Primary Health Lists

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

[2018] 3251.PHL

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

Heard at Columbus House, Newport
18,19, 20 September 2018
Panel deliberation: 21 September 2018

Before:

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

BETWEEN

DR HELEN WEBBERLEY

Applicant

and

NHS WALES

Respondent

Representation
For the Appellant: Mr Mathew Barnes, counsel, instructed by Legal and Risk Services. NHS Wales
For the Respondent: Mr Welch, counsel, instructed by the appellant under the DPA scheme

DECISION AND REASONS

The Appeal

1. Dr Webberley appeals against the decision made on 19 January 2018 by a Reference panel convened by Aneurin Bevan University Health Board (ABUHB/the Board or LHB) to remove her name from the Medical Performers List (the MPL).

2. The decision, made under paragraphs 10 (3) (by reference (4) (a) and (c)) of the National Health Service (Performers' List) (Wales) Regulations 2004 ("the Regulations") was that she is unsuitable to be included in the Medical Performers' List (MPL) and that the continued inclusion of her name would be prejudicial to the efficiency of the services that those in the relevant list perform.

3. The right of appeal is provided under regulation 15 and is against the respondent's decision to remove the performer made under regulation 10(3). The appeal is by way of redetermination.

The Chronology and Background

4. There is a long and complex background and the parties could not agree the chronology. We set out below the following by way of broad overview:

   a. Dr Webberley graduated in medicine from University of Birmingham in 1992. She holds postgraduate qualifications in General Practice: MRCGP (1995) and in sexual health, MFRSH (2007).

   b. Dr Webberley was included in the MPL of the then Torfaen LHB in 2005 and was subsumed into the ABUHB performers list in 2009. Dr Webberley has held a number of positions. She became a partner at the Blaina surgery in 2011. She last worked there in October 2015. In January 2016 she resigned her partnership there with effect from 1 June 2016. She has undertaken limited work as an NHS GP on a locum basis since then but the extent of this is not agreed. (We note here that on her evidence she has worked the equivalent of about 2 weeks as an NHS GP between June 2016 and her suspension from the MPL in April 2017).

   c. In her 2016 appraisal she acknowledged that most of her time was devoted to maintaining a recently started online information service for people with gender variance and offering online consultations to patients with gender dysphoria.

   d. She has a controlling interest in three companies registered with Companies House which were incorporated in dates in 2014 as follows:

      GenderGP Limited - 10 August
      My Web Doctor Limited - 13 November
      Online GP Services Limited - 16 November.

   e. On her own case the appellant has been involved in the provision of on-line medical services in a variety of ways which include:

      www.theonlinesurgery.co.uk
      www.oxfordonlinepharmacy.co.uk
      www.mywebdoctor.co.uk
      www.gendergp.co.uk

   f. By way of overview a number of complaints have been made regarding Dr Webberley's practice to the General Medical Council (GMC) which is the body responsible for the registration of all medical practitioners. It is clear that some of these complaints have been closed by the GMC and some are the subject of ongoing consideration by the Medical Practitioners Tribunal Service (MPTS)

which is the adjudication body of the GMC.

g. On 10 January 2017 the Care Quality Commission (the CQC) carried out an inspection of the Online Surgery (Dr Matt Ltd). The CQC report published on the 6 April 2017 stated that the service did not provide safe, effective, responsive, well led services in accordance with the relevant regulations. The CQC suspended the operation of this service until 29 June 2017.

h. On 24 January 2017 the CQC carried out an inspection of Frosts Pharmacy - Oxford Online Pharmacy. The CQC Report published on 6 April 2017 found that the service was not providing safe, effective, and well led services in accordance with the regulations. (Dr Webberley informed the LHB in October 2017 that, as a result of her suspension from the MPL, her contract with Oxford Online Surgery (Frost's Pharmacy) was withdrawn on the 25th April 2017.)

i. On 6 April 2017 Healthcare Inspectorate Wales (HIW - which is the Welsh body equivalent to the CQC) determined that Online GP Services Ltd was a "service of concern". This was because there was reasonable cause to believe that the service was being carried on without being registered. On 7 April 2017 HIW notified Dr Webberley of the outcome of their service of concern meeting.

j. On 10 April 2017 HIW wrote to the respondent advising that Online GP Services Limited which runs as Gender GP and My Web Doctor is a service of concern because they had reasonable cause to believe that it was operating a service without being registered under section 11 of the Care Standards Act 2000. The applicant was named as the Responsible Individual and Manager.

k. On 24 April 2017 Dr Webberley was interviewed under caution by HIW in presence of legal representative. During interview the applicant indicated that it would be unsafe to withdraw or stop the service, advice and help she was giving people and that she would continue to provide medical services.

l. On 25 April 2017 a Reference Panel meeting was held by the LHB. The outcome was that Dr Webberley was suspended from the respondent's Medical Performers List in accordance with Regulation 13 (1)(a) and 13 (1)(b).

m. On 9 May 2017 an Interim Orders Panel of the MPTS imposed conditions on Dr Webberley's registration until 8 November 2017 which included that all her work in relation to transgender patients must be supervised by a clinical supervisor who must be approved by her responsible officer at Aneurin Bevan University Health Board and that she must not start/restart work until the responsible officer has approved the applicant's clinical supervisor.

n. On 24 May 2017 HIW issued a Notice of Proposal to refuse registration under section 17 (3) of the Care Standards Act 2000 from Health Inspectorate Wales in respect of Online GP Services Ltd.

o. On 11 October 2017, pursuant to paragraph 14 of the Regulations, Dr Webberley requested a review of the suspension imposed by the RP.

p. On 2 October 2017 the interim conditions of practice order were continued by the MPTS.

q. On 12 December 2017 the LHB wrote to Dr Webberley giving notice of its intention to seek the removal of her name from the MPL of the grounds of

suitability and efficiency at a Reference panel convened for 9 January 2018. The LHB relied on 11 allegations and provided a period of 28 days' notice. Annexed to the notice letter was a lengthy Statement of Case, amongst other documents.

r. The RP meeting was held on 9 January 2018 and was chaired by Ms Bolt. The meeting was attended by Dr Webberley. The RP decided to adjourn the proceedings to enable consideration of the documentary evidence provided by Dr Webberley on 8 January 2018.

s. Dr Webberley remains the subject of fitness to practice proceedings before the MPTS. The IO was reviewed on 18 March 2018 and 9 September 2018. The matters being considered by the MPTS relate to a number of complaints regarding her practice as an on-line doctor i.e. her private practice. A date for the substantive hearing is not yet in view.

t. We were informed that Dr Webberley was prosecuted by HIW by way of 2 summons with regard to the offences of carrying on an independent medical agency, namely Online GP Services Ltd, without being registered. She pleaded not guilty and the case was heard in August 2018. We were informed at the hearing that the verdict was to be given on 5 October 2018.

The Decision under Appeal

5. At the adjourned meeting on 19 January 2018 the RP made the decision which is the subject of this appeal. Out of 11 allegations, it found the allegations 1, 2, 3, 4, 6 and 8 proved, and allegation 9 proved in part.

The Notice of Appeal

6. In this Dr Webberley maintains that the decision made on 19 January 2018 to uphold allegations 1, 2, 3, 4, 6, and 8, and to partially uphold allegation 9, and to remove her name from the Medical Performer's list, was wrong. We will consider the main points taken in the appeal in due course by reference to the individual allegations.

