Neutral Citation Number: [2021] EWHC 2889 (Admin)

Case No: CO/1665/2019

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

Birmingham Civil Justice Centre
Bull Street, Birmingham B4 6DS

Date: 28/10/2021

Before :

HHJ RICHARD WILLIAMS
(sitting as a judge of the High Court)

- -

Between :

The Queen on the application of Dr Siradzh Mokhammad	**Claimant**
- and –	
General Medical Council	**Defendant**

- -
- -

Dr Mokhammad represented himself
Alexis Hearnden (instructed by GMC Legal) for the Defendant

Hearing date: 4 August 2021

- -

(draft judgment circulated to the parties by email dated 21 October 2021)

HHJ Richard Williams:

Introduction and background

1. Dr Mokhammad ("***the Claimant***"), a registered doctor, challenges by way of judicial review the decision of the Medical Practitoner's Tribunal ("***MPT***") dated 25 January 2019 to impose a warning in the following terms:

   > "On 17 May 2017 you were involved in an incident in a hospital car park in Birmingham during which you used language and made a gesture, both of which were offensive and insulting. This conduct does not meet with the standards required of a doctor. It risks bringing the profession into disrepute and it must not be repeated. The required standards are set out in GMP and associated guidance. Whilst your conduct has not resulted in any restriction on your registration, it is necessary in response to that conduct [to] issue this formal warning."

2. At the time of the incident the Claimant was practising as a Locum Senior SHO and on a placement at Queen Elizabeth Hospital. The hospital car park was operated by a private company, QPark Limited. In April 2017, the Claimant purchased a 3 month car park permit and pass. However, the Claimant routinely was unable to access the car park with his pass because the barrier would not open as the car park was designated full, in which case he had to purchase a single use car park ticket. The Claimant was worried about being late for work, which he knew would impact upon colleagues and patients.

3. On the day in question, 17 May 2017, the Claimant again found that he was unable to access the car park using his pass, and so he purchased a single use ticket to gain access and then drove to Car Park F where the site office was situated in order to speak to the car park staff. In the office at the time were Ms A, administration assistant, Mr B, assistant site manager, Mr C, site supervisor, and Mr D, car parking host, all of whom had worked together for many years. It is not disputed that what then occurred was an ugly and explosive incident. Later that day the car park staff provided initial written accounts regarding the incident and in which it was alleged that the Claimant had used aggressive, threatening, abusive and/or offensive language directed towards Ms A, Mr B and Mr C. Also that day the Claimant made a complaint against Mr B and Mr C in respect of their alleged rude and aggressive behaviour directed towards him. By email dated 25 May 2017, and having been invited to do so, the Claimant submitted a more detailed account ("***HCL statement***") in respect of his complaint against Mr B and Mr C. In that account, the type of language allegedly used against the Claimant is similar to the type of language allegedly used by the Claimant against Mr B and Mr C.

4. The hearing before the MPT took place over a period of 10 days (14 January to 25 January 2019). The Claimant was represented by counsel during that hearing, although he represents himself at this hearing. There was no CCTV footage available to assist the MPT. Nor was there any mobile phone footage available despite Ms A having stated in her witness statement dated 2 August 2018 that she "took my mobile phone out and recorded a video of the argument between [Mr B] and [the Claimant]", but "Unfortunately I have since deleted this video

as I didn't think it was needed." Therefore, the MPT faced the difficult task of having to make findings of disputed fact solely by reference to the written and oral evidence of the Claimant and the car park staff. The MPT noted that:

> "[43] The Tribunal has considered all the evidence presented. It has noted that the accounts given by the GMC witnesses present in Car Park…and Dr Mokhammad were entirely different; the former contended that Dr Mokhammad was always the instigator of the unacceptable behaviour; Dr M's evidence put the instigation of the bad behaviour fully on the Q-Park staff. Nor were the accounts of the incident given by the 4 GMC witnesses present in the Car park particularly consistent with one another. It fell to the Tribunal to make sense of the incident based on its analysis of the evidence which was presented to it."

5. The MPT approached the incident in 3 parts:

    i) When the Claimant initially approached the customer window in the office ("***At The Window***");

    ii) When the Claimant returned to his car parked outside the office and was told by staff that he could not leave it there as it was causing an obstruction ("***Outside***"); and

    iii) When the Claimant returned to the customer window in the office having moved his car and asked the car park staff for their names ("***Return To The Window***").

