First-tier Tribunal Primary Health Lists

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

[2016] 2899.PHL V

Hearing held at the Royal Courts of Justice (hybrid hearing)
on 4 to 10 May 2021

BEFORE
Ms F Eden (Tribunal Judge)
Dr J Rutherford (Specialist Member)
Ms D Forshaw (Lay Member)

BETWEEN:

Mr Sumit Aggarwal

Appellant

-v-

NHS Commissioning Board
(NHS England)

Respondent

DECISION

The Application

1. This is an appeal by Mr Sumit Aggarwal ("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") on 14 December 2016 (communicated by a letter dated 19 December 2016) to remove the Appellant from the National Health Service Performers List ("Performers List") for dental performers.

Attendance

2. The Appellant represented himself and gave oral evidence. He called no witnesses.
3. The Respondent was represented by Mr George Thomas (Counsel). The Respondent's witnesses were Ms Bethany Sleeman, Dr Mike Edwards and Dr Alistair Lipp. Ms Amanda Narkiewicz and Ms Katherine Wackett of Mills and Reeves Solicitors also attended for the Respondent.

Late Evidence

4. During the hearing, the Appellant produced late evidence in the form of a

letter dated 4 May 2021 from Central and North West London NHS Foundation Trust about talking therapies. There was no objection to this being admitted by the Respondent. We considered it relevant and we admitted it.

5. The Appellant's written submissions also contained some information which was technically evidence, including a biography of Professor Peter Tyrer, a profile of Professor Stephen Dunne and information from the General Dental Council website about the Health Committee. The Respondent did not object to the admission of this evidence. We were mindful that the Appellant was a litigant in person and might find it difficult to understand the difference between evidence and submissions. We did not consider there was any prejudice to the Respondent by the admission of this evidence. Therefore, we admitted it.

6. Similarly, in advance of the hearing the Appellant sent to the Tribunal a large number of witness statements after the deadline for exchange of witness evidence. In practice, these witness statements were a hybrid of new information and applications to the Tribunal. All of these witness statements were included in the supplementary bundle. At the hearing, Mr Thomas agreed that there was no objection by the Respondent to the admission of these statements. We were mindful of the Respondent's status as a litigant in person and we admitted them.

7. Finally, the Appellant sent as late evidence on 16 April 2021 prior to the hearing certificates showing that he had completed Health Education England's Safeguarding Children and Young People Programme. The Tribunal administration told him that this was late evidence and he would need to apply for it to be admitted at the hearing. He made no application at the hearing. However, he referred to them in paragraph 80 of his closing submissions. As the Appellant considered these certificates to be important to his argument to the Tribunal and the Respondent did not raise any objection, we admitted them.

Background

8. On 13 May 2016 the Respondent suspended the Appellant with immediate effect after concerns were raised about his behaviour by two dental practices in which he had worked. The concerns related to the Appellant sending a large number of emails to a very wide distribution list about a commercial dispute with a dental practice, and to an incident that happened on 20 April 2016 when the police removed the Appellant from a dental practice where he was working. This suspension was reviewed and upheld by the PLDP on 16 May 2016. Following an oral hearing on 7 June 2016, which the Appellant did not attend, the PLDP suspended the Appellant for a further six months.

9. On 24 June 2016 the General Dental Council imposed an interim suspension order on the Appellant for 18 months. This resulted in a mandatory suspension for the Appellant from the Performers List under regulation 12(1A) of the 2013 Regulations. The Respondent notified the Appellant of this mandatory suspension on 28 October 2016. On 14 December 2016, the PLDP made its decision to remove the Appellant from the Performers List.

10. On 20 December 2016, the Appellant made his appeal to the Tribunal. The appeal was struck out by an order of Judge Brayne dated 4 April 2017. The appeal was reinstated on 19 January 2018 after the Appellant successfully

appealed to the Upper Tribunal. The Tribunal held a full hearing of the appeal on 4 and 5 July 2018 and the Appellant's appeal was dismissed on 16 July 2018.

11. The Appellant appealed the decision of the Tribunal. On 29 April 2020 the Upper Tribunal set aside the Tribunal's decision and remitted the appeal back to be heard by a freshly constituted Tribunal. The Appellant had provided the Upper Tribunal with two psychiatric reports commissioned by the General Dental Council, dated 10 August 2018 and 10 October 2018 (pages C172 to C197). The second report noted that the Appellant had been admitted to hospital as a psychiatric inpatient in September 2018. The reports suggested diagnoses of delusional disorder and schizoaffective disorder. Upper Tribunal Judge Perez found that there was "at the very least doubt as to whether the Appellant was fit to participate fully and effectively in the First-Tier Tribunal hearing on 4 and 5 July 2018." She made a direction that the Tribunal must (a) consider what to do about the doubt as to whether the Appellant has mental capacity to participate and (b) whether to invite an intervention from the Lord Chancellor , Official Solicitor or someone else.

12. On 3 August 2020, the General Dental Council indefinitely suspended the Appellant's registration.

13. There was detailed case management of the remitted appeal and the Tribunal's orders are included in the bundle.

Preliminary and procedural matters

The Appellant's capacity to conduct the proceedings

14. In October 2020, the Respondent made enquiries of the Official Solicitor who stated that she would be willing, in principle, to act for the Appellant provided that (a) there was evidence that the Appellant lacked capacity to conduct litigation in the Tribunal (b) there was security for costs and (c) the Official Solicitor was the Litigation Friend of last resort (see pages A501 to A502 and A540 to A543).

15. At a telephone case management hearing held on 20 October 2020, the parties agreed that before any further action was taken to list the appeal for re-hearing, the Appellant would be assessed by his GP, Dr Jay Vyas, who would complete a capacity assessment in the form provided by the Official Solicitor. On 30 October 2020, Dr Vyas assessed the Appellant as having capacity to conduct the Tribunal proceedings. On 27 April 2021, Dr Vyas carried out a further capacity assessment and found that the Appellant continued to have capacity to conduct the proceedings.

16. Although the Appellant has continued to assert that he has capacity since the proceedings were remitted back from the Upper Tribunal, he has given limited information about his mental health. Other than the reports of Dr Grewal, there is no psychiatric evidence in the bundle. In his various witness statements and in oral evidence, the Appellant said that he was detained under the Mental Health Act in October 2018 and had been taking the anti-psychotic medication Aripiprazole since then. The Appellant kept the Tribunal and the Respondent informed as to developments in his mental health during the period up to the Tribunal hearing. On 28 February 2021 he informed the Tribunal that he had been admitted to hospital on a voluntary basis following an assessment by mental health professionals. On 15 April 2021 the

Appellant took the decision to stop taking his Aripiprazole medication and informed the Tribunal and the Respondent of this.

17. The Appellant made various applications to be assessed by an independent psychiatrist (see my order of 1 April 2021 at page A696 and Judge Tudur's order of 22 April 2021 at page A707). He also made his own inquiries of the Official Solicitor and asked the Tribunal to invite submissions from the Official Solicitor as to what steps the Tribunal could take when faced with difficulties obtaining evidence as to a litigant's lack of capacity (page A735). On 30 April 2021, he made an application for an adjournment and a direction that the Respondent obtain an independent psychiatric report.

18. The Appellant did not pursue his adjournment application at the hearing. He said this was because Dr Rutherford was on the panel. Dr Rutherford is a consultant psychiatrist and, as well as being authorised to sit as a specialist member in the Primary Health Lists jurisdiction is the Chief Medical Member in the Chamber's Mental Health jurisdiction.

19. We were satisfied at all times during the hearing that the Appellant had the mental capacity to conduct the litigation. We did not consider it necessary to obtain further medical evidence as to his mental capacity. His GP had completed the capacity certificate and we considered that his GP would not have done this if he lacked the expertise to do so.

20. During the hearing, the Appellant was calm. He was courteous to the panel and to the Respondent's representative. He was able to reference papers in the bundle and to ask questions on cross-examination. He was able to answer questions on cross-examination and from the panel clearly and cogently. We understood the case that he was making, even if our final decision is not to agree with it. The Appellant displayed none of the erratic behaviour described in the Tribunal's decision following the hearing in July 2018. Nor did we observed him appearing to experience the same sort of distress which he showed in the telephone case management hearing, described in my order of 1 April 2021.

