



**Mr Oday Hamond
Appellant**

v

**Hywel Dda Local Health Board
Respondent
[2011] PHL 15442**

DECISION

Before: Judge Meleri Tudur
Mrs Libhin Bromley (Independent Member)
Dr Philip Wray (Professional Member)

Hearing: 8 March 2012

Venue: Prestatyn Magistrates' Court

Representation: Mr Hamond was unrepresented
Ms G Cooper, solicitor Legal and Risk Service
represented the Hywel Dda Local Health Board.

Appeal

1. Mr Hamond is a dentist who qualified in Jordan in 1995. In about 2002 or 2003, he moved to the United Kingdom, and worked as a dental nurse until he had an opportunity to take the overseas registration examination which he passed in September 2010.

2. In January 2011, Mr Hamond started working for Midas private dental surgery, performing general dental duties. He secured a Vocational Training Placement for one year at Carmarthen starting in August 2011, and applied on the 17 May 2011 for inclusion in the General Dental Performers List for the Hywel Dda Local Health Board. He commenced work in Carmarthen at a vocational training practice supervised by Dr Nelson Kernahan.

3. By letter dated the 1 November 2011, Mr Hamond was notified that his application for inclusion in the Dental Performers List of the Hywel Dda Health Board had been refused pursuant to the National Health Service (Performers Lists)(Wales) Regulations 2004(as amended) Regulation 6(1)(a)".. having

considered the declaration required by Regulation 4(4) and (if applicable) regulation 4(5)...” on the basis that he was unsuitable to be included in its performers list.

4. The decision had taken into consideration the fact that the Appellant had failed to declare that he was on police bail having been arrested by Greater Manchester Police and his failure to disclose that information rendered the Appellant unsuitable for inclusion in the list.

5. Mr Hamond appealed against the decision.

The Law

6. The relevant regulations are the National Health Service (Performers Lists) (Wales) Regulations 2004 (as amended). Regulation 4(2) sets out the information to be provided by the performer to the Local Health Board in the application for inclusion in the list. Regulation 4(4) requires the performer to send with the application a declaration as to whether the performer:

- (a) has any criminal convictions in the United Kingdom;
 - (b) has been bound over to keep the peace in the United Kingdom;
 - (c) has accepted a police caution in the United Kingdom;
 - (d) has accepted and agreed to pay either a procurator fiscal fine under section 302 of the Criminal Procedure (Scotland) Act 1995(2) or a penalty under section 115A of the Social Security Administration Act 1992(3);
 - (e) has, in summary proceedings in Scotland in respect of an offence, been the subject of an order discharging the performer absolutely (without proceeding to conviction);
 - (f) has been convicted elsewhere of an offence or what would constitute a criminal offence if committed in England and Wales or is subject to a penalty which would be the equivalent of being bound over or cautioned;
 - (g) is currently the subject of any proceedings which might lead to such a conviction which have not yet been notified to the Local Health Board;
 - (h) has been subject to any investigation in to the performer’s professional conduct by any licensing regulatory or other body;
 - (i) is currently subject to any investigation into the performer’s professional conduct by any licensing regulatory or other body;
 - (k) is the subject of any investigation by another Local Health Board or equivalent body which might lead to the performer’s removal from any of that Local Health Board’s lists or any equivalent lists;
 - (l) is or has been where the outcome was adverse, the subject of any investigation into the performer’s professional conduct in respect of any current or previous employment;
 - (m) has been removed from, contingently removed from, refused admission to or conditionally included in any list or equivalent list kept by a Local Health Board or equivalent body or is currently suspended from such a list and if so why and the name of that Local Health Board or equivalent body; or
 - (n) is or has ever been the subject of a national disqualification,
- and, if so, the performer shall give details of any investigation or proceedings which were or are to be brought including the nature of the investigation or proceedings, where and approximately when that investigation or those

proceedings took place or are to take place and any outcome.”

7. Regulation 6(1) provides that the Local Health Board may refuse to include a performer in its performers list on the ground that:

“(a) the Local Health Board having considered the declaration required by regulation 4(4) and (if applicable) regulation 4(5) and any other information or documents in its possession relating to the performer considers that the performer is unsuitable to be included in its performers list”.

