

Fitness to Practise Committee – 13 October 2011

‘Not well founded’ case review

Executive summary and recommendations

Attached as an appendix to this paper is a report reviewing cases between 1 April 2011 and 31 August 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 ~~page [] of the report reviewing not well founded decisions~~ paragraph 9 of the report.

Background information

This paper should be read in conjunction with a report on the same topic submitted to this Committee 26 May 2011.

Resource implications

None

Financial implications

None

Appendices

Appendix One – Not Well Founded Review

Date of paper

3 October 2011

Not well founded case review - 1 April 2011 - 31 August 2011.

1.0 Introduction

- 1.1 This paper sets out the number of cases that resulted in a decision of 'not well found' between April and September 2011. It discusses the reasons for those decisions and sets out a number of recommendations to develop the fitness to practise process.
- 1.2 In a paper reviewing not well found cases in October 2010 the Executive provided a summary of the work that was being undertaken in order to create a clearer understanding of the meaning of 'fitness to practise' and to improve fairness and efficiency for all parties involved. In particular this paper illustrated revisions that had been made to the ICP process to ensure that reliable and consistent guidance was provided to panel members. It also highlighted the increased focus on the quality of decision making that was being provided to all participants at panel training sessions and the revisions that had been made to internal and external FTP publications.
- 1.3 A further review of not well founded cases was presented to this Committee in May 2011 in which it was highlighted that there had been a slight reduction in the percentage of cases resulting in a not well founded outcome since this work had commenced. This was in contrast to the general increase in this outcome in the previous 3 years. It was subsequently suggested that we may continue to see a reduction in the frequency of not well founded outcomes as more cases progressed through the revised investigation process to the final hearing stage and familiarity with new FTP publications increased.
- 1.4 This report provides an updated review of not well founded decisions for hearings that took place in the first 5 months of 2011-2012 and examines the ways in which further changes in decision making trends may relate to the work undertaken by the FTP department over the last 18 months. The paper also explores changes to the methods used by the Commission for Healthcare Regulatory Excellence (CHRE) in order to review the quality of decisions made by FTP Panels.

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.

Table 1: Number of Case to Answer Decisions April 2005 – 31 August 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
2011-YTD	189	80	42
Total	2263	1308	58%

2.2 In the first half of 2011-2012 there has been a reduction in the percentage of case to answer decisions from the previous years. Possible reasons for this include the use of a 'case coordinator' during meetings, increased focus on the application of the case to answer test at training sessions and revised literature on the ICP process for registrants. A more detailed analysis of the work undertaken at this stage of the process is provided in an ICP review paper presented to the FTP Committee in October 2010. This can be found at:

<http://www.hpc-uk.org/aboutus/committees/archive/index.asp?id=524>

2.3 The FTP Committee is due to consider a paper at its February 2012 meeting reviewing the decision making of the Investigating Panels. That will include further analysis of decision making trends in relations to learning points

2.4 The relationship between the level of engagement demonstrated by registrants at the ICP stage and the not well founded outcome at final hearings remains significant. Of the 85 cases that resulted in a not well founded decision during 2010-2011, the registrant provided representations to the ICP in all but 6 cases. Of the 29 cases where a not well founded decision has been made at the final hearing so far in

2011-2012 representations were made by the registrant at the case to answer stage in all but 3 cases.

2.5 In previous papers it has been suggested that these statistics demonstrated a level of misunderstanding at this stage of the FTP process. In particular it was highlighted that representations by registrants to the ICPs were not adequately addressing the case to answer test.

2.6 A revision of the literature available on this process, which was completed in January 2011, may have had a positive impact - as reflected by the sharp reduction in the percentage of referrals that have been made to final hearings so far at this stage. The FTP Department will continue to review the level of understanding demonstrated by registrants in relation to the 'case to answer' test. Further guidance has also been produced which sets out what registrants may want to consider including in their response to an allegation.

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.

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 was approved by Council on 9 December 2010. It is anticipated that the formalisation of this procedure will assist in reducing the amount of allegations that result in a not well found decision at a public hearing, provide a fairer system of disposal for registrants facing such allegations.

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-found 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
2011-YTD	29	124	23
Total	278	1214	23

4.2 During the first 5 months of 2011, 124 cases have been concluded at a final hearing. Of those cases 29 were not well founded, which is 23% of cases concluded. This includes one case where more than one allegation was made against the same registrant. In 2010-2011 314 cases were concluded at a final hearing of which 85 were not well founded. This represented 27% of all cases considered.

