



Neutral Citation Number: [2023] EWHC 1213 (Admin)

Case No: CO/4163/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/05/2023

Before :

THE HONOURABLE MR JUSTICE BOURNE

Between :

PRASHANT SANKAYE	<u>Appellant</u>
- and -	
THE GENERAL MEDICAL COUNCIL	<u>Respondent</u>

Matthew McDonagh (instructed by **Weightmans LLP**) for the **Appellant**
Peter Mant (instructed by **GMC Legal**) for the **Respondent**

Hearing date: 3 May 2023

Approved Judgment

This judgment was handed down remotely at 10am on Monday 22 May 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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THE HONOURABLE MR JUSTICE BOURNE

The Hon. Mr Justice Bourne :

Introduction

1. This is an appeal from a decision of the Medical Practitioners Tribunal dated 3 October 2022. The tribunal made a finding of misconduct and impaired fitness to practise against the appellant, Dr Sankaye, and suspended him from practice for 12 months.
2. The appeal is brought under section 40 of the Medical Act 1983. By virtue of paragraph 9 of PD52D the appeal is by way of re-hearing rather than mere review, though this Court does not re-hear the evidence. Under CPR 52.21(3) this Court can allow the appeal where the tribunal's decision was "(a) wrong; or (b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court". In this case the appellant contends that the decision was wrong, and the burden is on him to show that.
3. This Court will defer to the professional expertise and judgment of the tribunal where this is relevant to the issues on the appeal. Similarly, where findings of primary fact are challenged, as they are here, I must bear in mind that the tribunal had the advantage of the oral evidence given before it and was able to see and hear the witnesses.

The evidence and submissions below

4. The Appellant qualified as a doctor in India in 1998 and had practised in the UK since 2004. At the material time he was practising as a consultant musculoskeletal radiologist at a centre owned by Alliance Medical Limited ("AML"). The complainant was a receptionist who worked at the centre. She was experiencing back pain and had asked the appellant to carry out a diagnostic ultrasound scan as a favour. He did so on 20 July 2020, fitting it in at the end of the working day between 5.30 and 6 pm.
5. Prior to these events, they had a good professional relationship. The appellant had previously performed hip injections on the complainant on two occasions. She sometimes asked him for advice and she had mentioned her back pain to him. He and she had exchanged WhatsApp messages, apparently earlier on 20 July 2020, which show that the intention was for him then to refer her for an MRI scan if that was indicated by the ultrasound. In his message agreeing to the scan, he added "May be I need to examine you as well". She replied to the message but did not respond to the sentence about a possible examination.
6. The tribunal saw written evidence from another radiographer, Parabjot Bamrah. She has said that that evening, she was preparing to close the centre and therefore went upstairs to see if the appellant had finished scanning the complainant. She put her head around the door of the treatment room and asked if they had finished and was told that they had. She then went to the reporting room down the corridor to wait for them. They emerged. Ms Bamrah and the appellant had a short conversation about the anticipated MRI scan. The appellant asked Ms Bamrah which way she would be going home. This was not unusual as they sometimes walked to the station together. As they descended the stairs, the appellant said that he had forgotten his coat and went back for it. Downstairs in Reception, the complainant asked if she could speak to Ms Bamrah, who took her into another room. Ms Bamrah could not remember her exact words but

recalled that the complainant told her that the appellant had touched her inappropriately. This was the first report of the incident.

7. Ms Bamrah advised the complainant to report the incident to management, and reported it to her own manager by text. On 27 July 2020 Ms Bamrah gave a statement to AML. She was interviewed by an investigator on 6 August 2020 and gave a similar account.
8. Meanwhile, on 23 July 2020, 3 days after the incident, the complainant gave a written statement to AML in which she set out details of the incident:
 - i. When she entered the ultrasound room, the complainant was comfortable to be left with the appellant and did not think a chaperone was necessary.
 - ii. However, she did not feel informed as to what to expect, e.g. as to her clothing or her position on the scanning bed.
 - iii. Before she climbed onto the bed, the appellant undid her dress zip and bra clasp. She thought this was strange as normally a doctor would not do it. He did not ask first and she did not remember him telling her he was going to do this.
 - iv. He asked her to lie face down on the bed. He started to move the scanning probe around her lower back. He moved her tights and underwear down a little without first telling her he was going to, which made her feel slightly uncomfortable.
 - v. While some ultrasound gel was on her back, he started to massage around the pain on her lower back.
 - vi. Then his hands moved inside her dress, around her waist. He then moved further up her back, massaging higher up the spine.
 - vii. He then asked her to stand up, and pressed her spine from behind while getting her to bend to each side and forwards and backwards.
 - viii. He then asked her to return to the bed, and put more gel on her back. Her account continued:

