FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2020] CSIH 12
XA35/19

Lord President
Lord Menzies
Lord Glennie

OPINION OF LORD CARLOWAY, the LORD PRESIDENT

in the appeal by

DR JANE MARY McLENNAN

Appellant

against

THE GENERAL MEDICAL COUNCIL

Respondents

Appellant: Duncan QC, P Reid; BTO Solicitors LLP
Respondents: Dunlop QC; Eversheds

9 April 2020

Introduction

[1] This is an appeal from a series of decisions of the Medical Practitioners Tribunal dated 6 July 2018 (sufficiency of evidence), 11 February 2019 (determination on the facts) and 19 March 2019 (sanction). The Tribunal found that, in a report about Mr A, which had been prepared for the purposes of proceedings before an Employment Tribunal, the appellant had: reported that Mr A had said certain things during the appellant's examination of him, which he had not said and which she knew he had not said; reported

that "his speech was heavily peppered with expletives" during the examination, which was untrue; and maintained at the Employment Tribunal hearing that the report was accurate, when she knew that it was not. She had attributed direct quotations to Mr A which she had known to be false. The Tribunal found that the appellant's actions had been dishonest. On 19 March 2019, it determined that the appellant's name should be erased from the medical register.

[2] The primary issue in the appeal is whether the Tribunal was entitled to make the finding of dishonesty and whether that finding was adequately reasoned. The appeal raises a subsidiary issue in relation to decisions on the sufficiency of evidence at the conclusion of the evidence against an individual. It also involves a question about the role of evidence of character or reputation in determining whether an individual is proved to have acted dishonestly or has otherwise misconducted himself or herself.

The Report

[3] Mr A had brought a claim in the Employment Tribunal against his former employers, namely the Criminal Injuries Compensation Authority. He alleged that he had a disability in terms of section 6 the Equality Act 2010. He maintained that he suffered from depression, irritable bowel syndrome (IBS) and severe headaches, which had a substantial and long-term adverse effect on his ability to carry out his normal day-to-day activities. On this basis, he contended that he had been discriminated against when he had been dismissed from his employment on 27 May 2013.

[4] The appellant was a NHS consultant, specialising in Old Age Psychiatry, at the Royal Edinburgh Hospital. She had qualified in 1984 and had become a consultant in 1994. She

had an extensive private practice which included the preparation of reports for both claimants and employers in Employment Tribunal cases.

[5] The appellant was instructed by solicitors acting on behalf of the Ministry of Justice, who have responsibility for the CICA, to provide a report on Mr A's condition. She was asked for her views on: whether, during the period of his employment, Mr A had a physical or mental impairment; if so, what the diagnosis was; what the relative dates of the onset of his condition were; and whether his condition met the statutory criteria. The appellant saw Mr A on 19 July 2014. She prepared a report dated 18 August 2014.

[6] After certain preliminary matters, the report commenced with a first section on Mr A's family and personal history. It was said that Mr A lived with his parents. He had started work with the CICA in 2009. Ever since then he said that he had been bullied and victimised. He had been obstructed in his attempts to find alternative employment by the terms of his employers' references. The second section dealt with Mr A's past medical and psychiatric history. This started:

> "2.01 Mr A said that he had kept exceptionally well in the past, prior to working with CICA. He said he had never had problems with anxiety, depression or his bowels prior to commencing work with them in 2009. This is not consistent with the evidence in his case notes."

References to earlier episodes of depression, as revealed in the general medical practitioner's records, were then mentioned.

[7] The third section covered Mr A's "occupational difficulties". This started:

> "3.01 Mr A's account was rather difficult to follow, as he displayed significant pressure of speech… He cursed freely…
> 3.02 Mr A said that he had been harassed and victimised almost since his first day at work with CICA. He said he became 'f….d off' at the language that CICA Applicants used when they were on the phone with him. He did not feel he should be subjected to such language from 'these f...ing girning bastards' and on one occasion he became irritable with a caller."

Mr A reported that he had become increasingly irritable, "stressed out", developing "crushing headaches" and being lethargic and lacking appetite. His bowel problem was described. He talked about being sent to do menial tasks, at which point "His range of expletives increased".

[8] The report continued:

> "3.13 He said his Managers frequently accused him of being confused about discussions they had or instructions he had been given and so he kept recordings of conversations with them, to demonstrate the 'f…ing lies the f…ing bastards telt'…".

Mr A said that he had been given access to his employers' file on him by accident. This revealed that his managers had been communicating information on allegations against him to prospective employers. He had seen some of the "f…ing lies" which his managers had told.

[9] In relation to his condition, the report said:

> "3.17 In terms of depressive symptoms, Mr A found it difficult to describe these other than in very vague terms. He said he felt constantly irritable and snappy…".

Mr A described obsessive behaviour in relation to checking light switches, locks and door handles. He did not mention any diurnal (daily) variation in mood, early morning awakening, reduced concentration, attention or recent memory. He was always angry and felt like hitting people at work. He found it difficult to restrain himself. He had contemplated suicide. He had stopped socialising because of his IBS. He had withdrawn from his family and friends. He was chronically tired and exhausted. He could not be bothered doing anything and spent much of his time in bed.

[10] On capacity for work, the report stated:

> "6.01 Mr A appeared to be a fit and well young man although he was very irritable. His conversation was somewhat difficult to follow at times, partly because of the number of expletives he peppered it with and partly because of the inconsistency in his account".

[11] In relation to the effect of Mr A's conditions, the report continued:

> "7.01 Mr A was very clear that he did not require any assistance or support in carrying out normal activities of daily living as a result of his [IBS], chronic headaches or depression. He said he had never needed any help or assistance because of his conditions and they did not disable him in any way.
> 7.02 He is able to see to his self care and personal hygiene without assistance, is able to buy and prepare food, he does not require to do housework as he lives with his parents."

[12] The description of Mr A's mental state examination was as follows:

> "8.01 Mr A… presented as being somewhat bombastic and had a degree of pressure and prolixity of speech. His thought content was preoccupied by the perceived injustices his Employers and colleagues had inflicted upon him, he was clearly significantly angry… His speech was heavily peppered with expletives. There was no evidence of depression or anxiety, abnormal perceptions or thoughts. His attention, concentration and recent memory were good…".

The appellant described the content of some of the Employment Tribunal documents (ET1 and ET3), which had been lodged by Mr A, and his GP's records.

[13] The report's summary and opinion included a statement that Mr A's assertion, that his employment had been the sole cause of a depressive disorder, IBS and headaches, was plainly inaccurate as these conditions had predated his employment. His account was not consistent and was "tinged with mendacity" (deception). The report continued:

> "10.08 As Mr A did not provide a consistent account nor one which accorded with the evidence in his case notes, it is not easy to come to a view regarding the effect of his alleged symptoms. I was unable to find evidence either from his account, his presentation nor the evidence before me that he was disabled in any way by Depression, [IBS] or… headaches and he was clear that he had no disabilities as a consequence of these".

The appellant expressed the view that Mr A had a condition which was akin to a Paranoid Personality Disorder with some features of a Dissocial Personality Disorder. Her report ended with a docquet which stated that the facts contained in the report, in so far as within her knowledge, were true.

The Employment Tribunal

[14] The Tribunal Hearing took place in Glasgow on 6 January 2015. Mr A represented himself. On 13 January, the Tribunal held that Mr A did not have a disability within the terms of section 6 of the Equality Act 2010. During the hearing, Mr A announced that he had covertly recorded his examination by the appellant. He maintained that the recording (which he had not formally produced) and his transcription of it (which he had lodged) demonstrated that the appellant had fabricated what he had said and that her account of the examination was inaccurate. One example was the appellant's reference to Mr A having sworn during the examination. His transcript showed (inaccurately) no swearing at all. The Tribunal declined (at para 5) to listen to the recording. It was not persuaded "regarding the authenticity" of Mr A's transcript and attached (para 35) no weight to it. Rather, the Tribunal, not having listened to the recording or having had regard to the transcript, expressed (para 39) a lack of surprise about Mr A and the appellant having different views on what had been said during the examination.

[15] The Tribunal noted (para 41), specifically in relation to swearing, that the appellant had recorded "in quotation marks, some of the comments made… where expletives were used" and that the appellant had described Mr A as having sworn "frequently and freely". Although the Tribunal did not consider that the issue of swearing was material, it accepted (para 42) the appellant's account about it.

[16] In what are erroneously headed "Findings of fact", the Tribunal rehearsed large tracts of the appellant's report, including most of her summary and opinion. It had not been disputed that Mr A had IBS and headaches. The Tribunal accepted that he had a mental impairment in the form of "anxiety/depression". These conditions had had adverse effects

on Mr A's ability to carry out normal day to day activities. The Tribunal found, in accordance with the appellant's view, that Mr A had provided no details to support his assertions. It noted (para 84) that the appellant had:

> "specifically asked [Mr A] questions to identify the effect the impairments had on day to day activities, but she found he could provide no details and became irritated by her questions".

The Tribunal did not find "substantial" adverse effect proved, as would have been required for a finding of disability under the 2010 Act.

