

PUBLIC RECORD

Dates: 17/04/2023 - 11/05/2023

Medical Practitioner's name: Mr Muhammad KHAN

GMC reference number: 3639881

Primary medical qualification: MB ChB 1985 University of Natal

Type of case	Outcome on facts	Outcome on impairment
New - Misconduct	No facts found proved	No Impairment

Summary of outcome

Case concluded

Tribunal:

Legally Qualified Chair	Ms Chitra Karve
Lay Tribunal Member:	Ms Jacqueline Telfer
Medical Tribunal Member:	Dr Laura Florence

Tribunal Clerk:	Mr Andrew Ormsby, 17/04/2023 – 20/04/2023, 24/04/2023 – 11/05/2023 Miss Emma Saunders, 21/04/2023
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Attendance and Representation:

Medical Practitioner:	Present and represented
Medical Practitioner's Representative:	Mr Kevin McCartney, Counsel, instructed by Hempsons LLP
GMC Representative:	Mr David Claxton, Counsel

Attendance of Press / Public

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

Overarching Objective

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

Determination on Facts - 10/05/2023

Background

1. Mr Khan qualified in South Africa in 1984 and became a Specialist Orthopaedic Surgeon in 1992, accredited and registered by the College of Medicine of South Africa. He obtained entry onto the General Medical Council (GMC) Specialist Register in 1996.
2. At the time of the events which are the subject of this hearing, Mr Khan worked as a full-time substantive Consultant Orthopaedic Surgeon at Barnsley Hospital (the Hospital) within Barnsley Hospital NHS Foundation Trust (the Trust). He began working in this post in 1995. He was also the Clinical Director for Orthopaedics and Rheumatology at the Trust from December 2000 to May 2005 and Clinical Director for Orthopaedics from April 2010 to February 2014. Mr Khan has more recently undertaken a number of locum Trauma and Orthopaedic Consultant posts at various hospitals across the UK.
3. The three complainants in this case – Miss A, Miss C and Miss D, were also employees at the Hospital and the Allegation against Mr Khan relates to alleged inappropriate and/or sexually motivated conduct. All allegations relating to Miss C were stayed following an application from Mr McCartney, Mr Khan's legal representative. This is explained more fully in paragraph 22 below.
4. As a result of the complaint made by Miss D and the actions which followed, there have been a number of internal and external legal processes which have generated multiple statements, court transcripts and decisions. In particular, there was an internal disciplinary investigation, a disciplinary hearing, an appeal against the decision of the disciplinary panel, Employment Tribunal proceedings and criminal proceedings in the Crown Court. Mr Khan was charged with sexual assault against Miss D and was acquitted at trial.
5. Following a hearing before a Medical Practitioners Tribunal in February 2019 (which concluded in July 2020), and an order of the High Court of Justice dated 2 March 2021, the case has been remitted to the Medical Practitioners Tribunal Service (MPTS).

6. This is the remitted hearing.

Miss A

7. Miss A was XXX working in the main surgical theatres at the Hospital and would sometimes work in Mr Khan's theatre as part of her role. She alleged that Mr Khan frequently asked her to assist as XXX in his theatre and if she did not, he would ignore her.

8. Miss A alleged that Mr Khan prohibited her from working with a colleague Miss B, as he said that they talked too much and it distracted him. Miss A alleged that, in a further attempt to stop her from talking, Mr Khan struck her on the hands on two occasions with a bone lever.

9. Miss A alleged that Mr Khan made inappropriate comments towards her. She alleged that one such comment was that she *'should hurry up and have an affair before she dried up due to her age'*, or words to that effect.

10. Miss A alleged that Mr Khan behaved inappropriately on a number of occasions by way of slapping her bottom and making comments about it, pressing his groin against her from behind while groaning suggestively or saying this is *'what I'd like to do to you'*, or words to that effect.

11. Further, Miss A alleged that, in autumn 2012, Mr Khan approached her and touched her breast, after she had scrubbed up. Following the alleged incident she requested a transfer so that she would not have to work with him any longer.

12. On an occasion later in 2012, Miss A alleged that, when pizzas were ordered for the department, and she expressed a preference for a different topping, Mr Khan told her that she would *'eat what I tell you to eat'*, or words to that effect.

Miss C

13. Miss C was a XXX at the Hospital and would sometimes work with Mr Khan as part of her role.

14. Miss C alleged that Mr Khan touched her vagina on two occasions; once when she was passing him in a coffee room doorway, and once in the coffee room itself.

15. Further, Miss C alleged that, on one occasion when there was an issue with changing a surgical list, Mr Khan told her to follow him to the male locker room where he would provide her with the information she needed. She alleged that, as she was crouched over a bin so that she had a flat surface to write on, Mr Khan approached her so that his clothed genitals were close to her face and said *'don't bite it, blow it'* or words to that effect.

16. Miss C further alleged that Mr Khan made lewd comments to her XXX.

Miss D

17. Miss D was an XXX at the Hospital and was based in operating theatres XXX. In her role, she only had limited interactions with Mr Khan.
18. Miss D alleged that, prior to an incident involving Mr Khan on 23 May 2013, there had been a number of inappropriate incidents over the preceding months. She alleged that there were several instances of Mr Khan suggesting to Miss D that she should go ‘on a date’ with him.
19. Miss D states that, in or around April 2013, whilst in an anaesthetic room at the Hospital, she banged her knee, which was particularly sensitive owing to a previous injury. She alleged that Mr Khan said that he would ‘rub it better’ for her, put a hand on her back, and, with the other, rubbed her knee while suggesting that they should ‘go on a date’.
20. Miss D alleged that the final incident involving Mr Khan occurred on 23 May 2013. She had been asked by a nurse to call for the next patient but was unsure which patient was next. When Mr Khan entered the room, she asked him which patient was next. She alleged that after Mr Khan gave her the patient’s name, when she turned away, he approached her from behind and wrapped his arms around her chest. She states that, after expressing that she wanted him to let her go, Mr Khan made a kissing gesture and tried to turn her around. She alleged that, when she tried to resist, Mr Khan grabbed her from behind again, ran his arm across her chest, put his hand on her breast and squeezed it, ran his hand down her back and across her buttocks, and said ‘no-one needs to know about this’.
21. It is alleged that Mr Khan’s actions as described by Miss A, Miss C and Miss D were sexually motivated.

The Outcome of Applications Made during the Facts Stage

22. The Tribunal granted Mr McCartney’s application made on behalf of Mr Khan, to exclude the evidence of Miss C and/or renew the application that had previously been made during a preliminary hearing, to stay the charges in relation to Miss C, as an abuse of process, pursuant to Rule 34(1) of the GMC Fitness to Practice Rules 2004 (‘the Rules’). The GMC opposed this application. The Tribunal’s full decision on the application is included at Annex A.
23. The Tribunal granted Mr Claxton’s application on behalf of the GMC, made pursuant to Rule 17(6) of the Rules, to withdraw paragraph 1(a) and amend paragraph 11 of the Allegation as paragraphs 1(b), 2(b) and 3 were not considered to be sexually motivated by Case Examiners. Mr McCartney did not oppose this application.
24. The Tribunal granted the GMC application for a witness, Ms G, former Chief Executive of the Hospital, to appear via video link rather than in person in order to cater for the witness’s availability. Mr McCartney opposed this application stating that it was preferable for witnesses to appear in person at the hearing. The Tribunal was informed that Ms G had been recently told about a CQC inspection into one of her departments on that day. The Tribunal considered whether there would be any unfairness to Mr Khan for Ms G to give

evidence remotely considering the circumstances that Ms G found herself in and decided that there would be no unfairness to Mr Khan.

25. The Tribunal granted Mr McCartney's application, made pursuant to Rule 17(2)(g) of the Rules, in relation to paragraph 8 of the Allegation. His application was in respect of paragraphs 8, 9(a), and 9(e) of the Allegation. The GMC opposed this application. The Tribunal rejected the application in relation to paragraphs 9(a) and 9(e) of the Allegation. The Tribunal's full decision on the application is included at Annex B.

26. The Tribunal granted Mr McCartney's application, made pursuant to Rule 34 of the Rules and/or an abuse of process, to exclude the evidence of Miss D and/or stay the charges arising from her evidence in relation to paragraph 10 of the Allegation. The GMC opposed this application. The Tribunal rejected Mr McCartney's application in relation to paragraph 9 of the Allegation. The Tribunal's full decision on the application is included at Annex C.

27. Because of the Tribunal's decisions in relation to the above amendments the Tribunal also made appropriate amendments to paragraph 11 of the Allegation. This is detailed in the amended Allegation below.

The Allegation and the Doctor's Response

28. The Allegation made against Mr Khan is as follows:

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

Miss A

1. You behaved inappropriately towards XXX Miss A, between 2006 and 2012 in that:
 - a. ~~you ignored her if she failed to do as you asked;~~ **Withdrawn**
 - b. you told her she was not allowed to work with XXX Nurse B;
To be determined
 - c. you said she 'should hurry up and have an affair before she dried up due to her age', or words to that effect; **To be determined**
 - d. on one or more occasion you:
 - i. told her you were attracted to her, or words to that effect;
To be determined
 - ii. touched and/or slapped her on the bottom; **To be determined**
 - iii. said her bottom was 'big, firm and you liked it', or words to that effect;
To be determined
 - iv. went up behind her and pushed your groin into her lower back;
To be determined
 - v. made suggestive groans whilst carrying out the activity set out at paragraph 1(d)(iv) above; **To be determined**
 - vi. said 'what I'd like to do to you' or words to that effect when carrying out the activity set out at paragraph 1(d)(iv) above. **To be determined**

2. You behaved inappropriately towards Miss A in or around Autumn 2012 in that you:
 - a. touched her right breast when working with her in Theatre 2;
To be determined
 - b. struck her on the hands on one or more occasions during surgical procedures with a bone lever. **To be determined**
3. You made an inappropriate comment to Miss A in or around November 2012 in that you said ‘you will eat what I tell you to eat’, or words to that effect. **To be determined**

Miss C

- ~~4. You behaved inappropriately towards XXX Miss C in that in or around December 2006 whilst Miss C was in Theatre 2 you:
 - a. pressed your genitals against her bottom; **Stayed as abuse of process**
 - b. said ‘this is what you are missing out on’, or words to that effect.
Stayed as abuse of process~~
- ~~5. You behaved inappropriately towards Miss C between 2006 and 2013 in that:
 - a. whilst standing in the doorway of the coffee room, you put your hand on her vagina; **Stayed as abuse of process**
 - b. whilst sitting in the coffee room, you put your hand on her vagina.
Stayed as abuse of process~~
- ~~6. You behaved inappropriately towards Miss C in late 2012 or early 2013, whilst in the locker room, in that you:
 - a. put your genitals close to her face whilst she was kneeling down;
Stayed as abuse of process
 - b. said ‘don’t bite it, blow it’, or words to that effect. **Stayed as abuse of process**~~
- ~~7. You behaved inappropriately towards Miss C between December 2006 and November 2015 you made one or more comments of a sexual nature to her in Afrikaans in that you described what you would like to do to her if you ‘got the chance’.
Stayed as abuse of process~~

