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Primary Health Lists

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

Appeal Number: PHL/15547

Between

David Krebs
(GDC registration number 48109)

Appellant

and

NHS Commissioning Board
(as successor body to Salford Primary Care Trust)

Respondent

The panel

Mr Brayne, Judge

Mr Kapadia, dental member

Ms Last

Representation

Counsel for the NHS Commissioning Board: Mr Lock, QC

Counsel for Mr Krebs: Mr Butler

DETERMINATION AND REASONS

The Appeal

1. By notice dated 13.11.2012 Mr Krebs appeals against the decision of the Salford Primary Care Trust (the PCT) dated 19.11.2012 to remove his name from its Dental Performers List (DPL).

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2. The Respondent's decision was made on the grounds of efficiency and suitability, under Regulations 10(3) and (4) (a) and (c) of the National Health Service (Performers' List) (Regulations 2004, as amended (referred to below as the Regulations).

The legal framework for removal

3. Regulation 10(3) of the 2004 Regulations provides as follows:

The Primary Care Trust may remove a performer from its performers list where any of the conditions set out in paragraph (4) is satisfied.

4. Regulations 10(4)(a)(and (c) set out the tests for removal on grounds of efficiency and suitability respectively :

(a) continued inclusion of that performer in the Local Health Board's performers list would be prejudicial to the efficiency of the services which those included in the relevant performers list perform ("an efficiency case")

(c) he is unsuitable to be included in that performers list)("an unsuitability case").

5. Regulation 12 states that the LHB, in an efficiency case, may,

instead of deciding to remove a performer from its performers list, decide to remove the performer contingently.

The issues in this appeal

6. Mr Krebs is a self-employed single-handed dentist who has practised for 38 years.
7. The NHS Commissioning Board (The Board), as successor body to the PCT, submits that there have been concerns in relation to the way in which dental services have been provided by Mr Krebs for a number of years. The attempts to deal with these have been met with hostility. Mr Krebs' refusal to undergo an NCAS (National Clinical Advisory Service) assessment was the "final trigger", leading first to the termination of his contract and then to the decision which is now the subject of this appeal.
8. The Board states that Mr Krebs' refusal prevents the Board from discharging its obligations to ensure that services are being provided to NHS patients of an appropriate standard.
9. Mr Krebs' case, set out most fully in his witness statement, is that he never had any complaints before 2006 either about the running of his practice or the treatment of patients. Relationships with the then PCT deteriorated following his request for a revision of his annual targets and rates of payment. He was not aware, until the present proceedings, of the full extent of the PCT's actions in investigating concerns relating to his practice, and submits that the PCT's action in "going straight to NCAS" exacerbated the difficulties in resolving the PCT's concerns. He states that the way in which the PCT carried out investigations into his practice was unsatisfactory or incompetent. The PCT should have taken into account the opinions of a report commissioned by Mr Krebs from a practitioner who had concluded that no reference to NCAS was necessary. Although at one point he had agreed to a

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referral to NCAS, he had fears that the PCT would present “an extremely partial version of events to NCAS...any investigation they carried out would be extremely disruptive to the practice...I did not feel that it was appropriate to agree with an NCAS inspection until the terms of reference could be agreed.”

10. The Tribunal notes that the PCT terminated Mr Krebs’ contract following the refusal to engage with an NCAS assessment. This is subject to High Court proceedings, with which this Tribunal is not concerned, though in light of the outcome of these proceedings we expect these will be rapidly resolved.