“He then continued to massage all of my spine and then he moved one hand under my dress to the front on my stomach, whilst the other hand stayed along my spine. He continued the massage movement on both sides front and back, and started to work his way further up. He got to the upper back and at this point I felt very awkward and uncomfortable as the hand at the front of me was between my breasts and under my bra, which he had previously undone. He did not say anything about his hands needing to be there, or ask prior to moving them there. This made me feel extremely uncomfortable and anxious as I didn’t know what was happening behind me due to being face down.”

- ix. His hands then returned to her lower back, going all the way down to her coccyx which was beneath her tights and underwear, again making her feel uncomfortable.
- x. Her account continued:

“He continued again with one hand at the front of me under my dress and one still on my back, and worked his way up again. When at the top of my back with one hand, the other was on my front and slightly more to my right side and was touching my right breast and moving around. I think it was at this point I commented that his hand was on my breast, to which he moved it slightly but said nothing and continued to massage. Whilst continuing he then moved it more to my breast again.”

- xv. She contacted a manager the next day, leading to a meeting on 23 July.
 - xiii. They went to the reporting room where Ms Bamrah asked questions about the proposed MRI scan, including whether she had any metal such as piercings. The appellant was going to say something but stopped. When Ms Bamrah left the room, he told the complainant that she would need to remove her nipple piercing. She says that he could only have known about that piercing by feeling it when he touched her breast.
 - xii. She was struggling to do her bra up from behind. The appellant came and did it for her, and zipped her dress up. This also made her feel awkward and uncomfortable.
 - xi. Just then, Ms Bamrah came in. When the door opened, the appellant quickly moved away from the complainant which made her more suspicious. Ms Bamrah asked if she was all right and she felt she had no choice but to say yes. When she left, the appellant started touching her back again at which point she said the pain was better and sat up as if ready to leave.
9. An interview was arranged with an investigator, which took place on 12 August 2020. The appellant again described the incident. There were some differences of detail in this description. For example, until prompted later, she did not refer to being asked to stand up and bend and then return to the bed. The contact with her breasts was described in these terms:
- “... movements of the hand, so one on the front of me and one on the back of me, so as the hand was pressing along my spine, the hand on the front was moving up as well with it. When it got to the top, because my bra had been undone, that had moved higher up so his hand was to start with initially just flat in the middle of my breast and then moved up and down. Then he went up again and I commented that his hand was on my breast, but he didn’t react shocked as in, ‘Oh, I’m really sorry! That’s not meant to happen.’ He just moved down slightly, carried on the assessment again and then moved his hand up, but this time it was more to the right-hand side, so although it wasn’t cupping it, his hand was still over it”.
10. On this occasion the complainant described her report to Ms Bamrah in these terms: “I kind of just blurted out that, ‘He’s just touched my breast.’”
11. As part of the investigation, the appellant gave a statement to AML on 15 September 2020. He described the way in which the scan appointment came about, and how he came to be alone with the complainant in the ultrasound room on Monday 20 July 2020. According to his account of the relevant events:
- i. He explained that the complainant’s dress and bra would need to be undone. She agreed to him undoing both, because the dress zip was behind her and she could only undo the bra herself by moving the clasp from her back to her front.
 - ii. As per his usual practice for musculoskeletal issues, he then conducted a physical examination of the area prior to carrying out the scan. He wanted to

