PRIMARY HEALTH LISTS

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

[2019] 3838.PHL

Heard on 25 February 2020 at the Civil Justice Centre, Birmingham

BEFORE
Mr H Khan (Tribunal Judge)
Ms M Harley (Specialist Member)
Mr R Stokes (Professional Member)

B E T W E E N

Mr Gurtejpal Singh Randhawa

Applicant

v

NHS England (West Midlands)

Respondent

DECISION

The Appeal

1. Mr Gurtejpal Singh Randhawa ("the Appellant) appeals against the decision made on 21 August 2019 by Performers List Decision Panel ("PLDP") to impose conditions upon his inclusion within the Ophthalmic Performers List.

Attendance

2. The Appellant was represented by Mr Sam Thomas (Counsel). Ms Judith Cummin, Solicitor attended. The Appellant did not attend the hearing.

3. The Respondent was represented by Mr Andrew Hockton (Counsel). The Respondent's witness was Mr Ben Njima.

The Hearing

4. The hearing took place on 25 February 2020. Following the hearing, the Tribunal directed that the parties file written submissions and these have been received from both legal representatives. The panel deliberated on the 12 March 2020.

Reporting Restriction

5. We consider it appropriate to make an order under Rule 14 of the Tribunal Procedure (First-Tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 ("2008 Rules") to prohibit the publication of the names of any person who has received care from the Appellant.

Late Evidence

6. The Tribunal was asked to admit additional evidence by the Appellant. This included the General Optical Cancel, Standards of Practice for Optometrists and Dispensing Opticians (effective from April 2016). There was no objection from the Respondent as to its admission and we concluded it was appropriate to admit it.

7. 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.

Background

The Appellant

8. The Appellant is an optometrist. The Appellant was first included on the National Performers List on 10 January 2011. The Appellant has since been practising within the West Midlands area as a locum across a number of practices.

The Respondent

9. The Respondent is established under section 1H of the National Health Service Act 2006 ("the 2006 Act") and, together with the Secretary of State, is subject to the duty in section 1(1) of the 2006 Act to continue the promotion in England of a comprehensive health service designed to secure improvement (a) in the physical and mental health of the people of England, and (b) in the prevention, diagnosis and treatment of physical and mental illness.

10. For the purpose of discharging that duty, the Respondent has the power to arrange directly for the provision of services for the purposes of the health service in England in accordance with the 2006 Act, and also through the clinical commissioning groups established under the 2006 Act and on whom functions relating to the commissioning of health services are also conferred. Further, the Respondent is required to exercise its powers so as to secure

the provision throughout England of “primary ophthalmic services”, as described in section 115(1) of the 2006 Act.

11. The Respondent must, by section 13E of the 2006 Act, exercise its functions with a view to securing continuous improvement in the quality of services provided to individuals for or in connection with (a) the prevention, diagnosis or treatment of illness, or (b) the protection or improvement of public health. In discharging that duty, the Respondent must, in particular, act with a view to securing continuous improvement in the outcomes that are achieved from the provision of the services. Relevant “outcomes” include, in particular, outcomes which show—

(a) the effectiveness of the services,

(b) the safety of the services, and

(c) the quality of the experience undergone by patients.

Events leading to the Decision of the PLDP

12. The Respondent had no concerns about the Appellant’s practice until October 2018 when he informed the Respondent in a letter dated 15 October 2018 that an investigation had been opened by the General Optical Council (“GOC”).

13. The events leading up to the GOC’s investigation were that on the 23 October 2017, the Appellant saw Patient A (whilst working as a locum Optometrist at Boots Opticians) to have her cataracts reviewed. During the examination, two visual field tests were performed, one by an Optical Assistant and the second by the Appellant. It was alleged by Patient A that she informed the Appellant that she was unable to see him standing beside her during the test. The Appellant noted the visual field defect in the right eye and made a routine referral on the basis of both cataracts and the visual field defect in the right eye. Patient A was seen by the Manor Hospital in February 2018 where a choroidal melanoma was detected in her right eye. She was referred in early March 2018 to the Royal Liverpool and Broadgreen University Hospital and advised that the best option was to have her right eye removed due to the size of the tumour. Her eye was removed on the 16th March 2018. Subsequently, Patient A made a complaint to the GOC in relation to the Appellant’s failure to make an urgent referral in October 2017.

