

Approved Judgment

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Case No: AC-2023-LON-003791

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13 January 2025
(circulated 24 December 2024)

Before :

The Hon Mrs Justice Foster DBE

Between :

Dr Graham Wheatley

Claimant

- and -

General Medical Council

Defendant

Lee Gledhill (instructed by **direct access**) for the Claimant
David Hopkins (instructed by **General Medical Council**) for the Defendant

Hearing dates: 10 July 2024

JUDGMENT

[Judge]: Mrs Justice Foster

INTRODUCTION

1. This is an appeal under section 40 of the Medical Act 1983 brought by Dr Wheatley against a Determination of a Medical Practitioners Tribunal (“the MPT”) dated 13 November 2023 after a hearing held between 30 May and 12 June 2023 and on 13 November 2023. The MPT found that on 9 November 2021 at a social event at the Tri Services Trainers Conference, Dr Wheatley had engaged in inappropriate behaviour towards his colleague referred to as Ms A.
2. The MPT decided that Dr Wheatley’s fitness to practice was impaired and imposed a six-week suspension upon him which is yet to come into effect.
3. Two Grounds of Appeal are pursued which challenge the factual conclusions of the MPT. It is argued that those conclusions are:
 - i) outwith the findings of a reasonable tribunal, and
 - ii) Not supported by adequate reasoning
4. Dr Wheatley’s case is that the inconsistencies in and inadequacy of the evidence led by the GMC were such that the MPT could not properly have been sure on the balance of probabilities that he had behaved as was alleged. The presence of inconsistencies and contradictions in the evidence both written and oral ought to have led to an acquittal. The unreasonableness of the MPT’s conclusions is fortified by the fact that the doctor was acquitted of one of allegations made against him on the basis that any touching of the complainant’s breast (earlier in the evening) had been accidental. The appellant was drunk and unsteady, the case against him was inherently weak, he was, as he stated, steadying himself to balance, and any touching of Ms A was accidental. The reasoning processes by which the MPT found the allegation proved were faulty.
5. The Appellant referred the Court to the final submissions on the evidence made on his behalf to the MPT.

FACTS

6. The Tri-Service Trainers Conference is an annual event. It is a three-day residential conference to support professional development in the Defence Deanery, that is the medical services within the Armed Services. Serving military officers alongside civilian medical practitioners working for Defence are the target audience. On 9 November 2021 there was a formal dinner organised by the Defence Deanery, with a drinks reception in an anteroom followed by dinner in the Sandhurst Officers’ Mess with a presentation and an address from the Dean, and an informal gathering thereafter. The appellant was attending in the capacity of a currently practising GP, and as an erstwhile Army Officer in the Royal Army Medical Corps which he had left in October

2001 at the rank of Lt Colonel. Dr Wheatley is currently a partner in a large General Practice in Lincolnshire. He obtained his medical qualifications at Nottingham University Medical School qualifying MBBS in 1986. He became a member of the Royal College of General Practitioners in July 1993 and obtained an MSc in general practice in 2001. His final post was as Associate Medical Director to the Director of Army General Practice. He was one of the distinguished guests on top table at the dinner. The complainant, Ms A is a Civil Service Member of the Defence Medical Academy administrative staff.

7. On the evening of 9 November 2021 the sit-down dinner, the first real get-together since Covid lockdown, started at around 7 PM and lasted around two hours after which people moved into the anteroom. All the people in the anteroom were GP trainers and were known to each other, there were a few administrative staff there also, Ms A was one. She had done much of the work to organise the dinner.
8. The facts found proved against Dr Wheatley by the MPT were that on 9 November 2021 he had engaged in inappropriate behaviour towards his colleague Ms A in that he had “*put [his] arm around Ms A’s waist on one or more occasions*” and “*placed [his] hand on Ms A’s bottom on one or more occasions.*” An allegation that he had persistently sought her attention despite requests on one or more occasions for him to stop, was deleted and not pursued. A further allegation to the effect that he had touched Ms A’s breast and the touching was sexual was found not proved.
9. In respect of the two proven allegations above, it was also found proved that the conduct “*was sexually motivated and that it amounted to sexual harassment pursuant to section 26 Equality Act in that [he] engaged in unwanted conduct of a sexual nature, which had the purpose or effect of violating the dignity of Ms A, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her.*”
10. No challenge is made independently to the finding of unfitness nor the suspension: the Grounds attack the substance of the findings of fact as stated.