- clarify exactly which areas needed to be scanned, so he palpated along the spine to check for tender points.
- iii. He asked her to do extension and lateral flexions on both sides while standing in order to understand whether any particular points were painful or tender.
 - iv. He then asked her to lie prone on the couch for the scan. To protect her clothing from gel and for privacy, he believed he first tucked protective paper into the top of her leggings or tights, moving these slightly downwards as they were over her coccyx. He did not remember feeling or seeing her underwear in this process.
 - v. He applied gel along the entire spine. He pressed quite hard with both thumbs on her spinous process and facet joints to see if there was any symmetrical pain or swelling, moving his hands from the upper spine to the lower spine.
 - vi. He then scanned her back with the ultrasound probe. This involved pressing with a certain amount of pressure with his thumbs and then with the probe in each area from the mid-cervical, down to the thoracic, lumbar, sacrum and sacroiliac joints. During the whole examination and scan, the extent of his touching extended only to her back and flanks.
 - vii. There was no touching of the front of her body, the abdomen and certainly not of her chest and breasts. It would have been very difficult to reach the front of her body while she was lying on her front, requiring her or him to lift up the front of her body while she was lying down.
 - viii. It is likely that he may have needed to put his hand and the probe underneath the elastic band at the back of the clothing, in order to reach her lower back, but if this happened it would have been only very slightly inside the clothing. The probe and his hand always remained above the level of protective paper that was tucked into her tights. The procedure was unremarkable and he did not get any sense that she was distressed, anxious or uncomfortable.
 - ix. Towards the end of the scan Ms Bamrah came in and asked if they were all right, they both said yes and she left again.
 - x. As he was washing his hands the complainant, who was adjusting her clothing, asked if he could help her do up her dress zip and bra clasp (for the same reason as before).
 - xi. They left the room together. He filled in a form for an MRI scan and then asked her to fill in her details. Ms Bamrah advised the complainant that she would need to remove any metal, including a navel piercing, and he reiterated that any piercings would need to be removed. He did not remember mentioning any specific piercing.
 - xii. On his way home, he sent the complainant a text saying she did not believe she had major issues with her back and suggesting the use of analgesic gels, and she sent a matter-of-fact response.
 - xiii. She did not communicate any problem to him.
 - xiv. On Wednesday 22 July he noticed that her MRI form was not in his reporting pile. He sent a text asking her when the MRI was happening but she did not reply.
 - xv. The first he heard of the complaint was a call from the Medical Director on Friday 24 July 2020.
12. In his statement the appellant also reflected on what he could have done differently. He now accepted that, since he had blurred the ordinary doctor/patient boundaries by providing clinical treatment to a colleague, his communication with the complainant

during the consultation was sub-optimal. He should have told her step by step what he was planning to do, and in particular should have told her beforehand that her clothes needed to be adjusted when he was tucking in the protective paper. With a routine female patient, by contrast, he would have offered a chaperone and would have left the room or provided a curtain when she was dressing or undressing.

13. In due course, the GMC proceeded with a number of allegations of misconduct arising out of these events. As is apparent from the appellant's investigation statement, many points of fact were common ground. He admitted a failure on his part to communicate adequately with the complainant before and during the examination and scan. The only significant areas of factual dispute were as to whether he touched the front of her body and her breast, whether any acts were done without her consent and whether any actions were sexually motivated.
14. The tribunal had sight of all of the statements and documents to which I have already referred.
15. The complainant, Ms Bamrah and the appellant provided witness statements to the tribunal.
16. In her statement dated 12 February 2021, some 7 months after these events, the complainant confirmed the truth of her investigation statement and again described what had happened. She mentioned the reference in the appellant's WhatsApp message to carrying out an examination and said that she had not noticed that part until afterwards. On 20 July 2020 she was just expecting an ultrasound scan. She could not now remember whether a chaperone had been offered. She did not remember whether the appellant wore gloves but said it did not feel as if he was wearing them. She described how he began by scanning the painful area, but then the process felt more like a massage. Again she described her position as lying down, then standing up, then lying down again. She repeated her account of the appellant then having one hand on her front underneath her dress and the other on her back. Pressing on both sides, he went up and down her spine. The first time he went upwards, he touched her between her breasts for a few seconds. The second time it was more to the right side, and his whole hand went over her right breast. She said something like "doc your hand is on my boob" and he just moved it down again. Then they heard the door open, and he stepped away and stopped touching her. When Ms Bamrah left again, the complainant said she felt better and stood up. She again described getting dressed, and the discussion about the MRI and piercings. In this statement she did not repeat the account of telling Ms Bamrah that something had happened.
17. Ms Bamrah's statement essentially confirmed what she had told the investigation.
18. On what are now the relevant issues, the appellant's statement for the tribunal was consistent with his statement for the investigation.
19. The complainant and the appellant also gave oral evidence at the tribunal hearing on 20-22 September 2022, more than 2 years after the events.
20. Mr Matthew McDonagh of counsel represented the appellant at that hearing, as he has on this appeal. He cross-examined the complainant at some length, going through her

