

**IN THE FIRST TIER TRIBUNAL
PRIMARY HEALTH LISTS – PHL 15397
THE GENERAL OPHTHALMIC SERVICES REGULATIONS
2008.**

BETWEEN

**ZAKIR KHAN AND POSH POSH SPECS LIMITED
AND
SEFTON PRIMARY CARE TRUST**

Panel

John Burrow - Tribunal Judge

Richard Stokes – Professional Member

Tim Bennett – Lay Member

1. The case was heard on the papers at Pocock Street on 12 October 2011. The bundle consisted of 383 pages plus 4 pages of late evidence from the Appellants of mostly references which were in the bundle in any event. The tribunal had regard to all the evidence.

The Appeal

2. On 5th February 2011 the Appellant and his company Posh Posh Specs Ltd applied to the Sefton PCT (the PCT) for a contract to provide ophthalmic services for domiciliary visits. On 28 April 2011 the PCT refused the application on the grounds of unsuitability, pursuant to Regulation 4 of the 2008 Regulations

Legal matters

3. The majority of the legal matters in the case are contained in the GOS Regulations 2008:
 - Regulation 4 (1) (2) and (3) provide that the persons (which includes the directors and secretaries of a corporate body) eligible for a GOS contract must not be unsuitable under Regulation 4(1)(3).
 - Section 118 (1) National Health Service Act 2006 provides that a PCT may, subject to exceptions issue a contract to any person.
 - The General Ophthalmic Service Practitioners 2008 Department of Health guide to the performers list suggest suitability should be given its every day meaning, with a broad area of discretion for the PCT.
 - The burden of proof to show unsuitability is on the PCT to the civil standard or balance of probabilities.
4. Any decision on suitability must be proportionate, balancing the applicant's right to pursue his profession against the PCT's duty to ensure public safety and the appropriate administering of GOS contracts.

Evidence

5. Mr Khan is an optical adviser. He is neither an optometrist nor an ophthalmic medical practitioner (OMP). He is not regulated by the General Optical Council or the GMC and is not on the PCT's

performers list, and he cannot personally deliver professional optometry services to patients. It is the optometrist or OMP who is regulated by the GOC or GMC, and delivers the professional optometric services to the patient.

6. As the holder of a GOS contract Mr Khan would typically accompany the optometrist or OMP on domiciliary visits to perform administrative duties in connection with the contract including completing payment forms. These forms will be submitted to the PCT for payment. In 2009 he was granted a GOS contract by Manchester NHS, which he has been operating to the present time.

7. On 8 April 2009 he applied to Sefton PCT for a General optical services contract for domiciliary visits (an “additional contract”). He completed the application form and there were no difficulties with the form itself which showed he had no convictions and had never been subject to adverse investigations by any regulatory or other body. It is a requirement of such applications that a CV be submitted. On the CV he set out his employment history which covered the period from February 1999 to 2009.

8. For the period Feb 1999 to October 2000 he stated he was an Optical Advisor. For the period October 2000 to May 2002 he said he was working for an opticians in Salford Lancashire, and he described himself as a Dispensing Advisor and a Trainee D/O, implying he was a trainee Dispensing Optician. A dispensing optician is regulated by the General Optical Council.

9. At this part of the CV Mr Khan said he was the main optical advisor for the firm, that he was solely responsible for all the optical equipment and that he used language skills doing diabetic retinopathy and implemented a training manual for use in new optical equipment. A subsequent email from the firm dated 3 September 2009 confirmed that he was an optical adviser with them, but not necessarily a main

adviser. They queried whether he had been involved in diabetic retinopathy, although they accepted he had used a company training manual, and had done some training in nursing homes. In 2009 they were continuing to use him as a locum OA.

10. The PCT asked for further details from Mr Khan about this entry in the CV and in an email of 3 July 2009 Mr Khan said that there was an error and the CV should have stated he was an Optical Advisor during this period. That application was not thereafter proceeded with.

11. On 5 February 2011 Mr Khan submitted a further application to the PCT. In the amended CV attached to this application it was made clear that he was an Optical Advisor from 1999 to the present. His wife Mrs Khan also completed an application form. She was the company secretary. In her CV she stated she had a degree in Biomedical Science “from September 1998 to June 2001” from Manchester Metropolitan University.