21. Had the Appellant shown erratic behaviour or significant distress during the hearing, we would have adjourned and considered whether to obtain additional evidence as to his mental capacity. Although it would not have been appropriate for Dr Rutherford to conduct any sort of medical examination of the Appellant, her expertise was important to the panel in the ongoing conduct of the appeal, reasonable adjustments during the hearing, and the decision not to adjourn for a further capacity assessment.

<u>Intervention by a third party</u>

22. As detailed above, both the Respondent and the Appellant made enquiries of the Official Solicitor. The Official Solicitor was never invited to intervene because the Appellant was found to have capacity to conduct the proceedings at both medical examinations by his GP.

23. The Appellant made various applications for an appropriate adult or independent adviser to be appointed to support him at the hearing. He was clear that he had no family member or friend to support him and did not wish to approach any voluntary organisations. I dealt with his application in my order of 1 April 2021 and Judge Tudur considered it again in her order of 22 April 2021. Judge Tudur directed him to send to the Tribunal the names of

any person he wished to support him at the hearing. He responded that there was nobody to support him.

24. We took into account the decision of the Court of Appeal in *AM(Afghanistan) v SSHD* [2017] EWCA 1123. We did not consider that this decision required the Tribunal to appoint a litigation friend for the Appellant because the analysis there refers to children and incapacitated adults (see paragraph 44 of *AM (Afghanistan)* and also the definition of protected party in rule 21.1(2)(d) Civil Procedure Rules). The Appellant had been found to have capacity to conduct the proceedings.

Reasonable adjustments

25. The Appellant had made a number of applications for reasonable adjustments in the hearing. After the Appellant was found to have capacity to conduct the proceedings on 27 April 2021, I directed that the Respondent should provide its view on adjustments and that there should be a preliminary hearing to deal with adjustments (my order of 28 April 2021 at page A726).

26. As noted above, there was limited medical evidence about the Appellant. However, given the Appellant's very recent hospital admission, it seemed highly likely that he met the definition of vulnerable adult in the 2008 Senior President's Practice Direction on Child, Vulnerable Adult and Sensitive Witnesses. The Respondent did not take any technical objection to treating the Appellant as vulnerable and agreed it was appropriate to make adjustments. Therefore, we proceeded on the basis that the 2008 Practice Direction applied, that the overriding objective required us to make adjustments, and that there may be a duty under the Equality Act to make adjustments.

27. The clerk invited the Appellant to go into the hearing room in order to familiarise himself with the surroundings before we entered the room. We then conducted a twenty minute hearing before starting the appeal at which we discussed the Appellant's adjournment application and in which the parties agreed the following adjustments:

    a. a break of at least fifteen minutes every hour and one full hour for lunch;
    b. the Appellant could ask for a break at any time;
    c. the proceedings to finish at the latest by 4 p.m. every day;
    d. cross-examination questions provided in writing in advance to the panel and the Appellant simultaneously and the panel to object to any inappropriate questions;
    e. the Appellant to be assisted by the panel in asking questions of the Respondent's witnesses;
    f. a decision about closing submissions to be made after the evidence had finished.

28. We explained to the Appellant that the Tribunal's proceedings are not routinely recorded and it would be logistically and financially difficult to obtain a transcript within the timescales he had requested. We also explained that we did not consider it appropriate to give him a copy of our notes as these are for our own personal use, rather than amounting to a formal record of proceedings.

29. The hearing was held in a formal court room at the Royal Courts of Justice. The panel did not sit at the bench at the top of the court room, but sat lower down where the court staff would normally sit. This was in order to be closer to the Appellant (whilst maintaining social distancing) and to make the hearing more accessible.

30. In the event, the Appellant did not require any assistance from the panel in cross-examining the Respondent's witnesses. Dr Lipp was the Respondent's key witness. The Appellant asked a few initial questions on cross-examination; the panel then asked further questions. We gave the Appellant a further opportunity to ask questions after the lunch break, when he had been able to reflect on Dr Lipp's evidence. The Respondent's evidence finished at 3 p.m. on the first day of the proceedings. The Respondent agreed to provide the Appellant with the list of cross-examination questions by 9 a.m. the following day and the hearing resumed at 1p.m. so that the Appellant would have an opportunity to consider the questions. We had no objection to any of the questions but, as regards question 12, I reassured the Appellant that the email that he sent about me following the 30 March telephone case management hearing would not prevent me from ensuring that he had a fair hearing.

31. The Appellant gave his evidence during the afternoon of day two and the morning of day three. We monitored him during the evidence and proactively offered him breaks when we considered it necessary. We gave the Appellant a twenty minute break after cross-examination so that he could consider any further evidence which he wished to give in response to the cross-examination.

32. The Respondent made closing submissions on the afternoon of day three. The Respondent was directed to send these in writing to the Appellant by noon the following day. We did not sit on day four in order to allow the Appellant an opportunity to prepare his closing submissions. As the appeal was listed for five days from Tuesday to Monday, this meant that the Appellant had the weekend in which to prepare his closing submissions.

33. As noted in my order of 1 April 2021 and the Respondent's submissions on reasonable adjustments, it would have been ideal if the Appellant's GP had also commented on appropriate adjustments when assessing the Appellant's capacity. However, we recognise that the Appellant's GP may not have the same knowledge of the court room and the detail of the proceedings as us. Also, we did not consider it to be a legal requirement that we obtain medical advice on reasonable adjustments and, applying the overriding objective, we did not consider it necessary to adjourn in order to obtain medical advice on adjustments. We relied on the expertise of Dr Rutherford to ensure that we had made all appropriate adjustments. In our experience of conducting Tribunal hearings for vulnerable parties, there were no other adjustments which could have been made, other than the Appellant having a supporter or advocate present during the hearing, which the Appellant had declined to arrange for himself. We followed all of the guidance in the Equal Treatment Bench Book relating to litigants in person and litigants with a disability, in so far as it was possible, given the practical constraints imposed by the pandemic.

<u>Form of hearing</u>

34. As noted above, the hearing was a hybrid hearing, with the parties in person and the witnesses appearing by video. It was our judgement that this struck the right balance between meeting the Appellant's needs and ensuring the safety of witnesses and others due to the public health situation, as well as dealing with the logistical challenges of finding a hearing room.

35. The Appellant made various applications for a fully in person, rather than a hybrid hearing. His initial application was dealt with my order of 1 April 2021 and Judge Tudur's order of 22 April 2021. It was not clear whether, in his reasonable adjustments applications, the Appellant was renewing this application. He referred to the case of *Bilta (UK) Ltd & Ors v SVS Securities Plc & Ors* [2021] EWHC 36 (Ch) in which Marcus Smith J directed witnesses to attend in person. In referring to that decision, the Appellant asked that the hearing be listed in the "supercourt" in the Rolls Building.

36. As I explained to the parties in my order of 28 April 2021, the Tribunal has limited influence over the hearing rooms which it is allocated. The Tribunal has no access to the Rolls Building. The Tribunal's administrative staff worked hard to obtain access to the hearing room at the Royal Courts of Justice in which the appeal was heard. The room in which the hearing was held was spacious and there was adequate social distancing for the attendees. Two screens were provided – one on either side of the court room – to ensure all in the court room were able to see and hear when the Respondent's witnesses gave evidence.

37. The Appellant did not raise the possibility of a fully face to face hearing at the preliminary hearing dealing with reasonable adjustments. We did not consider it appropriate to adjourn for a fully face to face hearing for all the reasons given in my order of 1 April 2021. Furthermore, although it might have been possible for some witnesses to have attended whilst maintaining social distancing, we did not consider that this was necessary. Although the hearing was held in the context of an improving public health situation, the public health advice was still to avoid unnecessary travel. The Appellant had made suggestions about witness coaching but there was no evidence to suggest that the Respondent was coaching its witnesses. Our analysis of the evidence in the bundle was that the Respondent would have no reason to coach its witnesses.

38. At the end of the hearing, both parties said they were satisfied with the hybrid hearing. The Appellant said that he had initially been concerned and that he had been to other hearings which had not gone well. However, he said that the hearing had gone well and he was happy with the adjustments which had been made. When asked, he said that he was able to communicate effectively with the Respondent's witnesses via the video link.

