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

[2022] 4547.PHL

Heard by Video Link on 3 October 2022
Panel Deliberation: 8 November 2022

BEFORE:
Judge Mr H Khan
Mr M Green (Specialist Member)
Ms P McLoughlin (Lay Member)

BETWEEN:

Mr Moshen Mobasseri

Appellant

-v-

NHS England

Respondent

DECISION

The Appeal

1. This is an appeal by Mr Moshen Mobasseri ("the Appellant"), made pursuant to Regulation 17 of the National Health Service (Performers Lists) (England) Regulations 2013 (as amended) ("the 2013 Regulations"), against a decision made by the Performers List Decision Panel ("PLDP") on 25 March 2022 to remove him under Regulation 14(3) (d) from the National Health Service Performers List ("Performers List") for dental performers.

The Hearing

2. The hearing took place on 3 October 2022. This was a video hearing which had been arranged at the request of the parties.

3. The documents that we were referred to are in the electronic hearing bundle (1073 pages) provided for the hearing.

Attendance

4. The Appellant was represented by Mr Sapandeep Maini-Thompson, Counsel. The Appellant attended the hearing but elected not to give any evidence.

5. The Respondent was represented by Jonathan Holl-Allen KC (Counsel). The Respondent's sole witness was Dr Patel (Dental Clinical Adviser, NHSE)

6. Mr Alex Hollingsworth (paralegal) and Ms Siobhan Singlehurst observed the hearing.

Preliminary issue

7. The position at the start of the hearing was that both parties confirmed that they sought to proceed with the final hearing. The Tribunal had explored with the parties the potential consequences of dealing with the appeal given the ongoing General Dental Council ("GDC") proceedings. However, this was done on a clear understanding that there are two separate and distinct jurisdictions.

8. The Appellant subsequently made request to postpone the hearing after discussion around the practical implications and once Mr Holl-Allen KC set out the position in relation to suspension payments. We then heard detailed submissions from Mr Maini- Thompson and Mr Holl-Allen KC.

9. We took into account the overriding objective including ensuring, so far as practicable, that the parties are able to participate fully in the proceedings, dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and avoiding delay, so far as compatible with proper consideration of the issues.

10. We concluded that whilst we acknowledge the Appellant's application for a postponement and his reasons, nevertheless, based on the circumstances of this case, we concluded that the application would be refused. Our reasons for doing so are set out below.

11. The starting point is that the jurisdiction of the Tribunal and that of the GDC are separate and distinct jurisdictions operating under a separate legislative framework. Accordingly, we do not consider that we are obliged to await the outcome of any other proceedings prior to dealing with this appeal.

12. Furthermore, as Mr Holl-Allen submitted, this is the first time that this point has been taken. We note that throughout these proceedings the Appellant has been legally represented as well as at any previous hearings.

13. The present position was that the GDC review hearing in February 2023 is a

review of the interim suspension order. We acknowledge the Appellant's submissions that the suspension may be lifted at this stage. However, there will be no factual findings made at that hearing. It has been described to us as a risk assessment exercise. There is, at present no fixed date for any final hearing of that matter.

14. We took into account the Appellant's concerns regarding self-incrimination. However, as has been made clear in these proceedings, he has elected, as he is his right, not to give evidence in these proceedings and therefore it is difficult to see how an Appellant in those circumstances can incriminate himself.

15. Accordingly, based on all the circumstances of this case, we concluded that the Appellant's application for a postponement of the hearing would be refused.

Background

16. There is a detailed history to the matter. It is set out in the papers. We have summarised some of the relevant history.

17. The Appellant qualified as a dentist in 2001. On 2 December 2002, he registered with the General Dental Council ("GDC").

18. Since 2006, the Appellant has held a general dental services ("GDS") contract at Camden High Street Practice, 22 High Street, London NW1 0JH ("the Practice"). The contract as at November 2020 was for 18,111 units of dental activity (UDA) with a value of £608,166. The Practice provides both NHS and private treatment.

19. In addition to the Practice, the Appellant works at a private practice, the Wimpole Dental Practice, 61 Wimpole Street, London Q1G 8AH.

20. On 19 August 2020, the Respondent received correspondence raising a number of concerns. On 1 September 2020 the Respondent met with the individual who raised further concerns.

21. On 3 September 2020, the Respondent's Business Services Authority (BSA) were commissioned to undertake a record card review. On 18th November 2020 the BSA produced a report ("the Report") of its findings. The Report reviewed 25 patient records, generating 46 claims for UDAs, 15 of which were treated by the Appellant. For the purposes of this appeal, the Report raised issues relating to record keeping and inappropriate UDA claims.

22. On 29 October 2020: the GDC Interim Orders Committee ("IOC") imposed conditions on the Appellant's registration for a period of 15 months with review of conditions to be undertaken after 6 months.

