First-tier Tribunal Primary Health Lists

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

IN THE MATTER OF THE NATIONAL HEALTH SERVICE (PERFORMERS LISTS) (ENGLAND) REGULATIONS 2013

[2020] 4153.PHL VKINLY

Heard by Video Link on 7-8 July 2021

BEFORE:
Mr H Khan (Tribunal Judge)
Mr D Styles (Specialist Member)
Ms J Everitt (Lay Member)

BETWEEN:

Mr Nadeem Syed

Appellant

-v-

NHS England

Respondent

DECISION

The Appeal

1. This is an appeal by Mr Nadeem Syed ("the Appellant") made pursuant to Regulation 17 of the National Health Service (Performers Lists) (England) Regulations 2013 ("the 2013 Regulations"). It is an appeal against a decision made by the Performers List Decision Panel ("PLDP") on 22 October 2020 (confirmed in a decision letter dated 29 October 2020) to conditionally include the Appellant on the National Health Service England Ophthalmic Performers List ("Performers List").

The Hearing

2. The hearing took place on 7 & 8 July 2021. This was a remote hearing which has not been objected to by the parties. The form of remote hearing was by video. A face to face hearing was not held because it was not

practicable, and no-one requested the same and we considered that all issues could be determined in a remote hearing. The documents that we were referred to are in the electronic hearing bundle (822 pages) provided for the hearing.

Attendance

3. The Appellant was represented by Mr A McGee (Counsel). The Appellant dialled into the hearing but did not give any oral evidence. The Appellant's witnesses were Dr Frank Eperjesi, Optometrist and Mr Henry Leonard, Optometrist and Association of Optometrists (AOP) - Head of Clinical & Regulatory. Ms Shamma Masud (Solicitor) also dialled into the hearing.

4. The Respondent was represented by Ms R Vanstone (Counsel). The Respondent's witnesses were Mr Rupesh Bagdai (Local Eye Health Network & Optometric Advisor) and Ms Rachel Sloan (Professional Standards Officer).

Late Evidence

5. The Tribunal was asked to admit additional evidence by the Appellant which comprised of the following:

    a. General Optical Council (GOC) determination of the substantive review dated 2 July 2021.

    b. Second Patient Audit Report of Dr Frank Eperjesi for 27 patients examined by Mr N Syed (the Registrant) between March 2020 and March 2021 (dated 4 May 2021).

6. In considering any late evidence, the Tribunal applied rule 15 and took into account the overriding objective as set out in rule 2 of the Tribunal Procedure (First Tier Tribunal) (Health Education and Social Care Chamber) Rules 2008. We admitted the late evidence as its admission was agreed between the parties and it was relevant to the issues in dispute.

Background

7. The Appellant is a practising Optometrist, registered with the General Optical Council (GOC) since 2001.

8. The GOC carried out an investigation into the Appellant's fitness to practise in 2019 and 2020. On 10 July 2020 the GOC found his fitness to practise was impaired by reason of misconduct and ordered conditional registration for a period of 12 months, with a review. Fifteen conditions were entered against his registration.

9. As a result, on 28 September 2020 the Respondent notified the Appellant that it was considering imposing conditions on his continued inclusion on the National Performers List. The conditions that the Respondent was considering were attached to the notification letter. These conditions were very similar to the GOC conditions.

10. On 30 September 2020 the Association of Optometrists wrote to the Respondent on behalf of the Appellant. They stated that he did not require an oral hearing and that he waived his right to the statutory 28 days' notice period. They also stated that he accepted the proposed conditions 1 – 10 and 13.

11. The PLDP met to consider the Appellant's case on 22 October 2020. The PLDP determined that conditions were necessary. They largely adopted the conditions as proposed by the Respondent but amended a number of the conditions.

12. The PLDP decided that in relation to condition 1, the record card audit should be carried out by a clinical investigator appointed by the Respondent, rather than engaged by the Appellant and approved by Respondent.

