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IN THE FIRST TIER TRIBUNAL OF THE TRIBUNALS SERVICE
HEALTH EDUCATION AND SOCIAL CARE CHAMBER
PRIMARY HEATH LISTS

CASE PHL/15323

Professor M Mildred - Chairman
Mr R Stokes - Professional Member
Mrs L Jacobs - Member

BETWEEN

JANE LOUISE FISHER (Registration Number 01-16996)

Appellant

and

DORSET PRIMARY CARE TRUST

Respondent

DECISION WITH REASONS

The appeal

1.The Appellant (“Mrs Fisher”) appeals from the decision of Dorset Primary Care Trust (“the PCT”) to refuse her application for a contract under the General Ophthalmic Services Contracts Regulations 2008 (“the GOS Regulations”).

Background

2.Mrs Fisher is an optometrist who has applied to the Respondent (“the PCT”) for a contract to provide a mobile ophthalmic service by means of a specially equipped minibus (the Eye Bus”) to cater for patients who experience difficulty or inconvenience travelling from rural locations to high street practices.

3.The PCT has the responsibility (and the power under the National Health Service Act 2006) for commissioning optometry services in Dorset by entering into contracts with optometrists. On 18 May 2010 Mrs Fisher applied to the PCT in standard form for a contract to provide mandatory ophthalmic services from the Eye Bus at fixed locations on Tuesdays to Thursdays each week.

4. The Eye Bus has a fully equipped consulting room and a waiting area. It is accessible to wheelchairs, and is equipped with all relevant equipment, including a fully computerised record keeping system.

5. On 23 September 2010, Dorset PCT informed Mrs Fisher by letter that her application had been refused. The basis for the refusal was that

“the application does not fit within the definition given in the regulatory framework. For a Mandatory contract the services to be provided are at a contractors practice premises. The panel determines that by inference this means a fixed premises. The Eye Bus concept falls outside the definition of a fixed premises”.

6. That letter advised Mrs Fisher of her right to raise the matter with PCT’s Disputes Panel and she did so. On 12 October 2010 the Disputes Panel met with Mrs Fisher in attendance. By a letter of the same date, the PCT explained that the PCT was not willing to reverse its earlier decision. The reason for that was expressed as follows:

“We would like to acknowledge your passion for this service and the arguments that you put forward for your case. The panel deliberated your evidence and deduced that this was not sufficiently compelling to reverse our decision to grant you a Mandatory Contract [sic]. The PCT in making its decision is bound by the Ophthalmic Regulations which do not give us the opportunity to be flexible. The same regulations are also prescriptive regarding the Additional Services contract which relates to the provision of domiciliary services.”

7. The letter advised Mrs Fisher of her right to appeal to the Family Health Services Appeals Authority (“FHSAA”). The basis of the PCT’s decision was thus that it did not believe that it could award a contract to Mrs Fisher in the absence of fixed premises from which her contract would be carried out but that there was no other reason for refusing her application.

8. By a notice of appeal dated 1 November 2010 Mrs Fisher appealed on the grounds (a) that provision of mandatory services in the Eye Bus is, in fact, within the scope of a contract permitted by the Regulations, properly interpreted and (b) that the PCT has failed to give due regard to the need to encourage the participation of disabled people in public life.

The hearing of the appeal

9. The appeal was heard on 27 April 2011 at Salisbury Law Courts. Mrs Fisher was represented by Mr David Pievsky instructed by Mr Steven King, Solicitor for the Association of Optometrists and the PCT by Mr Parishil Patel instructed by Beachcrofts LLP. In this decision numbers in square brackets are references to pages in the hearing bundle.

The statutory framework

10. It is necessary to set out the relevant statutory provisions at some length. The NHS Act 2006 (“the Act”) gives powers to and imposes duties on PCTs in relation to the provision of local ophthalmic services.

