

Primary Health Lists

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

[2016] 2746.PHL

BETWEEN

DR YOGENDRA DUTT SHARMA

Applicant

and

**THE NHS COMMISSIONING BOARD
(GREATER MANCHESTER)**

Respondent

Panel:

**Professor Mark Mildred – Judge
Dr I Lone– Professional Member
Ms L Jacobs – General Member**

DECISION

1. The Applicant appeals, pursuant to regulation 17(2)(a) of the National Health Service (Performers List) (England) Regulations 2013, a decision by the Performers List Decision Panel of Greater Manchester Health and Social Care Partnership ("the PDLP") to refuse to include him on the National Medical Performers List ("the List"), which was communicated to him by a letter dated 8 June 2016 ("the decision letter").
2. The decision to refuse inclusion on the list was expressed to be in accordance with Regulation 7(2)(a)(i) of the National Health Service (Performers Lists) (England) Regulations 2013 ("the Regulations"), namely that the Appellant was unsuitable to be included in the List.
3. This appeal is by way of redetermination.

The hearing

4. The appeal was heard by the Panel at Manchester Employment Tribunal on 27 April 2017. The Appellant was represented by Mr J McAdam, Counsel, and the Respondent by Ms R Vanstone, Counsel.

Issues

5. The decision letter expressed the reasons for refusal as follows:
 - 1) *You have failed to provide evidence of current indemnity in line with Regulation 4(3)(c).*
 - 2) *The Panel's decision that you are unsuitable is outlined in the information provided below and is relevant to your performance of the services which those included on in [sic] the performers list perform and any risks to your patients in line with Regulation 7(3)(d)...*
 - 3) *Your failure to ensure your practice met the standards expected as outlined by the General Medical Council's (GMC) Good Medical Practice...*
6. The information in the second point of the decision originated from a CQC Report dated 14 April 2016 following an inspection of the Applicant's surgery on 24 February 2016. The CQC considered the surgery to be overall 'inadequate' and placed it in Special Measures.
7. The matters that remain in issue and were for the Tribunal to decide were:
 - i. Is the indemnity information provided by the Applicant sufficient to satisfy the requirements of Regulation 4 National Health Service (Performers Lists) England Regulations 2013?; and
 - ii. Is the Applicant suitable to be included on the List in light of the findings of the CQC Report?
8. Regulation 4(2)(h) of the Regulations states a Practitioner must provide with an application for inclusion:

".... evidence that the Practitioner has in force an appropriate indemnity arrangement which provides the Practitioner with cover in respect of liabilities that may be incurred in carrying out the Practitioner's work".
9. The Applicant failed to provide such evidence, as opposed to a quotation for cover. Three days before the hearing the Appellant had made further applications for indemnity cover. He told us in evidence that he had applied for £10 million cover and would not practise without obtaining it. He had left putting the cover in place until he had our decision.
10. Dr Valentine's evidence was that there are rare circumstances where a performer may be permitted to apply holding only a quote for indemnity cover but those circumstances do not apply to the Applicant's case.
11. The concerns about the Applicant's practice were in summary that the CQC conducted an inspection of the Applicant's practice on 24 February 2016, this resulted in the issue of 3 warning notices to the Applicant on 17 March 2016. The CQC produced a report on the practice dated 14 April 2016. The overall rating for the practice was inadequate. Of the five main criteria for the overall rating, three: "Are services safe?", "Are services effective?" and "Are services well-led" were

rated "Inadequate". The criterion "Are services responsive to people's needs?" was rated "Requires improvement" and the criterion "Are services caring?" was rated "Good".

12. The report identified a number of specific areas of concern:
 - a. Members of the clinical nursing team were unaware of the policy or procedure to follow in the event of an incident occurring.
 - b. Systems and processes to ensure effective governance of the practice were not implemented.
 - c. Evidence that clinical audit and clinical team meetings were driving improvement in performance to improve patient outcomes was not available.
 - d. Several policies and procedures to effectively manage and govern the practice were not available.
 - e. Risks to patients were not appropriately assessed and well managed, specifically in relation to medicines management, recruitment and medical emergencies.
 - f. Not all systems, processes and practices were embedded to keep patients safe and safeguarded from abuse. Staff spoken to were unclear who the safeguarding lead was and a policy for the protection of children was not available.
 - g. Arrangements to ensure clinical staff were suitably trained, professionally registered, insured and benefited from ongoing training; supervision and appraisal were not in place.
13. The CQC re-inspected the practice on 7 December 2016 and found that some improvements have been made but there still remain areas of concern including key indicators, such as the quality of care provided to all six of the population groups, as requiring improvement.
14. Of the three areas graded in the first CQC report as being inadequate only one ("Are the services safe") was deemed to be at an appropriate level in December 2016.
15. There are references in the report that the improvements that have taken place are attributable to the new contract holders who formally took over the contract on 1 December 2016 but who had been in place since October 2016. The Appellant has not been providing clinical care since his suspension by the GMC in January 2014. His role had been as a contract holder until December 2016. The GMC had found in December 2015 that there was no impairment to his fitness to practise.
16. The Appellant had kept up his PDP and had been coordinating locums and checking on patient referrals. He now wants to work as a locum up to half-time and to undertake some dermatology sessions in secondary care, if possible. He acknowledges that he will need refresher training and supervision.
17. Much time at and outside the hearing was taken up with discussion of the detail of retraining requirements and their availability and cost. Closing submissions were made and by agreement time was given to the parties to make submissions in writing after the hearing with a view to conditional inclusion on the List.

18. The parties did in the event agree conditions for the Appellant's inclusion. Those conditions would be of no avail, if we decide that the Appellant is unsuitable to be included in the List.
19. In our judgement the Appellant has paid the penalty for an oversight or misrepresentation that was found by others to have been dishonest. He probably still regards his breach as a technical one. It is clear that the GMC decided in December 2015 that there was no impairment to his fitness to practise. We for our part decided that the Appellant was not unsuitable *per se* but that he undoubtedly needs to have realistic aims to practise without full-time clinical or contract-holding responsibilities.
20. In our judgement refusing to include the Appellant on the List, given that he acknowledges he must arrange adequate indemnity insurance cover and undergo appropriate retraining and supervision, would be a disproportionate response to his failings. The agreed conditions will in our judgement prevent his inclusion on the List prejudicing the efficiency of the services provided.
21. As a result of these considerations we allow the appeal subject to the Appellant entering into the conditions attached to this decision and providing evidence of current indemnity in line with Regulation 4(3)(c) to the reasonable satisfaction of the Respondent.

Judge Mark Mildred
Tribunal Judge
Primary Health Lists
First-tier Tribunal Health Education and Social Care Chamber
Date Issued: 30 May 2017