Case Reference: PHL/15434

IN THE HEALTH EDUCATION AND SOCIAL CARE CHAMBER
OF THE FIRST-TIER TRIBUNAL (Primary Health Lists)
IN THE MATTER OF AN APPEAL UNDER THE NHS (PERFORMERS' LISTS) REGULATIONS 2004

BETWEEN

DR JOSEPH JOHN BRAND **Applicant**

And

HAMPSHIRE AND ISLE OF WIGHT PRIMARY CARE TRUST **Respondent**

DECISION

Dr Brand PHL/15434

DECISION

1. **This is an appeal by Dr Joseph John Brand (the Applicant) dated 9th and 20th October 2011 against the decision of the Hampshire Primary Care Trust (the Respondent) dated 8th September 2011 to remove him from its Performers List under Regulation 10(6) of the National Health Service (Performers List) Regulations 2004 (the Regulations) and sent to the Applicant in a letter dated 13th September 2011. The Tribunal has made its determination based on papers only in a telephone hearing dated 6th January 2012. The appeal is brought under Regulation 15 of the Regulations and the powers of the Tribunal are that it can make any decision that the Respondent could have made (Regulation 15(3) of the**

Regulations). This is to remove or not remove the Appellant from the Respondent's Performers List.

2. **Regulation 10(6) states, as follows: "Where the performer cannot demonstrate that he has performed the services, which those included in the relevant performers list perform, within the area of the Primary Care Trust during the preceding 12 months, it may remove him from its performers list."l**
3. **In reaching its decision the Tribunal reminded itself that the burden of proving the issues are on the Applicant and that the standard is the civil standard; namely, on the balance of probabilities. The Tribunal also reminded itself that it must exercise the principle of proportionality at all times, balancing protection of the public and the wider public interest, including public confidence in the profession and the need to uphold and maintain the standards of the profession against the Applicant's own interests in being able to continue practising in his chosen profession.**
4. **The Tribunal noted that the Appellant's first Notice of Appeal is in the form of a letter dated 9th October 2011 and received on a date in October 2011 that is illegible in the Tribunal's copies. The Tribunal also noted that the Appellant's formal Notice of Appeal is dated 20th October 2011. The Tribunal has taken the view that this is not an out-of-time appeal, as the period of notice is 28 days. The Tribunal concluded that the Appellant's original letter dated 9th October 2011 can be treated as his first Notice of Appeal. Moreover, the Tribunal noted that the Respondent had not taken a point on this.**
5. **The Respondent had been alerted, after the Applicant had completed his Annual Declaration of practice on 11th April 2011 with accompanying letter dated 12th April 2011, to the fact that the Applicant had not worked locally in primary care in the preceding 12 months. He stated that this was by reason that the offers of employment he had were not suitable in time or place to him (see his letter dated 12th April 2011). As a result, the Respondent convened a Contractor Performance Panel on 19th May, 11th July and finally on 8th September 2011. On the first two occasions, it decided to give the Applicant more time to provide proof that he had been working for the previous 12 months, and to produce learning credits and proof of appraisal. The Tribunal noted that the Respondent had indicated in its letter of 15th July 2011 that they now required him to provide proof of primary care services undertaken over the previous 24 months as well as any sessions to be worked over the next few months.**
6. **As a preliminary matter, the Tribunal noted that the requirement of the Applicant set by the Respondent in its 15th July 2011 letter seemed to refer to a longer period, 24 months, and to the future working trends of the Applicant, as opposed to just the required preceding 12 month period within Regulation 10(6). The Tribunal has concluded that the Respondent may have been referring to the length**

of time that the Appellant had been working with the Armed Forces and that this had made no difference to the remit the Respondent had given to the Appellant as to what he had to produce, or to the Respondent's final decision, which was based upon the Regulation 10(6) the 12 month period.

