

Health and Care Professions Tribunal Service

PRACTICE NOTE

Making decisions on a registrant's state of mind

This Practice Note has been issued for the guidance of Panels and to assist those appearing before them.

Introduction

1. This practice note provides guidance on how Panels should approach decisions that require findings about a registrant's state of mind or motivation at the time of alleged conduct. This most commonly arises in relation to alleged dishonesty, sexually motivated conduct and cases in which it is alleged that the registrant's conduct was racially motivated. The principles of this practice note will apply to any other allegations where state of mind is being alleged.
2. Allegations of dishonesty, racial motivation or sexual motivation must be expressly set out in the allegation if justified on the facts. If the Panel considers that dishonesty, racial motivation or sexual motivation may form part of the case to be considered, and this has not been alleged, the Panel should consider whether there is a risk of under prosecution. If so, the Panel may invite submissions from both parties on amending the allegation.
3. Panels should make findings about what happened before determining the registrant's state of mind or motivation at the time of the behaviour in question. The findings about what happened will form an important part of the evidence to be examined when determining the registrant's state of mind or motivation.

Evidence and the standard of proof

4. The question of what a person's state of mind was is a question of fact. Panels must decide questions about a person's state of mind on the usual civil standard of proof (the balance of probabilities).
5. The state of a person's mind is not something that can be proved by direct observation. A person's state of mind can only be proved by inference or deduction from the surrounding evidence.¹

¹. *Basson v GMC* [2018] EWHC 505 (Admin), para 17

6. Panels must examine all the evidence and the circumstances, including the facts, the history, the registrant's explanation and any evidence as to character², and then consider whether the alleged state of mind can reasonably be inferred from the evidence.

Dishonesty

7. When making decisions involving alleged dishonesty, Panels will need to determine whether the registrant acted as an honest person would have acted in the circumstances. This means asking two questions³:

- a) **What did the registrant know or believe as to the facts and circumstances in which the alleged dishonesty arose?**

- i. Although this list is not exhaustive, in determining what the Registrant knew or believed as to the facts and circumstances in which the alleged dishonesty arose, Panels should consider the following factors:
 - a. Any surrounding evidence speaking to what the registrant knew or believed about what they were doing, for instance, what they said about it, what they have been told about it, what information was available to them, and what they recorded about it;
 - b. Any evidence relating to what was expected of the registrant in the particular circumstances;
 - c. Any evidence relating to the registrant's understanding of the wider context, for example, any rules or practices in the workplace, any individual requirements of the service user and so on;
 - d. Any subsequent account given by the registrant as to what they knew or believed, and the credibility of that account.
- ii. When assessing the registrant's understanding of the circumstances (and in particular, the credibility of their account of what they knew or believed), evidence of good character, including testimonials, can be considered.⁴

- b) **Given the registrant's knowledge and belief of the circumstances they were in, was the registrant's conduct dishonest by the standards of an "ordinary decent person"?**

² Arunkalaivanan v GMC [2014] EWHC 873 (Admin), paras 52, 62

³ Ivey v Genting Casinos (UK) Ltd [2017] UKSC 67, para 74; Raychaudhuri v GMC [2018] EWCA Civ 2027, para 54

⁴ Bryant and Bench v SRA [2007] EWHC 3043, paras 159-162

- i. Panels should ask themselves whether, taking account of the registrant's understanding of the circumstances, an ordinary decent person would find the conduct to be dishonest. This is purely an objective test. The registrant's own standards of honesty are irrelevant here; they are held to the standards of society in general.

Sexual Motivation

8. In determining sexual motivation, Panels must decide whether the conduct was done either in pursuit of sexual gratification or in pursuit of a future sexual relationship.⁵
9. Although this list is not exhaustive, in determining sexual motivation, Panels should consider the following factors:
 - a. The character of the conduct (i.e. is it overtly sexual, e.g. the touching of sexual organs);
 - b. The clinical appropriateness of the conduct;
 - c. The clinical justification or lack thereof for the conduct;
 - d. Any evidence regarding consent; and
 - e. The plausibility of any alternative explanation for the conduct.
10. The best evidence of a registrant's motivation is their behaviour.⁶ If the conduct is overtly sexual in nature, the absence of a plausible, innocent explanation for the conduct will invariably result in a finding of sexual motivation.⁷
11. Panels must take a broad view by putting all of the circumstances into the balance and then coming to a conclusion, on the balance of probabilities, as to whether the registrant had the alleged motivation.⁸ Panels should nonetheless be cautious as to what weight, if any, to give to the existence or otherwise of factors such as:
 - a. that there were lots of patients waiting to see the registrant at the time of the conduct;
 - b. that the room where the alleged conduct took place was not locked;
 - c. that the registrant did not ask the patient to undress;
 - d. that no complaint was made about the registrant;
 - e. that the registrant did not suggest they were sexually attracted to the patient, and so on.

