Primary Health Lists

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

IN THE MATTER OF AN APPEAL UNDER THE NHS (PERFORMERS LISTS) (ENGLAND) REGULATIONS 2013

Heard at Darlington Magistrates Court on 14.11.17 and (panel only) on 15.11.17

[2017] 3026.PHL

BEFORE
Judge Christopher Limb
Dr E Walsh-Heggie (Professional Member)
Ms L Bromley (Specialist Member)

BETWEEN:

Dr Anthony Paul Round

Applicant

-v-

NHS Commissioning Board (Cumbria & North East)

Respondent

DECISION

Attendance:
Dr A P Round
Mrs Philippa Doyle (Solicitor for Respondent) and her trainee; Dr J Slade; and Mrs L McGinty

Preliminary

1 Dr Round 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, and to make plain what (if it was his case) he contended were the reason(s) that he would be able to successfully participate in and complete an appraisal in the near future. The panel 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 Before any substantive argument or evidence was heard, the parties were informed that Dr Walsh-Heggie had in the course of her professional life attended conferences at which Dr Slade was present and was an appraiser in the north-east, but did not know him personally and had never worked with him. Both parties agreed that there was no objection to her hearing the case and the panel considered that there was neither actual nor apparent risk of bias or conflict of interest.

3 The letter at B153 was self-evidently intended to be the letter of 11 November 2015 and not that of 7 November 2016 (which also appears at its intended pace at B203) and was replaced by the letter of 11 November 2015.

4 The Respondent is commonly referred to as NHS England and in this decision will be referred to as NHSE.

Background

5 Dr Round was a mature student and his first degree was in mathematics. He graduated in medicine in 1978. He initially hoped to have a career in inter-disciplinary work but from 1996 commenced his career as a general medical practitioner ("GP"). He lives in Cumbria in a rural area a few miles from Whitehaven, and he has since 1996 followed a career as a locum GP, almost entirely in Cumbria, with some time as a locum GP working for the Prison Service as well as in GP practices.

6 There were no issues or difficulties until 2013, and in particular he completed annual appraisals up to and including the 2012/3 year (completed in December 2012). The appraisal system altered after that and he has subsequently either not participated or not completed all elements of annual appraisal. A brief summary is in the chronology (A12). This appeal and the relevant history relate to issues arising from the appraisal history and associated actions and the hearings/decisions of NHSE.

Issues

7 Both The National Health Service (Performers Lists) (England) Regulations 2013 ("Performers Lists Regs") and The General Medical Council (Licence to Practise and Revalidation) Regulations Order of Council 2012 ("GMC Regs") require a GP to participate in appraisal as an obligation respectively of being upon the Performers List (and therefore able to practise as a GP within the NHS) and of having a licence to practise with periodic revalidation and be upon the GMC Register (and therefore able to practise as a doctor in this country).

8 In practical terms an appraisal is a central aspect of the evaluation of a GP by the Responsible Officer ("RO") (in this case Dr Slade working for NHSE) which not only informs NHSE actions but also leads to a recommendation by the RO to the GMC that either the GP is fit to practise, or that the RO is unable to recommend that the GP is fit to practise, or that the RO suggests a deferment because more time is required to make a recommendation.

9 NHSE contend that Dr Round has without reasonable cause failed to complete all aspects of appraisal and that there is no reasonable prospect of his doing so in the near future. Both because of the consequent lack of assurance as to fitness to practise and as to safety of patients and because of the disproportionate use of NHSE resources provided to Dr Round compared with other practitioners, NHSE contend that his continued inclusion on the Performers List would prejudice the efficiency of services which those on the list perform and that removal is appropriate.

10 Dr Round does not dispute that he has failed to complete appraisals since 2013. He contends that removal was disproportionate and unnecessary. Although it was not always entirely clear to us from what he said at the hearing, we proceed upon the basis that he contends that it is inappropriate to impose any conditions upon his inclusion in the list.

