Primary Health Lists

The National Health Service (Performers Lists)(England) Regulations 2013

Appeal heard at the Royal Courts of Justice, 19 June 2017

BEFORE
Tribunal Panel
Judge Hugh Brayne (Judge)
Dr Elizabeth Walsh-Heggie (Specialist Member)
Mrs Lorna Jacobs (Specialist Member)

[2017] 2949.PHL

BETWEEN:

Dr Babtunde Adesanya Oshinusi

Applicant

v

NHS Commissioning Board (South East)

Respondent

DECISION

Preliminary matters

1. It was agreed before the hearing started that Dr Oshinusi could submit late written evidence, comprising 16 pages now inserted after document D105 in the Tribunal bundle.

2. Mr O'Connell confirmed that in his view Judge Melanie Lewis, in directions issued on 25 May 2017, had dismissed the strike out application made by the Respondent in the course of the telephone case management hearing which led to the 25 May directions. We therefore did not consider that application further.

3. In accordance with those directions the hearing proceeded without additional witnesses, though in clarifying matters with Dr Oshinusi we necessarily heard evidence from him.

Background to the appeal

4. Dr Oshinusi has worked as a partner in a GP practice since October 2003.

5. He was suspended from the medical performers list (MPL) on 27 July 2010, following an allegation of sexual assault on a patient. He was acquitted of this charge on 1 November 2013. The suspension expired on 30 April 2014.

6. The parallel suspension of Dr Oshinusi's GMC licence to practise was removed on 1 May 2014, though he remained subject to conditions which were eventually removed by a Medical Practitioners Tribunal on July 18 2016.

7. In 2014, NHS England (NHSE) sought advice from Health Education England Kent, Surrey and Sussex (HEKSS) as to appropriate training for a GP who had by this time not practised as a GP for nearly 4 years On 9 May 2014 Dr Oshinusi signed a voluntary undertaking under which he would not, amongst other things, return to independent clinical practice as an NHS GP without undergoing any training advised by the Deanery.

8. Dr Oshinusi attempted to have the voluntary undertaking reversed by this Tribunal, but the Tribunal struck out his appeal on 12 September 2014 as it has no jurisdiction over an undertaking.

9. There is a dispute as to exactly what training was then recommended. NHSE submits that what was agreed was that Dr Oshinusi would complete the Induction and Refresher Scheme (IRS). This scheme "provides an opportunity for general practitioners … who have previously been on the General Medical Council's … GP register and on the NHS England National Performers List.. to safely return to General Practice following a career break or time spent working abroad" (page 4, *Building the Workforce – the New Deal for General Practice: The GP Induction & Refresher Scheme 2015-2018*, March 2015, RCGP, BMA and NHS England). The respondent maintains it was the appropriate refresher training for Dr Oshinusi, and that Dr Oshinusi agreed to undertake the training. This training has two elements: a threshold test to ensure that participants have the minimum necessary level of clinical knowledge and judgement to participate, and then a period of supervised attachments. Dr Oshinusi however submits that he only agreed to take the initial tests in order to identify the length of the subsequent attachment, and that he did not agree to enter the IRS.

10. It is common ground that Dr Oshinusi made two attempts, on 15 December 2014 and 20 March 2015, to pass the multiple choice tests which comprise the entry requirements for further participation in the IRS. He met the minimum threshold for the Clinical Problem Solving Module but on both occasions failed the Professional Dilemmas

Situational Judgement (PDSJ) test, his scores on this module placing him on both occasions in the lowest possible band. Dr Oshinusi is entitled to further attempts, up to four in total, but he has made clear to the respondent and to the Tribunal he has no intention to try again.

11. Although Dr Oshinusi has completed a number of appraisals, a personal development plan, and unpaid clinical attachments in the period during which he has not practised, he has now not practised as a GP for almost seven years.

12. The respondent received evidence subsequently which, it says, showed an intention by Dr Oshinusi to recommence work in breach of his undertaking, and decided to suspend him under Regulation 12 on 15 September 2016. That suspension remains in force, and entitles Dr Oshinusi to receive payments from NHSE.

Issues and legal framework

13. The extent to which Dr Oshinusi has been supported by NHS England (NHSE) to enable him to meet the necessary standards, and has or has not co-operated with NHSE, is subject to dispute, but, for reasons set out below, we do not need to make findings of fact on this issue in order to determine this appeal fairly and justly. There is also some ambiguity in his witness statement as to whether the undertaking was voluntary or coerced, but in the hearing he gave clear evidence that he agreed to the undertaking and was bound by it.