23. On 14 January 2021, the Respondent notified the Appellant of its decision to

impose conditions on the Appellant's continued inclusion on the National Dental Performers List ("the List") pursuant to Regulation 10 (1) (b) of 2013 Regulations.

24. On 15 July 2021, the NHS Counter Fraud Service confirmed they would not be taking the matter further.

25. On 16 August 2021, the Report was shared with the Appellant, and he was asked to respond to allegations of poor record keeping and fraudulent UDA claims. A response was provided on 1 October 2021 by Dental Protection on behalf of the Appellant. In that response the Appellant immediately accepted shortcomings in respect of record keeping. He confirmed he did not knowingly submit fraudulent UDA claims and he submitted evidence to help support this.

26. On 7 December 2021, the GDC revoked its interim conditions and impose an interim order of suspension.

27. On 15 February 2022, NHS Counter Fraud Service provided its closure report which stated *'no evidence was found to substantiate the allegation that false claims were submitted… No patients advised that their treatment was not received or that they had paid privately which indicates that on balance the issues identified are likely to be contractual or performance issues rather than fraud.'* As part of the NHS Counter Fraud Service's investigations 12 patients were contacted and seven responded. Three confirmed they had had the treatment claimed; four confirmed they could not recall whether they had the treatment.

28. On 10 and 11 March 2022, the PLDP hearing was convened to consider the following allegations:

    (a) Allegation 1: that the Appellant had submitted inappropriate claims and financially benefitted from them.

    (b) Allegation 2: A November 2020 BSA assessment of the records of 25 patents, from the period February 2018 to January 2020, has identified the standards of record keeping have fallen below the standards outlined in both "Clinical Examination and Record Keeping – the Good Practice Guidelines" and "Dental Record Keeping Standards". The assessment has also identified concerns regarding the quality of clinical care provided.

    (c) Allegation 3: the Appellant failed to provide any substantive response to address the significant probity concerns highlighted by the November 2020 BSA report and made admissions to amending the contemporaneous clinical records.

b) On 25 March 2022, the Respondent sent the Appellant the decision letter confirming the Appellant was to be removed from the performer's list. The findings were as follows:

   a. Allegation 1 - found not to be proven.
   b. Allegation 2 - found to be proven.
   c. Allegation 3 - found to be proven.

The Agreed Issues for the Tribunal

29. The central issue is whether the Appellant should be removed under 2013 Regulations on the following grounds:

   a) Regulation 14(3)(d) (removal of a performer on the grounds of unsuitability).

The Respondent's position

30. The Respondent's position was that the Appellant is unsuitable to be kept on the Performers List.

The Appellant's position

31. The Appellant's case was that he should be allowed to remain on the Performers list.

The Regulatory Framework

32. The legal framework was set out in the Appellant's skeleton argument albeit with reference to Regulation 13 as opposed to Regulation 14. There was no dispute between the parties as to its application. We have therefore broadly adopted the legal framework as set out in the Appellant's skeleton argument with some additions as set out below.

33. 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 practitioner's from the Performers List.

34. Under Regulation 14, grounds for "Removal from the Performers List,

Regulation 14(3) states:

(3) The Board may remove a Practitioner from a performers list where any one of the following is satisfied—

(d) the Practitioner is unsuitable to be included in that performers list ("an unsuitability case").

35. Under Regulation 15, “Criteria for Removal” it is provided:

(1) Where the Board is considering whether to remove a Practitioner from a performers list under regulation 14(3)(d) (an unsuitability case), it is to consider—
(a) any information relating to that Practitioner which it has received pursuant to regulation 9;
(b) any information held by the NHSLA about past or current investigations or proceedings involving or relating to that Practitioner, which information the NHSLA must supply if the Board so requests; and
(c) the matters set out in paragraph (2).
(2) Those matters are—
(a) the nature of any event which gives rise to a question as to the suitability of the Practitioner to be included in the performers list;
(b) the length of time since the event and the facts which gave rise to it occurred;
(c) any action taken, or penalty imposed by any regulatory or other body (including the police or the courts) as a result of the event;
(d) the relevance of the event to the Practitioner's performance of the services which those included in the relevant performers list perform, and any likely risk to any patients or to public finances;

36. “Suitable” in this context means suitable to undertake NHS primary care services. “Unsuitable” is not defined in the Regulations. It is a plain English word, which is to be given its normal, everyday meaning.

37. While there is a power, <u>in some cases</u>, to impose conditions on a practitioner’s inclusion on the Performers List there is no power to impose conditions because a practitioner is unsuitable to remain on the list.

38. The appeal is governed by Regulation 17 of the 2013 Regulations and procedurally by the Tribunal Procedure (First-Tier Tribunal) (Health, Education and Social Care) Rules 2008 (“the 2008 Rules”).

