

IN THE FIRST TIER TRIBUNAL

Case No PHL 15337

HEALTH EDUCATION AND SOCIAL CARE CHAMBER

PRIMARY HEALTH LISTS

NHS PERFORMERS LIST REGULATIONS 2004

TRIBUNAL PROCEDURE (FIRST TIER TRIBUNAL) (HESC) RULES 2008

BETWEEN:

ANDRZE SKALBA

GDC Ref No 131480

Appellant

and

LINCOLNSHIRE PCT

Respondent

Before

Judge J Burrow

Dr P Wray

Mrs J Alderwick

Sitting at Field House 15 Breems Buildings London on 25 July 2011.

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1. The appeal

1.1 This is an appeal by Dr Skalba pursuant to Regulation 15(1) of the 2004 Regulations against the decision of the Lincolnshire PCT (the PCT) on the 18 August 2010 to remove him from the dental performers list on the ground of unsuitability. The central issue for this appeal to the Primary Health Lists (PHL) tribunal was whether Dr Skalba's proficiency in the

English language was such that he was unsuitable to be included in the dental performers list and whether the decision to remove him by the PCT was correct and proportionate.

2. Legal framework

2.1 The legal framework for this appeal is largely contained in the NHS Performers List Regulations 2004, which inter alia sets out the criteria by which decisions to remove a performer for unsuitability are to be considered.

2.2 Regulation 6(2)(b) provides that a performer must not be included in a dental performers list where the PCT is not satisfied that he has the necessary knowledge of English.

2.3 Regulation 10 provides that a PCT may remove a performer from its list where he is unsuitable to be included on it. Where there has been a finding of unsuitability, Regulation 12 prevents the imposition of contingent removal.

2.4 Regulation 11 sets out the criteria to be considered when deciding to remove a performer from its list. Regulation 11(7) in particular provides that the PCT (and therefore on appeal the PHL) should have regard to the overall effect of any relevant incidents relating to the performer.

2.5 Regulation 15 provides that the appeal to the PHL is by way of redetermination, and the PHL can make any decision which the PCT could have made.

2.6 We also took into account the relevant sections of the “Primary Medical Performers Lists Delivering Quality in Primary Care, Department of Health 2004” including paragraphs 7 and 17. Paragraph 7.10 states in respect of suitability, grounds for action may include where there is a lack of tangible evidence of a doctor’s ability to undertake the performers role (for example satisfactory qualifications, experience and essential qualities). The Guide applies to dentists as well as doctors.

2.7 We further had regard to the proportionality of the decision appealed against, taking into account all the relevant evidence in the case and considering the applicant’s interest in pursuing his profession on the one hand and his suitability on the other.

2.8 The burden of proving any factual matter rests upon the party asserting it, to the civil standard of proof. The issue of unsuitability is a matter of judgement for the tribunal taking into account all relevant matters.

2.9 Although the appeal form was submitted late, the period was extended to allow the appeal to be lodged.

3. Evidence

3.1 By agreement with both parties this case was heard under rule 23 of the 2008 Rules without an oral hearing – that is to say on the papers. The evidence in this matter consisted of the bundle produced by the PCT (which contained both parties’ papers).

3.2 Dr Skalba is a Polish national who was trained in dentistry at Wroclaw in Poland and was qualified as a dentist in Poland in May 1984. He apparently practised dentistry in Poland for many years. It is not known when he came to the UK but he was registered in the UK as a dentist on 4 February 2008 and began work at the Bridge Street Dental practice in Louth, Lincolnshire, on 1 February 2009. The practice manager was Anthony Kirschner who sent an email to the PCT on 5 February 2009 stating the Dr Skalba had completed the relevant documentation and that his language test results would arrive “in about a couple of weeks”.

3.3 Dr Skalba completed and signed an application form to be admitted to the dental performers list on 12 February 2011. The endorsement on page 2 of the form states that dentists applying from European member states must enclose one of several different English certificates, the effect of which is to certify sufficient competence in the English language. An English language certificate was in fact never sent.