14. It is necessary for the Tribunal to resolve the factual disputes as to whether Dr Oshinusi did comply with his undertaking of 9 May 2014, and whether, as claimed by the appellant, the undertaking subsequently lapsed.

15. It is common ground that a GP who has been out of practice for as long as Dr Oshinusi must demonstrate that he now has the necessary competences in order to return to practice. He accepted that this is the case when the undertaking was made, after three and a half years out of practice, and at the hearing he confirmed that that remains the case, after nearly seven years out of practice. Dr Oshinusi submits, however, that the steps he has undertaken comply with the requirements of the undertaking and/or are sufficient in themselves for him to remain on the MPL, and that they are compliant with the undertaking he gave to take such training as was advised.

16. The Tribunal must make a discrete decision as to whether, having twice failed the Situational Judgement Test and declined further attempts, Dr Oshinusi has demonstrated unsuitability to remain on the MPL. This is because the respondent submits that such a low score indicates an inability to exercise the appropriate judgement and professional standards for a practising GP.

17. The powers of the respondent to remove a person from the MPL are found in Regulation 14. None of the grounds for compulsory removal apply. The relevant grounds in this appeal are Regulation 14(3)(b) and (d) and 14(5:.
    - Regulation 14(3)(b) provides for removal where "continued inclusion on the performers list would be prejudicial to the services which those included on the performers list perform" (the efficiency ground);
    - Regulation 14(3)(d) provides for removal where "the Practitioner is unsuitable to be included in that performers list" (the suitability ground).
    - Regulation 14(5) provides for removal where "the Practitioner cannot demonstrate that [he] has performed the services, which those on the relevant performers list perform, during the preceding twelve months".

18. Criteria for making a decision on removal are found in Regulation 15 and, where suitability is in question, require, amongst other things, consideration of any information relating to the Practitioner received under Regulation 9. No matters identified in Regulation 9 relate directly to the issues in this appeal. However the fact that in a suitability case the Tribunal must consider the section 9 criteria does not mean that these are the only criteria which can be considered.

19. Regulation 15 also requires consideration of any "event" which gives rise to a question of suitability, the criminal or other consequences of such an event, and the relevance of the event to the Practitioner's performance and risk to patients or public finances. We interpret the word "event" broadly: the event which triggered the suspension and then removal was a long period of absence from practice. A further event under Regulation 15 was Dr Oshinusi's achievement of a score in the lowest band when assessed on the PDJS test in December 2014 and March 2015.

20. We note, in passing, that Dr Oshinusi pointed out that there is a reference in Regulation 9(10) to appraisals by "the Board "(i.e. NHSE). There is no allegation of failure to complete appraisals satisfactorily and we do not need to refer to this criterion.

21. The burden of proof in this appeal is that of the respondent, and the Tribunal effectively stands in the shoes of the respondent at the date of the appeal: we can make any decision on appeal which it would be open to the respondent to make. The fact that the respondent has the burden of proof does not mean that there is no evidential burden on the appellant: where he asserts facts, such as that he complied with the undertaking, he must adduce sufficient evidence of those facts for the facts to be capable of being found to be true.

Consideration

22. When the respondent made its decision to remove Dr Oshinusi from the MPL on 1 February 2017 it cited three grounds: that he had not practised as a GP in excess of three years; that he did not have the required competences; and that he had failed to engage with NHS England.

23. The competence ground provides the substantive potential ground for discretionary removal and is the focus of this appeal. This is because the period of absence has at all times been treated as a cause for retraining, not a ground in its own right, and the alleged absence of co-operation arose only in relation to that need for training, not as a freestanding concern.

24. We now address the disputed factual issues.

25. The first issue is the dispute as to whether the respondent actually required Dr Oshinusi to complete the IRS course, and not just the threshold tests. If the respondent did not direct him to complete this training, any failure to do so is not his fault and does not reflect badly on his suitability or the efficiency criterion.

26. Under the terms of the undertaking of 9 May 2017 (section 1(1)) NHSE could require Dr Oshinusi to undergo such training as the Deanery, which in this case means HEKSS, recommended. There are two letters setting out the advice or HEKSS, dated 28 May 2014 and 30 July 2014. The relevant scheme on which advice was sought is the IRS.