Miss D

- ~~8. You behaved inappropriately towards XXX Miss D in that on one or more occasion between March and May 2013 you asked her to go ‘on a date’ with you, or words to that effect. **Deleted following a Rule 17(2)(g) application**~~
9. You behaved inappropriately towards Miss D in or around April 2013, when after she banged her knee, you:
 - a. said ‘ooh, I bet that hurt, let me rub it better for you’ or words to that effect;
To be determined
 - b. put your hand on her back; **To be determined**

- c. put your hand on her left knee; **To be determined**
- d. rubbed her left knee; **To be determined**
- e. said 'we should go out on a date', or words to that effect. **To be determined**

- ~~10. You behaved inappropriately towards Miss D on 23 May 2013 in that whilst in the preparation room of Theatre 2 with Miss D you:~~
- ~~a. put your face close to hers; Stayed as abuse of process~~
 - ~~b. approached her from behind and wrapped your arms around her chest; Stayed as abuse of process~~
 - ~~c. put your hands on her ribs; Stayed as abuse of process~~
 - ~~d. said 'I like your small ribs', or words to that effect; Stayed as abuse of process~~
 - ~~e. made a kissing gesture towards her; Stayed as abuse of process~~
 - ~~f. tried to turn her around; Stayed as abuse of process~~
 - ~~g. grabbed Miss D from behind for a second time; Stayed as abuse of process~~
 - ~~h. ran your arm across her chest; Stayed as abuse of process~~
 - ~~i. put your hand on her left breast and squeezed it; Stayed as abuse of process~~
 - ~~j. ran your hand:
 - ~~i. down her back; Stayed as abuse of process~~
 - ~~ii. across her buttocks; Stayed as abuse of process~~~~
 - ~~k. said 'no one needs to know about this [Miss D]', or words to that effect. Stayed as abuse of process~~

11. Your actions set out at paragraphs ~~1-10~~ 1-3 and ~~8-10~~ 9 above were sexually motivated except for 1b., 2b., and 3. **Amended under Rule 17(6)**
To be determined

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

Witness Evidence

29. The Tribunal received evidence on behalf of the GMC from the following witnesses:
- Miss A, XXX working in the main theatres at the Hospital, in person;
 - Miss C, XXX at the Hospital, dated 20 November 2017, supplemental witness statement dated 1 March 2023 and second supplemental witness statement dated 9 July 2019;
 - Miss D, XXX at the Hospital, in person. Miss D left abruptly during cross-examination;
 - Dr E, Chief Executive of the Trust, in person;
 - Ms F, Joint Associate Director of Human Resources at the Trust, in person; and
 - Ms G, Former Chief Executive at the Hospital, by video link
30. The Tribunal also received evidence on behalf of the GMC in the form of witness statements from the following witnesses:

- Miss A, XXX working in the main theatres at the Hospital, dated 24 November 2016, and supplemental witness statement dated 16 March 2018;
- Miss D, XXX at the Hospital, dated 20 November 2016, and a supplemental witness statement dated 6 October 2017 and second supplemental statement dated 21 November 2017;
- Mr H, Operating Department Practitioner, dated 13 November 2017;
- Mr I, Theatre Support Worker at the Hospital, dated 15 December 2017;
- Ms J, Staff Nurse at the Hospital, dated 14 December 2017;
- Mr K, Consultant Orthopaedic Surgeon, dated 6 December 2017;
- Ms L, Director of Communications at the Hospital, dated 16 November 2016;
- Ms N, Independent HR Consultant approached to undertake a Preliminary Investigation Report on behalf of the Hospital, dated 26 September 2017;
- Ms G, Former Chief Executive at the Hospital, dated 29 November 2017;
- DC M, police witness statement, dated 22 November 2017;
- Ms O, Theatre Manager at the Hospital, dated 24 January 2019;
- Ms P, Assistant Nursing Director at the Hospital, dated 23 January 2019; and
- Ms F, Joint Associate Director of Human Resources at the Trust, dated 31 January 2019.

31. Mr Khan provided his own witness statement dated 7 November 2018 and also gave oral evidence at the hearing.

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

- Mr Q, Consultant Orthopaedic Surgeon at the Hospital, dated 23 March 2018; and
- Mr R, General Orthopaedic and Trauma Surgeon at the Hospital, dated 23 March 2018.

Documentary Evidence

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

- Various Trust Investigation documents, including witness statements and notes of meetings, various dates;
- Police and Crown Court documents, including witness statements and transcripts, various dates;
- Anonymous Letter, 'Possible Moral Hazard in Barnsley Hospital Foundation Trust', dated 21 August 2013;
- Miss D's Employment Tribunal witness statement, dated 30 August 2016;
- Miss C's Employment Tribunal witness statement, dated 13 September 2016;
- Disclosure documentation in relation to Miss C's evidence, including witness statement from Miss C, dated 13 September 2016, and further telephone notes and email correspondence of various dates;

- Ms P's Employment Tribunal witness statement, dated 27 July 2016;
- Various photographs of interior of the Hospital theatre rooms, undated;
- Mr Khan's Curriculum Vitae;
- Employment Tribunal Judgment - Dr XXX, dated February 2010;
- CPD Certificates, various dates;
- Testimonial bundle and 'thank you' cards and letters, various dates;
- Judgment for the first Employment Tribunal, dated March 2015;
- Judgment for further Judgment for further Employment Tribunal Hearing, date 29 August 2017;
- Airline boarding passes dated April 2013; and
- Sketch of layout of Theatre, drawn by Mr Khan during his oral evidence at the current hearing.

34. Before the Tribunal considered the evidence on facts Mr Claxton provided it with a 'schedule of evidence' that the GMC relied on. This was in order to assist the Tribunal to consider only relevant or agreed evidence on the remaining parts of the Allegation. Mr McCartney agreed with the content of that schedule, with some additional material that he indicated he would be referring to in his closing submissions. The Tribunal took this schedule and Mr McCartney's comments on it into account when making its decision on the facts.

The Tribunal's Approach

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

36. The Tribunal also took into account the advice of the Legally Qualified Chair which included a direction on the good character of Mr Khan:

'Good Character

I turn to the matter of good character. We have been told that Mr Khan has no convictions and he has no FTP history. He is of good character. That is a matter which the Tribunal can and should take into account in 2 ways:

Firstly when considering the likelihood of his behaving in the manner alleged;

Secondly when considering the likelihood of whether he has told the truth when giving his evidence before the Tribunal both in relation to his written statement and his oral evidence, along with the additional material that he has provided on his behalf. As I said, it is a matter which the Tribunal should take into account. It is not determinative. It sits alongside all the other evidence on these issues.

Where the credibility of a witness for the GMC has been called into question, as it has in this case, the Tribunal will need to take this into account, however on its own does not mean that that witness has not told the truth in evidence before the tribunal.'

The Tribunal's Analysis of the Evidence and Findings

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

The Tribunal's Overall Determination on the Facts

38. The Tribunal has determined the facts as follows:

Miss A

Paragraph 1(b) of the Allegation

39. The Tribunal considered the allegation that Mr Khan behaved inappropriately towards XXX Miss A, between 2006 and 2012 in that he told her that she was not allowed to work with XXX Nurse B.

40. The Tribunal noted that although Mr Khan denied this allegation, he admitted while giving oral evidence that after he had ensured that Miss A and B were not to work together in his theatre, he had told her that she was not allowed to work with Miss B.

41. Mr Khan gave the following account to the Tribunal: He stated that Miss A had been warned by him for months that she talked too much during the operations. He needed quiet to focus on the patient and she was distracting him. After repeated warnings, Miss A said to him that she was not going to stop so he should just 'get on with it'. Following that Mr Khan went to the Lead Nurse, Ms S and asked her to stop Miss A and Miss B working together in his theatre. It was after that that he had told Miss A that she was 'not allowed' to work with XXX Nurse B.

42. The Tribunal noted Mr Khan's witness statement, dated 7 November 2018:

'I do not like people talking in theatres or loud music, as confirmed by [Mr I] at my disciplinary hearing on 10 February 2014 at para 2.1.10, as it distracts us from the patient and the job at hand.

[...]

I mentioned [Miss A's] disruptive private conversations during operations, to Lead Nurse [Ms S], on several occasions and eventually requested that [Miss A] and [XXX Nurse B] be separated so that only one of them was in my theatre at any one time, to reduce the risks to patients. Both were upset with me for being separated.'

43. The Tribunal also took Miss A's witness statement, dated 24 November 2016, into account, particularly:

'9. In my Initial Account I noted that Dr Khan had stated that I was no longer allowed to work in his lists with XXX. This was [Nurse B]. I had worked with her for a long time. There had never been any complaints from other surgeons and there hasn't been since. We work very well together; in fact we are specifically put together by some team leaders.

10. Dr Khan would directly tell me I couldn't work with [Nurse B] I asked several times why we weren't allowed to work together anymore and he said that we talked too much and it was taking my attention away from him. I also asked Lead Nurse, [Ms S] - the same question and she said the same thing.'

44. The Tribunal noted that Miss A disagreed with Mr Khan's assertion that she talked too much. However, when giving oral evidence to the Tribunal, she accepted that if Mr Khan needed quiet during an operation, he was entitled to ask for it.

45. In the circumstances the Tribunal did not consider that it was inappropriate for a surgeon who is responsible for the efficient and safe working of an operating theatre to prefer quiet whilst carrying out surgery.

46. Therefore, the Tribunal concluded that Mr Khan had not behaved inappropriately towards XXX Miss A, between 2006 and 2012 in that he told her that she was not allowed to work with XXX Nurse B.

47. Accordingly, the Tribunal determined that paragraph 1(b) of the Allegation was not proved.

Paragraph 1(c) of the Allegation

48. The Tribunal considered the allegation that Mr Khan behaved inappropriately towards XXX Miss A, between 2006 and 2012 in that he said Miss A 'should hurry up and have an affair before she dried up due to her age', or words to that effect.

49. The Tribunal noted that Mr Khan disputed this allegation and, in his oral evidence, denied that he had said to Miss A that she should hurry up and have an affair before she dried up due to her age, or words to that effect.

50. The Tribunal took account of Miss A's witness statement, dated 24 November 2016, in particular:

'19. However Dr Khan would say things, such as commenting on your appearance or turn something that you were talking about into something rude. He said I should hurry up and have an affair before I dried up due to my age. Other staff would say things openly in front of

others, so it was a joke, but Dr Khan would do this when you were alone.'

51. The Tribunal noted that Miss A's witness statement made to earlier Employment Tribunal proceedings had not included this allegation.

