Primary Health Lists

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

Heard on 1 August 2018 at Port Talbot Justice Centre
Panel only on 24 September 2018

[2018] 3231.PHL

BEFORE
Mr C Limb (Judge)
Ms M Harley (Specialist Member)
Dr G Sharma (Professional Member)

BETWEEN:

Dr Tity Chauhari Tjiu

Applicant

v

NHS Wales
CwmTaf University Health Board

Respondent

DECISION

Attendance:
Dr Tjiu
Mr David Juckes (Counsel for Respondent); Mrs Leanne Fowler (Solicitor for Respondent); Dr Richard Quirke; and Mr John Palmer

Preliminary

1 Dr Tjiu represented himself. Both at the outset of the hearing and subsequently he was advised by the panel to make plain (and to challenge) any factual assertions of the Respondent with which he disagreed. We assisted him in putting questions to the Respondent's witnesses if he appeared to indicate a position which was contrary to their case but had difficulty in formulating such into a question.

2 In the interests of brevity the Respondent will be referred to as the LHB in this decision.

3 In the course of the hearing we received additional documents with agreement of both parties: an email from "GPC Wales Negotiator" of 25 July 2018 referring to a state-backed indemnity scheme, a

wales.nhs.uk website document referring to a Welsh Government announcement of state-backed indemnity scheme "planned from April 2019", the schedule to Dr Tjiu's insurance policy and covering letter from his broker, and a document "action planning from coaching – 10 November 2014"

4 We gave directions after the first hearing for written submissions as to suggested wording if we were to impose a condition relating to indemnity insurance. The Respondent sent 2 letters, one of 15th August 2018 "proposed list of conditions" and one of 16th August 2018 referring to explanation of its rationale in relation to run-off cover although covering other issues as well. The Appellant sent his proposals for conditions with his email of 28th August 2018.

Background

5 Dr Tjiu first registered with the GMC in 2000 and has been on the GP Register since 2006. He was for several years based full-time in a practice, did not work for a period 2015-6, and from 2016 has undertaken locum work. He was and (as far as we are aware) is on the Medical Performers List (MPL) of Hywel Dda LHB, but most of his locum work came from the area of the Respondent and he applied to join their MPL under cover of his letter of 18 October 2017 and attached application form (A19 onwards).

6 The application was refused as notified by letter of 21st December 2017 from Dr Quirke (A10 on) by reference to inadequate level of medical indemnity cover, a failure to declare information relating to an investigation by the Public Service Ombudsman for Wales (PSO) where the outcome appeared to be adverse, and a failure to give accurate details of his referral to the GMC for clinical assessment. They had made enquiries of Hywel Dda LHB prior to coming to their conclusion. Dr Tjiu wrote again to the Respondent on 14 January 2018 (A26), and lodged his appeal to this tribunal.

Issues

7 The application was subject to regulation 4A of the National Health Service (Performers Lists) (Wales) Regulations 2004 ("Performers Lists Regs") which by reference to 4(4)(h) sets out the required declaration when making an application in the same terms as Annexe 1 question (l) to Dr Tjiu's application, namely "Have you been subject to any investigation into your professional conduct by any licensing, regulatory or other body, where the outcome was adverse?". The Respondent contends that Dr Tjiu failed to give an accurate answer because of no reference to a PSO investigation and because information given as to GMC referral/investigation were not accurate. Although not referred to in their refusal letter the Respondent also contends that there was failure to refer to an NCAS referral. The first issue is whether there was failure to disclose or disclose accurately in his application.

8 By reference to regulation 4(3)(h), 4A requires 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 performer..". The second issue is whether Dr Tjiu's indemnity cover was appropriate and/or what are the necessary minimum terms of indemnity if such was to be imposed as a condition.

9 The foregoing is no more than a summary and we have considered both the written skeleton arguments and the Scott schedule.

Legal Principles

10 The Performers List Regs are included in full within section E of the bundle and we do not set out full quotations within this decision save as in the previous paragraphs.

11 We note Regulation 6 (1) (4) and (5), Regulation 15(3) and Regulation 8.

12 We informed the parties during the hearing that the issue of indemnity might be considered as an appropriate subject of a condition and heard oral argument and received written submissions as referred to in paragraph 4 of this decision.

Evidence

13 It is noted at the outset that there was very limited factual issue.

14 The history of investigations or referrals is for the most part not in dispute. The only difference of substance between the information from Hywel Dda LHB in exhibit RQ09 to Dr Quirke's statement (C42-4) and that in Dr Tjiu's statement paragraphs 14-5 and its exhibits relates to the order of events and whether the GMC involvement started with and flowed from Dr Tjiu's self-referral following his police caution or whether there were separate referrals by LHBs or others. The GMC letter and its annexe at page D15 onwards gives detail of chronology as well as the basis for its decision.

