PRIMARY HEALTH LISTS

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

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

CASE NO [2016] 2743.PHL

Heard on 28 and 29 November 2016 & 7 June 2017

Before:
Judge Mr H Khan
Mr M Green (Specialist Member)
Ms L Jacobs (Lay Member)

BETWEEN:

Mrs Leila Ayandeh

Appellant

-v-

NHS Commissioning Board (NHS England) North (Yorkshire and Humber)

Respondent

DECISION

The Appeal

1. This is an appeal by Mrs Leila Ayandeh ("the Appellant") 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") on 2 June 2016 to impose conditions upon her inclusion on the Performers List.

Attendance

2. The Appellant was represented by Ms Nicola Newbegin (Counsel). The Appellant attended throughout the hearing and gave evidence. The Appellant's witnesses were Ms Helen Nagaj (Local Dental Adviser & the Appellant's Mentor) and Mr Nicholas Baker (General Dental Practitioner).

3. The Respondent was represented by Mr Peter Anderson (Counsel) The Respondent called the following witnesses; Mr Paul Stewart, (Programme Manager-Revalidation), Mr Richard Berry (Clinical Dental Adviser), Mr John Hayes (Clinical Dental Adviser) and Mr Terry Brown (Dental Workforce Support Adviser, Health Education England).

The Hearing

4. The hearing took place on 28 & 29 November 2016 and 7 June 2017. Following the hearing, the parties agreed dates for the filing and service of written closing submissions. The last of these was received on 5 July 2017

Background

5. The Appellant is a General Dental Practitioner. She has been registered with the General Dental Council ("GDC") since 2009.

6. The Appellant was subject to a lengthy GDC investigation in relation to performance issues following a referral in 2011. As part of that investigation, the Appellant was subject to an assessment from the National Clinic and Assessment Service (NCAS) from February to March 2013. This was based on an assessment of 30 records and 18 observations over three days.

7. A substantive hearing before the Professional Performance Committee ("PPC") of the GDC took place on 28 September 2015. At that hearing, the appellant admitted in full all allegations, albeit, that not all of the allegations were found proved.

8. The PPC considered that the Appellant's fitness to practice was impaired by reason of her deficient professional performance and directed that her registration be subject to 12 conditions for a period of 18 months. The conditions included a requirement that the Appellant's work be supervised by another dentist who has to be on the premises at all times. As a minimum, this supervision requires the Appellant's work to be reviewed at least once a week via one to one meetings and case based discussions. The supervisor has to provide a three monthly report to the GDC. The Appellant is also required to keep her professional commitments under review and limit her dental practice in accordance with her supervisor's advice.

9. The PPC review decision supplied by the Appellant sets out that the PPC comprehensively reviewed the Appellant's case on 13 April 2017 and determined that those conditions remained appropriate to address the deficiencies found in her practice and to protect patients. The PPC, therefore, determined to impose conditions on her registration for a further period of 12 months.

The PLDP Decision

10. On 11 August 2014, a PLDP imposed conditions on the Appellants inclusion on the Performers List pending the outcome of the GDC hearing.

11. On 27 May 2016, a PLDP considered the proposal to impose conditions on the Appellant's inclusion on the Medical Performers List on the grounds of efficiency. Having considered all the written and oral representations in the case, the PLDP decided that it was appropriate, necessary and proportionate to impose conditions on the continued inclusion of her name in the Medical Performers List to prevent any prejudice to the efficiency of services.

12. There were a number of conditions imposed but the Appellant only challenges conditions (d), (f) and (g). Conditions (a), (b), (c), (h), and (i) were not in dispute. We, therefore, do not consider it necessary to set out those conditions which were not in dispute. By the time of the hearing in June 2017, the revised wording of the conditions in dispute was as follows;

Conditions	
(d)	Undertake suitable training in your practice with regards to the practice's PDS/GDS agreement.
(f)	You should agree a plan for a phased return to work period prior to the commencement of employment which is agreed between your GDC supervisor, NHS England Case Liaison Officer and Workforce Support Adviser at Health Education England, and limit your dental practice according to your GDC supervisor's advice. You should submit this plan to your NHS England case liaison officer via email to england.YHPP@NHS.net
(g)	During the phased return to work, and in accordance with the advice given by Mr Terry Brown, you should work for a minimum of 2.5 days (18 hours) per week throughout this period. This period will involve: (i) A direct observation of your clinical practice undertaken by a NHS England dental adviser during which your treatment of patients attended for NHS dental care is reviewed. This would include an observation of each of the following procedures and techniques; 1. A root canal (endodontic treatment) 2. An extraction 3. A restoration 4. A crown preparation 5. Radiographic positioning and techniques The timing of these observations will be agreed with you, your GDC supervisor and your case liaison officer. It is anticipated

	that this will be within the first three months of commencement of employment and should form part of the return to work plan. (ii) A record card audit of 20 randomly selected records of patients for whom you have provided treatment, undertaken by an NHS dental adviser.

