

Guidance for Medical Practitioners Tribunals on case management and exercising powers under Rule 16A (Adverse inferences, refusal to admit evidence and awarding costs)

Introduction

1. These powers are only available to a Medical Practitioners Tribunal (“MPT”) hearing an allegation or allegations of impaired fitness to practise (in accordance with Rule 17 of the General Medical Council (Fitness to Practise) Rules 2004 (“the Rules”).
2. This guidance will apply to cases which are referred to a hearing before a MPT on or after 31 December 2015 and where:
 - ▶ a pre-hearing meeting takes place; or
 - ▶ a first or second listings teleconference takes place; or
 - ▶ a letter imposing Rules or directions upon parties is sent out.

on or after that date. This is a living document and will be subject to periodic review.

3. The overriding objective of the GMC in making procedural rules is to ensure that MPT’s deal with cases fairly and justly. One key way in which the GMC meets this overriding objective is through the inclusion within the GMC (Fitness to Practise) Rules 2004 (as amended) (“the Rules”) of provisions for the making of directions to enable and facilitate the fair and just determination of cases. For the purposes of Rule 16A, a “direction” may be either a Rule 16 case management direction or a substantive direction made by a Tribunal (such as a direction to undergo an assessment).
4. Under Rule 16(7A), a case management direction is binding on the parties and on any subsequent MPT considering the case, unless the MPT considers that:

- a. there has been a material change in circumstances; or
 - b. it is not in the interests of justice for the direction to be binding.
5. Pre-hearing compliance with the Rules and case management directions allows both parties the opportunity to prepare and then present their case efficiently and effectively to the MPT, on the basis of mutual and timely prior disclosure of their respective evidence. This allows all parties to appreciate, in advance of the hearing, what the real issues in the case are and allows for a good understanding of the extent to which they are disputed. Similarly, once the hearing is underway, compliance with directions made by the Tribunal helps to ensure proper progress of the case. Parties in the context of fitness to practise proceedings are the GMC and the doctor facing allegations, together with their representatives.
6. The Medical Act 1983 (as amended by the General Medical Council (Fitness to Practise and Overarching Objective) and the Professional Standards Authority for Health and Social Care (References to Court) Order 2015) empowers the GMC when making procedural rules to provide for the consequences of non-compliance and the Rules include such provisions.
7. Where a party has failed to comply with a Rule or case management direction, the MPT has the discretion to:
 - a. draw adverse inferences; and/or
 - b. refuse to admit the evidence (where the failure relates to the admissibility of evidence); and/or
 - c. award costs.
8. These powers can be exercised following an application from a party or on the MPT's own initiative.
9. This guidance sets out the circumstances and factors relevant in exercising these powers. In practice, the exercise of these powers will occur relatively rarely due to the specific nature of the criteria to be met before each of the powers is available.
10. In exercising these powers, the MPT must have regard to the over-arching objective: the protection of the public. Pursuant to s.1B(1) of the Medical Act, this will entail pursuing the following objectives
 - a. protecting the health, safety and well-being of patients and the public;

- b. maintaining public confidence in the profession; and
- c. Promoting and maintaining proper professional standards and conduct for members of that profession.

Determining whether a case management direction should be binding

11. The powers under Rule 16(8) are available to the MPT following a failure to comply with a Case Management direction or a rule. Substantive directions made by tribunals are binding. The default position is that a Case Management decision is binding. However the rules provide a set of narrow circumstances where the MPT may find that a decision should not be binding where there has been a change of circumstances or another reason why it would not be in the interests of justice for the direction to be binding. In the vast majority of cases it will be immediately obvious that the directions should be binding but in some cases careful consideration will be required.
12. There is a distinction between a Tribunal direction and a request made by the Tribunal (for example asking parties to be ready at a given time after a short adjournment). The Tribunal Clerk will record any Tribunal direction which would potentially trigger powers under rule 16A and provide a copy to all parties so that there is clarity as to the position.

