out sliding of the foot to rest between her knees at mid-thigh level. The Tribunal noted that Ms G set out that she had complained to other people at the time and her reporting was relatively contemporaneous.

269. The Tribunal noted the discrepancy in Ms G's evidence regarding use of the diathermy pedal. On balance, the Tribunal did not accept that the diathermy pedal was in use during the course of the operation which Ms G asserted was the case initially and then changed her mind whilst giving evidence.

270. Due to evidence of Mrs P, the Tribunal noted that the re-enactment was not a re-enactment as such but a moving visual aid to assist the Tribunal in understanding the physical logistics of the operating theatre when carrying out this procedure. The Tribunal treated the videos and photographs as demonstrative of how the theatre was set up, and not as an exact re-enactment of what had allegedly occurred to Ms G.

271. The Tribunal noted that Ms G's description of the event would require Mr Gilbert to physically contort himself to do as was suggested by Ms G, which was more likely than not to have been noticed by other theatre staff. Dr O, an anaesthetist present at the operation, remembered no specific unusual aspects of this surgery.

272. Looking at the matter in the round, the Tribunal determined that the GMC has not discharged the burden of proof as to this alleged conduct on the evidence before it. The Tribunal concluded that there was insufficient evidence to demonstrate that the movement alleged happened in the detailed way as set out by Ms G. Accordingly, the Tribunal found this paragraph of the Allegation not proved. The Tribunal concluded that this incident could have been an example of Ms G's memory honestly developing over time.

Paragraph 16(a)(iii)

273. The Tribunal had regard to the various associated evidence and documentation, as set out in respect of paragraphs 16(a)(i) and (ii) above.

274. The Tribunal had regard to Ms G's statement initial statement to the Trust dated 7 July 2014:

"The second case in theatre on 3rd April involved a change of catheter which I performed. As I was handling the penis Mr Gilbert leaned over my shoulder and said 'Don't be scared, it doesn't bite'. The patient was anaesthetised. Theatre staff were present in theatre."

275. Ms G told the Tribunal that she now recalls that Mr Gilbert *"whispered seductively in my ear"*.

276. In his witness statement Mr Gilbert denied that this took place as alleged. He stated that he did not lean on Ms G's shoulder or whisper in her ear. Mr Gilbert stated that the case in question would have had a couple of scrub staff at the table and a member of anaesthetic staff supporting the patient who was awake. He stated that it would have been unusual for anyone in this environment to lean on someone's shoulder and to whisper something in this way.

277. The Tribunal concluded that this could have been an occasion when a witness' (Ms G) memory of an event had (albeit honestly) developed and became distorted with the passage of time.

278. For the same reasons as set out in respect of paragraph 16(a)(iv) of the Allegation, as detailed below, the Tribunal found this paragraph of the Allegation not proved.

Paragraph 16(a)(iv)

279. The Tribunal had regard to the various associated evidence and documentation, as set out in respect of paragraphs 16(a)(i) to (iii) above.

280. In his witness statement Mr Gilbert accepted that he might well have said something along the lines of “*don’t be scared, it won’t bite*” when Ms G was struggling to insert an instrument into the bladder of a male patient via the penis. He stated that this procedure occurred during a list in which they were removing stents from the transplant ureter and had to do this using a flexible cystoscope. Mr Gilbert stated that Ms G was struggling to hold the penis firmly enough to enable more easy insertion of the cystoscope and he said that he tried to relieve the stress by saying something light-hearted as she was clearly struggling with the cystoscope insertion. Mr Gilbert stated that he did not lean on Ms G’s shoulder or whisper in her ear when saying this. He said that he meant this as a light-hearted comment at the time, but he accepted that he should not have said this, and he was sorry.

281. Mr Gilbert stated that Ms G referred to this happening during a catheter change, but he stated that that case was undertaken by him, and he provided the operation note in which he was the named surgeon for the procedure. Mr Gilbert stated that whenever anyone did an aspect of a procedure under his name as a consultant, it was his practice to reflect this in his operation notes. Mr Gilbert stated that Ms G was not on the operation note for this aspect of the case. This was also her very first list with him having just started in the department. Mr Gilbert stated that the patient in question was well known to him with a lot of clinical complexity and he would not have left a new XXX registrar doing what was needed for this patient.

282. The Tribunal took account of Ms G’s GMC witness statement dated 22 November 2022:

“I describe an incident where Mr Gilbert made some comments whilst I was performing a catheter change. I remember him saying that I was scared to touch someone’s penis. The patient was a young male. It was a fistula operation, but we agreed that I would change the catheter. I had laid out all the kit and started to do it. People were milling about in theatre at this point, but there were less people as the main operation was already completed. I was mid procedure, and Mr Gilbert whispered in my ear, leaning on my shoulder behind me, “don’t be scared, it won’t bite”. I felt so awkward, but I just carried on doing it. His tone was really sinister. I don’t know what else I could have done in that situation. I was doing the job for the patient so I couldn’t stop.”

283. The Tribunal also took account of the operation note of the relevant procedure on 3 April 2014. This included notes of: “*Change of catheter. Gilbert*” on the first page of the

operation note. The Tribunal has heard from Mr Gilbert that the person who does the procedure signs the operation note, and his name is there regarding the catheter.

284. The Tribunal considered the type of operation and, with reference to the operation list from 3 April 2014, there was no procedure that included the removing of stents from the transplant ureter and doing this using a flexible cystoscope. It had regard to Mr Gilbert's oral evidence that, *"My recollections this occurred on a different operating list where we were doing flexible cystoscopies"*.

285. The Tribunal concluded that a comment such as this was likely said by Mr Gilbert to Ms G but the contemporaneous records did not support that it took place in this operation on 3 April 2014.

286. The Tribunal determined that the GMC has not discharged the burden of proof as to this alleged conduct on 3 April 2014 on the evidence before it. The Tribunal concluded that there was insufficient evidence to demonstrate that this conduct happened in the detailed way as set out by Ms G. Accordingly, the Tribunal found this paragraph of the Allegation not proved.

Paragraph 16(b)(i) to (v)

287. The Tribunal considered each part of this paragraph separately in its deliberations.

288. The Tribunal had regard to Ms G's statement initial statement to the Trust dated 7 July 2014:

"Mr Gilbert was on call the following week. On Friday 11th April we were in theatre coffee room about to go to theatre for a case and Mr Gilbert was asking if I was single. He said he "knew what I needed in a man". He asked what my plans were for the weekend or how I spend my spare time. When I said that I go to the gym he told me he was really glad that I had joined the transplant surgery and although he was looking forward to working with me he was most looking forward to "seeing me on a night out." He said "I bet you're really wild on a night out"."

289. The Tribunal took account of Ms G's GMC witness statement dated 22 November 2022:

“I describe an incident where Mr Gilbert made some comments about my appearance and whether I was single. He also said that he thought I would be really wild on a night out. These comments were lude and dirty and came out of nowhere. I was quite unassuming, as by then I was especially quiet because I was intimidated and vulnerable. I dreaded being around him, but I had no choice when I was on call.

We were in the theatre coffee room waiting for the patient to be put on the table in theatre and so were occupying this period of time. I remember I was seated on the furthest sofa on the right and Mr Gilbert was sat opposite me. There was a table in between us. He was very cocky, confident and arrogant. He said “I know what you need in a man. You need someone who can help you when you cry and be strong for you and tell you what to do. I bet you’re strong but also vulnerable. You need someone to support you when you cry, but also answer back to you. I know what you need in a man”. He also asked me, “how do you spend your spare time?”, and I replied to say that I go to the gym. I didn’t intend there to be any connotations implied, but he replied by saying, “oh you look great in a pair of scrubs, you really don’t need to work out. I’m really looking forward to getting you on a night out”.

The whole thing was really unsavoury and made me feel uncomfortable and threatened. I didn’t want to be anywhere near him, and I certainly didn’t want to be alone with him. It felt perverted. I felt like he might try it on with me and I would be stuck. I felt like he was going to engineer a night out so that he could try it on with me. It felt totally inappropriate.”

290. In his witness statement Mr Gilbert denied that this took place as alleged. He stated that he did not make any of these comments to Ms G. Mr Gilbert stated that the transplant unit seldom had nights out or social events and he could count on one hand the number of departmental socials he attended in his 12 years in the department.

291. The Tribunal noted that the initial statement from Ms G was dated 7 July 2014, which is some three months after the 11 April 2014 date. Within that statement, Ms G had stated: *“Although written in retrospect, I made notes at home to myself contemporaneously as these events happened so I am aware as to the exact dates and timings”*. The Tribunal had regard to Ms G’s oral evidence in response to questions in cross-examination, Ms G explained that she had a word document that she had that she was adding things to over time, and that this then became her statement of 7 July 2014. While the document is dated 7 July 2014, Ms G’s assertion is that she recorded the date and brief detail at the time that it happened. She told

the Tribunal that the original note was mislaid at some point as she has moved house five times.

292. The Tribunal considered whether the concerns raised by Ms G were because of comments entered by Mr Gilbert on 14 July 2014 in her portfolio and of meeting/s on 4 July 2014. The Tribunal determined that there was nothing within the written documents or evidence it has heard to suggest that Ms G would then proceed to manufacture or embellish concerns as some form of protective measure.

293. The Tribunal noted that a staff member asking a colleague if they have a partner as part of asking questions to start to get to know someone the context could well be innocent. However, the other parts such as that he bet she “*was really wild on a night out*”, were not innocent elements so if said they would be inappropriate.

294. The Tribunal considered that Ms G’s comments were contemporaneously recorded and found the specific details provided to be persuasive.

295. Having considered the evidence and the circumstances, the Tribunal concluded that it was more likely than not that Mr Gilbert made the inappropriate comments set out at paragraph 16(b).

296. In respect of paragraph 16(b)(i) of the Allegation, the Tribunal was of the view that if this comment was said in isolation, it may not necessarily be inappropriate. However, in the context of this whole conversation on 11 April 2014, as set out at the remainder of paragraph 16(b), the Tribunal determined that this comment, as an element of the conversation, was therefore inappropriate.

297. Accordingly, the Tribunal found paragraphs 16(b)(i) to (v) of the Allegation proved.

Paragraph 16(c)(i) and (ii)

298. The Tribunal considered each part of this paragraph separately in its deliberations.

299. The Tribunal had regard to Ms G’s initial statement to the Trust dated 7 July 2014:

“On 29th May 2014 I was in theatre with Mr Gilbert again for an afternoon list. The last case on the list was a right brachiocephalic AV fistula. During the afternoon, Mr

Gilbert asked me if I had yet got a boyfriend and I informed him that I did have a new boyfriend and things were pretty serious. I felt this information would help to stop the inappropriate comments and behaviour. During the case, whilst again sitting at the table, I crossed my legs and in doing so, my knee touched Mr Gilbert's knee. He then loudly said in theatre, with all theatre staff present, "I thought you said you had a boyfriend now! You're clearly not getting any at home if you need to touch my knees under the table". I quietly muttered that I was merely changing position."

300. In his witness statement Mr Gilbert denied that this took place as alleged. He stated that he would sometimes ask someone if they had a partner, but he would not assume that someone would be in a heterosexual relationship. Mr Gilbert stated that it was common for knees to touch underneath the operating table, when using the arm board for vascular access cases. He stated that he would not, however, have made these comments if any contact had occurred.

301. There was no direct evidence from the theatre staff about the events on 29 May 2014.

302. The Tribunal did consider the suggestion that the comment was said loudly in theatre and that other staff present would have been able to hear it. The Tribunal noted that Mr Gilbert has previously accepted making remarks tinged with innuendo that the relevant theatre staff who have given evidence on his behalf had never heard him make.

303. The Tribunal considered that Ms G's comments were contemporaneously recorded and found the specific details provided to be persuasive. It had regard to its reasoning as to paragraph 16(b) above.

304. Having considered the evidence and the circumstances, the Tribunal concluded that it was more likely than not that Mr Gilbert made the inappropriate comments set out at paragraph 16(c)(i) and (ii). Accordingly, the Tribunal found paragraphs 16(c)(i) and (ii) of the Allegation proved.

Paragraph 17(a) - Sexually Motivated

305. The Tribunal had regard to the specific parts of paragraph 16 of the Allegation that it has found proved, namely paragraphs 16(b)(i) to (v) and 16(c)(i) to (ii).

306. The Tribunal now had to consider whether Mr Gilbert’s actions were sexually motivated, in that the conduct was done either in pursuit of sexual gratification or in pursuit of a future sexual relationship. The Tribunal considered each part of this paragraph separately in its deliberations.

307. Ms G described the comments as being “*lewd*” and “*dirty*”. She said the comments made her feel “*intimidated*” and “*vulnerable*”. She described the whole thing as being “*really unsavoury*”, “*feeling perverted*”, and she felt that Mr Gilbert might try it on with her.

308. In his witness statement, in respect of paragraphs 17(a) to (c) of the Allegation, Mr Gilbert denied any sexually motivated conduct or any conduct of a sexual nature. He was attempting to say something light-hearted to ease the tension and stress of undertaking a procedure that Ms G had not carried out regularly.

309. The Tribunal had regard to the relevant legal principles in terms of the definition of sexual motivation, including the cases of *Basson* and *Arunkalaivanan* as referred above.

310. The Tribunal was clear that it must not to equate inappropriate conduct with sexually motivated conduct and should consider whether there could be any other explanation for inappropriate conduct given the nature of the words that have found to have been said. It was unable to find any other explanation for Mr Gilbert’s actions, such as ill-judged humour. The Tribunal concluded that it was for his sexual gratification but not with a view to pursuing a sexual relationship. The Tribunal concluded that Mr Gilbert’s actions were sexually motivated. Accordingly, the Tribunal found paragraph 17(a) of the Allegation proved in respect of paragraphs 16(b)(i) to (v) and 16(c)(i) to (ii).

Paragraph 17(b) - Sexual Harassment

311. The Tribunal had regard to the specific parts of paragraph 16 of the Allegation that it has found proved, namely paragraphs 16(b)(i) to (v) and 16(c)(i) to (ii).

312. The Tribunal now had to consider whether Mr Gilbert’s actions in this respect constituted sexual harassment.

313. In his witness statement Mr Gilbert denied that his actions constituted sexual harassment.

314. The Tribunal had regard to the relevant legal principles in terms of the definition of sexual harassment, which involves a course of conduct which amounts to harassment of another and which he knows or ought to have known amounts to harassment. Harassing a person includes alarming the person or causing the person distress. It noted that Section 26(2) of the Equality Act 2010 provides that a person (A) harasses another (B) if A engages in unwanted conduct of a sexual nature and the conduct has the purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

315. The Tribunal made particular regard to Ms G's comments that it was at the point of the events of 29 May 2014, following the previous concerns, that she *"felt Mr Gilbert's behaviour was inappropriate and had serious sinister undertones that I had never experienced before with any male work colleague"*.

316. The Tribunal considered the definition of sexual harassment and concluded, on the facts found proved, that Mr Gilbert's actions constituted sexual harassment as his course of conduct, on more than one occasion, created an intimidating, degrading, or offensive environment for Ms G. Accordingly, the Tribunal found paragraph 17(b) of the Allegation proved in respect of paragraphs 16(b)(i) to (v) and 16(c)(i) to (ii).

Paragraph 17(c) - Abuse of more senior position

317. The Tribunal had regard to the specific parts of paragraph 16 of the Allegation that it has found proved, namely paragraphs 16(b)(i) to (v) and 16(c)(i) to (ii).

318. The Tribunal now had to consider whether Mr Gilbert's actions in this respect were an abuse of his more senior position.

319. In his witness statement Mr Gilbert denied that his actions were an abuse of his more senior position.

320. The Tribunal had regard to the relevant legal principles in terms of the definition of abuse of a more senior position.