8. Regulation 15 provides that a performer may appeal by way of redetermination against the decision of the Local Health Board to refuse admission to a performers list under regulation 6(1).

Issues

9. The issues for determination by the Tribunal were set out in a schedule of findings sought by the Respondent dated 20 February 2012. There were four findings sought:

- (a) That no reasonable honest dentist in the same situation would have failed to declare that he was on police bail at the time of his application;
- (b) That the Appellant should have declared the information at a later stage;
- (c) That the Respondent acted reasonably in taking into account the non disclosure of the information in the decision that it made;
- (d) Whether the Respondent was correct to decide that the non-disclosure of information made the Appellant unsuitable for entry into the Dental Performers List.

Evidence

10. The Tribunal considered the bundle of documents submitted in advance of the hearing which included the Appellant’s notice of appeal, copy application and supporting documents, as well as the Respondent’s Response to the appeal and supporting documents. The Appellant requested an oral hearing of the appeal and the Tribunal heard oral evidence from the Appellant and from Ms J Paterson, Assistant Director of Primary Care at the Hywel Dda Health Trust.

11. The Appellant, in his grounds of appeal, explained the background to the application and the information contained in it. He had completed the DPL1 Form to the best of his ability and in response to Question 11 “Are you currently involved in any such proceedings”. He had ticked the box “No”. He stated in oral evidence that he had read the questions on the form and had interpreted question 11 to follow on from the previous question about proceedings outside the United Kingdom. He did not read the question as referring back to questions about criminal proceedings in the UK (contained in questions 5 and 6) on the form. He gave evidence that he had honestly read the form as sequential questions. He had been surprised at the letter informing him that his application had been refused because of his non-disclosure and was horrified that his integrity was being questioned on the basis of the alleged failure to disclose information. He had spent a great deal of time trying to clarify with the relevant police authority why the information about his arrest and bail had been placed on his Enhanced CRB check, when the information had not appeared on a previous CRB check issued in April 2011. The relevant arrest had taken

place in March 2010. He had been reassured by his solicitor that “arrest and bail” were not synonymous with “charged” and that his arrest had been a formality to enable the police to interview him under caution. He had received eight different dates to attend at the police station for further interview and eventually the investigation had been abandoned and in November 2011 his bail cancelled without further action by the police.

12. Mr Hamond had received a telephone call and a subsequent letter from Ms A Evans informing him that the CRB certificate indicated that he had been charged by Greater Manchester Police. He had disputed throughout that he had been “charged” and at the hearing, Ms Cooper apologised to him on behalf of the Local Health Board for wrongly asserting that he had been charged with any offence.

13. In oral evidence, Ms Paterson explained that where the performer is able to produce an old CRB certificate, then he is afforded a period of three months’ grace by the Hywel DDA Local Health Board to obtain a new certificate, during which time he or she may practise as though included in the performers’ list. The Appellant had therefore started his Vocational Training Placement on the 3 August 2011 despite the absence of a current enhanced CRB certificate. Ms Paterson made the final decision at the end of October 2011 and she perceived the Appellant not to have disclosed relevant information on the DPL1 application form and she reached a decision based on the information in the application form and the further information from the telephone conversations with Ms A Evans, Dental Contracts Manager, and correspondence from the CRB. She concluded that the withholding of information made the Appellant unsuitable for inclusion in the list. She stressed that the withholding of the information rather than the nature of the allegations was the cause of the decision not to include him in the dental performer’s list.

14. Ms Paterson confirmed her interpretation of question 12 on form DPL 1: “Are you currently the subject of any proceedings which might lead to such a conviction which have not been notified to the LHB?” to include within the word “proceedings” any police investigations, arrest and bail. She accepted that the alternative interpretation by the Appellant might be a different interpretation of the same question. She still considered it appropriate, however, for the Appellant to have disclosed in his application form “..the ongoing proceedings” ie the arrest and bail.

