

Learning Points Bulletin

Introduction

We are committed to promoting good practice and consistency in the regulation of health professionals. One of the ways we do this is through our powers under section 29 of the National Health Service Reform and Health Care Professions Act 2002. We can refer decisions of final fitness to practise panels to the courts, where we consider a decision is unduly lenient, and that it is necessary to do this to protect the public.

Our referrals under section 29 have resulted in some decisions being changed. However, the real value of scrutinising the regulators' fitness to practise decisions is the learning points that we identify from both the cases that have been referred to the courts and those that have not been referred.

This is the first of a series of learning points bulletins designed to assist fitness to practise panels in their consideration of future cases, and help to improve the regulators' processes and procedures. Every six months our bulletin will focus on a learning points theme. This theme will generally reflect the key learning points we have identified over the previous 12 months.

Since August 2008, we have reviewed 1529 final fitness to practise decisions and identified 158 learning points across the regulators. Of these, 47 were on the drafting of a fitness to practise determination. Therefore, as this was the most common learning point raised with the regulators, this is the theme of our first bulletin.

The learning points bulletin includes relevant case law and the learning points that we have identified. We encourage the regulators to share this bulletin with their panellists.

The language used

Most of the nine regulators have different names for their committees and panels; for simplicity, the term "panel" is used throughout this document. Also, the regulators have different statutory tests, so we have used generic terms of "misconduct" and "impairment of fitness to practise".

Why do you need to write a comprehensive fitness to practise determination?

Panels must give reasons for their findings, including findings of fact, so that:

- Everyone understands the decision;
- The public understands how the sanction the panel has imposed protects the public; and
- We can carry out our role of reviewing final fitness to practise decisions under section 29 of the Act.

What does the case law say?

- **Stefan, Gupta and Selvanathan** – both parties should be able to understand why the panel has reached their decision.
- **Threlfall** - panels are obliged, by common law and pursuant to Article 6 of the European Convention on Human Rights, to give adequate reasons in good time. Furthermore, there is a further practical reason why they should give adequate reasons for their decisions, and that is to enable the Council for the Regulation of Healthcare Professionals (CHRE's previous name) to consider whether to exercise its powers under section 29 of the 2002 Act.
- **Basiouny** – panels need to explain their reasons where they are not immediately obvious.
- **Marshall** – there is a duty on panels to explain how the sanction they have imposed protects the public.
- **Phipps** – panels should give reasons for their findings of fact. The need to give reasons for findings of fact will vary from case to case and will depend on the matter under consideration. The principles in *English v Emery Reimbold* [2002] 1 WLR 2409, that "*justice will not be done if it is not apparent to the parties why one has won and the other has lost*" are universal and apply to any tribunal charged with the duty to reach a judicial or quasi-judicial conclusion.

What makes a good determination?

A good fitness to practise determination will include:

- A description of the allegations
- An explanation of why particular allegations were or were not found proved
- An explanation of any important background facts which led the panel to reach its conclusion
- An explanation of why the findings on the allegations do or do not amount to misconduct or impairment of fitness to practise
- An explanation of why the sanction was or was not imposed.

Where the panel imposes a sanction that can be subject to review, the determination should also include:

- An explanation of whether or not a resumed hearing is necessary.
- An explanation of the sort of evidence the registrant would be expected to provide at a resumed hearing.

A review panel determination should include:

- Details of the initial allegations against the registrant, a brief summary of the initial findings by the panel, as well as any subsequent findings, and the actions taken by the registrant since the last hearing.

A description of the allegations

The determination should describe, in sufficient detail for the reader to understand, the nature and seriousness of the allegations. It can be useful to refer to breaches of the regulator's Code of Conduct.

Learning points

In a case where the registrant was alleged to have dishonestly and falsely represented qualifications, we did not find the determination sufficiently detailed to enable us to assess the seriousness of the allegations or the degree of patient risk entailed. The determination was not clear about whether the registrant was a registered mental health practitioner and the extent to which the absence of the claimed qualifications and registration made her unqualified to act as a custody manager.

An explanation of why the allegations were or were not found proved

If a decision turns simply on the credibility of one witness as opposed to another, then the reasons for the decision could be commensurately brief. Where a finding may appear to be inexplicable in relation to the evidence received, then more detailed reasons are needed.

Learning points

In a case involving two charges and six sub charges, the panel only commented that they were satisfied that, with the exception of those parts admitted by the registrant, the allegations were not well founded. The determination did not set out which allegations the registrant admitted. The determination should have set out which charges had been found proved, not proved or not to be well founded.