The Regulatory Framework

13. Regulation 10 of the NHS (Performers Lists) Regulation 2013 provides:

> (1) Where the Board considers it appropriate for the purpose of preventing any prejudice to the efficiency of the services which those included in a performers list performs or for the purpose of preventing fraud, it may impose conditions on a Practitioner's –
>
> (a) initial inclusion in a performer lists; or
> (b) continued inclusion in such a list.

14. Regulation 17(4) provides that on appeal the First-tier Tribunal may make any decision which the PLDP could have made. It is common ground that the First-tier Tribunal is not required to review 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.

15. The burden of proof lies on the Respondent and the standard of proof is the balance of probabilities. If it is considered necessary and proportionate to impose conditions, they may be the same as those imposed by the PLDP, or such other conditions as the First-tier Tribunal considers appropriate.

Evidence

16. We received an indexed bundle together with skeleton arguments from both parties. We do not rehearse their contents as these are a matter of record.

17. Mr Paul Stewart submitted that the GDC is concerned with a practitioner's fitness to practice but that NHS England need to assure themselves of a practitioner's fitness for purpose. He described this as meaning that the practitioner is able to fulfil the terms of their contract and, in his view, this was a much higher threshold than that of the concept of fitness to practice. He acknowledged under cross-examination that the PLDP did not have all the information that was before the GDC. He was aware of the NCAS report but had not read it.

18. He set out that the present condition requiring the Appellant to work for a minimum of 2.5 days (18 hours) per week had been reduced from the initial proposal 30 hours or four days per week. The difficulty was that there was

no refresher scheme in the dental profession. This had been a locally agreed condition in order in order to allow a practitioner to regain their skills as quickly as possible in general dentistry. In his view, it was important that the level of work that was undertaken allowed for a repetition of skills and practice in a suitable environment. In his view, the role that the Appellant was providing previously, which involved scaling and polishing, was not that of a full dental practitioner.

19. Mr Berry confirmed that he had met with the Mrs Ayandeh in November 2013, October 2014 and then February 2016. He acknowledged that the Appellant had taken initiatives to support a move back into clinical practice by engaging with Terry Brown in working on her PDP, updating her CV and identifying the opportunity to shadow an experienced practitioner. He also acknowledged that she had undertaken substantial CPD and had received a good reference from Dr Ziaras.

20. However, whilst he acknowledged that she had undertaken significant amount of CPD, he pointed out that the CPD would not address her failings. For example, she was singled out for not letting the local anaesthetic take effect and Dr Berry did not think that any CPD training would be able to address that. That could only be addressed by patient contact. Furthermore, he described Ms Ayandeh as a "*failing dentist*" and therefore submitted that the conditions imposed were appropriate and necessary. He went through each condition and set out his views.

21. Mr Berry confirmed that all NHS performers have an induction when joining a practice and that, as part of the induction, training is provided on NHS rules and regulations. This condition was appropriate in her case as she had not worked in an NHS practice for over two years. The purpose of the condition was to ensure that she was supported. He also confirmed that where a practitioner returns to NHS dental practice after a significant break, the area team routinely request evidence of training in NHS rules and regulations. Furthermore, all European dentists have that as part of their conditions of practice in the UK.

22. The idea behind such a condition is to ensure that performers are supported back into NHS dental practice. In his view, he expected that adequate training could be completed in two sessions. Furthermore, he accepted that the two-day course that the Appellant was booked on 9 & 10 February 2017 entitled NHS Return to Work Course: Regulations and Complaints Management Course would meet this requirement.

23. Mr Berry set out that the purpose of the phased return was to ensure that the Appellant was provided with a support network that all the relevant parties agreed on from the outset. He anticipated that this would be agreed quickly by email. There was a team of dental advisers who would be able to consider a phased return to work plan if the case liaison officer was unavailable for any reason. If an agreement could not be reached, then the workplace supervisor and the case liaison officer would be able to seek

advice from the workforce coordinator and the GDC caseworker, to explore the difficulties and to look for an acceptable way to move forward.

24. The intention of the phased return was to ensure that the Appellant finds herself in a supportive environment with a mentor who understands their obligations in support of the mentee and the mentee does not find herself thrown in at the deep end. Furthermore, it would also identify how the practice team would work together, what level of experience any accompanying nurse would have and what work was needed on the weak areas. The idea was that it would develop skills and confidence.