14. On 14 January 2019, the GOC ordered that the Appellant’s registration be subject to conditions for a period of 18 months. Those 5 conditions are set out in the determination. The record of determination also records that the Interim Orders Panel was reminded that its role was not to make findings of fact on the allegation made by Patient A, but to assess the risk based on the information available to it at that time. The panel determined that an Interim Order was necessary for the protection of the public and was otherwise in the public interest, and that an order imposing

conditions of practice would be sufficient to manage the identified risks.

15. On 23 January 2019, the Appellant notified the Respondent that conditions had been imposed on his GOC registration. The Respondent sought further detail from the Appellant regarding the background of this case and facts that led to the GOC's actions

16. On 21 August 2019, the PLDP decided to impose conditions. Its reasons which are set out in the letter dated 27 August 2019 include concerns with respect to the Appellant's assessment and diagnosis, in that, the Appellant failed to put himself in a position to us to make an effective diagnosis by carrying out a further examination and/or follow-up and treatment, in that, the Appellant failed to recognise a serious condition and take appropriate follow-up action in carrying out of diluted fundus examination and/or making of an urgent referral.

Legal Framework

The National Health Service (Performers Lists) (England) Regulations 2013

17. Section 123 of the 2006 Act is an enabling provision which provides that regulations may provide that a healthcare professional of a prescribed description (including those professions regulated by the General Optical Council) may not perform any primary ophthalmic service for which the Respondent is responsible unless they are included in a list maintained under the regulations by the Respondent.

18. The National Health Service (Performers Lists) (England) Regulations 2013 ("the Regulations"), made pursuant to section 123 of the 2006 Act, make provision (at regulation 3(1)(c)) for the maintenance and publication by the Respondent of an Ophthalmic Performers List. By regulation 37, an ophthalmic practitioner may not perform any primary ophthalmic services unless that ophthalmic practitioner is included in the Ophthalmic Performers List.

19. Applications by ophthalmic practitioners for inclusion in the ophthalmic performers list must, by regulation 4 of the Regulations, be made in writing to the Respondent and contain the information and undertakings prescribed by regulation 4, and further by regulation 39.

20. Regulation 10(1) of the Regulations provides that where the Respondent considers it appropriate for the purpose of preventing any prejudice to the efficiency of the services which those included in a performers list perform or for the purpose of preventing fraud, it may impose conditions on a practitioner's— (a) initial inclusion in a performers list; or (b) continued inclusion in such a list.

21. When considering whether to impose such conditions, regulation 10(2) requires the Respondent to give the practitioner

(a) notice of any allegation against the practitioner;

(b) notice of what action it is considering and on what grounds;

(c) the opportunity to make representations to it within a period of 28 days of the date of the notification under sub-paragraph (b); and

(d) the opportunity to put the practitioner's case at an oral hearing before it, if the practitioner so requests, within the 28 day period mentioned in at (c).

22. After considering any representations and any oral hearing, the Respondent must, by regulation 10(3), decide whether or not to impose conditions on the practitioner's inclusion in the performers list and within 7 days of making that decision, notify the practitioner of—

(a) that decision and the reasons for it (including any facts relied upon);

(b) any right of review under regulation 16; and

(c) any right of appeal under regulation 17 (together with information about how to exercise that right and that any right of appeal must be exercised within 28 days of being given notice of the decision).

23. By regulation 17, an appeal to the First-tier Tribunal lies against a decision of the Respondent to (among other things) impose, maintain or vary any conditions under regulation 10. On appeal, the Tribunal may (by regulation 17(4)) make any decision the Respondent could have made. 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.

24. 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.

The role of the General Optical Council and relevant legal provisions

25. The General Optical Council (“the GOC”) is established under section 1 of the Opticians Act 1989 (“the 1989 Act”) with the general function of promoting high standards of professional education, conduct and performance among registered opticians. Further by section 1, the “over-arching objective” of the GOC in exercising its functions is the protection of the public, which involves the pursuit of the following:

(a) to protect, promote and maintain the health, safety and well-being of the public;

(b) to promote and maintain public confidence in the professions regulated under

[the 1989 Act];

(c) to promote and maintain proper professional standards and conduct for members of those professions; and

(d) to promote and maintain proper standards and conduct for business registrants.

26. By section 7 of the 1989 Act, the GOC is required to maintain registers of (a) optometrists, and (b) dispensing opticians. By section 8, a person shall be entitled to be included in a register if he holds a prescribed qualification, has adequate practical experience, and is a fit person to practise.