6. The MPT made the following findings:

    <u>At The Window</u>

    i) Although the Claimant raised his voice, he was not verbally abusive towards Ms A or Mr B as alleged. In particular, the MPT did not find that the Claimant verbally abused Mr B by saying –

        "Fucking bastard"

        "You're a mother Fucker"

        "I'm going to fuck your wife";

    ii) Mr B and Mr C were not verbally abusive towards the Claimant as he alleged;

    <u>Outside</u>

    iii) Similar verbal abuse and threats were made by Mr B, Mr C and the Claimant, although no finding was made as to whether the Claimant was the first to utter them;

iv) The Claimant squared up to Mr B, but in doing so was not inviting a physical alteration, but rather adopting a posture to deter Mr B because the Claimant feared physical aggression;

v) The Claimant verbally abused Mr B by saying –

> "you're a mother fucker"
>
> "I'm going to fuck your wife"
>
> "you fucking bastard"
>
> "you're a donkey"
>
> "you're not human, you are an animal";

vi) The Claimant verbally abused Mr C by saying –

> "you're a mother fucker";

<u>Return To The Window</u>

vii) The Claimant verbally abused Mr C by saying "you motherfucker, I rape your wife and split her legs" whilst at the same time motioning as if he was pulling something apart; and

viii) The Claimant asked Mr C "what's wrong, you scared?", although this referred to Mr C withdrawing from the window to avoid being photographed.

7. The MPT concluded that:

i) The Claimant's conduct Outside amounted only to misconduct and not to serious misconduct. In so concluding, the MPT recognised that, although the language was quite dreadful, the Claimant was not the only person at fault (Mr B and Mr C having been found to have used the same language) and he was acting under the misguided belief that he was in the right having been prevented from using his car park pass; and

ii) The Claimant's conduct on his Return To The Window amounted to serious misconduct in that, although the expression used reflected the language used previously by Mr B and Mr C, it was worse and the accompanying gesture made it significantly worse.

Reasons given by MPT for the adverse findings of fact made against the Claimant

8. The MPT's determination on the facts runs to 18 pages, although the MPT's reasons for making adverse findings against the Claimant are briefly stated as follows:

> "<u>Outside:</u>

…………..

[61] It finds that bad language, abuse and threats were made by all persons outside, that is by Mr B, Mr C and [the Claimant]. It finds that Mr C was very much a party to this bad language as he was asked to return to the office by Mr B. It observes that the language allegedly used by [the Claimant] on the one hand and by Mr B and Mr C on the other is similar. It is therefore likely that the phraseology employed by each party was fed by that used by the other. Further it observes that [the Claimant] did not know what language would be attributed to him when he set out his account of the language used at him in his HCL statement, as he had not seen the car park staffs statements at this point. The Tribunal therefore finds that [the Claimant] did say the words alleged in paragraph 2(b)(iii) to (vii) of the allegation. It makes no finding as to whether he was the first to utter them.

………….

Return to the window

[66] [The Claimant] returned to the window, having in fact moved his car to avoid the £300 fine. He had parked in a place which was reserved for Birmingham Women's Hospital staff where he was not authorised to park. His purpose for returning to the window was to obtain the names of Mr B and Mr C. He clearly remained of the view that he was in the right and intended to make complaint as to his treatment. Ms A refused to give the names and asked him to move his car. Mr C stated that he did the same. Mr C stated that [the Claimant] thereupon said "You motherfucker, I rape your wife and split her legs" and with that he made the offensive gesture set out in paragraph 2(c) of the allegation. Mr C stated that he was becoming angry and Mr B drew him back, whereupon [the Claimant] said "What's wrong, you scared?" Mr B corroborates the offensive language allegedly spoken by [the Claimant] and the accompanying action. It is not corroborated by Ms A or Mr D. [The Claimant] states in his witness statement that, when at the window he was called a pussy, a motherfucker, son of a bitch, a dog and threats were made to fuck his sister, his mother and so forth. The context of this part of the narrative is that, as the Tribunal has found, this bad language had already been used by all involved outside the office. Moreover, [the Claimant] now had a further reason to be angry, namely the information that he was not entitled to park in the place to which he had moved his car. The Tribunal find on the balance of probabilities that [the Claimant] did utter the words set out in paragraph 2(b)(viii) of the allegation to Mr C, with the accompanying gesture. It also finds that [the Claimant] did utter the words set out in paragraph 2(b)(ix) of the allegation to Mr C, although this referred to Mr C's withdrawing from the window to avoid being photographed."

