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Primary Health Lists

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

DR FELTHOUSE

V

DERBYSHIRE PCT

[2012]PHL 15474

DECISION

Panel	Judge Nancy Hillier Dr Gopal Sharma Mrs Linda Thurlow
Venue	Leicester Magistrates Court
On	26 September 2012.

Dr Felthouse represented himself with the assistance of Ian McKivett.

Ms Elaine Madden represented the PCT assisted by Dr Black

Appeal

1. Dr Felthouse appeals under Regulation 15 of the Performers List Regulations 2004 (as amended) against the decision of NHS Derby City Primary Care Trust (the PCT) on 15 March 2012 to refuse his admission to be included in the NHS Derby City PCT Medical Performers List (the list).

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Background

2. On 20th December 2011 Dr Felthouse submitted an application for inclusion in the NHS Derby City Medical Performers List. The application was refused on 15th March 2012 by the Independent Contractor Performance Panel (ICPP) in line with Regulation 6(1)(b) of the NHS (Performers Lists) Regulations 2004 (as amended) which states:
“Having contacted the referees provided by him under Regulation 4(2)(f), it is not satisfied with the references”
3. This followed consideration of one satisfactory (Dr Brown) and one unsatisfactory (Dr T) reference. The latter amounted to an endorsed note of a telephone conversation which outlined various allegations against Dr Felthouse.
4. On receipt of the decision Dr Felthouse appealed it to this Tribunal on 12th April 2012. Following a Telephone Case Management Hearing on 16th May 2012 with Judge Hillier, the PCT agreed to consider further references, given the unusual way in which the unsatisfactory reference had come about and the fact that Dr Felthouse stated he was shocked by the allegations, none of which had been communicated to him, and that he could provide further positive referees to provide a “cumulative” reference.
5. Dr Felthouse submitted further references which were considered at ICPP on 19th July 2012. The references were all positive. One, from Dr Gregorowski appeared to be both positive and to satisfy the “time” requirement of 3 months. It was not clear however precisely how many “sessions” (a morning or afternoon) the reference covered. It covered a time period of in excess of three months.
6. The ICPP decided that once the number of sessions covered by the Dr Gregorowski reference was known, if it amounted, with others, to a cumulative reference equalling 12 weeks, the application should be approved. The decision was taken that 120 sessions were required to equate to a cumulative reference of 12 weeks. If the number of sessions

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provided a cumulative reference of less than 120 sessions then Dr Felthouse would be advised that he should undertake an assessment of clinical competence facilitated by the East Midlands Healthcare Workforce Deanery.

7. Dr Felthouse visited the PCT on 20.07.12 and was able to provide evidence of the provision of locum cover at the relevant surgery with Dr Gregorowski to cover a total of 73 sessions. The other references (excluding Dr Brown) covered a total of 98 sessions.
8. At that time the PCT was therefore in possession of a reference from Dr Brown which met the criteria laid down in NHS Derby City Primary Care Trust Performers List Management Policy and Procedures 6.1 and one set of cumulative references which covered a total of 98 sessions. Having determined that a 12 week cumulative reference as determined by ICPP would be expected to cover 120 sessions his cumulative reference this therefore fell short on their calculations by 22 sessions or 18%.
9. The PCT continued to refuse the application and the case was listed for hearing

Regulations and law.

10. The NHS (Performers Lists) Regulations 2004 (as amended) provide that an application should include:

4(2)(f) – names and addresses of two referees, who are willing to provide clinical references relating to two recent posts (which may include any current post) as a performer which lasted at least three months without a significant break, and, where this is not possible, a full explanation and the names and addresses of alternative referees

11. In addition, NHS Derby City and Derbyshire County Performers List Management Policy and Procedures require:

6.1 - Two clinical references with a minimum of three months' experience of working clinically with the applicant within the Primary Care sector of the NHS

Refusal may follow under 6(1)(b) if the PCT "*Having considered the referees*

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provided by him under Regulation 4(2)(f), [it] is not satisfied with the references.” The guidance also provides that:

13.4 – If initial references are not satisfactory, it is for individual PCTs to agree whether further references should be sought. However, on an individual case, it would not be good practice for PCTs to pursue references indefinitely on the off chance that one will eventually be satisfactory.

