Abuse of process

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It's a claim that the case has been unfairly progressed and should be stopped. This can be made by a registrant or raised by a panel.

This guidance explains the circumstances in which it may be appropriate for a panel to use its power to stop a case as an abuse of process.

A nurse, midwife or nursing associate can make an abuse of process application at any stage of the panel's decision-making process. They can make the argument about the whole case against them, or about part of the case. Equally, a panel may decide on its own that there has been an abuse of process.

If the nurse, midwife or nursing associate makes the application, they will only succeed if they can show that it's more likely than not that the alleged abuse of process can't be properly rectified in any other way than to stop the case.

How does the panel decide if there is an abuse of process?

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The panel can decide there is an abuse of process if:

- it will be impossible for the nurse, midwife or nursing associate to have a fair hearing, or
- continuing with the case would, in all the circumstances, offend the panel's sense of 'justice and propriety'.[1]

In deciding whether there has been an abuse of process which means the case should be stopped, the panel will consider whether the alleged abuse of process (such as delay, or a failure to disclose evidence) has caused serious prejudice or unfairness to the nurse, midwife or nursing associate.

In accordance with its overarching public protection objective, the panel will also consider whether there are ways of putting right the serious prejudice or unfairness, so that the nurse, midwife or nursing associate can have a fair hearing without stopping the case.

See some examples of the various types of abuse of process arguments that have been considered by the courts, below.

Abuse of process arguments

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Unreasonable delay

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The nurse, midwife or nursing associate's right to a fair hearing under human rights legislation includes a right to having their case heard within a reasonable time, [2] so the length of any delay is a relevant consideration for the panel.

For our purposes, the relevant time runs from when we first notified the nurse, midwife or nursing associate that we were sending their case for an investigation.[3]

The panel will only use its power to stop all or part of a case due to delay, in exceptional circumstances. This could be where there is real prejudice to the nurse, midwife or nursing associate which means that a fair hearing would be impossible because of the delays.

In an argument about delay, the panel will hear submissions from the nurse, midwife or nursing associate, and from us, on the circumstances leading up the application.

These will include the chronology of events, any possible reasons for delays, the way the nurse or midwife engaged with our process, and what any external third parties did or failed to do.

Unreasonable delay will be a possible abuse, if the period of the delay gives grounds for 'real concern'.[4]

In considering this, it will be relevant to consider the effect of the delay on the proceedings and any unfairness it could cause to the nurse, midwife or nursing associate.[5]

If the delay affected the memory or availability of witnesses or documentary evidence, these may be factors the panel takes into account in deciding whether the delay means it's no longer possible for the nurse, midwife or nursing associate to have a fair hearing.

It will also be relevant to consider the stage the hearing has reached, and what steps we could take to lessen the effect of the delay and make sure a fair hearing is still possible.[6]

If the panel could make a direction, or the parties could take a particular course of action to put the unfairness right, it will be important to explore those options before the panel decides that the hearing should be stopped as an abuse of process.

The complexity of the case or delay caused by a nurse, midwife or nursing associate will not be a reason to stop all or part of the proceedings.[7]

Incomplete or non-disclosure of information

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When we are investigating a nurse, midwife or nursing associate's fitness to practise, we need to provide them with enough information to understand the case against them, and to allow them to respond to our concerns.

One relevant factor to consider may be what level of disclosure is 'reasonable' in the circumstances.

Sometimes, where the nurse, midwife or nursing associate cannot reasonably be expected to gather relevant material themselves, we may need to help with this.

However there's no general duty on us, the regulator, to gather evidence on behalf of the nurse, midwife or nursing associate,[8] which would of course determine what evidence we'd have in our possession and what we'd therefore be able to disclose.

For more information about this, see our guidance on disclosure.

Increasingly, we ask the nurse, midwife or nursing associate to tell us about the context around what happened, and we do this early on in our investigation.

In deciding what disclosure is reasonable, it will be relevant to consider how the nurse, midwife or nursing associate initially responded when we asked them to tell us about relevant issues back when we started investigating.

If they refused to engage with our investigation at that stage, it is less likely to be reasonable to expect us to gather information on their behalf, about the same issues, if the case gets as far as a Fitness to Practise Committee panel.

This question will be relevant to whether the nurse, midwife or nursing associate has suffered prejudice or unfairness.

