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GENERAL SCHOLARLY ARTICLE

The Interaction Between Punitive and Protective Suspension Orders for UK Doctors



Abstract

If the UK's Medical Practitioners Tribunal Service (MPT) finds that a doctor's fitness to practice is impaired, one of the available sanctions is a suspension of the doctor's registration for up to 12 months. Ordinarily, such a suspension will not take effect until 28 days after the MPT's decision, which is the period within which the doctor can appeal to a court. However, where the MPT imposes a suspension, it may also make an immediate suspension order to prevent the doctor from practicing during the appeal window or while any appeal is pending. The cumulative duration of these two types of suspension often exceeds the statutory 12-month maximum for suspensions. One

interpretation is that immediate suspension orders may serve to discourage doctors from challenging the Tribunal's decisions on appeal, even where there are good grounds for considering that the decision may be successfully appealed.

Here, we examine the interplay between these two types of suspension by reference to empirical data collected from the MPT. We identify inconsistencies between tribunals as to the purpose of each, and we scrutinize a recent appeal case, which clarified whether these suspensions should be served consecutively or concurrently.

Introduction

In the UK, all registered healthcare professions, including medicine, have comparable "fitness to practice" (disciplinary) processes. When a doctor's fitness to practice is found to be impaired, the sanctions available to the Medical Practitioners' Tribunal Service (MPT) include suspension of registration for a period not exceeding 12 months (hereinafter: "substantive suspension").¹(s. 35D2), 2, 3 Similar provisions allow for tribunals involving dentists,⁴(s. 27B(6)(c)) pharmacists,⁵(art. 54(2)(d)) nurses,⁶(art. 29(5)(b)) and others to do likewise. A doctor (or other healthcare professional) who is suspended will often be required to attend a review hearing before resuming practice, so that the tribunal can consider whether they are fit to do so.

The wording of these provisions within their respective statutes is so similar as to be treated as identical, as the following examples from the Medical Act and Dentists Act, respectively, illustrate:

"... may, if they think fit ... direct that his registration in the register shall be suspended (that is to say, shall not have effect) during such period not exceeding twelve months as may be specified in the direction" —Medical Act 1983

"... may, if they consider it appropriate, direct ... that his registration in the register shall be suspended during such period not exceeding twelve months as may be specified in the direction" —Dentists Act 1984

Additionally, all UK healthcare regulators have an overarching objective of the protection of the public.¹(s. 1), 4(s. 1), 5(Art. 6), 6(Art. 6)

Under the Medical Act, a doctor who is suspended by the MPT has a right of appeal to the High Court in England, Wales, or Northern Ireland, or to the Court of Session in Scotland. Appeals must be brought within 28 days of the MPT's decision. Appeals will only be successful if it can be shown that the Tribunal's decision was insupportable: if its reasons were inadequate or its findings were not supported by the evidence, for example. The court will not overturn an MPT decision merely because the judge would have made a different decision. Substantive suspensions from the Medical Register do not take effect until the 28-day appeal window closes.¹(s. 40(4)) If the doctor appeals, the substantive suspension does not take effect until that appeal has been either withdrawn or rejected by the appellate court or withdrawn.¹(s. 38(3))

The effect of the provisions in the Medical Act is that a doctor whom the MPT has suspended will be able to continue practicing for 28 days if there is no appeal, and until the conclusion of an appeal if the doctor has exercised this right. For this reason, the Medical Act also provides that if the Tribunal is satisfied it is necessary for the protection of the public or is otherwise in the public interest or the interests of the doctor, it may order an "immediate suspension" until its substantive suspension for comes into force.¹(s. 38(1))

Again, equivalent legal provisions are in place for dentists,⁴(ss. 27B-30) nurses,⁶(Arts. 29 & 38) pharmacists,⁵(Arts. 58-59) and other health professions. Such is the similarity of the specific legislation for each profession; we may consider that a ruling involving one profession applies equally to all for the purposes of the following discussion.

The ability to impose an immediate suspension pending appeal can create a situation where a doctor’s time spent unable to practice exceeds that imposed by the Tribunal, and—in many cases—exceeds the statutory maximum period of 12 months.