52. The Tribunal accepted that witnesses can remember events at a later date.

53. Nonetheless, the Tribunal considered that Miss A's claim that Mr Khan said to her that she should hurry up and have an affair before she dried up due to her age, or words to that effect, was weakened as she had not made this claim to the Employment Tribunal and, in her oral evidence to the current hearing, she could not specifically state what was said or when.

54. It noted that this was weighed against a specific denial from Mr Khan who was of good character, as was accepted by the GMC in terms of the good character direction made to the Tribunal.

55. Further, the Tribunal was cognisant of the lack of any supporting evidence from other witnesses to corroborate this specific allegation. Miss A had not mentioned it to anyone else at any point.

56. The Tribunal considered that, in the circumstances, it could not consider that it was more likely than not, that Mr Khan behaved inappropriately towards XXX Miss A, between 2006 and 2012 in that he said Miss A 'should hurry up and have an affair before she dried up due to her age', or words to that effect.

57. Therefore, the Tribunal concluded that the GMC had failed to discharge its evidential burden.

58. Accordingly, the Tribunal determined that paragraph 1(c) of the Allegation was not proved.

Paragraph 1(d)(i) of the Allegation

59. The Tribunal considered the allegation that Mr Khan behaved inappropriately towards XXX Miss A, between 2006 and 2012 in that, on one or more occasion he told her he was attracted to her, or words to that effect.

60. The Tribunal noted that Mr Khan denied this allegation and disputed Miss A's evidence.

61. The Tribunal took account of Miss A's Employment Tribunal witness statement, dated 30 August 2016, in particular:

'10. I can't recollect the exact date or the first time Mr Khan touched me without my consent, as I feel it happened so much it felt like as if it had always been that way. The behaviour began with him coming up close to me and whispering in my ear, he would say something about my physical appearance and how he was attracted to me, this would make me feel embarrassed, but he seemed to enjoy that...'

62. The Tribunal also noted Miss A's oral evidence relating to this allegation. It considered Miss A's answers relating to this allegation such as her assertion that 'it happened all the time' and that it happened every time that Miss A and Mr Khan were on their own in places such as corridors etc was vague, lacked specificity and lacked clarity.

63. The Tribunal noted the good character direction in relation to Mr Khan, which had been accepted by the GMC.

64. Further, the Tribunal was cognisant of the lack of any supporting evidence from other witnesses to corroborate this specific allegation. Miss A had never mentioned this to anyone else until she came forward in June 2014.

65. The Tribunal considered that, in the circumstances, and on the balance of probabilities, it could not find that it was more likely than not, that Mr Khan behaved inappropriately towards XXX Miss A, between 2006 and 2012 in that, on one or more occasion he told her he was attracted to her, or words to that effect.

66. Therefore, the Tribunal concluded that the GMC had failed to discharge its evidential burden.

67. Accordingly, the Tribunal determined that paragraph 1(d)(i) of the Allegation was not proved.

Paragraph 1(d)(ii) of the Allegation

68. The Tribunal considered the allegation that Mr Khan behaved inappropriately towards XXX Miss A, between 2006 and 2012 in that on one or more occasion he touched and/or slapped her on the bottom.

69. The Tribunal noted that Mr Khan denied this allegation and disputed Miss A's evidence.

70. The Tribunal took account of Miss A's Employment Tribunal witness statement, dated 30 August 2016, in particular:

'Over the years he became increasingly both verbally and physically more inappropriate, he would touch and slap my bottom but would always turn this into a laugh and a joke, as though a bit of fun. I did not find this funny.'

71. The Tribunal also noted Miss A's witness statement, dated 24 November 2016, particularly the following:

'Dr Khan then started to slap my bottom, ask if I worked out and made some comment such as my bottom was big, firm and he liked it. This probably started in 2006. I would tell him he couldn't and shouldn't do that and it wouldn't happen for a while. Dr Khan would just laugh it off each time.'

72. The Tribunal noted that the first time this allegation was made appeared to be in 2016. Miss A acknowledged that she had never spoken to anyone about being touched by Mr Khan prior to this statement. In her witness statements, she indicates that she did complain to Lead Nurse Ms S about Mr Khan on more than one occasion, but only about 'controlling behaviour' and nothing else.

73. The Tribunal also examined DC M's police witness statement, dated 22 November 2017. This gives an account of the first time that Miss A made specific allegations against Mr Khan about inappropriate behaviour. This was in June 2014. DC M did not record anything relating to Miss A telling her that Mr Khan had slapped Miss A's bottom.

74. The Tribunal considered that other than Miss A's assertion that Mr Khan had touched and/or slapped her bottom, and Mr Khan's denial that he had done so, there was little evidence to corroborate the allegation on balance of probabilities.

75. The Tribunal also acknowledged the good character direction in relation to Mr Khan, which had been accepted by the GMC.

76. The Tribunal concluded that the GMC had failed to discharge its evidential burden.

77. The Tribunal considered that, in the circumstances, it could not find that it was more likely than not, that Mr Khan behaved inappropriately towards XXX Miss A, between 2006 and 2012 in that, on one or more occasion he touched and/or slapped her on the bottom.

78. Accordingly, the Tribunal determined that paragraph 1(d)(ii) of the Allegation was not proved.

Paragraph 1(d)(iii) of the Allegation

79. The Tribunal considered the allegation that Mr Khan behaved inappropriately towards XXX Miss A, between 2006 and 2012 in that on one or more occasion Mr Khan said her bottom was 'big, firm and you liked it', or words to that effect.

80. The Tribunal noted that Mr Khan denied this allegation and disputed Miss A's evidence.

81. The Tribunal also noted Miss A's witness statement, dated 24 November 2016, particularly the following:

'Dr Khan then started to slap my bottom, ask if I worked out and made some comment such as my bottom was big, firm and he liked it. This probably started in 2006. I would tell him he couldn't and shouldn't do that and it wouldn't happen for a while. Dr Khan would just laugh it off each time.'

82. The Tribunal observed that Miss A had not included this allegation in her witness statement given to the Employment Tribunal. Neither had she mentioned this to DC M in June 2016 when she first raised issues with respect to Mr Khan.

83. The Tribunal considered that other than Miss A's assertion that Mr Khan said her bottom was 'big, firm and you liked it', or words to that effect., and Mr Khan's denial that he had done so, there was little evidence to corroborate the allegation on the balance of probabilities.

84. The Tribunal also acknowledged the good character direction in relation to Mr Khan, which had been accepted by the GMC.

85. The Tribunal concluded that the GMC had failed to discharge its evidential burden.

86. The Tribunal considered that, in the circumstances, it could not find that it was more likely than not, that Mr Khan behaved inappropriately towards XXX Miss A, between 2006 and 2012 in that, on one or more occasion Mr Khan said her bottom was 'big, firm and you liked it', or words to that effect.

87. Accordingly, the Tribunal determined that paragraph 1(d)(iii) of the Allegation was not proved.

Paragraph 1(d)(iv) and (v) of the Allegation

88. The Tribunal considered the allegation that Mr Khan behaved inappropriately towards XXX Miss A, between 2006 and 2012 in that on one or more occasion Mr Khan went up behind Miss A and pushed his groin into her lower back.

89. The Tribunal noted that Mr Khan denied this allegation and disputed Miss A's evidence.

90. The Tribunal also acknowledged the good character direction in relation to Mr Khan, which had been accepted by the GMC.

91. The Tribunal took account of Miss A's witness statement given to the Employment Tribunal, dated 30 August 2016, in particular:

'12. During the later stages of our working relationship I found his behaviour made me feel more and more uncomfortable and more inappropriate. He would come up behind me and push his groin into my lower back. At the time I chose to ignore these interactions as I felt I was in some way to blame for them, as though I was allowing him to take advantage of me. I did protest about this behaviour but Mr Khan didn't take any notice and did not take it seriously.'

92. The Tribunal also considered DC M's police witness statement, dated 22 November 2017, in which she records that during her telephone call with Miss A, it was claimed that Mr Khan would come up behind Miss A and push his groin into her lower back:

'[Miss A] also stated that on a regular basis Mr KHAN would come up behind her and push himself into her.'

93. In addition, the Tribunal was mindful of Miss A's witness statement, dated 24 November 2016, in particular:

'Dr Khan washed his boots there and a lot of the incidents would happen in this corridor. I recall him on numerous occasions pushing his groin into the back of me. This happened at least six times over the years, he would make suggestive groans and say for example 'what I'd like to do to you.'

94. Further, the Tribunal considered that Miss A had been consistent in her oral evidence in relation to this allegation and it found her assertions to be feasible.

95. However, the Tribunal balanced this with the likelihood, given Mr Khan's good character, of Mr Khan behaving in this way, and his denial of the allegation and disputing of Miss A's evidence.

96. The Tribunal considered that, in the circumstances, it could not consider that it was more likely than not, that Mr Khan behaved inappropriately towards XXX Miss A, between 2006 and 2012 in that that on one or more occasion Mr Khan went up behind Miss A and pushed his groin into her lower back.

97. Therefore, the Tribunal concluded that the GMC had failed to discharge its evidential burden.

98. Accordingly, determined that paragraph 1(d)(iv) of the Allegation was not proved.

99. As the allegation that Mr Khan behaved inappropriately towards XXX Miss A, between 2006 and 2012 in that he made suggestive groans whilst carrying out the activity set out at paragraph 1(d)(iv) above, was reliant upon paragraph 1(d)(iv) of the Allegation being found proved, paragraph 1(d)(v) of the Allegation fell away.

100. Accordingly, the Tribunal determined paragraph 1(d)(v) of the Allegation was not proved.

Paragraph 2(a) of the Allegation

101. The Tribunal considered the allegation that Mr Khan behaved inappropriately towards Miss A in or around Autumn 2012 in that he touched her right breast in Theatre 2.

102. The Tribunal noted Miss A's witness statement for the Employment Tribunal, dated 30 August 2016, in particular:

'In autumn 2012 whilst I was scrubbing at the sinks in theatre 2, Mr Khan entered the scrub area to speak to me; I don't recollect the content of the conversation. As I turned to speak to him, I had my elbows bent and my hands up (correct position for hand scrubbing); he reached forward and quickly groped my right breast. I was shocked by what he'd just done but he carried on with the conversation as though nothing had happened. I didn't report this incident and regret not doing so, but I didn't feel able to discuss my situation with my friends or my partner, but at the same time I was afraid of what he would do next. At that time I chose to try and avoid being alone with him whenever possible, as I find confrontation and awkward situations extremely uncomfortable.'

103. It also took account of DC M's police witness statement, dated 22 November 2017, in which she records Miss A's claims during her telephone call with Miss A in June 2014, in particular the following:

'[Miss A] stated that on one occasion, whilst at work, Mr KHAN grabbed her breasts, over her clothing, whilst she was scrubbing up. Following this incident she avoided working with him and was placed onto a different team'

104. The Tribunal was also mindful of Miss A's witness statement, dated 24 November 2016:

'Dr Khan then touched my breast in early Autumn 2012 in Theatre 2. As stated in my Initial account, my hands were pointing upwards with my elbows bent as I was turning away from the sink. I was therefore facing Dr Khan and he was talking to me. Dr Khan then groped my right breast. He only did this once and it really angered me and shocked me. I was frustrated at myself that I had got into this position and that I didn't react.'