[17] On the physical element (IBS), the Tribunal founded (para 89) upon the appellant's view that Mr A had said that he did not require any assistance or support in carrying out normal day to day activities. It found (para 90) the appellant's report "persuasive", especially (para 93) in relation to the appellant's conclusion that Mr A's account had been dramatic and exaggerated. Mr A's claim on this basis, and that relative to his headaches, failed. In relation to the combined effects of the various conditions, which Mr A undoubtedly had, the Tribunal was guided (para 108) by the appellant's opinion in rejecting that there were any substantial adverse effects.

The Medical Practitioners Tribunal

General

[18] Meantime, on 14 November 2014, Mr A had raised his concerns about the report with the General Medical Council. He provided the GMC with the recording and his transcript. In January 2015, the GMC told Mr A that the matter was not to be pursued. He successfully sought a review of that decision. Although the GMC decided to review the case in August 2015, it was not until March 2018 that a hearing commenced. It lasted a remarkable 26 days over the following 12 months.

[19] The Tribunal had obtained a professionally produced transcript of Mr A's recording. It had the appellant's notes, which extended to only three pages for the 1 hour and 48 minutes of the examination. There was expert evidence from an "audio analyst" on the content of the recording and from a professor of phonetics who specialised in Glaswegian accents.

[20] In its determination of a submission on the sufficiency of evidence (The General Medical Council (Fitness to Practise) Rules Order in Council 2004, rule 17(2)(g)), prior to the appellant giving evidence, the Tribunal made certain comments about Mr A's account. It noted, in relation to swearing, that, taking the expert evidence at its highest, only eight instances of swearing could be identified; five of which had been noted by the audio analyst. The Tribunal stated:

> "34. …Whilst there are over 200 inaudible sections in the recording, many of these are no more than a second in length, and many occur when [the appellant] herself is speaking. Further, the inaudibles are not always contextually relevant to the allegation. They also amount to only a very small percentage of the total recording. The Tribunal cannot conceive that it would be practically possible for Mr A to have consistently masked the use of expletives in the recording, and in any event notes his view that such use is acceptable."

[21] The Tribunal regarded (para 35) Mr A as a reliable witness, in so far as proceedings before it were concerned. This view was based partly on Mr A's ability accurately to recollect the layout of the examination room some four years after having been there. The Tribunal took into account that Mr A had earlier denied using expletives, although at the hearing he conceded that he had done so. Mr A denied using the word "bastards", whereas the tribunal found that he had done. The Tribunal held that this did not materially affect his reliability because his use of swearing had not been deliberate or conscious. His demeanour during the hearing had been composed and calm.

[22] In reaching its view on sufficiency, the Tribunal had regard to *Soni* v *General Medical Council* [2015] EWHC 364 (Admin), in which Holroyde J expressed the view (para 61), which was founded upon by the appellant, that, before an inference of dishonesty could properly be drawn, a Tribunal required:

> "…to be able safely to exclude, as less than probable, other possible explanations for [the doctor's] conduct".

Holroyde J considered that powerful evidence of a positive good character was relevant to the equation as was the evidence, in that case, that a particular written form may not have been completed because of "…oversight, or administrative error, or loss of the form". He continued (para 62):

> "Thus the possibility of there being an explanation other than dishonesty for the absence of [the forms] was clearly before the [Tribunal]. … [T]here was no evidential basis on which the [Tribunal] could conclude that any such explanation was less probable than deliberate dishonesty".

[23] On this basis the Tribunal determined that, in relation to alternative explanations for the inaccuracies in the appellant's report:

> "45 … Only where those explanations were less probable than deliberate dishonesty, did [the Tribunal] determine there was a case to answer in respect of the dishonesty aspect of the allegation".

Thus, when it came to the allegation that Mr A had not said that he had been given access to his file by accident, and that the file had shown that his employers had been informing prospective employers of allegations against him, the Tribunal considered that the relevant entries in the appellant's report could be explained by the appellant having poor recollection of the consultation "due to the passage of time or inadequate notes, and that this is not less probable than dishonesty". Similarly, although the Tribunal held that Mr A had not felt "'paranoid' and as though everyone was against him", this too could be explained by poor recollection or inadequate notes. These alternative explanations were not "more probable

than dishonesty…, particularly in view of [the appellant's] many years of experience and status as an expert witness".

[24] The Tribunal having rejected most of the appellant's submissions on sufficiency, the appellant gave evidence. The Tribunal:

> "20. …noted that [the appellant] has been candid in the sense that she accepts that this report was not 'her finest hour' and that she was distracted due to problems with her father at the time and the fact that she was sleep deprived. It took account of her evidence that she was working full–time in the NHS, amounting to 12 sessions over 5 days each week. She had an on-call commitment of one in eleven. The Tribunal also had regard to the volume of private work she was undertaking. In 2014, she prepared 160 reports, which would have averaged three per week".

The Tribunal accepted the appellant's evidence on this, but continued that:

> "…whilst all of these factors could have a bearing on the quality of a written report, this would only pertain where a report lacks detail. In the cases where the report contains a high level of detail including a number of direct quotes the explanation is less convincing…".

[25] The Tribunal recorded that its chair had advised that previous good character was something which could be taken into account. In the result, the Tribunal gave limited weight to the appellant's previous good character. The chair had also referred the Tribunal to *Ivey* v *Genting Casinos* (UK) [2018] AC 391 in which Lord Hughes had said:

> "74 …When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts… [O]nce his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined… by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest."

The allegations and their determination

[26] The first issue for determination by the Tribunal (allegation para 1(a)) was whether the appellant's report had contained a number of comments, which she had attributed to Mr A, which had not been made by him and (para 1(b)) whether she knew that they had not

been made by him. The comments were detailed in a schedule. They were 17 in number. The Tribunal held that it had been proved that some 14 of these had been inaccurate and that each had involved dishonesty. Only three items, numbers 2, 8 and 13, in relation to whether the statements were accurate, were ultimately challenged in the appeal. It was accepted that the Tribunal had been entitled to reach the conclusions which it did in relation to the other items in relation to accuracy (although not dishonesty). The Tribunal's conclusions, including those on the disputed items, were as follows:

[27] *Item 1*: Mr A had not said (cf para 2.01 of the appellant's report) that he had never had problems with anxiety, depression or his bowels prior to commencing work with the CICA in 2009. As already observed, at the stage of the submission on sufficiency, the Tribunal had considered whether, in relation to the allegation of dishonesty, it was possible that the problem had simply been poor recollection by the appellant, either because of the passage of time between the examination and the report (three weeks) or the absence of adequate notes; there being only three pages to cover the whole examination. The Tribunal considered the possibility of misunderstanding or conflation of evidence from other sources. It did not consider that either of these explanations "would be more probable than dishonesty at this stage, particularly in view of [the appellant's] many years of experience and status as an expert witness".

[28] As it transpired, the appellant accepted in her evidence that Mr A had not made the statement which she had attributed to him. Not only had Mr A not said it, it was contrary to what he did say. This was demonstrated by the recording and the transcript in which Mr A had said that he had depression since 2004. The appellant had acknowledged that Mr A had depression prior to working for the CICA. Although the appellant disputed that she had known that Mr A had not made this statement, the Tribunal found that she had.

[29] *Item 2*: Mr A had not "cursed freely" (cf para 3.01). The Tribunal had, in the course of the submission on sufficiency, interpreted "freely" as meaning "with regularity" and "within natural conversation". The Tribunal accepted the appellant's evidence that she had understood "freely" to mean "as part of normal speech" and without inhibition. The Tribunal identified only eight occasions in the recording on which a swear word had been used. The first was at 25 minutes; the second at 58 minutes; and the last one was at 1 hour, 45 minutes. In its determination on sufficiency, the Tribunal repeated the formula regarding whether the possibility of poor recollection or misunderstanding was "more probable than dishonesty at this stage". It repeated this formula at the sufficiency stage in relation to items 3-8, 12-13, 15 and 17.

[30] In their final determination, the Tribunal had regard to the appellant's notes, which did not record any swear words or that Mr A had sworn. The explanation, which the appellant had tendered, that she had not noted them because she was afraid that Mr A might see her writing, was not accepted. She had exaggerated the frequency of his swearing and would have known this.

[31] *Item 3:* Mr A had not said (cf para 3.02), in the context of the CICA applicants, that he had become "f…d off" at their language on the phone. The appellant's notes did not contain this as a direct quotation. The appellant's explanation, that Mr A had used the phrase in another context and she had mistakenly attributed it to the phone calls, was not accepted. The appellant had directly attributed comments to Mr A which he had not made.

[32] *Item 4*: Mr A had not referred (cf para 3.02) to CICA applicants as "these f.....g girning bastards". He had used the word "bastards" twice, at 58 minutes and at 1 hour 42 minutes, but not the words "these f…ing girning". There had been no credible explanation as to why the report directly quoted something that Mr A had said, when he had not said it.

[33] *Item 5*: Mr A's range of expletives had not (cf para 3.10) increased when he had described being given menial tasks. The Tribunal noticed eight occasions when expletives were used, *viz*: "Christ", "Christ sake", "bastards", "hell", "f…ing, "f...ed"" and "f..k". No new swear words were used after the reference point. The Tribunal did not accept the appellant's evidence that her memory may have been at fault. It reasoned that, whereas poor recollection might lead to vagueness or a lack of detail, it would not lead a doctor, who was experienced in the writing of expert reports, to include a highly specific detail incorrectly.

