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The Use of Published Guidelines for Discipline Tribunals

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While many Canadian discipline tribunals have rules of procedure, few publish guidelines on how they make substantive decisions. Such guidelines are common in the UK, with those for the medical tribunal being quite comprehensive.

The Medical Practitioners Tribunal Service (MPTS) makes both interim and final discipline decisions and its newly-revised guidelines have just taken effect.

Introduction

The purpose of their guidelines is described as follows:

> This guidance should be used by tribunals to support consistent decision making and to ensure that their decisions meet the overriding objective of the MPTS to deal with cases fairly and justly. This includes acting in a way that is proportionate, transparent and fair. Tribunals should ensure that they refer to the relevant part of the guidance when reaching their decision(s).

The guidelines are not only intended to guide panels making individual decisions, but also to assist physicians and participating legal counsel present their cases effectively. The guidelines expressly consider equity principles. They also define the public interests that panels protect.

The guidelines provide a detailed analysis of the types of behaviour that constitute "impaired fitness to practise" (including professional misconduct). For example, the discussion of sexual misconduct includes types of intent, conduct towards colleagues, and conduct in a registrant's private life. The analysis ties sexual misconduct to its definition of public interests. A range of suggested sanctions is provided for different categories of sexual misconduct. Footnotes reference policies published by the regulator.

Interestingly, one of the categories of impaired fitness to practise is where the physician cannot communicate effectively in English to such extent that patient safety

could be compromised. Except in the most serious of cases, the suggested sanction is to impose conditions on practice.

Interim Orders

The guidelines devote an entire section to making interim orders (which are made by the tribunal). A decision-making tree is provided with the following steps:

- Is the test for imposing an interim order met? (i.e., "whether there is a risk arising from that information that means it's necessary to take interim action on the doctor's registration").
- What degree of risk arises? (i.e., "the seriousness of the concern or allegation, the likelihood of repetition, and the weight of the information available").
- Is it necessary to restrict the physician's registration? (i.e., what "is necessary for the protection of the public or is otherwise desirable in the interests of the public and/or in the interests of the doctor").
- Where an interim order is needed, what is proportionate? (i.e., conditions or a suspension, and for how long).

Again, factors to consider are offered for various types of misconduct. For example, for sexual misconduct some factors include:

- Whether there is a criminal investigation.
- Whether the information suggests predatory behaviour.
- The seriousness of the nature of the sexual conduct.
- Evidence of a pattern of sexually motivated behaviour.

Findings on the Merits

On making findings of fact, the guidelines suggest that the hearing panel begin with the admitted facts, understand the burden of proof, assess the reliability and credibility of witnesses, address hearsay evidence, make only appropriate inferences, and state and explain factual findings.

Unlike most Canadian discipline tribunals, UK hearing panels can only act if the registrant poses a current and ongoing risk to the public interest (including a risk of future public harm and whether the finding undermines public confidence in the profession). Again, a decision-making tree is provided for making this determination.

Sanction

Guidance is also given to ensure that any sanction is proportionate, transparent, and fair. The primary goal is to protect the public, not to punish the registrant. Where possible the sanction should facilitate the registrant's return to safe practice.

The appropriateness of each type of sanction is canvassed. For example, the guideline states as follows:

> Suspension may be proportionate in cases where some, or all, of the following factors are present:
>
> a. conditions are not appropriate, measurable and/or workable
> b. the level of current and ongoing risk to public protection is such that it cannot be safely managed with conditions and suspension is necessary to stop the doctor from working and putting patients at risk while they gain insight into any deficiencies and remediate, or undergo medical treatment, and/or
> c. the level of current and ongoing risk to public protection is such that, although patient safety is not an issue, suspension is needed to maintain public confidence in the profession and/or maintain professional standards.

Evidence of the registrant's level of insight and remediation is relevant to the length of the suspension.

Given this purpose-driven approach to sanctions, the guidelines state the following:

> Any time spent under an interim order of conditions or suspension is unlikely to be relevant to deciding the appropriate length of a suspension. This is because the type of action and the length of time it's put in place for both need to adequately address the decision that the doctor poses a current and ongoing risk to public protection requiring restrictive action in response.
>
> Interim orders serve a very different purpose to sanctions….
>
> However, time spent under an interim order of suspension may be relevant when determining the proportionate period of suspension to be imposed purely on the grounds of public confidence.

Conclusion

This article only scratches the surface about the level of advice provided in the guidelines.

Canadian regulators often provide high-level orientation to discipline panel members on these sorts of topics. However, such orientations are not directive in nature (recognizing the importance of the independence of the panels). Canadian regulators generally do not provide ranges of sanction for particular types of misconduct.

However, the guidelines are attractive. Some advantages of these sorts of guidelines include fostering increased consistency in decision-making and enabling hearing participants to better understand what issues they need to address.

There are at least two possible downsides to consider. The first is that the law is constantly evolving, and such a document can become legally inaccurate (so there is a need for regular updates). The second is that where the hearing panel departs from the guidance (which it is entitled to do), it may open itself up to criticism, especially without explaining why the departure was justified.

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