27. There is some ambiguity in the first letter (28 May 2014). HEKSS goes only as far as stating that a spell of nearly four years out of clinical work *might* lead the PLDP to make the IRS scheme a condition of inclusion on the MPL. However the second letter (30 July 2014) makes the advice much clearer: at that point HEKSS "recommends that he *should* undergo the Induction and Refresher Scheme … in order to facilitate a safe return to practice". However, by the time that letter was written the key meeting which leads to the dispute as to what was directed and agreed had already taken place.

28. Notwithstanding the cautious content of the first letter in relation to the suitability of the IRS for Dr Oshinusi, and before the second advice letter was issued, the joint author of both letters, Dr Kevin Hurrell, of HEKSS, arranged, with Dr Nathan from NHSE, to meet with the appellant on 1 July 2014 to go over the scheme, and to assist Dr Oshinusi with the recruitment of a supervisory practice if he chose to go ahead. This is evidenced in Dr Hurrell's email of 26 June 2014 (sent on his behalf by Sue Smith, not copied to Dr Oshinusi).

29. What was agreed at this meeting is important, and is disputed. The meeting note prepared by the respondent is headed "Notes of a

meeting between Dr Ohsinusi, HEKSS and the Kent LMC on 1 July 2014". It would be helpful for such an important meeting to have been formally minuted. What is shown is that a full discussion of the nature of the IRS took place, for Dr Oshinusi's benefit, and it was made clear that participation was recommended (because there was no suitable alternative); the agreement of Dr Oshinusi to participate is implied but not explicitly recorded. The implication that he will do so is sufficiently clear, however: a specific supervisor is identified, and agreement to seek financial support. These steps would not be needed if the discussion had stalled at the point of whether or not he would participate.

30. What is perhaps more important as evidence of what was agreed is that Dr Oshinusi then entered the first stage of the process, by undertaking the multiple choice tests. The presumption must be that he did this because he had agreed to take the training, as advised, and as therefore required by his undertaking.

31. However Dr Oshinusi now challenges that interpretation. He did not do so at the time, in particular when he received the note of the meeting (we asked him why not, and he said the meeting had been upsetting). Dr Oshinusi now states that, the MCQ tests were offered to him in the meeting of 1 July 2014 solely as a means of assessment to identify how long the workplace attachments would have to be. He denies they were offered for the purpose identified within the IRS of demonstrating sufficient basic competences to progress to the full scheme of supervised attachments. Dr Oshinusi therefore now asks us to accept that he was, at that meeting, offered not the standard IRS, but a bespoke period of supervised attachment of which the length was to be determined by his performance on the MCQs. We find this claim implausible; we can see no reason for such an arrangement not to have been explicitly documented both in the minutes and in follow up correspondence. We can see no reason why there was no prior discussion or advice regarding amending the scheme for Dr Oshinusi's specific circumstances. We are not satisfied that Dr Oshinusi is giving an accurate account of why he undertook the MCQ, not once but twice, if he did not intend to demonstrate that he met the threshold standards for participation in the IRS. We find as a fact that at the point he agreed to take these tests he wanted to do the IRS because that would be his route back to practice. What went wrong was that on both occasions on which he took the test, he could not demonstrate the threshold competence required in the PDSJ test. After that, we find, he changed his story as to what was decided at the meeting.

32. Because he failed the test twice, and now declines further attempts (he told us he would fail again so there was no point), Dr Oshinusi has been unable to complete the IRS training programme as advised. He cannot re-enter practice as a GP because he has undertaken to complete the training which was advised by the Deanery, but has failed the first element of that training. He cannot move forward unless he

breaches the undertaking, or alternative training is agreed, which has not happened. Concerned that he might enter practice the respondent decided to remove him from the MPL, but the present appeal had the effect of restoring the status quo pending the Tribunal decision. That is the reason the respondent then suspended Dr Oshinusi, but the result of that decision is that he remains entitled to payment, a factor relevant to efficiency.

33. The Tribunal must make a finding as to whether, through twice achieving a mark in the lowest possible band for the PDSJ test, Dr Oshinushi has shown that he does not have the level of competence or judgement to practise as a GP. This MCQ was a threshold test which considers his ability to make appropriate professional judgements and ethical decisions. Dr Oshinusi told us that his reason for not being able to pass, including why he would not pass if he tried again, was that he is a practising GP, not an F1 student or a registrar. Such an explanation cannot explain or justify such a low mark. The low mark must carry considerable weight in determining if Dr Oshinusi, who has not practised as a GP now for seven years, has the necessary judgement and attitudes to resume practice.

