

Guidance for case examiners on the withdrawal of referrals under Rule 28

Introduction

1. This guidance sets out the factors that should be considered by a case examiner when deciding whether or not to withdraw all or part of a matter which has been referred to an investigation committee, a medical practitioners tribunal or an interim orders tribunal following a referral by the Registrar under Rule 28 of the Fitness to Practise Rules 2004 (as amended). The aim of the guidance is to promote consistency and transparency in decision-making in relation to withdrawals of referrals to the investigation committee, medical practitioners tribunals or interim orders tribunals.

Legislative framework

2. Rule 28(1) allows the Registrar to refer a case to a case examiner, before the investigation committee hearing has opened, to decide whether or not the matter (or part of it) should be withdrawn. The Registrar may do so if:
 - a. the doctor withdraws their request for an oral hearing; or
 - b. it appears to the Registrar that for some other reason, the hearing should not be held.
3. Rule 28(2) allows the Registrar to refer a case to a case examiner, before the medical practitioners tribunal or interim orders tribunal hearing has opened, to decide whether or not the matter (or part of it) should be withdrawn. The question of possible withdrawal may arise either from an application by the doctor or by the GMC.
4. When considering whether to withdraw a matter referred to the investigation committee, an interim orders tribunal or a medical practitioners tribunal, the case examiner may decide under Rule 28(3) that:
 - a. all or part of the matter should be withdrawn* ; ; or
 - b. in the case of a matter that has been referred to a medical practitioners tribunal, other than a non-compliance matter, the tribunal should not proceed and the matter should be referred to a medical and lay case examiner under Rule 10 or Rule 11 to consider whether to propose undertakings or issue a warning, respectively.

* If all of the allegations are withdrawn, then the hearing will not go ahead. If only certain allegations are withdrawn, then the hearing will go ahead on the remaining allegations.

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5. Rule 28 is not intended as an avenue for appeal against an earlier decision to refer a doctor to the investigation committee or a tribunal.

Considering a withdrawal

6. Rule 28 does not set out a specific test for the Registrar to apply when considering whether to refer a matter to a case examiner, and their decision to refer will ultimately turn on the specific facts of the case and the application being made. However, they may consider the following questions when deciding to exercise their discretion to refer a matter to a case examiner:
 - a. Is there a change in circumstance, which potentially impacts upon the case examiners' previous rationale to refer the matter to hearing?
 - b. Is there any other reason why the hearing should not proceed?

If the answer to either of these questions is yes, then the Registrar will refer the matter to a medical or lay case examiner* to decide whether to withdraw all or part of a matter referred to the investigation committee, a medical practitioners tribunal, or an interim orders tribunal. Subject to availability, the decision will typically be made by one of the case examiners who made the original decision to refer the case to the investigation committee or tribunal.

7. Although the criteria for withdrawing all or part of a matter are broadly drafted, withdrawal will normally only be appropriate where:
 - a. there is new evidence that was not available at the time of the decision to refer
 - b. we are no longer able to rely on evidence that was relevant to the decision to refer
 - c. the case examiners failed to consider evidence that was relevant to the decision to refer and available to them
 - d. the case examiners have made a material error of fact or law in relation to the information relied upon in their decision to refer, which if corrected may have led to a different decision; or
 - e. the Legal adviser or GMC Counsel have raised concerns about the allegations not meeting the realistic prospect test*.

Investigation committee

8. The vast majority of referrals to the investigation committee withdrawn under Rule 28 result from the doctor withdrawing their request for an oral hearing and deciding to agree to a warning that they had initially declined to accept.
9. Material changes, such as fresh evidence or advice which calls into question whether a

* Please refer to the [realistic prospect test guidance](#) for a more detailed exploration of the test and its application

warning may still be appropriate, may also prompt the Registrar to refer a case to a case examiner for possible withdrawal. In these cases, the case examiner must consider carefully whether the new information or advice means that the doctor's behaviour no longer represents such a serious departure from the standards expected as to warrant a warning*.

