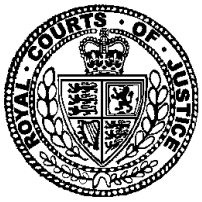

Neutral Citation Number: [2023] EWHC 3256 (Admin)

Case No: AC-2023-LON-001846; CO/2207/2023

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

Royal Courts of Justice
Strand, London, WC2A 2 LL

Date: 21st December 2023

**Before** :

**MR JUSTICE EYRE**

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**Between :**

| | |
|---|---|
| **ROBERT HAWKINS** | **Appellant** |
| **- and -** | |
| **HEALTH AND CARE PROFESSIONS COUNCIL** | **Respondent** |

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**Simon Butler** (instructed by **BSG Solicitors LLP**) for the **Appellant**
**Guy Micklewright** (instructed by **Blake Morgan LLP**) for the **Respondent**

Hearing date: 6th December 2023

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# Approved Judgment

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and released to The National Archives. The date and time for hand-down will be deemed to be at 10 am on 21/12/2023.

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## Mr Justice Eyre:

1. The Appellant is a registered physiotherapist. Following a hearing on 15th – 19th May 2023 a panel of the Health and Care Professions Tribunal ("the Panel") sitting as the Conduct and Competence Committee of the Respondent found that the Appellant's fitness to practise was impaired by reason of misconduct and imposed a twelve-month suspension order.

2. The allegations against the Appellant relate to a massage which he gave to a patient ("Service User A") on 26th October 2021. For current purposes the core of the case against the Appellant was that at a time when he asked her to raise her hips as she was lying on her back the Appellant was attempting to lower or to remove Service User A's underwear and that his action in doing so was sexually motivated. As will be seen below there was very little dispute as to the facts and the dispute was as to the proper interpretation of the Appellant's actions and as to his motivation.

3. The Panel had concluded that there was insufficient evidence to establish that the Appellant had been attempting to remove Service User A's underwear but did find that he had been attempting to lower it and that this action was sexually motivated.

4. At the outset of the hearing (in a move which had been foreshadowed earlier) the Appellant had admitted that he had been attempting to lower Service User A's underwear but denied that he had been attempting to remove it and denied that his action was sexually motivated. Attention at the hearing had then been focussed on the allegation that the Appellant was attempting to remove the underwear. The contention that the admitted attempt to lower Service User A's underwear (as opposed to the disputed attempt to remove it) was sexually motivated was not put to the Appellant either in cross-examination or in questions from the Panel.

5. The Appellant contends that in finding that the attempted lowering of the underwear was sexually motivated the Panel had adopted an unfair procedure. This was because a finding adverse to the Appellant was made on a matter which had not been put to him by way of questioning when he gave his evidence (namely the alleged sexual motivation for the attempted lowering of the underwear). The Respondent accepts that its case was not adequately put to the Appellant; that this was a serious procedural error; and that as a consequence the Panel's determination in this regard cannot stand and must be quashed.

6. The issue between the parties is as to the course the court should take having quashed the Panel's determination. The Respondent says that the matter should be remitted for reconsideration before a differently constituted panel. The Appellant says that this course would be unjust and that the court should not remit the matter but should instead dismiss the allegation as to sexual motivation.

## The Background to the Allegations.

7. Service User A had been receiving treatment intermittently from the Appellant over a period of approximately 13 years. Latterly those attendances had been for treatment to her hip. Service User A's husband was also a patient of the Appellant.

8. On 26th October 2021 Service User A attended for treatment by the Appellant. The appointment had been due to last for 30 minutes but the Appellant said that the appointment booked for the following treatment slot had been cancelled and he offered to extend the appointment for free.

9. Service User A stripped to her bra and knickers and the treatment began with her lying face down. During that part of the treatment the Appellant had loosened Service User A's bra straps and undone her bra. He then asked Service User A to turn on to her back and began massaging her upper chest between her breasts and her collar bone. While massaging that part of Service User A's body the Appellant said "you have a beautiful body". Service User A did not reply to that but remained silent with her eyes closed.

