

Health and Care Professions Tribunal Service

PRACTICE NOTE

“Case to Answer” Determinations

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

Introduction

1. Article 26(2) of the Health Professions Order 2001 provides that, where an allegation is referred to an Investigating Committee 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”.
2. The procedure to be followed is set out in Article 26(2) to 26(10) and in the Health and Care Professions Council (Investigating Committee)(Procedure) Rules 2003.

The “realistic prospect” test

3. 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. The role of the Panel is therefore to decide whether there is a case to answer, not to determine the allegation.
4. 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.”

¹ [2001] 1 All ER 91

Applying the test

5. 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 proof)² will be able to prove the facts alleged and that there is a realistic prospect that a panel will find, as a matter of judgement, that those facts amount to the statutory ground alleged and to current impairment.
6. The test does not 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 of a finding of current impairment.
7. In reaching its decision, a Panel:
 - a. should recognise that it is conducting a limited, paper-based, exercise and must not make findings of fact on the substantive issues;
 - b. must assess the overall weight of the evidence but should not seek to resolve substantial and material conflicts in that evidence.
8. 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.
9. Resolving substantial conflicts in the available evidence, such as assessing the relative strengths of competing arguments is not a task which should be undertaken by the Panel because that is not their role and they do not have the ability to test the evidence in the way that a panel at a final hearing can. 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.
10. 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. Panels may find it helpful to refer to the Practice Note on *Fitness to Practise Impairment* but must remember that at this stage their consideration is limited only to whether there is a case to answer.
11. It is important for Panels to remember that the realistic prospect test applies to the whole of an allegation, that is:
 - a. the facts set out in the allegation;

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).

- b. whether those facts amount to the 'statutory ground' of the allegation (e.g. misconduct or lack of competence); and
 - c. in consequence, whether fitness to practise is impaired.
12. Once the Panel has considered and applied the realistic prospect test to the alleged facts and statutory ground, they need to consider whether, based on those facts, there is a realistic prospect of a finding of impairment. At this stage, Panels must consider carefully any evidence, including evidence of insight, remediation and remorse which might suggest that, although the facts and statutory ground may be established, there is no realistic prospect of a finding of current impairment. In undertaking this task, Panels may find it helpful to refer to the Practice Note on *Fitness to Practice Impairment*.
13. It is important in all cases, that the Panels' reasons for their decisions are clear and that they demonstrate that they have considered the realistic prospect test at all three stages of their decision making. This is important because there will be cases where the facts and statutory ground can be established but there is no current impairment. For example, in a health case there may be a realistic prospect of establishing a health condition but that does not mean that the registrant's fitness to practise is impaired by reason of that condition.

Review and amendment of allegations

14. In considering whether there is a case to answer, Panels should consider each element of the allegation, to see whether there is sufficient evidence to provide a realistic prospect of the facts alleged being proved and whether those facts would amount to the statutory ground and establish that fitness to practise is impaired.
15. Having reviewed the evidence and in applying the realistic prospect test, the Panel may need to amend or delete elements of an allegation. 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 as revealed by the evidence.³
16. A panel may make minor amendments to an allegation without adjourning their consideration of the case. A minor amendment may be to correct a typographical error or to make a stylistic drafting change which does not affect the substance of the case alleged against the registrant.
17. If a Panel concludes that it is necessary to vary or amend an allegation to a material degree, where the changes alter the case against the registrant, both the registrant and the HCPC should be given a further opportunity to make

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

observations on the revised allegation before a final case to answer decision is made.

Impaired fitness to practise

18. In deciding whether there is a realistic prospect that fitness to practise is impaired, Panels should consider the nature and severity of the allegation.
19. 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.
20. A useful starting point for Panels is to consider whether the HCPC's case includes evidence which, if proven, would provide a realistic prospect that a panel would find that the registrant does not meet a key requirement of being fit to practise, which the HCPC regards as having the skills, knowledge, character and health to practise their profession safely.

No case to answer

21. 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.