

Fitness to Practise Committee – 26 May 2011

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 March 2011 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'.

Decision

The Committee is asked to

- (a) discuss the attached paper reviewing not well founded cases; and
- (b) agree with the recommendation(s) set out in pages 13-14 of the report reviewing not well founded decisions.

Background information

This paper should be read in conjunction with a report on the same topic submitted to this Committee on 21 October 2010. A copy of that paper can be found here; <http://www.hpc-uk.org/aboutus/committees/archive/index.asp?id=524>

Resource implications

None

Financial implications

None

Appendices

Appendix One – Not Well Founded Review

Date of paper

16 May 2011

Not well founded case review - 1 April 2010 to 31 March 2011.

1.0 Introduction

- 1.1 When reviewing not well found cases in October 2010 the Executive provided a summary of the work being undertaken in order to create a clearer understanding of the meaning of 'fitness to practise' for all parties involved in the process. One of the central aims of this work was to assist Panels in decision making at both the 'case to answer' and 'not well founded' stages of proceedings and ensure that only appropriate cases were being referred to public hearings. The central features of this work included;
- Implementation of a new process at the Investigating Committee Panel stage to further ensure that the 'case to answer' test is applied appropriately and consistently
 - Increased focus on decision making, structuring decision documents and the meaning of impairment at all Panel training sessions
 - Revision of all standard letters and publications and refreshment of the FTP section of the website to include a simplified layout with multimedia options, still photography and a video on the hearings process
 - Progression of a broader project aimed at managing the expectations of individuals raising a concern with the FTP department, including meetings with employers, development of a witness feedback process and further consultation on alternative methods of dispute resolution
- 1.2 This report provides a review of all not well founded decisions made during 2010-2011 and examines the ways in which changes in decision making trends may be related to the work undertaken by the FTP department in the last year. The paper also explores the role played by CHRE in reviewing the quality of decisions made by Conduct and Competence Committees in 2010-2011, particularly in relation to sanctions that are considered to be 'unduly lenient'.

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. In 2010-2011 there was a slight reduction in the percentage of 'case to answer' decisions from the previous year. At this point the reduction appears to be too slight, however, to draw any conclusions about the impact of the new processes being employed.

Table 1: Number of Case to Answer Decisions April 2005 – April 2011

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
2010-2011	512	294	57
Total	1998	1227	61%

2.2 The relationship between the level of engagement demonstrated by registrants at the ICP stage and the not well founded outcome at final hearings still appears to be significant. Of the 76 cases that resulted in a not well founded decision during 2009-2010, the registrant provided representations to the Investigating Committee Panel in all but eight cases. Of the 85 cases where a not well founded decision was made at the final hearing in 2010-2011 representations were made by the registrant at the case to answer stage in all but 6 cases.

2.3 This may suggest that representations provided by registrants have not adequately covered the issues at hand or addressed the test being applied by the Investigating Committee Panel. Amendments to the FTP website, which were finalised in January 2011, have aimed to address any confusion about the type of test being applied by providing a chronological overview of the nature of investigations at all stages of the FTP process. The Executive will continue to review the level of understanding demonstrated by registrants in relation to the 'case to answer' test and assess whether more work can be undertaken to enhance this.

2.4 These statistics may also indicate that the 'realistic prospect test' has been misapplied on 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. The introduction of a second Case Manager at each committee to coordinate proceedings is now in full operation. One of the aims of this role is to assist Panel members to ensure the 'case to answer' test is being applied appropriately and consistently. Further developments now allow Investigating Committee Panels to provide 'learning points' to registrants in appropriate cases rather than refer the matter to a final hearing. The significance of these changes is explored further at paragraphs 5.10 and 5.16.

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 by the HPC 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 usually make representations to that effect. This process is a proportionate and appropriate mechanism to balance the human rights of the registrant whilst ensuring public protection.
- 3.2 As a public authority, however, the HPC recognises that it should not act in a partisan manner by seeking to pursue an allegation which has no realistic prospect of success. Occasionally, therefore, after the Investigating Committee has determined that there is a case to answer in respect of an allegation the HPC will seek leave of a Panel to discontinue all, or part, of that allegation.
- 3.3 A large amount of work has been undertaken by the FTP department in the last year to develop a fair, consistent and transparent process for applying to a Panel for discontinuance of allegation. A Practice Note on this topic has now been approved by Council on 9 December 2010. It is anticipated that the formalisation of this procedure will assist in reducing the amount of cases that result in a not well found decision in future. This should apply in particular to those where it is clear that there is no realistic process of the HPC being able to prove the facts of an allegation prior to a hearing.

