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

[2019] 3668.PHL

Heard on 23 July 2019 at Norwich Tribunal Centre

BEFORE
Miss S Goodrich (Judge)
Ms Jane Everitt (Specialist member)
Dr Martin Stefan (Specialist member)

BETWEEN:

Dr HENRY MANNINGS

Applicant

and

NHS COMMISSIONING BOARD

Respondent

DECISION AND REASONS

Representation
The Appellant: in person
The Respondent: Mr Christopher Hamlet, Counsel, instructed by Mills and Reeve.

Introduction

1. This is an appeal by Dr Mannings against the decision made by the Performers List Decision Panel (the "PLDP") on 6 March 2019 to remove his name from the Medical Performers List (MPL) by reference to regulation 14(5) of the National Health Service (Performers List) (England) Regulations 2013 (“the Regulations”) on the grounds that he had not demonstrated that he had performed the services, which those included in the relevant performers list perform, during the preceding twelve months.

The PLDP decision

2. In the decision letter dated 8 March 2019 Ms Hole, the Chair, said that the panel took into account that Dr Mannings had not provided GP services for NHS England in the preceding 12 months and that his ongoing private work did not require him to be on the National Performers List. The panel decided to remove Dr Mannings' name from the performers list by reference to regulation 14 (5).

The Hearing

3. We had received and read in advance of the hearing a paginated and indexed bundle. At the hearing we decided to receive a late skeleton argument on the Appellant's behalf which very helpfully drew the threads together regarding Dr Mannings' appeal. Dr Mannings appeared in person. The judge spent some time explaining the nature of the process and the issues in the appeal, and thereafter enabled Dr Mannings to present his case.

The Respondent's case

4. The Respondent's case was set out in the Response to the appeal, the issues identified in the Scott Schedule and in the skeleton argument. We need not repeat the points made as they are a matter of record. In summary, the Respondent's case is that the decision to remove the Appellant on the ground set out in regulation 14 (5) was/is rational, reasonable and proportionate.

The Appellant's case

5. In summary, Dr Mannings' case is that the decision was motivated by an improper or ulterior purpose. He also questions whether regulation 14 (5) applies. If it does, the main points in his case regarding the exercise of discretion are that:
    a. The annual appraisal cost is about £500, and is greatly exceeded by the legal costs incurred in this matter (which would cover many years' appraisals), not to mention the bureaucratic costs incurred internally.
    b. This is not some sort of test case to establish a point of wider significance. His position is an unusual one.
    c. The Respondent did not take this action in respect of any of the previous years in which his practice had been solely conducted through Star Throwers.
    d. There would be no point in the existence of the discretion at all if it was inevitably to be exercised against a practitioner because of the cost to the NHS of his annual appraisals.
    e. Whether or not his MPL listing is strictly necessary for the work he does at Star Throwers, it is an important ingredient in his credibility with users of Star Throwers, and with such practitioners as recommended them to the charity.

f. Whatever the underlying legalities of the present matter may be, most members of the public would not understand them: they would think he had been struck off for some sort of misconduct.
g. He believes that the decision was influenced or inspired by hostility to him from consultants at the Norfolk and Norwich Hospital.
h. Removal from the MPL would be exploited unfairly probably in the Press and on the internet, and would significantly damage the reputation of the charity in Norfolk.
i. The work of the charity is extremely valuable in the Community, and to the NHS itself, because it performs services which would often otherwise be demanded of the NHS. He relies on the evidence of Dr Dernedde.
j. Absent an MPL listing, it will be necessary for Dr Mannings to obtain "a private listing", which costs considerably more than the NHS appraisals. Such costs will be borne by the charity, to the detriment of the service it performs, and, to some extent, to the detriment of the NHS which benefits from the services the charity perform. Alternatively, the costs would have to be passed on to patients of the charity, which would be completely contrary to its ethos "*and to what our patients expect of us, that is to say a free service comparable to that of the NHS."*

6. We heard oral evidence on oath from the Respondent's witness, Ms Goddard, the Programme Manager who had presented the case before the PDLP, and from Dr Mannings. We do not intend to set out herein all the evidence that was given but will refer to key parts when making our findings below.

The Burden and Standard of Proof

7. With an exception, (to which we will return) the Respondent bears the burden of proof in so far as any facts are in issue. The standard is the balance of probabilities. The issue of proportionality requires a judgement to be made. The Respondent beard the burden of persuasion in this regard.

The Regulations

8. The key regulation is as follows:

Removal from a performers list

……….