[34] *Item 6*: Mr A had not said (cf para 3.13) that he had kept recordings of conversations with his employers, to demonstrate the "f…ing lies the f…ing bastards telt". There was no evidence in the recording of this comment having been made. In light of, *inter alia*, the lack of a contemporaneous record of this remark in the appellant's notes, the Tribunal did not find the assertion that this comment had been made to be credible.

[35] *Item 7*: The complaint had originally been a wider one, involving access to his employer's file on him (*supra*). It had been narrowed down at the stage of the determination on sufficiency. In relation to the remaining element, Mr A had not said (cf para 3.14) that he had "seen some of the 'f…..g lies' that his Managers had put into his references". This was not audible on the recording. No note of it had been made by the appellant. Since the appellant must have been compiling her report from memory, she must have known that Mr A had not said this.

[36] *Item 8:* Mr A had not found it difficult to describe his depressive symptoms only in "very vague terms" (cf para 3.17). Prior to the examination, Mr A had sent the appellant an email, a copy of which he had given to the appellant at their meeting, in which he had set out his symptoms clearly. The appellant's evidence had been that the symptoms which he

had described were not those of depression. The appellant had listed a number of symptoms of depression. Mr A had reported the majority of these, notably problems with memory, concentration and sleeping, having no interest in socialising, anhedonia (lack of pleasure) and chronic anxiety, in both his email and at the examination. The appellant had not asked Mr A specifically about his symptoms or how they had affected him during his employment with CICA. There had been considerable evidence from the GP records that Mr A had been suffering from depression; having required treatment for many years. The appellant must have known that what she had written was incorrect.

[37] *Item 9*: Mr A had not said (cf para 3.19) that he was always angry, felt like hitting people at work that it was very difficult to restrain himself. He had not said that he was always irritable and often just felt like killing himself. This was not on the recording. There was an entry in the GP records from 5 April 2013 which stated:

> "… says head going to explode - actually referring to headaches - also stressed at work - CICA in Glasgow - also short temper - had been falling out with people and nearly fighting with strangers…".

The appellant accepted that her comments had come from the GP records and that they had not been said during the examination.

[38] *Item 12*: Mr A had not said (cf para 5.01) that his condition had kept him inside the house for most of the day, watching TV or "playing on his computer". There was no reference to "playing" on the recording. The appellant accepted that Mr A had not said this. The phrase ought to have been "working on his computer".

[39] *Item 13:* Mr A's conversation had not been "peppered" (cf para 6.01) with expletives. In view of the length of the consultation and the use of a swear word on only eight occasions, the appellant would have known that this did not constitute being "heavily (*sic*) peppered".

[40] *Item 14*: Mr A had not said (cf paras 7.01 and 10.04-06) that he did not require any assistance or support in carrying out the normal activities of daily living. He had not said that his condition did not disable him in any way. There was no evidence in the recording that Mr A had said this. There was no contemporaneous record of it in the appellant's notes. She had not specifically asked Mr A about his daily activities. The appellant had said that she had retrieved this information from Mr A's application to the Employment Tribunal (Forms ET1 and ET3). The information on that form had been simply to inform the ET about whether Mr A would need any assistance as his claim progressed. It was not about whether he required assistance or support in carrying out daily activities. The appellant had not explained how she came to write (at para 7.01) that "Mr A was very clear" on these matters. She would have known that she had not asked Mr A about his daily living, but her report read as if she had.

[41] *Item* 15: Mr A had not said (cf paras 1.01 and 7.02) that he lived at home with his parents and elder brother. The appellant had accepted that this was an error. The appellant must have known that Mr A had not said that he lived with his parents. He did not in fact live with his parents.

[42] *Item 17*: Mr A had not become (cf para 9.04) verbally aggressive as the consultation continued. The Tribunal deleted the additional comment that Mr A had also become more agitated on the basis that this may not have shown up in the recording. The latter did not suggest that Mr A had become "verbally aggressive". In the recording he appeared to be calm and non-aggressive. He had maintained his composure. He could be heard laughing at times. The appellant's evidence was that her wording was "unfortunate". She must have known that he had not been verbally aggressive.

[43] The remaining paragraphs of the allegation were, first (para 2), whether the statement in the appellant's report (at para 8.01) that Mr A's speech had been "heavily peppered with expletives" was untrue. This issue was similar to items 2 and 13 of paragraph 1 of the first allegation (*supra*). The Tribunal considered that eight expletives did not amount to Mr A's speech being heavily peppered, as the appellant had reported. The appellant had accepted that the phrase had been "an unfortunate use of words". The second allegation (para 3) was that, at the Employment Tribunal hearing, the appellant had maintained that her report had been accurate when the statements which she had attributed to Mr A had not been made. This was especially the case in relation to the direct quotations referred to in items 3, 4, and 6–8 (*supra*). The third allegation (para 4) was that the appellant's actions had been dishonest. All of these allegations were found established.

[44] The Tribunal considered (para 27), as they had been invited to do by the appellant, what motive there could be for the appellant to act dishonestly. The Tribunal took notice of certain aspects of the appellant's evidence which suggested that she had formed a dislike of Mr A. These were that she had referred to being uncomfortable with his demeanour and language and had perceived him to be overfamiliar. She had been keen for the consultation to end. It was unusual for her to consult with a patient who swore as often as Mr A had done. She had found it a particularly difficult task to draft the report. She had said in her written statement:

> "I had been quite intimidated by Mr A and his presentation during our consultation. I felt I was being bullied in the way he was taking control of the consultation and I have never responded well to such behaviour, perhaps because of the way my father had been with me. I can only think that this had an effect on the way in which I was reluctant to address Mr A's report".

[45] The Tribunal concluded (para 28) that the appellant had chosen to select information from sources which supported her view that Mr A was not disabled. She did not look for

support for Mr A's position. It did not consider (at para 29) that a professional could, in good faith, make fifteen errors of the kind that she had made due to problems with recollection. This was "far less probable than dishonesty". The Tribunal had first considered the appellant's knowledge or belief as to the facts. It concluded that she had included detail in her report that she had known to be incorrect. There was no other possible explanation other than her need to produce a report when she had not garnered the relevant information during the examination. Having identified her state of knowledge, the Tribunal applied the standards of ordinary decent people and determined that the appellant's behaviour had been dishonest.

Submissions

Appellant

[46] The appellant acknowledged that the bar in relation to disturbing the findings in fact of the Tribunal was a high one. Neither party had produced a transcript of the evidence at the Tribunal hearing. In summary, however, (1) in assessing the appellant's report, the Tribunal's reasoning had been affected by errors in relation to items 2, 8 and 13; (2) the Tribunal had failed to take into account that what the Tribunal had identified as errors in the report had involved subjective or impressionistic judgments; (3) the Tribunal had erred in: (i) reasoning that, in relation to the passage of time and the effect of stressors, memory could only be lost and a false memory could not be created; (ii) failing to proceed on the basis that dishonesty was inherently improbable; and (iii) overlooking the onus which had been on the respondents to demonstrate dishonesty rather than honest mistake; and (4) making the finding of dishonesty. It was unlikely that the appellant would have periled her career on the contents of the report.

[47] It was accepted that a court could not intervene with a tribunal's decision on fact, in the absence of a serious flaw in the process or the reasoning, unless it could be shown to have been "plainly wrong" (*Professional Standards Authority for Health and Social Care* v *Nursing and Midwifery Council* 2017 SC 542 at para [25]; *Garner* v *General Teaching Council* 2016 SC 1 at paras [18]–[22]). Where the decision did not concern matters within the Tribunal's specialist area, however, there was little to inhibit the court from substituting its own judgment if there was cause to do so (*Mallon* v *General Medical Council* 2007 SC 426 at para [20]).

[48] When making a finding of dishonesty, a tribunal had first to ascertain (subjectively) the individual's knowledge or belief as to the facts. It had then to determine whether the conduct was dishonest by applying the standards of ordinary decent people (*Ivey* v *Genting Casinos (UK)* (*supra*) at para 74, following *Royal Brunei Airlines* v *Tan* [1995] 2 AC 378 and *Barlow Clowes International* v *Eurotrust International* [2006] 1 WLR 1476 at para 10; *Frank Houlgate Investment* v *Biggart Baillie* 2015 SC 187 at para 44).

[49] The appellant departed from the submission, which had been contained in the written Note of Argument, that the Tribunal had not had regard to the personal attributes of the appellant, including her experience, intelligence and motive (*Royal Brunei Airlines* (*supra*) at 391). Evidence of previous good character was relevant to the assessment of knowledge (*Bryant* v *Law Society* [2009] 1 WLR 163). It was accepted that this was a matter of weight and that the Tribunal had taken these factors into account.

[50] It was a general rule of thumb that the more serious the allegation, the less likely it was to have occurred. Thus, fraud was inherently less likely to have occurred than negligence (*Re H (Minors)* [1996] AC 563 at 886-7; *In re S-B (Children)* [2010] 1 AC 678 at para 11). A finding of dishonesty required careful reasoning (*Qureshi* v *General Medical*

Counsel [2015] EWHC 3729 (Admin) at paras 45-46); the test being that set out in *Wordie Property Co* v *Secretary of State for Scotland* 1984 SLT 345). A professional person ought to have a presumption of innocence, so that very cogent evidence would be required before the allegation is held to be established (*Lawrance* v *General Medical Council* [2015] EWHC 586 (Admin)).