The agreed issues for the Tribunal

13. Both Mr McGee and Ms Vanstone submitted that the issue that required determination by the Tribunal was a narrow one. The Appellant did not dispute that his inclusion on the Performers List should be subject to conditions.

14. The issue that the Tribunal had to determine was whether the Respondent would appoint a Clinical Investigator to undertake a record card audit (as the PLDP had determined) *or* whether, as the Appellant submitted, the assessor currently identified by the Appellant and approved by the GOC should undertake a record card audit.

The Respondent's position

15. The Respondent's position was that it was necessary and proportionate for the Respondent to appoint its own clinical investigator to undertake a record card audit.

The Appellant's position

16. Mr McGee submitted that the Appellant has always been willing to accept an audit and investigation of his clinical record and his appeal does not denote any reluctance to be scrutinised
17. However, the Appellant considered that the record card audit required under condition 1 should be carried out by the assessor approved by the GOC –Dr Eperjesi rather than a clinical investigator as appointed by the Respondent.

18. The Appellant's case in relation to the issue in dispute included the following;

    a) it is otiose, excessively onerous and disproportionate for the Respondent to seek to impose its own clinical investigator to audit patient records;
    b) such a clinical investigator/auditor is already in place as part of the GOC-imposed conditions attached to the Appellant's registration as a result of

fitness to practise proceedings;
c) the GOC's auditor is competent and, importantly, independent;
d) there is no cogent reason advanced by the Respondent justifying the necessity for a second NHS auditor;
e) the regulatory remit of NHS England is in all essentials the same as that of the GOC.

The Regulatory Framework

19. In order to work as an Optometrist within the NHS England, an Optometrist must be on the "NHS Ophthalmic Performers List" maintained by NHS England.

20. The 2013 Regulations provide a self-contained, statutory regime for maintaining the Performers Lists for NHS medical, dental and ophthalmic practitioners in England. The Regulations govern the eligibility to apply, application by practitioners for inclusion on the list and the removal of practitioners from the list.

21. Regulation 10 of the NHS (Performers Lists) Regulation 2013 provides:

    (1) Where the Board considers it appropriate for the purpose of preventing any prejudice to the efficiency of the services which those included in a performers list performs or for the purpose of preventing fraud, it may impose conditions on a Practitioner's –

    (a) initial inclusion in a performer lists; or
    (b) continued inclusion in such a list.

22. Regulation 17(4) provides that on appeal the First-tier Tribunal may make any decision which the PLDP could have made. It is common ground that the First-tier Tribunal is not required to review the decision and reasons of the PLDP. It is required to make a fresh decision in light of all the information before it, which includes new information not available to the PLDP.

23. The burden of proof lies on the Respondent and the standard of proof is the balance of probabilities. If it is considered necessary and proportionate to impose conditions, they may be the same as those imposed by the PLDP, or such other conditions as the First-tier Tribunal considers appropriate

Evidence

24. We received an indexed bundle from both parties. This included witness statements from the witnesses. We do not rehearse all their contents as these are a matter of record. The following is a summary of some of the evidence. It is not meant to reflect everything that was said at the hearing or included in the hearing bundle.

25. Mr Bagdai set out that it was important for the Respondent to appoint its own clinical investigator. The regulatory remit of the Respondent was different to that of the GOC. The Respondent regulated performers to

ensure they are fit for purpose and suitable to carry out NHS primary care services. To obtain such assurance, he considered it was reasonable for the respondent to impose a condition that the Respondent appointed a clinical investigator to undertake a record card audit, rather than relying on the findings of an expert instructed by the Appellant.

26. Mr Bagdai explained that this was also important from a quality assurance point of view. The Respondent had to ensure that, for example, the clinical investigator was suitably qualified, had the relevant training and that there was no conflict of interest. The GOC investigation had made a number of very serious findings and Mr Bagdai expected the Appellant to want to provide assurances to the Respondent rather than to avoid it. The seriousness of the facts that have led to these proceedings justified and necessitated the Respondent seeking its own assurance about the clinical investigator.

