Neutral Citation Number: [2021] EWHC 374 (Admin)

Case No: CO/2845/2020

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

Manchester Civil Justice Centre
1 Bridge Street West, Manchester, M60 9DJ

Date: 02/03/2021

Before :

THE HONOURABLE MR JUSTICE JULIAN KNOWLES

- -

Between :

MUHAMMAD ZAKARIYA GOOLAM MAHOMED KHAN	**Appellant**
- and -	
GENERAL MEDICAL COUNCIL	**Respondent**

- -
- -

Kevin McCartney (instructed by **Hempsons**) for the **Appellant**
Alexis Hearnden (instructed by **GMC Legal**) for the **Respondent**

Hearing date: **25 November 2020**

- -

Judgment Approved by the court for handing down

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The Honourable Mr Justice Julian Knowles:

Introduction

1. This is an appeal by Mr Muhammad Khan, the Appellant, under s 40 of the Medical Act 1983 (MA 1983) against a decision of the Medical Practitioners' Tribunal (the MPT/the Tribunal) made on 11 December 2019 following disciplinary proceedings. The Tribunal found that the Appellant had behaved in an inappropriate and sexually motivated way towards three female members of staff (Miss A, Miss C and Miss D) at Barnsley Hospital NHS Foundation Trust (the Trust), where he worked as a consultant orthopaedic surgeon. On 22 June 2020 the Tribunal found that Mr Khan's fitness to practise was impaired as a consequence. On 20 July 2020 the Tribunal determined that Mr Khan's name should be erased from the Medical Register.

2. The Respondent to the appeal is the GMC, which brought the disciplinary proceedings against Mr Khan.

3. Each of the complainants made a number of complaints about sexually motivated physical and verbal conduct by Mr Khan. I will set out some of the details later, but the Tribunal found all but one of the factual allegations proved and that most of Mr Khan's conduct had indeed been sexually motivated.

4. Technically, under the legislation this appeal is against the order for erasure (s 40(1)(a)) but its real focus is the Tribunal's Determination of the Facts (the Determination). I am invited to quash that Determination on the grounds set out below, and it is common ground that if I do then the finding of impairment and the sanction of erasure must also be quashed.

5. I held a remote hearing on 25 November 2020. The Appellant was represented by Mr McCartney and the GMC by Ms Hearnden. I am grateful to both of them for their helpful written and oral submissions.

6. On the joint application of the parties, I made an order at the outset of the hearing under CPR r 39.2(4) granting anonymity to the three complainants. That order has been sealed and served.

7. Mr Khan qualified as a doctor in South Africa in 1984 and became a specialist orthopaedic surgeon in 1992, accredited and registered by the College of Medicine in South Africa. He was entered onto the General Medical Council's (GMC) Specialist Register in 1996. He worked in various roles at the Trust from 1995 until February 2014. He began working as a surgeon there in 1995. He was the Clinical Director for Orthopaedics and Rheumatology from December 2000 to May 2005 and was Clinical Director for Orthopaedics from April 2010 to February 2014.

8. The complaints against Mr Khan led to a number of internal and external legal processes. As well as the MPT proceedings and this appeal, they included disciplinary proceedings by the Trust in 2013-2014 which led to Mr Khan's dismissal for gross misconduct in February 2014; successful Employment Tribunal (ET) proceedings brought by him in 2015 for unfair and wrongful dismissal; an unsuccessful application by him to the ET for reinstatement; and a criminal trial in the Crown Court in 2016 for the sexual assault of Miss D, of which Mr Khan was acquitted.

9. The hearing before the Tribunal was protracted and occupied many days over a number of months. The papers before me on this appeal are extensive and run to some eight lever arch files.

The allegations and Mr Khan's response to them

10. The allegations against Mr Khan are set out in the MPT's Determination at [28]. There are a large number of them. I do not propose setting them all out, but I think the following summary gives an accurate flavour of what Mr Khan was accused of.

Miss D

11. Miss D was an Assistant Technical Officer and was based in the Trust's operating theatres. As the Tribunal noted at [39] of its Determination, Miss D's allegations were the first to be reported to the Trust.

12. She described a number of inappropriate incidents culminating in an incident in the preparation room of Theatre 2 on 23 May 2013 when she alleged that Mr Khan had put his face close to hers; wrapped his arms around her from behind; put his hands on her ribs; said he 'liked her small ribs' or words to that effect; made a kissing gesture; tried to turn her around; grabbed her from behind for a second time; ran his arm across her chest; put his hand on her left breast and 'squeezed' it; and ran his hand down her back and across her buttocks saying, 'no-one needs to know about this'.

13. Prior to that, she alleged that on more than one occasion between March 2013 and May 2013 Mr Khan asked her to go on a date with him, or words to that effect; and that in about April 2013 he had touched her inappropriately and made inappropriate comments ('let me rub it better') after she had banged her knee.

14. It was alleged that this behaviour was sexually motivated.

Miss A

15. Miss A was a staff nurse working in the main surgical theatres at the Trust and would sometimes work alongside Mr Khan.

16. The misconduct alleged by Miss A was said to have occurred between 2006 and 2012. Miss A alleges that Mr Khan would ask her to work as a scrub nurse in his theatres and would ignore her if she did not. She said that he prohibited her from working with a Miss B because he claimed they talked too much, and that in an attempt to stop her from talking he struck her on one or more occasions with a bone lever.

17. Miss A also alleged (inter alia) that Mr Khan told her to 'hurry up and have an affair before she dried up due to her age', or words to that effect; said that he was attracted to her; that he slapped her bottom, and said that it was 'big, firm and [he] liked it'; and that he had pushed his groin into her lower back whilst making suggestive groans.

18. This behaviour was also alleged to have been sexually motivated.

Miss C

19. Miss C was a Senior Theatre Practitioner and would sometimes work with Mr Khan.

20. The misconduct she alleged was said to have taken place between about 2006 and 2013. She said the first incident occurred in Theatre 2. She said that in December 2006 he had pressed his genitals against her bottom and said words to the effect of 'this is what you are missing out on'. She also alleged that on two occasions between 2006 and 2013 he had touched her vagina, and that in late 2012 or early 2013 there had been an incident when she was kneeling down in the men's locker room completing some paperwork. She said Mr Khan had put his genitals close to her face, and that she had said 'If you don't get that thing out of my face I will bite the fucker off', to which he replied, 'Don't bite it, blow it.'

21. She also alleged that on one or more occasions between December 2006 and November 2015 he made comments to her of a sexual nature in Afrikaans, in that he described what he would like to do to her, 'if he got the chance'.

22. This behaviour was also alleged to have been sexually motivated.

Mr Khan's case

23. Mr Khan submitted a 60-page witness statement in which he denied each of the allegations against him. He adopted this as his evidence-in-chief and was then cross-examined.

24. He maintained that none of the alleged incidents had ever happened, at least as described by the three complainants. In respect of Miss D, he admitted innocent physical contact on one occasion when she had become distressed and he had sought to comfort her by putting his arm around her. However, he categorically denied deliberately touching her breast or bottom or speaking to her as she alleged. His case, in summary, was that apart from that one episode of innocent physical contract, which had not been sexually motivated and which Miss D had exaggerated and embellished, the allegations against him were completely untrue and had never taken place.

25. He said that Miss A, Miss C and Miss D had been encouraged to give false evidence against him by senior Trust managers in order to get rid of him because they viewed him as a troublesome employee. At [16] of his witness statement he said:

> "16. I should make it clear from the outset that I deny these allegations which I regard either as embellishments of the truth or simply untrue. I consider that my dismissal and the manner in which I have been treated by the Trust was unfair[ly] discriminatory and influenced by political expediency. My belief is that I have been subject to a sustained and false campaign to justify terminating my employment. Despite my seniority and acknowledged clinical skills the Trust came to regard me as a problem employee and I believe the referral to the GMC represents the culmination of their efforts to get rid of me, to terminate my employment."

26. Mr McCartney for the Appellant put the matter this way in his Skeleton Argument at [9]:

> "A central part of his case was that the Trust encouraged, facilitated or connived in the creation of false allegations of sexual misconduct. He believed that initially this was because the Trust wished to terminate his employment as he had been a

> 'whistle blower' with regard to poor practice at the Trust. Further, as clinical lead of the orthopaedics team he had been critical of Trust management in respect of the death of a patient, which resulted in an inquest reported in the media."

Internal Trust proceedings

27. The initial complaint was made by Miss D on the 23 May 2013 to Nicola Bushby. She was interviewed by Jos Vines, a line manager, on the 28 May 2013 and made a formal complaint on 18 June 2013. The Trust initiated an investigation which was conducted by a Human Resources (HR) consultant, Susan Moloney. As a result of her preliminary report the Trust decided to hold an internal disciplinary hearing.

28. In August 2013, the Trust received an anonymous letter which made a number of further sexual complaints against Mr Khan which were said to have occurred over a significant period of time. Mr Khan asserted these were untrue. The proposed September 2013 hearing was adjourned to allow for another HR Consultant, Sue Adams – Brooke, to conduct a second investigation. She concluded that there was no case to answer in respect of the allegations in the anonymous letter. No further action was taken at that time with regards the anonymous letter. I will need to return to the anonymous letter later.

29. On 21 January 2014 and 10 February 2014 Mr Khan was subject to internal disciplinary proceedings following Miss D's allegation. Dr Richard Jenkins (then Medical Director of Mid-Yorkshire Hospitals) and Diane Wake (then Chief Executive of the Trust) both sat on the disciplinary Panel. Emma Lavery (then Senior HR Manager at the Trust) provided support and guidance to the Panel. The outcome of the disciplinary hearing was that Mr Khan was found guilty of gross misconduct and summarily dismissed in February 2014.