Failure to comply

13. Before considering whether to exercise any of these powers, the MPT should first decide whether there is a rule or direction which has not been complied with. This will first of all require the MPT to look at whether, as a matter of fact, there was a case direction made or a rule which required the party to carry out a particular action, by a particular date. The MPT will then consider whether the action was carried out and whether this was done on time. In some cases both parties will agree the facts, but in others it will be necessary to hear evidence and/or submissions before reaching a conclusion. The MPT should have regard to the record of directions (made at a pre-hearing meeting, listing teleconference or by way of correspondence). Whilst the MPT may be assisted by reference to any observations made by the Case Manager regarding compliance, this is a question for the MPT to decide on its own judgment.

14. In cases where the MPT finds that a party has not complied with a Rule or direction, it will assist the MPT to consider all of the circumstances of the non-compliance to establish whether this amounts to a culpable failure. This will include but is not limited to:
- a. What was the nature and extent of the failure to comply?
 - b. Who was responsible for the failure to comply?
 - c. What impact did the failure have on the other party, the MPT and/or the progress of the case?
 - d. What obstacles were faced by the party who failed to comply with the rule or direction?
 - e. What steps did that party take to overcome the obstacles?
 - f. Was there anything else that might reasonably have been done to avoid the non-compliance?
 - g. Did the party seek to minimise disruption by notifying the opposing party and/or the Case Manager of the problem?
 - h. What reasonable steps could the party have taken to avoid non-compliance with the rule or direction?

In considering the factors set out at (a)-(h) above, together with any other factors, the MPT will have regard to whether there were barriers to his or her compliance outside his or her control.

15. These factors will be of relevance when turning to consider whether it would be appropriate to exercise the powers referred to in the remainder of this guidance.

Drawing Adverse Inferences

16. This part of the guidance refers to powers which are available to the MPT following a failure to comply with a rule or case management direction. It does not interfere with the MPT's ability to draw an inference in relation to evidence heard during the course of the hearing. An adverse inference can be drawn against either the GMC or a doctor facing allegations.
17. The purpose of the power to draw an adverse inference is to ensure that a party cannot secure an unfair advantage by hindering the MPT's full and unfettered examination of the relevant evidence and issues in the case. The power to draw an adverse inference will be considered where a party has failed to provide

evidence leaving the MPT unable to assess its quality and/or determine what it means in the context of the case as a whole.

18. Where a party has failed to comply with a rule or a Case Manager direction, the MPT may draw an adverse inference but only if this is appropriate in all of the circumstances of the case.
19. The MPT should first decide whether there has there been a failure to comply. If it concludes that a party has failed to comply with a rule or direction, then it should turn to the circumstances in which that failure arose and consider the factors in paragraph 12 above.
20. Having considered all of the circumstances, the MPT should go on to determine its view on the motivation of the failing party: whether the failure was ill-motivated or made in bad faith. If the MPT concludes that the failure occurred because the failing party had an ulterior motive in seeking to keep unfavourable material away from the MPT, or otherwise conceal the truth from it, then it could be appropriate to draw an adverse inference.
21. Given the nature of the issue, it will almost always be the case that there will be no direct evidence as to the motivation of the failing party. The MPT will need to assess all of the circumstances of the failure in the context of the case as a whole, in determining whether there was improper motivation.
22. Before drawing an adverse inference, as a matter of fairness, the MPT should first consider whether there may be another explanation for the failure. It should be noted that a denial of the failure is not the same as an explanation for the failure. An inference against a party should only be drawn where it is the only reasonable inference to be drawn from the failure and there can be no other reasonable explanation.
23. The MPT, having drawn an adverse inference, should apply this inference to the relevant issue(s) in the case. It will then take this into account when considering the case as a whole. An adverse inference should be considered in the context of all of the evidence available in the case. The MPT should not find an allegation is proved or not proved, or base a decision on impairment, on the basis of an adverse inference alone. The MPT's power to draw an adverse inference does not reverse the burden of proof.