11. Section 115 of the Act provides:

“(1) Each Primary Care Trust must exercise its powers so as to provide or secure the provision, within its area, of the following primary ophthalmic services –

- (a) The sight-testing service mentioned in subsection (2),*
- (b) Such other primary ophthalmic services as may be prescribed, and*
- (c) To the extent that it considers necessary to meet all reasonable requirements, any further primary ophthalmic services.*

(2) The sight-testing service mentioned in subsection (1)(a) is a service for testing the sight of all of the following persons (except any such testing which takes place in prescribed circumstances)-

- (a) those aged under 16,*
- (b) those aged 16, 17, or 18 who are receiving qualifying full-time education,*
- (c) those whose resources must be treated in accordance with regulations as being less than or equal to their requirements,*
- (d) those aged 60 or over,*
- (e) those of such other description as may be prescribed....*

(4) A Primary Care Trust may (in addition to any other power conferred on it) –

- (a) provide primary ophthalmic services itself (whether within or outside its area),*
- (b) make such arrangements for their provision (whether within or outside its area) as it considers appropriate, and may in particular make contractual arrangements with any person.*

...”

12. Section 117 of the Act provides:

“(1) A Primary Care Trust may enter into a contract under which primary ophthalmic services are provided in accordance with the following provisions of this Part.

(2) A contract under this section is called in this Act “a general ophthalmic services contract”.

(3) A general ophthalmic services contract may make such provision as may be agreed between the Primary Care Trust and the contractor or contractors in relation to –

- (a) the services to be provided under the contract,*
- (b) remuneration under the contract, and*
- (c) any other matters.*

(4) The services to be provided under a general ophthalmic services contract may include –

- (a) services which are not primary ophthalmic services,*
- (b) services to be provided outside the area of the Primary Care Trust.*
- ...”*

13. Section 118 of the Act provides:

“(1) 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.

14. Section 121 of the Act provides : *“(1) A general ophthalmic services contract must contain such provision as may be prescribed (in addition to the provision required by the preceding provisions of this Part).*

- (2) Regulations under subsection (1) may in particular make provision as to –*
 - (a) the manner in which, and standards to which, services must be provided,*
 - (b) the persons who perform services, ...”*

15. The GOS Regulations set out the framework for general ophthalmic services contracts under section 117 of the Act. In particular, Part 2, and Schedule 3, set out conditions which must be met by a contractor before the PCT may enter into a general ophthalmic services contract with it.

16. Regulation 3 provides:

- “...A PCT may only enter into a contract if –*
 - (a) the conditions set out in regulation 4 are met, and*
 - (b) an application to enter into a contract, which complies with Schedule 3, has been made to that PCT.*

17. As to the Regulation 3(a) “conditions”, Regulation 4 provides:

- (1) For the purposes of section 118 [of the Act] (persons eligible to enter into [general ophthalmic services contracts] it is a prescribed condition that a person must not fall within paragraph (3).*
- (2) ...*
- (3) A person falls within this paragraph if –*
 - ...*
 - (k) the PCT is not satisfied that the person –*
 - (i) has the premises, equipment and record keeping arrangements, or*
 - (ii) will employ or engage, by the date the contract is to commence, appropriate staff,*

to provide the services under the contract.

18.Regulation 5 (1) provides that, where a PCT concludes that a person does not meet a Regulation 4 condition, it shall notify that person of: (a) that view and its reasons for that view and (2) his or her right of appeal to the Tribunal under Regulation 6.

19.Regulation 6 provides:

“(1) A person who has been served with a notice under Regulation 5(1) may appeal to the First-tier Tribunal against the decision of the PCT that the conditions in regulation 4 are not met.

...”

20.Regulation 9 provides that a contract must specify 9: (a) the names of the parties; (b) whether the contract is for “mandatory services” or “additional services” ...

21.Mandatory services are defined in Regulation 2(1) as

“the primary ophthalmic services provided under section 115(1)(a) of the Act (sight-testing service) to a person who falls within regulation 3(1) [of the Primary Ophthalmic Services Regulations 2008/1186] except sight-testing services provided as mobile services”.

22.“Mobile services” means

“the sight testing service provided by a contractor to patients –

- (a) attending at a day centre;*
- (b) residing at a residential centre; or*
- (c) at their home, where the patient is unable to leave it unaccompanied because of physical or mental illness or disability,*

where the contractor has entered into a contract with a PCT to provide such services in its area.”

