Primary Health Lists

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

[2015] 2575.PHL

Heard at Immigration Appeal Tribunal Manchester on 12 and 13th September 2016

BEFORE:

Judge Melanie Lewis
Dr Elizabeth Walsh Heggie (Specialist Member)
Mrs Lorna Jacobs (Specialist Member)

BETWEEN

DR AKHTAR TAK

Appellant

-v-

NHS COMMISSIONING BOARD
(Yorkshire & Humber)

Respondent

DECISION AND REASONS

Representation:

For the Appellant: Mr Simon Butler Counsel, instructed Hempsons Solicitors

For the Respondent: Mr Grey Counsel instructed by NHS England

Witnesses:

Dr Twomey Joint Medical director NHS England North (Yorkshire and Humberside)

Dr Tak

The Appeal

1. This is an appeal by Dr Tak originally against the decision made to impose conditions on his inclusion of the performers list pursuant to Regulation 17(4) and (2) of the National Health Service (Performers Lists) (England) Regulations 2013. The original appeal dated 30 December 2015 was limited to challenging the decision of the Performers List Decision Panel ("PLDP") to impose a condition of workplace supervision, but the amended appeal, dated 14 April 2016 challenged the need for any conditions at all, in the light of the positive report from the clinical placement.

2. In the light of the positive assessment, the Respondent sought to amend the conditions to reduce supervision, but maintain a level of local oversight. It listed a further Review PLDP hearing for 29 April 2016. However, given the Appellant's assertion that it would be unlawful for the PLDP to consider the matter before the determination of this appeal against the decision dated 27 November 2015, NHS England took the decision to cancel the hearing.

The Regulatory Framework

3. Regulation 17(4) provides that on appeal the First-tier Tribunal may make any decision which the PLDP could have made. This means that the First tier Tribunal applies the test set out in Regulation 10 (1) namely where it considers it appropriate for the purposes of preventing any prejudice to the efficiency of the service which those included on the performers list perform or for the purpose of preventing fraud, it may impose conditions on a performers inclusion on a list. It is common ground that the First-tier Tribunal is not confined to reviewing the decision and the reasons of the PLDP. It is required to make a fresh decision in light of all the information before it, which includes new information and any progress over what in this case is a considerable period of time: see Regulation 16(2).

4. Following an appeal, the Tribunal may following a request from the Practitioner or on its own initiative review the earlier decision: see Regulation 17 (7) but Regulation 17 (8) states that any such request may not be made within the period of one year beginning with the date of the First–tier Tribunal's last decision.

The Background

5. There is a reasonably complicated background to the appeal. The chronology involves related action taken by the General Medical Council (the "GMC") and the Care Quality Commission ("the CQC"). The full background is set out in the bundle before us and the Scott Schedule and need not be repeated herein in full. We summarise the key points in the chronology which go some way to explaining the procedural history and the positions taken by both parties.

6. In 2007 a Healthcare Commission Report was undertaken following a patient complaint. The Primary Care Trust undertook a clinical governance review leading to a referral to the GMC. Dr Tak has been subject to ongoing GMC investigation since 2010.

7. June 2014 Respondent received a complaint about the Appellant from a relative of a deceased patient. Appellant asked to complete a Serious Event Analysis in relation to a complaint received in June 2014. On 26 August 2014 the Respondent received a complaint regarding the Appellant. The complainant alleged that Appellant had contacted her with the intention of persuading her to withdraw her complaint.

8. In 2014 a performance assessment was carried out by the GMC between April and May 2014. Dr Tak's performance was assessed in the following categories (with reference to the GMC publication, Good Medical Practice) as being 'acceptable': i) assessment, ii) record Keeping, iii) Relationships with Patients and iv) working with colleagues. It was assessed as not 'acceptable' in (v) Maintaining Professional Performance and vi) Clinical Management. Of particular concern was his inability to diagnose diabetes reliably, his inability to manage hypertension appropriately and his inability to provide basic life support. He was aware of current guidelines but they were not forming part of his daily practice.

9. In August/ September 2014 the GMC (MPTS) concluded that his performance had been deficient and it was necessary to impose an interim order for conditions, including the appointment of an educational supervisor (Dr Shekhawat) and workplace supervisor (Dr Hussain). On 27 October 2014 a statement was received from an employee at the Appellant's practice alleging (among other things) that Appellant had dictated reports about his progress as if they had been completed by his work place supervisor, Dr Hussain. Dr Hussian confirmed that he had not written these reports.

10. On 10 October 2014 the Area Team undertook a Quality Visit at the Newington Health Centre where Dr Tak practised, and the audit showed significant concerns. The Area Team's Performance Advisory Group at the PDLP hearing in December 2014 recommended that there were sufficient grounds for removing Dr Tak.

11. On 17 December 2014 the PLDP decided that Appellant should not be removed or suspended from the Performer's List, on the basis that there had been no attempt to remediate performance through a local action plan supported by conditions. An Action Plan was developed with a new Supervisor, Dr Wellings.

