

**General
Medical
Council**

Regulating doctors
Ensuring good medical practice

Managing Fitness to Practise Panel Hearings

Guidance for panel chairmen

**October 2007
(with 31 May 2008 and 7 August 2009 revisions)**

CONTENTS

Introduction	3
The role of the chairman.....	4
Prior to the hearing	6
On receipt of papers	6
Conflicts of interest	6
Preparation for the case	6
Morning of the hearing.....	7
Start of the hearing.....	9
Some administrative matters	10
Constitution of panels / quorum.....	10
Specialist advisers.....	10
Legal assessors	11
Unrepresented doctors	11
Handling preliminary issues.....	12
Service / non attendance of the doctor	12
Public / private hearings	13
Adjournments.....	15
Preliminary arguments	16
Findings of fact.....	18
Standard of proof.....	18
Reasons for findings of fact.....	18
Impairment	19
Test applied.....	19
A question of judgment.....	19
Review cases.....	19
Personal mitigation / testimonial evidence.....	20
Sanctions	21
Submissions on appropriate sanction	21
The legal assessor's advice.....	21
Reaching a decision	21
Drafting a determination	23
Immediate orders	24
Some general points	25
Finishing time.....	25
Adjourning a case part-heard	25
Weekend sittings	25

Introduction

The GMC is committed to discharging its adjudication function in an effective, fair and transparent way. We aim to list cases for hearing as soon as reasonably practical and so far as possible ensure that cases are heard within nine months of referral. This involves ensuring that all parties have adequate time to prepare, that the time estimates for hearings are realistic, that there are effective channels of communication between the parties during the pre-hearing stage and that agreement is reached on a number of key issues e.g. whether there will be any preliminary arguments, whether any of the allegations are admitted, which witnesses are required to give evidence etc. The case management system is designed to do this. Nevertheless difficulties can, and do, arise.

Effective case management prior to a hearing is clearly important but it is equally important that hearings in progress are properly managed. Panel chairmen have a vital role to play. This guidance has been prepared to assist them in fulfilling their role.

Chairmen cannot, however, work alone. It is important that all panellists, legal assessors and panel secretaries understand the role of the chairman and support him or her in the task. For that reason copies of the guidance have been sent to all panellists, legal assessors and panel secretaries.

In keeping with our commitment to openness and transparency, this document has also been sent to the medical defence societies and copies are available on the GMC's website.

If you have any comments on the guidance, including suggestions as to how it might be improved please contact the Panel Development Team at 350 Euston Road, London NW1 3JN (email: pandevteam@gmc-uk.org)

The role of the chairman

- In open session, to ensure that:
 - a. the proceedings are conducted within the Rules;
 - b. the time is used effectively. If necessary, the chairman should intervene if counsel / representative / or doctor (if representing him or herself) strays from the issue or repeats arguments previously made and understood by the panel. The chairman might also discuss issues relating to time keeping, availability of witnesses etc with the parties and panellists at appropriate points during the hearing;
 - c. those appearing before the panel, including witnesses, are treated with courtesy and consideration. Where appropriate the chairman should ensure that all those appearing before the panel engage with the process as effectively as possible for example by ensuring that any questions posed to them are capable of being understood, that cultural differences / gender issues are taken into consideration, that reasonable efforts are made to accommodate those who may be fasting, or have a disability etc. The chairman should consider intervening if a witness appears unduly stressed while giving evidence and, if appropriate, take a short adjournment;
 - d. the doctor and all witnesses are informed, briefly, of the panel's role, who is in the room and that panellists are introduced if they ask questions;
 - e. the panel make due inquiry into the matter(s) before them;
 - f. the legal assessor is asked to provide advice on any points of law which may arise and at any point before the panel goes into camera;
 - g. any advice given by the legal assessor while the panel is in camera is repeated before the parties and that the parties have an opportunity to respond if they wish to do so;
 - h. if a specialist adviser is present, that he or she acts within the limits of the role;
 - i. breaks are taken at appropriate times.
- When the panel are in camera, to ensure that:
 - a. the time is used effectively;
 - b. the panellists understand the issue(s) under consideration and remain focussed on it / them;
 - c. there is first a general discussion of the issue(s) so that each panellist can express initial thoughts on what they consider important / not important;
 - d. all panellists contribute to the discussions / decision making. If necessary, the chairman should bring in any panellist who appears reticent and ask any panellist who appears to be dominating the discussion to allow others to speak;