<u>Composition of panel</u>

39. The Appellant made various applications in the course of the appeal for the Tribunal panel to be composed in a particular way. Those applications were all refused on the basis that composition of the Tribunal was governed by the 2015 Practice Statement. It continues to be the case that the decision as to the composition of the panel is one for the Tribunal, provided that the 2015 Practice Statement is complied with. However, it is worth noting that in the event, the panel did contain much, though not all, of the expertise which the Appellant had requested. As noted above, Dr Rutherford is a consultant

psychiatrist. I have substantial experience of sitting on the Mental Health Tribunal and Ms Forshaw is a very recently retired dentist with over forty years of clinical experience.

40. We departed from the Tribunal's usual practice and took time at the beginning of the hearing to explain our experience to the Appellant. We explained the limitations on Dr Rutherford's role and that she would not be able to conduct any medical examination of the Appellant. The Appellant consistently said that he was reassured by Dr Rutherford's presence on the panel.

<u>Final adjournment application</u>

41. In his closing submissions document, the Appellant asked the Tribunal to consider whether an adjournment was necessary to seek further evidence, including a mental state examination. We asked him about this application and he said that he had remembered that we had told him that Dr Rutherford would not be able to conduct a mental state examination and did not want the Tribunal to miss the opportunity to obtain all the evidence it needed. He said that he was concerned about whether he would be assessed as having insight, which he had dealt in paragraphs 116 and 117 of his closing submissions. He was concerned that the General Dental Council had said that he had shown insight too late.

42. We decided not to adjourn the hearing. We had no concerns about the Appellant's capacity to conduct the litigation, as detailed above. We considered that we had all of the necessary evidence to decide the appeal. We did not consider that up to date medical evidence was necessary for us to decide the appeal because our provisional conclusions, based on the evidence and submissions we had heard, did not turn on the Appellant's current mental state. Nothing that the Appellant said in his closing submissions changed those provisional conclusions. If we had considered it necessary to obtain further evidence as a result of our deliberation, we would have directed that it be provided.

Legal Framework

43. There is significant dispute between the parties as to the meaning of the legal provisions applicable to the appeal. Therefore, we simply signpost the relevant provisions and deal with their meaning in our conclusions below.

44. The relevant law is in the 2013 Regulations. Regulations 14 and 15 make provision for removal of a practitioner from the Performers List. Regulation 10 deals with the imposition of conditions on inclusion in the Performers List. Regulation 12 deals with suspension from the Performers List. Regulation 13 deals with suspension payments. Regulation 35 makes provision about removal from the dental performers list. Regulation 17 contains the right of appeal and the Tribunal's powers on appeal.

45. The Tribunal does not review the original decision of the PLDP but makes a fresh decision in the light of all the information available to it at the time it makes its decision, including information not available to the PLDP.

46. The Appellant disputed whether the appropriate standard of proof should be the balance of probabilities. In practice, there are very few disputed facts and our findings turn on the application of the 2013 Regulations to agreed facts.

Therefore, we do not consider that it would make any difference to our decision whether the standard of proof were the balance of probabilities or a slightly higher standard reflecting the impact of the appeal on the Appellant's livelihood.

Evidence

47. In addition to the late evidence detailed above, the Tribunal was provided with an indexed bundle, containing Tabs A to E. We refer to the evidence in this bundle where necessary to explain our conclusions.

<u>Evidence of Dr Edwards</u>

48. Dr Edwards adopted his witness statement at page C11 of the bundle. He confirmed that he has had no involvement with the Appellant since the PLDP meeting in 2016.

49. On cross-examination by the Appellant, he said that he was first instructed on the investigation around March or April of 2016. After the Appellant's emails were brought to the attention of the Respondent, a team was set up to consider the issues which had been raised. His involvement ended in December 2016 when the Appellant received the last letter from the Performers List Decision Panel. Dr Edwards said he had not been involved in the Appellant's subsequent appeal or other matters.

50. The Appellant asked Dr Edwards whether he considered that the Appellant was reasonable not to respond to the emails at pages D495 to D497 of the bundle (three emails sent o 18 April 2016 by Ernest Ofor from the Respondent's Practitioner Performance Team, including one email recalling the previous email). Dr Edwards said that he was surprised that the Appellant did not contact the sender of the emails because there was a follow up letter in early May. The Appellant asked him his professional opinion as a GP on whether mental illness could have triggered his behaviour and was a mitigating factor. Dr Edwards said that, without knowing the Appellant's diagnosis, in general terms mental illness can affect people's behaviour.

51. In response to questions from the Panel, Dr Edwards said that he did not know of any dentists who were unable to practise dentistry due to their health who had been left on the Performers List. He was not sure whether dentists who were not producing UDAs (Units of Dental Activity) were questioned. He said that in the medical arena a doctor who was not performing after 12 months would be picked up at appraisal. He was not aware of any mechanism for auditing dentists to see if they were clinically practising.

<u>Evidence of Ms Sleeman</u>

52. Ms Sleeman adopted her witness statement at page C8 of the bundle. She confirmed that she still remembered the Appellant pushing her as set out in the last three lines of paragraph 6 of her statement. She said that the Appellant was on the telephone to the police at the time, saying that she was being abusive. The surgery doors had glass panel. She had moved a patient into the surgery away from the Appellant and he was trying to get past her to the patient.

53. On cross-examination the Appellant pointed her to her written statement at page D491 which had been sent to the General Dental Council, in which she

stated that she would question his sanity. He asked whether in light of his diagnosed mental illness she would be willing for him to return to work. She said this was not for her to answer. Her organisation employs dentists who are on the Performers List and registered with the General Dental Council.

54. When asked by the Appellant whether the conversation was loud enough for patients to hear, she said that it seemed pretty loud and there was no separate waiting area. She recalled the Appellant pacing up and down the corridor but did not recall whether he was shouting or not. When asked, she said that the Appellant definitely physically pushed her; she did not fall or trip over. She could not recall whether anyone else would have seen; she was just concentrating on keeping the Appellant away from the patient. She could not recall what part of her body he touched. She said that she just remembered standing in front of the glass pane so that the Appellant could not make eye contact with the patient.

55. The Appellant asked Ms Sleeman whether she forgave him for what had happened. Although I intervened and said she did not have to answer, she said that she had no hard feelings towards the Appellant.

Evidence of Dr Lipp

56. Dr Lipp adopted his witness statement at page C160 of the bundle. He said that it was true at the time that he signed it but that he had heard during the course of the hearing that the Appellant had stopped taking his anti-psychotic medication. In clarification of paragraph 49 of his statement, he said that there was no automatic alert where a dentist had not worked for 12 months or record of whether a dentist is seeing NHS patients. The Respondent would normally be contacted by a third party to inform them that a dentist was not working. However, if a contractor has contracted to provide a certain number of Units of Dental Activity, this would be picked up. There was previously a system of contacting dentists to ask if they were still working but this no longer happens.

57. As to paragraph 51, Dr Lipp said that the requirement for dentists to demonstrate competence when they have been out of practice for 24 months applies regardless of the reason. The Respondent would investigate the extent to which a dentist was willing and able to work in NHS dentistry and what it would take to "get them up and running again." He said that it is not uncommon for dentists not to have worked for 24 months for health reasons. Dr Lipp said that by the time a dentist has been out of practice for 24 months the Respondent would start to become concerned about whether the dentist needed a period of refresher training or supervision. By the time a dentist had not worked for five years, the Respondent would have no doubt that the individual had deskilled and needed a period of refresher training. Dr Lipp said that this was a well trodden path and that the Respondent was keen to support individuals who had not been working to have refresher training. Performers are often nervous and lack confidence. The refresher training provides confidence to the dentist as well as to employers. Dr Lipp said that an individual who had not been working for five years would not be regarded as suitable for inclusion on the Performers List without additional evidence of refresher training and supervision.

58. Dr Lipp said that whilst the Appellant was suspended by the General Dental Council, he could undertake training but was unable to practice clinically.

