

THE FAMILY HEALTH SERVICES APPEAL AUTHORITY

CASE NO. FHS/13282

Miss. M Corbett - Chairman

Dr.S. Ariyanayagam – Professional Member

Mr M Cann - Member

BETWEEN

DR MRIGENDRA KUMAR NANDI (Appellant)
(GMC Registration Number 1307296)

AND

ISLINGTON PRIMARY CARE TRUST (Respondent)

DECISION WITH REASONS

1. The Appellant lodged an appeal with the Family Health Service Appeal Authority against his contingent removal from the Respondent's Performers' list. The notice of appeal was lodged out of time. The matter was listed before the Panel on 8.11.06 for an oral hearing in respect of the Applicant's application to extend the appeal period.

2. Both parties have asked the Panel to deal with the matter on the papers only. All of the members of the Panel have confirmed the declaration of no interest in the proceedings.

3. On 2.11.06 the Respondent wrote to the Family Health Services Appeal Authority (FHSAA) stating the contention of the Respondent that the FHSAA had no jurisdiction to hear the Appellant's application to extend the time period.

4. On 6.11.06 the FHSAA informed the parties in correspondence that the matter would remain listed and that the Panel would invite submissions as follows:

a) Whether the Panel had jurisdiction to hear an application to extend the 28 day time limit; and if the Panel decides that it did have jurisdiction

b) To decide whether the Panel should exercise its discretion to extend the 28 day period

5. At the hearing on 8.11.06 the Appellant was represented by Mr de la Rosa of Counsel, attended by his instructing solicitor from Lloyd and Associates, the Appellant did not attend in person. The Respondent was represented by Mr Shaw, solicitor, who was attended by Dr Peter Reader a representative from the Respondent PCT. The matter proceeded upon submissions as agreed between the parties. The Panel were not provided with any statement from the Appellant nor from his solicitor.

6. Brief chronology

27.6.06 Oral hearing of the Performers' List Panel hearing. The Appellant and his legal representatives from Lloyd and Associates were present. The Panel orally confirmed the PCT decision to recommend contingent removal on the grounds of efficiency pursuant to Regulations 10 and 12 of the NHS (Performers lists) Regulations 2004

- 4.7.06 The PCT wrote to Appellant, confirming the decision of 27.6.06 and stating that he had 28 days to appeal. The letter also wrongly stated the 28 day time limit to be 26.7.06. This letter was received by the Appellant on 5.7.06
- 14.7.06 The solicitor for the Appellant wrote to the PCT pointing out the correct 28 day time limit to be 2.8.06
- 18.7.06 The PCT wrote to the Appellant's solicitor saying that a notice of appeal had to be received by 2.8.06
- 25.7.06 The solicitor for Appellant wrote to the PCT thanking them for the clarification of the time period
- 4.8.06 Notice of Appeal (undated), was faxed to FHSAA
- 10.8.06 FHSAA wrote to the solicitor for the Appellant stating that the notice of appeal was out of time, and that he had to seek an extension of time
- 15.8.06 The solicitor for the Appellant wrote to the FHSAA seeking an extension of time

7. The FHSAA (Procedure) Rules 2001 provide in Rule 5 as follows:

(A) MAKING AN APPEAL TO THE FHSAA

Time period in which an FHS regulations appeal must be made
Rule 5. An appellant who makes an FHS regulations appeal must do so within the

period of 28 days beginning with the date on which the Health Authority gave him notice of the disputed decision.

8. We were referred to and have considered the following:

The FHSAA (Procedure) Rules 2001; in particular rules 5, 12, 45

National Health Service (Performers Lists) Regulations 2004

The National Health Service Act 1977

Civil Procedure Rules 1998 (CPR)

Supreme Court Practice O.59

Costellow v Somerset CC 1993 1WLR 256 (Court of Appeal)

Regalbourne v East Linsey DC 1994 158 L.G. Rev 81 (Court of Appeal)

Smith v Head 1999 EWHC Admin 373 (Dyson J)

The Queen on the application of Blackett v The Nursing and Midwifery Council 2004 EWHC 1494 (admin) Moses J

