PRIMARY HEALTH LISTS

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

CASE NO [2016] 2672.PHL

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

Heard at the Lands Tribunal on 17th and 18th November 2016

Before:
Judge Siobhan Goodrich
Specialist Member Dr Parvinder Garcha
Specialist Member Mr Mike Cann

BETWEEN:

DR. THAMOTHERAMPILLAI NIMALRAJ

Applicant

-v-

NHS COMMISSIONING BOARD
(Midlands and East (East))

Respondent

DECISION AND REASONS

Representation

For the Applicant: Dr Ogunsanya, Taylor Wood Solicitors

For the Respondent: Mr Rory Mulchrone, counsel, instructed by Capsticks

The Appeal

1. This is an appeal by Dr Nimalraj 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 29th March 2016 to impose conditions on the inclusion of his name in the Performers List.

The PLDP Decision

2. On 29th March 2016 a Performers List Decision Panel ("PLDP") considered the proposal made by NHS England Midlands and East (East) to impose conditions on the Appellant's inclusion on the Medical Performers List on the grounds of efficiency.

3. The specific allegations made were that Dr Nimalraj:

    1. Provided regulated services from non-registered practices between 31 May 2013 and 17 December 2014.
    2. Failed to implement appropriate safeguarding procedures.

4. Dr Nimalraj was not present at the PLDP hearing but was represented by his legal representative, Mr Ojo. 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 his name in the Medical Performers List to prevent any prejudice to the efficiency of services.

5. The conditions imposed by the PLDP were as follows:

    1. You shall notify NHS England promptly of any post you accept for which inclusion on the National Performers List is required and provide the contact details of your employer.
    2. You shall permit NHS England to disclose these conditions to your employer or any person requesting information about your Performers List status.
    3. You shall not undertake any lead safeguarding role, which requires inclusion on the National Performers List, until the NHS England Midlands and East (East) is assured that you have undertaken training to fulfil the role effectively and have demonstrated an appropriate understanding of the role as evidenced by a satisfactory interview with a safeguarding lead, approved in advance by NHS England.
    4. You shall within 3 months identify a mentor, to be approved by NHS England, with whom you will work to develop a Personal Development Plan to address the development of the skills in respect of the following:
        a. Protecting children, young people and adults at risk;
        b. Leadership and management;
        c. Raising and acting on concerns.
    5. Within 1 month of NHS England approving your mentor, you shall send a copy of your Personal Development Plan to NHS England for approval. You shall meet with your mentor on a regular basis, at a minimum of once per month, to discuss your progress towards meeting the aims set out in your Personal Development Plan. Your progress under your Personal Development Plan shall be considered and reviewed at your next appraisal.

6. You shall declare these conditions to current and future employers until such time as the conditions are lifted.

The Background

6. This appeal concerns events that arise when Dr Nimalraj was a provider and performer at the East Tilbury Medical Centre and Corringham Health Centre. Although two practices were involved we shall hereafter refer to "the practice". The full background is set out in the bundle before us and need not be repeated herein in full. In summary:

    a) Dr Nimalraj, in conjunction with a Dr Gorai, entered into a contract for the provision of PMS services at the practice on 1st June 2013. Dr Gorai had previously been in partnership with Dr (Mrs) Khan. Dr Khan's husband, Mr Khan, was the registered manager.

    b) Unbeknownst to Dr Nimalraj and Dr Gorai the Care Quality Commission (CQC) registration for the Practice had been cancelled with effect from 31st May 2013 in response to an application by the previous contract holder, Dr Khan.

    c) In April 2014 the CQC became aware that regulated activities were being carried out at the Practice, without registration and in breach of Section 10 of the Health and Social Care Act 2008.

    d) The Appellant was notified of the Section 10 breach on 28th April 2014. On 4th June 2014 and 21st August 2014, NHS England issued the remedial notices in respect of its failure to register with the CQC. By letter dated 19th November 2014, NHS England wrote to the contractor stating that in view of its failure to comply with previous remedial notices, NHS England would consider whether or not the contract should now be terminated.

    e) On 26th September 2014 two CQC inspectors, Elaine Allen and Tina Burns, visited East Tilbury Medical Centre and obtained evidence of regulated activities being carried out in breach of Section 10.

