

## Health and Care Professions Tribunal Service

# PRACTICE NOTE

### Mediation

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

#### Introduction

1. The Health Professions Order 2001 provides that, in relation to a fitness to practise allegation:
  - a. if an Investigating Panel concludes that there is a case to answer, it may undertake mediation instead of referring the allegation to a Conduct and Competence Panel or Health Panel<sup>1</sup>; and
  - b. if a Conduct and Competence Panel or Health Panel finds that an allegation is well founded, it may undertake mediation if it satisfied that it does not need to impose any further sanction on the registrant<sup>2</sup>.

#### Mediation and fitness to practise

2. The HCPC's overarching statutory objective is the protection of the public.<sup>3</sup> In considering the use of mediation, Panels must ensure that they act, and are seen to act, in a manner which is consistent with that objective.
3. Mediation is an effective means of resolving private disputes. In cases which involve conflict between a service user and a registrant, the service user may well prefer to resolve matters by mediation rather than taking matters further. However, it is the HCPC which makes an allegation against a registrant and the HCPC, acting in the public interest, may need to pursue an allegation further even when the service user concerned would prefer that the HCPC did not do so.

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<sup>1</sup> Article 26(6)

<sup>2</sup> Article 29(4)

<sup>3</sup> Article 3(4), Health Profession Order 2001.

4. In deciding whether referral to mediation is appropriate, Panels must take account of the “critically important public policy issues” which form part of protecting the public, identified in *Cohen v GMC*<sup>4</sup>. These include the need to:
  - a. protect service users;
  - b. declare and uphold proper standards of behaviour; and
  - c. maintain public confidence in the profession.

### **A consensual process**

5. Mediation is a consensual process and any decision to mediate will fail unless it is supported by both the registrant concerned and the other party.
6. Clearly, there can be no guarantee that mediation will achieve a mutually acceptable resolution. Consequently, before determining that mediation may be appropriate, a Panel must be satisfied that, regardless of the outcome of the mediation, it does not need to take any further steps to protect the public.
7. Although mediation is typically assumed to involve an unresolved dispute between a registrant and a complainant, there is no reason why, in appropriate circumstances, the registrant and the HCPC cannot be the parties in a mediation.
8. Mediation may only to be used after a decision has been made that there is a case to answer or where it is determined that an allegation is well founded. As both of those decisions are a matter of public record, in order to provide transparency and accountability, the fact that an allegation was resolved by means of mediation may form part of the information which the HCPC makes available to the public.
9. Normally, the outcome of a mediation is a private matter between the parties. If the mediator is to be able to inform the HCPC of the outcome, a Panel must obtain the consent of the parties and address this issue in its Order for mediation.
10. A draft Order referring an allegation to mediation is set out in the Annex to this Practice Note.

### **What is mediation?**

11. Mediation is a decision-making process in which the parties, with the assistance of a neutral and independent mediator, meet to identify the disputed issues, develop options, consider alternatives and attempt to reach a mutually acceptable outcome.
12. Mediation involves use of a common-sense approach which:

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<sup>4</sup> [2008] EWHC 581 (Admin)

- a. gives the parties an opportunity to step back and think about how they could put the situation right; and
  - b. enables participants to come up with their own practical solution which will benefit all sides.
13. Mediation is a collaborative problem-solving process which focuses on the future and places emphasis on rebuilding relationships rather than apportioning blame for what has happened in the past. It also makes use of the belief that acknowledging feelings as well as facts allows participants to release their anger or upset and move forward.
14. Mediation is also a voluntary process. The participants choose to attend, making a free and informed choice to enter and if preferred, leave the process. If the process and the outcome is to be fair, all parties must have the willingness and capacity to negotiate and there must be a balance of power between the parties.

### **What is the role of the mediator?**

15. The mediator acts in an advisory role in regard to the content of the dispute and may advise on the resolution process but has no power to impose a decision on the parties.
16. Mediators do not advise those in dispute, but help them to communicate with one another. The role of the mediator is to be impartial and help the parties identify their needs, clarify issues, explore solutions and negotiate their own agreement.