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

Evidence

40. We received an indexed bundle (including any supporting authorities) from both parties. We do not rehearse their contents as these are a matter of record. We have summarised the evidence insofar as it relates to the issues we determined.

41. Mr Patel explained that he had been involved in the Appellant’s case, providing clinical advice to the Respondent since August 2020.

42. Mr Patel explained that the Appellant had failed to maintain contemporaneous records, which was a core and basic professional requirement, for a significant period of time and had deliberately and intentionally created records for the 15 identified patients whose records were requested by the BSA. He considered that this was an obvious attempt to conceal poor record-keeping. He considered it "*implausible*" for records to be completed many months after.

43. Mr Patel considered that when note keeping is deficient, continuity of clinical care is compromised and where, as in this case, the deficiency relates in part to record keeping concerning radiography, patients may be exposed to ionising radiation without justification or with no clinical benefit in the form of information derived from that exposure.

44. Mr Patel stated that a template had been sent to the Appellant expecting a detailed response to probity concerns, including a response relating to each patient. However, he accepted that there was no mandatory requirement to use a template albeit that if the template was not used, the Respondent would expect a response with a similar level of detail from the Appellant.

The Tribunals Conclusions with Reasons

45. We took into account all the evidence that was included in the hearing bundle ((including any supporting authorities) and presented at the hearing.

46. We wish to place on record our thanks to Mr Maini-Thompson and Mr Jonathan Holl-Allen KC for their assistance at the hearing. We also wish to place on record our thanks to Mr Patel who gave evidence to the hearing.

47. We took into account the all the written submissions. We concluded that we would take into account the email dated 18 October 2022 from the Appellant's legal representative. We had directed written submissions following the hearing on 3 October 2022 and had also made provision within that order for the parties to provide a further written submission in response to the original written submission. The deadline for any further written submissions was 17 October 2022. The Appellant had complied with that direction and had confirmed in writing on 17 October 2022 that it would not be seeking to reply to the Respondent's written submissions.

48. On 18 October 2022, the Appellant confirmed that on reviewing the reply, Counsel for the Appellant was concerned that a dispute had arisen in respect of evidence that he was not made aware of and therefore not given an opportunity to respond to. We concluded that there was only a short delay in submitting the reply. We took into account any prejudice to the Respondent and concluded that taking into account the overriding objective, we would admit and consider this email.

49. We found the evidence of Dr Patel to be credible. We found his evidence to be careful and considered. We acknowledge that the Appellant attended

the hearing and as is his right, elected not to give any evidence.

50. We took into account the note from the Respondent's counsel dated 29 September 2022. In our view, 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. We had regard to the findings made at first instance, the reasons for those findings and whether the PLDP fell into error. There wasn't any dispute between the parties on the question of the nature of a determination in this context.

51. We concluded that in our view, having considered all the circumstances of the case, it was appropriate, pursuant to regulation 14 (d) of the 2013 Regulations for the Appellant to be removed on the grounds of suitability. Our reasons for doing so are set out below.

52. We reminded ourselves that the appeal was only in relation to allegations 2 & 3.

Allegation 2

53. Mr Maini-Thompson made it clear that the Appellant accepted the first part of the allegation. This was that "A November 2020 BSA assessment of the records of 25 patents, from the period February 2018 to January 2020, has identified the standards of record keeping have fallen below the standards outlined in both "Clinical Examination and Record Keeping – the Good Practice Guidelines" and "Dental Record Keeping Standards."

54. Mr Maini-Thompson made it clear that the second and final sentence was not accepted by the Appellant. This was that the assessment has also identified concerns regarding the quality of clinical care provided.

55. In our view, we did not consider that for this allegation to be proven we would have to consider all the elements of the allegation. In our judgement, the final sentence of allegation two was a discrete allegation. Allegation two substantially relates to deficient note keeping which in itself is not in dispute.

56. The Appellant has admitted to serious deficiencies in his record-keeping. The Appellant has admitted to amending all 15 sets of patient records relating to his own patients before those records were submitted to the BSA. The amendments occurred in a very short time window on 19 October 2020 on which the records were submitted to the BSA. The evidence was that the Appellant had been operating a system of record keeping under which he would at patient appointments dictate the content of his notes to his nurse, who would record them on a Word document. These documents were held on a server and *"periodically"* uploaded to the record-keeping software, Software of Excellence.

57. We agreed that this was an unsafe system, particularly where there was evidence that a period of years had elapsed before the transfer of the

records to the dedicated record-keeping software, at least in some cases.