27. Mr Bagdai did not consider that the condition was onerous. The audit would be carried out by a clinical investigator. It would require little input from the Appellant. He did not consider that the condition was disproportionate.

28. Ms Sloan explained that the Respondent had recruited clinical investigators. They had been trained and this included training on report writing. They had work shadowed and were offered support by the Deputy Medical Director. This provided a level of quality assurance to the Respondent. Ms Sloan made it clear that the clinical investigators were independent although they were paid by the Respondent due to their status as "deemed employees".

29. Dr Eperjesi explained that following approval by the GOC and in accordance with the GOC Conditions, on 5 August 2020 he obtained and assessed a sample of 25 of Mr Syed's patient records that the Appellant had completed between 1 October 2019 and 31 March 2020. He had also undertaken a second Patient Audit Report for 27 patients examined by the Appellant between March 2020 and March 2021.

30. Dr Eperjesi explained that whilst he had experience of GOC matters, he had no experience of monitoring Performers List conditions, had never worked for the Respondent and not been involved in any PLDP hearings. Furthermore, he had not heard of the term fitness for purpose until he was preparing for this hearing. He was not aware of how this differed from fitness to practise proceedings.

31. Dr Eperjesi concluded that from the Appellant's perspective, there was an element of input required for the audit process. For example, the Appellant had to take time off work to prepare and participate in any meetings.

32. Mr Leonard confirmed that he did not know the Appellant in either a professional or a personal capacity. He stated that from his own experience of how NHS England and NHS Improvement conduct regulatory investigations, there have been several instances of when NHS England and NHS Improvement has agreed for him/the AOP to conduct audits of patient records for AOP members under investigation and never has there

been any issue of independence raised. However, he personally had not acted as an assessor for both the GOC and the NHS on the same case.

The Tribunals Conclusions with Reasons

33. We took into account all the evidence that was included in the hearing bundle and presented at the hearing.

34. We wish to place on record our thanks to the representatives, Mr McGee and Ms Vanstone and the witnesses for their assistance at the hearing. We acknowledge the Appellant's attendance at the hearing.

35. We reminded ourselves that the Tribunal is considering the appeal at the date of the hearing and makes its decision on the basis of all of the evidence available to it, including any oral evidence at the hearing and is not restricted to matters available to the PLDP.

36. Mr McGee made it clear that the Appellant does not dispute that his inclusion on the Performers List should be subject to conditions. We acknowledged the parties confirmation that the only condition in dispute was condition 1. We noted that condition 1 was largely agreed. The agreed part included the amendment to the number of patient records and the time frame for the audit. The parties had very helpfully provided us with a revised condition 1 which clearly set out the parts that were agreed and the parts that were not.

37. The issue that the Tribunal had to determine was whether the start of condition 1 should read that the Respondent would appoint a clinical investigator to undertake a record card audit (as the Respondent submitted and the PLDP had determined) *or* whether, as the Appellant submitted, the assessor currently identified by the Appellant and approved by the GOC should undertake a record card audit.

38. In the case of the latter, the involvement of the Respondent in the decision as to who the assessor would be was limited to accepting whoever was approved by the GOC. This was currently Dr Eperjesi. The parties made it clear that whilst earlier in the process (at the proposal stage) there was agreement around the Respondent approving the Appellant's assessor, the parties' position at the final hearing was as set out above.

39. We concluded taking into account the evidence and all the circumstances of the case, the disputed part of condition 1 should read that the Respondent would appoint a Clinical Investigator to undertake a record card audit. We concluded that this was appropriate for the purpose of preventing any prejudice to the efficiency of the services which those included in a performers list perform. Our reasons for doing so are set out below.

