Primary Health Lists

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

[2018] 3644.PHL

Heard via video link on 24 and 25 November 2020

BEFORE

TRIBUNAL JUDGE ATKINSON

MR M CANN (Lay member)

DR J RUTHERFORD (Specialist member)

BETWEEN

MR LAZAR VUKOTIC

(Appellant)

and

THE NHS COMMISSIONING BOARD (KNOWN AS NHS ENGLAND)

(Respondent)

Representation:

For the Appellant: Not represented
For the Respondent: Ms R. Vanstone of Counsel

DECISION AND REASONS

The Appeal

1. This is an appeal against the decision of the respondent, issued on 14 August 2018, to remove Dr Vukotic from the performers list in exercise of a discretion to remove because he cannot demonstrate that he has performed relevant services in the preceding 12 months.

Summary Background and chronology

2. The appellant obtained his medical degree in Belgrade in 1976 and undertook GP training in Sweden. The appellant moved to the United Kingdom and became a partner at the Royal Arsenal Medical Centre.

3. In the period 2011 – 2012 S East London PCT undertook an investigation into the appellant and his former GP partners.

4. In 2013 the appellant moved his practice and began work at St Luke's Health Centre.

5. On 25 February 2014 the appellant was made subject to conditions by the respondent.

6. On 11 August 2014 the appellant became subject to conditions imposed by the GMC. The appellant stepped down as leader GP at St Luke's.

7. On 19 January 2015 NCAS published an assessment report in respect of the appellant which identified 6 areas of poor performance and 2 areas of inconsistent practice.

8. On 1 March 2015 the GMC published an assessment report in respect of the appellant which identified 3 areas of unacceptable performance and cause for concern in 2 areas.

9. On 6 January 2016 the appellant agreed undertakings with the GMC covering a range of matters including requirements for an educational supervisor, a clinical supervisor, and that the appellant be subject to close supervision with a supervisor based in the same practice. The undertakings also prohibited work in out of hours services and in on-call services.

10. Subsequently, steps were taken to attempt to identify and approve relevant clinical and educational supervisors. Dr Raza was approved as a clinical supervisor. No educational supervisor was, or has been, appointed.

11. On 17 May 2016 the appellant was dismissed from his employment from UK Care because the appellant had not had professional indemnity insurance since 10 August 2014.

12. The appellant has not been employed in a primary care setting, nor provided primary health lists services, since his dismissal on 17 May 2016.

13. Subsequently, no further proposed educational clinical supervisor candidates were put forward by the appellant.

14. On 19 February 2018 the appellant was advised by the respondent that he required a recommendation for revalidation purposes by 2 April 2018. The appellant was asked to provide information relating to compliance with his undertakings to the GMC. The appellant was advised that, in the absence of a response, steps would be taken in relation to the performers list regulations.

15. On 5 March 2018 the appellant's undertakings to the GMC were amended to enable him to work in a hospital setting. The undertakings which prohibited work in out of hours services and in on-call services were maintained, unamended.

16. On 14 May 2018 the respondent advised the appellant that he was subject to potential removal from the performers list because he had not performed services for 2 years.

17. On 14 August 2018, following an oral hearing, the respondent decided to remove the appellant. It is against this decision that the appellant appeals.

18. Thereafter, there were a number of procedural matters before the tribunal which ultimately resulted in the appeal being listed before the present tribunal.

The Law

19. The relevant law is to be found in the National Health Service (Performers Lists) (England) Regulations 2013. The relevant provisions are set out in the bundle and it is not necessary to reproduce them in full here.

20. In brief, regulations 14 and 15 make provision for removal of a person from the performers list. Regulation 14(5) of the 2013 Regulations provides for a discretionary power to remove a performer where they have not performed relevant services in the preceding 12 months.

21. It is convenient to note here that the appeal proceeded by way of redetermination of the issues and that the hearing was held with no restrictions on access by the public.

Preliminary and procedural matters

22. The tribunal at the outset of the hearing noted that the appellant was unrepresented. The tribunal indicated to the appellant that it would take steps to

ensure that he could effectively participate in the hearing and put forward his case, despite not being represented. In this respect, the tribunal took particular care to explain the proceedings, the various stages of the hearing, allowed the appellant additional time to put and prepare his case, assisted the appellant in framing relevant questions to witnesses and extended a degree of latitude in the filing of evidence during the course of the hearing.

23. In dealing with procedural issues and in giving directions on the management and conduct of the hearing the tribunal at all times took account of the tribunal's overriding objective to deal with the case fairly and justly.

The documents and evidence

24. The tribunal was provided with a bundle of several hundred pages, indexed to tab E ending at page 7. It comprised all the filed material on which both parties sought to rely.

25. In addition, during the course of the hearing, the tribunal admitted in evidence two further documents: a variation of undertakings document labelled 1 December 2017, as tendered by the appellant; and a variation of undertakings document, dated 27 March 2018, being a printout of the undertakings from the GMC website, as tendered by the respondent.

26. The tribunal heard oral evidence for the respondent, from Tony Joyce, senior professional standards manager and Dr Bavalia, deputy medical director for systems improvement and professional standards.

27. The tribunal also heard oral evidence from the appellant and from a retired nurse, Mrs E. Borrow.

Opening Submissions and evidence on behalf of the Respondent

28. Ms Vanstone relied on her skeleton argument and made further submissions. The respondent's case may be summarised as follows.

29. The appellant became subject to investigations in 2011 – 2012. The appellant resisted the plans formulated as a result of those investigations. The respondent made the appellant subject to conditions in 2014, which included a requirement to engage in an NCAS assessment.

