PRIMARY HEALTH LISTS

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

THE GENERAL OPHTHALMIC SERVICES REGULATIONS 2008

CASE No [2014] 2282.PHL

Heard on 11 December 2014 at Pocock Street, London

BEFORE:
Professor Mark Mildred – Judge
Mr Derek Styles – Professional Member
Professor Chris Dunn – General Member

UNIVERSITY VISION LIMITED

Appellant

-and-

NHS ENGLAND

Respondent

DECISION

The appeal

1. The Appellant appealed on 25 September 2014 against the refusal by the Respondent ("NHSE") to refuse to grant him a General Ophthalmic Services Contract (a "GOS Contract"), pursuant to the National Health Service (General Ophthalmic Services Contract) Regulations 2008 (the "GOS Regulations 2008").

The hearing

2. The hearing took place at Pocock Street on 11 December 2014. The Appellant was represented by Ms J Thelen instructed by Ms E Power, senior solicitor at the Association of Optometrists. NHSE was represented by Mr Clarkson of DAC Beachcrofts. Mr David Hershman attended on behalf of the Appellant and Mr J Catchpole on behalf of NHSE. Neither gave oral evidence. Both advocates had submitted very helpful written submissions which focused the conduct of the hearing. I have reproduced or adapted passages containing uncontroversial matters from those submissions in this decision.

Preliminary matter

3. The appeal was originally brought in the name of David Hershman but as University Vision Limited was the applicant for the contract it has been substituted by agreement for him under regulation 9 of the Tribunal Procedure (First-tier Tribunal) (Health etc) Rules 2008.

Background

4. The Appellant has operated two ophthalmic practices since about 1980 under GOS Contracts or their earlier equivalents.

5. The first practice in Malet Street, WC1E 7HY is on one level. Prior to December 2013, the Appellant operated a practice at Moorgate which was split between the first floor and a mezzanine, accessed via a spiral staircase, where the consulting room was located. The last NHS practice visit was in 2010 by Ms Poonam Sharma who raised no concerns regarding the layout of this practice.

6. Due to redevelopment, the Moorgate Practice was forced to move. Mr Hershman looked for new premises within reasonable walking distance of the Moorgate Practice to retain clientele but found little retail space in that area and in his price bracket. All that accommodation comprised two levels. He took a lease on premises at City Road.

7. In May 2014 Mr Hershman contacted NHSE regarding the move to the City Road Premises (some 5 months after leaving Moorgate and agreeing terms for the City Road premises) and was told to apply using the GOS Mandatory Application which he submitted on 30 May 2014 to NHSE on behalf of University Vision.

8. On 14 July 2014 Pat Leaning, Optometric Adviser, conducted a practice visit at the City Road Practice and noted, under "Consulting room", "23.5 Reasonable patient access", "no, consulting room is downstairs". She also noted, in response to item 11.4, "Contractor records reasons when sight tests are refused patients except in cases where a sight test is not necessary or the patient is not eligible", that "[w]ill write on record card but it has never happened."

9. At that time Mr Hershman explained that he would provide transportation to Malet Street by the taxi firm Addison Lee at the expense of the practice for any patients who were unable to navigate the stairs to the examining room.

10. Ms Leaning made a visit report which gives the following additional information:

> "During the practice visit, Pat Leaning Optometric Adviser identified a number of action points but the key concern was the consulting room which was located down a flight of stairs with no access available for wheelchair bound patients or patients with restricted mobility. Applicant suggested that such patient groups would be redirected to one of his practices nearby.

As the premises were recently purchased no concern was given to accessibility of services by certain patient groups. The contractor shall only refuse to provide services under the contract to an eligible person if it has reasonable ground for doing so. Patients should not be diverted to a particular practice."

11. Mr Hershman made enquiries as to the cost of a stairlift and has obtained a quotation of £4,400 for a reconditioned stairlift with a 12 month manufacturer's warranty.

