Neutral Citation Number: [2025] EWHC 802 (Admin)

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Case No: AC-2024-LON-003097

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/04/2025

Before :

MR JUSTICE CALVER

- -

Between :

(1) GENERAL MEDICAL COUNCIL

(2) THE PROFESSIONAL STANDARDS AUTHORITY FOR HEALTH AND SOCIAL CARE

Appellants

- and -

MR JAMES GILBERT **Respondent**

- -
- -

Ivan Hare KC (instructed by **GMC Legal**) for the **First Appellant**
Fenella Morris KC (instructed by **Browne Jacobson LLP**) for the **Second Appellant**
Mark Sutton KC (instructed by **Clyde & Co LLP**) for the **Respondent**
Hearing dates: 12-13 March 2025

- -

Approved Judgment

This judgment was handed down remotely at 10.00am on Thursday 03 April 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Mr Justice Calver :

INTRODUCTION

1. On 8 August 2024 following a 19-day hearing, a Medical Practitioners' Tribunal ("**the Tribunal**") imposed a period of eight months' suspension on the Respondent ("**Mr. Gilbert**") by reason of his misconduct. The Tribunal further held that it was unnecessary to direct a review, enabling Mr. Gilbert to resume unrestricted practice at the end of his period of suspension. On this appeal Mr. Gilbert was represented by Mr. Mark Sutton KC.

2. The First Appellant ("**the GMC**"), represented by Mr. Ivan Hare KC, appeals against the Tribunal's decision on sanction under s. 40A of the Medical Act 1983 ("**the MA**") on three grounds, contending that the sanction is insufficient to protect the public.

3. The Second Appellant ("**the PSA**") is a statutory body which is responsible for the protection of the public and has oversight of various regulatory bodies in the health and social care sector. It supports the appeal of GMC, and advances a further four grounds of appeal under s. 40B(2)-(5) of the MA. The Second Appellant was represented by Ms. Fenella Morris KC.

FACTUAL BACKGROUND

4. In short, between October 2008 and September 2009, Mr. Gilbert worked as a Senior Registrar at the Oxford University Hospitals NHS Foundation Trust ("**the Trust**"). He subsequently returned to the Trust and worked as a Consultant Surgeon between October 2010 to May 2022. It was subsequently alleged that he engaged in inappropriate conduct between August 2009 to April 2022 towards six colleagues. The Trust investigated the allegations and dismissed Mr. Gilbert on 20 May 2022. The GMC opened an investigation into Mr. Gilbert's fitness to practise after receiving a referral from the Trust in June 2022.

5. Following his dismissal from the Trust, Mr. Gilbert completed NHS '*choose & book*' outpatient appointments and surgical lists at The New Foscote Hospital, carrying out hernia repair surgery. He also undertook locum shifts as a Registrar in general surgery at the Brighton & Sussex Hospital from August 2022 until January 2023. From January

2023 to the time of the Tribunal hearing, Mr. Gilbert was appointed to the role of Chief Medical Officer at The New Foscote & Royal Buckinghamshire Hospitals Group. He continued to carry out NHS hernia waiting list clinics and surgeries, but also had a leadership and managerial role.

THE ALLEGATIONS AND THE TRIBUNAL'S DETERMINATIONS

6. The Tribunal considered an extensive list of allegations against Mr. Gilbert concerning sexually motivated conduct, sexual harassment, harassment related to race, intimidation, racist conduct, and abuse of Mr. Gilbert's senior position ("**the Allegations**") towards his colleagues Ms A, Ms E, Mr. F, Ms G, Ms H, and Ms I. At the outset of the hearing, Mr. Gilbert admitted a limited number of the Allegations but denied the others.

Determination on the Facts

7. The Tribunal heard live evidence from the alleged victims, and from Mr. Gilbert and seven medical professionals called on his behalf. Its conclusions on the Allegations are summarised at paragraph 400 of its Determination on the Facts. The majority of the Allegations against Mr. Gilbert were found to be proven (in addition to those which had been admitted by him), and the Tribunal made the following factual findings:

Allegation	Description	Finding
Ms A		
1(a)(i)(1)	On one or more occasions you behaved inappropriately towards [Ms A], in that you made inappropriate comments in that on a date between April 2019 and October 2019, during an operation you said to Ms A 'so are you a spurter? I can always tell which girls are the spurters', or words to that effect; [and]	Proven
1(a)(ii)	On a date between April 2019 and September 2019 you said to Ms A, 'You're a well put together girl, you must always wear matching underwear, correct? What kind are you wearing now?', or words to that effect"; [and]	Proven
1(a)(iv)	On a date between August 2009 and February 2010 you said to Ms A, 'oh no you need to come very quickly because they need to go and they have a really big organ, a huge organ and I know	Proven

	how much you love big organs', or words to that effect.	
1(b)(i)(1)-(2)	You touched Ms A inappropriately without her consent, in that i. on one or more occasions between August 2009 and February 2010, you grabbed Ms A by the waist; [and] ii. ran your hands up and down Ms A's body from her hips to her bra line.	Proven
1(b)(iii)	On or around 9 February 2021 you traced your finger across Ms A's wrist, up her arm, over her shoulder and over her clavicle to her sternoclavicular notch.	Proven
2(a)	Your actions as set out at paragraph 1 were sexually motivated; [and]	Determined and found proved in respect of paragraphs 1(a)(i)(1), 1(a)(ii), 1(a)(iv), 1(b)(i)(1) and (2)
2(b)	Constituted sexual harassment as defined in Section 26(2) of the Equality Act 2010, in that you engaged in unwanted conduct of a sexual nature which had the purpose or effect of violating the dignity of Ms A, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her; [and]	Determined and found proved in respect of paragraphs 1(a)(i)(1), 1(a)(ii), 1(a)(iv), and 1(b)(i)(1) to (2)
2(c)	Were an abuse of your more senior position.	Determined and found proved in respect of paragraphs 1(a)(i)(1), 1(a)(ii), 1(a)(iv), 1(b)(i)(1) to (2), and 1(b)(iii)
7	On a date in or around the winter of 2019 you said to Ms A about a patient during a ward round, 'you know how Africans clean themselves once they've gone to the toilet? They just use their hands, no wonder they always get infections', or words to that effect.	Proven
8	On a date in or around January 2020 you said to Ms A about a junior colleague, Mr. D, 'I know people like him, I used to know Africans as well….so I know these Africans, they are	Proven

	only interested in a good time, they only come out after the sun goes down', or words to that effect.	
9(a)	Between April 2019 and April 2022, you said to Ms A 'those two women, they love a good cat fight. Typical hysterical Bollywood women,' or words to that effect; [and]	Admitted
9(b)	In reference to a patient of Asian origin's weight, 'eating too many chapattis', or words to that effect;	Proven
9(c)(i)-(ii)	In reference to a person of African origin's weight: i. 'eating too much rice', or words to that effect; [and] ii. 'Africans don't do anything unless they are really sporty' or words to that effect.	Proven
10(a)-(b)	Your comments as at paragraphs 7 – 9: a. constituted harassment related to race as defined in section 26(1) of the Equality Act 2010, in that you engaged in unwanted conduct related to race, which had the purpose or effect of violating the dignity of Ms A, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her; [and] b. were racist.	Proven
Ms E		
11(a)	On one or more occasions between April 2011 and April 2013 you behaved inappropriately whilst at work towards your junior colleague Ms E in that you tickled her when you were alone with her without her consent; [and]	Admitted
11(b)	Grabbed and massaged her shoulders without her consent;	Admitted
11(c)(i)-(iii)	On one occasion in an office you: i. sat close to her, in that Ms E was trapped against the wall and window and was unable to move away; ii. stared at Ms E; [and] iii. said, 'I have been watching you and you're pretty perfect', or words to that effect whilst staring at Ms E's body and breasts;	Proven
11(d)	Asked her if her underwear was a matching set, or words to that effect;	Proven
11(f)	Squeezed her thigh between your thighs under the operating table;	Proven

11(g)	Said during operations when asking her to use the heparinished saline flush, 'Oh I didn't know you're a spurter?', or words to that effect;	Proven
11(i)	Said, after being told that Ms E may require dialysis, 'Well, when you need dialysis, I would love to do a high thigh fistula for you', or words to that effect;	Proven
11(j)	Telephoned Ms E outside of work when you had no reason to do so;	Admitted
12(a)-(c)	Your actions as set out at paragraph 11(a) – 11(i) were: a. sexually motivated; b. constituted sexual harassment as defined in Section 26(2) of the Equality Act 2010, in that you engaged in unwanted conduct of a sexual nature which had the purpose or effect of violating the dignity of Ms E, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her; [and] c. an abuse of your more senior position.	Determined and found proved in respect of paragraphs 11(a), (b), (c)(i) to (iii), (d), (f), (g) and (i)
Mr. F		
14(a) and (b)	On one or more occasions between February 2013 and November 2019, whilst at work you: a. you imitated an Indian accent in the presence of Mr. F; [and] b. asked Mr. F, 'oh when are you leaving the country now,' or words to that effect, with reference to Brexit.	Admitted
Ms G		
16(b)(i)-(v)	Between 2 April 2014 and 18 June 2014 you behaved inappropriately whilst at work towards your junior colleague Ms G in that on 11 April 2014 you made inappropriate comments in that you: i. asked if Ms G was single; ii. said that you 'knew what [Ms G] needed in a man', or words to that effect; iii. said that she 'looked great in a pair of scrubs and didn't need to go to the gym', or words to that effect; iv. said that you were 'looking forward to getting [Ms G] on a night out', or words to that effect; [and] v. said that you 'bet [Ms G] was really wild on a night out', or words to that effect;	Proved

17(c)(i)-(ii)	Your actions as set out at paragraph 16 were: a. sexually motivated; b. constituted sexual harassment as defined in Section 26(2) of the Equality Act 2010, in that you engaged in unwanted conduct of a sexual nature which had the purpose or effect of violating the dignity of Ms G, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her; [and] c. an abuse of your more senior position.	Determined and found proved in respect of paragraphs 16(b)(i) to (v) and 16(c)(i) to (ii)
Ms H		
20(b)(i)-(iii)	Between 1 April 2015 and 30 September 2018 you behaved inappropriately whilst at work towards your colleague Ms H in that: b. on a date between July 2015 and summer 2016 during a conversation with Ms H, whilst carrying out a procedure, you: i. said you could see how professional she was in squirting, or words to that effect; ii. said 'I didn't realise you were a squirter', or words to that effect; [and] iii. asked if she was like this as a woman, or words to the effect, in reference to your comments as described in paragraphs 20.b.i and/or 20.b.ii.	Proven
20(c)(i)-(ii)	On an occasion in Summer 2015 or 2016 you: i. touched Ms H's left knee from behind; [and] ii. said 'your legs are so sporty', or words to that effect;	Proven
20(d)(i)	On a date during the end of 2017 and beginning of 2018, you directly approached Ms H in a corridor and: i. put your hands underneath her jacket and touched her waist;	Admitted
20(d)(ii)	ii. said, oh dear it's a bit too narrow for both of us here…but it feels incredibly nice', or words to that effect;	Proven
21(a)-(b)	Your actions as set out at paragraph 20 were: a. sexually motivated; [and] b. constituted sexual harassment as defined in Section 26(2) of the Equality Act 2010, in that you engaged in unwanted conduct of a sexual	Determined and found proved in respect of paragraphs 20(b)(i) to (iii), 20(c)(i) to (ii),

	nature which had the purpose or effect of violating the dignity of Ms H, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her.	and 20(d)(i) to (ii)
Ms I		
22	On or around 7 August 2020, you said to Ms I about a patient during an organ retrieval procedure, 'look at all that fat, this is what happens when you eat chapatti', or words to that effect.	Proven
23(b)	Your comment as set out at paragraph 22: b. was racist	Proven

Determination on Impairment

8. Having set out its determinations on the facts, the Tribunal then considered whether Mr. Gilbert's fitness to practise was impaired by reason of misconduct. The Tribunal recorded (at [402]-[416]) that it had before it a body of evidence which was supportive of Mr. Gilbert, in particular, a nine-page reflective statement from him, a statement from his Responsible Officer, and 45 positive testimonials from colleagues, patients, and friends. It was not suggested that Mr. Gilbert was other than a highly competent surgeon.

