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Medical Practitioners Tribunal Service  
Seventh floor, St James's Buildings  
79 Oxford Street  
Manchester M1 6FQ

To: Medical Practitioner Tribunal members  
Legal Assessors

Tel: 0161 923 6263

Fax: 0161 240 7199

Email: [enquiries@mpts-uk.org](mailto:enquiries@mpts-uk.org)

Copy: Interim Orders Tribunal members  
Tribunal Clerks  
Medical Defence Organisations  
Employer Liaison Advisers

### **Learning points from recent appeals**

Further to a number of recent appeals where Tribunal decisions have not been upheld we thought it would be helpful to provide an overview of learning points arising from the Courts. Tribunals should ensure these learning points are considered when reaching decisions.

#### ***The Overarching Objective***

- Tribunals should consider all three limbs of the tripartite public interest test in the overarching objective under S1(1A) and (1B) of the Medical Act 1983, as amended:
  - (a) to protect, promote and maintain the health, safety and well-being of the public
  - (b) to promote and maintain public confidence in the medical profession and
  - (c) to promote and maintain proper professional standards and conduct for the medical profession.
- Tribunals should consider the specific circumstances of each case and make a proper balance of the three limbs, based on those circumstances. They should not give excessive weight to any one limb.

***The General Medical Council v Dr Narayan [2017] EWHC 2695 (Admin) (A11/17), The General Medical Council v Dr Somuah-Boateng [2017] EWHC 3565 (Admin) The General Medical Council v Dr Chaudhary [2017] EWHC 2561 (Admin), General Medical Council v Dr Robert Stone [2017] EWHC 2534 (Admin)***

The MPTS makes impartial decisions in doctors' fitness to practise hearings. The MPTS is part of the General Medical Council, but it is operationally separate and it is accountable to Parliament.

## ***The Sanctions Guidance***

- The relevant parts of the Sanctions Guidance should be considered and quoted (not just referenced by paragraph number) within determinations.
- If a Tribunal departs from the Sanctions Guidance, the relevant paragraph should be quoted and **clear** reasons given for departing from it.
- The purpose of sanctions is to protect the public pursuant to the overriding objective and, if a certain sanction is deemed necessary to protect the public, it should be imposed even where it leads to difficulties for the doctor.
- It is not necessary for all of the factors listed at paragraph 109 of the Sanctions Guidance to be satisfied in order to indicate that erasure may be appropriate.
- The list of characteristics or circumstances giving rise to vulnerability at paragraph 145 of the Sanctions Guidance should not be regarded as exhaustive.

***The General Medical Council v Dr Narayan [2017] EWHC 2695 (Admin) (A11/17), General Medical Council v Dr Robert Stone [2017] EWHC 2534 (Admin), Yusuff v General Medical Council [2018] EWHC 13 (Admin), General Medical Council v Theodoropoulos [2017] EWHC 1984 (Admin) (A13/17), The General Medical Council v Dr Somuah-Boateng [2017] EWHC 3565 (Admin) The General Medical Council v Dr Anoop Patel [2018] EWHC 171 (Admin)***

## ***Dishonesty***

- The test for dishonesty is as set out in *Ivey v Genting Casinos UK Ltd (t/a Crockfords Club) [2017] UKSC 67*. The second limb of the former test for establishing dishonesty, as set out in *R v Ghosh [1982] Q.B. 1053*, should no longer be used and the first (objective) limb of the *Ghosh* test is not the same as the second (objective) limb of the *Ivey* test.
- In dishonesty cases, it is particularly important for Tribunals to place the 2<sup>nd</sup> and 3<sup>rd</sup> limbs of the overriding objective in the balance.
- When considering whether an act of dishonesty is “an isolated incident” a Tribunal should take into account the nature of what occurred, including

whether the dishonesty required forethought and planning and the seriousness of the potential outcome of those dishonest actions.

- It will be an unusual case where dishonesty is not found to impair fitness to practise.
- Misconduct (e.g. dishonesty) does not have to take place in a clinical setting before it renders erasure, rather than suspension, the appropriate sanction.

*The General Medical Council v Dr Kennedy Krishnan [2017] EWHC 2892 (Admin) (A10/17), General Medical Council v Dr Iheanyi Chidi Nwachuku [2017] EWHC 2085 (Admin) (A12/17), General Medical Council v Theodoropoulos [2017] EWHC 1984 (Admin) (A13/17), General Medical Council v Dr Hemmay Raychaudhuri [2017] EWHC 3216 (Admin), General Medical Council v Dr Christopher Lamming [2017] EWHC 3309 (Admin), General Medical Council v Dr Muhammed Chaudhary 2017 WL 06762031*

### **Remediation/ Mitigation**

- In cases of serious misconduct where a finding of impairment is deemed necessary on public confidence/professional standards grounds, attempts by the doctor to remediate or reduce the risk of recurrence are of far less significance than in cases of clinical errors or incompetence.
- Personal mitigation issues are likely to be of considerably less significance in regulatory proceedings than in a criminal context because the overarching concern of the professional regulator is the protection of the public.
- When considering whether a doctor's conduct is remediable and the doctor has remediated, Tribunals should look for evidence that demonstrates the doctor **has** accepted responsibility for his/her conduct and **has** taken steps to ensure there is no repetition.
- Actual work undertaken, willingness to improve and progress should be considered when assessing extent of insight/remediation.

*General Medical Council v Dr Iheanyi Chidi Nwachuku [2017] EWHC 2085 (Admin) (A12/17), General Medical Council v Dr Robert Stone [2017] EWHC 2534 (Admin), McDermott v Health and Care Professions Council [2017] EWHC 2899 (Admin), The General Medical Council v Dr Somuah-Boateng [2017] EWHC 3565 (Admin), The General Medical Council v Dr Anoop Patel [2018] EWHC 171 (Admin), General Medical Council - and - (1) Dr Nilesh Pravin Jagjivan, (2) Professional Standards Authority for Health and Social Care [2017] EWHC 1247 (Admin) (06/17)*

### ***Service and Proceeding in Absence***

- *R v Jones [2002] UKHL 5* continues as relevant case law but distinction should be noted between criminal and regulatory proceedings.
- Fairness to the doctor should be the prime consideration but fairness to the GMC and the public should also be considered.
- Providing documentation has been served in accordance with the rules no additional steps are required to prove service, the onus is on the doctor to ensure contact details are up to date.
- Adjournments should be minimised.

***General Medical Council v Adeogba; General Medical Council v Visvardis [2016] EWCA Civ 162 (A04/16)***

### ***Restoration***

- Consideration of the overarching objective should always be given.
- Tribunals should not go behind the previous findings of fact, impairment or sanction.
- Tribunals should consider what is necessary to maintain public confidence and/or proper professional standards and conduct.

***General Medical Council v Dr Shekhar Chandra [2017] EWHC 2556 (Admin), General Medical Council v Dr Ahmed Nooh [2017] EWHC 2948 (Admin)***

### ***Interim Orders***

- All relevant factors should be considered when deciding whether to impose an interim order, decision making should be carefully set out in the determination so that it is clear to the informed reader that the proper legal test has been applied.
- Suspension should only be ordered on an interim basis where the risk cannot be managed by way of conditions.

***General Medical Council v Ankur Chopra [2017] EWHC 819 (Admin) (A07/17)***

Full learning points and details can be found within the judgments highlighted. Appeals circulars found [here](#) for specific cases have been, or will be, issued to summarise the specific learning from each judgment referred to.

Tribunal Development Section

0161 240 7292

[tribunaldevelopmentsection@mpts-uk.org](mailto:tribunaldevelopmentsection@mpts-uk.org)