25. Mr Berry identified that the requirement for the 2.5 dates per week was based on the advice of Mr Terry Brown. It imposed in order to ensure that there was adequate exposure to clinical experience on a weekly basis. In his view, without this level of commitment, there was a danger that there would not be enough momentum in the development of skills to reinforce the learning. He identified that there were three other dentists working with such conditions, some of which are part-time (3 days per week).

26. According to Mr Berry, the direct observation of the five procedures were selected to provide an opportunity to see the practitioner working across a range of treatments in areas which give an overall view of clinical skills, communication and record-keeping. These treatments would form the basis of assessment for practitioners undergoing Foundation Training or Training Equivalence and would be a good way to identify strengths and weaknesses. The list of procedures to be observed would allow the NHS to identify that the areas of poor performance noted in the NCAS assessment have been addressed, or that further learning was required in order to support the Appellant back to good practice.

27. Mr Berry explained that the record card audit is a powerful tool in helping to understand the approach taken to clinical practice by a performer. It helps identify if a practitioner was following good practice and allowed the auditor to review radiographs which gave an indication of the practitioner's ability to interpret them. The record card audit would be conducted by the NHS England Dental Adviser as this individual had been provided with training in the use of this particular audit tool and reporting system. The use of the NHS England Dental Adviser would also allow standardisation to the audit process, due to the training that has been provided and reduces the risk of distortion of the results through lack of clarity in the interpretation of data.

28. Mr Terry Brown confirmed that he had given evidence on behalf of the Appellant at the GDC. He had reached the conclusion around the minimum hours that were required per week. He had based this on the requirement for dentists who are new to the NHS and new to working in England. They have a minimum requirement of three days. However, he had reduced this by 0.5 days, in the Appellant's case, in order to reflect the experience that the Appellant has in NHS primary care. In his view, this was the "*ideal"* position. It would allow her the opportunity to gain relevant experience. For

example, if there were problems following tooth extraction, the patient could be seen by the Appellant on the following day.

29. Furthermore, this would also allow the Appellant time to build up a book of patients, plan and deliver the treatment plan and, in short, see the treatment from start to end. Under cross-examination, he accepted that he could support one day but if faced with the choice, his *"ideal"* position was 18 hours which would allow the Appellant sufficient time to address her remediation needs. He acknowledged that she had undertaken substantial CPD but this was in line with other dentists who were returning to work.

30. Mr Heyes submitted that the Appellant was not a normal returner and that she did need a different degree of supervision given the GDC concerns at the potential for patient harm. The previous deficiencies in her skills as found by the GDC were worrying and, essentially included, in his view, practical shortcomings of the simplest of nature.

31. In his view, it was appropriate for her to attend a course to refresh herself on the rules and regulations pertaining to the delivery of NHS dentistry. These changed frequently and would be very different now as compared to 3 years ago. In his view, such training could involve simply sitting in with the practice manager/receptionist to appreciate and understand the logistics and workings of the NHS system including units of dental activity accrual, form submission to the dental payment agency, patient charges, banding of treatment etc. In his view, this could be completed within a half day.

32. Furthermore, the requirement around the observations was not intended to be obstructive but aimed at protecting the patient whilst supporting the practitioner in a return to work. He concluded that less than 18 hours would not allow the Appellant sufficient opportunity to build up a patient base and improve the quality of treatment. In his words, "*the more you do the better you get"*.

33. Mr Heyes set out that the PLDP had deemed that close supervision in the NHS should entail some observation of the delivery of care in a phased return to work. In his view, given the major concerns highlighted regarding the Appellant's clinical competencies, even in performing the most basic of clinical procedures, he felt she would benefit from that level of supervision. Furthermore, a graduate in the first year of Foundation Training would be subject to a minimum of 18 such procedures (DOPS - Directly Observe Procedures) but the Appellant was being asked to perform just five. These were highlighted as common examples of treatments in the everyday delivery of dental care.

34. In his view, they were not onerous in number or nature. He made it clear that these were not intended as an assessment, as in the NCAS situation but as a way of supporting the Appellant in her return to clinical practice. They were not intended as a bar or impediment to return to work but as an excellent development opportunity for the Appellant whilst providing the NHS with the assurance that patients would be safe.

35. The Appellant submitted that she was happy to do whatever she needed to. She was passionate about dentistry and wanted to get back to work. She had undertaken substantial CPD including shadowing Dr Ziaras. She confirmed that she had qualified in Prague in June 2009. She arrived in the UK in 2010. She accepted that she had not worked in the NHS for over 2 years.

36. The Appellant admitted that she had made mistakes. However, she wanted to look forward and improve herself. She had tried her best and accepted that there had been failings.