LEGAL FRAMEWORK

11. The scope and character of this appeal is well established and not in dispute. A medical practitioner has an appeal as of right under section 40 the Medical Act to this Court. The appeal is described as by way of rehearing, but the extent to which an appellate court will defer to the judgement of the MPT is dictated by the circumstances. There have been various encapsulations in the caselaw of the manner in which a court of appeal will approach a challenge to findings of fact. The cases of *Southall v General Medical Council* [2010] EWCA Civ 407; 113 BMLR 178 and *Gupta v General Medical Council* [2001] UK PC 61; [2002] 1 WLR 1691 and many others, reflect that the MPT are the primary finders of fact. In *Gupta* Lord Rodger giving the reasons of the Board said (at paragraph 10):

“[...] the appeal court readily acknowledges that the first instance body enjoys an advantage which the appeal court does not have, precisely because that body is in a better position to judge the credibility and reliability of the evidence given by the witnesses. In some appeals that advantage may not be significant since the

witnesses' credibility and reliability are not in issue. But in many cases the advantage is very significant and the appeal court is slow to interfere with the decisions on matters of fact taken by the first instance body."

12. More recently in *Byrne v General Medical Council* [2021] EWHC 2237 (Admin) Morris J gave a detailed and comprehensive overview of the jurisdiction under section 40. He said (reflecting the proposition above):

“ ..

9. On appeal, the question for the Court is whether the Tribunal was wrong, or unjust because of a serious procedural or other irregularity: see CPR 52.21(3). Further, an appeal under s.40 is a full appeal by way of re-hearing (and is thus, in principle, broader than the usual jurisdiction of “review” applicable to most appeals): see CPR 52.21(1)(a) and Practice Direction 52D, paragraph 19.”

13. He distilled the principles as to the correct approach on an appeal against a tribunal's determination on the facts from the numerous cases and I adopt his analysis with gratitude. Between paragraphs 11 to 20 of *Byrne* he said this:

“(1) The approach of the Court on appeal to a finding of fact, and in particular a finding of primary fact

11. The issue is as to the circumstances in which an appeal court will interfere with findings of fact made by the court or decision maker below. ...

12. First, the degree of deference shown to the court below will differ depending on the nature of the issue below; namely whether the issue is one of primary fact, of secondary fact, or rather an evaluative judgment of many factors: Assicurazioni Generali at §§16 to 20. The present case concerns findings of primary fact: did the events described by the Patient A happen?

13. Secondly, ...[the] starting point is that the appeal court will be very slow to interfere with findings of primary fact of the court below. The reasons for this are that the court below has had the advantage of having seen and heard the witnesses, and more generally has total familiarity with the evidence in the case. A further reason for this approach is the trial judge's more general expertise in making determinations of fact: see Gupta, and McGraddie v McGraddie at §§3 to 4. I accept that the most recent Supreme Court cases interpreting Thomas v Thomas (namely McGraddie and Henderson v Foxworth) are relevant. Even though they were cases of “review” rather than “rehearing”, there is little distinction between the two types of cases for present purposes

...

15. Fourthly, the circumstances in which the appeal court will interfere with primary findings of fact have been formulated in a number of different ways, as follows:-

- (1) *where “any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge’s conclusions”*: per Lord Thankerton in *Thomas v Thomas* approved in *Gupta*;
- (2) - findings “sufficiently out of the tune with the evidence to indicate with reasonable certainty that the evidence had been misread” per Lord Hailsham in *Libman*;
- (3) - findings “plainly wrong or so out of tune with the evidence properly read as to be unreasonable”: per in *Casey* at §6 and *Warby J* (as he then was) in *Dutta* at §21(7);

...

16. *Fifthly, I consider that, whilst noting the observations of Warby J in Dutta at §21(1), on the balance of authority there is little or no relevant distinction to be drawn between “review” and “rehearing”, when considering the degree of deference to be shown to findings of primary fact: Assicurazioni §§13, 15 and 23. Du Pont at §§94 and 98 is not clear authority to the contrary. ”*

(2) *The credibility of witnesses and corroborating evidence*

17. *Where possible, factual findings should be based on objective facts as shown by contemporaneous documents: Dutta §§39 to 42 citing, in particular, Gestmin and Lachaux.*

18. ... *in assessing the reliability and credibility of witnesses, ... I consider that, if relevant, demeanour might in an appropriate case be a significant factor and the lower court is best placed to assess demeanour: ... the balance of authority supports this view: Gupta §18 and Southall at §59.*

19. ... *In a case where the evidence consists of conflicting oral accounts, the court may properly place substantial reliance upon the oral evidence of the complainant (in preference to that of the defendant/appellant): Chyc at §23. There is no rule that corroboration of a patient complainant’s evidence is required: see Muscat §83 and Mubarak §20.*

20. *Fourthly, in a case where the complainant provides an oral account, and there is a flat denial from the other person concerned, and little or no independent evidence, it is commonplace for there to be inconsistency and confusion in some of the detail. Nevertheless the task of the court below is to consider whether the core allegations are true: Mubarak at §20.”*

14. As to the second part of the challenge, *Southall* (supra) is the leading authority on reasons in the current context, the obligation being to give reasons to enable the losing party to know why he had lost and allow him to consider whether to appeal. Reasons must be plain because either they are set out or because they can be readily inferred

from the form and content of the decision. If they are not otherwise plain and obvious then they ought to be set out. In paragraph 55 of Southall it was said per Leveson LJ:

“in most cases particularly those concerned with comparatively simple conflicts of factual evidence, it will be obvious whose evidence has been rejected and why.”

although

“when... the case is not straightforward and can properly be described as exceptional, the position is and will be different.”

and

“... A few sentences dealing with the salient issues was essential [in the case of Southall]: this was an exceptional case, and I have no doubt, perceived to be so by the GMC, Dr Southall and the panel”

15. Morris J emphasised in *Byrne*, that *Southall* was not authority for the proposition that specific reasons for disbelieving the practitioner are required in every case when his defence is rejected. The case of *Byrne* also provides guidance on reasons concerning the credibility of witnesses.

“26 ... (1) Where there is a dispute of fact involving a choice as to the credibility of competing accounts of two witnesses, the adequacy of reasons given will vary.

In English v Emery, Lord Phillips stated that “it may be enough to say that one witness was preferred to another, because the one manifestly had a clearer recollection of the material facts or the other give answers which demonstrated that his recollection could not be relied upon”. On the other hand, Southall at §55, and Gupta at §13 and 14 suggest that even such limited reasons are not necessarily required in every case.

... there is no requirement for the disciplinary body to make, at the outset of its determination, a general comparative assessment of the credibility of the principal witnesses. Indeed such a practice, undertaken without reference to the specific allegations, has been the subject of recent criticism...

27. Finally, an appeal court will not allow an appeal on grounds of inadequacy of reasons, unless, even with the benefit of knowledge of the evidence and submissions made below, it is not possible for the appeal court to understand why the judge below had reached the decision it did reach. It is appropriate for the appeal court to look at the underlying material before the judge to seek to understand the judge's reasoning and to "identify reasons for the judge's conclusions which cogently justify" the judge's decision, even if the judge did not himself clearly identify all those reasons: see English v Emery Reimbold §§89 and 118.”

16. These are the principles which I apply.

THE CASE BEFORE the MPT

17. The GMC relied on witness statements including from other attendees at the function including Dr Katrina Peebles, Dr Timothy Brodribb, Ms A, Dr Dudley Graham, and Dr Sabine Jefferies. Of them, Ms A, Dr Graham, Surgeon Commander Brodribb and Dr Peebles were called to give oral evidence at the fact finding stage. Other material detailed the internal review that had taken place, and correspondence nearer the time of the events in issue.
18. Not all of the allegations originally made proceeded at the hearing. The GMC agreed that the first, that Dr. Wheatley had persistently sought Ms A's attention despite requests on one or more occasions to stop, could not be made out as she accepted that her attempts to avoid him and escape his attentions may well not have been realised by him. As to the allegation of touching her breast (numbered 1 (d)), she had explained in her own evidence how, in jovial conversation, his medals, and those of another decorated guest, had been transferred to her chest as a joke. She said in her written statement that she understood he was looking to adjust the medals that had become unhooked, and although touching her breast without her agreement was inappropriate, she did not think it had been deliberate. The GMC accepted (and the MPT decided) that the allegation that the touching of the breast was sexually motivated in those circumstances did not survive a half-time submission, so that there was no case answer on that allegation. The suggestion that it might amount to sexual harassment proceeded but in the event, the MPT did not find that allegation proved.
19. Ms A had said in her statement how she had had unwanted attention from the Appellant and another doctor throughout the evening at the event. There had been the incident when Dr Wheatley had touched her breast whilst adjusting medals, and she described the touching of her bottom. She had felt someone's arm around her lower waist, then his hand went to her bottom. He had approached from behind her. Her oral evidence was to broadly similar effect as her written statement. She said:

“He did not squeeze my bottom, and I don't think he patted or caressed it or anything, but it was an extremely uncomfortable situation, and initially I was in shock. I then remember saying to Graham something to the effect of 'you have your hand on my bum'. I think he took his hand off as soon as I said it.”
20. The MPT asked a number of questions which are revealing as to their concerns. There were agreed to be about 40 people present at the dinner, organised by Ms A, and the first since lockdown. Of that number only four, of whom Ms A was one, were administrative staff. There were a few others representing ethics and education, and a few trainees. The others were all GPs, whether military or civilian. They asked her about the avoidance mechanisms she had said she had used to avoid Dr Wheatley in the course of the evening, and regarding an answer she had given in cross-examination. Dr Wheatley's counsel, Mr McCartney, who did not appear before me, had asked her whether she had told Dr Wheatley to just go away. She said no, it was not always that simple. She was questioned by the panel Chair thus:

Q Just one question I have, a point in your evidence you were asked about devices you would use to stop Dr Wheatley – telling him to go somewhere else in effect from your

group, and you said you hadn't told him to go away, it's not always that simple. Can you explain what that meant? A. Nobody likes confrontation. Nobody likes to cause a scene, so as awkward as it is, I just chose to use other methods. The people that I was with and having conversations with, they knew how I was feeling, but I don't think when you're in that situation, it's very, very easy just to say, "Can you leave me alone, please?"