321. The Tribunal found that in respect of each of these instances the facts constituted using his more senior position as a consultant to behave in an improper manner towards Ms

G, his junior colleague. Accordingly, the Tribunal found paragraph 17(c) of the Allegation proved in respect of paragraphs 16(b)(i) to (v) and 16(c)(i) to (ii).

Paragraph 18(a) and (b)

322. The Tribunal had regard to Ms G's statement initial statement to the Trust dated 7 July 2014:

"At 11.30 on Monday morning, [Mr W] called me and I informed him that I was at home, correcting a paper from my thesis. [Mr W] told me that I needed to come in at some point to have a meeting with him as my educational supervisor about my logbook as he was worried I wasn't doing enough operating. I told him I was happy to come in anytime and he told me he would text me when it was convenient for me to come in. He never contacted me. On Tuesday 17th June, I did not go into work and again when I called by [Mr W] at 11.30 to say we needed to talk about my logbook, I left home immediately and came to work. I changed into theatre scrubs and went to theatre coffee room at the Churchill, where I was greeted by [Mr W]. [Mr W] told me that I was going to get a "dressing down" from Mr Gilbert when he arrived. Both [Mr W] and Mr Gilbert then proceeded to scold and lecture me in full view of all in the coffee room including a medical student who was gobsmacked by what he saw."

323. The Tribunal took account of Ms G's GMC witness statement dated 22 November 2022:

"I describe an incident where Mr Gilbert and [Mr W] proceeded to scold and lecture me in full view of all in the coffee room. During this conversation Mr Gilbert told me that I wasn't operating or attending enough and that I wasn't working hard enough. He said that just because I was a [XXX] surgeon that didn't mean I didn't need to try to learn about transplant surgery and that there was a lot to learn. It was difficult because I was being harassed at work and I didn't want to do extra work in that department, I was already working and doing everything that was required of me. During a lot of my shifts there weren't any transplants. I didn't attend Dr Gilbert's theatres if I could help it for obvious reasons. But I apologised and accepted fault and said something like "sorry, I'll do better in the future". This was very unlike me not to be enthusiastic in my job, but I had completely changed by then (June)."

324. In his witness statement Mr Gilbert denied that this took place as alleged. He stated that he did not scold Ms G in front of colleagues in the coffee room or at any other point, and that this was not how he would ever handle situations with a trainee regarding their performance in the workplace. Mr Gilbert stated that he believed that Ms G might be referring to an interaction she had with Mr W, who was her Assigned Educational Supervisor (AES). Mr Gilbert stated that he recalled hearing that Mr W had had a rant at Ms G and thinks that it was Mr W who told him about this. In terms of the timeline, Mr Gilbert stated that he did prepare a report on 2 July 2014 for Mr W setting out his concerns about Ms G's attitude and behaviour during her time in the department. He stated that he had a clinical supervisor meeting with Ms G on 4 July 2014 and Ms G also had an educational supervisor meeting with Mr W at the end of the day. Mr Gilbert stated that Ms G raised concerns about Mr W at the transplant unit on 7 July 2014.

325. The concerns that Mr Gilbert set out in his report included feedback he had received from a ward sister, and feedback from a number of the junior doctors that Ms G was always making disparaging comments about the post and the department, often in earshot of patients. It was set out that nursing staff had also fed back that the *"constant moaning and negativity"* were affecting confidence and morale of staff within the ward setting. The report also included a number of instances including a comment from a member of the nursing staff who had heard Ms G saying during a ward round in front of patients that she planned to get the Core Trainee out of theatre and to make her the *"ward bitch"*. The Trainee was then apparently ridiculed by Ms G for being in theatre and told her she needed to do the clinical jobs instead; a datix form was submitted and attached to the report.

326. In Mr Gilbert's oral evidence he stated that the reason that the comments were signed off on 14 and 18 July 2014 was that there had been no entries from Ms G about her meetings with each of them and they knew by then that she was not coming back to the unit, so the document was signed as a draft.

327. Within Mr Sutton's submissions on the facts, he stated that it was relevant to consider the tenor of Mr Gilbert's written assessment of Ms G. He submitted that Mr Gilbert's comments, against a background of concerning behaviour, were balanced and restrained and that the overall approach was supportive and constructive.

328. The Tribunal considered that Mr W, who was her educational supervisor, rang Ms G at home and she then describes having a dressing down from them both, which appeared to have been led by Mr W.

329. The Tribunal determined that it was more likely than not that Mr Gilbert had made these statements to Ms G but Tribunal concluded that merely saying those words did not constitute inappropriate behaviour. The Tribunal recognised that it was an uncomfortable scenario for Ms G but concluded that the behaviour was not inappropriate.

Accordingly, the Tribunal found this paragraph of the Allegation not proved.

Paragraph 19 - Intimidation

330. The Tribunal has found paragraph 18 of the Allegation not proved. Accordingly, the Tribunal found this paragraph of the Allegation not proved.

Paragraph 20(a)(i) and (ii)(1) and (2)

331. The Tribunal considered each part of this paragraph separately in its deliberations.

332. The Tribunal took account of Ms H's GMC witness statement dated 22 November 2022:

"I detail an incident where Mr Gilbert rubbed his back against my back. This must have been after 14 July 2015, as I recall that I was not just observing and I was scrubbed at the table. I think this took place around or even on the 22 July 2015. I can't recall what time of day it was. I was wearing a gown at the time. I felt Mr Gilbert pushing his back against my back. He made a comment about me feeling like a sporty person. We were in the middle of doing a transplant. I told [Mr F] afterwards."

333. Within her supplementary statement to the Trust dated 8 January 2022, Ms H said that she had asked Mr F for evidence for "dates of multivisceral transplants taking place, as there was a confusion about the date when Mister Gilbert rubbed his back against mine when scrubbed in theatre 9".

334. In his witness statement Mr Gilbert denied that this took place as alleged. He stated that he was not involved with an operation with Ms H on 22 July 2015 and the operation note for this case listed five other consultant surgeons involved in the case. Mr Gilbert stated that his name was not included within the Theatre Information Management System (TIMS) and it would have been if he had been scrubbed; there was also no record in his logbook. Mr Gilbert stated that, on 22 July 2015, he was approximately 180 miles away from the Churchill

Hospital doing a peripheral pancreas transplant assessment clinic in Plymouth. Further, Mr Gilbert stated that it would have been impossible to have acted in the way alleged without contaminating a sterile surgical field or being noticed by one of the many members of the team that would be in theatre.

335. The Tribunal had regard to the relevant contemporaneous documents, including the appointment record of Mr Gilbert at the Plymouth Clinic on 22 July 2015, his e-log to show that he was not carrying out surgery on 22 July 2015, and the TIMS note dated 22 July 2015 indicating an assistant surgeon who was unregistered (likely to be Ms H) when Mr Gilbert was not present. The Tribunal concluded that, on the evidence before it, that the incident could not have taken place on 22 July 2015.

336. The Tribunal noted that paragraph 20(a) of the Allegation stated, *“on or around 22 July 2015”*. In Ms H’s oral evidence to the Tribunal, she said that she was *“100% sure”* that it was 22 July 2015 but then said that it did not matter what date it was as it had *“happened anyway”*. Ms H told the Tribunal that it took place during a multi-visceral transplant, of which there were only two and that these took place on 2 July 2015 and 22 July 2014. She said that she consulted with Mr F as he had the register of these transplants. Ms H told the Tribunal that it must have taken place after 14 July 2015, XXX. She also said that Mr Gilbert was scrubbed during the procedure but that his touching of her back would not have contaminated the sterile surgical field.

337. The Tribunal noted the various dates when this incident was said to have occurred. The Tribunal noted that Ms G indicated she knew who the patient was but there was no evidence from the GMC to provide sufficient detail to identify the patient.

338. The Tribunal could not exclude that it was an inadvertent touching when Mr Gilbert came into contact with Ms H accidentally, in similar terms as in respect of paragraph 20(a)(i) of the Allegation.

339. The Tribunal determined that the GMC has not discharged the burden of proof as to this alleged conduct on the evidence before it. The Tribunal concluded that there was insufficient evidence to demonstrate that the behaviour alleged took place. Accordingly, the Tribunal found this paragraph of the Allegation not proved.

Paragraph 20(b)(i) to (iii)

340. The Tribunal considered each part of this paragraph separately in its deliberations.

341. The Tribunal had regard to Ms H’s email to Ms Q, Freedom to Speak Up Guardian, dated 15 April 2021:

“1) In the operating theatre whilst doing a fistula: he asked me to flush the vessels with a filled syringe and commented on this with the statement that he can see how professional I am in squirting and if I like this as a woman (I simply ignored it as I could not believe my ears).”

342. The Tribunal had regard to Ms H’s statement to the Trust dated 24 August 2021:

“We were in the operating theatre doing a fistula, quite early on during my time in the unit. It was the only fistula I did with him. He asked me to flush the vessels with a filled syringe and commented on it saying “I didn’t realise you were a squirter”. Then he said “do you like this as a woman?” There was a scrub nurse there because it was in theatre 9.

When we did the fistula procedure, we were sitting opposite each other at the small table and his knees would touch my knees. You try not to but this can happen. In surgery we are all close together. I did not feel that he was deliberately rubbing his knee against my knee. It was only when he made the squirter comment that it felt uncomfortable. I told James Gilbert that I did not like to be that close. I could always just leave and go to the lab so I had my safe place.”

343. In his witness statement Mr Gilbert denied that this took place as alleged. He stated that he acknowledged that he had on occasion made comments that had an element of innuendo including to male trainees and other theatre staff, but these occasions had been rare. He stated that his comments had always been general and never specific to an individual.

344. Mr Gilbert stated that it was necessary to flush through the arteries and veins regularly during fistula cases with a saline flush that usually took the form of a 20ml syringe connected to a special cannula. He stated that he would ordinarily do this as the lead surgeon. Mr Gilbert stated that, on occasion, the fluid could squirt out of the vessel or syringe

cannula tip. He stated that he recognised that historically when this occurred, he had made a misjudged comment such as *“oh a squirter”*. Mr Gilbert stated that he recalled making this comment when operating with Ms H. He stated that, in hindsight, he realised that it was wholly inappropriate for him to have made this comment; it was intended to be humorous but clearly caused offence for which he was truly sorry. Mr Gilbert stated that he did not make comments to Ms H to imply she was a *“professional”* in this, that she was a squirter, or that she *“liked this as a woman”*.

345. Within Mr Sutton’s submissions on the facts, he submitted that Ms K would have been scrubbed in Theatre 9 where Ms H alleged the comment was made. Mr Sutton stated that Ms K and other nurses had never witnessed any such language from Mr Gilbert.

346. The Tribunal noted the specific detail that Ms H was able to provide about this incident. She was able to indicate the type of operation, that it was in theatre nine, and that it was the only fistula operation that she did with Mr Gilbert.

347. Mr Gilbert stated that he recognised that he had on occasion made comments in the workplace that had an element of innuendo within an operative setting but that they had never been personalised to any individual. The Tribunal was also conscious of Mr Gilbert’s comments that he recalled making a misjudged comment such as *“oh a squirter”* when operating with Ms H.

348. The Tribunal has considered the potential for a pooling of recollection in respect of this *“squirter”* comment. It had regard to its comments above in terms of there being no relationship or overlapping in time in terms of Ms H working with Ms A or Ms E. The Tribunal has no evidence before it to substantiate the potential for a pooling of recollection with Ms A or Ms E.

349. In terms of paragraph 20(b)(iii) of the Allegation specifically, the Tribunal rejected the suggestion that it was not a personal comment addressed towards Ms H because of the words used, which was whether she was *“like this as a women”* in reference to squirting.

350. Having considered the evidence and the circumstances, the Tribunal concluded that it was more likely than not that Mr Gilbert said and asked the comments set out at paragraph 20(b)(i) to (iii) of the Allegation, or words to that effect. Accordingly, the Tribunal found paragraphs 20(b)(i) to (iii) of the Allegation proved.

Paragraph 20(c)(i) and (ii)

351. The Tribunal had regard to Ms H’s email to Ms Q, Freedom to Speak Up Guardian, dated 15 April 2021:

“I was standing in a colleague's office. The colleague was sitting and showing me something on his desk. My backside was turned towards the office door. Suddenly I could feel someone touching my left popliteal fossa. I was horrified and turned around. The colleague said immediately that this was inappropriate. He just answered that it looked so inviting, my legs were so "sporty" and grinned. For the protocol: I was wearing [XXX].”

352. The Tribunal had regard to Ms H’s statement to the Trust dated 24 August 2021:

“I was standing in [Mr F]’s office. Mr F was sitting and showing me something on his desk. My back was turned towards the office door. I was wearing [XXX]. Suddenly I could feel someone touching my left knee. I was horrified and turned around to see it was James Gilbert. James Gilbert just answered that it looked so inviting, my legs were so “sporty” and grinned.”

353. The Tribunal took account of Ms H’s GMC witness statement dated 22 November 2022:

“I detail an incident where Mr Gilbert touched my knee from behind. I can’t recall exactly when this took place, but it must have been sometime in summer months as I was wearing [XXX]. It would have been either Summer 2015 or 2016. The only people present were Mr F, me and Mr Gilbert.

My back was turned towards office door and I could feel someone touching my left knee. I know it was the left knee as I feel my right one differently due to an accident. He said to me words to the effect of “your legs are so sporty” with a grin on his face (I saw this as I turned around immediately).”

354. In his witness statement Mr Gilbert denied that this took place as alleged. He stated that he did not touch Ms H’s left knee from behind or make any comments about the appearance of her legs and would never do this.

355. The Tribunal determined that Ms H has given a detailed account including detail as to what she was wearing, the location, who else was present, and the mechanics of what happened and what was said.

356. The Tribunal determined that there was no honest embellishment or development of Ms H's evidence in the time period as she had consistently maintained a detailed version of events.

357. Having considered the evidence and the circumstances, the Tribunal accepted Ms H's version of events. It concluded that it was more likely than not that Mr Gilbert behaved inappropriately towards Ms H in touching her left knee from behind and saying comments to the effect of 'your legs are so sporty'. Accordingly, the Tribunal found paragraphs 20(c)(i) and (ii) of the Allegation proved.

Paragraph 20(d)(ii)

358. The Tribunal had regard to Ms H's email to Ms Q, Freedom to Speak Up Guardian, dated 15 April 2021:

"I was walking along the corridor in the office area wearing a [XXX] jacket which was not closed. He was coming towards me from the reception area and walked straight I tried to manoeuvre around him when he put his hands underneath my jacket, around my waistline, grinned (as always) and said: "oh dear it's a bit too narrow for both of us here.... but it feels incredibly nice...with one of his mouth angles moved up slightly as always).. an unpleasant experience."

359. The Tribunal took account of Ms H's GMC witness statement dated 22 November 2022:

"I detail an incident where Mr Gilbert touched me underneath my jacket. He was coming towards me I was wearing a [XXX] jacket, [XXX]. My [XXX] jacket was open, and he came towards me and put his hands underneath the jacket and touched my waist. He didn't put his hands under my blouse, but it was under the jacket. He said something like "it's obviously too narrow for both of us here". I think Mr F was approaching when it happened, and I discussed it with him briefly afterwards."

360. The Tribunal also had regard to Mr F's statement to the Trust dated 13 August 2021, in which he stated that he remembered seeing Mr Gilbert and Ms H in the corridor outside his office. Mr F stated that Mr Gilbert *"appeared to have his hands on Ms H's waist, underneath her coat"*.

