



Primary Health Lists

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

Dr Paulina Toteva

V

Cornwall and Isles of Scilly PCT

[2012] PHL 15476

Decision

Before **Judge Nancy Hillier**
Jillian Alderwick - Independent member
Ursula Bennett – Professional member

Heard at Bristol on 28 August 2012. Deliberations on disclosure of GDC complaint held on 7 September 2012 and deliberations on appeal held on 23 November 2012

Dr Toteva was represented by Mr Barnes of Counsel
The PCT was represented by Miss McDonald of Counsel

Appeal

1. By an appeal notice dated 13 April 2012 Dr Toteva appeals against a decision made by the Cornwall and Isles of Scilly PCT Decision Making Group on 22 March 2012 to remove her from the Performer's list on grounds of efficiency pursuant to Regulation 10(4) and under Regulation 8(2) in respect of her failure to fulfil a condition.

Factual Background

1. Dr Toteva is a dentist who is a Bulgarian national. In an application dated 24 August 2011 Dr Toteva applied to be included on the PCT's Dental Performers List. In her application she satisfied the requirement that she provide a language testing certificate as detailed in Annex A by relying on

- a University of Bath English Language Test (“UBELT”) score of 3, achieved on 8 July 2011, which exceeded the score of 2.5 required in Annex A.
2. On 16 November 2011 Dr Toteva took documentation to the PCT for checking and spoke with PCT staff. Dr Toteva was interviewed by Ms Gemma Holbrook, a Performance Information Manager, and Gerry Butler, a Dental Practice Advisor. Gemma Holbrook made a note that Dr Toteva had *“...some difficulty in understanding responses to questions and pronunciation of some words were incorrect. She also explained that she had had lessons / coaching in weeks leading up to her language test.”*
 3. Gerry Butler, wrote an e-mail to Karen Mitchell, a Contracts Manager, stating that Dr Toteva’s, *“... English language skill are only to a basic level at the moment.”* He continued :*“However, we do feel that if she does take up the position at Windsor Place she will be living and working in a totally English speaking world and we would expect to see improvements fairly quickly. However, it is probably that there will be a strong residual accent that may always cause some problems. We would like the panel to consider a conditional inclusion onto our list with a review after 3 months to see whether the required improvements are achieved.”*
 4. Gemma Holbrook also wrote an e-mail to Ms Mitchell. She identified the problem with Dr Toteva’s English, as follows: *“...did appear to understand most of our questions and gave adequate responses. I did struggle to understand some of what she said, and could see how a patient would too.”* Gemma Holbrook stated that she was concerned that Dr Toteva had not used her English for some time, and that she had lessons prior to the test. She also said *“I wonder if a conditional inclusion may be appropriate so that her language skills could be examined in say three months to ensure they have improved from working / living here, either by interviewing her again / Gerry visiting her at work / references from the practice / patient questionnaire.”*
 5. On 2 December 2011, the PCT wrote to Dr Toteva informing her that her application had been conditionally approved. The PCT imposed a condition that: *“... you must take an IELTS Academic Language Test and obtain an overall score of 7. This original certificate must be submitted to the PCT by 28th February 2012, failure to met [meet] this condition will result in your being removed from the Dental Performers List.”* This letter did not advise Dr Toteva of her right of appeal and she did not appeal the decision.
 6. On 18 Feb 2012, Dr Toteva achieved a score of 6.5 in the International English Language Testing System (“IELTS”) Academic Language Test. On 6 March 2012, the PCT wrote to Dr Toteva advising her that she had not met the condition imposed on her, that the PCT were considering removing her from the Dental Performers List, and that she had the opportunity to make representations before the decision was made.

7. On 18 March 2012, Dr Toteva responded, stating that a score of 6 for the IELTS Academic Language Test, or a score of 2.5 for the UBELT, should be acceptable to the PCT on the basis of Department of Health Guidance, and that she had achieved scores in excess of those in both tests.
8. On 23 March 2012, the PCT informed Dr Toteva that the Performer Panel was not satisfied that she had the knowledge of English which in her own interests or those of her patients was necessary in performing the services of dentistry in the PCT area and that she would be removed from the Dental Performers List on grounds of efficiency. The letter notified Dr Toteva of her right of appeal.

