IN THE FAMILY HEALTH SERVICES APPEAL AUTHORITY **CASE 15186**

Professor M Mildred- Chairman
Dr H Freeman - Professional Member
Mr W Nelson - Member

BETWEEN

DR AGNES OLAYEMI
(GMC Registration Number 3115228)
Appellant

and

CITY & HACKNEY TEACHING PRIMARY CARE TRUST
Respondent

SECOND DECISION WITH REASONS

1. On 19 November 2009 we gave a decision that is appended to this decision. In summary we refused the PCT respondents permission to rely at the hearing of the appeal on the new ground of efficiency, the removal having been made solely under Regulations 10(6) and (7) of the NHS (Performers Lists) Regulations 2004 as amended ("the Regulations"). Those regulations provide for removal on the ground of non-provision of services for at least 12 months.

2. In the light of that decision the PCT has decided and confirmed by a letter dated December 2009 from Messrs Capsticks to the Authority not further to resist Dr Olayemi's appeal (although it reserves its right to commence fresh removal proceedings on the efficiency ground).

3. In the light of this the parties invite us to vacate the hearing fixed for 17 and 18 December 2009 and allow the appeal.

4. Regulation 38(2)(b) provides that we may determine the appeal on the basis of the documents provided and without a hearing where the PCT states in writing that it does not resist and withdraws its reply to the appeal.

5. We are of the view that we have had adequate evidence in writing to permit us to reach a decision without an oral hearing. We note that the PCT does not seek to rely upon the evidence that exists relating to Dr Olayemi's failure to provides services and the reasons for it and accept their position.

6. Accordingly we allow Dr Olayemi's appeal against her removal from the PCT's Performers List.

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

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Mark Mildred
Panel Chair
15 December 2009

APPENDIX

IN THE FAMILY HEALTH SERVICES APPEAL AUTHORITY **CASE 15186**

Professor M Mildred- Chairman
Dr H Freeman - Professional Member
Mr W Nelson - Member

BETWEEN

DR AGNES OLAYEMI
(GMC Registration Number 3115228)
Appellant

and

CITY & HACKNEY TEACHING PRIMARY CARE TRUST
Respondent

FIRST DECISION WITH REASONS

Background

1. After a Performers Panel hearing on 25 June 2009 the Respondent ("the PCT") notified the Appellant general medical practitioner by letter dated 2 July 2009 of her removal from the Performers List under Regulations 10(6) and 10(7) of the NHS (Performers Lists) Regulations 2004 as amended ("the Regulations").

2. Regulation 10(6) provides for removal : "(6) Where a performer cannot demonstrate that he has performed the services, which those included in the relevant performers list perform, within the area of the Primary Care Trust during the preceding twelve months, it may remove him from the performers list". The Home Office "Guidance Primary Medical Performers Lists – Advice for PCTs" suggests at paragraph 7.4 that removal should not take place where the 12-month absence is a result of the performer's health.

The appeal

3. By a Notice of Appeal dated 21 July 2009 the Appellant appealed against this decision. The grounds of appeal submitted that the power under Regulation 10(6) should not have been exercised at all since the Appellant's non-performance of services were the result of her ill health of which details were given.

4. In the alternative the Appellant was submitted that any discretion to remove her should not have been exercised in the light of local and national policy and criticised the PCT's approach to calculation of the period of 12 months.

The PCT's application

5. It appears that the PCT experienced some confusion in its process for dealing with the appeal since it did not serve a formal reply under Rule 12 of the Family Health Services

Appeal Authority (Procedure) Rules 2001. Instead we were provided before the hearing on 20 October 2009 with a skeleton argument by Mr Richard Booth together with a bundle of documents.

6. Paragraph 3 of that skeleton argument reads "Given that the Appellant's appeal is by way of re-hearing, the [PCT] seeks to rely, in the alternative to Regulation 10(6) on the ground of inefficiency pursuant to Regulations 10(3) and 10(4)(a) of the [Regulations]. On behalf of the Appellant Mr Conrad Hallin submits that it is not open to the PCT to advance a new statutory basis for removal at the appeal stage.

7. We heard oral argument on this point on 20 October but, given the importance of the point and the short notice upon which it had been raised, we adjourned the hearing and directed written submissions on the point. We have received helpful submissions from both parties.

