Neutral Citation Number: [2021] EWHC 52 (Admin)

Case No: CO/4777/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/1/2021

Before :

MR JUSTICE GRIFFITHS

- -

Between :

PROFESSIONAL STANDARDS AUTHORITY FOR HEALTH AND SOCIAL CARE — **Appellant**

- and –

(1) HEALTH AND CARE PROFESSIONS COUNCIL

(2) LEONARD REN-YI YONG — **Respondents**

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Fiona Patterson (instructed by **Field Fisher LLP**) for the **Appellant**
Victoria Butler-Cole QC (instructed by **BDP Pitmans LLP**) for the **First Respondent**
The Second Respondent did not attend and was not represented

Hearing date: 8 December 2020

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Approved Judgment

MR JUSTICE GRIFFITHS :

1. This is a disciplinary appeal in relation to the Second Respondent, Mr Leonard Ren-Yi Yong ("Mr Yong"), who was a social worker employed by the London Borough of Lambeth.

2. The Appellant is the Professional Standards Authority for Health and Social Care ("the PSA"). The PSA is an independent body, accountable to Parliament, which has oversight over various health and social care regulators.

3. The regulators overseen by the PSA include the First Respondent, the Health and Care Professions Council ("the HCPC") which is the regulator of many health and care professionals, including (at the material time) social workers.

4. The appeal is a referral by the PSA under section 29(4) of the National Health Service Reform and Health Care Professions Act 2002 ("the Act") which provides:

> "Where a relevant decision is made, the Authority may refer the case to the relevant court if it considers that the decision is not sufficient (whether as to a finding or a penalty or both) for the protection of the public."

5. The decision in question is the written decision of the HCPC's tribunal service Conduct and Competence Panel following hearings in September and October 2019 ("the Decision"). The Decision was made by a panel of three, advised by a legal assessor.

6. The case against Mr Yong was presented by Counsel instructed by solicitors acting for the HCPC. Mr Yong was not present or represented. He has played no part in this appeal either and he does not appear before me, although he has been served with the proceedings and notified of the hearing. This has been proved to me by evidence.

The appeal

7. I will consider the Decision in detail below but, in summary, the Decision upheld allegations of misconduct by Mr Yong against a number of colleagues, referred to as Worker 1 and Workers 3-7. There is no appeal against the findings *against* Mr Yong. However, the Decision made a number of findings *favourable* to Mr Yong and this appeal challenges some only of those favourable findings, namely:

    i) Findings that, although the conduct proven against Mr Yong meant that he had "behaved inappropriately…towards female Colleagues", it did not in any case mean that he had behaved "in a harassing manner" towards them.

    ii) Findings, in respect of the same conduct, that none of it was "sexually motivated".

8. The ambit of the appeal has been narrowed as a result of discussion between the PSA (as Appellant) and the HCPC (as First Respondent). They both invite me to allow the appeal on the more limited basis now agreed between them. This is that:-

    i) Some although not all of the conduct found proven by the Panel should also be characterised as behaving "in a harassing manner". This aspect of the appeal is

limited to paragraphs 1(a), 1(b), 1(d)(i), 1(d)(ii), 1(e) and 1(f) of the allegations set out on pp 2-4 of the Decision of the Panel.

ii) Some although not all of the conduct found proven by the Panel should be characterised as "sexually motivated". This aspect of the appeal is limited to paragraphs 1(a) and 1(f) of the allegations.

iii) The matter should be remitted on this revised basis for the question of sanction to be redetermined. The sanction imposed by the Panel was a three-year Caution Order. Due to changes in the regulatory régime since the Decision, any reconsideration which I order will be carried out by a different body.

9. However, Mr Yong (by taking no active part in the proceedings at any stage) has not joined in this agreement. The proposed appeal, if allowed as suggested, will be to Mr Yong's detriment by making more serious findings against him, and exposing him to greater sanction, than the decision made by the Panel. Notwithstanding the agreement between the active parties, therefore, I must decide the appeal carefully and on its merits, taking nothing for granted.

Applicable legal principles

10. The approach of the High Court to appeals of this nature has been established in a number of cases. A recent summary is to be found in the judgment of Farbey J in *Professional Standards Authority for Health and Social Care v General Medical Council and Dighton* [2020] EWHC 3122 (Admin) at paras 16-17, as follows:-

> "**Legal framework**
>
> *The High Court's jurisdiction*
>
> 16. The PSA may refer a suspension decision of a MPT to the High Court if it considers that the decision is not sufficient for the protection of the public (section 29(4) of the National Health Service Reform and Health Care Professions Act 2002). The protection of the public includes not only matters relating to the health, safety and well-being of the public but also the maintenance of public confidence in the medical profession and the maintenance of proper professional standards and conduct (section 29(4A) of the 2002 Act).
>
> 17. The court will treat any such reference as an appeal against the relevant decision (section 29(7) of the 2002 Act). The proceedings will be governed by CPR Part 52. The court's consideration is therefore limited to a review of the decision and is not a rehearing (CPR 52.21(1)). An appeal will be allowed if the panel's decision is "wrong" or "unjust because of a serious procedural or other irregularity in the proceedings" (CPR 52.2(3))."

11. CPR 52.21 governs a section 29(7) appeal and provides:

> **52.21— Hearing of appeals**
>
> (1) Every appeal will be limited to a review of the decision of the lower court unless—
>
> (a) a practice direction makes different provision for a particular category of appeal; or
>
> (b) the court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing.
>
> (2) Unless it orders otherwise, the appeal court will not receive—
>
> (a) oral evidence; or
>
> (b) evidence which was not before the lower court.
>
> (3) The appeal court will allow an appeal where the decision of the lower court was—
>
> (a) wrong; or
>
> (b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court.
>
> (4) The appeal court may draw any inference of fact which it considers justified on the evidence."

12. The principles applying to a statutory appeal against the decision of a professional standards body were summarised by Sharp LJ (sitting with Dingemans J) in *GMC v Jagjivan* [2017] EWHC 1247 (Admin); [2017] 1 WLR 4438. After referring (in para 39) to the cases of *Meadow v General Medical Council* [2006] EWCA Civ 1390; [2007] QB 462; *Fatnani and Raschid v General Medical Council* [2007] EWCA Civ 46; [2007] 1 WLR 1460; and *Southall v General Medical Council* [2010] EWCA Civ 407; [2010] 2 FLR 1550), Sharp LJ summarised their effect (at para 40) as follows (omitting a passage not relevant to the present appeal):

> "40. In summary:
>
> i) Proceedings under section 40A of the 1983 Act are appeals and are governed by CPR Part 52 . A court will allow an appeal under CPR Part 52.21(3) if it is 'wrong' or 'unjust because of a serious procedural or other irregularity in the proceedings in the lower court'.
>
> ii) It is not appropriate to add any qualification to the test in CPR Part 52 that decisions are 'clearly wrong': see *Fatnani* at paragraph 21 and *Meadow* at paragraphs 125 to 128.
>
> iii) The court will correct material errors of fact and of law: see Fatnani at paragraph 20. Any appeal court must however be