12. The PCT informed her on 2 March 2011 that as part of the application process there would be a visit to the company premises and they asked to be shown the certificate during the visit. Mr Khan emailed back on 2 March 2011 to say Mrs Khan had made an error and should have stated that she only completed her foundation years in the course. A corrected CV was sent with the email.

13. During the inspection visit to the applicant’s premises on 23 March 2011, some items required attention including data handling procedures, a drugs disposal policy and a suitable patient leaflet. Remedial actions were set out in an action plan. Later it transpired that as yet some but not all of these matters had been attended to, but the PCT did not rely on any remaining shortfalls in their decision to refuse the application. Mr Wilkes, who carried out the visit, said he thought Mr Khan had displayed a lack of knowledge of the GOS contract regulations.

14. The Practitioner Performance Committee of PCT considered the application on the 28 April 2011 and refused it on the ground of suitability under Regulation 4(1), 4(2) and 4(3) of the 2008 Regulations. The effect of the regulations is to provide that any person found not suitable under Regulation 4(3) should not be granted a contract. In the decision letter of 8 June 2011 they referred to the two errors mentioned above.

15. On 1 July 2011 Mr Khan appealed that decision. The grounds of appeal were that he and his wife had been, as he put it, reckless and the errors were due to haste and that there had been no intent to deceive. The errors had been admitted and rectified as soon as they were realised without any attempt to forge or lie about them.

16. The PCT issued a response to the appeal on 19 August 2011. They pointed out the two errors in the 2009 and 2011 applications. They said the main concern was patient safety. They pointed out the contract would entail contact on domiciliary visits to possibly vulnerable patients. They said they did not allege that the errors in the CVs were made fraudulently, but there was a history of a lack of due diligence. In other words there was no allegation of dishonesty against Mr and Mrs Khan.

17. The PCT submitted an opening statement in the bundle. In that document they referred to the two errors but again reiterated they were not alleging dishonesty, but rather errors and inconsistencies in the CVs. They also referred to a statement by Mrs Khan concerning Mr Khan's employment history where she said he had been in partnership with Dr L, an ophthalmic practitioner who held and continues to hold a GOS contract with the Sefton PCT. It later became apparent that he held the contract as a sole trader, and Mr Khan had not been a partner but had been employed by Dr L.

18. In the opening statement the PCT accepted that the errors by Mr and Mrs Khan about their qualifications did not relate to qualifications which were necessary in order to obtain a contract. Section 118 of the NHS Act 2006 provides that a contract can be granted to “any person”, so there are no minimum qualification requirements. The PCT further confirmed they did not rely in their decision to refuse the contract on any outstanding uncompleted items on the action plan drawn up following the visit of Mr Wilkes.

Case for the PCT

19. There are witness statements from Fiona Boyle the head of corporate governance with the PCT. She explained the procedures of the PCT in taking the decision to refuse the application. She sets out information in the dealings between Dr L and the PCT.

20. A further witness statement from Robert Wilkes, the Optometric Adviser with the PCT, explained the PCT procedures in respect of an application for a contract, and in undertaking visits to applicant’s premises. He made visits in respect of the 2009 application and the 2011 application. He too sets out his dealings with Dr L. He was unsure if Mr Khan had attended at an inspection visits with Dr L.

Case law

21. The PCT relied on a number of previous decisions of the FHSAA. Such decisions are not binding precedents but the PCT relied on them as cases with what they regarded as similar circumstances. They first referred to *Hossain v West Yorkshire Central Services Agency* FHSAA Case No 11065. In that case the doctor had failed to disclose a refusal by another PCT and had failed to disclose a warning about performance. The panel concluded the failures were not dishonest and the appeal was allowed. This gives limited assistance since Mr Khan is not a performer and will not be providing professional optometry services to patients. The case if

anything emphasises the importance of the absence of a finding of dishonesty in allowing an appeal.

22. They also refer to the case of *Kim Brown V NE Lincolnshire Care Trust FHSAA Case No 15243*, where there had been a failure to disclose findings over the wrongful detention of employer's funds and overpayment of salary. Again, dishonesty was not found and the appeal was allowed, again emphasising the importance of the absence of a finding of dishonesty in allowing an appeal.