361. In his witness statement Mr Gilbert stated that this was admitted save that it was denied that he said, *"but it feels incredibly nice"*. He stated that he recalled an occasion when he had tried to pass Ms H in a corridor, but they had each moved the same way several times. Mr Gilbert stated that he could not remember exactly what happened but recognised that he may have put a hand on her to move her one way and said something along the lines of *"oh dear it's a bit narrow here"*. He stated that he would not have said that it felt nice or *"incredibly nice"*. Mr Gilbert stated that it was an unintentional and awkward moment, and he was extremely sorry that it had been perceived as having been done with an ulterior motive.

362. The Tribunal noted the admission made by Mr Gilbert apart from that he said, *"but it feels incredibly nice"*. The Tribunal found Ms H's straightforward detailed account to be persuasive and noted that she felt sufficiently troubled by Mr Gilbert's actions at the time to raise it with Mr F immediately.

363. The Tribunal considered, but discounted, Ms H's recollection being affected by an honest, imaginative reconstruction of events.

364. Having considered the evidence and the circumstances, the Tribunal concluded that it was more likely than not that Mr Gilbert behaved inappropriately towards Ms H in that he said, *'oh dear it's a bit too narrow for both of us here....but it feels incredibly nice'*, or words to that effect. Accordingly, the Tribunal found this paragraph of the Allegation proved.

Paragraph 20(e)

365. The Tribunal had regard to Ms H's statement to the Trust dated 24 August 2021:

"Another situation was when I was out of a retrieval with him. You need to cannulate the aorta so you have your cannula and you have the aorta of the donor and you need to bring the cannula into the aorta. The assistant needs to hold the aorta tight so that it is not bleeding and you put in the cannula. I had not worked with James Gilbert

before so I needed to ask how he did it. He said “oh, are you often thinking about whether you do it better yourself or you like it done by someone else?”

366. The Tribunal took account of Ms H’s GMC witness statement dated 22 November 2022:

“I detail an incident where Mr Gilbert made some comments whilst I was on a retrieval with him. I can’t recall exactly when this happened, but my Trust statement is written in chronological order so that should give some context to the timing. I can’t recall where we were exactly, but I was only out for retrieval with him once. This was the first and last time I went with Mr Gilbert on retrieval. The only people present were the scrub nurse, me and Mr Gilbert. When it happened, it was really busy in theatre preparing for perfusion.

We did the retrieval how I was trained to do it. Mr Gilbert was my first assistant. We brought in the aortic cannula, and I asked him how he would like to do this as he was the leading consultant. He said something like “oh, how do you prefer it; are you letting someone stick it in or are you doing it yourself?”

367. In his witness statement Mr Gilbert stated that he admitted that he would have said words that were similar to this. He stated that he denied that this constituted acting inappropriately towards Ms H. Mr Gilbert stated that he believed that this related to an organ retrieval during which a special cannula must be inserted into the aorta and tied down in place. He stated that, as the aorta is pulsating and under high pressure, the process required two people with one squeezing the aorta and the other cutting a hole in the front of the artery to insert the cannula and then tie it down. Mr Gilbert stated that he would definitely have asked Ms H how she preferred to cannulate and her preference as to who carried out which part of the procedure. He stated that if his comments were perceived as carrying any sort of innuendo then that was absolutely not his intention.

368. The Tribunal accepted that the alleged words would have been appropriate to say within the context of the use of a cannula. It was clear that both parties would need to be clear what the other was doing in this situation.

369. The Tribunal noted that this was a relatively short remark that Ms H told the Tribunal she felt uncomfortable about it, because it was an uncommon comment. The Tribunal had

the context but not the manner in which it was said or whether it was accompanied by a grin or a wink.

370. Given the nature and extent of evidence, the Tribunal was not satisfied that it was more likely than not that Mr Gilbert's behaviour was inappropriate in this instance. Accordingly, the Tribunal found this paragraph of the Allegation not proved.

Paragraph 21(a) - Sexually Motivated

371. The Tribunal had regard to the specific parts of paragraph 20 of the Allegation that it has found proved or admitted, namely paragraphs 20(b)(i) to (iii), 20(c)(i) and (ii), and 20(d)(i) and (ii).

372. The Tribunal now had to consider whether Mr Gilbert's actions were sexually motivated, in that the conduct was done either in pursuit of sexual gratification or in pursuit of a future sexual relationship. The Tribunal considered each part of this paragraph separately in its deliberations.

373. In his witness statement Mr Gilbert stated that this was denied.

374. The Tribunal had regard to the relevant legal principles in terms of the definition of sexual motivation, including the cases of *Basson* and *Arunkalaivanan* as referred above.

375. The Tribunal was clear that it must not to equate inappropriate conduct with sexually motivated conduct and should consider whether there could be any other explanation for inappropriate behaviour. It was unable to find any other explanation for Mr Gilbert's actions other than for his sexual gratification, such as ill-judged humour. The Tribunal concluded that Mr Gilbert's actions were sexually motivated. Accordingly, the Tribunal found paragraph 21(a) of the Allegation proved in respect of paragraphs 20(b)(i) to (iii), 20(c)(i) and (ii), and 20(d)(i) and (ii).

Paragraph 21(b) - Sexual Harassment

376. The Tribunal had regard to the specific parts of paragraph 20 of the Allegation that it has found proved or admitted, namely paragraphs 20(b)(i) to (iii), 20(c)(i) and (ii), and 20(d)(i) and (ii).

377. The Tribunal now had to consider whether Mr Gilbert’s actions in this respect constituted sexual harassment.

378. In his witness statement Mr Gilbert stated that this was denied.

379. The Tribunal had regard to the relevant legal principles in terms of the definition of sexual harassment, which involves a course of conduct which amounts to harassment of another and which he knows or ought to have known amounts to harassment. Harassing a person includes alarming the person or causing the person distress. It noted that Section 26(2) of the Equality Act 2010 provides that a person (A) harasses another (B) if A engages in unwanted conduct of a sexual nature and the conduct has the purpose or effect of violating B’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

380. The Tribunal considered the definition of sexual harassment and concluded, on the facts found proved, that Mr Gilbert’s actions constituted sexual harassment as his course of conduct, on more than one occasion, created an intimidating, degrading, or offensive environment for Ms H. Accordingly, the Tribunal found paragraph 21(b) of the Allegation proved in respect of paragraphs 20(b)(i) to (iii), 20(c)(i) and (ii), and 20(d)(i) and (ii).

Paragraph 22

381. The Tribunal noted that the people present for this procedure were Mr Gilbert, Ms I, a scrub nurse and Dr M, along with a runner and perfusionist.

382. The Tribunal had regard to Ms I’s statement to the Trust dated 6 September 2021:

“I remember there was one particular retrieval on a Thursday when Mr Gilbert was on call. It was in the evening and there was a Registrar with us.

The case started and he decided to stay on the lead surgeon’s side, which is the right side. The Registrar was on his opposite side as his first assistant and I was in the second assist position. Then he said “I will start the case then [the Registrar] will do a little and then you can do your bit”. We started the case and we were just a little bit into the skin when he said “Look at all that fat, this is what happens if you eat chapatti”. [XXX] Also, you are working in another hospital with a nursing team and an anaesthesia team from another hospital, a completely different set of people from

your regulars, and you're insulting a doctor who is altruistically donating organs. The patient was Asian.

I would have stopped him there if I were in any other situation. But I was myself under stress and decided to ignore it for now.

...

I had told [Prof Z] about Mr Gilbert's comment about the Asian patient eating chapattis, either when I resigned or at another time."

383. The Tribunal took account of Ms I's GMC witness statement dated 9 December 2022:

"I detail an incident where Mr Gilbert made comments about a patient during an organ donation. I am unable to recall when this happened exactly. [XXX] in June 2020 so this incident could have been perhaps in August or September. I was going out on a retrieval and Mr Gilbert was supervising me. I think it was Thursday if remember correctly.

When the case started, the registrar (who was junior to me) stood opposite Mr Gilbert and I was his second assistant.

The patient's weight/BMI was on the high side. We also knew that the patient was Asian as we get that information when we get the information of donation. Mr Gilbert said that he would start the case, he would have the registrar do some initial steps and then I could do the rest. He started the case, and as the patient was quite large, there was a thickness of the skin to go through. As Mr Gilbert was going through the skin he said, 'this is what happens if you eat chapatti'.

I was offended when Mr Gilbert said the comments about chapatti, [XXX] because he was saying this about the patient who was also an organ donor (and deserves all the respect for that), but also because the comment was made in front of a team of doctors and nursing and other theatre staff from another (host) hospital which was highly disrespectful. I decided to ignore it at this point as I was under stress of being scrutinized but I mentioned it to the head of the department at the next meeting."

384. In his witness statement Mr Gilbert denied using the wording alleged or linking his comments to the patient. He stated that he checked the records and the patient's BMI was 24, meaning that they were not overweight, and it would not have made sense to have said

“look at all that fat”. Mr Gilbert stated that he recalled that he had a conversation with Ms I about dietary influences generally and the impact on growing obesity levels. This was in the context of her having carried out retrieval surgery in the USA and India. Mr Gilbert stated that, during this discussion, he believed he might have commented on chapattis potentially contributing to weight gain. He stated that, given that this conversation was taking place in the early hours, it was possible that it did not come out as he had intended. Mr Gilbert stated that he was sorry that he caused offence and that respect for a person’s culture and race were very important to him and always had been.

385. The Tribunal also had regard to the witness statement from Dr M dated 10 May 2024, in which he stated that he had been informed of this allegation and did not recall Mr Gilbert saying this comment. Dr M stated that he believed that this would have stood out to him had this been said and that he would have remembered it. Dr M stated that he only remembered the retrieval as being uneventful.

386. The Tribunal considered the question of whether there had been a pooling of memories but there was no evidence before it to establish that Ms A had spoken to Ms I about her experiences of working at the Trust.

387. The Tribunal found Ms I’s evidence to be a clear recollection of an incident that had happened around one year previously, and details were given as to what had been said, who was present and where it happened. As a result, Ms I reported the matter to Prof Z.

388. The Tribunal noted that Mr Gilbert accepted that he recalled a conversation with Ms I about dietary influences but denied using the wording alleged or linking his comments to the patient. The Tribunal noted that the comment was not heard by Dr M who was also present. The Tribunal considered that Dr M was unable to recall with any detail what had actually occurred.

389. The Tribunal drew the inference that Ms I would not report an event at the next meeting to the head of department if it were as innocuous as suggested by Mr Gilbert. Whilst there was no written evidence of the report, the Tribunal accepted Ms I’s evidence that it was reported.

390. Having considered the evidence and the circumstances, the Tribunal concluded that it was more likely than not that Mr Gilbert said to Ms I about a patient during an organ retrieval

procedure, *'look at all that fat, this is what happens when you eat chapatti'*, or words to that effect. Accordingly, the Tribunal found this paragraph of the Allegation proved.

Paragraph 23(a) - Harassment related to race

391. The Tribunal had regard to the evidence referred to above in respect of paragraph 22 of the Allegation.

392. In his witness statement Mr Gilbert stated that this was denied.

393. The Tribunal had regard to the relevant legal principles in terms of the definition of harassment, which involves a course of conduct which amounts to harassment of another and which he knows or ought to have known amounts to harassment. Harassing a person includes alarming the person or causing the person distress. It noted that Section 26(1) of the Equality Act 2010 provides that a person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic (in this instance race), and the conduct has the purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

394. The Tribunal considered the definition of harassment and concluded that this only amounted to one occasion and therefore could not constitute a course of conduct to establish harassment as required by The Protection from Harassment Act 1997. Accordingly, the Tribunal found this paragraph of the Allegation not proved.

Paragraph 23(b) - Racist

395. The Tribunal had regard to the evidence referred to above in respect of paragraph 22 of the Allegation.

396. In his witness statement Mr Gilbert stated that this was denied.

397. The Tribunal had regard to the relevant legal principles, in that *"Racist comments"*- are comments perceived by the complainant or any other person to be motivated by hostility or prejudice based on a person's race or perceived race.

398. The Tribunal considered whether the comment made by Mr Gilbert came within this definition as a matter of fact.

399. Having considered the evidence and the circumstances, the Tribunal concluded that the comment as set out at paragraph 22 of the Allegation was motivated by prejudice based on a person's race or perceived race. It was clear that it was not motivated by hostility. The Tribunal considered the comment to be a low-level racist comment in terms of its seriousness, without seeking to undermine that it was nonetheless a racist comment. Accordingly, the Tribunal found this paragraph of the Allegation proved.

The Tribunal's Overall Determination on the Facts

400. The Tribunal has determined the facts as follows:

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

Ms A

1. On one or more occasions you behaved inappropriately towards your junior colleague, Ms A, in that:

a. you made inappropriate comments in that:

i. on a date between ~~August 2009 and February 2010~~ April 2019 and October 2019, during an operation you said to Ms A:

Amended under Rule 17(6)

1. 'so are you a spurter? I can always tell which girls are the spurters', or words to that effect;

Determined and found proved

~~2. 'oh no you need to come very quickly because they need to go and they have a really big organ, a huge organ and I know how much you love big organs', or words to that effect;~~

Amended under Rule 17(6)

ii. on a date between April 2019 and September 2019 you said to Ms A, 'You're a well put together girl, you must always wear matching underwear, correct? What kind are you wearing now?', or words to that effect;

Determined and found proved

iii. in the winter of 2019, you said to Ms A:

1. 'I enjoyed watching you walk around in your fuck me boots yesterday', or words to that effect;

Not proved

2. 'you must love the attention you get in that sexy leather jacket', or words to that effect;

Not proved

iv. on a date between August 2009 and February 2010 you said to Ms A, 'oh no you need to come very quickly because they need to go and they have a really big organ, a huge organ and I know how much you love big organs', or words to that effect;

Amended under Rule 17(6)

Determined and found proved

b. you touched Ms A inappropriately without her consent, in that:

i. on one or more occasions between August 2009 and February 2010, you:

1. grabbed Ms A by the waist;

Determined and found proved

2. ran your hands up and down Ms A's body from her hips to her bra line;

Determined and found proved

ii. on one or more occasions between April 2019 and August 2022 you stood closely behind Ms A in theatre whilst she was assisting in an operation and pressed yourself against her;

Not proved

iii. on or around 9 February 2021 you traced your finger across Ms A's wrist, up her arm, over her shoulder and over her clavicle to her sternoclavicular notch.

Determined and found proved

2. Your actions as set out at paragraph 1:

a. were sexually motivated;

Determined and found proved in respect of paragraphs 1(a)(i)(1), 1(a)(ii), 1(a)(iv), 1(b)(i)(1) and (2)

Not proved in respect of paragraphs 1(a)(iii)(1) and (2), 1(b)(ii), 1(b)(iii)

b. constituted sexual harassment as defined in Section 26(2) of the Equality Act 2010, 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 respect of paragraphs 1(a)(i)(1), 1(a)(ii), 1(a)(iv), and 1(b)(i)(1) to (2)

Not proved in respect of paragraphs 1(a)(iii)(1) to (2), 1(b)(ii), and 1(b)(iii)

c. were an abuse of your more senior position.

Determined and found proved in respect of paragraphs 1(a)(i)(1), 1(a)(ii), 1(a)(iv), 1(b)(i)(1) to (2), and 1(b)(iii)

Not proved in respect of paragraphs 1(a)(iii)(1) to (2), and 1(b)(ii)

3. Between ~~August 2009 and February 2010~~ April 2019 and October 2021, you behaved inappropriately towards Ms A in that:

Amended under Rule 17(6)

a. on one or more occasions you called Ms A late in the evening and outside of work when you had no reason to do so;

Not proved

b. you would discuss with Ms A how you were:

i. in close contact with her supervisors about her clinical progress;

Not proved

ii. instrumental in national selection or words to that effect;

Not proved

iii. able to affect her career prospects;

Not proved

as a result of which Ms A felt unable to refuse to undertake extra shifts or additional unpaid work;

c. you told Ms A about how you had affected other people's career progression and implied that you could do the same to her if she, 'became a problem', or words to that effect;

Not proved

d. on one or more occasions, you made derogatory comments about a colleague, Mr B, to Ms A in that you said that Mr B was:

i. 'a terrible surgeon', or words to that effect;

Not proved

ii. 'just useless', or words to that effect;

Not proved

iii. 'never going to get anywhere', or words to that effect;

Not proved

iv. 'a complete waste...but ultimately [he's] never going to go anywhere, he's just going to be a staff grade', or words to that effect.

