

Hearing: 13th May 2008

Siobhan Goodrich- Chair
Richard Stokes-Professional Member
Valerie Barducci-Member

BETWEEN:

COSTCO WHOLESALE UK LIMITED

Appellant

And

MILTON KEYNES PRIMARY CARE TRUST

Respondent

Representation

For the Appellant: Mr Charles Flint , Counsel, instructed by Nabarro
For the Respondent: No representation. Written representations submitted.

DECISION

The Background.

1. In 18th April 2006 this panel decided that Costco was unsuitable to be included to the list of Milton Keynes PCT because its inclusion involved contravention of regulation 13A (1) of the National Health Service (General Ophthalmic Services) Regulations 1986 (“the regulations”) and was contrary to the spirit of paragraph 9(4) of the terms of service. The panel also gave directions in relation to an oral hearing on the issue of national disqualification which it intended to hear after 4 weeks.
2. Costco exercised their right of appeal to the High Court. On 9th May 2006 Ms Reeves of Nabarro requested that the issue of national disqualification be postponed or stayed pending the outcome of the appeal to the High Court. The Chair agreed to this course.
3. On 18th February 2008 Mr Justice Newman handed down his judgement .In short he confirmed that Costco was unsuitable to be included in the list and dismissed the appeal. The basis of his Lordship’s decision was that he affirmed the FHSAA decision in respect of regulation 13(A). He also decided that Costco’s model of operation involved a positive breach of paragraph 9 of the Terms of Service.
4. Surprisingly Costco did not inform the FHSAA of the outcome of the appeal. The panel learned of the decision of Mr Justice Newman by other means and by letter

dated 9th April 2008 the FHSAA directed that the issue of national disqualification be restored for hearing on 13th May 2008.

5. The panel consisted of the same members who had made the original decision. No objection was taken to its composition. Milton Keynes PCT did not appear but submitted written representations. At the hearing Costco were represented by Mr Charles Flint QC.
6. No appeal has been lodged against the decision of Mr Justice Newman. It follows that Costco accepts that the model by which they have sought (and have been allowed) to deliver general ophthalmic services ("GOS") across a large number of PCTs across the country since 1994 was (and remains) fundamentally incompatible with the regulations and the statutory scheme.

Costco's position

7. Costco wish to avoid the "stigma" of the imposition of national disqualification and the statutory consequence that it would be unable to seek a review of any order for a minimum of two years. It submits that an order for national disqualification should be reserved for serious cases. Further it would serve no proper purpose and is not necessary because Costco intends to seek amendment of the planning consents granted by the individual councils involved so as to enable it to comply with the regulations and the terms of service. It is suggested that, in the interim, an order of national disqualification is not necessary because Costco has/will withdrawn from the list of the PCTs involved. In these circumstances no harm arises and there is no public interest that requires protection. If the panel considers that an order is or may be required we are invited to postpone our determination for a period of six months so as to afford Costco the opportunity to demonstrate that can comply with the requirements of the regulations and terms of service.
8. Costco relies upon the fact that it has provided GOS across the PCTs for many years without any finding in respect of any adverse incident. Mr Flint submitted that cases in which national disqualification has been imposed concern persons who are "inherently unsuitable" and ought not to be providing services to the public under any circumstances.

The Respondent's position

9. The key points of written submissions of Milton Keynes PCT may be summarised as follows:
 - Costco's membership model is incompatible with the statutory framework which is fundamental to the provision of GOS nationally: the issue is therefore serious.
 - Costco's proposals to remain on the lists whilst waiving any fees for the provisions of GOS does not cure the incompatibility of its membership model, not least because free eye tests would still only be available to a restricted population.
 - Costco has demonstrated that it is willing to withdraw from a list when invited to do so. This is an appropriate course of action.

The Statutory Power to impose National Disqualification

10. Section 159 of the National Health Service Act 2006 (like its predecessor) enables the consideration of national disqualification by the FHSAA in certain situations which include the dismissal by the FHSAA of an appeal against the refusal to include a contractor in a list. The logic is that the power to nationally disqualify is may be exercised when appropriate so as to prevent, amongst other matters:
 - (i) a contractor who has been refused admission or removed from the list of one PCT seeking to obtain entry in the list of another PCT in circumstances where the reasons for refusal to include or removal are not essentially local
 - (ii) inconsistency in the service provided nationally
 - (iii) multiplicity of proceedings
 - (iv) inefficiency and waste of resources at local level.

(v) consistency in decision making.

