

Fitness to Practise Committee – 21 October 2010

Not Well Founded Review

Executive summary and recommendations

Attached as an appendix to this paper is a report reviewing cases between 1 April 2010 and 31 July 2010 where panels of the Conduct and Competence Committee or Health Committee have determined that an allegation that a registrant's fitness to practise is impaired is 'not well founded'. This is to be read in conjunction with a report on the same topic submitted to this Committee on 25 February 2010. A copy of that paper can be found here <http://www.hpc-uk.org/assets/documents/10002C8920100225FTP-10-notwellfoundeddeterminations.pdf>

Decision

The Committee is asked to discuss the attached paper reviewing not well founded cases;

Background information

This paper should be read in conjunction with the research into 'Expectations of complainants' and in particular the work undertaken within this project to explain the meaning and purpose of fitness to practice and the roles of the regulator.

Resource implications

None

Financial implications

None

Appendices

None

Date of paper

4 October 2010

Not well founded case review - 1 April to 31 July 2010.

1.0 Introduction

1.1 When reviewing not well found cases at the beginning of 2010 the Executive suggested that a clearer understanding of the meaning of 'fitness to practise' would assist in decision making at both the not well found and no case to answer stages of fitness to practise proceedings. As a result a number of recommendations were made to the Committee in February this year. These included;

- Providing further guidance to registrants on the meaning of fitness to practise
- Providing further information to registrants on what information they should consider providing at the case to answer stage
- Making no case to answer and not well founded decision making an ongoing focus at panel refresher training
- Undertaking further exploration into the meaning of fitness to practise in HPC's context
- Keeping under review the relevant practice notes in this area and updating Council accordingly
- Providing clear and early indication to the registrant in cases where the HPC is unable to prove its case
- Encouraging registrants to attend hearings and provide their representations.

1.2 This report reviews not well founded decisions made between April and July 2010 and provides detail on the progress that has been made in relation to the recommendations above. It also explores the role played by CHRE in reviewing the quality of decisions made by Conduct and Competence Committees.

2.0 Case to Answer

2.1 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. So far this year there has been no significant change in the percentage of 'case to answer' decisions made by committees at this stage in the process.

Table 1: Number of Case to Answer Decisions April 2005 – 31 July 2010 (YTD)

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
2009-2010	499	291	58
2010-YTD	165	102	62
Total	1728	1035	60%

3.0 Proceeding with cases

3.1 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 that a registrant's fitness to practise is impaired, it 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.

4.0 Statistics

4.1 Between 1 April 2010 and 31 July 2010, 132 cases have been concluded at a final hearing. Of those cases 30 were not well founded, which is 23 percent of cases concluded. This includes some cases where more than one allegation was made against the same registrant. In 2009-2010, the number of cases where the allegation that the registrant's fitness to practise is impaired was not well founded was 76 cases or 30 percent of cases considered at final hearing.

4.2 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-founded 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
2009-2010	76	256	30
2010-YTD	30	132	23
Total	194	911	21

4.3 The table below indicates how decisions have been made by panels between April 2008 and 31 July 2010. This table indicates that a decision to find an allegation not well founded has been the second most used outcome overall during this period and the most used outcome in 2009-2010 and from 2010 to date.

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
2009-2010	65	40	15	46	1	10	3	76	256
2010-YTD	25	22	13	27	0	6	9	30	132
Total	156	87	41	98	2	16	16	146	563

4.4 The next table indicates the decisions reached by panels since April 2008 by percentage. Whilst not well-founded decisions have remained the most used outcome in 2010-YTD the percentage of final hearings resulting in this outcome has reduced considerably from the previous year.

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

Decision	Number 2008-2009	Percentage 2008 – 2009	Number 2009-2010	Percentage 2009-2010	Number 2010-YTD	Percentage 2010-YTD
Striking Off	66	37.8	65	25.3	25	18.9
Suspension	25	14.3	40	15.6	22	16.6
Conditions of Practice	13	7.4	15	5.8	13	9.8
Caution	25	14.3	46	17.9	27	20.4
Removed*	0	0	10	3.9	6	4.5
Amended	1	0.6	1	0.4	0	0
No Further Action	4	2.3	3	1.1	9	6.8
Not Well Founded	40	22.9	76	29.6	30	22.7
Total	175	100	256	100	132	100