> extremely cautious about upsetting a conclusion of primary fact, particularly where the findings depend upon the assessment of the credibility of the witnesses, who the Tribunal, unlike the appellate court, has had the advantage of seeing and hearing (see *Assicurazioni Generali SpA v Arab Insurance Group* (Practice Note) [2002] EWCA Civ 1642; [2003] 1 WLR 577, at paragraphs 15 to 17, cited with approval in *Datec Electronics Holdings Ltd v United Parcels Service Ltd* [2007] UKHL 23, [2007] 1 WLR 1325 at paragraph 46, and *Southall* at paragraph 47).
>
> iv) When the question is what inferences are to be drawn from specific facts, an appellate court is under less of a disadvantage. The court may draw any inferences of fact which it considers are justified on the evidence: see CPR Part 52.11(4) .
>
> v) In regulatory proceedings the appellate court will not have the professional expertise of the Tribunal of fact. As a consequence, the appellate court will approach Tribunal determinations about whether conduct is serious misconduct or impairs a person's fitness to practise, and what is necessary to maintain public confidence and proper standards in the profession and sanctions, with diffidence: see *Fatnani* at paragraph 16; and *Khan v General Pharmaceutical Council* [2016] UKSC 64; [2017] 1 WLR 169, at paragraph 36.
>
> vi) However there may be matters, such as dishonesty or sexual misconduct, where the court "is likely to feel that it can assess what is needed to protect the public or maintain the reputation of the profession more easily for itself and thus attach less weight to the expertise of the Tribunal …": see *Council for the Regulation of Healthcare Professionals v GMC and Southall* [2005] EWHC 579 (Admin); [2005] Lloyd's Rep. Med 365 at paragraph 11, and *Khan* at paragraph 36(c). As Lord Millett observed in *Ghosh v GMC* [2001] UKPC 29; [2001] 1 WLR 1915 and 1923G, the appellate court "will afford an appropriate measure of respect of the judgment in the committee … but the [appellate court] will not defer to the committee's judgment more than is warranted by the circumstances".
>
> vii) (…)
>
> viii) A failure to provide adequate reasons may constitute a serious procedural irregularity which renders the Tribunal's decision unjust (see *Southall* at paragraphs 55 to 56).”

13. These points of general principle apply as much to appeals from a decision of the HCPC under section 29(4) of the National Health Service Reform and Health Care Professions Act 2002 as they did to the appeals against the General Medical Council in question in *Jagjivan* and the cases cited in *Jagjivan*.

14. In *Jagjivan* the Divisional Court applied these principles and concluded that "the Tribunal's failure to find that there was a sexual motivation for Dr Jagjivan's actions was wrong and unsustainable. On the facts as found in relation to paragraphs 2(d) and (e), in our view, such an inference was irresistible."

15. In the later case of *Basson v GMC* [2018] EWHC 505 (Admin) Mostyn J refused to substitute a finding of sexual motivation for the contrary findings of the body appealed from, applying the following principles (at paras 17-18):-

> "17. The question for me is whether the tribunal's finding was legitimately made. In *Edgington v Fitzmaurice* (1885) 29 Ch D 459 , Bowen LJ famously said that the state of a man's mind is as much a fact as the state of his digestion. Therefore, in civil proceedings that fact, the state of the man's mind, is to be proved in the usual way by the necessary body of evidence on the balance of probabilities. An appellate challenge to a finding of fact is always highly demanding. However, the state of a person's mind is not something that can be proved by direct observation. It can only be proved by inference or deduction from the surrounding evidence. It has been said that the appellate challenge, where the disputed fact has been proved by inference or deduction, is less stringent than where the challenge is to a concrete finding of fact. In other cases, however, it has been said that the standard is the same.
>
> 18. I am prepared to accept that in a regulatory appeal the appellate challenge to a finding of fact derived from inference or deduction is less stringent than a challenge to a concrete finding of fact. Generally speaking, a finding of fact, whether one of a primary concrete nature or one made on the basis of inference or deduction, can only be challenged on appeal where it can be said that the finding is wholly contrary to the weight of the evidence or that there was some fault in the decision-making process that renders the finding unsafe."

The Decision of the Panel

16. The Decision of the Panel considered allegations in relation to the six colleagues of Mr Yong who were referred to, as I have mentioned, as Workers 1 and 3-7.

17. The overarching allegation was that, while registered as a Social Worker with the Health and Care Professions Council, Mr Yong between approximately September 2016 and June 2017, behaved inappropriately and/or in a harassing manner towards these seven female colleagues in the following respects.

The Panel's decisions on the "harassing manner" allegations

18. The allegation in relation to Worker 1 was as follows:

> "a) In relation to Worker 1, you:

> i. Between approximately September 2016 and October 2016, asked if she was free to join you to the 'Shrek experience' and suggested she wore a school uniform, or words to that effect;
>
> ii. On an unknown date in December 2016, asked whether she wanted to go to a Christmas party with you and to stay at your house afterwards, or words to that effect;
>
> iii. On or around 26 December 2016, you sent her a "WhatsApp" media message saying "l think you are quite a unique individual and deserve a much better year. Let's catch up after work when you get back. Enjoy! X" or words to that effect;

19. The Panel's Decision on this was (at para 69) that:-

> "The Panel accepted the evidence of Worker 1 in relation to the Registrant's behaviour towards her and found the factual part of the sub- particulars proved. The Panel was satisfied that on each occasion, the Registrant did not observe the proper boundaries expected of a manager towards a junior member of staff. The Panel found that the Registrant's behaviour caused Worker 1 to feel uncomfortable and insecure. The Panel was therefore satisfied that the Registrant had behaved inappropriately. The Panel was not satisfied that the Registrant had acted in a harassing manner towards Worker 1. Accordingly, the Panel found Particulars 1(a)(i)—(iii) of the Allegation proved in part."

20. The appeal asks me to overturn the decision that Mr Yong did not, in acting thus, act in "in a harassing manner".

21. The particulars in relation to Worker 3 were:

> "b) in relation to Worker 3, between approximately April to June 2017, you:
>
> i. Asked her, "how satisfied are you with your boyfriend, are you going to get married to him and what do you fight about" and then commented "I see a touchy subject" or words to that effect;
>
> ii. Asked her whether she had previous relationships with men that were older than her and what she liked about these relationships, or words to that effect;
>
> iii. Told her personal details about your extra-marital affairs and talked about a relationship you were having with a woman;
>
> iv. Asked her where she lived and told her that if she lived in the area where you were housesitting for the weekend she could have visited you, or words to that effect;

> v. Asked her when her boyfriend would be away and told her to keep the weekend free so you could do something together, or words to that effect;"

22. The Decision found that (iii) was not proved (para 71 of the Decision) because Worker 3 had not given evidence to that effect. The Decision found the rest of (i) – (v) (that is, excluding (iii)) proved to the following extent (para 70 of the Decision):

> "The Panel accepted the evidence of Worker 3 in respect of these sub-particulars of the Allegation and was satisfied that the Registrant had made these uninvited comments to her. The Panel was satisfied that these comments crossed professional boundaries and had no place in the workplace. Furthermore, the Panel found that due to the disparity in power between the Registrant and Worker 3 she was put into a difficult situation where she was asked to discuss personal matters of a private nature. The Panel was satisfied that the Registrant had behaved inappropriately. The Panel was not satisfied that the Registrant had acted in a harassing manner towards Worker 3. In reaching this decision, the Panel took into account the evidence given by Worker 3 of her impression of the Registrant's behaviour and demeanour at the time the comments were made. Accordingly, the Panel found Particulars 1(b)(i),(ii),(iv) and (v) of the Allegation proved in part."

23. The appeal asks me to overturn the decision that Mr Yong did not, in acting thus, act in "in a harassing manner".

24. The particulars in relation to Worker 4 were:

> "c) In relation to Worker 4, you:
>
> i. On or around 09 June 20167, called her into your office to talk about two young females you said were experiencing domestic violence and were helping outside of work, or words to that effect;"

25. The Decision found this proved (in para 72) to the following extent:

> "The Panel accepted the evidence of Worker 4 and was satisfied that the Registrant had this conversation with her in his office. Again, the Panel was satisfied that this conversation crossed professional boundaries and was inappropriate between a manager and a junior member of the team. The Panel accepted Worker 4's evidence that she did not perceive the Registrant to be making a sexual advance towards her. The Panel was not satisfied that the Registrant had acted in a harassing manner towards Worker 4. Accordingly, the Panel found Particular 1(c)(i) of the Allegation proved in part."