30. The NCAS assessment was published on 19 January 2015. It identified poor performance on the part of the appellant in the areas relating to: assessment of the patient's condition; clinical management; record-keeping; use of resources; maintaining professional performance; and communication with patients. In addition, the appellant's performance was noted to be inconsistent in relation to the areas of infection-control and written communication.

31. The appellant was also the subject of a GMC assessment. That assessment, published on 1 March 2015, found the appellant's practice to be unacceptable in relation to: assessment; clinical management; and record-keeping. In addition, it was noted that there was cause for concern in relation to maintaining professional performance and relationships with patients.

32. The appellant thereafter became subject to undertakings to the GMC on a range of matters which included a requirement that the appellant be subject to close supervision by a clinical supervisor, to have an educational supervisor and a workplace reporter.

33. The appellant has now been absent from GP practice for nearly 5 years and inevitably has become de-skilled. In cases where an individual has not performed relevant services for 2 years there is a requirement for attendance at an induction and refresher course.

34. Whilst it is accepted that the appellant in 2016 put forward a suitable clinical supervisor, he has not been able to identify a suitable educational supervisor. The appellant has not subsequently put forward a suitable educational supervisor.

35. The respondent has afforded the appellant sufficient time to make appropriate arrangements. The respondent did not seek to remove the appellant immediately after the expiry of the 12 month period in which he had not performed services. However, significant further time had now elapsed and the integrity of the performers list would be undermined if the appellant were not removed.

The oral evidence of Mr Joyce

36. Mr Joyce is a senior professional standards manager at NHS England and improvement. At the tribunal he adopted his witness statement dated 3 September 2020 as evidence in chief. Following the completion of his oral evidence and after Dr Bavalia had given evidence, Mr Joyce was re-called to enable the appellant a further opportunity to ask questions in the light of the evidence of Dr Bavalia. Mr Joyce's evidence may be summarised as follows.

37. Mr Joyce has been involved in the management of the appellant's case since 2014.

38. The case file shows that concerns about the appellant working as a GP were noted in 2011, which resulted in the production of an action plan in 2012. The appellant challenged the validity of the issues raised. Arrangements were made for an assessment to be undertaken by NCAS. For reasons of ill-health and the appellant's resistance to the process, the respondent placed conditions on the

appellant in respect of the performers list. The conditions included a requirement to engage with NCAS and for the appellant to be supervised.

39. On 11 August 2014 the appellant was made subject to conditions by the GMC.

40. The NCAS assessment was published on 19 January 2015. The GMC also conducted their own performance assessment and published a report in March 2015.

41. The GMC assessment required the appellant to work on a supervised basis with a clinical supervisor, an educational supervisor and a work based reporter. The GMC assessment also criticised the level of supervision in place at the time of the assessment. The GMC recommended that the appellant be subject to close supervision.

42. On 6 January 2016 the appellant accepted undertakings from the GMC. The appellant continued working at St Luke's Medical Center, where he was to be clinically supervised by Dr Raza. The appellant last worked clinically at St Luke's in February 2016.

43. Dr Fryer, as responsible officer, had approved Dr Raza as a clinical supervisor and as a workplace place reporter. Dr Fryer encouraged the appellant to send a list of potential applicants to act as an educational supervisor.

44. In May 2016 the appellant was dismissed from St Luke's medical practice for not holding the required professional indemnity. Thereafter, the appellant struggled to find a clinical supervisor to meet his GMC undertakings.

45. On 19 February 2018, Dr Fryer advised the appellant that she was due to make a revalidation recommendation by 2 April 2018 and requested information to support a positive recommendation. Dr Fryer also advised the appellant that failure to respond could result in his referral to a performance list decision panel in the light of his not having worked for 2 years.

46. On 26 March 2018, Dr Fryer delayed making a deferral recommendation to the GMC to enable the appellant to provide additional evidence to support his application.

47. On 14 May 2018, Dr Fryer, in light of the information provided by the appellant, advised the appellant that his case was to be referred to the performers list decision panel because he had not performed services for 2 years.

48. On 14 August 2018 the respondent notified the appellant that, following an oral hearing on 7 August 2018, he was to be removed from the performers list.

49. The appellant was not eligible to engage in the formal NHS induction and refresher course aimed at those who had been out of practice for 2 years or more. That is because the appellant is subject to restrictions on his practice. It is accepted that the appellant had been given inaccurate advice about this matter, however, the position had been clarified at the performance list decision panel meeting in August 2018.

50. The appellant was required by the terms of his undertakings to provide a personal development plan. Mr Joyce had not seen the plan entered onto the respondent's database. Mr Joyce understood that the personal development plan had been approved. Mr Joyce apologised for any confusion arising out of what had been said earlier. Mr Joyce was aware of approval of the plan following a face-to-face conversation with Dr Fryer shortly before the performers list decision panel meeting in August 2018. The documentation from Dr Fryer shows that in February 2018 the appellant was advised that his personal development plan needed to be approved. Dr Fryer did not receive a response to that letter.

51. The respondent had made enquiries about the appellant's indemnity insurance. The appellant had provided only a cover note relating to the indemnity. The cover note was not a sufficient basis for establishing that the appellant had adequate indemnity insurance.

The oral evidence of Dr Bavalia

52. Dr Bavalia is a deputy medical director of systems improvement in professional standards for the respondent. Dr Bavalia adopted her statement dated 3 September 2020 as evidence in chief. Her oral evidence may be summarised as follows.

53. Dr Bavalia became involved in the appellant's case in 2018 following notification to the appellant that his case would be considered at a formal hearing of the performance list decision panel.