Medical practitioners tribunal

10. Rule 28 decisions in respect of matters referred to a medical practitioners tribunal could arise from an application by the doctor/their representatives or following legal advice provided by Counsel or the Legal Adviser for the GMC to consider withdrawal of an allegation or part of it.
11. Case examiners will apply the realistic prospect test[†] when deciding whether an allegation (or part of it) should be withdrawn.
12. In considering whether to withdraw a matter (or part of it), the case examiner should be mindful that tribunals have broad powers to admit evidence under Rule 34(1).
13. The Medical Act does not require a complaint to be brought by a complainant or a public body (section 35C). It is not appropriate to withdraw a matter referred to a medical practitioners tribunal simply on the basis that a complaint has been withdrawn, without consideration of whether the GMC should proceed in the public interest, especially where we may still have sufficient evidence to support the allegations.
14. The case examiner might consider that the tribunal should not proceed but that a warning or undertakings may be more appropriate. In such cases, the case examiner can withdraw the matter (or part of it) from the tribunal and refer the case (or part of it) to a medical and lay case examiner to consider whether to issue a warning or recommend undertakings[‡].
15. When considering whether to withdraw a matter (or part of it), the case examiner should bear in mind that they can request further information, reports or legal advice.
16. Where considering withdrawal, the Registrar will normally seek representations from the doctor. The case examiner should carefully consider any representations made by the parties relevant to the application of the realistic prospect test. While doing so, the case examiners should also bear in mind there is a public interest in the ventilation before a tribunal in public of allegations which do have a realistic prospect of establishing impaired fitness to practise.

* Please refer to the [guidance on warnings](#) for a full overview of the factors to consider in determining when it is appropriate to issue a warning

[†] Please refer to the [realistic prospect test guidance](#) for a more detailed exploration of the test and its application

[‡] Please refer to the [guidance on undertakings](#)

Interim orders tribunal

- 17.** The case examiner should consider carefully whether the new information they are considering means that it is no longer necessary for the interim orders tribunal to consider making an order while the allegations against the doctor are investigated*. The key factor is the potential risk posed by the doctor to patients, the public interest and the doctor's own interests. Case examiners should make a careful assessment of whether the new information addresses or diminishes this risk to such an extent that it is no longer necessary for the interim orders tribunal to consider making an order.
- 18.** It is important to remember that the remit of an interim orders tribunal does not include the making of findings of fact or resolving disputes of evidence and a referral should not be withdrawn simply because the doctor disputes the information on which it is based.
- 19.** Circumstances when it may be appropriate to withdraw a referral under Rule 28 include, but are not limited to, where:
- information is received to suggest the doctor has been wrongly identified and had no role, or only a peripheral role, in the concerns referred to a tribunal
 - evidence is received to show the concerns referred to an interim orders tribunal are not as serious as originally thought and the test for an order is unlikely to be met
 - the referral was based on the fact of a criminal investigation which is then closed with no further action and, although the GMC's investigation into the underlying conduct may be continuing, the threshold for a referral to an interim orders tribunal is no longer met[†]
 - the referral was made in the doctor's own interests on the basis of concerns about their health, but new evidence suggests the doctor is receiving appropriate treatment and following advice such that an order no longer needs to be considered.

Deciding on a withdrawal

Reason for decision

- 20.** Rule 28(4) provides that when a matter (or part of it) is withdrawn, the Registrar is required to inform both the doctor and the complainant of the case examiner's decision and the reasons for it. The decision should briefly summarise the allegations against the doctor, as often this is necessary in order to understand the decision adequately. The reasons should make clear the grounds for withdrawing all or part of a matter and refer to both parties' submissions, including any new evidence or factors that have been taken into consideration.

* Please refer to the [guidance for decision makers on referral to an interim orders tribunal](#)

[†] It is important to note that in some cases, the allegations could still warrant a referral to the interim orders tribunal. Please refer to the [guidance on police cases resulting in acquittal/decision not to proceed to trial](#)

21. As with every decision made by the case examiner, the decision to withdraw all or part of a referral to the investigation committee or a tribunal must be carefully considered and clearly justified.