

PUBLIC RECORD

Date: 02/06/2023

Medical Practitioner's name: Dr Neil GRAHAM
GMC reference number: 2383392
Primary medical qualification: MB ChB 1977 University of Leeds
Type of case: MPT - Preliminary

Tribunal:

Legally Qualified Chair	Mr Andrew Lewis
Lay Tribunal Member:	Dr Nigel Westwood
Medical Tribunal Member:	Dr John Smith

Tribunal Clerk:	Ms Keely Crabtree
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Attendance and Representation:

Medical Practitioner:	Not present and represented
Medical Practitioner's Representative:	Mr Christopher Gillespie, instructed by Weightmans
GMC Representative:	Mr Alan Taylor, 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 Preliminary Matters - 02/06/2023

Admissibility application

1. Dr Neil Graham faces a number of allegations due to be heard before a MPTS Tribunal on Monday, 5 June 2023, listed for 10 days. It is alleged that Dr Graham inappropriately touched a female colleague on two occasions in 2017 and 2019, and that his actions were sexually motivated and/or amounted to unlawful sexual harassment. It is also alleged that Dr Graham acted dishonestly in not disclosing in his annual appraisals that he had been subject to investigation by InHealth in 2017. The latter allegations are set out in paragraphs 4 to 7 of the Allegation.

2. This is a preliminary application on behalf of Dr Graham to exclude evidence upon which the GMC propose to rely at the full hearing scheduled to start on 5 June 2023.

3. The evidence which the GMC propose to adduce is that of Colleague A, who was Operations Manager at InHealth in 2018. It is agreed that she was responsible for facilitating Dr Graham's appraisal and the GMC wish to adduce evidence of a conversation she had with Dr Graham, which they submit is relevant to the issues in paragraphs 4 to 7, in particular what Dr Graham knew he ought to disclose. The Tribunal will set out the proposed evidence in more detail below.

4. The GMC have been unable to secure her attendance. The Tribunal has seen a body of emails in which the GMC tried to persuade Colleague A to sign a witness statement. However, on 29 April 2023, she has declined to do so, saying that she does not "feel comfortable" attending as a witness because she has no recollection of events beyond what was in the contemporaneous documents (which the Tribunal has not seen).

5. The way in which the GMC seek to introduce Colleague A's evidence is by adducing the contents of an email she sent to a witness Ms B. Ms B made a statement dated 4 May 2023 to which she exhibits what she describes as a copy of an email from Colleague A. What she appears to have done is forward the document to herself with Colleague A's details at the bottom. The Tribunal can see that exercise took place on 8 January 2020 at 09:36.

6. Ms B says of this:

- a. I note that this email is sent from myself to myself, though due to the lapse of time I do not remember why this is the case. I also no longer remember when [Colleague A] would have written this email.
- b. I have tried to search through my emails to find the original email written by [Colleague A] but have not been able to do so.
- c. I do not, however, have any doubt that the email was written by [Colleague A].

Record of Determinations
Medical Practitioners Tribunal
Preliminary

7. Concerns were originally raised about the authenticity of this document. However, counsel agreed that, for the purposes of this preliminary hearing, the Tribunal should proceed on the basis that the document is a genuine email from Colleague A. The Tribunal was content to adopt this approach.

Submissions

8. On behalf of Dr Graham, Mr Michael Rawlinson, Counsel, and Mr Alan Taylor, Counsel, on behalf of the GMC, both provided written submissions to the Tribunal. At this hearing Mr Gillespie represented Dr Graham and Mr Taylor represented the GMC. Both made additional oral submissions to the Tribunal. In the interests of brevity, the Tribunal will refer to submissions on behalf of Dr Graham as being those of Mr Gillespie.

On behalf of Dr Graham

9. Mr Gillespie stated that the GMC have served witness statements from a variety of people directly involved in both the appraisal process itself and the associated investigation by InHealth. However, there has been no witness statement obtained from Colleague A, who at the time was the InHealth Imaging Services Manager, and later Head of Operations and who features frequently throughout the papers. Mr Gillespie stated that the GMC had tried to take a witness statement from her without success.

10. Mr Gillespie stated that on 29 March 2023, the GMC emailed Dr Graham's instructing solicitors again stating: "*We confirm that we have no further evidence to disclose. We were unable to obtain a witness statement from [Colleague A].*". However, on 10 May 2023, over a month beyond the GMC's disclosure deadline, the GMC emailed Dr Graham's instructing solicitors purporting to serve further disclosure. This included a draft supplemental witness statement by the witness Ms B dated 4 May 2023, and within that supplemental statement, she purports to exhibit an email from Colleague A.