account of the touching in detail. Unsurprisingly she now found it harder to remember in precisely what order some of the events had happened. Counsel suggested that she could have been mistaken in thinking that the appellant's hand touched her breast, and she disagreed.

21. The tribunal members also asked some questions about the key details of the allegation. My attention was drawn to the following exchange:

“DR MITCHELL: I just wondered if I could ask you, firstly, picking up on what my colleague was saying, you used the term ‘mirroring’ the two hands together mirroring one another, moving up your body.

A Yes.

Q You were lying flat at the time on the couch.

A Yes.

Q It's truly quite awkward, isn't it, if you are lying on that hand, for the hand to be moving up. How did that happen?

A Sorry, it wasn't a smooth movement, which is why I described it as sort of a massage movement, because his hands were having to move in order to get up the body.”

22. In addition, the tribunal received reports and oral evidence from two expert witnesses, both Consultant Musculoskeletal Radiologists. Dr Paul Emberton was instructed by the GMC and Dr Eugene McNally was instructed by the appellant. They also provided a joint report.
23. For present purposes it is only necessary to summarise the expert evidence on the key issue relating to touching the front of the complainant's body and her breast. In short, they agreed that touching the front of her chest and her breast was not clinically indicated or appropriate (and the appellant did not suggest that it was). They had disagreed about the propriety of other aspects of the examination but the tribunal resolved those issues in the appellant's favour.
24. Dr McNally also made some comments on the complainant's account of events. In particular:
- i. The appellant was probably wearing gloves but the complainant did not mention this.
 - ii. The appellant's account of a standing followed by a prone examination was more in line with what would be routine than her description of lying, then standing then lying again.
 - iii. Although it would be difficult to keep the palpated area free of ultrasound gel, no gel was described on her clothes or her front.
 - iv. There were some inconsistencies.
 - v. Inserting his forearm so that his left hand reached her right breast would have been awkward in the confined space and would have stretched her dress, but she gives no sense of this.
25. As to the mechanics of the alleged touching, the experts' agreed statement said:

“We agree, based on our experience of carrying out ultrasound examination of patients prone on an ultrasound couch, that it is physically difficult, but not

impossible, to insert the examiner's hand and forearm underneath the chest of a patient lying face down."

26. In oral evidence there was this exchange between Mr McDonagh and Dr Pemberton:

"Q The weight of her upon – the pressure upon that couch would have increased, wouldn't it, if any palpation or pressure was put upon the spine by the clinician?

A Yes.

Q You agree?

A Yes.

Q That would have had the impact of pushing her more into it?

A Yes.

Q Do you accept that it would be quite difficult in those circumstances for any human, or any doctor, to put their hand underneath the torso of that patient as they were pushed into the couch?

A I and Dr McNally agree on this point that it's difficult, almost impossible. We did agree."

27. Mr McDonagh also explored this point with Dr McNally in oral evidence:

"Q Finally, Dr McNally, for my purposes, the last matter I touched upon with Dr Emberton was the unlikelihood of a clinician being able to put their hand and freely move it around underneath the body of a patient who's face down on a couch being manipulated and pressured from move. Do you maintain the observations within the joint report and, indeed, in your report to that extent? To that matter?

A Yes, I think that would be extremely difficult without a lot of discomfort.

Q Why in your view do you say 'extremely difficult'?

A Well, I know from trying to assist patients who are in some way disabled, trying to help them up or around an ultrasound examination couch, that there is very limited ability to get your hand underneath without some assistance from the patient if they're able to give it. It's a very – well it's a closed space essentially and if you were to force your hand in it would be very uncomfortable for the patient. I don't think it would be very easy to move your hand around once you'd managed to achieve even getting your hand in in the first place. I just – it's a very tight space and it would be uncomfortable if not painful for the patient."

