

Primary Health Lists

The Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care) Rules 2008

IN THE MATTER OF AN APPEAL UNDER THE NHS (PERFORMERS LISTS) (ENGLAND) REGULATIONS 2013

Heard on 7th January 2020 at Nottingham Civil Justice Centre

[2019] 3760.PHL

BEFORE:

**Mr Christopher Limb (Tribunal Judge)
Ms J Everitt (Specialist Member)
Mr M Green (Professional Member)**

BETWEEN:

Dr Nabeel Aga

Applicant

v

NHS England

Respondent

DECISION

Attendance: Dr Nabeel Aga
Mr George Thomas (Counsel for NHS England "NHSE"),
and Mrs Elaine Madden

Preliminary

- 1 This tribunal can make any decision which the Respondent could have made (Regulation 17(4)). This is a rehearing.
- 2 The issues in the appeal concerned the imposition of conditions upon Dr Aga's inclusion in the performers list ("PL") in October 2018, and the maintenance of those conditions after review in June 2019. The substance of those decisions and of the conditions are found in the letters at B19 and B1 and relate to Performers List Validation by Experience ("PLVE").

- 3 In his appeal application form Dr Aga sought unconditional inclusion upon the PL, but early in the course of the hearing and after The National Health Service (Performers Lists) Regulations 2013 (“the Regulations”) had been considered Dr Aga accepted the principle of conditions being imposed but contested their wording and in particular asked that condition 2 be removed.
- 4 The legal framework imposed by the Regulations is fundamental to consideration of this case and there is no relevant factual dispute.
- 5 Dr Aga had made an application to submit additional evidence. The detailed content of that evidence was not considered or read but it was agreed that it related to Dr Aga’s relations with and history concerning the Seven Dental practice with whom he had commenced PLVE but had been unable to complete PLVE (he worked there between 1st October 2018 and 5th April 2019 – page C39). Mr Thomas upon behalf of NHSE openly accepted that it was no part of their case that the ending of that placement was due to any fault of Dr Aga and that there had been no allegation against Dr Aga (and none was intended) that he had acted in breach of the conditions. In such context Dr Aga accepted (and it was our conclusion) that the evidence was of no relevance to issues in the appeal and no permission was sought or granted for such additional evidence.
- 6 We were assisted by both written and oral submissions from both parties.

Background

- 7 Dr Aga qualified with a degree in dental surgery in India in 2011. He is a Portuguese citizen but has never practised dentistry in Portugal. He obtained an MSc in Orthodontics from Warwick University in 2014. He was registered with the General Dental Council (“GDC”) in 2014. Except for the period with the Seven Dental practice, he has always worked in private practice.
- 8 After April 2019 he has not been able to work in another practice approved for PVLE and has had difficulty finding a placement. We were told he has now found a placement which is approved for PLVE and is due to start there shortly. He is concerned that he has already lost a lot of time (and money) and is concerned that he will in effect have to restart from scratch.

Issues

- 9 Both parties now agree that the issue is whether the current conditions should be maintained and/or whether different conditions should be imposed.
- 10 It was agreed that any reference in the conditions to “NHS England (North Midlands)” should now be “NHS England (Midlands)” to reflect re-organisation.

Legal Principles

- 11 The Regulations are included in full within section E of the bundle and we do not set out full quotations within this decision.
- 12 We note Regulation 7(4) which sets out various grounds upon which there must be refusal to include a practitioner upon the PL.
- 13 We note Regulation 10 including the power to impose conditions for the purpose of preventing prejudice to the efficiency of services.
- 14 The Regulation which is central to this case is Regulation 34, and in particular paragraphs 34(2) and (4). In contrast to 34(1) these paragraphs concern mandatory grounds for refusal.
- 15 34(2) provides that there must be refusal of inclusion if either foundation training is not being undertaken or foundation training has not been completed or the practitioner is not exempt under 34(4) from undertaking foundation training. It is agreed that Dr Aga has not completed and is not undertaking foundation training (and would not be able to do so). It is therefore necessary to consider whether he is exempt from the requirement to undertake foundation training under 34(4). There are 3 categories of potential exemption.
- 16 34(4)(a) refers to section 15(1)(b) of the Dentists Act (nationals of EU states who hold a European diploma) or a practitioner in respect of whom Community law prohibits imposition of such a requirement. Dr Aga does not have a European diploma and the GDC have confirmed that his registration was under section 15(1)(c) (C106). We were referred to no provision of Community law which prohibits imposition of such a requirement and are not aware of any.
- 17 It is agreed and self-evident that 34(4)(b) is not applicable.
- 18 34(4)(c) provides for exemption if the practitioner “is judged, through an assessment by a post-graduate dean or director of postgraduate education to have knowledge and experience equivalent to that of a dental practitioner who has satisfactorily completed foundation training”. Read literally such provision would indicate that there must be a refusal (as opposed to conditional inclusion) if such assessment has not been made. In practical terms that would never be possible because the assessment of necessity takes place in the context of

practice for which inclusion on the list is necessary. The post-graduate dean or director of postgraduate education now work within Health Education England (“HEE”) – and HEE is used as a shorthand in this decision for both the HEE organisation and the post-graduate dean or director of postgraduate education. It would be a nonsense in practice if a condition could not be imposed to enable such assessment because the assessment could never be made and 34(4)(c) would be rendered meaningless. NHSE counsel agreed (and, in so far as he is able to agree a legal proposition, Dr Aga also agreed) that we should adopt a purposive interpretation such that a condition under regulation 10 (for the purpose of preventing prejudice to the efficiency of services) can in principle be imposed to enable an assessment under 34(4)(c).