23.“Additional services” are also defined in Regulation 2 as:

“mobile services which are provided to persons falling within regulation 3(1)(a) to (h) of the of the [Primary Ophthalmic Services Regulations 2008/1186]”

24.Contracts must also contain: (in Regulation 13) obligations on contractors to test patients’ sight, or check for illness; (in Regulation 14) the address of each of the “premises” to be used by the contractor for the provision of such services and the hours during which services are normally to be provided at each of those premises and (in Regulations 18 and 19) other terms equivalent to those contained in Schedule 1 (for mandatory services) or Schedule 2 (for additional services) of the Regulations.

25.The Schedule 1 requirements for mandatory services contracts include requirements about eligibility for sight-testing services (part 1), the services themselves (part 2), the persons who are to

provide the services (part 3), record-keeping (part 4), complaints and dispute resolution (parts 5 and 6), termination (part 7) and other miscellaneous matters (part 8).

26.Paragraph 3 of Schedule 1 places an obligation on a provider of mandatory services to ensure that the “*practice premises*”, and equipment, used for the provision of those services under the contract are suitable for the delivery of those services (including by way of providing a waiting room), and sufficient to meet the reasonable needs of the contractor’s patients.

27.Paragraphs 19(1) and 21 of Schedule 1 describe terms which would oblige a provider of mandatory services to allow persons authorised in writing by the PCT to enter and inspect the “practice premises” at any reasonable time, and also to allow other persons with the legal right to enter and inspect the practice premises to do so.

28.“Practice premises”, according to Regulation 2, means “*an address specified in the contract as one at which mandatory services are to be provided under that contract*”.

29.The Schedule 2 requirements (i.e. for additional services contracts) include all of the Schedule 1 requirements, with certain modifications: paragraph 1. Paragraph 4 of Schedule 2 has the effect that the access requirements described in paragraphs 19 and 21 of Schedule 1 apply to “the place where the additional services are being provided”.

30.Schedule 3 contains requirements for what should be contained on an application form, to be completed when applying for a GOS contract including (in Paragraphs 2(a) and 3) personal information about the applicant, including his “address “and (in Paragraphs 2(a) and 7) details of the “premises”, staff, equipment and record keeping arrangements which will be available under the proposed contract.

Mrs Fisher’s evidence

31.Mrs Fisher provided a full witness statement with 20 exhibits. She qualified as an optometrist in 1998 having obtained a B Sc Optometry from Cardiff University. She then worked for Boots until 2004, for Haine and Smith and then as a locum in Wiltshire until she moved to Dorset in 2006. She then worked at Specsavers from October 2008 to April 2010 and then as a locum.

32.In October 2010 she and her husband Steven Fisher decided to provide a mobile service (the Eye Bus”) to cater for patients who had difficulty travelling from rural locations to high street practices. They ascertained that it was possible to equip a minibus with all the equipment that would be found in a high street practice and consulted John Tomlinson who has provided a similar service in East Yorkshire since 1991. East Yorkshire PCT confirmed its view that provision of services via a minibus on a fixed rota in fixed locations would satisfy the Regulations.

33.Mrs Fisher provided a detailed outline of the proposal to the PCT in January 2010 but the PCT had decided to await the full proposal before expressing a view, although the outline was passed to its Optometric Advisor for his thoughts and Mrs Fisher was asked whether she was seeking a contract for additional services.

34.Mrs Fisher began buying relevant items and sought advice from Jane Bell at the Dorset Local Optometric Committee (“LOC”). She fitted out an appropriately sized Optare Alero minibus with

equipment to satisfy the requirements of the GOS Regulations and provided disabled access to the bus. The bus is self-contained without need for any outside services and fitted to a high standard with ophthalmic equipment.

35. An application for a General Ophthalmic Services (“GOS”) contract was submitted to the PCT in May 2010. There followed correspondence and a delay before Mrs Fisher began offering the service on 10 August 2010, operating 3 days per week at Puddletown, Shillingstone, Holnest, Beaminster and Marnhull. Eye examinations of eligible NHS patients were undertaken without payment as no contract with the PCT was in place.

36. Mrs Fisher is assisted by an optical assistant, Candi Stroud, and paper and electronic records are stored securely in Mrs Fisher’s office at home. The feedback from patients has been very positive and the number of patients has risen to 90, mainly elderly but also younger patients who have difficulty, whether because of childcare responsibilities or general time pressure, in attending a high street practice.