Employment Tribunal proceedings

30. After an unsuccessful internal appeal, Mr Khan began proceedings in the ET for unfair and wrongful dismissal, which succeeded. The ET concluded, *inter alia*, that Miss D's allegations of sexual assault had not been proved to the civil standard and that the approach of the Trust's disciplinary panel had been fundamentally flawed both in terms of the investigation and the manner in which the panel hearing had been conducted.

31. The ET ordered that Mr Khan be reinstated. The Trust resisted that order.

32. Miss A's allegations and Miss C's allegations were not made to the Trust until after Mr Khan had succeeded before the ET. In resisting his application for reinstatement, the Trust relied upon the complaints by Miss A and Miss C which had by then emerged. That resistance was successful and the order for reinstatement was revoked. It was held that reinstatement would not be practicable.

33. It was Mr Khan's case before the MPT that the Trust had encouraged Miss A and Miss C to make false allegations specifically in order to defeat his application for reinstatement.

Crown Court trial

34. Mr Khan was interviewed by the police about Miss D's allegations on 29 August 2013, however the Crown Prosecution Service only provided charging advice on 6 May 2015. He stood trial at Sheffield Crown Court in March 2016 in respect of one allegation of sexually touching Miss D contrary to Sexual Offences Act 2003, s 3. He was acquitted on 22 March 2016.

The Determination: summary

35. The MPT proceedings began on 25 February 2019 and occupied 35 days, spread over a number of months. It deliberated for six days. Although a large quantity of oral and written evidence was adduced, the issues for the MPT were, in many ways, straightforward. They were whether, in respect of each of the allegations made by Miss D, Miss A and Miss C, it was satisfied on the balance of probabilities that the allegation had occurred as described and, if it was so satisfied, was it also satisfied on the balance of probabilities that it was sexually motivated ? That said, there were a number of sub-issues relating to, for example, disclosure and the way in which the Trust had conducted its internal disciplinary proceedings, which the Appellant argued were relevant to the veracity of the allegations against him.

36. The Tribunal said at [29] of its Determination:

> "Mr Khan did not make any admissions to the Allegation[s]. The Tribunal is therefore required to determine whether Mr Khan behaved inappropriately towards Miss A, Miss C and Miss D as alleged, and whether his actions were sexually motivated."

37. The MPT set out the background at [1]-[3] of its Determination. At [4]-[9], [10]-[13] and [14]-[18] it summarised the complaints of Miss A, Miss C and Miss D respectively. At [19]-[27] it set out various pre-hearing orders that had been made, including for the use of screens and anonymity.

38. As I have said, the allegations against Mr Khan were set out in [28]. They ran to 11 sub-paragraphs with further sub-sub paragraphs.

39. At [30]-[33] the MPT listed the witnesses whose written and/or oral evidence it had received. At [34]-[36] it listed the documentary evidence, eg, documents relating to the Trust's investigation and the Employment Tribunal proceedings.

40. At [37] the MPT correctly directed itself that the burden of proof in respect of each allegation lay on the GMC and that Mr Khan did not have to prove anything. It said the standard of proof was the civil standard, namely, whether it was more likely than not that the alleged incidents occurred.

41. At [38] it said that it had considered each allegation separately and evaluated the evidence in order to make its findings of fact.

42. At [39] the Tribunal said that it would deal with Miss D's allegations first as they were the first to be reported to the Trust and her evidence had been heard first.

43. Between [40]-[78] the Tribunal considered the allegations made by Miss D. Before examining any of the evidence, at [40] the Tribunal declared her to be 'credible and consistent'. It then found each of her allegations proved for the reasons it explained. It

also found that each incident of Mr Khan's conduct had been sexually motivated.

44. Between [79]-[89] the MPT set out the background to the allegations made by Miss A and Miss C. It then summarised other proceedings, the detail of which I have already given including the disciplinary proceedings which led to Mr Khan's dismissal in February 2014; and his subsequent successful ET proceedings in April 2015.

45. The MPT noted the submission made on behalf of Mr Khan that the internal disciplinary process had been fundamentally flawed. It said it had considered all of the evidence available to it in relation to the impact of the process followed by the Trust, and the conduct of Trust management, on the veracity, truth and reliability of the evidence of Miss A and Miss C.

46. At [85]-[87] the MPT said:

> "85. The Tribunal considered Mr Khan's position that Miss A and Miss C fabricated their complaints and were influenced and encouraged by the Trust to do so in order to support the Trust's position not to re-employ Mr Khan. It carefully considered the position with regard to Miss A and Miss C and could identify no evidence of a conspiracy or encouragement by the Trust to support the position as was suggested.
>
> 86. The Tribunal was satisfied that there was no evidence that these allegations were fabricated by either claimant at the behest of the Trust. Further, it has seen no evidence to identify any individual or group of individuals as the instigators or co-ordinators of such a fabrication or of any conspiracy against Mr Khan.
>
> 87. The Tribunal was not persuaded on the basis of the evidence before it that the Trust management team influenced or encouraged Miss A or Miss C to fabricate their complaints in relation to the allegations before it. The Tribunal noted that the Trust requested anyone who had a complaint to come forward and speak up, as might be expected in any organisation where allegations of this kind were alleged, however there was no evidence the Trust induced, requested, persuaded, or enticed anyone to fabricate complaints. The Tribunal therefore did not accept the assertion of a Trust conspiracy against Mr Khan in relation to the allegations made by Miss A and Miss C."

47. It went on to note at [88] the evidence that both Miss A and Miss C discussed their concerns about Mr Khan with a police officer *before* the first ET hearing and so before any 'need' for further allegations against him arose. It said this evidence undermined Mr Khan's argument that Miss A and Miss C had fabricated their allegations to help the Trust resist his application for reinstatement. It said that when Miss A had learned of the possibility of Mr Khan being re-employed, she spoke with her manager about not working with him. The manager then asked Miss A to make a statement to assist the manager in actioning her request.

48. Between [90]-[123] the MPT set out its findings in relation to Miss A's allegations.

Again, before considering any of the allegations in detail, it described her as a 'confident, credible witness' ([91]). It found all but one of her allegations proved, and that although most of them had been sexually motivated, some of them had not been, eg, when he had hit her with a bone lever for talking.

49. At [124] et seq the MPT addressed the evidence of Miss C. It began by saying that it had first considered Miss C's credibility and, specifically, the extent to which it was undermined by her admission to having lied on oath in the ET proceedings about having authored the anonymous letter to which I have referred. At [126] it said it had assessed her 'demeanour' in making its credibility assessment. It said she had been 'adamant' that she had been truthful in her evidence.

50. The circumstances surrounding Miss C's admitted lie were as follows. In a witness statement for the ET proceedings, and in her evidence to that Tribunal, Miss C claimed to have written the letter. Before the MPT, Miss C admitted this evidence had been a lie. She declined to say who had written the letter or to explain how and in what circumstances she had falsely claimed to have written it.

51. This notwithstanding, for the reasons it gave between [125]-[134] (including, as I have said her 'demeanour'), the MPT concluded at [135] (emphasis added):

> "Having considered all of the evidence before it, the Tribunal was not persuaded that Miss C's admission that she lied about the authorship of the anonymous letter was, of itself, sufficient to undermine her credibility in relation to the rest of her evidence. It was satisfied that Miss C had given a *genuine, sincere and credible account* in relation to matters other than her authorship of the letter."

52. Between [136]-[172], for the reasons it gave, the MPT found each of Miss C's allegations proved and that all of Mr Khan's conduct towards her had been sexually motivated.

53. Finally, at [174] the MPT set out its conclusions in respect of each allegation by Miss A, Miss C and Miss D, and what it had found proved, and not proved.

Legal framework

54. Section 40 of the MA 1983 provides a right of appeal to the High Court against a sanction imposed by the MPT. The relevant part of s 40 provides:

> "(1) The following decisions are appealable decisions for the purposes of this section, that is to say -
>
> (a) a decision of a Medical Practitioners Tribunal under section 35D above giving a direction for erasure, for suspension or for conditional registration or varying the conditions imposed by a direction for conditional registration;
>
> ...

(7) On an appeal under this section from a Medical Practitioners Tribunal, the court may –

(a) dismiss the appeal;

(b) allow the appeal and quash the direction or variation appealed against;

(c) substitute for the direction or variation appealed against any other direction or variation which could have been given or made by a Medical Practitioners 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 (or, in Scotland, expenses) as it thinks fit."

55. CPR r 52.21 provides:

"(1) Every appeal will be limited to a review of the decision of the lower court unless -

(a) a practice direction makes different provision for a particular category of appeal; or

(b) the court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing.

…

(3) The appeal court will allow an appeal where the decision of the lower court was -

(a) wrong; or

(b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court."

56. Paragraph 19 of PD52D provides:

"(1) This paragraph applies to an appeal to the High Court under –

…

(e) section 40 of the Medical Act 1983;

…

(2) Every appeal to which this paragraph applies must be supported by written evidence and, if the court so orders, oral evidence and will be by way of re-hearing."