9. In his reflective statement dated August 2024, Mr. Gilbert explained that the last three years had been the hardest years of his life, and had been '*humbling, humiliating and deeply shameful*'. He stated that he believed he was a "*different person and a fundamentally changed practitioner from the doctor whose conduct led to these complaints being raised*". He expressed an unreserved apology to the victims of his conduct and sought to explain how, from the time of his suspension, he had reflected on his past behaviours and explained the steps which he had taken to alter them.

10. Those steps included counselling and accountability meetings, undertaking six courses (such as professional boundaries courses) and reading numerous books and articles on sexual harassment and misconduct and racism. Mr. Gilbert also sought to explain how, when challenging inappropriate language and behaviours by junior staff members in his role as Chief Medical Officer at New Foscote Hospital, he had considered his past behaviour and its impact on others in guiding his approach and the standards of conduct to be expected of colleagues.

11. At [467], the Tribunal found that Mr. Gilbert's behaviour amounted to misconduct. Its factual findings included findings that Mr. Gilbert had made comments which were sexually motivated and constituted sexual harassment; had engaged in non-consensual touching motivated by sexual gratification (which the complainants found discomforting and troubling); and had made racist comments. The conduct concerned five junior colleagues; and Mr. Gilbert had further abused his senior position in respect of two of them. The Tribunal found that his actions accordingly violated the standards of Good Medical Practice[1]; and applying the test set out by Dame Janet Smith in the Fifth Shipman Report, the Tribunal concluded that his actions amounted to misconduct which (a) undermined public confidence in the profession and (b) did not uphold the standards of the profession.

12. Turning to the question of whether Mr. Gilbert's fitness to practise was impaired by reason of the misconduct, the Tribunal found that it was. It concluded that his conduct was capable of remediation, and indeed this had been shown by Mr. Gilbert's own actions referred to in his reflective statement. However, although he had demonstrated some insight concerning the impact of his behaviour on others, the Tribunal cast doubt on one particular aspect of his reflective statement as follows:

> *474. The Tribunal considered, within Mr. Gilbert's reflective statement, that he stated that:*
>
> *"In 2012, the feedback from Ms E about behaviours was a watershed moment. I realised that my conduct and style of interaction had affected her sufficiently to flag this. I felt I had taken this feedback on board and had made changes that included putting a stop to shoulder massage and tickling."*
>
> *475. The Tribunal noted that, after the handing down of its Facts determination, Mr. Gilbert maintained on oath before it that this was still his view. The Tribunal however, had found proved misconduct relating to non-consensual physical touching, comments made for sexual gratification purposes, and racist comments against four other colleagues after 2012. The Tribunal, in its judgement, concluded that the feedback from Ms E was not a "watershed moment" for Mr. Gilbert as he had carried on behaving inappropriately and that if there was a "watershed moment" then it was likely to have been when Mr. Gilbert was dismissed from the Trust in 2022."*

[1] Good Medical Practice (2013) is guidance issued by the GMC setting out the principles, values and standards of professional behaviour for its member health professionals.

13. The Tribunal considered that Mr. Gilbert's insight was "*not fully developed*", and concluded that his fitness to practise was impaired by reason of misconduct:

> *"477. The Tribunal concluded that Mr. Gilbert had demonstrated a significant degree of insight and had taken a number of steps to remediate his failings. However, Mr. Gilbert's insight was not fully developed into the full extent of his behaviour as found proved by the Tribunal. He may benefit from further time to digest and reflect on the findings against him.*
>
> *478. The Tribunal determined that, without sufficient insight into the full breadth of his misconduct, it could not conclude that the behaviours complained of were highly unlikely to be repeated.*
>
> *479. The Tribunal considered that limbs b and c of the test set out by Dane Janet Smith … were applicable in this case…*
>
> *480. In particular, the Tribunal concluded that the need to maintain public confidence in the medical profession, and the standard of behaviour within the profession, required the finding that Mr. Gilbert's fitness to practise is currently impaired by reason of his misconduct. Members of the public would not have confidence in doctors if the Tribunal regarded such misconduct, with evidence of further reflection needed and development of insight required, as not impairing a doctor's fitness to practise.*
>
> *481. In the light of all of the above, the Tribunal has therefore determined that Mr. Gilbert's fitness to practise is impaired by reason of misconduct*."

Determination on Sanction

14. Having determined the issue of impairment, the Tribunal then finally turned to consider the question of the appropriate sanction to be imposed on Mr. Gilbert. This is the central issue with which this appeal is concerned. The Tribunal considered submissions by the GMC and Mr. Gilbert, and also had regard to the GMC's Sanctions Guidance (dated February 2024). At [513]-[515], it reminded itself of the overarching objective and the principle of proportionality, and identified various aggravating and mitigating factors in the case. It then proceeded to consider sanction.

15. When considering the appropriateness of *suspending* Mr. Gilbert's registration, the Tribunal referred to paragraphs 91-93 of the Sanctions Guidance, which provide as follows:

"*91. Suspension has a deterrent effect and can be used to send out a signal to the doctor, the profession and public about what is regarded as behaviour unbefitting a registered doctor. Suspension from the medical register also has a punitive effect, in that it prevents the doctor from practising (and therefore from earning a living as a doctor) during the suspension, although this is not its intention.*

92. Suspension will be an appropriate response to misconduct that is so serious that action must be taken to protect members of the public and maintain public confidence in the profession. A period of suspension will be appropriate for conduct that is serious but falls short of being fundamentally incompatible with continued registration (ie for which erasure is more likely to be the appropriate sanction because the tribunal considers that the doctor should not practise again either for public safety reasons or to protect the reputation of the profession).

93. Suspension may be appropriate, for example, where there may have been acknowledgement of fault and where the tribunal is satisfied that the behaviour or incident is unlikely to be repeated. The tribunal may wish to see evidence that the doctor has taken steps to mitigate their actions."

16. The Tribunal then took into account paragraph 97 of the Sanctions Guidance which sets out various factors which would indicate that the suspension of the doctor may be appropriate. Applying these factors to the facts of this case, and considering the various aggravating and mitigating factors, the Tribunal concluded that suspension was an appropriate and proportionate sanction on the facts of this case:

"*530. In all the circumstances, the Tribunal determined that suspension of Mr. Gilbert's registration would be appropriate and proportionate in this case. It considered that suspension would properly mark the seriousness of Mr. Gilbert's misconduct, would protect the public interest, and would uphold and maintain professional standards in the medical profession. Further, a period of suspension would send out a clear message to the public, the medical profession, and Mr. Gilbert, that such behaviour is not acceptable.*"

17. The Tribunal then went on to consider the alternative (and ultimate) sanction of *erasure*. The Tribunal considered the terms of paragraph 109 of the Sanctions Guidance which contains factors which may indicate that erasure is the appropriate sanction in a particular case, but it concluded that erasure would not be a proportionate punishment as follows:

"532. The Tribunal determined that the following sections of paragraph 109 of the SG were relevant in this case:

"Any of the following factors being present may indicate erasure is appropriate (this list is not exhaustive).

a. A particularly serious departure from the principles set out in Good medical practice where the behaviour is difficult to remediate.

b. A deliberate or reckless disregard for the principles set out in Good medical practice and/or patient safety. …

d. Abuse of position/trust (see Good medical practice, paragraph 81: 'You must make sure that your conduct justifies your patients' trust in you and the public's trust in the profession').

…

f. Offences of a sexual nature, including involvement in child sex abuse materials (see further guidance below at paragraphs 151–159)."

533. In terms of (a), whilst Mr. Gilbert's behaviour was a serious departure from the principles set out in GMP the Tribunal concluded that the behaviours complained of were not difficult to remediate in the light of its findings on Impairment. With regard to (b), the Tribunal did consider Mr. Gilbert's actions to amount to a reckless disregard for the principles set out in GMP given that concerns lodged by Ms E and Ms G and the continuation of the behaviour. In terms of (d), the Tribunal considered that this abuse was not in relation to patients but was in respect of colleagues and that does impact on the public's trust in the profession.

534. With regard to (f), the Tribunal noted that there were three examples on six occasions of non-consensual touching that was motivated by sexual gratification. The Tribunal concluded that, on a spectrum of serious, this was not the type of matter as discussed at paragraphs 151 to 159 of the SG. It also had regard to its comments and conclusion in its Impairment determination as to Mr. Gilbert's misconduct being remediable and, to a large extent, remediated.

535. The Tribunal determined that Mr. Gilbert's misconduct, whilst a serious breach of GMP, was not fundamentally incompatible with continued registration and that erasure of Mr. Gilbert's name from the Medical Register would be disproportionate. It remained of the view that a period of suspension was the appropriate and proportionate response."

18. The Tribunal then determined the appropriate length of the suspension. In doing so, it referred to paragraphs 99-102 of the Sanctions Guidance and reminded itself of those factors which are relevant to the determination of the length of suspension. It determined that a suspension for a period of eight months was the appropriate sanction in this case.

> *"538. The Tribunal noted that these incidents did not give rise to concerns about risks to patient safety, and that there was evidence that Mr. Gilbert was otherwise a skilled and well-regarded doctor.*
>
> *539. The factors that the Tribunal considered were relevant included the extent to which Mr. Gilbert departed from the principles of GMP, the extent to which his actions risked public confidence[2], the extent of his misconduct, and the seriousness of his inappropriate behaviour. The Tribunal also noted the aggravating and mitigating factors as outlined above.*
>
> *540. The Tribunal had regard to the steps taken by Mr. Gilbert including his remedial action, his apologies, and the extent to which he has addressed the concerns. The Tribunal was of the view that Mr. Gilbert has embraced the need to remediate and made determined efforts to demonstrate how he has changed his practice and conduct.*
>
> *541. In all the circumstances, the Tribunal determined that a period of eight months was sufficient and appropriate to mark the serious misconduct found. The Tribunal considered that this adequately reflected the balancing exercise that it has undertaken. The Tribunal also determined that this time period would be sufficient to uphold limbs b and c of the overarching objective, namely, to promote and maintain public confidence[3] in the medical profession, and to promote and maintain proper professional standards and conduct for members of the profession."*

19. Finally, the Tribunal considered the need for an *independent review* of Mr. Gilbert before he could return to unrestricted practice at the end of his period of suspension. The Tribunal held that this was unnecessary:

> *542. The Tribunal had regard to the relevant paragraphs of the SG, including the following paragraphs:*

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[2] It can be seen that contrary to the submission of Ms Morris KC (and the PSA's third ground of appeal), the Tribunal did consider and took into account in its finding of impairment and sanction the adverse effect that Mr. Gilbert's misconduct would have upon public confidence.

[3] See footnote 2 above

> *"163. It is important that no doctor is allowed to resume unrestricted practice following a period of conditional registration or suspension unless the tribunal considers that they are safe to do so.*
>
> *164. In some misconduct cases it may be self-evident that, following a short suspension, there will be no value in a review hearing. However, in most cases where a period of suspension is imposed, and in all cases where conditions have been imposed, the tribunal will need to be reassured that the doctor is fit to resume practice – either unrestricted or with conditions or further conditions. A review hearing is therefore likely to be necessary, so that the tribunal can consider whether the doctor has shown all of the following (by producing objective evidence):*
>
> *a. they fully appreciate the gravity of the offence*
> *b. they have not reoffended*
> *c. they have maintained their skills and knowledge*
> *d. patients will not be placed at risk by resumption of practice or by the imposition of conditional registration."*
>
> *543. The Tribunal, with reference to paragraph 164 of the SG, determined that Mr. Gilbert appreciated the gravity of his misconduct, and there has been no repetition/reoffending since the referral to the GMC. It was clear to the Tribunal that Mr. Gilbert has a high level of medical skills and knowledge and there is no issue in respect of his clinical skills.*
>
> *544. In all the circumstances, the Tribunal determined not to direct a review in Mr. Gilbert's case. The Tribunal determined that the public interest is served by the period of suspension and, given the comprehensive evidence of insight and remediation shown, it was not necessary to have a review hearing in this case. The Tribunal determined that it would be safe for Mr. Gilbert to resume unrestricted practice and that patients will not be placed at risk on resumption of practice.* (emphasis added)

20. As to the question of a review, at the hearing before me the parties had proceeded on the basis that this remained the case: there was to be no review. However, on the second day of the hearing Mr. Hare KC informed the court that as long ago as 30 August 2024 an Assistant Registrar employed by the GMC had in fact exercised the power under section 35D of the MA to direct a review hearing (which was listed for 7 May 2025). Owing to this extraordinary oversight which plainly should not have occurred, this decision was not communicated either to counsel for GMC or to Mr. Gilbert himself. I hasten to add that this was through no fault of Mr. Hare KC himself.