The Response to the Appeal

7. The respondent's case is that the decision to remove Dr Webberley's name from the MPL was the correct decision. Dr Webberley is unsuitable to be included in the MPL.

The Documents

8. We received two indexed and paginated bundles which included a Scott's Schedule. In the course of the hearing we received further documentation provided by Dr Webberley in an indexed bundle (marked 3) as well as some further documents from the respondent.

The Scope of the Appeal

9. As we explained after outset of the hearing the nature of the appeal is by way of redetermination**.** It is open to the tribunal in its redetermination to make any decision that would have been available to the Reference panel. Our task is not that of review of the RP decision but to make our own decision in the light of all the evidence before us, which includes evidence available as at the date of the appeal hearing.

10. The focus of our redetermination is on Allegations 1, 2, 3, 4, 6, 8 and 9. We would emphasise that we are not concerned with the merits or demerits of the issues that are to be considered by the MPTS. At its heart the appeal before us is about governance and governability in the context of the MPL.

11. We heard extensive legal submissions on the first day of the hearing regarding the RP's power to make a decision to remove. On the second day of the hearing Mr Welch submitted that these matters should be decided as a preliminary point because, if he was right, the decision should be "quashed" without more. We decided that it was more appropriate and efficient in the context of the overriding objective to proceed with the hearing. We will return to the legal submissions regarding the regulations in due course.

The Oral Evidence

12. We heard oral evidence:

On behalf of the respondent from:

- Dr Liam Taylor, the Deputy Medical Director of the Board.
- Dr Paul Buss, Executive Medical Director of the LHB and the Responsible Officer.

On behalf of the appellant from:

- Dr Webberley.

13. It is unnecessary to summarise the main evidence of the witnesses since this is set out in their statements which stood as their evidence in chief. When making our findings we will refer to the key aspects of the evidence before us as necessary to our reasoning.

The Burden and Standard of Proof

14. The respondent bears the burden of establishing that Dr Webberley's name should be removed from the List on the ground of suitability and/or efficiency. The standard of proof is the civil standard i.e. the balance of probabilities.

Final Submissions

15. We do not attempt to set out each and every matter upon which the parties relied. At the end of the oral evidence the key features of the respective positions of the parties as to merits may be summarised as follows:

16. Amongst other matters, Mr Barnes submitted that:

a) As to allegations 1 and 9, the evidence showed that, despite her denial, Dr Webberley was at the heart of the online services as shown by her CV. It may not matter if she was at the very heart of the services or not: what is significant is her response to the LHB's request to provide access to her records regarding her practice. Her reflection as to the CQC reports as shown in her appraisal is that their actions were *"nitpicking, unjustified and inflammatory".* Her attitude to self-appraisal is deeply concerning.
b) As to allegation 2, Dr Webberley effectively lied to the investigators. The three propositions she puts forward to justify her response to the investigators on 5 October 2017 are simply dishonest.
c) As to allegation 3, her account was "smoke and mirrors." It was obvious that Dr Webberley was providing registrable services. This has nothing to do with any lack of understanding but was to do with her attitude to regulation.
d) As to allegation 4, Dr Webberley first registered with the ICO on 18 January 2017. It should have been clear to her that she was a data collector. There has been no explanation as to why she did not realise this, or any subsequent reflection. It is a demonstration of her dismissive attitude.
e) As to allegation 6, there were four examples of GMC investigations not reported by Dr Webberley to the LHB. Her excuse is that she thought the LHB knew. See her position regarding re the IO conditions at B3/40 where she was trying

to conceal information from the LHB. It demonstrates her attitude to regulation Her attitude is also shown by her analysis of the complaints in her appraisal. She regards all the complaints as vexatious.

f) As to allegation 8, at first blush this is at the trivial end. However, her attention was drawn to the impact of this in 2016 and yet her use of the letters continues on the website.
g) Dr Webberley relies on her appraisal as the cornerstone of her defence, but her appraisal showed an alarming response to the proceedings and no evidence of reflection.
h) Her presence on the list is obviously prejudicial to the efficiency of services. She has deeply engrained attitudinal flaws which make it impossible for her to reflect in any real sense. She does not show any recognition of proper governance. She is unsuitable.

17. Mr Welch submitted that:

a) The correct interpretation of the law was that there was no suspension in existence at the time the RP conducted its review. The suspension imposed could not, as a matter of law, exceed six months and had therefore expired.
b) It was not accepted that the RP had power to consider removal under the regulations. The time limits re suspension were very important and the RP did not consider the point.
c) The power to remove did not exist because Dr Webberley had requested the review. He relied on the DoH guidance published in 2004.
d) Dr Webberley was treated unfairly in her dealings with the LHB. Dr Buss has written to HIW so he knew all about it. Why had no one ever sat down with her? The failure to do so was not compliant with reasonable investigation.
e) Dr Webberley was directed to discuss matters in her appraisal by Dr Buss which is why the appraisal record had been produced by her to the tribunal at short notice. The records, however, are those of the appraiser and she is not responsible for the contents.
f) Dr Webberley had not seen the complaint letter in December 2015 that was sent to the practice she had left. She did not include it in her list because it was not a normal complaint. Receiving a County Court claim is not the same as receiving a complaint to her professional body or to her employer. It was understandable that she did not classify it in the same way.
g) Dr Webberley had clear and adequate governance processes as set out in her statement. The respondent, on whom the burden of proof lies, had not asked for disclosure of those documents.
h) Dr Taylor's evidence was vague and imprecise. One charge was that Dr Webberley had not informed the LHB of complaints. She was not required to do so. Regulations 9 (1) (i) relates to "investigations" so that charge goes nowhere. The respondent could have sought to amend the charges but did not do so.
i) There was voluminous correspondence regarding allegation 2. The issue was whether Dr Webberley was non-cooperative or whether she was asserting her rights in asking for fairness and clarity. She was asking the LHB to tell her what they were concerned about. There had been an *"exit stage left"* by the investigators. Dr Webberley was not to be blamed.
j) So far as HIW is concerned Dr Webberley was entitled to plead not guilty to the summons. She is entitled to maintain her position.
k) As to allegation 8, the use of the letters MRCGP without qualification was

not cavalier. According to the BMA this was not an unusual scenario.

l) As to allegation 9, the CQC have a distinct function. They inspected the service provider and not Dr Webberley. The fact she was the Registered Manager does not make her responsible. The matters found by CQC were nothing to do with her, but were the role and responsibility of the Chief Executive.

m) The Tribunal should keep its eye on the ball. Dr Webberley did not *"dot the i's or cross the t's"* because it was a horrendous task to keep on top of matters in the context of the GMC matters and her serious health issues. The Tribunal cannot uphold the decision to remove.

n) Asked by the judge to address the issue of insight, Mr Welch submitted the primary case was about Dr Webberley's non-NHS work. Dr Webberley has insight. He made the observation that it was easier to demonstrate insight after a decision was made. Dr Webberley was a thoughtful, intellectual doctor who does reflect. Her potential to demonstrate what she has learnt is limited by her lack of practice. She is a dedicated doctor who wants to work and make a difference in a specialist field. She realises the LHB are critical and would do her utmost. She did not have a bad attitude or fixed position.

The National Health Service (Performers List) (Wales) Regulations 2004

18. Regulation 10 (3) provides the Local Health Board with a discretionary power to remove a performer from its medical performers list where any of the conditions set out in paragraph 10 (4) apply.