57. The approach the High Court should take to an appeal under s 40 was explained in *Fish v General Medical Council* [2012] EWHC 1269 (Admin), [28]-[32]:

> "28. Whilst the appeal constitutes a 're-hearing', it is a re-hearing without hearing again the evidence.
>
> 29. I venture to repeat certain quotations from earlier cases that I made in the case of *Chyc v General Medical Council* [2008] EWHC 1025 (Admin) concerning the approach of this court to challenges to findings of fact. I referred in *Chyc* to what was said by the Judicial Committee of the Privy Council in *Gupta v General Medical Council* [2002] 1 WLR 1691 where the following appears at paragraph 10:
>
> > "[T]he obvious fact [is] that the appeals are conducted on the basis of the transcript of the hearing and that, unless exceptionally, witnesses are not recalled. In this respect, these appeals are similar to many other appeals in both civil and criminal cases from a judge, jury or other body who has seen and heard the witnesses. In all such cases the appeal court readily acknowledges that the first instance body enjoys an advantage which the appeal court does not have, precisely because that body is in a better position to judge the credibility and reliability or the evidence given by the witnesses. In some appeals that advantage may not be significant since the witnesses' credibility and reliability are not in issue. But in many cases the advantage is very significant and the appeal court recognises that it should accordingly be slow to interfere with the decisions on matters of fact taken by the first instance body. This reluctance to interfere is not due to any lack of jurisdiction to do so. Rather, in exercising its full jurisdiction, the appeal court acknowledges that, if the first instance body has observed the witnesses and weighed their evidence, its decision on such matters is more likely to be correct than any decision of a court which cannot deploy those factors when assessing the position. In considering appeals on matters of fact from the various professional conduct committees, the Board must inevitably follow the same general approach. Which means that, where acute issues arise as to the credibility or reliability of the evidence given before such a committee, the Board, duly exercising its appellate function, will tend to be unable properly to differ from the decisions as to fact reached by the committee except in the kinds of situation described

> by Lord Thankerton in the well known passage in *Watt or Thomas v Thomas* [1947] AC 484, 484-488."

30. The passage from Lord Thankerton's opinion was as follows:

> "I do not find it necessary to review the many decisions of this House, for it seems to me that the principle embodied therein is a simple one, and may be stated thus: I. Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion; II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence; III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question."

31. I referred also to *Threlfall v General Optical Council* [2004] EWHC 2683 (Admin), at paragraph 21, where Stanley Burnton J, as he then was, said this:

> "Because it does not itself hear the witnesses give evidence, the court must take into account that the Disciplinary Committee was in a far better position to assess the reliability of the evidence of live witnesses where it was in issue. In that respect, this court is in a similar position to the Court of Appeal hearing an appeal from a decision made by a High Court Judge following a trial …."

32. So those are the parameters for considering the issues raised in this appeal in relation to the findings. It is plain that where the conclusion of the FTP is largely based on the assessment of witnesses who have been "seen and heard", this court will be very slow to interfere with that conclusion. Nonetheless, the court has a duty to consider all the material

> put before it on an appeal in order to discharge its own responsibility, appropriate deference being shown to conclusions of fact reached on the basis of the advantage of having seen and heard the witnesses. Where this court does not feel disadvantaged by not having heard the witnesses, and the issues can be addressed with little emphasis on the direct assessment of the evidence by the Panel, it is in a position to take a different view in an appropriate case."

58. In *Yassin v the General Medical Council* [2015] EWHC 2955 (Admin), [32], Cranston J explained the scope of an appeal under s 40 in the following terms:

> "32. Appeals under section 40 of the Medical Act 1983 are by way of re-hearing (CPR PD52D) so that the court can only allow an appeal where the Panel's decision was wrong or unjust because of a serious procedural or other irregularity in its proceedings: CPR 52.11. The authorities establish the following propositions:
>
> (i) The Panel's decision is correct unless and until the contrary is shown: *Siddiqui v. General Medical Council* [2015] EWHC 1996 (Admin) , per Hickinbottom J, citing *Laws LJ in Subesh v. Secretary of State for the Home Department* [2004] EWCA Civ 56 at [44];
>
> (ii) The court must have in mind and must give such weight as appropriate in that the Panel is a specialist tribunal whose understanding of what the medical profession expects of its members in matters of medical practice deserves respect: *Gosalakkal v. General Medical Council* [2015] EWHC 2445 (Admin);
>
> (iii) The Panel has the benefit of hearing and seeing the witnesses on both sides, which the Court of Appeal does not;
>
> (iv) The questions of primary and secondary facts and the over-all value judgment made by the Panel, especially the last, are akin to jury questions to which there may reasonably be different answers: *Meadows v. General Medical Council*, [197], per Auld LJ;
>
> (v) The test for deciding whether a finding of fact is against the evidence is whether that finding exceeds the generous ambit within which reasonable disagreement about the conclusions to be drawn from the evidence is possible: Assucurazioni Generali SpA v. Arab Insurance Group [2003] 1 WLR 577 , [197], per Ward LJ;
>
> (vi) Findings of primary fact, particularly founded upon an assessment of the credibility of witnesses, will be virtually unassailable: Southall v. General Medical Council [2010]

EWCA Civ 407 , [47] per Leveson LJ with whom Waller and Dyson LJJ agreed;

(vii) If the court is asked to draw an inference, or question any secondary finding of fact, it will give significant deference to the decision of the Panel, and will only find it to be wrong if there are objective grounds for that conclusion: Siddiqui, paragraph [30](iii);

(viii) Reasons in straightforward cases will generally be sufficient in setting out the facts to be proved and finding them proved or not; with exceptional cases, while a lengthy judgment is not required, the reasons will need to contain a few sentences dealing with the salient issues: Southall v. General Medical Council [2010] EWCA Civ 407, [55]-[56];

(ix) A principal purpose of the Panel's jurisdiction in relation to sanctions is the preservation and maintenance of public confidence in the medical profession so particular force is given to the need to accord special respect to its judgment: Fatnani and *Raschid v General Medical Council* [2007] EWCA Civ 46 , [19], per Laws LJ."

59. In *R(Dutta) v GMC* [2020] EWHC 1974 (Admin), [20]-[21], Warby J said:

"20 … This is a challenge to the Tribunal's fact-finding processes at Stage 1. A specialist Tribunal may of course have specialist expertise that is relevant at that stage, but this is not such a case. If the Court finds that the Tribunal went wrong at the first stage, it should quash the conclusions at all three Stages, unless persuaded that the error would have made no difference to the outcome. That, as Ms Hearnden rightly accepts, is a high threshold, which is not readily satisfied: *R (Smith) v North Eastern Derbyshire Primary Care Trust* [2006] 1 WLR 3315, 3321.

21. Bearing that in mind, the points of most importance for the purpose of this case can be summarised as follows:

(1) The appeal is not a re-hearing in the sense that the appeal court starts afresh, without regard to what has gone before, or (save in exceptional circumstances) that it re-hears the evidence that was before the Tribunal. 'Re-hearing' is an elastic notion, but generally indicates a more intensive process than a review: *E I Dupont de Nemours & Co v S T Dupont (Note)* [2006] 1 WLR 2793 [92-98]. The test is not the "Wednesbury" test.

(2) That said, the appellant has the burden of showing that the Tribunal's decision is wrong or unjust: *Yassin* [32(i)]. The Court will have regard to the decision of the lower court and

give it 'the weight that it deserves': *Meadow* [128] (Auld LJ, citing *Dupont* [96] (May LJ)).

(3) A court asked to interfere with findings of fact made by a lower court or Tribunal may only do so in limited circumstances. Although this Court has the same documents as the Tribunal, the oral evidence is before this Court in the form of transcripts, rather than live evidence. The appeal Court must bear in mind the advantages which the Tribunal has of hearing and seeing the witnesses, and should be slow to interfere. See *Gupta*, [10], *Casey*, [6(a)], *Yassin*, [32(iii)].

(4) Where there is no question of a misdirection, an appellate court should not come to a different conclusion from the tribunal of fact unless it is satisfied that any advantage enjoyed by the lower court or tribunal by reason of seeing and hearing the witnesses could not be sufficient to explain or justify its conclusions: *Casey*, [6(a)].

(5) In this context, the test for deciding whether a finding of fact is against the evidence is whether that finding exceeds the generous ambit within which reasonable disagreement about the conclusions to be drawn from the evidence is possible: *Yassin*, [32(v)].

(6) The appeal Court should only draw an inference which differs from that of the Tribunal, or interfere with a finding of secondary fact, if there are objective grounds to justify this: *Yassin*, [32(vii)].

(7) But the appeal Court will not defer to the judgment of the tribunal of fact more than is warranted by the circumstances; it may be satisfied that the tribunal has not taken proper advantage of the benefits it has, either because reasons given are not satisfactory, or because it unmistakably so appears from the evidence: *Casey* [6(a)] and cases there cited, which include *Raschid* and *Gupta* (above) and *Meadow* [125-126], [197] (Auld LJ). Another way of putting the matter is that the appeal Court may interfere if the finding of fact is 'so out of tune with the evidence properly read as to be unreasonable': *Casey*, [6(c)], citing *Southall* [47] (Leveson LJ).

22. Ms Hearnden places heavy reliance on another passage from *Southall*, [47], where Leveson LJ observed that:

> '… it is very well established that findings of primary fact, particularly if founded upon an assessment of the credibility of witnesses, are virtually unassailable.'

> However, it is clear from paragraph [47] read as a whole, that this sentence does not purport to represent a distinct principle, imposing a more exacting test than those I have identified. Rather, it is intended to be a distillation of the jurisprudence I have summarised. *Southall*, [47], also shows that the passage I have quoted from *Casey*, [6(c)] reflects high authority. It is a variation of words used by Lord Hailsham, sitting in in the Privy Council, in *Libman v General Medical Council* [1972] AC 217, 221F."