Q. What other methods did you use? What devices were you using? A. Just sort of – just trying to distract him."

21. As noted above, she had earlier explained in evidence that she had been affronted when he had leant over and adjusted the medals on her chest (which he had given her as a joke) without saying anything at all, or inviting her to adjust them. She had earlier acknowledged freely that she believed his touching of her breast was accidental and not deliberate.
22. Dr Dudley Graham explained in a statement made for the internal inquiry that he had seen Dr Wheatley the worse for wear during the evening, had sought to discourage him from drinking more and had seen him reach forward and touch Ms A's backside. Ms A had immediately asked him to stop and he himself said to him that he could not do that sort of thing and it was wholly inappropriate.
23. Dr Graham in his GMC statement explained he had known the Appellant as a colleague and close friend for over 25 years. He had known Ms A for about 10 years. He explained Dr Wheatley was drunk and swaying and "fairly incoherent." He said:

"As he approached, he reached out towards [Ms A] with his left hand and eventually made contact with her buttock. I had a plain view of this. I recall [Ms A] immediately asking him to stop. I no longer remember her exact words, but I could tell by the way she said what she said that she was shocked and that she didn't like Graham touching her buttock."
24. He described Ms A in his statement as not really being able to move away and how he had spoken to him. She was "*tearful, visibly distressed and shocked*" as if trying to process it. She had recounted that he had been following her and someone else during the evening but had brushed it off as "*Graham just being Graham.*" Dr Dudley Graham said he regretted

" ... not acting with more accord and not addressing Graham's state before leaving. That being said, with the event being in the home of the Army Medical Services, I didn't have any formal authority over his behaviour other than being his friend and a Senior Officer present at the dinner, and so would not have been in any formal position to do so."
25. He gave oral evidence to like effect.

26. There was cross-examination of each witness on behalf of Dr Wheatley as to who was standing where, and when, in the course of the events of the evening, and questioning by his counsel about the drunken state of Dr Wheatley. Dr Dudley Graham gave clear evidence of the deterioration in Dr Wheatley's condition, and Dr Wheatley's movements in respect of the touching of Ms A's buttocks. The following exchange took place:

“Q ... You told us that he's swaying, and then you say, paragraph 25: “As he approached, he reached out towards Ms A with his left hand and eventually made contact with her buttock.” Yes? A Yes.

Q I just want to understand that. Does that indicate to us that his hand was out in front of him for some period of time before it eventually made contact? A I was aware that his arm was outreached and he was – he was moving his arm forward.

Q You would accept, presumably, that that might be part and parcel of the swaying and unsteadiness? A To my recollection, it was a movement that had intent rather than balance.”

27. The Doctor did not resile from that assessment, nor what he said he remembered seeing, although pushed to do so. In re-examination he explained he had turned toward Dr Wheatley as he approached, and the latter moved towards Ms A with intent rather than to join the group and had stood close to Ms A. At that point Dr Graham then saw the movement with intent of his hand: not to try and regain balance. He also remembered Ms A saying something to him and appearing to be distressed. He then said to Dr Wheatley words to the effect of “You can't do that Graham”, and Dr Wheatley quickly moved away saying something incomprehensible. It lasted under a minute.
28. Dr Peebles is a GP and within the MOD, a senior Civilian Medical practitioner and the Defence Civilian Medical Practitioner Advisor. She is a friend of the Appellant. Her statement said she saw him between about 9 pm and 10 pm behaving in a drunken manner. She could not be bothered to talk to someone drunk like that; she was with another female doctor who told him to go away. She saw Dr Wheatley go over to Ms A. She said they spoke and then not long after he put his hand on her bottom, She said he “*did not keep his hand still, he moved it over both her buttocks cheeks, fondling them*” which lasted “*2-3 full seconds*”. She had the impression Ms A was pretending nothing had happened. The witness was shocked and said so to her companion who said, “*yeah that's just him.*” She then saw another person come between them as if creating a barrier. She described being “*inwardly furious*” in her statement and the next day reported it to Dr Brodribb.
29. Dr Brodribb, referred to as “Dr B”, the Defence Primary Healthcare Dean and Responsible Officer, reported in his statement that later in the evening he saw Ms A upset and crying; she reported behaviour that had upset her from the Appellant and one other male person at the event. He learnt more the next day. Ms A had described Dr Wheatley not getting out of her face all evening and also touching her bottom. Another doctor had described with frustration that he was in her face as well all evening. Dr Brodribb later called the Appellant. The Appellant said he could not recall the events described. Dr Brodribb said he seemed to him shocked to hear of the complaints, and

offered his resignation from his Conference role. Things then deteriorated somewhat, there was a “*weak*” apology offered by Dr Wheatley, who said he could not remember. He was encouraged to revise the apology by Dr Brodribb but declined, and on receipt of Ms A’s written complaint via Dr Brodribb threatened legal action against a number of people and the organisation including Ms A and Dr Brodribb.

