PUBLIC RECORD

Dates: 12/08/2024 - 29/08/2024

Medical Practitioner's name:	Dr Rajesh SHAH
GMC reference number:	4346052
Primary medical qualification:	MB BS 1988 Bombay University

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

Summary of outcome

Suspension – 12 months
Review hearing directed
Immediate order imposed

Tribunal:

Legally Qualified Chair	Mr Gerry Wareham
Lay Tribunal Member:	Ms Hermione McEwen
Medical Tribunal Member:	Dr Stephen Duxbury

Tribunal Clerk:	Ms Fiona Johnston

Attendance and Representation:

Medical Practitioner:	Present, represented
Medical Practitioner's Representative:	Mr Stephen Brassington, Counsel, instructed by MDDUS
GMC Representative:	Ms Rosalind Emsley-Smith, Counsel

Attendance of Press / Public

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

Overarching Objective

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

Determination on Facts - 22/08/2024

Background

1. Dr Shah qualified with an MBBS, MS at Bombay University, India, in 1988.

2. At the time of the events Dr Shah was practising as a Consultant Thoracic Surgeon at Wythenshawe Hospital, Manchester ('the hospital').

3. The events that led to Dr Shah's hearing can be summarised as follows: between 2005 and 2021, it is alleged that Dr Shah behaved inappropriately towards female colleagues A and B. It is also alleged that elements of his conduct constituted sexual harassment and were sexually motivated.

4. It is further alleged that, between 2017 and 2021, Dr Shah asked and/or allowed colleagues A and C to complete elements of his mandatory training. Finally, it is alleged that Dr Shah's actions were an abuse of his professional position as he was in a more senior position and the colleagues did not feel able to challenge, prevent or report Dr Shah's actions.

5. Dr Shah self-referred to the GMC following allegations of sexual harassment involving a colleague from the workplace, the hospital, between 2005 and 2021.

6. Following the complaint there was a Trust investigation in August 2021. The matter was also reported to Greater Manchester Police and Dr Shah was interviewed by the police on 13 December 2021 and 16 July 2022.

The Outcome of Applications Made during the Facts Stage

7. At the outset of the hearing, the Tribunal granted an application made by Ms Emsley-Smith, Counsel on behalf of the GMC made pursuant to Rule 17(6) of the General Medical Council (Fitness to Practise Rules) 2004 as amended ('the Rules'), to amend paragraph 1b (ii) and (iii) of the Allegation. The application was not opposed by Mr Brassington, Counsel on behalf of Dr Shah.

The Allegation and the Doctor's Response

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

Colleague A

1. Whilst employed as a consultant cardiothoracic surgeon at Manchester University NHS Foundation Trust ('the Trust') you:

    a. on one or more occasions between 2005 and 2012 treated colleague A in a derogatory manner when communicating with her in that you:

        i. tapped her cheeks when asking her to do something; To be determined
        ii. clicked your fingers to gain her attention; To be determined

    b. inappropriately touched Colleague A without consent in that between 2011 and 2021:

        i. on one or more occasions during the work social events listed in Schedule 1 ('the work socials') you used your hands to:

            1. touch colleague A's legs; To be determined

            2. rub up and down colleague A's back; To be determined

            3. kissed colleague A on the lips; To be determined

        ii. on one or more occasions, *other than in 1.b.i,* ~~after the work socials~~, when colleague A was in your office at the Trust ('your office') you:

            1. used your hands to touch her:

                a. back; To be determined

b. bottom; To be determined

c. hips; To be determined

d. breasts; To be determined

2. reached your arm across the front of her body, touching her breasts with your arm; To be determined

3. when she was sat in a chair ('the chair'):

a. brought your chair up to hers with your knees touching hers; To be determined

b. put your hands up her skirt; To be determined

c. touched her genitals over her underwear; To be determined

d. sat on her legs rubbing your penis up and down her legs; To be determined

e. attempted to touch her:

i. legs; To be determined

ii. thighs; To be determined

iii. breasts; To be determined

4. when colleague A stood up from the chair:

a. grabbed hold of her; To be determined

b. tried to kiss her on her:

i. neck; To be determined

ii. chest; To be determined

iii. on one or more occasions ~~after the work socials~~, when you were in colleague A's office you put both of your hands on colleague A's bottom; To be determined

c. on one or more occasions between 2011 and 2021 in your office:

   i. took your shirt off whilst talking to colleague A about a patient; To be determined

   ii. prevented colleague A from leaving your office by putting your hand or foot against your office door; To be determined

   iii. when colleague A attempted to leave your office you said 'don't go I've not finished' or words to that effect; To be determined

d. in or around March or April 2021 you stood by your office window, put your hands inside your trousers and masturbated whilst having a conversation about a patient with colleague A; To be determined

e. on one occasion whilst colleague A was pressed against your office door, you masturbated whilst leaning against her; To be determined

f. on one or more occasions between 2019 and 2021 when colleague A worked in another role, unnecessarily sought out colleague A to create an environment where you would touch her inappropriately; To be determined

g. on one or more occasions made inappropriate comments in that:

   i. when colleague A shouted at you during the incident described at allegation 1(b)(ii)(3)(c) you said 'shout at me again' or words to that effect; To be determined

   ii. when colleague A asked you to leave her alone you asked her to shout at you again, or words to that effect; To be determined

   iii. you called colleague A a 'good girl' or words to that effect; Admitted and found proved

   iv. you called one or more female colleagues 'bird' or words to that effect. Admitted and found proved

2. Your actions at paragraphs 1(a), 1(g)(iii) and 1(g)(iv) 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 colleague A or creating an intimidating, hostile, degrading, humiliating or offensive environment for colleague A. To be determined

3. Your actions as set out at paragraphs 1(b) – 1(g)(ii):

a. 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 colleague A or creating an intimidating, hostile, degrading, humiliating or offensive environment for colleague A; To be determined

b. were sexually motivated. Admitted and found proved

Colleague B

4. Whilst employed as a consultant cardiothoracic surgeon at the Trust you inappropriately touched Colleague B without consent in that:

    a. on 11 October 2014:

        i. you put your arm around colleague B's shoulder and steered her towards the coffee room at the Trust ('the coffee room'); To be determined

        ii. in the coffee room you:

            1. leaned in to hug colleague B; To be determined

            2. put both of your hands on the cheeks of colleague B's bottom; To be determined

            3. squeezed colleague B's bottom cheeks; To be determined

    b. on 2 October 2019 near the theatre allocation board outside of cardiothoracic theatre number three you:

        i. brushed your body against colleague B's breasts; To be determined

        ii. put both of your arms around colleague B; To be determined

        iii. put your left hand on colleague B's:

            1. right hip; To be determined

            2. right buttock; To be determined

        iv. squeezed colleague B's right buttock cheek. To be determined

5. Your actions as set out at paragraph 4:

a. 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 colleague B or creating an intimidating, hostile, degrading, humiliating or offensive environment for colleague B; To be determined

b. were sexually motivated. To be determined

6. Between 2017 and 2021 you on one or more occasions asked and/or allowed colleagues A and C to complete one or more of the non-practical elements of your mandatory training for you. Admitted and found proved

7. Your actions as set out at paragraphs 1, 4 and 6 were an abuse of your professional position in that:

a. you were in a more senior position than colleagues A, B and C; To be determined

b. colleagues A and B did not feel able to:

i. challenge your behaviour; To be determined

ii. prevent your actions; To be determined

iii. report your actions. 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

9. At the outset of these proceedings, through his Counsel, Mr Brassington, Dr Shah made admissions to some paragraphs and sub-paragraphs of the Allegation, as set out above, in accordance with Rule 17(2)(d) of the General Medical Council (GMC) (Fitness to Practise) Rules 2004, as amended ('the Rules'). In accordance with Rule 17(2)(e) of the Rules, the Tribunal announced these paragraphs and sub-paragraphs of the Allegation as admitted and found proved.

The Facts to be determined

10. In light of Dr Shah's response to the Allegation made against him, the Tribunal is required to determine those paragraphs of the Allegation that have been denied by him.

Witness Evidence

11. The Tribunal received oral evidence on behalf of the GMC from the following witnesses:

- Colleague A. She also provided a witness statement dated 10 October 2022 and 20 March 2024;
- Colleague B. She also provided a witness statement dated 18 November 2022 and 5 February 2024;
- Colleague C. She also provided a witness statement dated 27 May 2022 and 25 March 2024 and provided an email 15 August 2024;
- Ms D, medical secretary at the hospital. She also provided a witness statement dated 27 March 2024;
- Mr E, Consultant Urologist at the Trust. At the time of the alleged events Mr E was the Site Medical Director at the hospital. He also provided a witness statement dated 28 March 2024.

12. The Tribunal received oral evidence on behalf of Dr Shah from the following witnesses:

- Professor F, he provided witness statements dated 26 June 2024 and 5 August 2024. At the time of alleged events Dr F was the Clinical Director within the Lung Cancer & Thoracic Surgery Directorate at the hospital.
- Mr G, retired Consultant Cardiothoracic surgeon. Mr G also supplied a testimonial letter dated 30 June 2024.

13. Dr Shah provided his own witness statement, dated 25 June 2024 and also gave oral evidence at the hearing.

Documentary Evidence

14. The Tribunal had regard to the documentary evidence provided by the parties. This evidence included but was not limited to: statements from other witnesses, meeting notes and transcripts, Trust investigation notes, police interview notes and a number of testimonials from colleagues of Dr Shah.