37. The application had been supported by patients, local parish councils and a GP practice but was refused by the PCT by a letter dated 23 September 2010 on the ground that “the concept falls outside the definition of a fixed premises”. Mrs Fisher appealed this decision but the PCT’s appeal panel upheld the original decision after a hearing on 12 October 2010.

38. In oral evidence Mrs Fisher produced 7 pages of further testimonials and said that she was still providing services on the Eye Bus 3 days per week, shortly to rise to 4 days. She now provides services at Holness only by appointment but has added services at Yetminster. Appointments are made with her receptionist by an 0845 telephone number.

The PCT’s evidence

39. The PCT relied upon a witness statement by Melanie Susan Smoker, its Head of Primary Care and contracting since 2008. The PCT provides and commissions healthcare services for 395,000 over a large and varied area with a significant population of retired people.

40. Prior to 2008 ophthalmic services were funded by the Department of Health (“DH”). Thereafter those services were commissioned by PCTs under a new contract-based system under the 2008 Regulations and subject to DH Guidance and model contracts.

41. The new regime comprises mandatory services, that is those services (referred to in the Guidance as the “high street” service) and additional services, that is mobile (domiciliary) services provided by a contractor to eligible patients either (a) attending a day centre, (b) residing at a residential centre or (c) are housebound at home. The PCT currently holds 55 mandatory and 12 additional contracts.

42. Faced with Mrs Fisher’s unusual application the PCT consulted with professional bodies and DH and considered the application carefully with a Panel, albeit without taking legal advice on the Regulations, relying instead on the Oxford English Dictionary definition of “premises” as “the building or land near to it that a business owns or uses or a house or other building with its grounds and outbuildings”.

43.The PCT could not see how a converted bus could constitute “premises”, particularly as the Regulations specifically provided for mobile services to be provided in fixed premises and as the definitions section and Regulation 14 required the addresses at which services were to be provided under a contract to be specified so that there was a necessity for a fixed and permanent premises.

44.The support for Mrs Fisher’s proposal and evidence of the need for it do not affect the definitional problem. Ms Smoker is satisfied that the PCT is providing an appropriate ophthalmic service to the local community, including those who are unable independently to attend “high street” practices. To this end the PCT monitors domiciliary visits under additional contracts for mobile services and holds frequent locality meetings with GP practices at which concerns over the adequacy of services can be raised. To date no such concerns in relation to ophthalmic services have been raised although these meetings have raised concerns in relation to dental services.

45.In addition the PCT liaises with Age Concern and the Dorset Age Partnership: neither these nor the PCT’s own patient liaison or complaints services have raised any concerns over the adequacy of ophthalmic services.

46.The PCT noted that Mrs Fisher had not referred to any contract for similarly provided services having been entered into since the implementation of the 2008 Regulations; Mr Tomlinson’s East Yorkshire services had apparently begun in 1991 and he would probably have been exempted from the application procedures introduced by the GOS Regulations.

47.In oral evidence Ms Smoker said that the PCT, in addition to employing optometrists directly and entering into contracts for mandatory or additional services could enter into other community contracts. It would first conduct a needs assessment and then conduct a procurement exercise with a service specification and an open and transparent tendering process judged by a PCT Panel. The form of contract and location of the service would be set out in the tender documents. Such services could potentially be delivered in the eye bus.

48.In cross-examination Ms Smoker confirmed that any such service generating payments of more than £3,000 would be subjected to such a tendering process.

49.The PCT, when considering Mrs Fisher’s application, had no information from GPs, its complaints service or other teams suggesting that a contract for the Eye Bus services was required. Since the Panel considered that premises in the GOS regulations meant “building” neither decision letter mentioned this lack of need. The PCT felt that the application was innovative but did not fall within the GOS Regulations, even if it would provide benefits. The Panel had in front of it the DH Guidance and GOS Regulations, albeit in their 2008 (rather than 2010 amended) form.

50.Ms Smoker could not remember whether the letter at [134] was before the Panel but that was immaterial since the Panel was concentrating on the GOS Regulations. There was no reason to doubt the accuracy of the testimonials produced by Mrs Fisher.

