PRIMARY HEALTH LISTS

IN THE MATTER OF THE NATIONAL HEALTH SERVICE (PERFORMERS LISTS) (ENGLAND) REGULATIONS 2013

[2016] 2641.PHL

Heard at Cambridge County Court on 10th August 2016

BEFORE:
Judge Siobhan Goodrich
Dr Parvinder Garcha (Specialist Member)
Mrs Mary Harley (Specialist Member)

B E T W E E N

DR KAUSAR KHAN

Applicant

-v-

NHS COMMISSIONING BOARD
(Midlands and East (East))

Respondent

DECISION AND REASONS

Representation;

For the Applicant: Ms Mary O'Rourke QC, counsel, instructed by MDDUS

For the Respondent: Ms Clare Strickland, counsel, Blake Morgan

The Appeal

1. This is an appeal by Dr Khan pursuant to Regulation 17(1) and (2) of the National Health Service (Performers Lists) (England) Regulations 2013 ("the Regulations") against the decision made by the Performers List Decision Panel ("PLDP") to impose conditions on the inclusion of her name in the Performers List.

2. The conditions were imposed under Regulation 12(10) of the National Health Service (Performers Lists) (England) Regulations 2013 ("the Regulations"). Dr Khan had previously been suspended from the performers list but, following an oral hearing on 23rd February 2016, the PLDP decided to allow her to resume practice subject to conditions which are set out in the record of the decision dated 26th February 2016. The

PLDP imposed conditions on Dr Khan's continued inclusion on the performers list because it considered it appropriate for the purpose of preventing any prejudice to the efficiency of the services which those included on the performers list perform.

The Regulatory Framework

3. Regulation 17(4) provides that on appeal the First-tier Tribunal may make any decision which the PLDP could have made. This means that the First-tier Tribunal may act in accordance with Regulation 12(10) and either a) confirm or revoke the suspension or b) allow the practitioner to resume practice subject to conditions. Conditions may be the same as those imposed by the PLDP, or such other conditions as the First-tier Tribunal considers appropriate. It is common ground that the First-tier Tribunal is not confined to reviewing the decision and reasons of the PLDP. It is required to make a fresh decision in light of all the information before it, which includes new information not available to the PLDP.

The Background

4. There is a reasonably complicated background to the appeal. The chronology involves related action taken by the General Medical Council (the "GMC") and the Care Quality Commission ("the CQC"). The full background is set out in the bundle before us and need not be repeated herein in full. In summary:

    a) Concerns arose during a period from when the Applicant was a GP partner/principal at Marine Parade and Oulton Village Surgeries ("the Practice") from February 2014 until February 2015 at which point she was suspended from the Performers List. The concerns included: failure to appropriately manage and examine patients; failure to apply appropriate knowledge and safeguards; failure to visit (on one occasion); delayed referrals, including "two week waits"; inappropriate prescribing, including; repeat issuing of medication; co-prescribing of the same group of drugs; prescribing increasing quantities of medication; lack of management of patients on disease modifying anti-rheumatic drugs (DMARDS); poor management of results/letters from consultants; inappropriate delegation of clinical tasks to non-clinicians.

    b) When concerns began to arise in 2014, there were a variety of interventions by agencies which sought to support the Practice, and the Applicant, whilst improving standards. By June 2014 an NCAS action place was in place and in October 2014 an NCAS performance assessment was recommended. In March 2015:
        a. The CQC imposed conditions on the Practice.
        b. The Respondent imposed conditions on her inclusion on the performers list in place of suspension (27th March 2015).
        c. The GMC made Dr Khan subject to an interim conditions of practice order for 18 months. This included a requirement for close supervision (as defined in the GMC's glossary).

    c) Between April and August 2015, the Applicant was closely supervised in practice by Dr Mirza as part of NCAS assessment. He provided positive reports on her progress (C381-402).

d) On 9 September 2015, the GMC conditions were varied to remove the requirement for close supervision (C412-413).

e) In September 2015, the CQC issued a warning notice and then went on to conduct an investigation which resulted in removal of the Practice's CQC registration on 12 October 2015. The Applicant unsuccessfully appealed against the decision to remove CQC registration.

f) On 22nd October 2015 Dr Khan was suspended from the Performers list.

g) On 23rd February 2016 the PDLP (in place of suspension) imposed conditions which are the subject of this appeal. Since then the GMC conditions had again been varied at a review held on 16th June 2015 (C577 - 578) and having considered them, the Respondent offered to invite the PLDP to consider mirroring the GMC conditions (C590).

h) Dr Khan has now undergone GMC Performance Assessment. The outcome will be known to her in October.