"14 (5) Where a Practitioner cannot demonstrate that the Practitioner has performed the services, which those included in the relevant performers list perform, during the preceding twelve months, the Board *may* remove that Practitioner from the relevant performers list."

Other provisions are of some relevance:

“Medical performers list

24.(1) A medical practitioner may not perform any primary medical services unless that medical practitioner is a general medical practitioner and is included in the medical performers list.”

Regulation 3 provides that “medical performers list” means, unless the context otherwise requires, the list prepared, maintained and published by the Board pursuant to regulation 3(1)(a);

Regulation 7(4) provides that the Board *must* refuse any application for inclusion in which:

“(a) the practitioner has not provided satisfactory evidence that the Practitioner intends to perform the services which those included in that performer’s list perform”.

(our *italics*)

<u>Our Consideration and Findings</u>

9. Dr Mannings brings this appeal under regulation 17 (2) (c). Regulation 17 (1) provides that the appeal is by way of “redetermination”. Regulation 17(4) also provides that on appeal the First-tier Tribunal may make any decision which the PLDP could have made.

10. We are thus required to make a de novo (i.e. fresh) decision. This may be informed by new information or material that was not available to the PLDP. The redetermination of the appeal includes consideration of the evidence provided by both sides in this appeal and the oral evidence and submissions before us.

11. We have considered everything before us. If we do not refer to any particular part of the evidence or submissions it should not be assumed that we have not taken these into account.

12. We consider that core issues are:
    1. Are the grounds made out under regulation 14(5) of the National Health Service (Performers Lists) (England) Regulations 2013?
    2. If so, how should the discretion to remove the Appellant from the Medical Performers List be exercised?

13. The background to this matter is largely non-controversial and can be summarised as follows. Dr Mannings qualified in medicine in 1976. He became a well-respected general practitioner in practice in Wymondham, where he practiced for some twenty years. About 20 years ago he began to take a particular interest in oncology. He studied for a Masters’ degree in cancer immunotherapy. Over the years since then he held various hospital appointments across the region. In effect, he pursued this aspect of his career alongside some continuing work in general practice. Over the course of his long career he has never had a complaint made against him

by a patient. He has been appraised in his role as an MPL performer annually and no concerns have ever been identified. His last hospital appointment was at the James Paget University Hospital and ended in about 2015. About 10 years ago he set up a charity based in Wymondham called Star Throwers, the continuing aim of which is to assist people suffering from cancer. Much of the work involves counselling and support. He has also provided medical advice and treatment to those accessing his services via his position at Star Throwers, primarily but not solely related to cancer. We received the written evidence of Dr Dernedde, a consultant oncologist, who speaks very highly of Dr Mannings' skills as a speciality doctor. In summary, Dr Dernedde, and others at the James Paget University Hospital, had wanted Dr Mannings to be appointed to work in that hospital in 2018 in a particular role but, in the event, this was not approved by the clinical lead at the Norfolk and Norwich University Hospital (N&NUH).

14. By way of other background to which Dr Mannings has referred, a complaint had been initiated by a consultant at the N&NUH to the General Medical Council (the GMC) in 2012 concerning the care provided to two patients (but not by the patients themselves). This led to restrictions being imposed on Dr Mannings' practice by the Medical Practitioners Tribunal Service (the MPTS), which included his ability to prescribe. From Dr Mannings' description, it appears likely that this was an 18 month interim order imposed by the MPTS pending further investigation. It seems clear that the interim restriction on prescribing was removed after some two months. In the event, after some 18 months of investigation, the allegations made were not substantiated. It was evident to us that Dr Mannings is still deeply upset by these events. In his view the impact of the GMC/MPTS proceedings was that local GP practices ceased using his services as a locum.

15. Dr Mannings believes that the decision made by the PDLP on 6 March 2019 was motivated by an improper purpose or motive. We have considered all of his evidence regarding his conversation with Mr Gardner who was admitted to hospital at the request of Dr Mannings in a confusional state. Sadly, Mr Gardner has since died. In short, Dr Mannings says that on 6 March 2019 Mr Gardner told him that an oncology consultant had "bad-mouthed" Dr Mannings, and had said that Dr Mannings was "about to be removed and would no longer be allowed to practice". He relies on the statement of Mr Gardner's widow dated 20 May 2019 which is to similar effect, (save that her recollection is that her husband said that Mr Mannings had been" struck off".) Mrs Gardner said in her statement that Dr Mannings told Fred (her husband) that it was the first he knew of it.