28. Cross-examined by counsel for the GMC, Dr McNally accepted that this would be easier if the patient "was compliant with allowing the hand to access and lifting themselves".
29. Then the appellant gave oral evidence. He maintained that on the key events the complainant was mistaken. Asked in cross-examination whether he was suggesting that she had lied, he said "that will be speculation" and he agreed that on the face of it, she had no reason to make up a false claim. He repeated that he did not put his hand on the front of her body and move it up to her breast, and that she did not say "Doc, your hand's on my boob". Asked whether there was anything underneath her which she could have mistaken for his hand, he said "Why should I speculate?" Asked whether he was suggesting that she imagined it, he said "How do I know" and "I think that's up to the tribunal". One of his more substantive answers on this topic was:

“Now, I showed on the spine when you are pressing it’s literally a good pressure because spine is a deep, and you have to press it hard, and it puts a pressure on the patient. If patient is not looking or anything, patient might think that someone is pressing on her, and that can be a misbelief.”

30. The appellant in cross-examination also said that getting his left hand to the area of the complainant’s breasts was “physically impossible without damaging her clothes, slipping the clothes, tight clothes”. He also denied the suggestion that he had mentioned the complainant’s nipple piercing, and said that he did not know that she had one.
31. Some of his answers included gestures or physical demonstrations (“... you are pressing like *that*. So it is likely that the hand might go *here*”) which obviously cannot be reproduced in the transcript of the hearing. That emphasizes the advantage enjoyed by the tribunal at first instance which actually hears the live evidence.
32. There were questions from the tribunal members. My attention was also drawn to this exchange:

“Q So could it be that when you were in the chest area, your fingers might have been curved around? Is that possible?

A Miss, you know, everything is possible. But you know, it’s like this much, like yes, it can be physically possible, but I don’t remember intentionally honestly doing that, or anything like that.

Q Okay. So it is possible that your fingers, while you were examining the back, might have strayed around the side of her body?

A Miss, I honestly don’t recall that. But if you’re saying, like, every one’s patient, every patient and everyone’s patient, and how they lie down is different.

Q Yes.

A So when you are going, you can touch. Honestly, breast covers from here, to here, to back, like trapezius. So you can anatomically say I can be on the breast. I’m not denying that, but that’s like here.

Q Yes.

A It’s not like from front.”

33. Counsel made closing submissions on 26 September 2022.
34. Mr Barton, for the GMC, emphasized that the complainant made her complaint very soon after the events and that, on the appellant’s case, it was “riddled with errors, mistakes and misunderstandings”:

“She forgets entire conversations about her clothing. For instance, she forgets that it was she who had asked the doctor to undo her clothes and do them up again at the end. She misinterprets his palpating of her spine for an extensive back massage. She imagines his hands going under her body. She wrongly feels one hand on her back moving in parallel with the hand underneath. She thinks his left hand touches her breast twice, when in fact it is nowhere near her breast at all. She says in that statement she told him his hand was on her breast but either has misremembered that or said it so quietly that it wasn’t heard by the doctor. Finally, she misremembers mishears or misunderstands his comment about nipple piercing when they are alone filling out the MRI form.”

35. Mr McDonagh emphasized his client's good character and the need for cogent evidence to prove that such a person had acted in the way alleged. As to the nature of the central issue, he said:

“It is not about someone lying or someone telling the truth. It is about whether someone could be genuinely mistaken. Has Patient A made a mistake when she alleges that Dr Sankaye touched her breast on two occasions by placing his hand under her chest as she described? It was never suggested by the doctor, notwithstanding repeated questions and invitations, to speculate or comment, which ultimately drew an objection from myself, but it was never suggested by the doctor that this was a manifest lie. It was always his case that this is one of a mistake.”

36. Mr McDonagh then enumerated all of the reasons why the tribunal could conclude that the complainant was mistaken. He reminded the panel that the experts had said it was “nigh on impossible, although anything is possible for access to have been obtained in that way”. He later added:

“Don't speculate. Would she have arched her back to have given access the second time? That's not speculation. Her evidence is she was lying prone. There is no suggestion in the evidence that she raised her back at all. In the absence of that, it is not possible for the breasts to have been touched without causing great pain because of the Chinese burn aspect, I suppose, and moving the hand up the body, skin on skin. It just couldn't have happened in the way she has described.”