The Tribunal's Approach

15. The following legal advice was given to the Tribunal by the legally qualified chair, upon it being agreed by Counsel for both parties:

16. The Tribunal remind itself that it must form its own judgment about the witness evidence it heard and the reliability of each witness.

17. In assessing a witness's credibility, the Tribunal reminds itself that it should not assess witness credibility exclusively on the demeanour of the witness when giving their evidence, but their veracity should be tested by reference to objective facts proved independently in their evidence, in particular by reference to the documents in the case. The Tribunal should make a rounded assessment of a witness's reliability, rather than approaching their reliability in respect of each charge in isolation from the others: *R (on the application of Dutta) v GMC* [2020] EWHC 1974 (Admin).

18. It is open to the Tribunal not to rule out the whole of a witness's evidence based on credibility; credibility could be divisible: *Khan v The General Medical Council* [2021] EWHC 374 (Admin).

19. The Tribunal note that, when considering the evidence of any witness in this case, it should also bear in mind the extent to which the passage of time may have affected the memory of a witness. The Tribunal would be aware from its own experience that memories can fade with the passage of time, and that recollections may change, or may become confused, as to what did or did not happen at a particular time. The Tribunal should make due allowance for the way in which the passage of time may have affected the recollections of any of the witnesses.

20. In relation to witnesses generally, the Tribunal bear in mind that an honest witness could be mistaken, and a mistaken witness was not necessarily wrong about every fact.

21. As to individual pieces of evidence, the Tribunal is entitled to draw proper inferences - to come to common sense conclusions based upon the evidence which it accepted as reliable; but it must not speculate. Similarly, the Tribunal should not speculate about what other evidence there might have been. The Tribunal should only draw an inference if it could safely exclude other possibilities*: Soni v GMC* [2015] EWAC 0364 Admin.

22. The papers before the Tribunal contain evidence that has not been given orally during these proceedings. Hearsay evidence is admissible in these proceedings but the Tribunal must consider the weight, if any, to assign such evidence. When considering hearsay evidence, the Tribunal must consider the extent to which the evidence is agreed or disputed. The source of the evidence should be identified and the Tribunal should consider whether the witness was independent or may have had a purpose of their own or another to serve. The Tribunal must also consider the reliability of the evidence and should identify any mistakes or inconsistences found in it. There has been no opportunity to see the sources of disputed hearsay evidence tested under cross-examination, for example as to accuracy, truthfulness, ambiguity or misperception, and how the witnesses would have responded to this process. It may be that a witness has not addressed an issue in their written accounts that they may have been questioned about at this hearing.

23. The Doctor's previous good character must be taken into account by the Tribunal when assessing his credibility and the likelihood of him having done what has been alleged. His good character is not a defence to the Allegation, it is simply one factor to take into account when considering all of the evidence in the round. The weight to assign Dr Shah's good character is a matter for the Tribunal to determine, taking into account all the evidence presented and all it has heard. The Tribunal may decide that good character evidence supports a practitioner's credibility, and so is something which the Tribunal should take into account when deciding whether they believe his evidence (the 'credibility limb'); and the good character evidence may mean that he is less likely to have acted as alleged (the 'propensity limb').

24. Consent: Where consent is in issue as to any part of the allegation then it is open to the Tribunal to determine whether or not consent was given. If the Tribunal is satisfied on the evidence available that on the balance of probabilities consent was not present it should go on to consider whether the Doctor reasonably believed that consent was given. The most effective way of managing this is effectively to determine two questions:

- Did the Doctor genuinely believe the complainant consented?
- If so, did he reasonably believe it?

25. Deciding whether a belief as to consent is reasonable should be determined having regard to all the circumstances, including any steps taken to ascertain whether the other person consents. It is likely that in the particular circumstances of this case that will include consideration of the comparative status and position of the parties and their relationship.

Harassment and Sexual Motivation

26. Harassment is defined within s26 Equality Act 2010 and any conduct found proved to come within that definition will amount to harassment, or to behaviour "in a harassing manner", within the ordinary meaning of those words:

1. *'[26 Harassment (1) A person (A) harasses another (B) if— (a) A engages in unwanted conduct related to a relevant protected characteristic, and (b) the conduct has the purpose or effect of— (i) violating B's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B. (2) A also harasses B if— (a) A engages in unwanted conduct of a sexual nature, and (b) the conduct has the purpose or effect referred to in subsection (1)(b). (3) A also harasses B if— (a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex, (b) the conduct has the purpose or effect referred to in subsection (1)(b), and (c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct. (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account— (a) the perception of B; (b) the other circumstances of the case; (c) whether it is reasonable for the conduct to have that effect. (5) The relevant protected characteristics are— age; disability; gender reassignment; race; religion or belief; sex; sexual orientation.*

27. In *Basson v GMC* [2018] EWHC 505 (Admin), the High Court defined acting with sexual motivation as conduct done either in pursuit of sexual gratification or in pursuit of a future sexual relationship.

28. The Tribunal reminded itself that allegations of sexual motivation in the regulatory context were particularly serious. As such, the Tribunal would wish to seek cogent evidence before it concluded that a case of sexual motivation was made out. Sexual motivation requires a specific intent on the part of the doctor. It was not the same as carelessness, recklessness, or negligence.

29. It was important not to equate inappropriate conduct with sexually motivated conduct and the Tribunal should address the important question as to whether there could have been any other explanation for inappropriate conduct: *Arunkalaivanan v GMC* [2014] EWHC 873 (Admin). However, the key indispensable ingredient of motivation related to the individual's state of mind. The determination of an individual's state of mind was not

something that could be proved by direct observation. It could be proved only by inference or deduction from the surrounding evidence.

30. The Tribunal must be satisfied, on the balance of probabilities, that sexual motivation should be inferred from all the circumstances noting that the character evidence might be relevant to that exercise.

31. When considering sexual motivation, the Tribunal should make a deduction from all the facts and circumstances of the case and look at the material in the round. However, the best evidence of a sexual motivation could be the behaviour itself. If there was no plausible, alternative explanation as to why the doctor engaged in conduct or actions of an overtly sexual nature, then the Tribunal was entitled to conclude that the motivation was sexual.

Cross- admissibility and propensity

32. The Court of Appeal in Freeman & Crawford 2008 EWCA Crim 1863 at [20] addresses the question of cross-admissibility of evidence. It confirmed that evidence may be cross-admissible in two ways, as evidence to found the allegation or to establish propensity. Therefore it is open to a Tribunal to consider matters of propensity.

33. Where evidence relating to one count is considered in relation to another it must be relevant and admissible. Relevance is likely to depend upon similarities and this is a matter for the Tribunal. However, the Tribunal must exercise caution in this approach as the probative value of the evidence is lost if there is contamination or collusion between complainants. The Tribunal must also consider when determining whether to use the principle of crossadmissibility as to whether it is right and fair to do so, and it must be carefully balanced against the Doctor's evidence that he did not act as alleged.

34. The Tribunal has to reach a conclusion on each paragraph separately, but it is entitled, in determining whether or not each paragraph is proved, to have regard to relevant evidence in regard to any other paragraph. It may consider the evidence in the round. A Tribunal is not required to determine whether it is satisfied, on the evidence, to find one paragraph in the Allegation proved before it can move on to use that evidence to deal with any other paragraph in the Allegation: that approach would be too restrictive.

35. Hanson 2005 EWCA Crim 824 at [18] cautions that propensity (where found) is only one relevant factor. The Tribunal must assess its significance in the light of all the other evidence in the case. Propensity cannot be regarded as a satisfactory substitute for direct

evidence: R v Mitchell 2016 UKSC 55, at [55]. The Supreme Court described propensity as an incidental issue.

The Tribunal's Analysis of the Evidence and Findings

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

Colleague A Paragraph 1

37. The Tribunal read and heard evidence from Colleague A and Dr Shah that contrasted sharply as regards the central issues of the allegations.

38. Dr Shah admitted some intimate touching and claimed he had reasonable grounds to believe that it was welcome and was in some regards reciprocated. He and Colleague A would regularly sit very close together in his office XXX and that from incidental touching a relationship 'evolved' over time into one which involved sexual touching. He would start to touch her knees and thighs. Over the years, there would be more intimate physical contact. He would touch her back, bottom and hips. Dr Shah said that at no stage did Colleague A give him an indication that the touching was unwanted physical contact. He was insistent the 'touching' commenced prior to the social gatherings referenced in the Allegation.

39. Colleague A was clear that any touching was unwelcome and never consensual. She stated that Dr Shah first touched her at a social event which was a shock to her, but she felt maybe due to the alcohol. However, she states that after this he intermittently but repeatedly touched her inappropriately in the workplace. She states that she never consented to the touching and that she made this clear to Dr Shah. She also alleged that the touching went beyond that admitted by Dr Shah and that there were significant other incidents as set out in the Allegation, including masturbating in her presence on one occasion and whilst leaning against her on another.

40. Colleague A also stated that Dr Shah was disrespectful towards her, in that he tapped her cheeks and clicked his fingers towards her, called her a good girl and that he referred to female colleagues as 'birds'. Dr Shah admitted using the term good girl towards her and saying 'bird' when he could not remember a female colleague's name. He denied any intent to demean.

41. Paragraph 6 of the Allegation alleges that Dr Shah asked or allowed Colleagues A and C to complete part of his mandatory training. Dr Shah admitted this occurred, whereas Colleague A denied ever completing his training for him.

42. Faced with starkly contrasting accounts the Tribunal looked to other evidence which could confirm or contradict either witness.