THE LEGAL AND STATUTORY FRAMEWORK

Medical Act 1983

21. Section 1 of the MA sets out the overarching objective of the GMC. Insofar as relevant, it provides:

> *(1A) The over-arching objective of the [GMC] in exercising their functions is the protection of the public.*
>
> *(1B) The pursuit by the [GMC] of their over-arching objective involves the pursuit of the following objectives—*
>
> > *(a) to protect, promote and maintain the health, safety and well-being of the public,*
> > *(b) to promote and maintain public confidence in the medical profession, and*
> > *(c) to promote and maintain proper professional standards and conduct for members of that profession.*

It is common ground that the Tribunal was a part of the GMC and were therefore required, in the exercise of their functions, to have due regard to the overarching objective, and the objectives in subsection (1B).

22. Section 40 of the MA provides for a right of appeal to the High Court by healthcare professionals from a decision of a Medical Practitioners' Tribunal. A separate right of appeal *by the GMC* against certain types of Tribunal decisions (including a direction for suspension) is also provided for under section 40A of the MA. That section further provides for the powers of this Court on such an appeal:

> *"(1) This section applies to any of the following decisions by a Medical Practitioners Tribunal—*
>
> > *(a) a decision under section 35D giving—*
> > *(i) a direction for suspension, including a direction extending a period of suspension;*
>
> *(2) A decision to which this section applies is referred to below as a "relevant decision".*

(3) The General Council may appeal against a relevant decision to the relevant court if they consider that the decision is not sufficient (whether as to a finding or a penalty or both) for the protection of the public.

(4) Consideration of whether a decision is sufficient for the protection of the public involves consideration of whether it is sufficient—

(a) to protect the health, safety and well-being of the public;
(b) to maintain public confidence in the medical profession; and
(c) to maintain proper professional standards and conduct for members of that profession.

. . .

(6) On an appeal under this section, the court may—

(a) dismiss the appeal;
(b) allow the appeal and quash the relevant decision;
(c) substitute for the relevant decision any other decision which could have been made by the Tribunal; or
(d) remit the case to the MPTS for them to arrange for a Medical Practitioners Tribunal to dispose of the case in accordance with the directions of the court,

and may make such order as to costs . . . as it thinks fit."

23. The key distinction between the two provisions is as follows[4].

(1) Section 40 provides an unfettered right of appeal to a person in respect of whom an appealable decision has been taken, i.e. to a medical practitioner who has been made the subject of sanction by the Tribunal. There is no requirement for permission to appeal. No limitations are imposed upon the ambit of the appeal. Appeals under section 40 are by way of re-hearing.

(2) Section 40A of the 1983 Act permits the GMC to appeal against a relevant decision to the relevant court on the limited basis that "they consider that the decision is not

[4] See *Sastry v GMC* [2021] 1 WLR 5029, [98]-[99].

sufficient (whether as to a finding or a penalty or both) for the protection of the public." Appeals under section 40A are by way of review.

(3) The appeal court will allow an appeal in both cases where the decision of the Tribunal is (a) wrong or (b) unjust because of a serious procedural or other irregularity in the proceedings of the Tribunal.

24. Where, as here, the GMC brings a section 40A appeal, section 40B((1)-(3) of the MA provides that the PSA may become a party to the appeal by giving notice to that effect to the court, and having done so the PSA may make representations upon the appeal[5]. By section 40B(4), the PSA may advance its case on appeal on grounds that it might otherwise have proceeded with had the GMC not appealed. Where the PSA raises new grounds of appeal as it has done here, the GMC and the medical practitioner shall have the same opportunities to respond as if the case had been referred to this Court by the PSA pursuant to s. 29 of the National Health Service Reform and Health Care Professions Act 2002: see section 40B(5) of the MA.

25. The relationship between ss. 40 and 40A MA and the principles underpinning those provisions were authoritatively considered by the Divisional Court in *Jagjivan v GMC & PSA* [2017] EWHC 1247 (Admin) (Sharp LJ and Dingemans J):

> "*39. As a preliminary matter, the GMC invites us to adopt the approach adopted to appeals under section 40 of the 1983 Act, to appeals under section 40A of the 1983 Act, and we consider it is right to do so. It follows that the well-settled principles developed in relation to section 40 appeals (in cases including: Meadow v General Medical Council [2006] EWCA Civ 1390; [2007] QB 462; Fatnani and Raschid v General Medical Council [2007] EWCA Civ 46; [2007] 1 WLR 1460; and Southall v General Medical Council [2010] EWCA Civ 407; [2010] 2 FLR 1550) as appropriately modified, can be applied to section 40A appeals.*
>
> *40. In summary:*

5 The over-arching object of the Authority in exercising its functions is the protection of the public and this was the reason for the creation of the Authority (*CRHP v (1) GMC (2) Ruscillo* and *CRHP v (1) NMC (2) Truscott* [2004] EWCA Civ 1356 at [60]).

i) Proceedings under section 40A of the 1983 Act are appeals and are governed by CPR Part 52. A court will allow an appeal under CPR Part 52.21(3) if it is 'wrong' or 'unjust because of a serious procedural or other irregularity in the proceedings in the lower court'.

ii) It is not appropriate to add any qualification to the test in CPR Part 52 that decisions are 'clearly wrong': see Fatnani at paragraph 21 and Meadow at paragraphs 125 to 128.

iii) The court will correct material errors of fact and of law: see Fatnani at paragraph 20. Any appeal court must however be extremely cautious about upsetting a conclusion of primary fact, particularly where the findings depend upon the assessment of the credibility of the witnesses, who the Tribunal, unlike the appellate court, has had the advantage of seeing and hearing (see Assicurazioni Generali SpA v Arab Insurance Group (Practice Note) [2002] EWCA Civ 1642; [2003] 1 WLR 577, at paragraphs 15 to 17, cited with approval in Datec Electronics Holdings Ltd v United Parcels Service Ltd [2007] UKHL 23, [2007] 1 WLR 1325 at paragraph 46, and Southall at paragraph 47).

iv) When the question is what inferences are to be drawn from specific facts, an appellate court is under less of a disadvantage. The court may draw any inferences of fact which it considers are justified on the evidence: see CPR Part 52.11(4).

v) In regulatory proceedings the appellate court will not have the professional expertise of the Tribunal of fact. As a consequence, the appellate court will approach Tribunal determinations about whether conduct is serious misconduct or impairs a person's fitness to practise, and what is necessary to maintain public confidence and proper standards in the profession and sanctions, with diffidence: see Fatnani at paragraph 16; and Khan v General Pharmaceutical Council [2016] UKSC 64; [2017] 1 WLR 169, at paragraph 36.

vi) However there may be matters, such as dishonesty or sexual misconduct, where the court "is likely to feel that it can assess what is needed to protect the public or maintain the reputation of the profession more easily for itself and thus attach less weight to the expertise of the Tribunal …": see Council for the Regulation of Healthcare Professionals v GMC and Southall [2005] EWHC 579 (Admin); [2005] Lloyd's Rep. Med 365 at paragraph 11, and Khan at paragraph 36(c). As Lord Millett observed in Ghosh v GMC [2001] UKPC 29; [2001] 1 WLR 1915 and 1923G, the appellate court "will afford an appropriate measure of respect of the judgment in the committee … but the [appellate court]

> *will not defer to the committee's judgment more than is warranted by the circumstances".*
>
> *vii) Matters of mitigation are likely to be of considerably less significance in regulatory proceedings than to a court imposing retributive justice, because the overarching concern of the professional regulator is the protection of the public.*
>
> *viii) A failure to provide adequate reasons may constitute a serious procedural irregularity which renders the Tribunal's decision unjust (see Southall at paragraphs 55 to 56).”*

26. *Jagjivan* must be read in the light of the more recent case of *Bawa-Garba v GMC* [2018] EWCA Civ 1879, in which the Court of Appeal reasoned as follows:

> *61. The decision of the Tribunal that suspension rather than erasure was an appropriate sanction for the failings of Dr Bawa-Garba, which led to her conviction for gross negligence manslaughter, was an evaluative decision based on many factors, a type of decision sometimes referred to as “a multi-factorial decision”. This type of decision, a mixture of fact and law, has been described as “a kind of jury question” about which reasonable people may reasonably disagree … . It has been repeatedly stated in cases at the highest level that there is limited scope for an appellate court to overturn such a decision.*
>
> *…*
>
> *63. … In the recent case of R (Bowen and Stanton) v Secretary of State for Justice [2017] EWCA Civ 2181 , McCombe LJ explained (at [65]) that, when the appeal is from a trial judge’s multi-factorial decision, “the appeal court’s approach will be conditioned by the extent to which the first instance judge had an advantage over the appeal court in reaching his/her decision. If such an advantage exists, then the appeal court will be more reticent in differing from the trial judge's evaluations and conclusions".*
>
> *…*
>
> *67. That general caution applies with particular force in the case of a specialist adjudicative body, such as the Tribunal in the present case, which (depending on the matter in issue) usually has greater experience in the field in which it operates than the courts: see Smech at [30]; Khan v General Pharmaceutical Council [2016] UKSC 64, [2017] 1 WLR 169 at [36]; Meadow at [197]; and Raschid v General Medical Council [2007] EWCA Civ 46, [2007] 1 WLR 1460 at [18]-[20]. An appeal court should only interfere with such an evaluative decision if (1) there*

was an error of principle in carrying out the evaluation, or (2) for any other reason, the evaluation was wrong, that is to say it was an evaluative decision which fell outside the bounds of what the adjudicative body could properly and reasonably decide…

…

94. As we said earlier in this judgment, the Tribunal was, in relation to all those matters and the carrying out of an evaluative judgement as to the appropriate sanction for maintaining public confidence in the profession, an expert panel, familiar with this type of adjudication and comprising a medical practitioner and two lay members, one of whom was legally qualified, all of whom were assisted by a legal assessor.

GROUNDS OF APPEAL

27. In failing to impose the sanction of erasure, the GMC submits that:

(a) the Tribunal erred in its application of the relevant legal principles;

(b) the Tribunal has failed adequately to apply the relevant guidance when reaching its decision as to sanction; and

(c) the Tribunal has simply failed adequately to reflect the gravity of Mr. Gilbert's conduct.

28. The Professional Standards Authority for Health and Social Care advances four further grounds of appeal as follows:

(a) the Tribunal failed to consider the significance of the Registrant's racist statements for patient safety and public confidence, and to take those factors into account in relation to his impairment and the appropriate sanction;

(b) the Tribunal erred in finding that the Registrant's misconduct was "not difficult to remediate" (at [52]): his misconduct could well be fundamentally incompatible with his remaining on the register, and no reasonable Tribunal could conclude that it was not difficult to remediate;

(c) the Tribunal failed to consider the significance of its decision as to sanction of clinicians' and other members of the public's confidence in the regulation and discipline of doctors, and in particular their confidence that if they report doctors' misconduct it will be adequately addressed;

(d) the Tribunal failed to give adequate reasons for its decision: it failed to disaggregate the Registrant's sexually and racially inappropriate conduct, and identify the significance of each in relation to impairment and sanction; and it failed to explain its decision to impose an apparently lenient sanction sufficiently to uphold public confidence in the regulation and discipline of doctors.