26. There is no challenge in this appeal to any part of that finding, including the finding that Mr Yong was not proven to have acted in a harassing manner.

27. The particulars in relation to Worker 5 were:

> "d) In relation to Worker 5, you:
>
> i. Asked her "How did you meet your boyfriend, I bet you were at it like rabbits", or words to that effect;
>
> ii. On or around 13 April 2017, said "the only thing that needs resurrecting around here is my libido", or words to that effect;
>
> iii. On or around 15 June 2017, asked if she wanted to spend time with you on Saturday afternoon and/or evening, and said, "don't answer now, think about it and let me know" or words to that effect;"

28. The Decision found these proved (para 73) to the following extent:

> "The Panel was satisfied that the Registrant had behaved in the manner described by Worker 5 who gave thoughtful and considered evidence about these matters. The Panel was satisfied that the sexual nature of the Registrant's comments in sub-particulars 1(d)(i) and (ii) and the Registrant's unsolicited invitation to Worker 5 to spend time with him at the weekend amounted to an abuse of his position of power as a manager and clearly crossed professional boundaries. The Panel was satisfied that the Registrant's behaviour was inappropriate. The Panel was not satisfied that the Registrant had acted in a harassing manner towards Worker 5. In reaching this decision, the Panel took into account Worker 5's evidence that when the Registrant had made these comments to her, he hadn't lowered his voice or appeared awkward but seemed confident and cocky. She stated that her impression was that he liked to push boundaries and enjoyed getting a reaction out of people. Accordingly, the Panel found Particulars 1(d)(i)-(iii) of the Allegation proved in part."

29. The appeal asks me to overturn the decision, in relation to both (i) and (ii), that Mr Yong did not act in "in a harassing manner". It does not seek a finding of harassment in relation to (iii)

30. The particulars in relation to Worker 6 were:

> "e) In relation to Worker 6, you;
>
> i. On an unknown date between December 2016 and January 2017, asked about her relationship with her husband and said "you need to keep your husband happy, even if you are tired, you know, masturbate him" or words to that effect;

> ii. On or around March 2017, told her to film herself and her husband having sex;
>
> iii. Talked about a friend of yours to her, who is currently in a domestic violence relationship and told her that you invited her into your bed for cuddles."

31. The Decision found this proved in part (para 74) as follows:

> "The Panel accepted the evidence of Worker 6 who gave clear and consistent evidence about these matters. The Panel was satisfied that the uninvited sexual nature of these comments caused embarrassment to Worker 6. In the Panel's view, once again the Registrant's behaviour crossed professional boundaries and failed to respect his role as a manger. The Panel was satisfied that the Registrant behaved inappropriately. The Panel was not satisfied that the Registrant had acted in a harassing manner towards Worker 6. ln reaching this decision, the Panel took into account Worker 6's evidence that, although the Registrant had caused her to feel uncomfortable and embarrassed, when asked about his motive she stated that she did not perceive him to be making any sexual advances towards her and that he appeared to be trying to give her some male advice about her relationship. She described his demeanour as open, always relaxed and jokey. Accordingly, the Panel found Particulars 1(d)(i)-(iii) of the Allegation proved in part."

32. The appeal asks me to overturn the decision that Mr Yong did not act "in a harassing manner".

33. The particulars in relation to Worker 7 were:

> "f) In relation to Worker 7, you:
>
> i. Said to her "I know I shouldn't do this, but you could move into my flat where there is a spare room" or words to that effect;
>
> ii. On or around 23 December 2016, you clenched your arms around her and pressed your body including your chest and/or groin against her."

34. The Decision divided its conclusion on this between (i) and (ii). In relation to (i), it said (at para 75 of the Decision):

> "The Panel accepted Worker 7's account of this conversation with the Registrant. The Panel was satisfied that in the circumstances, it was inappropriate for the Registrant to have invited Worker 7 to move into his spare room. It was an uninvited and unwanted offer that caused Worker 7 to feel uncomfortable and vulnerable. The Panel was not satisfied that this was said in a harassing manner by the Registrant.

> Accordingly, the Panel found Particulars 1(f)(i) of the Allegation proved in part."

35. In relation to (ii), it said (at para 76 of the Decision):

> "In relation to the factual part of this sub-particular of the allegation the Panel accepted Worker 7's evidence that the Registrant clenched his arms around her and pressed his body including his chest against her. The Panel therefore found this part of the sub-particular proved. The Panel noted the inconsistencies in Worker 7's evidence in respect of whether the Registrant pressed his groin against her, in particular the body chart diagram (exhibit 2) completed by Worker 7 during her evidence. The Panel therefore found the 'and/or groin' part of the sub-particular not proved. The Panel was satisfied that Worker 7 had not consented to being hugged by the Registrant and that the manner in which he had done so had clearly caused Worker 7 extreme discomfort. The Panel was therefore satisfied that the Registrant's behaviour was inappropriate as he had clearly failed to respect Worker 7's boundaries. The Panel was not satisfied that this was done in a harassing manner. Accordingly, the Panel found Particulars 1(f)(i) of the Allegation proved in part."

36. The appeal asks me to overturn the decision that Mr Yong did not act in "in a harassing manner", under both (i) and (ii).

The Panel's overarching findings relevant to "harassing manner"

37. A separate allegation, again in relation to all the named Workers, was:

> "3) The matters set out in paragraphs 1 - 2 constitute misconduct."

38. The Panel found misconduct proved and there is no appeal against that. However, the Panel's decision on the overall question of misconduct included the following passage which is relevant, also, to the question of whether a "harassing manner" had been proved. It said (in paras 83-86 of the Decision)

> "83. The Panel was satisfied, applying its judgement, that the Registrant's repeated, uninvited and inappropriate behaviour towards six junior members of his team over several months fell far short of what would have been expected in the circumstances.
>
> 84. The Panel was further satisfied that the Registrant had repeatedly breached the professional boundaries expected and required of a social worker. The Panel was of the view that the Registrant had failed to understand the power imbalance that existed and how he, as a manager, had caused junior members of the team to feel embarrassed and uncomfortable in their place of work.

> 85. In all of the circumstances, the Panel was satisfied that the Registrant's behaviour amounted to misconduct that would rightly be characterised as deplorable by fellow practitioners.
>
> 86. The Panel therefore, found the statutory ground of misconduct to have been made out."

The Panel's decision on sexual motivation

39. Another separate strand of the case, covering all of the named workers, and all of the allegations, was:

> "2) Your conduct in paragraphs 1 a)-f) was sexually motivated."

40. The Panel decided that this was not proved. It said (in para 78 of the Decision)

> "When considering this Particular of the allegation, the Panel had regard to the judgement in the case of *Arunkalaivanan v GMC* [2014] EWHC 873 (Admin). The Panel gave careful consideration to all of the evidence it had heard in relation to the Registrant's motivation for his behaviour. The Panel had no direct evidence or written submissions from the Registrant on this point. The Panel did take into account HF's evidence that it was generally felt that the Registrant misread his audience and that the jokes he made were often inappropriate. HF also told the Panel that during her meeting with the Registrant on 27 June 2017, the Registrant also said that he had not intentionally meant to offend anyone and that he should have been more 'boundaried'. The Panel also noted that when questioned, a number of the witnesses had specifically stated that they did not perceive the Registrant to be making a sexual advance towards them. Accordingly, applying the burden and standard of proof, the Panel was not satisfied on the evidence available that the Registrant's repeated inappropriate behaviour was sexually motivated. The Panel has therefore found Particular 2 of the Allegation not proved."

41. The reference to *Arunkalaivanan* is not particularly apt. That was a case in which Ms Yip QC (as she then was) overturned a finding of sexual motivation on the particular facts of that case, which were different from the facts found to be proven against Mr Yong (see paras 56-66 of her judgment).