43. Colleague A stated that the first inappropriate touching occurred at a social gathering. Dr Shah touched her legs while sitting next to her. She pushed his hand away a number of times and was sure colleagues who were with her saw it. In her interview with the police she stated that she nudged her colleague as it occurred. She states that she also spoke to her colleague Ms I the following week 'as she witnessed it at the time'. Colleague A states that she spoke to Ms I again at later date setting out a complaint about Dr Shah's inappropriate behaviour and in return received advice. Ms I has no recollection of these conversations. When asked in her interview with the Trust whether she had ever witnessed Dr Shah act inappropriately towards Colleague A, Ms I replied 'never'. No-one present with Colleague A at the event has stated they can recall seeing anything inappropriate happening.

44. Colleague A also states that on occasions when touched by Dr Shah in his office she would shout and slam the door as she left. There is no supporting evidence for this despite working in a close team, in a shared secretarial office, in a busy department within the hospital. Indeed, many of her colleagues expressed great surprise when they become aware of the allegations.

45. Potentially against his interests, Dr Shah admits that Colleague A completed part of his mandatory training. WhatsApp messages and emails have been supplied which in some measure support this and suggest she had the means to do so. Professor F also states Colleague A volunteered to him that she had completed some of his own mandatory training even though he did not ask her to do so. Colleague C states that it was 'common knowledge' that Colleague A completed the training and that 'she was doing it in the office'. Colleague A denies ever doing any mandatory training for Dr Shah or anyone else.

46. Colleague A stated in her police interview that Professor F told her that *'he knew what Rajesh was doing to me, he told me that it had been covered up, the Trust had tried to cover it up and smooth things over'*. Professor F was adamant this did not occur and that he would not say such a thing.

47. The Tribunal could not identify any documentary or other evidence that undermined the account given by Dr Shah. It found his account of a prolonged consensual relationship that permitted intimate touching, but did not seem to manifest itself in any other way, to be unusual, but not of itself incredible.

48. Dr Shah is of strong and positive good character, as is supported by outstanding testimonials. Colleague A was herself of good character and highly regarded by her colleagues, but in light of the factors set out above which conflict with her account, and as the burden of proof lies with the GMC, the Tribunal could not be satisfied on the balance of probabilities that her account should be preferred to that of Dr Shah where the two contradicted each other in relation to material issues. Accordingly, applying this conclusion logically and consistently to each individual element of Paragraph 1 of the Allegation, the Tribunal found that only that intimate contact to which Dr Shah admitted could be found to have occurred.

49. On Dr Shah's account he believed that this contact was consensual and welcomed. He accepted when asked that the issue of consent was never openly discussed between them, but that he assumed it from Colleague A's response and demeanour. The Tribunal was intensely aware of the significant status and power differential between Dr Shah and Colleague A. It was agreed between the two parties between 2004 and 2010 that the relationship was professional only. Dr Shah states that the contact grew slowly and was persistent for many years and that he never had cause to doubt it was consensual. He states that any time Colleague A expressed disapproval of what he did or tried to do, such as putting his hand up her skirt and trying to kiss her chest, he desisted. The Tribunal noted that he accepts he may have tried again at another time, but that if he met with the same response he stopped. The Tribunal find that as these acts occurred within a relationship which he believed permitted some intimate contact, they were consistent with exploring 'boundaries', and did not of themselves indicate lack of consent. Dr Shah also states that any disapproval was voiced in a soft tone and that her demeanour remained pleasant. The Tribunal found on the evidence available to it that Dr Shah believed the contact was consensual and that this belief was reasonable in all the circumstances.

50. The Tribunal therefore find that only those elements of Paragraph 1 which Dr Shah accepts as factually correct can be established on the evidence. These relate to several and repeated instances of intimate touching. The Tribunal find the allegation that this touching was 'without consent' not to be proved. Accordingly, the Tribunal find Paragraph 1 of the Allegation not proved, with the exception of 1(g)(iii) and (iv) which are admitted and found proved.

Paragraph 2 in relation to 1(g)(iii) and 1(g)(iv)

51. The Tribunal had regard to the imbalance of power between Dr Shah and Colleague A. It also had regard to the setting in which the conduct occurred, in the workplace. The Tribunal noted Dr Shah's admissions and his expressed contrition.

52. Having considered the evidence and the circumstances, the Tribunal concluded that irrespective of Dr Shah's intention, the comments as set out at paragraphs 1(g)(iii) and 1(g)(iv) of the Allegation did have the effect of demeaning and creating an intimidating hostile, degrading, humiliating or offensive environment for her. Accordingly, the Tribunal found this paragraph of the Allegation proved.

Paragraph 3 in relation to 1(g)(iii) and 1(g)(iv)

53. The Tribunal did not find the allegations contained within paragraphs 1(b) – 1(g)(ii) proved. Although Dr Shah accepted that some of the actions alleged occurred, as the Tribunal had not found they occurred without consent, it could not find that they constituted '*unwanted* conduct of a sexual nature'.

54. Accordingly the Tribunal found paragraph 3(a) in relation to 1(g)(iii) and 1(g)(iv) not proved.

55. Paragraph 3(b) was admitted.

Colleague B Paragraph 4

56. Colleague B states that she first met Dr Shah whilst working as XXX in the Cardiothoracic theatre. She said that her contact with Dr Shah was minimal, that their relationship was professional. The first alleged incident set out at paragraph 4(a) happened on the 11 October 2014. She states Dr Shah approached her and congratulated on XXX by giving her a hug. Later that day they had been speaking about her career plans, he put his arm around her shoulder and steered her towards the coffee room. In the coffee room he gave her another hug and his hands went down to her '*bum cheeks'* and squeezed them. Colleague B said she was upset and shocked, and that she later emailed her manager with a letter explaining what happened. She did not take the matter further as XXX but wanted it on record.

57. Colleague B alleged the second incident, set out at paragraph 4(b) of the allegation, happened on the 2 October 2019. She told the Tribunal she returned to the hospital in XXX and the end of 2018/ beginning of 2019 started working as XXX within Cardiothoracic theatres doing some shifts XXX. The second incident happened when Dr Shah approached her and engaged in conversation at the allocation board. Colleague B said that Dr Shah then placed his left hand on the allocation board and turned to face her. He moved his left hand to her right hip and brushed his body against her breasts. He moved his hand from her hip to her right buttock which he then squeezed. Colleague B later approached Dr Shah, expressed her disapproval of his actions and asked that he never do it again. She spoke to a colleague about what had happened and then informed her manager, Ms H. Later that day she wrote a formal letter of complaint. She received a qualified letter of apology from Dr Shah.

58. Dr Shah said that he knew Colleague B reasonably well, that they met regularly as part of their duties. Dr Shah said he had a good working relationship with her. He had no knowledge of the complaint regarding the 2014 incident until after the 2019 matter was raised. Dr Shah told the Tribunal that on both occasions there may have been social touching, hugging or holding of the waist as they walked, but it was never inappropriate, and he did not touch her buttocks.

59. The Tribunal first considered the evidence of Colleague B in relation to the incident on 11 October 2014. Colleague B maintained throughout her oral evidence that Dr Shah had given her a hug, and he then squeezed her buttocks. The Tribunal noted that colleague B states she informed XXX straight after the alleged incident: *'At the end of the shift, Ms J (my Team Lead), Ms L and I were getting changed in the changing rooms and I mentioned to Ms J what had happened.'……. I remember that Ms J said that the Ward Manager wasn't going to be in the hospital until Monday and that I could either email Ms K (my manager) or speak to the Intensive Care Unit Manager, Person L. I believe I emailed Ms K either that evening or the day after, on the Sunday'.*

60. In response to the complaint made against him Dr Shah has denied any wrongdoing and maintains that his actions were merely showing support to Colleague B in response to her good news.

61. Mr Brassington stated on behalf of the Doctor that there is no evidence that the email Colleague B produces as a contemporaneous record of the incident was ever sent. The Tribunal note this gap in the evidence but find it unlikely that she would fabricate an email and present it to those investigating her allegation, as she would expect that its bona fides

would be checked or was capable of being checked. No evidence is supplied to suggest it is other than genuine. The Tribunal are satisfied it is a contemporaneous record.

62. Dr Shah was not aware of the allegation until 5 years after the incident, albeit through no fault of his. He states he is tactile by nature and therefore the fact there was innocent contact between him and Colleague B would not be a particular reason for him to recall the encounter. He states that as they walked to the coffee room she had her arm around his waist also. The Tribunal find the account of Ms B that their relationship was professional and formal more likely; there was a considerable gap in status and role between them and she says they only occasionally met, and then only on a professional basis. The Tribunal find that Dr Shah's claim that she would have placed her arm around his waist most unlikely.

63. Mr Brassington refers the Tribunal to what he states are considerable discrepancies in the accounts given by Colleague B. In her contemporaneous note she states that he steered her to the coffee room but in her police statement that she was in the room when he entered. In her live evidence when cross examined, she stated that the contemporaneous version was correct, that she had not reread it for the police interview and that she was focused then on the 2019 complaint. The inconsistencies the Tribunal were referred to were in its view peripheral to the complaint and did not of themselves indicate a lack of veracity or inaccurate recall of the core of the allegation.

64. In relation to the incident in October 2019, Colleague B stated that on seeing Dr Shah she was immediately afraid there could be a repetition of the inappropriate behaviour. She states Dr Shah touched her breast and squeezed her buttocks. Soon after the incident she approached Dr Shah to speak to him about his behaviour '*I recall telling Dr Shah that he couldn't do what he did at the allocation board, i.e. that he could not touch me like he did there as I did not like it and never to do it again. I recall he apologised and said he wouldn't do it again. He wasn't surprised or shocked that I had approached him; I got the impression that he knew what he did was wrong. The conversation was very quick.'.*

65. The Tribunal also noted that Colleague B reported that matter to Ms H on duty who asked her to put the complaint in a letter. A meeting with the head of XXX was arranged later that day who subsequently informed HR of the matter.

