

**Primary Health Lists**

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

**Heard at Sheldon Court,  
Birmingham**

**On 25 May 2016**

**BEFORE**

**TRIBUNAL JUDGE ATKINSON**

**DR R RATHI**

**MS S BROUGHAM**

**BETWEEN**

**THE NHS COMMISSIONING BOARD  
(KNOWN AS NHS ENGLAND)**

**(Applicant)**

**and**

**DR D GOODWIN**

**(Respondent)**

**[2016] 2602.PHL**

## **Representation:**

For the Applicant: Miss C Strickland of Counsel  
For the Respondent: Mr M Hayton Q C

## **DECISION AND REASONS**

### **The Appeal**

1. This is an application by NHS England for an extension of the respondent's suspension from its medical performers list under the National Health Service (Performers Lists) (England) Regulations 2013 ('the 2013 Regulations'). This application is opposed by the respondent ('Dr Goodwin').

### **The Background and Proceedings**

2. The respondent is a GP on the national medical performers list. At the material time he was a partner in a practice known as The Wand Medical Centre, in the West Midlands area.
3. On 28 February 2014 concerns were raised by the practice in relation to the respondent's treatment of patient A. The concerns in summary related to prescribing of dihydrocodeine; inadequate consultation, advice and record keeping; the carrying out of unnecessary intimate examinations on 7 occasions; and undertaking osteopathic manipulations on 4 occasions without the presence of a chaperone; and that local undertakings about such matters had been breached.
4. On 2 July 2014 the applicant referred these concerns to the GMC.
5. On 27 January 2015 the GMC's medical practitioners tribunal decided to impose conditions on the respondent's practise, including a condition prohibiting the respondent from undertaking intimate examinations without a chaperone, save in an emergency.
6. On 25 February 2015 the Wand Medical Practice made a referral to the GMC concerning a further patient, patient B. The concerns in summary related to treatment provided for chlamydia and suspected ectopic pregnancy; and inappropriate vaginal examination.
7. On 30 April 2015 the applicant, through its relevant delegated panel, decided that it was appropriate to apply conditions to the respondent, which so far as is material, included a prohibition on intimate examinations whether chaperoned or otherwise. Those conditions were ultimately accepted by the respondent on 8 June 2015.

8. The following day, 9 June 2015, the respondent had a consultation with patient C who was complaining of a lump on her bottom. The respondent arranged for patient C to return to see him for removal of what has been described as a peri-anal skin tag. That procedure was undertaken by the respondent in the presence of a chaperone and a student on 10 July 2015.
9. On 18 July 2015 another doctor in the respondent's practice raised concerns with the applicant about the treatment of patient C in the light of the conditions imposed by the applicant.
10. On 22 July 2015 the applicant decided that it was necessary to suspend the respondent and that decision was confirmed following a hearing on 6 August 2015; and the applicant subsequently informed the GMC of its decision.
11. On 23 September 2015 the GMC's medical practitioners tribunal found that there had been no breach of its own conditions; but varied its own conditions imposed to the extent of prohibiting both chaperoned and unchaperoned intimate examination, save in an emergency.
12. On 1 February 2016 the applicant made an in time application for extension of suspension which is the subject of the current proceedings before the tribunal.
13. On 8 March 2016 the GMC, following a report from its case examiners, decided that the allegations should proceed to a hearing on the issue of the respondent's fitness to practice. The matter is listed for hearing from 27 June 2016 to 15 July 2016.
14. The present application is for an extension of suspension to 5 August 2016.