Chaudhuri v Islington PCT 10860 (10.12.03)

FHSAA case number 11607/11646/11647 decided on 12.4.05 (an oral summary of the relevant decision relating to jurisdiction was given to the Advocates by the Panel)

Disciplinary and Regulatory Proceedings – by Brian Harris QC (chapter 15)

Medical Act 1983 s40

Dentists Act 1984 s29

Opticians Act 1989 s23

Osteopaths Act 1993 s31

Chiropractors Act 1994 s31

9. The Appellant's case in summary:

The Appellant submitted that the Panel does have jurisdiction to extend the time limit, and that it should so extend the time to allow the notice of appeal received by fax on 4.8.06.

The Appellant relied upon the following in support of its contentions:

9.1 The decision of the FHSAA in Chaudhuri v Newham PCT 10860 (10.12.03). That Panel noted that there was no provision in the Rules to extend the time for appeal, but said that the issue of extension of time is not uncommon within other jurisdictions. That Panel also relied upon Article 6 of the European Convention and decided it had jurisdiction to consider the application to extend the time for appealing. That Panel had regard to the existence of jurisdiction to extend the time for appealing in corresponding circumstances under CPR Part 52. It was submitted by the Appellant that this Panel should do likewise. (we noted that the Panel in the Chaudhuri case went on to decide that a good reason or convincing excuse for the delay had to be provided, which in that case it had not)

9.2 The decision of the FHSAA 11607/11646/11647 (decided on 12.4.05). This case is noted on the FHSAA website. It was not referred to the Panel, but the Chair of the Panel informed the Advocates of the decision of that Panel in relation to jurisdiction. The PCT did not object to an extension in that case. Their decision was, that by reference to the general import of Article 6, the Panel had jurisdiction to hear an appeal out of time. Again it was submitted that this Panel should do likewise and that it would be wrong for there to be conflicting decisions of the FHSAA relating to applications to pursue appeals out of time.

9.3 Rule 45 FHSAA (Procedure) 2001 Rules

Irregularities

Rule 45. - (1) Any irregularity resulting from failure to comply with any provisions of these Rules or of any directions before the panel has reached its decision shall not of itself render the proceedings void.

(2) Where any such irregularity comes to the attention of the panel, the panel may, and shall if it considers that any person may have been prejudiced by the irregularity, give such directions as it thinks fit to cure or waive the irregularity before reaching its decision.

The Appellant submitted that Rule 45 was designed to avoid a party being shut out by a procedural irregularity. It was said to be analogous to CPR rule 3.10 and that a failure to appeal in time is an irregularity which falls under rule 45 FHSAA (Procedure) Rules.

9.4 Further the Appellant submitted that the Civil Procedure Rules 1998 were of relevance to the Panel; Part 52 allows for applications to extend the time period for appealing, which applications should be decided having regard to the checklist in Rule

3.9. It was submitted that this checklist was applicable in the instant case, and that the checklist factors should be applied as follows:

- a) It is in the interests of the administration of justice for the time to be extended
- b) The application for extension was made promptly
- c) There was no intentional failure to comply
- d) The “good explanation” is that the lack of notice in time was inadvertent
- f) As to whether the failure to comply was caused by the party or his legal representative, the Panel was told by the Appellant’s Counsel “there was miscommunication, the date was simply missed”
- g) the trial date can still be met – since one has not been fixed
- i) There is no prejudice to the Respondent.

The Appellant also submitted that the fact that the appeal itself has substantial merit was of relevance to the rule 3.9 checklist.

9.5 The Appellant responded to the Respondent’s submissions in relation to the case of Blackett v Nursing and Midwifery Council 2004 EWHC 1494 (Admin). The Appellant submitted (a) that the Blackett case related to a particular form of statutory appeal with time limits laid down by Parliament, but that the Appellant’s case is an appeal under subordinate legislation, so it was submitted that the Blackett case was not relevant for our consideration. (b) In any event the Blackett case could be distinguished since it dealt with a time limit of 3 months, as opposed to 28 days, and that a time limit of 28 days without any provision to extend is not proportionate.

