

Fitness to Practise Committee – 13 October 2011

Practice Note: Case to Answer

Executive summary and recommendations

Introduction

As part of the work undertaken to review the number of not well founded decisions, it was identified that further guidance was required on the role of the Investigating Committee in drafting allegations and on the issue of evidence conflicts.

Decision

The Committee is asked to discuss the practice note and recommend that the Council approve the Practice Note – Case to Answer

Background information

All practice notes are placed on the HPC website and provided to stakeholders where required. Reference to the appropriate practice notes is provided in standard correspondence.

Resource implications

None

Financial implications

None

Appendices

Practice Note- Case to Answer

Date of paper

3 October 2011

PRACTICE NOTE

“Case to Answer” Determinations

This Practice Note has been issued by the Council for the guidance of Practice Committee Panels and to assist those appearing before them.

Introduction

Article 26(3) of the Health Professions Order 2001¹ provides that, where an allegation is referred to the Investigating Committee, it shall consider, in the light of the information which it has been able to obtain and any representations or other observations made to it, whether in its opinion, there is a “case to answer”.

The “realistic prospect” test

In deciding whether there is a case to answer, the test to be applied by a Panel, based upon the evidence before it, is whether there is a “realistic prospect” that the HPC will be able to establish at a hearing that the registrant’s fitness to practise is impaired.

That test (which in some proceedings is also known as the “real prospect” test) is relatively simple to understand and apply. As Lord Woolf MR noted in *Swain v Hillman*²:

“The words ‘no real prospect of succeeding’ do not need any amplification, they speak for themselves. The word ‘real’ distinguishes fanciful prospects of success... or, as [Counsel] submits, they direct the court to the need to see whether there is a “realistic” as opposed to a “fanciful” prospect of success.”

Applying the test

In determining whether there is a case to answer, the Panel must decide whether, in its opinion, there is a “realistic prospect” that the HPC (which has the burden of proof)³ will be able to prove the facts alleged and, in consequence, that a determination will be made that the registrant’s fitness to practise is impaired.

¹ SI 2002/254

² [2001] 1 AllER 91

³ That burden of proof only applies to findings of fact. Whether those facts amount to the statutory ground and constitute impairment is a matter of judgement for the Panel conducting the final hearing *CRHP v. GMC and Biswas* [2006] EWHC 464 (Admin).

The test does not call for substantial inquiry or require the Panel to be satisfied on the balance of probabilities. The Panel only needs to be satisfied that there is a realistic or genuine possibility (as opposed to remote or fanciful one) that the HPC will be able to establish its case.

In reaching its decision, a Panel:

- should recognise that it is conducting a limited, paper-based, exercise and not seek to make findings of fact on the substantive issues;
- may assess the overall weight of the evidence but should not seek to resolve substantial conflicts in that evidence. ~~The assessment of the relative strengths of competing evidence can only be properly undertaken at a full hearing.~~

It is for the HPC to prove the facts alleged. Registrants, *not for the registrant to disprove them*. Although registrants are not obliged to provide any evidence, many will choose to do so voluntarily and any such evidence should be considered by the Panel. ~~However, it will rarely resolve matters at this stage, as it will typically conflict or compete with the HPC's evidence and, therefore, will need to be tested at a hearing.~~

Resolving substantial conflicts in the available evidence, such as assessing the relative strengths of competing arguments is not a task which can be undertaken by an Investigating Committee Panel. However, the mere existence of such a conflict does not mean that there is a case to answer. Panels must consider whether, regardless of how the conflict is resolved, the evidence has a bearing on the issue of impaired fitness to practise.

~~In applying the test~~ *In deciding whether there is a case to answer*, Panels need to take account of the wider public interest, including protection of the public and public confidence in both the regulatory process and the profession concerned.

The test applies to the whole of the allegation, that is:

1. the facts set out in the allegation;
2. whether those facts amount to the 'statutory ground' of the allegation (e.g. misconduct or lack of competence); and
3. in consequence, whether fitness to practise is impaired.

In the majority of cases, the evidence will relate solely to the facts and, typically, this will be evidence that certain events involving the registrant occurred on the dates, and at the places and times alleged.

It will be rare for separate evidence to be provided on the 'statutory ground' or the issue of impairment, as these are matters of judgement for the Panel. For example, does, the factual evidence suggests that the service provided by the registrant fell below the standard expected of a reasonably competent practitioner or that the registrant's actions constitute misconduct when judged against the established

norms of the profession. In reaching that decision the Panel may wish to have regard to the HPC Standards of Proficiency or Standards of Conduct, Performance and Ethics.

Review and amendment of allegations

In considering whether there is a case to answer, Panels should consider each element of the allegation, to see whether there is evidence to support the facts alleged and whether those facts would amount to the statutory ground and establish that fitness to practise is impaired. Panels should also consider allegations 'in the round' to ensure that they strike the right balance in terms of the case which the registrant must answer.

In doing so, the Panel may need to amend or omit elements of an allegation. As allegations are drafted at an early stage in a dynamic investigative process, it is important that Panels give critical scrutiny to the drafting of allegations put before them, to ensure that they are a fair and proper representation of the HPC's case and fit for purpose.

If a Panel varies or extends an allegation to a material degree, the registrant concerned should be given a further opportunity to make observations on the revised allegation before a final case to answer decision is made.

Further guidance on the drafting of fitness to practise allegations is set out in the Annex to the HPC policy document "Allegations: Standard of Acceptance".

Impaired fitness to practise

In deciding whether there is a realistic prospect that fitness to practise is impaired Panels should consider the nature and severity of the allegation.

People do make mistakes or have lapses in behaviour and HPC would not be enhancing public protection by creating a 'climate of fear' which leads registrants to believe that any and every minor error or isolated lapse will result in an allegation being pursued against them.

Determining, on the basis of a limited, paper-based exercise, whether there is a realistic prospect of establishing impairment can sometimes be difficult. A useful starting point for Panels is to consider whether the HPC's case includes evidence which, if proven, would show that the registrant does not meet a key requirement of being fit to practise, in the sense that the registrant:

- is not competent to perform his or her professional role safely and effectively;
- fails to establish and maintain appropriate relationships with service users, colleagues and others; or
- does not act responsibly, with probity or in manner which justifies the public's trust and confidence in the registrant's profession.

A presumption of impairment should be made by Panels in cases where the evidence, if proven, would establish:

- serious or persistent lapses in the standard of professional services;
- incidents involving:
 - harm or the risk of harm;
 - reckless or deliberate acts;
 - concealment of acts or omissions, the obstruction of their investigation, or attempts to do either;
- sexual misconduct or indecency (including any involvement in child pornography);
- improper relationships with, or failure to respect the autonomy of, service users;
- violence or threatening behaviour;
- dishonesty, fraud or an abuse of trust;
- exploitation of a vulnerable person;
- substance abuse or misuse;
- health problems which the registrant has but has not addressed, and which may compromise the safety of service users;
- other, equally serious, activities which undermine public confidence in the relevant profession.

No case to answer

A decision that there is “no case to answer” should only be made if there is no realistic prospect of a finding of impairment being made at a final hearing, for example, because there is insufficient evidence to substantiate the allegation, the available evidence is manifestly unreliable or discredited or the evidence, even if found proved, would be insufficient for another Panel to make a finding of impairment. In cases where there is any element of doubt, Panels should adopt a cautious approach at this stage in the process and resolve that conflict by deciding that there is a case to answer.