37. The tribunal chair then set out her legal advice to the tribunal, giving a correct direction on the burden and standard of proof by reference to *Byrne v GMC* [2021] EWHC 2237 (Admin).

The tribunal's decision

38. The tribunal's determination of the facts was announced on 28 September 2022.
39. The tribunal disposed of a number of peripheral issues:
- i. It made no finding against the appellant in respect of not offering the complainant a chaperone or the alternative of wearing a gown as these were not needed or appropriate.
 - ii. There was a clinical justification for the appellant undoing the complainant's dress and bra and for touching the complainant's back, flanks, hips and waist as part of the examination.
 - iii. There was no sexual motivation for those acts.
 - iv. There was a failure to obtain consent to those acts. Undoing the complainant's bra, being an “intimate interaction”, without consent amounted to misconduct.
 - v. The remainder of those acts did not amount to misconduct.
 - vi. The complainant accepted that she may have asked the appellant to help her to do up her dress and her bra after the examination, so a lack of consent to those acts was not proved and there was no misconduct.

40. On the key issue, the tribunal's determination summarised the complainant's evidence. It then stated:

“37. The Tribunal accepts that there are minor inconsistencies in Patient A's statement to the Centre, to the GMC and her interview notes from the Centre regarding the number of times Dr Sankaye had touched her breast and the orientation of Dr Sankaye's hand when he touched her breast. Patient A may not be able to remember everything that happened during the incident particularly in respect of whether the gel was wiped off or present on her clothing after the consultation. The Tribunal found that Patient A was prepared to accept that there may have been gaps in her evidence and that there were minor details she could not remember. However, despite the inconsistencies, she was clear, across all of her evidence, that Dr Sankaye had touched the front of her body and her right breast with his left hand on at least two occasions. The Tribunal are not satisfied that she is mistaken in respect of this.”

41. It then set out the appellant's evidence, and stated:

“40. Dr Sankaye does not suggest that Patient A is lying but that she is mistaken about him touching her breast with his left hand. Dr Sankaye was unable to offer an alternative explanation but consistently stated that he did not touch her breast, that she was mistaken and that it would have been physically very difficult to touch her as she had described.”

42. It then concluded:

“41. The Tribunal considered the description of the incident as described by Patient A that Dr Sankaye had reached underneath her with his hand and touched in between her breasts with his palm and touched her right breast with his fingers. She accepted that she was not able to see this but was clear in her evidence, both written and oral, that his hand was present on her stomach and right breast. The Tribunal considered all of the evidence, including the evidence by both Patient A and the Doctor closer in time to the incident. The Tribunal was satisfied that the evidence given by Patient A regarding the position of Dr Sankaye's left hand during the physical examination was credible and consistent and that she was not mistaken in respect of this.

42. The Tribunal considered the opinion of both experts, which was an agreed opinion, that there was not a clinical explanation for a physical examination of the front of Patient A's Body or her breast in a spinal examination.

43. Accordingly, on the balance of probabilities, the Tribunal determined and found paragraph 1(e) of the Allegation proved.”

43. Having gone on to find that the touching of the complainant's breast was sexually motivated, the tribunal made a finding of serious misconduct and impaired fitness to practise. On 3 October 2022 it imposed a suspension from practice for 12 months. Those decisions are not separately challenged.

The grounds of appeal

44. The Notice of Appeal puts forward the following grounds:
- i. The tribunal gave no or no adequate reasons for concluding that the complainant was not mistaken and for not accepting the appellant's evidence.
 - ii. The tribunal wrongly attached weight to the early making and consistent nature of the complainant's complaint, in a case where the issue was not her truthfulness but whether she was mistaken.
 - iii. The tribunal wrongly put the burden on the appellant to satisfy it that the complainant was mistaken.
 - iv. The tribunal wrongly concluded that the appellant "was unable to offer an alternative explanation" for her belief, when he had done so.
 - v. The tribunal did not adequately consider the expert evidence as to the difficulty of the manoeuvre of inserting a hand beneath the chest of a prone patient.
 - vi. The tribunal failed to identify the evidence that persuaded it that sexually motivated touching had taken place.