10. The Appellant then massaged Service User A's abdomen. In the course of doing so he rolled down her knickers. Service User A said that the Appellant rolled these down by about 8cm. Previously when working on her hip the Appellant had moved down Service User A's knickers in order access her hip. However, Service User A said that this had been when she had been lying on her front and had never been by as much as 8 cm.

11. The Appellant then asked Service User A to bend her knees which she did. Next, he asked her to "lift up" - meaning that she was to lift her hips. Service User A's evidence was that the Appellant still had his hands on either side of her knickers on her hips and that her "immediate thought" was that the Appellant was about to pull down her knickers in order to remove them. She then grabbed her underwear to stop the Appellant pulling it any further. To that the Appellant responded by saying "oh, was that too far?" and Service User A replied to the effect of saying that it was and that she did not understand why that was necessary.

12. The treatment of Service User A ended almost immediately after that exchange and Service User A left the Appellant's clinic at about 1.00pm.

13. At 1.42pm the Appellant emailed Service User A saying:

> "Just wanted to check you weren't uncomfortable with today's treatment. I look forward to seeing you next week."

14. Service User A did not pick up or reply to that email immediately and this led the Appellant to text her at 3.06pm to check that he had the correct email address.

15. Service User A did reply to the email the next day saying:

> "I've thought considerably about my response to you.
>
> I was very uncomfortable with you wanting to remove my knickers (and told you so at the time) and don't see how that is in any way necessary for the treatment you were meant to be giving me.
>
> Also, as complimentary as it may seem, telling me that I have a beautiful body whilst massaging my chest area made me feel extremely uncomfortable.
>
> Being an ex-therapist myself I know what is acceptable and what isn't.
>
> I feel very conflicted because I highly rate the work you do and the improvements I've had physically since coming to you. It is unfair of you to make me feel this way..."

16. That email was sent at 1.48pm and the Appellant replied at 2.09pm saying:

> "…I cannot apologise enough; yesterday I behaved extremely unprofessionally, it was unacceptable, and I apologise for how you felt from my actions.
>
> I completely understand if you don't wish to continue your treatment, however, I promise I will never behave that way with you again if you do. I accept whatever you decide..."

17. A couple of days later Service User A told her husband about what had happened and there then followed a short exchange of text messages between him and the Appellant. Service User A's husband said that he was "very disappointed at [the Appellant's] behaviour" and that neither he nor his wife would be using the Appellant's services again. The Appellant replied saying just "understood, my apologies".

18. The Appellant accepted the substance of the history set out by Service User A but advanced some points relating to context and interpretation saying that his actions were not sexually motivated and that Service User A had misinterpreted what had been happening.

19. Thus the Appellant accepted having said that Service User A had a beautiful body but said that this had been a delayed response to an earlier comment from Service User A that she felt that she had "let herself go" during the pandemic. He accepted having lowered Service User A's underwear although he said this had been by no more than 4cm rather than the 8cm asserted by Service User A. He said that he had done that in order to access the area to be massaged. The Appellant accepted that he had asked Service User A to lift her hips. He said that he was seeking to access Service User A's tensor fasciae latae muscle ("the TFL muscle") in order to massage that part of her body. In order to do that he wanted to move the left side of her underwear with a view to better engagement of that muscle. However, the underwear was caught under Service User A's hips and the Appellant says that he asked the patient to lift her hips to release the underwear. In addition he did not accept that at that time he had his hands on both sides of Service User A's knickers. As to that the Appellant said that he could not recall where his hands were but that if both his hands were on Service User A's hips that would have been because one hand would have been to keep the underwear in place on the side of the hips where it was not being lowered.

20. The Appellant said that he had offered Service User A a towel to cover her body both at the start of the session and when he had asked her to turn over to lie on her back but that she had declined this offer. Service User A disagreed with this. She said that she had not been offered a towel on that occasion or on other times when she had been treated by the Appellant save when it had been very cold.