54. There are concerns about risk to patients in the appellant's case. As a result, the respondent took notice of the appellant's undertakings to the GMC in 2016, which included: working only under close clinical supervision; production of an extensive performance development plan; working only with an educational supervisor; working only with a work place reporter; not to work in any locum post fixed term contract; and not to working out of hours or on call. Those undertakings are appropriate and proportionate given the concerns outlined in the GMC and NCAS assessment reports.

55. In considering suitable supervisors, the respondent looked to GMC approved supervisors or those with previous experience of working with doctors in difficulty to undertake the supervisory responsibilities arising out of the undertakings. The

responsibility of finding a supervisor lies with the appellant. The responsible officer, in this case, Dr Fryer, is required to approve the supervisor. The respondent has no formal role in identifying supervisors but will try to support the finding of one.

56. The respondent in considering the suitability of a supervisor also looks at individuals who are not on the GMC list but who have supervisory expertise in order to avoid narrowing the pool. An individual who is not on the GMC list may have the appropriate skill set and experience.

57. The NHS runs an induction and refresher scheme for individuals who have not worked within the NHS for a two-year period. The scheme is available to 2 different groups: those who have never worked in the NHS; and those who have taken time out from working in the NHS. The scheme is targeted on those whose skills will have deteriorated after a two-year period of absence and therefore referral to the scheme is required.

58. Dr Bavalia is not familiar with the GMC document at page D29 of the bundle relating to consultations on educational and clinical supervisors. To the best of her knowledge, there has been no change in the rules about such matters. The document provides for a wider pool of supervisors then outlined previously because it relates to the training of GPs and doctors working in a secondary care setting. It is not clear from this document that those criteria are different from those applied by the respondent.

59. In the appellant's case, Dr Fryer had considered Professor Esmail, Dr Atkinson, Dr Ozturk and Dr Sivanathan as potential educational supervisors.

60. Dr Fryer, in considering Professor Esmail, noted that the professor was of high standing but was not an experienced educationalist, had not taught GP trainees and did not have experience with doctors with difficulties. Dr Fryer therefore did not consider Professor Esmail to be an appropriate educational supervisor given that the appellant needs a supervisor with a high level of educational skills.

61. In considering Dr Atkinson: Dr Fryer was of the view that Dr Atkinson would have been a suitable educational supervisor. However, following a conversation between them, Dr Atkinson said that he was unable to undertake the role.

62. In considering Dr Ozturk: Dr Ozturk had made enquiries of Dr Fryer about the commitment and level of engagement required, if he were to be the appellant's educational supervisor. Dr Fryer told Dr Ozturk that the appellant had complex educational needs. Dr Ozturk told Dr Fryer that he only had experience of dealing with GP trainees at ST2 and ST3 stages, and also that it would not be easy for him to take time off and travel to central London to meet. Dr Ozturk suggested that the respondent find a more experienced educational supervisor.

63. In considering Dr Sivanathan: Dr Fryer was unable to approve Dr Sivanathan, because he was not a sufficiently experienced trainer given that he had been a clinical supervisor for FY2 GPs since December 2013, his first ST1 trainees started in April 2016; and he had no experience of ST3 training.

64. Dr Bavalia had not seen a copy of the appellant's personal development plan, but understood that it was not aligned with the appellant's undertakings to the GMC.

65. It was accepted that the appellant had undergone the revalidation process with a positive recommendation from Dr Fryer as the responsible officer in September 2019. It would be reasonable to infer that such documentation included a personal development plan. TAs the appellant does not have a responsible officer, he is required to provide annual returns directly to the GMC rather than appraisals. Dr Bavalia would not see that documentation because the appellant no longer has a connection with the NHS.

66. It was difficult to say in the abstract what work the appellant could engage in that would help remediation in his case. However, doing some work would enable him to maintain some skills generally.

Submissions and evidence on behalf of the Appellant

67. The case as put forward by the appellant in his notice of appeal did not directly address the concerns of the respondent. In essence the grounds of appeal are to the effect that: the appellant has not been supported by the respondent in his remediation; the respondent has failed to meet with the appellant; the appellant has been treated unfairly because he has not been provided with feedback; the appellant has put forward a number of individuals who are suitable to be educational supervisors, however the respondent has unfairly rejected them; the respondent has removed the appellant because he is a whistleblower and the respondent has allowed those doctors, who he reported to the authorities, to continue in practice, whereas the respondent has not allowed the appellant to work as a GP.

68. In addition, the appellant made opening remarks that may be summarised as follows. The appellant has not been treated fairly. The tribunal now had an opportunity to hear the appellant's side of the story. The appellant had engaged with the assessments and understood his 'shortages' (sic). The appellant had received the most compliments when he had been in practice as a GP. The appellant had arranged for a clinical supervisor, Dr Reza. The appellant had also arranged for additional supervisors from Africa and Asia who had identified no problems.

69. The appellant also gave oral evidence. He adopted his statement, dated 1

September 2020, as evidence in chief and gave further oral evidence. The appellant's evidence may be summarised as follows.

70. Prior to the respondent's decision to remove the appellant in August 2018, the appellant had sought work as a primary care physician., He had been unable to do such work because his personal development plan was in limbo. The appellant had approached colleagues at the out of hours services at Kings Hospital. They did not make him an offer of work but said that it was possible.

71. The appellant's plans for return to work are complicated by the Covid 19 pandemic. The appellant wants to start work when a vaccine is available.

72. In the opinion of the appellant, given that he has been a doctor since the age of 26 and out of practice since 2016, he would need 3 months supervision on return. The appellant is of the view that he has not become de-skilled, for example in relation to giving injections and using a stethoscope. The appellant has concerns about the areas of gynecology and obstetrics, but generally, having worked as a doctor for more than 20 years he is of the view that there are some skills that do not go away.

