

Health and Care Professions Tribunal Service

PRACTICE NOTE

Striking Off Reviews: New Evidence and Article 30(7)

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

Introduction

1. Article 29(7) of the Health Professions Order 2001 (the Order) provides that a person who has been struck off the HCPC Register may not apply for restoration to the Register within five years of the date on which that striking off order took effect.
2. 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.
3. Requesting a review under Article 30(7) is not the same as an appeal of the decision under Article 38. A request under Article 30(7) should only be made where new evidence has come to light that was not considered by the Panel that originally imposed the striking off order. Where there is no new evidence, but the person subject to the striking off order wishes to challenge the decision of the Panel then an appeal under Article 38 will be the more appropriate route.

Procedure

4. Under Article 30(7) the procedure to be adopted for review applications follows the same procedure as applications for restoration to the Register under Article 33 (4)-(8). This means that the applicant should be provided with an opportunity to attend a hearing to argue their case.
5. Under Rule 13 of the Panel rules¹, the applicant should be provided with a notice which informs them of their right to attend a hearing for their application to be considered. The applicant then has a period of 28 days within which to confirm that they wish to attend a hearing. After this time, a date for the hearing will be fixed with at least 28 days' notice.

¹ The Health and Care Professions Council (Conduct and Competence Committee) (Procedure) Rules 2003 and The Health and Care Professions Council (Health Committee) (Procedure) Rules 2003

6. Under Article 33 of the Order and the Panel rules, the procedure to be followed by Panels when 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.
7. Rule 13(10) of the Panel rules provides that, in cases where the application is made by the person concerned, the applicant is to present his or her case first and the HCPC is to respond 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 HCPC to prove the contrary.

Issues to be addressed

8. In considering Article 30(7) review applications, Panels need to address three issues:
 - a. whether new evidence has become available which is relevant to the striking-off order which was made;
 - b. if so, whether to admit (i.e. to hear and consider) that evidence; and
 - c. if that evidence is admitted, having conducted a substantive review, deciding whether or not to maintain the striking-off order.
9. The need to address these three distinct issues does not mean that a Panel must 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 and complexity 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

10. "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.
11. Whether 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:
 - a. the finding that the allegations were well-founded;
 - b. the finding that fitness to practise is impaired; or
 - c. the decision to impose the sanction of striking off.

Admitting new evidence

12. 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 Panel rules provides a discretion to admit other evidence if the Panel is satisfied that doing so is necessary in order to protect members of the public;

13. Whether new evidence should be admitted is a matter within a Panel's discretion. 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:

- a. the significance of the new evidence;
- b. the *Ladd v Marshall*² criteria for reception of fresh evidence, namely:
 - i. whether with reasonable diligence the evidence could have been obtained and presented at the original hearing;
 - ii. whether the evidence is such that it could have an important influence on the result of the case; and
 - iii. whether the evidence is credible;
- c. 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;
- d. if the original hearing proceeded in the absence of the registrant, evidence that the registrant did not receive proper notice of the hearing;
- e. the public interest, including the impact upon others (such as vulnerable witnesses) if the case is re-opened, 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".

14. 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

15. 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:

² [1954] 1 WLR 1489

³ [2009] EWCA Civ 109

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

16. 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. Further guidance on this issue may be found in the Practice Note *Restoration to the Register*.