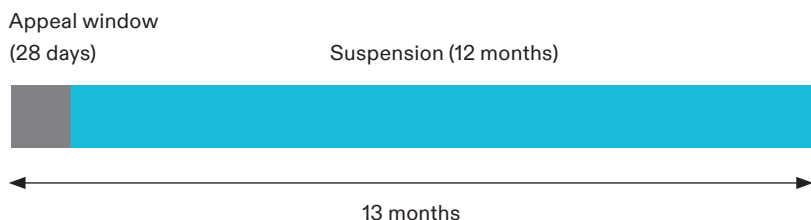
On October 3, 2022, Dr. Prashant Sankaye (General Medical Council reference number: 6118688) was handed a 12-month suspension for failing to comply with conditions that had been imposed on his right to practice. An immediate suspension was imposed by the MPT. Had Dr. Sankaye chosen not to appeal his substantive suspension, he would most likely have returned to the register after 13 months, as illustrated in Fig. 1a. However, he did lodge an appeal against the Tribunal’s

decision, which was rejected by the High Court on the May 22, 2023. His substantive suspension therefore commenced on this date, after a period of almost eight months during which the immediate suspension remained in place. This has the effect of increasing his total suspension to almost 20 months—well over the statutory maximum (Fig. 1c). This raises the question of whether the eight months of immediate suspension during which the appeal was pending should have been “absorbed” by the substantive suspension, as illustrated in Fig. 1d.

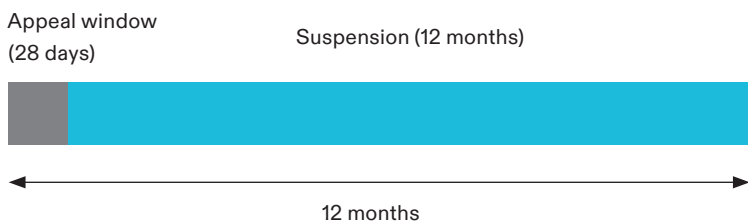
Of even greater significance are cases in which the appeal against suspension is successful, such as that of Dr. Helen Webberley (GMC: 3657058). Dr. Webberley

FIGURE 1: Potential timelines for the 12-month suspension imposed in the case of Dr. Prashant Sankaye

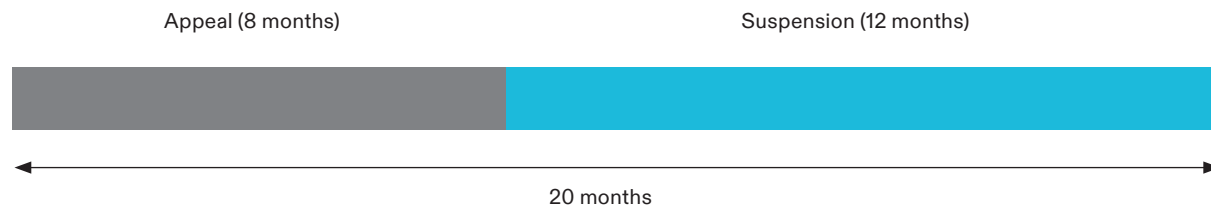
(a) Substantive suspension with immediate suspension (no appeal; served consecutively)



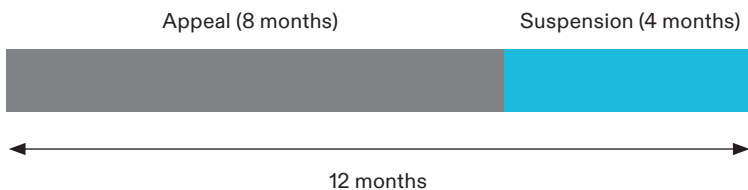
(b) Substantive suspension with immediate suspension (no appeal; served concurrently)



(c) Substantive suspension with immediate suspension (appeal; served consecutively)



(d) Substantive suspension with immediate suspension (appeal; served concurrently)



was found by the Tribunal to have failed to provide good clinical care because she gave advice to the mother of an 11-year-old girl about her treatment with puberty blockers without discussing the risks to the girl's fertility. She received a two-month substantive suspension on June 30, 2022, and an immediate suspension was ordered. Dr. Webberley successfully appealed the decision at the High Court on March 31, 2023, which ordered her name to be restored to the Medical Register from that date. In this case, the doctor was effectively suspended for nine months while appealing against a two-month sanction that was overturned. Under such circumstances, it is difficult to separate substantive and immediate suspensions, as the effect of each is identical when viewed from the perspective of the doctor concerned.