[51] The appellant did not challenge the findings on items 1, 9, 12 and 15 (*supra*) in so far as they found that what the appellant had reported Mr A as saying had not been what he had said. She accepted that, in the absence of a transcript of the evidence before the Tribunal, she had some difficulty in challenging the other items other than 2, 8 and 13. The latter items were all reports of the appellant's impression, recorded three weeks after the examination and in the absence of adequate notes.

[52] On item 2 (cursed freely) the Tribunal's approach to the word "freely" was wrong. The appellant's assessment had been subjective. She had used the word in the sense of Mr A being uninhibited, having regard to what was a relatively formal setting, as opposed to it meaning "with regularity". The Tribunal's arithmetical exercise was not appropriate. The Tribunal erred in failing to deal with the numerous inaudible passages. In equating their conclusion that Mr A did not curse freely with what the appellant actually knew, the Tribunal erred. This had been a subjective assessment. The effect of the use of expletives was a matter predominantly for the appellant to gauge. The Tribunal's assertion that the appellant had exaggerated the frequency of swearing had no basis in the evidence.

[53] On Item 8 (description of symptoms), the appellant's comment represented an impression formed by her rather than a statement made by Mr A. The Tribunal erred in relying upon the email, which had been sent to the appellant, and the GP records. Neither undermined the appellant's report that Mr A was a poor historian. The Tribunal failed to

have regard to the difficulty which the appellant had had in controlling and directing the examination. The appellant's report had been about oral presentation.

[54] On item 13, the allegation in the particular paragraph (6.01) was that Mr A's account was "peppered" and not "heavily peppered"(cf para 8.01). The Tribunal erred by failing to consider why this characterisation had not been open to the appellant. It failed to address the knowledge of the appellant.

[55] The Tribunal had made no proper assessment of the credibility and reliability of Mr A. Although, at the time of the decision on sufficiency, it had mentioned his reliability, that could only have been provisional. At that stage no assessment of credibility or reliability arose; beyond the Tribunal being satisfied that the evidence was not so inherently weak that it could not be relied upon (*Fox* v *HM Advocate* 1998 JC 94 at 113; *R* v *Galbraith* [1981] 1 WLR 1039 at 1042). The Tribunal required to return to the issue at the stage of the final determination. Saying that its view had not changed was not enough. A comparison of the competing positions was required. This was so even though it was acknowledged that there was force in the respondents' argument that the findings in fact would make little sense if the Tribunal had overlooked Mr A's credibility.

[56] In relation to the appellant's awareness that what she had written was untrue, the Tribunal had erred in its approach to how the memory worked. That approach did not coincide with day to day experience. This was against a background of dishonesty being an inherently improbable explanation and the onus being on the respondents. The Tribunal had not explained how it had come to find that what was inherently improbable had been established. At the sufficiency stage the Tribunal had misdirected itself in considering whether the alternative possibilities were "more probable" than dishonesty. This had been carried through to the determination stage. The Tribunal had moved away from a

presumption that dishonesty was less probable to one in which the appellant had had to establish that the alternatives were more probable.

[57] It was possible to misremember things. It was a *non sequitur* to hold, as the tribunal did repeatedly in relation to the individual items, that the fact that it was established that Mr A had not said what the appellant had reported him saying meant that the appellant had been aware, when writing her report, that he had not said what was reported. She had only taken three pages of notes. A period of three weeks had elapsed. The appellant's description of the extent of Mr A's swearing was very impressionistic in nature. The real issue in relation to many of the quotations was whether or not there had been swearing. In summary, the Tribunal's approach to awareness affected all of the findings.

[58] In relation to whether dishonesty had been proved, the Tribunal had erred in failing to make a finding on the appellant's knowledge. It had recited, but not applied, the test in *Ivey* v *Genting Casinos (UK)* (*supra*). It had not considered the possibility of carelessness. It had not explained how ordinary decent people would have considered the appellant to be dishonest. It had been important for the Tribunal to address why the appellant might have been dishonest. The conclusion that she had disliked Mr A was neither fair nor rational. It had not been suggested to the appellant that she had attempted to paint Mr A in the poorest light. The appellant had intended that the report be sent to Mr A for comment, although that had not happened. The Tribunal had failed to take account of the fact that any errors in the report had not affected the accuracy of the conclusion, which had not been challenged. The accuracy of much of the report had not been attacked. Some of the erroneous attributions had been garnered from other accurate sources. The Tribunal had not taken account of the trivial nature of many of the errors, including whether the appellant had been

playing on, or working with, his computer. The failure to attach weight to the appellant's good character was also an error.

Respondents

[59] The respondents did not dispute the appellant's summary of the law, with two qualifications. First, in relation to the inherent improbability of dishonesty, *In Re S-B (Children)* (*supra* at para 11) had made it clear, following *In Re B* [2009] 1 AC 11 (at para 13) that, despite earlier *dicta* in other cases in England and Wales, which suggested that the standard of proof may vary with the gravity of the allegation or the seriousness of the consequences to the individual who had been accused, there was only one standard of proof in civil cases. That was proof that the fact in issue more probably occurred than not. There was no connection between inherent probability and seriousness. In the present case, there had been between 12 and 15 inaccuracies in a report which had been compiled by an experienced professional for use at an Employment Tribunal. The decision to be made was a binary one: had there been dishonesty or a mistake? It was inherently improbable that the appellant had made this number of innocent mistakes. The choice, of where on the balance of probability the answer rested, was for the Tribunal to make.

[60] The Tribunal's determination on sufficiency had favoured the appellant. The appellant had not suggested that the Tribunal ought to have sustained the appellant's "no case to answer" submission. It was not legitimate to take the generous approach of the Tribunal at that stage and then to build on that for the purposes of the final determination. The assessment of probability had to involve looking at the evidence as a whole. The court had to ask whether the Tribunal's determination of the facts had been "plainly wrong". It was not possible to do this without a transcription of the evidence at the Tribunal (*Robertson*

v *Council of the Law Society* 2016 SLT 103 at para [21], following *Allardice* v *Wallace* 1957 SLT 225 at 227).

[61] It was for the Tribunal to decide what evidence to accept, what weight to give to it and to make findings in fact based upon it (*Garner* v *General Teaching Council* (*supra*) at para [47]). The test for interference on matters of fact was that in *Thomas* v *Thomas* 1947 SC (HL) 45 (at 54); that the court should only do so when an error "unmistakably… appears from the evidence". Deference should be paid to a specialist tribunal, dealing with professional persons, in relation to the writing of a specialist medical report. In any event, the test for overturning findings in fact was a high one (*Robertson* v *Council of the Law Society* (*supra*) at para [22]; *Gupta* v *General Medical Council* [2002] 1 WLR 1691 at para 10; *Perry* v *Raleys Solicitors* [2019] 2 WLR 636 at para 52).

[62] On item 1 (history of depression), the appellant had reported that Mr A had said that he did not suffer from depression until he had started with the CICA. The appellant's statement to that effect was designed to demonstrate that Mr A had been lying. She had accepted that he had not said this. In the summary section of her report, the appellant had said that Mr A had said that his employment had been the sole cause for the development of depression and his other problems. She had said (para 10.3) that "This [is] plainly not the case, as these conditions all began some years prior to his employment…". She continued by stating (at para 10.7) that Mr A's account was "tinged with mendacity".

[63] On items 2 (cursing freely) and 13 (number of expletives), it had been for the Tribunal to assess the evidence, including the recording and the transcript, in order to determine what could be heard and what, on the evidence as a whole, could be determined as fact. The Tribunal's arithmetic on the number of swear words, which had been used, was not challenged. The Tribunal's finding on the allegation (para 2) was that eight occasions

did not amount to a heavy peppering or a liberal sprinkling. That conclusion was not plainly wrong.

[64] On item 8 (vagueness on symptoms), Mr A had handed the appellant an email which described his symptoms. He had spoken about his symptoms of depression. The challenge on all three items (2, 8 and 13) was not made out.

[65] It was inconceivable that the Tribunal had not found Mr A credible, given the findings in fact. Where there was a straightforward dispute, whose resolution depended simply on which person was telling the truth, it is likely to be enough for the judge to indicate that he believes X rather than Y. There may be nothing else to say (*Flannery* v *Halifax Estate Agencies* [2000] 1 WLR 377 at 382). Even if it had not determined his credibility, that did not take the appellant anywhere, since eleven of the items were not challenged.

[66] In relation to the appellant's awareness, the Tribunal had methodically gone through every item and explained why it had found, in each instance, that the appellant had been aware of the true position. It set out what the appellant had written, what Mr A had said and what the appellant had known. There was a clear analysis of what the appellant had believed. The Tribunal had referred to the appellant's explanation; that her mental state may have contributed to the errors, being less convincing when she had included a high level of detail. That was a matter for the Tribunal to assess. In relation to the number of inaccuracies in the report, there was no "magic" in the use of quotation marks. The appellant had been reporting what Mr A had said or done, whether or not direct speech was used. It was common sense that a person may have forgotten something, but it was difficult to understand how so many statements could be attributed to Mr A when he had not made them. Out of 14 allegations, nine had been accepted as errors. The Tribunal's approach in

relation to probability at the sufficiency stage had been created by the appellant's citation of *Soni* v *General Medical Council* (*supra*). Inaccuracies having been established, the binary choice of deliberate or accidental remained. The Tribunal had found that the appellant must have known that she was not reporting the truth.