### **The Law**

15. The relevant law is to be found in National Health Service (Performers Lists) (England) Regulations 2013. The relevant provisions are set out in the bundle and it is not necessary to set them out in full here.
16. In brief, regulation 12 makes provision for the applicant to suspend a practitioner from the list where it is necessary to do so for the protection of patients or members of the public and where, amongst other things, the applicant is awaiting a decision of a regulatory body.
17. In the present case there is no issue as to whether or not a relevant decision of a regulatory body is awaited: the GMC allegations are to be heard in June-July 2016.
18. It is convenient to note here that the present proceedings before the tribunal

arise from an application being made under regulation 12(16): that is the jurisdiction of the tribunal is limited to granting or refusing the application for extension of an existing order for suspension. In consequence, the tribunal is acting in the capacity as primary decision maker on the application to extend a suspension and is not exercising an appellate jurisdiction. Thus unlike appeals on other matters that generally come before Primary Health List Tribunals, the present tribunal does not proceed by way of redetermination of a prior decision made by the relevant health authority. A further consequence of this approach is that it is not open to the tribunal make a determination on matters other than the granting or refusal of the application.

### **The documents and evidence**

19. The tribunal was provided with a bundle indexed and paginated to D14, comprising all the material on which both parties sought to rely together with other background materials. In addition, the parties filed respective skeleton arguments and a copy of the GMC's medical practitioner tribunal interim order of 14 March 2016, setting out the conditions imposed by that body on the respondent.
20. The parties agreed that the application was to proceed on the basis of submissions only. The tribunal therefore heard no oral evidence.

### **Submissions on behalf of the Applicant**

21. Miss Strickland relied on her skeleton argument and made further oral submissions. The submissions may be summarised as follows.
22. It is necessary to extend the suspension for the protection of patients or members of the public, and it is otherwise in the public interest.
23. So far as the public interest is concerned, if the application were not granted, then an inspection of the performer's list would not disclose the concerns relating to the respondent's practise. It is for the applicant to discharge its statutory duties which cannot be subordinated to the GMC.
24. So far as the protection of patients and the public is concerned, the applicant does not accept that imposition of conditions is sufficient in the circumstances of this case. That is because the concerns about the respondent are serious in nature, wide ranging, repeated over a number of years and relate to three different patients. The respondent does not accept that his treatment and interaction with the patients were inappropriate; nor that intervention is required. In the applicant's view, the respondent has already breached a condition on his practise by undertaking an intimate examination in circumstances in which he was prohibited from doing so; and there is a real risk that he will not comply with conditions in future. In this respect, the GMC

medical practitioner tribunal made no mention of the peri-anal surgical intervention undertaken on patient C on 10 July 2015.

### **Submissions of behalf of the Respondent**

25. Mr Hayton QC relied on his skeleton argument and made further submissions which may be summarised as follows.
26. The present proceedings need to be viewed in the context of the background circumstances. The respondent has been a GP since 1984, is a Fellow of the Royal College of General Practitioners and has been an examiner for that body since 1992.
27. In looking at the totality of the allegations made over a period of time, sufficient protection was afforded by the imposition of conditions, until the events relating to patient C.
28. So far as the public interest is concerned, the appellant was not able to practise without restraint as a result of the conditions imposed by the GMC medical practitioner tribunal. Whilst it was accepted that the relationship between the GMC provisions and performers list regulations was not such that there was a requirement that conditions imposed under the performance list should mirror those imposed under the GMC's regulatory regime, the more serious sanctions of suspension and removal were so subordinated.
29. The applicant had initially imposed conditions that were similar in tone to those imposed by the GMC. The events surrounding patient C caused the applicant to change its view about the sufficiency of conditions. However, the respondent had not willfully breached the conditions imposed by the applicant. The breach had been inadvertent. None of the patients, A, B or C had made a complaint about the respondent.
30. In these circumstances it is therefore not in the public interest that the respondent be prevented from providing medical services to the community.
31. So far as the public protection issues are concerned, it is extremely unlikely that the respondent would breach conditions in the future. It is his intention to perform telephone triage work which would not involve direct examination.
32. In all the circumstances, it is not proportionate to grant the application for further suspension of the respondent. The suspension came about as a result of an isolated incident; the respondent had not willfully breached the conditions imposed by the applicant; and the respondent was an experienced practitioner who would only be involved in triage.
33. The conditions imposed under the GMC regulatory regime, and to which the

respondent willingly agreed, were sufficient. The medical practitioner tribunal had had regard to the allegation concerning the consultation with patient C on 9 June 15. The respondent should not be prejudiced by the fact that there was an absence of power available to the present tribunal to impose conditions, rather than suspend.