37. Her position was that whilst she was happy to do whatever was needed, she did not want any further conditions to be imposed. She believed that any more conditions over and above those imposed by the GDC would put prospective employers off from employing her. However, she confirmed that that not a single prospective employer had told her that they would not employ her because of the NHS conditions, which she had been disclosing in her job application. Furthermore, the feedback that she had had in relation to the jobs that she had applied for had referred to the supervision requirements imposed as part of the GDC conditions as a barrier to her being successful with the job application.

38. She confirmed that she had never had problems claiming costs from the NHS. In previous jobs, if she was not sure, she would ask the practice manager. She had attended a course in February 2017 regarding rules and regulations. She accepted that everyone should have training on NHS rules and regulations.

39. The Appellant confirmed that she was happy to work any hours. The primary purpose for her was to get a job. If the work was local, she would be willing to work five days. If the work involved travelling, then she would be seeking two days. This was because she had young children and did not wish to be away from home for longer than she needed. She wanted the 18 hours to be flexible.

40. At the reconvened hearing on 7 June 2017, the Appellant confirmed that she had continued to apply for jobs. She set out the jobs that she had applied for. In November 2016, she had been liaising with the Gainsborough dental practice regarding a possible role for three days a week. However, the proposed supervisor was not approved by the GDC on the grounds that the supervisor had not been registered with the GDC for five years.

41. In January 2017, she was offered a role at the Cosmetic Dental Practice in Hull. This was for the role of a locum GDP for two days per week. The proposed supervisor Dr Paras Graces was approved by the GDC. However, Dr Graces changed her mind about acting as a supervisor given the commitment that was involved.

42. In February 2017, the Appellant attended an interview in Kent for an NHS job for three days a week. This involved an eight-hour round trip. However, her circumstances changed and the role was no longer available for three consecutive days and she had to decline the job offer before the supervisor was proposed to the GDC. It was difficult for her to make that long journey twice a week.

43. In March 2017, she was offered a role at Mint Dental in Barrow in Furness. This was a part-time role for three days a week at an NHS practice. This involved a six-hour round trip. She was hesitant to turn this down and so sought approval of the proposed supervisor, Ms Ann Hatfield. The GDC approved Ms Hatfield on 3 March 2017. However, the Appellant decided she would turn it down given the lengthy commute and time she would have to spend away from her two children.

44. In March 2017, she was offered a role at Genix in Hull. The proposed supervisor was Mr Steven Warner. The Appellant confirmed her solicitor was taking steps to liaise with NHS England to ensure that they were content for her to work at Genix. This post was for five days per week.

45. In May 2017, she had been offered a job at Genesis Dental in Hull. This is for three days a week. She was waiting for the practice to provide the name of a suitable supervisor. She was hopeful that she would shortly be able to start work at either Genix or Genesis.

46. The Appellant set out that being observed makes her nervous. Her experience with NCAS was stressful. Whilst observations made a nervous, she would be willing to be observed but did not want this requirement imposed as a condition. She thought it was more appropriate for someone from the practice to observe her. She didn't mind being observed as a trainee or on a course. The Appellant confirmed that she had no objection to the audit requirements sought.

47. The Appellant's evidence focused on the impact that the additional conditions over and above the ones imposed by the GDC, would have on her ability to secure employment. She confirmed that she was willing to undertake all the requirements but simply did not wish for them to be formalised as part of any conditions.

48. A GDC review hearing had taken place on 13 April 2017. The Appellant set out that although the review committee was impressed with her remediation efforts, it considered it necessary to maintain the GDC conditions. The Appellant provided the Tribunal with a bundle of documents including confirmation of the courses she had attended and a remediation table which sets out the steps that she has taken to address the areas of deficiency found by the GDC in October 2015.

49. The Appellant confirmed that the main obstacle to her getting a job was the GDC conditions. Not one dental practice had told her that it was the NHS conditions that were preventing her from getting a job.

50. Ms Helen Nagai, accepted that the proposed condition D was reasonable. Under cross-examination she accepted that condition F was reasonable. She considered that it was reasonable for there to be input into the phased return to work plan from the GDC, HEE and the NHS. Her main concern was around condition D. She was concerned that there would not be enough time within the first three months to arrange the observations of all the treatments. There would need to be flexibility around the observations. If there was flexibility, then she did not think it was unreasonable to have the observations. She confirmed that the Appellant had never complained about Mr Berry.