- e. others normally express their views before the chairman gives his / hers; this avoids any perception that the chairman is influencing the views of others;
- f. Panellists are aware that:
- i. they are not bound by their initial thoughts on the case; other panellists may have identified issues which the panellist had not previously considered or thought sufficiently important but which on reflection and having heard the views of others, places a different complexion on the case;
 - ii. they should not feel under pressure to change their views because they are in a minority;
 - iii. the purpose of the in camera discussion is to explore fully the aspects of the case e.g. the relevant evidence (both oral and documentary), the weight to be given to that evidence, the submissions made by both parties etc and, if possible, to reach a consensus. Panellists may be assisted by reference to transcripts, where available, or to their notes;
 - iv. any decision taken by the panel must be in the public interest, which includes:
 - the protection of patients
 - maintenance of public confidence in the profession
 - declaring and upholding proper standards of conduct/behaviour;
 - v. if, having fully explored all the issues, it is clear that consensus cannot be reached a majority decision is acceptable. It is a matter for the chairman's judgment as to when to call a halt to the debate and to put the matter to a vote;
 - vi. the chairman does not have a casting vote. Rules 38 (4) and (5) of The General Medical Council (Fitness to Practise) Rules 2004 (as amended)¹ cover what happens when the votes are equal;
- g. the determination reflects the decision(s) taken by the panel as a whole and the reasons for the decision(s).
- The chairman reads out the determinations of the panel.
 - Other aspects of the chairman's role are referred to in the following sections.

¹ Statutory Instrument 2004 No 2608 as amended by Statutory Instruments 2008 No 1256 (The General Medical Council (Fitness to Practise) (Amendment in Relation to Standard of Proof) Rules Order of Council 2008) and 2009 No 1913 (The General Medical Council (Fitness to Practise) (Amendment) Rules Order of Council 2009)

Prior to the hearing

On receipt of papers

- Read the papers as soon as possible.
- Check whether there are any conflicts of interest.
- Start preparation for the case.

Conflicts of interest

- If you recognise a conflict of interest, or think there may be a conflict, contact the Empanelment Team² immediately. Failure to do so increases the risk that the hearing may not be effective.
- The Empanelment Team will advise whether it is appropriate for you to sit on the case. Before providing that advice, they may need to seek views from others e.g. the parties to the proceedings.
- If you have to stand down, the Empanelment Team will try to find another panellist to replace you. They will also seek to place you on another panel that is sitting at the same time.
- Conflicts of interest may also become apparent on the morning of the hearing or during the course of a hearing. These should be dealt with as they arise.

Preparation for the case

Check:

- The type of case you will be considering (new, review, application for restoration etc).
- Whether there is a single issue (misconduct, deficient performance, conviction or caution, adverse physical or mental health, or a determination by another body) or whether the case raises two or more issues.
- That all the papers received are legible and paginated and whether any documents are obviously missing. If necessary, notify the office³ so that further copies can be made before the hearing: this will save time on the first morning of the hearing.
- Who is sitting on the panel and who the legal assessor will be⁴.

² Email: TheEmpanelmentTeam@gmc-uk.org

³ A contact name and telephone number is always shown on the front page of the papers.

⁴ This information is provided in the documentation sent out in advance of hearings.

Morning of the hearing

- Arrive in good time.
- Check with the panel secretary:
 - a. whether there has been any change to the composition of the panel or to the legal assessor;
 - b. whether the doctor is present and represented;
 - c. if the doctor is not present, whether there are any issues relating to the service of the Notice of Hearing;
 - d. the names of the GMC and defence representatives;
 - e. the list of witnesses expected to be called;
 - f. whether any special arrangements have been made e.g. for vulnerable witnesses, video evidence/link etc;
 - g. whether there are likely to be members of the press present;
 - h. whether there will be any preliminary arguments and if so the type of preliminary argument (e.g. application to adjourn, application to stay proceedings, application for voluntary erasure, abuse of process application etc);
 - i. whether there are any additional documents.
- Speak to the legal assessor - identify any issues where it is clear that advice will be required e.g. service, non-attendance of the doctor, abuse of process, late submission of reports. It is vital that the legal assessor is forewarned of any such issues so that he or she has an opportunity to prepare the advice that will need to be given.
- Speak to the other panellists - discuss the way in which you propose to manage the hearing to ensure that it is conducted fairly and on time. It will help to manage panellists' time during the hearing if you have made clear your expectations. It also provides an opportunity for panellists to ask questions or to raise any issues that may be of concern to them.
- If sitting with new panellists / a new legal assessor it will help them feel part of the proceedings from the outset if you:
 - a. introduce yourself
 - b. introduce the other panellists / legal assessor

- c. show the panellist(s) / legal assessor around the hearing room and panellists' room
- d. be available to answer questions during the breaks in the proceedings
- e. ensure they are not isolated during tea, coffee or lunch breaks.