Permission to apply for judicial review

9. An oral permission hearing took place on 22 June 2020 before HHJ Cooke, who refused permission. A renewed application for permission was made to the

Court of Appeal and permission was granted on one ground only by Lady Justice Nicola Davies on 30 April 2021 as follows:

> "Permission to apply for judicial review is granted on one ground, namely the index findings of fact of the MPT set out in paras 61 and 66 of the Tribunal's determination. As HHJ Cooke noted at [12] of his judgment, it is "slightly difficult to be exactly clear what point the tribunal was making in paragraph 61…….If the application for judicial review succeeds upon the index facts issue, the warning imposed by the MPT cannot be sustained. If the appeal fails on the primary facts issue, the warning which was imposed was reasonable and appropriate."

Legal framework

10. The Claimant has no statutory right of appeal under section 40 of the Medical Act 1983 where the MPT decided that the Claimant's fitness to practise was not impaired and a warning was imposed, although that decision may be challenged by way of judicial review.

11. Therefore, the role of this court is not to act as an appeal court, but rather to supervise the decision-making process of the MPT. In exercising that supervisory role, the "grounds on which the court will interfere are accordingly narrower than would be the case on an appeal. In particular, it is not enough for the [claimants] to show that the decisions were wrong. In order to succeed they must show that the [administrative body] acted unfairly or irrationally or otherwise unlawfully." – ***Johnson, Maggs v NMC*** [2013] EWHC 2140 (Admin) per Legatt J (as he then was) [19]. The learned judge went on [40]:

> "The test which must be met on a claim for judicial review before the court will interfere with findings of fact made by a tribunal is a high one……………On matters of fact as in all matters involving an evaluative judgment, the standard of review is one of reasonableness. It is for the tribunal empowered with the task of finding the facts to evaluate the evidence and decide what weight to give it. But a tribunal is not exercising its powers lawfully if it makes a finding of fact which has no reasonable evidential basis. Thus, the court will intervene if the evidence is not reasonably capable of supporting the tribunal's findings or where the reasons given by the tribunal do not rationally support the finding."

12. So far as the giving of reasons are concerned, Girvan LJ (sitting as a judge of first instance) summarised the position as follows in ***Casey v GMC*** [2011] NIQB 95 [6(c)]:

> "… the authorities establish that in most cases, particularly those concerned with comparatively simple conflicts of factual evidence, it will be obvious whose evidence has been rejected and why, thus satisfying the duty to make it clear to the losing party why he had lost. Where the issue is not straightforward the practitioner is entitled to know why his evidence in the case had been rejected. A few sentences dealing with salient issues may be essential. While a finding of fact based on the assessment of witnesses will only be interfered with if it can be regarded as plainly wrong or so out of

tune with the evidence properly read as to be unreasonable, the relevant issues must have been properly addressed (see Leveson LJ in ***Southall v GMC*** [2010] EWCA 407). In ***Selvanathan v GMC*** [2000] 59 BM Lord Hope stated that in practice reasons should now always be given by the panel in their determination. Fairness requires that this be done so that the losing party can decide in an informed way whether or not to accept the decision. In ***Selvanathan*** however the Privy Council concluded that there were no grounds for thinking that the appellant had suffered any prejudice due to the absence of reasons, the matter being relatively straightforward. In ***Gupta***, the Privy Council finding that there was no duty in that case to give full[er] reasons than had been given, declined to give further guidance though it reiterated what had been stated in ***Selvanathan*** namely that in cases where fairness requires reasons they should be given. In ***Southall v GMC*** Leveson LJ concluded that in straightforward cases setting out the facts to be proved and finding them proved or not proved will generally be sufficient to demonstrate why the party lost or won and to explain the facts found. When the case is not straightforward and can properly be described as exceptional the position is and will be different. In such cases at least a few sentences dealing with the salient issue is essential. In that case having regard to the rejection of the doctor's evidence and her defence, she, the doctor, was entitled to know why, even if only by reference to demeanour, attitude or approach to the specific questions posed to the doctor. In that case it was nothing to do with not being wholly convincing it was about honesty and integrity and if the panel were impugning her in those regards it should have said so."

