Health and Care Professions Tribunal Service

PRACTICE NOTE

Fitness to Practise Impairment

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

Introduction

1. This note provides guidance on how Panels approach decisions on whether a Registrant's fitness to practise is impaired.

2. The HCPC's overarching objective is protection of the public and the purpose of fitness to practise proceedings is not to punish registrants for their past acts and omissions, but to protect the public from those who are not fit to practise. It does this by:

    a. protecting, promoting and maintaining the health, safety and well-being of the public
    b. promoting and maintaining public confidence in the professions it regulates
    c. promoting and maintaining proper professional standards and conduct for members of those professions.

3. Fitness to practise is not defined in the Health Professions Order 2001, but it is generally accepted to mean that a registrant has the skills, knowledge, character and health to practise safely and effectively.

4. Impaired fitness to practise means more than a suggestion that a registrant has done something wrong. It means a concern about their conduct, competence, health or character which is serious enough to suggest that the registrant is unfit to practise without restriction, or at all.

The sequential approach

5. Fitness to practise allegations comprise three steps which Panels must consider sequentially. Although each step must be considered separately, it is important that panels ensure that each decision they make is consistent with each previous step. For example, if a panel considering impairment find that there is a real risk of repetition, this should follow through to the panel's decision at the sanction stage and should be reflected in the sanction imposed. Panels may find it helpful to pause before they finalise their decision at each stage to ensure that it is 'joined up' and consistent with their earlier findings and the reasons they have given to explain those findings. The steps are:

    a. whether the facts set out in the allegation are proved;

    b. whether those facts amount to one or more of the 'statutory grounds' alleged (e.g. misconduct or lack of competence);

    c. if so, whether the registrant's fitness to practise is currently impaired.

6. A sanction can only be imposed if a panel finds that a registrant's fitness to practise is impaired. If a finding of impairment is made, Panels will then hear submissions on the question of sanction and determine what, if any, sanction to impose.

7. It is important that these steps should be and be seen to be separate but this does not mean that, for example, Panels must always retire to consider each individual step separately in every case. They are 'steps' rather than formal stages and their management will depend upon the nature and complexity of the case. Although it is for the Panel to decide the approach, it is often helpful to agree what approach best suits the circumstances of the case with the presenting officer and the registrant or their representatives. Whatever approach is adopted, it is important that the determination should reflect the Panel's decision relating to each step separately and that every decision it makes is properly reasoned.

8. The HCPC has to provide sufficient evidence to persuade the Panel that the facts alleged are proved. This is sometimes referred to as the burden of proof and it is on the HCPC. Whether those facts amount to the statutory ground and whether fitness to practise is impaired are matters of judgement, rather than proof, for the Panel.

9. When a Panel is considering whether an alleged fact is proved, the standard of proof required is on the balance of probabilities. In other words, a panel must be satisfied that the act or omission alleged is more likely than not to have occurred before it can find it proved. If any of the facts alleged are proved, the Panel, then has to decide whether they amount to one or more of the statutory grounds. The fact that a panel has found some facts proved does not mean that a finding of a statutory ground will follow. Similarly, if a panel finds a statutory ground, a finding of impairment is not automatic. Each stage must be considered separately and reasons given for the panel's decision Panels are reminded that although each

stage is separate, their decision must be consistent and follow through from decisions made at earlier stages (see paragraph 5 above,)

Fitness to Practise Impairment

10. As stated above, the test of impairment is expressed in the present tense; that fitness to practise "is impaired."

11. A Registrant may have been impaired at the time of the failing identified in the allegation, however the Panel's task is to form a view about the registrant's ***current*** fitness to practise by taking account of the way in which the registrant has acted or failed to act in the past and, looking forwards whether they consider that the registrant's ability to practise safely is compromised and/or whether public confidence in the profession would be undermined in the absence of a finding of impairment.

12. When considering whether a registrant's fitness to practise is impaired and, if it is, what sanction should be imposed, a panel will need to consider what impact, if any, a registrant's denial of the alleged facts has on their assessment of impairment and sanction.