11. Mr Gillespie stated that the copy email was sent from Ms B email address to the same email address but, as indicated above, he took no point on that, for the purposes of this hearing.

12. Mr Gillespie stated that it is in those circumstances, given that Colleague A herself is not a witness to the proceedings, and given the forensic limitations, objection is taken on behalf of Dr Graham to the primary admissibility of Ms B's supplementary witness statement and to the admissibility of the associated email exhibit.

13. Mr Gillespie referred the Tribunal to the relevant Rules: *The Civil Evidence Act 1995 (CEA 1995)* and *Rule 34 (1) of the Fitness to Practice Rules*. Mr Gillespie also referred the Tribunal to the authorities of: *NMC v Mrs Ogbanna [2010] EWCA Civ 1216*, *R (Bonhoeffer) v General Medical Council [2011] EWHC 1585 (Admin)*, *Thornycroft v. Nursing and Midwifery*

Council [2014] EWHC 1565 and *El Karout v Nursing and Midwifery Council* [2020] EWHC 3079 (QB).

14. Mr Gillespie stated that there are four key matters that emerge from these authorities:

- There are two distinct stages to assessing fairness when considering hearsay in regulatory proceedings: Stage 1: Admissibility, Stage 2: Weight. This has been described as a *'critical distinction'*.
- The admission of the statement of an absent witness should not be regarded as a routine matter. The FTP rules require the Panel to consider the issue of fairness before determining the evidence. The Tribunal are required to perform a careful balancing exercise;
- The fact that the absence of the witness can be reflected in the weight to be attached to their evidence is a factor to weigh in the balance, but it will not always be a sufficient answer to the objection to admissibility;
- The Tribunal must be satisfied that the evidence is either demonstrably reliable or that there will be some means of testing it.

15. Mr Gillespie stated that the contents of the email are potentially very important to the resolution of the case overall and what emerges from it are three points:

- (1) Evidence of a direct conversation between Colleague A and Dr Graham about the investigation into viewing inappropriate material and his appraisal;
- (2) During that conversation, Dr Graham, according to the email, apparently asked if reference to the allegations against him of viewing inappropriate material *'had to be included, or could be removed'*;
- (3) Dr Graham also apparently admitted viewing the offending material *'..which he felt may have influenced his actions in accessing inappropriate material'*.

16. Mr Gillespie stated that points (2) and (3) are fundamentally disputed by Dr Graham as to exactly how and what was said by him as per his witness statement. Mr Gillespie said that these would be important matters that will go to an overall assessment of his credibility. For instance, if the Tribunal were to find, on the basis of the email, that Dr Graham explicitly asked for any reference to the investigation *'to be removed'* from his appraisal, that is potentially significant evidence supporting a finding that he was deliberately dishonest. The potential importance or sheer prejudicial effect of evidence that he effectively admitted to Colleague A that he had watched pornography or sexualised material at work are obvious.

Record of Determinations
Medical Practitioners Tribunal
Preliminary

17. Mr Gillespie submitted that if the email were admitted as hearsay there was no way for Dr Graham to challenge the contents of the email or the other matters raised. Mr Gillespie submitted that cross-examination of Ms B could not amount to any such challenge, as she was unable to give any evidence at the primary conversations between Colleague A and Dr Graham.

18. Mr Gillespie submitted that the admission of this evidence represents a material unfairness, and in essence amounts to an attempt by the GMC to get into the proceedings the evidence of an unavailable yet important witness *'by the back door'*. Further, attaching limited or diminished weight to the document once it was admitted does nothing to ameliorate that unfairness. Therefore, in all the circumstances the evidence should be ruled inadmissible.

19. In his oral submissions, Mr Gillespie explain the nature of the challenge to Colleague A's evidence. He told the Tribunal that Dr Graham would challenge how the meeting arose and also "how it was left", because it was Dr Graham's case that Ms C said she would ask her superiors about whether the investigations needed to be included in his appraisal and that she had not relayed the answer to him.

20. Mr Gillespie drew the Tribunal's attention to the time that had elapsed between the Trust investigation for which it appeared the email from Ms C been prepared and the conversation to which it related. He submitted that it was the combination of the time between the meeting and the email and the fact that Colleague A could not be cross examined on the effect that might have upon her memory that made the admission of the email unfair.