Not proved

4. Your actions as set out at paragraph 3 were intimidating.

Not proved

5. On a date between ~~August 2009 and February 2010~~ April 2019 and October 2021, you made an inappropriate comment about a junior colleague, Ms C, to Ms A in that you said, 'just because she looks good in tight clothes, it doesn't mean she's any good', or words to that effect.

Amended under Rule 17(6)

Not proved

6. Your actions at paragraph 5 constituted harassment related to sex as defined in Section 26(1) of the Equality Act 2010, in that you engaged in unwanted conduct related to sex 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.

Not proved

7. On a date in or around the winter of 2019 you said to Ms A about a patient during a ward round, 'you know how Africans clean themselves once they've gone to the toilet? They just use their hands, no wonder they always get infections', or words to that effect.

Determined and found proved

8. On a date in or around January 2020 you said to Ms A about a junior colleague, Mr D, 'I know people like him, I used to know Africans as well....so I know these Africans, they are only interested in a good time, they only come out after the sun goes down', or words to that effect.

Determined and found proved

9. Between ~~August 2009~~ April 2019 and April 2022 you said to Ms A:

Amended under Rule 17(6)

a. 'those two women, they love a good cat fight. Typical hysterical Bollywood women,' or words to that effect;

Admitted and found proved

b. in reference to a patient of Asian origin's weight, 'eating too many chapattis', or words to that effect;

Determined and found proved

c. in reference to a person of African origin's weight:

i. 'eating too much rice', or words to that effect;

Determined and found proved

ii. 'Africans don't do anything unless they are really sporty' or words to that effect.

Determined and found proved

10. Your comments as at paragraphs 7 – 9:

a. constituted harassment related to race as defined in section 26(1) of the Equality Act 2010, in that you engaged in unwanted conduct related to race, 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

b. were racist.

Determined and found proved

Ms E

11. On one or more occasions between April 2011 and April ~~2012~~ 2013 you behaved inappropriately whilst at work towards your junior colleague Ms E in that you:

Amended under Rule 17(6)

a. tickled her when you were alone with her without her consent;

Admitted and found proved

b. grabbed and massaged her shoulders without her consent;

Admitted and found proved

c. on one occasion in an office you:

i. sat close to her, in that Ms E was trapped against the wall and window and was unable to move away;

Determined and found proved

ii. stared at Ms E;

Determined and found proved

iii. said, 'I have been watching you and you're pretty perfect', or words to that effect whilst staring at Ms E's body and breasts;

Determined and found proved

d. asked her if her underwear was a matching set, or words to that effect;
Admitted and found proved

e. touched her knees with your knees under the operating table;
Not proved

f. squeezed her thigh between your thighs under the operating table;
Determined and found proved

g. said during operations when asking her to use the heparinised saline flush, 'Oh I didn't know you're a spurter?', or words to that effect;

Determined and found proved

h. said that you were only inappropriate with those who would be fine with it and that you were a good judge of character, or words to that effect;

Not proved

i. said, after being told that Ms E may require XXX, 'Well, when you need [XXX], I would love to do a high thigh [XXX] for you', or words to that effect;

Determined and found proved

j. telephoned Ms E outside of work when you had no reason to do so;

Admitted and found proved

k. behaved in a dismissive manner towards other trainees in front of Ms E;

Not proved

l. made derogatory assessments of other trainees in the presence of Ms E, in that you referred to them as:

i. 'lazy', or words to that effect;

Not proved

ii. 'not team players', or words to that effect;

Not proved

iii. 'no good', or words to that effect;

Not proved

iv. 'not worth supporting', or words to that effect.

Not proved

12. Your actions as set out at paragraph 11(a) – 11(i) were:

a. sexually motivated;

Determined and found proved in respect of paragraphs 11(a), (b), (c)(i) to (iii), (d), (f), (g) and (i)

Not proved in respect of paragraphs 11(e) and (h)

b. constituted sexual harassment as defined in Section 26(2) of the Equality Act 2010, in that you engaged in unwanted conduct of a sexual nature which had the purpose or effect of violating the dignity of Ms E, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her;

Determined and found proved in respect of paragraphs 11(a), (b), (c)(i) to (iii), (d), (f), (g) and (i)

Not proved in respect of paragraphs 11(e) and (h)

c. an abuse of your more senior position.

Determined and found proved in respect of paragraphs 11(a), (b), (c)(i) to (iii), (d), (f), (g) and (i)

Not proved in respect of paragraphs 11(e) and (h)

13. Your actions as set out at paragraph 11(j) – 11(l) were intimidating.

Not proved

Mr F

14. On one or more occasions between February 2013 and November 2019, whilst at work you:

a. you imitated an Indian accent in the presence of Mr F;

Admitted and found proved

b. asked Mr F, 'oh when are you leaving the country now,' or words to that effect, with reference to Brexit.

Admitted and found proved

15. Your conduct as set out at paragraph 14:

a. constituted harassment related to race as defined in section 26(1) of the Equality Act 2010, in that you engaged in unwanted conduct related to race, which had the purpose or effect of violating the dignity of Mr F, or creating an intimidating, hostile, degrading, humiliating or offensive environment for him;

Not proved

b. was racist.

Not proved

Ms G

16. Between 2 April 2014 and 18 June 2014 you behaved inappropriately whilst at work towards your junior colleague Ms G in that:

a. on 3 April 2014 during operative procedures with Ms G you:

i. touched her foot with your foot underneath the operating table;

Not proved

ii. slid your foot up the inside of her leg and rested your foot between her thighs at mid-thigh level;

Not proved

iii. leant on her shoulder and whispered in her ear;

Not proved

iv. said, in reference to a patient's genitals, 'don't be scared, it won't bite', or words to that effect;

Not proved

b. on 11 April 2014 you made inappropriate comments in that you:

i. asked if Ms G was single;

Determined and found proved

ii. said that you 'knew what [Ms G] needed in a man', or words to that effect;

Determined and found proved

iii. said that she 'looked great in a pair of scrubs and didn't need to go to the gym', or words to that effect;

Determined and found proved

- iv. said that you were ‘looking forward to getting [Ms G] on a night out’, or words to that effect;
Determined and found proved
 - v. said that you ‘bet [Ms G] was really wild on a night out’, or words to that effect;
Determined and found proved
 - c. on 29 May 2014 you made inappropriate comments in that you:
 - i. asked Ms G if she had a boyfriend;
Determined and found proved
 - ii. said, ‘I thought you said you had a boyfriend now! You’re clearly not getting any at home if you need to touch my knees under the table’, or words to that effect.
Determined and found proved
17. Your actions as set out at paragraph 16 were:
- a. sexually motivated;
Determined and found proved in respect of paragraphs 16(b)(i) to (v) and 16(c)(i) to (ii)
Not proved in respect of paragraphs 16(a)(i) to (iv)
 - b. constituted sexual harassment as defined in Section 26(2) of the Equality Act 2010, in that you engaged in unwanted conduct of a sexual nature which had the purpose or effect of violating the dignity of Ms G, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her;
Determined and found proved in respect of paragraphs 16(b)(i) to (v) and 16(c)(i) to (ii)
Not proved in respect of paragraphs 16(a)(i) to (iv)
 - c. an abuse of your more senior position.
Determined and found proved in respect of paragraphs 16(b)(i) to (v) and 16(c)(i) to (ii)
Not proved in respect of paragraphs 16(a)(i) to (iv)
18. On 17 June 2014 you behaved inappropriately towards Ms G in front of colleagues in the coffee room, in that you told Ms G that she wasn’t:
- a. ‘operating or attending enough’, or words to that effect;
Not proved

b. 'working hard enough', or words to that effect'.

Not proved

19. Your actions as set out at paragraph 18 were intimidating.

Not proved

Ms H

20. Between 1 April 2015 and 30 September 2018 you behaved inappropriately whilst at work towards your colleague Ms H in that:

a. on or around 22 July 2015 you:

i. rubbed your back against Ms H's back;

Not proved

ii. said:

1. that she felt like a sporty person, or words to that effect;

Not proved

2. that you could sense she was very well in shape, or words to that effect;

Not proved

b. on a date between July 2015 and summer 2016 during a conversation with Ms H, whilst carrying out a procedure, you:

i. said you could see how professional she was in squirting, or words to that effect;

Determined and found proved

ii. said 'I didn't realise you were a squirter', or words to that effect;

Determined and found proved

iii. asked if she was like this as a woman, or words to the effect, in reference to your comments as described in paragraphs 20.b.i and/or 20.b.ii;

Determined and found proved

c. on an occasion in Summer 2015 or 2016 you:

i. touched Ms H's left knee from behind;

Determined and found proved

ii. said ‘your legs are so sporty’, or words to that effect;

Determined and found proved

d. on a date during the end of 2017 and beginning of 2018, you directly approached Ms H in a corridor and:

i. put your hands underneath her jacket and touched her waist;

Admitted and found proved

ii. said, oh dear it’s a bit too narrow for both of us here....but it feels incredibly nice’, or words to that effect;

Determined and found proved

e. on a date between January and September 2018, during a procedure you said to Ms H ‘oh, how do you prefer it; are you letting someone stick it in or are you doing it yourself?’, or words to that effect.

Not proved

21. Your actions as set out at paragraph 20 were:

a. sexually motivated;

Determined and found proved in respect of paragraphs 20(b)(i) to (iii), 20(c)(i) to (ii), and 20(d)(i) to (ii)

Not proved in respect of paragraphs 20(a)(i), 20(a)(ii)(1) to (2), and 20(e)

b. constituted sexual harassment as defined in Section 26(2) of the Equality Act 2010, in that you engaged in unwanted conduct of a sexual nature which had the purpose or effect of violating the dignity of Ms H, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

Determined and found proved in respect of paragraphs 20(b)(i) to (iii), 20(c)(i) to (ii), and 20(d)(i) to (ii)

Not proved in respect of paragraphs 20(a)(i), 20(a)(ii)(1) to (2), and 20(e)

Ms I

22. On or around 7 August 2020, you said to Ms I about a patient during an organ retrieval procedure, ‘look at all that fat, this is what happens when you eat chapatti’, or words to that effect.

Determined and found proved

23. Your comment as set out at paragraph 22:

a. constituted harassment related to race as defined in section 26(1) of the Equality Act 2010, in that you engaged in unwanted conduct related to race, which had the purpose or effect of violating the dignity of Ms I, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her;

Not proved

b. was racist.

Determined and found proved

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

To be determined

Determination on Impairment - 07/08/2024

401. 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, Mr Gilbert's fitness to practise is impaired by reason of misconduct.

The Evidence

402. The Tribunal has taken into account all the evidence received during the facts stage of the hearing, both oral and documentary.

403. In addition, the Tribunal received further evidence in the form of a stage 2 bundle on behalf of Mr Gilbert. This consisted of a reflective statement (consisting of nine pages) with relevant courses/reading summary, Continuous Professional Development (CPD) certificates, a list of reading he had completed, a statement from Mr Gilbert's Responsible Officer, various patient and colleague feedback, and a large number of positive testimonials. Mr Gilbert adopted his reflective statement as his evidence under oath on 6 August 2024.

404. The CPD certificates included '*Equality, Diversity and Human Rights*' dated 10 June 2022 and 3 May 2023, '*Dignity, Privacy and Respect*' dated 2 May 2023, and Maintaining Professional Boundaries courses dated 20-22 September 2022, 6 May 2023 and 11 June 2024.

Responsible Officer statement

405. Within the statement dated 21 May 2024 from Mr Gilbert’s Responsible Officer, Professor AB stated that he had known Mr Gilbert since 2020 when the New Foscote Hospital (NFH) started to host the Vascular Access Surgery Service on behalf of Oxford University Hospital (OUH). He stated that Mr Gilbert operated regularly at NFH whilst he was an OUH employee and that:

“the consensus at the time amongst the team at the NFH was that Mr Gilbert was an able surgeon and committed to serving the renal failure patients.”

406. Professor AB also stated that:

“Mindful of our responsibility towards all staff, Dr Gilbert’s conduct has been under close scrutiny. In all my interactions with Mr Gilbert he has shown a clear interest and enthusiasm for patient care and medical education training. His conduct at NFH and more recently at the Royal Buckinghamshire Hospital (RBH), has been impeccable. I am not aware of any complaints by patients, relatives or colleagues against him.

...

He has been most careful not to find himself in a situation where his conduct can be misinterpreted in any way. I have noted that he takes particular care not to get involved in “office humour” or small talk.

On one occasion, Dr Gilbert identified and reported suboptimal professional conduct by a resident medical officer. The matter was swiftly dealt with (sic) the hospitals internal disciplinary protocol.”

Mr Gilbert’s reflective statement

407. Within Mr Gilbert’s reflective statement dated August 2024, he stated that the last three years had been the toughest years of his life and had been *“humbling, humiliating and deeply shameful”*. Mr Gilbert stated that the allegations, dismissal from the Trust and questions over his fitness to practise, had caused shock and hurt to his family, which had extended to friends, professional colleagues, and:

“More importantly, they will have undoubtedly left a lasting impact on GMC witnesses that have decided to speak up and raise concerns about my conduct as well as the public who, till now have put their trust in me. I express my unreserved apology to them.”

408. Mr Gilbert stated that he was under no illusion as to how serious this all is, the potential consequences to him, and the distress that he has caused to others. He stated that he had never stopped thinking or reflecting on where he went wrong, the mistakes he has made, and why he failed to perceive the impact of his behaviours over the years.

409. Mr Gilbert referred to the clinical work he has undertaken in the last two years, including a six-month registrar locum position at Brighton University Hospitals in August 2022, and his clinical work at the NFH. Mr Gilbert stated that the period as a registrar enabled him to experience again the power imbalance that exists between a consultant and a trainee. He stated that this had caused him to reflect deeply on his failure to appreciate the implications of differences in seniority. Mr Gilbert stated that he had always assumed that his style of interaction was acceptable and *“had not grasped the challenges that trainees can face when in the subordinate role and their difficulty in voicing concerns about objectionable behaviour”*.

410. Mr Gilbert referred to the professional boundaries courses. He stated that, in the role of consultant, he was responsible for setting the culture and that he was acutely aware that he had failed in this responsibility at times. Mr Gilbert stated that he could see that several of the GMC witnesses had had difficulties and challenging experiences as a result, that would have been to the detriment of their training experience and professional development. Mr Gilbert stated that he now recognised that trainees looked to him for guidance and as a role model, not as their peer or a friend. He stated that this was another element, as he reflected, that he could see he got fundamentally wrong. Mr Gilbert stated that this meant he had behaved inappropriately and left individuals feeling uncomfortable for which he was truly sorry.

411. Mr Gilbert also referred to the effect on the public’s confidence in his conduct and professionalism, and in their ability to be able to fully trust him. Mr Gilbert stated that he felt a *“deep sense of remorse and a determination to leave those aspects of my past behind me”*. He stated that he could see how, even if individuals did not seem to have a problem or raise concerns in the moment, that did not mean they did not have concerns. Mr Gilbert stated that he was conscious that he had been *“blinded to this reality”* in the past and that it was not

until these allegations that he *“ever truly stopped to think about what trainees have been feeling because of my behaviour”*.