Forensic Background

9. On 13 April 2012 Dr Toteva appealed that decision to this tribunal. On 11 June at a telephone hearing the appeal was timetabled to a final hearing.
10. On 2 August 2012 Hempsons solicitors, representing the Appellant, wrote to the tribunal requesting permission to file late evidence, namely a statement from Helen du Lac, a paralegal working for their firm. The reason given was that new matters had come to light in the PCT evidence which the appellant wished to address. This centred on submissions made by the PCT as to the DoH guidance on assessing an applicant's language ability and in particular factsheet 17. The tribunal requested a copy of the statement and the views of the PCT.
11. On 21 August 2012 at a Telephone hearing Miss McDonald submitted that the admission of Ms Du Lac's evidence was unfair because it referred extensively to the contents of a conversation Ms Du Lac had had with Mr Amit Bose who was not giving evidence. Miss McDonald submitted that the evidence should not be admitted because she would not have the opportunity to cross examine him at the hearing and because it was inherently unfair to admit evidence which enlarged on the guidance itself. She therefore submitted that it was of little probative value.
12. Mr Barnes replied that the only reason the matter had been addressed was because of the comments on the Associate Director of Primary Care, Miss Cory's statement filed on behalf of the PCT about the accuracy of the guidance and that the PCT's complaint about unfairness was unfounded because they could adduce evidence on the point.
13. The tribunal has power under Rule 15 (2) (a) to admit evidence whether or not it would be admissible in a civil trial. Having initially objected to admission of the evidence on the basis that the statement was largely hearsay this was not pursued by the PCT's Counsel who sought instead to submit that the evidence should be excluded under Rule 15(2)(b)(iii) on the grounds that it would be unfair to admit it.
14. Having considered the evidence and the submissions Judge Hillier allowed the application to admit the statement of Helen du Lac because whilst the evidence was largely hearsay the PCT could make submissions as to the appropriate weight which should be attached, if any, to Mr Bose's views. Further, if the evidence were not admitted the Appellant would have had no opportunity to present a contrary view to that of Dr Cory.

15. On the 23 August Ms McDonald applied to admit a further statement from Miss Cory made in response to the statement from Helen du Lac and which referred to the policies of 5 further PCTs and to the PCT response to the case of Dr Ubani. Mr Barnes objected to the admission on the basis that the statement was very late and that it was of very limited value. The panel decided that in the circumstances it was fair to admit the statement since the issues were already known to the parties and Mr Barnes would not be prejudiced in cross examination and could in due course make submissions as to the weight to be given to the evidence.
16. At the hearing on 23 August the panel heard the oral evidence of Miss Cory on behalf of the PCT, Dr Toteva and also Mr Scott on her behalf. One of the final questions to Dr Toteva was from the panel enquiring whether there had been any patient complaints about her. The questions were asked in the context of communication, since the PCT case rests on efficiency based on her failure to achieve an IELTS score of 7 which was a condition of her registration. Examples given to the appellant were a patient stating that they couldn't understand her or that she couldn't understand them. Dr Toteva said that there had not been any complaints. A short adjournment was then granted so that Counsel could gather their thoughts for closing submissions.
17. Upon returning to the hearing room Mr Barnes informed the panel that although the questions had been asked in the context of complaints about communication he felt it was appropriate to disclose that Dr Toteva was the subject of a GDC complaint and that he was able to confirm that the matter was a clinical complaint about the practice. He stated that a patient had complained about a course of treatment from the practice, including Dr Toteva who had treated the patient on an emergency basis. He therefore felt that it was a matter to be disclosed for clarity rather than having a bearing on the case.
18. The panel asked the parties to withdraw to consider their positions and to allow Miss McDonald time to discuss the matter with those instructing her. During the adjournment the panel reflected on what had been disclosed and decided that it may be necessary for the situation to be clarified to ensure fairness to both parties.
19. Since by this time the end of a normal sitting day had passed the panel directed that the parties should file submissions on the point. The panel reconvened in Birmingham on 7 September to consider the issues.
20. The panel considered the submissions of both parties. We were not satisfied that it was appropriate to proceed to submissions at that stage. A disclosure order was made against the GDC providing for disclosure of the complaint by 8 October 2012. This was complied with. Both parties and the panel had the opportunity to consider the disclosure. At a telephone directions hearing on 15 October 2012 the representatives of both parties agreed that they did not seek any further clarification of the complaint because it related to clinical matters, that their cases were closed and they wished to file written submissions for the panel to consider rather than reconvening. It was directed that the parties should file and exchange written submissions electronically by 12 November 2012. The panel considered the submissions and decided to proceed on the basis of the written submissions on 23 November 2012 without the need for the parties

to attend.