66. The Tribunal noted that Dr Shah had admitted that he had placed his hand on her waist. '*I put my hand around her hip and Colleague B's hand was also around my waist and we did hug. I deny this was inappropriate or without consent.'* Dr Shah also acknowledged

that a conversation had taken place with colleague B over the incident; '*Colleague B came there and said to me*, "*Dr Shah, please, can I have a word?" and so I excused myself from the consultant colleague, I moved away from him, a little bit away, to talk to Colleague B and she said to me, "Dr Shah, please, can you not touch me because I don't like it" and she said I remember very, very clearly she said, "I know you don't mean it". I said, "Okay and I'm sorry"*.

67. The Tribunal also noted that Dr Shah had sent Colleague B a letter of apology after the incident. *'I am writing to apologise for making you feel uncomfortable. I understand that I hurt you by compromising your personal space and by touching you in a way which you felt was inappropriate. For this I am truly sorry'.*

68. Colleague B states that she had to steel herself before she could confront Dr Shah about the unwanted contact, and that in order to make the approach feel less hostile she did say to him that she accepted that he may have meant it 'in a friendly way'. She says this was merely a less daunting way of raising the matter and in no way meant she accepted in reality that it was friendly or could be justified. Bearing in mind the power disparity between them, the Tribunal find this explanation credible. It would also seem unlikely that she would confront him whilst accepting the conduct was well intentioned having made a complaint to the contrary the same day.

69. The Tribunal was reminded that in her contemporaneous note Colleague B did not use the word 'squeeze'. She did say that Dr Shah placed his hand on her buttock and the Tribunal do not find this omission undermines her credibility. In addition, the Tribunal does note that in the police interview and statement she says he touched her with both hands, whereas in her evidence and note she is insistent it was one hand. She accepts this was an error, and states that she did not pick it up at the time and correct it but is adamant she was touched with one hand.

70. The Tribunal note the various inconsistencies in the accounts given by Colleague B and they do raise some concerns. However, they do not fundamentally undermine the credibility of her evidence and are explicable in all the circumstances. The contemporaneous records and complaints of both incidents support her central allegation that on two occasions Dr Shah squeezed her buttocks. The Tribunal also find Dr Shah's account that she reciprocated his hug, and put her hand around his waist, and then later sought him out to complain about the contact to have a central contradiction which renders it less likely to be accurate. In reaching this decision the Tribunal bore in mind Dr Shah's good character

71. For the above reasons the Tribunal accepted the account of Colleague B as the more likely version and is therefore satisfied on the balance of probabilities that the conduct alleged in paragraph 4 (a) and (b) of the Allegation is proved, except as regards for 2 (b)(ii).

Colleague B Paragraph 5 (a) and (b)

72. In respect of whether the conduct was of a sexual nature, the Tribunal reminded itself that it must look at the conduct as a whole having regard to the circumstances that prevailed at the time. The Tribunal was satisfied that the squeezing of Colleague B's bottom constituted conduct of a sexual nature.

73. The Tribunal had regard to the imbalance of power between Dr Shah and Colleague B. The Tribunal found that the manner in which this conduct took place and the events as described by Colleague B created a degrading and humiliating environment for her.

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

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

75. The Tribunal had determined in relation to paragraph 4 that Dr Shah had inappropriately touched Colleague B and was satisfied that this constituted sexual conduct. The Tribunal considered that in the absence of any contrary evidence it was the more probable inference that Dr Shah's acts were sexually motivated.

76. Accordingly, the Tribunal found this paragraph of the Allegation proved.

Paragraph 6

66. Paragraph 6 was admitted and found proved.

Paragraph 7

77. The Tribunal considered paragraph 7. It was satisfied that as a matter of fact Dr Shah was in a more senior position than Colleagues A, B and C and that therefore 7(a) was proved.

78. The Tribunal then considered paragraph 7(b). It noted that to some degree Colleague A and B both did challenge Dr Shah, therefore it found 7(b)(i) not proved. It found that as for Colleague A the findings of fact as regards paragraph 1 were such that the issue of seniority was not applicable. It did find that this may have been a reason why she acquiesced to completing the training as regards paragraph 6, but as she did not accept that she had done so, and as the Tribunal had heard she had voluntarily completed the training for Professor F, it could not find that reason established on the evidence. As regards Colleague B it was not relevant to her ability to prevent the actions, and she did report them. Therefore, the Tribunal found paragraph 7(b) as alleged not proved.

The Tribunal's Overall Determination on the Facts

79. The Tribunal has determined the facts as follows:

1. Whilst employed as a consultant cardiothoracic surgeon at Manchester University NHS Foundation Trust ('the Trust') you:

    a. on one or more occasions between 2005 and 2012 treated colleague A in a derogatory manner when communicating with her in that you:

        i. tapped her cheeks when asking her to do something; **Found not proved**
        ii. clicked your fingers to gain her attention; **Found not proved**

    b. inappropriately touched Colleague A without consent in that between 2011 and 2021:

        i. on one or more occasions during the work social events listed in Schedule 1 ('the work socials') you used your hands to:

            1. touch colleague A's legs; **Found not proved**

            2. rub up and down colleague A's back; **Found not proved**

            3. kissed colleague A on the lips; **Found not proved**

        ii. on one or more occasions, *other than in 1.b.i,* ~~after the work socials~~, when colleague A was in your office at the Trust ('your office') you:

            1. used your hands to touch her:

a. back; **Found not proved**

b. bottom; **Found not proved**

c. hips; **Found not proved**

d. breasts; **Found not proved**

2. reached your arm across the front of her body, touching her breasts with your arm; **Found not proved**

3. when she was sat in a chair ('the chair'):

    a. brought your chair up to hers with your knees touching hers; **Found not proved**

    b. put your hands up her skirt; **Found not proved**

    c. touched her genitals over her underwear; **Found not proved**

    d. sat on her legs rubbing your penis up and down her legs; **Found not proved**

    e. attempted to touch her:

        i. legs; **Found not proved**

        ii. thighs; **Found not proved**

        iii. breasts; **Found not proved**

4. when colleague A stood up from the chair:

    a. grabbed hold of her; **Found not proved**

    b. tried to kiss her on her:

        i. neck; **Found not proved**

        ii. chest; **Found not proved**

iii. on one or more occasions ~~after the work socials~~, when you were in colleague A's office you put both of your hands on colleague A's bottom; Found not proved

c. on one or more occasions between 2011 and 2021 in your office:

i. took your shirt off whilst talking to colleague A about a patient; Found not proved

ii. prevented colleague A from leaving your office by putting your hand or foot against your office door; Found not proved

iii. when colleague A attempted to leave your office you said 'don't go I've not finished' or words to that effect; Found not proved

d. in or around March or April 2021 you stood by your office window, put your hands inside your trousers and masturbated whilst having a conversation about a patient with colleague A; Found not proved

e. on one occasion whilst colleague A was pressed against your office door, you masturbated whilst leaning against her; Found not proved

f. on one or more occasions between 2019 and 2021 when colleague A worked in another role, unnecessarily sought out colleague A to create an environment where you would touch her inappropriately; Found not proved

g. on one or more occasions made inappropriate comments in that:

i. when colleague A shouted at you during the incident described at allegation 1(b)(ii)(3)(c) you said 'shout at me again' or words to that effect; Found not proved

ii. when colleague A asked you to leave her alone you asked her to shout at you again, or words to that effect; Found not proved

iii. you called colleague A a 'good girl' or words to that effect; Admitted and found proved

iv. you called one or more female colleagues 'bird' or words to that effect. Admitted and found proved

2. Your actions at paragraphs 1(a), 1(g)(iii) and 1(g)(iv) 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

colleague A or creating an intimidating, hostile, degrading, humiliating or offensive environment for colleague A. **Determined and found proved in relation to 1 (g) (iii) and (iv)**

3. Your actions as set out at paragraphs 1(b) – 1(g)(ii):

    a. 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 colleague A or creating an intimidating, hostile, degrading, humiliating or offensive environment for colleague A; **Found not proved**

    b. were sexually motivated. **Admitted and found proved**

<u>Colleague B</u>

4. Whilst employed as a consultant cardiothoracic surgeon at the Trust you inappropriately touched Colleague B without consent in that:

    a. on 11 October 2014:

        i. you put your arm around colleague B's shoulder and steered her towards the coffee room at the Trust ('the coffee room'); **Determined and found proved**

        ii. in the coffee room you:

            1. leaned in to hug colleague B; **Determined and found proved**

            2. put both of your hands on the cheeks of colleague B's bottom; **Determined and found proved**

            3. squeezed colleague B's bottom cheeks; **Determined and found proved**

    b. on 2 October 2019 near the theatre allocation board outside of cardiothoracic theatre number three you:

        i. brushed your body against colleague B's breasts; **Determined and found proved**

        ii. put both of your arms around colleague B; **Found not proved**

        iii. put your left hand on colleague B's:

1. right hip; **Determined and found proved**

2. right buttock; **Determined and found proved**

iv. squeezed colleague B's right buttock cheek. **Determined and found proved**

5. Your actions as set out at paragraph 4:

   a. 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 colleague B or creating an intimidating, hostile, degrading, humiliating or offensive environment for colleague B; **Determined and found proved**

   b. were sexually motivated. **Determined and found proved**

6. Between 2017 and 2021 you on one or more occasions asked and/or allowed colleagues A and C to complete one or more of the non-practical elements of your mandatory training for you. **Admitted and found proved**

7. Your actions as set out at paragraphs 1, 4 and 6 were an abuse of your professional position in that:

   a. you were in a more senior position than colleagues A, B and C; **Determined and found proved**

   b. colleagues A and B did not feel able to:

      i. challenge your behaviour; **Found not proved**

      ii. prevent your actions; **Found not proved**

      iii. report your actions. **Found not 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 - 28/08/2024

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

The Evidence

81. The Tribunal has taken into account all the evidence received during the facts stage of the hearing, both oral and documentary. The Tribunal received a further bundle from the doctor including reflective statements, evidence of continuing professional development and unredacted testimonials.