30. As noted, Dr Wheatley said at first he had no recollection of problems including the touching of Ms A’s bottom, but had apologised generally. He made a statement for the GMC in which he said that at the social event in question “social touching” including hugging, touching arms and putting arms round waists and shoulders was common. There was sometimes horseplay, which was often tactile, but he would not initiate it as he is usually extremely careful. He did not specifically recall that he made a beeline for Ms A. He said in the statement:

“Later in the evening, while walking in the bar area I remember feeling unsteady and reaching out to a person that turned out to be [Ms. A]. This may be the point when I touched [Ms A] on her waist and bottom. I do not remember my hand connecting with [Ms A]. I do remember that [Ms A] looked surprised, that I immediately moved my hand and arm away and I think I apologised to [Ms A]. It all happened very quickly, and it did not occur to me that it was anything other than a momentary accident.”

31. The next day he had written to Ms A (via Dr Brodribb, to be passed on) an email headed “*apology to [Ms A]*” the material part of which was:

“I’m really sorry as I understand you’re upset. I’ve not yet seen your statement and to be honest I don’t have complete recall from the later evening, so I don’t completely know what I’m apologising for yet but you have it anyway.”

32. In cross-examination Counsel for the GMC sought to highlight the inconsistencies of Dr Wheatley’s recall:

“Q You say you recall being unsteady near to the bar. A Yes.

Q You recall Ms A being there. A Yes.

Q But you don’t recall what you physically did. A No, I don’t. I wish I did. I wish I could help you further with that, but I don’t.

Q You don’t in fact recall reaching out to steady yourself. A I absolutely do. That was the point that I recall my hand being out in front of me. My right hand was carrying a glass and my left hand was out to try to steady myself.

Q That is a very clear recollection of yours, is it? A It is a recollection, yes.

Q Is it a clear recollection? A It is clear, actually, yes, thank you.”

33. He had also stated in emails after he had been complained about by Ms A, that in fact he did not remember, and maintained that there was very brief touching by him of Ms A. It was accidental or was for balance. It was not deliberate; and it was without sexual motivation. He was drunk and unsteady on his feet; his skeleton argument for this court describes him as “a very drunken man, unsteady on his feet”, which fact is prayed in aid of his case that the touching complained of was accidental.
34. Questions to him included some concerning the fact that he had made no suggestion at all in his first communication, when he knew there had been a complaint about touching her bottom, that he was just unsteady and simply reached out. He had said he had no memory of touching Ms A’s bottom. He suggested in terms earlier that Ms A had herself had “a very large amount to drink, and her behaviour showed this” (which was in fact not the case). He also made a counter complaint about her. The evidence did not support his allegations against her of bad behaviour and the internal complaint against her was dismissed. It was put to him the counter complaint was vindictive. He accepted in questioning “...this wasn’t the best way to handle this situation”. He denied he was seeking thereby to minimise the complaint that had been made against him.

MPT DECISION

35. After directing themselves correctly (and no challenge is made) on the burden and standard of proof, upon the effect of intoxication, their approach to evidence of fact and upon Dr Wheatley’s good character among other issues, the central findings of the MPT were as follows-

“37. The tribunal noted that the incidents in the Allegation were all said to have taken place during or after the dinner. The sequence of paragraphs in the Allegation is potentially misleading in that what is alleged in paragraph 1(d) was likely to have taken place before that in 1(b) and (c). The latter parts of the Allegation took place in a bar adjacent to the room where the dinner had taken place. The tribunal noted that there were some differences between the evidence of witnesses about who was talking to whom and where people were standing. The tribunal considered that these were not material differences and had little or no impact on the credibility of the accounts given. The evening had become informal by this point and people were moving between different groups.

38. The tribunal was also satisfied that Ms A, Dr B and Dr D were not intoxicated. They had each consumed some alcohol but such consumption was most unlikely to have affected their ability to observe and recall events.

Paragraph 1(b)

39. The tribunal examined the various accounts of this alleged incident provided by witness evidence. The tribunal reminded itself of evidence provided by Ms A in which she described the interactions with Dr Wheatley that evening,

“Throughout the night GW continued to harass me. He was extremely inebriated and would continue to seek me out whilst I was in conversations with other guests. He was very handsy and did put his hands around my waist on more than one occasion.”