Whilst he was suspended, the Respondent was also required to suspend him from the Performers List. Dr Lipp said that there is no route the Appellant can follow to refresh his skills in order to return to the Performers List whilst he remains suspended.

59. On questioning by the panel, Dr Lipp said that he thought that the General Dental Council reviewed indefinite suspensions every two years but he was not sure of the exact period of time. Dr Lipp said that if the General Dental Council reviewed the Appellant's case in two years and restored his registration, the Respondent would want to update itself as to the circumstances of the General Dental Council's decision, including whether there were any conditions attached to it. He said that it was quite usual for the General Dental Council to impose conditions when a dentist had a period of time without clinical practice. The Respondent would consider whether any additional conditions were needed in respect of NHS dentistry. It would be not be improbable in the Appellant's case that a period of refresher training and supervision would be included in the conditions. The Respondent would then regularly review the conditions and gradually lift the burden of reporting and supervision.

60. Dr Lipp was asked by the panel about the refresher training the Appellant had completed, evidenced at pages D68 to D105 of the bundle. He said that these were not courses that would retain or update the Appellant's practical clinical skills. These courses provided knowledge. If the Appellant were to be reinstated by the General Dental Council, the Respondent would seek advice from colleagues in the dental education service at Health Education England as to appropriate training. The immediate concern would be the Appellant's practical skills. He commented that there was no funding available to the Appellant to carry out the training he had undertaken and that it was commendable of the Appellant to have funded the training himself.

61. Dr Lipp was asked by the panel about the method of returning to the Performers List after a prolonged period of absence. He said that, in such a case, the Respondent would carry out a bespoke learning assessment, including an interview with a dental adviser and a learning needs assessment. The Performer would then have training and an introduction to clinical practice. The Performer would be highly supervised at the point at which he or she started treating patients. The Performer would then progress through different levels of supervision from direct side by side supervision to looser supervision, until the Respondent had regained confidence in the Performer's clinical abilities. Dr Lipp said there can be an extended period of refresher training and supervision over many months and that this is a "well travelled route."

62. When asked by the panel, Dr Lipp said that it would be for the Appellant to identify a dental contractor who was willing to provide clinical supervision. This is not something which many dental practices are able to provide. However, some dental practices see themselves as training practices and would be worth approaching to seek clinical supervision. Dr Lipp said that supervision placed a financial burden on a dental practice but he was aware that there could be agreements between a returning dentist and a practice to make supervision viable. He said that it would help very much if the Appellant

had at least made exploratory approaches to dental practices before applying to return to the Performers List.

63. On cross-examination by the Appellant, Dr Lipp agreed that it would be much harder for the Appellant to find a dental practice to supervise him than it was for him to find an initial training practice and the list of suitable practices was much smaller. He agreed that there was a better structure available to returning doctors, who have financial support and bursaries provided to enable them to return to the workplace.

64. Dr Lipp said that he was concerned about the Appellant's recent decision to stop taking his prescribed anti-psychotic medication, Aripiprazole. He said that, although there may be legitimate reasons, he was concerned that the Appellant had stopped taking it against medical advice and about the Appellant's well-being and the possibility of recurrence of symptoms of mental illness. He noted that in the Appellant's opening remarks, he had said that he had stopped taking the medication to see if this would trigger a recurrence of the illness. Dr Lipp said that he found this worrying. Dr Lipp said that, although a decision to take medication is a matter of personal choice and consent, he would be worried if any Performer stopped taking medication against medical advice. In general, he would expect health professionals to follow professional advice as to their well-being. He said that this was part of professional codes of conduct and he would view a decision by a Performer not to follow medical advice negatively.

65. On cross examination, the Appellant asked Dr Lipp if he would be more comfortable if the Appellant were taking depot medication (a regular intra-muscular injection). Dr Lipp said that he would seek advice and that he expected Performers to follow medical advice. He said that he was not qualified to advise on appropriate treatment and that he expected the Appellant to follow the advice of his treating physician.

66. On cross examination, the Appellant asked Dr Lipp about the construction of the 2013 Regulations. As regards the construction of regulations 14(5) and (7), Dr Lipp said that he agreed a period of suspension would not count towards the twelve month period in regulation 14(5), but the Respondent was not relying on regulation 14(5). As regards the construction on regulation 35, Dr Lipp said that the Respondent was not using regulation 35 but was removing the Appellant on the grounds of suitability.

67. On questioning by the panel, Dr Lipp said that under regulation 35, there is no discretion as to whether to remove a Performer. He said that there is a caveat in regulation 35 for cases where there is an indefinite suspension by the General Dental Council due to health grounds. He said that his understanding is that the General Dental Council would never remove a registrant on health grounds.

68. On cross-examination, the Appellant asked Dr Lipp about the Tribunal's recent decision in *Karunasekara v NHS England* [2020] 4096.PHL, in which the Tribunal had permitted Mr Karunasekara to remain on the Performers List subject to same conditions as those imposed by the General Dental Council. The Appellant asked whether it would be possible for any conditions imposed by the Respondent in his case to be linked to conditions imposed by the General Dental Council in the same way. Dr Lipp said that Mr Karunasekara's case was different from the Appellant's case because Mr

Karunasekara was not suspended by the General Dental Council. Instead, he was subject to conditions.

69. The Appellant also asked Dr Lipp about the case at the Medical Practitioners Tribunal determination relating to Dr John Bleasdale at page D325 of the bundle. The Appellant said that in that case the NHS had asked the General Medical Council for an early review of Dr Bleasdale's suspension. The Appellant asked if the Respondent would be able to ask the General Dental Council for an early review in his case. Dr Lipp said that the case of Dr Bleasdale was different because Dr Bleasdale had been suspended for reasons of misconduct and that he had remediated his misconduct.

70. The Appellant asked Dr Lipp about regulation 19 of the Health and Social Care Act 2008 (Regulated Activities) Regulation 2014 and the Care Quality Commission's guidance on it (pages D498 to D505). Dr Lipp agreed that this guidance allowed a provider of health or social care to employ people in a role whilst they were still undergoing training for that role. He emphasised that this was guidance for employers.

71. The Appellant commented to Dr Lipp that the General Dental Council had taken the decision to suspend him indefinitely without having a psychiatric report because the Appellant had refused to be assessed by any of the three psychiatrists named by the General Dental Council. This was because the Appellant thought they would be biased against him and wanted a new opinion. Dr Lipp commented that it would be better for the Appellant to be assessed by a psychiatrist who had seen him previously because it would then be easier to measure any progress made by the Appellant.

72. On re-examination, Dr Lipp said that the Respondent had not seen the full reasons for the decision by the General Dental Council to indefinitely suspend the Appellant in August 2020. The decision is at page C205 of the bundle and there is a hyperlink to a further document in that decision. However, the document does not contain the reasons for the decision because of the need to protect the Appellant's confidentiality. Dr Lipp agreed that the Respondent had taken account of the full reasons relating to the Appellant's interim suspension in June 2016 and the redacted reasons relating to the subsequent suspension in October 2017 in the record of the General Dental Council's decisions at pages C106 to C109 and at pages C141 to C157.

<u>The Appellant's evidence</u>

73. As detailed above, the Appellant had received the Respondent's cross examination questions in advance. The Appellant gave evidence during the afternoon of Wednesday 5 May and completed his evidence on the morning of Thursday 6 May. He had prepared written answers to the cross examination questions, which he sent to the Tribunal and the Respondent at 17:41 on Wednesday 5 May. These were received by the panel at 09:18 on Thursday 6 May. The panel agreed with the parties that these written answers would be treated as part of the Appellant's evidence on oath.

74. Before the Respondent's witnesses were called, the Appellant gave a short statement in response to Mr Thomas's opening statement. He said that what had happened in 2015 and 2016 had been triggered by his mental health. He said that he had stopped taking medication on 15 April 2021 and that this was to see whether he would relapse. If things got worse, he would start taking

his medication. He said he agreed that the events in 2015 and 2016 happened, with the exception that he did not push anybody, as alleged by Ms Sleeman. He felt troubled by the suggestion that he did, and this was a matter of some importance to him.