42. I am asked in this appeal to overturn the decision that Mr Yong was not sexually motivated in relation, only, to particulars 1(a) (in relation to Worker 1) and 1(f) (in relation to Worker 7).

The Panel's decision on sanction

43. When considering sanction, the Panel identified a number of mitigating and aggravating factors (paras 99-100 of the Decision):-

i) As aggravating factors, the Panel (at para 99) noted:-

"● The misconduct was repeated over a period of 10 months;

● The misconduct involved six junior members of the team;

● There is no evidence of remediation;

● There is only limited evidence of insight; and

● There is a risk of repetition."

ii) As mitigating factors, the Panel (at para 100) noted:-

"● The Registrant apologised for his behaviour when spoken to by HF and CM in June 2017;

● No Service Users were harmed or put at risk of harm;

● The Registrant is of previous good character and has no previous regulatory findings recorded against him; and

● The Panel heard evidence that the Registrant was a good Social Worker who built a strong team and that LBL was sad to lose him as a result of these matters."

44. The Panel decided to impose a Caution Order for a period of three years. This was at least partly based (as the Decision makes clear in para 107) on the Panel's findings "that the Registrant's behaviour was inappropriate but was not harassing or sexually motivated."

The Grounds of Appeal

45. Five Grounds of Appeal have been pursued and argued before me (a sixth is no longer pursued), as follows:

i) Ground 1: The Legal Assessor's direction to the Committee in respect of what constituted "in a harassing manner" as opposed to "inappropriate" behaviour was insufficient. He failed to provide the Committee with any guidance as to how they may differentiate between the two terms and their respective gravamen. More particularly, he failed to correct the Case Presenter's concession (in response to the Committee's question) that the respective terms denoted conduct of equal gravamen. As a result, the Committee fell into error in finding that the Registrant's behaviour was not "harassing" in respect of workers 1, 3,4,5, 6 and 7. The finding was at odds with their factual findings regarding the Registrant's behaviour towards the said six workers and their responses thereto.

ii) Ground 2: The Committee failed to provide adequate reasons as to why they had concluded that the Registrant's behaviour was not "harassing."

iii) Ground 3: The direction given by the Legal Assessor regarding "sexual motivation" was insufficient. The Legal Assessor failed to direct the Committee to apply the correct test described by Mostyn J in *Basson v General Medical Council* [2018] EWHC 505 Admin that a "sexual motive means that the conduct was done either in pursuit of sexual gratification or in pursuit of a future sexual relationship." Furthermore, the Legal Assessor also failed to direct the Committee that it was possible to find that the Registrant's behaviour was "harassing" but not "sexually motivated". The Conduct and Competence Committee fell into error in their analysis of whether the Registrant's behaviour had been sexually motivated and consequently their conclusion that it had been not sexually motivated. Their finding that allegations 1) a) (ii), 1) b) (ii)(v), 1) d) (iii), 1) e) (i)(ii) and 1) f) (i)(ii) were proved were all inconsistent with their conclusion that the Registrant's conduct had not been sexually motivated.

iv) Ground 4: The Committee failed to provide adequate reasons for their conclusion that the Registrant's behaviour was "inappropriate" but "not sexually motivated."

v) Ground 5: The Committee departed from the HCPC's Sanctions Policy and failed to provide reasons for doing so. Its factual findings precluded the use of a caution order, if the terms of the Policy were followed properly.

46. On these five Grounds, I am invited to allow the appeal and quash and replace the Panel Decision under s29(8)(b) of Act, making the additional findings of "harassing manner" and "sexual motivation" sought by the PSA (supported by the HCPC) which I have identified above.

47. The appeal is argued on the basis that, if I do substitute my own decision on the questions of "harassing manner" and "sexual motivation" in place of those of the Panel, "the court should adopt the Committee's findings in respect of the facts, misconduct and impairment". I am then asked to remit the question of sanction.

48. I will adopt that approach. It has the advantage of leaving the primary facts found by the Panel undisturbed, which is fully in accordance with the deference on questions of primary fact proved by witnesses which is recommended by the caselaw (e.g. *GMC v Jagivan* [2017] 1 WLR 4438 at para 40(iii)), while at the same time recognising that different considerations apply to drawing inferences from those primary facts (e.g. *GMC v Jagivan* [2017] 1 WLR 4438 at para 40(iv)).

Grounds 1 and 2: "harassing manner"

49. Grounds 1 and 2 go together in challenging the Panel's findings that in no case did the conduct found against Mr Yong by the Panel constitute, not only behaving inappropriately (which was found) but, also, behaving "in a harassing manner".

50. The Panel does not, in its decision, explain what it understands by the expression "in a harassing manner". On one view, it was simply a question of fact, applying the words in their ordinary meaning.

51. However, it was not pointed out to the Panel that the HCPC was subject to the public sector equality duty imposed by section 149 of the Equality Act 2010 which provides:

> "149 **Public sector equality duty**
>
> (1) A public authority must, in the exercise of its functions, have due regard to the need to—
>
> (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act (…)
>
> (2) A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1)."

52. The HCPC is a public authority bound by section 149(1)(a). Therefore, it has a duty to have due regard to the need to eliminate harassment "that is prohibited by or under this Act". It follows that the HCPC Panel should have had due regard, specifically, to the definition of harassment in the Equality Act. However, it did not mention that definition or have any regard to it when reaching its decisions on harassment. That was an error of law.

53. That definition is to be found in section 26 of the Equality Act 2020, which provides:-

> "26 **Harassment**
>
> (1) A person (A) harasses another (B) if—
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (b) the conduct has the purpose or effect of—
>
> (i) violating B's dignity, or
>
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
>
> (2) A also harasses B if—
>
> (a) A engages in unwanted conduct of a sexual nature, and
>
> (b) the conduct has the purpose or effect referred to in subsection (1)(b).
>
> (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
>
> (a) the perception of B;
>
> (b) the other circumstances of the case;
>
> (c) whether it is reasonable for the conduct to have that effect.
>
> (5) The relevant protected characteristics are—

…sex;…"

54. It is conceivable that conduct which did not fall within the statutory definition might nevertheless have been behaviour "in a harassing manner". It is, however, impossible that conduct falling within the section 26 definition would not constitute behaving "in a harassing manner". Any conduct within the section 26 definition must be harassment for the purposes of an HCPC disciplinary enquiry, given the public sector equality duty and given, indeed, the fact that section 26 conduct will amount to harassment, or to behaviour "in a harassing manner", within the ordinary meaning of those words.

55. Applying that definition to the primary facts found by the Panel, I must focus on the allegations in paragraphs 1(a) (in relation to Worker 1, see paras 18-19 above), 1(b) (in relation to Worker 3, see paras 21-22 above), 1(d)(i) and (ii) (in relation to Worker 5, see paras 27-28 above), 1(e) (in relation to Worker 6, see paras 30-31 above) and 1(f) of the Decision (in relation to Worker 7, see paras 33-35 above), those being the ones said on appeal to have been behaviour by Mr Yong "in a harassing manner".

56. Returning to the section 26 definition of "harassment", the Decision clearly found that all the acts of misconduct found were "unwanted conduct".

    i) This is evident, for example, from the findings in paras 83-85 of the Decision (which I have set out in para 38 above), that Mr Yong's behaviour was "repeated, uninvited and inappropriate", that a "power imbalance… existed", and that Mr Yong "had caused junior members of the team to feel embarrassed and uncomfortable in their place of work".

    ii) It is also evident from findings in respect of each of the individual Workers.

        a) Mr Yong made Worker 1 "feel uncomfortable and insecure" (Decision para 69).

        b) Mr Yong's comments to Worker 3 were "uninvited" and "due to the disparity in power… she was put into a difficult situation" (Decision para 70).

        c) Mr Yong's words to Worker 5 "amounted to an abuse of his position of power", were made when he "seemed confident and cocky" and were consistent with her impression that "he liked to push boundaries and enjoyed getting a reaction out of people" (Decision para 73).

        d) What Mr Yong said to Worker 6 was of an "uninvited sexual nature" which "caused embarrassment" to her and "caused her to feel uncomfortable" (Decision para 74).

        e) What Mr Yong said to Worker 7 "was an uninvited an unwanted offer that caused Worker 7 to feel uncomfortable and vulnerable" (Decision para 75). In relation to the Panel's finding that Mr Yong "clenched his arms around her and pressed his body including his chest against her", they were satisfied that she had "not consented to being hugged by the Registrant and the manner in which he had done so had clearly caused Worker 7 extreme discomfort" (Decision para 76).

