

In the First Tier Tribunal

Case No. PHL 15402/PHL 15417

Health Education and Social Care Tribunal

Primary Health Lists

NHS (Pharmaceutical Services) Regulations 2005

NHS (Performers List) Regulations 2004

Mr Pak Kao Ho

Appellant

and

Halton and St Helens Primary Health Care trust

Respondent and applicant

Panel

John Burrow – Tribunal Judge

Mr I Conquest – professional member

Mrs L Bromley – Lay member

1. The oral hearing took place on 7 October 2011 at the Employment Tribunals, Cunard Building, Pier Head, Liverpool. The PCT was represented by Rebecca Sutton of counsel instructed by Hill Dickinson. She was accompanied by David Hill of Hill Dickinson solicitors and Margaret Geoghegan Head of Medicine Management at the PCT. Ms Sutton called Dr Devina Halsall the Senior Pharmacist for Community Pharmacy for the PCT.

2. Mr Ho was represented by Kevin McCartney of counsel instructed by Charles Russell Solicitors and accompanied by Susan Hunneyball of Charles Russell Solicitors. Mr McCartney called Mr Ho the appellant. The documentary evidence was contained in the bundle containing tabs A – E, and opening submissions by the parties. An additional reference was added at the hearing.

The Application and the Appeal

3. On 23 February 2011 Mr Ho applied to be admitted to the Halton and St Helens PCT's (the PCT) pharmaceutical performers list. Mr Ho and Glentworth Healthcare Limited, of which he was the director, intended to establish a pharmacy in the PCT's region which would be open for 100 hours a week. It was intended that Mr Ho would be the superintendent pharmacist (SP).

4. On 16 June 2011 the PCT informed Mr Ho that his application had been refused under Regulation 19(2)(a) of the NHS (Pharmaceutical Services) Regulations 2005 on the ground of unsuitability. On 13 July 2011 Mr Ho appealed against the decision under regulation 19(6) of the 2005 regulations. On 26 August 2011 the PCT applied for a national disqualification under regulation 18A of the NHS (Performers List) Regulations 2004 in respect of Mr Ho.

Legal matters

5. The relevant legal issues were largely contained in the 2004 and 2005 Regulations mentioned above.

The 2005 Regulations

Regulation 19 (2)(b) – provides that a PCT, having checked the application, may refuse it on the grounds of suitability.

Regulation 19(4) – lists the matters the PCT must have regard to when considering an application.

Regulation 19(6) – provides a right of appeal to the First Tier Tribunal against a refusal to include.

Regulation 19(7) – confirms the appeal shall be by way of redetermination.

Regulation 21 – provides for conditions to be attached to inclusion in the performers list.

Regulation 24(1) – provides that the PCT may determine an application in such manner as it thinks fit.

The 2004 Regulations

Regulation 18A - permits the PCT to apply for a national disqualification where they have refused to include him in their performers list.

In the “Delivering Quality in Primary Care” - Department of Health Guide, it was said suitability could be a ground for action where a decision has been taken by a professional

body or where there is a lack of tangible evidence of satisfactory qualifications or experience. The term is to be given its every day meaning and may overlap with efficiency. Serious violence or fraud might warrant removal for suitability.

6. The burden of proving unsuitability lies with the PCT on the balance of probabilities. Any decision to refuse to admit to a performers list must be proportionate in balancing the interests of the performer in pursuing his profession and the interests of the PCT in public protection and in administering the performers list.

Evidence

7. Mr Ho first registered as a pharmacist in 1982. From about 1993 to 2004 the company of which he was then a director, Glentworth Trading Limited, owned four pharmacies. Mr Ho was the Superintendent Pharmacist of all four. Starting in 1998 one of the pharmacies, the Royal House Pharmacy, received a number of visits from an Inspector of the Royal Pharmaceutical Society (RPS). There was one visit in 1998, two in 1999, and four in 2000. Mr Ho was advised by the Inspector about the need to remove date expired stock from dispensary shelves as well as other matters, including a cluttered dispensary, unlabelled medication and recording the dispensing of controlled drugs. Mr Ho was given advice as to how to prevent reoccurrence.

8. In November 1999 and September 2000 a locum at the same branch received warnings on dispensing without a label and dispensing out of date stock. In April 2000 Mr Ho was sent a letter by the Head of Professional Ethics at the Professional Standards Directorate of the RPS about, inter alia, significant quantities of date expired stock and was given advice about how to ensure such stock was removed. In September 2000 he was given a written warning by the Head of Professional Ethics about the supply of out of date stock, and out of date stock being on the shelves of the pharmacy.