21. The accounts given by Service User A and the Appellant remained substantially consistent in the course of their oral evidence. Service User A accepted that she had found nothing untoward in the loosening of her bra straps and the undoing of her bra and that she regarded this as acceptable to enable ease of access to her body for the purpose of the massage. She said that she had only started to feel uncomfortable about what was happening when the Appellant said that she had a beautiful body. She went on to accept that she had no concerns about the Appellant massaging the lower part of her abdomen nor about him lowering her underwear in order to do so. However, Service User A maintained her belief that when he asked her to lift her hips the Appellant was seeking to remove her underwear saying that this was her reaction at the time prompted by the instruction and the position of appellant's hands.

## The Allegations in their Original and Amended Forms.

22. In their original form the allegations against the Appellant were:

> "1. On 26 October 2021, when massaging the chest area of Service User A (SUA), you told SUA they have 'a beautiful body', or words to that effect.
>
> 2. On 26 October 2021, you attempted to remove SUA's underwear, without consent to do so and/or when this was not clinically necessary.
>
> 3. Your conduct at particulars 1 and/or 2 was sexually motivated.
>
> 4. The matters at particulars 1, 2 and/or 3 amount to misconduct.
>
> 5. By reason of your misconduct, your fitness to practise is impaired."

23. On 13th October 2022 the Respondent gave notice that it wished to amend the allegations and in their amended form those said:

> "1. On or around 26 October 2021:
>
> a. when massaging the chest area of Service User A (SUA), you told SUA they have 'a beautiful body', or words to that effect;
>
> b. you attempted to lower and/or remove SUA's underwear:
>
> i. without covering SUA's pubic region;
>
> ii. without SUA's consent to do so; and/or
>
> iii. when this was not clinically necessary.
>
> c. you did not make any or any adequate record of the assessment and/or treatment of SUA's tensor fascia latae (TFL) muscle.
>
> 2. By your conduct at 1(b)(i) above, you failed to respect SUA's dignity.
>
> 3. Your conduct at any or all of particulars 1(a) and/or 1(b) was sexually motivated.
>
> 4. The matters at any or all of particulars 1 and/or 2 and/or 3 amount to misconduct.
>
> 5. By reason of your misconduct, your fitness to practise is impaired."

24. It will be seen that the amendment expanded the particulars of the actions said to amount to misconduct and advanced an attempted lowering of Service User A's underwear as an alternative to that of an attempted removal.

## The Proceedings before the Panel.

25. The hearing was conducted remotely with the Panel, the witnesses, the Appellant, and the advocates being in separate locations. It is apparent from the transcript that this caused some difficulties. There appear to have been difficulties in audibility and with connections being lost at times.

26. At the outset of the hearing the Appellant accepted through his counsel that the allegations could be amended. Mr Butler also set out the Appellant's position in summary. He explained that the Appellant admitted saying that Service User A had a beautiful body and that he admitted that he had been attempting to lower Service User A's underwear when asking her to raise her hips. He explained that the Appellant denied that he had been attempting to remove the underwear and that his actions had been sexually motivated. The Appellant also accepted that he had done this without covering Service User A's pubic area with a towel. He accepted that the attempted lowering was

not clinically necessary but that admission was because the lowering was in the course of a massage rather than clinical treatment.

27. Emma Condon is a physiotherapist and provided an expert report on which the Respondent relied before the Panel together with Miss Condon's answers to some supplementary questions. For current purposes it is relevant to note that Miss Condon accepted that it could be appropriate to lower a patient's underwear to access the TFL muscle. However, she did say that it would be easier to maintain a patient's dignity if that muscle was accessed with a patient lying on her side rather than on her back. Miss Condon also said that she would have expected a towel to have been used to cover such a patient's pubic area. She said that she would have expected for the patient's consent to the lowering to have been sought expressly if the lowering were to be done by the physiotherapist rather than by the patient herself (the latter being the course which Miss Condon said would have been more appropriate).

