

Fitness to Practise Committee 3 June 2010

Review of Striking Off Orders: New Evidence and Article 30(7)

Executive summary and recommendations

Introduction

The 2010-11 Fitness to Practise Department work plan set out a number of areas of work that would be considered over the course of the year. One area of work was to produce guidance for Practice Committee Panels on the procedure to be adopted in relation to the admission of new evidence on applications made for review under Article 30(7) of the Health Professions Order 2001.

The Practice Note sets out the test that Practice Committee Panels should apply when determining whether to grant applications.

Decision

The Committee is asked to discuss the practice note and recommend that the Council approve the Practice Note – Review of Striking Off Orders: New Evidence and Article 30(7)

Background information

All practice notes are placed on the HPC website and provided to stakeholders where required. Reference to the appropriate practice notes is provided in standard correspondence.

Resource implications

None

Financial implications

None

Appendices

Practice Note- Review of Striking Off Orders: New Evidence and Article 30(7)

Date of paper

20 May 2010

PRACTICE NOTE

Review of Striking Off Orders: New Evidence and Article 30(7)

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

Introduction

Article 29(7) of the Health Professions Order 2001 (the **Order**) provides that a person who has been 'struck off' the HPC Register may not apply for restoration to the Register within five years of being struck off.

However, Article 30(7) of the Order enables a striking off order to be reviewed at any time where "new evidence relevant to a striking-off order" becomes available after such an order has been made. That Article also provides for review applications to be dealt with in a manner similar to applications for restoration to the Register.

Procedure

Under Article 33 of the Order and the relevant Practice Committee procedural rules,¹ the procedure to be followed by Panels hearing Article 30(7) reviews and other restoration applications will generally be the same as for other fitness to practise proceedings, but subject to one important modification.

In cases where the application has been made by the person concerned, Rule 13(10) of the procedural rules provides for the presentation sequence to be reversed, with the applicant presenting his or her case first and the HPC responding to that case. This modification reflects the fact that the burden of proof is upon the applicant and that it is for the applicant to prove his or her case and not for the HPC to prove the contrary.

Issues to be addressed

In considering Article 30(7) review applications, Panels need to address three issues:

1. whether new evidence has become available which is relevant to the striking-off order which was made;
2. if so, whether to admit (i.e. to hear and consider) that evidence; and
3. if that evidence is admitted, having conducted a substantive review, deciding whether or not to maintain the striking-off order.

¹ the Health Professions Council (Conduct and Competence Committee) (Procedure) Rules 2003 and the Health Professions Council (Health Committee) (Procedure) Rules 2003.

However, the need to address these three distinct issues does not mean that a Panel needs to hold more than one hearing. It is open to a Panel to address all three issues at the same hearing. Equally, it may be appropriate for a Panel to deal with the first two issues at one hearing and then undertake any substantive review at a subsequent hearing. The approach adopted will depend upon the facts of the particular case, but the latter course of action may be appropriate if, for example, witnesses need to be called to give evidence at the substantive review stage.

New evidence

“New evidence” under Article 30(7) is any evidence that, for whatever reason, was not available to the Panel which made the striking-off order but which is “relevant to” the making of that order. Whether the evidence is relevant is a matter for the judgement of the Panel conducting the review but an overly restrictive approach to the question of relevance should not be adopted and, in relation to the original decision, “new evidence” may be relevant to:

- the finding that the allegations were well-founded;
- the finding that fitness to practise is impaired; or
- the decision to impose the sanction of a striking off order.

Admitting new evidence

Whether new evidence **may** be admitted is a question of law. As with other proceedings under the Order, a Panel may admit evidence if it would be admissible in civil proceedings in the part of the United Kingdom in which the case is being heard and, in addition, Rule 10(1)(c) of the procedural rules gives Panels the discretion to admit other evidence if the Panel is satisfied that doing so is necessary in order to protect members of the public;

Whether new evidence **should** be admitted is a matter of discretion for the Panel. In exercising that discretion, the factors to be taken into account and the weight to be attached to each of them will depend upon the facts of the case but should include:

- the significance of the new evidence;
- the *Ladd v Marshall*² criteria for reception of fresh evidence, namely:
 - whether with reasonable diligence the evidence could have been obtained and presented at the original hearing;
 - whether the evidence is such that it could have an important influence on the result of the case; and
 - whether the evidence is credible;

² [1954] 1 WLR 1489

- any explanation of why the new evidence could not have been presented at the original hearing or, if it could have been, whether there is a reasonable explanation for not doing so;
- if the original hearing proceeded in the absence of the registrant, evidence that the registrant did not receive proper notice of the hearing;
- the public interest, including the impact upon others if the case is re-opened (e.g. vulnerable witnesses), the need for “finality in litigation” and the countervailing public interest factor identified in *Muscat v Health Professions Council*,³ that there is:

“...a real public interest in the outcome of the proceedings. It [is] important from the public perspective that the correct decision [is] reached. It is not in the public interest that a qualified health professional, capable of giving good service to patients, should be struck off [the] professional register”.

The weight that is given to any new evidence will depend upon the facts of the case and the nature and importance of that evidence. However, even if a Panel finds that new evidence exists it is not obliged to admit the evidence and conduct a substantive review of the striking-off order. Whether it does so will be a matter for the Panel’s judgement, having regard to all the relevant factors.

Restoration following an Article 30(7) review

As with any other restoration application, Article 33(5) of the Order provides that a person must not be restored to the register following an Article 30(7) review unless the Panel is satisfied that the applicant:

- meets the general requirements for registration; and
- is a fit and proper person to practise the relevant profession, having regard to the particular circumstances that led to striking off.

If a Panel determines that a person is to be restored to the Register following an Article 30(7) review, restoration may be unconditional or the Panel may exercise its power under Article 33(7) of the Order to replace the striking off order with a conditions of practice order.

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³ [2009] EWCA Civ 1090