Legal Principles

11 Both the Performers List Regs and the GMC Regs are included in full within section E of the bundle and we do not set out full quotations within this decision.

12 Regulation 4(3) of the Performers List Regs require a practitioner applying to join the list to provide an undertaking to participate in any appraisal system established by NHSE. Regulation 9(10) similarly requires a performer on the list to participate in any such appraisal system.

13 Regulation 10 of the Performers List Regs entitles NHSE to impose conditions when it considers it appropriate to prevent prejudice to the efficiency of services, and regulation 11 entitles it to vary conditions, impose new conditions or remove the practitioner form the list if there is failure to comply with conditions. Regulation 14 gives NHSE power to remove from the list if continued inclusion would be prejudicial to the efficiency of services, and regulation 15 (5) and (6) indicate the matters to be considered.

14 Pursuant to regulation 17(4) of the Performers List Regs this tribunal can make any decision which NHSE could have made

15 We note the provisions of the GMC Regs and in particular 4(3)(a) and 6(5).

16 We also note that the GMC has published an Appraisal Policy of which the 2015 version is at C114 and note that the previous form was published in March 2013.

Evidence

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

18 The history of appraisals and of hearings is set out in the chronology at A12-14 and is not challenged. We were taken to the correspondence and documents which illustrate and give detail of such history and which are within sections B and C of the bundle. We considered such documents and the evidence of Dr Slade and Mrs McGinty which referred to such history.

19 It serves no purpose to set out all details of such history in this decision but we particularly note the following matters.

20 There was no participation in appraisal at all for the years 2012/3 and 2013/4. The system changed after 2011/2. Although we were not given full details of the system in 2011/2 compared to the system in 2012/3 and later, the system in and after 2012/3 was both greater in extent than previously and was intended to be normally submitted electronically. Dr Round told us both in his written statements and orally that the system required an email address to be used and moreover required an NHS email. He referred to his letter to Mrs Coyle, chair of the Performers List Decision Panel, in August 2015 (B143 on) following her letter to him giving notice that following failure to engage in appraisals there was to be consideration of removal from the list or imposition of conditions on his inclusion (B141 on). His letter and attachment are lengthy and have been read in full but in essence state that he does not have a satisfactory email, that his personal email was inappropriate because he received it on his Blackberry and (for example) “It does not work at home, and it is VERY tedious to type a message in reply (even just this long) into my Blackberry. I cannot read most attachments, and I can never print them. I have told NHS England that I do not have a satisfactory email address. Why can that not be accepted?”. He also told us orally that he had asked for an “NHS email” but was not given one until late 2015 (when he described in general terms having got one almost by chance, albeit never explaining the details further).

21 Dr Round told us that he was “extremely computer literate”. He told us that he mistrusted cloud-based email providers and believed that well-publicised hacking of email providers had proved his mistrust to be well-placed, but he also told us that the NHS email addresses were a

cloud-based system. He told us that he could access his NHS email (ie since 2015) from the local public library.

22 Both Dr Slade and Mrs McGinty told us that there was no need for an "NHS email" to use the site and enter appraisal details and also that if need be the appraisal details could be completed on paper and/or entered online with assistance from NHSE staff if use of a computer otherwise than at home (for example in a local public library) was for some reason not possible. Mrs McGinty in particular told us that she on many occasions offered advice and assistance as to completion of the appraisal forms. Dr Round (despite our efforts to clarify) did not make plain whether he disputed such evidence, but he did not challenge it or put forward any alternative.

23 Parts of the appraisal process were feedback both from colleagues and from patients and evidence of continuing professional development (CPD). The latter was expected to be normally 50 hours per annum and 250 hours per 5 year cycle. It was not disputed that there had been no patient feedback provided since 2013. It was not disputed that there had not been 50 hours of CPD per annum at the least in the last appraisal year (whether or not the CPD was of quality and/or included genuine reflection upon implications for practice) or thus far in the current appraisal year in which the appraisal was due this month.

24 Dr Slade told us that there was insufficient evidence of reflection following such CPD as had been undertaken. Dr Round did not challenge such opinion.