### **How is mediation conducted?**

17. Typically, the mediator will meet each party separately and ask them to explain how they see the current situation, how they would like it to be in the future and what suggestions they have for resolving the disagreement. If both parties agree to meet, the following steps then take place:
- a. the mediator will explain the structure of the meeting and ask the parties to agree to some basic rules, such as listening without interrupting;
  - b. each party will then have a chance to talk about the problem as it affects them. The mediator will try to make sure that each party understands what the other party has said, and allow them to respond;
  - c. the mediator will then help both parties identify the issues that need to be resolved. Sometimes this leads to solutions that no one had thought of before, helping the parties to reach an agreement;
  - d. the agreement is then recorded and signed by both parties and the mediator.

18. In practice, mediation is not undertaken by the Panel itself but by a trained mediator appointed to act on its behalf. The HCPC has standing arrangements for the appointment of mediators at the request of Panels.

### **Referral criteria**

19. Panels should recognise that certain types of case should not be referred to mediation.

20. As mediation is a closed and confidential process, its use is inappropriate in cases which raise wider public interest issues. The use of mediation in cases involving serious misconduct, criminal acts, serious or persistent lapses in competence, or abuse or manipulation of service users would fail to provide necessary public safeguards and seriously undermine confidence in the regulatory process.

21. Mediation will also be inappropriate in cases where a complainant has no wish to face the registrant again or where there is a power imbalance which cannot be addressed; with the result that the dominant party may be able to prevent the needs and interests of the other party from being met.

### **Suitable cases**

22. Mediation may (but will not always) be appropriate in minor cases that have not resulted in harm, where the risk of repetition or further issues arising is low, which are not indicative of more serious or continuing concerns about a registrant's fitness to practise. For example:

- a. involve low levels of impairment where the Panel feels that no sanction needs to be imposed;
- b. could be resolved with an apology, but where the Panel is satisfied that any failure to apologise is not indicative of a lack of insight or other deep-seated concerns;
- c. are about complaints of overcharging or over-servicing but where there is no evidence to suggest fraud or any other form of abuse of the professional relationship;
- d. are about management or contractual arrangements between practitioners, where there is no evidence to suggest any impropriety;
- e. involve poor communication, but which is insufficient to suggest that any service user has been put at risk or compromised.

### **Unsuitable Cases**

23. Mediation is not appropriate in cases which raise wider public protection issues and cannot reasonably be regarded as a limited dispute between the registrant and the service user. This includes (but is not limited to) cases involving:

- a. serious misconduct;

- b. abuse of trust; boundary violations, predatory or manipulative behaviour;
- c. serious or persistent lapses in professional competence;
- d. criminal acts, dishonesty or fraud;
- e. serious concerns arising from the unmanaged health of the registrant;
- f. substance abuse; or
- g. repeated allegations.

**Annex**

**ORDER OF REFERRAL TO MEDIATION**

The decision of the Panel in respect of the allegation made on [date] against [name of registrant] is that [there is a case to answer in respect of the allegation] [the allegation is well founded] for the following reasons:

[set out reasons]

Having considered all of the options open to it the Panel is satisfied, for the following reasons, that it would not be appropriate to [refer this matter to a Conduct and Competence Panel or Health Panel] [take any further action]:

[set out reasons]

The following matter(s) remains unresolved between [name of registrant] and [name of other party]:

[set out matter(s)]

and they have consented to that matter being referred to mediation and have further agreed:

- to attend the mediation;
- to inform each other and the mediator in writing, before mediation commences, of what they regard as the issues to be mediated;
- to file sufficient documents or other material with the mediator to enable mediation to be conducted effectively; and
- that the mediator may inform the HCPC of the outcome of the mediation.

**THE ORDER OF THE PANEL** is that:

1. the matter set out above be referred to mediation;
2. the mediation be conducted by [name of mediator or description of how the mediator is to be appointed];
3. the mediator inform the HCPC of the outcome of the mediation.

Signed: \_\_\_\_\_ Panel Chair

Date: \_\_\_\_\_