

Health and Care Professions Tribunal Service

PRACTICE NOTE

“Case to Answer” Determinations

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

Introduction

Article 26(3) of the Health Professions Order 2001 provides that, where an allegation is referred to an Investigating Panel, it must 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 HCPC will be able to establish at a hearing that the registrant’s fitness to practise is impaired.

That test (which in some proceedings is known as the “real prospect” test) is relatively simple to understand and apply. As Lord Woolf MR noted in *Swain v Hillman*¹:

“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 HCPC (which has the burden of persuasion)² 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 [2001] 1 All ER 91

² The HCPC only has the burden of proving the facts. Whether those facts amount to the statutory ground and, in consequence, whether fitness to practise is impaired do not require separate proof, but are matters 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 HCPC 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 and material conflicts in that evidence.

It is for the HCPC to prove the facts alleged, not for the registrant to disprove them. Although registrants are not obliged to provide any evidence, many will choose to do so and any such evidence should be properly taken into account by the Panel.

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 Panel. However, the mere existence of such a conflict does not mean that there is a case to answer. Panels need to consider whether the evidence in dispute has a material bearing on the issue of impaired fitness to practise. It may be that each of the conflicting versions of events, when taken at their highest, has no bearing on that issue.

In deciding whether there is a case to answer, Panels also need to take account of the wider public interest, including the overarching regulatory objective of protecting the public and public confidence in both the profession concerned and the regulatory process.

It is important for Panels to remember that the realistic prospect test applies to the whole of an allegation, that is:

- the facts set out in the allegation;
- whether those facts amount to the ‘statutory ground’ of the allegation (e.g. misconduct or lack of competence); and
- 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 suggest 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 relevant HCPC Standards.

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 fit for purpose and constitute a fair and proper representation of the HCPC’s case.³

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.

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 public protection would not be enhanced by the HCPC 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 HCPC’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.

³ Further guidance on the drafting of allegations is set out in the Annex to the HCPC policy document *Standard of Acceptance for Allegations*

A presumption of impairment should be made by Panels in cases where the factual 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;
- personal health problems which the registrant 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. This may arise where there is insufficient evidence to substantiate the allegation, the available evidence is unreliable or discredited, or where 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.

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