24. In determining whether to draw an adverse inference, it may assist the MPT to work through the following questions (with reference to the more detailed guidance set out above):
- a. Has a party failed to comply with a rule or case management direction? (The MPT should then consider the factors in paragraph 12 above)
 - b. What reason has been given for the failure? In all of the circumstances, what conclusion is to be drawn about the motivation behind the failure?
 - c. What was the nature and impact of the failure? Has the MPT been able to make a full assessment of the relevant issue(s) in the case or has the failure denied them access to some material evidence?
 - d. Is an adverse inference the only inference to be drawn?

Refusing to Admit Evidence

25. The purpose of the power to refuse to admit evidence is to protect the fairness of the proceedings and to ensure that a party cannot gain an unfair advantage by manipulating the hearing process.
26. Justice demands that determinations are made on the basis of evidence, and in general terms the MPT will be best able to deliver justice where it has access to all of the available evidence. Excluding evidence is a draconian step which should only be taken where absolutely necessary. An order to exclude evidence can be made against either the GMC or a doctor facing allegations.
27. Where a party has failed to comply with a rule or a case management direction relating to the admissibility of evidence, including deadlines for submitting it, the MPT may refuse to admit the evidence, either by way of a preliminary ruling on a legal argument, or during the course of the hearing.
28. In deciding whether to exclude evidence, the MPT should consider the following questions:
- a. Has a party failed to comply with a rule or direction pertaining to the evidence in question? (The MPT should then consider the factors in paragraph 12 above);
 - b. Does the party have a reasonable excuse for that failing?
 - c. Has the party deliberately sought to disrupt the proceedings by the manner or timing of the production of the evidence?
 - d. What issue in the case does the evidence go to?

- e. Will the other party be prevented from (or be significantly disadvantaged in) addressing the material issues raised by the evidence in question?
29. The MPT must always ensure that the hearing is fair, but fairness involves fairness to both parties. Ensuring fairness may require the MPT to balance the interests of one party against another. For example, allowing one party to present its case fully (by the admission of evidence served late in the proceedings) may conflict with the ability of the other party to answer that case.
30. The MPT should always consider whether there is any other mechanism which would allow the hearing to proceed fairly, before refusing to admit evidence. This could include adjourning the case to allow the other party time to prepare, notwithstanding the fact that adjournments are generally undesirable.

Awards for Costs

31. Usually, each party will bear their own costs. The MPT's decision as to the merits of an application for costs is separate from its findings in relation to facts, impairment and sanction. The purpose of the power to award costs is to encourage parties to comply with the rules and Case Management directions, to improve efficiency and thus to ensure that the over-arching objective is met.
32. Where a party has failed to comply with a rule or a case management direction, and they have behaved unreasonably in the conduct of the proceedings, the MPT may make an award of wasted costs against the party. An award of costs can be made against either the GMC or a doctor facing allegations.
33. Although the MPT will hear and decide applications in relation to costs only at the end of a hearing, the behaviour which gives rise to an application should be highlighted immediately. Where a party has failed to comply with a rule or direction and has engaged in unreasonable conduct, the other party should bring this to the attention of the MPTS* or the Case Manager (or the MPT, if the hearing has commenced) without delay. If the other party intends to make an application for costs, this should be communicated to the MPTS, the Case Manager or the MPT immediately. An application for costs will only be appropriate where the other party has failed to comply with a rule or direction

* This should be done by contacting the individual named on correspondence received by the party from the MPTS

and has engaged in unreasonable behaviour (to be determined by the tribunal) and as a result time or money has been wasted (to be assessed by the Case Manager).

