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The fitness to practise adjudication service
of the Health and Care Professions Council.

Health and Care Professions Tribunal Service

PRACTICE NOTE

Finding that Fitness to Practise is "Impaired"

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

Introduction

In determining whether an allegations is 'well founded', a Panel must decide whether the HCPC, which has the burden of persuasion in relation to the facts alleged, has discharged that burden and, in consequence, whether the registrant's fitness to practise is impaired. Whether those facts amount to the statutory ground of the allegation and constitute impairment is not a matter which needs to be 'proved' but is a matter of judgement for the Panel.[1]

Impairment

An allegation is comprised of three elements, which Panels are required to consider sequentially:

1. whether the facts set out in the allegation are proved;
2. whether those facts amount to the statutory ground set out in the allegation (e.g. misconduct or lack of competence); and
3. in consequence, whether the registrant's fitness to practise is impaired.

It is important for Panels to remember that the test of impairment is expressed in the present tense; that fitness to practice "is impaired". As the Court of Appeal noted in *GMC v Meadow*:[2]

> *"…the purpose of FTP procedures is not to punish the practitioner for past misdoings but to protect the public against the acts and omissions of those who are not fit to practise. The [Panel] thus looks forward not back. However, in order to form a view as to the fitness of a person to practise today, it is evident*

[1] *CRHP v. GMC and Biswas* [2006] EWHC 464 (Admin).

[2] [2006] EWCA Civ 1319

that it will have to take account of the way in which the person concerned has acted or failed to act in the past".

Although the Panel's task is not to "punish for past misdoings", it does need to take account of past acts or omissions in determining whether a registrant's present fitness to practice is impaired.

Factors to be taken into account

In Cohen v GMC[3] the High Court stated that it was "critically important" to appreciate the different tasks which Panels undertake at each of step in the adjudicative process.

The initial task for the Panel is:

"to consider the [allegations] and decide on the evidence whether the [allegations] are proved in a way in which a jury… has to decide whether the defendant is guilty of each count in the indictment. At this stage, the Panel is not considering any other aspect of the case, such as whether the [registrant] has a good record or… performed any other aspect of the work… with the required level of skill".

Subsequently, the Panel is:

"concerned with the issue of whether in the light of any misconduct [etc.] proved, the fitness of the [registrant] to practise has been impaired <u>taking account of the critically important public policy issues</u>".

Those "critically important public policy issues" which must be taken into account by Panels were described by the court as:

"the need to protect the individual [service user] and the collective need to maintain confidence in the profession as well as declaring and upholding proper standards of conduct and behaviour which the public expect… and that public interest includes amongst other things the protection of [service users] and maintenance of public confidence in the profession".

Thus, in determining whether fitness to practise is impaired, Panels must take account of a range of issues which, in essence, comprise two components:

the 'personal' component: the current competence, behaviour etc. of the individual registrant; and

[3] [2008] EWHC 581 (Admin)

the 'public' component:	the need to protect service users, declare and uphold proper standards of behaviour and maintain public confidence in the profession.

As the court indicated in *Cohen*, the sequential approach to considering allegations means that not every finding of misconduct etc. will automatically result in a Panel concluding that fitness to practice is impaired, as:

> *"There must always be situations in which a Panel can properly conclude that the act… was an isolated error on the part of the... practitioner and that the chance of it being repeated in the future is so remote that his or her fitness to practise has not been impaired…*
>
> *It must be highly relevant in determining if... fitness to practise is impaired that... first the conduct which led to the charge is easily remediable, second that it has been remedied and third that it is highly unlikely to be repeated".*

It is important for Panels to recognise that the need to address the "critically important public policy issues" identified in *Cohen* - to protect service users, declare and uphold proper standards of behaviour and maintain public confidence in the profession - means that they cannot adopt a simplistic view and conclude that fitness to practise is not impaired because, since the allegation arose, the registrant has corrected matters or "learned his or her lesson".

As indicated in *Brennan v HPC*,[4] in cases where a Panel makes a finding of impairment or imposes a sanction solely on the basis of the 'public' components of an allegation, it must explain the reasons for that decision. It is insufficient simply to recite that, for example, it is necessary in order to maintain public confidence in the profession.

Degree of harm and culpability

In assessing the likelihood of the registrant causing similar harm in the future, Panels should take account of:

- the degree of harm caused by the registrant; and
- the registrant's culpability for that harm.