75. The Appellant also gave a short statement before being cross examined by Mr Thomas. Due to an oversight of the panel, he did not affirm the truth of his evidence during this short statement. He made his affirmation before answering any questions on cross-examination. We did not consider it necessary to ask the Appellant to repeat his short statement after making his affirmation. There was no reason to doubt the truth of what he had said.

76. In his short statement before cross examination, the Appellant said that his case has been going on since 2016. He initially did not attend any proceedings conducted by the Respondent or the General Dental Council. At the time, he was concerned that the proceedings were risk based and not evidence based. He attended a General Dental Council hearing in 2017 which was supposed to be a three day hearing and was extended to a five day hearing. After this he lost faith in the regulatory system. At the hearing in 2017 he was in denial of his mental illness. There was a medical adviser and medical expert at consultant level at the hearing. At that hearing he said that he would take medication if it would result in him being able to return to work. However, the panel said that he had shown insight too late and did not believe him. He said that he had felt the regulatory actions were punitive. He said that work was good for his mental health and this had not been taken into account. He has not explored other areas of work because his knowledge and expertise lies in dentistry. He did not attend any regulatory hearings in 2018, 2019 or 2020. He did not attend the General Dental Council hearing in 2020 because he felt it should have been held in person, rather than remotely. The General Medical Council had started in person hearings by then and he considered that this should be possible for the General Dental Council.

77. He said that he had expressed a willingness to take depot medication, rather than oral medication because the General Dental Council had said that they could not be sure he was taking medication simply by seeing the prescription. He thought that if he took oral medication he might keep being suspended in a "ping pong" sort of a way. If he took depot medication, everyone would know he was taking it.

Current mental health

78. On cross-examination about his current mental health, he said that at the time of his admission to hospital in February 2021 he was taking his prescribed Aripiprazole medication, although those who carried out the assessment of his mental health doubted this. He said that the admission was precipitated by a crisis in his marriage, exacerbated by financial difficulties. He was having to ask his wife for money, which caused difficulty. He was in hospital for 12 days and then discharged. He asked to be discharged as he was an informal patient (not detained under the Mental Health Act) and hospital staff agreed. He was discharged on the same 10mg dose of Aripiprazole that he was taking when he was admitted. He was offered PRN (as needed) medication but he never asked for it.

79. On questioning by the panel, the Appellant said that when he was assessed prior to his February 2021 admission he knew many of the professionals, and they felt he would be able to engage and do as he was asked. He was advised to go to hospital and agreed, rather than being forced. He was in hospital from 27 February to 11 March and did not try to leave. He enjoyed psychology and occupational therapy sessions. He initially could not return home because of concerns raised by his wife. On 9 March she said he could return home. He did not leave immediately but made a request and was assessed by the team before leaving.

80. When asked whether the medication was not effective in preventing the crisis that led to his February admission, he said that he did not want to be evasive. He had always felt that he should be offered psychological therapy in addition to medication. His main argument with the General Dental Council was that there was too much focus on medication. He said that he had engaged in psychological therapy during his February 2021 admission and had found it very helpful. He felt he could relate to the psychologists as they were not focussing on medication. When asked whether he was aware that as an anti-psychotic medication, Aripiprazole could help with delusional beliefs, he said that initially his main diagnosis was personality disorder. He was given the diagnosis of schizoaffective disorder when he was first admitted to hospital. He said his understanding was that his treating clinicians had said Aripiprazole would help with racing thoughts, calm him down and help him cope better. If they said something different, he did not understand it.

81. On cross-examination, the Appellant said that he was telling the truth in his statement of 1 April (page D448) when he said he was taking Aripiprazole. He said he had taken his medication between October 2018 and April 2021. He said that he was saying he had a mental illness but not agreeing that Aripiprazole should be his only treatment. He said that he requested the prescription at page D295 when he was in hospital and his wife, who is a pharmacist, collected it for him. He never ran out of medication and there is still untaken medication at his home. The Appellant said that Aripiprazole was first prescribed by the consultant at Northwick Park hospital during his first admission to hospital. He did not discuss the decision to stop taking his medication with any medical professional. Later on, he discussed the decision with Dr Lakhani from the community mental health team when she called encouraging him to take it. He decided not to continue taking the medication despite Dr Lakhani's advice. He said that when he went for his capacity assessment prior to the hearing, his GP Dr Vyas asked if he was taking his medication and he said that he was not.

82. When asked on cross-examination about paragraph 22 of his skeleton argument (page A743), he said that the feeling of being forced to take medication was still a reason he was not taking his medication, but was not the only reason. He referred to Dr Lipp's evidence about the lack of funding returning dentists, compared to doctors and the lack of funding for psychological therapies. He said that he felt he was being fobbed off and told to take his medication and go home. He said that the General Dental Council telling him he could not be on the register if he did not take his medication felt like being forced to take medication.

83. When asked about whether his willingness to take depot medication

(paragraph 50 of his skeleton argument) contradicted his statement that he felt forced into taking medication, he said that he was willing to take medication if the Tribunal found this was necessary and desirable for him to return to work. He disliked being challenged about whether he was taking oral medication and wanted to show that there was no doubt he was taking medication. He said that he had felt more alive and raring to go since stopping his Aripiprazole. It had been three weeks since he stopped taking it. He felt that because the half life was 72 hours, he would have relapsed by now if he was going to.

84. The Appellant provided the late evidence about his access to talking therapies whilst an inpatient, and more recently in the community via a 'green card' which means he is able to access therapies without a direct referral, and said that he was exploring alternatives to medication. His wife is monitoring him and this is a period when he is able to take a trial and error approach.

85. When questioned by the panel, he said that there was no particular event or any side effects which caused him to stop taking medication on 14 April. He did not feel medication could help him. He had read about other people who had stopped medication and decided to give himself a chance. His wife was also being more supportive at this point. He felt that if he was not being believed about taking it, he may as well stop. He said he was contacted by the community mental health team about his medication because of the involvement of a social worker with his children. One week after stopping the medication, he had a telephone call from Dr Lakhani and his care co-ordinator who advised him to continue. They then contacted him to suggest tapering down to a reduced dose of 5 mg. However, by this time he had already been without medication for a week and decided not to take a reduced dose.

86. When asked on cross-examination about whether he would recognise a decline in his mental health, he said that previously he had lacked insight. That was mainly before October 2018 when he was given Haloperidol depot medication. He said his wife had not previously been aware of the extent of his illness but had been asked by health professionals to keep an eye on him. His parents also come to live with him occasionally and keep an eye on him. He disagreed that his decision to stop taking Aripiprazole demonstrated a lack of insight. He said that there should be joint decision making and that before his admission in February 2021, the mental health professionals assessing him found he had capacity to consent to an admission to hospital.

87. When questioned by the panel, he said that if he noticed a change in his mental health, he might contact the psychological therapies team or the community team. He has also had a good experience with the psychiatric liaison team when he has been to Accident and Emergency and thought this would be the best option.

88. When asked on cross-examination about whether he needed to demonstrate a period of good mental health when he was symptom free before returning to work, he said he had been out of work for five years. Being at work would be good for his mental health and better than sitting at home. He considered that the action taken against him was punitive.

89. When questioned by the panel about his diagnosis, he said that he had attended a lecture at the Royal College of Psychiatrists in February 2020 by Professor Peter Tyrer. Professor Tyrer adopts a trauma informed approach

which the Appellant finds a helpful way of understanding his mental health. He said this was one of the reasons why he had wanted to be assessed by a different psychiatrist for the General Dental Council proceedings.

Events in 2016

90. On cross-examination, the Appellant said that he agreed he had a significant mental illness between 2016 and 2019 and that he had no insight before October 2018 when he was detained under the Mental Health Act. He said that he did not disagree with the evidence of Ms Sleeman, apart from questioning whether he pushed her and questioning whether he could be overheard. He said that he was remorseful about the incident with Ms Sleeman. He considered his behaviour in 2016 was wholly linked to his mental illness.