57. Similarly, all Mr Yong's acts of misconduct were "related to a relevant protected characteristic", namely "sex". This was built into the allegation, which (before setting out particulars in relation to individual incidents and workers) was that Mr Yong "Between approximately September 2016 and June 2017 behaved inappropriately and/or in a harassing manner towards female Colleagues…" (Decision p 2). It was also clear from individual allegations, including the suggestion that Worker 1 should go out with him and wear a school uniform, and the explicitly sexual nature of his comments to Worker 3, Worker 4 and Worker 5.

My decision on "Harassing manner" – Worker 1

58. The Decision gives no reason for not finding that the misconduct proved against Worker 1 constituted harassment. I have set out the facts of that misconduct already (paras 18-19 above). The Panel accepted the evidence of Worker 1 about the circumstances, and it painted a clear picture (see para 95 below for the essentials of it). Applying, as the Panel should have done, the section 26 definition of harassment, Mr Yong's misconduct created "an intimidating, hostile, degrading, humiliating or offensive environment" for Worker 1, to quote from section 26. It caused her "to feel uncomfortable and insecure" (Decision para 19). That was reasonable and unsurprising in the circumstances. It follows from the facts found and the evidence accepted by the Panel that Mr Yong was acting in a "harassing manner" against Worker 1 and it was clearly wrong for the Panel to conclude otherwise. I will therefore add a finding to that effect, based upon the Panel's own primary findings.

My decision on "Harassing manner" – Worker 3

59. The Decision explains the Panel's conclusion that, although Mr Yong's behaviour towards Worker 3 was "uninvited", and "crossed professional boundaries", and "had no place in the workplace", and although "due to the disparity of power between the Registrant and Worker 3 she was put into a difficult situation where she was asked to discuss personal matters of a private nature", it "was not satisfied that the Registrant had acted in a harassing manner". It explained that conclusion (Decision para 70) as follows:

> "…in reaching this decision, the Panel took into account the evidence given by Worker 3 of her impression of the Registrant's behaviour and demeanour at the time the comments were made" (Decision para 70).

60. The evidence in question was set out in paras 35-38 of the Decision:

> "35. The Panel heard evidence from Worker 3 who stated that between April and June 2017 the Registrant had repeatedly talked to her about his personal life including his relationships. She stated that during these conversations the Registrant would also ask her about her own personal life and relationships. She stated that the Registrant liked knowing details about peoples' lives. She described how she believed that the Registrant was "attempting to form another level of connection to ascertain whether there was any possibility for a more personal relationship". She described that during these conversations the

> Registrant had asked her whether she was satisfied with her boyfriend.
>
> 36. She told the Panel that the Registrant asked her if she would consider a relationship with an older man. She stated that these conversations took place in the Registrant's closed office. She stated that she believed that the Registrant may have been attempting to ascertain whether she would be interested in forming a relationship with him.
>
> 37. Worker 3 also told the Panel that her partner had won a trip to Hawaii through work and that the Registrant had asked her when her partner would be away and then suggested that she should keep the weekend free so that they could do something together. She stated that this suggestion made her feel very uncomfortable as she had never given any indication that she wanted to spend time with him outside of work.
>
> 38. Worker 3 stated she had discussed her concerns with her work colleagues in June 2017. She told the Panel that although she had told HF that she did not feel uncomfortable at the time of these conversations with the Registrant, on reflection she believes that they were inappropriate in a work setting and made her feel uncomfortable. She described the Registrant as trying to control the environment by initiating personal conversations. She recalled trying to shut down these conversations on a regular basis. Worker 3 stated that she was never quite sure if he was looking for a sexual/ physical relationship with her."

61. The Panel found Worker 3 to be "an articulate, compelling witness who gave a detailed and analytical account during her evidence. The Panel found her to be a credible and reliable witness."

62. On the face of it, both the Panel's reasoning and conclusion on the question of "harassing manner" in relation to Worker 3 were wrong.

63. The section 26 definition to which the HCPC was bound under section 149 of the Equality Act to have "due regard" depends on either the "purpose or effect" of the conduct in question. The word "or" shows that harassment cannot be displaced merely by a lack of intent on the part of the alleged perpetrator if the effect is "violating… dignity" or "creating an intimidating, hostile, degrading, humiliating or offensive environment" for the alleged victim.

64. The Panel accepted Worker 3's evidence that the misconduct proved against Mr Yong "made her feel uncomfortable. She described the Registrant as trying to control the environment by initiating personal conversations. She recalled trying to shut down these conversations on a regular basis." (Decision para 38).

65. This must be considered in conjunction with the proven misconduct itself, which included asking Worker 3 "how satisfied are you with your boyfriend", and "whether she had previous relationships with men that were older than her, and what she liked

about these relationships", and "personal details about [Mr Yong's] extra marital affairs", and asking "when her boyfriend would be away". It must be considered in the context of Worker 3's evidence at paras 35-38 of the Decision.

66. Paying due regard to the section 26 definition, as the Panel should have, and not treating as definitive any purpose on Mr Yong's part, it is plain that Mr Yong's unwanted conduct was related to Worker 3 being a woman and that it had the effect of "creating an intimidating, hostile, degrading, humiliating or offensive environment" for her.

67. I am satisfied, therefore, that the Panel's primary findings of fact and assessment of Worker 3 as a witness compelled the conclusion that Mr Yong was acting in a harassing manner towards her. I will add a finding to that effect.

My decision on "Harassing manner" – Worker 5

68. The Panel found that Mr Yong asked Worker 5 "How did you meet your boyfriend, I bet you were at it like rabbits" and (on another occasion) said to her "the only thing that needs resurrecting around here is my libido". It found that the sexual nature of these comments "amounted to an abuse of his position of power as a manager and clearly crossed professional boundaries" (Decision para 73). However, it was not satisfied that the Registrant had acted in a harassing manner towards Worker 5.

> "In reaching this decision, the Panel took into account Worker 5's evidence that when the Registrant had made these comments to her, he hadn't lowered his voice or appeared awkward but seemed confident and cocky. She stated that her impression was that he liked to push boundaries and enjoyed getting a reaction out of people." (para 73)

69. It found Worker 5 to be "a thoughtful, credible and reliable witness" (Decision para 64).

70. Her evidence on the two acts which I am asked to find were Mr Yong behaving "in a harassing manner" (i.e. the allegations particularised in paras (d)(i) and (ii), but not (iii); see paras 27 and 29 above) was set out in the paras 39-44 (omitting reference to allegation (iii), which is not relevant):-

> "39. The Panel heard evidence from Worker 5 who told the Panel that she worked with the Registrant on a daily basis. She stated that they had a good working relationship and that she felt comfortable going to him for advice. She stated that they had a laugh but his comments would often border on inappropriate. She told the Panel that the Registrant was always interested in people's personal lives and it was often a struggle to get him to focus on the work in hand.
>
> 40. Worker 5 told the Panel that in February 2017, the Registrant was asking her about her boyfriend and commented that they were "at it like rabbits". Worker 5 stated that she was horrified by this but laughed it off.