60. In his oral submissions Mr McCartney relied in particular on [21(7)] in support of those of his grounds of appeal (which I will come to shortly) that attacked the Tribunal's findings of fact and its approach to the evidence. Ms Hearnden, in contrast, emphasised [21(3)], [21(4)] and [21(5)], and especially the latter, in support of her submission that I should be slow to interfere.

61. Warby J's reference to *Gupta* in this passage at [21(3)] is to the judgment of Lord Rodger of Earlsferry in *Gupta v General Medical Council* [2002] 1 WLR 1691, [10]:

> "In all such cases the appeal court readily acknowledges that the first instance body enjoys an advantage which the appeal court does not have, precisely because that body is in a better position to judge the credibility and reliability of the evidence given by the witnesses. In some appeals that advantage may not be significant since the witnesses' credibility and reliability are not in issue. But in many cases the advantage is very significant and the appeal court recognises that it should accordingly be slow to interfere with the decisions on matters of fact taken by the first instance body. This reluctance to interfere is not due to any lack of jurisdiction to do so. Rather, in exercising its full jurisdiction, the appeal court acknowledges that, if the first instance body has observed the witnesses and weighed their evidence, its decision on such matters is more likely to be correct than any decision of a court which cannot deploy those factors when assessing the position …"

62. I was also referred to [14] of the same decision:

> "14. … In every case, every MPT (including the PCC of the GMC) needs to ask itself the elementary questions: is what we have decided clear? Have we explained our decision and how we have reached it in such a way that the parties before us can understand clearly why they have won or why they have lost ?"

63. In *Fatnani and Raschid v General Medical Council* [2007] 1 WLR 1460, [20], Laws LJ said:

> "… the High Court will correct material errors of fact and of course of law and it will exercise a judgment, though distinctly and firmly a secondary judgment, as to the application of the principles to the facts of the case".

64. In his Skeleton Argument Mr McCartney referred me to what Stadlen J (as he then was) said in *Lawrence v General Medical Council* [2012] EWHC 464 (Admin), [337]:

> "261. … It must be apparent to the parties why one has won and the other has lost and the judgment must enable an appellate court to understand why the judge reached his decision …
>
> …
>
> 337. It does not, of course, follow that there are no circumstances in which a decision based in whole or in part on express or implied conclusions reached by an FTPP as to the demeanour of witnesses will not be overturned by the Court. There may be circumstances in which for example critical evidence has been ignored or is of such a character that logic or common sense or both demonstrate(s) that the view reached by the FTPP must be wrong. The court will always be astute to assess whether that has in fact occurred in any particular case if invited to do."

65. I think it is worth pointing out that notwithstanding the disadvantages that an appellate court has in not having heard witnesses when the Tribunal has done so, *Dutta* and *Lawrence* are examples of cases where the appellate court nevertheless did overturn findings of fact because of a flawed approach by the Tribunals in question.

Grounds of appeal

66. There were originally ten grounds of appeal settled by Mr McCartney, however some of these were combined and re-cast in his Skeleton Argument. As re-cast, the grounds of appeal are:

(1) The Tribunal failed to have any or any adequate regard to the good character of Mr Khan;

(2) The Tribunal misstated the evidence, omitted to consider other material evidence, failed to resolve significant conflicts in the evidence and/or came to conclusions on the facts which did not reflect the available evidence. Mr McCartney broke this down into a number of sub-grounds of appeal:

(i) The Tribunal did not deal adequately with the evidence of Nicola Bushby and Katie Taylor, two nurses at the hospital who said Mr Khan had never behaved inappropriately toward them and who denied a remark attributed to one or other of them by Miss D;

(ii) The Tribunal placed undue reliance on witnesses' demeanour in judging their credibility, in contravention of the principles in *Dutta*, supra;

(iii) The Tribunal erred in its approach to the evidence and credibility of Miss D and failed to consider or address such evidence as was said to undermine her credibility, including discrepancies in her accounts given at various times;

(iv) The Tribunal had been wrong to conclude there was 'no evidence' to support the contention that the Trust had encouraged Miss A and Miss C to make allegations against Mr Khan. There *was* such evidence which was capable of supporting such a conclusion;

(v) In relation to Miss A, in summary the Tribunal failed to adequately analyse and take account of the available evidence and the inconsistencies between Miss A's evidence and that of unchallenged witnesses: a proper analysis might have led to the conclusion her evidence was unreliable;

(vi) In relation to Miss C, the Tribunal wrongly decided that she was credible despite the evidence which pointed to the contrary, including her admitted lie about authorship of the anonymous letter and her failure/refusal to explain how or why this had come about;

(vii) The Tribunal should have allowed the 'half-time' *Galbraith* submission that Miss C's credibility had been so undermined that her allegations ought not to be allowed to proceed;

(viii) The Tribunal came conclusions regarding the credibility of witnesses that no reasonable Tribunal could have reached.

67. Mr McCartney therefore submits that I should quash the Tribunal's Determination and also the finding of impairment and the sanction which flowed from it.

68. Mr McCartney emphasised that whilst the Tribunal did not need to resolve every conflict in evidence, it needed to resolve those which had an important bearing on the complainants' credibility and that it was required to give clear reasons for its conclusions. He referred me to *R(H) v Nursing and Midwifery Council* [2013] EWHC 4258, [29]:

> "In my judgment where, as here, the MPT was faced with two conflicting accounts in relation to an issue of such profound importance to the appellant, the Panel was bound to give careful consideration to each element of evidence and then to arrive at a conclusion taking into account all the evidence in the round."

69. He put it this way in his Skeleton Argument at [160]:

> "The Tribunal did not have to resolve every issue in the case, however it should resolve those questions of fact that either impact upon the credibility of the principal witnesses and/or those which are determinative of a relevant issue or allegation. The Tribunal must first determine which facts are proven and thereafter draw appropriate inferences. If the Tribunal has either failed to determine the facts or come to a conclusion on the facts that no reasonable Tribunal court have reached, then there is no proper foundation for the subsequent inference."

70. A central theme of many of the submissions made by Mr McCartney was that the Tribunal simply had not grappled with, and so not reached proper conclusions upon,

important aspects of the evidence which he said undermined the credibility of the three complainants, and Miss C in particular. He said that 'pivotal' to the merits of this appeal was the question whether the Tribunal had addressed the defence case, either adequately, or at all.

71. Rather than properly address evidence going to the complainants' credibility, Mr McCartney said the Tribunal had instead made a subjective assessment of their credibility based in significant part on their demeanour. He said this approach was wrong and referred to *Dutta*, supra, [38]-[49], [40]. I need to set out a necessarily lengthy extract from Warby J's judgment (his emphasis):

> "38. In any event, I regret to say, in my judgment the Tribunal's reasoning process is vitiated by at least three fundamental errors of approach. First, the Tribunal approached the resolution of the central factual dispute by starting with an assessment of the credibility of a witness's uncorroborated evidence about events ten years earlier, only then going on to consider the significance of unchallenged contemporary documents. Secondly, the Tribunal's assessment of the witness's credibility was based largely if not exclusively on her demeanour when giving evidence. Thirdly, the way the Tribunal tested the witness evidence against the documents involved a mistaken approach to the burden of proof and the standard of proof.
>
> 39. There is now a considerable body of authority setting out the lessons of experience and of science in relation to the judicial determination of facts. Recent first instance authorities include *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3650 (Comm) (Leggatt J, as he then was) and two decisions of Mostyn J: *Lachaux v Lachaux* [2017] EWHC 385 (Fam) [2017] 4 WLR 57 and *Carmarthenshire County Council v Y* [2017] EWFC 36 [2017] 4 WLR 136. Key aspects of this learning were distilled by Stewart J in *Kimathi v Foreign and Commonwealth Office* [2018] EWHC 2066 (QB) [96]:
>
> i) *Gestmin*:
>
> o We believe memories to be more faithful than they are. Two common errors are to suppose (1) that the stronger and more vivid the recollection, the more likely it is to be accurate; (2) *the more confident another person is in their recollection, the more likely it is to be accurate.*
>
> o Memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is even true of 'flash bulb' memories (a misleading term), ie, memories of experiencing or learning of a particularly shocking or traumatic event.

- *Events can come to be recalled as memories which did not happen at all or which happened to somebody else.*

- The process of civil litigation itself subjects the memories of witnesses to powerful biases.

- Considerable interference with memory is introduced in civil litigation by the procedure of preparing for trial. Statements are often taken a long time after relevant events and drafted by a lawyer who is conscious of the significance for the issues in the case of what the witness does or does not say.

- *The best approach from a judge is to base factual findings on inferences drawn from documentary evidence and known or probable facts. 'This does not mean that oral testimony serves no useful purpose… But its value lies largely… in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny* and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. *Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth'.*

ii) *Lachaux*:

- Mostyn J cited extensively from *Gestmin* and referred to two passages in earlier authorities.[45] I extract from those citations, and from Mostyn J's judgment, the following:

- 'Witnesses, especially those who are emotional, who think they are morally in the right, tend very easily and unconsciously to conjure up a legal right that did not exist. It is a truism, often used in accident cases, that *with every day that passes the memory becomes fainter and the imagination becomes more active.* For that reason, a witness, however honest, rarely persuades a judge that his present recollection is preferable to that which was taken down in writing immediately after the incident occurred. Therefore, *contemporary documents are always of the utmost importance…*'

- '…I have found it essential in cases of fraud, *when considering the credibility of witnesses, always to test their veracity by reference to the objective fact proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities…'*

- Mostyn J said of the latter quotation, ‘these wise words are surely of general application and are not confined to fraud cases… it is certainly often difficult to tell whether a witness is telling the truth and I agree with the view of Bingham J that *the demeanour of a witness is not a reliable pointer to his or her honesty.’*

iii) *Carmarthenshire County Council*:

- The general rule is that oral evidence given under cross-examination is the gold standard because it reflects the long-established common law consensus that the best way of assessing the reliability of evidence is by confronting the witness.