73. The appellant plans to work in primary care in Lewisham or at Kings, where he is remembered positively and where there had been no serious complaints about his practice. The appellant also said that the GMC assessment showed that the appellant had good patient feedback. In his opinion, the NCAS assessment itself misdiagnosed two patients. The appellant had written to NCAS about these cases, but had received no response.

74. The appellant is of the view that he is now able to undertake out of hours work because the original GMC undertakings of 2016 had been varied in 2018 to allow him to do such work.

75. The appellant partly agrees with the GMC assessment that he might have deficiencies in the areas that he has already mentioned in oral evidence. The appellant does not agree with everything in the assessment. The appellant has undertaken a test of competence which he has passed. The appellant has not been able to undertake a peer review because he has not had the opportunity to do so.

76. The appellant accepts that that the GMC criticised his record-keeping. The appellant was of the view that that area has now been remedied by the appellant taking a course in 2012 and a further course in 2016.

77. The appellant said that the GMC criticisms about his assessment and clinical management related to the use of an inhibitor when a patient is also taking a diuretic; in that case, the appellant said that he had listened to the patient.

78. In the light of his undertakings to the GMC, the appellant accepted that the assessment report showed that his clinical management was unacceptable. The steps that he had taken to remediate this was to have a clinical supervisor and make monthly reports to a responsible officer. The appellant also had a personal development plan and yearly appraisals. The appellant stated that he engages in between 150 and 180 hours of continuing professional development each year and has not become rusty because he is reading.

79. The appellant had therefore partly remediated his position, but probably needed about 6 months in practice.

80. The appellant rejected the NCAS assessment report that his assessment skills and clinical management are poor. Those criticisms related to his use of resources in making a decision to arrange for an x-ray of a 75-year-old.

81. The appellant also rejected the NCAS criticisms about infection-control. The appellant had been criticised for his practice of washing his hands twice.

82. The appellant's view was that the NCAS assessment was also wrong in relation to 2 particular cases, one concerning child protection matters and the other case concerning a heart condition. The appellant had written to NCAS about these matters, but had received no feedback.

83. In the appellant's view there were no serious concerns about his practice. There were differences of opinion about treatment and the cost of treatment, however they are not serious concerns, but a matter of discussion.

84. The appellant had taken steps to remedy his position by engaging in online courses in respect of history taking; he had also taken online courses in respect of neurology and chest conditions. The appellant had undertaken a GP review course on initial investigations, diagnosis and treatment. The appellant had addressed other areas in his personal development plan by reading books, by audit of his referrals, by taking annual courses, for example, about safety netting and infection-control. The appellant's request for a meeting with the respondent about these matters had been ignored by the respondent.

85. Since 2016 the appellant had identified a clinical supervisor with whom he had had verbal contact. The appellant's efforts to find an educational supervisor had been inhibited by the respondent. The appellant hoped to be working in out of hours services in those hospitals where he is known. The appellant had had contact with those working at Kings in out of hours, but this work could not been taken forward because of the difficulties relating to acceptance of his personal development plan.

86. The appellant had been unable to put forward a named educational supervisor because he was hindered by the respondent. The respondent had

rejected a number of individuals that the appellant had put forward in 2016. Since then the appellant had unable to identify a specific, named individual to be his educational supervisor.

87. The appellant intended to work as a primary care physician at a hospital such as at Kings, Thomas's or Lewisham. The appellant had talked to colleagues and made verbal enquiries.

88. The appellant had specifically sought variation of this GMC undertakings and was 120% certain that the variation enable him to engage in such work. The variation was not within the bundle but could be made available.

89. [For convenience it is noted here that the tribunal directed the parties to provide a copy of the amended undertakings. They were admitted in evidence the following day. The appellant gave further oral evidence which is noted below]

90. The appellant had explained his undertakings. The appellant was told that ideally his educational supervisor and clinical supervisor could be combined. The appellant was unable to take matters any further because he was awaiting approval of his personal development plan.

91. The appellant was revalidated on 11 September 2019. The appellant said that he had provided his personal development plan and appraisals in support of the application in about March 2019. The appellant had two personal development plans on the advice of his appraiser, with one of them directed specifically at the undertakings from the GMC. The appellant was of the view that this personal development plan no longer needed to address issues relating to infection-control, referral routes, and chronic disease management**.**

92. On a return to work, the appellant accepted that he would be subject to supervision. The appellant was of the view that the clinical supervision, workplace reporter and educational supervisor could be combined in one role. The appellant anticipated that supervision for GMC purposes would amount to about 1 hour per fortnight; that educational supervision would be monthly, subject to specific advice and that clinical supervision would be a minimum of 30 minutes to 1 hour per week.

93. The appellant said that any return to work would be delayed because of the covid-19 pandemic. And that he was a vulnerable person. The appellant had not made any enquiries about the availability of supervisors since making enquiries prior to the respondent's decision to remove the appellant in August 2018.

94. The appellant accepted that he had not been able to identify a named individual with relevant experience who would be willing to undertake the role of educational supervisor. The appellant had also not identified individuals who would undertake the role of clinical supervisor or work based reporter, however,

he had had conversations with colleagues in Kings several years ago. On that occasion he had spoken to the doctor in charge of the out of hours service who had then said that it could be arranged. The appellant was of the view that his removal from the performers list might be a problem.

95. The appellant subsequently gave further evidence in the light of the filing of the amended undertakings which may be summarised as follows. The appellant had read the variation documents he had filed and recalled exactly its contents. He intended to work in out of hours work at Kings, Thomas or Lewisham.