### **Assessment of evidence and reasons**

34. The tribunal considered all the evidence and the submissions. In coming to its decision the tribunal has looked at the evidence as a whole. The tribunal also reminds itself that the application before it relates to an interim measure pending final determination of the substantive issues. It therefore follows that it is neither necessary nor appropriate for the tribunal to make determinative findings in respect of whether or not the allegations have been made out.
35. Rather, the approach required, is in the nature of a risk assessment involving the identification of the issues, an assessment of the seriousness of the issues and, ultimately whether, taking into account considerations of proportionality, it is necessary to extend the respondent's suspension from the performer's list for the protection of patients or members of the public or in the public interest, pending the final determination of the substance of the issues.
36. The tribunal also finds it convenient to note here that, in deciding the present application, it is a fundamental principle of administrative law that a statutory body, such as the present tribunal, in exercising discretionary powers must come to its own decision, rather than either delegating its decision to that of another body, or by fettering its own discretion and thereby failing to consider an application on its own merits.
37. The present tribunal therefore considers the present case on its own merits. There is no question of this tribunal's decision being subordinated to that of a decision made under the GMC regulatory regime, save where there is statutory authority as previously noted.
38. Accordingly in that context, the tribunal's approach, in summary, is to consider the issues, assess the risks, attach such weight as it thinks appropriate to the position adopted by the GMC, and come to a decision.

### **The concerns about the respondent's practise**

39. The concerns about the respondent's practise arise from his actions and behaviour in respect of three unconnected patients, A, B and C.
40. The concerns are in large measure set out in the list of allegations within the case GMC's case examiner report. There are 25 particularised allegations,

however, for reasons further explained below, the individual allegations do not capture all the concerns relating to the appellant's practice. That is because by their very nature, the allegations are fact specific, and are not framed to take into account wider issues, such as the respondent's insight and understanding of the applicant's concerns about his practise.

41. The tribunal further notes that the medical practitioner tribunal, whilst having the specific allegation about intimate examination of patient C on 9 June 2015 before it, has not set out its considerations, in detail, on the significance of the respondent undertaking a surgical procedure on patient C in an intimate area on 10 July 2015.
42. Turning next to the detail of the allegations, whilst it is not necessary to set out each allegation in full, it is helpful to set them out in more detail than heretofore.

#### Patient A

43. There are 16 allegations made in respect of patient A. They relate to the respondent's practice from July 2010 to June 2015. Some of the allegations relate to multiple incidents. Thus, for example, allegation 10 relates to the respondent undertaking inappropriate vaginal examinations. Whilst this amounts to one allegation, it is said that such examinations were undertaken on seven occasions: twice in May 2013, three times in July 2013 and on further occasions in September 2013 and December 2013.
44. Allegation 1 relates to the prescribing of dihydrocodeine and the respondent's failure to adequately provide advice, monitor and record the treatment.
45. Allegations 2 to 9 relate to the use of inappropriate prescriptions and failures in relation to suspicions of an ectopic pregnancy.
46. Allegations 10 to 12 relate to inappropriate examination of the vagina, as previously noted, as well as inappropriate breast examinations on 5 occasions.
47. Allegation 14 relates to osteopathic manipulations undertaken on 4 occasions without a chaperone.
48. Allegation 15 relates to the use of antibiotics.
49. Allegation 16 relates to the breach of local undertakings between 2010 and 2015 concerning unchaperoned examinations, osteopathic manipulations, double appointments for counseling sessions and intimate examinations.

## Patient B

50. There are 5 allegations, numbered 17-21 in relation to patient B. The allegations are fewer in number than patient A; however there is a degree of commonality to the extent that the allegations relate to intimate matters. Thus allegation 21 for example relates to inappropriate vaginal examination and allegation 19 relates to inappropriate palpation of the adnexae during vaginal examination.
51. Allegation 17 relates to failures concerning the taking of swabs and assessment, investigation and treatment for chlamydia.
52. Allegations 18, 20 and 21 relate to the respondent's actions concerning a suspected ectopic pregnancy from which arises allegation 19, as previously noted.