Start of the hearing

- Start **promptly** at 09:30. The Notice of Hearing stipulates that the parties should attend at 09:00 for a 09:30 start.
- Ensure all parties are called to the hearing room and that the proceedings are ready to start at 09:30.
- Should the parties indicate that they are not ready to start at 09:30:
 - a. call them to the hearing room at 09:30;
 - b. the parties may, if they wish, ask for a short adjournment;
 - c. if they do, ask:
 - i. why they are not ready,
 - ii. what the outstanding issues are, and
 - iii. how long they will take to resolve;
 - d. consider the application and if appropriate grant an adjournment to a convenient time. This may or may not be the time suggested by the parties as depending on the circumstances the panel may wish to be kept informed of progress and decide whether a stage has been reached where the proceedings may start while other outstanding issues are dealt with outside the main hearing;
 - e. if the panel accede to a request for an adjournment, ask whether there is anything useful the panel might do in the interim e.g. whether there are any papers to read;
 - f. where an application for adjournment is granted, ensure the hearing resumes at the time agreed;
 - g. should the parties then notify the panel that they require further time, ask what the outstanding issues are and how much more time is required to resolve them;
 - h. if appropriate the panel should grant a further adjournment but state when the panel will resume.

The process outlined above ensures that the reason for the delay is explained and recorded and, unless the case is one to be heard entirely in private, ensures that the press and public are aware of what is happening rather than being left to speculate.

Some administrative matters

Constitution of panels / quorum

- There have been challenges to the constitution of panels e.g. that the panellists are inexperienced or do not include a doctor from a particular speciality.
- Rule 6 of the General Medical Council (Constitution of Panels and Investigation Committee) Rules 2004⁵ provides that the quorum is three panellists and **shall** include:
 - a. A chairman, who may be either medical or lay;
 - b. A medical panellist, and
 - c. A lay panellist.
- The case of Dzikowski⁶ is helpful; paragraphs 23 and 24 deal with the composition of panels.

Specialist advisers

- Rule 3(2) of The General Medical Council (Fitness to Practise) Rules 2004 (as amended)⁷ provides that a specialist adviser **may** be appointed to advise a Fitness to Practise Panel in relation to medical issues relating to a doctor's health or performance.
- There is no provision⁸ to appoint a specialist adviser when it is alleged that a doctor's fitness to practise is impaired for reasons other than health or performance.
- The decision whether to appoint a specialist adviser rests with the Registrar. Generally speaking, the Registrar will appoint a specialist adviser in new cases where there are performance or health reports or, in review cases, where there is a new performance assessment report or a change in medical diagnosis.
- The case of Watson⁸ provides helpful guidance on the role of specialist advisers. Although it relates to a case heard under the previous Health Committee Rules the general principles apply equally to cases heard under the 2004 Rules. In summary:
 - a. The specialist adviser should not retire with the panel but give his or her advice in the presence of the parties.
 - b. The advice given by the specialist adviser should be limited to the significance of the information before the panel but should not express personal views on the

⁵ Statutory Instrument 2004 No.2611

⁶ Dzikowski – v – General Medical Council [2006] EWHC (Admin)

⁷ Statutory Instrument 2004 No 2608 as amended by Statutory Instruments 2008 No 1256 (The General Medical Council (Fitness to Practise) (Amendment in Relation to Standard of Proof) Rules Order of Council 2008) and 2009 No 1913 (The General Medical Council (Fitness to Practise) (Amendment) Rules Order of Council 2009)

⁸ Watson – v - General Medical Council [2005] EWHC 1896 (Admin)

doctor's fitness to practise. Unlike the authors of the reports available to the panel, the specialist adviser has not assessed the doctor.

Legal assessors

- The role of the legal assessor is set out in The General Medical Council (Legal Assessors) Rules 2004⁹.
- There have also been a number of judgments, which clarify the role of the legal assessor¹⁰.
- In summary, the role of the legal assessor is to advise the Panel on questions of law and of mixed law and fact, including the procedures and powers of the panel.
- The legal assessor is an adviser, not a decision maker. It is for the panel to decide whether to accept the legal advice given. If it does not accept the advice, reasons **must** be given.
- Where there is an unrepresented doctor the legal assessor:
 - a. can assist the panel by explaining the procedures to the doctor;
 - b. cannot represent the doctor i.e. put questions on behalf of the doctor or make submissions on his or her behalf;
 - c. should **never** be asked to see the doctor alone. This could be perceived as bias by other parties or an allegation by an unrepresented doctor about what a legal assessor did or did not say. The GMC's representative should also be present if the legal assessor speaks to an unrepresented doctor.

