



Primary Health Lists

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

Dr Agarwala

V

NHS Wakefield District PCT

[2012]PHL 15518

DECISION

Panel

Judge	Nancy Hillier
Professional member	Dr Iftikhar Lone
Specialist member	Mr Colin Barnes

Heard at Leeds on 6 December 2012

Dr Agarwala represented himself and gave evidence.

Ms Wild represented the PCT views and Dr Johnson D'Souza gave evidence on behalf of the PCT.

Appeal

1. Dr Agarwala appeals by notice dated 14 August 2012 against a decision taken by the NHS Wakefield PCT to remove him from its performers List under Regulation 10(6) of the NHS (Performers List) Regulations 2004 (the regulations). Paragraph 10 (6) provides "*where a performer cannot demonstrate that he has performed the services, which those included in the relevant list perform, within the area of the Primary Care Trust during the preceding twelve months, it may remove him from his list*".

Background

2. Dr Agarwala was listed on the NHS Wakefield Performers List on 3 February 2004. On 29 November 2010 Dr Agarwala self referred following his own admission to hospital, and he was suspended by the Respondent on 29 November. The GMC FTTP met on 23 February 2011 and placed conditions on Dr Agarwala's registration which were renewed on 9 August 2011 and 1 December 2011, when an undertaking not to take locum work of less than 1 month was required and given. The PCT suspension was lifted on 26 May 2011 following an oral hearing. Conditions were placed on his listing and the letter notifying Dr Agarwala of the conditions indicated that they would be reviewed in 6 months. The letter did not give Dr Agarwala notice that he could appeal the conditions, information which was provided to him in a separate letter on 2 June 2011.
3. In July 2011 Dr Agarwala started work for the Ashton Leigh and Wigan out of Hours Service. His work has been audited on a 3 monthly basis by Dr Rajiv Manghnani.
4. Dr Agarwala undertook a series of supervisory meetings in the Wakefield area on 9 June 2011, 14 July 2011, 3 November 2011, 5 January 2012, 8 March 2012 and 14 June 2012. Dr Agarwala was also satisfactorily appraised on 29 March 2012. Dr Evans has also conducted mentorship meetings with Dr Agarwala and he has undertaken frequent local occupational health visits, the most recent being 3 October 2012.
5. On 28 June 2012 the PCT wrote to Dr Agarwala requesting evidence that he had worked in the Wakefield area in the past 12 months to be supplied within the next 28 days. Nothing was received by the PCT and a letter was sent to Dr Agarwala on 9 August 2012 stating that Dr Agarwala would be removed from the list. Dr Agarwala appealed the decision by notice to the Tribunal dated 14 August 2012 and on 28 September 2012 Judge Hillier gave directions for the appeal to proceed to an oral hearing.

Preliminary issues

6. The PCT brought an addendum to Dr D'Souza's statement dated 17 October to the hearing. Dr Agarwala did not oppose the panel admitting it

into evidence. It consisted of 1 additional page and Dr Agarwala had had time to consider it. The panel considered the overriding objective and could see no prejudice to the appellant in accepting the document. The panel therefore admitted it into evidence.

Law

7. Our powers on appeal are to be found in paragraph 15 of the Regulations which (as amended) provides as follows:

- (1) A performer may appeal (by way of redetermination) to the First-Tier Tribunal against a decision of a Primary Care Trust as mentioned on paragraph (2) by giving notice to the First-Tier Tribunal*
- (2) The Primary Care Trust decisions in question are decisions-*
 - (d) to remove the performer under regulations 8(2), 10(3) or (6),.....*
- (3) On appeal the First-Tier Tribunal may make any decision which the Primary Care Trust could have made.*

8. PCTs have since 2004 been required by the government to maintain local lists of primary care performers, including GPs, as an important part of the overall regulatory system of doctors who provide general practice services. This function, usually known as “list management”, is distinct from the regulation of all doctors carried out by the General Medical Council. It is also separate from any contractual arrangements that may exist between a PCT and a GP, and from any employment relationship that may exist between a PCT and a GP.
9. The aim of the list management function is set out in guidance published by the Department of Health in 2004, entitled “*Primary Medical Performers Lists – Delivering Quality in Primary Care.*” Paragraphs 2.1 and 2.2 of that document state as follows:

“2.1 The NHS (Performers Lists) Regulations provide a framework within which PCTs can take action if a medical performer’s personal and/or professional conduct, competence or performance gives cause for concern.

