

Primary Health Lists

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

On the papers on 10 January 2019

[2018] 3251.PHL

BEFORE

**Ms Siobhan Goodrich (Judge)
Mr Martyn Green (Specialist member)
Mr Mike Cann (Specialist member)**

BETWEEN:

DR HELEN WEBBERLEY

Appellant

and

**NHS WALES/ANEURIN BEVAN UNIVERSITY
HEALTH BOARD**

Respondent

DECISION ON NATIONAL DISQUALIFICATION

1. On 22 October 2018 the panel made a decision to remove the Appellant from the Respondent's medical performers list (MPL) on the grounds of her unsuitability. The panel also gave directions regarding consideration of the potential issue of national disqualification. This included a direction for the parties to state if they remained content for the panel to proceed to consider the issue of national disqualification on the papers.
2. Suffice to say that it became necessary to issue subsequent directions. We need not rehearse the history which is fully set out in the various directions issued. In the event by email dated 11 December 2018 Dr Webberley unequivocally consented to consideration of the issue of national disqualification on the papers. (The Respondent had always requested consideration of the issue of national disqualification on the papers).
3. The consent of the parties is just one factor. We have made our own decision regarding the mode of hearing.
4. Both parties have been provided with ample opportunity to place any material on which they seek to rely before us. Having considered the material before us we consider that we can properly make a decision on the papers without a

hearing pursuant to rule 23 of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care) Rules 2008 (the Rules).

The Law

5. The discretionary power to direct national disqualification is set out in the National Health Service Act Wales 2006 (as amended by the Transfer of Tribunal Functions Order 2010 (S.I. 2010/22)):

“115 National disqualification

(1) If the First-tier Tribunal removes the practitioner from a list, it may also decide to disqualify him from inclusion in—

(a)....

(b) the supplementary lists prepared by each Local Health Board,

(c) the lists under section 49 or 63 prepared by each Local Health Board,

(d) the lists corresponding to the lists under section 49 prepared by each Local Health Board by virtue of regulations made under section 103,

(e).....

(f) the lists corresponding to the lists mentioned in paragraphs (a) to (d) prepared by the National Health Service Commissioning Board under or by virtue of the National Health Service Act 2006, or only from inclusion in one or more descriptions of such lists prepared by each Local Health Board and the National Health Service Commissioning Board the description being specified by the First-tier Tribunal in its decision.

(2) A decision by the First-tier Tribunal to do what is mentioned in subsection (1) is referred to in this section as the imposition of a national disqualification.

.....

(7) The First-tier Tribunal may at the request of the person upon whom it has been imposed review a national disqualification, and on a review may confirm it or revoke it.

(8) Subject to subsection (9), the person may not request such a review before the end of the period of—

(a) two years beginning with the date on which the national disqualification was imposed, or

(b) one year beginning with the date of the First-tier Tribunal's decision on the last such review.

(9) The Welsh Ministers may provide in regulations for subsection (8) to have effect in prescribed circumstances as if the reference there to “two years” or “one year” were a reference to a different period specified in the regulations....”

6. The relevant regulations are the National Health Service (Performers Lists) (Wales) Regulations 2004, (hereafter the Performers Regulations), as amended. Regulation 18 A makes clear that the decision to impose a national disqualification is a discretionary decision. It is open to the person on whom a national disqualification is imposed to request a review by the First -tier Tribunal - see regulation 18 A (6). Further provisions are:

“18 A (8) Subject to regulation 19, a request referred to in paragraph (6) may not be made before the end of the period of (a) two years beginning with the date on which the national disqualification was imposed.

Review periods on national disqualification

19.—(1) If on making a decision to impose a national disqualification, the First-tier Tribunal states that it is of the opinion that the...professional conduct of the performer is such that there is no realistic prospect of a further review being successful within the period specified in 18A(8)(a), the reference to “two years” in that provision shall be a reference to five years.”

The Parties’ Respective Positions

7. The Appellant provided evidence under cover of an email dated 19 November 2018. She does not accept the panel’s substantive decision. So far as the issue of national disqualification is concerned she relies, amongst other matters, on letters written by the Respondent and sent to the General Medical Council (GMC) in 2016 and 2017 to the effect that they were not aware of any concerns regarding her work as a GP locally.
8. In her letter dated 11 December 2018 Dr Webberley states that she is currently suspended from the GMC register pending the outcome of their investigations. She submits that the decision as to whether she needs to have restrictions placed on her registration, or whether she is to be suspended or removed from the register, will be decided by the Medical Practitioners Tribunal Service (MPTS) and the GMC. She contends that it is not necessary for this panel to nationally disqualify her from her work as an NHS GP “in the interim.” Her position is that: the GMC will have the benefit of a full investigation into the allegations that are being made against her and will evaluate whether she is suitable to be a doctor working in any capacity; If they find that her professional conduct has been a risk to patients, and that risk is ongoing, or if they find that it is necessary to take action to protect the public confidence in the profession, they have the powers to take action on her registration at its core; this would affect her ability to work both as an NHS GP and as a private provider.
9. The Respondent contends that an order for national disqualification should be made, with no application for a review to be made before the end of the period of five years being permitted. The Respondent relies upon the following: the findings of the panel in dismissing the appeal were of the utmost seriousness - it found that the Appellant’s attitude is one of “*entrenched resistance to regulation*” and “*highly coloured by her lack of integrity and candour.*” National