* Including removed via consent

5.0 Making the Decision

5.1 A 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.

5.2 The next table demonstrates those cases considered between 1st April 2010 and 31 July 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 01 April 2009 - 31 July 2010

Element of Allegation	Number of cases
Facts	9
Grounds	5
Impairment	16
Total	30

5.3 The table above demonstrates that in 53 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.

5.4 An analysis of the language used in cases indicates a number of consistent themes. An example of common phrases used is as follows:

Facts

- No evidence to support the facts alleged on the balance of probabilities
- There could have been alternative explanations
- Not persuaded by the quality of the evidence
- Not satisfied by the value of hearsay evidence
- Terms of the allegation rendered further investigation unnecessary
- Conflicts in the evidence of two witnesses
- Oral evidence more valuable than written
- Evidence was subjective in nature
- Evidence of registrant preferred to evidence of witness

Misconduct

- Single lapse of judgement
- Evidence falls short of demonstrating lack of competence
- Isolated incident/clerical error, which does not meet the threshold
- No intention to mislead
- No contractual prohibition

Impairment

- As part of his/her insight into this unacceptable behaviour the registrant has fully participated in the regulatory process
- No evidence to demonstrate the actions which led to the police caution demonstrate a pattern of behaviour which would compromise the reputation of the profession concerned
- Gave an honest account of the failings
- Coping strategies have been successfully implemented to deal with health issues
- Personal circumstances caused a great deal of stress in their capacity as a carer. A high degree of insight into the professional shortcomings was demonstrated.
- Impressed by the oral testimony of the Registrant and witness. The evidence established that the Registrant is a highly competent and well respected professional.
- Conduct which led to these proceedings has been remedied and it is highly unlikely to be repeated.
- Unique situation which was unlikely to reoccur
- Unfortunate one off incident in an otherwise unblemished career

5.5 There are a number of themes that can be identified by these statements. Firstly it is clear that, when the facts of an allegation are not well found, this is usually due to the standard or nature of the evidence presented. D

- 5.6 There is also evidence to indicate that a Panel occasionally finds itself restricted in making findings on the facts because of the manner in which an allegation has been drafted.
- 5.7 FTP Case Managers undertook a detailed training course in May 2010 in order to improve the way that allegations are drafted. The training included consideration of the three-stage decision making process undertaken by Panels and the challenges faced in order to prove each element of a written allegation. Numerous case studies were also undertaken to examine the structure, style and content of effective allegations. The aim of this was to ensure a consistent approach in which Case Managers accurately capture the substance of each complaint and provide an appropriate amount of detail on the central facts.
- 5.8 Investigating Committee Panels also play a central role in ensuring that an allegation is drafted in an appropriate manner. In asking whether there is a 'case to answer' the Committee examine whether there is a 'realistic prospect' that each part and particular of an allegation can be proven at a final hearing.
- 5.9 If the Committee is not satisfied that evidence exists to prove a part or particular it may remove it from the allegation at this stage. It may also suggest minor amendments to the manner in which the allegation has been drafted and remove certain elements if they detract from the accuracy of it. If the Committee is not satisfied with the general accuracy or structure of an allegation and feels that broad changes are required it will provide specific guidance and direct the Case Manager to redraft the allegation and provide it to the registrant again. The registrant will then be given a further 28 days to provide representations before the matter is reconsidered by an Investigating Committee Panel.
- 5.10 When the facts of an allegation are proven at a final hearing but the Conduct and Competence Committee find they do not amount to a ground (i.e misconduct) this is usually because an incident was isolated and uncharacteristic in nature or that the conduct was not serious enough in nature to breach our standards.
- 5.11 Where a lack of competence or misconduct has been found, but it is seen to be a relatively minor or isolated event and/or recurrence is regarded as unlikely, a case is more often considered not well found by a Panel at the stage of impairment. In the absence of other relevant factors (such as deterrent effect or the reputation of the profession etc), that approach is correct. The executive always takes this consideration into account when reviewing or updating policy in this area.

