

Section 29 Case Meeting

05 November 2021

157-197 Buckingham Palace Road, London SW1W 9SP



Members present

Alan Clamp (in the Chair), Chief Executive, Professional Standards Authority
Kisha Punchihewa, Head of Legal (Senior Solicitor), Professional Standards Authority
Simon Wiklund, Head of Legal (Senior Solicitor), Professional Standards Authority

In attendance

Eleanor Grey QC of counsel 39 Essex Chambers

Observers

Caroline Corby, Chair, Professional Standards Authority
Remi Gberbo, Lawyer, Professional Standards Authority
Michael Hannah, Scrutiny Officer, Professional Standards Authority

1. Definitions

1.1 In this meeting note, standard abbreviations have been used. Definitions of the standard abbreviations used by the Authority, together with any abbreviations used specifically for this case are set out in the table at Annex A.

2. Purpose of this note

2.1 This meeting note records a summary of the Members' consideration of the relevant decision about the Registrant made by the regulator's panel, and the Authority's decision whether or not to refer the case to the court under Section 29 of the Act.

3. The Authority's powers of referral under Section 29 of the Act

3.1 The Authority may refer a case to the relevant court if it considers that a relevant decision (a finding, a penalty or both) is not sufficient for the protection of the public.

3.2 Consideration of whether a decision is sufficient for the protection of the public involves consideration of whether it is sufficient:

- to protect the health, safety and well-being of the public
- to maintain public confidence in the profession concerned, and
- to maintain proper professional standards and conduct for members of that profession.

3.3 This will also involve consideration of whether the panel's decision was one that a disciplinary tribunal, having regard to the relevant facts and to the object of the disciplinary proceedings, could not reasonably have reached; or was otherwise manifestly inappropriate having regard to the safety of the public and the reputation of the profession (applying *Ruscillo*¹).

4. Conflicts of interest

4.1 The Members did not have any conflicts of interest.

5. Jurisdiction

5.1 The Legal Advisor confirmed that the Authority had jurisdiction to consider the case under Section 29 of the Act. Any referral in this case would be to the High Court of Justice of England and Wales and the statutory time limit for an appeal would expire on 11 November 2021.

6. The relevant decision

6.1 The relevant decision is the Determination of the Panel following a hearing which concluded on [REDACTED].

6.2 The Panel's Determination which includes the charges and findings is set out at Annex B.

7. Documents before the meeting

7.1 The following documents were available to the Members:

- Determination of the panel dated [REDACTED]
- The Authority's Detailed Case Review
- Transcripts of the hearing dated [REDACTED]
- Counsel's Note dated 4 November 2021
- Regulator's Final hearing Bundle
- Hearing exhibits
- Registrant's Bundle
- The HCPC's Case Investigation Report
- The HCPC's Investigating Panel decision dated [REDACTED]
- The HCPC's Standards of Conduct, Performance and Ethics (2016)
- The HCPC's Sanctions Policy (2019)
- The Authority's Section 29 Case Meeting Manual.

¹ CRHP v Ruscillo [2004] EWCA Civ 1356

7.2 The Members and the Legal Advisor were provided with a copy of a response from the HCPC to the Authority's Notification of Section 29 Meeting. The Members considered the response having received legal advice and after they reached a conclusion on the sufficiency on the outcome.

8. Background

8.1 The Registrant was employed as a registered [REDACTED] at the [REDACTED] (the Hospital).

8.2 The Registrant's relationship with the Hospital as a [REDACTED] was governed by a practising privileges agreement and a more general practising privileges policy.

8.3 Under these arrangements with the Hospital, [REDACTED] were prohibited from transferring service users seen on the Hospital premises to their own private practices.

8.4 The Hospital charged a set corporate rate for an appointment, which would be paid to the Hospital and then the Hospital would pay a set sessional fee to the [REDACTED]

8.5 [REDACTED] were able to book a room for the duration of the patient appointments due to be undertaken on a particular day.

8.6 Concerns regarding the Registrant's conduct arose in [REDACTED] when Service User A (SUA) contacted the Hospital's Senior [REDACTED] Administrator to request an invoice for her session with the Registrant. During the conversation, SUA disclosed that she had been seeing the Registrant on a weekly basis since [REDACTED] and making payments to her. However, the Hospital's income processing records indicated that SUA had not had an appointment since [REDACTED].