13. Each case must be considered on its own facts and panels should take account of the following principles and approach as set out in *Sawati v General Medical Council [2022] EWHC 283.*

    a. Registrants are entitled to a fair hearing, and this includes defending themselves against allegations which they deny. As the court said in *Sawati*, registrants should be given a *'fair chance before a Tribunal to resist allegations, particularly of dishonesty, without finding that the resistance itself unfairly counting against them if they are unsuccessful'*.
    b. Panels should consider the nature of the primary allegation against the registrants. A rejected defence of honesty may be more relevant to take into account where dishonesty (e.g. deceit, fraud, forgery etc) is the primary allegation than in cases where dishonesty is alleged, as a secondary allegation, to aggravate alleged facts which are not inherently dishonest.
    c. Panels should consider what it is that the registrant is actually denying. There is a difference between denying the primary facts (i.e. what the registrant is alleged to have done or not done) and denying a secondary fact of dishonesty based on an assessment of those primary facts. Such an assessment requires an evaluation of what a registrant knew or thought at the time. As the court said: *'resistance to the objectively verifiable is potentially more problematic behaviour (and more relevant to sanction) than insistence on an honest subjective perspective'*. However, panels should note that if a registrant denies a secondary allegation of dishonesty at the unreasonable end of the spectrum this may also be relevant to sanction.

d. Panels should ask themselves what other evidence of a lack of insight there is, other than the denial or defence which has been rejected. The court noted that *'a rejected defence which on a fair analysis adds to an evidenced history of faulty understanding is more likely to be relevant fairly to sanction than one said to constitute such faulty understanding in and of itself'.*
e. Panels should consider the nature and quality of the rejected defence. It is not appropriate to conclude that a registrant has not told the truth to the panel simply because a panel has rejected the defence. As the court said: *'it is going to require some thought to be given to the nature of the rejected defence. Was it a blatant and manufactured lie, a genuine act of dishonesty, deceit or misconduct in its own right? Did it wrongly implicate and blame others, or brand witnesses giving a different account as deluded or liars? Or was it just a failed attempt to tell the story in a better light that eventually proved warranted?*'.
f. The court said: *'These are evaluative matters. Tribunals need to make up their own minds about them, and their relevance and weight, on the facts they have found. But they do need to direct their minds to the tension of principles which is engaged, and check they are being fair to both the (registrant) and the public. They need to think about what they are doing before they use a (registrant's) defence against them, to bring the analysis back down to its simplest essence'*.

14. Panels should follow this approach at both the impairment stage when they are considering the issue of insight and risk of repetition and at the sanction stage when deciding which sanction, if any, should be imposed. Panels are reminded of the importance of considering the Sanctions Policy in all cases and that caution should be exercised before concluding that a registrant's denial of an allegation, in circumstances where that denial has been rejected by the panel, is of itself an aggravating factor. Panels should take account of the principles and approach set out above. Particular care should be taken in cases of dishonesty where a panel has rejected the registrant's defence. Although this *may* be regarded as an aggravating feature, panels must approach their consideration as outlined above and make clear in their reasons that they have done so.

Character evidence

15. When considering impairment, Panels may properly take account of evidence as to the registrant's general competence in relation to the subject matter of an allegation; the registrant's actions since the events giving rise to the allegation; or the absence of similar events.

16. In fitness to practise proceedings Panels may need to consider 'character evidence' of a kind which, in other proceedings, is only heard as personal mitigation in relation to sanction.

17. In admitting character evidence for the purpose of determining impairment, Panels must exercise caution but should not adopt an over-strict approach. It is important that all evidence which is relevant to the question of impairment is considered. Panels must be careful not to refuse to hear evidence at the impairment phase about, for example, a registrant's general professional conduct which, when heard at the sanction phase, may raise doubts about the conclusion that the registrant's fitness to practise is impaired.

