

Appeals Circular A14/19

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Learning points from recent appeals

Impairment

- Tribunals are entitled to use their experience to assess issues such as the risk of repetition of behaviour and insight.
- The lack of insight in the past is a relevant factor in assessing whether a practitioner has current insight.
- A practitioner has to demonstrate how, given the findings of a Tribunal, they can reassure the Tribunal that sufficient insight has been acquired and the practitioner knows and understands why the conduct was considered unacceptable and can't be repeated.
- Tribunals should balance concerns about ensuring that a practitioner understands why conduct is unacceptable, so that there is no risk of repetition, but not forcing the practitioner to admit guilt for something that they do not accept doing. Questioning of practitioners should be done with this distinction in mind when dealing with insight.
- Tribunals are entitled to consider the weight to be given to each element of the public interest, having regard to the particular circumstances of the case.
- Tribunals are entitled to find a practitioner's fitness to practise impaired to uphold the public interest, even where it concludes there is little risk of repetition of any clinical findings and no issue of public protection arises.

- When considering dishonesty, if a Tribunal determines a practitioner has acted dishonestly and regards that dishonesty as serious, it is likely that the practitioner's fitness to practise should be regarded as impaired.
- When considering dishonesty, a Tribunal is not required to establish a practitioner's motive before reaching a conclusion on dishonesty.

Nwapa v General Pharmaceutical Council [2019] EWHC 427 (Admin)

Blakely v General Medical Council [2019] EWHC 905 (Admin)

PSA v NMC (Ndlovu) [2019] EWHC 1181 (Admin)

Milerman v GDC [2019] WL 04259512

Sanction

- Tribunals should ensure that good, cogent reasons are provided in determinations to justify imposing a particular sanction, where relevant guidance indicates/suggests an alternative sanction ought to be imposed.
- Tribunals should ensure they attach appropriate weight to relevant parts of the Sanctions Guidance during the sanction stage in MPT proceedings.
- Tribunals are entitled to impose no sanction upon a practitioner whose fitness to practice has been found impaired but exceptional circumstances will need to be identified and set out in any determination, along with consideration of the overarching objective.
- Tribunals in a review hearing are bound to revisit the findings of the first tribunal as to insight/impairment, if *further* evidence/information is produced which casts a different light on those findings.

General Medical Council v Mmono [2018] EWHC 3512 (Admin)

General Medical Council v A Decision of the Medical Practitioners Tribunal Service in the case of Dr Mehta [2018] CSIH 69

Ihsan v General Medical Council [2019] EWHC 716 (Admin)

Butt v General Dental Council [2019] EWHC 2263 (Admin)

Aggravating and mitigating factors

- The need to protect the public and maintain public confidence in the profession may outweigh any mitigating circumstances put forward by a practitioner.
- Tribunals should identify relevant aggravating and mitigating factors and identify which factors they consider relevant to sanction and if particularly relevant to the elements of the case.
- Tribunals should ensure that they carry out an evaluation of both aggravating

and mitigating factors when assessing a practitioner's fitness to practice. Where a Tribunal carries out such an evaluation, the High Court will be slow to intervene in any subsequent decision.

Hariharan v General Medical Council [2018] EWHC 3358 (Admin)
General Medical Council v Mmono [2018] EWHC 3512 (Admin)
Rak-Latos v General Dental Council [2018] EWHC 3503 (Admin)
GMC v Sledzik [2019] EWHC 189 (Admin)

Evidence

- When considering a submission of no case to answer under Rule 17(2)(g), Tribunal's must decide whether the allegation could be made out, not whether it would be made out.
- A finding of no case should only be made if, on the evidence then before the Tribunal, the allegation could not be made out, taking the GMC's case at its highest.
- Tribunals should properly analyse the admissibility and weight of hearsay evidence when considering whether it is fair to admit such evidence.
- Tribunals should adopt a careful balancing exercise when considering hearsay evidence, especially where it is key evidence for a particular allegation.

R (on the application of Husband) v GDC [2019] EWHC 2210 (Admin)
El Karout v NMC [2019] EWHC 28 (Admin)

Kind regards

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