

Health and Care Professions Tribunal Service

PRACTICE NOTE

Concurrent Proceedings

This Practice Note has been issued by the Council for the Guidance of Panels and to assist those appearing before them.

Introduction

Article 32(3) of the Health Professions Order 2001 requires Panels to conduct fitness to practise proceedings “expeditiously” and it is in the interest of all parties that allegations are heard and resolved as quickly as possible.

Whilst there may be limited circumstances in which it is appropriate for fitness to practise proceedings to be postponed when a registrant is being tried concurrently¹ for related criminal charges, postponement should not be regarded as automatic and will rarely be appropriate where the registrant or the subject matter of an allegation is the subject of other civil proceedings.

Concurrent criminal proceedings

It is often suggested that a potential injustice may arise if regulatory or other civil proceedings are conducted at the same time as a related criminal trial, usually on the basis that, as more restrictive rules of evidence will apply in criminal proceedings, there is a risk that evidence which may not be admitted at that trial may enter the public domain in the course of the regulatory proceedings.

However, as the Court of Appeal held in *Mote v Secretary of State for Works and Pensions*², civil proceedings can often proceed concurrently without risk to the defendant’s rights in a related criminal trial, and there is a ‘real discretion’ as to whether or not to adjourn those civil proceedings. In particular, the Court pointed out that, as criminal defendants are now required to disclose their defence at an early stage, no prejudice arises from the fact that a defendant may disclose his or her defence to the criminal charges in civil proceedings.

¹ Concurrent proceedings are also referred to as parallel proceedings

² [2007] EWCA Civ 1324

The decision in *Mote* also clarifies that neither the privilege against self-incrimination nor the risk of ‘double jeopardy’ are grounds for delaying civil proceedings, as both are only relevant to criminal proceedings.³

Consequently, whilst Panel proceedings may be postponed until any related criminal trial has concluded⁴, there is no automatic obligation to do so and the decision is one within the discretion of the Panel.

An important consideration here is that acquittal in the criminal courts does not always preclude subsequent regulatory action. In some cases, the grounds for acquittal may be irrelevant for the purpose of fitness to practise proceedings. For example, a registrant who is charged with a sexual offence against a service user may be acquitted on the basis of doubts about the service user’s consent or lack of it, but may still face an allegation of misconduct based upon the inappropriate nature of the relationship with the service user.

As the Divisional Court made clear in *Ashraf v GDC*⁵, pursuing fitness to practise proceeding following acquittal in the criminal courts is not inherently unfair or abusive, as criminal and regulatory proceedings serve differing purposes.

Concurrent civil proceedings

The courts have shown a marked reluctance to stay regulatory proceedings when asked to do so by parties who are the subject of concurrent civil proceedings. As Stanley Burnton J. stated in *R v Executive Counsel of the Joint Disciplinary Scheme*⁶:

“Regulatory investigations and disciplinary proceedings perform important functions in our society. Furthermore, the days have gone when the High Court could fairly regard the proceedings of disciplinary tribunals as necessarily providing second class justice”.

The need for the discretion to stay one set of concurrent civil and regulatory proceedings to be exercised sparingly and with great care was highlighted by the Court of Appeal in *R v Panel on Takeovers and Mergers ex parte Fayed*⁷:

“It is clear that the court has power to intervene to prevent injustice where the continuation of one set of proceedings may prejudice the fairness of other proceedings. But it is a power to be exercised with great care and only where there is a real risk of serious prejudice which may lead to injustice.”

³ the privilege against self-incrimination only applies to incriminating oneself of a criminal offence. Similarly, double jeopardy only arises where a person is tried more than once by the criminal courts for essentially the same offence.

⁴ it is open to HCPC to seek an interim order where FTP proceedings are postponed

⁵ [2014] EWHC 2618 (Admin)

⁶ [2002] EWHC 2086

⁷ [1992] BCC 524

Whether there is “a real risk of serious prejudice which may lead to injustice” may be a difficult question to answer and will depend upon the facts of the case.

It is open to the parties in fitness to practise proceedings to ask the courts to stay those proceedings but, in the first instance, it is more likely that an application to stay the proceedings will be made to the Panel which is due to hear the case.

Staying proceedings

If Panels are asked to stay proceedings on the basis that a party is subject to concurrent civil or criminal proceedings, the approach which should be adopted, derived from the decisions of the courts⁸, is as follows:

- Panels must exercise the discretion to stay concurrent proceedings sparingly and with great care;
- a stay must be refused unless the party seeking the stay can show that, if it is refused, there is a real risk of serious prejudice which may lead to injustice in one or both of the proceedings;
- if the Panel is satisfied that there is a real risk of such prejudice arising then it must balance that risk against the countervailing considerations, including the strong public interest in seeing that the regulatory process is not impeded;
- each case turns on its own facts and Panels can only derive limited assistance from comparing the facts of a particular case with those of other cases.

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⁸ For example, R v Executive Counsel of the Joint Disciplinary Scheme [2002] EWHC 2086, which follows R v Chance, ex p Smith [1995] BCC 1095 and ex p Fayed