51. Ms Nagai's main objection was in relation to the 18 hour minimum working requirement. In her view, this decreased the Appellant's chance of getting a job and denied her the opportunity to work, for an initial one or two days per week in order to build up a relationship with the practice. In her view, this could help her prove herself to be a valuable member of the team and lead to her being offered increased hours. She felt this had no impact on patient safety. She suggested an alternative minimum of two days per week. This would be less than the 18 hours. However, she accepted that this was a figure that she "*plucked out of the air"* and there was no reasoning behind it. Ms Nagai was also not aware of any practice that had refused to employ the Appellant based on the NHS conditions.

52. Mr Barker confirmed that he had never had a face-to-face meeting with the Appellant when preparing his expert report. He did not think condition D, even in its revised format should be included. The Appellant had completed the two day NHS return to work course on regulations and complaints management. In his view, she would have covered everything that she needed. In his view, there was no need to have any additional condition covering that.

53. Under cross examination, he accepted that condition F was reasonable as long as it was separate from condition G. He did not think the observations should be of the type as set out in condition F. In his view, the criticisms in the NCAS report related mainly to radiographic skills which, in his view, were quickly and easily remedied by the use of beam - aiming devices and simple practise.

54. He disagreed with a minimum 18 hours requirement. He was not clear how setting a minimum of 18 hours clinical work per week would ensure patient safety. He accepted that she needed to practice her skills but did not consider it appropriate to set a minimum hours requirement. He was asked on a number of occasions by Mr Anderson as to what minimum requirement he would recommend. He explained that this would depend upon the individual involved and would be entirely subjective.

55. Under re-examination from Ms Newbegin, he considered that the minimum starting point should be a session. Each session would last half a day. His opinion was that a safer approach would be to permit a gradual

reintroduction to clinical duties. This would allow a focus on assessment and treatment planning exercises involving both supervisor and self-assessment including identifying improvement in skills and competencies. This should be a flexible arrangement, agreed between the Appellant and her clinical supervisor.

The Tribunals conclusions with reasons.

56. We took into account all the evidence that was included in the hearing bundle, presented at the hearing as well as the closing submissions. We have summarised the evidence insofar as it relates to the issues we determined.

57. We were provided with a copy of the NCAS report. This was a draft report dated 7 August 2013, prepared for the GDC, for use by the investigating committee. Ms Newbegin referred to the report in her cross-examination of the Respondent's witnesses. This included drawing the witnesses' attention to the examples of Dr Ayandeh's satisfactory practice, such as team work.

58. However, Ms Newbegin submitted, at the beginning of the Appellant's evidence that the Respondent should not be permitted to rely on the NCAS report for matters which were not taken forward to the GDC. Mr Anderson sought to rely on the NCAS report. His position was that whilst the Respondent would not be relying on those matters which were found not proven at the GDC, nevertheless, they did wish to put to her matters, around unsatisfactory practice, which were not taken forward to the GDC. We adjourned and considered the issue.

59. We concluded that the Respondent should be allowed to rely on the NCAS report. We would attach the appropriate weight to the parts of the NCAS report that were not taken forward to the GDC, once we had heard and established which parts the Respondent sought to rely on. Furthermore, we did not consider it to be fair if the Appellant was able to rely on the aspects of satisfactory practice but was then arguing that the Respondent could not rely on the unsatisfactory practice.

60. We found the majority of the witnesses to be clear and credible. Their evidence was well reasoned and they recognised the limitations of their evidence where it was appropriate. We also found that the Appellant was honest in giving her evidence. She, very fairly, recognised her failings and wanted to look forward.

61. We observed that the Respondent's witnesses all made it clear that the purpose of the conditions was to assist the Appellant's remediation and we found them to be sincere in their efforts to assist the Appellant. The Respondent's witnesses all made it clear they wanted the Appellant to be supported so that she could gain the skills and confidence necessary for good practice.

62. We found the evidence of Mr Barker to be somewhat confusing. We found Mr Barker's replies to questions from the Tribunal and under cross-examination to be evasive and non-committal. For example, he was asked on a number of occasions to what minimum hours requirement he would recommend. He referred to this being a subjective matter taking into account a number of factors but avoided answering the question directly in response to the Respondent's Counsel until he was asked by the Appellant's Counsel. Furthermore, he had never met the Appellant face to face and we, therefore, preferred the evidence of Mr Brown and Mr Berry who had both worked with the Appellant.

63. We reminded ourselves that the Appellant practised in the NHS for around three years in total prior to October 2013. Since then she has not worked as a dentist save for one month in early 2014 when she worked 1 to 2 days per week as a locum. Therefore, she has now spent longer out of the NHS than she has spent in it. Furthermore, the Appellant in her own evidence, accepted that she had made mistakes and accepted there had been failings but wanted to look forward and improve herself.

64. We concluded that the proposed conditions (d), (f) and (g) were appropriate for the purpose of preventing any prejudice to the efficiency of the services which those included in the performers list perform. We concluded that these conditions as revised were clear, relevant, workable, verifiable, necessary and proportionate. Our conclusions in respect of each condition are set out below.

