

THE FAMILY HEALTH SERVICE APPEALS AUTHORITY

Mr D Pratt – Chair  
Dr J Lorimer - Professional Member  
Mr W Nelson - Member

BETWEEN:

DR BHARAT BERRY  
(GMC No. 2384441)

Appellant

-and-

WEST ESSEX PRIMARY CARE TRUST

Respondent

DECISION ON APPLICATION FOR NATIONAL DISQUALIFICATION,  
WITH REASONS

THE APPLICATION

1. By a decision dated 2 September 2008 we dismissed Dr Berry's the appeal against his removal from the Performers List kept by West Essex Primary Care Trust ("The PCT") and directed his removal from that List, for the reasons set out in our decision. The PCT indicated at the outset that if we were to dismiss Dr Berry's appeal, it would apply for his national disqualification. At the conclusion of our decision, we invited the parties to make written submissions to us on the question of national disqualification, having seen the basis for our decision on the appeal.
2. We have received the following written submissions:
  - a. From Counsel for the PCT dated 26 September 2008 and 5 November 2008; and
  - b. from Dr Berry dated 27 September 2008 (with attachments), 13 October 2008 (with attachments) and 9 November 2008.We have considered them carefully in the light of our findings and decision.
3. Both parties agreed in writing that we should dispose of the hearing on the papers only, without the necessity of their attending.

DECISION

4. The unanimous decision of this Panel is that Dr Berry shall be nationally disqualified from inclusion in any list as is specified at (a) to (c) of Regulation 18A (1) of the NHS (Performers Lists) Regulations 2004 as amended, for a period of two years from the date of this decision.

REASONS

The relevant legal framework

5. By Regulation 18A of the National Health Service (Performers Lists) Regulations 2004 as amended by the 2005 Regulations ["the Regulations"] this Panel has power to impose a national disqualification if it removes a practitioner's name from a local list (as we have done in this case). The powers were formerly derived from s 49 N (1) of the National Health Service Act 1977, to which PCT refers in submissions. The exercise of our discretion is not specifically constrained or guided by statutory provision. It is available whether the ground for removal is a mandatory or discretionary one, and if discretionary, whether it is on grounds of suitability, fraud, or efficiency.
6. We are also aware of, and have kept in mind, Department of Health guidance for PCTs to consider when deciding whether to apply for national disqualification. It is entitled "Primary Care Trust Performers List Guidance", and we note (emphasis added):

- a. paragraph 40.2 which says that the FHSAA can itself decide to impose a National Disqualification if, having rejected an appeal, it considers that the *facts that gave rise to the removal decision are so serious that they warrant disqualification*; and
- b. Paragraph 40.4 which suggests a PCT should recognise the benefits of a national disqualification both for protecting the interests of patients and for saving the NHS resources. It says further that “*unless the grounds for removal ... were essentially local, it would be normal to give serious consideration to such an application*”.

We agree with this general approach, in particular that it is necessary to consider whether the grounds we have identified for the removal of Dr Berry from the West Essex Performers' List were essentially local to the that area.

7. Among other factors we consider relevant are:
- a. The seriousness of the deficiencies or conduct identified;
  - b. The range of those deficiencies;
  - c. The explanations offered by the practitioner and the insight demonstrated into his shortcomings;
  - d. The likelihood of those deficiencies or conduct being remedied in the near to medium term, particularly where failings of character or personality are involved;
  - e. Patient welfare and the efficient use of NHS resources; but balancing those against
  - f. The proper interests of the practitioner in preserving the opportunity to work within the NHS (which includes both pursuing his professional interests and earning money).
8. In our decision on Dr Berry's appeal we found that his inclusion in the Performers' List would be prejudicial to the services which those included in the List perform, and also (and perhaps more importantly for the purpose of considering the present application) that he was unsuitable to be included in that List.