Submissions

<u>Claimant</u>

13. It was submitted by the Claimant that given the lack of objectively verifiable evidence (such as CCTV or mobile phone footage), the MPT were constrained to make findings of fact based upon witness evidence only. However, the witness evidence did not amount to a reasonable evidential basis for the index finding.

14. Firstly, the MPT appears to have concluded that no one individual's account was fully reliable and have attempted therefore to piece together their own account of this complex interaction themselves. Thus, the MPT's version of events does not accord with anyone's evidence in full and finds support for the various factual findings piecemeal.

15. Secondly, the MPT highlighted various issues with the witness evidence of Ms A, Mr B and Mr C (the key witnesses in relation to the alleged misconduct):

    i) Ms A: elaborated aspects of her evidence under cross-examination, and while she stated she only typed up two of her three colleagues' initial statements, there was a finding she probably typed all three;

    ii) Mr B: was 'somewhat unsatisfactory' as a witness and the MPT expressed concern that he had had little actual recollection of the

sequence of events either at the time of the MPT hearing or indeed at the time he made his initial statement; and

iii) Mr C: 'came across well as a witness" but his oral evidence 'did not closely reflect his original statement' and the MPT was not satisfied that 'he properly recorded his part in the explosive situation that developed inside and outside the car park office'. It is notable that Mr C's original statement did not include the allegation that the Claimant had made any accompanying gesture when swearing.

16. Thirdly, the rationale of the MPT to find that the Claimant had been party to extreme bad language and swearing does not withstand scrutiny. The Court is referred to paragraphs 61 and 66 of the factual determination where the MPT notes that "Dr Mokhammad did not know what language would be attributed to him when he set out his account of the language used at him in his HCL statement" and relying upon that piece of evidence as meaning it was somehow therefore likely that the Claimant himself had used those words. However, the section of the HCL statement setting out the account of the language that was used is clear in that the language was used at him. Indeed, that was the Claimant's evidence before the MPT - that the car park staff had been swearing at him.

Defendant

17. It was submitted on behalf of the Defendant that the submissions advanced by the Claimant fall far short of the high threshold required to justify intervention. The evidence before the MPT was reasonably capable of supporting the MPT's findings that the Claimant made the statements and gestures alleged. The MPT was confronted with differing accounts of the car park incident and a denial of wrongdoing by the Claimant. It had direct evidence from Mr B and Mr C that the Claimant had uttered the words alleged. As the MPT observed, it was for the MPT to make sense of the conflicting accounts before it. In so doing it had the significant advantage of live witness evidence. It recognised inconsistencies or weaknesses in the evidence and critically applied itself to the allegations (for example, a number of allegations were not proved).

18. In refusing permission, HHJ Cooke commented that it was "slightly difficult to be exactly clear what point the tribunal was making [at para.61], but it seems to me a long way from indicating that the tribunal departed from a rational assessment of the witnesses to the extent that would be sufficient to justify an interference by the court". The Defendant submits that nothing in that paragraph betrays an error of fact or law.

19. At paragraph 61 of the facts determination the MPT noted that the Claimant had from an early stage described the car park staff as using language which they independently attributed to him. That mirroring of language in the early complaints, the MPT found, lent support to the idea that offensive language was batted backwards and forwards and that the bad language was used by both sides with the phraseology used feeding each other. It noted the Claimant's evidence that he had raised his voice and was slightly stressed as he was anxious to get to work. It found that he was angry as a result of his belief that a fraud was being

perpetrated and he was the first to say the f-word. The MPT could not be satisfied that abuse, bad language and threats were uttered At The Window by the Claimant. Paragraph 66 records the fact that the MPT preferred the account of Mr C, which was corroborated by Mr B (but not Mr D or Ms A), about the offensive words and gestures used by the Claimant on his Return To The Window. That assessment was properly undertaken on the evidence available; no error of law or fact is revealed by the MPT's approach described in paragraph 66.

20. The evidence against the Claimant (from car park staff) was assessed as sufficiently probative so as to justify making the relevant findings. In reality, the Claimant's claim falls squarely within the second type of cases identified by Brooke LJ in ***Adan v Newham London Borough Council*** [2001] EWCA Civ 1916 [37]: where a decisionmaker takes an honest view of the facts which could reasonably be entertained the decision cannot be set aside simply because thereafter someone thinks his view was wrong (quoting Lord Denning in ***Secretary of State for Employment v ASLEF (No 2)*** [1972] 2 QB 455, 493).

