



Defining Fitness To Practise

This article was first published in the Association of Regulatory and Disciplinary Lawyers Quarterly Bulletin, December 2008

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A striking feature of the reforms to the regulation of the healthcare professions in the early part of this century was the attempt to unify procedures for assessing different causes of disciplinary action. The General Medical Council (GMC) provides a useful example. Before 2004, the GMC ran a number of different disciplinary committees with distinct competencies, powers and procedures: the Professional Conduct Committee, the Health Committee and the Committee on Professional Performance. This produced difficulties of demarcation. For example, where would a case go if it involved health concerns which had an adverse impact on performance? These problems were exacerbated by the limited opportunities for transfer between the Committees.

After the amendments to the Medical Act 1983 (the 1983 Act) entered into force on 1 November 2004, all disciplinary cases involving registered medical practitioners were subject to the unified jurisdiction of the Fitness to Practise Panel (FPP). Under the new section 35C(2) of the 1983 Act, the question (which determines the availability of sanctions) for the FPP has become whether the practitioner's fitness to practise is impaired. Impairment to fitness to practise can be made out in one of five ways: misconduct; deficient professional performance; a conviction or caution for a criminal offence; adverse physical or mental health; or a determination by another regulatory body in the UK or elsewhere that fitness to practise is impaired.

The reform gives rise to two questions: what constitutes an impairment to fitness to practise given that the concept is not defined in the 1983 Act or the GMC (Fitness to Practise) Rules Order of Council 2004; and when that assessment should be made. Two recent decisions in the Administrative Court concerning allegations of misconduct have gone some way to providing the answers.

In *Zygmunt v General Medical Council* [2008] EWHC 2643 (Admin), Mitting J described the assistance provided in the GMC's Indicative Sanctions Guidance on the definition of fitness to practise as "unhelpful" (paragraph 28). The learned judge preferred the summary of potential causes of impairment offered by Dame Janet Smith in the Fifth

Shipman Inquiry Report (2004, paragraph 25.50), that is, where the doctor (a) presents a risk to patients; (b) has brought the profession into disrepute; (c) has breached one of the fundamental tenets of the profession; or (d) has acted in such a way that his integrity can no longer be relied upon. Mitting J also adopted that part of the judgment of Silber J in *Cohen v General Medical Council* [2008] EWHC 581 in which it was stated that the FPP should take into account the need to protect the individual patient and the collective need to maintain confidence in the profession as well as declaring and upholding proper standards of conduct and behaviour (Cohen, paragraph 62).

Both cases emphasise that the FPP's decision must be based on their assessment of the practitioner's fitness to practise at the date of hearing. As such and unlike under the old procedure (in line with *R (Campbell) v General Medical Council* [2005] 1 WLR 3488), a finding of misconduct does not automatically lead to the consideration of sanction: the FPP must acknowledge that there are situations where the misconduct was an isolated error which is unlikely to be repeated in the future or has been remedied by the time of the hearing. In *Meadow v General Medical Council* [2007] QB 462, Sir Anthony Clarke MR (paragraph 32) emphasized that the role of the FPP was not to punish the practitioner for past wrongdoing, but to protect the public: to look forward, not back. Sir Anthony Clarke acknowledged, however, that the FPP's view of a practitioner's fitness to practise today would inevitably be influenced by how they had acted or failed to act in the past. In this connection, both judges in the Administrative Court held that the FPP's practise of not hearing evidence from testimonials about current performance until the stage of sanction was wrong (*Cohen*, paragraph 69 and *Zygmunt*, paragraph 33). Such evidence may be highly relevant to the question of current impairment and should be considered before the FPP reaches its conclusion on impairment.

The importance of *Cohen* and *Zygmunt* should not be overstated. In the many cases, the findings of misconduct (for example, where they relate to matters of great seriousness or are repeated) are likely to make a finding of impairment almost inevitable. However, in those cases which fall outside this category, these decisions fill an important gap in the guidance available to FPPs and to courts hearing appeals from their decisions.

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