18. In deciding whether to admit character evidence, Panels must draw a distinction between evidence which has a direct bearing on the findings it must make and evidence which is simply about the registrant's general character. That distinction is not always clear. Expressions of regret or remorse may fall within the latter category but, character evidence of this sort may be helpful in a Panel's assessment of risk and the likelihood of repetition. Where insight, regret or remorse has been reflected in modifications to the registrant's practice, it is relevant to the question of current impairment. Evidence of remediation and reflection are likely to be particularly relevant at this stage.

Protecting the public

19. As fitness to practise is about public protection, in considering allegations Panels need to address what the case law describes as the 'critically important public policy issues' of:

    a. protecting service users;
    b. declaring and upholding proper standards of behaviour; and
    c. maintaining public confidence in the profession concerned.

20. Thus, in determining fitness to practise allegations, Panels must take account of two broad components:

    a. the 'personal' component: the current competence, behaviour etc. of the registrant concerned; and
    b. the 'public' component: those critically important public policy issues outlined above.

21. Although panels are likely to find it helpful to approach their consideration of impairment in this way, it is important that panels recognise that both aspects are interrelated and that both are components of the *public* interest.

5.1 Personal component

22. The personal component must be considered first, and the Panel's task is to form a view about the registrant's current fitness to practise based on, among other

things, the registrant's past acts or omissions. The key questions which need to be answered are:

a. are the acts or omissions which led to the allegation remediable?
b. has the registrant taken remedial action?
c. are those acts or omissions likely to be repeated?

23. There are some cases, including those involving serious attitudinal or behavioural issues, which may be more difficult to remediate or where public confidence in the profession (see below) requires a finding of impairment to be made.

24. An important factor will be the registrant's insight into those acts or omissions, the extent to which the registrant:

a. accepts that their behaviour fell below professional standards, understands how and why it occurred and its consequences for those affected; and
b. can demonstrate they have taken action to address that failure in a manner which remedies any issue and avoids any future repetition.

25. Insight is concerned with future risk of repetition. It is different to remorse for past misconduct and it is wrong to equate maintenance of innocence with lack of insight.

26. A panel must determine what insight a registrant has shown and make that clear in their reasoned decision.

Public Component

27. Next, Panels must consider the three elements of the public component. The first element of the public component - the need to protect service users - overlaps with the personal component. A registrant who has insight and is unlikely to repeat past acts or omissions may not present an ongoing/ future risk to service users.

28. The other two elements of the public component are maintaining professional standards and public confidence in the profession concerned. The HCPC has set out the standards it expects of registrants and panels should refer to those Standards and the importance of upholding them at the impairment decision-making stage. Panels should consider the need for the public to have confidence in the registrants who treat them. The public is entitled to expect registrants to be professionally competent and act with decency, honesty and integrity. The public should also be able to rely on the regulatory process to be robust, fair and transparent.

29. The key question to be answered here is, given the nature of the allegation and the facts found proved, would public confidence in the profession and how it is regulated be undermined if there were to be no finding of impairment?

Risk of harm

30. When considering impairment, panels will often have to assess the risk of harm. In assessing the likelihood of a registrant causing similar harm in the future, Panels should take account of:

    a. the risk of or degree of harm caused by the registrant; and
    b. the registrant's culpability for that harm or the risk of exposure of a service user, colleague or member of the public to unwarranted harm

31. In assessing harm and future risk, panels should take account of the fact that harm can be caused in different ways. It may be that the harm has an adverse affect on physical or mental health. In other cases, for example inappropriate conduct towards colleagues, including conduct which is sexual in nature or sexually motivated the harm may include a breakdown in trust within a wider team that may affect the safe and effective delivery of care.

32. The degree of or risk of harm cannot be considered in isolation, as even death or serious injury may result from an unintentional act which is unlikely to be repeated or, conversely, the harm suffered may be less than that which was intended or reasonably foreseeable.

33. In assessing culpability, Panels should take into account that deliberate and intentional harm is more serious than harm arising from a registrant's reckless disregard of risk which, in turn, is more serious than that arising from a negligent act where the harm may not have been foreseen by the registrant.