



Primary Health Lists

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

Appeal Number: PHL/15572

Between

**Dr Ninian Omand Thomson
(GMC registration number 2493691)**

Appellant

and

NHS England (Merseyside)

The panel

Mr Brayne, Judge

Dr Lone, Medical Member

Ms Last, Member

DETERMINATION AND REASONS

The Appeal

1. By notice dated 1 May 2013 Dr Thomson appeals against the decision of the NHS England dated 2 April 2013 to refuse to include his name onto the Medical Performers List (MPL).
2. The Respondent's decision was said by the Respondent to have been made under Regulation 6(1)(b) of the National Health Service (Performers' List) Regulations 2004, as amended (the 2004 Regulations). At the time of the decision the National Health Service (Performers' List) Regulations 2013 (the 2013) were in force. The wording of Regulation 7(2)(c) of the 2013 Regulations is the same and the Tribunal treats the decision as having been made under the 2013 Regulations..

The legal framework for removal

3. Regulation 4 of the 2013 Regulations sets out what information an applicant must provide when applying for inclusion, and Regulation 4(2)(f) in particular requires:

names and addresses of two referees, who are willing to provide clinical references relating to two recent posts (which may include any current post) each of which lasted at least three months without a significant break, or, where this is not possible, a full explanation of why that is the case and the names and addresses of two alternative referees.

4. The powers of the Tribunal are prescribed in Regulation 17 of the 2013 Regulations,:

(1) A Practitioner may appeal (by way of redetermination) to the First-tier Tribunal against a decision of the Board as mentioned on paragraph (2)

(2) A decision of the Board referred to in paragraph (1) is a decision to-
(a) refuse to include a Practitioner in a performers list on the grounds referred to in regulation 7(1)

(3) On appeal, the First-tier Tribunal may make any decision which the Board could have made.

Decision without a hearing

5. Dr Thomson said in his application that he wished the appeal to be determined without a hearing. The Board in its response agreed that this was acceptable. We are satisfied under Rule 23(1)(b) Tribunal Procedure (First-tier Tribunal)(Health, Education and Social Care Chamber) Rules 2008 that we are able to decide the matter without a hearing. We are grateful to the parties for the provision of a concise bundle containing the relevant papers.

The issues

6. Dr Thomson has not practised as a GP since October 2010 because of allegations which were referred both to the police and the GMC. The Board does not rely on these allegations in its decision. We are aware that neither the police nor the GMC have, after investigation, taken further action. The GMC has lifted the suspension imposed while it considered the allegations.
7. Dr Thomson applied for inclusion on the Board's MPL on 29 May 2012. He named two referees on his application form: Dr Hugh Neilson, consultant in the Department of Homeopathic Medicine, Old Swan Health Centre, Liverpool, and Dr Pravin Shar, GP and GP assessor, Hanford Health Centre, Stoke on Trent.
8. Dr Shah completed the reference form sent to him by the PCT on 12 June 2012. The wording on the form is amended by Dr Shah to show that the information supplied was based on knowledge gained by doing [Dr Thomson's] appraisal. We have not been supplied with the actual content of the reference.