105. Further, the Tribunal noted Miss A's oral evidence at the current hearing.

106. The Tribunal acknowledged that Mr Khan denied this allegation and disputed Miss A's evidence, asserting that there would have been a number of people in the vicinity of the 'scrub room' of Theatre 2 where the incident was alleged to have taken place. The Tribunal also noted that Miss A had also stated that there would have been other people in the vicinity of the 'scrub room'.

107. Mr Khan told the Tribunal that there was a glass wall with open doorway between the ‘scrub room’ and Theatre 2 and indicated that he would usually have been the last person to enter the scrub room except in very exceptional circumstances. The description he gave the Tribunal about the process of ‘scrubbing up’ was credible and realistic. He indicated that the nurses and other staff would scrub up first so that they could prepare the instrumentation and the patient, and only when everything was ready and the patient was ‘prepped’ would the consultant scrub up, enter the theatre and commence the operation immediately. He found it difficult to think of a situation when he might be in the scrub room with a nurse, scrubbing up for the same operation.

108. The Tribunal considered Miss A’s allegation and Mr Khan’s denial along with the lack of supporting evidence from any other witnesses to corroborate the particular allegation.

109. Further, the Tribunal considered that Miss A had been consistent in her oral evidence in relation to this allegation and it found her assertions to be plausible and feasible.

110. However, the Tribunal also considered Mr Khan’s denial of the allegation and his contesting of Miss A’s evidence to be plausible.

111. The Tribunal considered that, in the circumstances, it could not consider that it was more likely than not, that Mr Khan behaved inappropriately towards Miss A in or around Autumn 2012 in that he touched her right breast in Theatre 2.

112. Therefore, the Tribunal concluded that the GMC had failed to discharge its evidential burden.

113. Accordingly, the Tribunal determined that paragraph 2(a) of the Allegation was not proved.

Paragraph 2(b) of the Allegation

114. The Tribunal considered the allegation that Mr Khan behaved inappropriately towards Miss A in or around Autumn 2012 in that he struck her on the hands on one or more occasions during surgical procedures with a bone lever.

115. The Tribunal noted Miss A’s witness statement, dated 24 November 2016:

‘Towards the end of the time that Dr Khan and I were working together, which was in late autumn of 2012, I found him intolerable to work with, I recall working with him on a foot operation and he hit my hands with the instrumentation. This was specifically a bone lever and he struck me hard enough so that it hurt. He did this on two separate occasions within weeks of each other.’

116. It also considered Miss A’s oral evidence at the current hearing in which she claimed that Mr Khan struck her hands, on two separate occasions, because she was talking with other colleagues during surgery.

117. The Tribunal took into account Mr Khan's denial of the allegation.

118. It also noted that the GMC had not provided any supporting evidence from any other witnesses who would have likely been present during the alleged incident. Miss A had admitted that she was talking to a colleague when this happened, so it was highly likely that this colleague at least would have witnessed this incident.

119. Further, the Tribunal had not received any evidence to prove that Mr Khan had a propensity to strike others. It had received evidence in the form of many testimonials that Mr Khan behaved in a respectful, calm and professional manner. A colleague he had worked with for twenty years specifically commented that she had never seen him behave in an aggressive or inappropriate way.

120. The Tribunal also considered that, given Mr Khan's good character direction, and his denial of the allegation and disputing of Miss A's evidence along with the lack of any corroborating evidence, it would be difficult to find the allegation proved on the balance of probabilities.

121. The Tribunal considered that, in the circumstances, it could not consider that it was more likely than not, that Mr Khan behaved inappropriately towards Miss A in or around Autumn 2012 in that he struck her on the hands on one or more occasions during surgical procedures with a bone lever.

122. Therefore, the Tribunal concluded that the GMC had failed to discharge its evidential burden.

123. Accordingly, the Tribunal determined that paragraph 2(b) of the Allegation was not proved.

Paragraph 3 of the Allegation

124. The Tribunal considered the allegation that Mr Khan made an inappropriate comment to Miss A in or around November 2012 in that he said 'you will eat what I tell you to eat', or words to that effect.

125. The Tribunal noted Miss A's witness statement, dated 24 November 2016, in particular:

'I did undertake a couple of shifts XXX [...] as she was moved into the same team as Dr Khan in November 2012. As stated in my Initial Account, pizzas were being ordered. We always got margaritas so I just said can we not have some variety. He told me that I would eat what he told me to eat. I therefore responded saying I wouldn't bother and that I would eat my own food that I had brought from home. This shows that his controlling behaviour continued'.

126. Mr Khan denied this allegation and, in oral evidence, disputed the alleged incident stating that he would not tell someone what to eat.

127. The Tribunal considered Miss A's witness statement made to the Employment Tribunal, dated 30 August 2016, and noted that in this statement Miss A claimed that the pizzas had been ordered by a 'company representative', and not by Mr Khan:

'On another occasion during an extra theatre session it was often the case that company representatives bought the team dinner from a local pizza shop, I requested a meat topped pizza and was told by Mr Khan that "you will eat what I tell you to eat"'

128. In oral evidence, Miss A confirmed her account.

129. Mr Khan told the Tribunal that he would not have told anyone what to eat, what they ate was their own business and nothing to do with him. The Tribunal took into account the likelihood that it was the company representatives that bought the pizzas, and it was likely they had supplied Margaritas as they would be more acceptable to everyone. By this time, the Tribunal noted, Miss A was no longer working in that department and had moved to another surgery area. This was also following Mr Khan's approach to Ms S that Miss A and Miss B should not work at the same time in his theatre. Mr Khan acknowledged that Miss A had been very unhappy about no longer working with her colleague. In oral evidence to the Tribunal Mr Khan had stated that Miss A had challenged him about the separation, which he stated was surprising as he had warned her about talking during surgery several times.

130. The Tribunal accepted that there was now animus between Mr Khan and Miss A. Miss A might well have complained about the pizza and Mr Khan may well have responded sharply, however the Tribunal could not find that Mr Khan would have used the words as stated in the Allegation. It took into account Mr Khan's denial, the lack of corroborating evidence to support the allegation (it was likely there were several other witnesses to this incident) and taking into account the good character direction, the Tribunal could not conclude that Miss A's claim were more plausible and likely than Mr Khan's denial.

131. The Tribunal considered that, in the circumstances, it could not consider that it was more likely than not, that Mr Khan behaved inappropriately towards Miss A in or around November 2012 in that he said 'you will eat what I tell you to eat', or words to that effect.

132. Therefore, the Tribunal concluded that the GMC had failed to discharge its evidential burden.

133. Accordingly, the Tribunal determined that paragraph 3 of the Allegation was not proved.

Miss D

Paragraph 9 of the Allegation

134. Paragraph 9(a), (b), (c), (d) and (e) of the Allegation all relate to an alleged single incident and were considered together.

135. The Tribunal considered whether Mr Khan behaved inappropriately towards Miss D in or around April 2013, when after she banged her knee, he: said: ‘ooh, I bet that hurt, let me rub it better for you’ or words to that effect; put his hand on her back; put his hand on her left knee; rubbed her left knee; and said ‘we should go out on a date’, or words to that effect.

136. The Tribunal took into account that Miss D had answered some questions during cross-examination regarding the allegations relating to paragraph 9 of the Allegation but noted that she abruptly left before evidence in general was concluded.

137. Therefore, the Tribunal was mindful of the possibility that Miss D might have been asked further questions in cross-examination and re-examination or by the Tribunal.

138. The Tribunal noted that paragraph 9 of the Allegation relates to a single alleged incident.

139. The Tribunal acknowledged that the GMC relied upon Miss D’s witness statements, in particular her GMC witness statement:

‘8. XXX. I was sitting in the anaesthetic room and Dr Khan came in and asked me why I wasn't in theatre. I informed him that the Patient was infected; I think it was HIV on this occasion ~and therefore I was not to go in. I was sitting on a stool, swinging round when I banged my knee on the thin handle of the cupboard. This was the knee I had previously dislocated and therefore it was really painful. Dr Khan asked if I was okay and put one hand on my back and rubbed my knee with his other hand. I thought this was weird so I just said yes and turned away. I don't recall exactly when this happened as it was over 3 years ago.

9. On another occasion Dr Khan asked me on a date. I don't recall exactly when this happened as again it was over 3 years ago. I thought it was work banter -at first as everyone would joke with one another. He asked what I was doing on the weekend and I replied saying that I was seeing my boyfriend. Dr Khan replied saying 'not me then? I had only just turned 18 and I think it was the first time someone had said something like this to me. I spoke to my friend about this and we both thought that it was strange.’

140. The Tribunal also noted Miss D’s police witness statement, dated 19 June 2013, in particular:

‘Around the start of April 2013, I was at work and whilst sat in a swivel chair I managed to bang my left knee on a cupboard door handle. I was holding my knee as it

was quite sore. Mr Khan was present and saw me bang my knee. We were in Theatre 1's anaesthetic room.

Mr Khan approached me and said "Ooh, I bet that hurt, let me rub it better for you."

Mr Khan put his hand on my left knee and started rubbing it. He put his other hand on my back and started rubbing it. He said: "We should go out on a date" His voice was quiet and soft.'

141. The Tribunal was also provided with 'Notes of a fact finding meeting 28th June 2013', signed and dated 27 August 2013 by Miss D, which included the following:

'[Miss D] described when she was a runner for a particular case in theatre when she first started, she was in the anesthetic [sic] room waiting and Mr. Khan came in, he said we should go on a date some time. He then kept going on about going on a date with [Miss D]. [Miss D] described that she twisting in her chair and banged her knee, she said "oh that hurt" Mr. Khan came up and put a hand on [Miss D's] neck and bent over rubbing her knee.

After that he kept going on about going on a date with [Miss D]. He asked [Miss D] what she was doing that night and she said she was seeing her boyfriend, Mr. Khan responded with "I don't have a chance then"

[Miss D] described that some staff have banter between them, but she found it strange how he acted so she hasn't said 'anything before.'

142. Mr Khan denied this allegation in its entirety and stated that he did not know who Miss D was as she was a junior member of staff.

143. Further, Mr Khan stated in his oral evidence that it would have been unusual for him to be in this particular theatre at the time of the alleged incident. He told the Tribunal that this was not his theatre and another consultant would have been undertaking the operation that Miss D was a 'runner' for. The only reason he could think for being in another theatre would be if there had been some emergency and he had been called in to assist, in which case he would not be having chats with anyone.