40. We found the evidence of Ms Sloan and Mr Bagdai to be credible and well reasoned. We also found the evidence of Dr Eperjesi to be honest including fairly accepting that he had no experience of monitoring Performers List conditions and had not been involved in any PLDP proceedings. We found the evidence of Mr Leonard, whilst clear, to be limited in terms of the issue

that we had to determine. Mr Leonard acknowledged that he had conducted audits in relation to PLDP proceedings but accepted that these had not involved both the GOC and the Respondent in the same case.

41. We acknowledge the Appellant's position which was that he has always been willing to accept an audit and investigation of his clinical records. Mr McGee made it clear that the appeal does not denote any reluctance by the Appellant of being scrutinised. We also acknowledged the Appellant's concerns around the possibility of having two assessors which included it being onerous and disproportionate.

42. We concluded that it was appropriate to have such a condition for the purpose of preventing any prejudice to the efficiency of the services which those included in a performers list perform. The concerns investigated by the GOC included allegations of prescribing, record keeping and inappropriate and misleading behaviour. The allegations found proved during the GOC proceedings pose a real and identifiable risk to the efficiency of the service.

43. In our view, the starting point is that, as Mr Bagdai sets out in his statement, the regulatory remit of the Respondent is different to that of the GOC. The Respondent regulates performers to ensure that they are fit for purpose and suitable to carry out NHS Primary Care Services. Whilst action taken by the GOC *may* be relevant to the decision making, the 2013 Regulations provide for a discrete and particular aspect of public interest, namely the protection of the efficiency of the primary care services within the NHS by means of the Performers List. This is not within the GOC's remit. The remit of the Respondent includes prejudice to the efficiency of the service, the principles of fitness for purpose and suitability and are different to the principle of fitness to practise.

44. The Respondent has to consider whether it was necessary to impose conditions on the Appellant's continued inclusion on the list in accordance with Regulation 10(1)(b). Regulation 10(1)(b) specifically refers to the prejudice to the efficiency of services as a ground for imposing conditions. The Respondent is entitled to seek the imposition of such conditions that it considers necessary, appropriate and proportionate, in order for the efficiency of services to be maintained.

45. We were particularly persuaded by Ms Vanstone's submission that if Parliament had considered that the overarching regulation provided by the GOC was entirely aligned with all aspects of public interest involving the provision of primary care, in all cases where the performer is appearing before the GOC, the 2013 regulations regarding suitability, fraud and efficiency would be unnecessary. Given the different legislative provisions, we did not consider it appropriate to bind the Respondent to simply accepting any assessor which had been approved by the GOC.

46. Furthermore, the issue of quality assurance is important when it comes to identifying a clinical investigator. The Respondent needs to ensure that any assessor is suitably qualified to undertake such role. In our view, it was reasonable for the Respondent to ascertain whether the individual was

suitably qualified, had the relevant training and experience, as well as to consider any actual or perceived conflicts/bias prior to approving any such assessor. As Ms Sloan explained in her evidence, the Respondent had undertaken a recruitment drive and had recruited clinical investigators. These clinical investigators had attended training courses, work shadowed and had support available through Deputy Medical Directors. They have also been trained on report writing, including through the use of a template and have been trained on the process. Whilst we acknowledged that these assessors were remunerated by the Respondent, Ms Sloan made it clear that they were "deemed employees" for HMRC purposes.

47. In our view, this quality assurance was important not only from the Respondent's perspective but also from the Appellant's. The trained clinical investigators would be clear about the difference between fitness to practise and fitness for purpose and would be aware of the relevant requirements. In the end, the Appellant will have to satisfy the Respondent that he can practice without restriction.