The Decision appealed against

12. On 26 August 2014 NHSE refused the Application on the grounds of unsuitability, pursuant to Regulation 4 of the GOS Regulations 2008. The decision letter gave the following reasons for refusing the application:

> "In reaching its decision the Heads of Primary Care considered your application, in relation to the provision of General Ophthalmic Service (GOS) Mandatory Services). Your GOS application was a request to change the location of existing practice premises in City and Hackney to new premises in Islington. It was noted that the move had already taken place earlier in the year but the practice had not been providing GOS as the new practice premises was undergoing refurbishment. As standard practice for a change of location, your new practice premises was visited by Pat Leaning, Optometric Adviser on the 14 July 2014 to ensure compliance with the GOS contract.
>
> During the practice visit it was noted that the consulting room was located down a flight of stairs and there was no lift to allow access to people with limited mobility or in wheelchairs. The location of the consulting room was therefore restricting access to GOS services and no reasonable steps could be taken by you the applicant to increase accessibility. You suggested that such patient groups would be redirected to one of your practices nearby.
>
> NHSE (London Region) considered your application and decided your application to have failed the relevant criteria for a Mandatory Services contract as required under Schedule 1 Part 2 (3)(1) of the [GOS Regulations 2008] as amended and unanimously agreed to refuse your application. As the premise was recently purchased by you no regard was given to the accessibility of services by certain patient groups. Further, a GOS contractor shall only refuse to provide services under the contract to an eligible person if it has reasonable grounds for doing so."

13. The reasons for the decision were supplemented in NHSE's Response to the Appeal (the "Response"). There NHSE stated that the application was refused on the grounds that "the premises were not sufficient to meet the reasonable needs of the Contractor's patient or suitable for the delivery of services under the GOS contract." The Response goes on to state:

- contractors were expected to comply with the Equality Act 2010 and as that:

> "the inspection of the proposed practice premises highlighted that the premises were not compliant with the Equality Act or Disability Discrimination Act (DDA). As a result of being in breach of this legislation, the Contractor will not be complying with all relevant legislation, therefore it was appropriate to refuse the Contractor's application for a GOS Contract";

- contractors cannot refuse to provide services on grounds of disability (GOS Contract ¶39) and:

> "[a]s the proposed practice premises were deemed to be not Equality Act or DDA compliant it would likely be necessary for the Contractor to refuse to provide sight tests to some potential patients. However, because the Contractor would be making that refusal on the grounds of the patient's disability (due to the premises not being compliant) the Contractor would be in breach of the GOS Contract. For this reason it was appropriate that the application for the GOS Contract was refused;"

- as the GOS Contract is site-specific, if a person were referred to the Malet Street Practice from the City Road Practice due to being unable to access the consulting room it would be a breach of the GOS Contract, and [t]he Contractor would be required to notify the NHSE on every occasion that it was unable to provide the mandatory services to a patient. Where the proposed premises were not compliant the requirement on the Contractor to report would be more onerous. For this reason it was appropriate that the application for the GOS Contract was refused.

14. The Response also states that, as Mr Hershman did not notify NHSE in advance of the move, they were "unable to provide any necessary advice prior to the contractor moving to the new location."

15. As to the fact that no complaint was made about the layout at the similarly situation Copthall Avenue Practice, NHSE said:

> "The applicant has advised that the original premises were also not DDA compliant and enquired why the issue has only arisen now they have made an application for a new contract. The reason for this is because the applicant was entitled to a contract in 2008 under the national arrangements in place and as a result City and Hackney PCT would not have been in a position to decline the contract. The contract was issued by City and Hackney PCT who undertook a practice visit in 2010. GOS contracts transferred to NHS England London Region on 1 April 2013 and as a team we are ensuring a consistent approach to contract management, practice visits and decisions during the application process. We are unable to comment on the outcome of any practice visits that were undertaken by PCTs prior to April 2013."

16. In its Response, NHSE announced the following policy:

> "NHS England is not seeking to terminate any existing contracts which are located in non-DDA compliant premises because we acknowledge these

are historic agreements and whilst we do not wish to destabilise the existing provision we do seek assurances that providers show an intention to make reasonable adjustments. We do however wish to ensure DDA compliance for any new contracts and new premises; this includes an existing contractor moving to new premises."

17. As to the offer of providing a car service to transfer patients to the Malet Street Practice NHSE said:

> "The applicant has proposed transporting patients from the proposed premises to another practice 3 miles away and has not offered to fund the transportation costs. NHS England London Region is not of the opinion that this is an adequate solution. We believe it is unreasonable for some patients to be unfairly disrupted and believe that there would be an increased risk to patient safety during the transportation process. This proposal would, however, still result in a breach of contract because the patient would not have been seen in the premises where they had requested the sight test."