9.6 It was submitted that the case of Regalbourne v East Lindsey DC 1994 6 Admin LR 102 was out of harmony with the principles of the CPR and that if the Panel decides that it has jurisdiction to extend the time limit, the Panel’s discretion is wide and it should look at all the circumstances and conduct a balancing exercise by analogy to CPR rule 3.9 and 3.10.

10. The Respondent's case in summary:

The Respondent submitted that the Panel had no jurisdiction to entertain an application to extend the time limit, and if it did, the Panel should exercise its discretion not to permit an extension.

10.1 The 28 days is clearly stipulated in Regulation 10(12) of the 2004 Regulations and in Rule 5 of the 2001 Rules. This is mandatory. There is no provision in the rules to extend the time for an appeal.

10.2 Rule 45 appears in the 2001 Rules under the heading "Determination of Appeals". This rule assumes an appeal is lawfully issued and is proceeding. Rule 45 is of no relevance to an application to extend the time limit for appealing.

10.3 The other 2 FHSAA cases are not binding on our Panel. Their decisions should not be a bar to reaching the just decision now.

10.4 In relation to the Chaudhuri case: Contrary to what is said therein, many other health care jurisdictions do not allow extensions of time if not provided for by the rules eg General Medical Council, General Dental Council, General Optical Council. It was submitted that if we founded a jurisdiction merely on Article 6 grounds, it would mean that many other health care jurisdictions had regulations which were Article 6 defective, which was said to be absurd.

10.5 The Blackett case is the most helpful authority in the following way:

In a case where the statute itself does not provide a power to the court to extend time for appealing, the CPR 1998 do not confer any power to extend the time for bringing an appeal.

As to CPR Part 52, the CPR does not apply to FHSAA appeals, but even if it did, CPR 52(6) directs how an application to vary may be made when power exists. It does not confer a power to vary.

The provision of a 3 month time limit is not incompatible with Article 6 and there is no disproportionate application of that time limit within (the relevant statute).

10.7 In the event that the Panel does have jurisdiction to extend time, the Respondent relied upon the case of Regalbourne to state that lawyers' commitments or ignorance would be unlikely to amount to an acceptable explanation for exercising discretion to extend time, and if such an explanation were found, only then should the risk of prejudice be considered. The author of Disciplinary and Regulatory proceedings, Brian Harris QC, relied in Chapter 15 upon the Regalbourne case.

10.8 The Appellant has been legally represented during the PCT Panel hearing and during the course of these current proceedings. Although the Respondent's letter of 4.7.06 had wrongly specified 26.7.06 as the deadline, any doubt had been resolved by the Respondent's letter of 18.7.06 agreeing 2.8.06 as the deadline.

10.9 The notice of appeal was late because it was overlooked. By his own solicitor's letter of 25.7.06, but probably earlier, the Appellant knew that the appeal deadline was 2.8.06.

10.10 There is simply no explanation to not filing before 4.8.06 other than "inadvertence".

10.11 Lack of prejudice to the Respondent is irrelevant, although it was conceded that there was no prejudice by the filing 2 days late.

10.12 The merits of the appeal itself are irrelevant in considering whether to exercise discretion to extend the time period. There is no obligation upon the Respondent to submit grounds of opposition at this stage, so the Panel is unable to conduct any assessment of the merits. In addition the case of Regalbourne makes it clear that the panel would need to be satisfied that there is an acceptable reason for the delay before looking at the question of prejudice.