4.0 Statistics

4.1 The table below demonstrates the number of cases where an 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
2010–2011	85	314	27
Total	249	1093	23

4.2 During 2010-2011, 314 cases were concluded at a final hearing. Of those cases 85 were not well founded, which is 27% of cases concluded. This includes some cases where more than one allegation was made against the same registrant. In 2009-2010 256 cases were concluded at a final hearing of which 76 were not well founded. This represented 30% of all cases considered.

4.3 We can identify a slight reduction in the percentage of cases resulting in a not well founded decision in the last year, which appears to contrast with the general increase in this outcome in previous years. This may be related to a number of factors, including work undertaken at the ICP decision making stage during the year, the focus on decision making at Panel training sessions and the improvements and increased use of alternative mechanisms to resolve disputes

4.3 The table below indicates how decisions have been made by panels between 01 April 2008 and 31 March 2011. This table demonstrates that a decision to find an allegation not well founded has been the most used outcome overall during this period and, in particular, in each of the last two years.

Table 3: Decisions reached by Panels April 2008-2011

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
2010-2011	62	49	26	70	0	18	4	85	314
Total	193	114	54	141	2	28	11	201	745

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 2010-2011 the percentage of final hearings resulting in this outcome has clearly reduced from the previous year. Alternatively there has been a significant rise in the percentage of cases resulting in a caution order or a removal by consent agreement (which is captured in the 'Removed' column).

Table 4: Decisions reached by panels, percentages April 2008-March 2011

Decision	Number 2008-2009	Percentage 2008 – 2009	Number 2009-2010	Percentage 2009-2010	Number 2010-2011	Percentage 2010-2011
Striking Off	66	37.8	65	25.3	62	19.7
Suspension	25	14.3	40	15.6	49	15.6
Conditions of Practice	13	7.4	15	5.8	26	8.2
Caution	25	14.3	46	17.9	70	22.2
Removed*	0	0	10	3.9	18	5.7
Amended	1	0.6	1	0.4	0	0.0
No Further Action	4	2.3	3	1.1	4	1.2
Not Well Founded	40	22.9	76	29.6	85	27.0
Total	175	100	256	100	314	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 currently impaired.

5.2 The next table demonstrates those cases considered between 1st April 2010 and 31 March 2011 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 2010 - 31 March 2011

Element of Allegation	Number of cases	Percentage of cases
Facts	31	36
Grounds	18	21
Impairment	36	43
Total	85	100

5.3 The table above demonstrates that in 43% 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.

5.5 Not well founded on Facts

- No evidence to support the facts alleged on the balance of probabilities
- There could have been alternative explanations
- Not satisfied by the value of hearsay evidence
- Terms of the allegation rendered further investigation unnecessary
- Conflicts in the evidence of the two HPC witnesses
- Expert witness agreed with the evidence of the registrant
- Evidence was subjective in nature
- Evidence of registrant preferred to evidence of witness
- The HPC witness was not present and his/her evidence could not be tested
- No contractual prohibition

5.6 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 often due to the standard or nature of the evidence presented. The Panel prefer oral evidence to documentary evidence as it can be tested through questioning. Where there is a conflict between the two the Panel generally prefer oral evidence.

- 5.7 This underlines the importance of the work undertaken by the FTP department in the last year to make the process more accessible and transparent for all parties required to attend hearings. The FTP department always records, considers and responds to participant feedback at hearings and continuously reviews how improvements can be made to the standard of service provided to all witnesses.
- 5.8 There is also evidence to indicate that a Panel occasionally finds itself restricted in making findings of fact because of the manner in which an allegation has been drafted.
- 5.9 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. A refresher training session on drafting allegations will be provided to all HPC Case Managers in 2011.
- 5.9 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.
- 5.10 Developments made to the ICP process in the last year are designed to ensure that an appropriate and consistent approach is adopted by Panels whenever they are not satisfied with the manner in which an allegation has been drafted. Initially the Case Manager or ICP Co-ordinator in attendance will remind the Panel that it may remove a particular from the allegation if they consider it appropriate. The Panel is also made aware that it may make 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 that the allegation adequately reflects the evidence before it and feels that broad changes are required, however, it is advised to issue specific directions for 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. It is anticipated that improved clarity at this stage will help to prevent cases being not well found at final hearings due to the inability to prove a defective allegation.