The panel is responsible for regulating its own proceedings, and has various powers to require us and the nurse, midwife or nursing associate to exchange relevant information. The panel can consider whether to order adjournments, or give directions to obtain evidence, to see whether the issue that is alleged to cause an abuse of process, can be resolved without stopping the case altogether.

The panel can also ask for further information as to why the evidence is incomplete, to satisfy itself as to whether we have acted improperly, or whether the information has simply been lost.

In circumstances where there is evidence of impropriety in us not disclosing information to the nurse, midwife or nursing associate, potentially this could mean there is an abuse of process.

If the evidence before the panel remains incomplete, the panel can also consider its powers to decide what evidence is admissible, as a way of avoiding possible injustice.

It's possible that refusing to admit some of our evidence, because it would be unfair without also seeing or hearing the missing evidence, (which could provide important context), could avoid any injustice or unfairness.

Retracting a promise

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Another possible ground for an abuse of process application is that we made a promise or gave the nurse, midwife or nursing associate an assurance, and later retracted it.

Some examples of this might be promising not to proceed with investigations about a particular concern, or promising that we would keep particular information private. There may be other kinds of promise or assurance that it would be an abuse of process to retract.

In some circumstances it wouldn't be an abuse of process for us to investigate and take action about a fitness to practise concern that we've previously told a nurse, midwife or nursing associate that we won't be proceeding with.

For example, there could be new information or evidence that we weren't aware of when we made the first decision that shows we need to take action to prevent the nurse, midwife or nursing associate putting patients or members of the public at risk of harm.

The panel should consider this when trying to assess whether there is unfairness or injustice to the nurse, midwife or nursing associate.

It is relevant that we have specific powers to revisit decisions under our rules[9] and in case law[10] which include decisions made at any stage of our fitness to practise.

When considering promises or assurances we gave to the nurse, midwife or nursing associate, the panel can, if it needs to, ask for information about:

- what assurances we gave
- the level of officer or decision maker
- when in our process we gave the assurance.

Equally, it may also be relevant to consider whether the nurse, midwife or nursing associate could reasonably have relied on the assurance.

For example, if we stated we would not take action about a particular incident we were investigating, but the nurse, midwife or nursing associate then disclosed another more serious concern, would it be reasonable for the nurse, midwife or nursing associate to assume that we would not investigate the new concern?

Possible unfairness or injustice after promises made to nurses, midwives or nursing associates might be able to

be resolved by amending charges or some other action to cure the possible unfairness.

As always, the panel is able to consider any reasonable options to address any possible unfairness, before deciding that abuse of process is made out and that the case should be stopped.

Bad faith or serious breach of professional duty

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Sometimes, if one of our officers or decision makers acts in bad faith, this could cause an abuse of process, if that bad faith causes prejudice or unfairness to the nurse, midwife or nursing associate meaning they can't have a fair hearing, or that to proceed would be an injustice.

An application based on bad faith will need to include specific examples and evidence of how the nurse, midwife or nursing associate says we've acted in bad faith, or one of our officers breached their professional duty. It will also need to explain how the nurse, midwife or nursing associate says the fairness of our process has been affected.

1 R v Maxwell [2011] 1 WLR 1837
2 Article 6(1) European Court of Human Rights
3 Deweer v Belgium (1980) 2 E H R R 439 - time begins - Attorney – General's Reference (No 2 of 2001) [2004] 2 AC 72 HL – "time runs from the earliest time when the defendant was officially alerted to the likelihood of criminal proceedings being taken against him or her, which would normally be when he or she was charged or served with a summons"
4 Dyer v Watson [2004] 1 AC 379
5 Okeke v Nursing and Midwifery Council [2013] EWHC 714
6 R (Gibson) v General Medical Council and another [2004] EWHC 2781 (Admin) 'mere unreasonable delay, absent prejudice'
7 Haikel v General Medical Council [2002] UKPC 37
8 R (Johnson) v Nursing and Midwifery Council [2008] EWHC 885 (Admin)
9 Under rule 7 of the Fitness to Practise Rules. To find out more, see our guidance on reconsidering closed cases
10 Which allows us to revisit a decision if there has been a fundamental mistake of fact: R (Jenkinson) v Nursing and Midwifery Council [2009] EWHC 1111; Fajemisin v General Dental Council [2013] EWHC 350; R (Chaudhuri) v General Medical Council [2015] EWHC 6621.