5. It is against that background that the appeal came before us. We received a comprehensive indexed bundle together with helpful skeleton arguments from both parties. We do not rehearse their contents as these are a matter of record. It was common ground that the sole legal issue was what restrictions on practice are proportionately required in order to address the perceived risk to the efficiency of services that a GP is expected to provide. This inevitably includes the need to protect patient safety. The parties reached a measure of agreement as to the appropriate and proportionate conditions in the light of developments but there were some remaining issues that required resolution.

6. At the outset of the hearing the core issue on which the parties were not agreed was the inclusion of a condition that effectively mirrored that imposed by the GMC, namely, that Dr Khan confine her work to posts as a non-career grade doctor whose responsibilities would be no higher than CT1. CT1 refers to core medical training level 1, the level above foundation year level 2 (FY2).

7. We heard evidence from Dr Vijay Nayar, who is the Head of School and Deputy Postgraduate Dean at Health and Education in the East of England. He is also a GP principal and Trainer. In the light of his evidence it was agreed by the parties that a condition of practice that restricted practice in the primary care setting by reference to a hospital training grade was not helpful and potentially confusing. In short the reference to CT1 added little of substance to patient protection in the primary care setting. It had the clear potential to adversely impact upon the employment opportunities that might be available to enable Dr Khan to obtain work in a primary care setting in circumstances where any risk posed by her practice could be otherwise proportionately contained by appropriate supervision. Accordingly, it was agreed that the conditions should be reframed so as to exclude any reference to a training grade. We agreed that this was a sensible refinement to the conditions applicable to the delivery of primary

care that did not dilute the principles of the protection of patient safety which is core to the efficiency of services.

8. As to the issue of supervision, in order to assess the issue of risk we invited the parties to focus upon the evidence as to any adverse events when Dr Khan was supervised by Dr Mirza, since this was the most recent period demonstrating her clinical practice, and to consideration of the conditions necessary to address any perceived harm in the overall context of the concerns raised in the past. At the hearing we considered in some detail the incidents on which reliance was placed by the Respondent.

9. Ms Strickland on behalf of the Respondent submitted that it was necessary for the supervision to be "close" which would mean that the clinical supervisor must always be available on site. The Respondent also contended that supervision by way of case based discussion was necessary on a weekly basis and that a condition should be imposed as to its minimum duration at one hour. Ms O'Rourke submitted that it was important to recognise the overall context in which the concerns had arisen. Dr Khan has been registered as a doctor since 1994. She became a GP in 2004. There had been no concerns about her practice until 2013 at which point she was struggling, having taken on the role of practice principal in a locality and setting which presented challenges. It must be right that PLDP decided to allow Dr Khan to resume practice by lifting the suspension but the unintended effect of the stringency of the conditions imposed by the PLDP was to prevent her from doing so. Dr Khan accepts that some concerns were justified. Key to their consideration is her work circumstances at the time. Dr Khan did not suddenly go from being a good clinician to a poor one without explanation and the obvious explanation was her working environment. In the correct environment she will be better equipped but cannot secure that environment due to the stringency of the conditions (including the detail in respect of supervision) imposed by the PLDP. Ms O'Rourke tentatively suggested that there should be no condition imposed in relation to the frequency of case based discussion at all. If such a condition was imposed 2 weekly meetings for formal case based discussion were reasonable and proportionate.

10. Both parties agreed that whatever conditions were imposed it was important that they were clear.

Our Consideration

11. Our task is that of risk assessment pending a substantive decision in relation to Dr Khan's future position as a performer on the list. It is important to recognise that it is not our function to make findings of fact in relation to the alleged clinical incidents. That said, Dr Khan acknowledges that there were deficiencies in her practice in general terms. It appears to us Dr Khan has insight into the need to improve aspects of her clinical practice and was taking steps to address this when the Practice was closed by the CQC. Whilst we did not ignore the wide range of concerns arising from Dr Khan's clinical practice in the past it is notable that the overall effect of Dr Mirza's detailed reports regarding the close supervision he undertook in the period between April and August 2015 was broadly reassuring (see his reports at C379 to C402). In July 2015 he concluded that Dr Khan had good insight into her progress and performance and has

successfully completed the NCAS plan in its entirety (C399). In August 2015 he did not consider that close supervision was required any longer.

12. We considered all of the material before us. In the final analysis it appears to us that the vast majority of the incidents on which the Respondent had relied in support of the need for close supervision occurred in 2014 and early 2015. There is a relative lack of incidents thereafter. One matter that stood out was the prescription of 2184 Prochlorperazine tablets to a patient between June and September 2015. This incident appears to relate to systemic management of repeat prescriptions rather than deficiency in clinical judgement per se. The evidence that Dr Khan was directly involved on the occasion that the dose of Zomorph was increased was unclear as is the date of the prescription (C345). The issue concerning the provision of repeated doses of Hepatitis B in June 2015 (C245) appears to have its origins in poor practice systems and administration.