91. When cross-examined about his dealings with the Respondent, he said that the email at page C52 was linked to his mental illness. As regards the note of the telephone conversation at page C61, he said that he was not driving at 120 miles per hour and not on the motorway because he does not talk on the phone when driving. He was asked several times whether he might have said that he was driving at 120 miles per hour, even though he was not actually doing so. He replied that was not driving at 120 miles per hour. He did not agree that Ms Sandford would not have said that Indians were not welcome in England (page C62). He said that either she did say it or that there was a distorted telephone connection so that she seemed to have said it. He did not accept that he might have thought she said it because of his mental illness. He said that psychiatrists had asked him if he heard voices and he said that he did not. He said that he had brought up his Indian origin in the telephone call because he felt his protected characteristic was being infringed on. He said he did not refer to institutional racism. He did not say whether he accepted that the Respondent's staff were not trying to treat him unfairly or harass him. He said that the legal system was daunting. He said that on 9 June 2016 he was assessed by two psychiatrists who did not detain him under the Mental Health Act. He suggested that the Respondent should call Ms Sandford and the psychiatrists as witnesses.

92. Mr Aggarwal said that any failure to co-operate with the Respondent, including undergoing an occupational health assessment was wholly linked to his mental illness. In November 2018, he started to co-operate but did not receive any response, as shown in the Scott Schedule.

93. In his final evidence after cross examination, the Appellant said that he is no longer copying in large numbers of people to his email correspondence. At one stage he was sending emails to 150 people. He said that he wanted to apologise to Ms Sleeman and was willing to go a long way to make amends. As regards Ms Sandford he said that he apologised if there was a psychiatric link to what happened.

Recent events

94. On cross-examination about the email sent to the Tribunal forming part of his witness statement at D464, the Appellant said that my order following the telephone case management hearing had recorded that he had struggled to participate effectively. He said that he had reached a point of crisis and it was a cry for help. He no longer stood by the allegations. He said that his

confidence returned after I had acknowledged that he was a vulnerable witness. He said that in the past he might have fallen out with me and said that he had reflected on previous events, such as when he accused Judge Atkinson of bias. He did not agree that the email he sent was similar to accusations he had made in the past when mentally unwell. He felt it was different because my order had acknowledged that he became distressed. He said that there was a mutual acknowledgement and respect.

95. As regards the concerns about witness coaching raised in his statement at page D154, the Appellant said that the issue of witness coaching came to his attention as a result of internet searches and going to regulatory websites. Witness coaching was raised in the guidance he had included at page D159. He said that he was not trained in spotting witness coaching and could not go further in answering whether he thought the Respondent's witnesses were being coached.

Previous mental illness

96. The Appellant said that he agreed with Dr Grewal's report at page C172. However, he said that he had felt hurt because Dr Grewal had given a verbal assessment at the end of his examination of the Appellant which was different from the written report he finally wrote. As regards the addendum at page C189 he said that he did not meet Dr Grewal before he wrote this report so he did not know how he reached his conclusions. However, he said that he was taken to hospital the day after Dr Grewal wrote his report so Dr Grewal was right that his mental health had deteriorated. In fact Dr Grewal probably did not go far enough.

97. When asked whether he agreed that he was not fit to see patients at the time of Dr Grewal's report, the Appellant replied that he had a mental illness, which was not admitted or acknowledged at the time. When asked about whether he was suitable to be on the Performers List he said that he behaved in the way he did because his mental illness which was a protected characteristic. He considered that he should not be considered unsuitable because of a mental illness. He referred to his interpretation of regulation 35 of the Regulations, set out below. He said that he agreed that it was not appropriate for him to see patients between April 2016 and December 2016 and said that was why the General Dental Council made interim orders.

Impairment due to health and regulations

98. Much of the Appellant's oral evidence about the actions of the General Dental Council and the 2013 Regulations was about his interpretation of the 2013 Regulations. This is dealt with below under our legal analysis. The Appellant did not accept any of the propositions put to him about the Respondent's interpretation of the 2013 Regulations. The Appellant said that his indefinite suspension would be reviewed every two years, and that he has asked for an early review which has been refused by the General Dental Council.

99. The Appellant said that he felt the General Dental Council had been harsh in October 2017 because they said that he had agreed to take medication too late for it to be counted as insight and that the suspension was too long. He was given the maximum suspension, whereas it would have been better to start with the minimum period in the interests of helping him get back to work. He said that Aripiprazole has immediate effect and there was no reason to

wait for six months for him to recover. He considered the indefinite suspension of August 2020 to be far too harsh. He said that he should have been allowed to see a different psychiatrist in the same way as a differently constituted panel had been required to hear this appeal. He said that he had now reached the point where he would agree to see one of those three psychiatrists if he had to.

100. The Appellant said that he would agree to the Respondent having access to medical evidence in the form of a psychiatric assessment arranged by himself if the Respondent would help him to get medical evidence for the General Dental Council. He referred again to the Bleasdale case in which the NHS had asked the General Medical Council for an early review of a suspension. He said that he did not agree to share the discharge summary from his most recent admission to hospital on the basis that it did not deal with fitness to practise or work. When asked how the Respondent could ask the General Dental Council to review his suspension without any evidence as to his mental health, he said that the NHS has a budget of billions and 10% of GDP.

Lack of clinical experience over 5 years

101. The Appellant did not agree that his clinical skills could only be maintained by being in practice. He said that there have been no allegations raised about his clinical abilities by either the General Dental Council or the Respondent. He said that there was no requirement in legislation to undergo a period of induction or refresher training. He pointed to the fact that in regulation 14(7) of the 2013 Regulations any period of suspension is not to be counted when calculating whether a practitioner has performed NHS services. He said that he was not ruling out practising subject to conditions but they needed to be implemented in a positive way. He said that he had the foresight to know where to go for help, mentioning LonDEC, a training provider near Waterloo.

102. The Appellant suggested that regaining his skills would be like riding a bicycle after a break. When challenged on this, he said that if the General Dental Council allows him to return, he will be able to do any dental work. He said that he does not see why there are so many bodies to deal with and said that he wanted his case with the Respondent joined and linked to his General Dental Council case in order to eliminate the stress of dealing with regulators.

103. The Appellant said that he has a knowledge base, but it is very difficult to say how he would be on his first day. He still remembers how to hold the instruments but has never been out of work for five years before. He said that he would be happy to attend a learning needs assessment. When asked whether he needed a learning needs assessment in order to keep patients safe he said that patient safety was, of course paramount. He said that he was not looking to work in a new area, such as orthodontics. He would keep to areas he had previously worked in and might start with simpler procedures in the first week or two.

104. When asked about not having any recent clinical experience, the Appellant said that he understood the legal restrictions on him due to the General Dental Council suspension and that he could not work as a dentist in the United Kingdom.

105. When asked by the panel about the roadmap back into practice, he said that he was not resistant but felt he was going back in time to 2002 when he

graduated and did vocational training. He felt that conditions could be a barrier to progress but was willing to be subject to conditions. The problem was he could not do any work whilst suspended. He said that he was willing to engage and do all that it takes to get back to practice.

The Tribunal's conclusions with reasons

Did the Respondent have the right to remove the Appellant from the Performers List on the basis that he was not suitable to be included?

106. The Respondent argued that it was entitled to remove the Appellant from the Performers List under regulation 14(3)(d) of the 2013 Regulations on the basis that he was unsuitable to included in the Performers List. The Appellant disagreed that this option was available to the Respondent. He considered that his case should be treated as a "health" case, rather than an "unsuitability" case.

107. In his response to the Scott Schedule, his skeleton argument, written closing submissions and oral closing submissions, he referred us to:

    a. section 27B of the Dentists Act 1984 (which provides that a dentist cannot be erased from the General Dental Council's register if his fitness to practise is impaired solely on the grounds of adverse physical or mental health);

    b. regulation 35 of the 2013 Regulations which provides for mandatory removal of dentists from the Performers List in some cases, with an exclusion for health cases;

    c. the definition of "health case" in regulation 29 of the 2013 Regulations;

    d. mental illness amounting to disability and, therefore, a protected characteristic under the Equality Act 2010.

108. The Appellant argued that no concerns had been raised as to his technical ability and that the incidents which led to his original suspension and then removal from the Performers List were entirely attributable to his poor mental health. At the hearing, he argued that the 2013 Regulations should be read as a whole and that the Respondent should not be permitted to remove him for unsuitability when the relevant behaviour was entirely attributable to his mental health.