96. The appellant's attention was drawn to undertaking number eleven which specifically prohibited out of hours work. In response the appellant that was not true. The appellant has asked for a variation of the undertaking to enable him to do such work. The appellant invited the tribunal to contact the GMC directly.

97. The specific undertaking relating to the prohibition of out of hours was put to the appellant a number of times. His responses were variously: the variation document was not correct and that he did not have the document in front of him.

98. The tribunal stood the matter down to enable the appellant to print off the relevant document rather than working from an electronic version. On resumption, the appellant's further evidence was to the effect that the variation was not accurate and the respondent had been slow to amend the variation document. The appellant could not be responsible for the GMC#s failure to update their documentation in a timely way. The tribunal was invited to speak to an officer from the GMC to whom the appellant had been talking to during the break.

99. The tribunal directed that it would not be appropriate to take oral evidence over the telephone from an official from the GMC.

100. The tribunal invited the appellant to submit a statement from the GMC for consideration by the tribunal over the course of the hearing. Subsequently, the appellant indicated that he did not intend to file such a document.

The oral evidence of Mrs Borrow

101. Mrs Borrow is a retired practice nurse and former colleague of the appellant. She adopted her statement dated 12 September 2020 as evidence in chief. Her evidence may be summarised as follows.

102. Mrs Borrow has known the appellant since January 2000 when they began working together. Mrs Borrow was present at the time of the investigations into the appellant's GP practice in 2011.

103. Mrs Borrow is of the view that the appellant has not being treated as an

equal by Dr Fryer. Mrs Borrow was involved in typing emails for the appellant whilst trying to identify an appropriate educational supervisor. Mrs Borrow was involved in the preparation of the appellant's personal development plan. She is of the view that the respondent failed to meet with the appellant.

104. Mrs Borrow is of the view that the appellant was not treated as an equal in respect of other doctors in his previous practice who have been allowed to continue after going on fresh start courses. The appellant is being discriminated against because he was a whistleblower.

105. Mrs Borrow left the NHS because of the PCT and because the appellant's former colleagues have got away with things, whereas the appellant had been discriminated against.

Closing Submissions on behalf of the Respondent

106. Ms Vanstone, on behalf of the respondent, relied on her skeleton argument and made further submissions which may be summarized as follows.

107. The appellant should be removed from the performers list under regulation 14(5), which provided for discretionary removal following a 12 month period in which a doctor had not performed relevant services. In the present case the appellant had not performed such services for approximately 5 years.

108. The appellant disputes that he has become de-skilled as a result of not practising over this period. The appellant's belief that a period of 3 months of supervised work would be sufficient is not realistic.

109. The appellant's claim, that he has been unable to work as a GP for so long is due to lack of support from respondent, does not hold water. The evidence shows that, after his dismissal in May 2016, the appellant has not put forward a named individual as a potential educational supervisor and had made no enquiries or efforts in securing employment elsewhere.

110. The issues relating to the provision and approval of a personal development plan would not have prevented him from making arrangements for the provision of an educational supervisor. The appellant has made enquiries at Kings Hospital in August 2018, but, by such time, 2 years had already elapsed since the requirements set out in the GMC undertakings had been in effect.

111. The 2016 GMC undertakings had been amended in March 2018, but specific undertaking 11 continued with the effect of preventing the appellant from working in out of hours services. The variation was only to the effect that the appellant be allowed to work in a hospital setting. The appellant in oral evidence indicated that he had undertaken tentative enquiries for a post that he was not permitted to work in. The appellant's willingness to consider such work is

concerning, in light of the absolute clarity of the undertakings preventing out of hours work, being on-call and the requirement for close supervision.

112. The appellant has put forward no plan to return to work and has no intention of doing so. The appellant has merely suggested that he might engage in out of hours work and has not suggested any other employment.

113. The appellant's actions suggest an unwillingness to accept criticisms of his performance. There is insufficient evidence before the tribunal to show that he has remediated his position. The assessment reports from NCAS and the GMC provide in-depth evidence of the extent of his deficiencies. Given that evidence of wide-ranging concerns, it would be wrong to suggest that the respondent was overstating its case, or being too particular about identifying an appropriate educational supervisor.

114. The evidence shows that Dr Fryer, as the responsible officer, had identified the appellant as having complex needs in the light of the NCAS and GMC assessments. The NCAS report identified that a significant programme of work was required to be undertaken by the appellant to address numerous and wide ranging matters of poor or unacceptable performance and did not relate to simply one or two discrete areas. The GMC assessment report's recommendation, at paragraph 4.5, showed that the process of supervision in place at that time was not effective and that close supervision was required.

115. The appellant claims that Dr Fryer, in taking the steps that she did, was conducting a personal vendetta against him. The evidence, however, shows that Dr Fryer assisted the appellant with the revalidation process, was involved in the approval of the appellant's personal development plan, prompted him to respond and had given the appellant the opportunity to take steps before starting removal proceedings.

116. The evidence also shows that the appellant lacked insight. The appellant's claim that the annual GP review process and the courses that he has undertaken are sufficient does not indicate that he has taken on board the implications of the assessments and updated his practice. The evidence from the appellant's appraiser in 2017 (C412), and in the NCAS report show that his powers of reflection are limited and that he needs to further develop self-awareness and insight.

117. The respondent accepts that the appellant has produced an appropriate personal development plan. However, the appellant has provided no information about the progress of the implementation of that plan. The appellant has not provided a list of courses directed at the specific areas of deficiency.

