



CII

PRACTICE NOTE

Proceeding in the Absence of the Respondent/Appellant

This Practice Note has been issued by the Institute for the guidance of Disciplinary and Appeal Panels and to assist those appearing before them.

Introduction

1. As a general principle, a Respondent/Appellant has the right to be present and represented at a Disciplinary or Appeal Panel hearing. However, the procedural rules¹ for such hearings provide that, if an Appellant is neither present nor represented, the Panel has the discretion to proceed to hear the matter, provided that notice of the hearing has been served on the Respondent/Appellant in accordance with the rules.

Service of Notice of Hearing

2. Provided that a Panel is satisfied that the notice of hearing has been served in accordance with the Rules², a hearing may proceed in absence notwithstanding that it is evident that the notice was not received by the Respondent/Appellant.
3. In *Jatta v Nursing & Midwifery Council*³ the Court of Appeal held that there had been no procedural irregularity that vitiated the decision of a fitness to practise panel to proceed in Mr Jatta's absence where notice of the proceedings had been duly and properly served by sending to the registrant's registered address in accordance with the Council's Fitness to Practise Rules 2004, although the Council was aware the registrant was no longer living at the address and was travelling in Thailand. The court was satisfied that the panel was aware of the importance of the case, carefully considered the evidence in Mr Jatta's absence, including character references for him, but was satisfied that reasonable efforts had been made to serve notice of hearing and so rightly concluded that it was in the interests of justice to continue.

¹ Rules 22 and 40 of the Institute's Disciplinary Procedure Rules.

² Rule 4 of the Institute's Disciplinary Procedure Rules.

³ [2009] EWCA Civ 824

Exercise of the Discretion

4. As Mr Justice Gillen made clear when delivering the judgement of the High Court of Northern Ireland in the case of *Thiruvengadam v General Medical Council*⁴:

'It is unarguably in the public interest that trials and proceedings should take place of the date that they are scheduled to do so and that an adjournment should not be granted absent good and compelling reasons.'
5. Nonetheless, the discretion to proceed in the absence of the Appellant is one which has been described by the courts as 'severely constrained'. As the House of Lords held in *R v Jones (Anthony)*⁵, the discretion to commence and conduct proceedings in the absence of the Appellant 'should be exercised with the utmost care and caution.'⁶ In exercising that discretion, a Panel must strike a careful balance between fairness to the Appellant and the wider public interest. It must look at the material presented to it in the round to see where it leads.
6. In reaching a decision, the Panel **must** have regard to all of the circumstances of the case and, in particular, the following factors identified by the Court of Appeal in *R v Hayward*⁷, approved on appeal by the House of Lords, sub nom *R v Jones (Anthony)* (supra):
 - 6.1 the nature and circumstances of the Respondent's/Appellant's absence and, in particular, whether the behaviour may be deliberate and voluntary and thus a waiver of the right to appear;
 - 6.2 whether an adjournment might result in the Respondent/Appellant attending the proceedings at a later date;
 - 6.3 the likely length of any such adjournment;
 - 6.4 whether the Respondent/Appellant, despite being absent, wished to be represented at the hearing or has waived that right;
 - 6.5 the extent to which any representative would be able to receive instructions from, and present the case on behalf of, the absent Respondent/Appellant;
 - 6.6 the extent of the disadvantage to the Respondent/Appellant in not being able to give evidence having regard to the nature of the case;
 - 6.7 the general public interest and, in particular, the interest of any victims or witnesses that a hearing should take place within a reasonable time of the events to which it relates;
 - 6.8 the effect of delay on the memories of witnesses;
 - 6.9 where allegations against more than one Respondent/Appellant are joined and not all of them have failed to attend, the prospects of a fair hearing for those who are present.
7. The seriousness of the conduct alleged is **not** a factor that falls to be considered⁸.

⁴ 3 November 2010, GIL7983 (NI)

⁵ [2003] 1 AC 1; [2002] UKHL 5

⁶ Applied to disciplinary proceedings of professional bodies by the Privy Council in *Tait v The Royal College of Veterinary Surgeons* [2003] UKPC 34

⁷ [2001] QB 862; [2001] EWCA Crim 168

⁸ Although the Court of Appeal in *Hayward & Jones* (supra) considered that it was a relevant consideration, on appeal the House of Lords determined otherwise.

8. The key issue, according to the High Court in the case of *Jawid Yusuf v The Royal Pharmaceutical Society of Great Britain*⁹, is whether the Respondent/Appellant has voluntarily chosen not to attend. Munby J said that the committee was properly alert to the need to exercise its discretion to proceed in the appellant's absence with the utmost caution. The committee was entitled to find, as it did, that the appellant had voluntarily chosen neither to appear nor to be represented. Similarly, in *Varma v General Medical Council*¹⁰ the Court held that the Fitness to Practise panel had properly borne in mind that it had to balance the appellant's private rights against the public interest of having serious allegations properly investigated and had justifiably treated the appellant's failure to attend the hearing as a voluntary election not to be present.