disqualification is as necessary nationally as it is locally for the protection of the interests of patients and NHS resources as demonstrated by the reasons given by the panel for dismissing the appeal. The Appellant has not provided any evidence of mitigation, insight, or remediation. In any event, the qualities that the Tribunal found in the Appellant make it very unlikely that she is capable of insight and remediation. For example: (a) at paragraph 109, the Appellant, *“lacks the essential attributes of integrity and candour”*; (b) at paragraph 109, the Appellant, *“lacks insight”*; and, (c) at paragraph 110, the Appellant, *“has deep seated attitudinal flaws”*. Whilst national disqualification will have an impact on the Appellant, that impact is limited having regard to how little NHS work she was undertaking prior to her suspension.

Our Consideration

10. We have considered all of the material before us. If we do not refer to any particular aspect it should not be assumed that we have not considered the points made.
11. There are two discrete issues:
 - (i) Whether to impose national disqualification at all:
 - (ii) If national disqualification is imposed, whether to express an opinion that the conduct of the performer is such that there is no realistic prospect of a further review being successful within the period specified in 18A(8)(a). If we express this opinion the Appellant will be unable to apply for review before the end of five years.
12. We refer to our decision dated 22 October 2018. The findings made related to the overarching issue of Dr Webberley’s self-governance and her willingness to be subject to regulatory governance by those responsible for her continued inclusion in the MPL. In our decision we summarised the reasons for our decision regarding suitability:

“109. We consider that Dr Webberley’s sustained actions in frustrating the efforts of the LHB to reassure itself as to her standards renders her unsuitable for inclusion in the MPL. She told the investigators that terms of reference needed to be set but she knew they had already been set. We have found that her reasons for refusing access to her practice on 5 October were disingenuous and manipulative. She wanted to prevent access or investigation. The respondent has satisfied us that she lacks the essential attributes of integrity and candour which are essential to suitability. She also lacks insight. We do not consider that the attributes of suitability are divisible as between private and NHS practice because suitability is a concept that goes to the very core of practitioner’s true character and attitude. Dr Webberley’s attitude is one of entrenched resistance to regulation and is highly coloured by her lack of integrity and candour.

110. We have considered the overall effects of the past incidents and all the evidence in relation to the current situation in the round. We fully recognise that there were no significant issues regard to Dr Webberley’s clinical practice as an NHS performer when she last practiced at the Blaina surgery

in October 2015. Events since then and her responses to the LHB and HIW have revealed deep-seated attitudinal flaws in her approach to governance. The issue underpinning the need for governance is the obvious need for assurance in relation to patient safety.

111. We take full account of the impact of the decision upon Dr Webberley's ability to further her career and her ambitions. We take into account also that she was seriously unwell in 2016 and has suffered from ill health since. We have fully taken into account her past service in the NHS and her wish to practice in the NHS in future. We consider, nonetheless, that removal is the necessary, reasonable and proportionate response to the facts we have found. In our view, Dr Webberley is unsuitable to be included on the MPL maintained by the respondent."

13. The decision to impose a national disqualification is discretionary. The core rationale of our removal decision on the grounds of unsuitability was that Dr Webberley does not understand or respect the demands of governance. In our view the reasons for Dr Webberley's unsuitability were not due to local or geographical factors. This is demonstrated by the fact that she was not merely dismissive of the local health board (LHB) but was also dismissive of Health Investigation Wales (HIW) and the Care Quality Commission (CQC).
14. Dr Webberley makes the point that the MPTS will make a decision on her position on the Medical Register (from which she is currently suspended on an interim basis) so a national disqualification from the MPL is not necessary. In our view this misses the point which we explained in our substantive decision at [108]. Whatever the ultimate decision of the MPTS may be as to her fitness to practice as a registered medical practitioner, Dr Webberley's future potential ability to be included in an NHS performers list (as opposed to her registration as a medical practitioner) is governed by the Performers Regulations. We found that she is not suitable to be an NHS performer on the MPL.
15. If a decision for national disqualification is not made Dr Webberley, (if she retains her position on the Medical Register), would be free to apply for inclusion in the lists maintained for medical performers by different local health boards in Wales, or to the national medical performers list in England. Whilst there would clearly be grounds for refusal to include by reason of our substantive decision that she is unsuitable for inclusion in the Respondent's (local) list, the fact is that applications for inclusion inevitably absorb time and resources. In our view it is contrary to the public interest in the efficiency of the NHS that resources should be spent in the procedural requirements to consider and respond to an application from an unsuitable performer. Further, a refusal to include generates an automatic right of appeal which, if made, would then have to be redetermined on its merits. Any appeal generates resource demands and expense. Costs do not follow the event in this jurisdiction and the ability to claim seek costs is restricted.
16. We weighed the impact of an order for national disqualification as an NHS performer upon the interests of Dr Webberley against the public interest, which includes the protection of patients and the efficient use of NHS resources. We

