

Part 11: Adverse inferences, refusals to admit of evidence and costs awards

Key points

- ▶ Before reading this Part, we strongly recommend reading [Part 3](#) regarding our case management procedure.
- ▶ There can be consequences for you or the GMC for failure to comply with the [Rules](#) or case management directions.

Potential consequences for failure to comply

If you or the GMC do not comply with the Rules or case management directions, the medical practitioners tribunal can take the following actions:

- ▶ draw an adverse inference
- ▶ refuse to admit evidence
- ▶ award costs.

Adverse inferences and refusals to admit evidence

What does adverse inference mean?

To draw an adverse inference means that the medical practitioners tribunal may draw a negative conclusion from a party's failure to comply with a Rule or case management direction.

What does refusal to admit evidence mean?

A refusal to admit evidence means that the medical practitioners tribunal may refuse to receive evidence (eg witness statements, expert reports or other documents) where the party wishing to rely on that evidence has failed to comply with a rule or direction (see below).

When can a medical practitioners tribunal draw adverse inferences or refuse to admit evidence?

In certain rare circumstances, a medical practitioners tribunal can under Rule 16(A) draw an adverse inference or refuse to admit evidence that you or the GMC want to rely on.

When might an adverse inference be drawn?

An adverse inference can be drawn against a party who has failed to comply with a Rule or case management direction by not giving evidence (for example, witness statements, expert reports or other documents). The medical practitioners tribunal will consider:

- ▶ whether the failure to provide evidence has left the medical practitioners tribunal unable to assess the quality of that evidence or determine what it means in the context of the case as a whole
- ▶ whether the failure to provide evidence was ill-motivated or made in bad faith, or whether there is another reasonable explanation for the failure.

Where those criteria are met, the medical practitioners tribunal may draw an adverse inference if it is appropriate in all of the circumstances of the case. Two examples of what might cause the medical practitioners tribunal to draw an adverse inference and, in italics, what the adverse inference might be, are as follows.

- ▶ If you fail to produce evidence in accordance with a Rule or a case management direction, without reasonable excuse, the medical practitioners tribunal may conclude that the evidence *was not produced because it would be unfavourable to you*.
- ▶ If the GMC fails to comply with a direction to produce evidence by a certain date, but then gives this evidence at a later date and, in the absence of an adequate explanation, the evidence appears to have been altered, the medical

practitioners tribunal *may conclude that the evidence, before alteration, was unfavourable to the GMC.*

When might a medical practitioners tribunal refuse to admit evidence?

A medical practitioners tribunal can refuse to allow a party to rely on evidence where that party has failed to comply with a relevant Rule or case management direction relating to the production of that evidence. For example, if you or the GMC deliberately fail to disclose a witness statement by a relevant deadline without good reason, the medical practitioners tribunal can refuse to admit the evidence.

The medical practitioners tribunal will refuse to admit evidence only where absolutely necessary. Factors that the medical practitioners tribunal may consider when deciding on the admissibility of evidence will include:

- ▶ when the evidence was obtained
- ▶ the relevance of the evidence to the issues in the case
- ▶ any reasonable excuse given for the failure to produce the evidence in accordance with the Rule or case management direction
- ▶ whether there is any other mechanism, other than excluding the evidence, that would allow the hearing to proceed fairly.

How do I apply for the medical practitioners tribunal to draw an adverse inference or refuse to admit evidence?

If you wish to apply for the medical practitioners tribunal to draw an adverse inference or refuse to admit evidence, you should inform the medical practitioners tribunal at the earliest opportunity. When you receive notification of an application, the medical practitioners tribunal will arrange time during the hearing for the matter to be addressed. You will be able to explain why you think the medical practitioners tribunal should draw an adverse inference or refuse to admit evidence. The GMC will then have an opportunity to respond. After careful consideration of the arguments, the medical practitioners tribunal will announce its decision and give full reasons for it.

Costs awards

What is a costs award?

A costs award is an order made by a medical practitioners tribunal that one party (either you or the GMC) must pay some of the other party's costs. The party awarded costs is called the receiving party. The party ordered to pay costs is called the paying party. The medical practitioners tribunal may consider making a costs award either if one party makes an application for costs, or of its own initiative.