[67] On dishonesty, there was no complexity. As in *Ivey* v *Genting Casinos* (*supra*), the question was whether right thinking people would consider that the appellant had knowingly misstated the position. The Tribunal had been specifically directed to this test and had applied it. The Tribunal found, in relation to each item, that the appellant had said things that she had known to be untrue. These were clear examples of dishonesty. In reaching its decision, the Tribunal had taken into account all of the factors relied upon by the appellant, including her unblemished career, possible absence of motive, intimation of the report to Mr A and stressors. The Tribunal's approach to memory, and the recollection of detail, was plainly correct. There was no need for a finding of motive, although the Tribunal had thought that *animus* played a part. Once a tribunal finds that a person has said something which he or she knows to be untrue, in the absence of exceptional circumstances, there is no room for anything other than a finding of dishonesty. Given the binary nature of the decision which was taken, no informed reader would have been in any doubt as to the reasons for the decision in terms of *Wordie Property Co* v *Secretary of State for Scotland* (*supra*).

Decision

Sufficiency of Evidence

[68] It is worth commenting, *in limine*, that the Tribunal's approach, to the issue of whether there had been a sufficiency of evidence at the conclusion of the respondents' case (The General Medical Council (Fitness to Practise) Rules Order in Council 2004

rule 17(2)(g)), was very much in favour of the appellant. Sufficiency of evidence is not about whether one version of events is more or less probable than another. It is whether, on the evidence already led at that stage of the proceedings, a Tribunal would be entitled to draw the inference that the facts, which form the allegation, have been proved.

[69] It is not normally legitimate at the stage of determining sufficiency to take into account alternative explanations, especially if there has been no evidence to support the existence of these alternatives. It is not appropriate to offer a view on probability at that stage. Probability is concerned with the assessment of the weight to be attributed to evidence supporting competing versions of fact. Even if probability were a feature, it would not be correct to reject a claim of dishonesty because an alternative was not regarded as more probable. The test would have to be whether dishonesty was more probable. This, however, is essentially a semantic debate in the context of this case.

[70] The evidence led by the respondents, if it were ultimately accepted by the Tribunal, was capable of demonstrating that a significant proportion of what the appellant had attributed to Mr A in her report had not been said by him. In the absence of an acceptable explanation from the appellant, which did not exist at the sufficiency stage of the proceedings, a Tribunal would be entitled to infer dishonesty on the part of the appellant from the fact of the multiple discrepancies alone. In any event, when testing sufficiency, the Tribunal ought to disregard any explanation because, after all the evidence is led, that explanation may either not be live or it may be rejected as not credible or reliable (*Fox* v *HM Advocate* 1998 JC 94, LJG (Rodger) at 101). The Tribunal is not ultimately bound to draw the inference, but it is one which was open to it to draw from the disconnection between the terms of the report and the evidence of what was said at the examination. In deciding at the

stage of determining sufficiency whether that inference can be drawn, the character or reputation of the appellant is irrelevant (see *infra*).

[71] The possibility of poor recollection, or a conflation of different sources of material, having been the cause of the disconnect, and stemming from the time lapse of three weeks or thereby between the examination and the preparation of the report, did not arise at the stage of sufficiency. It was not for the appellant to proffer alternative causes in advance of giving evidence. It follows that the Tribunal should not have dismissed those parts of the allegations which were deemed by it to be the possible consequence of poor recollection (eg in items 7 and 17). The court must disagree with the *dicta* to a contrary effect in *Soni* v *General Medical Council* [2015] EWHC 364 (Admin) (Holroyde J at paras 61 and 62 *supra*).

The Standard of Proof of Dishonesty

[72] It was for the respondents to prove the allegations which they had proffered. However, once all the evidence in a dispute of fact is adduced, the question of onus seldom remains in play (*SSE Generation* v *Hochtief Solutions* 2018 SLT 579, LP (Carloway) at para [273] citing *Gibson* v *British Insulated Callenders Construction Co* 1973 SC (HL) 15, Lord Reid, at 22). The straightforward question for the Tribunal was whether, on the balance of probabilities, the allegation of dishonesty had been made out. It is no doubt correct to say that a finding of dishonesty requires careful reasoning. Almost all tribunal decisions do. The required quality of that reasoning remains that described in *Wordie Property Co* v *Secretary of State for Scotland* 1984 SLT 345 (LP (Emslie) at 348); being whether the decision leaves:

> "… the informed reader and the court in no real and substantial doubt as to what the reasons for it were and what were the material considerations which were taken into account in reaching it".

[73] If there is a dispute on a critical fact, the resolution of which depends upon the oral accounts of witnesses, if the fact finder accepts one or more witnesses and rejects others, it will rarely be sufficient for the Tribunal merely to state the fact of acceptance or rejection. Some reason, albeit that it may be a short one, will almost always be required in the event of a challenge to the decision. If the *dicta* in *Flannery* v *Halifax Estate Agencies* [2000] 1 WLR 377 (Henry LJ, delivering the opinion of the Court of Appeal at 382 (para (3)), is taken as suggesting otherwise, the court must disagree.

[74] Equally, there ought to be cogent evidence before dishonesty is found. In that respect, the court agrees with *Lawrance* v *General Medical Council* [2015] EWHC 586 (Admin) (Collins J at para 35). However, the use of such axiomatic language does not detract from the general legal proposition that the test to be applied in determining whether a crucial fact, including dishonesty, is to be found remains the balance of probabilities (cf Walker & Walker: *Evidence* (4th ed) para 4.3). Is the fact, on the whole relevant evidence which is accepted by the Tribunal, more likely than not to be the case?

[75] In approaching the exercise of deciding the critical issue, a Tribunal should keep an open mind, untinged by any preconceived general notions that dishonesty is less likely than not to have occurred or that it is inherently improbable, especially when the person accused is one of good repute. Whether dishonestly is made out will depend entirely on what facts are ultimately admitted or proved and what inferences can legitimately be drawn from them. If, for example, there is a lack of coincidence between what a patient is proved to have said at an examination and what the doctor reports that patient to have said, and the disconnect occurs on multiple occasions, it may not be too onerous a task for a Tribunal to draw an inference of dishonesty, even if it need not do so in particular circumstances.

[76] In order to find dishonesty established, all that was required was a determination that it was more probable than not. That would involve eliminating any alternative possibilities which were live at the end of the evidential hearing, but there was no need to find that these alternatives were "more probable" than dishonesty in order to find that dishonesty was not proved. Nevertheless, it is clear that the Tribunal found that dishonesty was more probable; in fact that it was, in relation to many of the items, the only possible explanation for what the appellant had reported.

[77] In *Ivey* v *Genting Casinos (UK)* [2018] AC 391, Lord Hughes explained (at para 74) that the exercise of determining whether dishonesty had occurred involved, first, the ascertainment of the individual's knowledge or belief as to the facts and, secondly, the application of the standards of ordinary decent people. That was a useful test in the context, which arose in that case, of distinguishing dishonesty from "cheating" at cards. It explained that the fact that the person's belief was reasonable was not a factor in the dishonesty equation. The issues in the present case may be more easily resolved, whilst still applying that test. As Lord Hughes observed (at para 53) "…dishonesty is… primarily a jury concept, characterised by recognition rather than by definition". It was his taking notice of the view of the English Criminal Law Revision Committee (8th report, para 39), that dishonesty was "… something which laymen can easily recognise when they see it…", that may have prompted his reference to ordinary decent people, when disapproving of the complexities introduced in England and Wales by *R* v *Ghosh* [1982] QB 1053. Once it had been established that Mr A had not said what the appellant had reported him as having said, the simple question could be more simply expressed as being whether the appellant knew that what she was reporting was not true. If that were the case, there would only be one inference that an ordinary decent person could draw.

Evidence of Character

[78] A person's character, whether good or bad, is normally a matter which is collateral to the issue of whether a person acted dishonestly on a particular occasion. It is not directly relevant to the proof of that issue. In the court setting, the evidence would be inadmissible (Dickson: *Evidence* (Grierson ed) para 6; Walker & Walker: *Evidence* (4th ed) para 7.4.1; Davidson: *Evidence* para 10.01). The quality of a person's general repute does not make the particular dishonesty on the occasion libelled more or less likely. Even if it did have some peripheral relevance, inquiry into it would normally be excluded on expediency grounds (*A* v *B* (1895) 22 R 402, LP (Robertson) at 404). Character may, however, be taken into account by a court or tribunal when assessing a person's credibility and, to a lesser extent, reliability; should he or she give evidence which refutes the allegation and invokes his or her reputation as a factor in assessing her credibility. *Bryant* v *Law Society* [2009] 1 WLR 163 (Richards LJ, delivering the opinion of the court, at para 161, following *Donkin* v *Law Society* [2007] EWHC 414 (Admin) Maurice Kay LJ at para 24) is correct on the effect of character or reputation on credibility, but not on it having a bearing on whether the person had or did not have a "propensity" to have been dishonest on the particular occasion under investigation.