412. Mr Gilbert stated that he hoped the evidence before the Tribunal would provide reassurance that he had made fundamental changes to his practice and approach to working relationships. He stated that he *“no longer instigate[s] or engage[s] with any informal non-work-related conversations nor with jokes or innuendo of any kind”* and referred to two practical examples of when he had dealt with this. Mr Gilbert stated that he was deeply ashamed of the things he has said, particularly as he was in a leadership role at the time.

413. In terms of physical touching, Mr Gilbert stated that he historically had been demonstrative, and touching is something he had done in social, and at times workplace-based, interactions to affirm or support people. This included putting hands on their shoulders and doing a short massage or poking and tickling them in the waist area. Mr Gilbert stated that he needed to *“own my mistakes, reflect on them and consider deeply the impact that they have had”*. He apologised for these actions and behaviours and said that they had been *“wholly wrong”*.

414. Within Mr Gilbert’s reflective statement, he stated that:

“In 2012, the feedback from Ms E about behaviours was a watershed moment. I realised that my conduct and style of interaction had affected her sufficiently to flag this. I felt I had taken this feedback on board and had made changes that included putting a stop to shoulder massage and tickling. That said there have been further allegations of inappropriate touch since this moment including touch in theatres and in outpatient clinics demonstrating anatomy. I have needed to ask deep and probing questions of myself as to whether I truly did learn from this and where I have failed to get the right changes in place.”

415. In respect of comments of a racial nature, Mr Gilbert stated that it had been distressing to read the allegations connected to race. He explained why he was strongly committed to *“fostering strong and inclusive relationships with people from all races and ethnicity”*. Mr Gilbert stated that there had been times in the workplace when he had shared stories of his life experiences and, looking back, he could now appreciate that he had *“lacked understanding and sensitivity and that the sharing of out of context personal things within a workplace setting have not only created an awkwardness for colleagues but have had the potential to be considered deeply offensive”*. He stated that he had put a stop to all kinds of

personal conversations as a result. Mr Gilbert also stated that he had imitated regional and overseas accents in the past as part of some humorous exchanges with colleagues who he felt were happy to participate and reciprocate. He stated that he was *“devastated that individuals may have found this offensive and am sorry if I have left them uneasy and intimidated and had a potential impact on their dignity and working experience”*. He stated that he was truly sorry and had put a stop to this.

416. Mr Gilbert referred to, amongst other things, the regular accountability and mentorship meetings that he had been attending. He stated that he believed he was a *“different person and a fundamentally changed practitioner from the doctor whose conduct led to these complaints being raised”*. He stated that he wanted to be the very best doctor he could but that he realised that it was not just about the very best clinical care for patients in that it *“must include maintaining appropriate professional working relationships with all my colleagues”*.

Submissions

Submissions on behalf of the GMC

417. Ms Hudson submitted that Mr Gilbert’s proven actions amounted to serious misconduct and his fitness to practise is currently impaired by reason of the Tribunal’s findings. She stated that the matters found proved included non-consensual touching of colleagues, racist comments, and harassment. Ms Hudson submitted that a finding of impairment was necessary to maintain confidence in the profession and send a message that this kind of behaviour is simply unacceptable in doctors.

418. In terms of misconduct, Ms Hudson stated that the Tribunal had found that there were four colleagues who had been subject to Mr Gilbert’s sexual misconduct amounting to sexual harassment and three colleagues where he had abused his more senior position.

419. In respect of Ms A, Ms Hudson stated that this involved the use of sexual words to her during the course of an operation, sexual comments about her underwear and about *“organs”*, and physical sexual contact in the touching of her waist and of his hands up and down her body from her hips to her bra line. Ms Hudson also stated that Ms A was subject to racial harassment because of Mr Gilbert’s racist comments.

420. Ms Hudson stated that Ms E was subject to unwanted sexual physical contact on multiple occasions. She was trapped on one occasion in the office with no way to get out, and subjected to sexual comments during an operation. Ms Hudson submitted that it was particularly serious that Mr Gilbert chose to make sexual comments to Ms E when she had come to him because she was unwell and his response to a junior trainee was to make a sexual comment about a thigh XXX.

421. Ms Hudson stated that, by the time of the conduct towards Ms E coming to a close, Mr Gilbert had been warned about the consequences of his behaviour. She stated that Mr Gilbert had accepted in cross-examination that Ms E had spoken with him about his conduct. Ms Hudson stated that it was important in terms of what Mr Gilbert was prepared to accept about his behaviour and that he did not in fact change his behaviour.

422. Ms Hudson referred to the matters that had been found proved in respect of Ms G, including that she was subject to sexual harassment by Mr Gilbert. Ms Hudson submitted that there could be absolutely no doubt that Mr Gilbert had been aware of his behaviour, but he still went on to act in the way found proved in respect of Ms H.

423. Ms Hudson also referred to the racism, in relation to the comments to Ms A and Ms I.

424. Ms Hudson referred the Tribunal to the following paragraphs of Good Medical Practice (2013) ('GMP'):

"24. You must promote and encourage a culture that allows all staff to raise concerns openly and safely.

...

35. You must work collaboratively with colleagues, respecting their skills and contributions.

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."

425. Ms Hudson submitted that paragraphs 41 and 42 of the earlier 2006 version of GMP were the same as the paragraphs referenced in the 2013 edition. With reference to GMP, Ms

Hudson submitted that Mr Gilbert’s colleagues had not felt confident to come forward and complain at first. She also submitted that those who came to work with Mr Gilbert should not have been subjected to this kind of sexual and racial harassment by someone who was using their more senior position.

426. Ms Hudson referred to the GMC’s ‘*Maintaining personal and professional boundaries*’ guidance that came into effect on 30 January 2024. She stated that this would be extremely helpful in guiding the Tribunal as to whether the misconduct as found proved was serious. Ms Hudson referred to several paragraphs, including:

“5. Professional and respectful working relationships between colleagues are central to positive working cultures. It is essential that individuals feel safe and respected in their workplaces, that they feel able to speak up when they experience or witness negative behaviours, and that they are supported to do so.

..

20. All forms of sexual misconduct in medicine, including all forms of sexual harassment, are always unacceptable...

...

22. Inappropriate sexual behaviours may be carried out by medical professionals and patients. They can have devastating impacts on individual wellbeing, psychological safety, patient safety, and medical professionals’ careers.

23. Examples of unacceptable sexual behaviours can include, but are not limited to:

a. sexual or sexist comments, jokes, innuendo and ‘banter’

b. suggestive looks or leering

c. groping or repeated unwelcome touching

...

f. intrusive questions about a person’s private or sex life

...

j. propositions and sexual advances

...

l. excessive or unwanted compliments on a person’s appearance.

32. Trust and respect are central to your professional relationships with colleagues. All healthcare professionals have a responsibility for the way they behave towards colleagues and for how they respond to individuals who have been targeted by sexually motivated behaviour.”

427. Ms Hudson submitted, with reference to paragraph 22 of this guidance, that the Tribunal had heard about the impact of the behaviours upon the witnesses who had given evidence. She also submitted that Mr Gilbert's actions were clearly unacceptable sexual behaviour and that this was on more than one occasion and in respect of more than one complainant. Ms Hudson submitted that the guidance sets out very clearly that the behaviour that has been found proved is deemed to be unacceptable.

428. Ms Hudson also referred to the GMC's *'Leadership and management for all doctors'* guidance that came into effect on 12 March 2012. Ms Hudson stated that, while there was no evidence that any patient has come to any harm and the evidence shows that Mr Gilbert is a good and capable surgeon, the guidance makes clear that it is essential for good and safe patient care that a doctor works effectively with other colleagues. She submitted that this did not happen in this case.

429. Ms Hudson submitted that Mr Gilbert had not followed the relevant guidance and that the matters found proved amounted to serious misconduct.

430. In terms of current impairment, Ms Hudson submitted that a finding of impairment was required in the public interest. Ms Hudson referred to the approach set out by Dame Janet Smith in the Fifth Shipman Report, as referred to in the case of *CHRE v NMC & Grant* [2011] EWHC 927 (Admin), as follows:

"Do our findings of fact in respect of the doctor's misconduct, deficient professional performance, adverse health, conviction, caution or determination 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...."*

Ms Hudson submitted that the racism and sexual misconduct did bring the profession into disrepute and, despite earlier warnings, Mr Gilbert had not changed his behaviours over the extensive period of time and continued to act in the same way. Ms Hudson submitted that Mr Gilbert had a responsibility to recognise the imbalance of power which existed in the relationship. He had a responsibility as a senior consultant to maintain clear boundaries in

the relationship that he had with junior colleagues but he failed to do so over a significant period of time.

431. Ms Hudson submitted that the sexual misconduct that these women had been victim to was very serious. She submitted that Mr Gilbert had abused his professional position and that the sexually motivated conduct and racist comments were completely unacceptable. Ms Hudson submitted that other doctors and members of the public would find them to be unacceptable too.

432. Ms Hudson submitted that Mr Gilbert's misconduct, despite what the Tribunal will have read about his expertise and the good standard of care that he had given to patients, fell so far below the standard to be expected such as to amount to serious misconduct. She reiterated that Mr Gilbert's fitness to practise is currently impaired.

Submissions on behalf of Mr Gilbert

433. Mr Sutton submitted that an essential part of the Tribunal's enquiry would be the question of remediation. He referred to the case of *Cohen v GMC* [2008] EWHC 581 (Admin), in that:

"It must be highly relevant in determining if a doctor's fitness to practise is impaired that first his or her conduct which led to the charge is easily remediable, second that it has been remedied and third that it is highly unlikely to be repeated."

434. Mr Sutton acknowledged that, as reflected in Dame Janet Smith's guidance (as quoted above), part of the Tribunal's assessment must engage with wider public interest considerations as enshrined in the overarching objective. He invited the Tribunal, as part of its assessment, to gauge the relative severity of the conduct that it has found. Mr Sutton stated that this may sound like a bold submission given the findings around sexual motivation, harassment and racially pejorative language, but as an experienced Tribunal, it would place its findings within a spectrum of severity. Mr Sutton submitted that this would inform part of the Tribunal's inquiry into issues of remediation, public protection, and the standing of the profession more generally.

435. Mr Sutton invited the Tribunal to consider the findings it had made within the context of Mr Gilbert's practice at the Trust including specifically his interactions with members of the clinical team. He referred to Mr Gilbert's clinical contribution. Mr Sutton stated that the

Tribunal is primarily concerned with matters of behaviour and of interaction with clinical colleagues. He suggested that there was a very substantial body of evidence to draw upon to inform the Tribunal's appreciation of this point. Mr Sutton submitted that it was relevant for the Tribunal to ask itself whether the findings it has made permeate the entirety of Mr Gilbert's practise during the period or if they are inconsistent with the generality of the evidence that it has in front of it. He submitted that this would be relevant to the Tribunal's assessment as to remediation. Mr Sutton also invited the Tribunal to have regard to the admissions that Mr Gilbert had made and the accompanying apology for the impact of his conduct.

436. Mr Sutton invited the Tribunal to consider Mr Gilbert in an overall context by looking at the matters in three discrete periods of time: (1) his time at Oxford until his employment was terminated, (2) his experiences as a registrar in Brighton for six months from August 2022, and (3) his experiences working at NFH as a surgeon and now as part of the management team. Mr Sutton also invited the Tribunal to have close regard to the content of Mr Gilbert's reflective statement.

437. In terms of (1), Mr Sutton referred to Mr Gilbert's witness statement regarding his clinical role in vascular access and transplant surgery. He submitted that Mr Gilbert's clinical work is well regarded and invited the Tribunal to note the significant level of commitment undertaken. Mr Sutton also submitted that these roles gave the Tribunal an indication of the number of trainees with whom Mr Gilbert was routinely interacting and could feed the Tribunal's appreciation of the concerns that had been raised relative to Mr Gilbert's practice judged in the round.

438. Mr Sutton referred to Mr Gilbert's witness statement that no concerns had been raised with him about his conduct between 2014 and 2021. He referred to Ms Hudson's submission in which she placed emphasis on the conversation that took place between Mr Gilbert and Ms E. Mr Sutton submitted that it was also relevant for the Tribunal to consider the period of seven years when Mr Gilbert was engaging in practice without any complaint being made to him about his style of interaction with colleagues.

439. In terms of the wider evidential picture, Mr Sutton suggested that there was a very significant body of material to inform the Tribunal's assessment of how Mr Gilbert's practice was progressing over the relevant time period. He stated that the Tribunal had the evidence of the theatre nurses and submitted that they provided very significant insight into Mr Gilbert's style of interaction with colleagues on a routine basis over years.

440. Mr Sutton referred the Tribunal to various extracts from the many positive testimonials provided on behalf of Mr Gilbert. These included, but were not limited to:

[Ms AD, Lead Vascular Access Nurse Specialist]

“He treated everyone with respect. He would allow everyone to ask questions and he encouraged [an] exchange of opinions and ideas. I can confidently say that I have never witnessed any form of inappropriate behaviour or harassment by Mr. Gilbert towards members of staff. I also never witnessed any racial remarks or comments before, during or after these sessions. I have never received any complaints about Mr. Gilbert from any member of staff, including student nurses who were on the dialysis units at the time.”

[Ms AE, who was the Chief Operating Officer of the NFH at the time of working with Mr Gilbert]

“I spent a considerable amount of time working with Mr Gilbert during this period, and in all instances found him to be completely dedicated to his job, professional, courteous and a pleasure to work with. My interactions with Mr Gilbert were always friendly, and he was entirely focused on the nature of his work and his patients. I worked with many Consultants during my time at The New Foscote Hospital and I can say with certainty that I always considered him to be a huge asset to the hospital.

During the entirety of my relationship with Mr Gilbert I found him to be an extremely pleasant, competent, and professional colleague, who was well loved by everyone in our theatre department, including team members of various ages and nationalities. We employed many nurses from overseas including from the Philippines, Jamaica and India, and many junior HCAs who interacted with Mr Gilbert regularly. Whilst I cannot remember any comments verbatim, I do recall more than one instance whereby staff members commented on how much they enjoyed working with Mr Gilbert since he began to operate at our facility.”

[Ms BA, who was a Ward Sister and then Matron at the time of working with Mr Gilbert]

“Throughout the years, ward staff would frequently approach Mr Gilbert when they faced challenges because they found him approachable, and he would be responsive and attentive to their needs. In my role as Ward Sister and later Matron, I never had a member of my team voicing discontent regarding Mr Gilbert’s behaviour. To put it into

context, this was not the same scenario for other members of the medical team, where I did have concerns raised and escalated to the Clinical Lead.

...

The Transplant team was proudly diverse in terms of ethnic background, religious beliefs, sexuality, etc and we often celebrated that with small ward events. We would often discuss our different cultural backgrounds and shared experiences and I never heard negative comments that could have been perceived as racist from anyone within the teams, including Mr Gilbert.”

441. Mr Sutton stated that the Tribunal might think that this evidence had certain echoes of the oral evidence that it had heard from theatre nurses who also said that they had had occasion to escalate concerns but never in Mr Gilbert’s case. He invited the Tribunal to have regard to this meaningful evidence of how Mr Gilbert was perceived as a colleague and to measure these observations alongside the findings that have been made, regarding racially pejorative remarks, to assess whether they were characteristic in any sense of Mr Gilbert’s behaviour or at odds with the behaviour of those working closely with him.

442. Mr Sutton stated that, whilst not centre stage, it is often observed that there is a public interest in harnessing the skills of capable and committed clinicians. He submitted that the observations and perspectives about Mr Gilbert’s clinical contribution and ability were matters that were relevant to the Tribunal’s assessment at this stage.