16. As Dr Mannings fairly accepted, the allegation of bad faith that he makes is a very serious one. Applying ordinary principles the burden is on him to establish the facts on which he relies in this regard. Mrs Gardner was not called to give evidence and so her account of what her husband said to her is untested. It was apparent to us from Dr Mannings' own evidence

that Mr Gardner had to give a physical description of the consultant which suggests that Mr Gardner did not know his name. Be that as it may, the real issue is the probability that the views of any consultant or any other person infected the PLDP decision.

17. We have considered the evidence in the round. In our view it is important to recognise the sequence leading up to the PDLP decision. It is clear that as long ago as 2 April 2018 the Appellant's appraiser identified that Dr Mannings had not undertaken NHS GP work and had not done so *"for some time".* By emails dated 17 September and 25 October 2018 Dr Mannings was invited to voluntarily remove himself from the MPL.

18. In our view it is regrettable that Serena McLean, a Programme Manager for Performance of the Respondent's directorate, referred in these emails to "mandatory" grounds for removal. This was wrong in law. However, we do not consider that this was material to Dr Mannings' response or to the decision ultimately made by the PLDP.

19. On 9 January 2019 the PLDP proposed removing Dr Mannings' name from the MPL. On 10 January 2019 notice of that proposal was provided to Dr Mannings, together with an invitation to attend at an oral hearing and/or provide written representation. On 6 March 2019 the PDLP met and considered the issue and decided to remove his name. We accept Ms Goddard's evidence that the panel recognised that this was a discretionary decision.

20. At the beginning of the hearing we explained that our task is to make an entirely fresh decision and, in this context, Dr Mannings' view that the decision was improperly influenced and/or motivated by an ulterior purpose did not therefore appear to be the key issue. It was apparent, however, that Dr Mannings' belief that the PDLP decision was influenced by bad faith underpinned how he put his appeal and how he viewed the merits of the decision taken. In short, he appeared to say that, but for his concern regarding bad faith, he could have understood and accepted the decision made, but his concern as to bad faith had caused him to question all aspects.

21. Having considered the evidence in the round we consider that the suggestion that the consultant or any other person had influenced the PDLP panel is tenuous and speculative. We consider that it is much more likely than not that the decision was made for the reason stated in the decision letter i.e. for the simple reason that Dr Mannings had not provided GP services for NHS England in the preceding 12 months.

22. An argument has been raised regarding the meaning of regulation 14 (5). In summary it is suggested that regulation 14 (5) might not apply because Dr Mannings has, in fact, been performing services which are akin to the services provided by a primary care performer. The issue raised is what is meant by the phrase *"has performed the services, which those included in the relevant performers list perform."* As we understand it Dr Mannings

submits that the wording in regulation 14 (5) leaves room for some kind of equivalence between the work he has been performing in his role at Star Throwers and the performance of services by others on the MPL.

23. It is notable that regulation 3 interprets "medical performers list" as meaning, unless the context otherwise requires, the list prepared, maintained and published by the Board pursuant to regulation 3(1)(a). It is suggested that the wording in regulation 14 (5) is not expressly limited to performance under the NHS and that this gives rise to an equivalence argument. We do not agree. These are the National Health Service (Performers List) (England) Regulations 2013 made under the National Health Service Act 2006, as amended, in order to govern the provision of primary medical services in the NHS. The Regulations as a whole govern inclusion and removal from the relevant lists, and the means/routes by which various regulatory decisions may be justified in the public interest. Similar phrasing referring to "the services which those included in the performer's list perform") is used in other parts of the regulations: see, for example regulation 7(4). It is also used in regulation 14 (3) (b) (i.e. "the Practitioner's continued inclusion in that performers list would be prejudicial to the efficiency of the services which those included in that performers list perform".)

24. In our view, the words "has performed the services, which those included in the relevant performers list perform" relate to the performance of primary care services within the NHS.

25. We find Dr Mannings has not performed the services, which those included in the relevant performers list perform, during the twelve months preceding our own decision. The work he performs is as an independent GP. We find that regulation 14 (5) is engaged. We stress, as does the Respondent, that this is the sole basis on which removal was/is sought. At its highest, the fact that Dr Mannings was been carrying out similar services to those performed by an NHS GP is a matter that is relevant to the exercise of discretion.

26. Essentially, we have a discretion. Dr Mannings makes the point that as removal is not mandatory it must be envisaged that there will be circumstances where a doctor who has not, in fact, provided primary medical services in the preceding 12 months is allowed to remain on the MPL. That must be right in principle.

