

## **PRIMARY HEALTH LISTS**

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

**CASE NO [2018] 3495.PHL**

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

**Heard on 22 March 2019 at Liverpool Civil and Family Court.**

**BEFORE**

**Judge Christopher Limb  
Mr Richard Stokes (Professional Member)  
Mrs Lorna Jacobs (Specialist Member)**

**MR RAJENDRA CHOPRA**

**Appellant**

**and**

**NHS ENGLAND**

**Respondent**

**DECISION**

**Attendance:**

**Mr Sam Thomas (Counsel for Mr Chopra), Mr Rajendra Chopra, and Miss Vandana Chopra.**

**Miss Rachel Birks (Solicitor for Respondent), Mr Alan Rice, Dr Paul Sedgwick, and Mr Michael Greenwood.**

### **Preliminary**

- 1 Both at the outset of the hearing and subsequently it was agreed that this tribunal can make any decision which the Respondent could have made (regulation 17(4)). This is a rehearing.

- 2 The issue in the case concerned the identity of the supervisor required as a part of the conditions placed upon Mr Chopra, and in particular whether Miss Chopra was reasonably to be considered as suitable or not in the context of her being the daughter of Mr Chopra. Both representatives agreed that the opinions and reasoning of the parties at the time of the original decision were not central to our decision, but that the submissions and arguments of the parties were central to the live issue. In that context the oral evidence was relatively brief.
- 3 In the course of the hearing we received additional documents with agreement of both parties, being the reports/audits sent by Miss Chopra to the General Optical Council (GOC). A copy of those documents should be sent to the tribunal to ensure that there is a full record of all documents before the tribunal. We have taken account of all the written and oral evidence.
- 4 In the interests of brevity the Respondent will be referred to as NHSE in this decision.
- 5 We were assisted by both written and oral submissions from both representatives.

### **Background**

- 6 At the end of 2017 Mr Chopra was subject to a fitness to practice investigation by the GOC. We have very little information about the substance of the issues although the letter at I 30 refers to visual loss in a patient with macula detachment. Mr Chopra's statement and its exhibits provide a history of events. We in particular note that the GOC made an interim order for 18 months from 6<sup>th</sup> March 2018, including a requirement for direct supervision of all work as an optometrist with presence in the consulting room during eye examinations and with the supervisor to be agreed by the GOC (I 6), and that Miss Chopra was proposed and agreed (I 10 and 12). As far as we are aware no further or final decision or finding has yet been made by the GOC.
- 7 In May 2018 NHSE considered imposing conditions upon Mr Chopra's inclusion on the Performers List and decided to impose conditions including (condition 3) direct supervision by a supervisor agreed by NHSE (I 31). Miss Chopra was proposed but not agreed: the final decision against which this appeal is brought was in September 2018 and indicated that she was not agreed because of "potential or perception of a conflict of interest" as his daughter (I 52).

### **Issues**

- 8 Both parties agree that the sole issue is whether Miss Chopra should be agreed as supervisor. Although the decision refers simply to the requirement for agreement by NHSE, both parties agree that NHSE (and also this tribunal) must act reasonably in considering whether the proposed supervisor is appropriate or not.
- 9 The foregoing is a blunt summary and we have considered both the written skeleton and oral arguments in relation to other matters which may influence the decision on the issue.

## **Legal Principles**

- 10 The Performers List Regulations are included in full within section J of the bundle and we do not set out full quotations within this decision.
- 11 We note Regulation 10 relating to the power to impose conditions for the purpose of preventing prejudice to the efficiency of services.
- 12 We were referred by the Respondent both to the NHSE Managing Conflicts guidance (H 28 onwards) and to various court decisions at J89 onwards. It was not suggested that the guidance or the decisions were directly applicable and binding, but that they were useful analogies. The Respondent further argued that if it was considered that there was no relevant guidance we should apply the general consideration that efficiency of services necessarily includes consideration of public perception of and confidence in the service.
- 13 The Appellant contended that the guidance and decisions were not applicable. It was not suggested that NHSE and this tribunal were not able to consider whether agreement of Miss Chopra as supervisor was appropriate looked at objectively.
- 14 As indicated to the parties (and not disagreed) this tribunal will consider decisions of other regulatory or disciplinary bodies with respect, but we are not bound by those decisions or any reasoning within them.
- 15 In general terms we must act reasonably, fairly and proportionately.