> *(4) The conditions mentioned in paragraph (3) are that the —*
>
> (a) continued inclusion of that performer in the Local Health Board's performers list would be prejudicial to the efficiency of the services which those included in the relevant performers list perform ("an efficiency case");
>
> (b) ….: or
>
> (c) performer is unsuitable to be included in the performers list ("an unsuitability case").

19. Other provisions under Regulation 10 regarding notice and process are as follows:

> *(8) Where a Local Health Board is considering removing a performer from its performers list under paragraphs (3) to (6) **…..**it shall give the performer —*
>
> (a) notice of any allegation against the performer;
>
> (b) notice of what action the Local Health Board is considering and on what grounds;
>
> (c) the opportunity to make written representations to the Local Health Board within 28 days of the date of the notification under sub-paragraph (b); and
>
> (d) the opportunity to put the performer's case at an oral hearing before the Local Health Board, if the performer so requests, within the 28 day period mentioned in sub-paragraph (c).
>
> *…*
>
> *(10) If there are representations, the Local Health Board must take them into account before reaching its decision, and shall then, within 7 days of making that decision, notify the performer of—*

(a) that decision and the reasons for it (including any facts relied upon); and

(b) any right of appeal under regulation 15.

(11) If the performer requests an oral hearing, this must take place before the Local Health Board reaches its decision, and the Local Health Board shall decide whether or not to remove the performer and then, within 7 days of making that decision, notify the performer of —

(a) that decision and the reasons for it (including any facts relied upon); and

(b) any right of appeal under regulation 15.

(12) When the Local Health Board notifies the performer of any decision, it shall inform the performer that, if the performer wishes to exercise a right of appeal, the performer must do so within the period of 28 days beginning with the date on which the Local Health Board informed the performer of its decision and shall tell the performer how to exercise any such right.

(13) The Local Health Board shall also notify the performer of the performer's right to have the decision reviewed in accordance with regulation 14.

(14) Where the Local Health Board decides to remove a performer under paragraph (6), the performer shall not be removed from its performers list until —

(a) a period of 28 days starting with the day on which the Local Health Board reaches its decision; or

(b) any appeal is disposed of by the [First-tier Tribunal],

whichever is the later.

Criteria for a decision on removal

20. Regulation 11 sets out the criteria for a decision on removal in relation to unsuitability, fraud and efficiency. So far as suitability cases are concerned it provides:

"11.—(*1) Where a Local Health Board is considering whether to remove a performer from its performers list under regulation 10(3) and (4)(c) (an unsuitability case), it shall —*

(a) consider any information relating to the performer which it has received in accordance with any provision of regulation 9;

(b) consider any information held by the Assembly as to any record about past or current investigations or proceedings involving or related to that performer which information it shall supply if the Local Health Board so requests; and

(c) in reaching its decision, take into consideration the matters set out in paragraph (2).

(2) The matters referred to in paragraph (1) are —

(a) the nature of any offence, investigation or incident;

(b) the length of time since any such incident occurred, any such offence was committed, and since any criminal conviction or investigation;

(c) whether there are other offences, incidents or investigations to be considered;

(d) any action taken or penalty imposed by any licensing or regulatory body, the police or the courts as a result of any such offence, incident or investigation;

(e) the relevance of any offence, incident or investigation to the performance by the performer of any relevant primary service and any likely risk to any patients or to public finances;

(f) whether any offence was a sexual offence to which Part I of the Sexual Offences Act 1997(***1***) applies, or if it had been committed in England and Wales, would have applied;

(g) whether the performer has been refused admittance to, conditionally included in, removed, contingently removed or is currently suspended from any list or any equivalent list, and if so, the facts relating to the matter which led to such action and the reasons given by the Local Health Board or equivalent body for such action;…"

21. Similar (but not identical) provisions are set out in regulation 11 (3), (4) and (5) concerning matters to be considered where a Local Health Board is considering removal of a performer from its performers list in an efficiency case.

22. Importantly, regulation 11 also provides that:

"(7) In making any decision under regulation 10, the Local Health Board shall take into account the overall effect of any relevant incidents and offences relating to the performer of which it is aware, ***whichever condition it relies on."*** (our **bold**)

Our Consideration and Findings

23. We have considered all the evidence and submissions before us and have considered matters in the round. If we do not refer to any particular aspect of the evidence or submissions in our reasoning it should not be assumed that we have not taken them into account.

24. We find that the broad history is as set out at paragraph 4 above. We will make the additional findings as relevant to key issues in dispute between the parties hereafter.

Legal Submissions

25. We deal first with the appellant's submissions regarding the panel's power to remove Dr Webberley's name from the MPL.

26. Mr Welch submits that there was no power vested in the LHB to make a removal decision because the suspension imposed on 25 April 2017 had, in fact, expired. He submits that regulation 13(4) applies and that this subsection covers decisions to suspend made under regulation 13 (1) (a) and (b). In short, he submits that the panel could not lawfully review a suspension that had already expired.

27. We note that this was not a point taken in terms before the RP but there is nothing in this because we are conducting a redetermination pursuant to the right of appeal under regulation 15.

28. Mr Barnes submits that regulation 13 (3) which applies to decisions under Regulation13 (1) (b) could not be clearer. Subsection (3) operates differently to subsection (2) because it specifies the basis for the decision to which it applies. If it had been intended to limit the suspension period whilst waiting for a decision of a regulatory body the draftsman would have repeated the wording in subsection (2). The effect of subsection (3) is that the suspension remained operative.

29. We have considered all the submissions made on this issue. The relevant parts of the Regulations are as follows:

Suspension

13*.— (1) If a Local Health Board is satisfied that it is necessary to do so for the protection of members of the public or is otherwise in the public interest, it may suspend a performer from its performers list in accordance with the provisions of this regulation —*

(a) while it decides whether or not to exercise its powers to remove the performer under regulation 10 or contingently remove the performer under regulation 12;

(b) while it waits for a decision affecting the performer of a court anywhere in the world or of a licensing or regulatory body;

(c) where it has decided to remove the performer, but before that decision takes effect; or

(d) pending appeal under these Regulations.

(2) Subject to paragraph (8), in a case falling within paragraph (1)(a), the Local Health Board must specify a period, not exceeding six months, as the period of suspension.

(3) Subject to paragraph (8), in a case falling within paragraph (1)(b), the Local Health Board may specify that the performer remains suspended after the decision referred to in that paragraph has been made for an additional period, not exceeding six months.

*(4) The period of suspension under paragraph (1)(a) or (b**)** may extend beyond six months if—*

(a) on the application of the Local Health Board, the [First-Tier Tribunal] so orders; or

(b) the Local Health Board applied under sub-paragraph (a) before the expiry of the period of suspension, but the [First-Tier Tribunal] has not made an order by the time it expires, in which case it continues until the [First-Tier Tribunal] makes an order.

*(5) If the [*First-Tier Tribunal*] does so order, it shall specify —*

(a) the date on which the period of suspension is to end;

(b) an event beyond which it is not to continue; or

(c) both a date on which it is to end and an event beyond which it is not to continue, in which case it shall end on the earlier of that date or that event, as the case may be.