7. **The Tribunal also noted that the Applicant had referred to the need for him to be on a Performer's List in order to practise as a locum to the Armed Forces. This is disputed by the Respondent. Although there is nothing to state otherwise within the legislation, the Tribunal noted that Regulation 10 (7) (b) of the Regulations makes it clear that for the purposes of computing the preceding 12 month period whole time service in the Armed Forces in a national emergency is not to be counted. Hence, as the Applicant was at all material times, by his own admission, a medical practitioner on standby for the Armed Forces for emergencies, Regulation 10(7) (b) would not apply to his case and it would also by implication seem to exempt the requirement for such practitioners, if whole time in an emergency, to be on a Performer's List. Therefore, the Tribunal has concluded that the Respondent was correct in its interpretation of the fact that a medical practitioner does not need to be on a Performers List to practice in the Armed Forces as a whole time performer in a national emergency. Whether the Armed Forces and/or locum agencies take an administrative view different to that (namely, that their medical practitioners, in fact, do have to be on a Performers List), especially with locum practitioners such as was the Applicant in years past, is not something that the Tribunal can adjudicate upon, as it has no information on that, and the Applicant has not provided it to support his appeal.**
8. **In addition, the Tribunal also noted the reference by the Applicant in his letter to the First Tier Tribunal dated 9th October 2011, that he had health issues. The Tribunal noted that he had not raised this to the Respondent at any earlier time, especially when he was asked on one occasion to demonstrate his practice in the preceding 12 months and on another occasion in relation to the preceding 24 months from May to September 2011. Furthermore, the Tribunal has not been provided by the Appellant with any documentary information, in the form, for example, of medical reports, on his ill health and how that has impacted on his ability to practice, if it has.**
9. **The Tribunal was of the opinion that, in balancing protection of the public against the Applicant's own interests, protection of the public prevails in this case. In the Tribunal's opinion, Regulation 10(6) of the Regulations exists to protect the public from out-of-date medical practitioners and the public has a right to expect that to be upheld by PCTs. Where this requirement is not met by a practitioner, this can be dealt with by way of removing him from the relevant Performer's List.**
10. **In the instant case, the Applicant in his Annual Declaration of 11th April 2011 letter was frank in his admission that he had not worked in the preceding year from April**

2010 to March 2011. In his letter dated 27th July 2011 the Applicant referred to on to the fact that he had "no well-defined programme" and therefore was unable to proceed with the matter at that time. He had already indicated to the Respondent in his 11th April 2011 Annual Declaration and accompanying letter dated 12th April 2011 that, although he had received offers of employment, those had "had not been at times or places that I could accommodate". Furthermore, in his letter supporting this Appeal, the Applicant stated that he had not done work in the previous 12 months because "nothing suitable has been available locally" and that he could not forecast what work he may be offered in the next 12 months. He referred to his appraisals being all in date and that the next one was due in December 2011. His Annual Declaration dated 11th April 2011 referred to an appraisal having been completed on 13th December 2010. However, no proof of any appraisal having been done in 2010 was submitted before the Respondent, especially after it had indicated to the Applicant its intention in respect of his removal from its Performers List, as evidenced from its correspondence to him from May 2011 onwards. Furthermore, the Tribunal noted that there was no proof by way of a new-evidence appeal before this Tribunal with respect to either or both appraisals having been completed. The Tribunal found this surprising in light of the fact that the decision to remove the Appellant affected and continues to affect his ability to earn a living as a medical practitioner in that area of the UK. In the Tribunal's view, this indicates that the Applicant seems less than enthusiastic to prove that he is able to comply with Regulation 10(6) and it also indicates an unwillingness on his part to persist with his medical practice.

11. **The Tribunal noted that, by his own admission in his Annual Declaration dated 11th April 2011, the Applicant had not worked in the Respondent's area during the preceding 12 months. He has not worked in the intervening period, throughout 2011, which means that, in the Tribunal's opinion, he has not worked for approximately 19 months to date. Despite being requested on a number of occasions by the Respondent to provide proof of work in its area in the preceding 12 months and any future sessions booked, as well any appraisals and learning credits, the Applicant has been unable to provide that and has not sought to appeal by way of new evidence, so as to bring any such proof of work in the relevant preceding 12 months and any future work, since September 2011, when the Respondent made its decision. The Tribunal has also noted the Applicant's stance on his retirement in his letter dated 14th June 2011, that he would like to remain on the Performers List for that year "after which I shall probably retire".**
12. **Therefore, the Tribunal has determined that it is clear that the Applicant has not complied with the provisions of Regulation 10(6) of the Regulations, that he has not expressed any motivation to comply with it, that he has now not worked for approximately 19 months and has no proof that he has work booked in the future**

and that he will probably be retiring very soon, in any event. Therefore, the Tribunal has concluded that the PCT's decision of 8th September 2011 was correct. In the Tribunal's view, the Applicant has now not worked for so long that, without the checks and balances of the provisions of Regulation 10(6) and the Applicant complying with them, the public could be put at risk by the Applicant being permitted to work by reason of being on the Respondent's Performers List.

13. **Thus, for these reasons, the Tribunal has determined that the Applicant's appeal is dismissed.**

Hearing Date: 6th January 2012

Karen Rea - Tribunal Judge
Dr D. Kwan – Professional Tribunal Member
Mrs J. Neylon – Lay Tribunal Member