48. We reminded ourselves that the role of the clinical investigator in this context was for the purposes of monitoring compliance with the conditions imposed. We acknowledged the evidence of Dr Eperjesi, and in particular the work that he had undertaken for the GOC. The Respondent accepts that Dr Eperjesi is experienced when it comes to proceedings before the GOC. However, Dr Eperjesi himself, very fairly and candidly accepted that he had not heard of the term fitness for purpose until he had prepared for this hearing. He made it clear that he was not aware of how it differed from fitness to practise. Furthermore, he had never worked for NHS England and had no experience of monitoring Primary Lists conditions. We wish to make it clear that this is not a criticism of Dr Eperjesi in any way but simply reflects the evidence that was given by him at the hearing.

49. In our view, it was important that the Respondent was satisfied that the clinical investigator was competent and had the relevant skills . We did not consider that this meant that higher standards were being imposed, simply that different considerations are in issue. We did not consider that given the different considerations, the Respondent should be bound by any decision of the GOC and was entitled to reach its own decision as to who to appoint. Ultimately this was a decision for the Respondent taking into account the circumstances of the case and the suitability of the clinical investigator. We had no reason to doubt Mr Bagdai's evidence that each case is judged on its own merits.

50. In our view, it was entirely reasonable, necessary and proportionate to impose a condition that the Respondent will appoint a clinical investigator to undertake a record card audit rather than the record card audit being undertaken by an assessor currently identified by the Appellant and approved by the GOC.

51. We acknowledge the Appellant is concerned that he would have to work with two clinical investigators. We accept that if the Respondent appoints a clinical investigator then the Appellant will have to engage with two separate clinical investigators, and this will have some implications in terms of

arranging and meeting with two individuals. However, we do not find that this is particularly onerous given that it will simply involve providing records to be audited, meeting with the clinical investigators to discuss the findings from an audit and ensuring that the clinical investigators feedback is incorporated into his performance development plan.

52. We also considered the Appellant's other submissions including about being placed in a conflicted position. We concluded that on the evidence that we heard it was unlikely that the Appellant would be placed in a conflicted position by engaging with two separate assessors as the advice provided by each of those (the assessor approved by the GOC and the clinical investigator appointed by the Respondent) is unlikely to be mutually exclusive; practitioners working in the NHS are expected to work in accordance with the requirements of inclusion on the Performers' List and whilst complying with the terms of their GOC registration. We wish to make it clear that we considered all the Appellant's submissions in reaching our decision even if we have not specifically referred to each one.

53. We concluded therefore that, taking into account all the circumstances of the case, the conditions imposed by the PLDP are both necessary and proportionate.

Decision

54. We concluded, therefore, that the Appellant's appeal shall be dismissed.

55. The decision dated on 22 October 2020 (confirmed in a decision letter dated 29 October 2020) to conditionally include the Appellant on the National Health Service England Ophthalmic Performers List ("Performers List") is confirmed save that condition 1 (as set out in the PLDP decision) shall be replaced with Condition 1 as set out in Schedule 1 below.

Judge H Khan

First-tier Tribunal (Health Education and Social Care Chamber)

Date Issued: 27 July 2021

Schedule 1 - Condition 1

1. NHS England and NHS Improvement will appoint a Clinical Investigator to undertake a record card audit. You will engage with the Clinical Investigator / Assessor in establishing and progressing the audit. The Clinical Investigator / Assessor will assess 15 of your patient records from each of your work locations which were completed from March 2021 to date. The Clinical Investigator / Assessor will adopt a suitable methodology to allow for a selection of a sample across the entire period. The records should be assessed for overall quality, detail and accuracy based upon the guidance provided by the College of Optometrists. This patient record audit should be completed within 28 days of this order coming into effect, and should highlight any concerns within the sample, but particular focus should be directed towards:

   a. Patient history
   b. Symptoms
   c. Ocular health
   d. Visual fields
   e. Visual acuity
   f. Justification of prescriptions issued
   g. Adequate follow-up advice regarding any pathology detected
   h. Reasons for changes of spectacles (with or without GOS voucher) where there is a small change in prescription.