27. Allegations made to the GOC that the fitness to practice of a registered optometrist or registered dispensing optician is or may be impaired are required to be dealt with under Part 2A of the 1989 Act. Section 13D(2) prescribes the only grounds on which fitness to practice is impaired, which (in summary) include misconduct; deficient professional performance; the imposition of criminal sanctions; and adverse physical or mental health.

28. The GOC's Fitness to Practise committee is established by section 5C of the 1989 Act for the purpose of inquiring into and determining allegations relating to fitness to practise. Section 13F prescribes the powers of the Fitness to Practise committee. If the committee finds that a registered optometrist's or registered dispensing optician's fitness to practise is impaired, it has the power as it sees fit to give a direction as specified in section 13F(3), namely

(a) the erasure of a registrant from the appropriate register;

(b) the registrant's suspension for up to 12 months;

(c) the making of the registrant's registration conditional on compliance (for a period not exceeding three years) with such requirements so specified as the committee sees fit to impose for the protection of members of the public or in his or its interests.

29. The Fitness to Practise Committee further, by section 13L of the 1989 Act, has the power to make an interim order, of a specified kind, that a registrant's registration be suspended or be made subject to conditions, where the Committee is satisfied that the exercise of this power is necessary for the protection of members of the public or is otherwise in the public interest, or is in the interests of a registrant. The specified orders include an order making the registrant's registration conditional on his compliance (for a period

not exceeding 18 months) with such requirements so specified as the committee sees fit to impose.

Evidence

30. We received an indexed bundle together with skeleton arguments from both parties. We do not rehearse their contents as these are a matter of record.

31. We heard evidence from Mr Njima. Mr Njima informed the Tribunal that he had provided advice to the PLDP. He set out that the decision of the PLDP reflected the conditions imposed by the GOC, except in relation to the frequency with which the Appellant was required to provide a report. The PLDP took the view that the reporting frequency was not too onerous and proportionate to the risk identified. He explained that the PDLP had considered a number of options as part of that process and this included taking no further action, referring to other organisations for remediation or intervention and the imposition of conditions.

32. Mr Njima explained that the Appellant had made representations as part of the PDLP process and had set out in his correspondence dated 22 July 2019 and that he was "*content for conditions to be imposed by NHS England"* but made representations with regards to the supervisor reporting monthly and the conditions appearing to be for an indefinite period. Mr Njima's statement also exhibited correspondence from the Appellant's legal representative dated 1 July 2019 indicating that the Appellant was content with the terms of the conditions but wanted to provide written representations regarding the frequency of the proposed meetings with the supervisor.

33. Mr Njima set out that there were concerns about the Appellant's knowledge of where to refer cases. The Appellant's stated pattern of work involved him working as a locum on multiple sites which were covered by different protocols for referring cases. This meant that the Appellant was working in different places and needed knowledge of where to refer cases in ach setting. Mr Njima accepted that the current concerns were focused around "where" to refer as opposed to "when" to refer. The Appellant had seen around one hundred patients in a two month period and this along with his work pattern meant that monthly supervision meetings were necessary.

34. Mr Njima explained that the Respondent had tried to work with the Appellant and address the concerns about where to refer patients. However, the Appellant had not taken up the invitation to discuss this.

The Tribunals Conclusions with Reasons

35. We took into account all the evidence that was included in the hearing bundle, presented at the hearing, as well as the closing submissions.

36. We noted that the Appellant did not attend the hearing, but he was legally represented. We were therefore content to proceed. We wish to make it clear that the Appellant's non-attendance did not affect our decision in any way.

37. We heard from Mr Njima. We found him to be a credible witness who set out his evidence in a clear and careful manner.

38. We were referred to previous first Tier Tribunal decisions made before the Primary Health Lists Tribunal. However, whilst we noted those decisions, we reminded ourselves that they were not binding on the Tribunal and we considered the specific circumstances of this case in reaching our decision.

39. We observed that the Appellant pursued a new and different argument upon the appeal, which involved challenging the Respondent's jurisdiction. This was different to the argument set out in the appeal application form and which was not pursued before the PLDP. We acknowledged that this was as Mr Hockton described it a "novel" submission. We were not persuaded as to its merits. In our view, the submissions failed to recognise the statutory role and status of the Respondent. The respective powers and jurisdiction of the GOC and the Respondent are not mutually exclusive but different and complementary. We do not consider that the exercise of the GOC's power under its own jurisdiction in any way limits or fetters the exercise of the Respondent's independent power under its own jurisdiction. Furthermore, there will not infrequently be divergences of approaches between the Respondent and the GOC and any other regulators.