21. When challenged about the apparent admissions made by Dr Graham at a trust investigation in 2020, Colleague A had told him that matters relating to the investigations needed to be included in his appraisal, Mr Gillespie explained that it was an important question of "nuance".

22. Mr Gillespie submitted that there was no good reason for the witness not to attend. There was no question of her being ill or intimidated. He took the Tribunal to the email correspondence between the GMC and Colleague A and submitted that her reason for not attending was simply that she did not wish to, or as she put it in her emails, "did not feel comfortable".

23. He submitted that in all the circumstances the admission of the email from Colleague A created unfairness that could not be cured by the Tribunal giving less weight to that evidence.

On behalf of the GMC

Record of Determinations
Medical Practitioners Tribunal
Preliminary

24. Mr Taylor referred the Tribunal to Ms B's supplemental witness statement dated 4 May 2023, and an email exhibit. He reminded the Tribunal of the statutory overarching objective and Rule 34(1) of the Fitness to Practise Rules. Mr Taylor stated that hearsay evidence is not per se inadmissible and that the weight to be attached to the evidence is a matter for the Tribunal.

25. Mr Taylor stated that the absence of a witness can result in that witness's evidence being excluded, but it was not an automatic response. He referred the Tribunal to the authorities: *Shaikh v General Pharmaceutical Council (2013) EWHC 1844 (Admin)*, *Brookman v General Medical Council (2017) EWHC 2400 (Admin)* and *Mansaray v Nursing and Midwifery Council (2023) EWHC 730 (Admin)*.

26. Mr Taylor stated that the existence or otherwise of a good and cogent reason for the non-attendance of the witness is an important factor. However, the absence of a good reason does not automatically result in the exclusion of that evidence.

27. Mr Taylor said that one of the factors to be taken into account was whether the evidence was the sole or decisive evidence in support of the charges. He submitted that in this case, it was not.

28. Mr Taylor stated that several witnesses would be available for cross-examination on the issues of the background context and appraisal and that Ms B was one of them. Mr Taylor said that Dr D, who had spoken to Dr Graham about accessing inappropriate material at work would be another.

29. Mr Taylor submitted that it was not accepted that the admission of this evidence amounts to an attempt by the GMC to get into the proceedings the evidence of an unavailable yet important witness 'by the back door'. Mr Taylor said that the GMC, in good faith, had sought to obtain a witness statement from Colleague A not least in order to produce the email that Ms B has instead produced.

30. Mr Taylor submitted that the GMC had made extensive efforts to secure the attendance of Colleague A over a period of four months from November 2022 to March 2023. However, she had made the decision that she did not feel comfortable going to court to act as a witness in person. Mr Taylor stated that she told the GMC on more than one occasion that she did not remember anything over and above what was in the contemporaneous documents.

31. Mr Taylor stated that whilst it would have been preferable for Colleague A to have produced the email herself, her absence was not fatal to the fairness of the proceedings. Further, the MPT will no doubt take that absence into account when assessing the evidence.

32. Mr Taylor stated that there is nothing to suggest that the email was in any way unreliable or that Colleague A had a reason to fabricate evidence against Dr Graham.

33. Mr Taylor took the Tribunal to a number of passages in the minutes of the Trust Investigation Meeting held at the Milton Keynes University Hospital on 14 January 2020. He submitted that the matters contained in Colleague A's email had been put to Dr Graham as questions and he had effectively admitted that Colleague A had told him that the complaint outstanding from 2017 would have to be included in his appraisal.

34. Mr Taylor acknowledged that Colleague A did not have a compelling reason for not attending. Nevertheless, the GMC had done all it reasonably could to secure the attendance of Colleague A who, he informed the Tribunal, now lived in XXX.

35. Mr Taylor submitted that there was no unfairness in this email being before the MPT. The Tribunal should be permitted to evaluate its significance in the light of the evidence of the other witnesses, while also taking into account that Colleague A will not have given oral evidence about it. Mr Taylor submitted that in all the circumstances the Defence's application to exclude the supplemental witness statement of Ms B should be refused.

The Tribunal's approach

36. The Legally Qualified Chair (LQC) gave legal advice to the Tribunal. Mr Gillespie and Mr Taylor were invited to share any observations or omissions on the legal advice once it had been read in public session. No submissions were made on the legal advice.

37. The Tribunal had regard to the relevant legal principles, including the overarching objective and Rule 34(1) of the GMC's Fitness to Practise Rules (2004) ('the Rules'), which provides:

'The Committee or a Tribunal may admit any evidence they consider fair and relevant to the case before them, whether or not such evidence would be admissible in a court of law.'