(a) Ground of Appeal: Errors in applying the relevant legal principles

29. The GMC contends that the Tribunal made three errors in applying the relevant legal principles in relation to the Tribunal's findings of fact/impairment.

(i) Allegation 15(b)

30. The first concerns the Tribunal's findings in respect of paragraph 15(b) of the Allegations: "*Your conduct set out at [Allegation]14 was racist*".

31. Mr. Gilbert admitted Allegations 14a and 14b, which were that:

> *On one or more occasions between February 2013 and November 2019, whilst at work you:*
>
> *a. you imitated an Indian accent in the presence of Mr F;*
>
> *b. asked Mr F, 'oh when are you leaving the country now,' or words to that effect, with reference to Brexit.*

32. However, the Tribunal found (in respect of Allegation 15(b)) that it was not proved that Mr. Gilbert's conduct in making these remarks was racist. The Tribunal's reasoning was that Mr. Gilbert did not intend his conduct to be offensive or insulting and Mr. F

(and Mr. Sinha, the other person present) did not perceive the conduct to be motivated by hostility or prejudice based on his race: [253]-[254].

33. It is important to understand the context in which these remarks were made by Mr. Gilbert, which is apparent from the background facts to this finding in paragraphs 245-249 of the Tribunal's Findings of Fact. In particular, the Tribunal noted the following:

(1) Mr. F stated that [Mr. Gilbert] has been a very good colleague and we had fun together."

(2) Mr. Gilbert accepted that he teased Mr. F about Brexit and the English test for UK citizenship that Mr. F was completing. He said that he was very sorry if any of the things he said caused hurt and offence to Mr. F and it was never his intention to do so.

(3) Mr. Gilbert admitted that he used an Indian accent whilst at work and he imitated other accents. He did not do this with the intention of offending anyone and he would often joke together with Mr. F. He was mortified that his actions had caused offence and he had reflected on his past behaviour.

(4) Whilst in an undated statement Mr. F stated that "it is not easy to recall this memory specifically, but I do remember that he would try to imitate accents etc. When this happened, I used to feel awkward", in his oral evidence to the Tribunal Mr. F told it that the comments were comic, foolish and banter. He said that they never mimicked anyone to be derogatory or racist and the comments were intended to be humorous and not racially pejorative. Mr. F made it clear that he did not take offence from the comments by Mr. Gilbert.

34. The Tribunal accepted, as a result, that Mr. Gilbert's actions did not constitute harassment (Allegation 15(a)) because Mr. F's dignity was not violated and it did not create an intimidating, hostile, degrading, humiliating or offensive environment for him. The GMC do not challenge that particular finding.

35. The GMC do, however, challenge the Tribunal's finding in respect of Allegation 15(b), that it was not proved that Mr. Gilbert's conduct in making these remarks was racist.

36. Mr. Ivan Hare KC submits that this was an erroneous application of the relevant legal principles. He contends that there is no requirement in order for racism to be made out

that the perpetrator should have considered their own conduct to be racist; nor that the alleged victim should have perceived the conduct to be racist and motivated by hostility or prejudice. It does not matter that (i) Mr. Gilbert did not intend to be racist or intend to be offensive, or (ii) Mr. F did not perceive the conduct to be racist. The Tribunal ought to have considered whether Mr. Gilbert's comments were *objectively* racist and it erred in failing to do so: see *Professional Standards Authority for Health and Social Care v General Pharmaceutical Council and Mr. Nazim Ali* [2021] EWHC 1692 (Admin) at [18]-[23], per Johnson J. If the Tribunal had properly addressed that question, Mr. Hare KC submits that it would have concluded that they *were* racist and accordingly this court is invited to substitute a finding that Allegation 15(b) is found proved.

37. Mr. Mark Sutton KC did not address the *Ali* case in his submissions and accordingly did not take issue with the submission that whether a remark is racist is to be judged *objectively*. Instead, he relied upon the definitions of key terms which the Legally Qualified Chairman provided to the Tribunal and the parties at the Tribunal hearing for their consideration as part of his Legal Directions. These were provided prior to the Tribunal adjourning to consider in private its findings of fact. Both parties were invited to comment on the wording and content of these Legal Directions (including the definitions). Mr. Sutton KC points out that the GMC's counsel did not take issue with the definition of "Racist Comments"[6] which it was being told that the Tribunal intended to apply as follows:

> "*34. "*Racist Comments" – are *comments perceived by the complainant or any other person to be motivated by hostility or prejudice based on a person's race or perceived race*."
>
> *35. The issue is whether the actions of Mr. Gilbert come within this definition as a matter of fact."*

38. Mr. Sutton KC accordingly submitted that that was the charge levelled at Mr. Gilbert and it was agreed that the issue which Mr. Gilbert had to meet was whether his actions came within that definition as a matter of fact. The Tribunal found that they did not and so the allegation was not proved because "*there was no evidence that the comments*

[6] Although the GMC suggested changes elsewhere, including to make clear that certain harassment charges related to the racism allegation.

made were perceived by Mr. F (or the other person present[7]) to be motivated by hostility or prejudice based on a person's race or perceived race".

39. In reply, Mr. Hare KC suggested that by referring to "*comments perceived by the complainant or any other person to be motivated by hostility or prejudice based on a person's race or perceived race*", the Tribunal was being advised to apply an objective test – i.e. "any other person" – and it misapplied that test. Had the Tribunal applied an objective test to whether the conduct in Allegations 14a and b were racist, then it should have found that it was.

40. I do not accept that submission. The definition does not refer to "comments *which would be* perceived by any other *reasonable* person…". The definition refers to "comments perceived by the complainant or comments [which are perceived by] any other person to be motivated…" It is focussing upon the perception of the actual person or persons who hear the remark. That is why the Tribunal refers in paragraph 254 of its Factual Findings to there being no evidence that the comments made "were perceived by Mr. F (or the other person present) to be motivated by hostility or prejudice based on a person's race or perceived race"[8].

41. However, I do consider, like Johnson J in *Ali*, that whether a remark is racist or not *is* indeed to be determined objectively: the assessment of meaning is an objective test that does not depend on the intention of the speaker. Indeed, the fact that a clinician did not consider or intend an objectively racist comment to be racist would itself be concerning.

42. After the appeal hearing in *Ali* before Johnson J, the case was remitted to the Fitness to Practise Committee, and the regulator appealed to this Court against the sanction of a warning. As Chamberlain J rightly stated in that subsequent appeal (see *Ali* [2024] EWHC 577 (Admin)):

> "*72. Where a regulated individual makes a comment which, objectively construed, is obviously racist, it will rarely count much in his favour that he did not intend it to be racist. The lack of understanding that or why it was racist may, indeed, give rise to a separate concern. Antisemitism may sometimes be more difficult to spot*

[7] This appears to have been a reference to Mr. Sinha.

[8] underlining added

> *than other forms of racism, in part because of the circumlocutions used to disguise it. But in my judgment, comment (d) fell into the obviously racist category. The word "Zionist" was a euphemism for "Jew": otherwise, it made no sense. The comment was an instance of two well-worn, racist conspiracy theories: that Jews control the government and that they use that control to commit acts of murder*."

43. In the present case, I consider that the Tribunal (acting on the advice of its legally qualified chairperson) adopted too narrow a definition of "racist comments" and in doing so erred in the application of the relevant legal principles. The comments were indeed objectively racist. A remark can be objectively racist even though the person to whom it is uttered may not take offence, or may not perceive it to be motivated by hostility or prejudice.

44. Disciplinary proceedings such as these are conducted in the public interest with the object of protecting the public: *GMC v Zafar* [2020] EWHC 846 (Admin) at [77]. The Tribunal's duty is to safeguard the public interest by correctly applying the law. The public would expect doctors to be sanctioned for uttering racist remarks, and public confidence in the medical profession may be harmed if they are not. If the test for racism were that a comment is only to be deemed racist if the recipient his/herself perceives the comment to be motivated by hostility or prejudice, despite the fact that any reasonable person would consider it objectively to be racist, that would seriously hinder this aspect of public confidence. The hearer of the racist remark may be junior to the clinician who makes the racist statement and be too intimidated to object. Does that mean that the remark is then deemed not to be racist? Obviously not.

45. That stated, the fact that recipient of the remarks (Mr. F) considered that they were intended to be humorous and not racially pejorative and that he did not perceive the comments to be motivated by hostility or prejudice based on his race and nor did anyone else who heard the remark, is important context. It is important context when it comes to the Tribunal's consideration of impairment and sanction, and in particular the severity of the sanction and the extent to which (if at all) it requires to be increased, as I explain below[9].

[9] I note that Johnson J took a similar approach in *Ali* at [33].

46. Indeed, in fairness to the Tribunal it is important to appreciate, in relation to sanction, that in its closing submissions before the Tribunal the GMC barely mentioned the allegations of racism and very largely focussed on the sexual misconduct charges. The only mentions of racism are those brief mentions in paragraphs 19(iv), 30, 32 (last sentence) and 62-64 of its written submissions and at D11/10B-D; D11/13C-D; and D11/18A-C of the transcript of its oral closing submissions. This is no doubt why the Tribunal dealt with the findings of racism more shortly than it dealt with its findings of sexual misconduct. This is also what led Ms Morris KC, counsel for the PSA to suggest that in the Tribunal's Determination "*the racial dimension to the case disappeared from view*." As I explain below, I consider that that submission goes too far, but it is true to say that the GMC's firm focus, and accordingly the Tribunal's too, was clearly upon the sexual misconduct allegations.

47. Accordingly, I find that the Tribunal ought to have found Allegation 15(b) proved.

(ii) Allegation 23(a)

48. Allegation 23(a) concerns harassment related to race. Allegations 22 and 23(a) read as follows:

> "*22. On or around 7 August 2020, you said to Ms I about a patient during an organ retrieval procedure, 'look at all that fat, this is what happens when you eat chapatti', or words to that effect.*
>
> *23. Your comment as set out at paragraph 22:*
> *a. constituted harassment related to race as defined in section 26(1) of the Equality Act 2010, in that you engaged in unwanted conduct related to race, which had the purpose or effect of violating the dignity of Ms I, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her."*

49. As the Tribunal recorded in paragraphs [382]-[383] of its Determination:

> "*382. The Tribunal had regard to Ms I's statement to the Trust dated 6 September 2021:*
>
> *"I remember there was one particular retrieval on a Thursday when Mr. Gilbert was on call. It was in the evening and there was a Registrar with us.*

The case started and he decided to stay on the lead surgeon's side, which is the right side. The Registrar was on his opposite side as his first assistant and I was in the second assist position. Then he said "I will start the case then [the Registrar] will do a little and then you can do your bit". We started the case and we were just a little bit into the skin when he said "Look at all that fat, this is what happens if you eat chapatti". He said that despite the fact I was there and I eat chapatti bread regularly.

Also, you are working in another hospital with a nursing team and an anaesthesia team from another hospital, a completely different set of people from your regulars, and you're insulting a doctor who is altruistically donating organs. The patient was Asian.

I would have stopped him there if I were in any other situation. But I was myself under stress and decided to ignore it for now.
…
I had told Professor Friend about Mr. Gilbert's comment about the Asian patient eating chapattis, either when I resigned or at another time."

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

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

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

I was offended when Mr. Gilbert said the comments about chapatti, not because I am Asian but because he was saying this about the patient who was also an organ donor (and deserves all the respect for that), but also because the comment was made in front of a team of doctors and nursing and other theatre staff from another (host) hospital which was highly disrespectful. I

> *decided to ignore it at this point as I was under stress of being scrutinized but I mentioned it to the head of the department at the next meeting."*

50. The Tribunal accepted Ms I's account of the facts at [390]:

> "*Having considered the evidence and the circumstances, the Tribunal concluded that it was more likely than not that Mr. Gilbert said to Ms I about a patient during an organ retrieval procedure, 'look at all that fat, this is what happens when you eat chapatti', or words to that effect. Accordingly, the Tribunal found this paragraph of the Allegation [22] proved*."