443. Mr Sutton invited the Tribunal to feed all of the perspectives contained in the testimonials into its assessment of Mr Gilbert’s fitness to practise viewed in its wider context as to whether the issues highlighted in the findings are representative of his practice as experienced from all of those different viewpoints. Mr Sutton also invited the Tribunal to consider the training experience of the complainants themselves, including the communications that Mr Gilbert had when Ms A faced a concern. Mr Sutton highlighted the tenor of Mr Gilbert's intervention and how he acted in a measured way to try and address/rectify the issue.

444. Mr Sutton invited the Tribunal to accept that Mr Gilbert had fully engaged in the Trust's internal disciplinary process and with these proceedings. He also submitted that Mr Gilbert had made a number of significant admissions, in circumstances where he had been clear in terms of what he could recall and made candid acknowledgement to that effect. Mr Sutton stated that Mr Gilbert has also expressed his apology for the injury that he has caused to the complainants, even in relation to matters where he does not recall events in the same

manner that they do. Mr Sutton stated that Mr Gilbert has nevertheless appropriately acknowledged the hurt that they have described and expressed his remorse for it.

445. In terms of (2), Mr Sutton invited the Tribunal to accept that Mr Gilbert embraced the opportunity in this locum registrar position and, as set out in his reflective statement, it gave him an opportunity to reflect on the power dynamic that exists. Mr Sutton referred to the various positive testimonials from Mr Gilbert’s time in this role. He stated that they gave an understanding of how Mr Gilbert responded going from a high performing and innovative vascular surgeon to fulfilling the role of a registrar. Mr Sutton submitted that Mr Gilbert had done so with complete commitment and had displayed none of the behaviours that have given rise to the index concerns.

446. In terms of (3), Mr Sutton referred to Mr Gilbert’s comments on the professional boundaries courses undertaken. Mr Sutton submitted that it was telling that one of these courses was referred to by Mr Gilbert as one of the most valuable professional development programmes that he recalled having been on. He also referred to the statement from Mr Gilbert’s Responsible Officer, Professor AB, and invited the Tribunal to note the observations he made about Mr Gilbert and the contribution that he had provided to the NFH.

447. Mr Sutton invited the Tribunal to see the range of observations made as providing a cohesive and consistent body of evidence that demonstrates that the behaviours that this Tribunal has made findings about have not been replicated. He stated that this was from the perspective of the whole range of people who would be expected to see that in any phase of his employment after the material events.

448. Mr Sutton referred to the comments of Dr BB, who acted in a mentor role for Mr Gilbert. Dr BB said that Mr Gilbert had been:

“fully engaged, cooperative, enthusiastic and very committed to understanding more about his own psyche and what motivated him... Our work spanned a total of 33 sessions... from June 21 through to April 23.

He was extremely honest, humble, able to be challenged, able to reflect and showed understanding and a realistic formulation of potential future employment.

I should be very happy to be a referee for him. He would be an asset to any organisation that he works with in the future.”

449. Mr Sutton referred to a number of other testimonials. He submitted that they provided important perspectives and experiences in respect of the issue of the extent to which Mr Gilbert has ingrained attitudinal issues or whether or not the experience of so many people working along alongside him was such that any attitudes have been effectively remediated and confronted. He submitted that the body of evidence to that effect was comprehensive and compelling.

450. Mr Sutton referred to the patient surveys and feedback. He submitted that this fed into the Tribunal's wider assessment of the public interest. Mr Sutton also referred to the extensive reading that Mr Gilbert has engaged in, the CPD courses, and reflective statement. He suggested that this provided a picture consistent with a clinician engaging with areas of criticism and concern about their practice and trying, in a genuine and committed way, to address and remediate those concerns.

451. Mr Sutton invited the Tribunal to give appropriate weight to the body of evidence he had highlighted to place alongside the public interest concerns and the public interest perspective. He submitted that the Tribunal should bear in mind the compelling public interest in having an effective, committed, and compassionate clinician continuing to work.

The Relevant Legal Principles

452. 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.

453. In approaching the decision, the Tribunal was mindful of the two-stage process to be adopted: first whether the facts as found proved amounted to misconduct, and that the misconduct was serious, and then whether the finding of that misconduct which was serious, could lead to a finding of impairment.

454. In respect of misconduct, the LQC referred to the comments of Lord Clyde in the case of *Roylance v GMC [No 2]* [2000] 1 AC 311, that:

"Misconduct is a word of general effect, involving some act or omission which falls short of what would be proper in the circumstances. The standard of propriety may often be found by reference to the rules and standards ordinarily required to be

followed by a medical practitioner in the particular circumstances. The misconduct is qualified in two respects. First, it is qualified by the word “professional” which links the misconduct to the profession of medicine. Secondly, the misconduct is qualified by the word “serious”. It is not any professional misconduct which would qualify. The professional misconduct must be serious.”

455. The LQC also referred to the case of *Meadow v GMC* [2006] EWHC 146 (Admin), which affirmed that ‘misconduct’ should not be viewed as anything less than serious professional misconduct.

456. If misconduct is established, then the Tribunal must determine whether Mr Gilbert’s fitness to practise is impaired today, taking into account Mr Gilbert’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.

457. The LQC stated that there was no statutory definition of ‘impairment’ but that the Tribunal could be assisted by the observations of Dame Janet Smith in the Fifth Shipman Report, as referred to in the case of *Grant* (and quoted above in Ms Hudson’s submissions).

458. The LQC reminded the Tribunal that it must consider the statutory overarching objective throughout its deliberations, namely, to act in a way that:

- a. protects, promotes and maintains the health, safety and wellbeing of the public;
- b. promotes and maintains public confidence in the profession;
- c. promotes and maintains proper professional standards and conduct for members of the profession.

459. In addition, the LQC referred to the case of *Grant* in that the Court said that:

“it is essential, when deciding whether fitness to practise is impaired, not to lose sight of fundamental considerations... namely the need to protect the public and the need to declare and uphold proper standards of conduct and behaviour so as to maintain public confidence in the profession.

...

the relevant panel should generally consider not only whether the practitioner continues to present a risk to members of the public... but also whether the need to uphold proper professional standards and public confidence in the profession would be

undermined if a finding of impairment were not made in the particular circumstances.”

The Tribunal’s Determination on Impairment

Misconduct

460. The Tribunal first considered whether Mr Gilbert’s actions amount to misconduct.

461. In reaching its determination, the Tribunal reminded itself of its findings. It considered each paragraph of the Allegation that had been admitted or which the Tribunal had determined and found proved. Within this exercise the Tribunal identified two areas that it determined did not amount to misconduct which was serious, namely paragraph 11(j) and paragraphs 14(a) and (b) of the Allegation.

462. In terms of paragraph 11(j), the Tribunal determined that the telephoning of Ms E outside of work when he had no reason to do so was inappropriate behaviour. It noted that the nature of the conversations were innocuous and in no way sexual. The Tribunal concluded that this conduct did not amount to misconduct which was serious.

463. In terms of paragraphs 14(a) and (b), the Tribunal determined that its findings of paragraph 15 being not proved were such that the conduct at 14 did not amount to serious misconduct as it did not constitute harassment related to race, nor have the Tribunal found that the comments were racist.

464. The Tribunal reminded itself of each of the remaining findings. The findings included comments that were found to be sexually motivated and constituted sexual harassment. There were actions of touching of a non-consensual nature, which the complainants found discomforting and troubling, and were motivated by sexual gratification. There were also two examples of racist comments being made. The Tribunal was also conscious that the conduct was in respect of five junior colleagues and there were abuses of Mr Gilbert’s senior position in relation to two colleagues.

465. In respect of the racist comments, the Tribunal had described these within the Facts determination as low-level racist comments in terms of their seriousness, without seeking to undermine that they were nonetheless racist comments. The Tribunal was clear that this conduct nonetheless represented misconduct that was serious and were within a

professional context. The ones in respect of Ms A were also found to have amounted to harassment related to race.

466. The Tribunal has considered each remaining part of the Allegation and has determined that each of these represent a departure from the standards set out in GMP. The Tribunal considered that paragraphs 36, 37 and 65 of GMP (which are quoted above) were engaged in this case, as well as paragraph 1 of GMP:

“Patients need good doctors. Good doctors make the care of their patients their first concern: they are competent, keep their knowledge and skills up to date, establish and maintain good relationships with patients and colleagues, are honest and trustworthy, and act with integrity and within the law.”

467. The Tribunal has concluded that Mr Gilbert’s conduct fell so far short of the standards of conduct reasonably to be expected of a doctor as to amount to misconduct. The Tribunal determined that the conduct found proved would undermine public confidence and did not uphold the standards of the profession.

Impairment by reason of misconduct

468. The Tribunal, having found that the facts found proved amounted to misconduct, went on to consider whether Mr Gilbert’s fitness to practise is currently impaired by reason of his misconduct.

469. The Tribunal considered whether Mr Gilbert’s conduct was remediable, whether it had been remediated, and any likelihood of repetition.

470. With regards to remediation, the Tribunal determined that the conduct was capable of remediation. In its deliberations it took account of various factors including the CPD certificates, list of reading undertaken, the statement from the Responsible Officer, as well as the mentorship and accountability sessions. The Tribunal bore in mind the positive testimonials provided on Mr Gilbert’s behalf and noted that there had been no other concerns identified, nor any repeat of the behaviour since. The Tribunal determined that there was a high level of remediation shown by Mr Gilbert and he has carried out activities to remediate his actions.

471. In respect of insight, there were a number of factors that the Tribunal took into account. These included the professional boundaries courses that were all undertaken since

Mr Gilbert’s dismissal from the Trust, the comments from Mr Gilbert’s Responsible Officer, and the mentorship peer support sessions with Dr BB. It also had regard to the accountability meetings that Mr Gilbert referred to, that included a weekly 1:1 with the Director of Nursing and with the Director of Governance to discuss and reflect on his behaviour toward staff in the hospital as well as during weekly hospital management meetings.

472. The Tribunal acknowledged that Mr Gilbert was entitled to deny the allegations against him and put forward his defence without this being held against him. The Tribunal also considered, in terms of insight, Mr Gilbert’s written reflective statement whereby he commented upon the impact that his behaviour has had on others. The Tribunal determined that this demonstrated insight in that he appreciated the impact of his actions on others.

473. The Tribunal noted that this was an experienced doctor of over 20 years qualification who had, only recently, appraised himself and became aware in more detail as to the need to maintain professional boundaries, how to do so, and the consequences of a failure to do so. The Tribunal noted also that Mr Gilbert had, for a number of years, had an educational trainer role in respect of various trainees and therefore should have been more than aware of the importance of maintaining professional boundaries in any event.

474. The Tribunal considered, within Mr Gilbert’s reflective statement, that he stated that:

“In 2012, the feedback from Ms E about behaviours was a watershed moment. I realised that my conduct and style of interaction had affected her sufficiently to flag this. I felt I had taken this feedback on board and had made changes that included putting a stop to shoulder massage and tickling.”

475. The Tribunal noted that, after the handing down of its Facts determination, Mr Gilbert maintained on oath before it that this was still his view. The Tribunal however, had found proved misconduct relating to non-consensual physical touching, comments made for sexual gratification purposes, and racist comments against four other colleagues after 2012. The Tribunal, in its judgement, concluded that the feedback from Ms E was not a “watershed moment” for Mr Gilbert as he had carried on behaving inappropriately and that if there was a “watershed moment” then it was likely to have been when Mr Gilbert was dismissed from the Trust in 2022.

476. The Tribunal noted from the reflective statement that Mr Gilbert no longer involves himself in innuendo, and provided examples to show how he now conducts himself with

colleagues at work. It was conscious that there had been no repetition of any such behaviour since the material concerns and appears to have taken every opportunity to demonstrate that he is working well and without issue.

477. The Tribunal concluded that Mr Gilbert had demonstrated a significant degree of insight and had taken a number of steps to remediate his failings. However, Mr Gilbert's insight was not fully developed into the full extent of his behaviour as found proved by the Tribunal. He may benefit from further time to digest and reflect on the findings against him.

478. The Tribunal determined that, without sufficient insight into the full breadth of his misconduct, it could not conclude that the behaviours complained of were highly unlikely to be repeated.

479. The Tribunal considered that limbs *b* and *c* of the test set out by Dame Janet Smith (quoted above), were applicable in this case. The Tribunal concluded that Mr Gilbert's misconduct did have the effect of bringing the medical profession into disrepute. It found that he had breached fundamental tenets of the medical profession by non-consensual touching of three colleagues on six occasions, sexually motivated comments and sexual harassment of four colleagues, racist comments to two colleagues, abuse of his senior position to three colleagues, and one colleague subject to racial harassment.

480. In particular, the Tribunal concluded that the need to maintain public confidence in the medical profession, and the standard of behaviour within the profession, required the finding that Mr Gilbert's fitness to practise is currently impaired by reason of his misconduct. Members of the public would not have confidence in doctors if the Tribunal regarded such misconduct, with evidence of further reflection needed and development of insight required, as not impairing a doctor's fitness to practise.

481. In the light of all of the above, the Tribunal has therefore determined that Mr Gilbert's fitness to practise is impaired by reason of misconduct.

Determination on Sanction - 08/08/2024

482. Having determined that Mr Gilbert'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

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

Submissions

Submissions on behalf of the GMC

484. Ms Hudson submitted that erasure of Mr Gilbert’s name from the medical register was the appropriate sanction in this case.

485. Ms Hudson submitted that this was not a case where no action could be taken on Mr Gilbert’s registration as matters were far too serious and over far too long a period of time. She submitted that conditions were also not appropriate in a case involving such serious misconduct. Ms Hudson asked how conditions could be formulated that would deal with the Tribunal’s findings in this case.

486. Ms Hudson referred to the Sanctions Guidance (5 February 2024) (‘the SG’). She submitted that the Tribunal’s findings were at the serious end of what is expected of a doctor, and that the various guidance referred to by the Tribunal in its Impairment decision meant that this was a case where erasure was a proportionate response.

487. Ms Hudson suggested, with reference to paragraph 55 of the SG, that there were a number of aggravating features in this case. She submitted that there had been a *“failure to work collaboratively with colleagues”, “discrimination against... colleagues”, “abuse of professional position”* in terms of the abuse of seniority towards junior colleagues, sexual harassment, racial comments, and harassment related to race. Ms Hudson submitted that each individual aspect would *“lead the Tribunal to consider taking more serious action”* but, in these circumstances, this behaviour had gone on for so long, and in respect of so many of Mr Gilbert’s junior colleagues, that this was an extremely serious matter. She suggested that this justified her submission for the sanction of erasure in this case.

488. Ms Hudson also referred to paragraph 56 of the SG in terms of aggravating factors. She submitted that, although under the heading *“Conduct in a doctor’s personal life”*, it was still relevant as it listed discrimination relating to characteristics protected by law and applied

in the same way to conduct towards colleagues. Ms Hudson submitted that sex and race were both features of discrimination that featured in Mr Gilbert’s case.

489. Ms Hudson recognised that the Tribunal would take account of the overarching objective and look at the different outcomes that are open to it. She submitted that when the Tribunal considered this, with reference to the guidance, it was the case that Mr Gilbert’s actions were such that they were fundamentally incompatible with continued registration. Ms Hudson stated that Mr Gilbert was a very skilled doctor but submitted that one aspect of his behaviour was that he had taken advantage of junior colleagues and carried out a course of significant sexual and racial misconduct that was incompatible with continued registration. She submitted that erasure was appropriate in order to maintain public confidence in the profession and to uphold proper standards of conduct and behaviour.