9. Dr Nielson completed the same reference form on 18 June 2012. The referee describes Dr Thomson's employment as a clinical assistant from May 2008 to September 2010, a position which involved him in history taking from patients with a wide variety of conditions and determining the appropriate homeopathic remedy. He is described as hard working, conscientious, reliable, punctual and well liked by patients. The form asks the referee to tick the appropriate boxes in relation to the applicant's level of skill in eight areas, two of which are Physical examination and Investigations and diagnosis. Instead of ticking a box Dr Neilson wrote: "not relevant in context of his employment at the department."
10. For reasons unconnected with this appeal, there was a delay before the application was considered by the then-PCT. The PCT's performers list checklist, processed by Sharon Barrett on 9 September 2012, contains the following under the heading "Recommendation from Clinical Adviser": "References Not Satisfactory. Needs to be decided in Performers List Committee". The signature under this entry is not legible.
11. On 24 January the PCT Performers List Committee considered the application. The relevant part of the decision is recorded as follows: "No approval given for Dr Thomson. 2 further clinical references are required..." The letter to Dr Thomson, from the NHS Commissioning Board on 25 January 2013, provides more detail. The relevant part of the letter, which is written by Linda Cullen, Programme Manager – Medical Directorate, states:
- The Committee also felt that the references provided were inadequate in that one of them was completed by your appraiser having done your appraisal on two occasions but has not worked alongside you as a clinical colleague. Your second reference was provided by your homeopathic colleague who, due to the nature of the work in that department was unable to comment on your clinical skills with regard to patient examination and investigations and diagnosis. Please provide the Committee with more up-to-date clinical references for their consideration preferably from colleagues who have worked alongside you in the capacity of a general practitioner."*
12. Dr Thomson wrote back on 12 February 2013. After dealing with other matters raised in Ms Cullen's letter he states:
- I am currently considering my legal position regarding the dissolution of my contract with my former practice. It would therefore be appropriate to use as references colleagues previously working there in training grades who would both by direct observation in joint consultation and indirectly by review of my cases be best placed to comment on my clinical skills regarding diagnosis, investigation, and examination skills. Please contact the following for references:*
13. Dr Thomson then names Dr Jennie Jacob, adding "She was GP registrar until August 2009." He further names Dr Titus Ganesh, Market Drayton Primary Care Centre, stating "he was GP registrar until August 2010"
14. This letter was followed by an email to Ms Cullen dated 19 February 2013 in which Dr Thomson proposes an additional referee: Dr Philip Masters "with whom I worked closely until his retirement about 4 or 5 years ago..." Dr Masters completed the form on 27 February 2013 and offers ticks either "above

average” or “average” in relation to all eight areas of clinical skills, adding in response to the question how long he had known Dr Thomson and in what capacity “3 years as a partner in general practice”.

15. The Board’s decision letter of 2 April 2013, against which Dr Thomson now appeals, stated the following:

In terms of references the Board would be looking to be assured of an applicant’s knowledge, skills and attitude in the general practice context of consultation, prescribing, referral and administration.

The reference provided by Dr PH Shah was on the basis of acting as your referee on two occasions and he stated that as he has not worked with you he was unable to give a reference on your capacity as a colleague.

In his reference Dr H Neilson was unable to comment on your clinical skills with regard to physical examination and investigation and diagnosis and they were not relevant in the context of your employment within the homeopathic service in Liverpool Community Trust where you worked as colleagues.

The Committee did not accept the reference from Dr P Masters as he is no longer registered with a license [sic] to practice [sic] with the General Medical Practice.

16. In his appeal against the decision Dr Thomson complained of the Board’s failure, when making its decision, to obtain or consider any reference from Dr Jacobs and stated that Ms Cullen had told him, on enquiry, that a reference was not sought from her as it would be stale (2009). He stated that; there was nothing in the regulations requiring a referee to be registered with the GMC. He said that the rejection of the reference from Dr Neilson arose from prejudice against Dr Thomson’s “belief in the homeopathic philosophy.” If Dr Nielson was not able to provide a reference, Dr Thomson was not given the opportunity to name another referee from that employment, notably Dr Hayhurst. Dr Nielson, as medical director, could have provided a reference after consultation with “the above named employees”, who were registered as practitioners with the GMC and trained in general practice. Examinations were carried out at the Centre, so the skills of examination were relevant to his employment at the Centre. Indeed he would have been negligent had he not used those skills during his homeopathic consultations. The references taken together showed sufficient evidence of knowledge, skills and attitude in the general practice context.
17. Dr Thomson went on to explain his reasons for believing that references from his most recent GP practice might be “unfairly pejorative”. He was considering litigation against the practice, and providing a favourable reference could put the referee in “legal jeopardy”.
18. He concluded the appeal by asking the Tribunal, if not satisfied with the references, to consider inclusion subject to conditions.

Adjournment of the appeal to obtain further evidence and submissions

19. The appeal was listed for consideration on the papers on 16 August 2013. However the panel considered, for reasons set out in the adjournment

decision which do not need to be repeated here, that further references should be sought and provided by the Board, and further submissions on that evidence. The following further references and submissions have now been received.