34. Dr Oshinusi asserts that the undertaking lapsed in 2016. If we agreed with him, this would tend to show that it is not his fault that matters have not been resolved, and in particular that any inefficiency while he remains suspended is the responsibility of NHS, not of Dr Oshinusi.

35. In support of this claim, he refers to a meeting in which he and his wife met Dr Ingram from NHS England some time which we calculate from the email to have been in late April or early May 2016. The evidence he refers to is an email from Dr Mears, Kent Local Medical Committee to Dr Oshinusi, and is dated 3 May 2016. That email refers to the Committee looking to help Dr Osinusi with a proposal to NHS England about “your conditions and your financial situation”. We are unable to see that this reference to the Committee – which is not part of NHSE and does not speak for it - talking to Dr Oshinusi about finding a way forward is capable of providing any evidence at all of a lapse of the undertaking.

36. It is surprising, to us, that Dr Oshinusi could believe such an undertaking could be allowed to lapse. The importance of honouring an undertaking was made clear in letters to Dr Oshinusi (in particular letter of 12 June 2015 from Linden Rakestrow on behalf of NHSE). In relation to undertakings given before admission to the MPL a breach of undertaking is a factor listed in Regulation 9 when considering removal from the MPL. Dr Oshinusi took legal advice before signing it. We have no doubt he knew that this was a significant document and a commitment made by him which would not have simply lapsed in the course of an unminuted conversation, with a different organisation, of which no detail now exists. We simply do not believe that Dr Oshinusi genuinely believes what he now asserts, that the undertaking is of no

present relevance because it has lapsed. If he did genuinely believe it, it shows a lack of understanding of the importance of his undertaking, and a lack of judgement in failing to ensure that NHSE now agreed that he was free to return to practice.

37. We summarise the conclusions we have reached at this stage. Dr Oshinusi was required, at a meeting on 1 July 2014, to undertake the IRS, in compliance with his undertaking to undergo the training advised by the Deanery. He has not completed that training, because he has been unable to demonstrate the minimum level of competence for entry onto the next stage of the scheme. He has provided untrue assertions as to what was said in relevant meetings and about the undertaking having now lapsed. In these circumstances the undertaking remains effective, and prevents a return to practice.

38. The fact that he cannot pass the threshold module SJT clearly supports a finding that patients' health and wellbeing would be at risk. We note the feedback from HEE in relation to this low score, set out at paragraph 12 of the respondent's application notice, which refers to difficulty in identifying the best response to situations, inappropriate assumptions, poor understanding of professional ethics or use of less patient-centred approaches and potentially failing to take account of how others are feeling. This makes him unsuitable to remain on the MPL. The evidence he gave in the hearing that he was unable to pass this module because he is not an F1 student or registrar but an experienced GP compounds the evidence that he lacks insight and basic understanding.

39. We are satisfied on the basis of these findings that the power to remove Dr Oshinusi from the MPL has been fairly and proportionately exercised. He is unable to demonstrate the required level of competence to return to practice. It would now not be efficient to expend the NHS's resources to further attempts to help him to address his training needs, or to continue to pay him during further periods of suspension. There is a reduced prospect of the training being satisfactorily completed in any event, because Dr Oshinusi has shown a lack of honesty in discussing, and insight into the extent of, his training needs. These findings meet both the efficiency and suitability criteria.

40. These findings are in themselves sufficient for us to dismiss this appeal. We have therefore not addressed Dr Oshinusi's evidence that he could demonstrate required levels of competence through other means – appraisals and personal development plan. These are requirements for all practitioners, and have not been identified in any evidence before us as sufficient measures to address skill and competence deficits for those who lack recent experience. In any event Dr Oshinusi undertook to comply with advice from the Deanery as to the training he must undertake, not to construct his own pathway, and it is not open to him now to go back into practice on the basis that

he is compliant.

IT IS ORDERED THAT:

The appeal is dismissed.

Judge Hugh Brayne
Primary Health Lists
First-tier Tribunal (Health Education and Social Care)

Date Issued: 23 June 2017