109. We disagree with the Appellant about this. The 2013 Regulations governing the Performers List are an entirely self-contained set of rules. They are completely different from the legislation governing the General Dental Council's register. In deciding this appeal, we are not deciding the Appellant's fitness to practise as he has asserted. Instead, we are deciding his fitness for purpose to be included on the Performers List.

110. The Appellant said at the hearing that the existence of the two regimes was confusing and created additional burdens for him. We understand that it is difficult for the Appellant dealing with two sets of rules relating to his ability to operate as a dentist. However, we are sure that the 2013 Regulations and the Dentists Act 1984 are supposed to operate entirely independently. This is because when something decided by the General Dental Council under the Dentists Act is important to a decision by the Respondent under the 2013 Regulations, the 2013 Regulations say this explicitly. For example, regulation

12(1A)(b) states that a dentist must be suspended from the Performers List if he is the subject of an interim suspension order made under the Dentists Act. Part 3 of the 2013 Regulations (regulations 29 to 35) deal specifically with dental practitioners and the impact of various consequences under the Dentists Act and the National Health Service Act 2006 on decisions made under the 2013 Regulations.

111. The Appellant is correct to say that, in cases such as his, where a dentist is suspended by the General Dental Council on health grounds, the dentist cannot be removed from the Performers List under regulation 35 of the 2013 Regulations. However, we agree with the Respondent that the rules in regulation 35 about removal are entirely distinct from the rules in regulation 14. Regulation 35 is an obligation, containing the word "must". The Respondent has no choice but to remove a dental practitioner if he is suspended by the GDC. Regulation 35 begins with the words "In addition to the grounds in regulation 14(1)", showing that these obligations are in addition to the other mandatory obligations to remove contained in regulation 14(1). By contrast, the power to remove under regulation 14(3)(d) is discretionary. It contains the word "may", meaning that the Respondent has a choice as to whether to remove the dental practitioner.

112. It makes sense that cases involving dental practitioners who have been suspended in "health cases", as defined in regulation 29 should be dealt with under this discretionary route in regulation 14(3), rather than the mandatory route in regulation 35. The discretionary route enables the Respondent to consider the nature of the practitioner's illness and make sure that any removal is proportionate, taking into account the concerns about disability discrimination raised by the Appellant.

113. We consider that if the Minister making the 2013 Regulations had intended to limit the application of regulation 14(3)(d) of the 2013 Regulations so that it did not apply in cases where a dentist had been suspended by the GDC for health reasons, the Regulations would have said this explicitly.

114. Therefore, we consider that the Respondent was right to consider whether the Appellant should be removed from the Performers List under regulation 14(3)(d) on the basis of suitability.

<u>Is the Appellant unsuitable to be included in the Performers List?</u>

115. Regulation 15(1) and (2) of the 2013 Regulations set out the matters which the Respondent, and, by extension, the Tribunal must consider when making a decision about whether a practitioner should be removed from the Performers List.

116. The original decision by the PLDP and the consideration by the Tribunal in July 2018 was based on the events which occurred prior to the Appellant's suspension in April 2016 and how the Appellant dealt subsequently with the Respondent and the General Dental Council. We are considering the situation as it is now. Events have moved on considerably since 2018, including the Appellant being diagnosed with a mental illness and receiving inpatient treatment.

117. The Respondent argued that the Appellant was unsuitable to be included in the Performers List on four grounds:

a. his current state of health

b. his insight into his current health needs and previous behaviour;

c. the findings of the General Dental Council about the Appellant and the outcome of its regulatory decisions relating to him;

d. the Appellant having been out of clinical practice for over five years.

Current state of health

118. The only evidence we have about the Appellant's mental health comes from him directly. He has provided us with the reports of Dr Grewal and told us about his admissions to hospital, including a recent admission in February 2021. He has told us about his prescribed medication and the advice of the community mental health Team that he should continue taking it.

119. We accept the Appellant's evidence about his medication and his recent admission to hospital. His evidence was cogent and consistent and there is no reason to doubt what he said.

120. The Appellant has chosen not to disclose any of his medical records and we have seen no recent psychiatric assessment of him. It is not our role to make a decision on whether the Appellant is currently well enough to work as a dentist. That is the role of the General Dental Council. As the Appellant pointed out several times during the hearing, the General Dental Council has an infrastructure which enables it to make this assessment. It can commission independent medical advice and draw conclusions if a dentist does not agree to be medically examined. Our role is to decide whether the Appellant is suitable to be on the Performers List. In doing so, we are required to take into account the decisions of the General Dental Council under regulation 15(2)(c) and (f).

121. We find that the fact of the Appellant having had a recent hospital admission in respect of his mental health is not, in itself, sufficient to make him unsuitable to be included in the Performers List. With sufficient insight and understanding of his or her mental health, it could be possible for a practitioner to have brief admissions to hospital and to remain suitable for inclusion on the Performers List. We consider it more important to consider the Appellant's insight into his mental health and the decisions of the General Dental Council about him.

Insight

122. As regards the events in 2015 and 2016, we find that the Appellant has made considerable progress in responding appropriately since the PLDP's decision in December 2016. He apologised to Ms Sleeman and, although he could not remember having pushed her, he was prepared to accept that this was her recollection of what happened. So far as the telephone conversation with Ms Sandford was concerned, it was difficult to judge the Appellant's insight. He did not appear to entertain the possibility that he might have said he was driving at 120 miles per hour, even though he was not. We find it highly unlikely that Ms Sandford would have made the racist comments alleged by the Appellant by the time. In cross-examination, the Appellant did not initially accept that he might have made a mistake about this. However, after time for reflection he did say that his research into trauma based mental illness suggested he might have gaps in his memory or that interference on the

telephone line caused him to misinterpret what was said. He was then prepared to countenance the possibility of him being mistaken.

123. The Appellant's answer to most of the questions about the events in 2015 and 2016 was that he was suffering from mental illness at the time and could not be held accountable for what he did. He did not say in terms that he had been unsuitable at the time because of his mental illness. Therefore, we consider that the question of his insight into what happened in 2015 and 2016, including the possibility of whether he would recognise any repetition, is inextricably linked to his insight into his mental illness now.

124. The Appellant has made considerable progress in managing his mental health since he was first admitted to hospital and he is to be congratulated on this. He accepts that he has a mental illness and that it might affect his ideas and behaviour. He has a clear understanding of the various ways in which he can get help if he needs it. We accept his evidence that he recently agreed to go to hospital on a voluntary basis when this was suggested by medical professionals and that he did not leave until his departure had been agreed by his treating team. We also accept his evidence that he used his time in hospital productively, engaging in occupational therapy and psychology sessions. The late evidence shows that he is seeking out further psychological input and this has been authorised by the community mental health team. There is evidence in the bundle that the Appellant has sought to educate himself about his mental health (pages A554 to A564, D211 to D221, D290 to D292). He also told us about his interest in Professor Tyrer's work.

125. Despite this, we are concerned about the Appellant's level of insight into his mental health. We carefully considered the arguments he made at paragraphs 116 and 117 about cultural differences in understanding of insight. However, we consider that the difficulties with his insight are based on objective criteria as follows.

126. First, the Appellant has chosen to stop taking his prescribed anti-psychotic medication, against medical advice. When asked about this, and about his willingness to take depot medication instead of oral medication, the only purpose he identified for taking medication was in order to get back to work. The Appellant identified the possibility that his medication might help calm racing thoughts, but did not say that this was a good thing or would help him achieve a sustained period of good mental health. The Appellant's complaints about the medication were related to health care professionals questioning whether he had taken it and the lack of psychological therapy. However, he did not give a good reason for disagreeing with the medical advice that the medication would help him. We find that the Appellant's failure to follow medical advice shows a lack of insight into his mental health and the role that medication could play in improving it. His willingness to take depot medication makes no difference to this conclusion because the Appellant has agreed to take depot medication so that he can get back to work, not because he agrees it is important to follow the advice of medical professionals.