## Patient C

53. There are 4 allegations, numbered 22-25, relating to patient C. These allegations relate to the events of 9 June 2015.
54. Allegation 22 is that either the appellant did not examine patient C; or in the alternative, did examine patient C but in circumstances which breached the GMC medical practitioners tribunal condition: not to undertake an intimate examination without a chaperone present.
55. Allegations 23 to 25 relate to the way in the consultation was recorded and the fact that the respondent then booked the patient C for minor surgery.
56. As noted previously, there are no allegations particularised in relation to the peri-anal surgical procedure undertaken on 10 July 2015.

## Other concerns

57. As noted earlier the tribunal takes the view that the allegations as particularised do not capture the full range of concerns that arise. That is because the respondent's response to the allegations and subsequent actions, are mentioned only in part and briefly, in the GMC case examiner's report; are not set out in the allegations themselves; and make limited reference to the peri-anal surgical procedure undertaken on 10 July 2015.
58. Thus the applicant has concerns relating to the respondent's potential lack of insight. This is an important aspect of the case before the tribunal which is not fully reflected in the allegations as framed by the GMC.
59. The applicant's particular concern about respondent's lack of insight arises



most obviously from the chronology of events culminating in the events relating to patient C, as explained further below.

60. The applicant is concerned that the respondent undertook both an intimate examination of patient C, on 9 June 2015, and subsequently undertook a surgical procedure in her peri-anal area on 10 July 2015, at a time when the applicant had agreed to be subject to NHS conditions that went beyond the GMC conditions: in particular the NHS conditions prohibited any intimate examination, whereas the GMC conditions allowed intimate examination if chaperoned.
61. It is submitted on behalf of the applicant that this raises issues about the respondent's willingness to breach conditions and lack of insight as to why the conditions were imposed. Mr Hayton, for the respondent submits that the breach was inadvertent and an isolated event.
62. The applicant's concerns also relate to the respondent's response when the concerns were referred to the authorities and an explanation called for. The respondent suggested amongst other things, that his actions in the consultation on 9 June 2015 and the procedure on 10 July 2015 did not amount to an intimate examination. The applicant considers this to be an overly semantic approach.
63. A further matter that is not captured by the allegations as particularised, but which is referred to in the case examiner's report, relates to the respondent's response to the allegations as whole. In particular, it is noted that the respondent believes his treatment of all three patients was appropriate or not so serious as to require GMC intervention demonstrates a lack of insight.
64. In the light of the above the tribunal now turns to its own assessment.

#### Assessment of seriousness, risk and proportionality

65. The tribunal finds that the allegations relate to the respondent's behaviour over a significant period of time; give rise to multiple issues concerning both clinical practice and inappropriate behaviour of a sexual nature; and that there are further concerns relating to the respondent's willingness to breach conditions and lack of insight.
66. The tribunal finds that these issues are serious matters that represent a risk to patients.
67. Mr Hayton submitted that the risk to patients could be managed by reliance on conditions imposed by the GMC which had now been varied to prohibit any intimate examination, rather than allowing chaperoned examination. The applicant had previously deemed that conditions were appropriate to the

allegations relating to patients A and B; and that it was only the alleged breach of condition relating to patient C that made the applicant consider that suspension was necessary.

