MPTS Medical Practitioners Tribunal Service

Appeals Circular A01/24

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Learning points from recent appeals PART A: Substantive hearings

Facts

- In cases involving sexual misconduct:
  - where there is a dispute as to whether the physical contact was sexual, deciding whether an action is sexual does not simply depend on how someone in the victim's position is likely to have construed it. That is one of the factors that must be considered, but it is far from determinative[1]. The Chief Constable of Thames Valley Police v A Police Misconduct Panel v PC Hafeez Javeed [2023] EWHC 2693 (KB);
  - when assessing the credibility of alleged victims of sexual misconduct (and considering lapse of time between the events and when they were reported) the tribunal must appreciate that it may take several years for victims of sexual abuse to come to terms with what has happened to them. Roy v General Medical Council [2023] EWHC 2659 (Admin)
- Some general reminders in relation to evidence:
  - the veracity of a witness's evidence should be tested by reference to objective facts, proved independently, and by reference to documents. The witness's

[1] In some cases the charge may specifically allege sexual harassment pursuant to s26(2) of the Equality Act 2010, ie that a registrant engaged in unwanted conduct of a sexual nature which had the purpose or effect of violating the victim's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for them. In deciding whether the conduct had that effect, the perception of the victim will be taken into account, pursuant to s26(4)(a).

credibility should not be assessed exclusively on their demeanour when giving evidence. Roy v General Medical Council [2023] EWHC 2659 (Admin);

- tribunals should not start with an assumption or presumption that a witness was credible or telling the truth and should not simply accept or give undue weight to the witness's subjective interpretation Kamran Ali v General Medical Council [2023] EWHC 2984 (Admin);

- when a doctor and a witness provide fundamentally incompatible versions of events, the tribunal can determine credibility and reliability against: the background of any admissions by the parties; the contemporaneous documents (which can be damning for a party and undermine their evidence in chief); and any consistencies and inconsistencies in their evidence Roy v General Medical Council [2023] EWHC 2659 (Admin);

- tribunals should analyse any relevant issues that come up in oral evidence and should expressly address in their determinations possible inconsistencies between evidence given at earlier interviews and oral evidence The Chief Constable of Thames Valley Police v A Police Misconduct Panel v PC Hafeez Javeed [2023] EWHC 2693 (KB)

- tribunals can properly place "substantial reliance" on oral evidence in the absence of corroborating documentary evidence Kamran Ali v General Medical Council [2023] EWHC 2984 (Admin) [reiterating *Byrne v General Medical Council [2021] EWHC 2237*]

- witness statements should be treated with caution where the witness had limited involvement in the relevant events *and* there is a long passage of time since the events Roy v General Medical Council [2023] EWHC 2659 (Admin).

- It is important that tribunals give sufficient reasons in their decision making (eg on the factual allegations). Reasons must be sufficient to allow any subsequent reviewing court to discern and understand the decision-maker's essential reasoning processes The Chief Constable of Thames Valley Police v A Police Misconduct Panel v PC Hafeez Javeed [2023] EWHC 2693 (KB). However, as part of the duty to give reasons, a tribunal is not required to refer to every submission or all the evidence before it. Kamran Ali v General Medical Council [2023] EWHC 2984 (Admin), or set out every factor and reason relied upon in coming to its decision Owusu-Yianoma v Bar Standards Board [2023] EWHC 2785 (Admin) *[reiterating English v Emery Reimbold & Strick Ltd [2002] 1 WLR 2409].*

Impairment and Sanction

- Shah Shahin Ali v General Medical Council [2023] EWHC 2400 (KB) reiterated some principles in relation to impairment:

  - insight is defined in the case of *Sawati v GMC [2022] EWHC 283 (Admin)* as "*an acknowledgment or appreciation of failings*". Insight (or lack of it) applies whatever the risk of repetition. Its purpose is to allow the risk of reoffending (however low) to be recognised and avoided;

- where a practitioner denies the underlying misconduct, they can demonstrate that even though they dispute that their conduct was wrong, they have put in place the necessary strategies to recognise it if it arose and prevent it.

- General Medical Council v Rezk [2023] EWHC 3228 (Admin) provided a reminder of principles which tribunals should take into account when considering sanction:

  - It is insufficient for a tribunal to only state that they've taken into account earlier findings (eg on impairment) when considering sanction. At sanction stage, tribunals should specifically identify aggravating/mitigating factors and expressly address issues such as whether public confidence and professional standards would be damaged if no sanction was imposed (a reiteration of GMC v *Chandra [2018] EWCA Civ 1898);*

  - when identifying the aggravating factors, a tribunal should consider the impact (of the misconduct) on the victim(s);

  - tribunals should consider sanction in order of least restrictive to most and therefore first consider whether there are exceptional circumstances to justify taking no action. Failure to follow this approach may mean that tribunals are pre-disposed to find exceptional circumstances because they have already decided that conditions nor suspension would not be a proportionate sanction;

  - exceptional circumstances (in taking no action) are unusual, special and uncommon, so such cases are likely to be very rare. A finding that for example, a doctor has been a diligent, conscientious and professional doctor on a training programme which he is completing in an exemplary fashion is not "*unusual, special or uncommon*".

- In cases where a tribunal disbelieves some parts of the registrant's evidence and instead prefers evidence of the victim, the tribunal does not necessarily need to consider their disbelief as compounding the misconduct. While there could be situations where a registrant's conduct during proceedings is so grave as to amount to a further aggravating matter, it would be artificial as a matter of routine to treat every occasion where the evidence of the complainant has been preferred over evidence given by the registrant as one that aggravates the disciplinary misconduct. R. (on the application of O'Connor) v Police Misconduct Panel [2023] EWHC 2892 (Admin)

- When assessing sanction, It is reasonably open to the panel to assess the evidence before it and consider the weight to be attributed to it, eg as to previous good service and other mitigation R. (on the application of O'Connor) v Police Misconduct Panel [2023] EWHC 2892 (Admin). However, public interest is of the utmost importance. Given that in a disciplinary context an unblemished past record and positive evidence of good character will be the norm, the weight to be given to personal mitigation in a serious case is likely to be limited. The Chief Constable of Thames Valley Police v A Police Misconduct Panel v PC Hafeez Javeed [2023] EWHC 2693 (KB). These personal areas of mitigation should be treated with caution in the regulatory context Owusu-Yianoma v Bar Standards Board [2023] EWHC 2785 (Admin).

- As to consistency of tribunal decisions in cases with similar allegations; each case is different and has to be determined on its own facts. Owusu-Yianoma v Bar Standards Board [2023] EWHC 2785 (Admin)

Kind regards
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