27. It is notable that all removal decisions under the Regulations are discretionary save those based on facts such as conviction for murder, national disqualification, death, or that the performer is no longer registered (see regulation 14 (1) (a) –(d)). Even decisions to remove based on criminal conviction (other than murder) involving sentences of more than six months, and the grounds which cover unsuitability, fraud and efficiency, provide *discretionary* grounds for removal. We mention these matters so as to emphasise that the situations in which removals are on a *mandatory* basis are carefully limited and defined under the

Regulations. In our view the balance of the discretionary decisions, (of which regulation 14 (5) is an example) fall to be exercised applying ordinary principles in light of all the circumstances and in the context of the Regulations.

28. The circumstances in any given case can be infinitely variable. In this appeal there is no real challenge to the core facts. It is common ground that Dr Mannings has not worked as a primary care performer in the NHS for many years. The last services he performed in an NHS GP practice were as a locum in 2015. Whatever the reasons may have been/may be, we do not accept that he intends to return to practice as a GP in the NHS. In our view the evidence shows that his focus is on his charitable work. He explained that he is developing this in a different area, namely, neurological disorders. His overarching point is that the services he provides under the auspices of Star Throwers are free of charge (like the NHS) and the work he does at the charity is of benefit to the NHS because he is helping patients. However laudable and/or beneficial this may be, the simple fact is the work that he is doing under the auspices of Star Throwers has been performed by him on a private basis as an independent or private medical practitioner, as evidenced by the fact that he issues private prescriptions. The fact (as we find) that he does not charge patients a fee for his services does not alter the fact that he has been, and is, acting as an independent or private general practitioner. He also told us that he was (at least in the past) paid a small salary by the charity. We find that Dr Mannings is in independent practice and as such his medical practice is not regulated by the NHS (Performers List) Regulations 2013.

29. We considered all the reasons why Dr Mannings wants to maintain his name on the MPL. It was very clear from his evidence that he wants his name to remain included on the MPL because patients believe that he is somehow providing services under the NHS. The point is made that inclusion on the MPL is an *"important ingredient in his credibility with users of Star Throwers."* The services he is, in fact, providing are as an independent medical practitioner. That is the reality that should be recognised because of the public interest in transparency and clear lines of accountability/responsibility.

30. The exercise of discretion must, in our view, be informed by the purpose of the Regulations. We consider that the Respondent is responsible for admission to, or removal from, the lists of primary care performers, and has regulatory oversight of the performers of primary care services whose names are included in the lists maintained. In short, the continued inclusion of a practitioner's name on the relevant list objectively conveys to the public a degree of assurance that the practitioner is regulated by the NHS. The continued inclusion of the performer's name implies that his performance is subject to governance and regulation by the Commissioning Board which is responsible for the MPL. For example, performers on the list are subject to regular appraisal which is one part of ensuring and maintaining quality. It is therefore entirely rational that the

performers' list is kept up to date and does not include practitioners who have not, in fact, provided primary medical services (i.e. as a performer in the NHS within the preceding 12 months). It is also within our knowledge and experience as a specialist panel that the means by which the Respondent carries out its governance responsibilities in the public interest are not simply centred on appraisal. The overall context or the responsibility for governance includes the complaints system, peer review, and other information gathered in various processes by which primary care performance within the NHS is monitored.

31. We considered all the reasons why Dr Mannings wants to maintain his name on the MPL. As set out above, his case is that patients who come to him want this reassurance. We accept that Dr Mannings' wish to remain included in the MPL is for a charitable purpose. We have no reason to doubt that Star Throwers provides a valuable service to those who wish to seek an alternative view regarding their condition or treatment. It is important to emphasise that the Respondent's case is not based on any criticism of his work. The simple fact is that he is providing such services in a private/independent capacity and not as a primary care performer in the NHS.

32. We agree that it is surprising that no steps were taken to remove Dr Mannings name from the MPL before 2018. We accept Ms Goddard's evidence that this was by reason of oversight. It is not suggested that the fact that Dr Mannings remained on the MPL created any form of legitimate expectation on his part. At very best the length of time before action was taken might amount to some form of passive acquiescence on the part of the Respondent, which may be of some relevance to proportionality.

33. Dr Mannings argues that the public interest relates only to the cost of appraisal and administrative costs. We can agree that this is one element but it is, not, in our view, the totality of the burden of responsibility and accountability. The bottom line is that the Respondent is responsible and accountable for the lists, and for the delivery of care provided by primary care performers in its lists. That is why the lists should be properly regulated and maintained.