- However, oral evidence under cross-examination is far from the be all and end all of forensic proof. Referring to paragraph 22 of *Gestmin*, Mostyn J said: ‘*…this approach applies equally to all fact-finding exercises, especially where the facts in issue are in the distant past.’* This approach does not dilute the importance that the law places on cross-examination as a vital component of due process, but it does place it in its correct context.

> [45] The dissenting speech of Lord Pearce in *Onassis and Calogeropoulos v Vergottis* [1968] 2 Lloyd's Rep 403, 431; Robert Goff LJ in *Armagas Ltd v Mundogas SA* [1985] 1 Lloyd's Rep 1, 57.”

40. This is not all new thinking, as the dates of the cases cited in the footnote make clear. *Armagas v Mundogas*, otherwise known as *The Ocean Frost*, has been routinely cited over the past 35 years. Lord Bingham's paper on "The Judge as Juror" (Chapter 1 of *The Business of Judging*) is also familiar to many. Of the five methods of appraising a witness's evidence, he identified the primary method as analysing the consistency of the evidence with what is agreed or clearly shown by other evidence to have occurred. The witness's demeanour was listed last, and least of all.

41. A recent illustration of these principles at work is the decision of the High Court of Australia in *Pell v The Queen* [2020] HCA 12. That was a criminal case in which, exceptionally, on appeal from a jury trial, the Supreme Court of Victoria viewed video recordings of the evidence given at trial, as well as reading transcripts and visiting the Cathedral where the offences were said to have been committed. Having done so, the Supreme Court assessed the complainant's credibility. As the High Court put it at [47], "their Honours' subjective assessment, that A was a compellingly truthful witness, drove their analysis of the consistency and cogency of his evidence …" The Supreme Court was however divided on

> the point, and the High Court observed that this "may be thought to underscore the highly subjective nature of demeanour-based judgments": [49]. The High Court allowed the appeal and quashed Cardinal Pell's convictions, on the basis that, assuming the witness's evidence to have been assessed by the jury as "thoroughly credible and reliable", nonetheless the objective facts "required the jury, acting rationally, to have entertained a doubt as to the applicant's guilt": [119].

72. The conclusions Warby J pithily expressed at [42] were as follows:

> "42 … It is an error of principle to ask 'do we believe her ?' before considering the documents … Reliance on a witness's confident demeanour is a discredited method of judicial decision making …"

Grounds of appeal: discussion

73. I have two detailed and lengthy Skeleton Arguments from Mr McCartney and Ms Hearnden (70 pages and 35 pages respectively). They contain a great number of points. Both go into a great deal of granular detail about the evidence in these protracted proceedings. In his oral submissions Mr McCartney highlighted particular evidential issues; I have had regard to those, and also the broader way in which he advanced the appeal in his Skeleton Argument. I have also carefully considered Ms Hearnden's reply.

(1) Did the Tribunal fail to have any, or sufficient regard, to Mr Khan's good character ?

74. Mr McCartney's first ground of appeal is that the MPT failed to have any, or any adequate regard, to Mr Khan's good character. He points out in his Skeleton Argument at [37] that the only reference to it came in [70] of the Determination, where the Tribunal said it was 'mindful' of his good character. But by then it had already found proved two of the allegations made by Miss D and that they had been sexually motivated.

75. Mr Khan was a man of positive good character and adduced written character evidence from ten individuals. A fellow consultant, Mr Nur, gave oral evidence and a statement was read from another consultant, Mr Aly Ismaiel).

76. The flavour of the good character evidence is given by the following.

77. A physiotherapist Carolyn Clay who knew and worked with Mr Khan for over 20 years said:

> "Mr Khan was always very personable and easy to get along with. He was softly spoken and never raised his voice. I never heard a cross word from him. He was never aggressive or inappropriate in any way (verbally or physically) towards me and I have never seen him behave in an inappropriate way towards anyone else.
>
> …

> I found Mr Khan to be firm in his resolve but always fair. Mr Khan has never invaded my personal space and he has never made me feel uncomfortable."

78. Stacey Whitaker, a health care assistant at the Trust for 27 years, who worked with Mr Khan for 13 of those years said in a statement prepared for the Employment Tribunal proceedings:

> "8. Over the years I have been witness to conversations and behaviour between Mr Khan and all grades of staff from Junior Doctors and Nursing staff to Senior Consultants and Management and only found this to be of a professional manner and context. Colleagues have very high regard for Mr Khan.
>
> 9. I perceive no problems with Mr Khan returning to work in Barnsley Hospital. I am happy to work with Mr Khan when he returns."

79. Mr Mark Price, a consultant orthopaedic surgeon who worked with Mr Khan in 2015/2016 said in a letter dated 20 March 2018 prepared for the Tribunal proceedings:

> "I would like to point out that not only did I have no problems with Mr Khan no concerns at any time were raised by any of my consultant colleagues. Also I think it is worth noting that, without prompting, one or two female members of the theatre team of their own volition chose to approach me and tell me how helpful and professional Mr Khan had been during [what] were some challenging trauma cases."

80. Mr McCartney also pointed to the evidence of Ms Bushby and Ms Taylor that Mr Khan had never behaved inappropriately towards them, and that he liked quiet and calm in the operating theatre and discouraged 'idle chat' (my phrase) during operations. Mr McCartney said these matters bore on the question of Mr Khan's good character.

81. Counsel who appeared at the Tribunal hearing (Mr Claxton for the GMC, Mr McCartney for Mr Khan) agreed a joint note of legal directions ('Joint Submissions as to the Applicable Law'). Good character was addressed at [5]-[7] (sic):

> "5. The case of *HCPC v Wisson* [2013] EWHC confirmed the relevance of a professional person's character in the resolution of factual allegations. Good character evidence could be relevant to a decision on conduct, especially where credibility was in issue. *Donkin v Law Society* [2017] EWHC 414 (Admin) was followed: good character is a factor to be taken into account by a panel when they are assessing whether a registrant's evidence was to be believed and whether it was likely he had done what was alleged.

6. The Crown Court Bench Book, which provides guidance to judges in relation to the legal directions to juries in criminal trials, provides the following specimen directions:

> ‘Good character is not a defence to the charge he faces but it is relevant to your consideration of the case in two ways. First, the defendant has given evidence. His good character is a positive feature of the defendant which you should take into account when considering whether you accept his evidence. Secondly, the fact that the defendant has not offended in the past may make it less likely that he acted as is now alleged against him. What weight should be given to the defendant’s good character on the facts of this particular case is a decision for you to make. In making that assessment you are entitled to take into account everything you know about him.’

7. The parties are agreed that Mr Khan’s character is a relevant feature of the evidence in this case and that the Tribunal should direct itself in accordance with the Bench Book direction extracted above.”

82. The Tribunal were addressed by Mr Claxton as follows (Day 24, p12):

> “Lastly some final remarks. The legal document to which I will refer you shortly deals with some subjects that I wish to end on. First, Mr Khan’s character. You should, in fairness to him, take his good character into account in the way described. You should also bear in mind that good character supports a defence but is not itself a defence. You should also bear in mind that good character is indirectly a feature of the GMC’s case. By that I mean when I started by saying Mr Khan abused his position, that is he used his status to protect against complaint. But that status was itself a function of his character and standing within the hospital. Second, if you were to find an allegation of sexual touching proved, the GMC submits that that would evidence a tendency to engage in unwanted sexual touching and that in turn could lend support to other allegations. But third, while the question of sexual motivation requires a separate consideration, and you should give it separate consideration, in relation to the majority of charges all but those within 1 and 3 that I have referred to already the nature of the touching and the things said is, in my submission, demonstrably and obviously pursuant to a sexual purpose.”

83. Mr McCartney in his closing submissions took issue with Mr Claxton's argument that somehow Mr Khan's good character supported the GMC's case, and urged the Tribunal to follow the agreed written direction on it (Day 24, p16).

84. The legally qualified Chair (and Ms Hearnden emphasised his legal qualification) gave the following direction to the Tribunal (Day 25, p30):

> "Mr Khan has chosen to give evidence. We must judge that evidence by precisely the same fair standards as we apply to any other evidence in the case. Mr Khan is of good character, he has no disciplinary matters proved against him. Good character is not a defence to the allegations Mr Khan faces but it is relevant to our consideration of the case in two ways. First, Mr Khan has given evidence; his good character is a positive feature of Mr Khan which we should take into account when considering whether we accept his evidence. Secondly, the fact that Mr Khan is of good character and has no previous disciplinary findings against him may make it less likely that he acted as is now alleged against him.
>
> What weight should be given to Mr Khan's good character on the facts of this case is a decision for us to make. In making that assessment we are entitled to take into account everything we know about Mr Khan. Overall, then, where there is a dispute we should decide what evidence we accept and which we reject. It is always a matter for us to decide what weight we attach to the evidence before us."

85. Ms Hearnden submitted in the light of this direction and the submissions it had been given, it could not be said that the Tribunal failed to have due regard to Mr Khan's good character.