> 41. Worker 5 stated that on 13 April 3017, she had asked the Registrant if she could leave work early as it was the Easter holidays and had said to him "Easter is the resurrection" to which he had responded "The only thing that needs resurrecting is my libido". Worker 5 described how she felt disgusted by this comment and walked away from the Registrant.
>
> 42. [not relevant]
>
> 43. Worker 5 stated that she hadn't reported her concerns at the time in part because she rarely had supervisions with her allocated manager and also because the Registrant's behaviour and comments were the last thing on her mind as she really didn't care about what he said. She stated that she had subsequently raised matters with HF after discussing the Registrant's behaviour with her work colleagues.
>
> 44. Worker 5 told the Panel that when the Registrant had made these comments to her, he had acted like he wasn't saying anything inappropriate. He hadn't lowered his voice or appeared awkward but seemed confident and cocky. She stated that her impression was that he liked to push boundaries and enjoyed getting a reaction out of people. Worker 5 also stated that there was joking in the office and this included sexual innuendo and the occasional joke about someone's sex life but that she now felt that the Registrant's comments were *"sleazy and amounted to an unfitting level of interest in personal matters"*.

71. Worker 5 did not, therefore, give evidence that her perception (which is relevant under section 26(4)(a) of the Equality Act) was that Mr Yong's conduct had the purpose or effect of violating her dignity or creating "an intimidating, hostile, degrading, humiliating or offensive environment" for her.

72. She disapproved of his comments – the first one "horrified" her and the second one "disgusted" her. However, she said that "they had a good working relationship and that she felt comfortable going to him for advice" and "she really didn't care about what he said".

73. This appears to be inconsistent with a finding that these comments created "an intimidating, hostile, degrading [or] humiliating… environment" for her, on her evidence.

74. It is not inconsistent with a finding that they created an "offensive" environment for her, and, if they did, that would be enough to satisfy the section 26 definition of harassment. However, bearing in mind the caution I must exercise in deciding an appeal without hearing the evidence and seeing the witnesses as the Panel did, I do not feel able to make a finding to that effect with a sufficient degree of confidence to justify overturning the Panel's finding that the evidence was not enough to establish that Mr Yong "behaved… in a harassing manner" towards Worker 5 in the particular circumstances of her case as explained by her. Worker 5 was clearly offended by the two comments; she was, as I have said, "horrified" by the first and "disgusted" by the

second. But an offensive comment does not necessarily create an "offensive environment" for the purposes of the Act. It might. But it is a matter of fact and degree whether or not it does. The evidence of Worker 5 on that specific question – whether the comments were, not only offensive, but created in her experience "an offensive environment" for her – is not recorded in the Decision, and I have not been referred to any such evidence in the transcript.

75. I will not, therefore, interfere with this aspect of the Panel's Decision in relation to Worker 5.

My decision on "Harassing manner" – Worker 6

76. The Panel accepted the "clear and convincing evidence" of Worker 6 being offended (rightly and understandably, I would say) by comments made by Mr Yong on separate occasions as follows:

i) Mr Yong asked about her relationship with her husband and said "you need to keep your husband happy, even if you are tired, you know, masturbate him", or words to that effect.

ii) Mr Yong told her to film herself and her husband having sex.

iii) Mr Yong talked about a friend of his, who is currently in a domestic violence relationship, and told Worker 6 that he invited her into his bed for cuddles.

77. The Panel was "satisfied that the uninvited sexual nature of these comments caused embarrassment to Worker 6" (Decision para 74). However, it was "not satisfied that the Registrant had acted in a harassing manner towards Worker 6". It explained this as follows (para 74):-

> "ln reaching this decision, the Panel took into account Worker 6's evidence that, although the Registrant had caused her to feel uncomfortable and embarrassed, when asked about his motive she stated that she did not perceive him to be making any sexual advances towards her and that he appeared to be trying to give her some male advice about her relationship. She described his demeanour as open, always relaxed and jokey."

78. This demonstrates the same obvious error of law and fact discussed in relation to Worker 3 (para 63 above). The statutory definition of harassment in section 26 does not depend on the motive or purpose of the alleged perpetrator. It is sufficient if the statutory effect has been created so far as the alleged victim is concerned.

79. As to this, the Panel's reasoning appears to suggest that, had they not (wrongly) regarded motive as determinative, they would have found harassment proved. It would be very surprising if they had reached any other conclusion on the evidence. Comments (i) and (ii), in particular, must surely have had the effect of violating Worker 6's dignity, which would be enough to satisfy the definition in section 26(1)(b)(i) of the Equality Act. They would also be expected to create "an intimidating, hostile, degrading, humiliating or offensive environment" for her, which would satisfy the alternative definition in section 26(1)(b)(ii), although it does appear from her evidence as

summarised in paras 45-51 of the Decision that, although Mr Yong's comments "shocked her and made her feel uncomfortable" (para 47), she initially shrugged them off (paras 49 and 51), before she reflected further on them and regarded them more seriously (para 46).

80. On the primary facts found by the Panel, therefore, and bearing in mind that they did not address the section 26 definition at all, I do feel able to say their decision that Mr Yong's misconduct against Worker 6 was not "acting in a harassing manner" was clearly wrong, and that a finding that it was acting in a harassing manner should be added to their findings of primary fact.

My decision on "Harassing manner" – Worker 7

81. The misconduct found by the Panel in respect of Worker 7 included not only inappropriate comments but also a physical assault. The Panel was not satisfied that the comments were "said in a harassing manner" (para 75) and also decided that the assault (which they describe as "being hugged") was not "done in a harassing manner" although Worker 7 "had not consented", and the manner of it "had clearly caused Worker 7 extreme discomfort" and "clearly failed to respect Worker 7's boundaries" (para 76).

82. The Panel does not, in respect of either element of the Worker 7 case, give any reason for not concluding that Mr Yong's behaviour was not "harassing".

83. I will consider each element separately.

Allegation (f)(i)

84. So far as the spoken words were concerned, the Panel "accepted Worker 7's account of this conversation" and found that "it in the circumstances it was inappropriate for the Registrant to have invited Worker 7 to move into his spare room. It was an uninvited and unwanted offer that caused Worker 7 to feel uncomfortable and vulnerable" (Decision para 75).

85. The Panel therefore accepted the evidence of Worker 7 which was recorded in para 52 their Decision as follows:

> "She stated that on an occasion before Christmas 2016, she was in the Duty Office with the Registrant, when he said to her *"I know I shouldn't do this, but you could move into my flat where there is a spare room*." Worker 7 told the Panel that the Registrant's manner had made her stomach churn. She stated that at the time she felt uncomfortable because he was a male and her supervisor and also because of the power he had. She stated that the Registrant was incredibly plausible but that she believed him to be manipulative. In her witness statement to the HCPC she stated:
>
> > *"It was not just the Registrant saying you need a room and / have one", but everything about it was really gross. It was such a shift from being at work with someone 9am- 5pm and*

> *discussing work related issues, to him attempting to put himself into a role of 'rescuer' or 'friend' or potentially something more. It was overly intimate in what it was offering and the tone and the way it was offered. It was a line that should never be crossed, was beyond unwanted and just made me feel vulnerable.*"

86. I cannot understand any possible basis on which it could be said that this did not establish "a harassing manner". The Panel was plainly wrong. I will therefore add a finding that Mr Yong's misconduct in this respect was not just "behaving inappropriately" but also "in a harassing manner".