21. When viewed against the evidence before it, the MPT's determination on the facts (and in particular paragraphs 61 and 66) falls well within the range of reasonable responses and reveals no lack of logic.

22. Fairness requires that reasons be given so that the losing party can decide in an informed fashion whether or not to accept the decision. The adequacy of reasons should take account of the knowledge on the part of those to whom the decision is addressed, of the submissions made and of the evidence before the tribunal. The MPT's reasoning is adequate, intelligible and rational in all the circumstances.

Discussion and conclusion

Exceptional case

23. It was submitted on behalf of the Defendant that this court has no power to interfere in a case where the administrative body tasked with finding disputed facts prefers one version of the facts to another when it could reasonably have accepted either version – per Brooke LJ [35 – 36] ***Adan v Newham London Borough Council***. However, this is not a case where the MPT faced with competing and contradictory evidence simply preferred one version of events over another.

24. In ***Dutta, R (On the Application Of) v General Medical Council*** [2020] EWHC 1974 (Admin) and in ***Byrne v General Medical Council*** [2021] EWHC 2237 (Admin), it was held that where the MPT is considering reaching a conclusion on the basis of a version of events that has not been put forward by either party, fairness requires that the parties be given a reasonable opportunity to address it before the MPT reaches such a conclusion. In the present case, the Claimant has not sought to challenge the MPT's decision on this particular ground of procedural fairness. However, in my judgment, this was not a straightforward case, and it can properly be described as exceptional in that the MPT adopted a novel interpretation of events (offensive language being batted backwards and

forwards) that (i) had never been put forward by the Defendant or (ii) even put to the Claimant in cross examination for his comment or response. The Claimant was not made aware that the MPT was considering making such a finding, and so his counsel did not have the opportunity to address it in closing submissions. Whilst the MPT in making its findings of fact was not constrained by the way in which the parties put their cases, the MPT's obligation to give adequate reasons must nevertheless be viewed in this context.

Cogent evidence required

25. The MPT outlined its approach to the fact finding exercise as follows:

> "19. In reaching its decision on facts, the Tribunal has borne in mind that the burden of proof rests on the GMC and it is for the GMC to prove the Allegation. Dr Mokhammad does not need to prove anything. The standard of proof is that applicable to civil proceedings, namely the balance of probabilities, i.e. whether it is more likely than not that the events occurred.
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> 20. The Tribunal had regard to case law, including the case of *In Re B (Children) (Fe) Appellate Committee [2008] EWCA Civ 282*, where Lord Hoffmann stated:
>
>> "2. *If a legal rule requires a fact to be proved (a "fact in issue"), a judge or Jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened*."'
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> 21. The Tribunal was also made aware of the case law of *Braganza v BP Shipping Ltd [2015] UKSC 17* where there is reference to the case of re H (Minors) [1996] AC 563, in which the factors to be taken into account when assessing the probability of an event occurring were considered:
>
>> *'When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probabilities.* '"

26. The allegations made against the Claimant, which included threats of sexual violence accompanied by graphic gestures, were undoubtedly very serious. However, the civil standard of proof (balance of probabilities) does not vary with the gravity of the alleged misconduct. There is, therefore, no legal requirement that the more serious the allegation, the more cogent the evidence needed to prove it, although it is right to consider the inherent probability of an

allegation in light of the particular circumstances of the case in determining whether it has been proved on the balance of probabilities - ***Bank St Petersburg PJSC & Anor v Arkhangelsky*** [2020] EWCA Civ 408.

27. In its assessment of the Claimant, the MPT found the Claimant "in his oral evidence to be a softly-spoken man, who appeared unlikely to get involved in this sort of incident. This was reflected in the several testimonials which he adduced." Therefore, it was legitimate and conventional, and a fair starting point, that the MPT approached the allegations against the Claimant on the basis that as those allegations were serious the less likely they were to be true, and so the more cogent the evidence needed to prove them – as per Males LJ in ***Bank St Petersburg PJSC & Anor v Arkhangelsky*** [at para 117].