490. Ms Hudson stated that the matters could not be described as an isolated incident, and there was a patent disregard for the guidance that all doctors are to follow, on a persistent basis over a decade. She referenced that Mr Gilbert had already been spoken to about his behaviour but recognised what the Tribunal had said in its Impairment determination in respect of the “watershed moment”.

491. Ms Hudson stated that it was open to the Tribunal to suspend Mr Gilbert’s registration for up to 12 months and this would have a deterrent effect and send out a message that this kind of misconduct would not be tolerated.

492. Ms Hudson recognised that, with reference to paragraph 93 of the SG, there is scope for the Tribunal to find that there had been some “*acknowledgement of fault*” but referred the Tribunal to the following parts of paragraph 97 of the SG:

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

a. A serious departure from Good medical practice, but where the misconduct is not so difficult to remediate that complete removal from the register is in the public interest. However, the departure is serious enough that a sanction lower than a suspension would not be sufficient to protect the public.

...

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

493. In terms of (a), Ms Hudson submitted that this case was not just one serious departure but involved multiple departures from GMP over a sustained period of time and where there were multiple victims of what Mr Gilbert has done.

494. In respect of (f), Ms Hudson stated that, whilst there had not been any repetition since referral to the GMC, there had been repetition of similar behaviour. She referred to the position that Ms A and Ms E were in (in 2010 and 2012) and that the behaviour towards the other complainants continued right up until 2021.

495. Ms Hudson submitted that the seriousness and the aggravating features meant that suspension was not appropriate. She referred to the relevant paragraphs of the SG in relation to erasure. Ms Hudson submitted, with reference to paragraph 109 of the SG, that there had been serious departures *“from the principles set out in Good medical practice where the behaviour is difficult to remediate”*. She stated that this related to the physical touching, the use of inappropriate sexual and racist language, and the harassment.

496. Ms Hudson submitted that there had also been *“a deliberate or reckless disregard for the principles”* set out in GMP. She stated that Mr Gilbert was a senior consultant for a considerable period of the time to which the Allegation referred, who had a vast amount of experience, in terms of education and medical practice, and who knew what the rules were. Ms Hudson submitted that Mr Gilbert knew how he should have treated colleagues but was prepared to do things quite literally *“under the table”*. She submitted that there was disregard for how Mr Gilbert knew he should be practising and treating colleagues, and that this was done for his own sexual gratification. Ms Hudson also submitted that there was an *“abuse of position”* in terms of Mr Gilbert’s seniority, and there was sexual touching that was more serious than if it had just been words alone.

497. Ms Hudson submitted that the features identified in paragraph 109 of the SG made it clear that the discrimination and sexual misconduct, had the capacity to seriously undermine public trust, and had a significant impact on the women that the Tribunal has heard evidence from.

498. Ms Hudson submitted that, despite what the Tribunal had said about insight and despite the fact that this was not a case where there was criticism of Mr Gilbert’s technical skills, the seriousness and persistence of the matters found meant that erasure was the appropriate and proportionate response,

Submissions on behalf of Mr Gilbert

499. Mr Sutton submitted that, while the SG was an important document, it was guidance and, ultimately, the decision on the appropriate disposal of this case was a matter for the Tribunal's collective judgement based on a fair minded and proportionate appreciation of the evidence. He submitted that it should not be approached as a series of tick box categories that bind the decision making. Mr Sutton referred to the key principle of the need for proportionality, in "*weighing the interests of the public against those of the doctor*". He invited the Tribunal to have this principle at the forefront of its approach. He stated that primacy, of course, must be given to the public interest but invited the Tribunal to see Mr Gilbert's interests as embracing his interest in pursuing his professional calling but also his livelihood.

500. Mr Sutton invited the Tribunal to have regard to the paragraphs of the SG in respect of mitigating factors. He submitted that these should be borne in mind when calibrating what sort of sanction was appropriate. Mr Sutton submitted that there was evidence that Mr Gilbert understands the problems, and has insight, and referred to the attempts to address and remediate. Mr Sutton submitted that that this was an area where the Tribunal's Impairment determination became very important and that a number of the observations made within it seemed at odds with the thrust of the GMC's submission that this should be regarded as an erasure case.

501. Mr Sutton submitted that he derived from the Impairment determination that Mr Gilbert had made important and well-evidenced steps down the journey of remediation, reflection, and insight. Also, that the journey, although well advanced, was not complete. He reminded the Tribunal that these observations sit alongside the notion that sanctions are not about punishment and are squarely concerned with public protection and the overarching objective.

502. Mr Sutton submitted that the finding of impairment was a significant marker in terms of the public perception of how Mr Gilbert's regulator views his conduct and the reasons underpinning that conclusion. Mr Sutton submitted that the finding and its implications were salutary, as had been this whole process in terms of Mr Gilbert's understanding, reflection, and amendments to his professional approach in the light of the concerns that have been raised.

503. Mr Sutton stated that mitigating factors also included Mr Gilbert's expressions of apology and the admissions made by him. Mr Sutton stated that Mr Gilbert had never said that any witness was lying, despite being invited in cross-examination to characterise them in those terms. Mr Sutton stated that Mr Gilbert has expressed his genuine remorse for what he has heard in the course of this hearing.

504. Mr Sutton, with reference to his submissions at the Impairment stage, invited the Tribunal to consider Mr Gilbert's misconduct in its wider setting. He asked that they not be regarded as wholly distinct from all the other aspects of Mr Gilbert's practice.

505. Mr Sutton stated that it was clear from the Tribunal's determination that Mr Gilbert should have had a much better appreciation of expectations in terms of professional boundaries. Mr Sutton submitted that Mr Gilbert has readily conceded that deficiency, and has set out in his reflective statement the learning undertaken. Mr Sutton submitted that Mr Gilbert had learnt a great deal and that his journey of professional development was well evidenced in the material before the Tribunal.

506. Mr Sutton referred to the Tribunal's comments regarding the high level of remediation shown by Mr Gilbert. Mr Sutton submitted that this journey of reflection was reflected in the comments from several people including his Responsible Officer and current employer, but also more wildly by those who experience Mr Gilbert's day-to-day conduct in the workplace. Mr Sutton submitted that Mr Gilbert's learning from this case and his experience has been usefully translated into an improved working environment in his current workplace. He stated that the evidence also reflects that Mr Gilbert is delivering extremely important and valued patient care.

507. Mr Sutton stated that Mr Gilbert fully acknowledges that this hearing process was part of a continuing process of reflection and self-challenge. Mr Sutton stated that Mr Gilbert fully understood why the Tribunal considered that the journey was yet to be completed. Mr Sutton invited the Tribunal to consider where, within the range of sanctions, that process of further remediation and reflection was best undertaken. He submitted that depriving Mr Gilbert of the opportunity to carry out further medical practice was wholly disproportionate, particularly in the light of the Tribunal's observations in its Impairment determination.

508. Mr Sutton asked whether the public interest was best served in terms of a ceasing or halting of Mr Gilbert's practice or whether the process of ongoing reflection could better be undertaken in an environment where he is doing good for patients and for fellow members

of the clinical team at NFH. Mr Sutton asked the Tribunal to consider whether there were structures that could be put in place to provide the requisite public interest protection. He stated that these could include Mr Gilbert's ongoing supervision and mentor/accountability sessions, with a process of review and reporting to demonstrate that the process of ongoing reflection was being fully adhered to, and with a satisfactory conclusion after an appropriate period of time.

509. Mr Sutton invited the Tribunal to engage with conditions as a serious alternative to the notion of Mr Gilbert being prevented from practising even for a short period of time. He submitted that, whilst the matters are undoubtedly serious, the finding of impairment goes some considerable way to recording the regulator's concern about the conduct in question. Mr Sutton asked, whilst the Tribunal considers the journey of remediation and insight well advanced but not complete, whether it necessarily had to be completed in a way that entailed cessation of Mr Gilbert's practice. He invited the Tribunal to engage with the question of whether that process could legitimately be undertaken in the workplace with the protective structures in place.

The Tribunal's Determination on Sanction

510. The decision as to the appropriate sanction to impose, if any, in this case is a matter for this Tribunal exercising its own judgement.

511. In reaching its decision, the Tribunal has taken account of the SG and of the overarching objective. It has borne in mind that the purpose of the sanctions is not to be punitive, but to protect patients and the wider public interest, although they may have a punitive effect.

512. The Tribunal has also had regard to the principle of proportionality, which means balancing Mr Gilbert's interests with the public interest.

Aggravating and mitigating factors

513. The Tribunal has found that Mr Gilbert's actions amounted to non-consensual touching of three colleagues on six occasions, sexually motivated comments, and sexual harassment of four colleagues, racist comments to two colleagues, abuse of his senior position to three colleagues, and one colleague subject to racial harassment.

514. In terms of aggravating factors, the Tribunal considered:

- the abuse of his position over a number of junior colleagues over a protracted period of time;
- there were two opportunities where concerns about Mr Gilbert’s behaviour were brought to his attention, i.e. in 2012 and 2014, but he did not change his behaviour. The Tribunal considered that the opportunities to change were not taken up and so these failures amounted to an aggravating factor.

515. The Tribunal has identified a number of mitigating factors in this case:

- it considered that the insight shown by Mr Gilbert into his misconduct and the efforts undertaken to remediate were mitigating factors;
- the regret and remorse expressed by Mr Gilbert;
- no previous fitness to practise history;
- no evidence to suggest that he had repeated the misconduct since the referral to the GMC;
- In terms of mitigation, the Tribunal had regard to the many positive testimonials provided on behalf of Mr Gilbert. It concluded that a number of the testimonials evidenced the work that Mr Gilbert has done to remediate his behaviour since his dismissal from the Trust in 2022.

No action

516. In coming to its decision as to the appropriate sanction, if any, to impose in Mr Gilbert’s case, the Tribunal first considered whether to conclude the case by taking no action.

517. The Tribunal determined that, in view of the serious nature of its findings on impairment, it would be neither sufficient, proportionate nor in the public interest to conclude this case by taking no action. There were no exceptional circumstances to justify the Tribunal taking no action.

Conditions

518. The Tribunal noted Mr Sutton’s submission that the finding of impairment was a marker that had its own resonance and he suggested that the Tribunal should allow Mr

Gilbert to continue his current practice by imposing conditions that were very similar to how he currently works. This included supervision, one-to-one reflection meetings, and mentorship.

519. The Tribunal considered whether it would be sufficient to impose conditions on Mr Gilbert's registration. It has borne in mind that any conditions imposed would need to be appropriate, proportionate, workable and measurable.

520. The Tribunal noted that, with reference to paragraph 81 of the SG, conditions might be most appropriate in cases involving the doctor's health, where there is a lack of necessary knowledge of English or involving issues around the doctor's performance. The Tribunal was clear that these factors were not relevant in Mr Gilbert's case.

521. The Tribunal again had regard to the serious nature of its findings as set out in the Impairment determination in that Mr Gilbert had breached fundamental tenets of the medical profession and that his actions had the effect of bringing the profession into disrepute.

522. The Tribunal rejected Mr Sutton's suggestion as it determined that, whilst there could be workable and measurable conditions put in place, it would not be proportionate as it would not mark the seriousness of the misconduct or address its findings on Impairment.

Suspension

523. The Tribunal then went on to consider whether suspending Mr Gilbert's registration would be appropriate and proportionate.

524. The Tribunal had regard to its findings in respect of misconduct and impairment, as well as the submissions provided by both parties. It also had regard to the aggravating and mitigating factors listed above and considered the paragraphs of the SG in relation to suspension, including the following paragraphs:

"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. Suspension from the medical register also has a punitive effect, in that it prevents the doctor from practising (and therefore from earning a living as a doctor) during the suspension, although this is not its intention.

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 (ie 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.”

525. The Tribunal determined that the following sections of paragraph 97 of the SG applied in this case:

“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, eg 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.”

526. The Tribunal considered these paragraphs of the SG regarding suspension and had regard to the aggravating and mitigating factors as outlined above.

527. The Tribunal has found that Mr Gilbert’s actions did amount to a serious breach of GMP and a departure from the relevant principles. Mindful of its findings at the Impairment stage, the Tribunal concluded that any sanction lower than suspension would not be sufficient or appropriate in order to maintain public confidence in the medical profession.

528. The Tribunal recalled its comments from its Impairment determination that there had been no repetition of any such behaviour since the material concerns had been brought to the attention of the GMC. Mr Gilbert appears to have taken every opportunity to demonstrate that he is working well and without issue. The Tribunal was satisfied that Mr Gilbert has insight but without sufficient insight into the full breadth of his misconduct, it could not conclude that the behaviours complained of were highly unlikely to be repeated. The Tribunal concluded that Mr Gilbert does not pose a *“significant risk of repeating behaviour”*.

529. The Tribunal considered that, taken together, the factors at paragraph 97 indicated that suspension was an appropriate sanction in this case.

530. In all the circumstances, the Tribunal determined that suspension of Mr Gilbert’s registration would be appropriate and proportionate in this case. It considered that suspension would properly mark the seriousness of Mr Gilbert’s misconduct, would protect the public interest, and would uphold and maintain professional standards in the medical profession. Further, a period of suspension would send out a clear message to the public, the medical profession, and Mr Gilbert, that such behaviour is not acceptable.

Consideration of erasure

531. Whilst the Tribunal concluded that a period of suspension was the appropriate and proportionate sanction, in view of Mr Gilbert’s misconduct, it considered whether erasure would be an appropriate sanction. It noted that a Tribunal may erase a doctor’s name from the medical register in any case *“where this is the only means of protecting the public”* (paragraph 107 of the SG), or where it *“is necessary to maintain public confidence in the profession”* (paragraph 108).

532. The Tribunal determined that the following sections of paragraph 109 of the SG were relevant in this case:

“Any of the following factors being present may indicate erasure is appropriate (this list is not exhaustive).

a. A particularly serious departure from the principles set out in Good medical practice where the behaviour is difficult to remediate.

b. A deliberate or reckless disregard for the principles set out in Good medical practice and/or patient safety.

...

d. Abuse of position/trust (see Good medical practice, paragraph 81: ‘You must make sure that your conduct justifies your patients’ trust in you and the public’s trust in the profession’).

...

f. Offences of a sexual nature, including involvement in child sex abuse materials (see further guidance below at paragraphs 151–159).”

533. In terms of (a), whilst Mr Gilbert’s behaviour was a serious departure from the principles set out in GMP the Tribunal concluded that the behaviours complained of were not difficult to remediate in the light of its findings on Impairment. With regard to (b), the Tribunal did consider Mr Gilbert’s actions to amount to a reckless disregard for the principles set out in GMP given that concerns lodged by Ms E and Ms G and the continuation of the behaviour. In terms of (d), the Tribunal considered that this abuse was not in relation to patients but was in respect of colleagues and that does impact on the public’s trust in the profession.

534. With regard to (f), the Tribunal noted that there were three examples on six occasions of non-consensual touching that was motivated by sexual gratification. The Tribunal concluded that, on a spectrum of serious, this was not the type of matter as discussed at paragraphs 151 to 159 of the SG. It also had regard to its comments and conclusion in its Impairment determination as to Mr Gilbert’s misconduct being remediable and, to a large extent, remediated.

535. The Tribunal determined that Mr Gilbert’s misconduct, whilst a serious breach of GMP, was not fundamentally incompatible with continued registration and that erasure of

Mr Gilbert’s name from the Medical Register would be disproportionate. It remained of the view that a period of suspension was the appropriate and proportionate response.

Length of suspension

536. The Tribunal had regard to paragraphs 99 to 102 of the SG, including paragraph 100 which sets out the factors which are relevant when determining the length of suspension. They are:

- “a. the risk to patient safety/public protection*
- b. the seriousness of the findings and any mitigating or aggravating factors...*
- c. ensuring the doctor has adequate time to remediate.”*

537. The Tribunal was also mindful that, as at paragraph 101 of the SG, its *“primary consideration should be public protection and the seriousness of the findings”*.