    f) The practice sought to apply for registration of the partnership and various incomplete applications were received by the CQC on 7th and 12th October 2014. A completed application was finally submitted on 17th December 2014.

    g) On 23rd February 2015 the CQC carried out a site visit to the Practice pursuant to the application process. A further site visit was carried out on 13th April 2015 as concerns had been identified about the way the Practice was operating. Both Dr Nimalraj and Dr Gorai were present. The review included a review of the e-declaration provided by Dr Gorai pursuant to the CQC application.

h) A safeguarding policy was submitted on 14th April 2015 but lacked detail and failed to address safeguarding pathways. Further, the policy was limited to safeguarding of children only and did not include adult safeguarding. Specifically, the CQC considered that the Appellant failed to demonstrate compliance with Regulations 13 (safeguarding from abuse and improper treatment), 17 (good governance) and 18 (sufficiency of staffing resource) of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014. In all the circumstances the CQC was not satisfied that the Practice had met the necessary requirements. The Appellant was notified of the CQC assessment by letter dated 9th June 2015.

i) In light of the concerns raised, NHS England sought to clarify with the Appellant and his partner, Dr Gorai, the ways in which they proposed to address the gaps in safeguarding provision identified. This led to a meeting on 29th June 2015 between Dr Gorai and his legal representative with NHS England. NHS England set out the options and in particular the option of voluntarily terminating the contract on a short notice period. This was agreed the following day with a four week notice period to give NHS England time to put in place alternative arrangements.

j) A PLDP meeting was held on 8th July 2015 to consider the concerns identified. Of particular concern was that of the 31 contractual obligations declared by the Practice in the e-declaration, only 9 were considered to have been met adequately or at all. Areas of deficiency identified include:

    (a) Lack of recording and review of significant events
    (b) Doctors employed but without relevant checks
    (c) The safeguarding policy was not sufficient with local contact details not included although staff had attended training
    (d) Staffing levels
    (e) Staff have not had the required training including infection control, information governance and adults safeguarding and chaperoning
    (f) The practice was not registered with the Information Commissioner Office as required under the DPA
    (g) The CQC plans to decline registration for the practice premises and manager.

k) On 29th March 2016 the PLDP made the decision under appeal and imposed the conditions set out at para 5 above.

l) On 25th August 2016 the General Medical Council (GMC) informed Dr Nimalraj of the outcome of the investigation into his fitness to practice. This investigation followed earlier referral by NHS England - Midlands and East in relation to a range of matters, which included the issue of the practice non- registration and concerns about

whether Dr Nimalraj's fully understood his safeguarding role. During the investigation enquiries were made of the CCG, amongst others, and information gathered as follows:

a) The CCG confirmed that: Dr Nimalraj had undertaken safeguarding training; his role was that of facilitator for safeguarding for the CCG GPs (and he was not a designated person for safeguarding; he had attended courses and visits in his role and had received positive feedback following a recent CQC visit looking at safeguarding locally.

b) The Thurrock Health Hubs Operational Manager had informed the GMC in May 2016 that Dr Nimalraj's "overall performance had been very good" and that he had undertaken a leadership role to promote and develop the GP Hub service; he was caring, popular with patients and colleagues, provided a good quality of care, was reliable and completed all his allocated sessions.

c) Purfleet Care Centre had not identified any issues regarding Dr Nimalraj's clinical performance.

The GMC case examiners concluded the case with no action taken because they considered that there was not a reasonable prospect of establishing that Dr Nimalraj's fitness to practice "is currently impaired" to a degree justifying action on his registration. They considered that, whilst ignorance of the facts regarding non registration was not a justification for Dr Nimalaraj's failure to ensure that he was operating within the law and regulations relevant to GP practice, any patient safety or public interest concerns had already been addressed by the actions of CQC and NHS England.
(We note in passing that it is clear that the GMC examiners were aware of the conditions imposed by the PLDP and, further, that Dr Nimalraj had lodged an appeal against that decision).

7. It is against this overall background that the appeal came before us.

The Regulatory Framework

8. 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.

9. 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. The burden of proof lies in 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.

The Hearing

10. 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. We also received further documentation pursuant to directions issued by the Tribunal on 16th November 2016 and on the second day of the hearing which we identified by reference numbers in the hearing.

