

Council – 6 December 2011

Practice Note: Costs

Executive summary and recommendations

**Introduction**

At its meeting in October 2011 the Council asked for further information about the use of cost powers in fitness to practise proceedings. The attached paper provides more detail on that topic.

**Decision**

The Council is asked discuss the attached paper on cost powers.

**Background information**

None

**Resource implications**

None

**Financial implications**

None

**Appendices**

Paper – Cost powers in fitness to practise proceedings

**Date of paper**

24 November 2011

## **Cost powers in fitness to practise proceedings**

### **1 Introduction**

- 1.1 At its meeting in October 2011, the Council discussed and considered the advice by the Council for Healthcare Regulatory Excellence (CHRE) on 'Modern and Efficient Adjudication'. CHRE referenced in their advice the suggestion by the Office of the Health Professions Adjudicator (OHPA) about looking at how costs powers can be used by regulators in fitness to practise proceedings.
- 1.2 The Executive proposed that cost orders could be construed as inconsistent with the principles which underpin the purpose of fitness to practise proceedings for the following reasons.
- The purpose of fitness to practise proceedings is protection of the public based as far as possible on the principles of restorative and rehabilitative justice. Cost awards appear to be more aligned with a retributive model of justice.
  - A key component of robust fitness to practise proceedings is involvement of all parties in those proceedings.. If the registrant concerned was facing costs they may be reluctant to fully engage in the process, which could compromise the administration of justice.
- 1.3 During the course of discussing that paper, the Council acknowledged the views of the Executive but asked for further information about the use of cost powers in regulatory proceedings.
- 1.4 This paper addresses the issue of cost awards and financial penalties in the fitness to practise function of the statutory regulators as it relates to individual registrants. It does not examine the existence or otherwise of such provisions in other administrative functions or in regulating businesses, where relevant.

### **2 Cost awards**

- 2.1 Costs awards are a means to reimburse the "other party" for costs incurred in litigation. They are also used as a deterrent to bringing proceedings in what would be an otherwise 'weak' case.
- 2.2 The awarding of costs against the parties involved follows the event. Their award is designed to act as disincentive to those who might otherwise bring unmeritorious claims. It is argued in some quarters that such an economic disincentive reduces the burden on the system and ensures

cases are dealt with expeditiously. However, the standards that can be applied to those that are represented by a legally qualified person cannot be applied to those who are representing themselves and more flexibility is afforded to such individuals in considering the awarding of costs. This is because the 'litigant in person' will not necessarily have the same understanding of the process as the legally qualified person.

- 2.3 Amongst the nine UK regulators overseen by the CHRE, none have the powers to award costs against registrants during the course of fitness to practise proceedings. Nor are there any powers for costs to be awarded against the regulator.

### **3 The award of costs in other tribunals**

- 3.1 Generally, tribunals in the United Kingdom do not have the power to award costs. One exception is the Employment Tribunal (ET). However, the ET determines disputes between two independent parties (an employer and employee or former employee), whereas most tribunals are concerned with adjudicating upon the interaction between individuals and emanations of the State (e.g. disputed welfare benefit claims).

- 3.2 The ET procedural rules allow significant cost awards to be made where the ET considers that a party has acted

*'vexatiously, abusively, disruptively or otherwise unreasonably; or where the tribunal considers that 'the bringing or conducting of the proceedings by a party has been misconceived.'*<sup>1</sup>

- 3.3 The Government justified the introduction of these costs powers on the basis that there were "too many weak cases in the system causing significant delays for those with genuine claims". However, groups such as Citizens Advice warned at the time that, as well as possibly deterring some 'weak' cases, the changes would lead to valid and deserving cases being withdrawn for fear of a substantial costs award, noting that claimants may understand the moral strength of their case but have little idea of its legal strength and thus its prospects of success or failure.

- 3.4 The ET's costs powers are not new but were a move from nominal costs to significant costs awards (up to £10,000). An analysis by Citizens Advice suggests that since the change was introduced, there has been a four-fold increase in the number of costs awards made but the ET's case disposal rate has remained relatively constant.

- 3.5 Research by the Ministry of Justice in 2009 showed that 39% of ET compensation awards were never recovered and of those that were recovered, only 53% were recovered in full. This has led to the introduction of new powers which enables the ET to authorise the recovery of these debts by High Court Enforcement Officers.

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<sup>1</sup> Schedule 1, Rule 40(2) The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004

## 4 Financial penalties

- 4.1 Some regulators are able to ‘fine’ a registrant as one possible outcome of fitness to practise or similar proceedings. The imposition of a financial penalty is different to the award of costs in that they are imposed as an outcome of a hearing.
- 4.2 Amongst the nine UK health regulators, only the General Optical Council (GOC) has the power to impose a financial penalty. The GOC can impose a financial penalty when it is found that a registrant is not fit to practise or train or run a General Optical Council – registered business. The GOC ‘Fitness to Practise Panels Hearing Guidance and Indicative Sanctions’ provides more detail on the imposition of financial penalties. It provides that

*‘The Fitness to Practise Committee has the power to impose a financial penalty order of any sum not exceeding £50,000. The order may be made in addition to, or instead of an erasure order, suspension or conditional registration order.’ It goes on to state that ‘Where the Committee is considering making such an award against an individual registrant, the registrant’s ability to pay should be taken into account.’<sup>2</sup>*

- 4.3 There is no other provision for the imposition of financial penalties (or fines) in regulatory proceedings in HPC’s sector.

## 5 Conclusion

- 5.1 Fitness to Practise proceedings are not analogous to litigation between two parties. They are not about litigation between two individuals. Instead the HPC brings a case about a registrant, having followed a prescribed process laid down in legislation, in order to protect the public. The registrant does not normally play a role in instigating these proceedings.
- 5.2 Further, the imposition of costs requires significant time and resource by the adjudicating body with the associated bureaucracy to support it. The costly assessment exercise required is not always proportionate to the costs that would be recovered as a result.
- 5.2 The Executive remain of the view that the use of cost powers in proceedings about the fitness to practise of individual registrants is disproportionate and not sufficiently aligned to the purpose of those proceedings. The purpose of the fitness to practise process is public protection and the HPC’s approach as far as is possible is to align with the models of restorative and rehabilitative justice.

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<sup>2</sup> General Optical Council Fitness to Practise Panels Hearings Guidance and Indicative Sanctions, January 2011