19 In general terms we must act reasonably, fairly and proportionately.

Evidence

20 It is noted at the outset that there were no relevant factual issues.

21 Only Mrs Madden gave evidence under oath. It was agreed by Dr Aga and NHSE that there was no need for him to give evidence and that there was no relevant challenge to his statement (it being accepted that the ending of the placement with the Seven Dental practice was not due to any fault of Dr Aga and that there was no allegation against Dr Aga that he had acted in breach of the conditions). Mrs Madden confirmed her statement. Her oral evidence related not to the history but to practical issues relating to assessment and PLVE.

22 She said that PLVE is the only form of assessment available in this context. The validation supervisor (“vs”) at the practice has to be approved, by HEE not NHSE. References by a vs are not an assessment (albeit potentially a part of the evidence available to HEE for an assessment) but are a means both of flagging up any issues and of informing NHSE that there is compliance with PL requirements. She confirmed that NHSE as the supervisory and regulatory body requires evidence that an assessment by HEE under 34(4)(c) is taking place and that conditions are being complied with. Put another way, NHSE require information as to whether there is or is not any breach of conditions in order to perform its obligations as the supervisory and regulatory body.

23 In answer to Dr Aga’s questions she said that the requirements and terms of PLVE are a matter for HEE. Similarly the judgment as to having knowledge and experience equivalent to that of a dental practitioner who has satisfactorily completed foundation training is matter for HEE, but NHSE as the supervisory and regulatory body need to know that HEE requirements are being followed. In answer to questions from the panel she said that she understood that the requirements at B23 had been revised to some extent but that the terms were entirely a matter for HEE (ie not dictated by NHSE).

- 24 Mr Thomas in his submissions in effect re-iterated his skeleton argument, indicated the logic of the legal position (as in paragraphs 15-18 above), and emphasised that the conditions must both enable HEE to make its assessment using PLVE and enable NHSE to undertake its role as the supervisory and regulatory body. On such basis the current conditions, including condition 2, are said to be required.
- 25 Dr Aga at various times asked for discretion or regard to his mitigation as to why the normal PLVE terms should not apply in the context of the delays he has encountered through no fault of his own. He did not challenge that the terms of 34(2) and (4) are mandatory. He did ask for us to exercise the power (which we accept we have, and NHSE accept we have) to revise the wording of conditions which are imposed to ensure efficiency of services by means of enabling assessment and consequent judgment that there is or is not knowledge and experience equivalent to that of a dental practitioner who has satisfactorily completed foundation training. He argued that the second condition was not required, essentially on the basis that the references under the third condition would provide the necessary information.

Decision and Reasons

- 26 There is no challenge to imposition of conditions but only to their terms and in particular the second condition.
- 27 Nothing in this decision should be taken to imply that there is any reason to suspect that Dr Aga does not have relevant skills, but rather that there has as yet not been an assessment of those skills under 34(4)(c).
- 28 The kernel of the ground for exemption under 34(4)(c) is that HEE should be able to make an assessment as to knowledge and experience equivalent to that of a dental practitioner who has satisfactorily completed foundation training. It is not disputed that PLVE is the only pathway available. It is not disputed that the terms, requirements and length of PLVE are entirely a matter for HEE. It is not disputed that the judgment of HEE (whether positive or negative) cannot be challenged by NHSE.
- 29 NHSE is a public body with supervisory and regulatory functions. Those functions include its duty to take action if conditions imposed on a practitioner are not being complied with.
- 30 The principle guiding the wording of conditions in this case should be such as enable HEE to make a judgment as a result of PLVE and enable NHSE to undertake its functions in such context.

- 31 Save for the change from “North Midlands” to “Midlands” there is no dispute as to conditions 1 and 3 and we direct such conditions should be imposed.
- 32 The vs referred to in condition 3 is a supervisor within the approved practice and not a part of either HEE or NHSE. The vs is, among other aspects, responsible for providing references under condition 3. The vs does not otherwise have any duties to assess knowledge and experience equivalent to that of a dental practitioner who has satisfactorily completed foundation training.
- 33 Without the first sentence of the current condition 2 there would be no explicit requirement upon Dr Aga to comply with the terms of PLVE decided by HEE. Without such requirement HEE would not be able make its judgment as a result of assessment under PLVE.
- 34 Without the second sentence an important source of evidence to enable both HEE and NHSE to undertake their functions would be removed.
- 35 We conclude that the current wording of condition 2 is appropriate proportionate and justified to achieve a satisfactory assessment under 34(4)(c) and to enable NHSE to undertake its proper regulatory and supervisory functions, and thereby to prevent prejudice to the efficiency of services.

Order

The appeal is refused except for the minor revision of conditions 1 and 3 referred to above.

**Tribunal Judge Christopher Limb
Primary Health Lists
First-tier Tribunal (Health Education and Social Care)**

Date Issued: 17 January 2020