*(6) The [*First-Tier Tribunal*] may, on the application of the Local Health Board, make a further order (complying with paragraph (5)) at any time while the period of suspension pursuant to the earlier order is still continuing.*

(7) If the Local Health Board suspends a performer in a case falling within paragraph (1)(c) or (d), the suspension has effect from the date the Local Health Board informed the performer of the suspension until —

(a) the expiry of any appeal period; or

(b) if the performer appeals under regulation 15, the [First-Tier Tribunal] has disposed of the appeal.

(8) The Local Health Board may extend the period of suspension under paragraph (2) or impose a further period of suspension under paragraph (3), so long as the aggregate does not exceed six months.

(9) The effect of a suspension is that while a performer is suspended under these Regulations the performer is to be treated as not being included in the Local Health Board's performers list, even though the performer's name appears in it.

(10) The Local Health Board may at any time revoke the suspension and inform the performer of its decision.

30. We find that the suspension decision was made by the RP on 25 April 2017 was expressly made by reference to regulation 13 (1) (a) and (b) i.e:

*(a) "…*while it decides whether or not to exercise its powers to remove the performer under regulation 10 or contingently remove the performer under regulation 12" and

(b) "…while it waits for a decision affecting the performer of a court anywhere in the world or of a licensing or regulatory body."

31. We remind ourselves that we are not conducting an appeal against the suspension decision. We noted also that following the suspension a detailed letter dated 23 June 2017 was sent by the appellant's former representatives, Carbon Law Partner, with reference to judicial review. This was met with a detailed and robust response on 7 July 2017. Judicial review was not pursued.

32. We have considered the submissions made regarding the de facto situation before the RP in January 2018. We find that the suspension decision had been made on 25 April 2017, at least in part, by reference to 13 (1) (b) and subsection (3) therefore applies. This provides the LHB with *discretion* to specify that the performer remains suspended *after the decision referred to in that paragraph has been made for an additional period*, not exceeding six months. In other words, if suspension is made under regulation 13 (1) (b) there is no obligation to specify when the suspension ends.

33. In our view the regulations provide that suspension remains in force until a decision has been made by the other regulatory body and such suspension can remain in force for an additional six months thereafter. We agree that the decision was also made under paragraph 13 (1) (a) but in our view this does not affect the substance or the effect of the order. In our view the suspension order was in force at the date of the RP in January 2018.

34. Even if we are wrong in this we stand in the shoes of the RP who, irrespective of the existence of any suspension order, had the power to make a decision to remove. We will deal with this further below in the specific context of the further legal argument advanced below.

35. Mr Welch submits that there is no power to remove on a review that has been requested by the practitioner. It is argued that since the review was requested by Dr Webberley this does not fall within regulation 14 (10) and the power to remove is therefore not available. He also relies on the guidance provided by the Department of Health in 2004.

36. The relevant regulations regarding review are as follows:

Reviews

14.—*(1) A Local Health Board may, and if requested in writing to do so by the performer must, review its decision to —*

….

(c) suspend a performer under regulation 13(1)(a) or (b), except where a suspension is continuing by order of the [First-tierTribunal].

(2) A performer may not request a review of a Local Health Board's decision until the expiry of a three month period beginning with the date of the Local Health Board's decision or, in the case of a conditional inclusion under regulation 8, beginning with the date the Local Health Board includes the performer's name in a performers list.

(3) After a review has taken place, the performer cannot request a further review before the expiry of six months from the date of the decision on the last review.

(4) If a Local Health Board decides to review its decision under this regulation to conditionally include, contingently remove or suspend a performer, it shall give the performer —

(a) notice of any allegation against the performer;

(b) notice of what action the Local Health Board is considering and on what grounds;

(c) the opportunity to make written representations to the Local Health Board within 28 days of the date of the notification under sub-paragraph (b); and

(d) the opportunity to put the performer's case at an oral hearing before the Local Health Board, if the performer so requests within the 28 day period mentioned in sub-paragraph (c).

(5) If there are no representations within the period specified in paragraph (4)(c), the Local Health Board shall notify the performer of its decision, the reasons for it (including any facts relied upon) and of any right of appeal under regulation 15.

(6) If there are representations, the Local Health Board must take them into account before reaching its decision.

(7) The Local Health Board shall, within 7 days of making its decision, notify the performer of —

(a) that decision;

(b) the reasons for it (including any facts relied upon);

(c) any right of appeal under regulation 15; and

(d) the right to a further review under this regulation

(8) If a Local Health Board decides to review its decision to impose conditions under regulation 8, the Local Health Board may vary the conditions, impose different conditions, remove the conditions or remove the performer from its performers list.

(9) If a Local Health Board decides to review its decision to impose a contingent removal under regulation 12, the Local Health Board may vary the conditions, impose different conditions, or remove the performer from its performers list.

(10) If a Local Health Board decides to review its decision to suspend a performer under regulation 13(1)(a) or (b), the Local Health Board may decide to impose conditions or remove the performer from its performers list. *[our **bold**]*

(11) A Local Health Board may not review its decision to suspend a performer under regulation 13(1)(c) or (d).

37. In our view the primary source for our power in our redetermination is set out in the Regulations made pursuant to sections 28X, and 126(4) of the National Health Service Act 1977. Mr Welch relies on the Guidance issued in 2004 by the Department of Health "Delivering Quality in Primary Care" with regard to the English performer's regulations. This lists the action that may be taken on review but does not refer to removal. Taking on board, at least for present purposes, that the spirit of the guidance is applicable to the Welsh regulations, we are not persuaded that the 2004 Guidance is definitive. We also do not consider that this guidance can, or should be taken, to displace the natural meaning and effect of regulations made pursuant to statute. At its highest the guidance might be taken to provide some support for the argument made regarding interpretation of the regulations. In our view the regulations are clear.

38. We find that the LHB made a decision to review. Regulation 14 (1) provides for a decision to review to be made by the LHB in two circumstances: in the exercise of its own regulatory power and/or in response to a request for review by a practitioner. The fact that Dr Webberley requested the review, (and it therefore had to be held on a mandatory basis, pursuant to regulation 14 (1)), is not the point. It was, nonetheless, a LHB decision to review.

39. It makes regulatory sense that the discretionary power to remove exists on a review of a suspension, just as it does when conditions or contingent removal are reviewed - see regulation 14 (8) and (9). In our view if the limitation for which Mr Welch argues exists the regulations would have been drafted differently so as to expressly exclude the power to make a removal decision if a review has been requested by the practitioner. The words which the appellant seeks to read in to the regulations would not, however, make sense in the context of the regulations as a whole - for reasons we will explain below.

40. Further, to follow Mr Welch's argument to its logical conclusion, if Regulation 14 (10) does not allow the LHB to remove a performer upon a review of a suspension requested by the performer, then the wording of the regulation must also mean that the LHB has no power upon review of a suspension (requested by the performer) to impose conditions in place of the suspension instead. This is manifestly absurd.

41. Moreover, it is important to recognise that it is open to an LHB to make a decision to remove a practitioner on the grounds of efficiency or suitability under Regulation 10 *at any time.* It is a freestanding power which is not dependent upon an earlier suspension decision ever having been made. It is, of course, a decision that cannot be taken unless due notice has been given. The requirements in respect of notice of intention to remove are set out in Regulation 10 (8) - see above. These mirror the requirements for notice of consideration on removal on review under regulation 14 (4).