3.4 Mr Kirschner sent a further email to the PCT on 17 February 2009 asking whether there was still an obligation for a dentist from Poland to provide results of a language test. He said “*It’s not the case of Mr Skalba, but I have just heard such news somewhere*”. Mr Sidebottom, a Practitioner Service Assistant with the PCT replied on 24 February 2009 to the effect that in respect of the GDC there was no obligation but an employer may suggest doing a language course. Nothing was said about the requirement to join the PCT’s dental performers list. It was asserted by Mr Kirschner that in subsequent telephone conversations Mr Sidebottom had said he would not ask Dr Skalba for a language certificate.

3.5 In any event Dr Skalba was included on the DPL on 15 April 2009 at a time when the PCT did not have evidence of Dr Skalba’s language competence. This was clearly not in accord with regulation 6 (2) (b) of the 2004 Regulations, where the PCT’s knowledge of the necessary English proficiency is a mandatory requirement.

3.6 On 18 May 2009 a complaint was made against Dr Skalba which included a complaint about his language ability, saying Dr Skalba “doesn’t speak English”. On 20 May 2009 Mr Sidebottom wrote to Dr Skalba asking him to provide evidence of passing a language test. Mr Kirschner replied, apparently on Dr Skalba’s behalf, saying Mr Sidebottom had said he would refrain from asking him to submit a test result, and referring to the email of 24 February 2009. Mr Sidebottom replied on 26 May 2009 saying that his email had referred to the GDC requirements.

3.7 On 7 July 2009 Dr Skalba wrote to Mr Sidebottom saying he had been preparing for an English test for some time, that he was having private language lessons and that he was being tutored by an English dental nurse. He said he will be sitting an approved language examination within 2 months. However, once again an English language certificate was never sent to the PCT.

3.8 Further complaints were made against Dr Skalba about his English. On or about 7 August 2009 a complaint by a patient included a complaint that he had a communication problem. In November 2009 a patient complained that “he spoke little English”. Mr Kirschner said in reply to that complaint that “*the dentist who treated you does not speak English well*”.

3.9 On 29 April 2010 the PCT wrote to Dr Skalba, asking for evidence of language competence to be supplied by 7 May 2010. The PCT also initiated an investigation into the complaints in 2009. Michael Hill, the Dental Adviser to the PCT, visited the surgery on 11 May 2010 and spoke to Dr Skalba. He said a satisfactory outcome was not possible because of communication difficulties and that Dr Skalba could only communicate with patients with the help of a dental nurse. The practice manager Mr Kirschner suggested Mr Hill might need an interpreter. The receptionist said it was a good job the dental nurse was there as she spoke Polish and English.

3.10 Dr Skalba replied on 6 May 2010 to the PCT request for evidence of language competence by saying he had booked a test on 6 June 2010. The PCT replied on 18 May 2010 saying that a PCT panel would consider suspension on 21 May 2010. He was offered the opportunity to appear in person, but Dr Skalba responded in writing. He said he had been told a language test would not be required of him and that he had invested in a practice in Lincoln. He said he had treated 4 -5000 patients and only two had complained. He said he would do all he could to pass the test on 6 June 2010.

3.11 On the 21 May 2010 the PCT suspended Dr Skalba for 3 months because of a failure to provide evidence of a passing a language test. They sent a letter on 27 May 2010 informing him of the decision. On 19 July 2010 the PCT wrote to Dr Skalba saying they intended to seek his removal from the DPL for the same reason on the ground of unsuitability. Dr Skalba was again offered an opportunity of an oral hearing on 19 August 2010. On 21 July 2010 Dr Skalba sent an email to the PCT saying he had suffered a stroke on 28 May 2010 and he had not been able to take the language test on 6 June 2010. He said he would take the test as soon as he was well enough.

3.12 The PCT convened a panel on 19 August 2010 where Dr Skalba was represented by his son. Dr Skalba was removed from the DPL on the ground of unsuitability due to not meeting the language test criteria. On 22 September 2010 Dr Skalba appealed against that decision. On 13 March 2011 he said he had worked in the Louth practice for about a year and asked if that was sufficient evidence of language competency. The PCT said it was not.