Unrepresented doctors

- Unrepresented doctors may have little understanding of the proceedings and what they can or cannot say at each stage.
- In addition to the assistance a legal assessor can provide (see above), the GMC's representative may also draw the panel's attention to evidence favourable to the doctor.
- The chairman should explain at various points in the hearing the particular stage reached and ensure, as far as possible that the doctor understands the position.

⁹ Statutory Instrument 2004 No 2625

¹⁰ The key judgments are: Fox –v– The General Medical Council (1960), Libman –v- The General Medical Council (1972), Nwabueze –v- The General Medical Council Privy Council Appeal No. 21 of 1999 and Walker –v- The General Medical Council Privy Council Appeal No. 94 of 2001.

Handling preliminary issues

Service / non attendance of the doctor

- If the doctor is not present, a two stage process must be followed:
 - a. the panel must first decide whether the Notice of Hearing has been correctly served and, if so, then
 - b. whether to proceed in the absence of the doctor.
- Rule 40¹¹ deals with the issue of service.
 - a. The Rule does **not** require that the papers are received by the doctor.
 - b. The Notice must be served in accordance with paragraph 8 of Schedule 4 to the Medical Act (i.e. by delivering it to the doctor, by leaving it at his registered address or last known address, by sending it by a registered post service or by sending it by a postal service which provides for the delivery of the Notice by post to be recorded).
 - c. If the doctor is represented by a solicitor or trade union or defence organisation, the Notice can also be served on the representative provided they have 'gone on record' as acting for the doctor.
- Proof of service may be proved by:
 - a. Confirmation of posting
 - b. A signed statement from any person serving the Notice confirming that the Notice was delivered to, sent to or left at
 - i. the doctor's registered address or last known address
 - ii. the business or electronic email address of the doctor's solicitor, trade union or defence organisation.
- Practitioners are required to maintain an up to date and effective registered address¹².
- If the panel is satisfied that Notice of the Hearing has been properly served, it must then decide whether to proceed in the doctor's absence¹³.

¹¹ The General Medical Council (Fitness to Practise) Rules 2004 – SI 2004 No 2608 as amended by Statutory Instruments 2008 No 1256 (The GMC (Fitness to Practise) (Amendment in Relation to Standard of Proof) Rules Order of Council 2008) and 2009 No 1913 (The GMC (Fitness to Practise) (Amendment) Rules Order of Council 2009)

¹² See section 30 of the Medical Act 1983, as amended

¹³ Rule 31 of The General Medical Council (Fitness to Practise Rules) 2004 – SI 2004 No 2608 as amended by Statutory Instruments 2008 No 1256 (The General Medical Council (Fitness to Practise) (Amendment in Relation to Standard of Proof) Rules Order of Council 2008) and 2009 No 1913 (The General Medical Council (Fitness to Practise) (Amendment) Rules Order of Council 2009)

- Key judgments where the courts have clarified the issues to be taken into account when deciding whether to proceed in the absence of a defendant / doctor include:

R – v – Jones [2002] UKHL 5

Alan Roderick Tait – v – The Royal College of Veterinary Surgeons Privy Council Appeal No. 67 of 2002

Yunez Teinaz – v – London Borough of Wandsworth [2002] EWCA Civ 1040

Sarfraz Alam Awan – v – The Law Society [2003] EWCA Civ 1969

Mahmood – v – General Medical Council [2007] EWHC 474 (Admin)

- In deciding whether or not to proceed the panel should consider:
 - a. the need to protect patients and have regard to the public interest and the interests of the practitioner;
 - b. the seriousness of the case;
 - c. the risk of reaching the wrong conclusion about the reasons for the doctor's absence;
 - d. the risk of reaching the wrong decision on the merits, as a result of not hearing the doctor's account;
 - e. any medical evidence about the doctor's health, and any challenges to such evidence.

Public / private hearings

- Rule 41 of the General Medical Council (Fitness to Practise) Rules (as amended)¹⁴ provides that:
 - a. hearings **shall** be heard in public, except
 - b. when the panel **are** considering whether to make or review an interim order or where they **are** considering the physical or mental health of the practitioner.