Cogency of the evidence relied upon by the Defendant

28. The evidence relied upon by the Defendant that the Claimant had uttered the alleged abusive words/made the offensive gesture was essentially the direct evidence from Mr B and Mr C. So far as the cogency of that evidence, the MPT found in their assessment of Mr B and Mr C significant indicators of unsatisfactory/unreliable evidence:

> "Mr B, Assistant Site Manager, O-Park Limited
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> 25. The Tribunal found Mr B a somewhat unsatisfactory witness. The answers he gave to some questions contradicted evidence from his colleagues, and on at least one point were wrong. For example, he did not produce his initial statement on the following day. He produced it on the same day.
>
> 26. The Tribunal was concerned that he had little actual recollection of the sequence of events either now or indeed at the time he made his initial statement. His grasp of detail was poor.
>
> Mr C, Site Supervisor, O-Park Limited
>
> 27. Mr C came across well as a witness. However the Tribunal noted that his oral evidence did not closely reflect his original statement. It accepted that the incident unfolded as he explained in that original statement but it was not satisfied that he properly recorded his part in the explosive situation that developed inside and outside the car park office."

29. The most serious allegation found against the Claimant was that on his Return To The Window the Claimant verbally abused Mr C by saying "you motherfucker, I rape your wife and split her legs" whilst at the same time motioning as if he was pulling something apart. The MPT felt that the accompanying gesture made the abuse significantly worse. However, in their initial accounts given on the day of the incident, Mr B and Mr C made no reference to any such gesture, which was first mentioned in Mr C's witness statement dated 7 August 2018 some 14 months later, although still not mentioned in Mr B's witness statement dated 13 August 2018. Further, the MPT noted in its determination that neither the offensive language allegedly spoken

by the Claimant on his Return To The Window nor the accompanying gesture were corroborated by Ms A or Mr D. The MPT does not explain why it felt able to make this finding notwithstanding the inconsistencies in the evidence relied upon by the Defendant and the accepted need for cogent evidence to prove the allegations.

30. It also appears that the MPT did not, at least in part, find Mr B and Mr C to be credible witnesses, since it found that they were not simply innocent and shocked victims as they claimed but had themselves been guilty of "bad language, abuse and threats" directed towards the Claimant. The MPT specifically found Mr C's evidence that he had removed himself from the incident when Outside as "implausible".

31. Lies in themselves do not necessarily mean that the entirety of the evidence of a witness should be rejected. A witness may lie in a stupid attempt to bolster a case, but the actual case nevertheless remains good irrespective of the lie. A witness may lie because the case is a lie. However, the MPT again does not explain why, having rejected significant parts of the evidence of Mr B and Mr C, it was nevertheless able to accept other parts of their evidence.

Credibility assessment of the Claimant

32. The MPT found that "bad language, abuse and threats were made by" all persons Outside being Mr B, Mr C and the Claimant. In making that finding, the MPT observed that "the language allegedly used by [the Claimant] on the one hand and by Mr B and Mr C on the other is similar. It is therefore likely that the phraseology employed by each party was fed by that used by the other."

33. The MPT then found that on his Return To The Window, the Claimant abused Mr C by saying "you motherfucker, I rape your wife and split her legs" whilst at the same time motioning as if he was pulling something apart. In making that finding, the MPT noted that it "has found, this bad language had already been used by all involved outside the office. Moreover, [the Claimant] now had a further reason to be angry, namely the information that he was not entitled to park in the place to which he had moved his car."

34. In ***Gestmin SGPS SA v Credit Suisse (UK) Limited*** [2013] EWHC 3560 (Comm), Leggatt J highlighted the fluidity/malleability of memories and the risk that witnesses may honestly be mistaken as to their recollection of events that took place years beforehand. However, this is not such a case, since the Claimant in his HCL statement gave a contemporary consistent account of his versions of events.

35. In rejecting the Claimant's version of events that he was the victim and not the perpetrator of abusive language it is implicit that the MPT did not find him to be a credible witness. However, under the heading "The Tribunal's evaluation of the witnesses" and in relation to the Claimant, the MPT merely stated:

> "37. The Tribunal found Dr Mokhammad in his oral evidence to be a softly-spoken man, who appeared unlikely to get involved in this sort of incident. This was reflected in the several testimonials which he adduced.