18. Extensive extracts from the Response are reproduced as NHSE relied upon the same grounds at the hearing.

Agreed Legal Background

GOS Regulations and Contract

19. Section 118(1) of the National Health Service Act 2006 provides that NHSE may, subject to exceptions, issue a contract to any person.

20. Regulation 4 of the GOS Regulations 2008 provides details of eligibility:

> "4(1) For the purposes of section 118 (persons eligible to enter into GOS contracts) it is a prescribed condition that a person must not fall within paragraph (3).
>
> …
>
> (3) A person falls within this paragraph if –
>
> …
>
> (k) the PCT is not satisfied that the person –
>
> (i) has the premises, equipment and record keeping arrangements, or
>
> (ii) will employ or engage, by the date the contract is to commence, appropriate staff,
>
> to provide the services under the contract." (emphasis added)

21. The mandatory services to be provided under the GOS Contract are set out in Schedule 1 to the GOS Regulations 2008. As to premises, that Schedule provides:

> "Premises, equipment and facilities
>
> (3)(1)(a) The contractor shall ensure that the practice premises and equipment used for the provision of mandatory services under the contract are
>
> (a) suitable for the delivery of those services; and
>
> (b) sufficient to meet the reasonable needs of the contractor's patients.
>
> (2) The obligation in sub-paragraph (1) includes providing proper and sufficient waiting-room accommodation for patients.
>
> (3) The contractor shall provide, in relation to all of the other services to be provided under the contract, such facilities as are necessary to enable it to properly perform that service."

22. Schedule 1 also provides:

> "(1) (5) the contractor shall only refuse to provide services under the contract to an eligible person if it has reasonable grounds for doing so, and those grounds cannot relate to a person's … disability.
>
> and
>
> 53 The contractor shall comply with all relevant legislation and have regard to all relevant guidance issued by the Board or the Secretary of State.

23. In 2008 the Department of Health issued Guidance on the GOS Contract (the "2008 Guidance"). The 2008 Guidance makes no specific reference to reasonable access. As to premises it provides:

> "Premises, equipment and facilities
>
> The Regulations require that the contractor ensure that practice premises and equipment are suitable for the delivery of the services contracted for and sufficient to meet the reasonable needs of the contractor's patients. This includes providing proper and sufficient waiting accommodation for patients. Contractors are also required to provide such other facilities as are necessary to enable it to properly perform the service which has been contracted for. It is important to note that this refers to "reasonable needs". This does not mean that contractors are obliged to meet any request made by a patient and does not empower PCTs to specify particular types of equipment the practice should have unless there is only one piece of equipment that would meet the purpose. The PCT must be satisfied that the practice has the necessary equipment to provide the service contracted for but if there is more than one piece of equipment

which can meet that purpose then it is for the practice to decide which to purchase."

24. On 3 April 2014, NHS England issued guidance entitled "Procedure approval of applications for General Ophthalmic Service Contracts" (the "Procedure Guidance"). The Procedure Guidance contains a "Practice Visit Protocol". Equality Act 2010

25. Pursuant to s. 29 of the Equality Act 2010, service providers "must not discriminate against a person requiring the service by not providing the service". Where a person is not provided a service, he or she could have been indirectly discriminated against pursuant to s. 19 of the Equality Act 2010:

> "19. Indirect Discrimination. (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
>
> (2) For purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if (a) A applies, or would apply, it to persons with whom B does not share the characteristic; (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it, (c) it puts, or would put, B at that disadvantage, and (d) A cannot show it to be a proportionate means of achieving a legitimate aim."

26. Service providers are also under a duty to make reasonable adjustments pursuant to ss. 20-21 of the Equality Act 2010:

> "20. Duty to make adjustments.
>
> …
>
> (2) the Duty comprises the following three requirements.
>
> …
>
> (4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage."
>
> …
>
> (9) In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to –
>
> (a) removing the physical feature in question,
>
> (b) altering it, or

(c) providing a reasonable means of avoiding it.

21. (1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person."