42. In any event the construction for which Mr Welch argues is a sterile debate. We find that the LHB had, by its letter dated 12 December 2017, given due notice of its intention to seek removal under Regulation 10 on suitability and efficiency grounds. We do not consider that there is any real or meaningful distinction to be made between notice of intention to remove under Regulation 10 simpliciter, and a notice of intention to remove under Regulation 10 in the context of a review under regulation 14. The fact is Dr Webberley knew by reason of the letter dated 12 December 2017 that the LHB were seeking her removal on unsuitability and efficiency grounds. She knew the allegations on which reliance was placed and had had proper opportunity to respond to them prior

to the decision made. She has also had very ample opportunity to respond to the very same allegations in this appeal. In its redetermination the Tribunal is able to make any decision the RP could have made. This would include the conversion (if that was ever deemed necessary - and we do not consider that it was) from a review of a suspension to consideration of a removal decision under Regulation 10.

43. In our view there is no substance to "jurisdictional" points taken by the appellant.

44. The further point is taken that the LHB did not give reasons for its decision. We agree that the RP stated its conclusions but gave no reasons as it was required to do under the regulations. We agree that it is regrettable that the RP did not state its reasons. However, as explained at the outset of the hearing, and on a number of occasions thereafter, the nature of a redetermination means that the tribunal considers the matter afresh, taking into account all of the evidence adduced by both sides, some of which was not before the RP.

45. The absence of reasoning by the RP is therefore not fatal or dispositive of the appeal because we are not conducting a review in the classic sense. We have considered the issue of fairness. As we have said Dr Webberley was provided with the lengthy Statement of Case, which set out in considerable detail the case advanced by the LHB. It was attached to the letter giving notice of the grounds said to justify removal. She has also known the summative conclusions of the RP since its decision. As to the respective arguments which may inform our reasoning, both parties have known the case to be advanced by each side as to the merits for many months, as well as the evidence on which each side chose to rely. Each side has had ample opportunity to adduce the evidence on which it relies in support of its case in this appeal. It is for the tribunal to decide in its redetermination whether, in the light of all of the evidence now before us, the respondent has satisfied us that Dr Webberley is unsuitable to be included in the MPL and/or whether the continued inclusion of her name is prejudicial to the efficiency of services that those on the list perform. That is the nature of a redetermination.

46. Stripped to its true core this appeal concerns the merits/reasonableness/proportionality of the decision to remove made by the RP in the exercise of its powers under regulation 10. The allegations which we are concerned all relate to the overarching issue of Dr Webberley's self-governance and her willingness to be subject to regulatory governance by those responsible for her continued inclusion in the MPL.

47. We will set out the main points taken by the appellant in her notice of appeal in respect of each allegation made by the LHB below. It is appropriate to record here our overall impression of the witnesses from whom we heard evidence.

48. We should deal with the point taken in Dr Webberley's response to the written evidence of Drs Taylor and Buss. In short (amongst other matters) it was suggested that neither Dr Taylor or Dr Buss were able to provide evidence since they were not the decision makers. There is no substance at all in this. This approach portrays a misconception regarding the nature of a redetermination.

49. We consider that Dr Taylor and Dr Buss were straightforward witnesses who explained the reasons underpinning their concerns in the context of their duties to regulate the continued inclusion of primary care practitioners in the MPL. We noted that Dr Taylor said in his statement that in the 15 years' experience of involvement in the review of clinical concerns he had never witnessed such resistance from a doctor in the face of valid concerns, to facilitating the provision of assurance on clinical safety on such a scale as that demonstrated by Dr Webberley. In his view GP appraisal of an individual

based on self-reported information cannot be the sole vehicle for the assurance of the governance framework in which a practitioner works. In his opinion it was wholly appropriate and reasonable to seek other assurances from other sources. Dr Buss' evidence was to similar effect.

50. In the event the main challenge to Dr Taylor's evidence was it was suggested that a different approach could and should have been undertaken towards process issues. For example, it is suggested that referral to NCAS should have been pursued further than it was and/or NCAS methodology should have been used.

51. In general terms we consider that Dr Webberley's approach to the issues raised regarding the allegations which formed the basis of the decision has been far from straightforward. It is notable that her main appeal statement is very short on facts but long on legal argument.

52. We will deal with specific aspects of Dr Webberley's evidence regarding facts when we give our reasons. In broad terms we found that Dr Webberley was a very unimpressive witness who demonstrated a marked unwillingness to accept obvious points and to seek to avoid giving straight answers.

53. One example of this was when she was asked about a letter of complaint dated 14 December 2015 when was sent to the Blaina surgery by a former patient who was writing from prison and seeking Dr Webberley's home address. Her position was that she did not know about the letter of complaint because it had been sent to the surgery so she did not see it. However, the very next document was a County Court claim form. Although this has no issue date it bears the same county court reference number as that cited in the letter. The fact that the claim had a number indicates that it had been lodged. It emerged that Dr Webberley had attended a telephone case management conference with a District Judge at an early stage. We find that, irrespective of whether she did not or did not receive the complaint letter, she knew about the issues raised by the patient soon after the claim was issued in or about December 2015.

54. Dr Webberley's approach to the claim for damages in her evidence to us was that this has nothing to do with her and what the patient was really complaining about was the prison doctor. Cursory reading of the claim form shows that this is inaccurate. In short, her former patient, then in prison, was claiming that she had been under the continuing care of Dr Webberley, a gender specialist who prescribed her hormone treatment. The core of the claim was that, once in custody, she needed Dr Webberley to confirm her treatment and prescription details but Dr Webberley would not talk to her, told the prison doctor that she did not know her and not to call again. The claimant's case was also that her solicitor wrote to Dr Webberley to no avail.

55. Irrespective of the truth or merits of the claim, (with which we are not concerned), the fact is that the county court claim was a complaint about Dr Webberley regarding her duty of care as a gender specialist. Dr Webberley did not acknowledge this claim in her annual appraisal which took place on 15 September 2016. The appraisal document recorded "there were no complaints from patients about the doctor's practice" (albeit with a qualification regarding an ongoing investigation by the GMC). Mr Welch submitted that she did not acknowledge the complaint in appraisal because she did not classify a county court claim as a complaint. At best this suggests a lack of insight**.**

56. It is convenient to begin with allegation 9.

Allegation 9

57. Allegation 9 is that Dr Webberley was *"the principal GP input associated with two internet based services in England (www.oxfordonlinephamracy.co.uk and www.theonlinesurgery.co.uk) which were inspected by the Care Quality Commission (CQC) in England and found not to be providing safe, effective and well led services in accordance with the relevant regulations.*

58. In her notice of appeal Dr Webberley maintained:
    i. *"There is no explanation of what "partially upheld" means and thus such a decision cannot stand. In any event it is not understood what is meant by "you were the principle GP input". There were other doctors providing medical services at the material time."*
    ii. *The English services had been previously inspected and no concerns found. They were re-inspected in January 2017 using their new methodology for inspecting digital services, however their guidance for this was not published until March 2017. They then further updated digital providers with their findings and recommendations from their first round of the new inspections in August 2017.*
    iii. *www.oxfordonlinepharmacy.co.uk and www.theonlinesurgery.co.uk are not owned by Dr Webberley. She was providing services to their owners, and it is these latter two services that were found to be failing by the CQC."*

59. In her statement in these proceedings and in her oral evidence Dr Webberley maintained that she was not the principal GP and effectively had no responsibility in respect of the failings identified by CQC. In short, she claims that her involvement with www.oxfordonlinepharmacy.co.uk and www.theonlinesurgery.co.uk. was minimal.