40. The tribunal accepted Ms A as a credible witness as she had given a generally consistent account which was unlikely to have been affected by excessive alcohol consumption. It rejected the alternative account given by Dr Wheatley, that any touching that took place was accidental. The tribunal considered that Dr Wheatley did not give a positive account regarding this incident. He could not remember carrying out such an act and resorted to speculation that any such contact that had taken place must have been accidental and was caused by his drunken state. The tribunal also noted that he had not been able to give a precise account when he had been asked to do so by Dr C soon after the dinner and instead apologised generally for any offence he might have caused due to his drunken state. In emails from him dated 12 and 15 November he had given a further account, now denying that he had been as drunk as was being alleged and seeking to transfer some of the blame for what had happened onto Ms A. The differences in these accounts adversely affect Dr Wheatley’s credibility.

41. The tribunal preferred the evidence of Ms A. The tribunal noted that Ms A made a complaint almost immediately after the incident.

42. The tribunal were mindful of the age disparity and difference in status in terms of their roles between Ms A and Dr Wheatley. They considered that Ms A and Dr Wheatley were not established friends or acquaintances and were occasional work colleagues at best. His touching of her waist was inappropriate in the circumstances. The tribunal accepted that it was unwelcome touching as per the evidence of Ms A and that it was a deliberate act by Dr Wheatley. The tribunal was satisfied that he intended this act despite his intoxicated state.

43. The tribunal reminded itself of the previous good character of Dr Wheatley but were satisfied that his evidence was not credible on this paragraph of the Allegation.

44. The tribunal found that Dr Wheatley’s actions at paragraph 1(b) were intentional and: inappropriate. The tribunal has therefore found paragraph 1(b) proved.”

and

“Paragraph 1(c)

45. The tribunal examined the various accounts of this alleged incident provided by witness evidence. The tribunal reminded itself of the witness statement provided by Dr B. The tribunal considered Dr B to be a credible and consistent witness and considered his account of the alleged incident:

'As he approached, he reached out towards Ms A with his left hand and eventually made contact with her buttock. I had a plain view of this.

I recall Ms A immediately asking him to stop. I no longer remember her exact words, but I could tell by the way she said what she said that she was shocked and that she didn't like Graham touching her buttock.

Ms A wasn't really able to move away, as she was between Graham, the wall and the bar.

I recall interjecting and saying to Graham something along the lines of 'you cannot do that sort of thing Graham'. I don't recall whether he said anything coherent in response to either myself or Ms A or anyone else in the group; he then moved away from the group.

The whole situation wouldn't have lasted any longer than a few moments, potentially a minute or so.

Ms A then moved out into the corridor only a short distance away from the bar area with [Ms I] and [Ms J]. I followed them out moments later.

I remember apologising to Ms A that this had happened to her and saying that it was wholly inappropriate what Graham did.

She was tearful, visibly distressed and shocked. I got the impression that she was trying to process what had just happened in the context of the evening as a whole.'"

THE APPEAL

36. Before this Court it is suggested by Dr Wheatley the Court should not give undue weight to the fact that the MPT saw the witnesses, and should recognise that the GMC witnesses were inconsistent as to precisely what happened. He takes issue with the way the MPT compendiously described the touching - touching a waist is very different from touching a bottom he says; the MPT were led into failing to analyse the allegations properly as a result. There were features of the evidence he argued that should have led the MPT to regard Ms A as unreliable, including the fact that the allegation of touching her breast was not made out. She made errors in her recollection of the evening, in that in one case a different person who had been importunate and inappropriate was deliberately distracted by her colleagues so she could escape from him and she had confused that incident with Dr Wheatley.
37. On this basis, Mr Gledhill, who did not appear below, on behalf of Dr Wheatley submits that the evidence was so inconsistent, one witness with another, as well as internally incoherent and/or inconsistent, that the case ought not to have gone beyond half time given the weaknesses.