23. They finally referred to the case of *Baxter and Opticall (UK) Limited v South Leicester PCT – FHSAA Case No 13408*, which was a case of an application for admission to the performers list. In that case the application concerned the provision of mandatory services not just additional (domiciliary) services. The performer was accused of failing to disclose two previous and one current investigation. There was no specific finding of dishonesty in respect of those matters but he was regarded as an unreliable witness. The appeal was allowed but the tribunal emphasised the importance of accuracy in optometry where the applicant is a performer carrying out patient assessments. Of course Mr Khan is not a performer and does not carry out patient assessments.

24. Because the application in *Baxter* was in respect of the performers list, conditions could be made and a condition not to undertake domiciliary visits was imposed. It would not be possible to impose conditions in respect of an application for a contract as in the current case. Again the *Baxter* case appears to emphasise the importance of the lack of finding of dishonesty.

Case for Mr and Mrs Khan

25. The case for the appellants is set out in the grounds of appeal mentioned above. No further witness statements or opening submissions were made. However three references were submitted.

26. The first reference was from Sophia Lapsley the Ophthalmic Services Coordinator at NHS Manchester. She referred to a contract for domiciliary visits which had been granted to Posh Posh Specs and Mr Khan in 2009, in effect the same type of contract as the application to Sefton PCT. She was present in 2009 when a contract application visit was made with the clinical lead Dr Sarah Slade.

27. She said Mr Khan was present and met all the requirements necessary to issue a contract. She was also present on a Contract Monitoring visit on 3 May 2011 when she said all actions were met by Mr Khan in a timely manner and there were no concerns with the delivery of the contract. She says she has corresponded with Mrs Khan on several occasions and has found her pleasant courteous and cooperative.

28. The second reference was from Hillary Hodgeson, Optometric Adviser for Manchester PCT. She too refers to the domiciliary eye care services contract granted by NHS Manchester NHS on November 5 2009 to Posh Posh Specs and Mr Khan. She carried out a Contract Monitoring visit on 3 May 2011 when she met Mr Khan who appeared to appreciate all the contractual obligations. She said all actions arising from the visit were completed within an appropriate timescale and signed off by 30 June 2011. She said Manchester NHS has no on-going concerns about the company.

29. The third reference was from Najma Chowdhury, the registered optician who is employed by Poshposh Specs. She has known Mr and Mrs Khan for about 8 years, and has observed the company delivering the best eye care possible to the public, in accordance with the NHS the GOC and the PCT. They are described as hardworking and honest having a good relationship with the optical industry and Mr Khan being honest in his dealings with the PCT.

Consideration by the panel

30. We considered the matter carefully. We noted there was no allegation of dishonesty against the Appellants and we attached weight to that matter. The height of the allegations against Mr and Mrs Khan was that they had not exercised sufficient care in completing their CVs. We accepted there had been inaccuracies in the CVs, but we did not make any finding of dishonesty in respect of those inaccuracies.

31. We further noted that the errors referred to qualifications which were not a precondition for the grant of the contract. We further noted the excellent references provided by Manchester PCT concerning the way the Appellants had operated a similar contract over a two year period. There was also a good reference from the Appellants@ optometrist.

32. There appeared no clear evidence of any deficit in the applicant's competency to administer the contract. Mr Wilkes had mentioned Mr Khan's apparent lack of knowledge about contracts when he visited in respect of the 2011 contract, but this assessment must be set against the assessment of Sophia Lapsley and Hillary Hodgeson who have far greater knowledge over two years, of Mr Khans ability to administer a GOS domiciliary contract, and they have provided positive references.

33. We noted the PCT's main ground for refusing the application was concern for patient safety. However we noted the appellants were not performers and did not themselves provide professional optometry services to patients. Their role was to administer the contract. In these circumstances we concluded in view of the way they had successfully administered the Manchester contract there was no discernable risk to patients, vulnerable or otherwise. We further noted the error by Mr Khan in his CV had been made some two years ago.

34. We accepted that it very was important that applicants take care and avoid errors in their applications for GOS contracts. But we concluded that on the facts above, including the good record of the Appellants and the absence of risk to patients the appellants are suitable to hold a GOS contract and we allow the appeal.

35. This does not meant the outstanding points in the action plan should not be resolved between the parties in the usual manner.

John Burrow

A handwritten signature in black ink that reads "John Burrow". The signature is written in a cursive style with a period at the end.

Judge HESC

18 October 2011