Law

21. The legal framework is provided by the National Health Service (Performers Lists) Regulations 2004 (“the Regulations”) as amended. Guidance has also been provided in respect of the Regulations by the Department of Health in a document entitled, “*Primary Medical Performers Lists*” (“the Guidance”).
22. Regulation 6(2) provides that: “*The grounds on which a Primary Care Trust must refuse to include a performer in its performers list are, in addition to any prescribed in the relevant part, that – ... (b) it is not satisfied he has the knowledge of English which, in his own interests or those of his patients, is necessary in performing the services, which those included in the relevant performers list perform, in its area ...*”
23. Regulation 8 provides, at paragraphs (1) and (2):
- “(1) A Primary Care Trust may determine that, if a performer is to be included in its performers list, he is to be subject, while he remains included in that performers list, to the imposition of conditions, having regard to the requirements of section 28X(6) (preventing fraud or prejudice to the efficiency of the service).*
- (2) If a performer fails to comply with a condition, which has been imposed by the Primary Care Trust, it may remove him from its performers list.”*
24. The Guidance provides at paragraph 15.4 that: “*PCTs may consider that a doctor can be included in their performers lists subject to certain conditions. The aim of the conditions must be: To prevent any possible prejudice by the doctor’s inclusion to the efficiency of the primary medical services (the “efficiency” test) ...*”
25. Regulations 10(3) and (4) provide that :
- 3) The Primary Care Trust may remove a performer from its performers list where any of the conditions set out in paragraph (4) is satisfied.
- (4) The conditions mentioned in paragraph (3) are that—
- (a) his continued inclusion in its performers list would be prejudicial to the efficiency of the services which those included in the relevant performers list perform (“an efficiency case”);
- (b) he is involved in a fraud case in relation to any health scheme; or
- (c) he is unsuitable to be included in that performers list (“an unsuitability case”).
26. Regulation 15 provides a right of appeal against a decision to impose a particular condition pursuant to Regulation 8(1), and against a decision to remove a dentist from the performers list pursuant to Regulation 8(2).

Regulation 15 (3) provides that: *“On appeal the First-tier Tribunal may make any decision which the Primary Care Trust could have made.”*

The issues and evidence

27. The panel identified the main issue in the case as whether Dr Toteva has sufficient command of English to perform dental services at Primary Care level to a safe standard. Subsidiary to that issue is the question of whether we should require an IELTS score of 7 as determinative of the position or the assessment of her by Professor Scott.
28. Miss Cory explained to the panel that since the Dr Ubani case the PCT had required an IELTS 7, and that Dr Toteva was the only dentist who had been required to obtain an IELTS 7. Miss Cory agreed that the guidance was to require a level 6 but said that following PCT's research "7 is the benchmark for us". She believed that a requirement of level 7 was in a policy document but explained that it was not in the bundle of documents.
29. Miss Cory agreed that the minutes of the meeting which decided to impose the condition of requiring level 7, communicated on 2 December 2011, were very limited, but recalled that the decision was made on the basis of patient safety. Miss Cory explained that in her view the issues were that a dentist with insufficient English may not be able to explain procedures, may be unable to keep adequate records and may lack ability to listen and understand a patient, potentially leading to misdiagnosis.
30. Miss Cory's view was that since Dr Toteva had only obtained a level 6.5 in the IELTS test there was sufficient evidence to show that she cannot fulfil those language conditions. She agreed that there was now significantly more information about Dr Toteva contained in the report of Mr Scott and from Dr Toteva's colleagues, but when asked whether the PCT had reconsidered its discretionary decision she said that it had not.
31. Mr Scott agreed with Miss Cory about the risks to patients where a dentist has insufficient command of English. He felt confident at the end of a 3 hour interview and assessment conducted with Dr Toteva that she possessed sufficient skills. He had taken an IELTS test and felt that it may be preferable to use that type of testing with an interview in order to achieve a better understanding of the performer's ability. He pointed out that there must be some issue as to absolute reproducibility with the IELTS because Dr Toteva had scored different levels in the different tests and had performed well during his assessment both orally and in writing. He stressed that he had seen "more records" than most, and that Dr Toteva's were excellent.
32. Mr Scott has 22 years experience in general dental practice; he was Postgraduate Dental Dean for Devon for 5 years and a Regional Adviser for General Dental Practice for 8 years, with responsibility for introducing and developing Vocational Training for newly qualified dentists; he later became a Dental Reference Officer and a Clinical Probity Officer for the Dental Practice Board of England and Wales and now prepares expert reports. He reported on Dr Toteva's ability to satisfy the requirements of Regulation 6(2)(b). He stated in his report dated 25 July 2012 that he was looking to see whether Dr Toteva could provide services in a way that would satisfy those who she has to deal with on a day to day basis. Within

the assessment process, Mr Scott looked at Dr Toteva's ability to read and comprehend NHS contract issues, her communication with colleagues, patients and in a social setting, her ability to keep proper records and, in relation to CPD, her ability to understand and appraise a scientific article from British Dental Journal.