38. Mr McCartney, who appeared below on behalf of Dr Wheatley, had devoted a large part of his cross-examination (and indeed his final address to the MPT) to the differences between what one witness said about the disposition of people in the bar at the relevant time, the groups that were talking, and the exact position and motion of Dr Wheatley's hand on Ms A's person. In oral submissions he highlighted the differences between Dr Peebles and the others, and suggested that the difference between her claim that there was a "caress", rather than a mere touch – which mere touch although not remembered by Dr Wheatley was accepted by reason of what other witnesses said they saw – cast such doubt on the GMC's case that the conclusion was unsustainable.
39. In this court, Mr Gledhill submitted that the actions of the evening were viewed through the prism of the allegations referring to the touching of Ms A's breast. They were not made out, but they distorted the tribunal's view of the allegation which was found against Dr Wheatley. He emphasised that there were times when Ms A had confused the unwanted attention she had received from another doctor that evening with Dr Wheatley's behaviour. This he said entirely undermined her evidence against him. Details of her evidence differed from others also as to who was standing where and talking to whom.
40. He argued that the MPT did not come to a firm conclusion as to where Dr Wheatley had in fact touched her and should have borne in mind what Mr Gledhill referred to as the continuum through social touching to sexual touching and whether it was one or the other. He submitted that here it was a case where there was no clear solid evidence – but the MPT drew an inference that the touching was sexual. They had to be careful with inferences and ought more carefully to have examined the possibilities of what the behaviour truly was, and the various options, but they did not. Here as elsewhere he submitted the lack of reasoning betrayed the lack of coherent thought and analysis by the tribunal.
41. The GMC before the MPT accepted in terms there were some differences in the accounts given. This was unsurprising it was submitted given the event, the numbers and the people moving around after the meal. They pointed out that the two doctors, independent witnesses, both confirmed the Appellant did put his hand on Ms A's bottom. The nature of the event was reflected in the shocked reaction of the victim and the two witnesses. The victim was so distressed she began to cry. One witness had told Dr Wheatley he just could not do that, another was very cross at what she saw.
42. The GMC relied upon what they described as a stark factual difference between what Dr Graham described that he saw, and what Dr Wheatley sought to suggest was merely an accident. They relied also upon Dr Peebles' evidence, particularly of her own reaction: she was troubled enough to notify Dr Brodribb independently the next morning; she was concerned to report the way that she saw Dr Wheatley had behaved. Another witness, Dr Sabine Jeffries did not see it herself. Dr Peebles said she had spoken immediately to her and Dr Peebles said she had expressed her own shock, and that Dr Jeffries made a comment. That was the "yeah that's just him" that Dr Peebles recalled. By contrast, the Appellant highlighted the fact that the versions of what was seen at the relevant time were not completely consistent and Dr Jeffries did not remember that claimed exchange.

43. Properly, it was accepted on behalf of Dr Wheatley that if the MPT thought it more likely than not he had formed an intention to touch Ms A even though drunk, his inebriation would provide no excuse.

CONSIDERATION

44. This was as Mr David Hopkins for the GMC submitted, essentially a simple case. There had been a complaint about personal behaviour made soon after a work social event by a female person against an older male of higher professional status in circumstances where that male was alleged by the complainant and said by witnesses, to be the worse for drink. The senior male had touched her, uninvited and inappropriately, she spoke to him, and he desisted. The fact of him touching her was seen by more than one independent witness. He said no, it was an accident. He could not remember the touching, but he did remember he was trying to balance and steady himself because he was drunk, it was not deliberate at all. That was in essence the case before the MPT.
45. The allegation was that the acts in question had taken place as the complainant described. Witnesses were called, including the complainant, as to what had happened and what they had seen. In short, the MPT believed the complainant, and accepted the evidence of several different eyewitnesses and were unperturbed that there were some differences between the various accounts which they did not find to be material.
46. The starting point for a principled approach to a fact challenge is, as set out above, the recognition that this Court will be very slow to interfere with findings of primary fact.

Among the important primary facts that the MPT found were the following:

- i) Throughout the night Dr Wheatley had harassed Ms A.
 - ii) Dr Wheatley was extremely inebriated and had sought her out.
 - iii) Dr Wheatley put his hands around her waist on more than one occasion.
 - iv) The touching was unwelcome as Ms A stated.
 - v) That it was a deliberate act by Dr Wheatley, despite his intoxicated state.
 - vi) He had reached out towards Ms A with his left hand and made contact with her buttock.
 - vii) Ms A immediately asked him to stop.
 - viii) Ms A did not like Dr Wheatley touching her buttock.
47. As to matters of deduction, or secondary fact, which the Court may look at rather more closely, the most salient of the MPT's secondary findings were:
- i) Ms A was a credible witness because she had given a generally consistent account which was unlikely to have been affected by excessive alcohol consumption.

- ii) The actions of Dr Wheatley were sexual in nature
- iii) Although there were some differences in testimony concerning who was talking to whom and where people were standing, they were not material to their conclusions.
- iv) The credibility of the accounts given was not impacted by the inconsistencies; it was relevant that the later part of the evening was informal and meant that people were moving between different groups.
- v) The accounts given by Ms A, Dr B and Dr D were more likely to be reliable in that these people were not intoxicated, their consumption was such that it was most unlikely to have affected their ability to observe and recall events.
- vi) Dr Wheatley's account was the less reliable since he said he could not remember carrying out the touching and resorted to speculation that any such contact that had taken place must have been accidental and was caused by his drunken state, but later sought to say he was not in fact intoxicated to a significant extent.
- vii) His account in emails after the event and the fact he sought to put the blame on Ms A undermined the reliability of his testimony.