118. If the power of removal in these circumstances were not exercised a question would arise about the purpose of such an approach. The evidence did

not show that the appellant had changed his practise. The appellant had identified no meaningful employment in which he might engage. The appellant had been unable to find an educational supervisor. The appellant had become de-skilled. Failure to exercise discretion to remove in these circumstances would serve to undermine the integrity of the performers list and therefore the appeal should be dismissed.

Closing Submissions on behalf of the Appellant

119. Before being invited to make closing submissions, the appellant was offered, and took, a break, in order to formulate a response to Ms Vanstone's submissions made on behalf the respondent. The appellant's subsequent submissions may be summarized as follows.

120. It was incorrect for Ms Vanstone to say that the appellant had said that 3 months supervision on return in practice would be sufficient. The appellant had meant that such a period was the minimum period that he would be able to find work as a locum.

121. The evidence relating to the GMC undertakings, as set out in the document reflecting the entries on the GMC website, was a short version of the undertaking which is confusing.

122. The appellant had engaged in a slip of the tongue when he had said in oral evidence that he wished to apply for an out of hours position. The appellant wished to apply for a post as a primary care physician within a hospital setting. It is accepted that the undertakings provide that the appellant does not engage in out of hours work.

123. The evidence of Tony Joyce showed that Dr Fryer was imposing her own criteria in deciding who could be an educational supervisor, rather than following the GMC guidance.

124. The appellant disputes that he lacks insight and asks that the respondent identify the basis of such a claim.

125. The appellant has undertaken in vivo, book based and online courses since he stopped working as a GP. The respondent has failed to check those courses. The appellant has also engaged in internal education and clinical meetings. The appellant has fulfilled the requirements for extension of his licence. The appellant has been appraised 5 times. The appraiser did not identify any omissions or make adverse comments on the appellant's ability to reflect. The respondent's position in seeking removal in the face of this evidence is vindictive.

126. The appellant is able to engage in meaningful change. For example, the NCAS assessment noted criticisms in relation to the appellant's child protection

practice. The appellant made arrangements for his practice to be changed by suggesting that 2 doctors being involved in such matters, rather than relying on a single doctor.

127. The NCAS report is incorrect in raising issues about infection control. That is because the appellant is very clean and usually the nurse manages such matters.

128. In summary, the respondent has bullied the appellant for the last 10 years and as a result, the appellant suffered a heart attack.

Findings of fact and assessment of evidence

129. The tribunal considered all the evidence and the submissions. In coming to its decision the tribunal has looked at the evidence as a whole**.**

130. The tribunal finds that there are a number of matters as to the sequence of events in this case that are not in dispute. They are reflected in the section above setting out the background and chronology. In essence, the background shows a history of concerns relating to the appellant over a period of a number of years; that he's been subject to assessments by NCAS and the GMC; and that he has not been engaged in work relating to the performers list since May 2016.

131. There are a number of matters that are in dispute. For convenience, those issues, and the tribunal's findings, have been grouped under the following headings: issues of de-skilling and deficit in the appellant's performance; the making good of any deficits; the timescale and feasibility of making good any deficits; whether it would be proportionate to exercise discretion to remove the appellant.

Findings on de-skilling and deficits in the appellant's performance

132. The appellant is of the view that his absence in performing medical services since 2016 has not resulted in a significant de-skilling effect. The tribunal rejects that view as explained below.

133. The tribunal finds, applying its own specialist knowledge and expertise, that any doctor who has not been in practice for nearly 4 ½ years will inevitably experience some decline in their skills. In this respect, the tribunal notes that the NHS makes provision for those who have been out of practice for 2 years to undertake an induction and refresher course in acknowledgement of the consequences of the de-skilling process.

134. Thus, under this process an individual who has been out of practice for 2 or more years is generally required to engage in the scheme, which includes a range of assessments relating to placement and simulated surgeries. The issues

typically covered include teamwork, clinical and communication skills with observed consultations, case-based discussions and clinical procedure observations. The scheme amounts to a substantial piece of work that typically may last up to 6 months, depending on the individual.

135. The tribunal finds that an absence from practice for a period of 4 ½ years, as opposed to 2 years, is likely to require a greater level of input than is found in a typical induction and refresher course as outlined above.

136. In the appellant's case, not only has the appellant been out of GP practice for considerably longer than the two-year threshold envisaged by the induction and refresher training programme, but also is starting from a lower base level of skills than a typical returner, as evidenced by the NCAS and GMC assessments.

137. The tribunal notes that the appellant in evidence and submissions does not accept many of criticisms as set out in the NCAS and GMC assessments. In evidence, the appellant said that the assessments showed some concerns, but not serious concerns. The tribunal rejects the view that there are no serious concerns, as explained below.

138. The tribunal finds the NCAS assessment to be reliable. That is because the opinions set out therein are a result of an assessment process undertaken by a team of assessors, including 2 clinical assessors, 1 lay assessor, an adviser, an occupational health assessor and a behavioural assessor. The assessment took place over a period of 6 days and included a review of 30 cases, and observation of practice involving 15 cases. The opinions set out in the assessment report are based on, and arise out of, the findings noted within the report, together with the observations undertaken.

139. The tribunal finds, in the light of that report, that the appellant's performance is poor in the areas of assessment of the patient's condition, clinical management, record-keeping, use of resources, maintaining professional performance and communication with patients.

140. The tribunal also finds the GMC assessment to be reliable. That is because the opinions set out therein are the result of an assessment process undertaken by a team of 4, including a medical assessor, a lay assessor a team leader and a leader in respect of tests of competence.

141. The assessment process involved interviews with the appellant, review of medical records, interviews with third parties, observation of practice, case-based discussion, a knowledge test, scenario assessments, simulated surgery and follow-up interviews. The tribunal finds that the opinions set out in that report are based on, and arise out of, the findings noted together with the observations undertaken.