9. In October 2000 on a further visit the Inspector noted some improvement and in January 2001 the Inspector was satisfied there was significant improvement. In August 2002 the stock was still in good order. While there was some deterioration in the position in early 2003 by June 2003 the Inspector was again satisfied and in March 2004 the inspector found there had been a big improvement with no out of date stock found. In fact two months earlier on 13 January 2004 a pharmacist at the Royal House Branch dispensed date expired Premique Cycle tablets without a label and without a patient information leaflet. On 21 October 2004 Mr Ho sold his interests in all four pharmacies.

10. On 20 April 2005 both Mr Ho as superintendent pharmacist and the dispensing pharmacist appeared before the Statutory Committee of the RPS. The Committee found both persons guilty of such misconduct as to render them unfit to be on the register. The summary of the judgement by the chair of the Committee referred to the fact that Mr Ho no longer

owned any of the pharmacies and that “he has no intention of acquiring one”. The Committee then issued a reprimand in respect of both Mr Ho and the pharmacist.

11. In fact it transpired from the full transcript of the Committee meeting that Mr Ho did not give an unconditional assurance that he would not acquire a pharmacy in the future. He was asked by a panel member during the hearing “And you cannot see yourself owning a pharmacy ever again after this case?” Mr Ho replied “I do not think I can say that because I am only 49 so 11 years before me but as far as I can see now, no. It is only because I enjoy pharmacy and I am looking for a change”. The assurance was limited to this current intention.

12. There after Mr Ho worked as a locum pharmacist for some 5 or 6 years, mainly for large multiples including Boots and Lloyds. He received outstanding references in respect of his work there being described as “the best locum in the area”. He remains a registered pharmacist with no conditions or restrictions on his registration, and no contact with counter fraud or NHS litigation

The decision to refuse

13. The Application by Mr Ho was decided by the PCT’s Professional Performance Assessment Group of the PCT on 19 May 2011. However it was accepted by Dr Halsall on behalf of the PCT that the decision in respect of applications should normally be made by the Independent Performers Committee. It was pointed out that regulation 24(1) of the 2005 Regulations provided for the decision to be made in any manner the PCT sees fit.

The Application for national disqualification.

14. Having refused the application, the PCT applied for a national disqualification, on the grounds that if Mr Ho was unsuitable to open a pharmacy in their area he was unsuitable to open a pharmacy in any PCT area as the issues were not merely local. They maintained that he should be prevented from utilising scarce NHS resources by further inappropriate applications for admission to performer’s lists elsewhere. They also maintained the matter was serious. They said a national disqualification for a minimum of 2 years was necessary and proportionate. They accepted that if the tribunal allowed Mr Ho’s appeal as to suitability to be on a performers list then the application for the national disqualification must fail.

The case for the PCT

15. The PCT stated in the decision letter of 16 June 2011 that the grounds of refusal of Mr Ho’s application were the visits by the Inspector in the late 1990s and early 2000s, the reprimand in 2005 by the statutory Committee of the RPS and the agreement by Mr Ho at those proceedings that he had no intention of acquiring another pharmacy. At the time of the

decision the PCT were unaware of the actual terms of Mr Ho's response on the issue revealed by the full transcript as set out in paragraph 11 above. The PCT maintained that the sanction had been reduced to a reprimand only because of Mr Ho's agreement not to own a pharmacy again.

16. The PCT said in respect of the out of date stock that Mr Ho was the Superintendent Pharmacist (SP) and must therefore take responsibility for the inadequacies in stock control. As the SP he bore responsibility for managing risk to the public, setting standards, ensuring legal and professional standards were met and dealing with systems failures. He had been found by the Statutory Committee to be unfit to be on the register.

17. The PCT said that although 6 years had passed since the reprimand had been imposed, during that time Mr Ho had not demonstrated insight or sought training to remedy past deficiencies or prepare for the future Superintendent Pharmacist (SP) position he was applying for. His good references related to his responsibilities as a Responsible Pharmacist (RP), not an SP. The responsibilities of an SP are set out in the General Pharmaceutical Council (GPhC) document "*Standards for Pharmacy Owners Superintendent Pharmacists and Pharmacy Professionals in Positions of Authority*". They included setting overarching standards and policies, ensuring legal and professional duties are met, supporting the responsible pharmacist, managing leading and training staff, record keeping and devising and implementing standard operating procedures (SOPs).