144. The Tribunal noted Miss D's evidence to the Tribunal, before she left the proceedings. She admitted that there seemed to be a confusion in the dates she had given regarding this allegation but confirmed that it would have been early April 2013. Under cross examination, she stated that there had only been one occasion when Mr Khan had asked her for a date, however she was unable to explain why in another statement she had indicated that the request for a date had happened in a kitchenette (i.e not in the theatre area as in the Allegation). She first stated that she thought the request for a date was on the same day as the 'knee' incident, however she then said that she could not remember. It was very shortly after this that Miss D left the proceedings and did not return.

145. The Tribunal took into account Mr Khan's denial as well as the evidence provided by him that he was out of the country from 17 March 2013, returning on 6 April 2013 and not returning to work until 8 or 9 April 2013. He disputed Miss D's evidence that the incidents took place on a day in early April, saying that he was away in early April.

146. The Tribunal, while accepting Mr Khan's evidence relating to his movements at that time, did not consider that his being away from work till 9 April 2013 negated the possibility of that part of the Allegation being found.

147. However the Tribunal was troubled by the inconsistencies in Miss D's evidence – both written and oral – regarding this incident. It took into account the effect of memory by passage of time, but noted the inconsistencies arose at various points over the years.

148. The Tribunal also took into account the documentary evidence that indicated that Miss D had stated that both Ms S and Ms J had told her that he behaved like that all the time and she should just tell him to 'fuck off'. However, under cross-examination at the 2019 hearing both Ms S and Ms J adamantly denied that they would ever say anything like that to a Consultant Surgeon.

149. The Tribunal weighed Miss D's evidence with that of Mr Khan. Other than Mr Khan's denial of all parts of paragraph 9 of the Allegation, there was the question as to why Mr Khan would be in a different surgeon's theatre, whether Miss D or Mr Khan had stated that the knee had hurt, whether he had touched her on the back or on the neck, and the issue as to when the request/suggestion they should go on a date was made.

150. The Tribunal reminded itself that the burden was on the GMC to prove the allegation on balance of probabilities whilst Mr Khan does not have to prove anything.

151. The Tribunal also considered that, given Mr Khan's good character direction, his denial of the allegation and the lack of supporting evidence other than Miss D's evidence, it would be difficult to find the allegation proved on the balance of probabilities.

152. The Tribunal considered that, in the circumstances, it could not consider that it was more likely than not, that Mr Khan behaved inappropriately towards Miss D in or around April 2013, when after she banged her knee, he:

- said 'ooh, I bet that hurt, let me rub it better for you' or words to that effect;
- put his hand on her back;
- put his hand on her left knee;
- rubbed her left knee;
- and said 'we should go out on a date', or words to that effect.

153. Therefore, the Tribunal concluded that the GMC had failed to discharge its evidential burden.

154. Accordingly, the Tribunal determined that paragraphs 9(a), 9(b), 9(c), 9(d), and 9(e) of the Allegation were not proved.

Paragraph 11 of the Allegation

155. Paragraph 11, namely that Mr Khan's actions as set out in paragraphs 1 – 3 and 9 above were sexually motivated except for 1(b), 2(b) and 3 was reliant upon paragraphs 1 – 3 and 9 being found proved.

156. As paragraphs 1 – 3 and 9 were not found proved, paragraph 11 of the Allegation falls away.

157. Accordingly, paragraph 11 of the Allegation in its entirety was found not proved.

The Tribunal's Overall Determination on the Facts

158. The Tribunal has determined the facts as follows:

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

Miss A

1. You behaved inappropriately towards XXX Miss A, between 2006 and 2012 in that:
 - a. ~~you ignored her if she failed to do as you asked;~~ **Withdrawn**
 - b. you told her she was not allowed to work with XXX Nurse B; **Not proved**
 - c. you said she 'should hurry up and have an affair before she dried up due to her age', or words to that effect; **Not proved**
 - d. on one or more occasion you:
 - i. told her you were attracted to her, or words to that effect; **Not proved**
 - ii. touched and/or slapped her on the bottom; **Not proved**
 - iii. said her bottom was 'big, firm and you liked it', or words to that effect; **Not proved**
 - iv. went up behind her and pushed your groin into her lower back; **Not proved**
 - v. made suggestive groans whilst carrying out the activity set out at paragraph 1(d)(iv) above; **Not proved**
 - vi. said 'what I'd like to do to you' or words to that effect when carrying out the activity set out at paragraph 1(d)(iv) above. **Not proved**
2. You behaved inappropriately towards Miss A in or around Autumn 2012 in that you:
 - a. touched her right breast when working with her in Theatre 2; **Not proved**
 - b. struck her on the hands on one or more occasions during surgical procedures with a bone lever. **Not proved**
3. You made an inappropriate comment to Miss A in or around November 2012 in that you said 'you will eat what I tell you to eat', or words to that effect. **Not proved**

Miss C

- ~~4. You behaved inappropriately towards XXX Miss C in that in or around December 2006 whilst Miss C was in Theatre 2 you:~~
- ~~a. pressed your genitals against her bottom; Stayed as abuse of process~~
 - ~~b. said 'this is what you are missing out on', or words to that effect. Stayed as abuse of process~~
- ~~5. You behaved inappropriately towards Miss C between 2006 and 2013 in that:~~
- ~~a. whilst standing in the doorway of the coffee room, you put your hand on her vagina; Stayed as abuse of process~~
 - ~~b. whilst sitting in the coffee room, you put your hand on her vagina. Stayed as abuse of process~~
- ~~6. You behaved inappropriately towards Miss C in late 2012 or early 2013, whilst in the locker room, in that you:~~
- ~~a. put your genitals close to her face whilst she was kneeling down; Stayed as abuse of process~~
 - ~~b. said 'don't bite it, blow it', or words to that effect. Stayed as abuse of process~~
- ~~7. You behaved inappropriately towards Miss C between December 2006 and November 2015 you made one or more comments of a sexual nature to her in Afrikaans in that you described what you would like to do to her if you 'got the chance'. Stayed as abuse of process~~

Miss D

- ~~8. You behaved inappropriately towards XXX Miss D in that on one or more occasion between March and May 2013 you asked her to go 'on a date' with you, or words to that effect. Deleted following a Rule 17(2)(g) application~~
9. You behaved inappropriately towards Miss D in or around April 2013, when after she banged her knee, you:
- a. said 'ooh, I bet that hurt, let me rub it better for you' or words to that effect; **Not proved**
 - b. put your hand on her back; **Not proved**
 - c. put your hand on her left knee; **Not proved**
 - d. rubbed her left knee; **Not proved**
 - e. said 'we should go out on a date', or words to that effect. **Not proved**
- ~~10. You behaved inappropriately towards Miss D on 23 May 2013 in that whilst in the preparation room of Theatre 2 with Miss D you:~~
- ~~a. put your face close to hers; Stayed as abuse of process~~
 - ~~b. approached her from behind and wrapped your arms around her chest; Stayed as abuse of process~~
 - ~~c. put your hands on her ribs; Stayed as abuse of process~~

- ~~d. said 'I like your small ribs', or words to that effect; Stayed as abuse of process~~
- ~~e. made a kissing gesture towards her; Stayed as abuse of process~~
- ~~f. tried to turn her around; Stayed as abuse of process~~
- ~~g. grabbed Miss D from behind for a second time; Stayed as abuse of process~~
- ~~h. ran your arm across her chest; Stayed as abuse of process~~
- ~~i. put your hand on her left breast and squeezed it; Stayed as abuse of process~~
- ~~j. ran your hand:
 - ~~i. down her back; Stayed as abuse of process~~
 - ~~ii. across her buttocks; Stayed as abuse of process~~~~
- ~~k. said 'no one needs to know about this [Miss D]', or words to that effect.
Stayed as abuse of process~~

11. Your actions set out at paragraphs ~~1-10~~ 1-3 and ~~8-10~~ 9 above were sexually motivated except for 1b., 2b., and 3. **Amended under Rule 17(6)**

Not proved

And that by reason of the matters set out above your fitness to practise is impaired because of your misconduct.' **Not proved**

159. As the Facts have not been found proved it therefore follows that Mr Khan's fitness to practise is not impaired.

160. The interim order currently imposed on Mr Khan's registration is hereby revoked.

161. That concludes this case.

ANNEX A – 19/04/2023

Application to exclude the evidence of Miss C and/or renewed application to stay the charges relating to Miss C

1. Prior to the opening of the remitted hearing, Mr McCartney, on behalf of Mr Khan, made an application to exclude the evidence of Miss C and/or renew the application that had previously been made during a preliminary hearing, to stay the charges in relation to Miss C, as an abuse of process, pursuant to Rule 34 (1) GMC Fitness to Practice Rules 2004 ('the Rules').

The Background

2. This is a remitted hearing which had previously been heard by a Medical Practitioner Tribunal (MPT) hearing in March 2019.

3. On 2 December 2022 the Tribunal, at a preliminary hearing, refused an application for the charges against Mr Khan to be stayed either in whole or in part.

4. Miss C provided evidence which she subsequently admitted was untrue. She had originally stated that she had written an undated anonymous letter.

5. In her Supplemental witness statement, dated 1 March 2023, provided for the present hearing, she stated the following:

'1. This supplemental witness statement should be read in conjunction with my witness statement dated 20 November 2017.

2. Since I provided my witness statement to the GMC on 20 November 2017 and gave evidence at the Medical Practitioners Tribunal Service hearing ('MPTS Hearing') of Dr Khan in March 2019, I have been shown a copy of an undated anonymous letter, which was also shown to me when I gave evidence in the MPTS Hearing. I would like to clarify for the avoidance of any doubt that I did not write this letter [...]

3. At paragraph 15 of my GMC witness statement dated 20 November 2017 I refer to an anonymous letter that I wrote, which was investigated. To clarify the anonymous

letter that I wrote was handwritten and in capital letters, thus the letter at Exhibit [...] is not my letter.

4. In addition to the above, I would also like to clarify that the contents of my Employment Tribunal witness statement dated 13 September 2016 and my GMC witness statement dated 20 November 2017 are true to the best of my knowledge and belief.

5. After I had given evidence at the MPT hearing in March 2019, I provided a supplemental witness statement dated 9 July 2019, to Hill Dickinson as requested by Barnsley Trust. I can confirm that the content of this statement is true to the best of my knowledge and belief.'

6. Further, Miss C went on to state:

'6. I have also been asked to comment upon in what circumstances that I came to say in my Employment Tribunal witness statement that I had written the anonymous letter. During the Employment Tribunal hearing, I was directed to the anonymous letter [...] and asked if I had written it. Prior to this I had never been shown a copy of the anonymous letter. From memory I think I may have been directed to a particular line within the anonymous letter, but I didn't look at the line or the letter itself. I believed that this was my letter; I didn't think that another letter existed, and so I confirmed that this was my letter immediately, without looking at the letter. I now know that this was a mistake, and I should have read the letter and I would have known immediately that this wasn't the letter that I had handwritten.'