15. She stated that she had not received any training on the interpretation of the questions on the form upon her appointment to her post about two and a half years ago and had formed her own impression of the information expected to be disclosed. She had not sought legal advice regarding the understanding of ‘proceedings.’ She had not concluded that Mr Hamond was unsuitable because of the arrest and bail but because he had not disclosed relevant information to the Health Board as required in the form. She did not consider that Mr Hamond had answered the question appropriately and was not therefore suitable for inclusion on the dental performers’ list.

16. In answer to Mr Hamond’s questions, she stated that she had not returned his telephone call or called him because it was his practice to record telephone conversations and she did not consider a recording of any discussion to be appropriate. She had concluded that Mr Hamond was aware of his arrest

and bail in the UK and that could have led to a criminal conviction and he should have replied 'Yes' to question 12 and should have explained the position relating to his arrest and bail on the form. In her view, "such a conviction" was a reference to a conviction relating to the proceedings but she did accept Mr Hamond's understanding of the question as a possible interpretation. She further confirmed that she would include the word "investigation" as part of the definition of "proceedings" but distinguished "investigation" and "proceedings" from an investigation into professional conduct. She had accepted all the evidence submitted up to the 27 October 2011 and decided that he hadn't disclosed information which he should have at the time. She considered it Mr Hamond's responsibility to get back to the Local Health Board with clarification and did not consider it appropriate for her to call Mr Hamond as she had been requested by him. She acknowledged that she knew he had asked her to call him and because he was recording conversations, she did not consider it appropriate to do so.

17. On behalf of the Local Health Board, Ms Cooper submitted that a reasonable, honest person would have disclosed in response to question 12 that he had been arrested and bailed but the Appellant had failed to do so. She submitted that the information was integral to the Local Health Board's assessment of his suitability and submitted that the suggestion that Mr Hamond had only a basic level of English was not sufficient to affect his understanding or his ability to seek advice on the information required by the form.

18. Ms Cooper further submitted that the Appellant had failed to disclose the information in response to requests by the Local Health Board contained in a letter and telephone calls. Her submission was that he could have disclosed the relevant information by way of explanation in a letter in response.

19. She disputed the Appellant's suggestion that Ms Patterson had made her decision on the basis of the perception that the Appellant had been charged with an offence. Ms Patterson had confirmed in evidence that she knew that Mr Hamond had not been charged, but rather the decision had been based on his non-disclosure of the information. The issue of suitability was one of integrity and character and the Local Health Board can only rely on the information provided by the performer himself. The grounds of refusal were suitability and efficiency.

20. Ms Cooper reminded the Tribunal that there are no degrees of suitability: the appellant is suitable or he is not. The breakdown of trust between him and the Local Health Board made him unsuitable for the role of dental provider. Additionally or alternatively the decision was to refuse to include him on the ground of efficiency.

Tribunal's conclusions with reasons

21. We carefully considered the written evidence submitted to the Tribunal in advance and the evidence given to us at the hearing. We also took account National Health Service (Performers Lists) (Wales) Regulations 2004 (as amended).

22. We considered first of all the information sought by question 12 prior to dealing with the findings requested by the Local Health Board. We agreed that

Mr Hamond's knowledge of both written and spoken English far exceeded that of a basic standard as suggested by the representative of the Local Health Board. On the basis of the wording as set out, the reference to "such convictions" means that the question is not free standing and must be linked to another question where there is a reference to convictions. The logical interpretation is that it is a follow-on question from question 11, which has a reference to convictions and we conclude that the correct interpretation must be that as interpreted by Mr Hamond. The question is sequential to the previous question and refers back to it. We did not accept Ms Paterson's interpretation of a free standing general question which could be referred back to question 5. We concluded that the question is specific and is a supplementary question about proceedings in countries other than the UK.