28. It was against that background that the focus at the hearing was on the allegation of the attempted removal of Service User A's underwear and on whether that was a sexually motivated act. I have already noted the difficulties of communication which there appear to have been during the remote hearing. In those circumstances it is understandable how the need to put to the Appellant the contention that an attempted lowering was sexually motivated was overlooked. However, it was overlooked and this was not put to the Appellant. That was, as the Respondent accepts, a serious procedural error.

## The Panel's Decision.

29. The Panel found the allegations proved save that the members concluded that there was insufficient evidence to establish that the Appellant had been attempting to remove Service User A's underwear. The Panel rejected the Appellant's explanation for the admitted attempting lowering of the underwear and concluded that his action in that regard was sexually motivated. In doing so the Panel said that it found that the Appellant had been motivated either by sexual gratification or with a view to forming a future sexual relationship. Neither of those aspects had been put to the Appellant orally and the latter had not formed part of the Respondent's case.

30. The Panel concluded that the Appellant's actions amounted to misconduct such as to impair his fitness to practise and imposed a suspension order lasting 12 months.

## The Grounds of Appeal.

31. The Appellant advanced six grounds of appeal.

32. Grounds 1 – 3 related to the finding that the Appellant's actions had been sexually motivated. In those the Appellant's primary point was that the Panel's approach was procedurally unfair though it was also said that its conclusion was not warranted on the evidence. I have already explained that the Respondent accepts that there was a serious procedural failure and that the Panel's determination cannot stand. The Respondent conceded these three grounds.

33. Ground 4 related to the finding that the Appellant's behaviour had raised "attitudinal issues" but that is no longer pursued.

34. Grounds 5 and 6 related respectively to the sanction of suspension and to the imposition of an interim suspension order. The Respondent concedes that the sanction cannot stand in light of the quashing of the determination as to sexual motivation. It is agreed that whether or not the question of sexual motivation is remitted for redetermination there should be remittal of the issue of sanction with a differently constituted panel being charged with assessing not just sanction but also whether the determined facts amount to misconduct and the consequent question of fitness to practise. The Respondent says that the challenge to the interim order should not have been by way of appeal. However, it points out correctly that the question is academic because the effect of Article 31(5) is that the interim order will lapse on the determination of this appeal.

## The Applicable Law.

35. The Health Professions Order 2021 ("the Order") was made under the Health Act 1999 and governs the functions of the Respondent.

36. At Article 3(4) and (4A) the Order provides that:

> "(4) The over-arching objective of the Council in exercising its functions is the protection of the public.
>
> (4A) The pursuit by the Council of its over-arching objective involves the pursuit of the following objectives–
>
> (a) to protect, promote and maintain the health, safety and well-being of the public;
>
> (b) to promote and maintain public confidence in the professions regulated under this Order; and
>
> (c) to promote and maintain proper professional standards and conduct for members of those professions."

37. Article 27 provides for the Conduct and Competence Committee to consider allegations referred to it by the Respondent.

38. The Panel's powers as to sanction derived from Article 29(3) which gave it power to strike off or to suspend a registrant or to impose a conditions of practice order or a caution order.

39. Article 38 provides for an appeal to the court and sets out the court's powers thus at 38(4):

> "In this article "the appropriate court" means—
>
> (a) in the case of a person whose registered address is (or, if he were registered, would be) in Scotland, the Court of Session;
>
> (b) in the case of a person whose registered address is (or, if he were registered, would be) in Northern Ireland, the High Court of Justice in Northern Ireland; and
>
> (c) in any other case, the High Court of Justice in England and Wales."

40. The effect of CPR Rule 52.21 and paragraph 19.1(d) of PD52D is that the appeal is by way of re-hearing and the court is to allow the appeal if it concludes that the decision of the Panel was either (a) wrong or (b) unjust because of a serious procedural or other irregularity in the proceedings before the Panel.

