

Fitness to Practise Committee – 25 February 2010

Not Well Founded Review

Executive summary and recommendations

Attached as an appendix to this cover sheet is a report reviewing cases where panels of the Conduct and Competence Committee or Health Committee has determined that that an allegation that a registrant's fitness to practise is impaired is 'not well founded'. The report reviews the reasons for decisions being made and makes a number of recommendations resulting from that review.

Decision

The Committee is asked to

- (a) discuss the attached paper reviewing not well founded cases; and
- (b) approve the recommendation(s) set out in page 11 of the report reviewing not well founded decisions.

Background information

This paper should be read in conjunction with the paper 'Standard of Acceptance' and the research into and work plan for 'Expectations of complainants'. The work plan particularly recommends that further work should be done on explaining meaning and purpose of fitness to practise and the role of the regulator. A recommendation for how decisions can be quality assured is also on the agenda for consideration by the Committee at its February 2010 meeting.

Article 29(1) of the Health Professions Order provides that

'If, having considered an allegation, the Health Committee or the Conduct and Competence Committee, as the case may be, concludes that it is not well founded –

- (a) where requested to do so by the person concerned, it shall make a declaration to that effect giving its reasons; and
- (b) in any other case and with the consent of the person concerned, may make such a declaration.

Date	Ver.	Dept/Cmte	Doc Type	Title	Status	Int. Aud.
2010-02-13	a	F2P	PPR	Not well founded_Review of cases	Final DD: None	Public RD: None

This means that where a decision in a case is that the allegation is not well founded, this decision is not published on the HPC website unless the registrant provides their consent.

Practice note 'Case to Answer' - http://www.hpc-uk.org/assets/documents/10002478PRACTICE_NOTE_CasetoAnswer.pdf

Practice note 'Finding Fitness to Practise Impaired' - <http://www.hpc-uk.org/assets/documents/1000289FFindingthatFitnessstoPractiseisImpaired.pdf>

Practice note 'Drafting Fitness to Practise determinations' - http://www.hpc-uk.org/assets/documents/10002B35PRACTICENOTE_DraftingFTPdecisions.pdf

Policy – Indicative Sanctions - http://www.hpc-uk.org/assets/documents/10000A9CPractice_Note_Sanctions.pdf

Resource implications

None

Financial implications

None

Appendices

Report - Not well founded review

Date of paper

12 February 2010

Not well founded – Review of Cases

1.0 Introduction

- 1.1 This report provides further information on the types of cases where a decision has been taken by a final hearing panel that the allegation that a registrant's fitness to practise is impaired is 'not well founded' and the decision making process that panels have to go through before reaching such a decision.

2.0 Legislative framework

- 2.1 Article 26(6) of the Health Professions Order 2001 provides that

'Where the Investigating Committee concludes that there is a case to answer under paragraph (2)(d)(i), it shall -

- (a) undertake mediation; or
- (b) refer the – case
 - (i) to Screeners for them to undertake mediation;
 - (ii) to the Health Committee in the case of an allegation of a kind mentioned in article 22(1)(a)(iv), or
 - (iii) to the Conduct and Competence Committee, in the Case of any other allegation

- 2.2 The Practice note 'Case to Answer' provides guidance to panels of the Investigating Committee on what information and factors they should consider in determining whether there is a realistic prospect that a panel of the Conduct and Competence Committee or Health Committee is going to determine that the allegation that the registrant's fitness to practise is impaired is 'well founded'. The table below demonstrates the number of cases considered by Investigating Committee panels since 2005-2006 and the number and percentage of cases that were subsequently referred to a final hearing panel.

Table 1: Number of Case to Answer Decisions April 2005 – January 2010

Year	Number of Cases Considered	Number of Cases Referred to a Final Hearing	Case to answer percentage
2005-2006	178	103	58
2006-2007	224	147	65
2007-2008	299	186	62
2008-2009	363	206	57
2009-YTD	399	234	59
Total	1463	876	60%

2.3 In considering cases referred by the Investigating Committee and in determining whether allegations are “well founded”, Panels of the Conduct and Competence Committee and the Health Committee are required to decide whether the HPC, which has the burden of proof, has discharged that burden and proved that the registrant’s fitness to practise is impaired.