51.Ms Smoker was asked about the initial response to Mrs Fisher’s application sent on the PCT’s behalf by the Dorset Family Health Services Agency. This referred repeatedly to the Eye Bus as “premises”. Ms Smoker explained this as a stock initial response in standard form by an agency that dealt with the procession of all contract requests on behalf of the PCT.

52. After conclusion of the oral evidence the Panel and the parties viewed the outside and inside of the Eye Bus.

The issues in the appeal

53. A preliminary question was raised whether the Panel had jurisdiction to hear the appeal against the PCT's refusal to enter into a contract with Mrs Fisher. The PCT is no longer taking this point. In the Panel's view the PCT, in informing Ms Fisher that it was not satisfied that the Eye Bus satisfied the concept of "*premises*", under Regulation 4(3)(k) it was informing her that a Regulation 4 condition was "*not met*". In consequence she has a right of appeal under Regulation 6(1) to the First Tier Tribunal. The jurisdiction to hear such appeals was transferred from the FHSAA to this Tribunal by Schedule 3 paragraph 169(a) of the Transfer of Tribunal Functions Order 2010/22.

54. The principal issue is whether the PCT is correct in its view that it is not satisfied that Mrs Fisher has (in the Eye Bus) the premises to provide the services under the contract. This might be expressed, since the Panel is redetermining the issues, as whether the Eye Bus constitutes "*premises*" for the purpose of the GOS Regulations.

55. A secondary issue ("the DDA issue") is whether the Panel has jurisdiction to consider the ground of appeal that the PCT has not given due regard (as is its obligation under section 49A of the Disability Discrimination Act 1995 ("the DDA")) to the need to eliminate disability discrimination, advance equality of opportunity and encourage the participation of disabled persons in public life.

The PCT's submissions

56. Mr Patel submitted that the question for the Panel was what Parliament had meant in using the word "*premises*" in the GOS Regulations and that the proper conclusion was that it could only have meant fixed building or address.

57. The NHS Act 2006 obliges the PCT in s. 115 (1)(a) to exercise its powers to provide or secure the provision of sight-testing services; by s. 115(4) it has power to provide such services itself or make appropriate arrangements for their provision and in particular to make contractual arrangements with any person. By s. 117 it may enter into a GOS contract and the GOS Regulations containing conditions for entry into a GOS contract are made pursuant to s. 118.

58. The Primary Ophthalmic Services Regulations 2008 S.I. 2008 No 1186 ("the POS Regulations") define "*additional services*" as mobile services provided to eligible persons (defined in Regulation 7 and restricted to patients in day centres, residential homes and patients' own homes so not relevant to the Eye Bus services) and "*mandatory services*" as everything else.

59. Regulation 7(2) refers to patients having difficulty obtaining mandatory services from "*practice premises*". This phrase is not defined in the POS Regulations but in GOS Regulation 2 as "*an address specified in the contract as one at which mandatory services are to be provided under the contract*". Since the word "*address*" is in the singular the premises must be fixed premises. Mrs Fisher's practice premises are described in her application at [89] as Holnest Park Farm but this cannot be her practice premises because services are not provided there (but in the bus) and the 4 villages referred to at [89] cannot be the practice premises because they are plural, not singular.

60. In an emergency or to meet an identified need the PCT could commission other services (not mandatory and not additional) under the GOS Regulations (including services provided in the Eye Bus): it is for the PCT to identify such needs in a systematic manner.

61. The Panel should define premises (in the absence of a definition in the GOS Regulations) logically and literally; it relies on the OED definition referred to in paragraph 42 above and the DH Guidance referring at pages 5, 6 and 8 to mandatory services as “high street” services and additional services as “mobile services”. The Panel should infer that mandatory services should be provided from fixed premises. Mobile services must also be provided from the particular fixed premises referred to in the GOS Regulations. Accordingly fixed premises are required for all services.

62. It is significant that Parliament defined mobile surgeries to include vehicles under Regulation 2 of the NHS (General Dental Services Contracts) Regulations 2005, S.I. 2005/3361 made under the same primary legislation but not in the GOS Regulations. This must be taken to be intentional.