The Appellant's submissions

8. The removal under Regulation 10(6) was described by the PCT as a '*purely administrative decision*' at its hearing and also stated that no criticism was made of her clinical practice. She was told that the removal did not prejudice her reapplying to join the list at a later date. The new statutory basis for removal is pursuant to Regulation 10(3) and (4) of the 2004 Regulations namely that her '*continued inclusion in its performers list would be prejudicial to the efficiency of the services which those included in the relevant performers list perform ("an efficiency case"*).

9. 'Efficiency' is defined under the Department of Health '*Primary Medical Performer Lists: Advice for Primary Care Trusts on list management*' at 7.4 as follows: '*These grounds may be used when the inclusion of the doctor on the PCT's list could be "prejudicial to the efficiency of the service" that is performed. Broadly speaking, these are issues of competence and quality of performance. They may relate to everyday work, inadequate capability, poor clinical performance, bad practice, repeated wasteful use of resources that local mechanisms have been unable to address, or actions or activities that have added significantly to the burdens of others in the NHS (including the doctors)*'.

10. This is a new and distinct statutory basis on which the PCT now seeks to remove the Appellant from the performers list and the PCT seeks to add the new basis for removing the Appellant from the list by utilising rule 41 of the FHSAA Procedure Rules 2001 ("the Rules"), which states the following at 41(7):

> "41(7) *At any hearing the panel may, if it is satisfied that it is just and reasonable to do so, permit a party to rely on grounds not stated in his notice of appeal or, as the case may be, notice of application, or his reply in either case and, in respect of an appellant, to adduce any evidence not presented to the respondent Health Authority [or Primary Care Trust] before or at the time it took the disputed decision*."

11. There is an important distinction to be drawn between a *ground on appeal* and *a ground for removing Dr Olayemi from the performers list*. Rule 41(7) should be restricted to the former and should not be interpreted as allowing the PCT to add entirely new grounds for removing Dr Olayemi from the performers list.

12. Regulation 41(7) is constrained by Regulation 15 of the Regulations which states that the FHSAA is re-determining the decision of the PCT and in so doing, under regulation 15(3) of

the Regulations: '*On appeal the FHSAA may make any decision which the Primary Care Trust could have made"*.

13. The FHSAA is a creature of statue and derives its powers from statute and the Rules. It cannot call upon powers outside that framework (see, for example, Dr Wahab v Medway Teaching Primary Care Trust (FHSAA case no 12243, 18th October 2006 at paragraph 17). The FHSAA cannot, therefore, act outside of Regulation 15.

14. The natural reading of regulation 15(3) would limit the FHSAA to making a decision on appeal '*which the Primary Care Trust could have made*'. In this case the only decision before the PCT was whether or not to remove the Appellant from the performers list under regulation 10(6) of the Regulations: for the FHSAA to go beyond this and consider the new statutory grounds of 'Efficiency' under Regulation 10(3) and 10(4) proposed by the PCT would go beyond power afforded by Regulation 15(3) and require it to be recast as follows: '*On appeal the FHSAA may make any decision which the Primary Care Trust could have made* [*including any hypothetical decision that the PCT might have made at the time had a different statutory basis for removal been advanced*'].

15. There is no basis and no justification for recasting Regulation 15(3) in this way. Indeed, there are strong reasons not to do so including the requirement to interpret Rule 41 to give full effect to the Appellant's Article 6 rights, pursuant to section 3 of the Human Rights Act 1998.

16. The procedure sought by the PCT would deny the Appellant the right to procedural requirements set out in the 2004 Regulations as follows:

i) Regulation 10(8)(a) – (d) inclusive requiring the PCT to give notice of allegations and the grounds for any action being considered, the opportunity to make written representations and put her case at an oral hearing;

ii) Regulation 10(10) requiring the PCT to take those representations into account and giving a reasoned and notify the Appellant of her right of appeal;

iii) Regulation 10(11) requiring the PCT to arrange an oral hearing.

17. It is clear from the above that at an oral hearing the PCT Panel should from the outset be considering a *proposal*, as opposed to a decision already taken, to remove the practitioner from the list. A proper and fair approach in such cases is for the officer to whom decision-making power is delegated to consider any material and then determine whether it shows grounds *for considering* removal or contingent removal. If they so determine, the practitioner must then be notified and offered the opportunity to make oral representations.

18. By putting forward the "efficiency" case for removal from the performers list only at the appeal stage, the PCT has completely avoided not only the first instance hearing, but the above careful process for putting forward a *proposal*, and has, in effect, considered this new "efficiency" case a *decision already taken* without ever offering the Appellant a chance to respond prior to the appeal to the FHSAA.