27. Guidance published by the Equality and Human Rights Commission for businesses states :

"Where a physical feature puts disabled people using a service at substantial disadvantage, you must take reasonable steps to:

Remove the feature

Alter it so that it no longer has that effect

Provide a reasonable means of avoiding the feature, or

Provide a reasonable alternative method of making the service available to disabled people".

Appeals

28. Where NHSE is of the view that the conditions in regulation 4 of the GOS Regulations 2008 are not met, it must notify the applicant of (1) that view; (2) the reasons for that view; and (3) the applicant's right of appeal.

29. Pursuant to regulation 6 of the GOS Regulations 2008, a person who has been served with a notice under regulation 5(1) may appeal to the First-tier Tribunal against the decision that the conditions in regulation 4 are not met.

30. The burden of proof to show unsuitability of the premises is on the NHSE to the civil standard of a balance of probabilities.

31. It was agreed between the parties that the relevant provisions in this appeal are those governing refusal of a new contract (rather than termination of an old contract) and that we must redetermine the application (rather than review the decision of NHSE).

NHSE's case

32. The mandatory services that the Appellant seeks to provide under the GOS Contract are (in summary):

a. the testing of sight (clause 30)
b. the referral of patients, in appropriate circumstances, where there are signs of injury, disease or abnormality of the eye or elsewhere which may require medical treatment (clause 31)
c. notification of sight test results of diabetic and glaucoma patients to general practitioners (clause 32)

d. to require patients to acknowledge receipt of prescriptions (clause 33)
e. to comply with requirements as to the form of prescriptions (clause 34)

33. Thus the testing of sight is the service from which all other aspects of mandatory services flow.

34. The consulting room at the proposed premises is located on a lower floor which can only be accessed by a flight of stairs. This renders the room where testing of sight would be carried out inaccessible to those using wheelchairs as well as creating difficulties for those with restricted mobility.

35. Taking into account its duties under Section 13G above, NHSE considers that a contract at these premises would create rather than reduce inequalities of access to ophthalmic services.

36. Each contract application requires the practice premises to be specified and this is reflected in the "practice premises" which will be defined in the contract as the location at which the mandatory services must be provided.

37. NHSE considers the proposal to re-direct patients to other premises to be inconsistent with the delivery of the contracted services and its duties to reduce inequalities of access pursuant to Section 13G.

38. NHS England does not consider this situation to fall within those described in the NHSE England procedure for the approval of applications as one in which with "relatively minor improvements" the application could be approved. The changes would require relocation of the consulting room or work to incorporate appropriate means of access to the lower floor.

39. The fact that there has been no disabled access to the Appellant's premises in the past should be weighed lightly against the ongoing duty under section 13G.

40. It is technically possible for a GOS Contract to name 2 premises but, if so, each would have to be compliant with legislation concerning disabled access. Installation of a stairlift at City Road would be accepted as a reasonable adjustment to allow compliance. The application should be refused on the basis that condition 4(3)(k) of the Regulations is not met.

The Appellant's case

41. In her submissions Ms Thelen set out a number of "challenges" to NHSE's decision. Whilst, as set out above, the Panel is taking the decision afresh by redetermination, it is convenient to treat those "challenges" as arguments why we should approve the application and what follows in paragraphs should be read in that light. I have interpolated her oral submissions into the written submissions.

42. The Appellant challenged the Decision in that the Respondent failed, in assessing suitability of the premises, to properly apply a test of reasonableness: by failing to take into account:

a. the lack of availability, to the Appellant, of accommodation other than on two floors;

b. the Malet Street accommodation which the Appellant had offered to ensure that services could be provided to anyone who was unable to navigate the stairs to the basement consulting room;

c. the fact that the Appellant had not turned away customers on grounds of disability in the past, despite the fact that the Moorgate Practice was similarly arranged; and

d. the cost to the Appellant of adjusting his premises to make the basement consultation room accessible;

and, taking these factors into account, the City Road Premises do meet the reasonable needs of the patients and therefore the Appellant satisfies the suitability requirements of paragraph 4.

43. The Appellant also challenges the Decision on the ground that it was unfair, in that:

- It evidences a failure to apply the GOS Regulations 2008, and related guidance, consistently; and

- in the past, premises over two floors had been considered to be suitable and consistent with the (very basic) guidance provided, and to the extent practice has changed, no notification of a changed approach had been provided, which is contrary to public law principles regarding transparent legislative frameworks and decision-making.