142. The tribunal finds, in the light of that report, that the appellant's performance is unacceptable in the areas of assessment, clinical management and record-keeping. The tribunal further finds that there is cause for concern with maintaining professional performance and relationships with patients.

143. The appellant appeared to suggest that the assessments were flawed and pointed to 2 cases where the NCAS assessors themselves had made errors. The tribunal rejects the suggestion that this is a sufficient basis on which to find that the assessment is flawed. That is because, even if it were accepted that there were 2 errors in the report, (which is not accepted by the tribunal), this would be an insufficient basis to undermine the assessment as a whole, given the wide range and depth of other evidence relied on by the assessors in coming to their opinion.

144. In the light of the above findings, the tribunal further finds that the evidence shows that there are serious concerns about the appellant's performance across a wide range of domains. The tribunal finds that, in these circumstances, the appellant has not only been significantly de-skilled by not having practised for over 4 years, but also that the de-skilling process has been exacerbated by the low base at which the appellant has been performing.

145. The tribunal in making the above findings also take into account the appellant's view as to the degree of seriousness of these concerns. The appellant is of the view that the concerns are not serious. The tribunal finds this approach to be supportive of the view that the appellant lacks insight into, and awareness, of his practise. Accordingly, the tribunal now turns to issues relating to the appellant's insight.

146. The appellant in oral evidence, and in written and oral submissions, claimed that he did not lack insight and challenge the respondent to identify evidence to that effect.

147. The tribunal finds that the appellant has shown limited insight into his practise as explained below.

148. Firstly, the NCAS report, at page C 24 indicated that in his final interview, the appellant was not engaged in meaningful reflection or open to making changes to his practise. The view expressed in the assessment was that the appellant used supervision sessions as an opportunity to reinforce his current views.

149. Secondly, whilst the NCAS report accepts that the appellant has a degree of self-awareness and insight, it nevertheless concluded that he needs to further develop in respect of these matters.

150. Thirdly, the GMC assessment makes numerous references to the appellant's lack of insight, for example, in case discussions.

151. Fourthly, the appellant has entered into undertakings in terms as set out in the documentation filed with the tribunal. The appellant's acceptance of the undertakings is predicated on the appellant's acceptance that the GMC assessment identified shortcomings which he needed to address.

152. However, the tribunal finds that the appellant, in oral evidence, made various statements indicating that he did not accept the criticisms set out in the GMC assessment. For example, the appellant said that he only partially accepted some of the criticism. By way of further example, the appellant identified 2 cases within the NCAS assessment which he considered to contain errors on the part of the assessors, and which in his view, undermined the reliability of the assessment.

153. By way of further example, the appellant said that the criticisms about infection-control were wrong because he had been told that he had over cleaned his hands. However, the tribunal notes that the NCAS assessment in this regard refers to the appellant's inconsistent approach to infection-control, rather than excessive use of hand cleaning.

154. Fifthly, the appellant, when appraised in 2017, was noted by his appraiser to show limited reflection, for example, when saying that a particular course was useful and informative, without actually recording what changes the learning would bring about in his practise.

155. Sixthly, as noted above, the appellant is of the view that there are no serious concerns about his practise. In the tribunal's view, such an approach is wholly at odds with the response taken by the regulatory authorities.

156. Thus, for example, the respondent initially put in place a relatively low-level supervisory regime following the imposition of conditions in 2014. That light touch supervision was found to be inadequate by the GMC assessors and in consequence the appellant was made subject to close supervision. Close supervision requires the clinical supervisor to be on site and available to the appellant at all times.

157. The GMC report recommended putting in place arrangements requiring a heightened level of supervision, known as close supervision. The appellant is thereby required to have supervision across 3 aspects of his practise: clinical supervision, educational supervision and the attendance of a workplace reporter.

158. When set in the context of these arrangements, the appellant's view, that there are no serious concerns about his practise, significantly undermines his claim to have a satisfactory level of insight into his practise.

159. Seventhly, the appellant in oral evidence suggested that he had taken

significant steps to remediate his position by attending in vivo courses, reading and undertaking on-line courses. The tribunal finds this to be a further matter that tends to undermine the appellant's claim of adequacy of insight when placed in the context of the NCAS assessment recommendations to the effect that the appellant will need to complete a significant programme of work to address the areas for improvement.

160. Eighthly, the appellant in oral evidence demonstrated a lack of understanding of the extent of the limitations on the range of work that he was allowed to engage in as a result of his undertakings to the GMC. In particular, throughout his oral evidence, the appellant made repeated reference to the prospect of engaging in out of hours work at Kings, at Thomas', or at Lewisham.

161. The appellant indicated that he had approached colleagues at the out of hours service. The appellant said that he was now able to undertake such work because of a variation in his undertakings in March 2018. The appellant said that he had not been able to take forward his plan of engaging in such work because, at that time, his personal development plan had not been approved.

162. However, the tribunal finds that the GMC undertakings of 2016 as varied in 2018, both clearly and unequivocally prohibit the appellant from engaging in out of hours work.

163. The terms of the undertakings were specifically put to the appellant in oral evidence on a number of occasions. In response, the appellant insisted that the variation in 2018 had the effect of allowing to undertake out of hours work and that the documents before him were wrong.

164. The appellant, in his closing submissions, attempted to distance himself from his earlier evidence about his consideration of doing out of hours service. He submitted that his reference out of hours was a slip of the tongue or a linguistic mistake.