7. Before the previous application at the Preliminary hearing to stay was made the GMC conceded that it did not regard Miss C's explanation for her admitted lies, as detailed in a statement prepared by Hill Dickinson (HD) solicitors on 9 July 2019, as true.

8. The GMC also confirmed that it would not rely upon the contents of the HD statement at the principal hearing.

9. On 1 March 2023 Miss C provided a further statement in a purported attempt to explain her lies in her previous witness statements to the Employment Tribunal (ET), the previous 2019 MPT Tribunal and twice in her oral evidence. The explanation provided in the latest GMC statement reiterated and relied upon the HD statement which the GMC do not accept is true and do not rely upon.

10. At the present hearing the GMC presented Miss C's evidence and cited the principle that it was open to the Tribunal to rely upon a witness even though it does not regard all of their evidence as true or consistent with other evidence it relies upon.

Submissions

Submissions on behalf of Mr Khan

11. Mr McCartney submitted that the GMC had continued to rely on Miss C, a witness who had previously admitted lying in previous witness statements and in previous oral evidence under oath/affirmation.
12. Mr McCartney stated that the integral consideration was that of fairness and quoted relevant case law.
13. Mr McCartney submitted that, Miss C had by her own admission, misled the ET and the MPT. He stated that the GMC proposed to call her on the basis that not only are her ET and MPT witness statements untrue, but two further witness statements seeking to retract her previous admission of lies were also untrue.
14. Mr McCartney submitted that the result of Miss C's lies were acts which irrefutably are intended, and have a tendency, to pervert the course of justice. He submitted that the GMC would need to ask the Tribunal to consider giving a warning on self-incrimination before she even adopts her witness statements under oath, because of the possibility of her committing a criminal offence.
15. Mr McCartney submitted that the assurance given by the GMC that it would not rely on the HD statement was rightly made. He further noted that the GMC did not seek to rely upon Miss C's HD statement '*and presumably her final GMC statement*' because it accepted that Miss C had already misled the ET and MPT, and that the HD evidence would further mislead another MPT.
16. Mr McCartney stated that the evidence of Miss C did not meet the required criteria of fairness and submitted that the Tribunal should act in a manner consistent with Article 6 of the Human Rights Act (Right to a Fair Trial) and the principles of natural justice. He stated that this was a highly unusual case, with little jurisprudence to provide guidance. The issue involves not just an inconsistency in evidence but an attempt to further mislead; and as such it requires the Tribunal to intervene in the interest of justice.
17. Mr McCartney concluded by submitting that Miss C had already accepted that she lied in two jurisdictions (ET and MPT) and that neither party to the proceedings accepted that her self-serving HD and supplemental GMC statements are true, and that the independent evidence provided further support for the contention that she continued to lie. He stated that, the charges relating to Miss C should be stayed, because to call a witness who the GMC at the very least suspected of deliberately misleading the Tribunal must offend the Tribunal's sense of justice and propriety.

Submissions on behalf of the GMC

18. Mr Claxton submitted that the application gave rise to the following questions:

- i. do the matters raised demonstrate a prejudice or unfairness to Mr Khan to such a degree that the proceedings as a whole should be regarded as so unfair that the only remedy is a stay;
- ii. even if the proceedings are fair, does the conduct of the GMC or another relevant feature of the background mean that it would be an affront to the justice and propriety of the Tribunal to allow the proceedings to continue; and
- iii. does any conclusion at ii withstand a balancing exercise in which the public interest in the usual conduct of the proceedings and the resolution of the allegation by the Tribunal is weighed against any impropriety identified.

19. He submitted that none of the categories of abuse were engaged and the proceedings against Mr Khan are both fair and do not give rise to any affront to justice or the Tribunal's sense of propriety.

20. Mr Claxton submitted that the propriety or otherwise of continued reliance on the evidence of Miss C should be assessed in the context of the statutory architecture. He stated that following the successful appeal to the High Court and the quashing of the MPT findings at first instance, the totality of the allegations were referred back to the Case Examiners for reconsideration of the merits of the complaints and emphasised that this, in the statutory scheme, was the correct, and arguably the only, route by which to assess whether those allegations that are dependent on her evidence should remain. He stated that the Case Examiners were in possession of all material including the transcript of her evidence in which she admitted to lying and defence submissions and they had even so concluded that there remained a case to answer for Mr Khan.

21. Mr Claxton stated that the GMC is not in a position to go behind that assessment of the Case Examiners and that, in this context, there can be no bad faith on the part of the GMC. He concluded by stating that the fact of Miss C's lie will be before the MPT if the matter proceeds and would doubtless form an important part of its assessment of her credibility and honesty.

The Relevant Legal Principles

22. The Tribunal had regard to Rule 34(1) of the Rules which states:

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

23. The Tribunal was mindful that Rule 34(1) of the Rules gives it a broad discretion to admit evidence if it is fair and relevant to do so. It reminded itself that it must consider fairness from all perspectives and consider the overarching objective.

24. The Tribunal had regard to the principles as provided by Lord Dyson in *Maxwell* [2010] UKSC 48, [2011] 1 WLR 1837 (at [13]), cited in *Warren v A-G for Jersey* [2011] UKPC 10, [2012] 1 AC 22 (at [22]).

25. Lord Dyson summarised the two categories of case in which the court has the power to stay proceedings for abuse of process:

'It is well established that the court has the power to stay proceedings in two categories of case, namely (i) where it will be impossible to give the accused a fair trial, and (ii) where it offends the court's sense of justice and propriety to be asked to try the accused in the particular circumstances of the case. In the first category of case, if the court concludes that an accused cannot receive a fair trial, it will stay the proceedings without more. No question of the balancing of competing interests arises. In the second category of case, the court is concerned to protect the integrity of the criminal justice system. Here a stay will be granted where the court concludes that in all the circumstances a trial will offend the court's sense of justice and propriety (per Lord Lowry in R v Horseferry Road Magistrates' Court, ex p Bennett [1994] 1 AC 42 (at 74G)), or will undermine public confidence in the criminal justice system and bring it into disrepute (per Lord Steyn in Latif [1996] 1 WLR 104 (at 112F)).'

26. While this guidance was provided in criminal proceedings, the Tribunal accepted that the principles must apply in all court or quasi-legal proceedings.

27. The Tribunal also had regard to *R v Cairns* [2002] WL 31599658 (2002), in particular:

'31. For present purposes they can be briefly summarised and we do no more than that. The prosecution has a discretion as to the witnesses it actually calls at trial. But the discretion is to be exercised in the interests of justice and therefore is subject to the overall control of the court on the usual principles applicable to the exercise of a discretion. If a witness can give direct evidence of primary facts and his evidence is capable of belief, then a proper exercise of the discretion will normally require him to be called by the prosecution.'

28. Further, the Tribunal also noted *R v Smith* [2019] WL 02918079, in particular the following:

'28. The relevant principles can, we think, be summarised as follows:

(1) Subject to the overall control of the court, the prosecution has a discretion as to what witnesses to call at a trial, but that discretion must be exercised in accordance with the interests of justice and the general duty of the prosecution to put all evidence which it considers relevant and capable of belief before the jury.

(2) It is open to the prosecution - and indeed the interests of justice may require it - to call a witness to give evidence only part of which the prosecution considers to be worthy of belief.

(3) In such circumstances the prosecution is in principle entitled to adduce other evidence to contradict that part of the witness's evidence which the prosecution

considers to be inaccurate or false, and to invite the jury to reject that part of the witness's evidence.

(4) That may be done without applying to treat the witness as hostile. However, unless the witness is declared hostile, evidence adduced to contradict the witness may not include a previous inconsistent statement of that witness, nor is the prosecution, as the party calling the witness, entitled to cross-examine the witness.'

The Preliminary Tribunal's Decision, 2 December 2022

29. The Tribunal had regard to the contents of Miss C's witness statement dated, 20 November 2017.

30. The Tribunal was mindful that it had made a determination on this preliminary matter on 2 December 2022 and noted its findings, in particular the following:

'29. In relation to the issues regarding the anonymous letter Miss C allegedly wrote, and her overall credibility, the Tribunal accepted that Miss C gave differing evidence throughout various litigation processes, to the point where she has now accepted that she had given false evidence that she had written the anonymous letter. It was mindful that the GMC intended to proceed with the evidence of Miss C and the allegations she had raised. The Tribunal also noted that the GMC accepted that a further assertion by Miss C that her earlier evidence of authorship of the letter had been an innocent mistake was also untrue. In the Tribunal's view, Miss C's evidence is a matter that Mr Khan would be able to explore during the substantive hearing and, if anything, assists his case rather than causes him any particular unfairness.

30. The Tribunal was also mindful that witnesses could be untruthful at certain points of their evidence, but truthful at other points. Both Mr Khan and the GMC would be able to adduce and test the evidence at the substantive hearing, and the Tribunal would be able to place an appropriate amount of weight on each part of Miss C's (and any other witnesses') evidence. The Tribunal found that the decision of the GMC to keep Miss C as a witness in these proceedings was not therefore a reason to stay these proceedings.'

31. The Tribunal also noted its finding on 2 December 2022 that it was possible for Mr Khan to face a fair substantive hearing:

'34. In relation to the issues regarding the anonymous letter Miss C allegedly wrote, and her overall credibility, the Tribunal accepted that Miss C gave differing evidence throughout various litigation processes, to the point where she has now accepted that she had given false evidence that she had written the anonymous letter. It was mindful that the GMC intended to proceed with the evidence of Miss C and the allegations she had raised. The Tribunal also noted that the GMC accepted that a further assertion by Miss C that her earlier evidence of authorship of the letter had been an innocent mistake was also untrue. In the Tribunal's view, Miss C's evidence is a matter that Mr Khan would be able to

explore during the substantive hearing and, if anything, assists his case rather than causes him any particular unfairness. '

[...]

'57. Given these matters, the Tribunal overall concluded that it was possible for Mr Khan to face a fair substantive hearing. It next considered, taking the issues Mr McCartney had raised as a whole, whether it would offend the Tribunal's sense of justice and propriety to hold Mr Khan's substantive hearing.'

[...]

'59. The Tribunal was also mindful of the public interest in this case. It noted that the public requires allegations made against a doctor to be investigated and, where necessary, to be heard at a tribunal. It noted the allegations Mr Khan faces are of a serious nature, and that a stay of proceedings would mean that these allegations would not be heard. Given that the Tribunal had found that Mr Khan could face a fair hearing, and that the process would not be an affront to justice it considered that it was in the public interest for this hearing to proceed to the substantive stage.'

The Present Hearing

32. The Tribunal noted that Miss C had prepared a fresh statement, dated 1 March 2023 for the present hearing which repeated the Hill Dickinson statement, which the GMC accepted was untrue.

33. The Tribunal took into account that Miss C's untrue evidence had been submitted yet again in the present MPT hearing. It regarded that this was a significant further development.

