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Medical Defence Organisations

Admissibility and weight of witness evidence

This circular sets out a reminder of some of the key Rules[1] and considerations in relation to witness evidence.

Procedure for admitting witness evidence

The Rules provide that, unless otherwise directed by an MPTS Case Manager, at least 28 days before the hearing, each party shall provide the other with copies of any documents that they intend to introduce as evidence, including witness statements.[2] Within 14 days of this, parties must notify one another if they require any witness to attend to give oral evidence or to be available for cross examination.[3] In practice, these deadlines are usually modified significantly by pre-hearing case management directions, often requiring the parties to undertake these activities sequentially and at an earlier stage in order to ensure effective hearing preparation.

Format of witness evidence

The Rules provide that a witness's evidence in chief must be received by way of a signed written witness statement, unless the tribunal, an MPTS Case Manager or the agreement of the parties authorises that evidence to be given orally as 'oral evidence in chief'[4]. In all but exceptionally rare cases it will be unnecessary duplication (and

[1] GMC Fitness to Practise Rules 2004 (as amended)
[2] Rule 34(9)
[3] Rule 34(9A)
[4] See Rule 34(11)

potentially procedurally unfair) for a tribunal to receive and read a witness's statement in advance *and* hear oral evidence in chief.

Oral evidence in chief is therefore simply evidence given orally, rather than in a witness statement, and should be distinguished from *oral cross examination* or hearsay evidence (see below).

Rule 35(2)(b) to (d) sets out the procedure for oral cross examination of witnesses and the order in which the parties or tribunal will cross examine or ask questions of them. If, however, a witness is giving oral evidence in chief, there is an additional step[5] in which the witness will first be examined by the party calling them, which will involve them providing their detailed oral account, in the absence of a written witness statement being provided to the tribunal.

When is a witness statement or evidence considered 'hearsay'?

Hearsay isn't defined in the Rules, but is defined in the CPR[6] as '*a statement made, otherwise than by a person while giving oral evidence in proceedings, which is tendered as evidence of the matters stated*'. This may arise where one party notifies the other that they require the witness to attend for cross examination, but despite this request, the party (for one reason or another) fails to call the witness or the witness refuses or is unable to attend. In this case, the party who wants to rely on evidence contained in a witness statement will need to make an application to the tribunal to admit the witness statement as hearsay.

Hearsay may also arise when a witness recalls an account given to them by a third party, ie. it is second hand evidence.

When is a witness statement or evidence *not* considered hearsay?

In circumstances where the witness's evidence is agreed, neither party will call or require a witness for cross examination. The tribunal will have a copy of the uncontested witness statement; this is *not* classed as hearsay. In this case, parties will inform the witness that they are not required for oral cross examination at the hearing, and they are effectively 'stood down'. Tribunals may still request to question the witness whose evidence has been agreed if they believe that it's essential in order to determine the issues in dispute (Rules 35(2)(d)). However, tribunals should first consider how putting these questions will assist the tribunal reach a decision on the issues in dispute if parties have agreed the witness evidence. If the tribunal remains of the view that further clarification from the witness is necessary, then the most effective and proportionate method for seeking such clarification should be explored. In many instances this may be achieved by putting questions in writing or by telephone evidence. Consideration should be given to the overall management of the hearing and the fairness to proceedings at all times.

[5] Rule 35(2)(a)

[6] Civil Procedure Rules, Part 33.1(a)

Where the tribunal considered that clarification from the witness was necessary but this was not ultimately obtained, this does not affect the status of the uncontested witness statement; this is still ***not*** classed as hearsay.

In cases where witnesses are not called because their evidence is agreed between the parties [ie in circumstances where their evidence is about their state of belief, as opposed to facts], it is unfair for a tribunal to reject that evidence on the grounds that the witnesses were not cross examined. There is no basis for the wholesale rejection of such evidence and this constitutes a material irregularity.

What factors should a tribunal consider in deciding whether to admit hearsay evidence?

A party wishing to rely on any form of hearsay evidence (whether that is contained in a witness statement as with the situation set out above or otherwise) should make an application to the tribunal to admit that evidence as hearsay. If a tribunal identifies hearsay evidence where no application has been made, then the tribunal should invite the party seeking to rely on the hearsay evidence to make an application (if they are able to). In the absence of a specific application , the tribunal should still go on to consider whether the
hearsay evidence should be admitted (and if so, what weight to give it).

The test for admitting hearsay, as with all evidence in hearings, is set out in Rule 34(1):'*The Committee or a Tribunal may admit any evidence they consider* ***fair and relevant*** *to the case before them, whether or not such evidence would be admissible in a court of law'.*

In considering fairness in admitting hearsay evidence, it is important for the Tribunal to apply the legal principles derived from the case of *R (Bonhoeffer) v GMC* [2011] EWHC 1585 (Admin)[7]. There are two distinct stages to assessing fairness when considering hearsay evidence in regulatory proceedings:

- Stage One: Admissibility.
- Stage Two: The weight to be attached to the hearsay evidence (given that it's not been tested in cross examination).

Bonhoeffer set out three questions that a tribunal should consider when deciding whether to allow or exclude evidence from an absent witness:

- was there a good reason for non-attendance (and, consequently, for the admission of the absent witness's untested statements as evidence)?

- whether the evidence of the absent witness constitutes the sole or decisive basis for conviction or the factual finding(s) in regulatory proceedings?

[7] as confirmed in the case of Freeman v GMC [2023] EWHC 45 (Admin), and the case of Thorneycroft v NMC [2014] EWHC 1565 (Admin)

- are there sufficient counter-balancing factors to ensure a fair hearing?

Tribunals should first therefore satisfy themselves that the evidence ought to be classed as hearsay, and if so, should consider the *admissibility* (whether it is fair to admit it) and *weight* to be given to that evidence.

If the evidence is admitted, the tribunal should adopt a careful balancing exercise when considering the hearsay evidence, especially where it is key evidence for a particular allegation[8].

Kind regards
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[8] El Karout v NMC [2019] EWHC 28 (Admin)