¹⁴ Statutory Instrument 2004 No 2608 as amended by Statutory Instruments 2008 No 1256 (The General Medical Council (Fitness to Practise) (Amendment in Relation to Standard of Proof) Rules Order of Council 2008) and 2009 No 1913 (The General Medical Council (Fitness to Practise) (Amendment) Rules Order of Council 2009)

- In multi-factorial cases, where health is one of the issues under consideration, the panel should:
 - a. hear all parts of the evidence which do not relate to the doctor's health in public;
 - b. hear those parts of the evidence which relate to the doctor's health in private.
- If a submission is made to hear the whole of the hearing in private e.g. because it is submitted that the issues are inextricably linked, the panel should:
 - a. consider the arguments advanced and any challenges to it;
 - b. have regard to the wording of Rule 41 which starts with the premise that hearings **shall** be held in public except in certain limited circumstances. This ensures openness and transparency and that the process is accountable;
 - c. consider how much of the information is already in the public domain e.g. in cases involving a conviction for drink driving the court hearing and all the evidence relating to it will have been heard in public;
 - d. bear in mind that the panel secretary has a duty under Rule 37(b) of The General Medical Council (Fitness to Practise) Rules 2004 (as amended) to publish the panel's decisions, with the exception of confidential issues relating to the doctor's physical or mental health. Difficulties can arise if panels decide to hold the whole or part of hearings in private when issues other than the doctor's health are being considered.
- Rule 41(2) gives the panel discretion to exclude the public from the whole or part of proceedings, where they consider it appropriate to do so. Such circumstances are rare but have occurred where it is necessary to protect the rights of third parties. For example:
 - a. a panel sat in private in order to protect the identity of an abused wife whose identity had been protected in the court proceedings that resulted in her husband's appearance before the panel;
 - b. another panel sat in private to ensure that the identity of a doctor's children was protected; the doctor was alleged to be abusing his children.
- There have been occasions where panels were asked to hear applications from third parties as to whether the press and public should be excluded:
 - a. in one case a panel heard an application from the wife of a doctor who was not named in the allegations who was not a GMC witness but who may have been called as a defence witness. She had no standing to make an application and should not have been permitted to do so. Had it been the intention of the defence to call her as a

witness she could have been protected by the provisions relating to vulnerable witnesses;¹⁵

b. in another case, a member of the press made an application for a hearing to be heard in public. Although the press have no standing to make such applications, the criminal courts allow such applications to be made. It may therefore be appropriate in such circumstances to consider the application. It is, however, unlikely that a panel would conclude that a hearing, which the Rules prescribe should be in private in certain circumstances, should be heard in public on the basis of an application by the press claiming it was in the public interest to hear the matter in public.

- When sitting in private, ensure that only those parts of the hearing that need to be discussed in the absence of the press and public are raised.

Adjournments

- Panels should take into account **all** material circumstances, including any likely inconvenience to the witnesses and the effect of any delay on the fairness of the proceedings.
- Ask relevant questions to ensure that:
 - a. the time lines are correct;
 - b. reasons put forward for an application are challenged and supporting evidence produced.
- If an application is made on the basis of non-disclosure of documents, remember that disclosure is not usually carried out on one occasion but is a continuous process. Check:
 - a. what has already been disclosed and when;
 - b. what remains to be disclosed;
 - c. how relevant the undisclosed documents are to the case;
 - d. whether it is possible for the party making the application to consider the documentation as the case progresses.
- Consider what time is needed to resolve the issue (10 minutes, an hour, half a day, a day, etc).
- If the panel conclude that it is necessary to adjourn the case to a later date, consider whether:

¹⁵ See Rule 36 of The General Medical Council (Fitness to Practise) Rules 2004 SI 2004 No 2608 as amended by Statutory Instruments 2008 No 1256 (The General Medical Council (Fitness to Practise) (Amendment in Relation to Standard of Proof) Rules Order of Council 2008) and 2009 No 1913 (The General Medical Council (Fitness to Practise) (Amendment) Rules Order of Council 2009)

- a. an interim order should be imposed and/or
 - b. directions should be given e.g. whether any assessments are to be carried out, the date by which reports/documents are to be disclosed etc.
- It may be submitted that there is no risk to patient safety and the public interest in granting an application for adjournment because the doctor is subject to an interim order. Applications should only be granted if the merits of the application require it.
 - Applications for adjournment can arise at any stage of the proceedings. The approach to such requests made at other stages of the proceedings should, in broad terms, reflect the points outlined above.

Preliminary arguments

- Where preliminary arguments are to be made, ask about the nature of them as it may help to contextualise the issues. These might include:
 - a. abuse of process
 - i. delay
 - ii. entrapment:
 - b. recusal / bias;
 - c. stay;
 - d. non disclosure;
 - e. late submission of documents (specifically expert reports);
 - f. voluntary erasure.
- Ask the representatives to submit bullet point skeleton arguments, cross referenced to relevant documents etc.
- Enquire about the proposed length of the submissions and consider how this might impact on the overall timetable. It is open to you, as chairman, to give counsel an indication of the amount of time they will be given to develop their submissions. It is unlikely more than an hour will be required by either party.
- If, whilst hearing the preliminary arguments, you consider that either side is repeating the same argument, confirm that the panel has understood the point and ask counsel to move on. If you are in any doubt about intervening, seek advice from the legal assessor.
- Do not be concerned by the threat of an appeal / judicial review. Should such a threat be made by either party you should remind the individual concerned of the panel's role and point out that such 'threats' are inappropriate and, if from a lawyer, wholly unprofessional.