19. The denial to the Appellant of the right to a first instance hearing on the facts before the PCT would in turn deny the Appellant the right to an appeal by way of redetermination *on the facts* since a further appeal from the FHSAA to the High Court would be restricted to points

of law. She would thereby be entirely deprived of any right of redetermination on the facts.

20. The FHSAA in Wahab at paragraph 19 has observed that Parliament intended, by giving a right of appeal, for the practitioner to be given '*two bites of the cherry*' and that the Appellant would be deprived of this opportunity if the PCT were able to bring further evidence of '*new matters*'. Whilst this decision was specifically concerned with new *evidence*, the point is all the more potent where the Appellant is potentially denied an appeal of removal from the performers list on an entirely new, previously un-advanced statutory basis.

21. Further, such a denial is arguably contravening the requirements of Article 6 of the European Convention of Human Rights.

22. If the Appellant is wrong in the above submissions the PCT nevertheless is required to request that the FHSAA exercise its discretion to allow the new case to be brought at this stage. Indeed, the Appellant considers that *on any view* it is not just and reasonable to allow the new case to be brought at the appeal stage since:

(b) There is no good reason for the PCT's failure to bring this new case under Regulation 10(3) and (4) against the Appellant at the first instance stage (save perhaps that the case appears weak on the merits).

(c) As stated by the FHSAA in Wahab at paragraph 19): '*…by the time a PCT moves against a practitioner, it could and should have assembled cogent evidence to prove its case at a time of its choosing…*'. It must be all the more true that a PCT should, if it has assembled what it considers to be sufficient relevant evidence, advance a case on the appropriate statutory basis.

(d) It would not be '*just and reasonable*' to deny the Appellant this first instance hearing (and thereby an appeal by way of redetermination on the facts) without a compelling, or at least a good, reason from the PCT as to why the case under regulation 10(3) and (4) was not advanced at first instance.

(e) By contrast to the Appellant (who would effectively lose the right to appeal on the facts), the PCT is not prejudiced by the FHSAA refusing to exercise a discretion to advance the regulation 10(3) and (4) case at this stage since it is open to it to bring any such case against the Appellant as it sees fit.

The PCT's response

23. It is clear from the words of Regulation 41(7) that the Panel has a discretion to permit the PCT in this case to rely on the new ground of prejudice to the efficiency of the services in question, in addition to the existing ground under Regulation 10(6).

24. There is no basis within the Regulations or the Procedure Rules for a distinction between a ground on appeal and a ground for removing the Appellant from the Performers List. The reliance of the Appellant on Regulation 15 of the PLR is misconceived.

25. Pursuant to Regulations 15(1) and 15(2)(d) a performer may appeal (by way of redetermination) to the FHSAA against a decision of the PCT to remove the performer under Regulations 8(2), 10(3) or (6), 12(3)(c) or 15(6)(b). Pursuant to Regulation 15(3), on appeal

the FHSAA may make any decision which the PCT could have made. Thus, the FHSAA in this case has the power to remove the performer or not to remove the performer, those being the decisions which were open to the PCT. There is no question of the FHSAA exceeding its powers under Regulation 15. There is no basis in the statutory framework for limiting the ground of removal to Regulation 10(6) alone – that would involve reading in some extra words to Regulation 15(3) which are not there. It would also make a nonsense of r.41(7) of the Procedure Rules.

27. The Appellant's submissions in relation to the removal of procedural safeguards would have more force, if the appeal were not by way of a complete re-hearing before the FHSAA and if r.41(7) were couched in different terms. In fact, save for the arguable loss of one layer of appeal in relation to the issue of inefficiency, the Appellant (with sufficient time provided to deal with the efficiency ground) is in no worse a position than she would have been, had the efficiency ground been considered by the PCT Panel.

28. The Appellant relies on the decision of an FHSAA Panel in the case of *Wahab* at paragraph 19 in respect of a performer being entitled to "two bites at the cherry". It is important to note that the relevant part of the decision in *Wahab* concerned fresh evidence which was not before the PCT Panel. What was actually said by the FHSAA Panel at paragraph 19 was: "Moreover there is some force in the submission that the practitioner may be deprived of two bites at the cherry, as Parliament intended by giving a right of appeal, if the PCT were able to bring further evidence of new matters, perhaps occurring after its original decision was made. It may be a question of where the line is drawn." It will therefore be apparent that the position in that case was very different from the present case where a new ground but no new evidence (post-dating the PCT panel decision) is sought to be relied on by the PCT.