18. The responsibilities of a RP are set out in Regulation 4 of the Responsible Pharmacy Regulations and included the safe and effective running of the pharmacy, supervising the dispensing of medicine, the supervision of pharmacy staff, the implementation of policies and procedures of the pharmacy on a day to day basis, the implementation of SOPs and their amendment if necessary, and record keeping.

19. The PCT argued that the responsibilities, although overlapping to a degree, were separate. In particular the SP had responsibility for devising and implementing Standard Operating Procedures (SOPs) while the RP had responsibility for day to day execution of the SOPs. This was particularly the case for Mr Ho as he had been a locum mostly in multiples where his exercise of the RP role may be more limited than a smaller pharmacy as there are layers of management between the two positions in large pharmaceutical companies. They suggested that the long hours of the intended pharmacy meant that his ability to perform the SP function was particularly important. He will retain the SP responsibilities even when not on site.

20. The PCT did not accept that the passage of time necessarily remedied Mr Ho's deficiencies which resulted in the Reprimand. They did accept there had been no adverse incidents since 2004, and since 2009 he had fulfilled the responsibilities of the RP without adverse incident. They said his continuing professional development and training did not indicate he had undertaken training in the functions of an SP, but were for the most part

concerned with his duties as a locum pharmacist. Further they said his record at the Royal House pharmacy indicated he was deficient in such skills.

21. The PCT accepted that Mr Ho had undertaken some CPD training, but they said it had not focussed on the CPD cycle of reflection, planning, action and evaluation, either in respect of the deficiencies revealed in the Reprimand in 2005 and the earlier inspector's visits, or on the intended role of superintendent pharmacist. The PCT said they expected that Mr Ho would have taken SP and management refresher courses, and completed a Personal Development Plan. A number of CPPE courses were referred to by Dr Halsall in her evidence as being suitable although it transpired that she had not done the courses herself and could not speak to their contents. The PCT suggested Mr Ho had shown a lack of insight in these matters.

22. They noted that following Mr Ho's application to join the performers list the PCT had written to him asking him to clarify why, having indicated in the 2005 proceedings he no longer intended to acquire a pharmacy, he was now seeking to do so. Mr Ho had responded "I was planning to take early retirement some 6 years ago but I am working as full time pharmacist since I believe St Helens can benefit from an independent late night pharmacy offering a wide range services from a 5000 square ft purpose built premise." The PCT suggested that their query sought information on the issue of remediation of the 2005 deficiencies, but that Mr Ho's reply did not deal with the issue, showing a lack of insight.

23. There was an issue as to the manner in which the PCT had taken the decision to refuse Mr Ho's application. The decision was taken by the Professional Performance Assessment Group not the Independent Performers' Committee. The PCT said the membership of the two groups was the same and in any event under the 2005 Regulations the PCT may determine the application in any way they see fit.

24. The application for a national disqualification was made on 26 August 2011. The PCT maintained the issue of dispensing out of date medicines could be serious, although they accepted the period by which the medicine was out of date was only a month and no actual harm had been caused to the patient. The PCT maintained that the issues were not merely local to the PCT. Also they suggested that the issues they had raised about the deficiencies of Mr Ho's application to them, including lack of insight, would be true of any application to any PCT. They suggested a two year national disqualification was necessary and proportionate to allow Mr Ho time to prepare himself for the role of SP.

The case for the Appellant Mr Ho

25. Mr Ho stated that the Royal House Pharmacy had a small dispensary but because it was so busy – some 13,000 items a month - they carried a large amount of stock, some £250,000 worth where pharmacies usually carried £20 – £30,000 worth . This had made it difficult to check the shelves. Also suppliers often sold them short dated stock and there had

been staffing difficulties. After he had received the warning letters from the head of Professional Ethics, he had implemented a new system for checking the out of date stock, which was achieving significant improvements in the situation in 2000, as noted by the Inspector.

26. There had been no problems with the other three pharmacies in the group where there had been no complaints at all. Unfortunately the regular pharmacist at the Royal House pharmacy had dispensed one item in January 2004 which was a month out of date, for which Mr Ho as superintendent pharmacist took responsibility. Mr Ho concluded in 2003 the business was too much for himself and his wife and he sold his interest later in 2004.

27. In the proceedings before the statutory committee he had admitted the matter. He had not given a permanent agreement not to own a pharmacy again but had answered as indicated in the transcript as to his present intentions. It would have been possible for an undertaking to be requested of him but that had not been. He submitted the PCT were wrong to suggest that the sanction had been reduced to a reprimand solely because of his indication that he would not own a pharmacy again, an indication that was never in fact given in any event. The PCT had placed undue weight on that issue, given the error.

