

Particular features of misconduct charging

Reference: PRE-2e Last Updated: 29/11/2021

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A **misconduct** charge will usually start with a short preamble. The body of the charge should then contain a series of concise descriptions of the nurse, midwife or nursing associate's acts or omissions, which individually or cumulatively we say amount to misconduct, and wherever possible, the dates on which or periods of time during which we allege the acts or omissions occurred.

We will generally not refer to the sections of **the Code** that may be relevant to the Fitness to Practise Committee panel's consideration of misconduct. The Code will instead be used at the hearing as evidence of the obligations of the nurse, midwife or nursing associate.

The charge should conclude with an allegation that the nurse, midwife or nursing associate's fitness to practise is impaired by reason of their misconduct.

Serious clinical outcomes

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If a patient died or suffered serious harm because of a nurse, midwife or nursing associate's clinical failings we may include the fact that the nurse, midwife or nursing associate caused that in the charges. Our **guidance on investigating what caused the death or serious harm of a patient** explains when we will do this, and why. It explains why we will not charge a nurse, midwife or nursing associate with causing death or serious harm to patients unless they deliberately chose to take a risk with the safety of patients or service users in their care. Evidence that the nurse, midwife or nursing associate's failings caused or contributed to the outcome will only be admissible if that is what we say in our charge.¹

In cases where a patient died or suffered serious harm, but we have decided that is not part of our case against the nurse, midwife or nursing associate, applying the **guidance on this question**, we will still refer to the death or harm as part of the background. When we do this, we will make it very clear to the panel that we are not saying this made the nurse, midwife or nursing associate's clinical failing more serious.

Motivation

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Discriminatory motivation

The Equality Act 2010 makes it unlawful to discriminate against anyone based on the nine characteristics protected by the Act (age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, sexual orientation).

This section provides detailed guidance about the circumstances where it will be appropriate to charge either a sexual or a racially abusive or discriminatory motivation.

Other protected characteristics

However, it's important to recognise that the same principles apply to the other characteristics protected by the

Equality Act. So, for example, where we consider that misconduct has been motivated by hostility to people with disabilities, their religion or belief or sexual orientation, the discriminatory motivation will need to be charged separately.

Sexual misconduct and sexual motivation

In all cases relating to sexual misconduct or conduct that may have been sexually motivated, we should ensure that:

- the charges specify the misconduct alleged;
- the charges specify that the misconduct was “sexual” in nature; and
- we consider carefully whether sexual motivation should be separately charged. It may be appropriate for the charge to state that the conduct was both “sexual” in nature *and* sexually motivated

Our decision whether misconduct should be charged as being “sexual” in nature and whether “sexual motivation” should be separately charged will always depend on the facts of the particular case.

The key questions we will consider are whether there is evidence that the professional’s behaviour was sexually motivated and whether charging motivation will add substantially to the seriousness of the charges.

Sometimes we won't charge sexual motivation as it will be sufficient for the charge to state simply that the behaviour was sexual. An example of this could be if a nurse, midwife or nursing associate touches a patient's genitals or slaps their bottom without any clinical reason.

In a case like this, we might decide that it wasn't necessary to include an additional charge of sexual motivation because the misconduct alleged was so clearly sexual in nature.²

In cases where we charge sexual motivation, careful consideration should be given to the type of sexual motivation that is being alleged.

For example, the motivation may have been sexual gratification or the pursuit of a future relationship. It may be advisable to specify the type of sexual motivation alleged in the charges. Where sexual motivation is charged and is then denied by the nurse, midwife or nursing associate at a hearing, they must be given a clear opportunity to respond to the allegation of sexual motivation in cross-examination.³

In drafting charges relating to sexualised language and behaviour, careful thought will need to be given to the motivation for the behaviour, particularly when such behaviour occurs in the workplace or is connected to the professional’s role, such as sexual behaviour towards a colleague or a current or former patient.

In cases where sexualised language or behaviour is sexually motivated (for example motivated by sexual gratification or a desire for a future relationship), the sexual motivation alleged should be included in the charges.

Motivation may need to be charged where it’s required to explain the wider context of the behaviour or a predatory element. Care will also be needed to ensure that the charges capture any predatory or deliberately targeted behaviour. For example, in the case of **Wood**⁴ a paramedic admitted sexually motivated behaviour towards a patient. However, the Court held that the paramedic's knowledge of the patient's vulnerability, and the possibility that he pursued the patient because she was vulnerable, were potentially serious aggravating factors that should have been brought out in the charges.