29. Further, it ill-behoves a practitioner who complains about the unfairness of the procedures adopted by the PCT Panel to make the submission that she has been denied the opportunity of an initial determination on the facts (and often on the papers alone) by that PCT Panel when the FHSAA appeal by way of re-determination is properly treated as curing any procedural defects below and where there can be no question as to the fairness of the FHSAA procedures or hearing itself.

30. It is submitted that it is hard, given the above, to see where the perceived unfairness lies if the FHSAA Panel were to consider the ground of efficiency in this case without the PCT Panel having done so first.

31. In relation to the exercise of discretion, by r.41(7), the FHSAA Panel may, if it is satisfied that it is just and reasonable to do so, permit the PCT to rely on a ground not stated in its Reply. In essence, the Appellant repeats her earlier submissions in relation to the existence of the discretion when submissions are made in relation to its exercise. Crucially, the Appellant nowhere submits that she cannot deal with the efficiency ground at this stage. Moreover, the only possible ground of prejudice identified is the loss of the PCT Panel's determination of the ground of efficiency on the facts – as submitted above, the PCT suggests that this, on its own, creates no prejudice where there will be a thorough and fair FHSAA hearing by way of redetermination in any event.

32. In the absence of a submission from the Appellant that she cannot deal with the efficiency ground at this stage, and in the absence of any actual (as opposed to theoretical) prejudice to

the Appellant, it is submitted that the efficient regulation of primary care makes it just and reasonable for the FHSAA Panel to consider the ground of efficiency in addition to the Regulation 10(6) ground at the appeal hearing in this case. It is conceded that the ground of efficiency could have been raised earlier by the PCT. It is further conceded that it remains open to the PCT to raise it afresh in any event pending the resolution of the Appellant's appeal herein. However, the man on the Clapham omnibus would properly regard it as absurd if the PCT, doing its best to provide effective primary care, were required to start a fresh, time-consuming and expensive set of proceedings in relation to the ground of efficiency in the event of the Appellant succeeding on the Regulation 10(6) ground in the appeal herein.

Discussion

33. Given the importance of the issues both in this appeal and generally we have summarised the full and helpful submissions at length.

34. It is noteworthy that the PCT made no reply to the appeal before that contained in the skeleton argument of Counsel of 14 October which, as set out above, sought to advance an alternative case. It is hard to characterise this as an attempt to amend its reply. To the extent, therefore, that the PCT simply wishes to rely upon its first and only reply (in the skeleton argument) Rule 41(7) may not be engaged and the question would then be whether an intention or wish to rely in defending an appeal on a different statutory ground for removal is a permissible reply to the appeal.

35. For the sake of completeness the PCT may wish us to regard their position as covered by Rule 41(7) on the basis that the new ground was not stated in its reply to the appeal simply on the basis that there was no such reply. Accordingly we will deal with Rule 41(7).

36. The PCT seeks in effect to persuade us (having regard to Rules 15(3) and 41(7)) that it should be permitted to rely upon a ground not stated in its reply to the appeal to persuade us to come to a decision to which the PCT itself could have come. The words "reply to the appeal" seem to us to connote a reflexive or defensive response to the grounds of appeal rather than an opportunity to advance a new case.

37. Despite the fact that the Panel redetermines the issues arising in the case at the appeal stage, this is at root an appeal against the decision of the PCT and that in itself appears to us to confine the agenda for the appeal to the matters before the PCT Panel. The prohibition on the PCT leading new evidence supports the view that the ambit of the appeal is constrained by the issues dealt with at the PCT hearing. Rule 41(7) effectively "stops the clock" in relation to evidence at the appeal as far as the PCT is concerned and a rational basis for this is suggested in Wahab at paragraph 19: *".. as the drafters may well have considered that by the time a PCT moves against a practitioner, it could and should have assembled cogent evidence to prove its case at a time of its choosing, while the practitioner may have had only 28 days in which to take advice, obtain evidence and present his or her case. Moreover there is some force in the submission that the practitioner may be deprived of two bites at the cherry, as Parliament intended by giving a right of appeal, if the PCT were able to bring further evidence of new matters, perhaps occurring after its original decision was made…."*.

