

## Guidance for decision makers on assessing the impact of health in misconduct, conviction, caution and performance cases

### Cover note

In September 2015 we asked Professor Louis Appleby, a leading mental health expert, to advise us as we carried out a fundamental review of cases relating to a doctor's health and the way we communicate with doctors who may be vulnerable. Following this review, we are exploring and putting in place measures to reduce the impact of GMC investigation on doctors – particularly those with health concerns. A key measure relating to cases where health is a concern is a move to resolve more of these cases consensually (via undertakings), where this is appropriate.

In light of this review, we have revisited our guidance on cases where both health and misconduct or performance allegations are present. These cases present a particular challenge because while we wish to reduce the impact of GMC investigation on unwell doctors as far as possible, we will continue to need to address allegations of misconduct or poor performance where there is a risk to patients or confidence in the medical profession.

Due to this, it is critical that our guidance on responding to cases where both health and misconduct or performance allegations are present is clear and robust, but also proportionate. How we respond will depend on the severity of the conviction or alleged misconduct and/or the nature of the risk presented by any alleged poor performance. In cases where the conviction or caution or alleged misconduct/poor performance are at the lower end of the spectrum of issues that would normally require action and there is cogent evidence that these are linked to health allegations, they may be resolved by taking action solely to address the health allegations. However, in light of our role to protect patients and uphold confidence in doctors, we must address the conviction or caution, or address the alleged misconduct or poor performance in addition to any action we take to address health allegations in cases where the alleged misconduct or poor performance

- a** is not linked to a doctor's health, or

- b** is linked but is a serious allegation, including where a doctor has received a conviction or caution for misconduct.

This guidance aims to minimise the impact on unwell doctors with health concerns as far as possible while ensuring that we protect patients and public confidence in doctors. \* For further information, please contact: [FTPPolEnq@gmc-uk.org](mailto:FTPPolEnq@gmc-uk.org).

\*The purpose of any action taken by the GMC is not to be punitive but to protect the public and the wider public interest, although it may have a punitive effect. See the judgement of Newman J in the case of the Council for the Regulation of Healthcare Professionals v General Dental Council (Fleischmann) [2005].

## Introduction

- 1 This guidance aims to help decision makers make fair and consistent decisions in misconduct, conviction or caution, and performance cases, where health is a factor. It sets out the factors to consider when deciding how a misconduct, conviction, caution or performance case, which also involves a doctor's health, should be treated.
- 2 A health problem may explain, or provide a reason for, poor performance, misconduct or behaviour leading to a conviction or caution. In some cases it may be possible to address the allegation of misconduct or poor performance by dealing solely with the health problem and without taking specific action in relation to the misconduct or performance issue.
- 3 To do so, three factors must be present:
  - a Cogent evidence that a doctor's health is linked to the allegation of misconduct or poor performance and;
  - b Where the doctor has a pre-existing health condition that poses a risk to their medical practice, there must be evidence that a doctor has taken steps to minimise reoccurrence of any risks posed by their health, e.g. compliance with treatment. Where the incident happened at the onset of a condition or despite compliance with treatment, this will be regarded as a mitigating factor, and;
  - c Evidence that the allegations of misconduct or poor performance are at the lower end of the spectrum of matters that would usually require action to protect patients or confidence in the medical profession.
- 4 As a result of the above there may be no realistic prospect of establishing that a doctor's fitness to practise is impaired by reason of the alleged misconduct and/or performance. Where there is no realistic prospect of finding impairment by reason of misconduct and/or performance, this may mean that a case can be treated as a pure health case, rather than as a multifactorial case involving health and misconduct and/or performance.
- 5 In cases where the alleged misconduct that meets the realistic prospect test (RPT) carries a presumption of impairment and which is by its very nature more serious, the alleged misconduct will normally need to be addressed, even if it is linked to a doctor's health. This is because of the public confidence issues these allegations raise. However, given the broad range of misconduct that carries a presumption of impairment, there are some circumstances in which health may constitute an exceptional circumstance that could justify solely addressing the allegations about the doctor's health. Given the seriousness of these cases, this approach can only be taken in cases where there is cogent evidence of a link to a doctor's health and the alleged misconduct is at the lower end of the spectrum.