28. There were many factors which were relevant to the decision to impose a reprimand, including the nature of the offence, and the excellent references. Further both he and the pharmacist who had dispensed the out of date stock were given the same sanction, a reprimand. The Committee had been obliged to make a finding of unfitness in order to impose a reprimand. The out of date medicines had occurred only in respect of the one pharmacy.

29. After the sale he worked for 6 years as a locum, mainly in branches of Boots and Lloyds. Mr Ho explained that he had been acting as responsible pharmacist (RP) at most of his locum placements, where he was usually the sole pharmacist on the premises. Since the establishment of the RP position in 2009 the duties of the RP have in reality overlapped significantly with those of the SP.

30. Mr Ho said that working on the premises of large multiples enabled him to work in an environment of best practice, where he had reflected about his difficulties in the Royal House Branch and where he had learnt a lot about the best policies and procedures in pharmacies. It had been a significant learning experience. He implemented best practice SOPs and carried out all the responsibilities of a RP. This would be relevant for the duties of a SP.

31. One area he had reflected about in his plans for the 100 hour pharmacy was in relation to staffing. He intended to have two teams each working for 50 hours a week and a third staff pool which could be drawn on if there were staff shortages. He also read up about the legal responsibilities of the RP through the RPS Tool Kit and through the Pharmaceutical Journal

and the Chemist and Druggist. In the hearing the PCT accepted there were no issues as to Mr Ho's competency as a pharmacist, and indeed they accepted he was a good pharmacist.

32. He said he had undertaken considerable training in many areas of professional pharmacy through the CPD scheme. He took courses in Warfarin update, Lithium update, Flomax Relief launch, diabetes, pet medicine, MUR case studies, and Schizophrenia. He also took courses in NHS Information Governance, the Responsible Pharmacist, the 1998 Data Protection Act, Patient Safety and Dispensing errors, the new separate GPhC and RPS, Dispensary and Pharmacy Design for Patient Safety and Control of Entry for Community Pharmacy.

33. He also took courses in smoking cessation, repeat dispensing, emergency hormonal contraception, substance use and misuse, child protection, and skills for the future. All these matters were entered on his CPD record. In addition to the courses on his CPD record he did a considerable amount of other study, reading many articles on law, ethics, patient safety, pharmacy management in pharmaceutical journals. He was ready and willing to work with the PCT in further training. He is undertaking further courses at the present time, including managing teams and people and clinical governance.

34. Mr Ho said all these course were relevant for maintaining and improving the standards of a pharmacist. This in turn was relevant to a SP because an SP also had to be a good pharmacist to be able to perform his duties of devising and implementing SOPs. A number of the courses were specifically relevant to the position of SP, including for example Dispensary and Pharmacy Design, Dispensing Errors and Control of entry.

35. He said the PCT had failed to take into account the changes in regulation of pharmacies since 2005. SOPs have been mandatory since 2005 and there is a professional requirement that RPs inform themselves about them. The RP provisions have been in place since October 2009 with a statutory responsibility inter alia to establish maintain and review SOPs. There are responsibilities for the RP in all major facets of pharmacy work including dispensing, staff management, management procedures and SOPs, and he has successfully undertaken these responsibilities in many of the locum placements over 5 years. All these matters were in reality very relevant for an SP.

36. He had also run three of his pharmacies for many years as Superintendent Pharmacist without any complaint in respect of those three. He had joined a joint buying organisation which provided support and assistance for pharmacists. They provided draft SOPs, as do the National Pharmacy Association. While he had not had to devise many SOPs while a locum, he had acquired extensive knowledge of best practice in SOPS in national pharmacy organisations as an RP. This too would be highly relevant for an SP.

37. There were 10 references produced for the 2005 hearing, and many of the referees had known Mr Ho for a long time. They referred to Mr Ho as professional, reliable, courteous and extremely helpful, hardworking, astute and diligent with high standards of

professional competence. He was described as meticulous with prescribing, as “one of the best” and someone who will go out of his way to provide a caring service. A consultant physician at the local hospital described Mr Ho as efficient and courteous, without a single complaint having been made over many years’ contact.

38. There were further, more recent references sent in in 2011 with his application form. They referred to his performance as a locum and RP. All were excellent. They described him as reliable, diligent, professional and conscientious, a good manager with excellent management skills and a strong understanding of community pharmacy. He was described as fully knowledgeable of company policies and that he follows them to the letter, being reliable and trustworthy.