It is a well-established practice in the criminal justice system to recognize "time served" (for example, in prison while awaiting trial) prior to sentencing as part of a sentence itself. This is not always applicable to suspensions imposed by the MPT: in *Adil v General Medical Council*,⁷ which we have previously scrutinised at some length,⁸ the Court of Appeal held that whether a period of immediate suspension should be taken into account depends on the purposes of the immediate suspension and the substantive suspension: where the period of suspension imposed is required to mark the gravity of the misconduct so as to send a message to the profession, periods of interim suspension should be taken into account; but where the period of suspension imposed is required in order to rehabilitate the practitioner and/or "for the continued protection of the public from harm," periods of interim suspension have "little or no relevance."

This ruling was followed by Mrs. Justice Lang in the recent case of *Ahmedsowida v General Medical Council*.⁹ She observed that the Court of Appeal decision in *Adil* does not expressly address what is to happen when a substantive suspension is required both to mark the gravity of the misconduct and to protect the public. Her conclusion was that, logically, periods of interim suspension should not be considered under such circumstances. In such a case, giving credit for previous interim suspensions would be likely to undermine the public interest in that it could result in a practitioner returning to practice while their fitness to practice was still impaired.

Empirical analysis

Data Collection

To test the assertions that immediate suspensions may serve to discourage doctors from challenging the

Tribunal's decisions on appeal, we examined the outcomes of MPT hearings over a three-year period. The MPT publishes determination notices for hearings and decisions on its website, where they remain for a period of 12 calendar months. Beyond that period, fitness-to-practice determinations for individual practitioners remain available on their Medical Register entries. Determination notices for MPT hearings heard in the three-year period between January 2020 to December 2022 were downloaded and collated. In total, 833 determination notices for substantive hearings were collected.

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A manual search of the online legal database Westlaw was carried out to determine how many cases were appealed in the courts. All appeals involving the GMC between January 2020 and December 2023 were collated. These were cross-referenced with doctors' surnames (and, subsequently, their unique seven-digit registration numbers) in the Medical Register to determine which of these were appeals against MPT determinations heard during the three-year period of interest, and to confirm total lengths of suspension.

From the 833 records collected, 283 cases which were not being heard at the first instance (ie: reviews, reinstatements, etc.) were excluded, as were 343 cases for which suspension was not the sanction, leaving 207 cases in total. Immediate suspensions were imposed in 56 cases (27.1%).

Appeals

Several factors may influence a doctor's decision to appeal, including legal advice on the prospects of success and the legal costs of going to court. The lengthening effect of an immediate suspension on the substantive suspension period could also discourage doctors from appealing against the Tribunal's findings. Where a suspension is shorter than the estimated length of the appeal process, a pragmatic doctor might well believe that lodging an appeal is not a worthwhile endeavour, even if in possession of legal advice that an appeal is likely to succeed. Furthermore, with longer suspensions the total time spent off the register may

exceed the maximum duration for a substantive suspension, which—again—invites a pragmatic decision not to appeal. One might reasonably assume that doctors with immediate suspensions would be discouraged from challenging the outcome of their tribunal: however, this was not borne out by the data. Only nine of the 207 suspensions (4.3%) were appealed. Of these, four had an immediate suspension in place. The appeal rate with immediate suspensions was 7.1% (4/56) compared to 3.3% (5/151) without, though this difference is not statistically significant as assessed by Fisher's test ($p = 0.23$). This suggests that the imposition of an immediate suspension does not, in fact, discourage doctors from making an appeal.

In eight of the nine cases appealed, the total suspension (substantive + immediate) exceeded 12 months. Where a doctor did not appeal their suspension, the statutory maximum was exceeded only where a 12-month substantive suspension was imposed (to which a 28-day immediate suspension must be added). Thirty such cases were identified accounting for 14.7% of all doctors suspended. In total, the total suspension exceeded 12 months in 18.4% of cases (38/207).

Length of suspension

A series of paired chi-square tests for association were carried out to determine whether there was a cut-off substantive suspension length at which the prospect of an immediate suspension being imposed became significant.

There is an association between substantive suspension length and the imposition of an immediate suspension ($p < 0.001$). Where a substantive suspension of six months or longer is imposed, an immediate suspension is more likely to be directed than where shorter suspensions (of one or three months) are applied. Immediate suspensions were issued in 56 of the 207 cases examined (27%), of which only 10 were issued in the 102 cases involving a substantive suspension of less than six months' duration (10%). This rate rose to 44% (46/105) for suspensions of six months or longer.