- 6 A criminal conviction for misconduct that would otherwise meet the realistic prospect test would usually require action to specifically address the conviction even where the misconduct is closely linked to a doctor's health. In these cases, action that solely addresses the allegation about the doctor's health is unlikely to be sufficient to address the public confidence issues raised by the conviction.
- 7 Where there is evidence to support a serious allegation of misconduct (including a conviction/caution), a serious performance allegation or there is no cogent evidence of a link between a health issue and a misconduct/performance allegation, then the allegations should be treated separately.
- 8 If a doctor has received a conviction for a serious offence, or a conviction resulting in a custodial sentence, \* these cases must be referred directly to a Medical Practitioners Tribunal (MPT).
- 9 This document should be read in conjunction with the following pieces of guidance:
  - a [Guidance for the Investigation Committee and Case Examiners on making decisions at the end of the investigation stage](#)
  - b [Guidance for decision makers on assessing risk in health cases](#)
  - c [Guidance for decision makers on assessing insight when considering whether undertakings are appropriate](#)
  - d [Sanctions guidance for members of medical practitioners tribunals and the General Medical Council's decision makers.](#)

## Factors to consider

- 10 The seriousness of the alleged misconduct/performance raised about a doctor, the behaviour leading to a conviction/caution, and the potential risk to future patients are the primary factors that should be taken into account when considering whether an allegation of misconduct or poor performance can be managed solely by addressing the health allegation.
- 11 Decision makers should also take into account other factors relating to a case, such as:
  - a a doctor's insight into the (alleged) misconduct and/or alleged poor performance;
  - b a doctor's insight into their health and its impact on their practice;

\* Including suspended sentences

- c** whether the doctor is in treatment;
  - d** the likelihood that the alleged misconduct/alleged poor performance might be repeated.
- 12** Further details of factors to be considered are set out in the [Sanctions guidance](#) and [Guidance for the Investigation Committee and Case Examiners on making decisions at the end of the investigations stage](#).

## **Misconduct**

### *Lower-level misconduct*

- 13** With less serious allegations of misconduct, where there is no patient harm and there is cogent evidence that the doctor's health is linked to the alleged misconduct, case examiners may address the allegations solely by taking action to address the health issue. This will only be appropriate where there is cogent evidence that the doctor's health explains the doctor's conduct, meaning that the allegation of misconduct will not meet the realistic prospect test.
- 14** This will also apply (in limited circumstances) to cases that fall within one of the categories of presumed impairment (see paragraph 5), where the alleged misconduct lies at the lower end of the spectrum. In these cases, health may in certain circumstances be considered as an exceptional circumstance, and undertakings may be agreed.
- 15** Where a doctor's health has some connection to the misconduct allegations, but it does not explain the doctor's behaviour, if the alleged misconduct (even where less serious) would still meet the realistic prospect test, the case should be treated as a health and misconduct case.

### *Deciding whether undertakings are appropriate in health and misconduct cases*

- 16** Health related undertakings are unlikely to be appropriate where the case examiners have determined there is a realistic prospect of an MPT finding a doctor's fitness to practise to be impaired and where undertakings will not be sufficient to protect patients and maintain public confidence.
- 17** Some cases will not be appropriate for undertakings, e.g. where evidence is disputed or a doctor does not agree to undertakings.
- 18** When deciding to resolve cases involving health concerns through undertakings, case examiners should also take into account any other mitigating or aggravating factors

as specified in the [Sanctions guidance](#) and [Guidance for decision makers on assessing insight when considering whether undertakings are appropriate](#).

- 19** Examples of the types of cases which might be suitable for undertakings can be found in Annex A.

#### *Serious misconduct and convictions*

- 20** Some health and misconduct or conviction/caution allegations will still need to be referred to a MPT. This is the case even where health provides an explanation for the misconduct.
- 21** These types of cases fall into three categories:
- a** Allegations of serious misconduct that raise public confidence issues.
  - b** Where a doctor has a conviction that results in a custodial sentence\* (where the Registrar is required to refer directly to an MPT).
  - c** Where a doctor has a non-custodial conviction that has been referred to the case examiners for a decision, and the conviction would, in itself, meet the RPT. A response specifically to address the conviction is required because of the public confidence issues raised by this type of case.
- 22** Allegations of serious misconduct that pose a risk to the public's confidence in the medical profession may relate to a doctor's actions during their professional practice or an incident which has taken place in their personal life.
- 23** Where the alleged misconduct is so serious that public confidence would only be maintained by referring the case to a MPT, the case should not be resolved through undertakings, even where a doctor's health may explain or provide a motive for the alleged misconduct.
- 24** The more serious the allegations of misconduct, the more likely there will be a public interest in the matter being referred to a hearing. The sorts of allegations that are likely to result in a referral include (but are not limited to):
- a** Sexual assault or indecency
  - b** Violence
  - c** Improper sexual or emotional relationship(s)

\* Including suspended sentences

- d Knowingly practising without a license
- e Unlawfully discriminating in relation to characteristics protected by law
- f Dishonesty
- g Gross negligence or recklessness about a risk of serious harm to patients.