The Tribunal's Decision

34. The Tribunal considered its earlier decision and reflected as to whether the circumstances remained the same, or so similar as to lead the Tribunal to the same conclusion. It also reminded itself of its duty with respect to the overarching statutory objectives, in that these were serious allegations and generally should be heard in order to protect the public interest. This had formed a central plank to its previous decision.

35. The earlier facts, in summary, were that Miss C had lied, and later admitted that she had lied, in witness statements and in oral evidence to both the Employment Tribunal and the MPT hearing in 2019. It was at that hearing under cross-examination that she finally admitted her lies.

36. Following this, Miss C had attempted to retreat from this position by providing yet another statement (the HD Statement) that she had made a mistake, rather than that she had lied. The GMC had accepted that this statement was untrue.

37. After the preliminary hearing in November 2022, Miss C had produced another statement, as copied above, that reiterated the position of mistake. In this statement she also indicated that her previous statements (where she had earlier admitted lies) continued to be true to her knowledge and belief.

38. Even accepting the general principle that a witness can be truthful about one part of their evidence and not truthful about another, at this point the Tribunal, given the repeated lies before yet another MPT hearing, determined that a point had been reached which risked undermining the regulatory process.

39. Therefore, the Tribunal concluded that to allow repeated presentation of untrue evidence ran the risk of undermining public confidence in the process, and was also, as in the case of *Maxwell*, an affront to the court's sense of justice and propriety.

40. Accordingly, the Tribunal determined to stay the charges in relation to Miss C in the Allegation.

ANNEX B – 02/05/2023

Application pursuant to Rule 17(2)(g)

1. At the close of the GMC's case Mr McCartney, Counsel, on behalf of Mr Khan, made an application pursuant to Rule 17(2)(g) of the General Medical Council (Fitness to Practise Rules) 2004, as amended ('the Rules').

2. His application was in respect of paragraphs 8, 9(a), and 9(e) of the Allegation. He invited the Tribunal to determine that the GMC had adduced insufficient evidence upon which it could properly find these paragraphs proved.

Submissions on behalf of Mr Khan

3. In relation to paragraph 8 of the Allegation, Mr McCartney submitted that the GMC had provided insufficient evidence and that he relied on the first limb of the *Galbraith* test. He stated that the evidence was that in response to Miss D stating that she was seeing her boyfriend at the weekend Mr Khan is alleged to have said '*not me then*' and that this is a statement of fact rather than a request for a date.

4. Further, Mr McCartney stated that, whilst Miss D said in her GMC witness statement that her account to the police was correct, when cross examined in March 2019, she stated that there was one occasion that he asked her on a date and one occasion that he rubbed her knee. He pointed out the fact that the GMC's case was that there were two separate occasions when Mr Khan had asked her for a date, not just one. He stated that when cross examined in the Crown Court in 2016, Miss D stated that Mr Khan had asked her on a date whilst she was in the kitchenette. When questioned in the present proceedings she agreed that what was set out in her GMC witness statement, which did not mention a kitchenette,

was the extent of it. He stated that Miss D then went on to say she thought it was the same day as the knee rubbing, but then said that she could not remember.

5. In relation to paragraph 9(a) of the Allegation Mr McCartney submitted that, when questioned, Miss D agreed that her account in the GMC statement was the extent of it, when asked if she was sure she stated that *'I think so'*. There is no mention of the words *'ooh I bet that hurt.. let me rub it better for you'* in the GMC statement.

6. Mr McCartney, in relation to paragraph 9(e) of the Allegation, submitted that Miss D's GMC statement did not refer to Mr Khan asking her to go out on a date when she banged her knee. According to this statement, the asking for a date happened on another occasion. He argued that Miss D previously said this happened in the kitchenette and the words that it was alleged Mr Khan had used would not in any case amount to asking someone out on a date.

Submissions on behalf of the GMC

7. Mr Claxton referred to relevant case law and referred to Miss D's GMC witness statement which he stated adopted previous accounts that she had given. He stated that Miss D had adopted her GMC statement during the present proceedings.

8. He submitted that accounts that were part of the body of evidence, and Miss D's adoption of her witness statements and her oral evidence in combination was such that the evidence in relation to both paragraphs was neither weak or tenuous.

9. Mr Claxton submitted that the proper time to balance and weigh Miss D's evidence and consider any possible inconsistencies was at the conclusion of the facts stage as opposed to pursuant to an application at the close of the GMC's case.

10. Further, Mr Claxton referred to Miss D's police statement where she stated that she could not remember if Mr Khan had asked her to go *'on a date'* only on one occasion. He submitted that the fact that she stated that she could not remember if it was only one occasion or not *'left the door open'* to greater reliance on her contemporaneous accounts.

11. Mr Claxton asked that the Tribunal consider the alleged words of Mr Khan, namely *'what are you doing on the weekend?', 'going out with your boyfriend',* and *'not me then',* not as words to be analysed on the page but as things said to Miss D in a particular context, and that context can enlarge on the meaning of words. He later clarified that while the Tribunal was not entitled to go beyond the words of a particular allegation, the context in which those words were said could inform a decision that a Tribunal might make.

12. Mr Claxton submitted that within Miss D's contemporaneous evidence there was sufficient support for paragraphs 8, 9(a) and 9(e) of the Allegation.

The Tribunal's Approach

13. The Tribunal had regard to Rule 17(2)(g) of the Rules:

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

14. It reminded itself that, at this stage, its purpose was not to make findings of fact but to determine whether sufficient evidence, taken at its highest, had been presented by the GMC such that a Tribunal, correctly directed as to the law, could properly find the relevant paragraphs proved to the civil standard.

15. The Tribunal considered the submissions of both parties. It also took account of all of the evidence presented to date, both oral and documentary, in reaching its decision.

16. The Tribunal had particular regard to the case of *R v Galbraith* [1981] 1 WLR 1039, which sets out that:

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

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

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

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

The Tribunal's Decision

Paragraph 8 of the Allegation

17. The Tribunal considered the evidence adduced by the GMC in support of the allegation that Mr Khan behaved inappropriately towards a junior member of staff Miss D in that on one or more occasions between March and May 2013 he asked her to go 'on a date' with him, or words to that effect.

18. The Tribunal considered whether the evidence adduced by the GMC was such that it could lead to a finding that the allegation was proved.

19. The Tribunal noted that the wording of this allegation appeared to emanate from a police statement, dated 19 June 2013, where she used the words leading to the allegation in paragraph 8.

20. However, the Tribunal considered a number of other accounts given by Ms D over the years relating, apparently, to this incident. These accounts were inconsistent with the allegation. In her GMC witness statement dated 20 November 2011 Miss D states he had asked her for a date but then went on to explain what had happened, in that Mr Khan had asked her what she was going to do over the weekend, and when she answered that she was seeing her boyfriend he had replied 'not me then'. Miss D adopted this statement at the present hearing.

21. The Tribunal cannot see how this account of the conversation between Mr Khan and Miss D could mean that he was asking her for a date. In this statement she indicated that she was unsure whether what Mr Khan was saying was just 'banter', but it made her uncomfortable. It may have been her perception that he had asked her for a date when he said 'not me then' but the evidence is simply too tenuous.

22. At the present hearing, when cross examined, Miss D indicated she could not remember the circumstances or the exact occasion when Mr Khan asked her to go on a date. While this is entirely understandable given the considerable period of time that had lapsed between the incident and the present hearing, it gives no further evidence that the Tribunal can consider.

23. There is some confusion also with her evidence in relation to this paragraph and paragraph 9(e) where it is alleged he asked her for a date on another day.

24. It considered that, in the circumstances, the evidence in support of this allegation was inherently weak, vague and inconsistent with other evidence.

25. In the circumstances the Tribunal therefore determined that the evidence adduced by the GMC was such that it could not lead to a finding that paragraph 8 of the Allegation was proved.

26. Accordingly, it granted Mr McCartney's application under Rule 17(2)(g) of the Rules in relation to paragraph 8 of the Allegation.

Paragraph 9(a) of the Allegation

27. The Tribunal considered the evidence adduced by the GMC in support of the allegation that Mr Khan behaved inappropriately towards Miss D in or around April 2013, when after she banged her knee he said 'ooh, I bet that hurt, let me rub it better for you' or words to that effect.

28. The Tribunal considered whether the evidence adduced by the GMC was such that it could lead to a finding that the allegation was proved.

29. The Tribunal noted Miss D's GMC witness statement, dated 20 November 2016, in particular paragraph 8 of her statement:

'XXX. I was sitting in the anaesthetic room and Dr Khan [sic] came in and asked me why I wasn't in theatre. I informed him that the Patient was infected; I think it was HIV on this occasion and therefore I was not to go in. I was sitting on a stool, swinging round when I banged my knee on the thin handle of the cupboard. This was the knee I had previously dislocated and therefore it was really painful. Dr Khan [sic] asked if I was okay and put one hand on my back and rubbed my knee with his other hand. I thought this was weird so I just said yes and turned away. I don't recall exactly when this happened as it was over 3 years ago.'

30. The Tribunal noted that Miss D gave evidence to this Tribunal in relation to paragraph 8 of her GMC witness statement. Miss D indicated that what was in her GMC witness statement was the extent of that incident.

31. However, it also noted Miss D's police statement, dated 19 June 2013, which stated:

'Around the start of April 2013, I was at work and whilst sat in a swivel chair I managed to bang my left knee on a cupboard door handle. I was holding my knee as it was quite sore. Mr Khan was present and saw me bang my knee. We were in Theatre 1's anaesthetic room.

Mr Khan approached me and said: 'Ooh, I bet that hurt, let me rub it better for you'.'

32. The Tribunal considered that the evidence adduced in support of this allegation was not inherently weak, vague and inconsistent.

33. In the circumstances the Tribunal therefore determined that the evidence adduced by the GMC was such that it could lead to a finding that paragraph 9(a) of the Allegation was proved.

34. Accordingly, it refused Mr McCartney's application under Rule 17(2)(g) of the Rules in relation to paragraph 9(a) of the Allegation.

Paragraph 9(e) of the Allegation

35. The Tribunal considered the evidence adduced by the GMC in support of the allegation that Mr Khan behaved inappropriately towards Miss D in or around April 2013, when after she banged her knee he said 'we should go out on a date', or words to that effect.

36. The Tribunal considered whether the evidence adduced by the GMC was such that it could lead to a finding that the allegation was proved.

37. The Tribunal noted Miss D's police statement, dated 19 June 2013, which stated:

‘Mr Khan put his hand on my left knee and started rubbing it. He put his other hand on my back and started rubbing it. He said: “we should go on a date”. His voice was quiet and soft.’

38. It also noted paragraph 9 of Miss D’s GMC statement, dated 20 November 2017:

‘On another occasion Dr Khan [sic] asked me on a date. I don't recall exactly when this happened as again it was over 3 years ago.’

39. When cross examined during the present Tribunal, Miss D said that Mr Khan had asked her for a date, she also set that that was the extent of the incident, or words to that effect.