[79] The degree to which evidence of character or reputation may be significant to the issue of credibility or reliability will vary according to the facts and circumstances of the particular case. Some caution is required, however, before giving it too much weight. The inquiry by a Tribunal into an allegedly dishonest act or other misconduct will, or at least should, focus on the act itself. The Tribunal will look primarily at the evidence which bears directly on whether or not the act occurred. It is important for a Tribunal not to be deflected

from that task by delving too deeply into an individual's professional or personal background. Although that individual may well be able to secure testimonials to his or her good character from amongst his or her close associates, it is unlikely that the opposing party, who is attempting to prove the allegation, will have either the time, resources or ability to delve into the individual's past in an attempt either simply to refute the terms of such references or to secure evidence of a less than perfect past.

[80] As with evidence of good character, proof of bad character will equally have no direct relevance to a central issue of dishonesty in a particular setting. Even if it had a direct bearing on whether the individual had a "propensity" to act in the manner alleged, that is not relevant to proof of the particular act. As a generality, those pursuing disciplinary proceedings should not be permitted to introduce evidence of general bad character as an element in the proof of dishonesty on a specific occasion. They are not to be encouraged to ingather evidence of bad character either to refute the terms of references, which might be, or have been, produced, or as an attempt to undermine either credibility or reliability. If it were to be otherwise, tribunal hearings would be greatly prolonged, and the tribunal could be deflected from its purpose, by parties addressing matters of peripheral, if any, significance. Although it may be legitimate to establish that an individual has no previous disciplinary record, since that is a matter which is usually readily ascertainable, there must be practical constraints on the extent to which a tribunal should otherwise permit evidence of either general good or bad character, when that character is not the gravamen of the complaint. In this case, the Tribunal were entitled to attach little weight to the appellant's good character in so far as it bore upon the merits of the case.

Mr A's Credibility

[81] It is not every case that requires a determination on the credibility and reliability of each party. In this case, Mr A's credibility and reliability was of limited importance. The essential matters requiring determination were, first, what Mr A had said at the consultation. That was, in large part, established by the recording and its transcription. It was not disputed that Mr A had made the recording of the examination. There was expert evidence from the audio analyst that the recording had not been tampered with. Secondly, there was the appellant's belief of what had been said. There was the appellant's evidence on that matter. The issue turned in large measure on her credibility and reliability. What the appellant had written in her report was not disputed.

[82] *Quantum valeat*, the extent to which Mr A's credibility, as distinct from his reliability, was an issue in the mind of the Tribunal is unclear. The Tribunal had, at the stage of the determination on the submission on sufficiency, expressed the view that it regarded his evidence as reliable. There is little point in addressing the reliability of a witness, if his or her credibility has not already been accepted. Given that the Tribunal ought not to have been making any concluded findings on credibility or reliability, other than perhaps in an extreme case, at the stage of a determination on sufficiency, it is reasonable to infer that what the Tribunal was saying about Mr A's reliability then was simply that, taking his evidence as both credible and reliable, there was a case to answer. At the determination stage, the Tribunal did state that its view on Mr A's reliability had not changed. In the context of a case in which his credibility and reliability was of marginal importance, that was sufficient to meet any reasons challenge.

The Finding of Dishonesty

[83] The Medical Practitioners Tribunal is a specialist body which has been created by statute to examine and determine allegations of professional misconduct in the context of medical practice. As such, the issue of whether there has been serious misconduct is "pre-eminently" a matter for the Tribunal, which has the requisite expertise in matters of practice which it can bring to bear on the critical issue (*Robertson* v *Council of the Law Society* 2016 SLT 103, Lord Menzies, delivering the opinion of the court, at para 22, citing *Mallon* v *General Medical Council* 2007 SC 426, LJC (Gill), delivering the opinion of the court, at para [28]). Although there is some force in the argument that the court is equally, if not better, placed to assess a matter of dishonesty, the allegation is of dishonesty in a particular context; that is in the compilation of medical reports for legal proceedings. The manner in which examinations of patients are conducted and recorded by the medical practitioner, and the form and content of the report, fall within the Tribunal's area of specialism. Due deference therefore has to be given to the Tribunal's conclusion on the facts; it having had the advantage of seeing and hearing all of the evidence, especially that of the appellant herself (see now *General Medical Council* v *Raychaudhuri* [2019] 1 WLR 324, Sales LJ at para 57).

[84] It is not the case that the court cannot interfere with findings in fact simply because there is no transcription of the proceedings before the Tribunal. In certain situations, notably appeals from inferior or delegated courts, a transcription may be necessary before the court can review a finding in fact and substitute its own judgment, having detected an error in the inferior court's approach. Such substitution may not be possible without a transcript of the whole, or a substantial part, of the testimony. However, there are many other situations in which the court has an adequate account of the evidence which was given before an inferior court or tribunal. Some tribunals do not record proceedings *verbatim* and

such an account may, in any event, be quite expansive. The court may be able to detect an error, and quash the decision in relation to a particular finding in fact, on the basis of, for example, an erroneous conclusion which unmistakably appears from the account of the evidence provided. Where, as here, the Tribunal has set out an adequate narrative of the evidence, it would be unreasonable to require a party to produce a transcription of 26 days of proceedings in order to present an appeal.

[85] Nevertheless, the test for reviewing matters of fact, especially in a situation where there is no transcript, remains a high, but by no means an impossible, one (cf *Southall* v *General Medical Council* [2010] EWCA Civ 407, Leveson LJ at para 47: "virtually unassailable" citing, *inter alia*, *Gupta* v *General Medical Council* [2002] 1 WLR 1691, Lord Rodger at para [10]). The traditional test has been that the finding must be capable of being described as "plainly wrong" (*Clarke* v *Edinburgh and District Tramways Co* 1919 SC (HL) 35, Lord Shaw at 37, adopted in *Thomas* v *Thomas* 1947 SC (HL) 45, Lord Thankerton at 55, Lord Macmillan at 59). This simply means, in modern parlance, that the inferior court or tribunal has reached a decision on a particular fact which no reasonable judge could have reached or that the decision on that fact cannot reasonably be explained or justified (*Henderson* v *Foxworth Investments* 2014 SC (UKSC) 203, Lord Reed at paras 62 and 67; *HS* v *FS* 2015 SC 513, LJC (Carloway), delivering the opinion of the court, at para [19] *et seq*).

[86] It may be accurate to describe an assessment of the quantity of a person's swearing in a person's speech as an evaluative judgment, which depends to a large degree on the subjective view of the person describing the frequency of the oaths used. There may also be a degree of force in the contentions that: an arithmetical approach may not provide a complete answer; and the high level of inaudible passages in the transcript of the examination could have been dealt with in a more comprehensive fashion. The Tribunal did

explain that, although there were over 200 inaudibles, many were no more than a second in length and many were during the appellant's speech. They amounted to a very small part of the total. In these circumstances, and having regard to the limited number of occasions which were detectable, it cannot be said that the Tribunal was plainly wrong, not only in holding that what had occurred did not involve a heavy peppering of swear words or cursing freely, but also that the appellant knew that to be the case. Although, were this to have been the only allegation of dishonesty, the Tribunal's reasoning may have been the subject of a more critical analysis, the combination of the swearing with the individual findings of dishonesty, and the cumulative effect of multiple findings in that regard, renders the Tribunal's conclusions on this aspect fully justified and reasoned.

[87] It is not the swearing or the appellant's approach to it which merits the greater consideration. What was under investigation were a large number of attributed statements in a single report which, it was established, Mr A had not said. The circumstances in which this occurred were that the appellant, as a respected member of the medical profession, knew that her report would be relied upon in legal proceedings, which had been initiated by the subject of the report with a view to establishing disability discrimination. The importance of a high degree of accuracy would have been obvious. The Tribunal was able to establish not only that Mr A had not said what he was, in indirect speech, described as saying (eg absence of depression pre CICA, freely cursing) but that he had not said particular words which had been attributed to him in direct speech. The latter included: describing himself as "f....d off" at CICA applicants; referring to CICA applicants as "these f...ing girning bastards"; calling his employers' remarks to him as the "f...ing lies the f...ing bastards telt"; and seeing "some of the "f...ing lies" that his employers had composed. As the Tribunal reasoned, it is extremely difficult, in circumstances in which it is proved that

Mr A did not use these phrases, to attribute such specifics to anything other than dishonesty; that the appellant knew that what she was reporting was fabrication.

[88] There is no reasonable explanation, other than dishonesty, for the appellant stating that Mr A had said he had no problems prior to working with the CICA when not only had he not said that but also he had said the opposite. Similarly, in the description of Mr A's behaviour during the examination, stating that he had been "verbally aggressive" when, on listening to the recording, he was not, is reasonably attributable only to dishonesty. Most significant in all of this was the multiple nature of the proved or accepted erroneous attributions. It is not possible to categorise the Tribunal's finding of dishonesty as plainly wrong in these circumstances.