25 In relation to appraisal in general, there was no dispute that Dr Round had had not only advice from his appraisers for the 2015/6 and 2016/7 years, but had also had advice from a GP tutor.

26 The history of hearings and summary of conditions imposed and (in May 2017) of removal form the Performers List are in the chronology (A12-14) as well as in the written statements of the Respondents' witnesses. Mrs McGinty's first statement gives further detail as to the November 2016 hearing in paragraph 31 onwards (C9 on). Such includes a description of both the advice and guidance given as to how Dr Round might consider alternative ways of obtaining patient feedback and obtaining work (eg paragraphs 35 and 36) and emphasises the gravity of the situation (eg paragraph 39).

27 Mrs Doyle told us that she had tried to assist Dr Round as an unrepresented party, and in particular had by reference to the case of *Partington* (section F) suggested that clear action towards completing appraisal even at the appeal stage of the process might lead to a lesser step than removal from the list. Mrs Doyle was not challenged in such assertion.

28 It is noted that Dr Round told us (and had told the Respondents and the panels) that he could not obtain work after the imposition of conditions in 2015. He at no time explained why that was the case, despite the very clear position of the Respondent that the conditions did not prevent Dr Round obtaining work for any objective reason. Alternative ways of obtaining work and patient feedback had been suggested as indicated above.

29 Dr Round told us that he had undertaken (estimated) 15 hours of CPD for the current 2016-7 year but could undertake the remaining required hours within a month if conditions were removed. In that context and more generally he told us that he had lost motivation albeit saying that some of what the Respondent and its witnesses had told him in 2017 had improved his motivation. Having in the past refused to seek work through a locum agency as a matter of principle he told us he would now consider that approach to obtaining work. He said that he had thus far looked for work using the local CCG website, cold calling local GP practices but not through agencies. He told us that he actively sought work in 2016 but had done little to seek work in 2017. He also told us that the practice at which he had carried out most of his work before 2015 would not employ him when he informed them that conditions had been imposed upon him (and he had lost his previous prison work for unrelated reasons), and refers to two other practices in his statement (D6) but did not give further details of other responses save that he was unsuccessful. On more than one occasion he referred to the possibility that he could/should be helped to get work.

30 Both in written and oral evidence the Respondent's witnesses and in particular Dr Slade told us that there was not only a national shortage of GPs and GP vacancies but that there was a notable shortage in Cumbria. He gave the example that a recent recruitment drive for foreign GPs had a provisional allocation of 22 full-time placements in Cumbria.

31 Mrs McGinty told us that the time spent by herself and other NHSE staff in relation to Dr Round's appraisal was very greatly in excess of any other GP in the region (2,570 in total, including about 900 locums). Where there is considered to be a failure to satisfactorily complete appraisal NHSE have a progressive series of 4 letters which are sent to the GP. No-one other than Dr Round has progressed to the 4th letter. Dr Slade told us that he had not been unable to recommend a GP for revalidation by the GMC except for Dr Round. Mrs McGinty estimated that she had personally spent at least 2 days relating to Dr Round and that junior staff had spent far more time, about 2 weeks time in total during the year : in contrast to the approximate 30 minutes most GPs required to deal with their appraisals.

32 Towards the end of his evidence Dr Round told us that he accepted that he would in the future have to "move on in a more rational way". He said that if conditions were lifted he believed he would proceed and

engage “more sincerely”. In a similar vein and in relation to CPD he told us that “I know rationally that I should do 2 to 3 hours each week. But it is difficult with a sword over your head”.

Decision and Reasons

33 We found both Dr Slade and Mrs McGinty to be straightforward and reasonable witnesses. There was no defined challenge to any of their factual evidence. We accept its accuracy.