60. In her statement in these appeal proceedings Dr Webberley accepted that she was the 'Registered Manager' of Dr Matt Ltd (the OnLine Surgery) but says that many of the failings outlined in the report were due to management failings of the service provider (DMC Healthcare Ltd). This business was owned and operated by DMC Healthcare Ltd who were responsible for the overall management and service. It is untrue that she was Lead Clinician. There were other doctors providing services to this provider and there was no distinction that she was lead clinician. She was not the only GP providing services at the time of the inspection.

61. As to the facts regarding Dr Webberley's involvement we find as follows:

    a) The website www.oxfordonlinepharmacy.co.uk under the heading "About Us" states:

    "Oxford Online Pharmacy is the online dispensing arm of the Frost Group Pharmacy Group in Oxfordshire

    Employing experienced pharmacists and healthcare professionals, the group is headed up by Stuart Gale and Dr Helen Webberley…

    In the biopic Dr Webberley was described as:

    "the site's dedicated GP…Together Dr Webberley and Chief Pharmacist, Stuart Gale, are committed to ensuring every patient gets the best possible care."

    b) In her CV Dr Webberley referred to her employment as a Medical Director at the Oxford Online Pharmacy.

c) So far as Dr Matt Ltd is concerned, the letter on 13 March 2017 from solicitors then instructed on Dr Webberley's behalf illuminates the issue. They informed HIW that Online GP Services Ltd continue to provide online medical services and stated that for a short time Dr Webberley was employed as the Medical Director and registered provider for Dr Matt Ltd. When the company failed its CQC inspection on 11 January 2017 she had resigned and has had nothing to do with the company since.

d) The CQC inspection report stated that Doctor Matt Ltd employs "a" GMC registered GP who works remotely in analysing patient information forms when they apply on line for prescriptions." We consider it very likely that this was Dr Webberley – see below.

e) Dr Webberley relies on the fact that she was not mentioned by name in the CQC reports. We find was she was at the heart of both of the services inspected by the CQC. We say this not least because it was recorded within her appraisal under the heading that deals with "Colleague Feedback" that:

"The Doctor was criticised by the CQC for her involvement with two online pharmacies. The Doctor has lodged a formal complaint as she feels their actions were "nit-picking, unjustified and inflammatory".

In our view, whilst the appraiser made the record, the probable source of this information was Dr Webberley. We consider it very likely that it reflects her attitude to the CQC investigations and the phrase *"nit-picking, unjustified and inflammatory*" was a direct quote from her. It is difficult to see why she made a complaint to CQC if she was not at the heart of the online services inspected that were found to be lacking.

62. In our view Dr Webberley has attempted to distance herself from her involvement in the online pharmacies inspected by the CQC.

63. We have considered the reports of the CQC inspections. Each inspection was conducted by a team led by Professor Field. It is obvious to us from reading the full reports that the CQC findings were evidence based and raised matters of significant concern in relation to patient safety that related, in particular, to leadership and management. We have found that Dr Webberley was at the heart of both services. We find that Dr Webberley's attitude that the CQC reports were "*nit-picking, unjustified and inflammatory"* is very disturbing.

64. We find Allegation 9 proved.

Allegation 1

65. Allegation 1 is that Dr Webberley *"provided generic and specialist on-line medical services in the absence of clear and adequate governance processes."*

66. In the appeal notice and before us Dr Webberley's case is that her governance was fully discussed at her appraisal in line with 'Clinical Governance Wales' Paragraph 16, Table 1". Further her case is that *"during the material time she has also undertaken individual appraisal, audit, CPD and regularly checks performance indicators. She has in her possession and follows a full set of clinical and practical policies and protocols, complaints procedure, meetings, patient/ colleague feedback, audit, research. She follows International and National guidance where available."*

67. Whilst making these assertions Dr Webberley has not provided in this appeal the clinical and practical policies and protocols, complaints procedure, (notes of) meetings, patient/ colleague feedback, audit, or research to which she had referred in the notice of appeal. She, by her representative, suggests that she has not been required to disclose documents by the respondent. We are unimpressed by this. There are no "discovery" provisions in Tribunal proceedings. It is a matter for each party to decide whether or not to adduce documentary evidence in support of their case.

68. Dr Webberley also relies upon the simple fact of appraisal as sufficient to address the concerns raised. We considered the evidence regarding appraisal upon which she relied. We agree that appraisal is a useful tool but we do not consider that it provides any or any adequate assurance as to governance, given the nature and extent of the concerns raised by the CQC, amongst others. In our view her self-assessment in her appraisal shows a startling lack of self-reflection.

69. We find Allegation 1 proved.

Allegation 2

70. Allegation 2 is that Dr Webberley had *"repeatedly resisted the legitimate and reasonable efforts of Health Board officers and nominated investigators to undertake a local review of your on-line prescribing."*

71. We considered the evidence as to the extent to which Dr Webberley had undertaken work as an NHS performer since her resignation as a partner effective from 1st June 2016. We recognise that the respondent did not (and does not) seek removal on the grounds that the appellant had not practised, or had practised very little, as an NHS GP. However, the background to the decision is that it had received significant information as to how the appellant was conducting her practice, albeit in a private practice and online sphere. We find that this together with the substance of the CQC reports provoked legitimate grounds for concern about her current standards of practice generally. We agree the clear need arose for the LHB to obtain objective reassurance as to the standards of Dr Webberley's practice. The reality is that the extent to which Dr Webberley had worked as an NHS performer did not provide the basis for any realistic assessment of the safety of her practice. In our view it was entirely appropriate and reasonable that the LHB sought to gain assurance as to the standards by which Dr Webberley operated because she is a GP included in the MPL that it maintains. It is relevant to note in this regards that Dr Webberley refers to her position as an NHS GP in the context of her online practice (see the website entry before us regarding oxfordonline), and also when writing to other doctors (see the Gender GP letter dated 2017 at C532a).

72. In her appeal statement and in this appeal Dr Webberley places very heavy emphasis on the fact that when the investigators came to her house on 05/10/2017 it was Mr Thomas who terminated the meeting stating, '*We think that to be fair to you we believe it will be very difficult to proceed today; we need greater clarity as to the Terms of Reference and why we are doing the role.'* In our view the record of that visit has to be read as a whole.

73. Her overall position is that she had simply required clarity and fairness in the investigation process, but had been told that the LHB were not using any national or local policies or guidelines. She maintains, amongst other matters, that the LHB had attempted to use an English service inspection toolkit in which the investigators have no training.

74. We have considered the very lengthy correspondence that took place between July and December 2017 and all of the evidence in the round. We have also considered the points made by Dr Webberley in her "Response to the Allegation of Non-Compliance with the Investigation of my Online Prescribing" which she submitted to the RP on 05/01/2018. In summary, she questioned the terms of reference, the competence of the investigators, their independence, their training, and the proposed use of the CQC methodology. It is also suggested that a referral to NCAS should have been made.

75. We considered the lengthy record regarding the attempted inspection. On 5th October 2017 she told the investigators that it was necessary to set out the terms of reference but we find that she knew these had been provided to her by the LHB. She did not <u>like</u> the LHB's terms of reference but that is a different matter.

76. We accept Dr Taylor's evidence that Dr Thomas called him on 5 October to advise that the Applicant was resistant to the use of the CQC methodology and had asked them to adopt NCAS methodology instead.