are satisfied that in all the circumstances it is fair, reasonable and proportionate to make a direction for national disqualification.

17. We therefore direct that Dr Webberley is nationally disqualified from:

- the supplementary lists prepared by each Local Health Board,
- the lists under section 49 prepared by each Local Health Board,
- the lists corresponding to the lists under section 49 prepared by each Local Health Board by virtue of regulations made under section 103,
- the lists corresponding to the lists mentioned above prepared by the National Health Service Commissioning Board under or by virtue of the National Health Service Act 2006.

Period for Review

18. The practical effect of regulation 19(1) of the Performers Lists Regulations 2004, (as amended by the National Health Service (Performers Lists) (Wales) (Amendment) Regulations 2006), is that the review period for national disqualification is extended to five years if the First-Tier Tribunal states that it is of the opinion that the professional conduct of the performer is such that there *“is no realistic prospect”* of a request for review before the end of the period of two years being successful. This is a high threshold.

19. We have derived some assistance from **Swain v Hillman [2001] 1 All ER 91** where, in the context of the court’s power to summarily dispose of claims in civil proceedings and the overriding objective, Lord Woolf MR stated:

“The words ‘no real prospect of succeeding’ do not need any amplification, they speak for themselves. The word ‘real’ distinguishes fanciful prospects of success or, as [Counsel] submits, they direct the court to the need to see whether there is a “realistic” as opposed to a “fanciful” prospect of success.”

20. The wording of regulation 19 requires us to give an opinion based on our current assessment, but it is directed to an assessment of the realistic prospects of a review being successful at a future stage. We must have regard to the facts as found by us but also look forward to the prospects of success in the future at a given point. Notwithstanding our firm views as to Dr Webberley’s lack of candour and her deep-seated attitudinal flaws, a genuine change of attitude, amongst other changes, would be relevant in a review. She might, for example, decide that she wants to resume ordinary practice as an NHS general practitioner, as she had done without any significant incidents prior to her decision to focus on a specialist area by way of on-line practice. We are mindful that it is a very serious matter indeed to preclude access to the Tribunal to enable a fair adjudication in respect of any change that might occur within the primary period of disqualification.

21. We have reviewed all the material before us. We noted that there were no issues regarding the Appellant’s integrity or candour or her attitude to governance when she practiced at the Blaina surgery, delivering ordinary

services as an NHS GP. It is apparent from our substantive decision that issues regarding her suitability arose after she decided to focus her professional life in the provision of on-line services in the private sector. Whilst it is clear from our decision that we were (and remain) wholly unimpressed by her lack of integrity and candour and her entrenched attitude to governance, it is not, in our view, fanciful to envisage that Dr Webberley might yet develop appropriate insight. Experience in regulation informs us that the possibility of future remediation or rehabilitation should not be lightly discarded: people do change. We bear in mind also that Dr Webberley is relatively young in terms of her professional life. In our view it is at least possible that Dr Webberley could develop appropriate insight in future and could provide evidence of remediation or rehabilitation at a review. In this context we do not consider it appropriate to effectively preclude the possibility of any review by the Tribunal before the end of a period of five years.

22. We do not consider that it fair, reasonable and proportionate to express the view that Dr Webberley's professional conduct is such that there is no realistic prospect of a further review being successful before the end of the period of two years beginning with the date on which the national disqualification is imposed. We stress that our decision should not be taken as any indication that Dr Webberley would necessarily succeed in a review of the direction for national disqualification. This would depend upon whether she would then be able to demonstrate that she has developed genuine insight and that she has truly changed her attitude to governance, such that she has become suitable to be a GP performer providing services in the NHS.

Decision

23. (1) We have made a direction for national disqualification.
- (2) We do not consider it fair, just or proportionate to express the opinion that the professional conduct of the performer is such that there is no realistic prospect of a further review being successful within the period specified in Regulation 18A(8)(a).

Rights of Review and/or Appeal

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

**Tribunal Judge Siobhan Goodrich
Primary Health Lists
First-tier Tribunal (Health Education and Social Care)**

Date Issued: 23 January 2019