

Case No: PHL/15243

Registration no:

IN THE FIRST – TIER TRIBUNAL PRIMALY HEALTH LIST

BETWEEN:

MRS KIM BROWN

Appellant

and

NORTH EAST LINCOLNSHIRE CARE TRUST

Respondent

DECISIONS AND REASONS

- 1) This is an appeal by Mrs. Kim Brown (“the Appellant”) and the refusal of North East Lincolnshire Care Trust Plus (“the Respondent”) against the refusal of the application for a General Ophthalmic Services Contract (“a GOS Contract”) pursuant to the National Health Service (General Ophthalmic Services Contracts) Regulations 2008.

Decision

- 2) Appeal granted.

Preliminary Matter

- 3) The hearing took place on the 14th April 2010 at the Tribunal Service in Leeds. Neither party was represented at the hearing with both parties accepting that the Hearing should proceed as a papers only hearing pursuant to the regulations.
- 4) The Appeal was heard by Mrs J Crisp (Chairman), Mr R Stokes (Professional) and Mr W Nelson (General Member).
- 5) Prior to the Hearing all three Panel Members confirmed that they had no prior involvement or knowledge of the case.
- 6) The Tribunal considered the bundle of documents supplied together with further documentation supplied by the Appellant provided on the morning of the hearing.

Background

- 7) On the 25th June 2009 the Appellant applied for a GOS Contract by formal application, which was received by the Respondent on the 6th July 2009. The Respondent refused the application based on information supplied by the Appellant’s previous employers relating to her dismissal. This refusal was communicated by letter to the Appellant on the 11th December 2009.
- 8) The Appellant completed the application form required as necessary given that she was applying for a contract as a sole contractor, not a performer and attached a CV. The CV confirmed dates of previous employment including a statement that the Appellant had retired from full time work in 2005. In answer to the declaration “Have you been subject to an investigation into professional or business conduct in respect of any current or previous employment or business where the outcome was adverse” the Appellant answered “No”
- 9) After receiving the application form the Respondent pursuant to a letter written on the 4th September 2009 received information from the Appellant’s previous employers that

the employment had been terminated for gross misconduct. The Respondent then requested an authority from the Appellant for further information in this regard. The Respondent replied that the information was confidential pursuant to an ACAS agreement.

- 10) The Respondent received copies of the papers filed in the Employment Tribunal together with details of a disciplinary hearing between the Appellant and her employers where the following facts were upheld.
- 11) That an overpayment of £1800.96 made by bank transfer to the Appellant when she was not entitled to such a sum by the Appellant whilst she was employed as a Practice Manager was gross misconduct.
- 12) That the unilateral changing of the payment dates for wages by the Appellant was evidence of financial gain and gross misconduct
- 13) That the failure to keep written records led to financial gain for the Appellant and was gross misconduct.
- 14) The Appellant confirmed that she had made a bank transfer; it had been highlighted by her in August 2004. This was not notified to the Partners where she was employed. She had been employed at that practice from 1976 to 1984 as a junior receptionist and then from 1991 to 2005 as a Practice Manager. The error was pointed out by the company accountant in October 2005 and arrangements were made to repay that sum by monthly instalments of £250.00 per calendar month with Mr. Segal one of her employers. She was under considerable stress at the time and cannot recall why the error was made. Her marriage was breaking down, she was the victim of domestic violence and pursuant to that domestic violence was engaged in criminal proceedings against her husband. That hearing was scheduled to take place in November 2004; the Appellant did not have to give evidence as her husband pleaded guilty to the offences before the trial commenced.
- 15) The Appellant states that she never received written instructions re the payment of staff although the employers suggest an agreement was in place to make payments on the 28th of each month. No further evidence is presented and this fact was not relied upon in the Employment Tribunal.
- 16) The Appellant confirmed that she was not expected to keep written records of hours worked. She had commenced work in 1998 as a Practice Manager on 30 hours per week but that had increased from September 2005 to 45 hours per week. The Respondent accepts that the hours had increased as a result of a member of staff leaving in

September but it had not been agreed that the permanent hours were to be increased to 45 hours per week.

- 17) The Employment claim for unfair dismissal was compromised on the 14th July 2006 upon repayment of the balance outstanding of 1300.96 with both parties agreeing to keep the terms of the agreement confidential save for immediate family, legal advisers or where required by law.
- 18) The Respondent having received the information refused the Appellant's application for a GOS contract relying on the information from the previous employers as to the dismissal for gross misconduct. Further the non-disclosure of the existence of an investigation in response to the application form which was completed on lead the Respondent to believe that the Appellant either mislead or intended to mislead the Respondent on completion of that form. The Respondent therefore refused the Application on the basis that they were not satisfied that the Appellant was a person suitable to provide General Ophthalmic Services.
- 19) The Respondent opposes the Appellant's appeal for the following reasons: -
- 20) That insofar as the overpayment of £1,800.96 was concerned the relationship between the Appellant and any contractor relies on honest and accurate transfer of information in support of payments. The sum involved was substantial and the Appellant herself was responsible for making accurate payments where such payments were properly due. The practice would have been adversely affected financially as a result of her actions.
- 21) Early payment of wages may not have been made with the intention of gaining financially however; financial gain would have been the result of her actions due to interest accruing through accelerated payment.
- 22) The information which has been produced with regard to the hours the Appellant worked demonstrates the inaccuracy of the hours worked for which no explanation has been offered by the Appellant.
- 23) The Appellant should have understood that the investigation by her previous employers amounted to a relevant matter for the purposes of declaration (J) on the application form. The operation of this system of GOS contracts relies on full and accurate disclosure to the respondent by contractors. No satisfactory explanation has been given for the failure to disclose in this case.