Condition D

65. We concluded that this condition was appropriate for the purpose of preventing any prejudice to the efficiency of the services which those included in the performers list perform. Whilst we acknowledged that the Appellant had completed a two day "NHS return to work course: regulations and complaints management course", the wording of the condition was revised, from that originally imposed by the Respondent, in recognition of the fact that she had attended this two-day course.

66. We noted that it was accepted, on behalf of the Appellant, that the requirements under this condition would "occur in any event", in the course of any employment. Furthermore, Ms Nagai, the Appellant's own mentor, said in terms that she did not object to this condition. The only objection came from Mr Barker, who also acknowledged it would happen "de rigueur" and did not see how we could go to efficiency to include a condition in respect of it.

67. In our view, we considered the revised condition appropriate given that the Appellant has not participated in a dental practice with a PDS/GDS agreement for a considerable period. We had no reason to doubt the assurances provided by the Respondent that the training is not onerous and will simply consist of a short session with administrative staff in the practice that the Appellant joins.

68. It may be that Mr Barker is correct when he says that, save for the number of UDA's to be completed, GDS/PDS contracts do not vary from practice to practice and, therefore, what is covered by the regulations, and therefore attendance on the February course means that she is up-to-date. However, it is clear that this is not the case in practice, as it was agreed by both the Appellant and the Respondents that this would occur in any event. In our view, the Appellant's lengthy absence from a dental practice with a PDS/GDS agreement, makes this condition appropriate for the purposes of preventing any prejudice to the efficiency of NHS dental services.

Condition F

69. We concluded that this condition was also appropriate for the purpose of preventing any prejudice to the efficiency of the services which those included in the performers list perform. We did not accept the arguments, put forward on behalf of the Appellant that this is onerous and that it may be logistically difficult to agree such a plan between the identified parties.

70. In our view, this condition was not onerous and given that the Appellant has accepted her past failings, the principle of a phased return to work, is in our view, sensible and appropriate. Furthermore, this will allow other external input into the phased return to work programme and we consider this appropriate given that, in the past, the Appellant has, according to the NCAS report, rated her abilities to be greater than they actually were.

71. Ms Nagaj also accepted that there should be some form of return to work programme. We agreed that the principle of the phased return is a simple idea which merely involves doing simple procedures whilst observed, then simple procedures unobserved, then adding in more complex procedures when ready. Both Ms Nagaj and Mr Barker accepted that they had no objections to condition F on its own and their concerns appeared to be based on an incorrect assumption that this was directly linked to condition G and, in particular, whether all the specific treatments referred to condition G would need to be undertaken in the first three months of employment.

72. We agreed with the Respondent's submission that there is nothing unworkable about such a process. We also considered that it would be entirely appropriate to involve Mr Berry, who it has to be said is very familiar with the Appellant's case, as well as Health Education England.

73. Further, whilst the Appellant was concerned about any delay in agreeing the phased return to work, we had no reason to doubt the assurances provided by the Respondent that both it and the Health Education England were large organisations with support staff and holiday cover. This could be done through the use of modern communication practices such as email. We noted that the condition also provides an email address.

74. The condition also makes it clear that the Appellant was obliged to limit her dental practice according to her GDC supervisor's advice. In our view, it

was entirely appropriate for the purpose of preventing any prejudice to the efficiency of NHS dental services.

Condition G

75. As Mr Anderson submitted, there are three parts to this condition. These are;

    a) a minimum 18 hour working week during the return to work period
    b) direct observation of the five procedures by Mr Berry
    c) record card audit of 20 records by Mr Berry

76. We will deal with each part as this is the way it was presented to us at the hearing.

    (a) A minimum 18 hour working week during the return to work period

77. We agreed that it was, as Mr Anderson put it, "common sense" that there must be a minimum period in which the Appellant must work per week. The rationale for having a minimum number of hours is clear. This will ensure there is adequate exposure to clinical experience on a weekly basis. It supports the development of confidence and provides an opportunity for learning requirements to be identified, developed and put into practice. We agreed that without this level of commitment, there is a danger that there will not be enough momentum in the development of skills to reinforce the learning.

78. Furthermore, in our view, the Appellant cannot return to her 2013 level of performance and then surpass it without sustained practice. The idea of a minimum number of hours was accepted by both Mr Barker and Ms Nagaj. The issue was one of what constitutes the minimum.

79. We preferred the evidence of Mr Terry Brown on this issue. He was someone who was very familiar with the Appellant, having met her many times. As we have set out above, Mr Barker had never met the Appellant face to face. Furthermore, Mr Brown's assessment was based on an assessment of the Appellant's previous clinical experience and experience of working in the NHS primary care dental service.