538. The Tribunal noted that these incidents did not give rise to concerns about risks to patient safety, and that there was evidence that Mr Gilbert was otherwise a skilled and well-regarded doctor.

539. The factors that the Tribunal considered were relevant included the extent to which Mr Gilbert departed from the principles of GMP, the extent to which his actions risked public confidence, the extent of his misconduct, and the seriousness of his inappropriate behaviour. The Tribunal also noted the aggravating and mitigating factors as outlined above.

540. The Tribunal had regard to the steps taken by Mr Gilbert including his remedial action, his apologies, and the extent to which he has addressed the concerns. The Tribunal was of the view that Mr Gilbert has embraced the need to remediate and made determined efforts to demonstrate how he has changed his practice and conduct.

541. In all the circumstances, the Tribunal determined that a period of eight months was sufficient and appropriate to mark the serious misconduct found. The Tribunal considered that this adequately reflected the balancing exercise that it has undertaken. The Tribunal also determined that this time period would be sufficient to uphold limbs *b* and *c* of the overarching objective, namely, to promote and maintain public confidence in the medical profession, and to promote and maintain proper professional standards and conduct for members of the profession.

Whether to direct a review hearing

542. The Tribunal had regard to the relevant paragraphs of the SG, including the following paragraphs:

“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. However, in most cases where a period of suspension is imposed, and in all cases where conditions have been imposed, the tribunal will need to be reassured that the doctor is fit to resume practice – either unrestricted or with conditions or further conditions. A review hearing is therefore likely to be necessary, so that the tribunal can consider whether the doctor has shown all of the following (by producing objective evidence):

- a. they fully appreciate the gravity of the offence*
- b. they have not reoffended*
- c. they have maintained their skills and knowledge*
- d. patients will not be placed at risk by resumption of practice or by the imposition of conditional registration.”*

543. The Tribunal, with reference to paragraph 164 of the SG, determined that Mr Gilbert appreciated the gravity of his misconduct, and there has been no repetition/reoffending since the referral to the GMC. It was clear to the Tribunal that Mr Gilbert has a high level of medical skills and knowledge and there is no issue in respect of his clinical skills.

544. In all the circumstances, the Tribunal determined not to direct a review in Mr Gilbert’s case. The Tribunal determined that the public interest is served by the period of suspension and, given the comprehensive evidence of insight and remediation shown, it was not necessary to have a review hearing in this case. The Tribunal determined that it would be safe for Mr Gilbert to resume unrestricted practice and that patients will not be placed at risk on resumption of practice.

Determination on Immediate Order - 08/08/2024

545. Having determined to suspend Mr Gilbert’s registration for eight months, the Tribunal has considered, in accordance with Rule 17(2)(o) of the Rules, whether Mr Gilbert’s registration should be subject to an immediate order.

Submissions

Submissions on behalf of the GMC

546. Ms Hudson referred to a number of paragraphs of the SG, including paragraph 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.”

547. Ms Hudson submitted that, whilst acknowledging that there was no risk to patient safety in this case, the findings that the Tribunal have made are of serious misconduct. She invited the Tribunal to impose an immediate order given the concerns that have been expressed about Mr Gilbert’s behaviour and the public confidence in the profession upon balancing that with Mr Gilbert’s own interests.

548. Ms Hudson stated that, although Mr Gilbert is a competent surgeon, an immediate order is necessary for the maintenance and protection of public confidence in the profession given the serious concerns and findings made. She stated that Mr Gilbert had departed from multiple principles of GMP and his actions have risked public confidence. Ms Hudson submitted that the extent and seriousness of the inappropriate behaviour meant that both limbs *b* and *c* of the overarching objective applied and required an immediate order.

549. Ms Hudson stated that there was an interim order of conditions in place on Mr Gilbert’s registration and that this would need to be revoked at the end of this hearing.

Submissions on behalf of Mr Gilbert

550. Mr Sutton referred to the relevant guidance in that the Tribunal should be satisfied that it is necessary to impose an immediate order for the protection of members of the

public or otherwise in the public interest, or is in the best interests of the doctor. Mr Sutton submitted that the word ‘necessity’ lay at the core of the Tribunal’s discretion.

551. Mr Sutton referred to the Tribunal’s Sanction determination, in that suspension was an appropriate basis of disposal in this case. He invited, for the particular reasons identified in paragraph 49 of that decision, the Tribunal to reflect on whether this was a necessity case and whether or not, assessed against that standard, an immediate order was warranted in this case. Mr Sutton invited the Tribunal to decline the application for an immediate order.

The Tribunal’s Determination

552. In making its decision the Tribunal had regard to a number of paragraphs of the SG, including paragraph 178 set out above and the following paragraphs:

“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.”

553. The Tribunal had regard to its determinations on facts, impairment and sanction.

554. In the light of the Tribunal’s findings, it did not consider there to be a risk to patient safety.

555. In all the circumstances, the Tribunal determined not to impose an immediate order of suspension on Mr Gilbert’s registration. The Tribunal was of the view that an immediate order was not necessary to protect members of the public, was not otherwise in the public interest, nor was in Mr Gilbert’s best interests.

556. The Tribunal considered that the substantive suspension would be sufficient to uphold limbs *b* and *c* of the overarching objective, which are to promote and maintain public confidence in the medical profession, and to promote and maintain proper professional standards and conduct for members of the profession.

557. This means that Mr Gilbert'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 Mr Gilbert does lodge an appeal he will remain free to practise unrestricted until the outcome of any appeal is known.

558. The interim order is hereby revoked.

559. That concludes this case.

ANNEX A - 18/07/2024

Application to amend the Allegation

560. On 18 July 2024 Ms Hudson, Counsel on behalf of the GMC, made an application for amendment of the Allegation under Rule 17(6) of the GMC (Fitness to Practise Rules) 2004 as amended ('the Rules'), which 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.”*

561. The proposed amendments were as follows:

1. *On one or more occasions you behaved inappropriately towards your junior colleague, Ms A, in that:*

a. *you made inappropriate comments in that:*

i. *on a date between ~~August 2009 and February 2010~~ April 2019 and October 2019, during an operation you said to Ms A:*

...

3. *Between ~~August 2009 and February 2010~~ April 2019 and October 2021, you behaved inappropriately towards Ms A in that:*

...

5. *On a date between ~~August 2009 and February 2010~~ April 2019 and October 2021, you made an inappropriate comment about a junior colleague, Ms C, to Ms A in that you said, ‘just because she looks good in tight clothes, it doesn’t mean she’s any good’, or words to that effect.*

...

9. *Between ~~August 2009~~ April 2019 and April 2022 you said to Ms A:*

...

11. *On one or more occasions between April 2011 and April ~~2012~~ 2013 you behaved inappropriately whilst at work towards your junior colleague Ms E in that you:*

Submissions

Submissions on behalf of the GMC

562. Ms Hudson stated that the above amendments were requested due to the oral evidence of Ms A and Ms E, respectively. She referred to the following:

- Paragraph 1(a)(i):
Ms A said that the date was wrong, and this occurred when she returned to work as a Registrar.
Within Ms A's witness statement, there is the evidence "*Right at the beginning [XXX] when I was his trainee*". Ms A clarified that this was when she was his trainee Registrar, XXX.
- Stem of paragraph 3:
The date of October 2021 is chosen because Ms A's document alleging this is dated 12 September 2021 so it must have occurred in that time.
Ms A said that the original date was wrong, XXX.
- Paragraph 5:
The date of October 2021 is chosen as Ms A's document alleging this is dated 12 September 2021 so it must have occurred in that time.
Ms A said in her evidence that this occurred when XXX.
- Stem of paragraph 9:
Ms A said in her evidence that this occurred when XXX, which was April 2019.
- Stem of paragraph 11:
Ms E said in her evidence that she could specify the time frame of paragraph 11(i) of the Allegation XXX.

563. Ms Hudson stated that the application should be considered in line with the overarching objective and must be done justly and fairly. She submitted that fairness applied to both sides. It applied to the public interest, the complainants who have come forward, to the GMC, and to Mr Gilbert.

564. Ms Hudson submitted that the issues that had arisen in relation to the dates were not of significance to this case overall. She stated that the GMC was not seeking to introduce neither an entirely new timeframe nor a set of new allegation nor new complainants.

565. Ms Hudson stated that the explanation for why the amendment was required was that Ms A was taken to her statement and the word “*trainee*” during her oral evidence. Ms A set out the period in which she was a registrar, XXX in April 2019. Ms Hudson stated that the author of the amendments, many of whom are not medically qualified, would have thought the word “*trainee*” referred to someone who was not a registrar. She submitted that the proposed amendment was simply qualifying the period over which Ms A was a registrar. Ms Hudson stated that Mr Gilbert may wish to adduce further evidence but submitted that these parts of the Allegation should not fall due to the misinterpretation of a date.

566. In terms of the timing of this application, Ms Hudson referred to the wording of Rule 17(6), as quoted above. She submitted that it was wrong to criticise when this application has been made, as it was normal practice not to make an application to amend until all of the evidence had been heard. There was otherwise the potential of repeated delays after each complainant has given their evidence and clarified matters. Ms Hudson submitted that the clarification came about as a result of questions in cross-examination and that there was further time to explore with the witnesses what happened in terms of dates and what was done.

567. Ms Hudson submitted that the amendments were correcting an incorrect date due to a misinterpretation of what the witness meant. She stated that Ms A and Ms E had not seen the Allegation and they would have undoubtedly immediately spotted the error had they done, which they did when they were giving evidence.

568. Ms Hudson submitted that the Tribunal could accommodate these amendments to the Allegation without injustice to Mr Gilbert. She submitted that the amendments should be allowed as otherwise they may fall due to a simple error in date.

Submissions on behalf of Mr Gilbert

569. Mr Sutton, Counsel, referred to Rule 17(6) of the Rules, to the overarching objective, and the need to exercise all such discretion justly and fairly. He submitted that the proposed amendments were not ‘slips’ or typographical errors; they were substantial matters. Mr

Sutton submitted that they had a significance in the way that Mr Gilbert had understood the case against him and, critically, prepared the case against him.

570. Mr Sutton stated that the Allegation was produced in draft on 22 December 2023 and in their finalised form on 13 June 2024. The defence case, in terms of time frames, was clearly set out in Mr Gilbert's witness statement but the significance of the difference in time frames was a matter that was regarded as a critical part of the evidence. Mr Sutton stated that they had prepared based on those dates and his questions for the witnesses, particularly Ms A, were based on those dates being relied upon.

571. Mr Sutton submitted that the application for amendment was made very late in the day. He stated that the evidence had been heard and witnesses had given their evidence. He submitted that the application should have been made promptly, and certainly at a time when that witness was still under oath and when decisions could have been taken on how to explore evidence in the light of the significantly amended case.

572. Mr Sutton stated that the Tribunal had not received a proper explanation as to why this error had come about. He stated that he had only been notified that this application was in contemplation today and, crucially, Mr Gilbert is entitled to understand how this has come about. Mr Sutton asked who had drafted the allegations and what interaction, if any, had they had with either the witnesses themselves or those who have gathered the evidence. He stated that they did not wish to be obstructive and that it was clearly in the interests of all parties that this case should not be interrupted. However, they were concerned that they were entitled to a proper explanation of how this has come about, especially given that the draft Allegation was formulated six months ago.

573. Mr Sutton submitted that, while they did not wish to oppose the proposed amendments, but they had to be given time to address the case in its reformulated shape. He stated that Mr Gilbert should have the opportunity to adduce further items of evidence that related to the significantly later time frame.

Additional submissions

574. In response to the explanation/statement point, Ms Hudson stated that allegations are formulated by multiple different solicitors in the legal department based on the documents and their reading of them. She stated that the material is gathered by paralegals,

which is a separate part of the legal department to where the allegations are formulated by lawyers looking at the written material in front of them.

575. Mr Sutton submitted that there was an interest in having it explained; it was not a matter of incidental or superficial importance when an error of this kind takes place. He submitted that it should be explained to the satisfaction of the Tribunal and Mr Gilbert, and that it might help to avoid this sort of error occurring in the future if people are required to address this sort of inquiry from the Tribunal.

576. Ms Hudson stated that there were multiple people who formulate the allegations, and they were based on the written documents. She stated that there was a chain of individuals at the GMC who look at this, which goes all the way to the top of the fitness to practise directorate. Ms Hudson asked which particular person they were seeking the explanation from. She also asked what issues the statement was going to address and how it would assist given that nothing untoward was being suggested. Ms Hudson stated that there would inevitably be some delay if this had to be undertaken.

Tribunal's Decision

577. The Tribunal had regard to the submissions from Ms Hudson and Mr Sutton, Rule 17(6) of the Rules, and all of the evidence before it. It will consider whether to grant Ms Hudson's application for the amendment of the Allegation. The Legally Qualified Chair (LQC) reminded the Tribunal that it should consider each amendment separately and to ask whether it could be made without injustice. The LQC stated that the Tribunal should bear in mind the submissions made by each party, but it was not bound by them.

578. The Tribunal will also consider, secondly, whether a statement is required from an individual within the GMC with an explanation as to how these errors have occurred. The Tribunal was clear that it considered this request in the light of the overriding objective and the principle of proportionality.

579. The Tribunal had regard to the nature of each proposed amendment and the surrounding evidence.

- Paragraph 1(a)(i):
The Tribunal had regard to Ms A's Exhibit 1. She stated:

“Right at the beginning [XXX] when I was his trainee, we were doing a fistula operation...”

The Tribunal was clear that this error arose out of a misinterpretation of “trainee” and, as set out by Ms Hudson, this was when Ms A was a trainee Registrar XXX in April 2019.

- Stem of paragraph 3:

The Tribunal had regard to Ms A’s Exhibit 1. She stated:

“[XXX] in April 2019, he would call me late in the evening out of work when neither of us were on call and I felt compelled to answer because he was my Consultant.”

The Tribunal noted that the date of 2019 is clearly given within Ms A’s exhibit and was an obvious error in the Allegation when compared with the content of the exhibit.

- Paragraph 5:

The Tribunal noted Ms A’s Exhibit 1. It was aware that sections of the document were redacted and so there may have been other parts of the document that gave further details as to the time period. The Tribunal had regard to Ms A’s oral evidence in which she was clarified that this matter was alleged to have occurred on a date between April 2019 and October 2021 rather than between August 2009 and February 2010.

- Stem of paragraph 9:

The Tribunal noted that the wording of the dates was not incorrect but that, on the oral evidence of Ms A, the time frame could now be narrowed.

- Stem of paragraph 11:

The Tribunal had regard to Ms E’s Exhibit 1. She referred to the date “March 2013” in respect of this matter. The Tribunal noted that the date of 2013 is clearly given within Ms E’s exhibit and there was an obvious error in the date contained in the Allegation.

580. The Tribunal determined to grant the GMC’s application for the various amendments of the Allegation as set out above. It concluded that the amendments reflected the evidence given by Ms A and Ms E and, with reference to Mr Gilbert’s witness statement, did not

consider that it affected the context in which he has responded to the Allegation. The Tribunal was unable to find any injustice to Mr Gilbert in the making of the amendments.

581. In terms of fairness, the Tribunal will allow Mr Gilbert additional time in terms of the provision of further evidence given the change to the dates arising from these amendments to the Allegation.

582. Having categorised the nature of the errors, the Tribunal requires the GMC to provide a written explanation as to how the errors at paragraph 3(a) and 11(i) of the Allegation have occurred, and how they were missed during the reviewing process. It considered that this was proportionate given the nature of the errors made and was fair in the circumstances that have arisen.