IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION THE ADMINISTRATIVE COURT **[2018]**

EWHC 505 (Admin)
CO/5275/2017 Royal Courts of Justice
Wednesday, 21st February 2018

Before:

MR JUSTICE MOSTYN

B E T W E E N :

BASSON — Appellant

- and -

GENERAL MEDICAL COUNCIL — Respondent

MR A COLMAN (instructed by RadcliffesLeBrasseur) appeared on behalf of the Appellant.

MR I HARE QC (instructed by GMC Legal) appeared on behalf of the Respondent.

J U D G M E N T

MR JUSTICE MOSTYN:

1 The appellant qualified as a doctor in 1987 in South Africa. He came to this country to work in 1994. He obtained the GP qualification in 2001, and has been a partner in his present practice since 2007. He has enjoyed an unblemished career, and no complaint

of inappropriate conduct had ever been made against him before the one with which I am concerned.

2 I am concerned with the events of 25th July 2016. On that day, the appellant saw a patient. She later that day alleged that the appellant had fleetingly touched her right leg when there was no reason to do so, and at virtually the same time had asked the patient whether she was on her way to work, and on being told that she was, commented, "that is the reason for the short skirt then".

3 The patient said that the appellant did this and said this, having moved round to sit next to her in order to take her blood pressure, and that while he did so, he maintained eye contact with her which she found "unnerving".

4 The patient reported this conduct to the GMC on the same day. She also reported the matter to the police. In a statement made to the police on 8th August 2016, that is to say about two weeks after the event, she stated: "I think it was done in a sleazy way and sexual".

5 In a witness statement in the disciplinary proceedings on 12th May 2017, she stated: "I felt that it was sleazy."

6 And in her oral evidence to the tribunal on 16th October 2017, she stated:

> "I did not feel like it was an innocent touch; I felt like it was sexually motivated to touch my knee in a place... There was no reason to touch my leg and especially of an intimate place that I did not invite. It was the only word I could use to describe it would be of a sexual motive and it was sleazy. That is how I felt from it."

7 The appellant was interviewed by the police on 12th August 2016. It seems to be agreed that he was not aware of the allegations against him until shortly before that interview. In his interview he explained that as a busy GP he sees around 200 patients per week. Therefore, he would have seen around 600 patients between the events in question and the allegations being brought to his notice. His position at interview was that he had no recollection of this consultation with this patient.

8 In a letter to the GMC on 8th October 2016 he maintained that position. He stated: "I cannot remember the episode at all.

9 In his witness statement dated 3rd October 2017 he stated: "I cannot recall why she had attended the surgery or 25 July 2016, or anything about the consultation itself." 10 In his oral evidence to the tribunal, he stated "I cannot remember the incident".

11 Therefore, all of his evidence, both written and oral, about the events in question, was conjectural. The appellant was informed by the police on 15th August 2016 that there was no case to answer and the matter would not be taken further. However, the appellant rightly was not prepared to dispute the veracity of the core facts alleged by the patient in the disciplinary proceedings. Therefore, in a letter dated 22nd January

2017, written to the GMC, he admitted: "inappropriately touching the inside of the patient's knee" but denied

sexually assaulting her. He admitted making the remark about her short skirt, but stated: "I can't see anything wrong with it." In his "reflective" statement made in July 2017, he stated:

> "The touching of her leg on the inside of her knee that followed was totally unwarranted - it was non clinical touching that has no place in medicine and simply should not have happened. It was me coming down to the level of a patient in a vulnerable position without even realising it and acting totally inappropriately. Bearing in mind that the patient is lady in her late twenties, I can understand that people may think it was sexually motivated. This did not occur to me at the time. The police officer described it as a laddish act. That is probably an apt description. The patient was shocked by the act and I can't blame her for it. She was in a vulnerable position and to be subjected to treatment like that was certainly wrong and she was right to be shocked by the experience - it simply should not have happened."

12 Under cross-examination before the tribunal, the appellant admitted that his touching of the patient was inappropriate because it came from a person in a massive position of power to a

person who was in a totally vulnerable position. Moreover, the appellant accepted that it had sexual connotations. The conduct would not have been perpetrated by him on an elderly patient or on a mother attending with a child. The appellant admitted that his comment about the short skirt was totally inappropriate, non-clinical, and nothing to do with the consultation.

13 Before the tribunal, the core concrete facts were admitted and, therefore, agreed. The appellant admitted that he had inappropriately touched the patient, as alleged, and that he had made the comment about the short skirt. In admitting that the touching was inappropriate, the appellant was going so far as to accept that his touching was non-clinical. The issue, indeed, the only issue for the tribunal, in terms of its primary determination, was the state of mind of the appellant. It was alleged that the appellant did what he did and said what he said with a sexual motive. This, the appellant vehemently denied.