[89] It may be somewhat speculative to conclude that the appellant had composed a report which was adverse to Mr A's interests simply because she had disliked him. What is clear is that the false details and embellishments, which the appellant had incorporated in the report, gave it a veneer of attention to detail, and thus professional skill and competence, which would not otherwise have been present. Although it may be that the errors in the report had not affected the appellant's overall conclusion, the persuasive nature of the report stemmed at least in part from the convincing nature of the detailed analysis of what Mr A had said, including the references to direct speech, and his peppering of expletives. Without the false elaboration, the weight which the Employment Tribunal placed on its content may have been altogether different.

[90] The appellant submitted that the Tribunal had misunderstood how the memory worked. Although there was no attempt on the appellant's part at the hearing of the appeal to describe the way in which memory did work, in contrast to the Tribunal's understanding, the suggestion was that false memory (confabulation) could have played a part. It would be

extremely alarming to the legal system if false memory were to play a part in the work of medical professionals when producing reports upon examinations, even if composed three weeks later. The Tribunal did not consider that to be a possibility. They were correct to do so.

[91] In relation to each item, the Tribunal explained the reason for its decision on the particular discrepancy. Its reasoning is clear in each case. It leaves the informed reader in no real or substantial doubt as to what the reasoning for the decision was and what material considerations had been taken into account in arriving at it.

[92] The appeal should accordingly be refused

FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2020] CSIH 12
XA35/19

Lord President
Lord Menzies
Lord Glennie

OPINION OF LORD MENZIES

in the appeal by

DR JANE MARY McLENNAN

Appellant

against

THE GENERAL MEDICAL COUNCIL

Respondents

Appellant: Duncan QC, P Reid; BTO Solicitors LLP
Respondents: Dunlop QC; Eversheds

9 April 2020

[93] I am in complete agreement with your Lordship in the chair, and there is little further that I wish to add. For the reasons given by your Lordship, I agree that the appeal should be refused.

[94] I do not suggest that the Tribunal's decision is completely flawless, but I am satisfied that the Tribunal was entitled to reach the conclusions which it did, and I can find no error of law such as might vitiate its decision. The issue which has most influenced my assessment of the Tribunal's decision is item 1 of Schedule 1, which is set out at

paragraphs [26] & [27] above. At an early stage in the appellant's report, in paragraph 2.01, which was the opening paragraph of the section of the report dealing with Mr A's past medical & psychiatric history, the appellant stated as follows:

> "Mr A said he had kept exceptionally well in the past, prior to working with CICA. He said he had never had problems with anxiety, depression or his bowels prior to commencing work with them in 2009. This is not consistent with the evidence in his case notes."

[95] It was accepted before the Tribunal that the statements attributed to Mr A were never said by him, and indeed that he stated the opposite. The effect of this paragraph was to cause the reader to regard Mr A as lacking credibility, or at least as being unreliable. This laid the foundation for other observations in the report which were more or less critical of Mr A, and were generally unfavourable (see the submissions for the Respondents at paragraph [61] above). As your Lordship in the chair observes at paragraph [87] above, there is no reasonable explanation, other than dishonesty, in the appellant stating that Mr A had said he had no problems prior to working with the CICA when not only had he not said that but also he had said the opposite.

[96] The Tribunal is a specialist body, and so its conclusions are due the deference which the court accords such bodies. Even without such deference, I can find no error of law in the Tribunal's conclusion that the appellant had acted dishonestly with regard to item 1. This alone, even leaving aside the other items relied on (and I do not suggest that they should be ignored), is in my view enough to justify the Tribunal's decision, and the refusal of this appeal.

FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2020] CSIH 12
XA35/19

Lord President
Lord Menzies
Lord Glennie

OPINION OF LORD GLENNIE

in the appeal by

DR JANE MARY McLENNAN

Appellant

against

THE GENERAL MEDICAL COUNCIL

Respondents

Appellant: Duncan QC, P Reid; BTO Solicitors LLP
Respondents: Dunlop QC; Eversheds

9 April 2020

[97] Your Lordship in the chair has helpfully set out the nature of the appeal, the relevant decisions and reasoning of the Tribunal and has summarised the arguments on both sides. I gratefully adopt all of that. In addition, I respectfully agree with what your Lordship says about a number of discrete points under various headings, *viz*. sufficiency of evidence, standard of proof for dishonesty, evidence of character and Mr A's credibility. I also agree with what your Lordship says in paras [83]-[85] about the approach of the court to fact findings of a specialist body such as the Medical Practitioners Tribunal and, indeed, any

inferior court or tribunal. Nonetheless I feel bound to disagree with your Lordship's conclusion that the appeal should be refused and the decision of the Tribunal upheld. In my opinion the Tribunal's reasoning on a significant number of the individual items which it had to consider is seriously flawed, not only calling into question their conclusions on these items but also casting doubt upon the validity of their decisions on other items and the fairness of the process. For my part, I would allow the appeal and quash the Tribunal's decision. My reasons for coming to this conclusion appear from the following paragraphs.

[98] In assessing the strengths of any challenge to the Tribunal's decision, much depends, so it seems to me, on where one starts. If one were to start with the finding at item 1 – a finding that the appellant deliberately misreported Mr A as having said that he had never had depression prior to commencing work with CICA in 2009, in order to contrast this with his medical records showing that he had had symptoms of depression considerably earlier than that, and thereby showing his account to be inconsistent and, in places, "tinged with mendacity" – one might readily come to the view that any criticism of particular findings by the tribunal on other individual items of the complaint paled into insignificance compared with this clear and obvious example of the appellant's dishonesty. But the finding of dishonesty in relation to item 1, like all other findings of dishonesty in relation to other items in the complaint made against the appellant, turned ultimately on the tribunal's assessment of the appellant's credibility. The Tribunal disbelieved her when, in respect of some items, she insisted that her account was accurate and, in respect of those and other items, disbelieved her explanation of how errors might have arisen without any dishonesty on her part. Although in respect of individual items in the complaint the Tribunal endeavoured to set out its reasons for rejecting the appellant's explanation, it is, in my opinion, impossible to divorce this exercise from the adverse view which the tribunal had formed as to the

appellant's overall credibility. That view was heavily influenced by the conclusion to which the Tribunal came on the question of the appellant's statements concerning Mr A's swearing during the interview.

[99] It is convenient to look compendiously at those items in Schedule 1 of the Tribunal's decision which relate to the appellant's account, in her report, of Mr A's swearing in the course of her interview with him. The relevant items are set out below. The words in quotations are words from the appellant's report which, so it is alleged, to the appellant's knowledge, did not reflect what Mr A had said during the interview. The paragraph numbers are numbers in the appellant's report.

Item in Schedule 1	**Words complained of**	**Para in appellant's report**
Item 2	"He cursed freely…	Para 3.01
Item 3	"He said he became 'f…d off' at the language that CICA Applicants used when they were on the phone with him"	Para 3.02
Item 4	"He did not feel he should be subjected to such language from 'these f…ing girning bastards'"	Para 3.02
Item 5	"His range of expletives increased at this point…"	Para 3.10
Item 6	"… he kept recordings of conversations with them, to demonstrate the 'f…ing lies the f…ing bastards telt'"	Para 3.13
Item 7	"… he had seen some of the 'f…ing lies' his Managers had put into references …"	Para 3.14
Item 13	"His conversation was somewhat difficult to follow at times, partly because of the number of expletives he peppered it with…"	Para 6.01

In addition, there is an allegation at para 2 of the complaint that the following passage in the appellant's report was untrue:

Para 2 of complaint	"his speech was heavily peppered with expletives"	Para 8.01

[100] In considering these parts of the complaint, the Tribunal heard evidence from the appellant and from Mr A. It also had before it the appellant's notes of the interview, such as they were (and they were admittedly inadequate). In addition, the Tribunal had the advantage of hearing the recording of the appellant's interview with Mr A, of considering a professionally prepared transcript of that recording (Mr A's own transcription having been shown to be inaccurate in material respects) and of hearing expert evidence as to how the recording was deciphered and what could or could not be heard on it. We did not have a transcript of the evidence from the appellant or of that from Mr A. Nor did we listen to the recording. To that extent I recognise that the Tribunal was, in many respects, in a better position than this court to evaluate the evidence. Nonetheless, we were given a copy of the transcript of the interview (6/2 of process, "Record of Patient Consultation") and the Tribunal set out clearly its reasoning and its conclusion as regards the use of expletives during the interview as evidenced by the transcript. In my opinion, therefore, we are able to consider critically that reasoning and conclusion, and should only hold back from such adverse comment as might appear to be warranted if there is a possibility that other material, which we have not seen, might cast a more favourable light on it.

[101] The interview lasted just over an hour and three quarters. The transcript of the interview runs to 36 pages. It begins with an exchange of pleasantries on Mr A's arrival and concludes when, as the transcript records, "the patient appears to have left the

consultation". For present purposes I am interested only in the "inaudibles", ie those parts of the conversation where the word "[inaudible]" appears in the transcript, indicating that the transcriber could not make out what was being said. Given that the recording was being made surreptitiously by Mr A, it is perhaps not surprising that there were a large number of inaudibles. The number of inaudibles fluctuates but tends to increase as the interview proceeds. To give an impression of the frequency

- on page 2 there are only three inaudibles, two of which are when the appellant was speaking;
- on page 3 there are nine inaudibles, four of which occurred while the appellant was speaking;
- on page 8 there were eight inaudibles, all of them occurring while Mr A was speaking;
- on page 13 there were only three inaudibles, two of them while Mr A was speaking.