41. The parties are agreed that there was a serious procedural error in the proceedings before the Panel and that its decision cannot stand. The issue is whether the challenged decision as to misconduct should simply be quashed or whether in addition the court should remit the matter for a further hearing of that allegation before a differently constituted panel.

42. Counsel's researches have not found any authority setting out the approach to be taken by the court once a panel's decision has been quashed and the court is deciding whether to substitute another decision for that of the Panel or to remit the matter for rehearing. They were, however, agreed on the applicable principles and I have substantially adopted their analysis.

43. The court has a discretion. That discretion is necessarily a wide one because of the wide variety of differing circumstances in which it will have to be exercised. Those circumstances will differ both as to the form of the failing in the decision or procedure of the panel and as to the matters leading up the hearing before the panel. The discretion will have to be exercised having regard both to the purpose of the regulatory regime and to the interests of justice. The following considerations are potentially relevant in the current case.

44. First, account must be taken of public interest in the proper regulation of health care professionals and in the maintenance of high standards in the healthcare professions. I have quoted above article 3(4) and (4A) with its identification of the protection of the public as the Respondent's over-arching objective and with the subsidiary objectives of the promotion of public confidence and the promotion and maintenance of proper professional standards and conduct as being aspects of the pursuit of that overarching objective. The public interest in those matters is an important one and Mr Micklewright was correct to identify it as a consideration underlying the conclusion of the Court of Appeal in *Ruscillo v Council for the Regulation of Health Care Professionals* [2004] EWCA Civ 1356 that a regulatory body could appeal against an unduly lenient decision by a panel dealing with such matters.

45. In order to maintain high professional standards and to uphold the public interest in the proper regulation of healthcare professionals allegations against such professionals must be properly investigated and properly determined once investigated. Those complaining of misconduct have an important interest in their allegations being determined before a panel properly considering the material advanced. Those accused of misconduct also have an interest in such proper determination which not only provides for the upholding of allegations against those properly accused but also for the definitive dismissal of allegations against those wrongly accused.

46. However, a further factor is the public interest in finality of proceedings and in the prompt determination of allegations against healthcare professionals. Delay and multiple hearings in cases of allegations of professional misconduct are both to be avoided where possible. Not only are they wasteful of public resources but they increase the stress which such proceedings cause both for the accused professional and for the person whose allegation is under consideration.

47. Next, regard must be had to the requirements of fairness and of justice. To some extent these requirements are elements of the public interest to which I have just referred. However, they are more focussed on the circumstances of the particular case and of the

particular healthcare professional. The consideration will necessarily be fact-specific but it will be appropriate to have regard to the circumstances of the proceedings in question; the nature of the allegation being made; the reason why the decision of the original panel has been quashed; the time since the events in question; and whether it will be possible to have a fair hearing if the matter is remitted for rehearing by a new panel (and potentially when such a hearing will be possible). The question of whether there is unfairness or injustice to the professional concerned in having to face again the same allegations will depend on the particular circumstances. However, in light of the public interest in the proper regulation of healthcare professionals and in the proper determination of allegations of misconduct the mere fact that a professional will have to undergo a further hearing is unlikely of itself to be a potent factor against remittal.

48. Finally, it is necessary to consider the utility or otherwise of remittal for a hearing before a further panel. There will be no point in remitting a matter for a further hearing if on a proper consideration of the evidence the only proper conclusion would be the dismissal of the allegation. Thus in *Soni v General Medical Council* [2015] EWHC 364 (Admin) Holroyde J, as he then was, declined to remit the matter for a further hearing having concluded that the evidence of the witnesses even when accepted could not properly lead to the necessary finding of dishonesty (see at [69] and [70]).