77. As a specialist tribunal we draw on our experience of NCAS methodology and assessments. These may be appropriate where concerns about specific performance issues (i.e. about standards of clinical care) have actually been identified. This was not this case. Here the LHB were seeking assurance about governance processes. This may or may not have led to specific concerns that might or might not have warranted further assessment.

78. In our view the terms of reference, and the means by which LHB proposed to investigate Dr Webberley's records and her practice were entirely reasonable. We find that the LHB had gone to great lengths to explain how the inspection would be conducted. There is no "magic" or difficulty about the CQC methodology which is a simply a template of questions/issues. We do not accept that any special training would be required for the investigators. There is no real substance in Dr Webberley's complaints about the independence of the investigators who, we find, were independent in the sense of professional autonomy.

79. All of Dr Webberley's points assume that a negative conclusion would be reached. There was no rational basis for that pre-emptive assumption. If the investigators were to make findings that were unfair, Dr Webberley would have had ample opportunity to challenge those findings if a decision under regulation 10 were to be based on their views. She would have had that opportunity both at any RP (if held) and on appeal to the Tribunal in the event that an adverse decision were to have been made. In our view the thrust of Dr Webberley's objections put "the chicken before the egg". We find that she used every possible argument to frustrate any investigation or overview of her practice.

80. We find that the many and varied objections she took, both in correspondence and on 5 October 2017, were to seek to prevent investigation. In our view the correspondence and the record of the actual visit when read as a whole shows the lengths to which she was prepared to go to deter investigators from their role. In the course of the visit she even raised her concerns about her personal liability in the event that an investigator sustained injury at her home. In our view her reliance of one sentence from the record of the visit to justify her position is highly selective and disingenuous. We find that the reality that the investigators had to withdraw because it was clear she would not cooperate and permit access to her records. Having seen and heard her give evidence we find that her claimed reasons for refusing effective access on 5 October were disingenuous and manipulative.

81. We find Allegation 2 proved.

Allegation 3

82. Allegation 3 is that Dr Webberley *"provided patient services privately via your on-line websites based in Wales (www.gendergp.co.uk and www.mywebdoctor.co.uk) despite not being registered by Healthcare Inspectorate Wales (HIW) as required by legislation and continue to provide such services despite your acknowledged understanding of such a requirement."*

83. The appellant's response in the Notice of Appeal was that:

i. Web sites, as is well known, are not based anywhere, that is the nature/function of the World Wide Web. Websites are not required to be registered with the HIW/CQC. Companies do not need to be registered. However 'providers of services' need to be registered. Many clinicians who undertake NHS or private practice will have their own website explaining what they do and who they are.

ii. She has three companies, which are all registered at her home address in Wales. One (Online GP Services Ltd) is for business and tax purposes and does not 'provide services'. The other two (Gender GP Ltd and My Web Doctor Ltd) are both dormant.

iii. When she was providing services she applied for registration with the CQC and HIW. The CQC found that, *'As Dr Webberley is in Wales and is based in Wales she would not at this time require to be registered with us.'*

iv. The HIW in their decision letter of 24 May 2017 stated: *'The information provided to HIW….. suggests that private services will be provided by a medical practitioner at various venues across the UK on an ad hoc basis and via the company's websites. On the basis of this information HIW is not satisfied that the services fall within the scope of section 2(4) of the Act and regulation 4(1) of the Regulations.'*

84. In broad terms her approach in her statement in this appeal (June 2018) was that she has complied with legislation and there is no evidence to suggest she has not. She re-iterates that the HIW have stated that her services do not fall within their scope of registration.

85. We find that:

a) Dr Webberley first contacted HIW on 14th November 2016 in relation to registering her websites. She made an application but this was returned as the information was incomplete.

b) She made another application on the 10th February 2017 for registration but it was not approved.

c) On 10 March 2017 HIW wrote to Dr Webberley seeking confirmation that no services that require registration under the Care Standards Act 2008 were being provided by Online GP Services Ltd.

d) In an interview on Radio 4 on 6th April 2017 Dr Webberley suggested that she previously had not felt her service had to be registered with HIW as her services had been of an advisory nature only.

e) On the same day HIW determined that Online GP Services Ltd was a service of concern. This was because there was reasonable cause to believe that the service was being carried on without being registered.

f) On 7 April HIW notified the Applicant of the outcome of their service of concern meeting.

g) On 10 April 2017 HIW wrote to the respondent advising that Online GP Services Limited which runs as Gender GP and My Web Doctor is a service of concern because they had reasonable cause to believe that it was operating a service without being registered under section 11 of the Care Standards Act 2000. The applicant was named as the Responsible Individual and Manager.

h) In her appraisal dated October 2017 it was recorded *"HIW have been asking the Doctor to register and have made a HUGE fuss. Yet they have still not confirmed that the Doctor needs to be registered".* We find this entry reflected Dr Webberley's attitude rather than that of the appraiser.

i) In her notice of appeal her approach to this issue was to present a number of reasons why the services she provides are not registrable. We consider that, when quoting from letters from HIW in this appeal, she has selected only those parts which she contends support her case that her services were not registrable, and ignoring the overall effect/import of the HIW correspondence.

j) She has been prosecuted by HIW in relation to her failure to register and awaits the District Judge's decision.

k) In our view it is not seriously arguable that she was not providing registrable services under section 11 of the Care Standards Act 2000.

l) We have considered whether Dr Webberley's stance arises from any genuine misunderstanding but find that this is not the explanation. Dr Webberley is, we find, someone who was, and is, determined to argue any point in order to seek to avoid regulatory oversight of her on-line services.

86. We find allegation 3 proved.

Allegation 4

87. Allegation 4 is that *"prior to January 2017, you were storing and processing patient data electronically despite not being registered as a data controller with the Information Commissioners Office, as required by legislation.*

88. Dr Webberley accepts that she was not registered with the ICO so the allegation is proved. We make findings regarding the context of the admission. Her position is that as soon as she realised she needed to be registered she did so. She relies on the fact that the ICO did not take any action. We agree with the respondent's submission that her explanation about her failure to recognise her legal obligations provides little or no indication of insight or self-reflection.

Allegation 6

89. Allegation 6 is that Dr Webberley *"repeatedly failed to inform the Health Board of complaints made against you to the General Medical Council (GMC) as required by Regulation 9 (1) (i) of the Performers List Regulations."*

90. In the notice of appeal Dr Webberley responded that Regulation 9 (1) (h) below does not require Dr Webberley to inform the Health Board of complaints. She referred to regulation 9 (1) (h).

91. Regulation 9 sets out the relevant requirements with which a performer in a performers list must comply as follows:

9.—(1) A performer, who is included in a performers list of a Local Health Board, shall make a declaration to that Local Health Board in writing within 7 days of its occurrence if the performer —

……

(h) is informed by any licensing, regulatory or other body of the outcome of any investigation into the performer's professional conduct, and there is a finding against the performer;

(i) becomes the subject of any investigation into the performer's professional conduct by any licensing, regulatory or other body;

……

and, if so, the performer shall give details of any investigation or proceedings which were or are to be brought, including the nature of the investigation or proceedings, where and approximately that investigation or those proceedings were or are to take place, and any outcome.

92. In our view it was always clear that the LHB relied on (and still rely on) regulation 9 (1) (i). In our view there is no merit in the suggestion that this allegation must fail because it referred to "complaints" rather than investigations. We find that there were a number of complaints that were made to the GMC and some of these became investigations. Dr Webberley's case is that she did not need to inform the LHB because it was aware of the GMC proceedings and would be, and/or was, informed by the GMC in any event. However, this misses the point: the regulation is in mandatory terms. It requires action by the performer and requires her to submit details to the LHB.

