PRIMARY HEALTH LISTS

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

CASE NO [2018] 3411.PHL

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

Heard on 3 October 2018 at Nottingham Civil Justice Centre.

BEFORE
Judge Mr H Khan
Dr Z Kapadia (Professional Member)
Ms M Harley (Specialist Member)

BETWEEN:

Dr Rupal Fatania

Applicant

-v-

NHS Commissioning Board North Midlands (NHS England North Midlands)

Respondent

DECISION

The Appeal

1. This is an appeal by Dr Rupal Fatania ("the Appellant") made pursuant to Regulation 17 of the National Health Service (Performers Lists) (England) Regulations 2013 ("the 2013 Regulations") against a decision made by the Performers List Decision Panel ("PLDP") of 18th June 2018 (confirmed in a letter dated 25th June 2018) to remove her from the NHS Performers List.

Attendance

2. The Appellant represented herself at the hearing and gave oral evidence. The Appellant did not call any witnesses to give oral evidence on her behalf.

3. The Respondent was represented by Mr George Thomas (Counsel). The

Respondent called Ms Elaine Madden, Professional Standards Manager for NHS England North Midlands and Dr David Geddes, a qualified General Practitioner and the Director of Primary Care Commissioning for NHS England.

The Hearing

4. The hearing took place on 3 October 2018 at Nottingham Civil Justice Centre.

Late Evidence

5. The Tribunal was asked to admit additional evidence by the Appellant which comprised of an insurance document from Beazley Medical Malpractice Insurance which covered the period 21 September 2018 to 20 September 2019. The Respondent sought to admit an email from Mr Kevin Culliney from Lockton's Brokers dated 11 September 2018.

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 Dental Practitioner included on the Respondent's Performer List ("the Performer List").

8. The Respondent made it clear that upon joining the Respondent's Performer List, a practitioner is required to provide a number of undertakings. This includes an undertaking: *"…to maintain an appropriate indemnity arrangement which provides cover in respect of liabilities that may be incurred in carrying out work as a Practitioner at all times and to provide evidence of such an indemnity arrangement to the Board on request*.

9. The Respondent did not (and still does not) consider that the Appellant has an appropriate indemnity arrangement. An oral hearing took place on 18 June 2018 and the Respondent's PLDP determined that the Appellant's indemnity was not adequate for the protection of patients and therefore she was not suitable to remain on the Performers List pursuant to Regulation 14 of the 2013 Regulations.

The Agreed Issues for the Tribunal

10. The issues for the Tribunal had narrowed by the time of the Tribunal hearing.

11. Mr Thomas set out that the Appellant had secured a higher level of financial

indemnity, now a maximum of £5 million for one claim, albeit with an aggregate limit also of £5 million.

12. Mr Thomas also explained that although there remained an outstanding issue about the nature of the exclusion relating to blood-borne viruses, the clarification provided by the insurers on the wording of the exclusion meant that the Respondent no longer relied on this as a basis for seeking the Applicant's removal from the list. The Respondent will continue to request an amendment to the wording of this clause in order to reflect the nature of the exclusion relied upon by the insurer.

13. The only issue that required the Tribunal's determination related to "run-off cover". Mr Thomas explained that if a policy of insurance has run-off cover, it means that the cover under the policy is extended for a defined number of years after the policy period had concluded. This was the only basis upon which the Respondent remained of the view that the Appellant was unsuitable to remain on the Performer List due to the inadequacy of professional indemnity insurance.

The Respondent's position

14. The Respondent's position was that the Appellant does not have "run-off cover", potentially leaving her uninsured in relation to claims notified to her after the current policy comes to an end on 20th September 2019. This gives rise to a real risk that the lack of run-off cover will leave patients unprotected in relation to treatment provided up to 20th September 2019, where a claim is notified after that date.

15. The Respondent's position was that "Run-off" cover is essential. It is a condition of suitability that such run-off cover is in place. The absence of any "run-off cover" means that the Appellant continues to be unsuitable to remain on the Performers List.