63. The DH Guidance shows the intention of the Department that mandatory services are provided from “high street” premises and additional services from other particular fixed premises. The fact that there appears to have been a service similar to that provided by the Eye Bus operating in East Yorkshire since 1991 is not binding on the Panel. It is a singleton, introduced under different regulations and the consistent approach to avoid anomalies is to require premises to mean fixed buildings.

64. In relation to the DDA issue, if Mrs Fisher’s submission that her bus comprises premises for the purpose of the Regulations is correct, she is eligible to enter a contract in which case breach of the DDA does not arise. If the bus does not comprise premises for the purpose of the Regulations, the PCT has no discretion and any failure to have regard to section 49A of the DDA cannot bear upon whether Regulation 4(3)(k) is satisfied.

Mrs Fisher’s submissions

65. The power of the PCT under NHS Act 2006 s. 118 to enter into a GOS Contract is with any person, not any person with fixed premises; s.121(2) is silent as to premises at which services may be delivered. This is left to the GOS Regulations, and premises therein need not be fixed premises because the word “fixed” is not included in the Regulation 4(k)(i) and there is no warrant for inserting it. When enacting these Regulations Parliament knew that the common law had regularly interpreted “premises” to include more than fixed buildings, to include vehicles. It was using the word “premises” as shorthand for buildings, vehicles and vessels.

66. In *Norton v Knowles* [1969] 1 QB 572 at 574 Salmon LJ decided that the land and caravan together were the premises and that the purpose of the underlying statutory provision encouraged interpreting premises according to the wide and natural meaning of the word.

67. Courts have described “premises” as a word which takes its meaning from its context. The context here does not require the premises to be fixed. The criterion is whether the applicant has the premises to provide the services under the contract.

68. There are also a significant number of statutory provisions in which “premises” is defined as including vehicles. Thus, although premises can mean fixed premises, it does not have to mean

that. Mr Pievsky accepted that his example of the definition of premises to include vehicles in s. 4(8) of the Children and Young Persons (Protection from Tobacco) Act 1991 cut both ways as it was made explicit, in contradistinction to the present case.

69. On the contrary, there could be no sensible policy of ensuring that opticians should only be allowed to offer services to the public from inside a building, rather than from inside a high quality mobile unit like Mrs Fisher's Eye Bus. If the PCT's construction of the Regulations were correct, it could have no discretion to allow similar arrangements to those proposed, even when in an emergency no other services were available.

70. The address given in the application form was adequate as it gave the PCT a fixed address for the contract holder and details of locations at which the services were provided.

71. The Panel must interpret the Regulations themselves in the light of the intention of Parliament (and not that of the DH). The Guidance glosses the Regulations by characterising mandatory services as high street services and is based on the GOS Regulations in their 2008 form rather than as amended in 2010.

72. The initial response to Mrs Fisher's application on behalf of the PCT referred to "premises" 5 times: this was not merely a standard letter but a response to a particular application.

73. The Panel should seek to give effect to Parliament's purpose or intention rather than focus solely on the literal meaning of the actual words of the Regulations. The intention of Parliament was to ensure that, where there is a reasonable requirement for ophthalmic services, those services should be available to the public, and ultimately should aim towards improving their health. To that end contractors should have the staff, facilities, qualifications and competence to provide good quality ophthalmic services, available where reasonably required.

74. Dorset has an ageing population and a majority of the Eye Bus patients are elderly; the service is heavily supported locally. There is no reason why Parliament would have wanted to exclude the provision of this service, particularly in the light of all the testimonial evidence; without it the statutory purpose to provide a comprehensive service would not be achieved by the PCT. Even if the PCT had power to enter into other contracts, mandatory and additional service contracts were the main means of providing a comprehensive service.

75. There was no reason to imply the word "fixed" to prefix the word "premises". *R (Quintavalle) v Secretary of State for Health* [2003] 2 AC 687 at 695C and 700C was recent House of Lords authority for the proposition that a purposive approach to interpretation was the primary approach for a tribunal to take.