8.7 The concerns were escalated, and an internal investigation was commenced by the Hospital Director.

8.8 When interviewed as part of the internal investigation, the Registrant informed the Hospital Director that she had agreed to see SUA privately because SUA could not afford the Hospital fees. Initially, the Registrant stated that SUA was an exception, that she did not have a private practice and that she had not consulted with SUA on the Hospital premises. However, as the interview progressed, the Registrant admitted that she had been seeing the Hospital patients privately on premises which belonged to the Hospital.

8.9 The Registrant did not engage in the internal investigation thereafter. Her practising privileges were terminated by the Hospital.

8.10 The Hospital's investigation indicated discrepancies between the number of hours that the Registrant was using Hospital consultation rooms and the invoices tendered. It appeared that invoices had been issued by the Registrant for therapy sessions that had taken place at the Hospital premises and for which entries had been made on the Hospital's electronic care notes system, but no associated Hospital invoices were generated on the Hospital's invoicing

system. It appeared that 6 patients had been discharged from the Hospital's finance system by the Registrant.

- 8.11 The Hospital's investigation further indicated that invoices issued by the Registrant to the Hospital showed gaps in her working day purporting to show that she was not seeing patients when in fact she was seeing patients privately.
- 8.12 A total of 37 [REDACTED] sessions involving 8 service users were not invoiced to the Hospital during the period [REDACTED] to [REDACTED].
- 8.13 The Hospital made a referral to the HCPC on [REDACTED].
- 8.14 On [REDACTED], the HCPC Investigating Panel decided that the Registrant had a case to answer in relation to the allegation that:
- between [REDACTED] to [REDACTED], the registrant charged an unauthorised private rate in relation to services carried out at the Hospital to a number of Service Users;
 - accepted payments into an unauthorised account for the Hospital private rate services from a number of service users; and
 - her conduct was dishonest.
- 8.15 At the conclusion of the HCPC case, Counsel for the Registrant made a submission that there was no case to answer. The Panel acceded to the application and, therefore, the hearing went no further.

9. Applying Section 29 of the 2002 Act

- 9.1 The Members considered all the documents before them and received legal advice.
- 9.2 The Members discussed the following concerns about the decision:

The Panel's approach to the HCPC's application to amend the allegation

- 9.3 An application was made on day one of the hearing to amend the date range in the allegation from [REDACTED] to [REDACTED] to [REDACTED] to [REDACTED].
- 9.4 The panel decided not to permit the amendment because there would be a risk of prejudice to the Registrant.
- 9.5 The Members noted that the focus of the Panel's consideration of this application was on potential prejudice to the registrant. The Members were of the view that the Panel's focus ought to have been on:
- ensuring the allegation reflected the evidence; and,
 - if amendments were required, considering what steps could be taken to counter any potential prejudice to the Registrant.
- 9.6 The Members were of the view that the Panel could have adjourned to consider the application or, permitted the application and adjourned to allow the Registrant additional time to consider the amended allegation.

- 9.7 The Members, however, queried whether allowing the application would have made a material difference to the outcome of the hearing. The application to amend the allegation related to a discrete issue, that being the date range of the allegation but there were fundamental concerns regarding the way in which the allegation had been particularised.
- 9.8 The Members concluded that the additional evidence from the wider date range was relevant to charges that could have been particularised in the allegation but were not.