68. The alleged breach of that condition, it was submitted, amounted to an isolated incident which when viewed against the background of the case did not transform the case into one where suspension was necessary, when conditions were the necessary and proportionate response previously. The respondent intended in the future to practise in the area of triage and therefore it was unlikely that he would be in a position to undertake intimate examinations.
69. The tribunal rejects those submissions for the reasons set out below.
70. Firstly, it is important to consider all of the available evidence and the allegations in their totality. The tribunal rejects the view that the concerns relating to patient C amount to an isolated event. In substance, the circumstances of patient C relate to the respondent undertaking inappropriate intimate examinations and not simply the fact that there was an alleged breach of conditions. As noted above, these allegations relating to inappropriate intimate examinations are multiple and originate from three different patients over a significant period of time.
71. Second, in looking at the totality of the allegations, the respondent's behaviour in relation to patient C and his responses to the allegations as a whole, cast a different light on the allegations relating to patients A and B. In particular the events relating to patient C casts doubt on whether or not conditions are sufficient to protect patients in the future; and indeed whether conditions had been sufficient in the past.
72. Third, in considering the need to protect patients in the future, the tribunal rejects the submissions to the effect that the respondent has learnt his lesson. That is because the respondent's willingness to abide conditions and the sufficiency of his insight into the nature of, and seriousness of, the allegations are matters that remain to be determined at a final hearing. The present tribunal's task is to determine whether suspension as an interim measure is necessary and proportionate pending final determination of the factual issues and ultimate judgment as to what steps are necessary in the light of those facts.
73. Thus in the present proceedings the tribunal finds that there is a risk that the respondent will breach future conditions either willingly or through lack of insight. It remains an open question whether or not the respondent willingly breached conditions; or breached conditions due to lack of insight; or breached conditions due to mere inadvertence; or breached conditions for any other reason. Those are matters that will be determined at a final hearing.

74. Given the above, the tribunal does not find that the respondent has learnt his lesson. The available evidence shows that there is a real risk that he would breach conditions; and that there is a real risk that he would not abide by an informal undertaking to work only within triage.
75. In assessing whether or not the continuing suspension of the respondent is necessary and proportionate the tribunal also takes account of the position adopted by the GMC: that conditions, including conditions prohibiting any intimate examination, is the appropriate measure.
76. The tribunal attaches limited weight to that position for a number of reasons. First, and generally, the measures taken by the GMC are made with regard to considerations and objectives that differ from the objectives of the NHS performer's regulations. Whilst there may be areas of overlap, there are also differences. The GMC perspective and criteria of fitness to practise are framed differently as compared to the performer's list perspective of protection of patients and issues of suitability.
77. Second, and more particularly in the present case, the GMC conditions have been imposed with limited regard to the applicant's concern that the respondent undertook an intimate examination of patient C on 9 June 2015 in breach of the NHS conditions prohibiting any intimate examination, as opposed to breach of the GMC condition which permitted intimate examination and which is the focus of the GMC's concerns. Nor is it apparent from the material before the tribunal what consideration was given by the GMC medical practitioner tribunal to the respondent's carrying out of a perianal surgical procedure on patient C on 10 July 2015 at a time when he was prohibited by the NHS performer's list conditions from the undertaking of intimate examinations, let alone undertaking surgery in an intimate area.
78. In considering all the matters before the tribunal, and in the light of the preceding paragraphs, the tribunal finds that the imposition of GMC conditions on the respondent's practise is not a sufficient measure to protect the public from the respondent's performance of duties under the NHS performer's list. In essence, as explained above, that is because conditions have been insufficient in the past and there is a real risk that they would be insufficient in the future.
79. The tribunal further finds that in these circumstances it is necessary and proportionate to extend the suspension of the respondent from the performer's list and to await a decision of the relevant GMC body.
80. Given the tribunal's findings above, it is not necessary for the tribunal to deal in detail with the submissions advanced on the alternative grounds for extending the suspension of the respondent: that is on the grounds that it is

otherwise in the public interest. It is sufficient to note that it is also in the public interest that the suspension of the respondent be extended; that in coming to that view the tribunal has given appropriate weight to the views emanating from the GMC regulatory regime; and that the tribunal has considered the application on its own merits.

### **Decision**

81. The application by NHS England for an extension of Dr Goodwin's suspension from its medical performers list is granted.

82. The tribunal are informed that Dr Goodwin's case is listed before the GMC medical practitioners tribunal in June/July 2016; and accepts that in those circumstances an extension of the suspension period to 5 August 2016 is appropriate.

**Signed**

**J Atkinson**

**Judge of the First Tier Tribunal  
Dated 7 June 2016**