

## When does misconduct by a professional amount to professional misconduct?

The Court of Appeal has considered what amounts to professional conduct for the purposes of the MHPS in the case of *Idu –v- The East Suffolk & North Essex NHS Foundation Trust*. The allegations raised against the Appellant surgeon included, amongst others, refusals to follow management instructions and inappropriate (rude, uncivil, and, on occasions, aggressive) verbal and written communications.

10 October 2019

The Court of Appeal has considered what amounts to professional conduct for the purposes of the MHPS in the case of *Idu –v- The East Suffolk & North Essex NHS Foundation Trust*.

The allegations raised against the Appellant surgeon included, amongst others, refusals to follow management instructions and inappropriate (rude, uncivil, and, on occasions, aggressive) verbal and written communications. The CoA helpfully summarised the approach to be taken in classifying matters of professional conduct for the purposes of the MHPS:

- The defining characteristic is that it arises from the exercise of medical skills. This does not mean anything done by a doctor in the course of his or her work will be covered.
- Professional misconduct will normally (but not always) equate to clinical misconduct (i.e. misconduct in the course of the treatment of patients).
- The question as to whether something arises from the exercise of medical skills is an imprecise test – in carrying out this assessment, it is helpful to consider whether the resolution of the issue requires the experience and expertise of an independent doctor.
- It is legitimate to attach weight as to whether the individual has challenged the characterisation of the allegations during internal proceedings.

In this case, the CoA was satisfied that the fact that the Appellant was a doctor, was nothing more than the context in which the allegations arose – those allegations all related to her relationship with members of management and other colleagues or staff. The issues were therefore managerial (or personal) in nature, and not matters of professional misconduct.

The arguments put forward by the Appellant as to why the allegations could, in the alternative, amount to capability issues, were less sustained. The CoA was satisfied that allegations of this nature (rudeness, bullying, and intransigence with management), in the absence of any suggestion of any underlying medical conditions, had rightly been characterised as issue of conduct rather than capability.

This decision doesn't change the previous approach taken to matters of professional misconduct but it is a helpful reminder of the approach that will be taken. Ultimately, the classification of whether a conduct issue is personal or professional remains a matter for the tribunal and courts – however, a documented reasoning as to classification during internal proceedings may well be helpful in demonstrating that the issue has been considered seriously by an employer. This reasoning should include an assessment as to whether an independent medical opinion would be useful in resolving the matters in dispute.

Employers may find, however, that more challenges to classification are raised during internal proceedings to avoid any detrimental inferences being drawn in subsequent legal proceedings.



**Mark Hickson**

Head of Business Development

onlineteaminbox@brownejacobson.com

+44 (0)370 270 6000

---

## Related expertise

Services

Employment