12. Dr Felthouse must satisfy us that on a balance of probabilities the references he supplied were sufficient to meet the regulations and requirements. We stand in the shoes of the PCT decision maker.

Evidence and submissions

13. Dr Felthouse said that this should have been a simple case and that he had tried his utmost to supply the relevant references and to make sure that the PCT had sufficient information about him to admit him to the list. He stated that he had never been told of a requirement that the references must cover 120 sessions in order to satisfy the 12 week period. He believed that a requirement of 10 sessions per week equivalence was excessive since most GP's would not actually work that number of sessions. His professional indemnity cover envisaged him undertaking 7-8 sessions per week and he believed 8 sessions could be regarded as a full time post when other duties and training were included. He had worked for more than 50 sessions per year which is regarded as a minimum for appraisal purposes. He had work to go to and was frustrated by the fact that he had not been admitted to the list. As a person who works 75% full time equivalent he felt the PCT had been very inflexible, especially since he felt he had now supplied more than adequate references.

14. Dr Black checked with his PCT by telephone and indicated that the PCT norm for full time contracts was 9 sessions per week. Ms Madden stated that the application had been processed in accordance with the NHS (Performers Lists) Regulations 2004 (as amended), the “Primary Medical Performers Lists, Delivering Quality in Primary Care, Advice for Trusts on list management” and the NHS Derby City Primary Care Trust Performers

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List Management Policy and Procedures.

15. Ms Madden told the panel that the application would have been referred to the ICCP in any event due to previous matters declared on the application, but that she had also noted that one of the referees named by Dr Felthouse referred to a period going back more than 2 years and therefore did not meet the criteria of the NHS Derby City PCT Performers List Management Policy and Procedures which states “*Two clinical references with a minimum of three months’ experience of working clinically with the applicant within the Primary Care sector of the NHS within the past two years*”. She contacted Dr Felthouse and asked him to supply an alternative referee, which he did.
16. On 13 January 2012 the first reference was received by the PCT. Ms Madden explained that this reference was satisfactory. The PCT then received Dr Felthouse’s satisfactory CRB certificate on 16 January 2012.
17. Dr Felthouse supplied further referees from Drs Seth and Jha but in Ms Madden’s view these did not meet the criteria of either Regulation 4(2)(f) or the PCT Performers List Management Policy and Procedures 6.1 as they were for work periods of less than three months in duration.
18. Dr Felthouse had also supplied the name of Dr T as a referee. Dr T would satisfy the “time” criteria so Ms Madden agreed to contact Dr T. She eventually spoke with Dr T on the evening of 7 March 2012. He said he would give a verbal reference over the phone.
19. Dr T said that he had not identified any concerns whilst Dr Felthouse had been working in the practice but when he had left some matters had come to light, including an allegation of a failure to complete an appropriate clinical examination on a patient with a spinal complaint. It was also alleged that another patient had seen Dr Felthouse swearing at and banging his computer during a consultation. There was a further concern about Dr Felthouse’s interpretation of letters and test results including raised Glomerular Filtration Rates and ultrasound tests which may have indicated a possible testicular cancer in a patient.
20. On 15 March 2012 the ICCP considered the application on the basis of the 2 references and refused the application.

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21. At that stage the PCT had several positive references. One satisfied the “time” requirement, one was not satisfactory but had been given very reluctantly by a GP who had not at that stage shared the allegations with Dr Felthouse and other references were positive but did not individually satisfy the time requirement. The ICPP agreed following a Telephone Case Management hearing to consider further “Cumulative References” in addition to the satisfactory initial reference they had seen.
22. Dr Felthouse supplied several references. On 11 July 2012 he also put forward a reference from Dr Gregorowski, a GP who Dr Felthouse had believed had retired and emigrated. The PCT requested the reference the same day and it was received on 17 July 2012. It was satisfactory and covered a period of more than 3 months. The reason given by the PCT for the refusal of the references overall rested solely on the basis that the cumulative references only covered 98 sessions.

Tribunal’s decision with reasons.