The Appellant's position

16. The Applicant's case was that she has been advised that run-off cover is not required unless or until she has decided she will not continue working beyond her current policy period. The Appellant stated that she would renew her insurance annually and purchase run-off cover when she ceased practise.

The Regulatory Framework

17. There was no dispute as to the legal framework as set out in the Respondent's skeleton argument. In order to work as a General Practitioner within the NHS England a Medical Practitioner must be on the "Medical Performers List" maintained by NHS England.

18. 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 medical performers for inclusion on the list and the removal of the medical performers from the list.

19. This is an "unsuitability case". The Respondent does not seek removal conditions on any other ground.

20. 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").

21. Regulation 15 "Criteria for Removal" sets out a number of matters that are to be considered when deciding whether the criteria for removal are met. 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;*
> *…*

22. There are myriad ways that a practitioner may be deemed to be unsuitable to remain on the Performers List. By reference to the specific consideration the Tribunal are required to take into account at Regulation 15(2)(d), "any likely risk to any patients".

23. 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"). 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 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.

Evidence

25. We received an indexed bundle 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.

26. Ms Elaine Madden had provided two statements. The first statement was dated 10 September 2018 and the second statement was dated 17 September 2018. She explained the position in relation to "run- off cover". If a policy of insurance has run-off cover, it means that the cover under the policy is extended for a defined number of years after the policy period had ended.

27. Ms Madden set out that a complaint was received about the Appellant in or around January 2017. This triggered the Respondent to request details of the Appellant's indemnity arrangements. Ms Madden explained that when a potential concern is received about a performer it is standard procedure to request details of that individual's indemnity arrangement. Once received, it is reviewed to ensure that it is an appropriate indemnity arrangement. A full copy of the Appellant's indemnity policy was received by email on 27 November 2017.

28. Ms Madden explained that the appropriateness of any indemnity arrangement is considered on a case-by-case basis. Where practitioners obtain a policy of insurance in the commercial market, (such as in the case of the Appellant), rather than from dental defence unions, the extent of the cover provided can vary significantly. She explained that performers are required to obtain an appropriate indemnity arrangement which provides cover for liabilities that may be incurred in carrying out that practitioner's work. This is to ensure that (a) patients can seek and receive adequate redress and (b) to protect the performer from facing liabilities that they cannot meet because of inadequate indemnity.

29. Ms Madden made it clear that whilst there is no national guidance as such on what is an appropriate indemnity arrangement, there has been consideration and discussion of the key requirements of a practitioner's indemnity arrangements at a local level. Following discussions between Medical Directors (from different regions) and dental advisers, consideration of the cases brought before the Performers List Decision Panel and knowledge of what is available in the commercial insurance market, it was agreed by the Respondent's North Midlands team that in relation to the run-off cover issue, there should be run off cover of at least three years (or longer if it was possible).

30. Ms Madden had reviewed the Appellant's policy with Beazley Medical Malpractice Insurance which commenced from 21 September 2018 and expired on 20 September 2019. She noted that it only provides cover for "claims made" and "reported" during the policy period. It does not include any provision for run-off cover. The significance of this is that, if another policy of insurance is not purchased at the end of the policy period (20 September 2019) and a claim arises after the policy period has ended from treatment provided to a patient during the policy period, then there will be no provision for that patient to seek adequate redress.

31. Ms Madden had emailed the Appellant on 14 February 2018 informing her that her policy of insurance was insufficient to meet the requirements for inclusion on the Performers List. The Appellant was provided until 28 February 2018 to seek and obtain an amended insurance policy and was advised that if she was unable to do so, the case would be referred to the Performance Advisory Group ("PAG").

32. On 27 February 2018, the Appellant had advised Ms Madden that she had sought to amend her policy but the quote provided was too expensive. The Appellant also advised in email correspondence that she was unable to obtain an indemnity from the dental defence union's (due to a historic issue relating to a missed payment), leaving her with limited options in the commercial market.

33. On 2 March 2018, the Appellant was advised that the case would be referred to the PAG on 21 March 2018. The PAG determined that the matter should be escalated to the PLDP for consideration.