11. In this case the issue of national disqualification was raised by the FHSAA itself and has been stayed pending appeal since May 2006. Following the decision of Mr Justice Newman Costco decided to write to each PCT on whose list it remains seeking to negotiate at local level. In our view this approach was misconceived given that the issue of national disqualification was stayed. We note with dismay that Nabarro did not inform the PCTs involved that a decision of the issue of an order for national disqualification by the FHSAA was still outstanding. We were advised by Mr Flint on instructions that it was considered unnecessary to do so as it was assumed that the PCTs were aware of this and that the Department of Health had apparently advised that Costco should pursue issues with each PCT individually. It seems to us highly unlikely that the person giving this advice had been informed or was aware that the issue of national disqualification was pending before the FHSAA.
12. In our view it would have made perfect sense had Nabarro informed each PCT that of the issue of national disqualification was pending. Each PCT could quite legitimately have decided that it would not waste precious time and resources on negotiations and telephone conference calls with a view to deciding Costco's position on the list because the FHSAA was seized of the matter on a national basis. The demands placed upon PCTs are many and various: assuming that the PCT officers had read the decision of 18th April 2006 it would not be surprising if the fact that the FHSAA had decided to consider the issue of national disqualification had escaped attention or been lost with the passage of time. Moreover only Costco and the FHSAA knew that that decision had only been stayed pending the appeal. In our view Costco by its solicitors should have ensured that it provided the full picture to the PCTs. Even if it was assumed that the relevant PCT officers had by some means guessed that the issue had been adjourned by the FHSAA pending the appeal, disclosure of this fact was required in the interests of plain dealing. It is apparent to us that Costco by its advisors sought to advance its own interests with little regard to the public interest in economy of resources. We note that in its submissions Costco relied upon the fact that no PCT had sought to remove it from its list but we regard this to be of little or no weight in the circumstances.
13. Whilst we disapprove of the apparent efforts made to seek to fetter the exercise of this panel's discretion we have striven to consider the issue on its true merits. An order for national disqualification is not designed to be punitive although, if made, it will inevitably adversely affect the interests of the contractor: the power exists solely to protect the public interest.
14. In the light of the decision of Mr Justice Newman one might think at first blush the obvious solution was for Costco to withdraw its name from each PCT list in which it is included and then apply afresh when it has obtained the planning consents and completed all necessary works. We were advised that Costco has withdrawn from the local health boards in Scotland but the view had been taken that it could not do so in England and Wales because of Regulation 8. This provides as follows:
 - (1) Subject to paragraphs (2) and (3), where a contractor gives notice in writing to the {Primary Care Trust} that he wishes to withdraw from the ophthalmic list, **his name shall be removed from that list at the expiration of three months from the date of that notice or such shorter period as the [primary Care Trust] may agree...**
 - (2) Where a [Primary Care Trust] is investigating an ..optician
 - (a) **for the purpose of deciding whether or not to exercise its powers under section 49F, 49G or 49I of the Act;**
 - (b) in order to see whether theoptician has failed to comply with a condition imposed
 - (c) or who has been suspended under section 49(1) (a) of the Act

the Optician may not withdraw from any list kept by any [Primary Care Trust] in which the ..optician is included...until the matter has been finally determined by the PCT....

(our emphasis)

15. The clear mischief to which regulation 8 is directed is to prevent a contractor who faces investigation avoiding a PCT decision on the merits. If a contractor facing such investigation were permitted to withdraw the potential further consequence of a PCT application to the FHSAA for national disqualification and /or consideration of such an order by the FHSAA of its own motion would also be circumvented and the overall statutory scheme designed to safeguard the public interest would thus be undermined. In the light of the decision of Mr Justice Newman each of the PCTs involved were (or should have been) considering whether to exercise its own powers of removal. It is thus at least arguable that, in strict terms, acceptance of a request for withdrawal is contrary to regulation 8. In this case, however, a decision on the merits of the refusal to include by Milton Keynes PCT had already been made and the FHSAA was seized of the issue of national disqualification. In our view a PCT can legitimately permit withdrawal without contravention of regulation 8 in these very particular and limited circumstances. Even if we are wrong in that view the decision that we make must be proportionate to the desired objective in the light of the facts.
16. On the evidence now before us a number of the PCTs involved in England and Wales upon whose list Costco appears have accepted the request that its name be withdrawn. At the hearing it was unclear to us whether the name of Costco has *actually* been removed from those lists. Unless or until a contractor's name is actually removed it could, at least in theory, seek to claim payment for the provision of GOS undertaken pending actual removal but Costco have written to all relevant PCTs undertaking not to do so with effect from 1st May 2008. Mr Flint submitted that actual removal was of no other significance. We disagree. Until its name is actually removed any member of the public who exercises his right to consult the list will believe that Costco is a "suitable" contractor operating under the auspices of the Nation Health Service. One aspect of the statutory scheme is that inclusion on the list provides the patient with the name of relevant PCT should he/she be dissatisfied with any aspect of the service received which he/she *believes* has been funded at public expense. Mr Flint submitted that such concerns were unreal in the context of this case since only one complaint has ever been made in relation to Costco. We do not consider that we can dismiss this aspect so easily because there must always be a potential for consumer complaint and, in any event, it would be wholly inappropriate were any member of the public to be misled. It appeared to us that Costco by its submissions consider that the details and the overall purpose of the statutory scheme which is designed to protect the wider public interest are unimportant.
17. We invited Mr Flint to address us on why a postponement would not be amount to a decision to effectively allow contingent removal on a national basis. At a local level a contingent removal in an efficiency case may be appropriate on a local basis so as to allow a practitioner to take necessary steps to improve whilst also protecting the public interest in the interim by the imposition of conditions. In suitability cases however contingent removal is not permitted. Further parliament did not provide that a decision on National disqualification (whether based on inefficiency or unsuitability) can be made contingently upon compliance with conditions. We rose to enable Mr Flint to consider the point. He submitted that the key issue behind national disqualification is protection of patient safety which is not a consideration in this case and, further, that all cases concerning national disqualification have involved "irredeemable" individuals who cannot under any circumstances be permitted to practice because of the risk posed to patient safety.
18. In our view this takes too narrow a view of the public interest which includes, not least in the context of this case, the necessity to uphold and declare the need for compliance with the requirements of the statutory scheme as well as the avoidance of