2.4 In proving impairment, Panels are required to consider sequentially the three elements of the allegation which are as follows:

1. whether the facts set out in the allegation are proved;
2. whether those facts amount to the ‘ground’ set out allegation (e.g. misconduct or lack of competence); and
3. in consequence whether the registrant’s fitness to practise is impaired.

2.5 The practice note ‘Finding Fitness to Practise Impaired’ approved by the Council in October 2009, provides further guidance to panels on factors they should take into account when determining whether a registrant’s fitness to practise is impaired. It particularly notes that it is important for Panels to recognise that the test of impairment is expressed in the present tense; that fitness to practise is impaired (not was, or could be). It also notes that as the Court of Appeal noted in GMC v Meadow¹

‘...the purpose of FTP procedures is not to punish the practitioner for past misdoings but to protect the public against the acts and omissions of those who are not fit to practise. The [Panel] thus looks forward not back. However, in order to form a view as to the fitness of a person to practise today, it is evident that it will have to take account of the way in which the person concerned has acted or failed to act in the past.’

2.6 It is clear from this that although the Panel’s task is not to ‘punish for past misdoings’, it does need to take account of past acts or omissions in determining whether a registrant’s fitness to practise is impaired.

¹ (2006) EWCA Civ 1319

- 2.7 In determining whether fitness to practise is impaired, Panels must take account of a range of issues which in essence comprise of two components:
1. the 'personal' component: the current competence, behaviour etc of the individual registrants; and
 2. the 'public' component: the need to protect service users, declare and uphold proper standards of behaviour and maintain public confidence in the profession.
- 2.8 It was noted in *GMC v Cohen*², that the sequential approach to considering allegations means that not every finding on the "ground" of the allegation will automatically result in a Panel concluding that fitness to practise is impaired, as
- "There must always be situations in which a Panel can properly conclude that the act...was an isolated error on the part of the... practitioner and that the chance of it being repeated in the future is so remote that his or her fitness to practise has not been impaired."*
- 2.9 Cohen goes on to provide that '*it must be highly relevant in determining...if fitness to practise is impaired that...first the conduct which led to the charge is easily remediable, second that it has remedied and third that it is highly unlikely to be repeated.*'
- 2.10 It is also important for Panels to recognise that the need to address the "critically important public policy issues" identified in *Cohen* - means that they cannot adopt a simplistic view and conclude that fitness to practise is not impaired simply on the basis that, since the allegation arose, the registrant has corrected matters or "learned his or her lesson".

3.0 The Role of the Council for Healthcare Regulatory Excellence (CHRE)

- 3.1 In accordance with section 29 of the NHS Reform and Health Care Professions Act 2002, CHRE can refer decisions made by panels of the Conduct and Competence or Health Committee to the High Court if they feel following a section 29 case meeting that the decision reached is "unduly lenient" or has been "under prosecuted". At the conclusion of all final or review hearings, HPC send a copy of the decision and order to the CHRE and provide copies of the transcripts and bundle of documents provided to the panel on request.
- 3.2 CHRE have considered [] HPC cases at section 29 case meetings and referred 5 cases to the High Court since 2004. Two of those cases were withdrawn by the CHRE before consideration by the High Court and the original decisions remain in force. One decision was considered by the High Court and remitted back to a panel for further consideration and the registrant was subsequently restored to the register with conditions of practice. In the final two cases, the cases were disposed of via consent

² EWHC 581(Admin)

and the cases remitted back to the HPC where one registrant was struck off the register and one registrant had a suspension order imposed. In the case where the registrant was struck off, a panel initially determined that the allegation against them was not well founded. That case was considered in 2008.