Allegation (f)(i)

87. There is no doubt that Worker 7 considered Mr Yong to have sexually assaulted her and, indeed, she reported him to the police on that basis (Decision para 58). The Panel decided that it would not accept her evidence about the full extent of the assault. The allegation against Mr Yong was that "you clenched your arms around her and pressed your body including your chest and/or groin against her" but the Panel found (on what, I have to say, were rather flimsy grounds; see Decision paras 55 and 66) that he did not press his groin against her. There is no challenge to that finding of primary fact and I leave it as it is. This means that the allegation established was "you clenched your arms around her and pressed your body including your chest… against her". As I have already mentioned, "The Panel was satisfied that Worker 7 had not consented to being hugged by the Registrant and that the manner in which he had done so had clearly caused Worker 7 extreme discomfort" and Mr Yong "had clearly failed to respect Worker 7's boundaries".

88. Although it rejected her evidence about groin contact, the Panel "found that Worker 7 generally gave a precise and accurate account" (Decision para 66) and it did not, in particular, reject the following evidence which it noted from her:

> "53. Worker 7 also told the Panel about an incident that occurred on or around 23 December 2016. (…) She stated that she was sitting at her desk in the open plan office and recalled workers gathering to say goodbye to Worker 4 who was about to go on leave. Worker 7 stated that she was busy typing but did not want to appear rude so she got up to say goodbye to Worker 4, she recalled some of the others hugging each other. She stated that she did not hug anyone as she is not that sort of a person. She told the Panel that where she comes from it would be regarded as unprofessional to hug someone at work. She stated that in nine years in the UK, she had only agreed to what she described as an "air-hug" so as not to appear rude on two previous occasions. Worker 7 further stated that she was a conservative person and even if she embraced members of her own family it would be an "air-hug". She stated that she would not hug someone in a manner that caused their bodies to make contact.
>
> 54. Worker 7 stated that she was at the back of the group when suddenly, the Registrant moved towards her. She described how

> he then put his arms around the top of her arms in a crab like gesture and pressed his body against her. (…) Worker 7 stated that the Registrant took her completely by surprise and she froze. She told the Panel that she had done nothing to suggest that she consented to being hugged in this manner by the Registrant. She stated that when the Registrant let go of her, he looked at her and "*smirked*". She told the Panel that everything after that was a blank as she was so shocked by what had happened to her. She stated that she now believes that the Registrant was smirking at her as if to say "*look what I can do*".
>
> (…)
>
> 56. Worker 7 told the Panel that this incident had a significant impact upon her and contributed to her decision not to accept a full-time position with LBL. She stated that she finished working for LBL in February 2017."

89. The Panel found that this was an act of misconduct on Mr Yong's part, which caused "extreme discomfort" and "clearly failed to respect Worker 7's boundaries" (para 76). No reason is given for then saying (also in para 76) that the Panel was "not satisfied that this was done in a harassing manner".

90. It seems to me clear that the conclusion that Mr Yong did not act in a harassing manner was inconsistent with the Panel's primary findings of fact and with those parts of Worker 7's evidence which the Panel had not rejected. It was clearly wrong and cannot stand. A finding that he did act in a harassing manner will therefore be added.

Grounds 3 and 4: "sexual motivation"

91. The Panel's reasoning and conclusion on the question of "sexual motivation" (which I have quoted in full at para 40 above) did not distinguish between particular allegations but approached it on a broad brush basis which did not engage with the facts of any of the allegations. Although the Panel said it "gave careful consideration to all of the evidence it had heard in relation to the Registrant's motivation for his behaviour" it did not refer to the evidence which supported sexual motivation, which was necessary even if it was being discounted: indeed, if it was being discounted, it was even more necessary to refer to it and explain that. This was a case in which Mr Yong failed to attend the hearing or to provide any evidence to it in any form. There was therefore no positive evidence from him as to his motivation and no positive resistance, from him or on his behalf, to the suggestion that the misconduct proved had a sexual motivation. The Panel's conclusion that the facts were proved, and that they constituted misconduct, but that they did not have a sexual motivation, was harder to sustain and understand as a result.

92. The appeal seeks a finding of "sexual motivation" only in relation to Mr Yong's misconduct against Workers 1 and 7.

Sexual motivation – Worker 1

93. The Panel accepted that Mr Yong was guilty of professional misconduct which impaired his fitness to practise by (i) asking if Worker 1 was free to join him to the Shrek Experience and suggesting that she wore a school uniform, or words to that effect; (ii) asking whether she wanted to go to a Christmas party with him and to stay at his house afterwards; and (iii) sending her a WhatsApp message saying "I think you are quite a unique individual and deserve a much better year. let's catch up after work when you get back. Enjoy! X". The finding that this was not sexually motivated is surprising.

94. The Panel accepted the evidence of Worker 1 in relation to the Registrant's behaviour towards her (Decision para 69).

95. This included the following evidence:-

i) In answer to a question suggesting "prior to speaking to the others you were not sure whether he was being flirty or not, but you felt uncomfortable and having spoken to the others it made you feel more?" she said:

> "No, I think 1 was uncomfortable and I was sure of my feelings that he was suggesting something that I felt was inappropriate and made me uncomfortable but I think I was insecure being questioned if I had been perhaps flirty with him. I think I was still going round in those thoughts, but I felt more confident when I was speaking to others and also raising the concerns together."

I understand that to mean her evidence was that he was indeed "being flirty" and her anxiety was about whether she had given him cause for that. (Transcript in Core Bundle p 49).

ii) In her witness statement she said that, when he asked her to stay at his house after a Christmas party "I felt that perhaps he had wanted to have sex with me".

iii) In relation to the kiss or "x" at the end of the WhatsApp message, her evidence was "I just know that I would not receive an "x" from another manager. I never had a personal message from another manager writing an "x" previously." (Transcript in Core Bundle p 52).

iv) She was asked "about the issue of the Shrek Experience, when you were asked about wearing a school uniform did you feel that was sexual, or did you not feel that was sexual at the time?". She answered (Transcript in Core Bundle p 55):

> "I remember I was feeling quite surprised and shocked that he suggested it. At the time I must have felt that it was something sexual but I remember thinking like even now when I think back yes, I wondered what that meant. I remember thinking what did he mean with that. My colleague said it was maybe a child ticket and maybe that was the reason but it was still uncomfortable and I remember feeling uncomfortable being asked to wear a school uniform. As I said before, I cannot say for sure it was with a sort of a sexual intent, but something made me uncomfortable and at the time I probably could not

> figure out why that was but I just felt uncomfortable being asked to wear a school uniform."

v) There was no evidence that it was a child ticket. It is far-fetched to assume, even in Mr Yong's favour, that it was a child ticket, not only because it is inherently unlikely that he would ask an adult to accompany him with a child ticket but because it would have been dishonest had he done so. The Decision does not engage with her evidence that "At the time I must have felt that it was something sexual", which was strongly supported by the circumstances.

96. It seems to me that this unchallenged evidence, coupled with the circumstances of the case, lead irresistibly to the conclusion that Mr Yong had a sexual motivation in saying what he did. The Panel's exoneration of Mr Yong from this motive on the basis that "the Registrant misread his audience and that the jokes he made were often inappropriate" is not relevant to this allegation. There was no suggestion that Mr Yong's propositions to Worker 1 were a joke: Worker 1's evidence (not limited to the passages I have quoted) was not to that effect and did not support it. Likewise, the Panel's reliance on evidence of other workers, in relation to other allegations, that they "did not perceive the Registrant to be making a sexual advance towards them", was inadequate in the context of his misconduct towards Worker 1, who gave evidence, apparently accepted by the Panel, that she did have that perception.

97. I therefore consider the Panel's failure to find a sexual motivation in relation to Mr Yong's proven misconduct towards Worker 1 to be plainly wrong on the evidence accepted by the Panel. A finding of sexual motivation will be added.

Sexual motivation – Worker 7

98. The Panel accepted that Mr Yong was guilty of professional misconduct which impaired his fitness to practise by (i) saying to Worker 7 "I know I shouldn't do this, but you could move into my flat where there is a spare room" and (ii) clenching her arms around her and pressing his body including his chest against her in the manner I have already discussed.