40. We were not persuaded that the case of *R. (on the application of Mandic-Bozic) v British Association for Counselling and Psychotherapy) [2016] EWHC 3134 (Admin)* ("MB Case") was relevant in these circumstances. That case relates to the actions of voluntary not statutory bodies. The case can also be distinguished on the basis that MB was exonerated after a lengthy hearing. In the circumstances, re-litigation of broadly the same issues by another non-statutory body was understandably considered to be unfair.

41. In the present case, the powers of the two bodies are entirely separate and serve different purposes. The Respondent is a statutory body which not only has a power to intervene in specified circumstances, and in some cases there is an obligation to do so. In any event, there has been no lengthy proceedings of the GOC exonerating the Appellant. There has been no final decision of the GOC. In our view, we do not consider that it was manifestly unfair to the Appellant to answer proceedings before the Respondent's panel.

42. Accordingly, we were also not persuaded by the submissions put forward including around cause of action or issue estoppel. We rejected the Appellant's submission that there was a bar on the

Respondent litigating the matter because the doctrine of course of action of action estoppel applied.

43. Furthermore, we note that the Appellant himself (in his correspondence dated 22 July 2019) acknowledged that the Respondent applied a different test than that considered by the GOC when imposing an interim order of conditions.

44. We went on to consider the alternative submission that there was insufficient evidence before the Tribunal to go beyond the conditions imposed by the GOC.

45. We acknowledge that there have been no findings made by the GOC and acknowledge that the Appellant contests any "failure" alleged by the Respondent.

46. We did not consider that there was insufficient evidence before the Tribunal to go beyond the conditions imposed by the GOC. As we have set out above, the respective powers and jurisdiction of the GOC and the Respondent are not mutually exclusive but different and complementary. We concluded that all the conditions were appropriate for the purpose of preventing any prejudice to the efficiency of the services which those included in the Performers List perform. Our reasons are set out below.

47. It was clear that the Appellant has expressly both in person and through his legal advisers (emails dated 1 July 2019) accepted the imposition of conditions. For example, the correspondence dated 22 July 2019 states that "I state from the outset that "*I am content for conditions to be imposed by NHS England"*. We acknowledge that that correspondence raised concerns about the supervisor reporting requirements and the indefinite nature of the conditions.

48. Furthermore, the email dated 5 June 2019 from the Appellant's legal representative set out that *"if the recommendation of the Tier 1 PL DP is that the GOC conditions asked of sufficient regulatory oversight, or NHS England wish to mirror these conditions, then I cannot envisage any concerns by Mr Randhawa..."* The correspondence dated 1 July 2019 from his legal representative states "…*Mr Randhawa is content with the terms of the conditions*…" but sought to make written representations with regards the frequency of the proposed meetings with supervisor. The correspondence from his legal representative dated 25 July 2019 also makes it clear that *"Mr Randhawa is not opposing the imposition of conditions merely the details of the conditions to be imposed."* Furthermore, the email dated 5 June 2019 from the Appellant's legal representative set out that *"if the recommendation of the Tier 1 PL DP is that the GOC conditions asked of sufficient regulatory oversight, or NHS England wish to mirror these conditions, then I cannot envisage any concerns by Mr Randhawa..."*

49. We specifically considered the main objections raised by the Appellant in his correspondence dated 22 July 2019 with regard to

the conditions. In summary, these were that the monthly reporting proposed by the Respondent would create prejudice by duplicating work to be undertaken by the proposed supervisor and the indefinite period of the conditions.

50. We noted that there has been very little evidence produced by or on behalf of the Appellant in relation to the clinical issues or any problems relating to the conditions imposed especially with regards to duplication of work in relation to the supervision requirements.

51. Our decision took into account that the Appellant's stated pattern of work which involved him working as a locum on multiple sites which were covered by different referral protocols for referring onward cases. It was clear from the oral evidence of Mr Njima that concerns remained about the Appellant's knowledge of *where* referrals should be made rather than *when* referrals should be made. In our view, it was important for the purposes of preventing any prejudice to the efficiency of services which those included in the performers list perform for them to know where to make the referrals. There will be cases which require urgent referrals and where any delay could have significant consequences for the patient. We were particularly persuaded by the evidence of Mr Njima that that the Appellant had seen in excess of one hundred patients across the sites. This would, in our view, mean that bi-monthly meetings would provide insufficient monitoring for the purpose of preventing any prejudice to the efficiency of the services which those included in the performers list perform.