80. Mr Brown had extensive experience as he had been a member of the Yorkshire and Humber Deanery Competency Assessment Panel for nearly 10 years. The panel made recommendations on training and supervisory requirements for experienced dentists new to working in the NHS who do not have a Vocational Training certificate and are not exempt from the requirement to have one. The Competency Assessment Panel had a minimum working requirement of three supervised working days for dentists who are new to the NHS and new to working in England. In his recommendation, this had been the starting point. His recommendation for the Appellant was 0.5 days less because of the experience she has in NHS primary care.

81. This was in our opinion, a well reasoned and thought out rationale, relating the number of minimum number of hours specifically to the Appellant, although we acknowledge that he accepted that he could support one day he made it clear that if faced with the choice, his *"ideal"* position was 18 hours in these circumstances. In our view, having considered the circumstances of this case, we agreed with his analysis that the Appellant needed sufficient time to address her remediation needs.

82. Mr Brown's recommendations were in contrast to those of Mr Barker and Ms Nagaj. Mr Barker referred to any such recommendations as being subjective and dependent upon the Appellant as an individual but conceded that he had never met the Appellant. Furthermore, his response as to the minimum number of hours was evasive, despite being given multiple opportunities to set out his recommendation. In the end, he put forward half a day (described as one session) but did not, in our view, provide an adequate explanation as to how he reached that figure in this case. He also conceded that this might increase to 2 days (four sessions).

83. Ms Nagaj, on the other hand, clearly accepted that her minimum recommended hours of two days was "*plucked out of the air".* In the circumstances, we therefore, prefer the evidence of Mr Brown on the basis that he was familiar with the Appellant and provided a clear justification for his conclusions.

84. We agreed that this minimum period allow the Appellant time to build up a book of patients, plan and deliver the treatment plan and, in short, see the treatment from start to end. We did not consider than less 18 hours would not allow the Appellant sufficient opportunity to build up a patient base and improve the quality of treatment.

85. We rejected the Appellant's contention that all the conditions and in particular, the 18 hours minimum, amounted to a suspension. We accepted the Respondents assertion, that this case falls more into the "more difficult to find a job" category but not the "impossible to find a job" category. Whilst we acknowledge that the Appellant had made a number of unsuccessful job applications, the Appellant, in her oral evidence, clearly acknowledged that there was not one single instance where any employer cited the NHS conditions as a problem. In fact, the feedback nearly always related to the GDC conditions and especially the close supervision as being an issue.

86. Further, the Appellant has now secured five job offers. These were at Gainsborough (three days), Kent (three days), Barrow (three days), Genesis in Hull (4 days) and Genix (Hull) full-time. The position at Genix is proceeding and the Appellant has Genesis as a backup. Furthermore, the evidence about other dentists (one with similar conditions to the Appellant and 18 hours, 2 dentists with minimum 30 hours condition) who secured employment demonstrated it was possible to get a job with these or other similar conditions.

(b) Direct observation of the five procedures by Mr Berry

87. The proposed observation concerns 5 techniques relating to the basics of dentistry. In our view, the five techniques correlate to the operative skills deficit identified by NCAS. For example, root canal (endodontic treatment - example 12), an extraction (examples 5/6/13/14), a restoration (examples 3/4/7/8/9/10), a crown preparation (example 15- this relates to crown reduction rather than preparation) and radiographic positioning and technique (examples 1/2).

88. We were somewhat surprised as to Mr Barker's reluctance to accept that examples 5/6/13/14 relate to poor extraction technique and examples 3/4/7/8/9/10 to poor filling technique. In our view, these were clearly the technique for successful tooth extraction involves a number of distinct stages. These include, amongst others, the satisfactory provision of local anaesthesia and correct selection and safe use of instruments such as luxators, elevators, forceps. Failure in in one of exhibits poor extraction technique. Similarly, not allowing local anaesthetic to take effect before removing caries from a tooth with a rotary instrument, failing to remove caries from the enamel-dentine junction or placing a glass-ionomer restoration in a wet environment exhibit poor filling technique.

89. The GDC findings demonstrated failings relating to "basic and fundamental areas of dentistry". In our view, these proposed observations relate to the basics of NHS services and the Respondent has a duty to ensure that those services are provided efficiently. Further, this was less than the minimum of 18 such procedures (DOPS) for first year graduate trainees and the Appellant was being asked to perform just five.