4.0 Proceeding with cases

4.1 When a decision is taken by a panel of the Investigating Committee that there is a case to answer, cases are always referred to panels of the Conduct and Competence Committee or Health Committee to determine whether the allegation is proven. It is not appropriate for cases to be withdrawn after an independent panel has reached a decision that there is a case to answer. The appropriate course of action is instead for the matter to be considered by a properly convened panel and for them to make that decision. As the onus is on the HPC to prove its case that the registrant's fitness to practise is impaired, the HPC will make representations to that effect but will not withdraw cases. This mechanism is a proportionate and appropriate mechanism to balance the human rights of the registrant whilst ensuring public protection.

5.0 Disposal of cases via consent

5.2 In appropriate cases, consideration will be given as to whether it is appropriate to 'dispose of a case via consent. The Practice note on this subject 'Disposal of cases via consent' provides that 'the consent process is a means by which the HPC and the registrant concerned can seek to conclude a case without the need for a contested hearing, by putting before a Panel an order of the kind which the Panel would have been likely to make in any event.'

5.3 Consideration will only be given to resolving a case via consent:

- after an Investigating Committee Panel has found that there is a "case to answer," so that a proper assessment has been made of the nature, extent and viability of the allegation;
- where the registrant is willing to admit the allegation in full (that the facts occurred, the ground is made out and that this amounts to impairment to practice). A registrant's insight into, and willingness to address, failings are key elements in the fitness to practise process and it would be inappropriate to dispose of a case via consent where the registrant denied liability; and
- where any remedial action proposed by the registrant and to be embodied in the Consent Order is consistent with the expected outcome if the case was to proceed to a contested hearing.

5.4 A key feature of the consent policy is that it is not a process where the Council will consider entering into negotiations to dispose of a case, particularly due to the need for a registrant to admit to the whole of the allegation rather than some or part of it. This mechanism also ensures that

cases where it is possible that the allegation is not going to be proven are disposed of this way, thereby balancing firmly the need to protect the public with the human rights of the registrant.

6.0 Statistics

6.1 Between April 2009 and January 2010 209 cases were concluded at a final hearing. Of those cases, 52 were not well founded, 25 percent of cases concluded. This includes some cases where more than one allegation was made against the same registrant. In 2008-2009, the number of cases where the allegation that the registrant's fitness to practise is impaired was not well founded was 40 cases or 23 percent of cases considered at final hearing.

6.2 The table below demonstrates the number of cases where the allegation was not well founded since April 2004.

Table 2: Number of 'Not well founded' decisions

Year	Number of not well-found cases	Number of concluded cases	Percentage of cases not well founded
2004-2005	3	45	7
2005-2006	1	51	2
2006-2007	18	96	19
2007-2008	26	156	17
2008-2009	40	175	23
2009-YTD Jan 2010	52	209	25
Total	140	732	19

6.3 The table below indicates how decisions have been made by panels between April 2008 and January 2010. This table indicates that a decision to find an allegation not well founded was the second most commonly used decision after striking off used by panels in this period.

Table 3: Decisions reached by Panels April 2008-YTD

Year	Struck Off	Suspended	Conditions	Caution	Amended	Removed	NFA	Not Well Founded	Total
2008-09	66	25	13	25	1	0	4	40	175
2009-YTD	55	13	12	39	0	6	6	52	209
Total	121	64	25	64	1	6	10	92	385

6.4 The next table indicates the decisions reached by panels since April 2008 by percentage.

Table 4: Decisions reached by panels, percentages April 2008-YTD

Decision	Number 2008-2009	Percentage 2008 – 2009	Number 2009-Jan YTD	Percentage 2009- Jan YTD
Striking Off	66	37.8	55	26
Suspension	25	14.3	39	18.7
Conditions of Practice	13	7.4	12	5.7
Caution	25	14.3	39	18.7
Removed*	0	0	6	2.9
Amended	1	0.6	0	0
No Further Action	4	2.3	6	2.9
Not Well Founded	40	22.9	52	25
Total	175	100	209	100

* Including removed via consent

7.0 Making the Decision

7.1 Panel may find that an allegation is not well founded when:

- the facts have not been proved by the HPC;
- the facts have been proved but do not amount to one of the grounds set out in Article 22 of the Order; or
- if the facts have been proved and that amounts to a ground but that does not amount to fitness to practise is impaired.