51. The Tribunal found at [399] that Mr. Gilbert's comment about chapattis was racist (allegation 23b):

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

52. However, when it came to Allegation 23a (harassment related to race), in paragraphs 393-394 of its Determination, the Tribunal determined as follows:

> "393. *The Tribunal had regard to the relevant legal principles in terms of the definition of harassment, which involves a course of conduct which amounts to harassment of another and which he knows or ought to have known amounts to harassment. Harassing a person includes alarming the person or causing the person distress. It noted that Section 26(1) of the Equality Act 2010 provides that a person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic (in this instance race), and the conduct has the purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*
>
> *394. The Tribunal considered the definition of harassment and concluded that this only amounted to one occasion and therefore could not constitute a course of conduct to establish harassment as required by The Protection from Harassment Act 1997. Accordingly, the Tribunal found this paragraph of the Allegation not proved."* (underlining added)

53. Thus, although the Tribunal found that the comment was racist and that Ms I was offended by what she considered to be a "*highly disrespectful*" remark, it determined that there was no harassment related to race because it only happened on one occasion.

54. Mr. Hare KC submitted that the Tribunal failed to apply the correct definition of harassment despite referring expressly to section 26 of the Equality Act 2010 ("EA") in its Determination at [393], which was also how the concept was defined in Allegation 23(a) and was therefore the charge which Mr. Gilbert had to meet.

55. As Mr. Hare KC points out, unlike under the Protection from Harassment Act 1997 ("1997 Act"), there is no requirement under the EA that harassing conduct should be repeated. Put differently, harassment can be made out on a single instance of conduct.

56. Mr. Hare KC submitted that the Tribunal wrongly applied separate definitions of (i) harassment and (ii) sexual harassment, with the former being defined by it by reference to the 1997 Act (and requiring a course of conduct): see [19] of its Determination:

> • *"Sexual harassment" - by virtue of Section 26 of the Equality Act 2010. Section 149(1) of the Equality Act 2010 provides that a public authority must, in the exercise of its functions, have due regard to the need to eliminate harassment that is prohibited by the 2010 Act. The GMC is a public authority for the purposes of the 2010 Act.*
>
> *The MPTS is part of the GMC and is, therefore, also obliged to have due regard to the definition of harassment in the Equality Act 2010. However, section 149(9) provides that Schedule 18 (exceptions) has effect. Schedule 18, paragraph 3, states that section 149 does not apply to the exercise of a judicial function. The Tribunal is exercising a judicial or quasi-judicial function.*
>
> *Therefore, the definition of sexual harassment in the Equality Act 2010 is a mechanism for defining harassment. Section 26(2) provides that a person (A) harasses another (B) if A engages in unwanted conduct of a sexual nature and the conduct has the purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*
>
> • *"Harassment" - In Majrowski v Guy's and St Thomas's NHS Trust [2007] 1 AC 224, it was said that, where the quality of the conduct said to constitute harassment is being examined, courts and tribunals are well able to recognise the boundary between conduct which is unattractive, even unreasonable, and*

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

57. Mr. Hare KC submits that the Tribunal therefore erred in its application of the relevant principles at [394] in deciding that the conduct complained of could not constitute racial harassment because it "only amounted to one occasion" and was not repeated. He submits that that does not prevent the conduct from amounting to harassment, as defined in section 26(1) of the EA. The Court is accordingly invited to substitute a finding that Allegation 23(a) is found proved.

58. I accept Mr. Hare KC's submission. The Tribunal's definition of harassment is muddled and yet the charge was straightforward: that the comment made to Ms I about a patient during an organ retrieval procedure "*look at all that fat, this is what happens when you eat chapatti*" constituted harassment (related to race) as defined in section 26(1) of the EA, in that Mr. Gilbert engaged in unwanted conduct related to race, which had the effect of creating a degrading or offensive environment for Ms I. I do not accept Mr. Sutton KC's suggestion that it was the drafting of the allegation which gave rise to the muddled legal analysis of the Tribunal on this point.

59. The relevant definition was clearly satisfied in this case in the light of the Tribunal's findings of fact in [390], and the Tribunal erred in its application of the relevant principles in deciding that the conduct complained of could not constitute racial harassment because it was not repeated. I do not accept Mr. Sutton KC's submission that the definition was not satisfied on the facts in this case: Ms I clearly stated that she

was offended by the comment which had the effect of creating a degrading or offensive environment for her.

60. However, the fact that the conduct complained of amounted to just one remark on one occasion is again important context when it comes to assessing impairment and, in particular, the severity of the sanction imposed and the extent to which (if at all) it requires to be increased, as I explain below.

61. Ms Morris KC further criticises the Tribunal's use of language at [399] of its Determination to the effect that this was a "*low-level racist comment in terms of its seriousness*". I agree with Ms Morris KC that referring to racism as "low level" is unhelpful, as it risks minimising the seriousness of racist conduct. But it is also unrealistic not to recognise that there is a spectrum of racist behaviour and that it is always necessary, in considering impairment and sanction, to have regard to the context in which the racist remark was made. A racist comment made in anger which offends the person to whom it is directed is likely to be more serious than a racist remark misguidedly made in jest to a person in circumstances where nobody hearing the remark takes offence. This is not to doubt for one moment, however, that both racist remarks are unacceptable and serious. I consider that this was the reasonable distinction which the Tribunal was seeking to make in referring to "low-level" racism albeit that the use of the epithet "low-level" was unfortunate.

(iii) Patient safety and public confidence: Failure properly to assess overall seriousness of Mr. Gilbert's conduct

62. Third, Mr. Hare KC submits that the Tribunal failed to have regard to the fact that a significant amount of Mr. Gilbert's misconduct took place during the course of operations or other clinical activities where the victim may have been distracted from patient care by the conduct/comment[10]. This is, he argued, an aggravating feature of the

[10] Mr. Hare KC added that when considering impairment, the Tribunal should also have taken into account that colleagues are members of the public too and hence the first part of the overarching objective in s. 1 of the 1983 Act was also engaged. I consider that that submission goes too far: section 1(a), which refers to the health, safety and well-being of the *public*, is to be contrasted with section 1(c) which refers to proper professional standards and conduct for members *of the medical profession*. However, I do not consider that this adds anything in terms of the relevant sanction: on any view there was serious misconduct in this case leading to impairment.

misconduct[11]. In particular, the misconduct took place during clinical procedures or on a ward round as follows:

1. Allegation 1(a)(i): during an operation (sexual misconduct);
2. Allegation 7: during a ward round (racism);
3. Allegation 11: under the operating table during an operation (sexual misconduct);
4. Allegation 20b: during a surgical procedure (sexual misconduct);
5. Allegation 22: during an organ harvesting operation (racism).

63. In the GMC's closing submissions to the Tribunal on the facts, on two occasions they highlighted the fact that sexual comments were made by Mr. Gilbert *during an operation* (at D17/2 and D17/3). However, they also stated as follows:

> "*Because although, of course, this has not been a case about patient safety – and there is no evidence that any patient has come to any harm whatsoever; in fact, the evidence produced by the doctor is that he is a good and capable surgeon – as this guidance makes clear it is essential for good and safe patient care that a doctor does work effectively with other colleagues. That did not happen in this case*."

64. This was a reference back to paragraph 22 of the "Maintaining personal and professional boundaries" guidance which states:

> "*Inappropriate sexual behaviours may be carried out by medical professionals… they can have devastating impacts on individual well-being, psychological safety, patient safety and medical professionals' careers.*"

65. The Tribunal took account of this submission at [428].

66. When the GMC summed up its case on impairment to the Tribunal (at [D17/7]), it referred to the approach of Dame Janet Smith in the Fifth Shipman Report, as referred to in *CHRE v NMC & Grant* [2011] EWHC 927 (Admin) in which she stated:

> "*Do our findings of fact in respect of the doctor's misconduct, deficient professional performance, adverse health, conviction, caution or*

[11] Mr. Hare KC argued that this also amounted to an erroneous application of the relevant legal principles; but in truth this issue goes to the seriousness of the misconduct.

> *determination show that his/her fitness to practise is impaired in the sense that s/he:*
> *a. has in the past acted and/or is liable in the future to act so as to put a patient or patients at unwarranted risk of harm; and/or*
> *b. has in the past brought and/or is liable in the future to bring the medical profession into disrepute; and/or*
> *c. has in the past breached and/or is liable in the future to breach one of the fundamental tenets of the medical profession….*"

67. The GMC did not suggest that there was a patient safety issue in this case (limb (a)); rather its case was that limbs (b) and (c) of Dame Janet's analysis were engaged. The GMC accordingly stated as follows:

> "*When Dame Janet Smith, in the Fifth Shipman Report, set out the questions that a tribunal was to ask when you're considering the questions about protecting patients and upholding public confidence in the profession, she set out as follows: has the doctor in the past acted, or is liable in the future to act, so as to put a patient or patients at unwarranted risk of harm; has the doctor in the past, or is liable in the future, to bring the medical profession into disrepute? In my submission, racism and sexual misconduct, as found proved, does bring the profession into disrepute and, despite the warnings, the doctor did not learn over the extensive period of time over which these incidents occurred, he continued to act in the same way. The third question: has the doctor in the past, or is he liable in the future, to breach one of the fundamental tenets of the medical profession? Mr. Gilbert, in my submission, had a responsibility to recognise the imbalance of power which existed in the relationship that he had as a senior consultant and the junior colleagues, who were there trying to learn, who were there trying to be educated, to maintain clear boundaries in the relationship that he had with them. He failed in that regard over a significant period of time. Sexual misconduct, that these women have been a victim to, is very serious. The doctor has abused his professional position, pursuing this conduct, this sexually motivated conduct. His racist comments are completely unacceptable, and other doctors and members of public would find them to be so."*

68. The Tribunal accordingly recorded that this was the GMC's case at paragraphs [430]-[432] of its Determination on Impairment and it adopted the Dame Janet Smith test of impairment at [458].

69. In the light of the way in which the case was put, the Tribunal concluded at [479]-[480] in its finding on Impairment that limbs (b) and (c) (but not a) of Dame Janet Smith's test were applicable as follows:

> "*479. The Tribunal considered that limbs b and c of the test set out by Dame Janet Smith (quoted above), were applicable in this case. The Tribunal concluded that Mr. Gilbert's misconduct did have the effect of bringing the medical profession into disrepute. It found that he had breached fundamental tenets of the medical profession by non-consensual touching of three colleagues on six occasions, sexually motivated comments and sexual harassment of four colleagues, racist comments to two colleagues, abuse of his senior position to three colleagues, and one colleague subject to racial harassment.*
>
> *480. In particular, the Tribunal concluded that the need to maintain public confidence in the medical profession, and the standard of behaviour within the profession, required the finding that Mr. Gilbert's fitness to practise is currently impaired by reason of his misconduct. Members of the public would not have confidence in doctors if the Tribunal regarded such misconduct, with evidence of further reflection needed and development of insight required, as not impairing a doctor's fitness to practise"*.

70. Furthermore, when coming to consider sanction, the Tribunal recorded as follows at [538]-[539]:

> "*538. The Tribunal noted that these incidents did not give rise to concerns about risks to patient safety, and that there was evidence that Mr. Gilbert was otherwise a skilled and well-regarded doctor.*
>
> *539. The factors that the Tribunal considered were relevant included the extent to which Mr. Gilbert departed from the principles of GMP, the extent to which his actions risked public confidence*[12]*, the extent of his misconduct, and the seriousness of his inappropriate behaviour. The Tribunal also noted the aggravating and mitigating factors as outlined above*".

71. Indeed, the GMC did not refer to patient safety in their submissions to the Tribunal on sanction. Accordingly, they did not refer to paragraph 109c of the Sanctions Guidance relating to erasure; nor did they refer to patient safety in the context of paragraph 109b of that Guidance.

72. Consistently with all of this, when it came to the GMC's submissions in relation to whether Mr. Gilbert's registration should be subject to an immediate order, it addressed the Tribunal as follows:

> "*Whilst I acknowledge that there is no risk to patient safety in this case, the findings that you have made are of serious misconduct… it is necessary for the*

[12] See footnote 3 above.