4. Dr Skalba’s case

4.1 In his written statement for this appeal dated 11 April 2011 he said he started at Bridge Street Dental Care on 1 February 2009. He said there was no mention of having to provide an English language test for a few months and when he was told he would have to provide a test result he was disappointed. He said had learned most of his English while working at the Bridge Street practice. He said it would probably have been difficult for him to pass the test before he started work at the practice.

4.2 He said he worked there for about a year and had treated about 10,000 patients. He said the PCT should not have put him on the performers list if they didn't think he met the language criteria. He had closed his practice in Poland and brought his family over. He had had a stroke after he was suspended and was recently diagnosed with another serious illness. He submitted a letter from his consultant to this effect. In an email of 21 July 2010 he said he had difficulty walking, seeing and speaking and that recovery would be a long process. He said he would like to be put back on the performers list without the necessity of a language test "and not because he did not speak English".

5. Consideration by the Tribunal

5.1 We considered the evidence with care. We noted that there was a clear endorsement on the application form to the effect an English language certificate was necessary. Dr Skalba signed that application form personally. The email from Mr Kirschner of 5 February 2009 had said one was to be delivered in about two weeks, but one was never sent. In the light of Dr Skalba's remarks that he learnt most of his English at the Bridge Street practice and that it would have been difficult for him to pass a test at that time, and in light of the complaint made in May 2009 that he doesn't speak English, that remark was unrealistic at the least, and possibly misleading.

5.2 Thereafter in May 2009 Dr Skalba was again put fully on notice that a language certificate was required by the PCT in the letter of 20 May 2009. In response to that letter Dr Skalba had undertaken in July 2009 to produce one within 2 months – that is to say by September 2009. He again failed to do so. He had still not produced one by April 2010, some 11 months after being requested to do so and some 7 months after giving an undertaking that he would supply a certificate. In April 2010 the PCT repeated their request for a certificate following a further patient complaint about his lack of English in November 2009. We concluded that such a failure for such a length of time is significant and serious. He has been given every opportunity by the PCT to produce a certificate or show his English is adequate and he has failed to do so.

5.3 Furthermore there is evidence that his proficiency in English is inadequate for a dentist. This evidence comes from the patient complaints, and from Mr Hill, Mr Kirchner and the practice nurse during the PCT investigatory visit to the practice in May 2010. Dr Skalba himself does not actually claim anywhere in his submissions that he has adequate English. He has never appeared at any hearing in person where his English could be assessed. We are in no doubt at all that his English is inadequate and that this inadequacy potentially puts patients at risk.

Unsuitability

5.4 Dr Skalba was removed from the DPL on 19 August 2010 on the grounds of unsuitability pursuant to Regulation 6(2)(b) of the 2004 Regulations. We considered the definition of “unsuitability” in the 2004 Department of Health guide which states that grounds for action for unsuitability may include a situation where there is a lack of tangible evidence of a doctor’s ability to undertake the performer’s role (for example satisfactory qualifications, experience and essential qualities). We accepted that a lack of proficiency in English and a lack of certification could fall within this definition.

5.5 We also accepted the evidence from Mr Hill that it is essential that dentists are able to communicate effectively with patients. Dental treatment can be complicated and treatment options must be clearly discussed with the patient to allow a patient input into the treatment plan. The patient must also be informed of the long term prognosis for the treatment and financial implications, including NHS or private treatment. The patient must understand potential problems and risk factors. The final treatment plan will be signed by the patient and the dentist and both must fully understand the plan. It is a requirement that a dentist has sufficient competence in English to be allowed to join the dental performers list. For all these reasons we accepted that it is necessary for a dentist to be proficient in English and to provide an appropriate certificate, and where there is inadequate proficiency in English there is a potential risk to patients.

5.6 We concluded that Dr Skalba had failed to provide evidence of an appropriate competence in the English language and that his English was in fact inadequate for practice as a dentist. We concluded for these reasons that Dr Skalba was unsuitable to be included in the performers list.

5.7 We considered the submissions by Dr Skalba as to the effect removal from the list would have on him and his family but concluded that the decision by the PCT to remove was necessary, proportionate and correct. Should Dr Skalba’s proficiency in the English Language improve sufficiently he may be able to re-apply to the performers list. We rejected the appeal.

John Burrow

Judge HESC/PHL

2 August 2011