- 5.12 It should also be noted 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. Accordingly there is no suggestion that a 'case to answer' decision at the Investigation Committee Panel stage is incorrect in such circumstances.
- 5.13 It can be identified from a review of the analysis above that there may be cases where a more appropriate course of action could have been to find the allegation of impairment well founded and then go on to impose no further action. It would appear that this approach is being considered more frequently by Panels this year as a decision to take no further action has been chosen in 6.8% of cases to date, as opposed to 1.1% of cases in 2009-2010.

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

- 6.1 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 Hearing Officers 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.
- 6.2 In 2009-10 there were no cases referred to the High Court by CHRE and there have been no referrals so far during 2010-11.
- 6.3 If minor concerns are identified during the review of a decision CHRE will write to the HPC in order to highlight where it considers errors have been made and identify 'learning points' arising from this. Since April 2008 learning points have been identified in relation to 45 hearings. 4 of these hearings dated back to 2007, 19 of the hearings took place in 2008-2009 and on 17 took place in 2009-2010. So far this year learning points have been identified following concerns raised in 5 cases.

Table 6: Number of learning points identified by CHRE 01 April 2008 - 31 July 2010 (YTD)

Year	Number decisions referred to CHRE	Number of decisions in which 'learning points' were identified	Percentage of decisions in which 'learning points' were identified
2008–2009	311	19	6.1
2009-2010	426	17	3.9
2010-YTD	179	5	2.7
Total	916	41	4.4

6.4 When responding to learning points that have been suggested by CHRE the Director of Fitness to Practise has highlighted that established procedures exist in order to place Fitness to Practise Panels at arms length from the Executive. This ensures that decision making is as independent and impartial as possible. Accordingly it is not usually appropriate to comment on the decisions reached by Panels, or in particular to 'second guess' why they chose to impose one sanction over another. In certain cases, however, the Director of Fitness to Practise will pass CHRE comments to all Panel members (rather than just the panel members relating to an individual case) as part of a continual process of improving the quality of decision making.

7.0 Impact of Representation

7.1 The next table demonstrates the number of cases where the allegation is not well founded in comparison to whether the registrant attended the hearing and whether they were represented. The HPC is aware that legal or professional representation is not accessible to all registrants and has designed its processes to ensure that, as far as possible, hearings 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'.

7.2 The Executive is currently working to improve the information that is available to participants prior to the hearing through improvement to standard letters, reviewing and updating the literature that is produced and through the production of new multi-media options and an online video on the HPC website.

Table 7: Not well founded by profession and representation April 2010-YTD

Profession	No	Yes - by representative	Yes - by self	Total
AS	0	0	0	0
BS	1	0	0	1
CH	0	3	0	3
CS	0	0	0	0
DT	0	0	0	0
HAD	0	1	0	1
ODP	0	1	1	2
OT	0	3	1	4
PA	2	4	3	9
PH	1	5	0	6
PSY	0	1	0	1
RA	0	3	0	3
SL	0	0	0	0
Total	4	21	5	30

7.3 The table above demonstrates that in cases where the allegation was not proven, between 1 April 2010 and 31 July 2010, 26 out of 30 registrants (87 percent) either attended the hearing or were represented. In all decisions at final hearings during this period the registrant has either attended or been represented on 86 occasions. This amounts to 65 percent. In 2009-2010, 62 percent of registrants were either represented or attended a final hearing and in 84 percent of cases where the allegation was not well founded the registrant either attended or was represented at the hearing.

Table 8: Representation and Not Well Founded – Percentage

Year	Total Number of Cases	% represented or attended	Number of Cases Not well founded	% represented or attended.
2009-2010	256	62	76	84
2010-YTD	132	65	30	87

8.0 Type of Complainant

8.1 The table below indicates that in cases where a member of the public or an employer is the original complainant the facts of the allegation are often found to be not proven at a final hearing.

Table 9: Not well founded and complainant type April 2010 - YTD

Element of Allegation	Complainant Type						
	22(6)	Employer	Other	Police	Public	Registrant	Total
Not well found- facts	1	4	0	0	3	1	9
Not well found- grounds	0	1	0	0	1	3	5
Not well found- impairment	2	11	0	2	1	0	16
Total	3	14	0	2	5	4	30