- Once submissions have been made and questions asked, seek the legal assessor's advice. Ensure that the legal assessor has time to draft his or her advice.
- When in camera:
 - a. ensure panellists remain focussed on the issue or issues raised;
 - b. if necessary, help panellists identify the issue(s) from the documents;
 - c. ensure that the decision reached is structured and reasons given.

Findings of fact

Standard of proof

- The standard of proof when considering findings of fact is the civil standard¹⁶.

Reasons for findings of fact

- Generally speaking, panels are not required to give reasons for findings of fact.
- There may be cases where the principle of fairness requires reasons to be given. The issue was covered in the Court of Appeal judgment in case of Phipps¹⁷ where Mr Justice Wall stated:

'In every case, as it seems to me, every Tribunal (including the PCC of the GMC) needs to ask itself the elementary questions: is what we have decided clear? Have we explained our decision and how we have reached it in such a way that the parties before us can understand clearly why they have won or why they have lost?'

If, in asking itself those questions the PCC comes to the conclusion that in answering them it needs to explain the reasons for a particular finding or findings of fact that, in my judgment, is what it should do. Very grave outcomes are at stake. Respondents to proceedings before the PCC of the GMC are liable to be found guilty of serious professional misconduct and struck off the Register. They are entitled to know in clear terms why such findings have been made. '

- Ensure that panels follow the guidance given by Mr Justice Wall and that where appropriate reasons for decisions are given.

¹⁶ Rule 34 (12) of the Fitness to Practise Rules 2004, as amended by The General Medical Council (Fitness to Practise) (Amendment in Relation to Standard of Proof) Rules Order of Council 2008 and The General Medical Council (Fitness to Practise) (Amendment) Rules Order of Council 2009

¹⁷ Robert Phipps and The General Medical Council [2006] EWCA Civ 397

Impairment

Test applied

- The test is whether the doctor's fitness to practise **is** impaired¹⁸.
- Impaired fitness to practise can be founded on past matters.
- In health cases where the doctor is in remission, bear in mind the provisions of Rule 17(6)¹⁹ which enable the panel to take into account the doctor's current condition, any continuing or episodic condition and any condition which, although in remission, may recur.

A question of judgment

- It is for the panel to decide, exercising its judgment, whether the doctor's fitness to practise is impaired based on the facts found proved.
- The position was confirmed in the case of Biswas²⁰.

Review cases

- The GMC does **not** have to prove impairment.
- Consider:
 - the previous findings of fact that lead to a finding of impairment;
 - the previous panel's reasons for finding impairment and the reasons for the sanction imposed;
 - what the doctor has done during the period of conditions or suspension to demonstrate that his/her fitness to practise is not impaired.
- It is for the doctor to demonstrate that he or she is fit to resume unrestricted practise.
- Where a doctor's fitness to practise was found to be deficient whilst working in one specialty but the doctor now wishes to change specialty:

¹⁸ See Sections 35C(1) and (2) Of the Medical Act 1983, as amended, and Rule 17(2)(j) and (k) of The General Medical Council (Fitness to Practise) Rules 2004 SI 2004 No.2608 as amended by Statutory Instruments 2008 No 1256 (The General Medical Council (Fitness to Practise) (Amendment in Relation to Standard of Proof) Rules Order of Council 2008) and 2009 No 1913 (The General Medical Council (Fitness to Practise) (Amendment) Rules Order of Council 2009)

¹⁹ The General Medical Council (Fitness to Practise) Rules 2004 SI 2004 No.2608 as amended by Statutory Instruments 2008 No 1256 (The General Medical Council (Fitness to Practise) (Amendment in Relation to Standard of Proof) Rules Order of Council 2008) and 2009 No 1913 (The General Medical Council (Fitness to Practise) (Amendment) Rules Order of Council 2009)

²⁰ CHRE – v - General Medical Council and Dr Biswas [2006] EWHC 464 (Admin)

- a. it is implicit, if the doctor has not remedied the deficiencies in his or her practice, his or her practice remains deficient and that is not safe to resume **unrestricted** practice, albeit in a different specialty;
- b. ensure that the panel understand that if it accepts any assurances from the doctor that he or she will no longer practice in the specialty where deficiencies were identified and on that basis conclude that the doctor's fitness to practise is not impaired and is allowed to resume unrestricted practise, there is nothing to prevent the doctor returning to the speciality in which deficiencies were identified at a later date.
- c. consider whether the protection of the public and the wider public interest would best be served by finding the doctor's fitness to practise impaired in relation to the particular aspect of his or her practice by **either**:
 - i. accepting an undertaking which must be in writing and offered by the doctor that he or she will practise only in the specialty in which no concerns have been raised, **or**
 - ii. imposing a condition on the doctor's registration to the same effect for the maximum period of three years and directing a review hearing before the end of that three year period.