14 The tribunal decided that what the appellant did and said was done with a sexual motive. A sexual motive means that the conduct was done either in pursuit of sexual gratification or in pursuit of a future sexual relationship. The tribunal did not, in fact stipulate explicitly what the appellant's sexual motive was; inferentially they found that he behaved in the way that he did for sexual gratification.

15 In reaching its decision, the tribunal was at pains to state that it treated the appellant as a witness of honesty. It accepted his evidence that he could not remember the events in question. It reached its conclusion on the basis of all the evidence before it, including the admissions made by the appellant. The appellant appeals against that finding. He says that it represents an indelible stain on his character. This is notwithstanding that the tribunal accepted that his conduct was at the lowest end of

culpable misbehaviour of this nature. This was reflected in the sanction imposed which was of a mere 28-day suspension from practice.

16 Counsel for the GMC, Mr Hare QC, accepts that within the spectrum of sexual misconduct this was right at the bottom end and that the sanction was the most lenient that could have been awarded following a finding of sexually-motivated misconduct.

17 The appellant appeals against this finding. The question for me is whether the tribunal's finding was legitimately made. In *Edgington v Fitzmaurice* (1885) 29 Ch D 459, Bowen LJ famously said that the state of a man's mind is as much a fact as the state of his digestion.

> Therefore, in civil proceedings that fact, the state of the man's mind, is to be proved in the usual way by the necessary body of evidence on the balance of probabilities. An appellate challenge to a finding of fact is always highly demanding. However, the state of a person's mind is not something that can be proved by direct observation. It can only be proved by inference or deduction from the surrounding evidence. It has been said that the appellate challenge, where the disputed fact has been proved by inference or deduction, is less stringent than where the challenge is to a concrete finding of fact. In other cases, however, it has been said that the standard is the same.

18 I am prepared to accept that in a regulatory appeal the appellate challenge to a finding of fact derived from inference or deduction is less stringent than a challenge to a concrete finding of fact. Generally speaking, a finding of fact, whether one of a primary concrete nature or one made on the basis of inference or deduction, can only be challenged on appeal where it can be said that the finding is wholly contrary to the weight of the evidence or that there was some fault in the decision-making process that renders the finding unsafe.

19 Counsel for the appellant, Mr Colman, argues that the finding cannot tenably be upheld for
two reasons. First, it is said that in its determination, the tribunal did not reflect either the inherent improbability of the appellant's conduct or the absence of what had been described as the indicia of sexually-motivated misconduct. Secondly, it is said that having accepted the appellant was a witness of honesty and integrity, it was therefore impossible for the tribunal to have gone on to find that what he did was done with a sexual motive. That would have been at the forefront of the appellant’s mind and it would not have been possible for him to have forgotten it. In accepting his evidence that he could not genuinely remember anything about the incident, it must follow, therefore, that he did not do what he did with sexual intent.

20 I reject the first argument of Mr Colman. Before the tribunal, Mr Colman fully argued the relevant legal principles relating to the so-called inherent probabilities. He cited the leading decision of Lord Nicholls in *Re H* [1996] AC 563. It is impossible to think that these principles were not in the tribunal's contemplation when it reached its decision. A tribunal such as this does not have to spell out every argument it has received when it reaches its decision. It only has to deal with those arguments that are essential to the decision that it has to reach. I do not accept that it was essential for this

argument to be recited and anatomised in the determination. Equally, I do not accept the criticism that the tribunal failed to reflect the lack of indicia of sexual misconduct. This is a misplaced criticism because, of course, one of the traditional indicia was present, namely inappropriate comment.

21 I reject the second argument of Mr Colman also. I do not see that it follows as a matter of logic that because the appellant genuinely could not remember the consultation in question, that he could not therefore have formed, during the consultation, a low grade sexual motive in what he said and in what he did.

22 It seems to me to be perfectly plausible that there was a fleeting aberration by this otherwise impeccably behaved doctor who said what he said and did what he did with a low grade sexual intent, and that he, over the next three weeks, banished all recollection of the event from his memory.

23 The appeal is therefore dismissed.

24 In my judgment, the finding made by the tribunal was one that was available on the evidence before it; indeed, I would go further and say it would have been arguably wrong

for the tribunal to have reached any other conclusion on the controversial question than the one that it did.

25 However, I do think it needs to be spelt out, by me, that in the spectrum of misconduct of this nature, the conduct of the appellant here is at a very low level of culpability. This was recognised by the tribunal in the extremely lenient sanction that it imposed. That concludes this judgment.

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This transcript has been approved by the Judge.