15 The substance of the involvement of the PSO, NCAS and GMC and their respective findings or actions or conclusions are not in dispute, but rather whether Dr Tjiu made a false or inadequate declaration regarding them. All those bodies did in their respective functions not consider Dr Tjiu unfit or unsuitable to practice. Similarly, Hywel Dda LHB considered him suitable to be on their list (subject to the issue as whether his work was being undertaken in their area).

16 In the foregoing context we consider that the first issue is largely to be determined by our own judgment having heard both sides' arguments and submissions rather than by resolution of a factual issue.

17 We now turn to the evidence relating to indemnity/insurance.

18 Dr Tjiu has been refused cover by the indemnity organisations since 2015. From 2016 he returned to practice and obtained insurance through a broker with Corvelia Limited. That had a limit of £2.5m but subsequently he has been able to obtain cover for £10m. That is (in Dr Tjiu's summary sent 28th August) £10m for any one claim and in the annual aggregate, excludes birth-related incidents but not pre-natal incidents, has a policy excess per claim of £20,000, and has run-off cover available but which can only be purchased on retirement or ceasing to work.

19 As more fully set out in their documents sent to us in August after the first hearing, the Respondent takes the view that £10m cover is appropriate but per claim, with run-off cover for claims arising after practice has ended, with no exclusions for any particular conditions or illnesses, and with monthly assurances as to the means to cover an excess of no more than £20,000. They refer to GMC concerns in 2017 as to interpretation, NHS England guidance also in 2017, and to the decision of the All Wales Associate Medical Directors in Primary Care Peer Group adopting a common approach requiring: no exclusions on grounds of conditions/health issues/diagnosis; minimum capped indemnity of GBP 10 million per claim; minimum run off cover of 10 years; and annual declaration of adequate insurance/indemnity cover.

Decision and Reasons

20 We found all three witnesses to be straightforward and reasonable, and there was no suggestion to the contrary in cross-examination. There was no defined challenge to any of their factual evidence except in relation to the history of GMC involvement. In his oral evidence we did not find Dr Tjiu evasive or otherwise unsatisfactory. In so far as it is necessary to make a finding as to the GMC history we consider that the history given by the GMC itself at pages D16 onwards is the most likely to be correct. We note that it begins with the police caution and that the matters referred to under the heading August 2014 –November 2015 arose "during" that investigation. That is broadly what Dr Tjiu told us.

21 The first issue in the case does not arise from a factual dispute but concerns whether the declarations in his application were false or materially incomplete. The initial aspects of such consideration are whether the PSO and NCAS are bodies within the ambit of "licensing, regulatory or other body" as in the Performers Lists Regs and the application. The context indicates that the bodies referred to must be bodies who have a function including making decisions including "adverse outcomes", and are in the broad nature of bodies giving professional assessments of doctors for the benefit of the public. There is no interpretation section in the Regulations to assist us.

22 The PSO is in our judgment not a licensing body, but its broad purpose is to make public findings upon professional behaviour and/or make recommendations in such context. It is part of a system of regulatory bodies or quasi-regulatory bodies. It is within the ambit of the Regulations.

23 The NCAS is upon our understanding and in our professional experience a body which only acts upon referrals from healthcare organisations and gives advice to those organisations. It is advisory and not a decision-maker. In our opinion it is not within the ambit of the Regulations.

24 The next question in our judgment is whether the GMC or PSO made decisions which were adverse outcomes and not declared.

25 We do not have direct evidence of the PSO findings but Dr Tjiu provided the GMC document which at page D17 refers to the PSO as upholding each aspect of complaint including that about the care provided by Dr Tjiu. That is in our judgment self-evidently an adverse outcome.

26 One aspect in relation to the GMC is whether it made adverse findings and another is whether there was an adverse outcome when there was an eventual conclusion that he was fit to practise. There is no dispute as to the concerns as to opiate prescribing and out of hours practise being upheld, that the Interim Orders Panel placed restrictions on out of hours practice, and that a performance assessment was undertaken in such context. That assessment led to a conclusion that he was fit to practise but did not negate the findings which led to the assessment. The assessment led to a view as to future fitness not a finding that there were not failings in the past. Another related aspect is whether the information in the application (page A25) was properly considered "full details". There was performance assessment (disclosed by Dr Tjiu). The GMC thereafter considered (D23) that "none of the concerns about Dr Tjiu's clinical practice resulted in regulatory action".

27 The underlying purpose of the system of lists, regulation and indeed of this tribunal is to protect the safety of patients. We consider ourselves entitled to hold that medical practitioners have a duty to exercise a high level of care when acting in this context. In making declarations we would expect them to err on the side of caution.

28 We do not consider that looked at objectively the declaration (A25) gave full details of investigations involving an adverse outcome. Adverse findings and not only adverse sanctions are relevant and there is no reference in the declaration to anything other than the police caution except for "This lead to the GMC starting investigation into my clinical practice", and in similar vein "concerns were being investigated by the GMC" and "I underwent the GMC performance assessment", in

each case without indication of the nature of findings or concerns other than the police caution.