5.11 Grounds

- Single lapse of judgement
- Evidence falls short of demonstrating misconduct
- The registrant was inexperienced but did not lack competence
- Isolated incident/clerical error, which does not meet the threshold
- The registrant made a considered decision, based on experience
- The registrant was following 'common practice'
- No intention to mislead, intimidate or influence the witness
- The consequences of the registrants' actions were minor in nature
- The registrant acted in the best interest of patients
- The registrant's actions did not impact upon his profession

5.12 When the facts of an allegation are proven at a final hearing but the Panel find they do not amount to a ground (i.e misconduct/lack of competence) 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 or have a negative impact on the profession.

5.13 Impairment

- The registrant has fully participated in the regulatory process and accepts her wrongdoings
- A high degree of insight demonstrated.
- The registrant's evidence proved that he would now act differently
- These actions do not amount to behaviour which would compromise the reputation of the profession
- No public interest in further action
- Coping strategies have been successfully implemented to deal with health issues
- Personal circumstances caused a great deal of stress at the time.
- The evidence established that the Registrant is a highly competent and well respected professional.
- Unique situation which was unlikely to reoccur
- Several years have passed since this isolated incident

5.14 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 often considered not well found by a Panel at the stage of impairment. In the absence of other relevant

considerations (such as any negative impact on the reputation of the profession or the need for a deterrent factor) that approach is correct. The executive always takes this consideration into account when reviewing or updating policy in this area.

- 5.15 It should also be noted that, in some cases, panels prefer the evidence of the registrant at the hearing. 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.
- 5.16 During 2010 the FTP department introduced a system at the Investigating Committee stage which allows Panels to issue written 'learning points' to registrants in appropriate cases, rather than refer the matter to a final hearing. This applies when a Panel determines that the alleged facts could be proved at the final hearing, and would amount to an established ground, but considers that the matter is very minor in nature and there is subsequently no realistic prospect of the allegations amounting to current impairment. It is anticipated that the appropriate use of 'learning points' at this stage, which advise registrants about their future conduct, may also help to reduce unnecessary 'case to answer' determinations.
- 5.17 As highlighted by the examples above, however, concerns surrounding impairment generally require the application of a current test, which is more appropriately achieved by a final hearing Panel, having had the benefit of hearing and testing live evidence from both parties.

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 bundles of evidence on request.
- 6.2 In 2009-10 there were no cases referred to the High Court by CHRE and there have been no referrals during 2010-2011.
- 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 87 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.

- 6.4 As demonstrated by the table below, 'learning points' were identified in relation to 51 hearings during 2010-2011.

Table 6: Number of learning points identified by CHRE 01 April 2008 - 31 March 2011

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	267	19	7%
2009-2010	351	17	5%
2010-2011	413	51*	12%
Total	1031	87	8%

* Two points were raised to highlight examples of good practice.

- 7.4 The Executive always engages fully in this process and conducts a thorough analysis of each 'learning point' raised. When responding to each point the Director of Fitness to Practise will initially consult with members of the Case Management and Hearings teams to determine whether the concerns are justified. It must be remembered, however, that the procedures established at both the investigation and adjudication stages are designed to place Fitness to Practise Panels at arm's length from the Executive. This ensures that decision making is as independent and impartial as possible. Accordingly it is often not appropriate to comment on the decisions reached by Panels, or in particular to 'second guess' why a Panel chose to impose one sanction over another.

- 7.5 The Director of FTP will always seek to establish whether sufficient reasoning has been provided in the Panel's written decision and whether that document adequately illustrates to members of the public why a particular sanction was considered appropriate. The process is also used to assess whether any common misunderstandings exist in relation to the rules and policies applicable to Fitness to Practise proceedings. Where an error is clearly identified, or an area of concern arises on more than one occasion, the Director of Fitness to Practise will refer 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.