11. The Tribunal expressed its concern that many of the matters raised in the grounds of appeal/evidence did not illuminate or advance the true issue to be decided. The matters raised included: allegations of bias in respect of the composition of the PLDP; a distinction to be drawn between contractual and performance obligations; the contention that the Respondent had agreed not to take any further action in the context of the agreement reached; bad faith/abuse of process/ulterior motive; lack of due process. It was, however, agreed at the outset of the hearing that the determinative issue was whether conditions on the continued inclusion of Dr Nimalraj's name on the list are necessary and proportionately required in order to address the perceived risk to the efficiency of services which those included in the list perform. It was also common ground that the issue of risk to the efficiency of services embraces the need to protect patient safety.

12. With the agreement of the parties we exercised our powers to receive oral evidence flexibly and in an order that suited the best use of the hearing time in the context of the core issue before us. We heard oral evidence from Dr Nimalraj and Dr Lipp.

13. Dr Lipp is the Medical Director for NHS England - Midlands and East. He had been in post in that role since April 2016 and prior to this was the deputy Medical Director. His post incorporates the statutory role of Responsible Officer and, thus, responsibility for the Responsible Officer Regulations and the Performers List Regulations. In the course of his evidence on 18th November 2016 it became clear that, in the light of the evidence now before us, he no longer held any concerns about any safeguarding issues.

14. After we reserved our decision on 19th November 2016 Mr Ojo wrote to the Tribunal on 23rd November 2016 expressing concern that the matters regarding leadership and management on which the Respondent relied

amounted to a new allegation. We have considered this letter and the response provided by Capsticks. In our view the point taken by Mr Ojo (who was not present at the hearing) is misconceived. We do not consider that it can reasonably be said that Dr Nimalraj was not aware that it was the Respondent's case that the fact that the practice was unregistered called into question whether conditions regarding his leadership and management were necessary and proportionately required. Amongst other matters, leadership and management was a matter addressed by Dr Nimalraj in his statement at para 27 in particular.

Our Consideration

15. We considered all material before us. If we do not refer to any particular part of the evidence or submissions this does not mean that we have not taken it into account, in so far as relevant to the issue we have to decide.

16. We find that the overall chronology and background is as set out in paragraph 6 above.

17. We make the following additional findings:
    a) Dr Nimalraj has been a GP since 1999. He moved to practice in Essex in 2003 as a salaried GP.
    b) He became a partner in the practice on 1st June 2013. Dr (Mrs) Khan was the main outgoing partner. Dr Nimalraj believed that the practice was registered with the CQC when he joined on 1st June 2013. Mr Khan (Dr Khan's husband) was the approved practice manager at that time. Dr Nimalraj understood that all policies were in place and had been updated at the time of CQC registration in April 2013.
    c) Dr Nimalraj initially worked 3 sessions a week which was later reduced to 2 sessions a week until he stopped working at the practice on 13th August 2013.
    d) Prior to his joining the practice a patient had died from a drug overdose on or about 13th May 2013. Dr Nimalraj's unchallenged evidence was as follows. He had raised the issue of this patient's death with the CCG and NHS England. This led to internal and external investigations of the four previous doctors who had been involved in the patient's management. He was commended for his role in the investigation. The review of practice policies around repeat prescriptions and general safeguarding for vulnerable patients identified the need to update practice policies. This was agreed with NHS England who assisted the practice in updating the policies and provided confirmation and assurance that it was satisfied with the updated policies.
    e) He was wholly unaware that the practice had been deregistered by the CQC. He believes that this arose as the result of Mr Khan making an application without the knowledge or consent of the partners.
    f) Following notification of the deregistration in 2014 there were a number of visits/inspections on various dates. Dr Nimalraj's unchallenged evidence was that in December 2014 an inspection team of Dr Menon, Dr Lingard and another officer found that there

were no issues or concerns regarding patient care although there was an issue regarding the storage of vaccines which was subsequently addressed by Dr Gorai. He was present when the CQC out an inspection in February 2015 but was not interviewed. It is apparent from Dr Lipp's statement that Dr Nimalraj was also present at the CQC visit to the practice in April 2015.