33. Dr Toteva stated that: *"I know my English has improved since arriving and working in the UK. I have, and am continuing to work on improving my English skills since it was suggested that they needed improvement in November 2011 ... I do not feel that my current level of English is a barrier in any aspect of my work at the Windsor Place Dental Practice, nor does it affect my ability to take part in the CPD courses I have completed. I am able to communicate with both my patients and colleagues at a satisfactory level."*
34. The bundle of evidence also contained a letter dated 25 July 2012 from the Practice Manager at Windsor Place Dental who stated that *"Paulina has improved her English skills whilst she has been with us and I am sure she will continue to improve her English as her confidence increases"*.

Submissions

35. Mr Barnes submitted that Mr Scott's conclusions, following a thorough assessment of Dr Toteva, are reliable and credible evidence that Dr Toteva's language ability is sufficient and safe. He relied in particular on Professor Scott's conclusion that: *"In my opinion Dr Toteva has demonstrated a knowledge of English which satisfies the requirements of regulation 6(2)(b) of the National Health Services (Performers Lists) Regulations 2012, in that her English language skills would not prevent her from being able to perform the services which other dentists on the performers list perform. She possesses a sufficient level of knowledge of English to enable her to communicate properly with patients, staff and colleagues, and to undertake effective CPD. She is able to keep proper clinical records which satisfy (from a linguistic perspective) all the required standards of legibility, accuracy and completeness. She appears to be making continuous progress and I believe the above reflects her current status. I was impressed by her determination to succeed with her English and I could see no reason why she would be unable to effectively undertake general practice dentistry in England and to integrate successfully in to British society."*
36. Ms McDonald submitted that this assessment should not be *"...relied upon in relation to the appellant's ability to communicate in English or accepted as a substitute for attaining a 7 in IELTS. This is first because his expertise is not in language or communication but in dentistry. Secondly the suggestion that all that needs to be shown is an ability to understand and apply terms relevant to dentistry rather than the more general language skills tested by IELTS ignores the importance of communication with and understanding of patients who will express themselves in a variety of different ways. Thirdly the circumstances under which Professor Scott assessed the appellant's language skills did not provide a properly*

objective or testing situation. For reasons which are readily understandable Professor Scott was at pains to put the appellant at her ease and was clearly supportive in his approach to the assessment, making allowances for areas where she did struggle. Some of the material about which she was asked was provided 3 or 4 days in advance, another exercise involved answering multiple choice questions. Professor Scott himself acknowledges the necessarily subjective nature of his assessment: it was not, however a formal test and my conclusions are based on my reactions to the various topics we discussed....IELTS clearly provides a reproducible standard for employers of applicants whose first language is not English."

Tribunal's decision with reasons.

37. We carefully considered the oral evidence, the written evidence contained in the bundle and admitted as late evidence, and the submissions made by both parties, and applied the law and guidance as set out in this decision.

The basis of the proposed removal.

38. The PCT approach to the case has been that the burden of proof rests on the appellant. Ms McDonald stated in her skeleton argument that

*"At the outset the Tribunal is reminded of the mandatory nature of the wording at Regulation 6(2)(b) of the NHS (Performers List) Regulations 2004 which provides that the PCT **must** refuse to include a performer on its list where "it is not satisfied that he has a knowledge of English which, in his own interests or those of his patients, is necessary in performing the services.". It was thus for the appellant to satisfy the PCT and, now, this Tribunal, that she is sufficiently proficient in English to ensure patient safety. The PCT's decision-making process throughout has been informed by the importance of patient safety and it is within this context that the decision to remove the appellant from its performers list should be considered."*

39. Whilst we accept that a PCT must refuse inclusion in circumstances where it is not satisfied about the necessary standard of English, this was never a case where inclusion was refused. Dr Toteva had achieved the basic standard required and was included on the list. The PCT must therefore demonstrate on a balance of probabilities that she should be removed. The purpose of Regulation 6 is to ensure that dentists with insufficient command of English are not placed on the list because it would not be safe to do so. If we are satisfied that Dr Toteva's English is insufficient to perform dental services safely it would be appropriate to refuse the appeal and confirm the removal.

40. The PCT decision letter of 23 March refers to efficiency grounds as the basis of removal. This of course would be under Regulation 10 (4) rather than under Regulation 8(2) which allows discretionary removal if a

performer fails to comply with a condition. The letter also refers to the failure to fulfil the condition of inclusion. The panel considered that in either case the fundamental question was whether Dr Toteva has sufficient command of English to practice safely. In the case of either efficiency removal under Regulation 10(4) or removal for failure to meet the condition under Regulation 8(2) an inability to communicate safely with patients would merit removal.