93. We find Allegation 6 proved.

Allegation 8

94. Allegation 8 is that Dr Webberley *"provided misleading information on a public website stating that you were a member of the Royal College of General Practitioners whereas you weren't a member at a time when the reference to your purported membership was still publically **(sic)** accessible on your website."*

95. In the notice of appeal Dr Webberley accepted that her use of MRCGP was wrong. She agrees that she should have used "Dr Helen Webberley MRCGP (1995)" instead of "Dr Helen Webberley MRCGP". Her case is that her intention was to show that she had achieved the relevant accreditation, not that she was a current member. In short, she maintains that her use of "MRCGP" was an innocent mistake.

96. The respondent relies, in particular, on a print out from the Oxford Online Pharmacy website, which stated that she *"is a member of….the Royal College of General Practitioners.'* Dr Webberley maintains that she did not write the website copy and, even if she had been aware of it, she had no access to amend or change it.

97. In our view it is very improbable that Dr Webberley was not involved in how her services were described on www. oxfordonlinepharmacy.co.uk. The text of the whole entry is, in effect, a "bi-line" summary of her career. It contains marked similarities to the letter written in her name dated in 2017 (C532a). It is probable that this was the standard letter she sent to other doctors to advise them of her qualifications, expertise and the services she is providing at the Transgender Medical Clinic, GenderGP, to their patients. This stated *"I am a practising NHS General Practitioner and a member of the*

Royal College of General Practitioners…" The letter is signed by her with the use of MRCGP.

98. For the avoidance of doubt we note that this was not the only occasion that Dr Webberley used "MRCGP". She did so in other correspondence.

99. We find that her use of "MRGCP" was misleading because it implied she was a member of the college when she was not. We do not accept her evidence that the website copy was written without her input, approval or knowledge. In any event, a GP has a duty to make sure that information given to the public is accurate. Even on her own case Dr Webberley failed to ensure that information issued under her name was accurate.

100. We find Allegation 8 proved.

Consideration of the overall effects of the incidents

101. We have found Allegations 1, 2, 3, 4, 6, 8 and 9 proved. We agree that the allegation proven regarding Dr Webberley's use of MRGCP is not, on the face of it, a matter at the most serious end of the spectrum. However, like the facts we have found proven regarding allegations 4 and 6, it is part of a picture regarding Dr Webberley's attitude to, and compliance with, rules and regulations - which is of a piece with our findings regarding allegations 1, 2, 3 and 9.

102. Under regulation 11 (7) we are required to consider the overall effects of the incidents. In our view the overall effect of the allegations we have found proven is that Dr Webberley does not respect the legal and regulatory framework in which she operates. The reality is that she does not regard herself as accountable to the LHB, or even to HIW.

103. It is well known that the reasons that underpin a decision based on efficiency and/or suitability often overlap. In general terms the issue of suitability concerns the lack of fundamental characteristics that are essential to continued inclusion on the list such as the integrity, insight and attitude of the practitioner. As a matter of law conditions cannot be imposed in relation to a practitioner considered to be unsuitable for obvious reasons. By way of contrast conditions can be imposed of a practitioner in an efficiency case. In an "true" efficiency case the issue is whether, realistically, conditions can be imposed that are sufficient to address the inefficiency considered to be involved in the appellant's continued presence on the MPL. It is therefore fair and logical (and consistent with the exercise of proportionality) to decide the efficiency grounds first.

104. In our view Dr Webberley's attitude to regulation provides the explanation for the fact that she frustrated the efforts of the LHB to seek to assure itself as to her practice. Dr Webberley does not accept, respect or understand external governance. Her approach throughout has been to resist inspection of her practice to the "nth degree". She wishes to enjoy the benefits of being a performer included on an NHS list because this provides her with the ability to say she is an NHS GP - which in turn supports her ability to provide on line services in private practice. However, she does not wish to be accountable to the Board that is responsible for governance of the MPL. Having seen and heard Dr Webberley give evidence we find that beneath a thin veil of her claimed pursuit for fairness, justice and clarity, her real approach and attitude to the LHB is to resist utterly the notion of accountability.

105. In our view Dr Webberley's attitude to governance is also demonstrated by her approach to registration with HIW. We have found that she did not want to be

registered with HIW and has doggedly sought to avoid this. Registration with the HIW would involve inspection.

106. In our view no conditions could realistically be imposed that would begin to address the clear inefficiency posed by her continued inclusion in the MPL because she does not, in truth, accept that she is accountable to the LHB. In this she is very plainly wrong.

107. We find that Dr Webberley's continued inclusion on the list is plainly prejudicial to the service that those on the list provide. Time spent in dealing with Dr Webberley's idiosyncratic approach and entrenched resistance to the ordinary demands of governance is time wasted and which could be better deployed for the benefit of those practitioners that engage with the principles of governance and accountability. She has, to date, absorbed considerable resources but to no avail in terms of any or any adequate assurance or governance or even a glimpse of any improvement in her attitude to regulation.

108. In our view no conditions could realistically be imposed that would protect against the obvious inefficiency that Dr Webberley's continued inclusion in the MPL would involve. She considers that the only body that is responsible for her continued practice is the GMC. This approach is wholly mistaken. It is, of course, true to say that the MPTS will decide on the future of her registration as a medical practitioner on the grounds of her fitness to practice. The LHB are however, the regulators of whether she is suitable to be included *on the NHS list* – and for which it alone is responsible. Their task is aptly described as "fitness for purpose" i.e. fitness to be included in the list as an NHS performer of primary care services.

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

110. We have considered the overall effects of the past incidents and all the evidence in relation to the current situation in the round. We fully recognise that there were no significant issues regard to Dr Webberley's clinical practice as an NHS performer when she last practiced at the Blaina surgery in October 2015. Events since then and her responses to the LHB and HIW have revealed deep-seated attitudinal flaws in her approach to governance. The issue underpinning the need for governance is the obvious need for assurance in relation to patient safety.

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

THE DECISION

112. We confirm the respondent's decision on suitability grounds and dismiss the appeal. We should also say that we confirm the respondent's decision on efficiency grounds in the alternative and we dismiss the appeal on this ground also.

Rights of Review and/or Appeal

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

Directions regarding Potential National Disqualification

114. We did not hear substantive submissions on this potential order pending our decision. The parties agreed in principle that if we were to confirm the decision to remove, this issue of national disqualification would be considered on the papers.

115. We now issue consequential directions:

i. The respondent shall send to the appellant and lodge with the Tribunal written representations regarding national disqualification, addressing also the length of disqualification, **by 4pm on Tuesday 30 October 2018**.
ii. The appellant shall respond by written representations sent to the respondent and lodged with the Tribunal **by 4pm on Tuesday 6 November 2018.**
iii. Each party shall inform the Tribunal in writing by **midday on Thursday 8 November 2018** whether they remain content for the Tribunal to proceed to consider the issue of national disqualification on the papers.

WARNING

Both parties are reminded that failure to comply with any of the directions at para 114 above may result in the Tribunal using its powers in rule 8 (4) (a) to strike out all or part of the party's case or restricting the party's participation in the proceedings.

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

Date Issued: 22 October 2018