- 25** Criminal convictions also raise specific public confidence issues. Where a doctor has a conviction for misconduct that results in a custodial sentence,<sup>\*</sup> the case must be referred to a MPT. The guidance on [Convictions, cautions and determinations](#) has further information on the types of cases that should be directly referred to an MPT.
- 26** In relation to other criminal convictions, where a criminal conviction would not in itself meet the RPT but the case has progressed as a result of the health allegations, any decision should relate only to the health allegations. However, as discussed above, a criminal conviction for misconduct that would otherwise meet the RPT would usually require action to specifically address the conviction even where the misconduct is closely linked to a doctor's health. In these cases, action that solely addresses the health allegations is unlikely to be sufficient to address the public confidence issues raised by the conviction.
- 27** See Annex B for a list of example cases.

## Performance

- 28** An allegation of poor performance may be the result of, or may be amplified by, a health issue, or a doctor may have unrelated health and performance allegations. Because of the risks to patients raised by poor performance, it will usually be necessary to respond to the performance allegations as well as the health allegations where both are present. There may be limited circumstances in which the performance allegations are at the lower end of the spectrum and the link with the doctor's health is so clear that it may be appropriate to address the performance allegations solely by addressing the doctor's health. However, any risk to patients will need to be carefully assessed and addressed.
- 29** In some cases there is cogent evidence of a link between allegations about a doctor's performance and a health condition, in other cases a link is suggested but is not clearly evidenced, or there may be no link between health and performance.

<sup>\*</sup> Including suspended sentences

- 30** Health and performance allegations may be addressed by health and performance undertakings to manage any risks and can be varied as appropriate as a doctor's health and/or performance improves.
- 31** In cases where there are misconduct allegations in addition to those about health and performance, these should also be addressed these. In line with the guidance above, these may be treated as health cases in some circumstances.
- 32** Undertakings may be appropriate to address both health and performance allegations where case examiners have determined that there is a realistic prospect of an MPT finding the doctor's fitness to practise to be impaired, and where undertakings will be sufficient to protect patients and maintain public confidence.
- 33** Some health and/or performance cases will not be appropriate for undertakings. This will be where evidence is disputed, a doctor does not agree to undertakings, undertakings would be insufficient to protect the public or there are additional allegations of misconduct which must be ventilated before a Medical Practitioners Tribunal.

# Annex A – Examples of health and misconduct/performance cases where undertakings may be suitable

This annex outlines a number of case studies where both health and misconduct/performance allegations are present and there is no patient harm. While these case studies can be used to give an indication of the types of cases where undertakings might be considered, each case will be different and there may be other mitigating or aggravating factors present which affect the outcome.

## Example 1

### *Misuse of drugs and criminal caution*

A doctor was arrested and given a caution for possession of a Class C drug. A health assessment finds that the doctor has self-prescribed the drug (a sedative) which they take on a regular basis to control an anxiety disorder. The health assessor recommends supervision. There is clear evidence of a cogent link between the misconduct and the doctor's health condition and the doctor has insight into their health problems and is in appropriate treatment. A caution was given but there were no concerns about the doctor's clinical performance or risk to patients.

**Suitable for undertakings** - In this case the misconduct is closely linked to the doctor's health issue and while serious, it is not so serious as to require us to refer it to a hearing. Undertakings would be suitable in this case if the doctor has insight and is engaged in treatment.

## Example 2

### *Misuse of alcohol*

A doctor is suspended from work after drinking excessively the night before a shift and not turning up for work on two occasions. When the doctor's employer contacted them to follow up, it became clear that the doctor was not able to work due to excessive alcohol intake. The doctor's employer suspended the doctor and referred the doctor to the GMC. A health assessment diagnosed harmful use of alcohol and an alcohol dependency disorder.

**Suitable for undertakings** – While missing a shift is a serious matter, this case is likely to be suitable for undertakings because there is cogent evidence of a link between the alcohol consumption and the doctor's health condition, and because the doctor did not exacerbate the situation by attending work while under the influence of alcohol.

## Example 3

### *Performance*

A doctor is referred for concerns that have arisen recently, including being late for clinic and arriving in a dishevelled state, and for making a series of mistakes involving correspondence and record keeping. The doctor has also shouted at a colleague on two occasions. A health assessment diagnoses a mental health condition and the health examiner's opinion is that concerns at work relate to his health. The doctor accepts the GMC's findings and acknowledges the impact that his health has had on his work.