127. Secondly, the Appellant's arguments about his mental health focus on the impact on him, and not on how his presentation might affect his care and treatment of patients. He refers to disability being a protected characteristic and on the importance of work to his mental health. However, a period of physical or mental ill health can affect the suitability of a performer to remain

on the list. A dentist who could not use his hands effectively due to a tremor or joint difficulty would not be able to treat patients effectively, through no fault of his own. Similarly, a period of mental ill health can affect a dentist's judgement or ability to communicate with patients to the extent that he cannot treat them effectively.

128. Thirdly, the Appellant has chosen to give very limited disclosure as to his mental health. His own evidence is that he has had more than one hospital admission since the reports of Dr Grewal. However, he did not provide discharge summaries from any of these admissions. Furthermore, the Appellant's evidence was that he did not agree to be assessed by any of the three psychiatrists put forward by the General Dental Council before its decision in August 2020. He said that he would now see one of those psychiatrists, but only because that would be necessary if he were to return to the General Dental Council's register. We draw inferences from the Appellant's limited disclosure and his refusal to engage with the General Dental Council psychiatrists that he is not willing to accept unwelcome and difficult analysis of his mental health. We consider that effective insight into mental health involves being able to listen to and accept a range of opinion.

129. The Appellant's lack of insight puts him at risk of not understanding when he has become unwell and not accepting the observations of medical professionals that he has become unwell. Although he identified his wife as a person who was able to monitor him, it is far more important that he listens to mental health professionals. The lack of insight also means that he is at risk of providing substandard treatment to patients without realising it. Therefore, we find that the Appellant's lack of insight into his mental health currently makes him unsuitable to be on the Performers List.

Findings of the General Dental Council

130. Regulation 15(2) of the 2013 Regulations requires us to take into account the findings of the General Dental Council. The most recent finding of the General Dental Council is that the Appellant has been indefinitely suspended (page C205). We do not have the reasons for this decision. They have not been provided to the Respondent as they are confidential. The Appellant has not chosen to provide us with a copy of the reasons.

131. Therefore, we are left with a finding by the General Dental Council that the Appellant should be indefinitely suspended and the knowledge that this decision was made by the Health Committee. The Appellant has told us that this indefinite suspension is reviewed every two years and that he asked for an early review which was refused. Therefore, there is no immediate prospect of the Appellant returning to the General Dental Council register.

132. In the light of this, we do not consider that the Appellant can be suitable to remain on the Performers List. He is not able to work as a dentist in the UK, whether carrying out NHS services or otherwise. We do not consider that it would be more proportionate to suspend him from the Performers List than remove him because there is no indication of whether he will be reinstated to the General Dental Council register. Regulation 12(1) of the 2013 Regulations states that suspension is only available to the Respondent whilst it considers whether to remove. The Respondent now has all the information it needs to take a decision to remove.

Being out of clinical practice for over five years.

133. It is not disputed that the Appellant has not practised dentistry for five years. He says this does not affect his suitability to remain on the Performers List. He points to the fact that no issues were raised about his clinical expertise at the time of his original suspension and removal and his history of successful training and clinical practice. He points to the evidence of the multiple training courses he has undertaken during the five years he has been out of practice.

134. Dr Lipp said that Appellant was to be applauded for having undertaken self-funded training. We agree with this. We are impressed with the way in which the Appellant has worked hard to keep his knowledge up to date (pages D68 to D105). However, we do not consider that this knowledge based training will be sufficient. The Appellant agreed that he has not been able to carry out any practical training since he was suspended by the General Dental Council. We understand that the Appellant has previously performed well clinically as a dentist and that no concerns were raised about his performance. However, it is inevitable that any dentist would require supervision and retraining after a period of five years without practical experience. The Appellant cannot gain practical experience until he returns to the General Dental Council register.

135. In oral evidence and in his closing submissions, the Appellant referred to the possibility of carrying out remedial work with LonDEC. However, the Appellant has not provided information about the training which LonDEC provides or an offer by LonDEC to carry out training whilst he remains suspended by the General Dental Council. The fact remains that the Appellant cannot get practical experience whilst he is suspended. Therefore, we do not consider that the existence of LonDEC makes any difference to our conclusions.

136. The Appellant also referred in his seventeenth witness statement and his closing submissions to regulations 18 and 19 of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 and the Care Quality Commission's guidance on it. The argument was that he was permitted by these regulations to work whilst carrying out remedial activity. However, this regulatory regime is in addition to the professional regulation to which the Appellant is subject as a dentist. He cannot work as a dentist until the General Dental Council suspension is lifted. He will require a period of supervision and retraining once the suspension is lifted.

137. We have some sympathy with the Appellant's complaint about the difference between the financial support for retraining offered to GPs and that offered to dentists. We can see that it will take a lot of time and effort for the Appellant to regain his clinical expertise once he has been reinstated by the General Dental Council. We can see from the evidence of Dr Lipp that there is limited support available to dentists wishing to return to practice after a period of absence. However, our role is not to decide what support should be given to the Appellant to return to work. Our role is to decide whether he is suitable to be on the Performers List now. We conclude that he is not, because he has been out of clinical practice for five years.

138. In the discussion about the length of time that he has been out of clinical practice (as well as in his closing submissions and skeleton argument), the Appellant drew our attention to regulation 14(5) and (7) of the 2013 Regulations. Regulation 14(5) gives the Respondent a power to remove a practitioner from the Performers List if he has not provided NHS services for

12 months. Regulation 14(7) states that periods of suspension are not to count towards the 12 months. We do not consider that regulations 14(5) and (7) are relevant because the Respondent is seeking to remove the Appellant under regulation 14(3)(d).

Should the Appellant's inclusion on the Performers List be linked to his inclusion on the General Dental Council's Register?

139. The Appellant suggested that the Respondent could suggest an early review of his suspension by the General Dental Council, for which he considered the Bleasdale case to be a precedent. He also suggested that the Tribunal could link his Performers List registration to this General Dental Council registration in the way he perceives the Tribunal to have done in *Karunasekara v NHS England*. In this way, when he was reinstated by the General Dental Council, he would automatically return to the Performers List subject to any conditions imposed by the General Dental Council.

140. We understand why this proposition is attractive to the Appellant. He spoke about his frustration with having to deal with two regulatory bodies. However, we do not have power under the 2013 Regulations to make the order suggested by the Appellant. Under Regulation 17(4) we can only make a decision which the Respondent could have made. The power to impose conditions is in regulation 10 and there is no power to impose conditions where a practitioner has been found to be unsuitable.

141. Even if we did have power to impose conditions, we would not consider it appropriate to link the conditions to those imposed by the General Dental Council in an open ended way. In the case of *Karunasekara*, there were already conditions imposed by the General Dental Council. The Tribunal knew what they were and allowed Mr Karuasekera a limited period of 12 months to secure employment. The Appellant's suggestion would mean that he would return to the Performers List without any opportunity for the Tribunal or the Respondent to review the General Dental Council's conditions and consider whether additional conditions were needed for NHS dentistry.

Conclusions and proportionality

142. Our finding is that the Appellant is currently unsuitable to be on the Performers List because of his lack of insight into his mental health, the fact that he has been indefinitely suspended by the General Dental Council, and the fact that he has not been in clinical practice for five years.

143. We considered carefully whether the Appellant should be removed from the Performers List. We took into account the considerable impact on his livelihood and the arguments he made about work being good for mental health. We considered the need to avoid stigma related to mental illness and the Appellant's arguments about disability discrimination. We also took into account the considerable and commendable progress the Appellant has made in managing his mental health and acknowledging and addressing the events of 2015 and 2016.

144. However, when weighing these considerations against the importance of patient safety, we concluded that the Appellant should be removed from the Performers List. His lack of insight means that he is unlikely to realise when he is putting patients at risk. The length of time he has been out of practice means that he does not currently have the skills to keep patients safe whilst

practising and his indefinite suspension means he has no foreseeable prospect of gaining the supervised experience he needs to regain his clinical skills.

145. We also took into account the fact that the Appellant can apply to rejoin the Performers List in future and that there will be a further right of appeal against any refusal by the Respondent to include him on the Performers List.

146. We wish the Appellant the best for a full mental health recovery and a return to clinical practice when appropriate.

Decision:

The appeal is dismissed.

The Appellant is to be removed from the Performers List

Judge Faridah Eden

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

Date: 27 May 2021