In some cases, sexualised language or behaviour may not be sexually motivated. Still, there may be an intention to cause distress or discomfort to another person, perhaps in the context of bullying, harassing or discriminatory behaviour. In such cases, the bullying, harassing or discriminatory motivation is likely to be a serious aggravating factor and should be specifically alleged in the charges.⁵

There may be some cases where there are other explanations for the sexualised language or behaviour like an unprofessional culture in the workplace. In those cases, when drafting charges, we’ll consider the impact of the unprofessional conduct on colleagues or other members of the public. We may consider that regulatory action is required in relation to serious unprofessional conduct, regardless of its motivation. However, we will always take into account the context in which the misconduct arose.

Racially abusive misconduct

In all cases relating to racially abusive misconduct, we should ensure that:

- the charges specify the alleged misconduct
- the charges specify that the conduct was racially abusive, and
- we carefully consider whether a racially abusive motivation should be separately charged. For example, it may be appropriate for the charge to state that the conduct was both “racially abusive” in nature *and also* motivated by an intention to be racially abusive.

In some cases, the racially abusive nature of the conduct will be obvious, and there'll be no need to charge a racially abusive motivation separately.⁶ Our decision whether “racially abusive motivation” should be separately charged will always depend on the facts of the particular case. The key questions we will consider are whether there is evidence that the professional intended their behaviour to be racially abusive and whether charging motivation will add substantially to the seriousness of the charges.

Dishonesty

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Where we need to allege that a nurse, midwife or nursing associate has acted dishonestly, we will always identify the act or omission that we say was dishonest, and we will specifically allege that the nurse, midwife or nursing associate behaved dishonestly. Except where it is obvious from the conduct itself, we will also clearly explain why we say the alleged conduct was dishonest.

We will generally need to specify the nurse, midwife or nursing associate’s dishonest intention. Dishonesty describes a state of mind rather than a course of conduct, and the nurse, midwife or nursing associate’s acts or omissions will only be considered to be dishonest if they demonstrate they were intentionally seeking to mislead or wrongly take advantage of another person.

By way of example, if it is alleged that a nurse deliberately failed to disclose a conviction they received in 2010 for assault in an application form for work at a care setting, the charge may read:

“That you, a registered nurse:

On 1 January 2017, failed to disclose on an application form to the General Nursing Home that you had been dismissed from your previous employment.

Your actions as set out in charge 1 were dishonest in that you deliberately sought to mislead the nursing home by withholding this information.”

This describes the nurse’s deliberate decision not to disclose the information to the nursing home in order to conceal their former dismissal from employment. It makes clear that on our evidence, the omission was not accidental or the result of confusion or poor judgment.

Another example might be where a midwife incorrectly documents the administration of medication. This may be due to simple carelessness, or it may be a deliberate attempt to conceal an error. In the latter case, the charge might read:

“That you, a registered midwife,

Failed to administer Oxycodone to Patient A on four occasions on [date].

Incorrectly signed Patient A’s MAR chart indicating that you had administered Oxycodone on four occasions on [date].

Your conduct in signing the MAR chart as described in charge 2 was dishonest in that in doing so you deliberately sought to represent that you had administered Oxycodone when you knew that you had not.”

In this example, it should be noted the term ‘incorrectly’ is used in charge 2 rather than ‘falsely’. Use of the term ‘falsely’ to describe inaccuracy may cause confusion (because it implies dishonesty) and be unnecessarily duplicitous, given that dishonesty has been separately charged.

1 R (El-Baroudy) v General Medical Council [2013] EWHC 2894 (Admin)

2 See GMC v Haris [2020] EWHC 2518 for discussion of a case of this type (the judgment was subsequently upheld on appeal – see Haris v GMC [2021] EWCA Civ 763)

3 See Sait v GMC [2018] EWHC 3160 (Admin); in Council for the Regulation of Health Case Professionals v General Medical Council and Rajeshwar [2005] EWHC 2973 (Admin) the omission of an allegation that

inappropriate conduct was sexually motivated was found to be procedurally irregular, and to have caused the panel's decision to be unduly lenient

4 PSA v HCPC and Wood [2019] EWHC 2819 (Admin)

5 For an example of a case where the Court was highly critical of a panel's finding that behaviour in the workplace was not sexually motivated and was not harassment see PSA v HCPC and Yong [2021] EWHC 52.

6 See PSA v HCPC & Roberts [2020] EWHC 1906 (Admin) and PSA v GPhC and Ali [2021] EWHC 1692 (Admin), a case where the pharmacist's intentions were held not to be relevant to an objective assessment of whether the words used by him were anti-Semitic.