29 We therefore conclude that there was failure to give full details of investigations into professional conduct.

30 We do not find that Dr Tjiu deliberately made a false declaration but rather that he was nonchalant about it in the context of a transfer application when he was already on a list with an LHB who knew full details. If he had been asked for fuller details after his application we consider that he would have provided them, as he did in his letter of 14 January 2018 after the refusal (A26-8). He knew that Hywel Dda would be contacted.

31 Regulation 6(4) and (5) indicate that in coming to a conclusion as to unsuitability we should consider not only a failure in making a full declaration but all the surrounding circumstances. We consider it relevant that we do not find a deliberate failure to give full details, that Dr Tjiu was not consciously dishonest, and that the subjects which were not detailed did not lead to a conclusion that he should not be able to practise. We do not conclude that he is unsuitable in those circumstances.

32 In those circumstances we allow the appeal in the relation to the first issue.

33 We now turn to the indemnity issue.

34 We received no evidence that GPs in general, or Dr Tjiu in particular, had been informed of the requirements for the minimum terms of indemnity cover. The Respondent's own evidence was to the effect that there was notable discussion on the topic from 2017, and it appears that there is likely to be state-backed indemnity in the near future albeit without clarity as yet as to its terms.

35 We consider that in the absence of clear guidelines available to Dr Tjiu in advance it would be inappropriate to consider that inadequate indemnity made him unsuitable but rather that, if his indemnity was inadequate, the issue should be dealt with by a condition which sets out minimum terms clearly.

36 In principle we consider that there should be no requirement for a GP to obtain indemnity cover from one of the indemnity organisations (such as the MPS with whom Dr Tjiu had cover until 2015). Cover from a professional indemnity insurer would be adequate if its terms were adequate.

37 If Dr Tjiu's evidence based upon advice received from his broker as to the cover able to be found on the open market is correct, it appears to be the case that no cover meeting the Respondents' proposed terms is

available. Such has given us cause for considerable concern and consideration.

38 Having considered the issue at length we have concluded first (not contested) that indemnity cover for claims by patients is appropriate and necessary and a fully reasonable requirement. It is required by regulation 4(2)(k). The minimum terms of such cover are not specified in any regulations. There has recently been advice/guidance on such matters as set out in the Respondents' documents sent after the first hearing.

39 It is in our opinion within the proper remit of an LHB to decide upon its requirements for indemnity cover for GPs upon its list. Subject to those requirements being objectively within the ambit of reasonable opinions, we do not consider it is within our expertise or knowledge to gainsay their conclusions. We would expect the LHB to make its requirements known to those on its list or applying to join its list. It will obviously be preferable (but not within our powers to order) that all LHBs adopt the same requirements and we are aware that Dr Tjiu has been on Hywel Dda's list with a lower level of cover.

40 Our general knowledge from our professional lives (and we are an expert tribunal meant to use such knowledge) leads us to conclude that a level of £10m cover is reasonable: indeed there are claims above such amount even though few in number. There is no basis upon which not to conclude that if there are claims that more than one might arise within the same policy year, and it is reasonable to require a level of £10m cover per claim not per policy year.

41 Claims can arise after retirement from practice and run-off cover is reasonable in such context. This may be the area in which it is most difficult to obtain cover in the open market but we have been clearly informed that the indemnity organisations provide such cover as part of their annual cover and not only at the time of retirement, and it is therefore available at least to that extent and it is a reasonable requirement for the protection of patients.

42 Exclusion of certain conditions would cause great difficulties in practice and be unworkable. For example, the exclusion on Dr Tjiu's current policy in relation to delivery of a child would seem unworkable if he was called to attend a pregnant patient who quite unexpectedly went into labour in his presence and continued rapidly to delivery. Would he be expected to abandon her?

43 Annual confirmation of insurance is objectively reasonable, and would upon our understanding feature as part of annual appraisal in any event.

44 The two documents sent by the Respondent since the first hearing have slightly different outlines of minimum terms/cover, and we

consider it reasonable and fair to apply the slightly less onerous terms in the letter of 16th August which reflects the conclusions of the All Wales group and is foreseen to be the basis adopted throughout Wales.

45 We therefore allow the appeal against refusal to include Dr Tjiu on the list but impose conditions that his professional indemnity cover shall include: (i) no exclusions on grounds of conditions/health issues/diagnosis; (ii) a minimum capped indemnity of GBP 10 million per claim; (iii) minimum run off cover of 10 years; and (iv) an annual declaration of adequate insurance/indemnity cover. Such are reasonable and proportionate.

46 We consider that Dr Tjiu's appeal should be allowed to the extent that he is accepted upon the Medical Performers List of the Respondent but with the conditions as to indemnity cover set out in paragraph 45.

Order

43 The appeal is allowed in the terms of paragraphs 45 and 46.

Judge Christopher Limb
Primary Health Lists
First-tier Tribunal (Health Education and Social Care)

Date Issued: 27 September 2018