7.2 The next table demonstrates those cases considered between April 2009 and January 2010 and what stage in the process it was determined that the HPC had failed to prove its cases

Table 5: Break down of not well founded decisions April 2009 - January 2010

Element of Allegation	Number of cases
Facts	17
Grounds	10
Impairment	25
Total	52

7.3 The table above demonstrates that in 52 percent of cases, panels have found that the facts and grounds have been proven but that this does not amount to an impairment to practise. Of the cases considered, two were considered by panels of the Health Committee.

7.4 An analysis of the language used in cases indicates a number of consistent themes. An example of language uses is as follows:

Facts

- No evidence to support the facts alleged
- Insufficient evidence to support the facts
- Evidence of registrant preferred to evidence of witness
- No real prospect of HPC discharging the burden of proof

Misconduct

- Single lapse of judgement
- Single incident with no intent
- No contractual prohibition

Impairment

- Insight and acknowledgement of wrong doing and taken appropriate measures to deal with the stress that contributed to the actions
- Unique situation which was unlikely to recur
- Strong character evidence attesting to current fitness to practise
- Taken steps to update working practices, recognised mistakes and amended practice accordingly
- Taken steps to address the underlying facts which caused the misconduct
- Unfortunate one off incident
- One off incident in an otherwise unblemished career
- Misconduct demonstrates that the registrant was acting out of character
- Shortcomings were largely due to a combination of factors which are unlikely to recur.

7.5 That theme is that where a lack of competence or misconduct is found, but it is relatively minor or an isolated event where recurrence is regarded as unlikely, this does not amount to impaired fitness to practise. In the absence of other relevant factors (such as deterrent effect or the reputation of the profession etc), that approach must be correct. The executive proposes that this consideration should be taken into account when reviewing or updating policy in this area.

7.6 Another theme is that in some cases, panels prefer the evidence of the registrant. The practice note on case to answer provides that where there is a dispute in the evidence, a final hearing panel is best placed to resolve that dispute

8.0 The Purpose of fitness to practise proceedings

8.1 It is important to note that Fitness to practise proceedings are not intended to be punitive. The Panel's task is to determine whether, on the basis of the evidence before it, the registrant's fitness to practise is impaired. In effect, the task is to consider a registrant's past acts, determine whether the registrant's fitness to provide professional services is below accepted

standards and to consider whether he or she may pose a risk to those who may need or use his or her services in the future. Where such a risk is identified, the Panel must then determine what degree of public protection is required.

- 8.2 It is also important for Panels to remember that a sanction may only be imposed in relation to the facts which a Panel has found to be true or which are admitted by the registrant. Even if a Panel has determined that fitness to practise is impaired, it is not obliged to impose a sanction. In appropriate cases, a Panel may decide not to take any further action, for example, in cases involving minor, isolated, lapses where the registrant has apologised, taken corrective action and fully understands the nature and effect of the lapse.
- 8.3 The range of sanctions available to Panels must not influence the decision as to whether or not fitness to practise is impaired. The finding of impairment and sanctioning stages of a hearing should be (and be seen to be) separate elements of the process. To reinforce this point, Panels should retire to determine whether or not fitness to practise is impaired and then return to announce their decision and the reasons for that decision. Where the Panel has decided that fitness to practise is impaired it should then hear any submissions on behalf of the parties in relation to mitigating or aggravating factors before retiring again to determine what, if any, sanction to impose. The Panel should then return to announce that sanction and the reasons for that sanction.
- 8.4 Such considerations are a regular part of the ongoing training that is provided those that hear such cases on decision making.
- 8.5 It can perhaps be identified from a review of the analysis above that there are cases where it is possible that the decision in the case should have been to find the case that the registrant's fitness to practise is impaired well founded and then go on to impose no further action.