g) Dr Nimalraj's had wished to resign his partnership because he had effectively ceased working at the practice in August 2013 but was not permitted to do so by NHS England. Following the service of the notices to refuse registration of the practice on 7th May 2015 he resigned from the PMS contract on 18th May 2015 and also from the partnership.
h) During his time as a named partner he was not the managing or clinical lead or QOF lead or safeguarding lead of the practice.
i) He was involved with the development of the CCG from 2011 and thereafter was appointed as an elected member. This role requires that his name is included on the performers list.
j) He was appointed to the role of Safeguarding Lead in the CCG in 2014 which can be fulfilled by persons not on a Performers list. The CCG role is not to be confused with that of designated statutory Safeguarding Lead or named safeguarding lead.
k) He is currently in practice as a GP at the Purfleet Care Centre working four sessions as week. This is in addition to his role at the CCG.
l) To his knowledge there have never been any concerns about the clinical care he had provided to patients as a GP at any practice.
m) At the time of the PLDP decision he had completed the safeguarding training which is recommended for a GP, namely level 2 and 3. He has in fact also completed leadership training at a far higher level in connection with his role as safeguarding lead for the CCG and is regularly appraised and mentored in that role.

18. In our view Dr Nimalraj has amply demonstrated before us that his knowledge and understanding of safeguarding was, and is, far in excess of that which is ordinarily required of a general practitioner on the List. Dr Nimalraj has also provided evidence regarding the development plan that is underway in the context of his CCG role. We agree with Dr Lipp's assessment that it is not necessary to impose the proposed conditions 3 and 4 a upon his name in the list in relation to safeguarding.

19. The residual allegation in which the Respondent relied as warranting the imposition of conditions 4 b) and c) was the admitted fact that the practice provided regulated services from between 31 May 2013 and 17 December 2014 when "the practice" was not in fact registered. We agree that this admitted fact potentially engages consideration of Dr Nimalraj's leadership and management and ability to raise and act on concerns is a deficiency that needs to be addressed by conditions.

20. The Respondent contends that the fact that Dr Nimalraj was responsible as a partner for the deficiencies in the practice during the period that it was

unregistered means that conditions under the proposed conditions are necessary to avoid prejudice to the efficiency of the services which those included in the performers list perform. It is submitted that Dr Nimalraj had demonstrated little or no insight into management or leadership responsibilities because he had not acknowledged his responsibility for the fact that the practice was unregistered and operating in breach of section 10 of the Health and Social Care Act 2008, and he has not provided any written reflection about this serious state of affairs. The Respondent recognised that the partnership ended in May 2015 and that Dr Nimalraj is no longer a contract holder. It was submitted that it was important that any deficiencies in Dr Nimalraj's leadership and management and his ability to raise and act on concerns should be addressed now as this would promote efficiency in the event that Dr Nimalraj were to apply to become a partner in a practice hereafter.

21. In our view the factual context is important. The practice was deregistered following the submission of an application by the outgoing manager. We accept that Dr Nimalraj was ignorant of this fact until April 2014. When Dr Gorai and Dr Nimlaraj learnt that the practice had been deregistered, steps were taken by Dr Gorai, as senior partner, to address the issue of CQC registration. It is clear to us that Dr Gorai, as senior partner, dealt with the application processes. The applications were deficient. CQC inspections took place in September 2014 and February 2015 and concerns were identified. It is clear that, although he was present at the CQC inspections in February and April 2015, Dr Nimalraj was not interviewed by the Inspectors.

22. The CQC found deficiencies in the practice processes which led to the conclusion that the partnership had not demonstrated compliance with regulations 13, 17 and 18 of the Health and Social Care Act 2008. In the event, it was agreed by both partners and NHS England that the registration application would be abandoned and the practice closed. In our view this demonstrated that Dr Nimalraj had insight into the issues that made the continuation of this practice untenable. He had indeed already requested that his PMS contract be terminated.

23. The Respondent contends that for so long as the PMS contract endured Dr Nimalraj was responsible for the practice. This is, of course, entirely correct as a matter of law. It is also correct that the fact that the practice was unregistered was a serious breach of the law. The issue with which we are concerned is whether the Respondent has satisfied us that conditions on the inclusion of Dr Nimalraj's name on the list are necessary and proportionately required to avoid prejudice to the efficiency of services which those on the list provide.