23. We then considered the findings that we were invited to make by the Respondent:

a) no reasonable honest dentist in the same situation would have failed to declare that he was on police bail at the time of his application;

24. We considered the evidence in support of this submission and concluded in the light of our decision that the question relates to "proceedings" that an arrest and bail without charge is not sufficient to require a positive response to the question. We have concluded that an arrest and bail do not amount to "proceedings" and that the question posed was therefore correctly answered. None of the questions up to question 12 on the form refer to criminal investigations and consequently, we have concluded that the Appellant was not required by the Regulations to disclose information about an ongoing police investigation. Our decision on this issue is therefore that a reasonable and honest dentist in the same situation would not have felt obliged to declare that he was on police bail at the time of his application because the information was not required by the Regulations.

b) That the Appellant should have declared the information at a later stage;

25. The Regulations do not require the Appellant to have disclosed his arrest and bail at any stage unless there is a criminal charge and conviction. Questions 5 to 10 on the DPL1 form all refer to either convictions or admissions of guilt and not to allegations which have not yet been adjudicated upon. Questions 13 - 19 all refer to professional conduct and investigations arising from it. Page 21 of the DPL1 form contains a series of undertakings which the performer must provide on application for inclusion into the list to inform the Local Health Board in writing within 7 days if he is convicted of any criminal offence in the United Kingdom; has a binding over or penalty imposed following an admission of guilt in the United Kingdom or Scotland; under paragraph (f), if he is convicted elsewhere of an offence or under paragraph (g), is "...charged in the United Kingdom with a criminal offence or I am charged elsewhere with an offence which if committed in the United Kingdom would constitute a criminal offence or becomes the subject of an investigation into professional misconduct. Consequently, we conclude that it would not have become necessary for the performer to disclose information about his arrest and bail at a later stage either unless he was charged, admitted his guilt of an offence or was convicted of a criminal offence.

(c) That the Respondent acted reasonably in taking into account the non-disclosure of the information in the decision that it made;

26. As a result of our conclusions in paragraphs 24 and 25 above, it follows

that we conclude that the Respondent did not act reasonably in taking into account the non-disclosure of the information in the decision that it made not to include the performer in its dental performers' list. Careful regard should have been had to the nature of the information not disclosed before taking such drastic action as to exclude the performer from the list. The CRB letter to NHS Shared Services, who undertook the CRB check on behalf of Hywel Dda Local Health Board, encouraged the postponing of any suitability decision until the outcome of the investigation was known. The panel was not given any evidence that this had been considered nor acted upon. The impact of the decision was explained by the Appellant at the hearing, and had not been considered by the decision maker: As a result of his exclusion from the list, the Appellant had lost his vocational training position, had been unable to obtain any alternative employment in his chosen profession and was unable to pay his mortgage and currently unemployed. The impact of the decision was significant and it is clear that there was a lack of understanding with regard to the meaning of the questions asked in the DPL1 and this resulted in the inappropriate use of the information provided by Mr Hamond when the decision to refuse him was made.

d) Whether the Respondent was correct to decide that the non-disclosure of information made the Appellant unsuitable for entry into the Dental Performers List.

27. Our final conclusion is that the Respondent was not correct to decide that the non-disclosure of the additional information made the Appellant unsuitable for entry into the Dental Performers List.

28. We have considered the Appellant's declaration required by Regulation 4(4) and conclude that the information in it was accurate, that he did not therefore fail to disclose relevant information and is suitable for inclusion in the performers' list. We did not consider the overall effect of the matters being considered as required by Regulation 6(5) and wrongly concluded that the performer is unsuitable for inclusion in the dental performers' list. We did not believe that the overall effect of the matters had been considered, as required by Regulation 6(5), and it had wrongly been concluded that the performer was unsuitable for inclusion in the dental performers' list.

29. The second reason for refusal of entry was reliance upon Regulation 6(1)(e) that "admitting the performer to the list would be prejudicial to the efficiency of the services which those included in the performers list perform". The basis of the submission was that the trust required between the Local Health Board and the Appellant had broken down and would prejudice the efficiency of the services. No additional evidence was relied upon to support the submission and on the basis of the conclusions set out in relation to the alleged failure to disclose we conclude that the refusal on the basis of an alleged breakdown of trust is neither reasonable nor proportionate in the present case.

The appeal succeeds.

Order

Appeal allowed.

The Hywel Dda Local Health Board is directed to admit Mr Hamond to the dental performers' list and be permitted to continue and complete his Vocational Dental Training

Signed:

Meleri Tudur

Judge Meleri Tudur
21 March 2012