39. In the two formal references which were attached to the application form he was assessed as excellent in every category which had been ticked and it was said “he is known to be one of the best locums in the area”. He was said to demonstrate excellent leadership and management skills. He has good communication skills. He is accredited in a wide range of services. He is often requested by pharmacies on a regular basis. The PCT accepted he was a good pharmacist.

40. Mr Ho did not accept he had not demonstrated insight. He had accepted responsibility at the Statutory Committee proceedings. He had recognised that seeking to manage 4 pharmacies was too much and he had sold his interests. He had taken steps to improve the management of stock at the Royal Group Pharmacy, the effectiveness of which were recognised by the Inspector. He had reflected on the difficulties at the Royal House Pharmacy, including staffing and SOPs, and he had read many articles in Pharmaceutical journals. His CPD courses had caused him to think about the difficulties he had encountered in the Royal House branch.

41. He did not accept he had shown lack of insight in responding to the PCT’s email asking why he was seeking to own a pharmacy. It had not been made clear that the PCT were seeking information about remedial steps and he had merely answered the question asked. The PCT accepted in the hearing that the consultation process with Mr Ho in respect of his application had been wholly inadequate.

42. In respect of the National Disqualification, Dr Ho submitted that cases such as *Bergauer v Nottingham City PCT* 2009 EWHC 2763 emphasised that conduct should be of the most serious kind in order to warrant a national disqualification. In the *Bergauer* case the performer had been persistently dishonest and had made false allegations against others. Mr Ho argued that with no fitness to practise issues since 2005, very positive references and the acceptance by the PCT that he was a good pharmacist, he did not fall into that category.

Consideration by the Panel

43. We reminded ourselves that the appeal was a redetermination not a review of the PCT decision making process. We considered Mr Ho as a witness and found him to be an honest and open witness, on occasion to the extent of underplaying his case. We concluded that he was suitable to be included on the performers list for a number of reasons. We considered the matter under the heads set out in Regulation 19(4) of the 2005 Regulations.

44. Regulation 19(4)(a). The nature of any offence investigation or incident. We accepted that Mr Ho had taken an unduly long time to bring about improvements in the Royal Branch, but never the less by 2000 he was achieving significant improvements. His difficulties with the Royal branch where there were specific problems were in contrast with his success in the running the other branches without incident. We noted the sanction was a reprimand, which is at the lower end of seriousness for the Statutory Committee. We did not accept the sanction had been imposed solely because of an indication never to own a pharmacy in the future, an indication which was not in fact given in any event. We noted no undertaking had been requested and that the pharmacist appearing with Mr Ho was also given a reprimand. We accepted the Committee must have taken many other matters into account including the nature of the offence and the good references.

45. Regulations 19(4) (b)(c)(d) and (e) - the length of time since any offence, and any other offences. We noted that some of the events giving rise to the reprimand occurred as long as 13 years ago, and that it had been 6 years since the Reprimand. We accepted the passage of time was an important factor. While the mere passage of time did not necessarily remedy poor performance, the absence of repetition over time could be some indication lessons had been learnt. There had been no recurrence by Mr Ho after 2005. We further accepted that the passage of time had been utilised by Mr Ho to reflect on the reprimand, and undertake extensive training which both directly and indirectly assisted him in being a good pharmacist and a good SP.

46. We further accepted that his excellent work as a locum and a responsible pharmacist in an environment of best practice by the multiples will assist him to perform his functions as an SP well. We accepted many of the functions of an RP and an SP overlapped or interacted with one another. We noted his long experience of running three of the four pharmacies successfully as an SP. We concluded it was significant that not only did he have no sanctions imposed on him since the reprimand but that his professional abilities appear to have been widely acknowledged as good or excellent.

47. Regulation 19(5) - The overall effect of all matters considered. We accepted that Mr Ho had shown insight. He had recognised that the 4 pharmacies were too much for him and had disposed of his interests. He had fully engaged with CPD and other training over a significant period of time and was ready and willing to cooperate with the PCT in further training. We accepted he had reflected on the shortcomings of the Royal House Branch and had learnt lessons through comparisons with best practise in the branches he worked in as a locum. We further accepted that he had reflected on the new SP position in that he has selected some appropriate CPD courses and undertaken other reading over a period of time specifically with this function in mind. For all these reasons we do not accept he is

unsuitable to be on the performers list and we allow the appeal. Because we have allowed the appeal, the application for a national disqualification must be refused.

WE ORDERED:

1. The appeal be allowed and Mr Ho to be admitted to the PCTs performers list.
2. The application for a national disqualification to be refused.

Judge John Burrow



11.10.11

