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Dear Kelly

Striking off in competence and health cases

You asked for my advice on whether a striking off order can be made when a suspension order, which was imposed in respect of a competence or health allegation, is reviewed under Article 30 of the Health Professions Order 2001 ('the Order').

As you will be aware, Article 30 of the Order provides that suspension and conditions of practice orders must be reviewed before they expire and also enables applications to be made at other times to vary, replace or revoke an existing order. In relation to such reviews or applications, Articles 30(1)(b) and 30(4)(d) respectively provide that the relevant Practice Committee may:

> "... with effect from the expiry of the order, make an order which it could have made at the time it made the order being reviewed;" and
>
> "... replace the order with any order which it could have made at the time it made the order being reviewed and the replacement order shall have effect for the remainder of the term of the order it replaces;"

Thus, in either situation, the Practice Committee's powers are clearly limited to making an order which could have been made at the time the original order was made.

The difficulty that this clear and unambiguous limitation presents is that Article 29(6) of the Order provides that:

> "A striking-off order may not be made in respect of an allegation of the kind mentioned in article 22(1)(a)(ii) or (iv) [i.e. a competence or health allegation] unless the person concerned has been continuously suspended, or subject to a conditions of practice order, for a period of no less than two years immediately preceding the date of the decision of the Committee to make such an order."

Clearly, unless a registrant has already been suspended or subject to conditions of practice for the requisite two years, a striking off order cannot be made when a competence or health allegation is first heard. Consequently, if a suspension or conditions of practice order is made against that registrant then, when it is reviewed, striking off will not be an option as a striking off order is not an order which could have been made at the time the original order was made. Thus, unless striking off was an option when the case was first heard (because the registrant had been subject to prior suspension or conditions of practice for two years), it cannot be imposed under Article 30 in relation to competence and health allegations.

In addition, from the language of Article 29(6) it would seem that the power to make a striking off order in respect of a competence or health allegation only becomes available when a further allegation is made (i.e. one which is different from the original allegation which led to suspension or conditions of practice being imposed on the registrant).

At first sight it is easy to assume that there is a drafting error in Articles 29 and 30, as it is reasonable to suggest that Parliament intended that the HPC would be able to strike a person off on a second review of a suspension or conditions of practice which was imposed in relation to competence or health. However, upon reflection, I believe that this limitation on striking off may have been intentional.

Where registrants are suspended or subject to conditions of practice in respect of a competence or health allegation there is no reason for assuming that they will automatically be removed from the register at the end of two years and, it is entirely possible that their competence or health will improve over a longer period of time, enabling them to return to practice. In such circumstances the review of orders will be limited to determining whether an improvement has occurred which would allow the burden of the existing order to be lessened or, if not, to continue the existing order for a further period or, in the case of a conditions of practice order, to vary it or replace it with a suspension order.

Where the Council believes that the registrant has passed the "point of no return" and should be struck off, it will have to make an allegation to that effect and prove its case.

Obviously, it would be unlikely to be an entirely new allegation in the sense that "last time we said you harmed patient X, now we are saying you harmed patient Y" but more likely "you were suspended for harming patient X and, since then, the information available to us shows that your condition has deteriorated to the point that there is no realistic prospect of you being able to return to safe and effective practice". This does not constitute double jeopardy as the new allegation would relate to events and circumstances which are linked to, but occurred after, the previous decision.

In practice, allegations of this kind would be made using the Article 22(6) power to treat a matter as if it was an allegation and, ideally with the consent of the registrant, could by-pass the case to answer stage and be sent directly to the Practice Committee which was to hear the matter. The evidence put before the Practice Committee would include the existing order and, unusually in HPC proceedings, the Council would need to make a submission as to sanction and seek a striking off order. Provided that it was expressed in those terms – as a submission – and appropriate advice was given to the Panel about its discretion to decide the case on its

merits, this causes no difficulties and would be in line with the Administrative Court's decision in *R (Bevan) v GMC*.

The public policy behind the limits on sanctions in competence and health cases is that these are often "no fault" allegations. In cases where competence or health is a factor but where the registrant's behaviour amounts to misconduct – for example, being aware that health or competence is failing but continuing to practice in reckless or wilful disregard to the impact on patients – HPC needs to ensure that allegations are framed appropriately so that the option of striking off is available at the outset. That approach is supported by case law, notably the decision in *Crabbie v GMC*.

It would also be possible to reduce the number of competence and health cases in which a second, striking off, allegation would need to be pursued if registrants who are subject to a suspension order could remove themselves from the register voluntarily. I am aware that, as required by Article 11(3)(b) of the Order, the Council has made rules which prevent a person's registration from lapsing if he or she is the subject of, *inter alia*, a suspension order, but I can see no reason why a Practice Committee, when conducting a review, should not revoke a suspension order in a case where the registrant asks it to do so, provided that he or she gives an undertaking to immediately apply for removal from the register and, on the facts, there is no risk to the public (for example, where a registrant in failing health who is suspended wishes to retire). The public interest would not be served by insisting upon bringing proceedings in such a case when, in practice the same end result (of removing the person from practice) could be secured without the cost and distress of a hearing.

Perhaps we can discuss this matter further once you have had the opportunity to consider this letter.

Kind regards.

Yours sincerely

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