23. We have carefully considered the bundle, the written and oral evidence, the submissions made by both parties, the overriding objective and the relevant law and Regulations and applied the relevant law to our decision making.
24. We have concluded that the PCT have been inflexible and have forgotten the reasoning behind the regulations requiring satisfactory references. We have also decided that the arbitrary imposition of a 120 session requirement, previously not communicated to Dr Felthouse and lacking in reasoned justification, was unnecessary, disproportionate and unfair.
25. The concept in this case is fairly straightforward. Dr Felthouse failed to supply 2 satisfactory references with his initial application. One reference, from Dr Brown, was satisfactory and covered the relevant length of time, namely 3 months in the past 2 years. The others were either too short in terms of time period covered, or, in the case of Dr T, was unsatisfactory.
26. In our assessment, having agreed to consider cumulative references the

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PCT became fixed on the number of sessions covered rather than quality of the references, they failed to consider the fact that Dr Felthouse works 75% of the full time GP pattern as a locum, and the fact that both Dr Brown and Dr Gregorowski had had the opportunity to comment on Dr Felthouse working a significant number of sessions over a significant period of time.

27. We are very surprised that the ICPP “parked” Dr Brown’s reference and ignored its effect on the amount of time the overall references covered. They then ignored the fact that Dr Gregorowski’s reference, coupled with Dr Brown’s reference, would apparently have met the original 2 reference criteria because they had “moved on” to require a cumulative reference to be added to that of Dr Brown. Finally, without warning or recorded reasoning, they imposed a 120 session requirement for the “cumulative references.”
28. We are not satisfied that the retrospective imposition of a 120 session rule was reasoned or proportionate. Dr Black was unaware how many sessions would be regarded as full time per week by his own PCT contract until he made a telephone call at the panel’s request to clarify the position. It was therefore clear to us that little consideration had been given to the imposition of the requirement. It is most surprising that the PCT should attempt to justify these 10 sessions per week without considering the impact of part time working, being a locum and their own concept of 9 sessions as full time work. There was no reasoning or analysis behind the imposition of this arbitrary requirement and we reject it entirely.
29. A simple examination of Dr Felthouse’s CV as a locum with the references supplied shows a consistent pattern of satisfactory references over time. We agreed with Mr McKivett’s submission that the matters raised by Dr T were not of the nature which would lead to suspension or removal from the list, and we bore in mind the PCT concession that their refusal rested solely on the “falling short” by 22 sessions on the 120 session basis rather than any allegations made against Dr Felthouse. We concluded that these references were sufficient to demonstrate the regulations were met once Dr Gregorowski’s reference was accepted and included. His reference

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covered a period of about six months, was positive and together with the Dr Brown reference was sufficient in our view to satisfy the regulations. Those references were bolstered by the other positive references of lesser duration which were supplied.

30. The central theme for consideration of references should be to keep patients safe but to recognise the need for proportionate action. We rejected Dr Black's assertions "We were flexible in our interpretation" because it was not reflected in his evidence. There is no policy to require 10 sessions per week as a minimum when looking at cumulative references and the figure was arbitrarily imposed after Dr Felthouse had been informed that the PCT would consider cumulative references.
31. The PCT case rested solely on the 120 session requirement, which we have found is unreasoned and unreasonable. We are satisfied that with references from Dr Brown and Dr Gregorowski, Dr Felthouse supplied under Reg 4(2)(f) the *names and addresses of two referees, who are willing to provide clinical references relating to two recent posts (which may include any current post) as a performer which lasted at least three months without a significant break...*
32. No reasons are proposed by the PCT under 6(1)(b) in respect of these references of "*Having considered the referees provided by him under Regulation 4(2)(f), [it] is not satisfied with the references.*". In these circumstances the appeal is allowed and Dr Felthouse should be admitted to the List. We also observe to the PCT that their policy of requiring references to fall within a 2 year period of *their* meetings rather than the *date* of application may be unfair if a delay occurs, especially where a GP has been unable to work pending consideration of their application.

Accordingly:

The Respondent is directed to admit Dr Felthouse to the NHS Derby City Medical Performers List forthwith.

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Judge Nancy Hillier

Lead Judge Care Standards and Primary Health Lists

12 October 2012

Amended under the slip rule on 16 October 2012.