

Tribunal Circular 02/25

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Stays of Medical Practitioner Tribunal ('MPT') hearings due to abuse of process

This circular sets out a reminder of some key considerations for tribunals in deciding whether it is appropriate to exercise its discretionary power to stay a MPT hearing (ie end the proceedings) due to abuse of process¹. This may arise from an application made by the doctor, or of the tribunal's own motion, and can take place at any time during the proceedings.

- ▶ It should be noted at the outset that it is very rare for a stay to be granted. A stay of proceedings is a remedy of last resort² and has been held to be very exceptional³. In order to grant a stay, there must be something so gravely wrong as to make it unconscionable that a hearing should go forward, such as disregard for basic human rights or gross neglect of the elementary principles of fairness⁴.
- ▶ In addition to indefinite stays of proceedings, tribunals can grant a temporary stay until specific issues are rectified: for example, where the GMC has evidence in its possession or has the ability to obtain that evidence from a third party, a temporary stay could be imposed until such a time as this evidence is obtained and disclosed. Tribunals should therefore clarify if it is an indefinite stay that the doctor is requesting, and if so, consider as part of their deliberations whether a temporary stay may instead be a sufficient remedy to the abuse found.
- ▶ In applications made by a party, it is for that party to establish the abuse of process. The starting point is that the tribunal will proceed with the case unless the party can

¹ The tribunal can either stay the whole case (i.e. the entire allegation brought by the GMC) or part of the case (i.e. some elements of the allegation)

² AG Ref No1 of 1990 [1992] 1 QB 630

³ AG Ref No2 of 2001 [2004] 2 WLR 1

⁴ R v Martin [1998] AC 917

displace that presumption by demonstrating to the civil standard that it should not, on one or both of the grounds below.

What is the legal test for identifying an abuse of process?

The Supreme Court⁵ confirmed that there two main types of case where a court may stay proceedings due to an abuse of process:

► **Where the [doctor] cannot receive a fair hearing in the circumstances (Ground one)**

If a tribunal concludes that a doctor cannot receive a fair hearing, it should stay the proceedings without further consideration (ie without balancing the competing interests of the GMC). In most cases, fairness can be ensured by effective case management during the hearing process. If a tribunal concludes that the doctor can receive a fair hearing, it should move on to consider reason two below.

► **Where it would be unfair for the [doctor] to be tried because it would offend the [tribunal's] sense of justice and propriety to 'try the accused' in the particular circumstances of the case (Ground two)**

For applications based on ground two, the tribunal should assess whether, in all the circumstances, continuing with the hearing will offend the tribunal's sense of justice and propriety, or will undermine public confidence in the tribunal proceedings and will bring it into disrepute.

In determining the above, the tribunal must conduct a balancing exercise between the public interest in the allegation against the doctor being considered and the competing public interest in avoiding the integrity of the justice system being compromised if the hearing proceeded⁶. A stay should only be granted if there is no other route to achieving a fair hearing: the tribunal could instead make other directions or modifications to address any potential unfairness.

Examples of cases in which abuse of process has been considered by the Court

The tribunal should exercise its own discretion and it is not possible to give exhaustive examples of the types of issues that may lead to an application for stay being granted or refused. However below are some types of cases which have been determined by the courts.

Delay

An application for a stay of proceedings may be made, for example, on the basis that the GMC has taken a disproportionate and unjustifiable amount of time investigating the concerns and that an abuse of process therefore arises: Article 6(1) of the European

⁵ R v Maxwell [2010] UKSC 48

⁶ R v Latif [1996] 1 WLR 104

Convention on Human Rights provides the right for an individual to have their case heard within a reasonable time. The principles⁷ to be applied when considering whether to stay proceedings because of delay are as follows:

- ▶ Even where delay is unjustifiable, an indefinite stay should be the exception rather than the rule;
- ▶ Where there is no fault on the part of the complainant or the prosecution (i.e. the GMC), it will be very rare for a stay to be granted;
- ▶ No stay should be granted in the absence of serious prejudice to the defence so that no fair trial can be held;
- ▶ When assessing possible serious prejudice, the decision maker should bear in mind their power to regulate the admissibility of evidence and that the trial process itself should ensure that all relevant factual issues arising from delay will be considered;
- ▶ If, having considered all these factors, the assessment is that a fair trial will be possible, a stay should not be granted.