Submissions

82. On behalf of the GMC, Ms Emsley-Smith, Counsel, submitted that essentially there are 3 elements of misconduct involved:

- request by Dr Shah of Colleague A and Colleague C to perform his mandatory training (Paragraph 6 of the Allegation);
- harassment of Colleague A related to sex (Paragraph 2 as it relates to Paragraph 1(g)(iii) and (iv)) of the Allegation);
- The inappropriate touching of Colleague B (Paragraphs 4 and 5 of the Allegation).

83. Ms Emsley-Smith addressed the inappropriate touching of Colleague B first, commencing with the earlier 2014 incident. She submitted that Dr Shah steered Miss B into a private place and committed an act which the Tribunal have determined was sexually motivated. She said that this was premeditated, in that Dr Shah sought to get Colleague B alone. She submitted that once in the coffee room the hug, hands on the bottom and the squeeze of the buttocks constituted a sexual assault.

84. She submitted that Dr Shah at the time was a highly regarded surgeon, who held significant power and authority. She said that such an act would be deplorable from anyone, but was particularly so in that it was perpetrated on a junior colleague at work whilst she was going about her duties.

85. She submitted that the second matter in 2019 was perhaps worse by virtue of the repetitive nature of the act.

86. Ms Elmsley-Smith stated that the acts together, involving unwanted sexual contact, were such that they must be viewed as being at the serious end of the spectrum as regards sexual harassment.

87. Ms Emsley-Smith then addressed the harassment of Colleague A. She submitted that the evidence of Colleague A showed that Dr Shah used the term 'bird' very often about female colleagues and that this demonstrated a disrespect towards women. She acknowledged that the evidence revealed that not all women felt the terms used were disrespectful, but reminded the Tribunal that it had found that the conduct had the effect of violating the dignity of Colleague A, creating a hostile, degrading, humiliating or offensive environment for her.

88. She submitted that no matter what else was going on in the relationship between Dr Shah and Colleague A, the Tribunal have found harassment was a feature of Colleague A's working life with him. That is the contrary to the requirement set out in Paragraph 1 of Good Medical Practice ('*GMP')* to '*establish and maintain good relationships with patients and colleagues'*.

89. She further submitted that this conduct, violating the dignity of a member of staff, creating an offensive environment for them breaches paragraphs 41 and 46 of the 2006 edition (36 and 37 of the 2013 edition) of GMP.

90. She submitted that creating such an atmosphere for a member of staff, an atmosphere which must have persisted over a significant period of time, must be viewed as serious misconduct.

91. She submitted that for the Tribunal to determine that a finding of harassment relating to sex does not constitute serious misconduct would be to disapply the Equality Act as regards doctors' regulation, contrary to the expectations set out in GMP.

92. With reference to the admitted matters in Paragraph 6 of the Allegation concerning the mandatory training, Ms Emsley -Smith submitted that Dr Shah should never have put a junior member of staff in a position where disciplinary action could follow. This was an abuse of trust and power, provided a poor example to others and thereby amounted to serious misconduct.

93. Moving on to the question as to whether Dr Shah's fitness to practice is currently

impaired Ms Emsley-Smith submitted that 2 of the 4 limbs identified by Dame Janet Smith (see paragraph 30 of this determination) were engaged:

> *b. Has in the past 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;*

94. Ms Emsley-Smith stated that as regards the sexual touching of Colleague B there was concern that there could be repetition. Dr Shah was entitled to deny the allegations, but in categorising Colleague B as a liar he demonstrated little or no appreciation of the full impact of his conduct. She also submitted that whether or not the Tribunal were satisfied as to that point, there is clearly misconduct which is so serious that it requires sanction in the public interest.

95. As regards to the misconduct related to harassment relating to sex, she submitted that Dr Shah has not appreciated the full impact of his comments, even though he admitted making them and states he regrets doing so. She asserted that he is at the start of the journey as regards insight. She submitted that overall, Dr Shah has a 'blind spot' in his ability to appreciate the impact of his actions on others, and that this was apparent in the mandatory training issue and the possible consequences for those subordinate to him. For those reasons, she submitted that current impairment should be found in relation to Colleague B.

<u>On behalf of Dr Shah</u>

96. Mr Brassington submitted that if impairment was a matter capable of admission, he would concede it on behalf of Dr Shah with regards to Paragraphs 4 and 5 of the Allegation in relation to Colleague B. He accepted the seriousness of the Tribunal findings and the applicability of the two limbs (see Paragraph 14) claimed to be engaged by the GMC. However, he stated that impairment was a matter of judgment for the Tribunal exercising its own discretion. He could not accept that Dr Shah presented a risk of repetition of that behaviour, but acknowledged that the public interest must demand a finding of current impairment in relation to both incidents.

97. As regards the other conduct, he posed the question whether fellow members of the profession or the wider public would regard them as 'deplorable'.

98. Dr Shah conceded he had used the words 'good girl' and 'bird' when talking to Colleague A. The term 'bird' was used when he could not remember the names of females, it was never directed at anyone present. The term 'good girl' was never intended to be derogatory and some of those to whom it had been addressed stated in evidence they did not find it to be so.

99. He submitted that Dr Shah has admitted from the outset that he used those words and that it was inappropriate. It is clear from his witness statement and his reflections, which include an unreserved apology that he never intended to create an offensive environment, nor did he appreciate at the time the impact of his behaviour on Colleague A and her emotional wellbeing.

100. Mr Brassington rejected the argument that for the Tribunal not to find impairment would be to ignore the intent of the Equality Act. The legislation was of wide application and there must be an acknowledged difference between employment and disciplinary proceedings. To do otherwise would require that every breach of the Equality Act must come to a regulatory body. Mr Brassington reminded the Tribunal that Dr Shah had already embarked on acts of remediation and submitted that there was a vanishingly small risk of repetition.

101. With regards to the mandatory training, Mr Brassington questioned whether fellow members of the profession would regard this as deplorable. He emphasised that no clinical training was completed by the administrative staff; this was an obvious conclusion to draw because they would not be able to do it. He referred to Colleague C's evidence that she did not think that she had done anything wrong or unusual at the time and did not feel pressurised into doing it.

102. He reminded the Tribunal of Dr Shah's written reflections which speak to his understanding as to how inappropriate it was to ask more junior colleagues to do this work, irrespective of whether they knew they should not.

103. In conclusion, Mr Brassington submitted that Dr Shah accepts there will be a finding of current impairment in respect of his conduct relating to Colleague B, and is aware of the impact this will have on what would otherwise have been an exemplary career and legacy. In respect of the other conduct, Mr Brassington submitted that a finding of current impairment should not be made. He did not agree that Dr Shah had not properly reflected on his conduct and that he was only at the beginning of his remediation journey.

The Relevant Legal Principles

104. The Legally Qualified Chair ('LQC') gave advice on the approach to be taken by the Tribunal in relation to impairment.

105. In approaching the decision, the Tribunal must be mindful of the two-stage process to be adopted: first whether the facts found proved amounted to misconduct which was serious; and secondly, whether the finding of serious misconduct should lead to a finding of impairment. There is no burden or standard of proof and the decision of impairment is for the Tribunal's judgement alone.

106. The Tribunal must determine whether Dr Shah's fitness to practice is impaired today, taking into account his 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. It should also consider whether a finding of impairment is warranted taking into account the wider public interest.

107. Throughout its deliberations, the Tribunal must be mindful of its responsibility to uphold the overarching objective, as set out in the Medical Act 1983 (as amended). That objective is the protection of the public and involves the pursuit of the following:

a. to protect, promote and maintain the health, safety and wellbeing of the public;

b. to maintain public confidence in the profession;

` c. to promote and maintain proper professional standards and conduct for members of the profession.

108. The LQC highlighted the case of *Roylance v GMC (no2) (2000) 1 AC 311* in which 'misconduct' was defined as 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'. In the case *Nandi* v GMC [2004] EWHC 2317 (Admin), it was said that serious misconduct is sometimes described as misconduct which would be considered deplorable by fellow practitioners.

109. Whilst there is no statutory definition of impairment, the Tribunal is assisted by the guidance provided by Dame Janet Smith in the Fifth Shipman Report, as adopted by the High

Court in *CHRE v NMC and Paula Grant [2011] EWHC 297 Admin.* The Tribunal noted that any of the following features are likely to be present when a doctor's fitness to practise is found to be impaired:

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

110. The LQC also drew the Tribunal's attention to Cohen v GMC (2008) EWHC 581 in which the Court held that the task of the panel, in considering impairment, is to take account of the practitioner's misconduct and then consider it in light of all the other relevant factors known to them. The Court stated that it will be highly relevant in determining if fitness to practise is impaired to consider:

- whether the practitioner's misconduct is easily remediable;
- whether the misconduct has been remedied; and
- whether the misconduct is likely to be repeated.