Suitability

Reasonableness

44. There is no absolute contractual requirement to provide access to the consulting room for those with limited mobility or in wheelchairs. Rather, with respect to suitability, both the GOS Regulations 2008 and the GOS Contract state that the premises must meet the "reasonable needs" of customers.

45. This reflects the approach of the Equality Act 2010 – both in terms of the duty to make reasonable adjustments and the availability of a justification defence to indirect discrimination (i.e. a proportionate means of achieving a legitimate aim). This approach is reflected in the Procedure Guidance and the practice visit form, which refer only to "reasonable access".

Factors to be Considered

46. Considering reasonableness requires a holistic approach. Here, the limited inquiry undertaken was flawed.

47. The Panel should not placed any weight on the fact that the Applicant recently purchased his property and, thus could have chosen a different site. Mr Hershman has explained that, as a practical matter, he did not have the option of leasing a property situated over one level.

48. The Panel should consider the adjustment offered (transport by taxi to the Malet Avenue Practice) holistically. What is reasonable reflects not only the disadvantages to the potential customer of not making the adjustment, but the disadvantage to the service provider of making the adjustment.

49. Mr Hershman had proposed an alternative means of providing the service. That such a course could be considered a reasonable adjustment under the Equalities At 2010 is clear from the relevant guidance. The Appellant maintains that the adjustment offered, funded transportation between the City Road Practice and the Malet Street Practice, is a reasonable one. The practices are located approximately 3 miles from each other; the drive is approximately 20 minutes and the risk involved is minimal.

50. What is reasonable also depends on the number of service users who will potentially benefit. Ms Leaning was told, on 14 July 2014, that no one had ever been turned away from the Moorgate Practice. This lack of demand should be taken into account.

51. Mr Hershman has explained the difficult financial situation the City Road Practice is currently experiencing as a result of the move. Other building works have been delayed. Mr Hershman has been quoted £4,400 for a stairlift. While it is accepted that finances alone are unlikely to be a good reason to avoid an adjustment under the Equality Act 2010, given the presence here of the absence of a historical demand for access and an alternative means of providing a service, the Appellant maintains that its arrangements meet “reasonable needs” and thus are suitable.

52. It is not accepted that any material risk from the proposed transport exists. Those who attend the City Road Practice will either work or reside in London, generally speaking; any further journey will be one of many such journeys made on a daily basis. Any additional risk must be miniscule and should not, on any view, drive analysis. Similarly, the relatively short trip will not result in sufficient disruption so as to make the proposed adjustment unreasonable.

53. Further, NHSE can keep under review the situation regarding disabled access at the City Road Practice. The Appellant will be required, under the GOS Contract, to record and, on request, report any instance where he has to turn away a customer. This will include transporting a customer to the Malet Street Practice. If, on the view of NHSE, there are sufficient instances of this occurring, it can order a remedial notice under clause 162 of the GOS Contract.

Equality Act

54. Where a service provider does not provide a service to a person by reason of their disability, they fall foul of the Equality Act 2010 unless the practice is

either a proportionate means of achieving a legitimate aim or there is no reasonable adjustment which can be made so as to allow the person to access the service in a way which does not place them at a substantial disadvantage, compared to those without the disability.

55. For the purpose of the analysis as to whether a service provider discriminates where he does not provide access to a customer with limited mobility, it is submitted that where an adjustment can be reasonably made, denying access in the absence of that adjustment will not be a proportionate means of achieving a legitimate aim. The reverse is also true. Thus, regardless of the provision of the Equality Act 2010 considered, the focus of the inquiry will be the same.

56. Here, the arrangements proposed by Mr Hershman are reasonable bearing in mind the issues canvased above: the financial status of the Appellant; the cost of the adjustment; the lack of alternative premises; the minimum disruption caused by attending another site and the lack of historic demand for access to a consulting room on another level. That lack of demand in the Moorgate and the City Road premises cannot be explained by relatively immobile potential patients being deterred by the layout of the premises as that is not obvious from outside.

57. Thus, it is denied that the Appellant is operating in breach of legislative requirements, as contended by NHSE. In any event, the fact that no person was turned away from either the Moorgate Practice or the City Road Practice means that no breach of the legislative requirements can have occurred.