76. A result in which no general ophthalmic contracts can be awarded for services provided from the Eye Bus, merely because it is not a building or fixed premises would be: (a) inconsistent with the policy behind the Act and the Regulations; (b) unreasonable, from the point of view of patients who are likely to benefit from having available to them a mobile service such as that offered by the Eye Bus; (c) inconvenient, for the same reason; (d) arbitrary, in that there is no reason why Parliament should have intended such a result; and (e) anomalous, in that: (i) there is unopposed evidence before the Tribunal that in East Yorkshire a very similar mobile practice has been operating since 1991, and that the relevant PCT there has no problems with it, providing it operates

from pre-arranged and predictable locations; (ii) in Scotland the definition of “practice premises” was changed in 2007 to mean “a place to which the public has unrestricted access during normal business hours and at which general ophthalmic services are provided”, a definition that could, on any view, in principle be satisfied by the Eye Bus; and (iii) it cannot be logical or fair that, in principle, an Eye Bus would be permissible in Scotland or in East Yorkshire, but not in Dorset.

77. In consequence, the Panel could, and on the authorities, must, interpret the legislation in a way which avoids these anomalies and unreasonable results. It could easily do so, simply by interpreting the word “premises” in Regulation 4(3)(k) as including “mobile premises”.

78. In relation to the DDA Mr Pievsky submitted that public authorities are under a specific statutory duty to have

“due regard to... the need to promote equality of opportunity between disabled persons and other persons... the need to take account of disabled persons’ disabilities, even where that involves treating disabled persons more favourably than other persons... [and] the need to encourage participation by disabled persons in public life”.

79. The PCT is a public authority and was thus obliged, when considering whether a refusal of a contract on grounds that it was to be carried from inside a bus, rather than from inside a building, to consider the likely or possible impact of that decision on disabled persons. If it fails so to do, its decision may be unlawful.

80. Parliament would not have intended that interpretation of “premises” would offend the purpose of the DDA. Provision of additional services is not of itself enough to achieve that purpose.

81. The Panel has power to allow an appeal, if satisfied that there has been a breach of section 49A for four reasons. First, there is no limit in Regulation 6 to the type of grounds that can be advanced on appeal (whether or not ultimately successful).

82. Second, the statutory appeals system exists to correct unlawful decisions. This point can be taken here, as well as on an application for judicial review: it would not be sensible to institute an appeal system that did not permit any argument that could be made on an application for judicial review.

83. Third, it must be open to this Panel to allow an appeal under Regulation 6(i), if satisfied that a PCT failed to have regard to an obviously relevant consideration notwithstanding that the obligation breached arose out of statute rather than any other source.

84. Fourth, the issue arises both as a free-standing point (appeal to be allowed because of failure to comply with s. 49A) and as a necessary consideration in the interpretation of “premises” in the Regulations because it could not have been the purpose or intention of Parliament when making them to achieve a result that was contrary to the DDA.

The PCT’s reply

85. In reply Mr Patel submitted that the initial response to Mrs Fisher's application at [88] was a standard letter and it was no part of the Agency's function to interpret whether the Eye Bus constituted premises for the purpose of the Regulations.

86. In relation to the DDA Mr Patel accepted that, if a consequence of the PCT's decision was a breach of the DDA, that would be relevant in the interpretation of the Regulations. The PCT had performed its duties under the DDA by having proper regard to the Regulations and by taking steps to ascertain needs and ensuring that assistance is given by appropriate organisations to those who need it.

87. The PCT agreed that the approach to the Regulations should avoid absurd or unworkable results. It had the means to determine the sufficiency of services and powers to provide bespoke services or transport but had identified no unmet need from its surveys.

Discussion

88. The starting point is indeed to consider what Parliament intended by its use of the word "premises". There is evidence for and against an interpretation that is wider than fixed premises or buildings.

89. The literal meaning of the word according to its dictionary definition suggests that land and buildings are an essential feature of premises. On the other hand courts have extended the meaning since the 19th century and the Court of Appeal has recently decided that the word "premises" takes its meaning from the context in which it is used: *Spring House (Freehold) Ltd v Mount Cook Land Ltd* [2002] 2 All ER 822 at paragraph 28 and *Thames Water Ltd v Hampstead Homes Ltd* [2003] 1 WLR 198 at paragraph 36.