2.2 Protection of patients should be the overriding consideration when considering whether a performer should be admitted to a list, suspended or removed from a list, whether restrictions should be placed on a performer's position on a list, or whether the performer should be excluded from all lists (disqualification).

10. The burden of proof rests on the Respondent to demonstrate that the removal is justified on the evidence. The relevant standard of proof is on the balance of probabilities.

Parties positions

11. In his appeal Dr Agarwala agreed that he had not worked in the NHS area for 12 months. He explained that he had been unable to work in the area due to the GMC restrictions imposed upon him; however he stated that he had worked in the Wakefield area for over 10 years prior to the GMC referral and that he intended to return.
12. Dr D'Souza stated that Dr Agarwala had not performed services in the area since his contingent removal from the list on 26 May 2011. Dr D'Souza had made the decision to remove following consultation with colleagues. He was concerned that the situation was untenable because of the GP revalidation process for a National List, the difficulty of accessing "soft" information about Dr Agarwala and accessing appraisal information. He had not had any further information because Dr Agarwala had not responded to the request, and he had not received a response from Dr Manghnani at Wigan Ashton and Leigh in respect of a request for information about Dr Agarwala.

Tribunal's decision with reasons

13. We have carefully considered the written and oral evidence and the submissions made by the parties. We have applied the law as set out above and have borne in mind that the burden of proof rests on the Respondent to demonstrate that the exercise of discretion to remove is proportionate in all the circumstances.
14. We placed into the balance the need for PCT's to be able to monitor the GP's on their lists for obvious safety and administrative reasons. We are

satisfied that it becomes harder for PCT's to act on "soft" information when a GP is working in another area, and matters such as appraisal become more burdensome. We note however that a satisfactory appraisal has taken place in 2012.

15. Under the current system, members of the public would naturally have concerns about the practicalities and safety of a PCT monitoring a GP who had not worked in their area for some time unless there was a robust exchange of information about the GP and a real prospect that he would be returning to work in the area. Dr Agarwala has agreed to waive confidentiality in respect of the monitoring taking place for the GMC.
16. We were not satisfied that the revalidation process was relevant to the decision to remove as there is no evidence at this stage that Dr Agarwala is unlikely to be revalidated.
17. Against that we balanced the fact that Dr Agarwala has been working since his suspension was lifted in Out of Hours in Ashton Leigh and Wigan without any concerns being raised or complaints by patients. We took into account the fact that Dr Rajiv Manghnani has audited Dr Agarwala's work on a 3 monthly basis whilst he has been working at the Ashton Leigh and Wigan Out of Hours service, and that Dr Agarwala has agreed that these assessments may be shared with Wakefield PCT. On 26 September 2012 Dr Manghnani wrote "I have no concerns about Dr Agarwala's professional performance". Mr Lakeland, Urgent Care Services manager stated in correspondence dated 2 November 2012 that Dr Agarwala has conducted himself in "an exemplary and professional manner", and that there have been no patient complaints about his consultations. We have also been provided with Dr Agarwala's medication and test results, which are all appropriate and within acceptable limits.
18. We find that this lowers the assessable risk to patients, especially given the fact that Dr Agarwala had a satisfactory appraisal in 2012. We are also aware that he has financial dependents and that he has in our assessment a clear and genuine wish to return to work in West Yorkshire, which is why he has not applied to another PCT.
19. Having balanced these factors and the evidence as a whole we have concluded that the PCT has not satisfied us on the balance of probabilities

that it is appropriate to remove Dr Agarwala from the list, and we find that such a decision would be disproportionate and an unreasonable exercise of discretion.

Observations

20. Whilst the GMC will review the conditions attached to Dr Agarwala's registration in February 2013, the PCT have not reviewed the conditions imposed by them upon Dr Agarwala in May 2011. The panel have suggested that the PCT undertakes a review at the earliest opportunity. We have also suggested to the PCT that decisions about removal should be referred to an appropriate decision making group with full minutes of the meeting being taken and full reasons for the decision given to the GP concerned.
21. Dr Agarwala has agreed that his test results and reports by Dr Manghnani should be shared with Wakefield PCT and we hope that Ashton Leigh and Wigan will cooperate with this to ensure Dr D'Souza and the Wakefield PCT are kept up to date with developments.

ORDER

The appeal is allowed. The decision of the Respondent to remove Dr Agarwala from the Wakefield NHS Performer's List shall have no effect.



Judge Nancy Hillier
Lead Judge Care Standards and Primary Health Lists
17 December 2012