

## Health and Care Professions Tribunal Service

# PRACTICE NOTE

## Discontinuance of proceedings

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

### Introduction

1. After an Investigating Panel has determined that there is a 'case to answer' in respect of an allegation, objective appraisal by the HCPC of the evidence it has gathered since that decision was made may reveal that the HCPC does not have a realistic prospect of being able to establish all or part of the allegation.
2. This may occur for a number of reasons including when new evidence becomes available after the case to answer decision is made or because, as the HCPC prepares the case for hearing, new and significant doubts arise in relation to the quality or viability of the evidence that was considered by the Investigating Panel.<sup>1</sup>
3. As a public authority, the HCPC should act in the public interest and should not seek to pursue an allegation which has no realistic prospect of success. In that event, the HCPC may apply to discontinue the proceedings.<sup>2</sup>

### Discontinuance

4. The appropriate method of discontinuing a case (in whole or part) which has been referred for hearing but has not yet begun to be heard<sup>3</sup> by a Conduct and Competence Panel or Health Panel is for the HCPC to apply to a Panel for discontinuance.<sup>4</sup>

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<sup>1</sup> for example, the case to answer decision is a paper-based exercise and doubts about the credibility or reliability of a witness may only arise when the witness is interviewed after that decision has been made.

<sup>2</sup> discontinuance may also be appropriate where an overriding public interest consideration arises, such as a crucial witness being too ill to participate in the proceedings.

<sup>3</sup> if the HCPC no longer intends to pursue all or part of an allegation at a substantive hearing, as the matter is already before a Panel, the appropriate course of action is for the HCPC to 'offer no evidence' at that hearing rather than make a separate discontinuance application.

<sup>4</sup> a different process applies when an allegation is withdrawn to enable a registrant and the HCPC to enter into a voluntary removal agreement. This is set out in the Practice Note on disposal of cases by consent.

5. A Panel cannot simply agree to discontinuance without due inquiry. It needs to be satisfied that the HCPC's rationale for seeking discontinuance is sound and, in particular, does not amount to 'under-prosecution'. As the Court of Appeal made clear in *Ruscillo v CHRE and GMC*<sup>5</sup>, Panels conducting fitness to practise proceedings:

*“should play a more proactive role than a judge presiding over a criminal trial in making sure that the case is properly presented and that the relevant evidence is placed before it.”*

6. In order to be satisfied that discontinuance is appropriate the Panel's task is not to re-consider the decision reached by the Investigating Panel, but to ensure that the HCPC has proper grounds for discontinuing all or part of the allegation, i.e. that there is no realistic prospect of the allegation (or part of it) being established.
7. The nature and scope of the Panel's inquiry will depend upon the reasons which the HCPC provides and Panels are entitled to expect HCPC Presenting Officers to assist them in this regard by setting out a clear, appropriately detailed and objectively justified explanation of why there is not a realistic prospect of the HCPC establishing that the allegation is well founded. The reasons for discontinuance may apply to one or more of the relevant stages, i.e. the alleged facts and/or the statutory ground and/or impairment.
8. The HCPC is expected to provide the Panel with a skeleton argument<sup>6</sup>, in advance of the hearing, setting out:
  - a. a summary of the case, including a brief chronology and a general description of the allegations and the events giving rise to them;
  - b. details of the new evidence that has come to light, or the evidential concerns that have arisen, since the case to answer decision was made;
  - c. an explanation of why that new evidence or those concerns mean there is no longer a realistic prospect of the allegation being established;
  - d. an explanation of what steps, if any, the HCPC has taken to resolve the situation (for example, by seeking other witnesses or compelling the production of documents) or why such steps are unavailable or inappropriate;
  - e. an assessment of the extent to which the allegations engage the 'public components' of impairment<sup>7</sup> and, in consequence, whether discontinuance would be consistent with the HCPC's over-arching statutory objective of public protection.

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<sup>5</sup> [2004] EWCA Civ 1356

<sup>6</sup> for both partial and full discontinuance applications

<sup>7</sup> derived from *Cohen v GMC* [2008] EWHC 581 (Admin) - the need to protect service users, declare and uphold proper standards of behaviour and maintain public confidence in the profession. These are more fully considered in the Practice Note on finding that fitness to practise is 'impaired'

9. In most cases where discontinuance is appropriate, the arguments for doing so should be clear and straightforward. Panels should not need to conduct a detailed examination of the evidence and, in particular, should avoid doing so where only partial discontinuance is being sought. If evidence needs to be tested or material evidential conflicts need to be resolved, that should take place at a full substantive hearing. Discontinuance is unlikely to be appropriate in cases of that kind.

### **Partial discontinuance**

10. If a Panel is asked to discontinue only part of an allegation, it must first consider whether it is appropriate and in the public interest to do so. It should then go on to consider whether those elements of the allegation which it is being asked to leave in place amount to a viable allegation.
11. This is particularly important where, for example, the original allegation is based upon a pattern or sequence of events. If partial discontinuance removes some of those events from the factual pattern, the Panel should consider whether what remains would be sufficient to establish the statutory ground of the allegation or that fitness to practise is impaired.
12. If an allegation is partially discontinued, a freshly constituted panel will consider the revised allegation. The Panel considering the discontinuance application must also ensure that the revised allegation is coherently drafted and, in particular, that no essential background detail has been removed, as the Panel which hears the revised allegation will not be made aware of that partial discontinuance.<sup>8</sup>

### **The effect of discontinuance**

13. Although fitness to practise proceedings are not subject to a strict 'double jeopardy' rule, as a public authority the HCPC should not make repeated attempts to pursue the same allegation against a registrant. In granting discontinuance applications in respect of the whole of an allegation, Panels should make a formal finding that the allegation is not well founded.
14. If the decision has been taken on the basis of insufficient evidence and there is the prospect of further proceedings taking place if new and significant evidence comes to light or circumstances arise that require action to be taken in order to protect the public, this should be made clear in the Panel's written determination so that the registrant is on notice that such action may be taken at a later date.

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<sup>8</sup> unless it is brought to the Panel's attention by the registrant. The discontinued elements of an allegation would be part of the record that is shared with the Professional Standards Authority for audit purposes