86. It is now clearly established that, just as in a criminal trial, in professional disciplinary proceedings good character is relevant to both credibility and propensity: *Donkin*, supra, [24]-[25]. In *Bryant v Law Society* [2009] 1 WLR 163, [158]-[163] the Tribunal expressly declined to consider good character evidence in this way, relying on *R (Campbell) v General Medical Council* [2005] EWCA Civ 250. The Divisional Court said this failure was a 'significant legal error' and quashed the finding of dishonesty made against Mr Bryant. Recently, in *Martin v Solicitors Regulatory Authority* [2020] EWHC 3525 (Admin), [51]-[52], the Divisional Court said:

> "51. There was no dispute before the Tribunal that Ms Martin was of good character: she had an unblemished regulatory record before these matters, and many positive professional and personal testimonials. She had achieved and pursued all her professional endeavours while at the same time taking responsibility for supporting her family financially, first as the primary breadwinner and, from 2014, as a single mother of children born in 2000 and 2004. Since evidence of good character is relevant to credibility and propensity (and not just to sanction), Ms Newbegin

> submitted that it was an error for the Tribunal to make no reference to Ms Martin's good character when dealing with allegation 1.1. Moreover, the fact that seven allegations were rejected with findings being made that were consistent with her evidence, and the inherent unlikelihood of Ms Martin risking everything for the sake of a relatively small sum, meant that the Tribunal was wrong to discount Ms Martin's evidence as it did.
>
> 52. Mr Wheeler did not dispute before the Tribunal (or before us) that evidence of good character is relevant to credibility and to propensity in relation to allegations of dishonesty: *Donkin v Law Society* [2007] EWHC 414. However, he submitted that the significance of such evidence ought not to be overstated and should not detract from the primary focus on the evidence directly relevant to the alleged wrongdoing. We agree."

87. I accept Mr McCartney's submission that the Tribunal's reasons do not contain a self-direction on good character, and that the first time Mr Khan's character was mentioned was at [70], by which time the Tribunal had (a) found a number of Miss D's allegations proved; (b) found them to have been sexually motivated; and (c) had rejected Mr Khan's account. The question, it seems to me, is whether the absence of a good character direction vitiates the Tribunal's decision on the basis that it must therefore be inferred that it did not take Mr Khan's good character properly into account.

88. I unable to say that it does. Nor do I accept Mr McCartney's oral submission that the Determination has to be read as meaning the Tribunal only took good character into account when Mr Khan was advancing a positive case, as opposed to when he was simply denying an allegation.

89. As a general rule, it is not readily to be assumed that a judge at first instance has failed to apply well-understood principles even when they are not directly set out in his/her judgment: *Piglowska v Piglowski* [1999] 1 WLR 1360, 1372G. In my judgment, that principle applies with particular force in this case. Given (a) the agreed written directions of law which the Tribunal had; (b) Mr Claxton's express acceptance of the relevance of good character in those written directions; (c) Mr McCartney's submissions which also referred to the relevance of good character; and (d) the legally qualified Chair's direction to the Tribunal how Mr Khan's good character was to be approached, it is impossible to infer that the Tribunal must then have wholly left it out of account.

90. In *Vitalis v Nursing and Midwifery Council* [2017] EWHC 3281 (Admin), [21]-[25] the absence of a good character directions was held not to be fatal to the Tribunal's findings on the particular facts. In *Shaw v Logue* [2014] EWHC 5 (Admin), [180]-[182], a decision Ms Hearnden referred me to, the appellant Mr Shaw had a long and distinguished career as a solicitor and adduced substantial good character evidence. The Solicitors Disciplinary Tribunal made no express reference to this evidence in its findings and it was submitted on Mr Shaw's behalf that the Tribunal must have paid no, or no adequate regard to it. Jay J said at [182]:

> "182. The issue on this appeal is whether there is a substantial doubt as to whether the SDT bore Mr Fenwick's

> submissions in mind and had regard to the good character of the Appellants as relevant to the issues of credibility and propensity. In my judgment, there is no such doubt. The SDT is an expert, professional jury which does not need the sort of 'good character direction' one sees in criminal trials (and neither counsel sought to give one), and does not need to have demonstrated that it took the Appellants' good character into account by express reference to these trite principles in the body of its Judgment. It is obvious to anyone experienced in this line of work that the SDT, in the light of both Appellants' history and the inherent unlikelihood of an experienced solicitor such as Mr Shaw seeking to place his career in jeopardy, would be very slow to find subjective dishonesty, unless driven by the evidence to do so. Put in these terms it may be appreciated that Mr Fenwick was right to emphasise these cogent commonsense factors (see paragraph 156.44) rather than the testimonial evidence, which in my judgment added very little to the overall picture."

91. This approach was approved by the Court of Appeal in *Wingate v Solicitors Regulatory Authority* [2018] EWCA Civ 366, [167]:

> "167. The tribunal was aware that Mr Malins was of previous good character. The tribunal received character references and had them in mind. Unfortunately, in a case such as this a solicitor's previous good character can do little to mitigate the seriousness of his misconduct or the sanction that must follow. This case is very different from *R (Campbell) v GMC* [2005] EWCA Civ 250; [2005] 1 WLR 3488 and *Donkin v Law Society* [2007] EWHC 414 (Admin), upon which Ms Morris relies. The Solicitors Disciplinary Tribunal is not obliged to give itself a good character direction of the kind that Crown Court judges routinely give to juries in criminal trials: see *Shaw v Logue* [2014] EWHC 5 (Admin) at [180]-[182]."

92. From these authorities I derive the following. Whilst a disciplinary Tribunal must take good character evidence into account in its assessment of credibility and propensity, *Donkin*, supra, and *Bryant*, supra, show it is an error not to do so, it is not required slavishly in its reasons to give a self-direction to that effect (although if it does do so, there can be no room for argument – a proposition Ms Hearnden did not disagree with). It is sufficient, where the matter is raised on appeal, if the appeal court is able to infer from all the material that the Tribunal must have taken good character properly into account. That is the conclusion I reach in this case. It would be simply unrealistic to suppose that the Tribunal overlooked it, given what it had received orally and in writing including, most importantly, a clear direction from its legally qualified Chair, who was a constituent member of the Tribunal. In *Donkin*, supra, Maurice Kay LJ said at [25] that, 'I am not satisfied from the text of the stated Reasons that [good character] played any part in its consideration of dishonesty.' That, it seems to me, was a conclusion on the particular facts of that case. I have concluded that is not the situation here.

93. I therefore reject the first ground of appeal.

(2) Did the Tribunal misstate the evidence, omit to consider other material evidence, fail to resolve significant conflicts in the evidence and/or come to conclusions on the facts which did not reflect the available evidence ?

94. As I indicated, Mr McCartney broke this ground of appeal down into a number of sub-grounds.

(i) Did The Tribunal deal adequately with the evidence of Nicola Bushby and Katie Taylor ?

95. Mr McCartney pointed out that Nicola Bushby and Katie Taylor were both called as witnesses of truth by the GMC. Both were nurses at the Trust who worked with or alongside Mr Khan. Miss D made her first complaint to Ms Bushby, who was also called as a prosecution witness in the criminal trial. At no stage in the proceedings was it ever suggested to either witness by the Tribunal that they were untruthful, mistaken or inaccurate. Nicola Bushby stated that she had never received any complaint about Mr Khan of the type of inappropriate behaviour alleged. Katie Taylor confirmed in her GMC statement that she had never been subject to any untoward behaviour from Mr Khan. Both gave evidence of how he expected people to behave in theatre, namely that he liked quiet; did not like 'chitter chatter'; and did not like music. They both also denied Miss D's evidence that they would tell Mr Khan to 'fuck off' when he behaved sexually towards them.

96. Mr McCartney said the evidence of both witnesses was either ignored by the Tribunal, simply acknowledged or disregarded on a basis never ventilated in the proceedings, in the manner deprecated by Warby J in *Dutta*, supra, [35]-[36].

97. In reply, Ms Hearnden did not respond to this argument in terms but considered the Tribunal's approach to their evidence as it impacted on Miss D's account (in essence, sub-ground (iii)). She defended the Tribunal's reasoning and conclusions on this topic (Skeleton Argument, [40]-[53]).

98. I think Miss Hearnden's approach of considering Ms Bushby's and Ms Taylor's evidence in relation to Miss D's credibility is the right one, however I propose to deal with it in relation to sub-ground (ii) rather than (iii).

(ii) Did the Tribunal place undue reliance on witnesses' demeanour in judging their credibility, in contravention of the principles in Dutta, supra ?

99. This issue was addressed in Mr McCartney's Skeleton Argument at [41]-[42] and in Ms Hearnden's Skeleton Argument at [37]-[39]. As I shall explain, it links to some of the points on the evidence which both parties emphasised in their oral submissions.

100. Mr McCartney submitted that the Tribunal had fallen into error by placing too much – or indeed any - reliance on its subjective assessment of the three complainants' demeanour in giving evidence when assessing whether their credibility and whether their allegations had been proved. He referred me to the passages from *Dutta* that I set out earlier in support of his argument the Tribunal had erred. He also argued – and this was the focus of his oral submissions – that the Tribunal had not properly addressed important evidential matters going to the three complainants' credibility.

101. He said the most obvious example of this flawed approach was the way in which the Tribunal had dealt with Miss C's evidence. At [124], right at the start of the section of the Determination dealing with Miss C's complaints, but before it had considered any of the evidence in detail, the Tribunal said it had 'first considered Miss C's credibility …'. Then, at [126], it said it 'had been in a position to make its own assessment of her demeanour throughout'. It then described her at [135] as having given a 'genuine, sincere and credible account' in relation to matters other than her authorship of the anonymous letter.