4.3 We can now begin to identify a reduction in the percentage of cases resulting in a not well founded decision in the last 18 months, which contrasts with the general increase in this outcome in previous years. This corresponds with the reduction in cases being referred to a final hearing at ICP's and is considered to be related to the work highlighted earlier in this paper.

4.4 The table below indicates how decisions have been made by panels between 01 April 2008 and 31 August 2011. In the previous two years the not well founded decision was the most common outcome at final hearings by some distance. So far in 2011-2012, Cautions have been the most common decision and the Not Well Found outcome has only occurred marginally more often than a Strike Off order.

Table 3: Decisions reached by Panels April 2008-31 August 2011

Year	Struck Off	Suspended	Conditions	Caution	Amended	Removed	NFA	Not Well Founded	Total
2008-09	66	26	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
2011-YTD	27	19	11	31	0	6	1	29	124
Total	220	134	65	172	2	34	12	230	869

4.4 The next table indicates the decisions reached by panels since April 2008 by percentage. This helps to highlight the reduction over the last 18 months in not well-founded decisions and the increase in 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 2009- 31 August 2011

Decision	Number 2009-2010	Percentage 2009-2010	Number 2010-2011	Percentage 2010-2011	Number 2011-YTD	Percentage 2011-YTD
Striking Off	65	25.3	62	19.7	27	21.8
Suspension	40	15.6	49	15.6	19	12.1
Conditions of Practice	15	5.8	26	8.2	11	8.9
Caution	46	17.9	70	22.2	31	25
Removed*	10	3.9	18	5.7	6	4.8
Amended	1	0.4	0	0.0	0	0.0
No Further Action	3	1.1	4	1.2	1	0.01
Not Well Founded	76	29.6	85	27.0	29	23.4
Total	256	100	314	100	124	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 2011 and 31 August 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 2011 - 31 August 2011

01 April 2010 – 31 March 2011			01 April 2011 – 31 August 2011		
Element of Allegation	Number of cases	Percentage of cases	Element of Allegation	Number of cases	Percentage of cases
Facts	31	36	Facts	10	34
Grounds	18	21	Grounds	8	28
Impairment	36	43	Impairment	11	38
Total	85	100	Total	29	100

5.3 The table above demonstrates that in 38% of cases, panels have found that the facts and grounds to be been proven but that this does not amount to an impairment to practise. Whilst this remains the most common point at which an allegation is not proven the frequency has reduced slightly from 2010-2011 when 43% of not well found cases were not proven at this stage.

5.4 An analysis of the language used in cases indicates a number of consistent themes that arise during the Panel's deliberations.

5.5 Not well founded on Facts

- Panel did not find the witnesses evidence to be as reliable as the Registrants.
- The particulars were not proved to the requisite standard
- HPC applied for proceedings to be discontinued on the basis there was no realistic prospect of any substantial part of the allegations being established.
- The hearsay basis of the allegation was contradicted by the Registrants oral evidence.

- The HPC witnesses' oral evidence did not support the original complaint that was used as the basis of the allegations.
- 5.6 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. Oral evidence is generally seen to be more reliable than documentary evidence as it can be explored or tested through questioning. Accordingly 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 during 2010-2011 to make the process more accessible 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 In the previous study of not well found decisions during 2010-2011 there was evidence that Panels were occasionally restricted in making findings of fact because of the manner in which an allegation had been drafted. No reference to such problems was found in the current study. There has also been a slight reduction in the percentage of cases that have been not well found on the basis of the facts so far in 2011-2012.
- 5.9 FTP Case Managers undertook a detailed training course in May 2010 and again in September 2011 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.
- 5.10 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. Further revisions have been made to the case to answer practice note on the topic of allegation drafting and credibility of evidence.
- 5.11 As highlighted in the previous paper on not well found cases developments made to the ICP process during 2010-2011 were 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.

5.12 **Grounds**

- An isolated error of judgement
- The registrant had not acted dishonestly.
- The registrant was significantly ill at the time of the allegation, but had not been diagnosed or treated for the disorder (health case).
- A single act or omission not sufficiently grave as to constitute misconduct
- The matters found proved were isolated and minor errors and omissions. It could not find that they were so low in standard as to amount to a lack of competence
- There has been no evidence that the found fact amounted to inappropriate behaviour in the circumstances

5.13 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.