12. Further to initial visits on 26 March 2015 CQC rated the Newington Health Centre as "inadequate" and puts it in special measures. On 17 April 2015 the PMS agreement was terminated, and since that time Dr Tak has not been able to practise as his GMC Interim Orders Conditions,(IO Conditions) and Performers List conditions restricted him to working at the Newington Health Centre.

13. In July 2015 an update from the New Provider at Newington Health Centre was shared with GMC Employer Liaison Service to support the GMC investigation. The new provider highlighted poor leadership and

management, in particular that hundreds of patient records reported lost were found hidden in a cupboard and that some of the practice disease registers were found to be to be inaccurate.

14. There was some delay as Dr Tak was out of the country and/or unwell but the PDLP hearing took place on 27 November 2015. Dr Tak did not want a Phase Two Action Plan. His proposal that he should be supervised for a period of 4-6 weeks and then an assessment could be made was accepted by the PDLP. The conditions remained with the addition of a condition that an assessment placement would take place at a GP training practice comparable to the refresher component of the Induction and Refresher scheme. It was further agreed that a new programme supervisor would be appointed. On 2 February 2016 the appeal was stayed to allow Dr Tak to complete his assessment.

15. As stated previously,the original appeal was against the imposition of a placement supervisor. A PDLP hearing was set for 29 April 2016 by which time it was agreed the requirement that he work under a supervisor could be lifted. Through his lawyers Dr Tak challenged the legality of that hearing with an appeal ongoing, and whilst the Respondent did not accept that it was illegal, that hearing was cancelled to avoid further litigation. Further amended grounds of appeal were submitted challenging the need for any conditions as his clinical assessment had shown that he was safe and competent to practice, and he had understood that if the assessment was successfully completed, that would be the end of the matter.

The Evidence

16. We read a full witness statement from Dr Paul Twomey dated 6 June 2016 with supporting documentation. Dr Twomey also gave oral evidence.

17. He acknowledged, as did the Respondent, that Dr Tak had made positive progress. He did not accept that Dr Tak had been promised that he would not be subject to any conditions if the placement was successfully completed. Reliance was placed by Dr Tak on the reassurance from the PDLP decision that 'if there was an assurance that Dr Tak was *'fit and ready to return to practise and there was no risk to patient safety and the quality of the service was assured'* preceded by the words '*The Chair sought to reassure Dr Tak that it was the intention of all parties to being closure to the matter as soon as it was possible to do so'.* That statement had to be read with the subsequent statement that the conditions would be reviewed '*in the light of progress made with the placement arrangements and assessment outcomes'.*

18. He confirmed that the purpose of the conditions suggested was to allow the doctor to 'flourish' within a support framework on returning to work after a considerable gap and with a considerable history of concerns, without prejudice to the service after a positive refresher assessment but which had lasted only 4 weeks. We record that, during the hearing some constructive dialogue between the parties about the content of the proposed conditions

took place. Dr Tak would have to pay for a mentor (Dr T was not obliged to have a mentor he suggested he may like to appoint one for himself and acknowledged and he would be subject to the usual appraisal process where the current practice was that an appraiser was appointed for three years.

19. We read a full witness statement from Dr Tak who gave oral evidence. Dr Tak is now 67 years of age and whilst we noted at GMC hearings he had said he did not want a managerial or supervisory role, he was not able to be so clear with us. He said all practices required Doctors to undertake a management role. He highlighted that he had, in his absence from work, undertaken a number of online courses and undertaken over 50 hours of CPD. At Kirton Lindsay, his assessment placement, we clarified that he had had 15-20 minute appointments to see each patient. Both in cross examination and through the questions from the Tribunal, we raised issues about the pressure of the usual model of 10 minute appointments, and locum and out of hours practice. He agreed that it could be helpful to discuss things with other Doctors but he saw no need to limit his work to practices where there were 3 partners or, as modified, to the equivalent of 3 full time GPs.

Our Consideration

21. We have considered all the evidence both written and oral and were assisted by a well organised bundle, a Scott Schedule, full witness statements with supporting documentation and by submissions by both counsel. It was helpful that Mr Butler has represented Dr Tak across a range of proceedings and could update us.

22. We find each particular set out in the Scott Schedule, divided into three headings namely Patient Safety, Poor Clinical Practice and Probity to be supported by the evidence. The issue is at this point what weight we attach to it.

23. In balancing a range of factors we start with the position that this appeal has a certain artificiality given the passing of time and the accepted progress made since the decision appealed against. Dr Tak at the date of the hearing has made progress. Following an assessment at Kirton Lindsey Surgery between 11 February 2016 and 11 March 2016 Dr Tak was assessed as competent in the following areas: Clinical Expertise, Communication and teamwork and professionalism and his Information and Management Technology was graded as good to excellent. Dr Shekhawat stated that he was safe and competent to practice and recommended his full inclusion in the medical performers list without restriction. The issue is not risk to patients but conditions that will support Dr Tak return to work and flourish. We characterised the Respondent's case as not 'running before he can walk'.

24. Further the MPTS has since lifted all conditions on Dr Tak's registration and Mr Butler told us that all outstanding matters with the GMC will shortly be concluded. An appeal is ongoing to the Health Services Appeal Unit re the termination of his PMS contract.