## **Evidence**

- 16 It is noted at the outset that there was very limited if any factual issue.
- 17 All witnesses confirmed their written statements.
- 18 Mr Rice agreed (as was evident on the documents) that the GOC had agreed Miss Chopra as supervisor and that NHSE were aware of such when making its decisions.
- 19 Dr Sedgwick presented the NHSE case before the panel in September 2018. Most questions to him in cross-examination related to his holding various roles in different cases and the possibility of conflict of interest in such context. The essence of his replies was that each case had to be looked at on its own merits.
- 20 Mr Greenwood was the lay chair of the panel in September 2018. He was asked in cross-examination as to relevant considerations when a conflict of interest was in question and concluded by saying such a close familial relationship “was a different order of magnitude”.
- 21 Mr Chopra told us that his daughter was like a teacher or tutor and informed him as to modern practice. His examples concerned either documentation or information given to patients, not methods or approach to clinical examination or diagnosis. He told us that it would not be financially viable to practice if he had to pay a supervisor.

- 22 Miss Chopra told us of the shortcomings of Mr Chopra's record cards and explained that he had readily accepted her advice for larger more detailed and clearer clinical records. She told us that she now works as a locum optometrist for Specsavers, for whom she previously worked on a permanent contract. She can choose when to work and she keeps a day per week free to supervise Mr Chopra. She explained her role as involving both guidance to Mr Chopra and identification of any concerns (to GOC and via them to NHSE).
- 23 She confirmed that she had not previously undertaken supervision or training for supervision: the only formal training available in such context is believed to be that for supervision of pre-registration optometrists. She had on occasion supervised when her previous boss was away. She confirmed that she had supervised about 30 patients during supervision of Mr Chopra and had herself undertaken an examination of the back of the eye in 3 or 4 patients.
- 24 She did not consider that she was subject to any conflict of interest or perception of bias.
- 25 In her oral submissions Miss Birks emphasised that the test in relation to a condition was whether it was appropriate, as opposed to the GOC test of whether it was necessary. She noted that this was a case in which direct supervision (not general or close supervision) was ordered, i.e. the most strict form. She argued that an important part of the role of supervisor was as the reliable gateway to information to NHSE in relation to concerns and that an objective risk of bias or perception of the reasonable member of the public as to bias or conflict was a proper concern of public confidence in the independence of the supervisor. She referred to the guidance and authorities as set out in her written argument.
- 26 Mr Thomas said that there was no evidence of actual bias: we do not consider that NHSE suggested that there was any evidence of any actual bias. He suggested that it followed that there was no actual prejudice as to the efficiency of services. He referred to the GOC not having expressed any concerns as to Miss Chopra or her reports. He suggested that the tests to be applied by the GOC and the NHSE (and this tribunal) were similar. He argued that it should be considered that Mr Chopra could not afford to pay for a supervisor and that therefore it was disproportionate to require another supervisor who would require payment because that would in practice amount to suspension. Having suggested that neither the guidance at H 28 onwards nor the decisions at J89 onwards were comparable or designed/directed to a comparable situation, he suggested that this tribunal was a well-informed observer and had no basis to consider that there was any actual or reasonably perceived conflict of interest or risk of perceived conflict of interest.

### **Decision and Reasons**

- 27 There is no challenge to imposition of conditions requiring supervision in the form of direct supervision. We consider that the only real issue concerns the supervisor being a very close family member (daughter) and whether the objective perception of risk of bias or lack of independence is a relevant and

proper consideration and (if so) a reasonable and proportionate basis for not agreeing Miss Chopra as supervisor.

- 28 We state clearly that we neither read nor heard any evidence or suggestion to impugn Miss Chopra's own clinical skills or to suggest that she in any way consciously has or will act favourably to her father because of their family relationship.
- 29 We consider that efficiency of services can and should be properly understood to include objective public confidence in those services and such confidence in the supervision. That confidence properly includes an objective appearance of independence.
- 30 We accept that neither the guidance nor the decisions to which we have been referred are directly applicable. However, we consider that the broad approach is comparable so long as each case is considered on its own merits. In particular we find that the observations of the Administrative Court in *R v Norwich City Council* [2001] EWHC 657 Admin are helpful. We note paragraphs 62 to 64 in relation to a tribunal's independence: for example "The extent to which they have been influenced may indeed be something of which they themselves are unaware. Real possibility and real danger (of influence of connection) are necessarily tests for the very reason that actual bias cannot readily be demonstrated". Reliance upon lack of influence or independence looked at objectively is required in a supervisor in a broadly comparable way to a tribunal.
- 31 We do not know what consideration was actively given to the relationship of father and daughter by the GOC. The only information we have is an exchange of emails (I 10 and 12). We do not consider that we are in any way bound by the fact of their agreement.
- 32 If it is otherwise appropriate to impose a condition for the purpose of preventing inefficiency (including public confidence in efficiency of services), we do not consider that it is proper to not do so because the individual practitioner does not have funds to pay. That would involve an unwarranted distinction depending upon finances rather than objective appropriateness.
- 33 We conclude that it is appropriate not to agree the Appellant's daughter as his direct supervisor. We consider that there is reasonable and objective perception of risk of bias or lack of independence in such a close family relationship.

**Order**

43 The appeal is refused.

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

**Date Issued: 16 April 2019**