34. The PDLP determined that the Appellant's indemnity was not adequate for inclusion on the list and recommended that the Appellant should be removed from the list. Following an oral hearing, on 18 June 2018, the PLDP determined that the Appellant's indemnity was not adequate for the protection of patients because in the event of clinical negligence or other claims, patients may not be able to receive appropriate redress. Ms Madden explained that the PLDP were sympathetic to the Appellant's situation but decided in the circumstances that she should be removed. This decision was communicated by a letter dated 25 June 2018.

35. Ms Madden did not accept that the Appellant's current policy of insurance was adequate in terms of the run-off issue. Ms Madden made it clear that she was not aware of any specific guidance from the General Dental Council ("GDC") on commercial policies. However, in her view, it was not for the GDC or indeed commercial insurance providers to determine what *"appropriate indemnity arrangements"* should be in the context of the regulations.

36. Ms Madden did not accept the suggestion from the Appellant that the policy of insurance that she had obtained in the commercial market was a "standard" (in that all general dental practitioners obtaining insurance in the commercial insurance market have the same level of cover).

37. Ms Madden explained that she regularly had sight of the policies of insurance obtained by practitioners in the commercial market. In her role as Professional Standards Manager, she reviewed indemnity arrangements of general dental practitioners when concerns were raised. The commercial insurance policies that she had sight of generally made provision for some run-off cover. Practitioners who have a history of previous claims have been offered run-off cover but have had to pay a higher premium to obtain it. Ms Madden explained that she had seen policies obtained from Beazley Medical Malpractice Insurance which made provision for run-off cover. This was the first time that a dental practitioner had challenged the requirement for run-off cover. In all other cases, practitioners had, obtained run-off cover as soon as it was brought to their attention that they did not have it.

38. Ms Madden accepted that it was possible to purchase run-off cover at the end of a policy. For example, where the practitioner no longer wished to practice or in circumstances where the practitioner was about to retire. However, the reasons why the Respondent was seeking for it to be obtained at the outset included that it could not compel a practitioner to purchase it, for example, on retirement as a Respondent would no longer have any means of enforcing such a provision. Therefore, the patients would be left unprotected. Furthermore, whilst the practitioner may well have the intention of purchasing run-off cover at some point in the future, this could be affected by serious illness to the practitioner, affordability issues for the practitioner in the future or events such as the practitioner's death.

39. Dr Geddes set out that he had not been involved in the present case. He would not ordinarily be involved in a local appeal. However, he explained that although the issue was local in origin, it was escalated to the national level because of the nature of the proceedings.

40. Dr Geddes explained that most dental practitioners are able to secure adequate indemnity cover through one of the dental defence unions. This is generally accepted to be the most comprehensive form of cover. However, some dental practitioners either opt to obtain insurance from the commercial market, or turn to the commercial insurance market because they are not able to obtain indemnity cover from a dental defence union.

41. If a dental practitioner obtained insurance from the commercial market, there is scope for a policy of insurance obtained by one practitioner to vary from that obtained by another. Some of the policies of insurance obtained by dental (and medical) practitioners in the commercial market have caused concern at the national and local level because the cover has not been deemed to be adequate.

42. Dr Geddes explained that it is imperative that where things go wrong, patients or their families can be appropriately compensated. That is at the heart of the provisions relating to adequate indemnity, and is a focus of NHS England given its legislative responsibilities. Dr Geddes explained that it was of importance that dental practitioners have adequate insurance so that

they, or the organisations that they work for as an associate, are protected from significant financial loss should something go wrong.

43. Dr Geddes accepted that at present, there was no published national guidance to assist decision-making in relation to this issue by PLDPs at a local level. He had been asked to input into this case to ensure that there was consistency and robustness in the process of determining what an "appropriate indemnity arrangement" was for dental practitioners. However, it was for the PLDPs to make decisions on a case-by-case basis in accordance with the regulations.