The parties' submissions

45. In the appeal hearing before me, Mr McDonagh placed his main focus on inadequacy of reasons. Realistically, he did not seek to persuade me that no reasonable tribunal could have upheld the complaint. Rather he submitted that, contrary to the requirements for reasons in tribunal determinations of GMC complaints as considered in *Southall v GMC* [2010] EWCA Civ 407, the reasons given in this case were not sufficient for the appellant to know why he lost.
46. Mr McDonagh submitted that this was not a simple case of one word against another, but was a complicated case requiring careful scrutiny and analysis. The circumstances of the ultrasound scan itself were unusual. The spinal examination may not have been what the complainant was expecting. There were inconsistencies in the complainant's evidence. There was expert evidence on a number of issues including the inherent unlikelihood or difficulty of the doctor touching the patient in the way described.
47. That being so, the tribunal's reasons, he submitted, did not meet the necessary standard. The tribunal was wrong to give weight to the complainant's consistency because truthfulness was not the issue. The tribunal may have been entitled not to be concerned by the inconsistencies but it needed to explain why that was. Weight was given to the mistaken finding that the appellant had not advanced an alternative explanation, when in fact he had accepted that the complainant's breast may have protruded to the side causing contact with his hand when he touched her flank. No reason was given for finding that he had lied to the tribunal, for example by reference to his demeanour.
48. Mr McDonagh accepted that the appeal could not succeed solely because of the phrase "The Tribunal are not satisfied that she is mistaken ...", but submitted that it added force to his criticisms of their failure to grapple with the question of why the appellant would be lying and with the inconsistencies in the complainant's case.
49. Whilst Mr McDonagh accepted that findings of primary fact when founded on an assessment of the credibility of witnesses are "virtually unassailable" on appeal (see

Southall at [47] per Leveson LJ), he submitted that in this case, the tribunal had thrown away the advantage of hearing the evidence by failing to explain its conclusions. Although it mentioned the appellant's submission about the difficulty of the manoeuvre at paragraph 40 of its determination, it did not analyse the point and made no reference at all to the expert evidence that it would have been "difficult, almost impossible".

50. On this appeal the GMC was represented by Peter Mant of counsel. He submitted that the tribunal's determination explained all that it needed to explain, i.e. that (1) the complainant's account of the touching was clear and consistent, (2) inconsistencies were minor, (3) it had been accepted that she was an honest witness and there was no alternative explanation for her perception of the touching and (4) on all the evidence it was satisfied that she was not mistaken.
51. Mr Mant pointed out that the tribunal set out the inconsistencies in the evidence at paragraph 37 (quoted above) and therefore had them well in mind.
52. So far as the expert evidence was concerned, the tribunal showed its awareness of the issue of the difficult manoeuvre at paragraph 36, where they quoted the complainant's evidence that "it was not a smooth movement". No more was needed where, during the tribunal hearing, the appellant's counsel had not cross-examined the complainant about the possibility that the insertion of the hand caused discomfort or pain. Although the experts thought the manoeuvre would be difficult, they agreed it was possible.
53. As to an alternative explanation, Mr Mant noted by reference to the hearing transcript that the appellant in the witness box was unwilling to speculate as to how a mistake could have occurred. The farthest that he went was the passage which I have quoted at paragraph 29 above. At best this explanation seems to have consisted of a suggestion that the complainant might have thought that the appellant's hand was underneath her when in fact it was on top of her. Mr Mant described that suggestion as fanciful. Meanwhile, he submitted, the accidental touching of a breast protruding at the complainant's flank, which is the other possibility that was canvassed, could not explain the complainant feeling a hand being placed in between her breasts and then moving squarely onto her right breast.

Discussion

54. It is not in dispute that in this case, rule 17(2)(j) of the General Medical Council (Fitness to Practise) Rules 2004 required the tribunal to give reasons for its findings of fact.
55. In *Southall* (where the central issue was whether a doctor, in a child protection interview, had accused a patient of murder) Leveson LJ said:

"55. For my part, I have no difficulty in concluding that, in straightforward cases, setting out the facts to be proved (as is the present practice of the GMC) and finding them proved or not proved will generally be sufficient both to demonstrate to the parties why they won or lost and to explain to any appellate tribunal the facts found. In most cases, particularly those concerned with comparatively simple conflicts of

factual evidence, it will be obvious whose evidence has been rejected and why. In that regard, I echo and respectfully endorse the observations of Sir Mark Potter.