In considering the degree of harm, Panels must consider the harm caused by the registrant, but should also recognise that it may have been greater or less than the harm which was intended or reasonably foreseeable.

The degree 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. The registrant's culpability for that harm should also be considered. In assessing culpability, Panels

[4] [2011] EWHC 41 (Admin)

should recognise that deliberate and intentional harm is more serious than harm arising from the 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.

Character evidence

In deciding whether conduct "is easily remediable, has been remedied and is highly unlikely to be repeated", Panels may also need to consider 'character evidence' of a kind which, in other proceedings, might only be heard as mitigation or aggravation as to sanction after a finding had been made.

Whilst it is appropriate for Panels to do so, in admitting character evidence for the purpose of determining impairment, they must exercise caution. As the Court of Appeal noted in *The Queen (Campbell) v General Medical Council,*[5] issues of culpability and mitigation are distinct and need to be decided sequentially and:

> *"The fact that in some cases there will be an overlap, or that the same material may be relevant to both issues, if they arise, does not justify treating evidence which is exclusively relevant to personal mitigation as relevant to the prior question, whether [the allegation] has been established."*

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. The latter will only be relevant if the Panel needs to hear mitigation against sanction.

For example, in considering allegations involving dishonesty, Panels may need to consider character evidence in determining whether the registrant's actions were dishonest, in reaching a decision about impairment or as mitigation in relation to sanction.

When considering impairment, Panels may properly take account of evidence such as the registrant's competence in relation to the subject matter of the allegation; the registrant's actions since the events giving rise to the allegations; or the absence of similar events. However, Panels should not normally rely on such evidence if it is disputed by the registrant and has not yet been the subject of a determination by a regulatory body, tribunal or court.

Character evidence of a more general nature which has no direct bearing on the findings to be made by the Panel, should not be admitted at this point. Expressions of regret or remorse will usually fall within the latter category. However, where there is evidence that, by reason of insight, that regret or remorse has been reflected in

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5 [2005] EWCA Civ 250

modifications to the registrant's practice, then it may be relevant to the question of impairment.

In deciding whether to admit character evidence at the impairment rather than the sanction phase, Panels need to consider whether the evidence may assist them to determine whether fitness to practise is impaired. Whilst caution needs to be exercised, an over-strict approach should not be adopted as, it is important that all evidence which is relevant to the question of impairment is considered, such as evidence as to the registrant's general competence in relation to a competence allegation.

In considering evidence of impairment, Panel's will readily recognise and be able to disregard character evidence of a general nature which is unlikely to be relevant. However, as the decision in *Cheatle v GMC*[6] highlights, a Panel must be careful not to refuse to hear evidence at the impairment phase about a registrant's general professional conduct which, when heard at the sanction phase, may raise doubts about its conclusion that the registrant's fitness to practise is impaired.

The sequential approach

In determining whether fitness to practise is impaired, Panels should act in a manner which makes it clear that they are applying the sequential approach by:

- first determining whether the facts as alleged are proved;
- if so, then determining whether the proven facts amount to the statutory ground (e.g. misconduct) of the allegation;
- if so, hearing further argument on the issue of impairment and determining whether the registrant's fitness to practise is impaired; and
- if so, hearing submissions on the question of sanction and then determining what, if any, sanction to impose.

It is important that these four steps should be and be seen to be separate but this does not mean that, for example, Panels must retire four times in every case.

The management of the steps in the process will depend upon the nature and complexity of the case and, as the court accepted in *Saha v. GMC*[7], the fitness to practise process is composed of "steps" rather than formal "stages".

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6 [2009] EWHC 645 (Admin)

7 [2009] EWHC 1907 (Admin),

Findings of fact

Whilst there is no general obligation in law to give separate decisions on finding of fact, in more complex cases it may be necessary to do so. As the Court of Appeal stated in *Phipps v General Medical Council*:[8]

> *"every Tribunal ... needs to ask itself the elementary questions: is what we have decided clear? Have we explained our decision and how we have reached it in such a way that the parties before us can understand clearly why they have won or why they have lost?*
>
> *If in asking itself those questions the Tribunal comes to the conclusion that in answering them it needs to explain the reasons for a particular finding or findings of fact that, in my judgment, is what it should do. Very grave outcomes are at stake. Respondents ... are entitled to know in clear terms why such findings have been made."*

22nd March 2017

[8] [2006] EWCA Civ 397