**Suitable for undertakings** – Likely to be suitable for health undertakings as the performance allegations are clearly linked to the doctor's health, there is no patient harm, and the doctor has insight into their health problems. If there is likely to be an ongoing risk to patients that is not addressed by health supervision, performance undertakings are likely to be necessary.

#### **Example 4**

##### *Presumption of impairment - violence*

A doctor was refused access to a nightclub. As the security guard tried to remove the doctor from the area, the doctor became verbally abusive and in resisting attempts to move him from the area pushed the security guard away. The push was not forceful but nevertheless results in a caution for common assault. A health assessment diagnoses alcohol dependency, and the health examiner's viewpoint is that the misconduct is linked to the doctor's health condition.

**Suitable for undertakings** – Likely to be suitable for undertakings where there is cogent evidence that the incident is linked to the doctor's health, it is the doctor's first offence, the doctor has insight, and is engaged in treatment. While all violence is serious, the incident was at the lower end of the scale of violent conduct, did not involve a patient and there is cogent evidence that it is linked to the doctor's health condition.

#### **Example 5**

##### *Presumption of impairment - dishonesty*

A doctor receives a caution for a shop-lifting a number of small items. This is the doctor's first offence. A health assessment diagnoses a mental health condition and discussion with the doctor reveals that they were away from home during a training placement and were isolated when they became unwell. The assessment found a clear link between the doctor's health and the theft. The doctor has insight into their condition and is receiving treatment for it, and it is judged that the risk to patients is low.

**Suitable for undertakings** – Likely to be suitable for undertakings as there is cogent evidence that the misconduct is linked to the doctor's health, the incident was at the lower end of the scale of conduct involving theft, there is no patient harm, and the doctor has insight and is engaged in treatment.

## Annex B – Examples of health and misconduct or conviction/caution cases where undertakings are not appropriate

### Example 1

*Misuse of drugs, presumption of impairment – dishonesty, criminal conviction*

A doctor is convicted of stealing for their own use from hospital stock over a three month period. A health assessment diagnoses opiate dependence syndrome.

**Referral to a hearing** – Given the criminal conviction for misconduct that requires action, undertakings would not be suitable. If the matter had not resulted in a criminal conviction, health undertakings may be sufficient if the doctor had not put patients at risk as a result of his misconduct (for example by removing for their own use medication that had been prescribed to a patient to support their care), had insight and was complying with treatment.

### Example 2

*Presumption of impairment – violence and dishonesty and criminal conviction*

A doctor is convicted of three counts of aggravated burglary and possession of crack cocaine. A health assessment diagnoses opiate dependence syndrome.

**Referral to hearing** - In this case, the misconduct is very serious, carries a presumption of impairment and resulted in a criminal conviction so undertakings would not be suitable. If it attracted a custodial sentence the case would have to be referred directly to a hearing under our rules.

### Example 3

*Presumption of impairment – sexual assault*

A doctor is convicted of sexual assault against two junior nurses and a receptionist. The doctor was found to have kissed and touched their breasts without consent. A health assessment diagnoses a depressive disorder and harmful use of alcohol.

**Referral to hearing** - This misconduct is extremely serious, carries a presumption of impairment and would not be suitable for undertakings given the public confidence issues it raises. This includes cases where the doctor has not been convicted of the alleged actions but findings have been provided in fitness to practise proceedings. If the

conviction attracted a custodial sentence the case would have to be referred directly to a hearing under our rules.

#### **Example 4**

*Presumption of impairment – images of sexual abuse of children, criminal conviction*

A doctor is convicted of viewing 250 indecent images of children. A health assessment diagnoses a depressive disorder and harmful use of alcohol.

**Referral to hearing** - This misconduct is extremely serious and carries a presumption of impairment and therefore health would not constitute an exceptional circumstance. It would not be suitable for undertakings. This type of case is also likely to carry a custodial sentence where we are required to refer direct to a hearing under the rules.

#### **Example 5**

*Presumption of impairment – dishonesty, criminal conviction*

A doctor receives a conviction for forging and stealing multiple prescriptions which they presented at a number of local pharmacies over a period of 12 months. The doctor had previously received a warning from the GMC for self-prescribing. A health assessment finds that the doctor is suffering from a mental health condition which the doctor attempted to control through self-medication. The case was referred to a hearing as the doctor lacked insight, dismissed their actions as negligible, and the actions were prolonged and serious.

**Referral to a hearing** – The misconduct is serious and protracted. It carries a presumption of impairment, resulted in a criminal conviction and the doctor lacks insight. Health would not therefore constitute an exception, despite cogent evidence of a link to a doctor's health condition.