11. The Decision of the Panel:

- a) Rule 5 FHSAA Procedure Rules 2001 specifies that the time limit for appealing is 28 days.
- b) S49M NHS Act 1977 Act specifies that the time limit for appealing is 28 days.
- c) Rule 45 FHSAA Procedure Rules 2001 is of no relevance or assistance in an application to extend the time limit to lodge an appeal. There is no cross reference to Rule 5, as one would expect if it were related to Rule 5. It appears under a heading “Determination of Appeals”, ie assuming an appeal is lawfully made.
- d) The 1977 Act and 2001 Rules have not provided any express power to extend the time for appealing beyond 28 days.
- e) The 2 other FHSAA cases are not binding upon us, but are relevant for us to consider. We note that in the second case, the PCT conceded that an appeal could be brought out of time. In neither case (it appears) was there extensive legal argument. The Blackett case was decided subsequent to the Chaudhuri case.
- f) The CPR 1998 are not binding upon our Tribunal.

g) The Blackett case appears to us to be a very similar situation to the instant case, in that there was no express provision for the extension of time. Mr Justice Moses held that the CPR 1998 did not confer any power on the court in relation to a statutory appeal to extend the time for appealing.

He went on to state that CPR rule 52(6) does not confer power but merely directs how an application to vary time may be made in circumstances where such a power exists.

h) Mr Justice Moses held that the 3 months' time limit (specified in the statute in question) was compliant with Article 6 of the European Convention on Human Rights.

We have considered the fact that Blackett was a case of a 3 month time limit, whereas the FHSAA Procedure Rules 2001 and NHS Act 1977 provide for 28 days. We note that the European Court of Human Rights has acknowledged the need for statutory time limits for appeals. In our view, the setting of a 28 day time limit is consistent with Article 6. It pursues the legitimate aim of providing certainty. It is not disproportionate and is necessary to pursue the objective of providing certainty. We find that 28 days is a perfectly reasonable time period in which to appeal.

12. The decision of the Panel is that we have no jurisdiction to hear any application to extend the time limit.

13. If the Panel is wrong and it does have jurisdiction to entertain an application to extend time for appealing, the Panel considers the case of Regalbourne to be of persuasive authority in relation to the factors we must consider. (The case of Regalbourne was applied by Dyson J in Smith v Head 1999 EWHC Admin 373). Before the Panel can consider exercising its discretion to extend time, the Panel would need to be satisfied that there is an "acceptable explanation" for the delay. Lawyers' commitments or ignorance were unlikely to amount to an acceptable explanation. Only if such an explanation is

found does the Panel go on to consider the risk of prejudice. (Bingham LJ who sat as a member of the Court of Appeal in both the Costellow and the subsequent Regalbourne cases, said in Regalbourne that he did not regard his judgment in Costellow as applicable to an application to appeal out of time, let alone an application to extend the time for appealing against the decision of a statutory tribunal in a public law context).

14. The Chaudhuri case was relied on by the Appellant in relation to the founding of jurisdiction. That Panel decided that the notes to rule 52 CPR 1998 suggest that a “good reason” should be provided for the delay, and that the case of Costellow suggested that a “convincing excuse should be provided”. The case of Regalbourne is not mentioned in the Chaudhuri decision.

15. The CPR 1998 are not binding upon the Panel. However we note that if the rule 3.9 “checklist” had been relevant for us to consider, the Appellant made his application to extend time promptly by letter of 15.8.06, and that the Respondent says it is not prejudiced by the delay.

In addition we were told that:

The “good explanation” for the lateness of the notice of appeal was inadvertence. As to whether the failure to comply was caused by the party or his legal representative, the Panel was merely told “there was miscommunication, the date was simply missed”.

16. We note that the Appellant retained the same legal representative as at the 27.6.06 panel. We note that the date of 2.8.06 was suggested by the Appellant’s solicitor on 14.7.06 as the correct one.

17. We consider that no “acceptable explanation”, or “good reason” has been given to the Panel for the failure to lodge an appeal in time. Having decided this, and considering the authority of Regalbourne, we consider that the merits of the case as set out by the Appellant are not relevant to our decision.

18. Summary

a) The Panel does not have jurisdiction to consider an application to extend the time for appealing.

b) In any event the Panel considers that no acceptable explanation, no good reason nor any convincing excuse has been given for the failure to lodge the appeal in time.

19. The parties have rights of appeal pursuant to section 11 of the Tribunals and Enquiries Act 1992 and may lodge a notice of appeal at the Royal Courts of Justice, Strand, London WC2A 2LL within 28 days from the date of this decision.

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Michelle Corbett

Chairman

December2006