38. The LQC stated that the High Court and the Court of Appeal have set out in a number of decisions principles to be followed, guidance on how to follow those principles and questions that the Tribunal should ask itself. He emphasised at the outset that none of these matters is conclusive in itself however his firm advice is that the Tribunal should go through each one in turn to ensure that it follows the principles, by asking the questions and arrive at its answer by balancing all these factors.

39. The LQC referred to the authority: *Nursing and Midwifery Council v Mrs Ogbanna [2010] EWCA Civ 1216*.

40. The LQC stated that the importance of the case is that it reminds Tribunal's that fairness is a condition of admissibility and cannot always be avoided by giving less weight to some evidence.

- ii. ‘The Court of Appeal rejected the argument that fairness could be addressed by the weight given to the evidence, in the following terms: *“That submission appears to me to overlook the point that the criterion of fairness referred to in 31(1) is relevant to whether the statement should be admitted at all: the rule expressly required the decisions as to the exclusion of the hearsay statement to be governed by considerations, inter alia, of fairness. In that context, the NMC should perhaps be reminded that it was seeking to adduce Miss E’s statement as the sole evidence supporting the material parts of charge 1 when it knew that evidence was roundly disputed and could not be tested by cross-examination. It was, moreover, seeking to adduce it in support of a case that it was promoting, whose outcome could be (as in the event it was) the wrecking of Mrs Ogbanna’s career as a midwife, a career which had lasted over 20 years. I should have thought it was obvious that, in the circumstances, fairness to Mrs Ogbanna demanded that in principle the statement ought only to be admitted only if she had the opportunity of cross-examining Miss E upon it. ...”*

41. The LQC advised that it is clear from that decision that fairness means that it must be fair in the context of the whole case or at least the allegation to which the evidence relates and is not concerned with mere technical breaches. This was emphasised in *The High Court in Freeman v GMC [2023] EWHC 45*. The test is whether admitting the evidence would prevent the doctor having a fair hearing on that allegation.

42. The LQC referred to the authority of *R (Bonhoeffer) v GMC [2011] EWHC 1585 (Admin)* which summarised the principles as follows:

- i. 1.1. *The admission of the statement of the absent witness should not be regarded as a routine matter. The FTP rules require the Panel to consider the issue of fairness before admitting the evidence.*
- ii. 1.2. *The fact that the absence of the witness can be reflected in the weight to be attached to their evidence is a factor to weigh in balance, but it will not always be a sufficient answer to the objection to admissibility.*
- iii. 1.3. *The existence or otherwise of a good and cogent reason for the non-attendance of the witness is an important factor. However, the absence of a good reason does not automatically result in the exclusion of the evidence.*
- iv. 1.4. *Where such evidence is the sole or decisive evidence in relation to the charges, the decision whether or not to admit it requires the Panel to make a careful assessment, weighing up the competing factors. To do so, the Panel must consider the issues in the case, the other evidence which is to be called and the potential consequences of admitting the evidence. The Panel must be satisfied either that*

the evidence is demonstrably reliable, or alternatively there would be some means of testing its reliability.

43. The LQC stated that the High Court in *Freeman v GMC [2023] EWHC 45* approved of the Tribunal reminding itself that that *it was not yet at the stage of assessing the evidence and considering the question whether it could draw an inference of the Appellant's culpability from the evidence. The question "at this stage" was whether Mr G's evidence could "presently be assessed to be the 'sole or decisive' evidence" in relation to the contested Allegations (§62).* Accordingly the Tribunal reminded itself that is the Tribunal's position at this hearing and it must make a decision on the material it has.

44. The LQC stated that the Tribunal needs to look closely at the evidence of the Trust investigation at pages 20,21,23 to 25 when deciding if the evidence of Colleague A could properly be described as "sole or decisive".

45. The LQC referred to *El Karout v NMC [2019] EWHC 28 (Admin)* in which the judge added the danger of relying upon hearsay not in a properly recorded statement – where the maker has a chance to read it through and confirm the contents. The court made it clear that a Tribunal had to look at two considerations:

- a. first accuracy. Can the Tribunal be confident that it has an accurate record of what the witness has said? In *Karout* the regulator relied upon attendance notes of telephone conversations where the original contemporaneous notes will last. Mr Gillespie asks us to treat this document with similar caution;
- b. Secondly, the Tribunal must look at the context in which the witness recorded their "evidence". The Court said, "Equally importantly, even if the Committee could fairly and properly rely on the accuracy of what each of the patients was reported as saying, the context of the telephone conversations was very different from the formal setting of a request for information that might be used in disciplinary proceedings in which the career of a midwife was at stake".