Mr Krebs’ agreement to an NCAS referral

11. At the hearing, before the Tribunal heard evidence, we felt it appropriate to discuss with counsel the nature of Mr Krebs’ case. We were aware that up to now he had refused an NCAS assessment. Mr Locke told us that, in discussion before the hearing, he had again refused such an assessment.
12. Following some discussion with counsel, Mr Butler eventually conceded that Regulation 9(6) places Mr Krebs under an obligation to undergo an NCAS assessment when requested to do so by the PCT. On that basis we adjourned to allow Mr Butler to consider whether Mr Krebs might now be willing to accept such an assessment. If he was willing to do so Mr Locke told us he would need time to take instructions as to whether the PCT would then agree to contingent removal, and if so whether any additional conditions, beyond co-operation with the NCAS assessment, would be sought.
13. We were in due course informed that Mr Krebs did now agree to an NCAS assessment. After some discussion with counsel about whether we should adjourn while the NCAS referral took place, or conclude the appeal, it was agreed that the appeal should be allowed and contingent removal ordered, subject to Mr Krebs co-operating with an NCAS assessment. There was some discussion as to the wording of the condition, and this was left for the Tribunal to determine.
14. The parties are in agreement that the terms of referral to NCAS should be identical in terms to those originally drafted, and found in the bundle as an exhibit to the witness statement of Mr Berry. These terms were first sent to Mr Krebs for comment in March 2012.

Costs

15. Mr Locke submitted a costs application. The actual calculation of the Board/PCT’s costs was not disputed and amounts to £23,188.60. In the absence of objection we did not scrutinise the detail. Similarly there was no objection on grounds of ability to pay.
16. Costs are only to be awarded under the Tribunal Procedure (First-tier Tribunal)(Health, Education and Social Care Chamber) Rules 2008 Rule 10(1)9b) where “the Tribunal considers that a party or its representative has acted unreasonably in bringing, defending or conducting the proceedings.”
17. Mr Locke’s submission was that Mr Krebs had today agreed to a referral on terms drafted and sent to him for comment more than a year ago. Mr Krebs had consistently refused to participate. The decision of the PCT to remove Mr Krebs on grounds of efficiency and suitability arose from that refusal. The

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PCT had no alternative. The decision to remove from the DPL, and the appeal against that decision, would not have taken place if he had previously agreed. It was unreasonable of Mr Krebs not to agree to a referral, only to agree to it at the Tribunal hearing after significant costs had been incurred.

18. Mr Butler submitted that Mr Krebs' appeal had been successful. The decision to remove on grounds of suitability, which was one of the grounds put forward by the Board, had by definition been rejected, since contingent removal was only available on efficiency grounds. If the PCT at any time had pointed out that Mr Krebs was under a statutory obligation to co-operate with an NCAS assessment, he would no doubt have agreed earlier.
19. We reject Mr Butler's submissions. It was for those advising Mr Krebs to explain to him his duties under the Regulations. We reject the submission that because we have not now found Mr Krebs to be unsuitable, he has succeeded in his appeal against the decision that he was unsuitable.
20. The Tribunal is only able to allow the appeal, in part, because Mr Krebs has changed his mind. If he had continued to refuse an NCAS assessment, in defiance of his obligations under the Regulations, we would probably have found the argument that he was unsuitable to remain on the DPL very persuasive. His change of mind is, however, late, and up until that change of mind we agree with Mr Locke that Mr Krebs' conduct was unreasonable. Before that change of mind a finding that the Board could not carry out its duty to ensure standards would have been virtually inescapable. It was Mr Krebs' decision, whether or not on the basis of advice, to refuse co-operation. It was this which the PCT was entitled to take into account in finding him unsuitable, and this refusal which has changed, enabling the appeal to succeed in part.
21. The PCT's expenditure which Mr Krebs' unreasonable conduct has occasioned is probably not limited to the costs of these proceedings, but we can only consider costs incurred in the proceedings.

Decision

22. The appeal is allowed in part.
23. David Krebs is contingently removed from the NHS Commissioning Board's performers list.
24. David Krebs' conditional inclusion on the performers' lists is subject to the condition that he co-operates fully with a referral to the National Clinical Advisory Service, the referral to be as drafted in March 2012.
25. David Krebs is to pay the NHS Commissioning Board's costs in these proceedings amounting to £23,188.60.

Tribunal Judge Hugh Brayne

8 April 2013