48. The Court will show less deference to such matters of deduction, but in the present case their deductions amount in substantial part to judgements upon the reliability of conflicting testimony as between the victim and the eyewitnesses on the one hand, and the Appellant on the other. In my clear view, there is, as the MPT held, no central inconsistency in the evidence called by the GMC. Such differences as the external evidence revealed are explicable in terms of the party, the environment, the celebratory atmosphere, and were carefully considered. The tribunal said further:

“The tribunal noted that Dr Graham had not seen Dr Wheatley fondling Ms A's bottom but Dr Peebles had. The tribunal did not find that such inconsistencies in the description were material and found they did not undermine the central point in the evidence that deliberate touching of Ms A's bottom had occurred. Neither witness was prepared to accept that Dr Wheatley might have touched Ms A's bottom accidentally because of unsteadiness caused by drink. Dr Peebles also said that she had remarked to Dr Jefferies that Dr Wheatley had touched Ms A's bottom.” [48]

and

“The tribunal considered that although witnesses had differing recollections these do not undermine the consistent evidence of the touching having taken place. The tribunal noted that Dr Jefferies did not recall Dr Peebles saying that Dr Wheatley had touched Ms A's bottom. However Dr Jefferies did not say that such words had not been said.” [49]

49. It is in my judgement quite impossible to say that the MPT made appealable errors in their factual analyses or in the reasoning of their decision. As stated above this was an

essentially simple matter in which the MPT had available records of what was seen, said and done at the time from the complainant, made soon after the events, and from witnesses in the internal inquiry that took place. It also had the reactions and statements of the main protagonists on paper for the GMC proceedings.

50. Importantly it had the benefit of those advantages which the principles spell out, that afford the primary decision-maker a distinct advantage when making its primary assessment of the facts.
51. The MPT placed reliance on the evidence of Dr Graham. Reading his oral evidence in full shows, in my judgement, that he was a careful, precise witness upon whom the MPT could reasonably rely for a clear, unbiased view as to what happened. The difference between “touching” that was described by him and “fondling” described by another, did not, nor could it in the circumstances of this short-lived event in the context of a lively informal social setting, make Dr Graham into an unreliable historian. Likewise the differences in the positioning of people, and the detail of movements in the room, or movements of the main players (that were painstakingly highlighted and presented to the MPT in the submissions of Mr McCartney on behalf of Dr Wheatley), could quite properly be described as having little or no impact upon the credibility of the witnesses’ accounts (paragraph [37]).
52. Crucially, this tribunal accepted that the complainant was a witness of truth. Aside from the advantages of seeing her cross-examined, this deduction was well-supported by the other facts. She spoke to remonstrate at once. She became very upset shortly after. She told another of what had happened to her. The paperwork supported her case: her internal complaint was very promptly made and consistent with her evidence.
53. There was ample material for the MPT to conclude that Dr Wheatley’s account was unsatisfactory: it emerges clearly from his approach to what happened, what he did and did not remember, and his reaction to her complaint.
54. I do not accept that the decision of the tribunal regarding the touching of Ms A’s breast in any way adversely tainted the case in respect of the substantive finding of the MPT. Ms A herself had said in evidence that she believed the touching of her breast had happened accidentally when Dr Wheatley leant over to retrieve the medals pinned to her chest. She did not assert that it was a deliberate assault – she was upset because he had not asked whether he might retrieve them, which she felt would have been appropriate, but had just done so. In my judgement the tribunal was quite right to treat the allegation involving the medals as it did – which approach was not resisted by the GMC.
55. I do not accept that the MPT in some way misapprehended the evidence, nor that in the light of the clear evidence supporting Ms A’s account, that they made a decision that was not open to them in law on the evidence before them. They were not wrongly influenced by other allegations made.
56. I also agree that this was in effect a choice between accepting Ms A’s account of what happened which in its material particulars was supported by a number of witnesses, or rejecting it and accepting what Dr Wheatley said about losing his balance and by

accident touching her bottom. The evidence of the GMC witnesses did not support Dr Wheatley's account, which itself was ambivalent.

57. Each of the foundations for finding the complaint proved on the balance of probabilities was set out in the reasons. It must not be forgotten that the primary purpose of reasons in this context is to tell the person who loses why he has lost. It is clear beyond peradventure why the case was found proved here.
58. Whilst it is impossible to impugn the findings or the reasoning it is worth noting, finally, that the MPT also determined as follows.
59. The tribunal reminded itself that this is a case of sexual misconduct, whereby Dr Wheatley had acted inappropriately towards Ms A with his actions being sexually motivated and amounting to sexual harassment. Nevertheless, the tribunal considered that Dr Wheatley's misconduct fell at the lower end of the spectrum of gravity in terms of sexual misconduct cases. It noted that Dr Wheatley was heavily under the influence of alcohol at the time, there had been a single incident, and that he had immediately withdrawn his hand when he was asked to do so.
60. The tribunal was satisfied that the misconduct which it had found was remediable, had been substantially remedied and that the likelihood of repetition was very low.
61. It was for these reasons no doubt that the sanction upon Dr Wheatley was in the terms that it was, and which must now take effect. The appeal must be dismissed.