13. Looking at matters in the round, it appears to us that there may well have been systemic issues concerning the practice that impacted upon the standards of Dr Khan's usual clinical practice. Since the positive NCAS performance assessment matters have been overtaken by the enforced closure of the Practice and Dr Khan has been unable to secure a post in a different practice setting. We agree that the issue is what conditions are proportionately required in order to protect patient safety and the efficiency of services.

14. Our overall impression is that the vast majority of the matters that caused understandable concern arose in the overall context of the Marine Parade and Oulton Broad surgeries and at a time when Dr Khan struggled in her role as practice principal. If, however, Dr Khan is able to secure employment, it will be in a different environment i.e. in a practice and setting that has to be approved by NHS England and where the clinical supervisor is also approved by the Responsible Officer for NHS England. Having carefully considered all of the material before us we consider that any risks posed to patient safety and the efficiency of services can be adequately addressed in a setting where the clinical supervisor is not necessarily on site at all times. In our view an important linked safeguard to the monitoring of Dr Khan's ongoing clinical practice is the requirement to provide a reflective log so that supervision and case based discussion are focussed on clinical issues arising.

15. As to frequency we consider that a condition imposing a requirement for 2 weekly case based discussion is an adequate and proportionate safeguard provided the reflective log is maintained and shared. In our view this level of frequency, and the fact that four weekly reports to NHS England are required, is sufficient to address potential risk and focus attention on any areas of weakness. The clinical supervisor, who has to be approved by the Responsible Officer for NHS England, will know and can be trusted to judge what is required in terms of the duration of the case based discussion meetings. We do not consider it necessary or appropriate to set a minimum duration for these meetings.

Decision

16. We announced at the hearing that we agreed that it was necessary that Dr Khan's name on the Performers List be subject to conditions for the purpose of preventing any prejudice to the efficiency of the services which those included on the performers list perform but reserved our decision as to the detail of conditions. In light of the reasoning set out above we have decided that the following conditions are necessary and proportionately required:

    1. You must notify NHS England of any post you wish to accept for which inclusion on the National Performers list is required and provide the contract details of your proposed employer.

    2. You must obtain the approval of NHS England before accepting any post for which inclusion on the Medical Performers list is required.

    3. You must allow NHS England to exchange information with your employer and any contracting body for which you provide medical services.

    4. You must permit NHS England to disclose these conditions to any person requesting information about your performers list status.

    5. You must inform NHS England in writing of any disciplinary procedures taken against you from the date of this decision.

    6. You must inform NHS England if you apply for general medical employment outside the UK.

    7. You must inform the following parties that your inclusion is subject to these conditions.
        a. Any organisation or person employing you to undertake general medical work
        b. Any prospective employer (at the time of application).

    8. You must not work in any locum post or fixed term contract of less than 4 weeks' duration.

    9. You must only work under supervision in any posts.

    10. You must have a clinical supervisor who must be agreed in advance with your Responsible Officer. The clinical supervisor must be approved by Health Education England as an educational supervisor or able to demonstrate (to the satisfaction of the Responsible Officer) competence to the level of an approved educational supervisor for postgraduate training in general practice.

    11. The clinical supervisor should:
        - be available to give advice and assistance as required

- meet with you formally at least once a fortnight for a case based discussion
- if your supervisor is on leave a named GP on the GP Register must clinically supervise you under the same arrangements

12. You must maintain a reflective log of patients seen and prescriptions offered, including areas of uncertainty, learning points and subsequent actions. This log must be recorded at the end of each surgery, patient confidentiality protected and shared with your clinical supervisor to inform discussion.

13. You must seek reports on your performance from your clinical supervisor every 4 weeks and submit them to NHS England in a format to be agreed between your clinical supervisor and NHS England.

Rights of Review and/or Appeal

17. The Applicant is hereby notified of the right to appeal this decision under section 11 of the Tribunals Courts and Enforcement Act 2007. She also has the right to seek a review of this decision under section 9 of that Act. Pursuant to paragraph 46 of the Tribunal Procedure (First- tier Tribunal) Health, Education and Social Care Chamber) Rules 2008 (SI 2008/2699) a person seeking permission to appeal must make a written application to the Tribunal no later than 28 days after the date that this decision was sent to the person making the application for review and/or permission to appeal.

Judge Siobhan Goodrich
Primary Health Lists
First-tier Tribunal (Health Education and Social Care)

Date: 22 August 2016