44. Dr Geddes explained that insurance obtained on "claims made" and "reported" basis means that the cover only provides for claims made and reported during the policy period. At the end of the policy period, if a further policy of insurance is not purchased, there is no cover available to patients if something goes wrong, but which had not yet been reported (i.e. where there is a latent damage). He explained that for various reasons, claims are not always brought immediately after the incident, particularly where the claim is for neglect which may only become apparent when a patient moves to a new dentist. In his view, dental practitioners should ensure that they have run-off cover that will cover them following a career change, retirement from clinical practice or death. In short, dental practitioners must ensure they have adequate provision for run-off cover.

45. Dr Geddes explained that it was appropriate for dental practitioners to obtain run-off cover as part of the policy rather than to purchase it later. This was due to the fact that purchasing it at the outset would mean that the practitioner is covered and the insurance company was bound by any contractual arrangements. It would avoid a situation where the insurance company could simply step away. It also meant that it would protect patients and the practitioner and would provide cover in the event of the practitioner's illness or if the practitioner died. Furthermore, it would help prevent a situation whereby the insurance provider refused to provide run-off cover if, for example, there were a large number of claims during a particular period.

46. The Appellant explained she had been practising as a dentist since 2011. She presently undertook dentistry work for 1.5 days per week. She had taken the decision to do so in order to keep premiums to a minimum. She had recently started undertaking facial aesthetics work such as Botox at a clinic for the remainder of the working week.

47. The Appellant did not seek to argue against the principle of run-off cover. She recognised its benefits and stated that it was there to protect patients as well as her as a dental practitioner. The Appellant's position was that she does not need to arrange / pay for run-off cover until she is anticipating stopping practice. It was her view that her current policy meets the requirements needed to be able to work in clinical general dentistry. She explained that she had recently increased her indemnity limit up to £5 million and had also dealt with the other issue regarding blood-borne

viruses.

48. The Appellant set out that it was difficult for her to source alternative cover with other providers due to her working history. There had never been an issue with her clinical work. She explained that she worked in a Practice for a short time that had been subject to mass media coverage due to an infection control breach. This was at the Daybrook Dental Practise in Nottingham which belonged to Mr Desmond D' Mello. She was not aware of this when she started working with that Practice and was only informed of this in her first week in 2014. The problems with that Practice had led to the recall of 22,000 patients and had resulted in multiple claims to Dr D'Mello's indemnity provider. Dr D'Mello's indemnity had been provided through Dental Protection.

49. The Appellant explained that at that time, her indemnity cover was also with Dental Protection. As a result of the "high-risk" circumstances surrounding the Daybrook Dental Practice, Dental Protection also terminated her membership with immediate effect. Due to that termination, she had since been refused indemnity with alternative providers and had to source an alternative policy, (through Lockton's, her insurance brokers) in order to continue practising dentistry.

50. The Appellant explained that she had liaised with Lockton's who were her insurance brokers and who had provided run-off cover terms. She had been told by Lockton's that run-off cover was purchased at the end of a policy. She had also been advised by multiple brokers that run-off cover is only purchased in circumstances where insurance has ceased to be renewed but not where there was cover present whilst the policy was still in place. She aimed to continue her policy with Lockton's and therefore did not consider that she needed to purchase run-off cover until her policy with them ended.

51. The Appellant disputed that she would need to purchase it at the outset as opposed to at the end of the policy. The Appellant explained that the issue for her was affordability. She had been quoted a price over the phone which was on par with the cost of her current policy. However, she had not been given a written quote.

52. The Appellant explained that she had no choice but to pay "*extortionate rates*" for alternative cover and this was because of the sole reason of being in the "*wrong place at the wrong time*". This has had a great impact on her finances over the years and as a result she had to reduce her working hours in order to reduce her insurance premium costs.

53. The Appellant accepted that she was not able to produce any documentary evidence to support her account of what Lockton's had told her. She had relied on what she had been told over the phone. The Appellant considered that she was being singled out by being asked for run-off cover but accepted that she did not have any documentary evidence that others were

able to practise without any run-off provision in place.

The Tribunals Conclusions with Reasons

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

55. We reminded ourselves that as this was a redetermination, it remained for the Respondent, to prove its case for removal under Regulation 14 of the 2013 Regulations.