102. Mr McCartney said that, taken as a whole, it was clear that on a number of occasions Miss C had evidenced a genuine intent to deceive which had to be properly dealt with. He said that judging Miss C's veracity simply or mainly on her demeanour was plainly wrong in any event, but it was particularly insufficient given what he described as the 'dramatic' evidence of her previous dishonesty.

103. In relation to Miss D, he pointed to [40], where the Tribunal said at the outset that Miss D was 'credible and consistent', despite discrepancies in her evidence which the Tribunal had not addressed. I will come to these later.

104. In relation to Miss A, he pointed to [91], where the Tribunal described her as 'confident, credible' and 'sincere and consistent'. He also relied on at least one evidential conflict which potentially had a bearing on Miss A's credibility which the Tribunal had failed to resolve.

105. In reply, Ms Hearnden said that the caution urged in *Dutta*, supra, and the other decisions related to *over*-reliance on demeanour as a barometer of truth or reliability. She said there was no justification for suggesting that the Tribunal had elevated demeanour above other factors to favour the complainants' evidence. She said that it had, instead, undertaken a careful analysis of what was said in the complainants' written and oral evidence, the credibility of their accounts, and any inconsistencies within or between witness accounts. As I have said, she emphasised [21(3)-(5)] of *Dutta* in support of her argument. She emphasised in her oral submissions that the Tribunal had made a 'judgment call' about Miss C's credibility following consideration of a great deal of evidence and that it had been open to the Tribunal to conclude that on the central allegations she was telling the truth, her lie about the letter notwithstanding. She said it would be a 'dangerous encroachment into the arena' for me to take a different view simply based on a review of transcripts and submissions alone.

106. I have anxiously considered this ground of appeal and I have concluded there is force in Mr McCartney's submissions, the broad thrust of which I agree with. I understand Ms Hearnden's submissions, and have considered them carefully, and she is right to say that it was open to the Tribunal not to rule out the whole of Miss C's evidence simply because she had admitted to lying on oath previously. I expressly agreed in oral submissions that it is open to a fact-finder, depending on the facts, to conclude that although a witness has lied about X, it believes her in relation to Y; in other words, credibility can be divisible. Ms Hearnden was also right to urge caution on my part. However, it seems to me that given Miss C's proven willingness to lie on oath, the most careful and accurate scrutiny of her evidence was called for, adopting proper fact-finding methodology. To be fair to the Tribunal, it said something similar at [125]. But I have concluded that the Tribunal's reasons betray significant errors of reasoning. I emphasise that I am not substituting my own view of the facts for that of the Tribunal. I am *not*

concluding that the Tribunal should have concluded that Miss C was not capable of belief about anything. What I have concluded is that the Tribunal adopted a fundamentally erroneous methodology in its approach to the evidence, such that its Determination cannot stand. As I shall explain, the Tribunal's reasons violate principles that have been clearly set out in the case-law.

107. In relation to Miss C, the Tribunal's approach was first to consider her credibility generally (at [124]-[136]) and, having done that, and found her to be 'genuine, sincere' and 'credible' ([135]), to consider the individual allegations against Mr Khan at [137]-[173]. But by then its conclusions were foregone because of what it had already decided in the first section that she was 'genuine'. When its reasons for concluding that Miss C was 'credible' are examined, it is clear that the Tribunal fell into the precise trap which *Dutta*, supra, warned against.

108. By beginning with the question of her credibility generally and without reference to the specific allegations she had made ('The Tribunal first considered Miss C's credibility as a witness …' (at [124])), it seems to me that the Tribunal was, in effect, beginning its analysis by asking 'Do we believe her … ?', which is the very thing which Warby J said in *Dutta*, supra, at [42] should not be done.

109. True it is that the Tribunal then went on to consider her lies about the anonymous letter. However, its analysis was flawed because in deciding she was telling the truth about everything other than the letter it appears to have based its conclusion very significantly on her 'demeanour' and the fact she had been 'adamant' ([126]), as well as its assessment that she was 'genuine' and 'sincere' ([135]). All of these were subjective assessments and the latter two observations begged, to a large extent, the very question the Tribunal had to decide, namely: had the GMC proved each allegation made by Miss C on the balance of probabilities ?

110. The Tribunal's language shows that its reasons were based in significant part on the twin fallacies that 'the more confident another person is in their recollection, the more likely it is to be accurate' and 'because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth' *(per* Gestmin, supra). I also consider its reasons violated Warby J's second stricture in *Dutta*, supra, [42], that 'Reliance on a witness's confident demeanour is a discredited method of judicial decision making'. That must be all the more so in the case of a witness who had admitted lying on oath on a previous occasion.

111. Mr McCartney attacked the Tribunal's reasoning in this section on another basis. He said its reasons for upholding Miss C's credibility did not bear scrutiny, or that - at least - it had not properly grappled with evidence which had the potential to undermine her credibility. He pointed to [130]. Miss C, who is gay, said that Mr Nur, a Muslim consultant, had 'brought her' a Koran and 'asked me to read the Koran and that God would forgive me …'. The only reasonable interpretation of her evidence was that she was saying Mr Nur had given her a copy of the Koran to take away and read, as opposed to, for example, simply bringing one in to show to her. Mr Nur in his evidence said that he had 'never given anybody a copy of the Koran'.

112. Mr McCartney said this was a stark clash in evidence and that both accounts could not be true. He said that if Mr Nur's account were to be preferred then it seriously undermined Miss C's credibility because it was a further lie by her. He said that the Tribunal's attempt to explain away the conflict on the basis that 'each form of words [ie, give v

brought] was open to a different interpretation', and thus that this matter did not undermine Miss C's credibility, was unsustainable. I also have some difficulty in following the Tribunal's reasoning on this point.

113. He also said that the Tribunal had not properly dealt with the conflict of evidence between Miss C and a Ms Foster, a Trust employee who had given evidence at the ET reinstatement proceedings and in 2016 had made a witness statement. In that witness statement, she said that Miss C had given her the following oral account in 2013 of the 'locker room' incident:

> "Mr Khan was dressed in theatre scrubs and once inside the changing room pulled his trouser waistband down to show her his penis, commenting 'it is a pity your gay, just look at what you're missing.' [Miss C] told me she said to Mr Khan 'Fuck off' she laughed at him and left the male changing room. She didn't say he followed her or said anything else to her."

114. Miss Foster was adamant before the MPT that Miss C had given that account ('That is exactly what I was told'). Miss C said she had said no such thing. In response to the question, '… Ms Foster has got that entirely wrong ?' she replied, 'Absolutely'.

115. Mr McCartney said this was another direct conflict of evidence bearing on Miss C's credibility, which the Tribunal had not grappled with. At [160]-[161] the Tribunal resolved this issue in Miss C's favour, saying it accepted her 'cogent and detailed description of the incident'. The Tribunal did not in terms explain why it rejected Ms Foster categorical evidence, although implicit in its reasoning seems to be the suggestion that she was simply mistaken because (as she accepted) she had written her statement three years after the conversation without the benefit of contemporaneous notes.

116. But it seems to me the problem with the Tribunal's reasoning on this issue is that by the time it came to consider it, it had already declared that Miss C was a credible witness who had told the truth about everything other than the anonymous letter. To that extent, its conclusion as to who was telling the truth on this issue (Ms Foster or Miss C) was preordained. Having declared Miss C to be credible and truthful on everything but the letter, it was hardly likely then to conclude that Ms Foster was truthful on this issue and Miss C was not.

117. The Tribunal said at [135] (emphasis added):

> "135. *Having considered all of the evidence before it,* the Tribunal was not persuaded that Miss C's admission that she lied about the authorship of the anonymous letter was sufficient, of itself, to undermine her credibility …"

118. But the Tribunal, at that stage, had *not* considered all of the evidence before it, as I have explained. As well as the 'Ms Foster issue', further, and obviously, it had not considered Mr Khan's evidence in which he denied Miss C's allegations and given reasons why they could not be true: see, eg, his witness statement at [114]-[131]. It had simply looked at Miss C's evidence alone and, as I have said, based in significant part on the *way she had given that evidence* – an impermissible approach - had decided she was telling the truth before it had even begun to consider the specific allegations she had made. The fundamental point is that the Tribunal could not have reached a reliable conclusion on

Miss C's credibility without considering, as part and parcel of that determination, all of the evidence which went to the question of credibility. That, it did not do.

119. I think it is obvious that the Tribunal's general conclusion that Miss C was credible (ie, telling the truth) meant that its findings on each of her allegations against Mr Khan were a foregone conclusion. This is amply illustrated by the Tribunal's reasons for finding allegation [5] proved (putting his hand on Miss C's vagina). It said at [147]:

> "147. The Tribunal has expressed its concerns about the truthfulness of Mr Khan's evidence. *It has accepted Miss C's evidence as credible and sincere in relation to matters other than her authorship of the anonymous letter …"*

120. This paragraph shows that the Tribunal's conclusion at [135] about Miss C's credibility was not a form of headline summary of its later conclusions. It was a free-standing conclusion which then coloured (and, as I have said, pre-determined) its conclusions in relation to her allegations.

121. Although Mr McCartney did not quite put the matter this way, there is an argument that the way the Tribunal approached these allegations came close to reversing the burden of proof. By declaring Miss C to have given a 'genuine, sincere and credible' account on her evidence alone (but without consideration of her specific evidence on each allegation, Mr Khan's evidence), it might be said to have put the burden on Mr Khan then to displace that credibility conclusion in respect of her specific allegations. I need not decide this issue on that basis, however. It seems to me that the Tribunal's reasons were fundamentally flawed, for all of the reasons I have given.