58. Furthermore, the Appellant has admitted that in respect of the 15 patients there are discrepancies between the original records held on the server and the corresponding entries in the dedicated record-keeping software *"due to the fact that he made changes to the records when uploading the records onto the Software of Excellence system"*. The BSA has also identified examples of discrepancies between A's records and contemporaneous records made by the hygienist. It was noted that the scores of the Basic Periodontal Examinations (BPEs) recorded by the hygienist on the date that the patient had been seen, were not consistent with the details recorded by the Appellant in his non-contemporaneous entries; for example for Patient ID:- 10, BPE scores of 222/222 were recorded by the hygienist in the clinical notes on 05/03/18; however the entry by the Appellant on 19/10/20 which stated 'transferred from 05/03/18' recorded BPE scores of 333/333)

59. Furthermore, it was clear that some of the records made by the Appellant on 19.10.20 were much more extensive than the contemporaneous records which preceded them, and we agreed with Mr Patel's assessment that it was "*implausibl*e" that the Appellant could have recalled the patient's clinical presentation in such detail so long after the event.

60. We acknowledge the Appellant's position that whilst failures in record-keeping can impact the quality of clinical care in certain circumstances, there was no evidence to suggest that the quality of clinical care was in fact affected either by deficiency in record-keeping or otherwise. We took into account the Appellant's submission that there was no evidence that any patient suffered any harm as a result of his record-keeping deficiencies or those of the practice more generally. In fairness, the evidence of Mr Patel makes it clear that the Respondent could not, on the balance of probabilities, have considered that these were clinical concerns.

61. However, in our judgement, and a point made by Mr Patel in his evidence, where note keeping is deficient, continuity of clinical care inevitably is compromised and where, as in this case, the deficiency relates in part to record-keeping concerning radiography, patients may be exposed to ionising radiation without justification or with no clinical benefit in the form of information derived from that exposure.

62. In our judgement, we found allegation two be proven in its entirety.

<u>Allegation 3</u>

63. We concluded that allegation three was also proven in its entirety. We noted that allegation three had two discrete parts, namely that there was a failure to provide any substantive response to the probity concerns raised by the BSA report and that the Appellant had admitted amending contemporaneous records. The challenge on appeal is to the finding in respect of the first part of the allegation only. There was no challenge to the finding in respect of the admission as this is contained in the letter from

Dental Protection dated 1 October 2021.

64. In fairness, the Appellant accepts that he did not provide an itemised and highly particularised response. It was initially not accepted that the template had not been received by the Appellant, but this was contained in the hearing bundle and the letter from the Dental Protection dated 1 October 2021 specifically referred to it.

65. We accept that a letter had been sent by Dental Protection on 1 October 2022, there was no mandatory requirement to complete the template sent by the Respondent and that the questions included general questions. However, having heard Mr Patel's evidence, we would have expected a detailed response to probity concerns including a response relating to each patient case. In circumstances where, such as this, when the template was not used, we would have expected the Appellant to provide a response in similar level of detailed to that which would be provided when completing the template. He did not do so. Accordingly, we find allegation three proven in its entirety.

66. We then considered the issue of suitability. We acknowledge that we are looking at the Appellant's suitability overall. We took into account his unblemished record, extending for over 20 years in which his Counsel submits, he has treated thousands of patients with no complaints. We took into account the extensive CPD which he has undertaken. We took into account the CPD evidence contained in the hearing bundle. We concluded that the Appellant had undertaken some relevant CPD, but we found that the reflection was limited. For example, there were references to lessons learned with little detail which raised concerns about his level of insight.

67. In our judgement, considering all the circumstances of this case, we concluded that the Appellant was unsuitable to be included on the performers list. In our view, the Appellant's record-keeping was so seriously deficient and he made significant alterations to his clinical records long after the events to which those records related and immediately before supplying them to the BSA. The admitted conduct of amending the records long after the event to which they related was an act which fell below expected standards.

68. We considered the admitted conduct was sufficient on its own for the Appellant's removal. We share the Respondent's concerns that the Appellant's conduct demonstrates a significant departure from the standards of those included in the list and identifies a fundamental suitability issue in that the Appellant has failed to maintain contemporaneous records which, in our view is a core and basic professional requirement for a significant time. In addition, the Appellant has deliberately and intentionally created records for the 15 identified patients whose records were requested by the BSA. We concluded that these findings alone justified the conclusion that the Appellant was unsuitable to remain on the list.

69. Furthermore, the Respondent made it clear that conditional inclusion on the

performers list is not an option in a suitability case. In our judgement, based on the circumstances of the case we consider it both necessary and proportionate for the Appellant to be removed from the NHS Performers list.

70. We concluded therefore that the Appellant's appeal shall be dismissed and the decision to remove him from the NHS Performers List shall be confirmed.

Decision

71. We concluded, therefore, that the Appellant's appeal against the decision made by the Performers List Decision Panel ("PLDP") on 25 March 2022 to remove the Appellant from the NHS Performers List for dental performers shall be dismissed.

72. The decision to remove him from the NHS Dental Performers List is confirmed.

Judge H Khan

Lead Judge

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

Date Issued: 22 November 2022