46. The LQC reminded the Tribunal that the important features to look for in formal statements or records of proceedings are:

- a. The statement of truth
- b. The opportunity to read through, correct and sign
- c. In proceedings –
 - i. the formality

- ii. careful questions – leading to detail
- iii. an oath or affirmation

47. The LQC reminded the Tribunal to consider the email from Colleague A in light of those considerations.

48. The LQC stated that against that background the High Court *Thorneycroft v NMC* [2014] EWHC 1565 (Admin) set out seven questions, six of which are relevant here:

(1) whether the statements were the sole or decisive evidence in support of the relevant allegations,

(2) the nature and extent of the appellant's challenge to the contents of the statements,

(3) whether there was any suggestion that the witnesses had reasons to fabricate their allegations,

4) the seriousness of the charge, taking into account the impact which adverse findings might have on the Appellant's career,

(5) whether there was a good reason for the non-attendance of the witnesses,

(6) whether the Respondent had taken reasonable steps to secure their attendance, and

...

Tribunal's Decision

49. The Tribunal first asked itself whether the material contained in Colleague A's email was the sole or decisive evidence in respect of paragraphs 4 to 7 of the Allegation. The Tribunal had careful regard to the minutes of the trust investigation in which it saw that the matters contained in Colleague A's email had been put to Dr Graham in the form of questions and he had apparently admitted that Colleague A had told him that the fact that he was being investigated would have to be included in his appraisal. Accordingly, the Tribunal concluded that the contents of Colleague A's email added little to the evidence against Dr Graham, beyond what he had already admitted and the relatively small matters of "nuance" that he might put to Colleague A in cross examination could be fairly dealt with by Dr Graham giving evidence.

Record of Determinations
Medical Practitioners Tribunal
Preliminary

50. The Tribunal considered the nature and extent of Dr Graham's challenge to the contents of Colleague A's email. The Tribunal's view was that Dr Graham had admitted the majority of the matters set out in that email. The Tribunal noted the matters that Mr Gillespie challenged but also noted that Colleague A now appears to have no recollection of the events of some five years ago. In those circumstances the Tribunal was not persuaded that the matters which Mr Gillespie proposed to challenge on behalf of Dr Graham were of real significance.

51. The Tribunal concluded that there was no suggestion that Colleague A had any reason to fabricate the contents of her email.

52. The Tribunal found that the allegation of dishonesty was a very serious allegation. It concluded that honesty was fundamental to the appraisal process and the lack of it undermined an important aspect of public protection. However, the Tribunal balanced that finding against its finding that the contents of Colleague A's email were not central to these allegations.

53. The Tribunal considered whether there was good reason for the non-attendance of Colleague A. It was of the view that Colleague A was not unwell, under any threat, was not a vulnerable witness and that there were no practical impediments to her attendance. The Tribunal noted that Colleague A now resides in XXX, however, it concluded that measures could have been put in place for her to give evidence by video-link.

54. The Tribunal therefore concluded that no good reason had been advanced as to why Colleague A could not attend the substantive hearing, other than she was an unwilling witness who did not wish to attend the proceedings or provide a witness statement.

55. In the circumstances the Tribunal was of the view that the GMC had taken all reasonable steps to secure Colleague A's attendance.

56. Having dealt with each of those questions in turn, the Tribunal decided that admitting the disputed evidence would not make the hearing unfair, insofar as it relates to paragraphs 4 to 7 of the Allegation. It balanced all the considerations set out above and in particular reminded itself that the evidence which the GMC wished to rely upon was neither sole nor decisive evidence and, as far as the Tribunal could tell at this stage, the challenges to it were not significant, taking the evidence as a whole. As far as the Tribunal could see, on the matters before it, the most significant obstacle to Dr Graham advancing his case was not the evidence of Colleague A but the admissions he had made to the trust investigation. In those circumstances the Tribunal is satisfied that any potential unfairness can be dealt with by the Tribunal reminding itself that Colleague A is reporting on a meeting that occurred over a year before she wrote her email and is not there to be questioned.

57. Accordingly, the Tribunal rejects Dr Graham's application to exclude the evidence described above and the GMC is free to rely upon it.