90. In this case Parliament could have used the phrase "fixed premises" or "buildings" or similar but chose not to. That it was aware in making the GOS and POS Regulations of the possibility that healthcare services could be delivered from vehicles is clear from its inclusion of vehicles in the definition of mobile surgery in Regulation 2 of the NHS (General Dental Services Contracts) Regulations 2005 made under the same primary legislation. Further, in s. 4(8) of the Children and Young Persons (Protection from Tobacco) Act 1991 premises were defined to include vehicles. As Mr Pievsky candidly accepted, however, this point cuts both ways as Parliament has here chosen not to replicate this definition.

91. The Panel accepts that Parliament must be taken to have been aware in 2008 and 2010 that courts had decided in the interpretation of statutory and non-statutory materials that "premises" were more than merely fixed buildings and structures.

92. The Panel gives little weight to the letter [88] sent on the PCT's behalf in response to Mrs Fisher's application, preferring the view that this was part of an administrative process rather than the result of any analytical examination of the question whether a bus could constitute premises.

93. Whilst the Panel recognises the framework referred to by Mr Patel in the definition of "practice premises" the point does not appear wholly relevant since the phrase appears in relation to the provision of additional services (whereas Mrs Fisher seeks a contract to provide mandatory services). Further, the definition of practice premises in GOS Regulation 2 refers to an address in a contract: no form of contract has as yet been entered into and it would be open to the parties to

identify an address or addresses for contractual as well as for service delivery purposes. We have heard no evidence to suggest that the Regulations would require separate contracts for separate addresses at which similar services would be provided by the same contractor.

94.The Panel is not bound by the reference in the Guidance to mandatory services as “high street” services: it is for us to interpret the intention of Parliament, not the view of a Government Department at a time before the Regulations relevant to this application had been made.

95.The intention of Parliament was, in the Panel’s view, that good quality ophthalmic services should be available where reasonably required. The fact that a special category of additional services was provided for those with extreme disabilities should not pre-empt the field: there are less severe needs to be met on the part of the elderly or infirm or those in rural areas disadvantaged by caring responsibilities or lack of transport. The delivery of mandatory services to them by unconventional means and at no or minimal extra expense appears to the Panel probably to comply with rather than to frustrate the intention of Parliament.

96.There is conflicting evidence of the need for the Eye Bus services but this is not an issue that the Panel needs to resolve: Mrs Fisher will only be paid for services provided to eligible patients. Any extra administrative resource incurred by the PCT may very well be offset by savings on transport, administration of volunteers, time spent in locality meetings and the like and the potential avoidance of extra fees paid for patients accessing domiciliary services provided under additional contracts

97.Finding that the Eye Bus can be “premises” for the purpose of the GOS Regulations will not, in the Panel’s view, occasion great upheaval or extra expense in the provision of mandatory services. Such an arrangement is only likely to be viable in remote country areas for those who find it difficult to visit services provided in the nearest population centres.

98.It is clear from the above that there are arguments to be made on both sides. On balance the Panel accepts the submission that Parliament chose not to define “premises” so as to require a fixed building. In so doing it left open (rather than explicitly permitting or forbidding) the provision of mandatory ophthalmic services in vehicles such as the Eye Bus.

99.If we have misconstrued the intention of Parliament in so finding, we are reassured that our error is capable of correction by the simplest amendment of the Regulations to insert the word “fixed” in the definition of “premises”.

100.In the light of this finding it is not necessary to decide the DDA issue. In any event the Panel accepts Mr Patel’s approach to the issue set out in paragraph 64 above. The PCT’s duty under DDA s. 49A is a factor that we have taken into account in our interpretation of “premises”.

Decision

102.For all the above reasons the appeal is allowed and the Panel decides that the Eye Bus constitutes “premises” for the purpose of GOS Regulation 4(k). It is for the PCT to determine whether Mrs Fisher has the premises, equipment and record keeping arrangements to provide the services under the proposed contract.

Review and appeals

103. The attention of the parties is drawn to Part 5 of the Tribunal Procedure (First tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008, 2008 S.I. No. 2699 in relation to reviews of and appeals from this decision.

Tribunal Judge: Mark Mildred
Date Issued: 28 April 2011