111. The LQC further referred the Tribunal to the principle set out in Cheatle v GMC [2009] EWHC 645 (Admin): 'The doctor's misconduct at a particular time may be so egregious that, looking forward, a panel is persuaded that the doctor is simply not fit to practise medicine without restrictions, or maybe at all. On the other hand, the doctor's misconduct may be such that, seen within the context of an otherwise unblemished record, a Fitness to Practise Panel could conclude that, looking forward, his or her fitness to practise is not impaired, despite the misconduct.'

112. The LQC drew the Tribunal's attention to the case of Yeong v GMC [2009] EWHC 1923 (Admin), which states that 'where a FTPP considers that fitness to practise is impaired for such reasons, and that a firm declaration of professional standards so as to promote public confidence in that medical practitioner and the profession generally is required, the efforts made by the practitioner to address his problems and to reduce the risk of recurrence of such misconduct in the future may be of far less significance than in other cases, such as those involving clinical errors or incompetence'.

113. When considering the issue of insight and remediation the Tribunal must bear in mind the guidance in the line of authorities including *Nicholas-Pillai v GMC [2009] EWHC 1048 (Admin), Towuanghantse v GMC [2021] EWHC 681* and *Sawati v General Medical Council [2022] EWHC 283 (Admin).* Maintenance of innocence at a Tribunal should not automatically result in a finding of failure of insight: it is of potential relevance but its relevance should be properly considered in context. In particular where a denied allegation involves an issue of dishonesty the Tribunal must consider whether the element of dishonest state of mind was a primary allegation and then the nature of the denial. It should also consider how far 'lack of insight' is evidenced by anything other than the rejected defence and the nature of the defence, identifying clearly any respect in which it was itself a deception, if such is the case.

The Tribunal's Determination on Impairment

Misconduct

114. The Tribunal first considered whether the facts found proved were a sufficiently serious departure from the standards of conduct reasonably expected of Dr Shah, as a registered medical practitioner, such as to amount to misconduct.

Paragraph 1 & 2 of the Allegation

115. In its deliberations, the Tribunal had regard to *Good Medical Practice ('GMP') (2013 edition)* and the paragraphs relevant to this case. The Tribunal was of the view that Dr Shah's behaviour towards Colleague B was a clear departure from the principles contained in the following paragraphs of GMP:

> '*1 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.*'

> '*3 Good medical practice describes what is expected of all doctors registered with the General Medical Council (GMC). It is your responsibility to be familiar with Good medical practice and the explanatory guidance which supports it, and to follow the guidance they contain.*'

'*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.*'

116. In its finding of facts, the Tribunal had found that Dr Shah's conduct in the workplace towards Colleague A amounted to conduct which met the definition of harassment related to sex under section 26(1) of the Equality Act 2010. The Tribunal noted the significant imbalance of power between Dr Shah and Colleague A, but also reminded itself that Colleague A had felt able to challenge the use of the language, although it did persist. The term 'bird' was not directed at any individual present, but used when he could not recall a female person's name. The doctor stated that the term 'good girl' was intended to praise or thank, though he accepts in hindsight it was inappropriate.

117. The Tribunal bore in mind that it had found that the use of these terms was harassment under section 26(1) of the Equality Act. It did not accept that to make this finding meant that it was bound to find serious misconduct. The legislation was of wide applicability, and it cannot be the case that every breach must lead to a regulatory hearing. A finding of misconduct is a matter within the discretion of the Tribunal.

118. The Tribunal reminded itself of the test set out in *Nandi*, above. The terms used were unprofessional and inappropriate and Dr Shah was correct to acknowledge this and regret their use, and to take steps to understand why this is so and avoid using them again. However, the Tribunal was not satisfied that colleagues of Dr Shah, or members of the public who became aware of what occurred, would find the behaviour so reprehensible as to be 'deplorable'. The Tribunal therefore found the use of these comments not to be sufficiently serious as to be misconduct which could found a determination of current impairment.

Paragraph 6 of the Allegation

119. As regards the mandatory training, the Tribunal noted that Dr Shah had admitted these matters from the outset. The Tribunal was satisfied that in not doing his mandatory training himself Dr Shah was setting a poor example as someone in such a senior a position. It was claimed on his behalf that none of the training undertaken by A and C for Dr Shah was clinical in nature. There was no evidence presented as regards the nature of the training and the Tribunal accepted the inference it was invited to draw that it must have been of a generic and relatively basic type.

120. It was suggested by the GMC that an aggravating feature of the conduct was that Colleagues A and C were in effect coerced to do the training by reason of the power disparity and that he made them 'accomplices' and thereby at risk of disciplinary action. Colleague A denied doing the training, so her state of mind was harder to ascertain, but Professor F gave evidence that she completed some of his training without any prompt from him, and indeed against his wishes. Colleague C is clear she did not think she was doing anything wrong at the time and thought it standard practice:

> *'Mr Shah came into the office and said that he had his appraisal the next day and that his mandatory training needed to be done and he asked if I would do this. I said I would because I know this has been done previously by [Colleague A] whilst in her XXX role and I was also made aware that one of the waiting list coordinators had also done this previously. I didn't feel at the time that this was anything new given it had been done previously.'*

121. The Tribunal assessed any risk of significant disciplinary consequences to A and C as low, in circumstances where they had followed direct instructions from their much more senior colleague. Dr Shah admitted responsibility when challenged. There is no evidence he had undertaken this action knowing it would put them at risk, though he would have known he was asking them to do work they should not be responsible for. Again applying the test in *Nandi* the Tribunal was satisfied that colleagues or well informed members of the public would find his actions unprofessional, but not deplorable. There was no evidence of risk to the public and in all the circumstances the failure to complete elements of the mandatory training was not so serious as to be serious misconduct which could found a determination of current impairment.

Paragraphs 4 & 5 of the Allegation

122. As was conceded by Mr Brassington on behalf of Dr Shah, the finding of misconduct as regards Colleague B is of a different nature. The Tribunal viewed Paragraphs 4 and 5 of the Allegation as constituting one set of offending to be considered together.

123. The matters found proved amounted to two occasions of unwanted touching of a sexual nature. Counsel for the GMC submitted that on the first occasion in 2014 Dr Shah 'steered' Colleague B to the coffee room and this was evidence of premeditation as he wished to get her alone. The Tribunal note that the 'steering' was never suggested by Colleague B to be for this express purpose nor is there other evidence that it was. There is evidence that the coffee room was frequently busy, and no reason for Dr Shah to suppose it

would be empty. It is also noted that Colleague B neglected to mention the 'steering' in one account, even saying she was in the coffee room when Dr Shah arrived. The Tribunal see this as confirmation she did not regard it as a significant element of his conduct. Also, the touching on the second occasion occurred in a busy open area, again not supporting the implication that the 'steering' was a planned element to ensure privacy before touching her.

124. Nevertheless the Tribunal is satisfied that Colleague B suffered distress as a result of Dr Shah's conduct on both occasions. The unwanted and inappropriate sexual touching of a junior female colleague in the workplace can only be viewed as serious misconduct. The Tribunal also notes the fact of the repetition. The Tribunal noted but found of limited relevance that the conduct also constituted a breach of Section 26(2) of the Equality Act.

125. In respect of the conduct found proven against Dr Shah in relation to Colleague B, the Tribunal concluded that any reasonable colleague or well-informed member of the public would find it deplorable and that consequently it constituted serious misconduct.

Impairment

126. Having found that the facts found proved in relation to Paragraphs 4 and 5 of the Allegation amounted to serious misconduct, the Tribunal went on to consider whether, as a result of that misconduct, Dr Shah's fitness to practice is currently impaired.

127. The Tribunal was satisfied that limbs (b) and (c) of Dame Janet Smith's guidance were engaged, as submitted by the GMC.

> b. Has in the past 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.

128. The Tribunal was also of the view that two of the three limbs of the overarching objective were engaged:

> b. to maintain public confidence in the profession;
>
> c. to promote and maintain proper professional standards and conduct for members of the profession.

129. The Tribunal does not have cause for concern as regards Dr Shah's interaction with his patients. However as there had been found proved two occasions of inappropriate sexual touching against a junior colleague within the workplace, the Tribunal has reason to consider the welfare and wellbeing of other colleagues and whether there is a risk that such behaviour could be repeated. The Tribunal noted that Dr Shah had an excellent professional and personal reputation, his testimonials were extremely impressive including some from more junior, female colleagues who had worked with him for years. The Tribunal further noted that many of the female, colleague witnesses stated that they had never experienced any inappropriate behaviour from Dr Shah and felt comfortable in his presence. The Tribunal also noted that there has been no repetition of the conduct or further complaint of any kind since 2019. The Tribunal had regard to Dr Shah's awareness of the grave impact of these findings on his professional reputation and the impact of these findings on his legacy. The Tribunal also had regard to the evidence which demonstrates that Dr Shah has made some efforts to remediate, including attending a two-day Professional Boundaries course and that he had subsequently created a reflective statement. On balance the Tribunal did not find there was sufficient evidence to be satisfied that there was a risk of repetition of the misconduct.

130. The Tribunal has no doubt Dr Shah's misconduct brings the medical profession into disrepute and that he has breached fundamental tenets of the medical profession, in particular, the requirement to respect colleagues. It is of the view that the misconduct is of such a serious nature that irrespective of any personal insight and remediation a finding of current impairment would still be necessary to maintain public confidence in the profession and to promote and maintain proper professional standards and conduct for members of the profession.

131. The Tribunal concluded that for the reasons set out above Dr Shah's fitness to practice is currently impaired by reason of misconduct.