Personal mitigation / testimonial evidence

- There is clear guidance from the Court of Appeal²¹ that personal mitigation is relevant to sanction and not to earlier stages of the proceedings.
- The judgment recognises that there may be circumstances where such evidence is relevant at an earlier stage e.g. the circumstances in which the doctor was working. Testimonial/character evidence might also be relevant in cases where the doctor's honesty has been called into question.

²¹ R-v-The General Medical Council (ex-parte Campbell) [2005] EWCA Civ 250 – see in particular paragraph 46 of judgment

Sanctions

Submissions on appropriate sanction

- Ensure that both parties, first the GMC and then the doctor, address the panel on what they consider to be the appropriate sanction, having regard to the Indicative Sanctions Guidance.
- Mr Justice Collins made it clear that either party can make submissions but that it is for the panel to decide the appropriate sanction in any case²².
- The Panel may, as an alternative to imposing a sanction, take into account any written undertaking offered by the doctor.²³ Remember, it is for the doctor to offer any written undertakings. It is **not** for the panel to invite the submission of undertakings.
- If it is suggested that the panel should impose a particular sanction because that sanction was imposed in another case raising the same or similar issues - remember that Mr Justice Goldring made it clear that that was not the correct approach, the panel should adopt an holistic approach and consider each case on its merits²⁴.

The legal assessor's advice

- Ensure that before going into camera the legal assessor provides his or her advice.
- That advice should remind the panel of its task; it should **not** be a summary of the evidence.
- It should also include reference to the Indicative Sanctions Guidance but should not quote large sections of it.
- The legal assessor should also remind the panel that the decision is theirs and theirs alone taking into account all they have heard and the relevant guidance.

Reaching a decision

- Consider the submissions made and any evidence in mitigation, including personal mitigation, testimonials and evidence from character witnesses.
- Remind the panel that:
 - a. the number of testimonials submitted is not necessarily an indicator of value; many may have been written without any knowledge of the events that resulted in the doctor's appearance before the panel and unless there has been a break in the

²² Bevan – v – The General Medical Council [2005] EWHC 174 (Admin)

²³ The General Medical Council (Fitness to Practise) Rules Order of Council 2004 Statutory Instrument 2004 No 2608 as amended by Statutory Instruments 2008 No 1256 (The General Medical Council (Fitness to Practise) (Amendment in Relation to Standard of Proof) Rules Order of Council 2008) and 2009 No 1913 (The General Medical Council (Fitness to Practise) (Amendment) Rules Order of Council 2009)

²⁴ Harry – v – The General Medical Council [2006] EWHC 3050 (Admin)

proceedings almost all will have been written without knowledge of the panel's findings against the doctor;

b. the testimonials of value are those written by people who are fully aware of the reasons for the doctor's appearance before the panel and are still prepared to speak well of him or her;

c. similar points apply to character witnesses.

- Voting should be carried out from the bottom up i.e. the panel should consider the lowest sanction first.
- For every sanction rejected, the panel needs clear reasons why; long explanations are unnecessary if the reason is obvious.
- If concluding a case with a sanction lower than that suggested by the GMC's representative:
 - a. ensure there are clear reasons why the panel did not consider the higher sanction appropriate;
 - b. bear in mind that the Council for Healthcare Regulatory Excellence may seek to appeal a decision on the grounds that it is unduly lenient. It is important to demonstrate that the panel has correctly carried out its task and considered the submissions made and why it has reached a different conclusion;
 - c. it may also be appropriate to provide a similar explanation in cases where the decision is borderline, e.g. where the panel concluded that suspension was the appropriate sanction but where the option of erasure was discussed but deemed unnecessary.
- If considering **written** undertakings offered by the doctor, consider:
 - a. the undertakings in the light of the separate guidance provided on [undertakings](#)²⁵ and the Undertakings Bank;
 - b. whether the doctor has sufficient insight to abide by the written undertakings and that there is no other reason to suggest that the doctor will not comply with them;
 - c. whether they are sufficient to protect the public interest.
- If a panel concludes that conditions or suspension are appropriate:
 - a. consider the period of conditions or suspension necessary. Panels must give clear reasons in their determination why they consider the particular period of conditions or suspension appropriate;

²⁵ Undertakings at FTP Panel hearings (http://www.gmc-uk.org/Undertakings_at_FTP_Panel_hearings_Aug_09.pdf 26870331.pdf)

- b. ensure that the same mitigating circumstances used to agree a lower sanction (i.e. suspension rather than erasure or conditions rather than suspension) are not also used to reduce the period of suspension / conditions;
 - c. consider whether there should be a review hearing. Although there is no explicit power to direct a review hearing, it is implicit from section 35D of the Medical Act 1983, as amended, that the panel may do so in cases where a period of suspension or conditions is imposed.
- The chairman should, at each stage of the panel's discussions, sum up what has been agreed and check that this has been noted by the panel secretary.