However, and this is an illustration of the number of inaudibles tending to increase as the interview went on,

- there were 12 inaudibles on page 18, all but two of which were attributable to Mr A;
- on page 19, there were 14 inaudibles, all but one of which were attributable to Mr A.

Going further forward into the transcript, and counting the number of inaudibles on the last seven pages,

- on page 29 there are 10 inaudibles, eight of them attributable to Mr A;
- on page 30 there are 14 inaudibles, 13 of which are attributable to Mr A;
- on page 31 there are 13 inaudibles, all but one attributable to Mr A;
- on page 33 there are 17 inaudibles, all but one of which is attributable to Mr A;
- on page 34 there are 15 inaudibles, all but one attributable to Mr A;

- on page 35 there are seven inaudibles, all but one attributable to Mr A; and
- on page 36 there are 16 inaudibles, all of them attributable to Mr A.

[102] That is the transcript of the interview which the Tribunal had before it. In paragraph 34 of its decision on the question of sufficiency under Rule 17(2)(g) of the General Medical Council (Fitness to Practise) Rules 2004 (as amended), the Tribunal made these remarks about the number of times Mr A used expletives during the course of the interview with the appellant. It did so under reference to the transcript of the interview to which I have referred:

> "34. … Taking the available expert evidence at its highest (and even taking into account those that have not been identified by both experts) the Tribunal has not identified more than eight expletives, the presence of five of which were confirmed by the GMC expert … Whilst there are over 200 inaudible sections in the recording, many of these are no more than a second in length, and many occur when [the Appellant] herself is speaking. Further, the inaudibles are not always contextually relevant to the allegation. They also amount to only a very small percentage of the total recording. The Tribunal cannot conceive that it would be practically possible for Mr A to have consistently masked the use of expletives in the recording, and in any event notes his view that such use is acceptable."

[103] Although this was said in the context of the question of sufficiency, it is clear that it was a determination to which the tribunal adhered throughout its decision-making. Thus:

- In its final decision, for example, it made the following finding as regards item 2 ("he cursed freely"):

  > "… The Tribunal has only been able to identify eight sections of the 1 hour and 48 minute recording and transcript of the recording where a swear word was used. … The Tribunal could find no evidence to support the assertion that Mr A had sworn "freely". This allegation is therefore proved …"

- As regards item 3 (where the appellant is criticised for having said that Mr A used the expression "f…ed off", the Tribunal said that

"Having listened to the audio recording and read the transcripts, the Tribunal could find no evidence that Mr A had said this. Neither expert identified this expletive within their reports. This allegation is therefore proved. …"

- As regards item 4 ("f…ing girning bastards"), the Tribunal found that Mr A had used the word "bastards" but could find no evidence from the recording or the transcript that he had used either of the other two words ("f…ing girning"). It therefore found the allegation proved.

- Similarly, with item 5, where it was said that the range of expletives increased from a certain point, the tribunal identified from the transcript that from the relevant point

  "… no new swear words were used beyond this point, which had not been used previously. The range did not therefore increase at this stage and this allegation is therefore proved."

- As regards item 6 ("f…ing lies the f…ing bastards telt") the Tribunal said that it had listened to the recording and read the transcripts and could find no evidence that supported this. The appellant tried to identify three places in the transcript where it might have been said but, having listened to all three sections, the Tribunal concluded not only that it did not hear this being said but that it would not fit contextually with the comment made in those sections.

- As regards item 7 (which was concerned with whether the appellant had correctly recorded Mr A as having referred to "some of the 'f…ing lies'" his managers had put into references for him), the Tribunal noted that neither expert had identified the swearing in their reports of the recording and the Tribunal did not hear it either – and since the appellant did not herself have any notes of this they found the allegation proved.

- As regards item 13 ("His conversation was somewhat difficult to follow at times, partly because of the number of expletives he peppered it with…"), having identified that the concern related to the accuracy of referring to expletives rather than the conversation being somewhat difficult to follow, the Tribunal said this:

  "… The Tribunal refers to its findings for allegation 2. This allegation is therefore found proved. … Given the length of the consultation and the use of a swear word on only eight occasions, [the Appellant] would know this did not constitute being "heavily peppered". This allegation is therefore proved."

- The reference in that quoted passage is a reference to the allegation made in paragraph 2 of the complaint ("His speech was heavily peppered with expletives"). Having explained that it was prepared to accept the appellant's definition of what constituted an expletive, the Tribunal said that it

  "… found eight examples of expletives under her definition … Bearing in mind the consultation lasted 1 hour and 48 minutes, the Tribunal considered that these eight

> examples did not amount to Mr A's speech being 'heavily peppered with expletives' …"

[104] The Tribunal's reasoning on the question of Mr A's use of expletives can be summarised in this way. Having listened to the recording and read the transcript, they could only be sure that swearing could be heard in eight places. Therefore – and this is a logical non-sequitur – there were only eight occasions on which Mr A swore or used expletives. The appellant was wrong to suggest that Mr A swore or used expletives on more than eight occasions. She must have known, therefore, that his language was not full of expletives as stated by her – and any statement in her report that Mr A used expletives on more than these eight occasions was therefore dishonest.

[105] That approach by the Tribunal is manifestly illogical and unfair. It is obvious that the fact that the Tribunal could only identify eight occasions on which expletives were used does not mean that there were only eight such occasions. Their reasoning gives no credence to the possibility that many of the countless inaudible passages in the transcript may have contained swearing or the use of expletives by Mr A. Given his view, mentioned by the Tribunal, that such language was acceptable, there is no reason to think that he would not have used expletives on more than those eight occasions. The Tribunal makes the point, in the passage quoted from paragraph 34 of their decision on the sufficiency argument, that "many" of the inaudibles in the transcript were "no more than a second in length" – but its use of the word "many" implies that some such passages were clearly longer than that, and, in any event, there are few swear words which cannot be spoken within the space of a second. The Tribunal also makes the point that some inaudibles occur when the appellant was speaking – but, as indicated above, by far the majority of the inaudibles occurred in the speech of Mr A. The Tribunal says that the inaudibles were "not always contextually

relevant to the allegation" – but you do not need many to be "contextually relevant" (only a couple of the items refer to language where context might be relevant), and, in any event, there is no relevant "context" to the assertion in the appellant's report about, for example, the range of swear words increasing or Mr A's account being "peppered" with expletives. The Tribunal says that these inaudibles amount to only a very small percentage of the total recording – but many pages show inaudibles in double figures, and if only a few of those inaudibles masked the existence of swear words the picture would be entirely different. Finally, the Tribunal says that it would not have been practically possible for Mr A to have consistently masked the use of expletives in the recording, but that is not the point – it does not follow that he was not inadvertently mumbling, dropping his voice or becoming semi-indistinct when swearing.

[106] Taking as their starting point, almost as an established fact, the proposition that Mr A resorted to expletives on only eight occasions during the interview lasting 1 hour and 48 minutes, the Tribunal not only disbelieved the appellant's evidence about the frequency and range of his use of expletives, but also refused to accept her evidence of particular things being said when this was not apparent from the transcript and she could not support her evidence by reference to her admittedly inadequate manuscript notes of the interview. It is clear, in my opinion, that the Tribunal formed the view, based upon its analysis of the transcript of the interview, that the appellant was not to be believed. There was no rational basis for that conclusion.

[107] In my opinion that undermines the findings of the Tribunal in respect of items 2, 3, 4, 5, 6, 7 and 13, as well as its finding in relation to the allegation in paragraph 2 ("his speech was heavily peppered with expletives"). But it goes further than that. In respect of all the other items the Tribunal had to make an assessment not only of whether Mr A had said

what he was reported to have said by the appellant in her report, but also, if he had not said that, whether the appellant had acted dishonestly in including the relevant passage in her report. In every instance the Tribunal decided that the misstatement of Mr A's position was not, as she contended, the result of error on her part but was done by her deliberately, knowing it to be false, and therefore dishonestly. It is, to my mind, impossible to conceive that in reaching its conclusion on these various matters, the Tribunal was not influenced to a significant extent by its finding that the appellant was engaged in an exercise of bad-mouthing Mr A by making him out to be foul-mouthed throughout the interview when, according to the Tribunal, he only swore on eight occasions. I consider that the whole of the Tribunal's decision – including the finding of dishonesty in relation to item 1 – is likely to have been infected by its manner of dealing with the question of the use of expletives under reference to the transcript of the interview.

[108] There are aspects of the Tribunal's decision in respect of other items which I find difficult to comprehend; but, except for saying that they too may well have been arrived at in part because of the irrational view reached by the Tribunal on the issue of swearing, they are of relatively minor importance and I do not propose to deal with them further.

[109] In light of the unsatisfactory manner in which the Tribunal has proceeded, as set out above, I would allow the appeal and quash the decision of the Tribunal. In the ordinary course the appropriate order to make would be to remit the matter to a freshly constituted Tribunal to reconsider the complaints made against the appellant. However, given that the hearing before the Tribunal took some 26 days, given that the events with which these proceedings are concerned took place in 2014, and given that, so we were informed, the appellant has now retired, it seems to me that it would serve no useful purpose to remit the

matter. In those particular circumstances, I would simply allow the appeal and quash the decision.