Determination on Sanction - 29/08/2024

132. Having determined that Dr Shah'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

133. The Tribunal has had regard to all findings of fact and evidence received during the earlier stages of the hearing, where relevant, in reaching a decision on sanction.

Submissions

134. On behalf of the GMC, Ms Emsley-Smith reminded the Tribunal that the imposition of a sanction, if any, was a matter for the Tribunal, but submitted that given the seriousness of the misconduct found, the aggravating features of this case and Dr Shah's lack of insight, a serious sanction was mandatory.

135. Ms Emsley-Smith referred the Tribunal to paragraphs 14, 16, 17, 18, 19 and 20 of the Sanctions Guidance (2024) ('SG') and submitted Dr Shah has plainly conducted himself in a manner which undermines the reputation of the profession. She submitted that Dr Shah has breached fundamental tenets of the medical profession in his conduct towards Colleague B.

136. Ms Emsley-Smith referred the Tribunal to the aggravating and mitigating features in the case and submitted that, given the seriousness of the findings of the Tribunal, taking no action or imposing conditions on Dr Shah's registration would not be proportionate, nor would it uphold the over-arching objective. She submitted that a sanction of suspension would not adequately mark the seriousness of the misconduct and the message which is required as a response to it. She stated that it was GMC's position that the appropriate sanction was one of erasure.

137. In respect of suspension Ms Emsley-Smith referred the Tribunal to paragraphs 92 and 93 of the SG and reminded it that suspension may 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. She submitted that this may be an appropriate response for conduct that is serious but falls short of being fundamentally incompatible with continued registration. Ms Emsley-Smith submitted that the conduct found proven in this case, was conduct that was fundamentally incompatible with continued registration.

138. Ms Emsley-Smith referred the Tribunal to paragraphs 107, 108 and 109 of the SG which relate to the sanction of erasure. She submitted that Dr Shah's actions displayed a blatant disregard for the expectation that a doctor must maintain the high standards of the medical profession. She stated that the misconduct found proved showed a disregard for the principles set out in Good Medical Practice. She said that Dr Shah must have known at the time that squeezing Colleague B's bottom was grossly inappropriate conduct and breached GMP in an egregious manner.

139. Ms Emsley-Smith referred the Tribunal to paragraph 138(b) of the SG which states that more serious outcomes are likely to be required where there are serious findings that involve sexual harassment; she submitted that sexual harassment which involves sexually motivated, unwanted physical contact does constitute a serious finding. She also referred to paragraph 149 of the SG which references cases which involve sexual misconduct with colleagues as being within the category of cases warranting a more serious response as regards sanction.

140. Ms Emsley-Smith submitted that the Tribunal would undoubtedly consider the many positive testimonials on behalf of Dr Shah in determining the appropriate sanction. However, she submitted that there are two points on the testimonials to be considered:

1. The testimonials were written in advance of the findings of fact. Although each author was made aware of the allegations Dr Shah faced, Professor F made it clear in his evidence that he had - in effect - disregarded the allegations of Ms. B on the basis that Dr Shah had informed him that there was no evidence of wrongdoing and it was a misunderstanding. That characterisation is no longer available to Dr Shah.

2. Being an excellent surgeon cannot mitigate sexually inappropriate conduct to junior colleagues.

<u>On behalf of Dr Shah</u>

141. Mr Brassington submitted that following the Tribunal's determination on facts and impairment, the appropriate and proportionate sanction to impose is one of suspension.

142. He accepted that the public interest is vested in declaring and upholding proper standards of conduct and behaviour, but that it was not a 'one-way street'. He submitted that the public would be equally concerned with returning an otherwise useful doctor to practice, though he accepted that being an excellent surgeon, cannot mitigate sexually inappropriate conduct and no amount of brilliance could excuse such behaviour.

143. He submitted that the gravity of what has been found in this case is not in any way sufficient on its own to justify erasure from the medical register. He said the GMC's submission was utterly disproportionate and lacking in judgment. He accepted that Dr Shah's conduct was entirely inappropriate and should never have happened, but stated that it was not such that it meant erasure must inevitably follow.

144. Mr Brassington referred the Tribunal to the many positive testimonials which attested to Dr Shah's excellence as a surgeon and value to society. He told the Tribunal that Dr Shah's patients have already been deprived of his unique and lifesaving skills for three years. He conceded this was entirely the fault of Dr Shah, but referred the Tribunal to paragraph 17 of the SG, as referenced by the GMC:

> "*Patients must be able to trust doctors with their lives and health, so doctors must make sure that their conduct justifies their patients' trust in them and the public's trust in the profession (see paragraph 81 of Good medical practice). Although the tribunal should make sure the sanction it imposes is appropriate and proportionate, the reputation of the profession as a whole is more important than the interests of any individual doctor".*

145. He submitted that Dr Shah may have let down the profession but his conduct towards his patients had always been appropriate and proper. He submitted the Tribunal should consider this when assessing the public interest.

146. He submitted that it is important to put into context the misconduct which has been proved against him and that the Tribunal will be required at this point to have regard to mitigating and aggravating features.

147. Mr Brassington submitted that Dr Shah has expressed his regret and apologised in his reflective statement. There have been no previous findings as regards to his fitness to practice. Dr Shah has cooperated with all the inquiries and investigations, and there are positive testimonials. He told the Tribunal that Dr Shah had self-referred to the GMC in June of 2021, before any formal disciplinary hearing had been convened at the Trust and before any contact with the police. He also referred the Tribunal to those elements of the testimonials which referenced the doctor's personal qualities. In particular, there were testimonials, and witness evidence, from junior colleagues who stated that they valued and enjoyed his company within the work setting and did not find his behaviour in any way inappropriate.

148. Mr Brassington submitted that Dr Shah has demonstrated insight and remediation. He had apologised at the time for matters and even though he maintained his denial he had undergone relevant training. He has undertaken a Professional Boundaries course and produced appropriate and measured reflections on it. He continued working at the Hospital following the incident in 2019 until April 2022, when he was dismissed, and there was no

repetition of the misconduct. Mr Brassington reminded the Tribunal that Dr Shah had previously been a man of good character and that he was heading towards the twilight of an extremely successful and distinguished career when his misconduct let him down.

149. Mr Brassington conceded that the Tribunal's concerns were focused on public interest, personal mitigation would be of limited impact. He stated that nevertheless the Tribunal should be aware of Dr Shah's circumstances. He told the Tribunal that since his dismissal, in April of 2022, Dr Shah has not had any salary, which has had a devastating impact upon his finances. He is XXX years old with many useful years of public service remaining. He said that the right thinking reasonable member of the public would want him back at work as soon as possible in an effort to make amends for his misconduct and for the disrepute that he has brought upon the profession by his behaviour.

150. He reminded the Tribunal that it had found that Dr Shah does not present a risk of repeating this misconduct.

151. Mr Brassington submitted that the public would want a message to be sent to mark the seriousness of the misconduct, but they would also want him back at work. He submitted that a period of suspension, something less than the maximum, would be appropriate in the circumstances. He asserted this would adequately mark the seriousness of the behaviour but also protect the public interest which required that this doctor be back at work.

The Tribunal's Determination on Sanction

LQC Advice

152. There is no burden or standard of proof at this stage. The decision as to sanction is a matter for the Tribunal exercising its independent judgement.

153. The Tribunal had regard to the current version of the SG including the guidance on the approach it should take and the sanctions available to it.

154. The Tribunal noted that the main purpose of imposing a sanction is to protect the public. Its purpose is not to punish, although it may have a punitive effect. When imposing a sanction, it must be proportionate and the Tribunal must impose the least restrictive sanction necessary.

155. The Tribunal are the final arbiters of sanction but should bear in mind the guidance of Sir Thomas Bingham MR in *Bolton v Law Society [1994] 1 WLR 512 at 598)* [51] that the most fundamental purpose of sanction is to maintain the reputation and sustain public confidence in the integrity of the profession: "*The reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is a part of the price*."

156. The LQC advised the Tribunal in accordance with the case *of Arunachalam v The General Medical Council [2018] EWHC 758 (Admin)*. In that case Mr Justice Kerr commented that cases relating to sexual misconduct are inherently serious and may lead to erasure, even for "a first time offender" with a good clinical record. He said that *"[O]ften, maintaining public confidence in the profession and upholding high standards of behaviour by stamping out unacceptable behaviour of this kind will require erasure in a sexual misconduct case"* [paras 34 and 58]; and that in considering the available sanctions in ascending order of gravity, "it is essential that the tribunal must evaluate the mitigating features as well as the aggravating features and balance them against each other when considering whether the sanction of suspension is appropriate. It is an error of law to leave that exercise to the final stage of considering erasure since, once suspension has been ruled out, the case is effectively over since erasure remains the only available sanction" [para 39] The case is also authority that where the victim is a colleague, rather than a patient, "severe sanctions….are generally necessary, in addition, to protect and uphold the dignity of workers in the profession and to protect their freedom to work without being molested" [para 59];

157. When considering the issue of insight and remediation the Tribunal must bear in mind the guidance in the line of authorities including *Nicholas-Pillai v GMC [2009] EWHC 1048 (Admin), Towuanghantse v GMC [2021] EWHC 681* and *Sawati v General Medical Council [2022] EWHC 283 (Admin).* Every accused person is entitled to put a robust defence, and maintenance of innocence at a Tribunal should not automatically result in a finding of failure of insight: it is of potential relevance, but its relevance should be properly considered in context. It should also consider how far 'lack of insight' is evidenced by anything other than the rejected defence.

