

Appeals Circular A01/25

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Learning points from recent appeals

Facts

- ▶ When considering applications relating to vulnerable witnesses:
 - ▶ An alleged victim of acts of a sexual nature should not automatically be treated as a vulnerable witness. The tribunal must decide whether the quality of their evidence is “otherwise likely to be adversely affected”¹ and if so whether they should be treated as a vulnerable witness; this should be a reasoned decision.
 - ▶ If a person *is* designated as a vulnerable witness, Rule 36 does not provide that they should not be compelled to attend the hearing; such a conclusion requires careful consideration, including exploration of other means of obtaining the witness’ evidence.

[Professional Standards Authority Council for Health and Social Care v General Pharmaceutical Council and another \[2024\] EWHC 3335 \(Admin\)](#)

- ▶ [Professional Standards Authority Council for Health and Social Care v General Pharmaceutical Council and another \[2024\] EWHC 3335 \(Admin\)](#) further provided that a submission of no case to answer (by either the registrant or the regulator) can only be determined once the regulator has fully opened its case and called its evidence (ie by taking the tribunal through the documentary evidence in the

¹ Rule 36 of the Fitness to Practise Rules 2004 (as amended)

hearing bundle). As explained in *Professional Standards for Health and Social Care v NMC and X* [2018] EWHC 70 (Admin) the “test in *R v Galbraith* [1981] 1 WLR 1039 can only be applied if a tribunal has considered evidence; if it has not, there is nothing to which that test can applied”.

- ▶ In cases where a regulator informs a registrant that a case against them has been closed, this does give rise to a legitimate expectation that no further action will be taken. However, the regulator can resile from this if the closure was based on a fundamental mistake of fact² and/or the person in question did not have authority to make the closure decision. The exceptional step of a stay of subsequent tribunal proceedings cannot be justified in these circumstances. [Professional Standards Authority for Health and Social Care v General Pharmaceutical Council & Anor](#) [2024] EWHC 3005 (Admin)
- ▶ [Eyboren v The Nursing and Midwifery Council](#) [2024] EWHC 2975 (Admin) provided some useful learning points related to fact finding:
 - ▶ in sexual misconduct cases where a complainant suffers from a mental health condition (particularly where they have been sectioned) the tribunal should expressly deal with this (ideally using medical evidence about state of health) in their reasoning, as it may be relevant to the assessment of their ability to give evidence and their credibility by any tribunal. Whilst the health condition does not automatically make the complainant’s evidence untenable, it is a matter of evidence and degree;
 - ▶ in relation to cross admissibility, tribunals are required first to assess the credibility of one complainant (A), then if found credible and if the evidence contained a clear modus operandi or pattern of behaviour with similarities to the complaints of (B) that credible evidence could be used as adding some weight to the complaint of (B)³;
 - ▶ in cases that are one party’s word against another, the tribunal should assess the way in which the witnesses answer each question and how the answers interlock; how readily they concede matters they had to concede and whether they disseminate or evade questions. There should be some tolerance for inconsistency in detail and some confusion in complainants’ evidence, which is normal.

² As set out in *R (Chaudhuri) v General Medical Council* [2015] EWHC 6621 (Admin)

³ The authority for this approach is *R v Chopra* [2007] 1 CR App R 16 and the Crown Court Bench Book direction in Chapter 12.

- ▶ [Juchi v Nursing & Midwifery Council \[2024\] EWHC 2825 \(Admin\)](#) provided a reminder that a tribunal cannot revisit its completed fact-finding stage in order to consider the admission of new evidence on the issues *in contention*⁴. New evidence sought to be relied upon by the parties may only be admitted on an appeal.

Impairment and Sanction

- ▶ In cases of misconduct (particularly dishonesty) the presence or absence of an explanation from the registrant as to why they acted in the way alleged and of a demonstration of an understanding of what caused them to act in that way are very significant elements in the assessment both of the level of the registrant's insight and of the risk of repetition of the misconduct. It is necessary for insight to be particular, rather than general, and of practical application as well as merely theoretical; the relevant insight has to be with reference to the particular actions and the particular misconduct of the registrant whose conduct is in question. [Hyder v General Medical Council \[2024\] EWHC 2945 \(Admin\)](#)
- ▶ When reasoning their sanction decisions, tribunals should avoid a tick box exercise that the case law indicates is insufficient. Instead of explaining their thinking by way of a cursory checklist of matters to which they had regard the tribunal should explain how they took those matters into account and explain why they reached their ultimate conclusion. [Director General of the Independent Office for Police Conduct, R \(on the application of\) v Police Misconduct Panel \[2024\] EWHC 2796 \(Admin\)](#)

Kind regards
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⁴ In the case of R (oao) Jenkinson [2009] EWHC 1111 a conviction was quashed and that conviction had founded the NMC's case against the registrant. This quashed conviction was not a *contentious* fact. The Judge found that the conviction presented an unusual situation where an inferior tribunal might be taken to have inherent power, without recourse to a court of superior jurisdiction, to quash a (facts) decision based upon a subsequently quashed conviction.