34. Upon being put on notice that a party intends to make an application for costs, the MPT should inform the other party of the steps that should be taken in order to prepare for a potential costs application, including gathering information relating to the sums wasted and ability to pay (even though this will only be relevant to the assessment of costs to be carried out by the Case Manager if the MPT makes an order for costs)
35. The MPT will consider any relevant evidence and submissions from both parties on:
 - a. the alleged failure to comply with rules or a Case Manager direction; and
 - b. the allegedly unreasonable behaviour in the conduct of the proceedings.
36. In determining whether to make a costs award, the MPT will need to consider the following questions:
 - a. Has there been a failure to comply with a rule or direction? (The MPT should then consider the factors in paragraph 12 above);
 - b. Has the party who failed to comply acted unreasonably (see paragraph 36-41 below) in the conduct of the proceedings?
 - c. If the answers to (a), (b) are “yes”, should the MPT exercise its discretion to make a costs award against the party who failed to comply?
37. The additional question, as to whether the other party incurred any costs/wasted any time, which but for the non-compliance would not have been incurred/wasted, will be determined by the Case Manager if the MPT makes an order for costs.
38. Unreasonable behaviour may be either procedural (relating to the process) or substantive (relating to the issues in the case). For the purposes of an application for costs, “unreasonable behaviour” relates to behaviour in the course of the hearing itself, or in preparation for the hearing. The failure to comply may itself amount to “unreasonable behaviour”.
39. In *Ridehalgh v Horsfield and others* [1994] Ch. 205 CA (Civ. Div.), Sir Thomas Bingham MR defined “unreasonable” behaviour as

“...describing conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner’s judgment, but it is not unreasonable.”

40. The MPT should consider all of the circumstances surrounding the behaviour in question. The MPT may wish to consider the following non-exhaustive list of questions, which are independent of one another (although of course more than one may feature in a single case). Has the party engaged in:
- a. conduct that is designed to frustrate the process?;
 - b. uncooperative and obstructive conduct that goes beyond the limits of acceptability or fairness and for which there is no reasonable excuse?;
 - c. behaviour that jeopardises the fairness of the proceedings?;
 - d. the pursuit of a case which is known to be dishonest?;
 - e. the evasion of rules or directions intended to safeguard the interests of justice (e.g. deliberately conniving at incomplete disclosure)?
41. The question of what is reasonable is related to and proportionate to the purpose and objectives of the party. It is important that parties are not unduly fettered in the pursuit of appropriate objectives, for example the presentation of a proper defence or the protection of the public.
42. The fact that a particular course of action undertaken by a party did not result in an outcome that was favourable to the party will not of itself render that action “unreasonable”. Delay, absent other features, is not enough to amount to unreasonable behaviour but it may be an outward sign of such behaviour.
43. The MPT will consider the relevant behaviour in the context of the circumstances of the case as a whole, and will guard against labelling behaviour born out of language barriers, cultural differences, or illness as “unreasonable”.
44. In considering whether to make a costs award, the MPT should not take into account the paying party’s ability to pay. If a costs award is made, this important factor will be taken into account at the assessment of costs stage, when the Case

Manager will review any evidence on ability to pay, as provided by the paying party (see paragraphs 45-47 below).

Costs awards Against Legal Representatives

45. An MPT faced with making a decision as to whether to make a costs award against a legal representative should make full allowance for the fact that it may be difficult for the representative to freely present his position, given the principles of legal professional privilege and client confidentiality. In these circumstances a costs award against the representative should only be made where – proceeding very carefully - it is plain to see that there is nothing that could be said by the representative even if he were unrestrained, which would allow him to resist the application.

Assessment of Costs

46. If the MPT makes a costs award, an assessment of the amount of costs to be paid will be made by a Case Manager. The receiving party has a period of 28 days from the conclusion of the proceedings to serve a schedule of wasted costs on the paying party and the Case Manager. Upon receipt of the schedule of wasted costs provided by the receiving party, the paying party must within 28 days serve a written response to the schedule, together with details and evidence of their ability to pay. The Case Manager has a discretion to vary this time limit in individual circumstances if it is just and fair to do so.

47. Costs will be assessed on the basis of the amount of the receiving party's time that was wasted. The Case Manager will assess whether there are any wasted costs and use the [*Guidance for case managers on the assessment of costs*](#) in determining the appropriate sum and will have regard to the paying party's ability to pay.