⁵ Basson v GMC [2018] EWHC 505 (Admin), para 14

⁶ Haris v GMC [2021] EWCA Civ 763, para 37

⁷ Haris v GMC [2021] EWCA Civ 763, paras 51, 58

⁸ Arunkalaivanan v GMC [2014] EWHC 873 (Admin), para 66

12. For example, while locking a treatment room door might provide some evidence in support of a finding of sexual motivation, its absence does not necessarily negate such a finding.⁹
13. Consideration should be given to the vulnerability of the patient or victim and whether the registrant was aware of the vulnerability. If a Panel considers that a victim's vulnerability may have formed part of the registrant's motivation for the alleged conduct (i.e. they may have been targeted *because* they were vulnerable) it should invite submissions from both parties on amending the allegation to include this as a factual allegation.¹⁰
14. In some cases, the allegation may have been drafted as the registrant's conduct being "sexual in nature" rather than "sexually motivated". In these cases, Panels should not make a finding on what the registrant's state of mind was in relation to the conduct, only whether the conduct was, in itself, sexual in nature. Panels will be assisted in considering the test for a criminal offence of sexual assault, for instance, whether the conduct was:
 - a. an act which was, whatever the circumstances, sexual; For instance, this could include the deliberate touching of the complainant's genitalia in circumstances where there was no clinical justification for it; or
 - b. an act that because of its nature may be sexual, and because of the circumstances is sexual¹¹. An example of this might be where a registrant sends a text message to a complainant which is capable of being read in different ways, one of which is sexual, and the circumstances suggest that the registrant intended it to be read in that way.

Racial motivation

15. The HCPC may allege that a registrant's conduct is '*racist*' or '*racially motivated*'. In cases where a panel is considering whether words used are '*racist*', the intention of the registrant is irrelevant to whether or not the conduct was racist. The panel must simply determine, as a question of objective fact, whether the conduct was or was not racist.
16. If a panel is considering a case in which it is alleged that the registrant's conduct is '*racially motivated*', the panel must investigate the context and intention to determine whether or not 'racial motivation' is established. In *Lambert Simpson v HCPC (2023) EWHC 481 (Admin)*, the High Court ruled that conduct will be racially motivated when (i) the act in question...had a purpose behind it which at least in significant part was referable to race and (ii) the act was done in a way showing hostility or a discriminatory attitude to the relevant racial group'.

⁹ *Raza v GMC [2011] EWHC 790 (Admin)*, para 34

¹⁰ *PSA v HCPC and Wood [2019] EWHC 2819 (Admin)*, para 64

¹¹ s78 Sexual Offences Act 2003

17. In these cases, panels must therefore firstly decide whether the registrant's alleged words or conduct are proved on the balance of probabilities. If they are, then the panel should consider whether the conduct was racially motivated by applying the approach and test set out in paragraph 16 above.

State of mind relating to other allegations of discrimination

18. It may be alleged that a registrant's conduct is motivated by other discriminatory behaviour, for example regarding protected characteristics. Protected characteristics include age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

19. In such cases, panels should adopt the same approach to their decision making as set out above. This means that they should consider the facts alleged first. Then, depending on how the allegation is framed, consider if the proven facts demonstrate discriminatory behaviour and/or conduct motivated by discrimination.

Setting out decisions in state of mind cases

20. Panels are referred to the Practice Note on [Drafting Fitness to Practise Decisions](#).

21. When setting out their decision on the facts in a state of mind case, Panels should:

- a. State the test to be applied – e.g. *Ivey* (dishonesty); *Basson/Haris* (sexual motivation); *Lambert-Simpson* (racial motivation).
- b. State the conclusion for each limb of the relevant test; and
- c. Explain the reasoning for those conclusions, including a brief analysis of the most relevant facts.

22. When making their decision on sanction Panels should have regard to any particularly relevant sections of the [Sanctions Policy](#)¹², including the following sections:

- a. Dishonesty – paragraphs 56-58
- b. Abuse of Professional Position – paragraphs 67-75 (see sections relating to Predatory Behaviour pp71-72 and Vulnerability pp73-75)
- c. Sexual Misconduct – paragraphs 76-79

¹² As updated

d. Discrimination (paragraphs 63-66)

23. When setting out their decision, Panels must explain how they have applied the Sanctions Policy, and must take particular care to explain any deviation from it.