The submissions of the parties

9. It is said on behalf of the PCT that we should nationally disqualify Dr Berry both because of our findings of serious deficiencies and want of clinical skills and management over a wide range of practice, and because of our adverse findings about his honesty and probity. Reliance was placed (among other things) on our findings at paragraphs 289 – 290 that Dr Berry demonstrated no evidence of any insight into the nature and extent of his deficiencies, and that he had been dishonest in a number of important respects in his dealings with the PCT, the PAG and with this Panel. We found that he had sought to manipulate the evidence, falsified or destroyed clinical records and sought to get witnesses to give untrue evidence favourable to himself. We therefore concluded (paragraph 290) that we did not see how the PCT could have any trust or confidence in their dealings with him in the future; “*If a professional man is capable of dishonesty where his own interests are affected, it gives little confidence that the interests of the patient will always be given priority.*”
10. The PCT points out that these deficiencies and want of suitability are not confined to the locality of West Essex.
11. Dr Berry submitted in his first document that:
- a. He had placed before us an immense number of letters of support from patients, nurse, practice staff, a pharmacist, and a nursing home manager.
  - b. He had given long service to patients: in excess of 30 yrs in the NHS and since January 1984 as a GP. During that time there had been no complaint about him.
  - c. No patient had complained in respect of the events giving rise to the appeal we have determined *and no one had suffered harm*.
  - d. He wants to work in General Practice as a locum under supervision in other nearby districts.
  - e. He challenges our findings of “perceived dishonesty”, and refers to obtaining further evidence, for example of handwriting, in order to demonstrate that his account was correct.
12. Dr Berry attached a document containing the findings of the General Medical Council Interim Orders Panel on 18 September 2008 [documents A 4-5]. That Panel found that he “may be a real risk to members of the public...”. Conditions were then attached to his registration,

including requirements that he be supervised by a named senior medical practitioner and that he should undertake no locum posts shorter than 1 month.

13. By supplementary submissions of 13 October Dr Berry raised issues of bias and inappropriate conduct by senior PCT officials including the Chief Executive Mr. Thomas and the PAG investigating officer Mr Greenwood and a PCT manager, Catherine O'Connell. In the latter case he asserted that she had colluded with his former receptionist Donna Rule to backdate a statement. He went on to submit that there was no reason why he could not work with *other* PCTs in a spirit of goodwill, and friendship. By necessary inference he conceded that he could do so with this PCT and this must be so, not least in light of the serious allegations he still maintains against their senior officers above. He also attached a decision of Collins J given on 22 November 2006 (when the learned Judge was considering how the disciplinary hearing before the PCT should be conducted). Apart from a comment during argument about something done by Mr Greenwood which was understandable but not entirely helpful, there is nothing contained within it of relevance to Dr Berry's submissions or to this present issue.
14. Only after Mr Booth (Counsel for the PCT) put in further submissions drawing attention to what he termed "incredible evidence" and "lack of insight" in these submissions, did Dr Berry put in a third letter of submissions, which expressed sorrow for "some patients who should not have been treated [who] slipped the net". He further submitted that he had not been able to work for the last 2 ½ years, and disqualification for a further 2 years would be "almost inhumane". In this third letter of submissions (9 Nov 2008) he conceded he had made errors which he promised to avoid in future and promised also that he would not run a weight clinic in future.

#### Consideration of the application and decision

15. We have taken all Dr Berry's submissions into account. In challenging some of the Panel's findings he does not demonstrate insight, any more than was the case at the substantive appeal hearing. He makes accusations afresh against PCT officers and fails to acknowledge the gravamen of our findings. Some of the matters he raises at this stage are irrelevant and are either intended to obfuscate or show want of any self-examination, or an inability to accept criticism.
16. In our view, while the clinical issues are of concern, they should be remediable in a practitioner who had the ability to recognise his own problems and accept criticism. We are not satisfied that Dr Berry has shown any evidence of that degree of insight. His first response is often a readiness to blame others. But of greater concern to us for the purpose of this application is his lack of integrity, as we have found. Our findings at paragraph 290 drive us to the conclusion that Dr Berry is as unsuitable to be included in any Performers' List as he is to be included in that of West Essex. His unsuitability does not arise from circumstances in that particular locality, nor from circumstances which prevailed only at a particular time.
17. Although it is not a factor which is determinative of our decision in any way, we are also concerned that Dr Berry's professional plan, such as he has outlined, is to do locum work in adjoining localities. In its nature, locum work in GP practices is likely to mean that he will work more in isolation than he would in a several-handed partnership. The opportunity for meaningful supervision would be limited.
18. In our judgement, balancing Dr Berry's interests and all the matters he has urged on us, against the serious and fundamental criticisms which we have found proved, it is appropriate to make the order for national disqualification. This means that from the date of this decision he is disqualified from inclusion in any list mentioned at (a) to (c) of Regulation 18(A) (1) of the Regulations as amended.
19. We have considered whether the period of disqualification should be extended from the normal two years under the powers conferred by Regulation 19, but in our view this is not appropriate. The period of disqualification will therefore be for two years.
20. In accordance with Rule 42 () of the Family Health Service Appeal Authority (Procedure) Rules 2001 Dr Berry is hereby notified that he may have the right to appeal against this decision under Section 11 of the Tribunals and Inquiries Act 1992. Any appeal shall be made by lodging a notice of appeal in the Royal Courts of Justice, The Strand, London WC2A 2LL within 28 days from the receipt of this decision.

DUNCAN PRATT  
Chair of the Panel

15 December 2008