20. The Board has now provided a reference from Dr R Chambers. She worked as a fellow partner in the GP practice with Dr Thomson from July 2007 to October 2010, when Dr Thomson was suspended by the GMC. She was aware of a complaint to the GMC and that Dr Thomson had been cleared in relation to that allegation. She rated Dr Thomson as average on all clinical skills and relationships with colleagues and staff, and above average for communications and relationships with patients.
21. The Board has provided a reference from Dr M Adilih. This doctor worked with Dr Thomson from April 2004 to October 2010 as a partner in the practice. The doctor rated Dr Thomson as above average in all categories, and believed him to be a good clinician and a good team member, commenting on his enthusiasm and willingness to help. He was aware of the complaint to the GMC which had led to the suspension and the fact that Dr Thomson had been cleared.
22. Finally the Board provided a reference from Dr J Jacob, who was a GP registrar in Dr Thomson's practice August 2008 – August 2009. She rated Dr Thomson as average on all criteria, said that she had no concerns, but referred to the fact that she had had only a short time of professional contact with Dr Thomson. He had been liked by his patients.
23. Dr Thomson provided further evidence and submissions on 17 October 2013. He had not been able to undertake an appraisal since 2009, but had kept himself up to date in respect of mandatory training requirements for a GP, by reading relevant medical journals and monitoring NICE guidelines.
24. The Board provided comments on the references of Drs Chambers, Adilih and Jacobs. It was acknowledged that while the contents may appear satisfactory, "we feel [these references] may not be appropriate for this process as it fails to assure us that Dr Thomson is up to date with current treatment guidelines and prescribing. In addition Dr Thomson has not undergone a formal GP appraisal since 2009".

Findings and reasons

25. Because, for reasons set out below, we find satisfactory references have been provided, we do not need to consider Dr Thomson's proposal, in the alternative, for his conditional inclusion on the MPL.
26. Dr Thomson is correct in stating that it is not a requirement of the Regulations for a referee to be currently registered with the GMC. We see no reason for rejecting the reference of Dr Masters, since there is no other reason to dismiss his opinion (other than the lack of recent knowledge).
27. We agree with the Board that it is not appropriate to rely on the reference from an appraiser, whose role is entirely different. We also share the concerns about the reference of the colleague from the homeopathic hospital, who could not comment on all relevant skills.

28. However we do not share the Board's other concerns. Indeed the Board's arguments offer no way forward for a GP who has been out of practice, in this case for reasons beyond his own control. Dr Thomson could not apply for inclusion on the performers' list until the GMC had made its decision to remove his suspension. By then he could not provide a clinical reference from a colleague with whom he had worked in the past two years.
29. The Board now offers only generic concerns about the remaining referees, that there has been no appraisal since 2009 (which was unavoidable and can soon be rectified if Dr Thomson goes back into practice) and he may be out of date. It has not sought to take into account, or investigate, the extent to which Dr Thomson has taken steps to keep up to date.
30. The Board's objections to the references obtained as a result of the Tribunal's adjournment can, at best, be described as both half-hearted and unpersuasive. It would not be unreasonable to assume that the Board now expects the Tribunal to allow the appeal. If that is a correct assumption it would have been reasonable to expect it to make that decision itself, thereby saving time and public expense (albeit expense to the Tribunal, not the NHS).
31. We are, now that we have the references referred to above, quite satisfied, looking at the evidence now obtained, that Dr Thomson satisfies the criterion in Regulation 2(f). None express concerns. All describe an acceptable level of clinical and other skills. All but one are from those who have had the most recent opportunity available to work with Dr Thomson. None suggest any reason to fear Dr Thomson is not willing to take any necessary steps to bring his practice knowledge up to date. We have evidence, which the Board does not contradict or criticise, from Dr Thomson that he has taken reasonable steps to keep up to date while unable to practise as a GP.

Decision

32. The appeal is allowed. The Board is to include Dr Thomson's name in the Medical Performers List forthwith.

Tribunal Judge Hugh Brayne

04 November 2013