> *maintenance and promotion of public confidence in the medical profession for their (sic) to be an interim order of suspension in the circumstances of this case*."

73. This led the Tribunal to record at [547] of its Determination as follows:

> *"[The GMC] submitted that, whilst acknowledging that there was no risk to patient safety in this case, the findings that the Tribunal have made are of serious misconduct. [It] invited the Tribunal to impose an immediate order given the concerns that have been expressed about Mr. Gilbert's behaviour and the public confidence in the profession upon balancing that with Dr Gilbert's own interests*."

74. In his reply, Mr. Hare KC suggested that the GMC was only acknowledging here that there was no risk to patient safety in the context of its application for an interim order of immediate suspension *as a result of* the Tribunal having already found that there was no risk to patient safety, and so the GMC was here simply recognising, pragmatically, that it could not re-argue that point. But that disregards the fact that the GMC accepted *throughout* that there was no specific risk to patient safety in this case and that acceptance is what led the Tribunal so to find at every stage of its Determination.

75. Mr. Hare KC further submitted that the allegations themselves put the case that the misconduct posed a risk to public safety in so far as they specifically referred to the conduct having taken place in certain instances in a clinical setting (see paragraph 62 above).

76. I do not accept that submission. Rather, the fact that certain of the allegations which were found proved took place in a clinical setting bore upon the seriousness of the misconduct, as the Tribunal found. See for example the Tribunal's observation in its Determination on Impairment at [465] that the racist comments "*represented misconduct that was serious and were within a professional context*".

77. That is consistent with the GMC's oral submissions to the Tribunal on impairment. At D17/2G-H, in the context of their submission that this amounted to serious misconduct on the part of Mr. Gilbert (leading to impairment), the GMC stated "*In respect of Ms A, using sexual words to her, and importantly during the course of an operation*"; and at D17/3C, "*she was also the victim of sexual touching, again, importantly, during an operation, and sexual comments during an operation.*"

78. The Tribunal also bore well in mind (to which it adverted in its Determination on Impairment at [426]) the GMC's "Maintaining personal and professional boundaries" guidance, in particular the passage which states:

> "*5. Professional and respectful working relationships between colleagues are central to positive working cultures. It is essential that individuals feel safe and respected in their workplaces …*"

79. That chimes with the GMC's more general submission which it made before the Tribunal (referred to above) that "*it is essential for good and safe patient care that a doctor does work effectively with other colleagues",* which the Tribunal recorded and presumably had in mind when it came to impairment and sanction.

80. Ms Morris KC in particular submitted that the Tribunal failed to consider the significance of Mr. Gilbert's racist statements for (i) patient safety and (ii) public confidence, and to take those factors into account in relation to his impairment and the appropriate sanction (this being the first ground of the PSA's grounds of appeal[13]).

81. So far as (ii) public confidence is concerned, I do not accept the submission that the Tribunal failed to consider the significance of Mr. Gilbert's racist statements for public confidence, and to take that factor into account in relation to his impairment and the appropriate sanction. In its Determination of Impairment at [465] the Tribunal referred to the racist comments (i.e. those which it found proved) and stated that it "*was clear that this conduct … was serious and …. within a professional context*" and then at [480] it concluded that "*the need to maintain public confidence in the medical profession … required the finding that Mr. Gilbert's fitness to practise is currently impaired by reason of misconduct. Members of the public would not have confidence in doctors if the Tribunal regarded such misconduct, with evidence of further reflection needed and development of insight required, as not impairing a doctor's fitness to practise."*[14]

82. The Tribunal then stated at [521] in relation to sanction that it "*again had regard to the serious nature of its findings as set out in the Impairment determination in that Mr.*

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[13] "The Tribunal failed to consider the significance of the Registrant's racist statements for patient safety and public confidence, and to take those factors into account in relation to his impairment and the appropriate sanction."

[14] See also footnotes 2 and 3 above.

Gilbert had breached fundamental tenets of the medical profession and that his actions had the effect of bringing the profession into disrepute" and it concluded at [527] that "*any sanction lower than suspension would not be sufficient or appropriate in order to maintain public confidence in the medical profession*."

83. So far as (i) public safety is concerned, Ms Morris submitted that – despite the fact that it was never the GMC's case that public safety was *in fact* put at risk – the Tribunal should nonetheless itself have found there to be an issue of public safety, because where a clinician makes *racist comments* in a clinical context, the tribunal is obliged to consider what those statements reveal about his beliefs and what risks are posed to patients who are subject to them. She submitted that the clinical decisions of the clinician could be affected by his racist attitude. She suggested that the fact that a clinician holds racist attitudes about certain persons might affect the way he treats them from a clinical perspective.

84. I do not accept the generality of this submission. It always depends upon the facts of a particular case whether or not patient safety is in fact put at risk as a result of the clinician's misconduct. There was no suggestion in this case that Mr. Gilbert was other than a skilled and capable vascular surgeon[15] and there was a body of evidence to that effect before the Tribunal at the impairment stage. There was no evidence to support the suggestion that he had ever failed to treat a patient with his usual care and skill by reason of their race; indeed, as Mr. Sutton KC pointed out, there was a substantial body of testimonial letters before the Tribunal, to which it referred, which threw light on Mr. Gilbert's highly positive interactions with colleagues from diverse racial backgrounds.

85. That stated, these racist remarks were serious (as the Tribunal found, at least in respect of those which it held to be proved) and, in the case of the racist remarks which formed the subject-matter of Allegations 9b and 22, would at least have been *capable* of distracting those who heard them in a clinical setting, which potentially posed a risk to patient safety. I accept that this *capability* was an aggravating feature of Mr. Gilbert's racist conduct which ought to have been, but was not, referred to as such by the Tribunal

[15] As the Tribunal noted at [538].

at [514] of its Determination on Sanction. I return to this feature of the misconduct below.

86. Moreover, it is no answer to say, in the case of Allegation 22, that the patient would not have heard the remark because they were not sentient, being the subject of the operation. The making of such a racist remark whilst the patient is on the operating table is an affront to their dignity, and brings the medical profession into serious disrepute, as well as being capable of giving rise to a patient safety issue. These features go to the seriousness of the misconduct.

87. Mr. Hare KC and Ms Morris KC also submitted that the Tribunal failed to analyse the effect on patient safety of the *sexual misconduct* allegations which were found proved. It was said that this type of misconduct might very well distract the victims of the sexual misconduct, and thereby imperil patient safety. I do not doubt that the sexual misconduct in this case was *capable* of distracting the victims (being medical professionals), thereby imperilling patient safety, and all patients can reasonably expect their safety not to be so imperilled. This was the point which the GMC made in its closing submissions on the facts before the Tribunal: it is "*essential for good and safe patient care that a doctor does work effectively with other colleagues."*

88. I accept Mr. Hare KC's submission that this *capability* was an aggravating feature of Mr. Gilbert's misconduct and that it ought to have been, but was not, referred to as such by the Tribunal at [514] of its Determination on Sanction. But whether *in fact* patient safety was imperilled will depend on the facts of the case and the evidence of those concerned. For example, it may be that the person who is subjected to the relevant misconduct may be able to put the incident out of their mind or "compartmentalise" it so as to continue to do their job professionally; or it may be that they are not performing any significant part of the surgery being undertaken so as to cause any risk to patient safety. It depends on the facts of each case whether patient safety in an individual case was specifically put at risk. It is not appropriate to speculate or generalise.

89. In the present case, there is no question that the sexual misconduct of Mr. Gilbert was highly inappropriate and indeed disgraceful, particularly where it was committed when a patient was present (which would also mean that the colleague subjected to it would be less likely to object) and the evidence before the Tribunal demonstrated that it had a

serious affect upon his victims. However, whilst it was *capable* of imperilling patient safety, none of Mr. Gilbert's victims gave evidence that patient safety was in fact put at risk as a result (no doubt, to a large extent, as a result of their commendable professionalism).

90. I accordingly agree with the Appellants that the fact that that patient safety was *capable* of being imperilled as a result of the misconduct concerning the Allegations in paragraph 62 above was an aggravating feature which affected the seriousness of Mr. Gilbert's misconduct and which the Tribunal wrongly failed to reflect in its Determination.

(b) Ground of Appeal: The Tribunal has failed adequately to apply the relevant guidance when reaching its decision as to sanction; and

(c) Ground of Appeal: The Tribunal failed adequately to reflect the gravity of Mr. Gilbert's conduct

91. The GMC's second ground of appeal is that the Tribunal failed properly to apply the Sanctions Guidance on erasure (removing the name Mr. Gilbert from the medical register) in a case where, it submits, there were a number of indicators that erasure was appropriate. Because they are related, I consider this with its third ground of appeal, which is that the Tribunal failed adequately to reflect the gravity of Mr. Gilbert's conduct in its sanction.

92. I also consider in this context the three further grounds of appeal of the PSA which also bear upon sanction, namely that:

> *(b) the Tribunal erred in finding that the Registrant's misconduct was "not difficult to remediate" (at [52]): his misconduct could well be fundamentally incompatible with his remaining on the register, and no reasonable Tribunal could conclude that it was not difficult to remediate; and*
>
> *(c) the Tribunal failed to consider the significance for its decision as to sanction of clinicians' and other members of the public's confidence in the regulation and discipline of doctors, and in particular their confidence that if they report doctors' misconduct then it will be adequately addressed; and*

(d) the Tribunal failed to give adequate reasons for its decision: it failed to disaggregate the Registrant's sexually and racially inappropriate conduct, and identify the significance of each in relation to impairment and sanction; and it failed to explain its decision to impose an apparently lenient sanction sufficiently to uphold public confidence in the regulation and discipline of doctors.

The Sanctions Guidance

93. The most recent version of the Sanctions Guidance (with which this case is concerned) took effect from 5 February 2024. The Guidance is published by the GMC and sets out the approach to be taken by Medical Practitioners' Tribunals when imposing sanctions. As the Court of Appeal noted at para. 83 of *Bawa-Garba*:

> "*The Sanctions Guidance contains very useful guidance to help provide consistency in approach and outcome in MPTs and should always be consulted by them but, at the end of the day, it is no more than that, non-statutory guidance, the relevance and application of which will always depend on the precise circumstances of the particular case*…"

94. Four aspects of the Guidance are particularly relevant to the grounds of appeal which have been advanced in this case.

95. First, paragraphs 91-98 of the Sanctions Guidance provide guidance in respect of the imposition of a period of **suspension** (for a maximum period of up to 12 months). Insofar as relevant, this provides:

> "*91. Suspension has a deterrent effect and can be used to send out a signal to the doctor, the profession and public about what is regarded as behaviour unbefitting a registered doctor. Suspension from the medical register also has a punitive effect, in that it prevents the doctor from practising (and therefore from earning a living as a doctor) during the suspension, although this is not its intention.*
>
> *92. Suspension will be an appropriate response to misconduct that is so serious that action must be taken to protect members of the public and maintain public confidence in the profession*[16]*. A period of suspension will be appropriate for conduct that is serious but falls short of being fundamentally incompatible with continued registration (ie for which erasure is more likely to be the appropriate sanction because the tribunal considers that the doctor should not practise*

[16] Emphasis added

again either for public safety reasons or to protect the reputation of the profession).

93. Suspension may be appropriate, for example, where there may have been acknowledgement of fault and where the tribunal is satisfied that the behaviour or incident is unlikely to be repeated. The tribunal may wish to see evidence that the doctor has taken steps to mitigate their actions...

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

a. A serious departure from Good medical practice, but where the misconduct is not so difficult to remediate that complete removal from the register is in the public interest. However, the departure is serious enough that a sanction lower than a suspension would not be sufficient to protect the public.

b. In cases involving deficient performance where there is a risk to patient safety if the doctor's registration is not suspended and where the doctor demonstrates potential for remediation or retraining.

c. In cases that relate to the doctor's health, where the doctor's judgement may be impaired and where there is a risk to patient safety if the doctor were allowed to continue to practise even under conditions, or the doctor has failed to comply with restrictions or requirements.

d. In cases that relate to knowledge of English, where the doctor's language skills affect their ability to practise and there is a risk to patient safety if the doctor were allowed to continue to practise even under conditions.