Drafting a determination

(Many of the points below also apply to drafting determinations at other stages of the proceedings.)

- Ensure that all panellists are involved in agreeing an outline of the determination i.e. the structure it should follow, the issues to be identified, the points to be stressed etc.
- If the panel wish to refer to any case law, ensure that it is correct in the context of the case under consideration and appropriate.
- Once the outline of the determination is agreed:
 - a. you should take responsibility for producing the first draft. Remember, the determination is the panel's determination and must reflect the views of the panel as a whole;
 - b. it is not appropriate for the legal assessor to draft the determination, although he/she can check it and ensure that it does not include that which is irrelevant or incorrect;
 - c. the panel secretary's role is to assist the chairman and panel and may work with the chairman to produce the first draft;
 - d. ensure that all panellists have an opportunity to read and comment on the initial draft;
 - e. ensure the panellists are focussed on the task; it is important to get the draft right but do not allow panellists to spend undue time over the drafting and ensure they do not attempt to revisit issues that have previously been discussed and agreed;
 - f. ensure the determination is clear and reasoned:
 - g. in terms of sanction imposed everyone should be able to understand why the panel imposed the sanction it did, including why other sanctions were dismissed;
 - h. if a period of conditions or suspension has been imposed, ensure clear reasons are given for the period chosen;

- i. if there is to be a review hearing, ensure that it is clear what is expected of the doctor in the interim and what information he/she will be required to produce at that review hearing;
 - j. if the panel has imposed a period of conditions or suspension but not directed a review hearing, ensure that it is clear why the panel is satisfied that the doctor will be fit to resume unrestricted practice at that time.
- Once you have an agreed draft, read it through to check that it flows and that the reasons for the decisions reached are clear. The legal assessor might be used as a sounding board as the 'objective' observer for the last read through.

Immediate orders

- The panel may impose an immediate order in any case where it has imposed conditions, suspension or erasure. Before making a decision the panel **must** consider any submission or evidence from either party²⁶. You therefore need to invite these from both parties before making a decision.
- Remind the panel that if no such order is made the doctor remains free to practise unrestricted during the 28 day appeal period and, if he or she appeals the decision, until the appeal is disposed of.
- Consider the submissions made or evidence presented and reach a decision.
- Ensure that the panel's determination makes clear the decision reached and the reasons for that decision.

²⁶ Rule 17(2)(o) of the General Medical Council (Fitness to Practise) Rules Order of Council 2004 Statutory Instrument 2004 No 2608 as amended by Statutory Instruments 2008 No 1256 (The General Medical Council (Fitness to Practise) (Amendment in Relation to Standard of Proof) Rules Order of Council 2008) and 2009 No 1913 (The General Medical Council (Fitness to Practise) (Amendment) Rules Order of Council 2009)

Some general points

Finishing time

- There is no set finishing time.
- In the normal course of events panels might expect to conclude the day's business at about 17:00.
- It may be necessary to sit later to conclude the evidence of a particular witness, or on the final scheduled day of a case to conclude the case.
- Remember, long sitting days may give rise to an appeal on the ground that the panel was tired and did not give adequate consideration to all the evidence or submissions made.

Adjourning a case part-heard

- If it is clear that the panel cannot conclude business within a reasonable time, it may be necessary to adjourn the proceedings to a later date.
- Seek to resume within a reasonable period of time; it is unfair to the doctor, the complainant and other witnesses to leave matters outstanding for long periods of time.
- The priority for all panellists is to conclude the part-heard case. Should a panellist be due to sit on another case on dates when it is proposed that the part-heard case be resumed, the panellist should sit on the part-heard case and notify the Empanelment Team that they will be unavailable for the other case. The Empanelment Team will then find another panellist to replace them on that other case.

Weekend sittings

- Weekend sittings should only be considered if it is not possible to find an alternative date during the working week.
- Do not assume that access to the building and hearing room will be available; there are a number of maintenance tasks carried out over weekends and access to the building or hearing rooms may not be available.
- Before agreeing any date for weekend sittings ask the panel secretary to check whether the parties will be able to gain access to the building on the date, or dates, in question.