> 38. During his oral evidence, Dr Mokhammad explained that prior to the incident, he had had parking issues for 3 weeks where he struggled to gain access to the hospital staff car parks and get a car park space despite having paid £85 for a car park pass. Instead he had either to buy a single day ticket for £16 to obtain a car park space or find street parking.
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> 39. Dr Mokhammad went on to explain that these constant parking problems caused him to be repeatedly late for work, which in turn had an impact on patients, nurses and other doctors and also reflected on his reputation.
>
> 40. Dr Mokhammad further stated that, because of the car parking issue, he believed that he had been a victim of fraud by Q-Park, including by the car park staff involved in the incident. He was not aware before the incident of the Q-Park application terms and conditions. These stated, that even with a pass, there is no guarantee of a car park space.
>
> 41. The Tribunal considered that Dr Mokhammad was convinced, albeit wrongly, that he was a victim of a fraudulent scheme, and that this belief gave him cause for complaint in the build-up to the incident. The Tribunal had regard to Mr Brassington's observation that Dr Mokhammad has a habit of talking over people.
>
> 42. The Tribunal was cognisant that the car park staff had complained about Dr Mokhammad's behaviour by 12:16 on 17 May 2017, and that Dr Mokhammad made a complaint about his difficulties gaining access to the car park in which he also complained about the behaviour of two of the car park staff in an e-mail at 15:11 on the same day."

36. In my judgment, in the particular circumstances of this case, the Claimant was entitled to know why the MPT had rejected his evidence. The Claimant was cross examined at length. If the MPT doubted the Claimant's credibility whether generally or by reference to specific allegations, it should have expressly said so and given its reasons for doing so even if only relatively briefly. In the evaluation of witnesses section of its determination and having already made assessments as to the reliability of Mr B and Mr C, the MPT failed to articulate any distinct assessment of the Claimant's credibility in circumstances where the MPT was required to make findings of disputed fact solely by reference to the competing witness evidence.

<u>Transparency</u>

37. In making its finding that the Claimant used abusive language Outside, which fed into its later finding that the Claimant used abusive language and worse on his Return To The Window, the MPT appears to have attached significant weight to the fact that the Claimant "did not know what language would be attributed to him when he set out his account of the language used at him in his HCL statement, as he had not seen the car park staffs statements at this point." Like HHJ Cooke and Nicola Davies LJ, I struggle to understand what point the MPT is making there. It should not be a matter of conjecture as to why the MPT reached the conclusions that it did. In circumstances where the MPT in making

adverse findings against the Claimant relied upon his own contemporary HFL statement, which was consistent with his version of events (i.e. that he was the victim as opposed to the perpetrator of the abusive language), then it ought properly to have explained in clear terms why that somehow meant that it was more likely, rather than less likely, that he used those words.

Conclusion

38. In conclusion, procedural fairness required that the MPT give reasons for the adverse findings it made against the Claimant. Whilst I accept that any such reasons need not have been elaborate, they must nevertheless have been adequate, transparent and intelligible in order to explain why the MPT reached its conclusions. I do not find that the MPT's reasoning was legally adequate to enable the Claimant to understand why the MPT found against him in circumstances where:

    i) The MPT found that it was inherently unlikely that the Claimant would get involved in this type of incident;

    ii) The MPT approached the allegations on the basis that cogent evidence was required for the Defendant to discharge the burden placed upon it to prove those allegations;

    iii) The primary evidence relied upon by the Defendant was the testimony of Mr B and Mr C;

    iv) The MPT did not find Mr B to be a reliable witness;

    v) The MPT did not find Mr C to be a wholly reliable witness;

    vi) The MPT did not find Mr B and Mr C to be credible witnesses in so far as the MPT rejected their evidence that they were entirely innocent victims and found that they had also been guilty of using "quite dreadful" language towards the Claimant;

    vii) The MPT did not explain why it felt able to accept parts of the evidence of Mr B and Mr C whilst at the same time rejecting other parts of their evidence as not being reliable/credible;

    viii) The MPT rejected the Claimant's evidence/defence but without explaining why it did not find the Claimant to be a credible witness either generally or by reference to particular allegations and despite having heard the Claimant give lengthy oral evidence. If (as must be the case) the MPT disbelieved the Claimant, he was entitled to know why; and

    ix) The MPT did not explain properly or at all why ultimately it preferred a version of events, which had not even been advanced by the Defendant, by relying primarily upon a contemporary statement provided by the Claimant that was entirely consistent with his version of events.

39. In my view, this means that the decision of the MPT to find the Claimant guilty of misconduct cannot stand and the warning cannot be sustained.

40. I will list a date for this judgment to be handed down, remotely and without attendance, and invite the parties to agree a draft of the resulting order, which should be submitted by email to my clerk. Any matters not agreed should be noted in the draft and explained by short written submissions so that if possible they may be resolved without a hearing.