If the medical practitioners tribunal decides that a costs award should be made, the amount of costs payable will be assessed by a legally qualified case manager once the hearing has concluded.

When can a costs award be made?

The medical practitioners tribunal's decision on costs is separate from its decision on the fitness to practise proceedings. This means that even if the medical practitioners tribunal finds that your fitness to practise is not impaired, the GMC could still make an application for costs against you. Equally, you can still make an application for costs, even if your fitness to practise is found impaired.

A costs award can only be made against a party if:

- ▶ they have failed to comply with a relevant rule or a direction **and**
- ▶ they have behaved unreasonably (see below).

If a costs award is made, the receiving party can only claim the amount that has been lost through time or money wasted because of the other party's failure to comply. You may be able to claim costs, but you cannot claim back all of your costs and nor can the GMC – please see the [Schedule of Costs template](#). It is expected that costs awards will be made infrequently.

What does unreasonable behaviour mean?

Unreasonable conduct describes behaviour that has no reasonable justification. It is not possible to give a finite list of what would be considered unreasonable conduct, as every case is different. But some examples include:

- ▶ improper treatment of witnesses (for example by being unnecessarily rude or aggressive)

- ▶ being deliberately dishonest
- ▶ purposefully being obstructive and obscuring the real issues in the case.

Unreasonable conduct could take place during the preparation for the hearing, or during the hearing itself. A failure to comply with a relevant Rule or with a case management direction may itself amount to unreasonable conduct (eg if you or the GMC has an expert report to be used in the hearing, but fails, without reasonable excuse, to disclose the report until the last moment).

How do I apply for a costs award?

You should only apply for a costs award if the GMC has failed to comply with a Rule or case management direction and you consider that the GMC has acted unreasonably. If this behaviour occurs before the start of the hearing, you should immediately tell us that you intend to make an application for costs. If the hearing has started, you should inform the medical practitioners tribunal at the earliest opportunity. This is important because time needs to be set aside for the costs application to be heard.

On receiving notification of a costs application, or if the medical practitioners tribunal itself decides that a costs award consideration should take place, the medical practitioners tribunal will remind parties of the steps they need to take to prepare for the costs application.

Parties should inform the medical practitioners tribunal of their intention to make a costs application without delay – the costs application itself will not be heard until the end of the hearing. You and the GMC will be able to submit evidence and make submissions on the matter of whether a costs award should be made.

If the medical practitioners tribunal decides that a costs award should be made against you or the GMC, it will announce its decision and provide written reasons. The amount of costs payable by the paying party will be assessed by a legally qualified case manager, once the hearing has concluded.

How will the case manager calculate the costs payable?

The case manager will need further information from the parties to calculate the costs that should be paid. The receiving party must prepare a [schedule of costs](#), which they should give to the case manager and the paying party within 28 days of

the end of the hearing. The schedule of costs must be supported by evidence, where indicated.

The paying party will then have 28 days from receipt of the schedule of costs to serve their written response and evidence of their ability to pay. An [ability to pay self-assessment](#) should be prepared and submitted, and must be supported by evidence where indicated.

If either party is unable to comply with the 28-day timeframe, they can ask for an extension of time. However, the case manager will only allow extra time if there is a good reason for the request. You should assume that you will only have 28 days to submit your schedule or response, with the relevant evidence, and make preparations accordingly.

What is included in a schedule of costs?

The case manager will only allow claims in respect of costs that have been incurred or wasted as a result of the paying party's failure to comply with a relevant Rule or case management direction. If a cost would have been incurred in any event, the claim for that particular cost will not be allowed. Only reasonably incurred costs will be recoverable and the amount awarded is subject to an overall cap. You can find further information in [Guidance for case managers on the assessment of costs](#).

How long will the paying party have to make the payment?

Costs will usually be payable 14 days after the date of the assessment of costs, unless the case manager specifies a different period.

What happens to the costs assessment if an appeal has been lodged?

Where a party seeks to appeal the outcome of a medical practitioners tribunal hearing, the case manager will usually assess the costs to be paid in accordance with the usual timetable. In exceptional circumstances, the case manager may decide to postpone the costs assessment until the outcome of the appeal is known.

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