40. The Tribunal considered that the evidence adduced in support of this allegation was not inherently weak, vague and inconsistent.

41. The Tribunal concluded that it was appropriate for the Tribunal to consider this allegation at the facts stage given the evidence adduced by the GMC.

42. In the circumstances the Tribunal therefore determined that the evidence adduced by the GMC was such that it could lead to a finding that paragraph 9(e) of the Allegation was proved.

43. Accordingly, it refused Mr McCartney’s application under Rule 17(2)(g) of the Rules in relation to paragraph 9(e) of the Allegation.

ANNEX C – 02/05/2023

Application to exclude the evidence of Miss D and/or stay the charges relating arising from her evidence

1. At the close of the GMC’s case Mr McCartney, Counsel, on behalf of Mr Khan made an application pursuant to Rule 34 (1) GMC Fitness to Practice Rules 2004 (‘the Rules’), which states:

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

Background

2. Miss D was giving oral evidence at the hearing when she became emotionally distressed while answering Mr McCartney’s questions and left abruptly before the conclusion of her oral evidence.

Submissions on behalf of Mr Khan

3. Mr McCartney submitted that when being cross examined about the inconsistencies in her account, which were directly relevant to the Allegation, Miss D left the hearing and refused to come back.
4. He stated that save for what Miss D had said to the Tribunal before she left there was no explanation for her leaving and her refusal to return; she simply made the decision that she did not want to engage in the process any further.
5. Mr McCartney stated that before she left, Miss D was cross examined on her work standards, a number of complaints she made about other members of staff and the facts relating to paragraphs 8 & 9 of the Allegation. She had not been cross examined on the allegation in paragraph 10 which Mr McCartney asserted was the most serious allegation.
6. Mr McCartney referenced relevant case law and Article 6 of the European Convention on Human Rights (ECHR).
7. Mr McCartney stated that there was no good reason why Miss D was unable to complete her evidence. Miss D's evidence was the sole or decisive evidence in respect of paragraph 10 of the Allegation. He stated that the question for consideration is whether there are sufficient counterbalancing factors to render the proceedings fair.
8. Mr McCartney stated that it was necessary for Miss D to have been called and cross examined compliant with Article 6 (3)(d) and that the fact that Miss D had been cross examined during other hearings did not obviate the need for her evidence to be challenged and inconsistencies explored, otherwise there would have been no need to call any witnesses at a re-hearing.
9. Mr McCartney gave a list of examples of topics he would have cross-examined Miss D on. These are not repeated here but include differences in her accounts to various people including staff where she had worked, the police and the GMC; assertions she had made about what others had said that had been rebutted by those individuals and changes to her account over time. He would also have put to her Mr Khan's versions of events. None of this and other topics could now be put to her.
10. Mr McCartney asserted that Miss D's response to his questions would have allowed the Tribunal to resolve possible conflicts in the evidence and to assess the witness's credibility.
11. Mr McCartney concluded by stating that although Miss D had been cross examined before this did not render a hearing fair in her absence. The transcripts of the cross examination from 2019 had been provided to the present Tribunal in order to facilitate their understanding during any cross examination on points that had been explored previously.

Submission on behalf of the GMC

12. Mr Claxton referenced Miss D's GMC witness statement, dated 20 November 2016 which adopted the previous accounts that she had given of the alleged events. He reminded the Tribunal that she had adopted the statement at the present Tribunal.

13. Mr Claxton accepted that it was usually best that a witness gave oral evidence before a Tribunal, so that this evidence could be tested by cross examination. He submitted however that in the present circumstances this principle must be balanced with the fact that the present Allegation is an old Allegation, she would be asked to recall information that went back a number of years and she had provided accounts that the Tribunal had in the form of written statements.

14. Mr Claxton referenced case law and stated that there was no unfairness to the degree that proceedings would be non-compliant with Article 6 of ECHR if Miss D's evidence were continued to be admitted and considered.

15. Mr Claxton stated that Miss D had attended the hearing and had adopted her GMC witness statement and her witness statements were therefore not hearsay evidence but her Evidence in Chief.

16. Mr Claxton submitted that Miss D's evidence in relation to the topics that Mr McCartney had raised had already been explored in previous cross examinations in the Crown Court and the previous MPT hearing and that the Tribunal had access to the transcripts. He stated that the Tribunal had a substantial body of material with which to assess Miss D's evidence.

17. Mr Claxton concluded by submitting that Article 6 of the ECHR had a single requirement of fairness but that there were a number of methods by which that fairness might be achieved. In the final analysis the proceedings were fair and that were the Tribunal to continue to admit the evidence of Miss D the proceedings would be Article 6 of ECHR compliant.

The Relevant Legal Principles

18. The Tribunal had regard to Article 6(3)(d) of ECHR which states:

'Right to a fair trial

3. *Everyone charged with a criminal offence has the following minimum rights:*

(d) to examine or have examined witnesses against him/her and to obtain the attendance and examination of witnesses on his/her behalf under the same conditions as witnesses against him/her'

19. The Tribunal also had regard to *Freeman v General Medical Council* [2023] EWHC 45 (Admin), in particular the following:

'The Court must examine: (1) First, whether there was a good reason for the non-attendance of the witness and, consequently, for the admission of the absent witness's untested statements as evidence; (2) Second, whether the evidence of the absent witness was the sole or decisive basis for the defendant's conviction; (3) Third, whether there were sufficient counterbalancing factors, including strong procedural safeguards, to compensate for the handicaps caused to the defence as a result of the admission of the untested evidence and to ensure that the trial, judged as a whole, was fair.

...In disciplinary proceedings which raise serious charges amounting in effect to criminal offences which, if proved, are likely to have grave adverse effects on the career and reputation of the accused party, if reliance is sought to be placed on the evidence of an accuser between whom and the accused party there is an important conflict of evidence as to whether the misconduct alleged took place, there would, if that evidence constituted a critical part of the evidence against the accused party and if there were no problems associated with securing the attendance of the accuser, need to be compelling reasons why the requirement of fairness and the right to a fair hearing did not entitle the accused party to cross-examine the accuser.

is not dictated by any absolute rule whether of common law or under Article 6 ... There is ... no absolute rule whether under Article 6 or in common law entitling a person facing disciplinary proceedings to cross-examine witnesses on whose evidence the allegations against him are based. Nor does such an entitlement arise automatically by reason of the fact that the evidence of the witness in question is the sole or decisive basis of the evidence against him.'

The Tribunal's Decision

20. The Tribunal noted that Miss D was emotionally distraught and abruptly absented herself during cross examination by Mr McCartney. It further took into account that attempts were made the following day to contact Miss D so that she could continue to give evidence before the Tribunal. These attempts had been unsuccessful.

21. The Tribunal first considered whether there was a good reason for Miss D to leave and absent herself as a witness.

22. It considered that there was a good reason for Miss D to absent herself from proceedings as she was very evidently highly emotionally distressed, and had told the Tribunal that her distress was because of the continued nature of these proceedings.

23. The Tribunal then went on to consider whether Miss D's oral evidence would have been decisive in deciding paragraphs 9 and 10 of the Allegation.

24. It considered that her oral evidence would have been decisive in considering paragraphs 9 and 10 of the Allegation. She was the originator of the allegation, which was disputed by Mr Khan.

25. In relation to paragraph 9 of the Allegation, however, the Tribunal took into account the fact that Miss D had given evidence to this Tribunal in relation to the particulars in that paragraph and that Mr Khan was not disadvantaged by not having an opportunity to test her evidence in relation to paragraph 9 of the Allegation.

26. Therefore the Tribunal did not grant Mr McCartney's application with respect to paragraph 9 of the Allegation.

27. The Tribunal then went on to consider whether there were sufficient counterbalancing factors, including strong procedural safeguards, to compensate for the handicaps caused to the doctor as a result of the admission of the untested evidence relating to paragraph 10 of the Allegation.

28. The Tribunal considered that Miss D's evidence in relation to the alleged events on 23 May 2013 in the preparation room of Theatre 2 was crucial to the allegation, and that Mr Khan would be put at a disadvantage were this evidence to be left untested.

29. The Tribunal took into account that, even though Miss D had previously been cross examined in the Crown Court, the issues were still contested and noted that the doctor had consistently disputed Miss D's evidence.

30. In the circumstances the Tribunal conclude that it would be unfair to admit Miss D's evidence in relation to paragraph 10 of the Allegation without giving the doctor the opportunity to test such evidence.

31. Accordingly, the Tribunal granted Mr McCartney's application to exclude the evidence and/or stay the charges arising from Miss D's evidence in relation to paragraph 10 of the Allegation.

ANNEX D – 11/05/2023

Addendum to Annex A

1. At the handing down of the Tribunal's facts decision, Mr Claxton, on behalf of the GMC, asked that the Tribunal add a short addendum to Annex A in order to clarify the GMC's position so that the public record most accurately reflected what was said on behalf of the GMC.

2. Mr Claxton submitted that this could be achieved by adding the following extract from an earlier written submission:

'At the start of the substantive hearing, the GMC explained that:

Mr Khan was dismissed following an investigation that resulted from the complaint made by Miss D.

Mr Khan appealed his dismissal before the Employment Tribunal and was successful. The Trust had relied on the anonymous letter as part of its case. The ET judgment includes the observation that in their opinion, the Trust had created the anonymous letter. An order was made for Mr Khan's re-engagement.

The Trust appealed against the order that Mr Khan be re-engaged by which time Miss A and Miss C had come forward and were witnesses in the EAT.

Miss C asserted in her witness statement and in her evidence to the ET that she had written the anonymous letter.

Miss C repeated that assertion as part of her evidence to the MPT. In the course of cross-examination, Miss C accepted that she had not written the letter and that the assertion she had was untruthful.

Subsequently, without any knowledge or other input of the GMC, and with the assistance of the Trust who had engaged Hill Dickinson solicitors, she advanced an innocent explanation for the assertion of authorship, namely that she had written a letter, but not the letter, and that she had been mistaken as to which letter she asserted authorship of.

At an abuse of process hearing in December 2022, the GMC gave an undertaking that it would not (for the purposes of that argument and for any future purposes) rely on the content of the Hill Dickinson statement.

As the existing GMC witness statements of Miss C contained the erroneous assertion of authorship, it was necessary to obtain a further statement correcting the position in advance of this substantive hearing. In that further statement from March 2023, Miss C repeats the explanation first given in the Hill Dickinson statement. The GMC will call Miss C and we anticipate that she will adopt all of her statements as her evidence-in-chief. The GMC has considered the position and does not resile from the undertaking given in December 2022. It will not ask the Tribunal to accept the explanation set out in the most recent statement.

The GMC will invite the Tribunal to consider the balance of Miss C's evidence as truthful.'

3. Mr McCartney, on behalf of Mr Khan, made no objection to adding the above extract as an addendum to Annex A.
4. The Tribunal agreed to Mr Claxton's request.