

Substitution of tribunal members at medical practitioners tribunal hearings

Introduction

1. This guidance is for use at medical practitioners tribunal hearings when deciding whether or not to substitute a tribunal member during the course of the proceedings.
2. The need for substitution may arise because a tribunal member is no longer available (e.g., due to ill health) or is no longer eligible to remain on the tribunal (e.g., because of a conflict of interest which has arisen).
3. Under the General Medical Council (Constitution of Panels, Tribunals and Investigation Committee) Rules Order of Council 2015 ('the Constitution Rules') the MPTS selects membership of a tribunal and has the power to appoint a tribunal member at any time, including substituting a tribunal member, if necessary*. Paragraph 3 of Schedule 4 to the Medical Act 1983 (as amended) and Rule 8 of the Constitution Rules clarifies that proceedings are still valid when there is a change in tribunal member.
4. This guidance sets out the factors which should be considered by the MPTS when deciding whether or not to substitute, and by tribunals when deciding how to continue with the hearing. It will also be of assistance to tribunals when considering the nature of any directions to issue.

The process

5. Upon notification to the MPTS that a tribunal member is not able to continue a case from a specific date, and the tribunal would not be quorate without arrangements being made to substitute the tribunal member, the MPTS will explore the specific circumstances to identify, where possible, a suitable point in the hearing for a substitution to be made.

* R. (on the application of Michalak) v General Medical Council [WL 2748521 (2011)]

6. There are two decisions that will need to be made at different stages of this process:
 - a. the decision by the MPTS as to whether substitution is possible, or whether to convene a freshly constituted tribunal, considering the interests of justice*, and
 - b. the decision of the tribunal- after hearing submissions from the parties- as to the arrangements for resuming the hearing.
7. Substitution of a tribunal member has the potential to cause injustice to the parties, however the delay caused by not substituting a tribunal member and instead convening a new tribunal, may cause a greater injustice. Whatever steps are taken to mitigate any negative effects of either the substitution or the adjournment of proceedings, will need to balance competing considerations to arrive at a fair and proportionate outcome.

MPTS Decisions

8. If it becomes clear during a hearing that a substitution may be required, the tribunal clerk for the hearing or the individual tribunal member should ensure that the MPTS is notified as soon as possible. The MPTS will consider whether there are any other practical arrangements that can be made, for example non-sitting days or consideration by the tribunal of an adjournment, in order to retain the same tribunal.
9. Where it may be necessary to substitute or convene a freshly constituted tribunal, steps will be taken to explore availability to replace the outgoing tribunal member.
10. Considerations when making a decision whether to substitute or convene a new tribunal include but are not limited to:
 - ▶ the stage the hearing of the allegation(s) has/have reached
 - ▶ the extent of delays likely to be caused by potential substitute tribunal members' availability compared with convening a fresh tribunal
 - ▶ fairness to the parties if there is further delay due to resuming at a particular point in the hearing

* Rule 8(4) of the Constitution Rules say that Paragraph (3) does not apply where the Registrar or the MPTS (as the case may be) considers that it is in the interests of justice to convene a freshly constituted Panel, Tribunal or Committee.

- ▶ the nature and complexity of the allegation(s) and facts upon which they are based
- ▶ the nature and extent of the oral evidence already given
- ▶ where applicable to the hearing stage reached, whether the tribunal can use transcripts as an alternative to rehearing evidence.

11. If the MPTS decides to substitute a tribunal member it will notify the parties and invite them to address the MPTS on the arrangements for resuming the hearing. The MPTS will provide what other information it considers necessary in respect of the personal or professional circumstances of the tribunal member being substituted.
12. When a substituted tribunal member is available immediately (or at the point of any resumed hearing if the replacement need becomes known during an adjournment), the proceedings will then continue with a quorate tribunal making decisions about how to proceed in accordance with Rule 29(5) of the General Medical Council (Fitness to Practise) Rules Order of Council 2004 ('The Rules').
13. Where the MPTS becomes aware that a replacement tribunal member is not available for the remainder of the hearing listing this will be communicated to the tribunal while the tribunal remains quorate, so that proceedings can be adjourned as appropriate. The tribunal should identify with the parties suitable dates to reconvene and the MPTS will ensure that a replacement tribunal member is available for the reconvened hearing.
14. Where the Chair of the tribunal becomes unavailable for part of the remainder of a hearing, it is open to the MPTS to promote another tribunal member to Chair (Rule 6 of the Constitution Rules). However, where the tribunal would not be quorate as a result, substitution of a tribunal member will still be required, as set out above.
15. The MPTS will ensure that appropriate arrangements are made for the replacement tribunal member to review any material that is considered essential for the tribunal to continue the hearing. Where possible, the MPTS will try to ensure that substitution occurs only at the end of a 'stage' in the hearing, eg once the decision on facts has been handed down.

16. In some exceptional circumstances the MPTS may determine that it is in the interests of justice to appoint a new tribunal in its entirety*.

Tribunal decisions

17. At either the point the 'original' tribunal is determining to adjourn the hearing, or the tribunal resumes the hearing with a substituted tribunal member- whichever is earliest and most practicable for the situation- the tribunal *may where appropriate* issue directions under Rule 29(5) of the Fitness to Practise Rules 2004 (as amended). This requires that, when a hearing is resumed following an adjournment, if there has been substitution of a tribunal member, the tribunal may, having considered representations from the parties where appropriate, issue directions which it considers necessary in the interests of justice, about:
- ▶ the stage at which the hearing is to be resumed
 - ▶ any special procedure which must be followed (including varying an existing direction or the order of proceedings).
18. When the tribunal reconvenes, but before the hearing of the allegation is resumed, the parties' submissions will be considered as to whether:
- ▶ the hearing should be restarted, or
 - ▶ the stage at which the hearing should restart.
19. An adjournment of the hearing to enable a substitute tribunal member to be appointed should be kept as short as possible. Uncertainty from delay will be unfair to the parties and may cause difficulties for witnesses.

Factors to be considered

20. The factors which the tribunal will take into consideration when deciding how to continue with the hearing will include, but are not limited to:
- ▶ the stage the hearing of the allegation(s) has reached
 - ▶ fairness to the parties if there is further delay due to resuming at a particular point
 - ▶ the nature and complexity of the allegation(s) and facts upon which they are based
 - ▶ the nature and extent of the oral evidence already given

* (4) Paragraph (3) does not apply where the Registrar or the MPTS (as the case may be) considers that it is in the interests of justice to convene a freshly constituted Panel, Tribunal or Committee.

- ▶ ability to recall witnesses, if to do so is necessary to ensure the fairness of the proceedings
- ▶ where applicable to the hearing stage reached, whether the tribunal can use transcripts as an alternative to rehearing evidence.

21. The tribunal will provide a reasoned determination. The determination will set out, for example:

- ▶ the stage at which the hearing will resume and directions as to the procedure to be adopted to enable the hearing to be concluded with the substituted tribunal member; or,
- ▶ that the hearing with the currently constituted tribunal should be abandoned and rescheduled to start afresh with either a completely new tribunal, or the original and substituted tribunal members, on a date and time to be notified to the parties.

22. Where a hearing has reached the impairment or sanction stage, the tribunal may decide to go back to the beginning of those submissions to the point immediately after the decision was made either on the facts or impairment. Commencing a new hearing would be relatively unusual given the time and resource implications and disruption for the parties and the witnesses.

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