5.14 In adjudicating upon this element of an allegation fairly it is essential that panels adopt a consistent interpretation of the established grounds. Current guidance on the appropriate definition to adopt for each ground was provided to all HPC Legal Assessors during training sessions in July 2011.

5.15 **Impairment**

- The Registrant has shown real insight and has meaningfully reflected on his practice as a consequence of these incidents.
- The proved particulars should be regarded as isolated incidents in the context of the Registrants 23 year career
- The Panel is satisfied that the risk of repetition is low because Mr A has accepted that his behaviour was inappropriate.
- The Panel is of the view that the Registrant has made considerable efforts to achieve and maintain acceptable

standards and this has clearly continued, within limited parameters, during the period since their resignation.

- The Panel was impressed by the insight and efforts made at remediation of his practice by the registrant.

5.16 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. In such cases it is essential that the panel clearly explains how its decision provides a sufficient level of public protection.

5.17 It should also be noted that, in some cases, panels prefer the evidence of the registrant at the hearing. The HPC Practice Note on case to answer decisions 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.

5.18 As demonstrated by the panel reasoning highlighted 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 and 2010-11 there were no cases referred to the High Court by CHRE. There have also been no referrals so far during 2011-12 so far.

- 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 109 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 12% of all hearings during 2010-2011 and have continued at the same rate so far in 2011-2012 with 22 learning points being raised following notification of 178 completed hearings. This represents a significant increase from previous years.

Table 6: Number of learning points identified by CHRE 01 April 2008 - 31 August 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%
2011-YTD	178	22	12%
Total	1209	109	9%

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

- 6.5 A paper on the learning points process is on the Committee agenda for its October 2011 meeting.

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 available 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 took steps to improve the information that is available to participants prior to a hearing during 2010-2011 through revisions to

standard letters, FTP brochures and Practice Notes. The HPC website has also been refreshed 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.

7.3 The table below demonstrates that in cases where the allegation was not proven so far in 2011-2012, 26 out of 29 registrants (90%) either attended the hearing or were represented. During 2011-2012 this figure stood at 89%.

Table 7: Not well founded by profession and representation April 2011-31 August 2011

Profession	No	Yes - by representative	Yes - by self	Total
AS	0	0	0	0
BS	0	2	1	3
CH	1	4	0	5
CS	0	0	0	0
DT	0	2	0	2
HAD	0	0	0	0
ODP	0	2	0	2
OR	0	0	0	0
OT	0	0	0	0
PA	2	9	1	12
PH	0	3	0	3
PSY	0	1	0	1
P/O	0	0	0	0
RA	0	0	0	0
SL	0	1	0	1
Total	3	24	2	29

7.4 To put the figures above into context the table below demonstrates that in all final hearings during 2011-2012 registrants have attended and/or were represented on 80 occasions. This accounts for only 65% of all concluded hearings. In 2010-2011, 64% of registrants were either represented or attended a final hearing yet in 89% 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 Concluded	% represented or attended	Number of Cases Not well founded	% represented or attended.
2009-2010	256	62	76	84
2010-2011	314	64	85	89
2011-YTD	124	65	29	90

8.0 Type of Complainant

8.1 As was the case in 2010-2011, the table below indicates that a large proportion of cases that were not well found at a final hearing have originated from concerns raised by employers or members of the public. In particular it has been found 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 2011 – 31 August 2011

Element of Allegation	Complainant Type						
	22(6)	Employer	Other	Police	Public	Registrant	Total
Not well found- facts	2	3	2	0	3	0	10
Not well found- grounds	2	3	0	0	2	1	8
Not well found- impairment	3	4	0	1	3	0	11
Total	7	10	1	1	8	1	29

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

9. Conclusions

9.1 It is suggested that the work undertaken by the FTP Department and highlighted in this paper is beginning to have a positive impact upon the quality of panel decision making at both the ICP and Final Hearing stages. This is reflected in the reduction we have seen so far in 2011-2012 in the amount of cases that result in a not well found decision at final hearings.

9.2 The Executive proposes to keep the frequency of not well found decisions under continued review to ensure that progress continues to be made in this area.

9.3 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
- Make effective use of CHRE learning points to produce useful training materials for panel members and legal assessors
- Encourage registrants to engage with revised publications and attend hearings to provide representations to the panel;
- Respond to feedback from all participants at hearings and conduct on-going review of the standard of service provided to witnesses
- Continue to promote the use of learning points at Investigating Committee Panels where appropriate
- Provide refresher training on drafting allegations to all HPC Case Managers in 2011.