165. The tribunal does not find that to be a satisfactory explanation. That is because the appellant made repeated reference to out of hours work in various contexts and such references are highly unlikely to have been used repeatedly a result of a slip of the tongue.

166. In addition, the appellant's suggestion that he can be employed as a primary care physician in a hospital setting potentially conflicts with his undertakings. That is because such posts are typically regulated by the performance list arrangements, irrespective of the services being physically located within a hospital.

167. The tribunal finds these aspects of the appellant's evidence to be further evidence that tends to undermine his claim of having an appropriate level of

insight into his performance and circumstances.

168. Accordingly, in light of the above, the tribunal finds that the appellant has serious deficits in his performance across a range of issues and has limited insight and awareness.

Findings on timescale and feasibility of making good the deficits

169. The tribunal finds that that the prospects of the appellant being able to make good the deficits as found above are limited, as explained below.

170. The tribunal takes into account the positive factors noted within the NCAS report that are supportive of remediation, namely: the appellant's resilience, a degree of self-awareness and insight and positive attitude.

171. However, such factors are to be weighed against the following matters.

172. The appellant has been unable to make satisfactory arrangements in relation to engaging in GP practice for over 4 years. The appellant in that time has not been able to bring forward a suitable educational supervisor. The tribunal notes that this lack of satisfactory arrangements pre-dated the onset of the Covid-19 pandemic, and that the appellant could have continued with efforts during the pandemic.

173. The appellant claims that his ability to engage in practice has been hampered by a vindictive approach on the part of the respondent. In particular, the appellant claims that Dr Fryer has unfairly failed to approve any of the potential educational supervisors nominated by the appellant. The tribunal rejects that claim as explained below.

174. The tribunal finds that the oral evidence of Dr Bavalia, together with the documentary evidence from Dr Fryer, shows that there is good reason explaining why each of the individuals put forward by the appellant were not approved as educational supervisors. That is because in brief: Professor Esmail is not an experienced educationalist; Dr Atkinson, whilst suitably qualified, did not feel able to take on the role; Dr Ozturk considered himself to have limited experience in the context of the appellant's complex educational needs; and Dr Sivanathan had no experience of ST3 training. The tribunal finds that the appellant's allegations on these matters are ill-founded.

175. For convenience the tribunal, at this point, further finds that the appellant's allegations against Dr Fryer in respect of other matters, and in particular of not being supportive, are similarly ill founded. Thus, the tribunal finds that Dr Fryer supported the appellant in obtaining his validation by delaying the process to enable the appellant a further opportunity to gather relevant evidence in support of his application.

176. By way of further example, Dr Fryer did not initiate consideration of the appellant's removal from the performance list until approximately 2 years after his leaving practice, whereas if Dr Fryer had wish to act against the appellant at the earliest opportunity, she could have done so under the regulations, after a period of only 12 months. The tribunal finds that such actions are not characteristic of an individual who is engaging in a vendetta.

177. In addition to the above matters weighing against the viability of remediation within a reasonable timescale, the tribunal also attaches significant weight to the appellant's limited insight into: the nature of his poor performance; the extent of his poor performance; and the steps and extent of work required in order to achieve a satisfactory level of performance.

178. The tribunal finds that both the appellant's view that his engagement in vivo and on line courses, together with his reading, has brought about a significant degree of remediation; and his view that undertaking paper appraisal exercises is sufficient to show that there are no serious concerns, are further matters that undermine the feasibility of the appellant being able to achieve satisfactory performance within a reasonable timescale.

179. The tribunal further finds that the difficulties arising from the appellant's lack of appreciation of the extent of the challenges he faces is amplified by the lack of evidence showing he has taken any significant concrete and practical steps to achieve his own limited goals. Thus, the appellant was unable to present to the tribunal any significant evidence showing that he had a detailed plan in place. For example, the appellant had not taken any further steps to identify possible work, whether paid or unpaid, in which he might and engage and which carried with it the prospect of preserving some of his skills.

180. In considering the above, the tribunal finds that the prospects of the appellant being able to make good the deficits are limited.

Exercise of discretion and proportionality

181. The tribunal now turns to the issue of whether to exercise its discretion to remove the appellant from the performance list. It is not disputed that this discretion is exercisable given the appellant's failure to engage in relevant services for more than 12 months.

182. In the present case, the appellant has not been in practice since May 2016. The appellant has become de-skilled as a result.

183. In addition, the extent of work required to enable the appellant to achieve a satisfactory level of performance is greater than the consequences of mere absence in and of itself. That is because, in the period prior to his absence, the

appellant was performing at an unacceptable level in a number of respects.

184. During the period of his absence, the appellant has failed to make significant progress in remedying his situation.

185. Further, over the course of the last 4 years the appellant has not been able to identify a suitable individual to be his educational supervisor. Nor has the appellant identified, or undertaken, other forms of medical work that would assist him in returning to a satisfactory level of practice.

186. The tribunal finds that the appellant has been afforded ample opportunity to make progress in returning to practice. The tribunal finds the absence of satisfactory progress over such a long period of time is indicative of limited prospects of the appellant being successful in the future.

187. Given what is said above, the tribunal finds that the removal of the appellant is a proportionate response when taking into account all the circumstances. There are no other interventions open to the tribunal that would have the effect of appropriately regulating the appellant's performance of primary care services. The effect of removal from the performance list does not prevent the appellant undertaking medical work in a hospital setting, provided that it does not involve the provision of services covered by the performance list.

Decision

The appeal is dismissed

Dr Vukotic is to be removed from the performers list

Judge J Atkinson
Primary Health Lists Tribunal
First-tier Tribunal (Health Education and Social Care)

Date Issued: 04 December 2020