- 8.2 This may indicate why there has been a level of dissatisfaction from members of the public and employers as to the outcome of some complaints. Work is currently being undertaken by the Executive to manage the expectations of those who complain and to increase understanding of what we mean by fitness to practise. This includes a general review of the relationship with employers, including numerous meetings with Ambulance Trusts in 2010. There has also been a review of the documentation used by complainants to make initial contact with the HPC, such as the complaint referral forms and information brochures on reporting concerns. Further information on all the work being done on this project is included in a separate paper to this Committee.
- 8.3 When a complaint originated from an employer a case is frequently not proven at the stage of impairment. In some cases this is because implementation strategies or retraining have been successfully completed by the registrant during the period of investigation by the Fitness to Practise Department. While this is not a problem in principal, the Executive recognises that it may be difficult in some circumstances to make an accurate assessment of a registrant's current fitness to practise if there have been excessive delays in the investigation of a complaint.
- 8.3 The requirement to progress cases expeditiously is contained in Article 32(4) of the Health Professions Order 2001. The Fitness to Practise department adheres to this by ensuring that all cases under investigation are reviewed and, if possible, progressed every two weeks. When a date for a final hearing has been set the Head of Adjudication will make a stringent analysis of any adjournment requests that are received. Such requests will only be successful where there is evidence to demonstrate that hearing the case on the scheduled date would result in clear prejudice on the registrant's part.

9.0 Case to Answer decision making

- 9.1 Of the 76 cases where a not well founded decision was made during 2009-2010, in all but eight cases the registrant provided representations to the Investigating Committee Panel at the 'case to answer' stage. Of the 30 cases where a not well founded decision was made between 01 April 2010 and 31st July 2010 representations were made by the registrant at the case to answer stage in all but 6 cases. This may suggest that representations provided by registrants do not adequately cover the issues at hand which are then fully reviewed at hearing.
- 9.2 It may also indicate that the 'realistic prospect test' has been misapplied on a number of occasions by the Investigating Committee Panel. 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 is not fully tested 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. Information on the work being done to address these matters is highlighted below and fully explored in a separate paper reviewing Investigating Committee Decisions, which is presented to this Committee.

10.0 Summary of work undertaken in 2010

- 10.1 As stated earlier the Fitness to Practise Department is in the process of revising a number of standard procedures and documents in order to implement recommendations which should help to minimise the occurrence of not well found decisions at the hearings stage. A number of central developments have been touched upon in this paper and are summarised below;
- 10.2 The general process of referring cases to the Investigating Committee Panel has been reviewed and changes have now been implemented to ensure that the 'case to answer' test is being applied accurately and consistently. One central revision is the introduction of a more detailed case investigation form which directs panels to key evidence in the bundles they are provided with, in relation to each allegation. The layout and structure of ICP decision forms has also been revised and the requirement for Panels to identify 'learning points' in appropriate 'no case to answer' decisions has been introduced to improve the way we deal with complaints of this nature. A Case Manager will also now attend each meeting over the course of the day to ensure the process runs smoothly, provide assistance to colleagues presenting cases and ensure the Investigating Committee Panel is given consistent guidance. It is envisaged that each of these developments will help to

ensure that cases are not referred to a final hearing where no realistic prospect exists of making a finding of impairment.

- 10.3 Further progress has been made on a broad project being undertaken by the FTP department to examine and manage the expectations of individuals that make a complaint to the HPC about registrants. This includes further analysis of alternative mechanisms of dispute resolution, a review of all standard documentation, development of witness feedback documentation and further focus on our relationship with employers. A more detailed update on the work undertaken here is also provided in a separate paper to this committee.
- 10.4 In order to encourage those involved in fitness to practise hearings to engage with our literature and guidance the Hearings section of the HPC website has been thoroughly revised to make it more accessible and interesting. Changes include a new interactive layout with multimedia options such as still photography and an online narrated video, which takes interested parties through the constitution and role of Fitness to Practise Panels, the process of giving live evidence at hearings and the considerations of the Panel when making decisions.
- 10.5 Refresher training days have been undertaken in 2010 with all Panel Chairs, Legal Assessors and Lay Partners. Training has also been provided to newly appointed dietician and podiatry partners, who are now due to take part in fitness to practise panels before the end of the year. A large part of this training has focussed on the application of the case to answer test at the Investigation Committee stage. Through presentations, case studies and focus groups Panel members have been encouraged to re-evaluate the process of analysing evidence, the manner in which to structure and write decisions and the meaning of impairment in fitness to practise proceedings.