158. The Tribunal reminded itself that the submissions made were only to assist in its decision making. It was not bound by them and the decision on what sanction, if any, to impose was one for it to determine.

<u>Aggravating and Mitigating Factors</u>

159. Before considering what action, if any, was appropriate in this case, the Tribunal considered and balanced the aggravating and mitigating factors. In particular, it referred to paragraphs including 25-49 of the SG for mitigating factors and paragraphs 50-56 for aggravating factors.

160. The Tribunal considered the following to be aggravating factors in this case:

- The repetition of the inappropriate sexual touching of Colleague B;
- The misconduct occurred within the work environment and was perpetrated on a colleague;
- Dr Shah was a senior surgeon and his behaviour towards his more junior colleague displayed a breach of trust and failure in responsibility.

161. Having identified the aggravating factors in the case, the Tribunal identified the following mitigating factors:

- Dr Shah has expressed regret and apologised to Colleague B, the GMC and the public. His reflective statement describes his remorse and regret for his actions;
- Dr Shah has produced many testimonials to his good character. It further noted his colleagues at the Trust describe him as a knowledgeable and dedicated surgeon;
- Dr Shah has attended courses by way of remediation and produced reflections on his learning.

No action

162. In coming to its decision as to the appropriate sanction, if any, to impose in Dr Shah's case, the Tribunal first considered whether to conclude the case by taking no action. It noted that taking no action may be appropriate where there are exceptional circumstances.

163. The Tribunal determined that there were no exceptional circumstances in this case. Given the findings in relation to sexual misconduct and impairment, the Tribunal considered that action was required in order to uphold and maintain public confidence in the profession. It would not be sufficient, proportionate, or in the public interest to conclude this case by taking no action.

Conditions

164. The Tribunal next considered whether it would be sufficient to impose conditions on Dr Shah's registration. The Tribunal has borne in mind that any conditions imposed would need to be appropriate, proportionate, workable and measurable.

165. The Tribunal noted that neither party submitted that an order of conditions was an appropriate sanction in this case. The Tribunal had regard to the various paragraphs of the SG which indicate the circumstances which conditions might be appropriate.

166. This case involved sexual harassment of a work colleague. The Tribunal did not consider that any conditions would be workable or effective, nor would they mark the seriousness of the misconduct found. Further, the Tribunal did not consider that conditions would be appropriate, proportionate or satisfy the demands of the Overarching Objective.

Suspension

167. The Tribunal then went on to consider whether imposing a period of suspension on Dr Shah's registration would be appropriate and proportionate.

168. The Tribunal acknowledged that suspension has a deterrent effect and can be used as a declaratory signal to the doctor, the profession, and to the public about what is regarded as behaviour unbefitting a registered doctor.

169. The Tribunal took account of the following paragraphs of the SG which indicate circumstances in which it may be appropriate to impose a sanction of suspension:

> *'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 ...'

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

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

...

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

f No evidence of repetition of similar behaviour since incident

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

170. The Tribunal also bore in mind paragraphs 149 and 150 the SG which relate to sexual misconduct:

149 This encompasses a wide range of conduct from criminal convictions for sexual assault and sexual abuse of children (including child sex abuse materials) to sexual misconduct with patients, colleagues, patients' relatives or others…

150 Sexual misconduct seriously undermines public trust in the profession. The misconduct is particularly serious where there is an abuse of the special position of trust a doctor occupies, or where a doctor has been required to register as a sex offender. More serious action, such as erasure, is likely to be appropriate in such cases.

171. The Tribunal had determined Dr Shah's sexual misconduct was a serious breach of GMP and fell far short of the standards of conduct reasonably expected of a doctor. It was of the view that the sexual misconduct was serious in its consequences for Colleague B and the reputation of the medical profession as a whole, and noted that such conduct made the sanction of erasure more likely, but not inevitable. The Tribunal considered carefully the

nature of the misconduct as proved and determined that although it did involve unwanted sexual touching, it was not of such a nature that it was at the highest end of the spectrum as regards sexual misconduct. The Tribunal then considered whether the conduct, serious as it was, fell short of conduct that was incompatible with continued registration.

172. The Tribunal looked at the criteria in paragraph 109 of the SG and determined that 109 (a), (d) and (f) were engaged.

> ***109*** *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 fundamentally incompatible with being a doctor
>
> …..
>
> d Abuse of position/trust (see *Good medical practice*, paragraph 65: *'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 in child sex abuse materials

173. The Tribunal were of the view that the conduct was potentially remediable, and that it had evidence that Dr Shah had commenced that remediation. There had been a breach of trust, in that Dr Shah was much more senior to Colleague B. However, the Tribunal did not find that his seniority had been a significant contributor to the misconduct which had been largely opportunistic in nature. The Tribunal recognised that any unwanted sexual touching, particularly within a work environment, must be viewed as significant and serious. However, as stated above, it did not find the actions of Dr Shah to be at the most serious end of the scale of such misconduct. The Tribunal also reminded itself that it must not assume that all sexual misconduct must lead to automatic imposition of the sanction of erasure, but that it was for the Tribunal to exercise its own discretion taking into account all the circumstances.

174. The Tribunal reminded itself that it had found that there was no risk of the behaviour being repeated. For those reasons the consideration of insight and remediation was of less importance, but the Tribunal was satisfied that Dr Shah displayed a developing level of insight, as

demonstrated by the remedial work he has undertaken. Dr Shah had attended courses and produced detailed written statements demonstrating his understanding and awareness of how his conduct impacts on others. It noted that it could not be expected that there would be evidence of full remediation and insight so soon after Dr Shah had maintained his denial of the offending behaviour.

175. For these reasons the Tribunal determined that the misconduct found fell short of being fundamentally incompatible with continued registration. The Tribunal therefore decided that a sanction of suspension would uphold the overarching objective in the circumstances of this case. The Tribunal was satisfied that a period of suspension would maintain public confidence and uphold professional standards and conduct. The Tribunal did consider that it was in the public interest to retain a valuable doctor on the register, but this was not a significant factor in its determination. The Tribunal accepted the submission of the GMC, as did Mr Brassington on behalf of the Doctor, that 'being an excellent surgeon cannot mitigate sexually inappropriate conduct to junior colleagues'.

176. The Tribunal determined that a period of suspension would be sufficient to uphold the overarching objective and would send a clear message to the profession and the wider public that conduct of this nature was unacceptable. Further, it considered that a period of suspension was the appropriate and proportionate sanction in this case.

177. The Tribunal determined that Dr Shah's registration should be suspended for a period of twelve months. The Tribunal considered that this was an appropriate period in order to reflect the seriousness of the misconduct found proven and to afford the doctor a sufficient period of time to reflect and continue on his journey of insight and remediation.

178. The Tribunal determined to direct a review of Dr Shah's case. A review hearing will convene shortly before the end of the period of suspension, unless an early review is sought.

179. The Tribunal wished to clarify that at the review hearing, the onus will be on Dr Shah to demonstrate how he has remediated and developed full insight into his misconduct. It therefore may assist the reviewing Tribunal if Dr Shah provides that Tribunal with:

- Evidence of reflection which focuses on his misconduct;
- Up-to-date testimonials;
- Evidence of how Dr Shah has kept his clinical knowledge up to date;
- Any other evidence which Dr Shah may wish to submit.

180. Dr Shah will also be able to provide any other information that he considers might assist in demonstrating that his fitness to practise is no longer impaired.

Determination on Immediate Order - 29/08/2024

181. Having directed that Dr Shah's registration be suspended for 12 months, the Tribunal has considered, in accordance with Rule 17(2)(o) of the Rules, whether Dr Shah's registration should be subject to an immediate order.

Submissions

182. On behalf of the GMC, Ms Emsley- Smith submitted that it was necessary in this case to make an immediate order in light of the Tribunals findings. She submitted that an immediate order is in the public interest and necessary to protect public confidence in the profession.

183. On behalf of Dr Shah, Mr Brassington submitted that an immediate order is neither necessary nor desirable in the public interest. He said that Dr Shah represents no risk whatsoever to any patient or any member of the public. There has been a significant passage of time in this case and no repetition.

The Tribunal's Determination

184. The Tribunal has taken into account the relevant paragraphs of the SG which state:

> *'172 The tribunal may impose an immediate order if it determines that it is necessary to protect members of the public, or is otherwise in the public interest, or is in the best interests of the doctor….'*
>
> *173 An immediate order might be particularly appropriate in cases where the doctor poses a risk to patient safety. For example, where they have provided poor clinical care or abused a doctor's special position of trust, or where immediate action must be taken to protect public confidence in the medical profession.*
>
> *178 Having considered the matter, the decision whether to impose an immediate order will be at the discretion of the tribunal based on the facts of each case. The tribunal should consider the seriousness of the matter that led to the substantive*

direction being made and whether it is appropriate for the doctor to continue in unrestricted practice before the substantive order takes effect.

185. The Tribunal determined that that there were no patient safety risks, therefore an immediate order was not necessary to protect members of the public.

186. However, given the nature of the allegations and the seriousness of the findings in this case, the Tribunal determined that an immediate order was necessary to protect public confidence in the medical profession.

187. The Tribunal therefore determined to impose an immediate order of suspension on Dr Shah's registration.

188. This means that Dr Shah's registration will be suspended from today. The substantive direction, as already announced, will take effect 28 days from the date on which written notification of this decision is deemed to have been served, unless an appeal is made in the interim. If an appeal is made, the immediate order will remain in force until the appeal has concluded.

189. The interim order is hereby revoked.

190. That concludes the case.

Schedule 1

XXX