8.0 Impact of Representation

- 8.1 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 available to all registrants and has designed its processes to ensure that, as far is 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'.
- 8.2 The Executive has improved the information that is available to participants prior to a hearing during 2010-2011 through revisions to standard letters, FTP brochures and Practice Notes. It has also refreshed the HPC website to simplify the design and content, provide a logical, step-by-step guide to the process and introduce multi-media options such as photographs of the HPC premises and an online video outlining what happens at FTP hearings.
- 8.3 Regardless of this it still appears that registrants are more likely to be successful at a final hearing if they attend in person or, in particular, if they attend with legal and/or professional representation. The table below demonstrates that in cases where the allegation was not proven in 2010-2011, 76 out of 85 registrants (89%) either attended the hearing or were represented, which is a higher percentage than in the previous year.

Table 7: Not well founded by profession and representation April 2010-2011

Profession	No	Yes - by representative	Yes - by self	Total
AS	0	0	0	0
BS	1	1	1	3
CH	0	9	0	9
CS	0	0	0	0
DT	0	0	0	0
HAD	0	2	2	4
ODP	1	2	2	5
OR	0	0	0	0
OT	1	5	1	7
PA	3	19	5	26
PH	1	13	0	14
PSY	2	8	1	11
P/O	0	0	0	0
RA	0	3	1	4
SL	0	1	0	1
Total	9	63	13	85

7.4 To put the figures above into context the table below demonstrates that in all final hearings during 2010-2011 registrants attended and/or were represented on 201 occasions. This accounts for only 64% of all concluded hearings. In 2009-2010, 62% of registrants were either represented or attended a final hearing yet in 84% 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
2010-2011	314	64	85	89

8.0 Type of Complainant

8.1 As was the case in 2009-2010, the table below indicates that a large proportion of cases that were not well found at a final hearing originated from concerns raised by employers or members of the public. In particular it is clear that cases in which the HPC fails to prove the facts of an allegation (the first stage of the test) most commonly relate to concerns that have been raised by members of the public.

Table 9: Not well founded and complainant type April 2010 - 2011

Element of Allegation	Complainant Type						
	22(6)	Employer	Other	Police	Public	Registrant	Total
Not well found- facts	4	8	1	0	16	2	31
Not well found- grounds	1	8	2	0	4	3	18
Not well found- impairment	4	26	0	2	4	0	36
Total	9	42	3	2	24	5	85

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 still being undertaken by the Executive to manage the expectations of those who complain and to explore alternative methods of dispute resolution. In addition to the revision of all FTP publications and the FTP section of the website in 2010-2011 work is currently being

undertaken with a view to piloting the use of mediation in fitness to practise proceedings during 2012. 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 more likely to be not well found 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.
- 8.4 The requirement to progress cases expeditiously is contained in Article 32(4) of the Health Professions Order 2001. The Fitness to Practise department will continue to adhere 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.
- 8.5 By closely observing these established procedures the Fitness to Practise department has been successful in reducing the average length of time taken for a Fitness to Practise hearing to conclude after a concern is raised from mean average 18 months in 2009-2010 to 16 months in 2010-2011.

9. Conclusions

- 9.1 The Executive proposes to keep the frequency of not well found decisions under continued review and will brief all future committees this.
- 9.2 The following work will continue to be undertaken to ensure that, wherever possible, only appropriate allegations reach the final hearing stage.
- Continue to monitor the number of hearings resulting in a not well founded decision
 - Continue to report on why the HPC is unable to prove cases at a final hearing
 - Encourage solicitors to identify cases at an early stage in which the HPC may be unable to prove its case in order to facilitate discontinuance proceedings

- Continue to engage fully with reviews conducted by CHRE and provide a full and considered analysis of all learning points raised
- Refer all valid concerns raised by CHRE in relation to 'under prosecution' of cases with Panel members at an early stage
- Encourage registrants to engage with revised publications and attend hearings to provide representations to the panel;
- Continue to review the level of understanding demonstrated by registrants in relation to the 'case to answer' test and assess whether more work can be undertaken to enhance this.
- Respond to feedback from all participants at hearings and conduct on-going review of the standard of service provided to witnesses
- Make no case to answer and not well founded decision making an on-going focus at panel refresher training
- Continue to promote the use of learning points at Investigating Committee Panels where appropriate
- Continue to engage with registrants, employers and stakeholders in consultations on alternative forms of dispute resolution
- Provide refresher training on drafting allegations to all HPC Case Managers in 2011.