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

f. No evidence of repetition of similar behaviour since incident.

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

96. Where a tribunal considers that suspension is the appropriate sanction, paragraph 99 of the Sanctions Guidance provides that the length of the suspension (up to 12 months) is a matter for its discretion, depending on the seriousness of a particular case. Paragraph 100 of the Sanctions Guidance sets out some factors which will be relevant in determining the length of suspension, namely:

(a) The risk to patient safety/public protection;

(b) The seriousness of the findings and any mitigating or aggravating factors (as to which, see also paras. 24-60 and 102 of the Guidance); and

(c) Ensuring the doctor has adequate time to remediate.

97. By paragraph 101 of the Sanctions Guidance, the tribunal's primary consideration should be public protection and the seriousness of the findings.

98. A tribunal is also required to give reasons for its conclusions, including the factors which led it to conclude why that particular period of suspension was appropriate: see paragraph 106 of the Sanctions Guidance.

99. Second, the Guidance also sets out the circumstances in which a Medical Practitioners' Tribunal should consider imposing the sanction of **erasure**. This is the most severe sanction available to a tribunal. The relevant paragraphs of the Guidance provide:

> *107. The tribunal may erase a doctor from the medical register in any case – except one that relates solely to the doctor's health and/or knowledge of English – where this is the only means of protecting the public.*
>
> *108. Erasure may be appropriate even where the doctor does not present a risk to patient safety, but where this action is necessary to maintain public confidence in the profession. For example, if a doctor has shown a blatant disregard for the safeguards designed to protect members of the public and maintain high standards within the profession that is incompatible with continued registration as a doctor.*
>
> *109. Any of the following factors being present may indicate erasure is appropriate (this list is not exhaustive).*
>
> > *a. A particularly serious departure from the principles set out in Good medical practice where the behaviour is difficult to remediate.*
> >
> > *b. A deliberate or reckless disregard for the principles set out in Good medical practice and/or patient safety.*
> >
> > *c. Doing serious harm to others (patients or otherwise), either deliberately or through incompetence and particularly where there is a continuing risk*

to patients (see further guidance below at paragraphs 129–132 regarding failure to provide an acceptable level of treatment or care).

d. Abuse of position/trust (see Good medical practice, paragraph 81: 'You must make sure that your conduct justifies your patients' trust in you and the public's trust in the profession').

e. Violation of a patient's rights/exploiting vulnerable people (see Good medical practice, paragraph 41 on children and young people, paragraph 87 regarding expressing personal beliefs and paragraph 90 regarding information about services).

f. Offences of a sexual nature, including involvement in child sex abuse materials (see further guidance below at paragraphs 151–159). g Offences involving violence.

h. Dishonesty, especially where persistent and/or covered up (see guidance below at paragraphs 120–128).

i. Putting their own interests before those of their patients (see Good medical practice introduction on page 7 'Patients must be able to trust medical professionals with their lives and health. To justify that trust you must make the care of patients your first concern, and meet the standards expected of you in all four domains.' and paragraphs 94–97 regarding conflicts of interest).

j. Persistent lack of insight into the seriousness of their actions or the consequences.

100. Third, the Guidance specifically considers sexual misconduct cases and provides as follows:

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

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

101. Fourth, the Guidance also addresses the question of when a tribunal should order a review hearing following a period of suspension. Insofar as relevant, paras. 163-171 of the Guidance provide:

> *163. It is important that no doctor is allowed to resume unrestricted practice following a period of conditional registration or suspension unless the tribunal considers that they are safe to do so.*
>
> *164. In some misconduct cases it may be self-evident that, following a short suspension, there will be no value in a review hearing. However, in most cases where a period of suspension is imposed, and in all cases where conditions have been imposed, the tribunal will need to be reassured that the doctor is fit to resume practice – either unrestricted or with conditions or further conditions. A review hearing is therefore likely to be necessary, so that the tribunal can consider whether the doctor has shown all of the following (by producing objective evidence):*
>
> *a. they fully appreciate the gravity of the offence*
>
> *b. they have not reoffended*
>
> *c. they have maintained their skills and knowledge*
>
> *d. patients will not be placed at risk by resumption of practice or by the imposition of conditional registration.*
>
> *165 Should there be a change of circumstances in the future and a review hasn't been directed, under section 35D (4B and 11B) of the Medical Act 1983, the registrar may, at any time before the expiry of the sanction, refer the case back to the MPTS for a review hearing. The reasons given for not directing a review might help inform any decision under this section.*
>
> *166 It is therefore important that tribunals fully explain any instance where they decide not to direct a review hearing.*
>
> *168 Where a doctor's registration is suspended, the tribunal may direct that:*
>
> *a. the current period of suspension is extended (up to 12 months)*
>
> *b. the doctor's name is erased from the medical register…*

c. impose a period of conditions (up to three years).”

Submissions

102. The Tribunal was carrying out an evaluative judgment as to the appropriate sanction to impose in order to maintain the protection of the public and to reflect the seriousness of its findings. In carrying out its evaluative decision, Mr. Hare KC submits that the Tribunal committed errors of principle such that its evaluative decision fell outside the bounds of what the Tribunal could properly and reasonably decide.

103. Mr. Hare KC submits that whilst the Tribunal referred at [532] of its Determination to four of the factors in paragraph 109 of the Sanctions Guidance making erasure appropriate (being factors a, b, d and f), it should also have referred to others. In particular, Mr. Hare KC submitted that the Tribunal ought to have referred to factor c: “*doing serious harm to others (patients or otherwise), either deliberately or through incompetence and particularly where there is a continuing risk to patients*”; factor i: “*putting their own interests before those of their patients*”; and factor j: “*Persistent lack of insight into the seriousness of their actions or the consequences*”.

104. As to these, so far as factor c is concerned, he submitted that there was clear evidence of harm caused to Mr. Gilbert’s professional colleagues.

105. Mr. Hare KC referred to the fact that Ms A described not feeling safe in her place of work (D1/34F; 41) [1294, 1301] and feeling “*horrified, …humiliated … and violated*” by Mr. Gilbert (D2/15A-C) [1336]; and that Ms G described feeling “*intimidated, threatened, harassed … fearful*” (D3/20E) [1413] and “*coming to work and every day trying to figure out how I was going to avoid James Gilbert, how I was going to avoid sexual harassment, intimidation, bullying and so on*” (D3/37F-G).

106. So far as factor i is concerned, Mr. Hare KC refers to the fact that several of the incidents of Mr. Gilbert’s sexual misconduct took place in the operating theatre or while the victims were carrying out a clinical procedure. Mr. Gilbert therefore placed his sexual gratification before the interests of the patients he was treating.

107. So far as factor j is concerned, Mr. Hare KC submitted that Mr. Gilbert’s sexual misconduct had already been drawn to his attention in 2012 and 2014 without having

any impact on his attitude or conduct. In his reflective statement, Mr. Gilbert referred to the feedback from Ms E about his behaviour as a "*watershed moment*"; yet he persisted in such conduct towards a number of other junior colleagues over a period of years. In fact, it appears that it was only when he was dismissed form the Trust that he started to take such matters seriously.

108. Mr. Hare KC submits, further, that the Tribunal's decision not to direct a review is impossible to understand where: (i) it concluded that Mr. Gilbert's insight was not fully developed (Impairment: [477]); and (ii) where the Sanctions Guidance (at [164]) provides a clear steer towards a review in most cases, except where a short period of suspension is imposed.

Analysis

109. The Sanctions Guidance is not to be read as though it were a statute. It lists certain factors which *may* indicate that erasure is appropriate. Nor does the guidance mandate a particular outcome, as any decision on sanction is necessarily fact specific. The Tribunal found that Mr. Gilbert's misconduct was serious and that it impaired his fitness to practice. It was then for the Tribunal to reach an evaluative decision as to what was necessary to protect the public.

110. That stated, as the Court stated in *Jagjivan*, in a case which concerns sexual misconduct (and, I consider, racist statements), this court can assess what is needed to protect the public or maintain the reputation of the profession more easily for itself and thus attach less weight to the expertise of the Tribunal, albeit that the court will nonetheless afford a necessary measure of respect to the Tribunal's judgment.

111. In considering its sanction, the Tribunal expressly referred (at [514]) to the following factors as amounting to aggravating factors in Mr. Gilbert's case:

> *"• the abuse of his position over a number of junior colleagues over a protracted period of time;*
>
> *• there were two opportunities where concerns about Mr. Gilbert's behaviour were brought to his attention, i.e. in 2012 and 2014, but he did not change his behaviour. The Tribunal considered that the opportunities to change were not taken up and so these failures amounted to an aggravating factor."*

112. The second of these two aggravating factors which the Tribunal took into account in determining sanction is the same as factor j referred to by Mr. Hare KC. The Tribunal clearly had it well in mind. As for the first of these two aggravating factors (abuse of position), the Tribunal also had well in mind Mr. Gilbert's abuse of power over a number of junior colleagues over a protracted period of time. However, I consider that Mr. Hare KC is right to maintain that the Tribunal should have given more weight to *the harm* caused to the victims of Mr. Gilbert's sexual misconduct.

113. So far as factor i is concerned, as explained above, the Tribunal did take into account the fact that certain of the allegations which were found proved took place in a clinical setting and that that fact bore upon the seriousness of the misconduct.

114. As the Tribunal itself noted at [524] of its Determination on Sanction, paragraph 92 of the Guidance on Sanction provides that:

> *Suspension will be an appropriate response to misconduct that is so serious that action must be taken to protect members of the public and maintain public confidence in the profession. A period of suspension will be appropriate for conduct that is serious but falls short of being fundamentally incompatible with continued registration (ie for which erasure is more likely to be the appropriate sanction because the tribunal considers that the doctor should not practise again either for public safety reasons or to protect the reputation of the profession).*

115. The Tribunal then applied (at [525-6]) paragraph 97 of the Guidance, referring to certain specific factors which might indicate that suspension was the appropriate sanction:

> "*a. A serious breach of Good medical practice, but where the doctor's misconduct is not fundamentally incompatible with their continued registration, therefore complete removal from the medical register would not be in the public interest. However, the breach is serious enough that any sanction lower than a suspension would not be sufficient to protect the public or maintain confidence in doctors.*
>
> *e. No evidence that demonstrates remediation is unlikely to be successful, eg because of previous unsuccessful attempts or a doctor's unwillingness to engage.*
>
> *f. No evidence of repetition of similar behaviour since incident.*
>
> *g. The tribunal is satisfied the doctor has insight and does not pose a significant risk of repeating behaviour*."

116. As described above, the Tribunal had a substantial body of evidence before it as to the steps taken by Mr. Gilbert to remediate his behaviour, which was contained in a reflective statement as well as a statement from his responsible officer. The Tribunal also had before it a substantial body of testimonial letters throwing light on Mr. Gilbert's positive interactions with colleagues from diverse racial backgrounds, as well as hearing positive oral evidence from a number of colleagues who had worked with him over an extensive period of time. These were all factors which the Tribunal was entitled to consider tended to suggest that suspension (and not erasure) was the appropriate sanction.

117. The Tribunal noted that there had been no repetition of this behaviour by Mr. Gilbert since the material concerns had been brought to the attention of the GMC. This evidence contradicted the suggestion that Mr. Gilbert any longer demonstrated a "*persistent lack of insight into the seriousness of their actions or the consequences*". Having considered all the evidence, I consider that the Tribunal was entitled to find, as it did, that the behaviours complained of were highly unlikely to be repeated and that he did not pose a "*significant risk of repeating behaviour.*"

118. It follows that contrary to Ms Morris KC's submission, I do not accept that the Tribunal "erred in finding that the Registrant's misconduct was "*not difficult to remediate*" by reason of the nature and extent of the misconduct" [17], and that no reasonable Tribunal could conclude, on the particular facts of the case, that it was not difficult to remediate. Taking into account the nature and extent of the misconduct in this case, I consider that the Tribunal was entitled to find in the light of the substantial body of evidence before it of the steps taken by Mr. Gilbert to remediate his behaviour that (i) there was no evidence that demonstrated that remediation was unlikely to be successful and (ii) the behaviours were not difficult to remediate. Certainly, I do not consider that this court should substitute its view in this respect for that of the Tribunal who heard extensive evidence on the topic of remediation.