The allegations against a registrant included that he removed a patient's shorts without valid consent, massaged a patient's buttocks without valid consent and massaged a patient's tummy without valid consent. The panel found that it was not probable that the registrant pulled down the patient's shorts but did not explain why they thought it not probable. The panel accepted the registrant's version of events that he had informed the patient that he would be working on her buttocks before starting the massage and that he did not massage her tummy. However, the panel did not explain why they considered this a more likely version than the patient's. The panel also did not explain why they considered that the patient had given valid consent as they only explained that the patient had given informed consent rather than specific and informed consent (valid consent).

An explanation of any important background facts which led the panel to the reach its conclusion

Statements about the case should be supported by evidence. If a panel were to be satisfied that a registrant had not been misusing controlled drugs, they should refer to their reasons for believing this to be true e.g. the fact they had seen medical reports, including drug test results.

Learning points

In a case where a registrant had failed to inform their employer about their criminal conviction, the determination lacked detail about why the registrant had failed to disclose their involvement in criminal proceedings, conviction and sentence. The determination should have set out if it was because, for instance, the registrant was forgetful, confused or had wilfully not disclosed the information.

In a review hearing, the panel did not provide a detailed explanation for finding that the registrant had kept up to date in their field of expertise. This was particularly important given the registrant had not carried out that specific area of work for four years, had only been involved in limited clinical practice in the last 14 months and by their own admission may need supervision on return to that specific area of work.

An explanation of why the findings on the allegations do or do not amount to misconduct or impairment of fitness to practise and why

Learning points

In a case where the panel found that the registrant was not impaired, the determination lacked detail on why they had reached this view, how the decision protected the public or how the decision complied with the regulator's indicative sanctions guidance.

An explanation of why the sanction was or was not imposed.

The panel's determination should note their consideration of the sanctions starting with the lowest possible sanction and moving upwards. The determination should note that the panel has considered the sanction below and immediately above the sanction imposed and the reasons for not imposing those sanctions. Reasons should be given in sufficient detail so that interested parties can understand why a sanction has been imposed.

The explanation should include:

- Why the sanction imposed is the most appropriate one and how it protects the public
- Why other sanctions would not be suitable
- Why the period imposed for the caution, conditions of practice or suspension order has been chosen
- Reference to the relevant Indicative Sanctions Guidance (ISG)
- Where the panel's decision does not appear to accord with the ISG, an explanation for this, based on the specific circumstances of the case.

Learning points

In a case where the panel had acknowledged that the registrant faced serious clinical allegations which had the potential to harm patients, the determination did not adequately address the reasons why the sanctions of erasure and suspension would be disproportionate. Panels should ensure that reasons are given for why a sanction would disproportionate so that the public understand the reasons for the sanction imposed.

An explanation of whether or not a resumed hearing is necessary and the sort of evidence the registrant would be expected to provide at a resumed hearing.

Learning points

In a case where a registrant had a conditions of practice order, there was no express mention in the determination that the registrant would be subject to a review hearing and what evidence that they would be expected to present at the review hearing. The need for and the purpose of a review hearing should be set out in the determination. The panel should also set out what evidence

the registrant should submit prior to the review hearing to demonstrate their fitness to practise. Without this, the registrant can claim that the process has been unfair as they have not been told how to satisfy the requirements of the panel. This information will also reassure the public that the registrant will not return to unrestricted practice without demonstrating that they are fit to practise.

A review panel determination should include details of the initial allegations against the registrant, a brief summary of the initial findings by the panel and the actions taken by the registrant since the last hearing.

A person should be able to read a review determination in isolation of previous determinations.

Learning points

In a case where a hearing was held to review a suspension order imposed on 07 February 2007 and reviewed on 21 September 2007 and 21 July 2008, the determination did not include sufficient details of the initial allegations or findings of the previous panels to enable a reader to understand the reasoning of the current panel. The reader would only have understood that there were clear deficiencies in the registrant's practice but not what these deficiencies were.

Conclusion

In summary, determinations should clearly set out:

- **What** the regulator is alleging the registrant has done
- **Why** the allegations were or were not found proved
- **What** the panel considered when reaching its decision on whether the allegations were found proved or not proved
- **Why** the allegations do or do not amount to misconduct or impairment of fitness to practise
- **Why** the sanction was imposed and how it protects the public
- **Why** a review hearing is necessary and the sort of evidence a registrant should present at the hearing

We would welcome any feedback that you have about our learning points bulletin and would also be happy to answer any queries that you may have. Please contact:

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