wasted resources and inconsistency. Patient safety, although an extremely important factor, is not the only factor to be considered. Additionally it is not the case that a contractor who is nationally disqualified is forever “irredeemable”- there is, after all, statutory provision for review after a prescribed period. In our view it matters not whether the issue arises because of “personal” issues or because of issues arising from corporate policy or planning issues. The power exists without any distinction. The question is whether it should be exercised in all the circumstances of this particular case having regard to the issue of proportionality.

19. The simple fact is that it has been authoritatively decided by Mr Justice Newman that Costco is unsuitable to provide GOS and that decision plainly has national implications. The necessary changes that Costco hopes will enable it to comply fully with the regulations may take some time to achieve. Parliament has decided that *if* it is correct that an order of national disqualification is made at least two years must elapse before a contractor can apply for review. It would be plainly wrong to allow this fact to influence the issue of whether an order is necessary or to make a decision to deliberately postpone a decision for a significant period so as to circumvent the will of parliament. It is also plainly wrong that Costco should remain on any PCT list throughout England and Wales or be included on in any other list until it is able to deliver services with proper regard to the statutory scheme for the delivery of general optical services under the NHS. We are, however, persuaded that it will not be necessary to make an order for national disqualification *provided* Costco withdraws *and is actually removed* from the list of each PCT upon whose list it currently appears. Costco can then make a fresh application for inclusion to each PCT as and when it considers that it is in a position to fully comply with the regulations. A considered decision can be then be made at local level in the specific context of the changes effected at each store, the decision of Mr Justice Newman and evidence as to Costco’s willingness to fully embrace the obligations that go hand in hand with inclusion on the list and the provision of GOS under the NHS. In that way the harm that an order for national disqualification would cure should be fully addressed.
20. If Costco wish to apply for inclusion in the future to the list of any PCT it is, of course, obliged under the regulations to disclose the fact that it was removed from the list of Milton Keynes PCT and explain why. We consider that any risk to the public interest with regard to potential applications to new PCTs will thereby be sufficiently safeguarded. It would be eminently sensible for Costco to provide the decision of Mr Justice Newman and this decision to each PCT to which it may apply.

Decision

21. In these circumstances and on the terms set out below we direct that the decision concerning national disqualification is stayed for a short period to enable the provision of further evidence confirming that actual removal has been effected in respect of all the relevant PCTs :
 - i. Upon receipt of this decision Costco shall serve a copy of this determination upon each PCT upon whose list it has appeared/still appears within three days.
 - ii. Costco shall lodge a schedule (together with supporting documents) with the FHSAA by 1st September 2008 stating its position on the list of every PCT upon whose list it has appeared/still appears, the date of withdrawal and providing written confirmation that its name has been actually removed.
 - iii. Pending the provision of such evidence the decision in respect of national disqualification is stayed.
 - iv. The decision of this panel will be given in writing following consideration of the evidence and/or submissions referred to above.

22. We further direct, pursuant to Rule 47(1) of the Family Health Services Appeal Authority (Procedure) Rules 2001 that a copy of this decision is sent to the Secretary of State, The National Assembly of Wales, the Scottish Executive and The Northern Ireland Executive.
23. The attention of both parties is drawn to the provisions of Rule 43 of the Rules.

Siobhan Goodrich
Chair

Either party to these proceedings has the right to appeal this decision under and by virtue of Section 11 Tribunals and Inquiries Act 1992. Any appeal should be made by lodging a notice of appeal in the Royal Courts of Justice , The Strand , London WC2A 2LL within 28 days