ECHR Considerations

9. In *Abdalla v Health Professions Council*¹¹, the Court rejected the argument that the decision to proceed in the Appellant's absence was in breach of her rights under Article 6(1) of the ECHR; or alternatively, was a breach of natural justice. Sullivan J held that lack of funds to pay for legal representation would not justify an adjournment where there was no realistic prospect that the position would change in the reasonably near future and that if the appellant chose not to avail herself of the opportunity to attend the hearing then the committee was entitled to proceed in her absence.

Medical Grounds

10. In *Chaudhari v General Pharmaceutical Council*¹², Mr Justice King said – in relation to the discretion provided by regulation 19 of the Pharmaceutical Society (Statutory Committee) Regulations 1978 to proceed in a registrant's absence – that the Committee was not bound to grant an adjournment simply because of medical certificates supplied by the registrant and was entitled fully to scrutinise the medical evidence supplied. A party who claims to be not fit to attend a professional disciplinary inquiry has to demonstrate that his health prevents attendance at the hearing.
11. His Lordship cited, with approval, the words of Lord Justice May in *Awan v Law Society*¹³, who said this:

“Courts and tribunals have sometimes to consider applications to adjourn which look as if they may be advanced for insubstantial reasons in order to put off a hearing which the Applicant would rather not face up to. If medical reasons are advanced the Tribunal may well require production of a medical report or certificate in support of the application. If a report or certificate is produced the Tribunal is entitled to consider whether it sufficiently supports the reason of the adjournment which is relied upon. It is not obliged, in my judgment, to grant the application to adjourn simply because a medical certificate is produced, whatever its content.”

⁹ [2009] EWHC 876 (Admin)

¹⁰ [2008] EWHC 753 (Admin)

¹¹ [2009] EWHC 3498 (Admin)

¹² [2011] EWHC 3433 (Admin)

¹³ [2003] EWHC 1969

- 12 In *Chaudhari* (supra), the Court was satisfied that the Committee in each of its rulings had given careful reasons, including by reference to the previous history of applications for adjournments, why it was not satisfied that the appellant had discharged the burden upon her to demonstrate the requisite degree of ill-health, and why in effect they concluded that the applications to adjourn were no more than a delaying tactic by the appellant to put off the hearing. Accordingly, the High Court declined to interfere with that decision.
- 13 However, the situation is different in cases where a disciplinary body cannot properly conclude - on the basis of the evidence before it - that a practitioner is being disingenuous as to his inability to participate effectively, in the proceedings and, hence, has voluntarily absented himself.
14. For example, in *R (on the application of Sabah Al-Zayyat v General Medical Council*¹⁴, the Queen's Bench Division found that a Fitness to Practise Panel had acted perversely in deciding to proceed with an hearing, given the lack of evidence in support of its conclusion that the claimant's absence was not genuine and, hence, was voluntary. Mitting J held that In cases where it is shown by medical evidence that a practitioner is unfit to attend a hearing, either as a result of involuntary illness or incapacity¹⁵, it would be very rarely, if indeed ever, right for the Panel to proceed in his absence.

Procedure

15. Before determining any application to proceed in the absence of a Respondent/Appellant, the Panel must refresh its mind as to the principles set out in this Practice Note.
16. The Panel should seek clarification of whether notice of the hearing was properly served (and may, if necessary and appropriate, require the Presenting Officer to make further enquiries and/or adduce further evidence in relation to that issue). If it is so satisfied (but not otherwise), the Panel should then consider the factors set out above to determine whether, in all the circumstances, it is appropriate to proceed with the hearing in the absence of the Respondent/Appellant.
16. The decision reached and the reason for doing so should be recorded as part of the record of the proceedings.
17. If the Panel decides that a hearing should take place or continue in the absence of the Respondent/Appellant, it must ensure that the hearing is as fair as the circumstances permit. In particular, reasonable steps must be taken to expose weaknesses in the Institute's case and to make such points on behalf of the Respondent/Appellant as the evidence permits¹⁶. Whilst that does not mean that a Panel necessarily must engage in a detailed cross-examination of witnesses in the same way as a legal representative or litigant-in-person might, nonetheless, it is a duty that must be performed properly and not merely as part of a rubber-stamping exercise.

¹⁴ [2011] Med LR 174

¹⁵ Under common law principles intoxication or abuse resulting from alcoholism or drug addiction is considered voluntary.

¹⁶ See for example, the judgment of Pitchford J in *R(on the application of Compton) v General Medical Council* [2008] EWHC 2868 (Admin) at paragraphs 30 – 31, cited with approval by

18. The Panel must also avoid reaching any improper conclusion about the absence and, in particular, must not treat that absence as an admission of guilt.
19. In the event that a Disciplinary Panel makes adverse findings of fact against a Respondent, it is not obligated to adjourn the case to allow the Respondent the opportunity to adduce evidence or make submissions in mitigation, before proceeding to determine whether to impose a sanction¹⁷.

Elder J in *McDaid v Nursing and Midwifery Council* [2013] EWHC 586 (Admin), at paragraphs 41 – 43.

¹⁷ *Faniyi v Solicitors Regulation Authority* [2012] EWHC 2965 (Admin)