56. We acknowledged that the Appellant had taken positive steps and had made amendments to her indemnity policy by securing a higher level of financial indemnity, now a maximum of £5 million for one claim, albeit with an aggregate limit also £5 million. We also acknowledged the position around the nature of the exclusion relating to blood-borne viruses. The Respondent's position, at the hearing, was that it was no longer relied on these issues as a basis for seeking the Appellant's removal from the list.

57. We agreed with Mr Thomas' submission that this was an unusual case. There were no concerns about the Appellant's clinical skills and the issue related to run-off cover alone. The question for the Tribunal was whether the Appellant was unsuitable to remain on the Performers List due to the inadequacy of professional indemnity insurance.

58. We found the Respondent's witnesses to be clear and their evidence well reasoned. Ms Madden's and Dr Geddes evidence was set out carefully and was measured in its approach. We had no reason to doubt the Respondent's sincerity in trying to work with the Appellant to get this issue resolved. It was apparent that the Respondent was hoping to resolve matters earlier in the process.

59. The Respondent suggested that the Appellant was offered an opportunity to consider her position after hearing the Respondent's evidence and the rationale for run-off cover. We discussed it with the Appellant and we granted the Appellant a short adjournment in order to allow her to take advice. We made it clear that although we were providing her with this opportunity, it was not on the basis that we had taken a view either way. The Appellant confirmed after taking advice that she wished to proceed with her case.

60. We considered all the circumstances of the Appellant's case. We concluded that, the Appellant was unsuitable to remain on the List due to the inadequacy of professional indemnity insurance. Our reasons for doing so are set out below.

61. We considered "suitable" in this context to mean 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.

62. The Appellant did not seek disagree with the rationale for run-off cover. There was no dispute as to its merits. She accepted that run-off cover was essential and provides protection both to a patient and to the practitioner in respect of claims.

63. The Appellant did not challenge the Mr Thomas's submission that it is often the case that claims are presented after the policy period has expired. For example, under the Limitation Act 1980, the primary limitation period for a personal injury claim is three years from the date of injury. A patient therefore has up to 3 years to bring a claim. However, in many cases even three years will be insufficient, as the limitation period may be extended where the patient does not learn of the injury until a later date (section 14 of the Limitation Act 1980), or where the court exercises its discretion to extend the period (section 33 of the Limitation act 1980). As Mr Thomas explained, for "misdiagnosed" cases, for example a missed tumour, it will often be the case that the patient is not aware of the injury until after the policy period has expired.

64. We shared the view of Dr Geddes that it was important for patients or their families to be able to seek legal redress and for dental practitioners and their employers to be protected from significant financial loss should something go wrong.

65. It was also clear from the email from the email from Locktons dated 11 September 2018 that the Appellant did not have standard cover from Beazley's as she claimed. The email dated 11 September 2018 made it clear that the standard level of cover insured a dentist for £10 million on any one claim. The email set out that there were exceptions to this but that these were "*few and far between*" and are only usually offered because insurers wish to limit their exposure due to activities or claims record. Furthermore, the email confirmed that where restrictive cover was offered, the policy was often constructed on a "*claims made*" bases with a period of run-off cover built in for an additional premium

66. We concluded that Appellant's existing policy of insurance with Beazley's only provides cover for "claims made" and "reported" during the policy period. It does not include any provision for run-off cover. We agreed with Ms Madden's explanation that the significance of this is that if another policy of insurance is not purchased at the end of the policy period (20 September 2019) and a claim arises after the policy period has ended, from treatment provided to a patient during the policy period, there will be no provision for that patient to seek adequate redress. We concluded that the Appellant's policy provides even less protection to patients towards the end of the policy period. For example, a patient treated on the last day of a policy period would have no protection at all, as the policy would inevitably have expired In fairness, the Appellant did not seek to challenge this. Her view was that she would simply renew the policy on its expiry and therefore the policy, as long as it was renewed, would continue to provide adequate protection.