41. Paragraph 17.9 of the Guidance provides that, in considering removal on efficiency grounds, the PCT should consider: *“The nature of any incident that is considered to be prejudicial to the efficiency of the services performed by the doctor ... the nature of the incident or incidents in terms of risk to patients”*. Further, Paragraph 4 to Annex E of the Guidance provides that: *“The key to dealing with issues of capability is that, wherever possible, employers should be looking to satisfactorily resolve the issue, through assessment and support. The employer should be looking to identify any problems early enough to prevent serious harm to patients. Where the employee is prepared to work with the employer to resolve the problem and where they can be returned to a satisfactory level of performance, through for example, retraining, instigating disciplinary procedures would not usually be appropriate.”*

Does Dr Toteva have sufficient command of English to perform dental services at Primary Care level to a safe standard?

42. The panel decided that this is the key question in this appeal. The PCT position is that an IELTS score of 7 is appropriate to determine the position, and it relies on the fact that Dr Toteva scored 6.5 rather than 7 as evidence to show that Dr Toteva does not have sufficient command of English and as evidence to demonstrate that removal is appropriate under either Regulation 8(2) or 10(4). Dr Toteva submits that reliance on the score is contrary to the Department of Health Factsheet 17 guidance and that in any event the IELTS test does not compare with the assessment of her by Mr Scott.
43. We agree with Miss Cory and Mr Scott that a dentist with insufficient language skills may not be able to explain procedures, may be unable to keep adequate records and may lack ability to listen and understand a patient, potentially leading to misdiagnosis. How those language skills are assessed is a matter for each PCT. We were satisfied on Mr Scott's evidence that level 7 for IELTS may be appropriate for an academic who needs highly technical language to undertake an examination or an academic course of study. The difference in this case is that we are looking at the practicalities of adequate records and conversing with patients.

The IELTS test versus the assessment by Mr Scott.

44. It is most unfortunate that we do not have minutes of the process by which the PCT made the decision to impose condition of level 7 IELTS. Whilst the test is objective and reproducible it was not necessarily appropriate in this case. The PCT staff felt that an interview once Dr Toteva had been in

post for 3 months was appropriate, and that would have given more opportunity for observations of colleagues. We had the benefit of Mr Scott's assessment which we found to be thorough, well conducted and properly analysed. We reject the submission that Mr Scott does not have expertise to consider communication. He has very extensive experience of dentistry, patients and dentists and was very focussed on an assessment to look at communication skills to ensure a satisfactory standard for patient safety.

The failure to notify Dr Toteva of her right of appeal in respect of the conditions imposed.

45. It is regrettable that the PCT did not include information on appeal in its decision letter. We would ask that the PCT ensures that this serious deficiency has been addressed, since its omission is a fundamental error.

The response of Dr Toteva to a request by the PCT for further information when they were considering removal.

46. Dr Toteva's response was contained in an email which was terse and lacked detail. It may be that relations between herself and the PCT had deteriorated by then and she felt that the issue was very straightforward, but the paucity of response did not assist her case and we would urge her to ensure that she is more communicative in future.

Conclusion

47. The panel concluded that, in the light of all the evidence and considering the submissions of Counsel, we were satisfied on the basis of Mr Scott's evidence that Dr Toteva's English is sufficient to perform dental services to a safe standard at primary care level. We preferred Mr Scott's evidence to the requirement of an IELTS test because he has an extensive expertise in dentistry and vocational trainee education. He looked at NHS contract issues, communication in a social setting, record keeping and CPD considerations based on a British Dental Journal article as part of the assessment process and engaged in the type of individual assessment initially envisaged by Ms Holbrook and Mr Butler. He did not ignore the IELTS test, in fact he took it himself, and he took Dr Toteva's scores into account, as well as the fact that the test is reproducible. We acknowledge that the PCT wish to ensure patient safety and their view that Dr Toteva should have to prove her adequacy in English. She achieved their requirements for listing at the outset however and, on the basis of Mr Scott's assessment and the comments of her colleagues, we are satisfied that her English is sufficient to perform dental services to a safe standard at primary care level even though she has achieved an IELTS score of 6.5. We would have been satisfied even if the burden of proof rested on Dr Toteva. We therefore allow the appeal. It follows from the above that we do not agree that conditional inclusion subject to an IELTS 7 is appropriate or necessary.

ORDER

Appeal allowed. The PCT are directed to list Dr Toteva on the Performer's list without conditions.



Judge Nancy Hillier

Lead Judge Care Standards and Primary Health Lists

4 December 2012