34 There was no factual dispute identified by Dr Round except his contention that he was refused an NHS email and required an NHS email to use the appraisal system online, and (it was unclear if he made this contention) that there was a shortage of locum jobs in Cumbria. We accept the evidence of NHSE witnesses that an NHS email is not required to access and complete appraisal online, and also that they offered assistance to complete the appraisal if there was technical difficulty. We did not understand Dr Round’s logic as to why he refused to use another email or considered that he should be assisted to acquire an NHS email in some different way to all other practitioners. More importantly, we consider the email issue to be a red herring. Dr Round did not suggest that he had obtained patient feedback or further CPD and was simply unable to enter details into the system. Absence of an email could not explain any reasonable basis not to acquire or undertake required elements of appraisal.

35 We accept Dr Slade’s evidence that there is not a shortage of GP locum vacancies in Cumbria. We also accept that there is no objective reason why any of the conditions imposed would prevent jobs being offered, unless it was the objective absence of CPD or patient feedback or other requirements of appraisal which caused concern in potential “employers” and which they could be rightly concerned about.

36 Appraisal is a part of the requirements for practice within the NHS and of GMC registration. Participation in appraisal is not optional within either system. It would not be appropriate for this tribunal to (in effect) revise the system for Dr Round, but we do in any event accept that it is objectively reasonable and sensible for the protection of patients and assurance of the public as to fitness to practise.

37 The decisions of earlier panel hearings which imposed conditions were not appealed and there is no reason brought to our attention to doubt the fairness of those hearings or that the decisions were within the range of reasonable outcomes. Breach of the conditions is not disputed. Breach of the conditions is in a formal sense a potential basis for ordering removal, but the history of hearings and conditions is in our opinion also of importance because it provided Dr Round with a repeated reminder and prompt that he must comply with and participate in the appraisal system.

38 A GP is a professional who (like other doctors and indeed like many other professionals) has a duty to inform himself as to the requirements of professional practice. It is not the job of NHSE to provide advice, but they have in fact done so both informally and also by the obvious implications of the earlier hearings and orders imposing conditions upon practice. He must comply with the same requirements as all other GPs wishing to practise in the NHS.

39 Dr Round told us that he did not foresee how he could obtain patient feedback despite the suggestions of NHSE staff as to how that might be done. In so far as that task is harder because of his failure to obtain work, such failure is in large part the result of Dr Round's self-imposed refusal to follow suggested routes of obtaining work such as using a locum agency and/or his earlier failures to obtain or provide feedback when he did have work. In relation to CPD, Dr Round told us (as at the date of hearing which was almost the end of the current appraisal year) that he had undertaken only 15 hours of CPD and gave no reason other than a lack of application on his part with "a sword over his head".

40 We find that there has been breach of earlier conditions and also a failure to fully participate in appraisal even in the last and current year which is prejudicial to the efficiency of services provided. Appropriate appraisal is a reasonable requirement to ensure safe delivery of services by GPs. There is also prejudice to efficiency of GP services in a wider sense because of the disproportionate resources required from NHSE supporting Dr Round compared with other GPs' appraisals, although that is of lesser importance than the continuing failure of Dr Round to participate in the appraisal and undertake (inter alia) necessary feedback and CPD.

41 There is a clearly a power to remove Dr Round from the Performers List. We have considered the various factors referred to in regulation 15 of the Performers List Regs and also more generally whether it is proportionate or necessary to remove him or whether imposition of conditions or no sanction would be appropriate. There has in our judgment been a repeated failure to co-operate with the appraisal system. The history and the absence of any objective excuse for such failure does in effect amount to a refusal to participate and a contention that he should be treated in a different and more favourable or lenient way than all other GPs. The system is an objectively appropriate system to ensure safe practice by GPs so far as possible and give patients and the public confidence that GPs are fit to practise. There have been numerous opportunities provided to Dr Round to remedy the failures but they have not been taken. Dr Round entirely failed to even suggest how he was going to comply with the appraisal process, never mind give us objective reason to consider that he would participate fully in the appraisal system in the future.

42 We consider that removal was appropriate, reasonable and proportionate.

Order

43 The appeal is dismissed.

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

Date Issued: 4 December 2017