

Tribunal Circular



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To: All Tribunal Members
Legal Assessors

Cc: Tribunal Clerks

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

Tel: 0161 923 6263

Fax: 0161 240 7199

Email: enquiries@mpts-uk.org

R (on the application of BMA) v GMC [2016] EWHC 1015 (Admin)

A challenge was brought by the British Medical Association to the implementation of Rule 6(b) of the GMC (Legal Assessors and Legally Qualified Persons) Rules Order of Council 2015, which came into force on 31 December 2015.

Rule 6(b) provides that after the Tribunal has begun its deliberations in private, if the legally qualified tribunal chair advises other tribunal members on any question of law, he need not do so in the presence of the parties, unless he considers it to be necessary. The advice provided can be stated within the tribunal decision. It was said that this breached the right to a fair trial, and is irrational as it differentiates between advice given by a legally qualified chair and that of a legal assessor – the latter being required to give or repeat advice in the presence of parties to provide an opportunity to make submissions before the tribunal reaches a decision.

In considering the provision that the LQC provides advice in the presence of the parties if he considers it necessary, Mr Justice Hickinbottom stated that this caveat was unnecessary because "...as a body exercising public functions, the tribunal is bound to conduct itself to ensure the hearing is fair in the sense of complying with article 6...and, if it is necessary for the parties to be given an opportunity to comment upon a particular matter to render the proceedings fair, then such an opportunity must be given". It was said that "it would...be necessary if it would be procedurally unfair not to give the parties such an opportunity, e.g. if it concerns a relevant point of law upon which no submissions have been made and which is (or may be) controversial and material...That merely reflects the principle of general application that no court or tribunal can decide a case on the basis of a material proposition of law upon which the parties have been given no opportunity to comment and challenge."

Hickinbottom J stated that "where a legal member of a tribunal expresses a view on the law to other members, he can properly be described as "advising" those other members, without engaging the jurisprudence of legal assessors, because the member is a full member of the tribunal who participates fully in the decision-making process and thus attracting all of the jurisprudence that attaches to judges and other legal members who exercise full judicial function within a mixed tribunal". In considering a comparative with the legal assessor, it was said "usually, where the legally qualified person is a full member of the tribunal, whilst no doubt giving legal advice to the other members, he will occupy a different role from a legal assessor who stands outside the decision-making tribunal".

The decision to dismiss the claim for judicial review is summarised at paragraph 56 as follows: "In any event,... I consider paragraph 6(b), as properly construed, does not require a legally qualified chair, when he has given advice to the other members of the tribunal panel in private and after their deliberations have

begun, to make the parties privy to that advice and give them an opportunity to comment upon it, prior to the tribunal making a decision. It is sufficient for that advice to be incorporated into the tribunal's decision. There is an exception, where the legal chair considers it is necessary for the advice to be given to the parties, to enable them to comment upon it, before a decision is made. An example would be where a new material legal point arises during the panel's deliberations, upon which the parties have had no earlier opportunity to comment or challenge. In that event, he must give the parties that advice and that opportunity. Construed thus, paragraph 6(b) is neither contrary to the requirements of article 6 or common law fairness, nor otherwise unlawful."

Kind regards

Tribunal Development Section

0161 240 7292

Tribunaldevelopmentsection@mpts-uk.org