The Panel's decision that there was no case to answer

- 9.9 The Members were concerned that:
- the allegation before the Panel did not reflect the concerns referred and evidence available to the Regulator; and,
 - in considering the no case to answer application, the Panel noted that the HCPC had not charged potential misconduct that the Panel itself identified, but then did not take any further action in relation to that potential misconduct.
- 9.10 The Members considered, therefore, whether, in light of the potential misconduct identified by the panel, the decision that there was no case to answer without amending the allegation to include that potential misconduct constituted an under-prosecution.
- 9.11 The Members considered how the allegation could have been amended. They noted that there was evidence of potential misconduct in relation to:
- transferring patients in a way that breached the Registrant's contractual agreement with the Hospital,
 - using the facilities of the Hospital to see patients privately, and
 - not being candid with the Hospital when interviewed as part of the internal investigation.
- 9.12 The Panel had noted the potential misconduct in relation to transferring patients and using the Hospital premises to see patients privately. The Members considered how the Panel factored these additional matters in when deciding that the Registrant had no case to answer on the allegation before it and whether it should have referred the case back to the HCPC to consider charging the potential misconduct identified.
- 9.13 The Members considered it was difficult to determine whether there was sufficient evidence to support the potential misconduct identified by the Panel because of the paucity of the investigation. For example, it was unclear how the Hospital's patients had become private patients of the Registrant and therefore whether the Registrant had acted in breach of her contractual agreement with the Hospital.
- 9.14 The Members formed the view that it would be difficult to demonstrate that there was clear evidence of misconduct that was not charged. Rather, there were clear lines of inquiry that had not been pursued by the HCPC. For example, the HCPC did not obtain statements from all relevant service users. It was

concerning that the HCPC relied on the investigation report prepared by the Hospital as part of its internal investigation and particularised charges on that basis, rather than conducting its own independent investigation into all potential misconduct.

- 9.15 The Members found that, because of the poor investigation and gaps in evidence they could not reach a view as to whether amended charges could have led to a different outcome.
- 9.16 The Members went on to consider the Panel's role when considering the no case to answer application.
- 9.17 The Members considered that the Panel could be expected to question the evidence of other misconduct that was not included in the allegation when determining the no case to answer submission, and consider the issues around the case.
- 9.18 In that context, the Members noted that there was evidence which, as identified by the Panel, indicated that there may have been concerns around dishonesty/lack of candour and a lack of integrity in relation to the registrant's response to the investigation conducted by the Hospital. These matters could properly have been included as a charge.
- 9.19 Whilst the wider concerns identified by the panel were not investigated by the HCPC, there were matters that could and should have been included in the charge that made the case against the registrant more serious.

Conclusion on insufficiency for public protection

- 9.20 The Members were concerned that:
 - the Panel identified potential misconduct which had not been charged, but took no further action regarding those concerns.
 - with the HCPC's under-investigation into potential misconduct.
 - On the evidence available, the HCPC had not identified all relevant allegations.

The Members concluded that the panel's determination that there was no case to answer was insufficient for public protection.

10. Referral to court

- 10.1 Having concluded that the panel's Determination was insufficient for public protection, the Members moved on to consider whether they should exercise the Authority's discretion to refer this case to the relevant court.
- 10.2 In considering the exercise of the Authority's discretion, the Members received legal advice as to the prospects of success and took into account the need to use the Authority's resources proportionately and in the public interest.
- 10.3 The Members concluded that the Authority should not exercise its discretion to appeal the determination, because:

- there were elements of the concerns that related to potential under-investigation, rather than under-prosecution; and,
- the misconduct, on the facts of this case, was not at the upper end of the scale of seriousness
- its concerns about the HCPC would not necessarily be addressed by bringing an appeal in this particular case
- there were alternative means available to the Authority to express its concerns about the HCPC's investigation.

10.4 Taking into account those considerations, along with advice on the prospects of success, the Members agreed that the Authority should not exercise its power under Section 29 and refer this case to the High Court of Justice of England and Wales.

11. Learning points

11.1 The Members agreed that the learning points set out at Appendix C should be communicated to the Regulator.



Alan Clamp (Chair)

02/12/21

Dated

12. Annex A – Definitions

12.1 In this note the following definitions and abbreviations will apply:

The Authority	The Professional Standards Authority for Health and Social Care
The Panel	A Conduct and Competence Panel of the Health and Care Professions Tribunal Service
The Registrant	[REDACTED]
The Regulator	The Health and Care Professions Council
HCPC	The Health and Care Professions Council
The Act	The National Health Service Reform and Health Care Professions Act 2002 as amended
The Members	The Authority as constituted for this Section 29 case meeting
The Determination	The Determination of the Panel sitting on [REDACTED]
The Court	The High Court of Justice of England and Wales
The Code	HCPC Standards of Conduct, Performance and Ethics (2016)
The SG/ISG	HCPC's Sanctions Policy (2019)