56. When, however, the case is not straightforward and can properly be described as exceptional, the position is and will be different. Thus, although it is said that this case is no more than a simple issue of fact (namely, did Dr Southall use the words set out in the charge?), the true picture is far more complex. ... I am not suggesting that a lengthy judgment was required but, in the circumstances of this case, a few sentences dealing with the salient issues was essential: this was an exceptional case and, I have no doubt, perceived to be so by the GMC, Dr Southall and the panel.”

56. In the present case, the central issue may not have been easy to resolve but that does not mean that it was a complex or exceptional issue. The question was, on the balance of probabilities, was the complainant right in her honest perception of the touching or was she mistaken about what happened? It was coloured by the question of how difficult the touching manoeuvre would have been, but in my judgment there was no other significant complicating factor.
57. An atypical feature of this case was the insistence on the appellant’s side that the complainant’s honesty was not challenged. Ultimately it should have been for the tribunal to assess her honesty and credibility, and not for the appellant. Be that as it may, this had the effect of narrowing the issue to one of mistake.
58. That being so, I do not accept that the tribunal was bound to give specific reasons for rejecting the appellant’s denial of the allegation. If the complainant was not mistaken, then his denial had to be untrue.
59. The residual question for me is therefore whether the tribunal’s reasons were sufficient to explain to the appellant why the tribunal decided that the complainant was not mistaken.
60. Although the GMC had the burden of proof, it must be recognised that the narrowing of the issue to one of mistake made the case difficult for the appellant to defend. The point was put eloquently by Mr Barton in the passage quoted at paragraph 34 above. If the complainant was mistaken, then she made a bizarre sequence of mistakes that would be objectively very surprising.
61. That being so, I do not consider that the tribunal was bound to say much more than that, on the balance of probabilities, her clear and consistent evidence was not mistaken.
62. It is now clear that the appellant’s best point was the physical difficulty of executing the alleged touching manoeuvre. However, the appeal transcript, read as a whole, does not show that this was the main focus before the tribunal. It was only briefly touched on in cross-examination and submissions. That could explain why the tribunal’s reasons do not discuss the merits of the point, though they acknowledge its existence.
63. In fairness to the appellant, I consider that the reasons would have been improved by a little more discussion of that point with a recital of what the experts had said about it. In the end, however, it is probable that not much more could have been said about it. The

experts accepted that the manoeuvre was possible. If the complainant's perception was not mistaken, then that difficult but possible manoeuvre was what happened.

64. Nor do I consider that the appellant has identified any other error in the tribunal's analysis which could conceivably undermine its overall determination. On the individual grounds I therefore conclude:
- i. As I have said, the tribunal did give adequate reasons for concluding that the complainant was not mistaken and for not accepting the appellant's evidence.
 - ii. The tribunal may not entirely have appreciated that the early making and consistent nature of the complaint were more relevant to honesty than to the issue of mistake. However, even if honesty was not challenged, it was still a matter about which the tribunal was required to be satisfied, and that may explain the references to these points. But even if the importance of those points was overstated, I do not consider that to be capable of undermining the tribunal's acceptance that, rather than making a bizarre sequence of mistakes, the complainant had experienced what she claimed to have experienced.
 - iii. Read as a whole, the determination clearly shows that there was no error as to the burden of proof. In any event, the tribunal reached a clear decision on the merits. This is not a case where an issue was evenly balanced and the burden of proof was decisive.
 - iv. I do not consider that the tribunal was wrong about the lack of an alternative explanation. In his evidence the appellant was persuaded to comment on possible explanations but showed no wish to advance one, or at best advanced an explanation which was not credible i.e. the possibility that the complainant perceived a hand above her body as a hand beneath her body.
 - v. Although it would have been better for the tribunal to say more about the expert evidence, it showed that it had the difficulty of the alleged manoeuvre in mind. In the end it accepted that the complainant was not mistaken when she said that the difficult but possible manoeuvre had happened.
 - vi. The tribunal did identify the key evidence, which was the complainant's evidence of what had happened.

Conclusion

65. For these reasons the appeal must be dismissed.