Breach

58. NHSE maintains that the Appellant would be in breach of the GOS Contract by referring a person to the Malet Street Practice. This is denied: (1) the reasonable needs of customers can be, and are being, met at the City Road Practice, (2) there is no evidence of a historical breach in terms of turning away customers for reasons of disability; and (3) as set forth above, it is denied that the Appellant is in breach of his obligations under the Equality Act 2010 (on reasonableness grounds). Therefore, there is no basis for saying that breach of the contract is inevitable.

59. In any event, the focus of the enquiry must be on the suitability requirement, which refers to “reasonable needs” of customers.

60. NHSE maintains specifically that breach would result from the referral to the Malet Street Practice as the GOS Contract currently contemplated is “site specific”. This issue could be resolved by simply adding the City Road Practice to the Malet Street Practice GOS Contract. Breach then becomes one of form not substance. The potential for a technical breach of the GOS Contract in this way, should not, properly construed, tread on the analysis which is required as to “suitability”.

<u>Fairness</u>

61. Fairness arguments arise, on public law principles, in two ways;

- Consistency. Suitability is not being assessed in the same way across all practices.

- Changed policy. To the extent NHSE has either changed their practice, or is interpreting suitability differently as between "new" and "old" practices, that change is unannounced, which is a public law error.

Consistency

62. Consistency is a principle of good administration:

"There is an established principle of public law that "all persons in a similar position should be treated similarly", see Stanley Burnton J. in *R (Middlebrook Mushrooms Ltd) v Agricultural Wages Board of England and Wales* [2004] EWHC 144 at [74]. Any discretionary public law power "must not be exercised arbitrarily or with partiality as between individuals or classes potentially affected by it", see Sedley J. in *R v MAFF, ex parte Hamble Fisheries* [1995] 2 All ER 714 at 722a-b. One reason for that rule is that it provides consistency in decision making, and some certainty about the application of rules."[1]

63. It would be inconsistent to treat practices and applications differerently. The Tribunal should take the need to apply regulation consistently, and the lack of any previous concerns about the layout of the Appellant's practice, into account when analysing suitability.

64. The persons in a "similar position" in this case were those contractors working on 2-floored premises moving to new 2-floored premises.

65. Further, given the lack of premises on one level available to be leased as "new" premises, there is no real basis to distinguish between "old" and "new" properties.

Policy Change

66. Nowhere does the guidance elucidate what is required by way of access in order for premises to be suitable. Rather, there are merely summary references to "reasonable needs" and "reasonable access".

67. For the first time, in its Response, the NHSE has stated that the reason why the issue of access was raised with Mr Hershman now, rather than previously, was because the NHSE was adopting this approach with respect to new contracts and new premises. Nowhere is this new approach set out by way of guidance. Rather, the Procedural Guidance (published in April 2014) approaches reasonable needs in the same way as the 2008 Guidance.

68. As a matter of public law, notice of the relevant policy is required so that an individual knows the criteria which are going to be applied. See *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12 (per Lord Dyson)

[1] *R (Hussein) v SSHD* [2012] EWHC 1952 (Admin) (at [46]) (per James Dingemans QC).

(at [34-6]) (per Lord Philips) (at [302]). This must be even more true in the context of a changed interpretation of the policy. There was no complaint in relation to the Appellant's City Road premises and he was entitled to be made aware of the new policy and clear guidance on the meaning of "reasonable access".

69. As to premises, the 2014 Protocol refers only to "Reasonable patient access" in the non-clinical areas, reception/waiting area, dispensing area and consulting room and thus gives very little emphasis to the requirement. The Appellant had no idea of the changes when he made his application and was entitled to expect the changes would have been made clear.

70. The Tribunal should take the lack of any guidance on either this particular aspect of suitability, or the change in approach, into account when determining whether the Appellant's premises are suitable under the GOS Regulations 2008.

Discussion

71. The context in which this appeal arises is the overriding duty in s. 13G to have regard to the need to ... reduce inequalities between patients with respect to their ability to access health services and the obligation in the GOS Regulations 2008 and the GOS Contract to meet the reasonable needs of customers.