122. I turn to Miss A. I think similar criticisms can be made of the Tribunal's reasoning about her evidence. Whilst not as stark as in Miss C's case, it does appear that the Tribunal made, at the outset, a global assessment that she was telling the truth based impermissibly on her demeanour. That is because, as I have already said, in the second paragraph of its discussion ([91]) it described her as 'confident, credible' and 'sincere and consistent'. Again, it seems to me that this approach displays one of the errors of reasoning identified in *Gestmin*, supra, namely that it is wrong to suppose 'the more confident another person is in their recollection, the more likely it is to be accurate'. The Tribunal also referred to its (necessarily subjective) assessment that when giving evidence she had showed 'wearied resignation' to Mr Khan's behaviour towards her, in terms which suggested that the Tribunal believed that this somehow supported the veracity of her account.

123. Mr McCartney pointed to a particular piece of evidence bearing on Miss A's credibility which he said the Tribunal had not grappled with. Miss A said that when she complained on the telephone to DC Bowling about Mr Khan's conduct, DC Bowling replied, 'He sounds like an innocent man to me' and then the phone went dead. DC Bowling flatly denied saying any such thing. There was thus a direct conflict in evidence between two of the GMC's witnesses. I agree that how this issue was resolved had a direct bearing on Miss A's credibility and thus that the Tribunal needed to confront it, and resolve it, as part of its assessment of Miss A's credibility.

124. The justifiable criticism can be made that this general, globalised assessment based on Miss A's demeanour infected the Tribunal's assessment of her allegations. This can most clearly be seen in [119], the 'bone lever allegation', where the Tribunal said, 'As

explained earlier in this determination, the Tribunal found Miss A to have given a sincere and cogent account and it was concerned about the credibility of Mr Khan's account'. I read this to be a reference back to the Tribunal's initial assessment that she was 'confident and credible'. It is another example of the Tribunal using an earlier general finding of credibility as support for a particular allegation.

125. In relation to Miss D, the Tribunal said that her answers had been 'consistent' ([40]), and went on to make the bald assertion that she was 'credible' again before it had considered any of the evidence relating to her allegations and how they had emerged, and the evidence which tended to undermine her credibility. Whilst perhaps not as obviously wrong as its approach to the other two complainants, this, it seems to me, was tantamount to the Tribunal asking at the outset whether it believed her, which it should not have done: *Dutta*, supra, [42].

126. Mr McCartney submitted there was evidence bearing on the question of Miss D's credibility which had to be dealt with properly as part of the assessment of her credibility, but was not. During oral submissions I asked what his best point was on this. He said it was the conflict between Miss D on the one hand, and Ms Bushby and Ms Taylor on the other, about a particular remark she said one or other made in her presence when she was making her initial complaint about Mr Khan on 23 May 2013. Miss D said in evidence that she was '100% certain' that after she had first complained about inappropriate touching, one or other of Ms Bushby and Ms Taylor had said, 'Oh, when Mr Khan does that, we just tell him to fuck off'. (D3, p27). Both Ms Bushby and Ms Taylor denied any inappropriate behaviour by Mr Khan towards them. Also, both women denied in the strongest terms ever saying anything like that. Ms Taylor said she would never speak to a consultant in such a way (D3, p94):

> "Q. … Did you hear Nicola Bushby say, 'We just tell him to fuck off' ?
>
> A. No.
>
> Q. Did you say that ?
>
> A. No.
>
> Q. Would it be language you would ever use to a consultant ?
>
> A. Absolutely not and especially not Mr Khan."

127. Ms Bushby was equally emphatic (D3, pp72-73):

> "Q. … It has been suggested at one point that either you or Katy Taylor when you were together said, 'Mr Khan does this, we just him to fuck off'. Would you ever say that to a consultant ?
>
> A. No. I would never say that to a consultant, nor would I ever encourage a member of staff to say that to a consultant – ever.
>
> Q. So if I suggest to you that anybody asserting that is just

complete nonsense ? (sic)

A. Absolutely, absolutely. I would be sacked !"

128. Mr McCartney said that this conflict of evidence was of vital importance. That was for two reasons. First, because on Miss D's account it showed Mr Khan to be someone who had behaved in a sexual manner towards other women besides her, Miss A and Miss C, whereas if Ms Taylor and Ms Bushby were to be believed, he was someone who behaved appropriately as far as his professional dealings with them were concerned. Second, he said it also went directly to Miss D's credibility because, if the Tribunal concluded that Ms Taylor and Ms Bushby were telling the truth, it led to the conclusion that Miss D was someone who was prepared to embellish her account of events, which was precisely what she was accused of doing regarding the physical contact with Mr Khan which he said had been entirely innocent and non-sexual but had been embellished by Miss D.

129. I accept Mr McCartney's submission that this evidence had a direct bearing on Miss D's credibility. It was not open to the Tribunal baldly to declare at the outset, before considering any of the evidence in detail, that Miss D was 'credible'. In any event, when the Tribunal did deal with the alleged remark at [59], it misstated the evidence. It said that 'Miss Taylor had no recollection of saying this and had joined the meeting after it had begun. Miss Bushby denied saying it'. As I have quoted, Ms Taylor's evidence was *not* that she had 'no recollection' of saying it: she categorically denied saying it, as did Ms Bushby

130. Mr McCartney also pointed to other evidence that he said went to Miss D's credibility. He said that Miss D had given inconsistent accounts, in particular, her first complaint to Miss Bushby on 23 May 2013 in which she said that Mr Khan had 'brushed her breast, bottom and hugged her from behind'. Mr McCartney said this account differed markedly from the allegation she eventually made including that he had 'squeezed' her breast and ran his hand down her back and across her buttocks. Later, on 28 May 2013 in an interview with a Jos Vines, Miss D a gave an account which was much closer to the account she eventually gave to the MPT about what had happened.

131. Although there were potential explanations for the first inconsistent account given to Ms Bushby (eg, the record was not contemporaneous; and the other reasons the Tribunal gave at [64], as well as the other reasons advanced by Ms Hearnden), I agree that this evidence was *capable* of showing that Miss D was not credible and/or unreliable, and so it needed to be considered as part and parcel of the assessment of her credibility. It was a wrong approach for the Tribunal to find Miss D to have been 'credible and consistent' before it had considered any of the evidence.

132. The Tribunal was given a cross-admissibility direction, ie, a direction that if it found the allegations of one complainant proved, and was satisfied that that established a propensity on his part to engage in unwanted sexual touching, then that propensity could be taken into account in determining whether the other complainants' allegations were proved: Joint Submissions as to the Applicable Law, [3]; Day 24/13; Day 25/29. The Joint Submissions said at [3]:

"If after giving consideration to one of the allegations arising out of the evidence of one of the complainants, and if you found that allegation proved, you should go on to consider whether that

> proven allegation is capable of establishing a propensity to act in that manner – ie, to engage in unwanted sexual touching of female colleagues. If you were to conclude that such a propensity was established, this is capable of supporting the GMC's case in relation to other allegations …"

and reference was then made to *R v Chopra* [2007] 1 Cr App R 16 and the specimen direction in Chapter 12 of the Crown Court Bench Book.

133. The Tribunal did so conclude. At [123] it said:

> "The Tribunal noted in its findings in relation to Miss A that there was a pattern of repeated sexually motivated behaviour. The pattern found proved with Miss A was similar to the sexually motivated behaviour found proved with Miss D. The Tribunal considered whether this demonstrated a tendency on the part of Mr Khan to act in this way. Given its findings of sexually motivated inappropriate touching of work colleagues, the Tribunal could come to no other reasonable conclusion than that there was sufficient connection between the facts it found proved in relation to Miss D and Miss A to demonstrate a propensity in Mr Khan to act in this manner."

134. The Tribunal used this supposed tendency to uphold Miss C's allegations. It said at [141]:

> "The Tribunal accepted as genuine Miss C's specific account of these incidents, what she was doing and where they occurred, and determined that Mr Khan's account could not be relied upon. The Tribunal had already established that Mr Khan has a tendency towards this type of conduct, which supported the evidence it has relied upon in relation to this sub-paragraph of the Allegation. It found sub-paragraph 4a of the Allegation proved."

135. At [162], again in relation to Miss C, it said:

> "The Tribunal determined that although the evidence was sufficient to find sub-paragraph 6a proved of itself, it found support in the evidence of Mr Khan's tendency to this type of behaviour. It therefore found sub-paragraph 6a of the Allegation proved."

136. Given the Tribunal's application of the cross-admissibility principle, it might have been sufficient to quash the Determination if I had found the Tribunal's reasons flawed in respect of just one of the complainants, because that might have been said to have undermined the Tribunal's whole chain of reasoning. However, I have found its approach to the evidence of all three complainants to have been erroneous. For these reasons, I consider that the Tribunal's Determination was based on a fundamentally flawed approach and that it cannot stand and must be quashed. It follows that the finding of impairment and the sanction which flowed from the Determination cannot stand and are also quashed.

Other matters

137. This conclusion makes it unnecessary for me to consider the other sub-grounds of appeal advanced by Mr McCartney. Resolution of them would require delving minutely into the eight volumes of material supplied on behalf of Mr Khan on the appeal and a close analysis of what exactly was said (or not said) in evidence during the 35 or so days of testimony and submissions. That would not be proportionate.

138. For the reasons I have given, this appeal is allowed and the sanction of erasure is quashed. I invite counsel to draw up a suitable order.