90. These were highlighted as common examples of treatments in the everyday delivery of dental care. We did not accept the argument put forward that any such condition cannot be imposed on the grounds that the GDC did not ask for direct observation. This is based on an incorrect premise that the GDC are exercising a superior jurisdiction to this Tribunal. Furthermore, regulation 10 does not impose a restriction on the Respondent imposing conditions where the practitioner's regulatory body has imposed conditions.

91. The Appellants concerns (as raised by Ms Nagaj) about practically being able to observe all five techniques in a three-month period are, in our view, adequately covered by the wording that it is "*anticipated"* that this will be within the first three months. This makes it clear that this is not definitive and, as Mr Anderson submitted, the three-month period is directory and not mandatory. Mr Anderson made it clear that the Appellant will not be in breach of the condition if all the observations cannot be undertaken within the first three months. Further, Mr Barker and Ms Nagaj accepted the observation condition on the basis that the three months is indicative.

92. Whilst we acknowledge the Appellant may become nervous about being observed, as she found the whole NCAS observation stressful. Nevertheless, there is a difference between the NCAS observation and

observation under this condition. This observation will be carried out by Mr Berry. Mr Berry is known to the Appellant and she finds him supportive. Mr Berry made it clear that he would not treat the observation as a pass or a fail but would provide help if the Appellant was deficient. NCAS, on the other hand, consisted of a team of 2 to 3 people and were strangers to her. The NCAS assessment was very much a pass or fail assessment.

(c) Record card audit of 20 records by Mr Berry

93. The Appellant and Mr Barker accepted that there should be a record card audit. The issue was by whom it should be undertaken. We concluded that it should be the NHS dental adviser, Mr Berry. The NHS dental adviser has been provided with training in the use of this particular audit tool and the reporting system. The use of the dental adviser provides for standardisation to the audit process due to the training that has been provided and reduces the risk of distortion of the results through a lack of clarity in the interpretation of the data. Furthermore, in our view, this proposal is preferable to the suggestion put forward by the Appellant that the practice should undertake it.

94. In our view, the Respondent has an independent interest in verifying the Appellant's ability to practice and the condition also addresses the issue raised by the Appellant, in relation to the other conditions, and reduces the obligations it places on the employing practice.

95. We concluded that all the conditions in dispute were appropriate for the purpose of preventing any prejudice to the efficiency of the services which those included in the performers list perform. In our view, the conditions were clear, relevant, workable necessary and proportionate taking into account the circumstances of this case.

96. We considered whether or not time limits should be imposed on the conditions. We declined to impose any time limits on the conditions. We did so on the basis that Mr Heyes made it clear that the conditions were subject to a 12 month review period. The Appellant now has job offers. Furthermore, the Appellant will now be working on patients under the same pressure as other dentists. It is too early to say how this will work and this will very much depend on how well the Appellant performs. We, therefore, at this stage, declined to impose any time limits on the conditions.

97. We considered the circumstances of this case and concluded that the conditions were proportionate, necessary and workable. We concluded that they were appropriate for the purpose of preventing any prejudice to the efficiency of NHS dental services for the reasons set out above.

Conclusion

98. We concluded that it was necessary for the Appellant's name on the Performers List be subject to the conditions as set out below for the purpose of preventing any prejudice to the efficiency of the services which those

included on the performers list perform. The relevant conditions are as set out below;

Conditions	
(a),(b),(c),(e) (h), and (i)	As set out in the Decision Letter dated 2 June 2016.
(d)	Undertake suitable training in your practice with regards to the practice's PDS/GDS agreement.
(f)	You should agree a plan for a phased return to work period prior to the commencement of employment which is agreed between your GDC supervisor, NHS England Case Liaison Officer and Workforce Support Adviser at Health Education England, and limit your dental practice according to your GDC supervisor's advice. You should submit this plan to your NHS England case liaison officer via email to england.YHPP@NHS.net
(g)	During the phased return to work, and in accordance with the advice given by Mr Terry Brown, you should work for a minimum of 2.5 days (18 hours) per week throughout this period. This period will involve: (iii) A direct observation of your clinical practice undertaken by a NHS England dental adviser during which your treatment of patients attended for NHS dental care is reviewed. This would include an observation of each of the following procedures and techniques; 6. A root canal (endodontic treatment) 7. An extraction 8. A restoration 9. A crown preparation 10. Radiographic positioning and techniques The timing of these observations will be agreed with you, your GDC supervisor and your case liaison officer. It is anticipated that this will be within the first three months of commencement of employment and should form part of the return to work plan. (iv) A record card audit of 20 randomly selected records of patients for whom you have provided treatment, undertaken by an NHS Dental Adviser.

Judge H Khan
Lead Judge Primary Health Lists/Care Standards
First-tier Tribunal (Health Education and Social Care)

Date Issued: 31 August 2017