38. If that is right, the same principle in relation to new grounds of appeal (effectively new causes of action) must be more cogent.

39. The proper interpretation of Regulation 15(3) was extensively argued by Counsel. The

PCT submits that there is no basis in the statutory framework for limiting the ground of removal to Regulation 10(6) alone – that would involve reading in some extra words to Regulation 15(3) which are not there.

40. The Appellant submits the natural reading of regulation 15(3) would limit the FHSAA to making a decision on appeal '*which the Primary Care Trust could have made*'. In this case the only decision to be made by the PCT was whether or not to remove the Appellant from the performers' list under Regulation 10(6). For the FHSAA to go beyond this and consider the new statutory ground of 'efficiency' under Regulation 10(3) and 10(4) proposed by the PCT would go beyond power afforded by Regulation 15(3) and, as it submits, require it to be recast as follows: '*On appeal the FHSAA may make any decision which the Primary Care Trust could have made* [*including any hypothetical decision that the PCT might have made at the time had a different statutory basis for removal been advanced*']".

41. In order to decide the issue it is necessary to look for other indications in the Regulations. In our view these are to be found in the procedural safeguards contained in Regulations 10(8), 10(10) and 10(11). The approach of the PCT would necessarily debar the Appellant from the protection contained in those provisions. At present the Appellant can only infer the basis upon which the efficiency ground is put and has had no sight of the allegations that would be made against her. It is clear that Parliament intended to put into place a regime involving a full investigation, notice of allegations, the opportunity to make representations and an oral hearing. The Appellant has had none of these in relation to the efficiency ground. In addition, allowing a first trial of the efficiency ground at the hearing before us would deprive the Appellant of her statutory right of appeal by way of redetermination of the facts.

42. It is also true that the PCT characterised the decision under Regulation 10(6) as "purely administrative" and it appears to us that the difference in kind between that and an allegation of inefficiency is a further reason to conclude that the addition of the efficiency ground exceeds the latitude conferred by Rule 41.

43. All these considerations lead us to the conclusion that the terms of Regulation 15 and Rule 41(7) do not permit reliance by the PCT at the appeal stage on a statutory ground for removal different from that relied upon at the PCT hearing.

Discretion

44. In case we are wrong in that conclusion we will deal with the exercise of any discretion that (contrary to our main conclusion) we may possess. We should begin by saying that it is plain that there is a complex and contentious factual background to these proceedings and we have not formed, and must not form any view of the merits in relation the underlying factual disputes.

45. It may well be that the Appellant would be able to meet any allegations made against her at a hearing before us some 4 weeks away and we trust that such a hearing would be procedurally fair. We also accept the PCT's point that fresh proceedings under the efficiency ground will inevitably involve expenditure of scarce public resources and cause delay and disruption to the PCT's provision of general medical services.

46. Against these considerations must, however, be weighed the facts that the PCT chose to act as it did in the knowledge of what it now says have been historical difficulties with the Appellant and indeed chose (no doubt for the kindest of reasons) to characterise the

proceedings as purely administrative.

47. Further, as the PCT admits, several enquiries of the Appellant were sent to incorrect addresses and its reply to the appeal was not filed in accordance with the Rules due to an administrative confusion. It appears from a light reading of the documents before us that the PCT were aware, at its lowest, that there were questions in respect of the Appellant's state of health yet chose to pursue removal only under Regulation 10(6).

48. We conclude that the prejudice to the Appellant occasioned by the loss of the procedural protections referred to above and the loss of the availability an appellate redetermination on the facts outweigh the prejudice to the PCT in starting fresh proceedings on the efficiency ground (if it so decides). We would not, therefore, exercise any discretion that we may possess to allow the PCT to add the efficiency ground to this appeal.

Article 6

49. Although we have carefully considered the submissions of the parties in relation to Article 6 of the European Convention on Human Rights and Fundamental Freedoms, we have reached conclusions on the proper construction of the Regulations and Rules and will not extend this decision by referring to those submissions in detail, although we have had them in mind when construing the statutory material.

New evidence

50. Given our conclusions we will not deal with the question of admission of new evidence.

Decision

51. For the above reasons we will not entertain an alternative ground advanced by the PCT that the Appellant should be removed from the performers list on the efficiency ground Regulations 10(3) and 10(4)(a) in this appeal.

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

……..
Mark Mildred
Panel Chair
19 November 2009