## The Parties' Contentions on Remittal in Summary.

49. As I will explain more fully below Mr Butler, for the Appellant, argued against remittal of the sexual motivation allegation on the basis that the court could conclude that the state of the evidence was such that no fresh panel could properly conclude that the Appellant's actions had been sexually motivated and that, as a consequence, remittal would be a pointless exercise. In addition he said that it would be unjust to remit the matter in circumstances where the Respondent had had an opportunity to put the contention that the attempted lowering of Service User A's underwear had been sexually motivated but had chosen not to do so.

50. In arguing for remittal Mr Micklewright denied that such a course would involve any unfairness to the Appellant; contended that there was evidence from which it could properly be inferred that the attempt to lower the underwear was motivated by seeking sexual gratification; and said that the public interest in the proper determination of the allegation called for remittal for a further hearing.

## Discussion and Conclusion.

51. The remittal of the matter to a differently constituted panel will have the consequence that the Appellant will have the matter hanging over him for a further period. In addition there will be an inevitable impact on Service User A who will also be in the position of knowing that her allegation has not been finally disposed of. However, it is relevant to note that this is a case where the facts are substantially common ground and where the issue is as to the Appellant's motivation when acting as he accepts he did. Moreover, although any delay in disposing of such allegations is regrettable this case concerns an incident in October 2021 and so this is very far from being a stale case. It follows that the impact on the Appellant and on Service User A of the prolongation of the proceedings can carry little weight against the public interest in proper regulation of healthcare professionals and in the proper determination of allegations against them to

which I have referred above. I turn, therefore, to the questions of whether there are considerations of utility or fairness which militate against remitting the matter.

52. As to utility it would not be appropriate to remit the matter if the court is in as good a position as a fresh panel would be to determine the question of sexual motivation and is able safely to conclude that there was no sexual motivation. That would only be the case if the court were able to say that the state of the evidence is such that no further panel considering the matter properly could conclude that the attempted removal of Service User A's underwear was sexually motivated. That, albeit in the context of an allegation of dishonesty, was the position in *Soni* and the Appellant says that it is the position here.

53. In contending that there was no proper basis for a finding of sexual motivation and so nothing to be gained by remittal of the matter Mr Butler placed particular emphasis on two aspects of the evidence before the Panel. The first was the expert evidence of Emma Condon. Miss Condon accepted that the lowering of underwear could be necessary in the course of massage to access particular parts of the body and that lowering of the underwear "could be indicated when trying to access the TFL muscle". The second was the acceptance by Service User A in the course of cross-examination that she did not have any concerns about the Appellant's earlier lowering of her underwear or the massage of the parts of her body which had been covered by the underwear. A related point is the fact that Service User A became concerned only when she believed that the Appellant was trying to remove her underwear and the Panel found that the allegation of an attempted removal was not established. It follows with that the Panel found that Service User A had been mistaken in her belief in that regard.

54. Those are, indeed, potent considerations but they do not preclude a finding that the Appellant's action in attempting to lower Service User A's underwear was sexually motivated. There are a number of matters which could properly be seen as indicative of a sexual motivation. Based on those a properly directed panel could conclude that the Appellant had been sexually motivated when attempting to lower Service User A's underwear at this point. Such a finding is by no means inevitable and much will depend on the assessment of the evidence which the Appellant gives when questioned about his motivation for the attempted lowering. However, for the following reasons that finding is one which would be open to such a panel.

55. The answers given by Service User A in cross-examination were to the effect that she had not been concerned about the earlier lowering of her underwear. It is to be remembered that the core allegation did not relate to that earlier lowering but to the time when the Appellant asked Service User A to raise her hips, having already asked her to bend her knees. It was that request which caused Service User A to be concerned. The fact that she had no concern about the earlier lowering is supportive of the Appellant but it does not necessarily mean that Service User A's concerns at the later stage were not justified. The Panel did not accept that Service User A had been correct in believing that the Appellant was seeking to remove her underwear but it is clear that she did have a concern at that stage.