Procedural errors/missing evidence

An application may be made for a stay due to, for example, the GMC allegedly failing to follow the investigatory process set out in the GMC (Fitness to Practise) Rules 2004 or by a failure or inability to obtain certain evidence. Case law has held that a tribunal must *"consider whether, in the light of those defects, the public interest in ensuring that standards are upheld and grave crimes are prosecuted is outweighed by the public interest in the integrity and the fairness of the process."*⁸

Additionally, an application may be made where evidence is unavailable (either through that evidence being lost or destroyed), or where the evidence has not been obtained meaning the defence has been deprived of the chance to utilise it as part of their case. In considering such an application, a tribunal may wish to consider factors such as:

- ▶ The relevance of the material;
- ▶ Whether the material should have been preserved;
- ▶ Why the material was destroyed or is unavailable (i.e. whether this has arisen through bad faith, the fault of a party or through incompetence);
- ▶ Whether there are any alternative remedies available which would remedy the issue.

As noted above, a tribunal may wish to consider whether a temporary stay would be appropriate instead of an indefinite stay if the evidence in question is not indefinitely lost or unavailable and could be obtained within a reasonable period of time. Tribunals should

⁷ R v S [2006] EWCA Crim 77

⁸ Clinton v General Medical Council [2017] EWHC 3304 (Admin)

also note that there is no general duty upon the GMC, as a regulator, to gather evidence on behalf of a doctor⁹.

Retracted assurances

An application under this ground may be made, for example, where a doctor asserts that they were made to believe or were assured that a GMC investigation will be closed with no further action being taken. Case law¹⁰ has held that there is unlikely to be an abuse of process under this ground unless:

- ▶ There had been an unequivocal representation made by those with conduct of the investigation that the defendant/doctor would not be prosecuted;
- ▶ That the defendant/doctor had acted on that representation to their detriment.

Doctor health

In cases where a doctor is suffering from ill health, the usual course of action is for an adjournment, as opposed to the case coming to an end entirely¹¹. However, an application may be made under for a stay of proceedings on the basis that the adverse health of a doctor (for example, a terminal illness or where they are lacking capacity) means that they cannot participate in the proceedings. It is likely that a tribunal will require independent medical evidence from the doctor's treating clinicians in order to reach a decision¹².

A tribunal may wish to consider whether any stay should be indefinite¹³, or on a temporary basis if the tribunal is of the view that the doctor's health may improve in the future.

Previous consideration of concerns

An application may be made under this category that the allegation to be considered by a tribunal has already been ventilated in another jurisdiction: for example, where a doctor has been charged and acquitted of a criminal offence at trial regarding the examination of a patient.

Case law¹⁴ has noted that regulatory tribunals are not prevented from investigating matters which have previously been the subject of criminal trial resulting in an acquittal, and that a tribunal operates to a different standard of proof and aims to establish whether there is impaired fitness to practise and not whether a criminal offence has been committed.

Other points to note

⁹ R (Johnson) v Nursing and Midwifery Council [2008] EWHC 886 (Admin)

¹⁰ R v Townsend [1998] Crim LR 126

¹¹ Ie see Varma v General Medical Council [2008] EWHC 753 (Admin)

¹² Varma v General Medical Council [2008] EWHC 753 (Admin)

¹³ For example where the practitioner could never receive a fair trial due to cognitive impairment

¹⁴ R (Redgrave) v Commissioner of Police of the Metropolis [2003] EWCA Civ 4; Sacha v General Medical Council [2009] EWHC 302 (Admin)

- ▶ In MPT cases with professional tribunals, adverse publicity is not a valid reason to stay proceedings for abuse of process (ie as it may be in a criminal trial with a jury).¹⁵
- ▶ Tribunals should bear in mind that even if they refuse an application for abuse, a doctor could resubmit the application or alternatively the tribunal could revisit the issue on its own motion as the hearing develops and new information is received.
- ▶ A doctor may also seek an adjournment to apply for judicial review of a tribunal's refusal of the application for abuse, although case law indicates that in general, it is preferable for proceedings to be allowed to take their course and a challenge to their validity to be taken by way of appeal¹⁶.
- ▶ In addition to making an application to stay for abuse of process on the grounds of delay, a doctor may also make a submission of "no case to answer" under rule 17(2)(g). It should be noted that these are two different issues and should receive "distinct and separate consideration".¹⁷ A party may make an application that there is no case to answer when they assert that there is no evidence against the doctor in relation to the matters alleged, or there is some evidence, but it is of a tenuous character.¹⁸

Kind regards
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¹⁵ General Medical Council v British Broadcasting Corporation [1998] EWCA Civ 949

¹⁶ R (Mahfouz) v GMC [2004] EWCA Civ 233

¹⁷ R. v F [2011] EWCA Crim 1844; [2012] Q.B. 703

¹⁸ The test set out in R v Galbraith [1981] 2 All ER 1060