Legal clarification

While legal rulings affecting the fitness to practise process for doctors often directly involve doctors, they may involve any registered healthcare professional due to the similarity of the legislation governing each profession's disciplinary activities. The case that clarified whether immediate suspensions in place pending appeal should be deducted from any substantive suspension involved a dentist, Dr. Nabeel Aga (General Dental

Council reference number: 254472). While registered with the General Dental Council (GDC), Dr Aga was found to have committed several acts of sexually motivated stalking and harassment. On July 21, 2023, the GDC's Professional Conduct Committee (PCC) imposed a nine-month substantive suspension pursuant to s. 27B of the Dentists Act 1984.⁴ It also directed an immediate suspension pending the substantive suspension taking effect, under provisions in s. 30 of the Act.

High Court

Dr. Aga appealed to the High Court,¹⁰ arguing that the 9-month suspension was "manifestly excessive or disproportionate". In December 2023, some five months after the PCC hearing, his appeal was rejected. Had his substantive suspension started at the time of the PCC's decision, Dr. Aga would effectively be suspended from the Dental Register for a total of 14 months. The judge, Mr. Justice Ritchie, was troubled by this, since the Dentists Act 1984 provided for a maximum suspension period of 12 months.^{4(s. 27B (6))}

The GDC argued that the immediate suspension was a different suspension to the nine-month substantive suspension that the PCC had imposed, having been imposed under different provisions within the Dentists Act (s. 27B and s. 30, respectively). Mr Justice Ritchie rejected this argument in trenchant terms, saying:

"Such an interpretation breaches the statutory ban on any suspension being over 12 months and is in effect a punishment for appealing, which is contrary to established principles.

"Parliament fixed the maximum duration ... of 12 months [in the Dentists Act] and did not legislate for that to be ignored or breached by the interaction between [the provisions for substantive suspension and for immediate suspension]. The latter are subservient to the former. I consider that the GDC's interpretation ... drives a coach and horses through the statutory 12-month maximum ... which cannot have been the intention of Parliament.

"It effectively increases the PCC's carefully measured and titrated sanction just because [an appeal has been lodged] ... which results in registrants considering that they are being treated unfairly in relation to appeals because their sanction is increased by the very act of appealing.

"Furthermore, in my judgment it is contrary to natural justice to penalise an appellant just for

the act of appealing ... when the right to appeal is provided by statute.”

He went on to determine that the correct construction of the provisions of the Dentists Act in the context of this appeal was that the suspension started when the immediate suspension took effect. In his judgment, “the end of the suspension occurs after nine months of suspension have been served, and it does not matter which piece of paper had the effect of causing the suspension.”

The Council’s interpretation drives a coach and horses through the statutory 12-month maximum.

GDC Statement

On January 3, 2024, the GDC published a statement asserting that they, in common with other healthcare regulators, consider immediate suspensions as separate from substantive suspensions, so that the immediate suspension covers the period before the substantive order takes effect. The statement continued:

“The recent ruling [by the High Court] departed from the longstanding existing interpretation of the legislation. We need clarity on this point so that the regulatory framework, guidance and practice are unequivocally clear.

“The only way to achieve clarification is through the courts and this is what we are planning to do. We’ll provide a further update when there is more information to share.”

Controversially, the GDC went on to state that:

“We have informed [the PCC] that the GDC’s submission at hearings is likely to be that the existing guidance remains applicable ... We have also reiterated that the substantive sanction, immediate suspension and/or any directions are a matter for the [PCC] to determine in each case as they consider appropriate.”

Though carefully worded, this would seem to amount to a decision to ignore the ruling of the High Court and continue as before until a superior court ruled on the matter.

Court of Appeal

The GDC appealed against the decision of the High Court.¹¹ A panel of three Appeal Court judges held that the outcome was a matter of statutory interpretation, and that Mr. Justice Ritchie had approached the case incorrectly. Lady Justice Nicola Davies pointed to the different purposes of a substantive suspension following a finding that the registrant’s fitness to practice was impaired, and a decision to impose an immediate suspension during the appeal period. In deciding to impose a sanction of suspension following a finding of impairment, the PCC had regard to whether the misconduct was remediable, whether it had been remedied, and took account of the respondent’s insight and the risk of repetition. It also had regard to the wider public interest, which includes a need to uphold and declare appropriate standards of conduct and behaviour, and to maintain public confidence in the profession.¹² (para. 6.1) A tribunal need not consider many of these factors when deciding to impose an immediate suspension.¹² (para. 6.38) These are, therefore, two distinct suspensions at different stages of the fitness to practice process. It was her judgment that, while there may be some chronological overlap of the two, if it is unfair to prolong the effective length of a suspension by issuing an immediate suspension, this is a matter for Parliament to address, not the courts.