119. Ms Morris KC relied upon a passage in the judgment of Kerr J in *Arunachalam v GMC* [2018] EWHC 758 (Admin) at [58] for her argument on this last point, where the judge stated:

[17] Paragraph 23 of PSA's skeleton argument, as refined by Ms Morris KC's oral submissions.

> "[*Sexual misconduct] cases are inherently serious, such that they may well lead to erasure, even for a first time offender with a good clinical record. Often, maintaining public confidence in the profession and upholding high standards of behaviour by stamping out unacceptable behaviour of this kind will require erasure in a sexual misconduct case".*

120. Ms Morris KC submitted that sexual misconduct cases are inherently serious and as a result erasure was the only appropriate sanction in a case such as this. But it is not possible to generalise in this way, whether the case be a sexual misconduct case or otherwise. Whilst it is undoubtedly right to say that in general sexual misconduct cases are inherently serious, the appropriate sanction in every case depends upon the facts of the case concerned, including where in the spectrum of gravity the sexual misconduct in the particular case falls. Indeed, *Arunachalam v GMC* is a good illustration of this point. That was a sexual misconduct case in which the registrant's name was erased from the register by the tribunal, but Kerr J quashed the tribunal's decision and instead substituted a 12-month period of suspension for the sanction of erasure.

121. Mr. Hare KC and Ms Morris KC also both criticise paragraph [534] of the Tribunal's Determination, in which it stated that:

> *"With regard to [Sanctions Guidance paragraph] (f), the Tribunal noted that there were three examples on six occasions of non-consensual touching that was motivated by sexual gratification. The Tribunal concluded that, on a spectrum of serious, this was not the type of matter as discussed at paragraphs 151 to 159 of the SG. It also had regard to its comments and conclusion in its Impairment determination as to Mr. Gilbert's misconduct being remediable and, to a large extent, remediated."*

122. Mr. Hare KC and Ms Morris KC submitted that the Tribunal was here wrongly minimising the seriousness of the sexual misconduct. I do not accept that submission. I consider that the point that the Tribunal is making here is that, as paragraph 149 of the Guidance states, there is a wide range of sexual misconduct ranging from the very serious (convictions for sexual assault and sexual abuse of children) to the serious (sexual misconduct with patients, colleagues, patients' relatives or others). Paragraphs 151-159 of the Guidance concern the very serious end of that spectrum (for which the case for erasure is particularly strong). That is not this case.

123. That stated, in setting the period of the suspension I consider that the Tribunal did not give sufficient weight to the seriousness of the sexual misconduct in this case. I return to this below.

124. Ms Morris KC further submitted[18] that the Tribunal failed to give adequate reasons for its decision. She also argued that it failed to disaggregate the Registrant's sexually and racially inappropriate conduct, and identify the significance of each in relation to impairment and sanction; and that it failed to explain its decision to impose an apparently lenient sanction sufficiently to uphold public confidence in the regulation and discipline of doctors.

125. There are two strands to this submission. The first is that the Tribunal failed to give adequate reasons for its decision. I reject that submission. The Tribunal addressed the question of whether erasure was the appropriate sanction in paragraphs [531]-[535] of its Determination and gave reasons as to why it was not. It also gave reasons for imposing an eight-month period of suspension as the appropriate sanction at paragraphs [523]-[530]. Whilst the PSA may consider that sanction to be "lenient", the Tribunal nonetheless explained why it was imposing the sanction that it did. Those reasons are sufficient, contrary to Ms Morris KC's submission (and ground 4 of the PSA's appeal). It follows that the Tribunal summarised sufficiently its findings on the principal important issues[19].

126. The second strand was summarised in the following way by Ms Morris KC: "*A reader of the Tribunal's decision cannot be reassured that it gave sufficient consideration to every aspect of the Registrant's misconduct, and in particular his racist statements*."

127. I do not accept that submission either. It is plain that when one reads the Tribunal's decision as a whole, it turned its mind to the individual elements of the Respondent's misconduct at each step of its reasoning, from impairment through to sanction. Thus, at paragraphs [464]-[465] and in particular [479] of its Determination in addressing impairment, the Tribunal expressly reminded itself of the nature of the misconduct with which it was concerned, viz:

[18] In the PSA's fourth ground of appeal.

[19] *Professional Standards Authority for Health and Social Care v GMC and Uppal* [2015] EWHC 1304.

> "*non-consensual touching of three colleagues on six occasions, sexually motivated comments and sexual harassment of four colleagues, racist comments to two colleagues, abuse of his senior position to three colleagues, and one colleague subject to racial harassment*."

128. Indeed, the Tribunal devoted paragraph [465] of its determination on impairment to explaining why the racist comments amounted to serious misconduct:

> *"465. In respect of the racist comments, the Tribunal had described these within the Facts determination as low-level racist comments in terms of their seriousness, without seeking to undermine that they were nonetheless racist comments. The Tribunal was clear that this conduct nonetheless represented misconduct that was serious and were within a professional context. The ones in respect of Ms A were also found to have amounted to harassment related to race."*

129. Then, when it came to its determination on sanction, the Tribunal again reminded itself of its factual findings at paragraph [513]:

> "*The Tribunal has found that Mr. Gilbert's actions amounted to non-consensual touching of three colleagues on six occasions, sexually motivated comments, and sexual harassment of four colleagues, racist comments to two colleagues, abuse of his senior position to three colleagues, and one colleague subject to racial harassment*."

130. Mr. Sutton KC accordingly submits, and I agree, that a reader of the Determination would be fully reassured that the Tribunal gave consideration to every proven aspect of the Registrant's misconduct, including the proven facts concerning the Respondent's racist comments and his harassment related to race.

131. Finally, Mr. Hare KC further criticises the Tribunal for finding (at paragraph [533] in respect of factor b in paragraph 109 of the Sanctions Guidance) that there was a reckless, rather than a deliberate disregard for the principles set out in Good medical practice in that despite concerns lodged by Ms E and Ms G about his misbehaviour, Mr. Gilbert's misbehaviour continued. But it was open to the Tribunal to find on the evidence before it that Mr. Gilbert had behaved in a reckless rather than a deliberate manner, and it is not for this court to second-guess the Tribunal's finding in that regard.

132. In all the circumstances, the Tribunal's evaluative decision that a period of suspension rather than erasure was appropriate on the facts of this case was, in my judgment, one which did not fall outside the bounds of what the adjudicative body could properly and reasonably decide, even taking into account the fact that the Tribunal ought to have found that Allegations 15(b) and 23(a) were proved. Indeed, I agree with the Tribunal's conclusion at [535] that erasure in this case would be a disproportionate sanction in all the circumstances. Suspension is a serious sanction which in principle sufficiently marks the gravity of Mr. Gilbert's conduct.

133. I would add that I think it is going much too far to submit, as did Ms Morris KC that the fact that Allegations 15(b) and 23(a) should have been found to be proven, when the context of the misconduct in respect of those particular allegations is taken into account, adds sufficiently to the seriousness of the overall misconduct so as to tip the balance of the appropriate sanction from suspension to erasure.

134. However, in determining a period of suspension of 8 months (at [536]-[541), I consider that the Tribunal:

(a) wrongly failed to take into account[20] the fact that the misconduct of Mr. Gilbert, in those cases identified above, (whilst not in fact imperilling public safety) was *capable* of imperilling public safety;

(b) wrongly failed to take sufficiently into account the harm which was caused to the victims of his sexual misconduct;

(c) wrongly failed sufficiently to mark the seriousness of its findings, giving too much weight to Mr. Gilbert's mitigation, bearing in mind that matters of mitigation are likely to be of considerably less significance in regulatory proceedings than to a court, because the overarching concern is the protection of the public;

(d) wrongly failed to take into account the fact that it ought to have found Allegations 15(b) and 23(a) proved.

[20] See the Tribunal's Determination at [536] and [538].

135. In addition, one of the factors said to be relevant in the guidance to determining the length of the suspension is "*ensuring the doctor has adequate time to remediate*."

136. As to that, at [477]:

> "*The Tribunal concluded that Mr. Gilbert had demonstrated a significant degree of insight and had taken a number of steps to remediate his failings. However, Mr. Gilbert's insight was not fully developed into the full extent of his behaviour as found proved by the Tribunal. He may benefit from further time to digest and reflect on the findings against him."*

137. Despite this finding, the Tribunal then inconsistently determined at [544] as follows:

> "*the Tribunal determined not to direct a review in Mr. Gilbert's case. The Tribunal determined that the public interest is served by the period of suspension and, given the comprehensive evidence of insight and remediation shown, it was not necessary to have a review hearing in this case. The Tribunal determined that it would be safe for Mr. Gilbert to resume unrestricted practice and that patients will not be placed at risk on resumption of practice*."

138. I agree with Mr. Hare KC and Ms Morris KC that this an error of principle. As paragraph 164 of the Sanctions Guidance states:

> *"In some misconduct cases it may be self-evident that, following a short suspension, there will be no value in a review hearing. However, in most cases where a period of suspension is imposed, and in all cases where conditions have been imposed, the tribunal will need to be reassured that the doctor is fit to resume practice – either unrestricted or with conditions or further conditions. A review hearing is therefore likely to be necessary, so that the tribunal can consider whether the doctor has shown all of the following (by producing objective evidence):*
>
> *a. they fully appreciate the gravity of the offence*
>
> *b. they have not reoffended*
>
> *c. they have maintained their skills and knowledge*
>
> *d. patients will not be placed at risk by resumption of practice or by the imposition of conditional registration*."

139. This is plainly not a case where there would be no value in a review hearing (and one was indeed subsequently directed by the GMC). It will be necessary for Mr. Gilbert to

demonstrate to the review panel that, at the time when he seeks to resume practice, each of factors a-d above are satisfied. Whether that is so can only be determined at the time of the review. It cannot be pre-judged by the Tribunal in the manner suggested by it in paragraph 544 of its Determination.

140. It follows that upon this ground the Tribunal's Determination falls to be quashed and the appeal allowed.

141. Since the nature of the misconduct with which this court is concerned is sexual misconduct and racist misconduct, I consider that the court can itself assess what is needed to protect the public or maintain the reputation of the medical profession, and attach less weight to the Tribunal's assessment of the same.

142. Standing back, I consider the Tribunal's evaluative decision that an eight-month suspension with no review was a sufficient sanction in this case to be wrong. In my judgment, that was an evaluative decision which fell outside the bounds of what the Tribunal could properly and reasonably decide. I also consider that there was an erroneous application of the relevant legal principles by the Tribunal in respect of Allegations 15(b) and 23(a). This entitles the court to substitute for the relevant decision of the Tribunal any other decision which could have been made by the Tribunal.

143. In my judgment, the sanction which should be imposed to reflect the factors in paragraph 134 above, and also to ensure that Mr. Gilbert has adequate time to remediate, is one of 12 months' suspension, with a review hearing at the end of that period of suspension. The sanction of eight months suspension is wrong: it is not a sufficient penalty for the maintenance of public confidence in the medical profession and for the maintenance of proper professional standards and conduct for members of that profession[21].

144. Whilst it has not influenced my decision, I note that at [491] of the Determination, the Tribunal records the GMC as having submitted to it that:

[21] Which is the relevant test, and which is echoed in the third ground of the PSA's grounds of appeal.

> "*it was open to the Tribunal to suspend Mr. Gilbert's registration for up to 12 months and this would have a deterrent effect and send out a message that this kind of misconduct would not be tolerated*."

145. I agree. A suspension of 12 months, which is the maximum period of suspension, reflects the seriousness of the misconduct of Mr. Gilbert and is also necessary for the maintenance of public confidence in the medical profession. It also gives Mr. Gilbert an adequate period to reflect upon and remediate his behaviour, before a review can take place to assess whether he is fit to practise once again or not.

146. It follows that I allow these appeals to the extent set out in this judgment.