25. Mr Butler stressed the lack of first hand factual evidence and the lack of findings in this case. However there is a wealth of evidence from a number of sources to which we attach weight. In particular the GMC Performance Assessment where his practice in three key areas was not assessed as 'acceptable' against the objective GMC 'Good Medical Practice'. This followed concerns from 2005. We were concerned that Dr Tak, a very experienced and senior practitioner demonstrated a basic lack of skills in diagnosing diabetes, managing hypertension and a lack of competence in life support.

26. Whilst Dr Tak is no longer subject to GMC conditions pending their investigation, the GMC proceedings and NHS Performers List functions are separate. The issue is one of local oversight against a very considerable adverse history.

27. We have read the patient complaints and we attach weight to them. The complaint from the relative of the deceased person (June 2014) was based on what they saw and we find it telling that the Serious Event Analysis provided by Dr Tak was inadequate.

28. We have read the findings of the CQC report (March 2015), again reached on their objective criteria and where the Practice was graded 'inadequate; across the key areas save in relation to one: 'Are Services Caring?' and that was graded 'Requires Improvement'. The summary of adverse key findings found what was observed was 'inadequate' for providing safe, effective and responses services, and for being well lead. It was also 'inadequate' for providing services for the six population groups. This was enforced by concerns raised by the new providers and what staff reported.

29. We found the evidence and approach of Dr Twomey to be measured and balanced. We accept that he has tried to work with Dr Tak and met with him to listen to his concerns about his supervisors and found a new way forward, on more than one occasion. We accept that the Respondent, whilst having in mind the long history of concerns, is now minded to support Dr Tak back to work but with some monitoring and oversight. Whilst there was some reference to Dr Tak being ill, we were given no explanation for what we find was his clear lack of performance. We allowed Dr Tak to speak to us outside the strict turn of evidence and as a result feel we heard his true voice. He feels that he was misled and that by now this matter should be at the closed as he maintains was promised by the PDLP in November 2015. We fully acknowledge the very considerable stress placed on Dr Tak by this and other related proceedings but we must conclude that he continues to show a lack of insight and reflection.

30. We conclude that conditions are appropriate at this time and turn to what they should be. They must of course be specific, measureable, achievable and time limited. We gained no clear picture of how Dr Tak sees his future employment at this late point in his career and we had no evidence as to the local possibilities, being mindful of the need to consider what was

realistic and achievable. He was working 15-20 hours per week and that level would seem likely again. The initial, less restrictive conditions suggested by the Respondent were expanded on and developed during the hearing with, in particular, a helpful suggestion by the Appellant that NHS England can exchange information with the Appellant's employer or any contacting body as that should give an oversight of how Dr Tak is working day to day, away from an Assessment situation. It was made clear that this would only be with his knowledge and on notice but if he reflects further on this, distanced from his current adversarial mindset we hope he will see that this can be to his advantage. He may wish to be free of scrutiny but he is, of course, going to be subject to the usual appraisal and Personal Development Plan process.

31. Looking at matters in the round we conclude that the conditions proportionately required in order to the efficiency of services are somewhat less restrictive than those suggested by NHS England.

32. Conditions (i) (ii), (iv) and (vi) see below in our Order were not contentious.

33. We do not conclude that it is appropriate to impose a condition that Dr Tak work in a group practice where there are 3 full time GP equivalents as well as himself as that may unduly restrict his options and he may not look to their support whatever the number. We considered that the suggested 368 sessions would be unachievable and we concluded that a minimum of 150 sessions within a 12 month period was both achievable and reflects his previous working pattern and realistic employment opportunities. It equates to 3 sessions week

34. We were concerned that Dr Tak did not readily acknowledge the demands that locum work can place on even an experienced GP who must get used to new patients and new systems, but we recognise this is how he is likely to get back to work. We noted that during his assessment he had longer patient consultations of 15-20 minutes, which are longer than are likely to be available on his return to work. He had fewer patients per session 8 to 12 rather than the usual 16 and he was in a closely supervised and supported environment. The issue was around whether this should be restricted to two or four week contracts but we have ordered a condition which allows for two weeks but requires Dr Tak to undertake a minimum of 4 sessions at the same practice so that the demands on him are reduced.

35. In light of the reasoning set out above we have decided that the following conditions are necessary and proportionately required:

i. To notify any commissioning organisation with which you propose to enter into a contractual relationship of these conditions;

ii. To notify NHS England of any post you accept, before starting it;

iii. To only work in a group practice setting where there are at least two full time equivalent GPs as well as yourself with full time equivalent being defined as at least 24 sessions per week.

iv. Not to work in any locum post or fixed term or fixed term contract of less then 2 weeks' duration with at least 4 sessions at the same practice in each contract. .

v. Not to a) join any GP partnership b) undertake any line management role and c) have a management role developing or managing Practice Management Systems

vi. That NHS England may exchange information with your employer and any contracting body for which you provide medical services.

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

Date Issued: 23 September 2016