She pointed out that if Mr. Justice Ritchie’s decision were correct:

“[i]t would undermine the overriding objective [of the protection of the public; and] ...

“[i]t has the potential to undermine the ability of a [registrant] to remediate the failings which led to the finding of misconduct.”

Lord Justice Stuart-Smith agreed with Lady Justice Nicola Davies and added:

“Although I accept that the interpretation that we are endorsing may have the effect of extending the period during which ... registration is suspended, that does not seem to me to be either unfair or contrary to the public interest. It is always open to the [registrant] to request a review of his case before the conclusion of the period of the substantive suspension or for the [regulator] in an appropriate case to initiate the review itself. As always, the touchstone will be the protection of the public.”

He correctly identified that a registrant whose effective suspension length exceeds that imposed by a Tribunal

may apply for a review at the point where the combined length of the suspension and immediate suspension equal the length of the substantive suspension.^{12(para. 6.26)} In the example given in Fig. 1c, Dr. Sankaye could apply for a review after four months of his suspension, as the total time for which he was off the register at that point was 12 months, which was the intended duration of his suspension.^{1(s. 35D(4B))} Indeed, it is not uncommon for review hearings to be held after 11 months of suspension in cases where an immediate suspension is imposed, but no appeal is lodged, thus bringing the total suspension to 12 months (Fig. 1b).

This would ride roughshod over the carefully drafted provisions of the legislation.

Lady Justice Nicola Davies also pointed out that to conflate the two forms of suspension might actually prevent a review where the combined period of suspension and a suspension and immediate suspension exceeded 12 months, as this is the maximum duration allowed by statute.^{4(s. 27b(6)(c))} Thus, a registrant subject to a review could return to practice without satisfying a Tribunal that their fitness to practise was no longer impaired. She remarked that this “would ride roughshod over the carefully drafted provisions of the [legislation], which at their core reflect the need to protect the public.”

Lady Justice Whipple agreed with both judgments.

A welcome reminder?

Although the *Aga* judgement ultimately maintained the status quo, it is perhaps still beneficial to have had this contemporaneously reiterated, if only to remind the Tribunal of the distinction between the purposes of directions for suspension and of immediate suspensions.

There is a clear distinction between the purpose of a substantive sanction and that of an immediate suspension. Furthermore, each are derived from different sections of the Medical Act: namely, s.35D and s.38, respectively. The former section allows for the Medical Practitioners Tribunal to direct that a doctor’s registration be [substantively] suspended for period not exceeding 12 months and only if they find that the doctor’s fitness to practice is impaired. Compare this with s.38, which specifies that upon imposing an immediate suspension in the public interest, the doctor may remain suspended

until the appeal window is closed, or the outcome of any appeal is determined, with no set timescale. A “punitive” suspension cannot exceed a year, but in cases where an appeal is lodged, a “protective” suspension has no set time-limit other than the time taken by the courts to resolve the appeal.

In several cases heard before *Aga*, the MPT did not make immediate suspensions, explaining that this was because they were aware such orders act to extend suspensions. When Dr. Adrian Harrop (GMC: 7266505) was suspended for one month in November 2021, the Tribunal determined an immediate suspension was not necessary, stating that it “would result in Dr. Harrop effectively being suspended for two months.” In December 2022, in the case of Dr. Robert Lutaaya (GMC: 5194290), the Tribunal considered that “having determined to impose a one-month suspension, an immediate suspension of suspension would effectively double that period, thereby resulting in a disproportionate amount of suspension”. No such concern was expressed for Dr. Damian Duffy (GMC: 7406614), who in March 2020 submitted that “a 12-month suspension was a sufficient period in [my] case, and that by imposing an immediate suspension it would essentially add a month to that period.” The MPT imposed the order notwithstanding this submission. An identical situation—with an identical outcome—arose in October 2021 when Dr. Farina Sheikh (GMC: 7544952) stated that “if an immediate suspension of suspension was imposed then [my] registration effectively would be suspended for 13 months.” There obviously remains significant inconsistency in the Tribunal’s treatment of these suspensions as either interrelated or independent.

Hopefully, the unambiguous clarification made by Lady Justices Davies and Whipple and Lord Justice Stuart-Smith will bring some much-needed consistency to deliberations determining if and why immediate suspensions should be imposed.

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