56. As to Miss Condon's evidence the fact that the lowering of the underwear could be legitimate and could be undertaken without any improper motive does not mean that all such lowering was legitimate. The question is the motive which the Appellant had at the relevant time. In that regard it is of note that Miss Condon also said that she did not

believe that it would be necessary to ask a patient to move his or her knees so as to move the underwear to the extent necessary. In addition the tenor of her evidence was to the effect that she would have expected there to have been a limited movement of the underwear rather than a lowering of it.

57. There are a number of elements of the evidence which are relevant and which can legitimately be seen as supportive of the contention that the Appellant's actions were sexually motivated.

i) The Appellant accepts that he told Service User A that she had a beautiful body as he was massaging her upper chest when she was lying on her back with her bra undone. Mr Butler placed weight on the fact that the Panel had said, at [74], that it determined that the comment "could not be seen in isolation as sexually motivated". The point, however, is that the comment does not necessarily have to be seen in isolation. In particular it will be open to a new panel to see the comment as relevant to the Appellant's subsequent actions.

ii) Service User A's evidence was that the earlier lowering of her underwear had been to a greater extent than had previously been the case. There was a dispute about this but it would be open to a panel to accept Service User A's evidence and to regard it as supportive of the sexual motivation allegation.

iii) It is of note that the Appellant had not proffered a towel to Service User A.

iv) The Appellant did not explain to Service User A why he was asking her to raise her hips.

v) It was Service User A's evidence that the Appellant was standing with his hands on either side of her hips. As I have explained above the Appellant did not accept that his hands had been in that position and proffered an explanation as to why they would have been there if they were. However, here again it would be open to a panel to accept Service User A's evidence and to regard it as supportive of the allegation of sexual motivation.

vi) A potent consideration is the perception which Service User A had at the time. It is apparent that she did have a concern at the time. It may be that her perception was mistaken and that is something which a new panel will have to consider. However, it will also be open to a fresh panel to conclude that her perception was substantially accurate and that it provides an indication of the Appellant's motivation.

vii) The email exchanges between the Appellant and Service User A after the appointment and the subsequent text message exchange between the Appellant and Service User A's husband are also relevant. It will be open to a panel to regard these as indicating an acceptance by the Appellant that he had been acting improperly and to conclude that the impropriety was because of a sexual motivation.

58. None of the factors is conclusive by itself. The Appellant has an explanation for a number of the matters and as already noted there are factors pointing away from a sexual motivation. The Appellant must be given an opportunity to respond orally to

questioning about his motivation. It may be that the Appellant's explanation will be found to be persuasive or at least such as to cause a panel not to be satisfied that his actions were sexually motivated. However, such an outcome is by no means inevitable. It cannot be said at this stage that the state of the evidence is such that a finding of sexual motivation could not be made. It follows that considerations of utility do not preclude remittal. Indeed the contrary is the case because remittal would enable the exploration in evidence of a matter which was not previously explored namely sexual motivation on the footing of an attempted lowering (but not attempted removal) of the underwear.

59. I turn to the question of fairness. This was the main plank of Mr Butler's contentions. He submitted that remittal of the matter to a new panel would amount to giving the Respondent a second bite of the cherry and would do so unfairly. The contention was that the Respondent had chosen at the hearing to focus on attempted removal of the underwear and had not referred, whether in the opening or closing submissions or in the course of cross-examination, to the attempted lowering of the underwear as an alternative. Mr Butler submitted that in those circumstances and the Panel having found the attempted removal allegation unproved it was unfair that the Respondent should be able to revert to the allegation that the attempted lowering had been sexually motivated.

60. I do not accept that contention. The allegation that the Appellant was attempting to lower Service User A's underwear was put forward as an alternative to the contention that he was attempting to remove it from the time that the proposed amendment was put forward on 13th October 2022. The Respondent's contention had remained throughout that the Appellant's actions had been sexually motivated whichever of the alternative factual scenarios was established.