72. The absence of a specific reference to reasonable access in the 2008 Guidance is by no means determinative since it is clear that "such other facilities as are necessary [for the proper performance of the contract]" must be provided. Further, the 2014 Procedure Guidance gives notice that reasonable patient access is necessary.

73. Mr Hershman is, on his evidence, a professional person with 25 years' experience and access to legal advice. We cannot accept that the obligations imposed by the Equality Act 2010 were wholly unknown to him. We take notice that there has been widespread discussion in national, professional and technical media concerning the impact the legislation may have on businesses and small employers. He would or should also have been familiar with the terms of the GOS Contract.

74. We accept that difficulties arose out of the need to vacate the Moorgate premises but it is clear that there was a substantial programme of fitting out the City Road premises and we cannot accept that the Appellant was not on notice that there were requirements in relation to "Health and Safety" (to use a generic term apt to include access for those with limited mobility) about which he could and should have taken advice from his professional association, his solicitors, the contractors themselves or, indeed, NHSE.

75. This conclusion also deals with the complaint that a policy change must be announced. The implementation of the Equality Act and the incorporation of the relevant duty into the National Health Services Act 2006 are matters of public

record. Ms Thelen accepted that ignorance of the law is no good excuse for failure to comply with it.

76. We accept the principle that a public body should treat all persons in a similar position in a similar manner. That raises the question of the appropriate comparator group. The Appellant's approach outlined at paragraph 64 above appears to us to require a sub-group comparison that is unrealistically restrictive and would tend to thwart the implementation of the 2014 Procedure Guidance which itself was designed to reflect the duty arising under the Equality Act.

77. We prefer NHSE's formulation that the comparator group should be others applying for a new GOS contract under the 2014 Procedure Guidance. That would achieve the policy aim of all new contracts being awarded in compliance with the new provisions and legislation.

78. We accept that meeting the "reasonable needs of customers" does not demand perfection and that there must be a question of degree. We examine in turn the Appellant's submissions on reasonability.

79. We do not accept that a shortage of one-floor premises within the Appellant's financial abilities should excuse the subject premises from compliance with the policy aim and statutory duty of accessibility. Were it otherwise the statutory goals could be thwarted with impunity.

80. We cannot accept that services offered in Malet Street could be services provided under a GOS Contract naming only the City Road premises. Further we do not consider that expecting a patient to take a 3 mile taxi ride each way taking 20 minutes (at least) in working hours is a reasonable way of meeting her needs or a reasonable adjustment.

81. We accept that the Appellant had not turned away immobile patients in the past but consider this is outweighed by the obligation to satisfy the regulatory requirements of the new regime. This is perhaps another way of saying that practice must change to reflect new statutory standards.

82. We have considerable difficulty with the submission that the cost of making a reasonable adjustment to ensure compliance is an argument in the Appellant's favour. NHSE accepts that the installation of a stairlift would achieve compliance. That cost is £4,400 without VAT and £5,280, if VAT is payable – it is not mentioned on the quotation.

83. Mr Hershman's evidence is that he had been billing about £450,000 from both practices until the end of his Moorgate practice and achieving a surplus of about £225,000 per year and had been in practice for 25 years. Thus the cost of the stairlift is about 1% of the former annual turnover and about 5% of the annual Malet Street surplus.

84. Further Mr Hershman's evidence was that there were no more than 200 NHS eligible patients at Moorgate so that, at about £20 per patient for a NHS

examination, he would recoup the cost of a stairlift from 1 year's NHS examination charges. Those patients might (in the light of experience at Moorgate – see paragraph 22 of his witness statement) generate very considerable income from the sale of frames and lenses.

85. In the light of those considerations (and we accept that it is not for us to judge the Appellant's financial standing or acumen) we simply cannot understand how it can be said to be reasonable access to send patients to practice governed by a different contract 3 miles away.

86. Ms Thelen accepted that cost was a factor in (although not determinative of) the assessment of reasonability. We think this is correct in relation to the reasonability of both the adjustments and the access.

Conclusion

87. For all these reasons we refuse the Appellant's application for a GOS contract at 18 City Road, London EC1Y 2AF on the ground that Regulation 4(3)(k)(i) is not satisfied in relation to the premises.

First-tier Tribunal Judge Mark Mildred
First-tier Tribunal (Health Education and Social Care)

Date Issued: 17 December 2014