9.0 Impact of Representation

- 9.1 The next table demonstrates the number of cases where the allegation has not been well founded and whether the registrant attended the hearing and were not represented. The HPC has designed its processes and procedures to ensure that as far as possible they are open and accessible to all. A number of Practice notes have been produced in this area including 'Proceeding in the Absence of the registrant' and 'Unrepresented Parties'.
- 9.2 The Unrepresented parties practice note particularly provides guidance to panels on dealing with registrants who are not represented at final hearing. Registrants are also advised of their right to attend the hearing and as the paper on length of time sets out, are provided with substantial notice of the date of the hearing. It is also however recognised that fitness to practise proceedings can be daunting and the Executive do propose further improve the information that is available for those attending hearings through improvement to standard letters, reviewing and updating

the literature that is produced and through the production of a DVD/web video.

Table 6: Not well founded by profession and representation April 2009-YTD

Profession	No	Yes - by representative	Yes - by self	Total
AS	0	1	0	1
BS	0	2	1	3
CH	0	6	1	7
CS	0	1	0	1
DT	0	1	0	1
ODP	1	1	2	4
OT	2	4	4	10
PA	4	3	0	7
PH	0	11	0	11
RA	0	4	0	4
SL	0	1	2	3
Total	7	35	10	52

9.3 The table above demonstrates that in cases where the allegation was not proven between April 2009 and January 2010. 45 out of 52 registrants (86 percent) either attended the hearing or were represented. In 124 decisions in 2009-YTD, the registrant has either attended or been represented at the final hearing. This amounts to 59 percent. In 2008-2009, 54 percent of registrants were either represented or attended a final hearing and in 88 percent of cases where the allegation was not well founded the registrant either attended or was represented at the hearing.

Table 7: Representation and Not Well Founded – Percentage

Year	Total Number of Cases	% represented or attended	Number of Cases Not well founded	% represented or attended.
2008-2009	175	54	40	88
2009 – Jan YTD	209	59	52	86

9.4 It can therefore perhaps be argued that attending the hearing is clearly advantageous to the registrant as they, through their attendance at the hearing can demonstrate and provide evidence on factors which are relevant to finding whether fitness to practise is impaired

10.0 Type of Complainant

The table below indicates that in 80 percent of cases where a member of the public is the original complaint type, the facts of the allegation were not proved. This perhaps indicates why there is a level of dissatisfaction from this group as to the outcome of the complaint. This again suggests that further work should be done on explaining the purpose of the fitness to practise process as indicated by the recommendations resulting from the expectations of complainant's research.

Table 8: Not well founded and complainant type April 2009-YTD

Element of Allegation	Complainant Type						
	22(6)	Employer	Other	Police	Public	Registrant	Total
Not well found- facts	1	5	1	0	8	2	17
Not well found-ground	1	4	2	0	1	2	10
Not well found-impairment	4	17	0	1	1	2	25
Total	6	26	3	1	10	6	52

11.0 Case to Answer decision making

11.1 Of the 52 cases where a not well founded decisions, in all but five cases the registrant provided representations to the Investigating Committee Panel at the 'case to answer' stage. This perhaps indicates that the 'realistic prospect' test is not properly being applied or that representations provided by registrants do not cover fully the issues at hand which are then fully reviewed at hearing. There is a careful balance to strike between referring cases or not, particularly given that the evidence gathered as part of the Investigating Committee stage will not be fully assessed until the final hearing. It perhaps also indicates the need for further clinical or expert evidence to be sought in cases where there is a dispute in the evidence.

11.2 The Executive also suggests that a clearer understanding of what fitness to practise is, for the Council, will assist in the decision making reached at both the not well founded and no case to answer stages of fitness to practise proceedings.

12.0 Recommendations and Conclusions

12.1 The Executive proposes that as a result of this review, the CHRE report into handling complaints and the expectations of complaints work that the Committee agree to the following recommendations

- Further guidance should be provided to registrants on the meaning of fitness to practise
- Further information should be provided to registrants on what information they should consider providing at the case to answer stage
- No case to answer and not well founded decision making to be an ongoing focus at panel refresher training
- That further exploration should be undertaken into the meaning of fitness to practise in HPC's context
- That the Executive should keep under review the relevant practice notes in this area and update accordingly
- That when the HPC are unable to prove its case, clear and early indication should be provided to the registrant to that effect with clear criteria and assessment forms for doing so
- That registrants are encouraged to attend hearings and to provide their representations.