52. Furthermore, we observed that there are different levels of supervision, general supervision (as is suggested here), close and direct supervision. In the Appellant's case, the least onerous form of supervision has been adopted. Furthermore, we did not consider that monthly supervision with a supervisor was too onerous or in any way disproportionate. It is, in our view, in this case, appropriate to monitor the issue of efficiency.

53. Furthermore, we were concerned that despite the Appellant being invited to discuss the ongoing concerns with the Respondent, he had declined to do so. In our view, given how the current situation arose, it was not clear as to what the Appellant's reasons were for refusing to meet and discuss the issue of referrals. We considered the duration of the conditions. We had no reason to doubt that the Respondent would keep this under review, but we did not consider that, at this stage, there was any need to impose any time limit on the conditions.

54. We considered the circumstances of this case and concluded that the conditions were proportionate and necessary. We concluded that they were appropriate for the purpose of preventing any prejudice to the efficiency of services which those included in the performers list perform.

IT IS ORDERED THAT:

55. The Appellant's name on the Performers List shall be subject to the conditions as set out in attached Schedule 1 for the purpose of preventing any prejudice to the efficiency of the services which those included on the Performers List perform.

Lead Judge Primary Health Lists/Care Standards
First-tier Tribunal (Health Education and Social Care)

Date Issued: 30 March 2020

Schedule 1

Conditions

Notification

1.1. You must notify NHS England's Responsible Officer or nominated deputy within 7 calendar days of the date of these conditions taking effect of:

1.1.1. The details of all current posts, including job title, location and responsible officer or nominated deputy information;

1.1.2. The contact details of all employing and or contracting bodies including those of your direct line manager;

1.1.3. The details of any organisation on whose ophthalmic list you are included; and

1.1.4. The contact details of any locum or out of hours agency you are registered with.

1.2. You must notify NHS England's Responsible Officer or nominated deputy of:

1.2.1. Any posts you accept before commencement of that post;

1.2.2. Any investigation or formal disciplinary or court proceedings by any employer or contracting body within 7 calendar days of being notified of such proceedings; and

1.2.3.Any complaints within 2 calendar days of that complaint being received.

2. Supervision

2.1. At any time you are employed or engaged to provide NHS ophthalmic services, you must be supervised by a clinical supervisor ("the **Supervisor").**

2.2. The Supervisor should be:

2.2.1. Registered with the General Ophthalmic Council in the same category of the register as yourself or higher; and

2.2.2. Nominated by you.

2.3. The detail of the Supervisor and arrangements for supervision must be notified to and approved by NHS England's Responsible Officer or nominated deputy.

2.4. You must not start or restart work until the approval specified at Condition 2.3 has been obtained.

2.5. You must:

2.5.1. Meet with your Supervisor, in person at least once a month for a case-based discussion and feedback session to review a sample of records of 10 of your clinical consultations consisting of a mixture of cases, 60% being comprise of cases in which you made referrals and 40% of cases in which you did not make referrals.

2.5.2. Seek a report from the Supervisor on a monthly basis using the template supplied by NHS England ("the Report"); and

2.5.3. Provide NHS England with a copy of the Report and any notes of discussions and agreed actions arising from those meetings within 7 days of the meeting taking place.

3. Co -operation

3.1. You must:

3.1.1. Provide appropriate responses within requested timescales to all communication from NHS England; and

3.1.2.Meet, upon request, with any NHS England representative to review your progress against these conditions.

4. Exchange of Information - General

4.1. You must allow NHS England to exchange information relevant to these
conditions with any person, organisation or contracting or employing body, including but not limited to:

4.1.1. Any organisation or person employing or contracting you to provide
ophthalmic services;

4.1.2. Any prospective employer or contractor employing or contracting you to
provide ophthalmic services;

4.1.3. Any regulatory body; and

4.1.4. Your Supervisor/Deputy Supervisor.

5. Notification

5.1. You must inform the following persons of these conditions within 7 calendar days of the date of these conditions taking effect:

5.1.1. Any organisation or person employing or contracting you to provide
ophthalmic services immediately;

5.1.2. Any prospective employer and/or contracting body employing or contracting you to provide ophthalmic services, at the time of application;

5.1.3. Any locum agency or out of hours service you are registered with;

5.1.4 Your medical indemnity provider;

5.1.5 The General Ophthalmic Council