24. Our task is the assessment of risk to the efficiency of services based on what has happened in the past and in the light of a holistic evaluation of all the material before us. We bear fully in mind that the public interest requires that we should exercise our discretion to impose conditions for the purpose of preventing prejudice to the efficiency of health services if such are appropriate, necessary and proportionate to that aim.

25. In our view it was clear on the evidence before us, rightly or wrongly, Dr Nimalraj had always viewed himself as powerless to take on a more proactive role in the practice and the application processes because Dr Gorai was the senior and managing partner. We consider it likely that this was attributable to the partnership dynamic rather than a reflection on Dr Nimalraj's true abilities. It is notable that Dr Nimalraj ceased working at the practice very soon after the partnership was formed. We infer that the fact that he had expressed views about the serious incident that occurred before he arrived at the practice may have played a part in this. After the issue with non-registration arose Dr Nimalraj had made clear that he wanted to end his partnership and position as a contract holder**.** He was not allowed to do so. The fact is that the PMS contract ceased with the agreement of all concerned in mid 2015. He is now a salaried GP and thus not a contract holder. In our view the risk of recurrence is very low indeed although we recognise that the facts give rise to the need to consider Dr Nimalraj's attitude to his responsibilities.

26. It is true to say that Dr Nimalraj's case has not been assisted by the overly legalistic approach taken in the grounds of appeal and in his witness statement. Indeed, the contents of those documents would cause anyone reading them to be concerned about the quality of Dr Nimalraj's insight. However, having seen and heard him give evidence over a prolonged period we consider that he has significant experience of, and insight into, the pitfalls of taking on responsibility as a partner in circumstances where the ability to exercise appropriate control or effect change is, or may be, limited. We consider that it is very unlikely that Dr Nimalraj would entertain the prospect of taking on any GP partnership responsibilities or becoming a contract holder in the near or even distant future. Having seen and heard him explain his perspective in his own words we do not consider it necessary that he undertakes a mentoring or development programme or writes a document to reflect on his understanding of the legal and other responsibilities under a PMS contract.

27. Overall, and despite the poor impression created by some parts of his witness statement, we formed a favourable impression of Dr Nimalraj's evidence. In the context of all the circumstances that prevailed at the practice in 2013 to 2015 we do not consider that his response or his inability to effect change within the partnership was such as to justify the conclusion that conditions on the inclusion of his name on the list are necessary. In our view, he found himself in a difficult situation in a very specific context and he, in common with the CQC and NHS England, awaited events. It is important to recognise that there is no evidence placed before us that any action or inaction on his part led to harm to any patient in the period that the practice was deregistered. Further the evidence suggests that the deficits in the leadership and management of the practice were tolerated by the statutory authorities whilst the re-registration processes which culminated in the formal demise of the contract and practice were undertaken. This is entirely understandable given that precipitate closure of the practice (despite its non-registration) would have had a profound effect on the

provision of local medical services but it nonetheless serves to place the issue of risk into perspective. In any event, we consider that Dr Nimalraj has learnt from his experiences, is aware of the need to comply with the requirements of registration, and has good insight into his responsibilities as a performer on the list. We also consider that he has good insight into the responsibilities involved in a leadership and management role should that be required of him in a salaried role. He had already demonstrated his insight and leadership in response to the incident which had occurred in 2013 before he became a partner and which he raised with the authorities. His insight has also been amply demonstrated in his willing engagement with the mentoring, appraisal and development processes that are in place in the context of the leadership role he performs at the CCG, including in his role as Safeguarding lead in that organisation.

Conclusion

28. The Respondent has not satisfied us that it is appropriate and necessary to impose any conditions upon the inclusion of Dr Nimalraj's name on the Performers List for the purpose of preventing any prejudice to the efficiency of the services which those included in a performers list perform. It follows that the imposition of the proposed residual conditions would be disproportionate and unlawful. It is, of course, the case that ongoing reflection and the further development of skills are always desirable but the matters placed before us do not satisfy us that the imposition of the proposed conditions (or any other conditions) is warranted in all the circumstances.

Decision

29. The appeal is allowed for the reasons set out above.

Rights of Review and/or Appeal

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

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

Date Issued: 1 December 2016