99. Worker 7's evidence (which was not, of course, contradicted by any evidence from Mr Yong himself) included the following:

i) "There was definitely a sexual undertone to Leonard Yong's comment" (Statement para 25, referred to on Transcript at Core Bundle p 137).

ii) On the physical contact, Worker 7 was asked: "Is there any reason you can think of why Mr Yong might have thought it was appropriate to hug you at that point?" to which she answered (Transcript in Core Bundle p 141):-

> "No, and this is why I am so adamant that this was not a gesture of affection or anything and certainly on the receiving end of it, it came across to me as a sexual threat. That is how I took it and I believe that was genuinely how it was meant."

iii) In answer to the question "What did you believe his motive to be after he smirked at you?" Worker 7 said "That it was a sexual threat, this is what I can

do and I took it as that it could have been more." (Transcript in Core Bundle p 144).

100. It is theoretically possible that Mr Yong meant well when offering Worker 7 accommodation in his spare room and had no sexual motive (although it does seem unlikely). It is also theoretically possible that Mr Yong meant only to be friendly when he gave Worker 7 an unexpected and unwelcome hug. But the Panel was satisfied that separately and together these were acts of misconduct which impaired his fitness to practice. This does not seem to me to be consistent with an innocent motive in either case. The evidence of Worker 7 puts the matter beyond doubt, given that her evidence was the only evidence before the Panel on these allegations and that (apart from their finding that there was no groin contact) her evidence was generally accepted by them. Her evidence was unequivocally that there was "definitely a sexual undertone to Leonard Yong's comment" and his physical contact "was a sexual threat". She was in a very good position to judge this; no-one from whom the Panel heard was in a better position. The Panel did not refer to or engage with her evidence about this at all. This was plainly wrong. In my judgment, on the primary facts they found, and the uncontradicted evidence they heard, a finding that Mr Yong's misconduct towards Worker 7 was sexually motivated ought to have been made. I will therefore add such a finding.

Ground 5: sanction

101. Ground 5 is that the Panel departed from the HCPC's Sanctions Policy in imposing no more than a Caution Order and failed to provide reasons for doing so. Ground 5 argues that the Panel's factual findings precluded the use of a Caution Order.

102. I have been referred to HCPC's Sanctions Policy, which deals with the use of a Caution Order on p 25 as follows:

> "**When is a caution order appropriate?**
>
> 100. Where a panel finds that a registrant's fitness to practise is impaired, the least restrictive sanction that can be applied is a caution order.
>
> 101. A caution order is likely to be an appropriate sanction for cases in which:
>
> - the issue is isolated, limited, or relatively minor in nature;
> - there is a low risk of repetition;
> - the registrant has shown good insight; and
> - the registrant has undertaken appropriate remediation.
>
> 102. A caution order should be considered in cases where the nature of the allegations mean that meaningful practice restrictions cannot be imposed, but a suspension of practice order would be disproportionate. In these cases, panels should provide

> a clear explanation of why it has chosen a non-restrictive sanction, even though the panel may have found there to be a risk of repetition (albeit low)."

103. This word "and" linking the bullet points in para 101 is important. It suggests that all the bullet-point elements must ordinarily be present if a caution order is likely to be an appropriate sanction.

104. In Mr Yong's case, none of the bullet point elements was present. The misconduct proved against him consisted of multiple incidents on different dates and against a number of different female colleagues. The Panel found in terms that the is a risk of repetition. The Panel found "There is only limited evidence of insight". It also found "There is no evidence of remediation". This appears from para 99 of the Decision (quoted at para 43 above).

105. Even on the basis found by the Panel, therefore, I would have found considerable force in the submission that the Panel's sanction could not stand. Even if meaningful practice restrictions cannot be imposed, it is not at all clear why a suspension of practice order would be disproportionate in this case.

106. However, given that I have added findings that Mr Yong acted in a harassing manner and (in the case of Workers 1 and 7) had a sexual motivation, the basis upon which the Panel determined its sanction has on any view ceased to be appropriate and must be reconsidered. The importance of these additional aggravating factors is obvious. The Decision itself noted that its decision on sanction was expressly based, in part, on the finding that Mr Yong's behaviour "was not harassing or sexually motivated" (Decision para 107).

107. Sanction is not a matter that I will decide for myself. It is much better that it should be determined by the relevant statutory body, at least in the first instance, because such a body has expertise to bring to its evaluation of sanction that I cannot have. Both the PSA and the HCPC ask me to remit the question of sanction to what is now the relevant statutory body. As a result of legislative change, that is no longer the HCPC. The HCPC has been replaced for these purposes by Social Work England (see regulation 22 of the Children and Social Work Act 2017 (Transitional and Savings Provisions) (Social Workers) Regulations 2019).

108. I will therefore remit the question of sanction for redetermination by Social Work England.

Costs

109. I am asked to award costs and to assess them summarily, the hearing having taken less than one day.

110. HCPC has agreed to pay PSA's costs. That is in my view correct. The appeal was necessary because of the HCPC's errors in the Decision. Bearing in mind the costs schedules put before me, and the submissions made to me, I assess the costs to be paid by the HCPC to PSA in the sum of £20,000.

111. HCPC applies for costs against Mr Yong from 10 August 2020 by way of an indemnity so that HCPC remains fully liable to PSA but can recover what it can from Mr Yong to defray that liability. HCPC asks me to assess those costs.

112. I refuse to make an order for costs against Mr Yong on that basis. Mr Yong was not responsible for this appeal, although he was, of course, responsible for the original HCPC proceedings. He played no part in the Panel hearing and made no submissions to the Panel. Therefore, no errors made by the Panel were his fault. He has also not opposed this appeal.

113. Costs are sought by HCPC against Mr Yong from 10 August 2020 because, HCPC argues, Mr Yong ought to have joined the agreement between HCPC and the PSA about how this appeal should be disposed of which was reached in a draft Consent Order on that date. In the absence of his agreement, the Consent Order could not be finalised. A proposal that it should be made without a hearing was rightly refused by Heather Williams QC, sitting as a Deputy High Court Judge, by Order dated 29 October 2020.

114. I reject that argument. Mr Yong was not obliged to work out for himself how and to what extent the Panel had fallen into error in not making any findings of harassing behaviour or sexual motivated conduct. If those errors were not obvious to the professional body, legally advised, which made those errors (as I have found) in its Decision, Mr Yong was not at fault in leaving the matter to this Court as, indeed, Heather Williams QC did.

115. However, it is clear that some costs were incurred in proving to my satisfaction that Mr Yong had been duly served with the proceedings and also notified, specifically, of the date of the hearing before me, at which he was entitled to be heard (see para 6 above). These costs could and should have been avoided if Mr Yong had complied with his duty to engage with his professional regulators. Per Sir Brian Leveson PQPD in *GMC v Adeogba* [2016] EWCA Civ 162 at para 20:

> "... there is a burden on medical practitioners, as there is with all professionals subject to a regulatory regime, to engage with the regulator, both in relation to the investigation and ultimate resolution of allegations made against them. That is part of the responsibility to which they sign up when being admitted to the profession."

116. Although I am satisfied that this did not require Mr Yong to consent to the substantive appeal against the Decision, it did at least require him to respond to and acknowledge the service of documents on him. Had he done so, the costs incurred in proving that he had been served, and had been notified of the proceedings, and was actually aware of the hearing date before me, would not have been incurred. He ought, therefore, to pay them. Having regard to the submissions made to me, and to the schedules of costs, I assess those costs against Mr Yong in the sum of £1,000. The PSA does not apply for any costs against Mr Yong and so this order will be an order in favour of HCPC by way of indemnity against their liability to the PSA in the greater sum of £20,000 which I have ordered.

117. I will invite Counsel to agree an Order which reflects this judgment accordingly.