67. We took into account the Appellant's case that she has been advised by her insurance brokers that run-off cover is not required unless or until she has decided that she will not continue working beyond her current policy period. The Appellant accepted that she had no documentary evidence supporting the advice that she claimed she had been given by Lockton's. The Appellant was also unable to refer the Tribunal to a single case where another Dentist was, as she claimed, being allowed to practice without run-off cover.

68. We were not persuaded by the Appellant's position that she does not need to arrange /pay for run-off cover until she is anticipating stopping practice. In our view, there must be certainty that indemnity insurance protection will continue to protect patients who are being treated now. Patients would not be protected if their ability to have recourse to a dental practitioner's professional indemnity insurance depended on the actions that the practitioner may (or may not) take in the future. If, for whatever reason, a dental practitioner was unable or unwilling to take out run-off cover (perhaps due to serious accident or ill-health, death or bankruptcy), the patient would be entirely unprotected. In fairness to the Appellant, she acknowledged that in these circumstances, a patient would be left unprotected. This would be an unacceptable level of patient risk and is, in our view, therefore inadequate cover.

69. Furthermore, purchasing run-off cover at the outset would also (as Dr Geddes set out) have the benefit of binding the insurance company into the arrangement. The Appellant has experienced at first hand the difficulties created with indemnity cover as a consequence of difficulties she says she had by being associated with Daybrook Dental Practise. This led to an additional premium being demanded and the non payment of which led her insurance being terminated and her being denied membership with alternative providers. The Appellant failed to address what would happen if at the end of a policy, she tried to purchase run-off cover but it was refused for whatever reason or in circumstances where there are number of claims made against her which lead to the insurance company refusing to offer her run-off cover. We found the Respondent's approach of insisting run-off cover is purchased at the outset to be reasonable. As the Respondent makes it clear, it has no sanction if a practitioner, decides on retirement simply not to purchase run-off cover.

70. The Appellant's own evidence from Mr Phillip Martin (dated 29 August 2018) from the Vice Chair of the Leicestershire Local Dental Committee as well as Chair of the Leicestershire Practitioner Advice and Support Scheme made it clear that the Appellant was aware of the requirement to have a three year run-off period and that *"it would not be appropriate for Rupal to continue working without adequate cover".* Mr Martin agreed with the Respondent that she should not be working without adequate cover but suggested a temporary suspension rather than complete removal from the Performers List.

71. We acknowledge that there are myriad ways that a practitioner may be

deemed to be unsuitable to remain on the Performers List and the Tribunal are required to take into account at Regulation 15(2)(d), "any likely risk to any patients". In this context, the risk to patients is that, in the event of an adverse outcome leading to a significant compensation claim, there may be insufficient indemnity cover to meet a claim, together with any associated legal costs. Such an arrangement would plainly constitute an unacceptable level of risk, thus unacceptable patient care.

72. Mr Thomas also made it clear that whilst there is a power, in some cases, 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. Therefore, he made it clear that neither the Respondent nor the Tribunal can address any continuing unsuitability due to inadequate insurance cover by imposing a pro-active condition that the Applicant have a certain level of cover.

73. We took into account the Appellant's circumstances (including issues of affordability) and considered that removing the Appellant from the List was both necessary and proportionate at this stage. She has been given a number of opportunities to deal with the issue of the run-off cover. She is working for the majority of the working week. She recognises the risks of not having run-off cover both to patients and to the practitioner but has elected not to do purchase it. We concluded that a practitioner who has been unable or unwilling to arrange for adequate indemnity insurance in the event of an adverse outcome for a patient (or patients) must be regarded, for the time being at least, as unsuitable to remain on the list.

74. We note that the Appellant's removal will not prevent the Appellant from re-applying once she has made arrangements to deal with the issues raised in this decision. The Respondent made it clear that it would arrange for the matter to be considered quickly in the event that such an application was made.

75. We concluded, therefore, that the Appellant's appeal shall be dismissed and the decision to remove her from the NHS Performers List is confirmed.

Tribunal Judge H Khan
Primary Health Lists
First-tier Tribunal (Health Education and Social Care Chamber)

Date Issued: 17 October 2018