24) The Respondent submits that even taking into account the circumstances related by the Appellant in relation to her personal circumstances at the time of her dismissal, those matters call into question the Appellants suitability as indicative of the way in which she would react to stresses of this kind.

Law

25) Section 118 of the National Health Service GOC Contracts provides

26) A Primary Care Trust may, subject to such conditions and exceptions as may be prescribed, enter into a General Ophthalmic Services contract with any person.

27) Regulation 4 of the General Ophthalmic Services Contracts Regulations 2008 provides details of eligibility. Before entering into any contract, the PCT must satisfy itself that the person does not fall within any of the paragraphs set out in Regulation 4 (3)

28) (l) the PCT is not satisfied that the Applicant is a person suitable to provide General Ophthalmic Services

29) The standard of proof is the civil standard.

Findings

1. The Appellant did wrongly receive the sum of £1800.96 in August 2004. This was not brought to the attention of her employers until the Company Accountant raised the issue in October 2005. Mr. C. Segal being one of the employers accepted a repayment schedule of £250.00 per calendar month. The overpayment bears few hallmarks of dishonesty. No explanation has been provided although the entry itself was highlighted. The payment was not to a factious person and was admitted. There is no evidence of previous dishonesty; it was a one off payment.
2. The Appellant had been employed for a considerable period of time and must have demonstrated a level of integrity and honesty to achieve the position of Practice Manager which she had held since 1988.
3. In so far as the payment dates are concerned, no written direction was given by the Employers. No supervision seems to have been in place. The Appellant was left to run the practice as she believed best. The Employers should bear responsibility for lack of control and supervision.
4. The Appellant was under considerable stress at the time of the incident in 2004 both from being a victim of domestic violence, her marriage breakdown and the subsequent Crown Court hearing in November 2004.

5. The Appellant when completing the application form for the GOS contract was a contractor and not a performer. The Tribunal believe that the Appellant may have misinterpreted the form. The Appellant is not a professional; page two of the form is directed to a performer's application not a contractor. Professional experience is not a prerequisite, it is not essential. The Tribunal find that the Appellant could legitimately ignore this page. Enhanced CRB is not a requirement for a contractor. The required documents including the CV do not request that an explanation be provided in respect of a dismissal.
6. The question on the declaration "have you been subject to an investigation...." and which was answered in the negative the Tribunal find could be interpreted as professional business conduct. The Appellant was not employed in either a professional or business capacity and whilst one may expect a dismissal to have been disclosed the Tribunal do not find that this gives rise to a deliberate intention to mislead in the absence of a clear and specific request to provide that information.
7. In respect of the CV the panel do not criticise the Appellant for stating "retired from full time work in 2005"
8. The Tribunal find there is no evidence of any other dishonesty other than the one incident in 2004.
9. The Tribunal do not accept that the practice would have been adversely affected financially. The evidence is to the contrary as the entry was not picked up for a period of 14 months. There is little evidence of any financial control exerted by the Partners.
10. The Tribunal do not accept that the payments made earlier in the month shows evidence of financial gain. The interest point holds little weight, if any, given the timing and sums involved.
11. The retrospective investigation into the hours worked by the Appellant does not give rise to a dishonest overpayment by the Appellant to herself. There is no accurate record of the work undertaken as no requirement was in place by the Employers. The Appellant could have worked as she suggested through her lunch hour and by taking work home. This is not evidence of dishonesty, the Employers accept they adopted a flexible arrangement including when one member of staff left in September 2005.
12. The Tribunal accept that forms should be completed accurately, however the Appellant's explanation for non disclosure is also accepted in that she felt bound by the terms of the ACAS agreement.
13. No evidence has been presented to show how the Appellant has reacted to stress in the past and the Tribunal therefore find that the stress which the Appellant suffered in 2004 is not an indicator of how the Appellant may react to stress in the future. It was a one off incident which needs to be put in context of her circumstances at the time.

14. The Tribunal accept the references which have been provided in particular the reference from the Appellants latest employer who confirms that the Appellant is trustworthy, dedicated and highly motivated. Her work involves handling of cash and she has been in that work since January 2007.

15. Accordingly the Tribunal find that none of the evidence which has been presented leads them to the conclusion that the Appellant is a person who is unsuitable to be offered a GOS contract. The Appellant's behaviour was out of character in the light of 20 years exemplary service which would lead the Tribunal to accept it was due to the stressful circumstances at the time and that the behaviour is unlikely to be repeated

The Panel therefore uphold the Appeal.

Signed.....

Date.....