34. The purpose of the 12 month provision in regulation 14 (5) is that it sets a bench mark regarding the expectation of some performance within NHS primary care. Dr Mannings makes the point that if he had performed even one session then the regulation would not be in play. Ms Goddard agreed. So do we. This does not really assist us in this appeal because that is not the factual situation. We find that regulation 14(5) is engaged on the facts. This therefore gives rise to the exercise of a discretionary decision.

35. However late it is that the situation in this particular case has been recognised, it is one that has important implications so far as the overall public interest is concerned. In our view it is not in the public interest that the Respondent is required to be responsible for the governance of someone who has not, as a matter of fact, been providing primary care

services under the NHS for a very long time. Dr Mannings' own evidence is that members of the public seeking his advice have been reassured by the fact that he is recognised as a primary care performer under the NHS. It is not in the public interest that members of the public might believe that care is being provided by a medical performer under the NHS when, in fact, that is not the case.

36. For the purposes of this decision we accept that the decision to remove Dr Manning's name from the MPL represents an interference with his rights under Article 8 of the ECHR which is sufficient to engage protection under Article 8 (2).

37. The Respondent has satisfied us that the removal is in accordance with the law and is necessary in pursuit of a legitimate public interest aim, namely, ensuring that the system for regulation and governance of primary care services under the Regulations is directed to, and focused on, those who have provided NHS primary care services within the NHS within the last 12 months. It is also in the public interest that there is no scope for confusion. In our view there is a clear risk that public confidence could be undermined in circumstances where someone who is not providing primary care services under the NHS remains on the MPL.

38. The real issue is proportionality. We considered all of the material before us when assessing the impact of the decision and balancing this against the public interest.

39. On the one hand it is not in the public interest that the Respondent is responsible, or should be perceived as being responsible, for a medical practitioner who has not performed primary care services in the preceding 12 months. It is in the public interest that the resources of the Respondent are focussed on those who are primary care performers in the NHS. It is also in the public interest that patients fully understand the means by which treatment is in fact being provided and that any scope for confusion is avoided.

40. On the other hand, it is in Dr Manning's private life interests that his name remains on the list. However, he can continue to provide services as a private registered medical practitioner, albeit with cost consequences for himself and/or the charity and/or for patients using the services of the charity. We recognise that the expense involved in alternative provisions which address his independent status, will deplete the assets/resources available to meet the other aims of the charity but this simply recognises the reality of the situation i.e. he has been providing private/independent medical services. We are not persuaded by the simple assertion that the charity will close because of the expense involved in Dr Manning's private registration. Even if we were to assume that this were to arise, we have to balance the impact of the decision against the wider public interest considerations.

41. A core argument in favour of Dr Mannings' case is that he provides a valuable and much needed service. In short, he contends that there should be room for proportionate accommodation of the unique circumstances of his case. He provides services which are needed and which should be seen as a useful adjunct to the NHS, and not in derogation from it. The Respondent did not take steps to remove him before 2018.

42. We have balanced all the arguments for and against the decision. Having weighed the various factors involved we consider that the public interests engaged far outweigh the interests of Dr Mannings and other interests before us. We have decided that it is necessary, fair and proportionate that Dr Manning's name is removed from the list.

43. Dr Mannings may or may not have a good point about the difficulties of the NHS, in the context of diminishing numbers of GPs, providing the bespoke care that he/the charity provides and/or that there is a need for a new and different model. That is not for us to decide. We have found the facts, applied the law and have weighed all relevant matters in the balance applying the test of proportionality.

44. We are mindful of Dr Mannings' concerns regarding how the decision may be perceived by the public and the media. Such issues are beyond the panel's control and cannot rationally provide a basis to avoid making a decision that is otherwise right on public interest grounds. It may, however be helpful to state the following in simple terms (but without derogation from our full reasoning as set out above):

- The decision we have made to remove Dr Mannings' name from the Medical Performers List has not been based on any suggestion whatsoever that his care of those he has advised or treated has been lacking in any way.
- The decision has been made because he has not been performing primary care services within the meaning of the NHS Regulations during the last 12 months.

<u>Decision</u>

45. We confirm the Respondent's decision and dismiss the appeal.

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

Date Issued: 31 July 2019

Rights of Review and/or Appeal

The Appellant is hereby notified of the right to appeal this decision under section 11 of the Tribunals Courts and Enforcement Act 2007. He also has the right to seek a review of this decision under section 9 of that Act. Pursuant to paragraph 46 of the Tribunal Procedure (First- tier Tribunal) Health, Education and Social Care Chamber) Rules 2008 (SI 2008/2699) a person seeking permission to appeal must make a written application to the Tribunal no later than 28 days after the date that this decision was sent to the person making the application for review and/or permission to appeal.