61. It is significant that the Appellant had admitted that he had been attempting to lower Service User A's underwear. The issues in dispute were, first, whether the Appellant had been attempting to remove the underwear rather than lower it and, second, whether the attempt which was to be proved (in the case of the attempted removal) or which had been admitted (the attempting lowering) had been sexually motivated. This was not a case where the Respondent had abandoned the allegation based on a sexually motivated attempted lowering of the underwear nor one where the Respondent is now advancing a new case which had not been previously advanced. The contention that there had been a sexually motivated attempted lowering of the underwear had been part of the Respondent's case since October 2022. In particular it had been part of the Respondent's case at the time of the hearing.

62. The consequence is that at the start of the hearing the Appellant knew that he was facing an allegation that when he had asked Service User A to lift her hips he had been attempting either to remove her underwear or to lower it and that his actions in either case were sexually motivated. He had admitted that he had been attempting to lower the underwear. In those circumstances it is not surprising that attention was focused on the allegation of an attempted removal. In addition it is apparent that there were sundry difficulties arising from the fact that the hearing was being conducted remotely as I have noted above. Nonetheless it is apparent that there was no abandonment of the allegation now in issue. Thus the transcript of day 2 of the hearing shows the Respondent's presenting officer saying the following in his closing submissions:

> "Charge 1(b), dealing first with the stem, which is that the Registrant attempted to lower and/or remove Service User A's underwear, we have heard that the Registrant accepts that he attempted to lower it but denies that he was attempting to remove the underwear. The Panel will need to consider if the attempt was, indeed, to remove the underwear. In short, was he trying to pull her knickers down? …" (page 3 at C)
>
> "So once the Panel have decided whether or not it was a case of attempting to lower or remove, the Panel should then consider each of the sub-particulars. …" (page 3 at F)
>
> "Considering then 1(b)(ii), that the Registrant attempted to remove or lower Service User A's underwear without her consent…" (page 4 at A)
>
> "The final factual allegation, charge 3, is that `Your conduct at any or all of the particulars at 1(a) and/or 1(b) was sexually motivated', that is by saying `You have a beautiful body' whilst massaging the chest area and/or attempting to lower or remove underwear without offering a towel for dignity without seeking proper consent, or when it was not clinically necessary." (page 5 at B)

63. It follows that if the Appellant had reflected on the position at the end of the hearing but before the Panel's determination he could not reasonably have thought that the Respondent had abandoned the allegation that his actions had been sexually motivated. Still less could he reasonably have thought that the Respondent had conceded that if the allegation that he had been attempting to remove the underwear was not established then the Appellant should not be found to have been sexually motivated in the admitted attempted lowering of the underwear. The Appellant would have noted that he should have been given an opportunity to address that issue in cross-examination but he could not have concluded that the contention had been abandoned. It is apparent that the failure on the part of the presenting officer and the Panel to question the Appellant on this point was the result of an oversight.

64. Now and at the hearing the remaining issue between the Respondent and the Appellant is and was whether the Appellant's admitted conduct in attempting to lower Service User A's underwear was sexually motivated. Fairness requires the Appellant to be given an opportunity to respond to that allegation by answering questions in cross-examination. However, it does not require that the Respondent be precluded from pressing the allegation. Putting it slightly differently there is no unfairness in there being a fresh hearing at which the allegation which was before the earlier Panel but which was not properly addressed is considered.

65. As a consequence there is no consideration in respect either of utility or fairness which can operate against the public interest in a proper determination of the allegation against the Appellant. Similarly, that public interest outweighs the hardship to the Appellant flowing from the prolongation of the matter and from the fact that there will be a further hearing. In those latter regards it is relevant to note that the allegation is not stale and that the remaining issue is a narrow albeit important one.

66. The allegation that the Appellant was sexually motivated when he attempted to lower Service User A's underwear is, therefore, to be remitted for hearing by a differently constituted panel which is also to determine the questions of misconduct, impairment of fitness to practise, and of sanction in light of its conclusion on that issue.