

Fitness to Practise Committee – 24 May 2012

Not Well Founded Review

Executive summary and recommendations

Attached is a report reviewing cases between 1 April 2011 and 31 March 2012 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 12 of the report reviewing not well founded decisions.

Background information

This paper should be read in conjunction with a report on the same topic submitted to this Committee 26 May 2011 and 13 October 2011.

Resource implications

None

Financial implications

None

Appendices

Appendix One - Not Well Founded Review

Date of paper

14 May 2012

Not well founded case review - 1 April 2011 – 31 March 2012.

1.0 Introduction

- 1.1 This paper sets out the number of cases that resulted in a decision of 'not well found' between April 2011 and March 2012. It discusses the reasons for those decisions and sets out a number of recommendations to further develop the fitness to practise process.
- 1.2 It is a continuation of the regular analysis provided to the committee by the Executive, since 2010. Previous papers have 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.
- 1.3 This report provides an updated review of not well founded decisions for hearings that took place in the last 12 months 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.

2.0 Case to Answer

- 2.1 The table below demonstrates the number of cases considered by Investigating Committee Panels since 2007-2008 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 2007 – 31 March 2012

Year	Number of Cases Considered	Number of Cases Referred to a Final Hearing	Case to answer percentage
2007-2008	299	186	62
2008-2009	363	206	57
2009-2010	499	291	58
2010-2011	512	294	57
2011-2012	516	252	51
Total	2189	1229	56

- 2.2 In 2011-2012 there has been a continued reduction in the percentage of case to answer decisions from the previous years. Possible

reasons for this include the continued revision of 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.

- 2.3 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 67 cases where a not well founded decision has been made at the final hearing in 2011-2012 representations were made by the registrant at the case to answer stage in all but 4 cases.
- 2.5 In previous committee 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 A Practice Note on the topic of discontinuance was approved by Council on 9 December 2010.

4.0 Statistics

4.1 The table below demonstrates the number of cases where an allegation was not well founded since April 2007.

Table 2: Number of 'Not well founded' decisions

Year	Number of not well-founded cases	Number of concluded cases	Percentage of cases not well founded
2007–2008	26	156	17
2008–2009	40	175	23
2009-2010	76	256	30
2010-2011	85	314	27
2011-2012	67	289	23
Total	294	1190	25

4.2 In 2011-12, 289 cases have been concluded at a final hearing. Of those cases 67 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 2011-12 continues a trend of reducing percentages of cases resulting in a not well founded decision. This in some ways 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. In 2011-2012, Cautions have been the most common decision and the Not Well Found outcome has only occurred slightly more often than a Strike Off or Suspension order.

Table 3: Decisions reached by Panels April 2008-31 March 2012

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
2011-2012	56	55	29	69	0	11	4	67	289
Total	249	170	83	210	2	39	15	268	1034

4.4 The next table indicates the decisions reached by panels since April 2009 by percentage. This helps to highlight the reduction over the last two years in not well-founded decisions, the stability of the rate of striking off, and the increase in cases resulting in a caution order or the application of a condition of practice.

Table 4: Decisions reached by panels, percentages April 2009- 31 March 2012

Decision	Number 2009-2010	Percentage 2009-2010	Number 2010-2011	Percentage 2010-2011	Number 2011-2012	Percentage 2011-2012
Striking Off	65	25.3	62	19.7	56	19.3
Suspension	40	15.6	49	15.6	55	19.0
Conditions of Practice	15	5.8	26	8.2	29	10.0
Caution	46	17.9	70	22.2	69	23.9
Removed*	10	3.9	18	5.7	11	3.8
Amended	1	0.4	0	0.0	0	0
No Further Action	3	1.1	4	1.2	4	1.4
Not Well Founded	76	29.6	85	27.0	67	23.1
Total	256	100	314	100	289	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 March 2012 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 March 2012		
Element of Allegation	Number of cases	Percentage of cases	Element of Allegation	Number of cases	Percentage of cases
Facts	31	36	Facts	28	41.8
Grounds	18	21	Grounds	14	20.9
Impairment	36	43	Impairment	25	37.3
Total	85	100	Total	67	100

5.3 The table above demonstrates that in 37% 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. This has reduced from 43% in the previous year, and can be attributed to the timely investigation and hearing of these cases in order to prove current impairment. The proportion of cases that are not well found at the facts stage has increased from the previous year. This may be related to the cases referred on from Investigating Committee, or it may be related to the quality of the investigation, or the witnesses called by the HPC. We are reviewing this with our external investigators as part of our ongoing quality assurance programme.

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

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 and continued in 2011-12 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. The follow up call to witnesses after participating at a hearing demonstrates how this is appreciated and has been highlighted by CHRE as an example of good practice in communicating with stakeholders.

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.

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. In 2011-12, there was one case.
- 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.
- 6.4 As demonstrated by the table below, 'learning points' were identified in relation to 12% of all hearings during 2010-2011 and 15% of those in 2011-2012 with 64 learning points being raised following notification of 430 completed hearings. This represents a significant increase from previous years but indicates the development of CHRE scrutiny processes across all of the nine health care regulators.

Table 6: Number of learning points identified by CHRE 01 April 2008 - 31 March 2012

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%
2011-2012	430	64	15%
Total	1461	151	10%

* 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 May 2012 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 is 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 2011-2012, 63 out of 67 registrants (94%) 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 March 2012

Profession	No	Yes - by representative	Yes - by self	Total
AS	0	0	0	0
BS	0	3	3	6
CH	2	10	0	12
CS	0	0	0	0
DT	0	3	0	3
HAD	0	2	0	2
ODP	0	2	0	2
OR	0	0	0	0
OT	0	5	2	7
PA	2	14	2	18
PH	0	7	0	7
PSY	0	6	0	6
P/O	0	0	0	0
RA	0	2	0	2
SL	0	2	0	2
Total	4	24	7	67

- 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 194 occasions. This accounts for only 67% of all concluded hearings. In the same year, the percentage of cases with an outcome of not well found was 94%. 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. This shows that cases resulting in not well found are much more likely to have represented registrants.

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
2011-2012	289	67	67	94

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	4	10	1	0	11	2	28
Not well found- grounds	2	6	1	0	4	1	14
Not well found- impairment	9	9	1	1	4	1	25
Total	15	25	3	1	19	4	67

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 continued reduction seen 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
 - Further develop the role of the ICP Co-ordinator to improve consistency of advice to panels, and to continue to promote the use of learning points at Investigating Committee Panels where appropriate
 - As the numbers of FtP staff increase to take on the volumes of cases associated with regulating social workers in England, and the increase in allegations of the existing 15 professions, the Executive will provide a consistent induction and refresher training programme including drafting of allegations.