

IN THE FAMILY HEALTH SERVICES APPEAL AUTHORITY

SITTING AT CARDIFF

Case No: FHS/14923

Chairman Mr Christopher Limb
Professional Member Dr R Sadek
Lay Member Mrs M Frankel

BETWEEN:

DR CHINATU AKANO
GMC Reg No: 6061365

Appellant

and

CARDIFF LOCAL HEALTH BOARD

Respondent

DECISION

INTRODUCTION

1. This is our Decision upon the appeal of Dr Akano against the Decision of the Cardiff Local Health Board ("LHB") to remove him from its Medical Performers List. That was a Decision reached at a meeting of the Reference Panel of the LHB on 14th October 2008 which was communicated to Dr Akano by letter of 17th October 2008. Dr Akano notified his intention to appeal against such removal by letter of 27th October 2008 to the FHSAA.
2. All members of the Panel have signed a Declaration of no interest in the proceedings.
3. The removal of Dr Akano was on the basis of his being unsuitable to be included in the Medical Performers List.

LEGAL FRAMEWORK

4. The appeal is brought pursuant to Regulation 15 of the National Health Service (Performers Lists) (Wales) Regulations 2004. Pursuant to Regulation 15(3) the FHSAA may on an appeal make any Decision which the LHB could have made. The hearing is in the nature of a re-hearing and, unless the quality of evidence has been affected, the FHSAA is not normally concerned with arguments as to shortcomings or errors in the course of the hearing against which the appeal is brought. We have treated the appeal as a re-hearing and decided the matter on the merits of the evidence presented to us.
5. Pursuant to Regulation 10(3) "The Local Health Board may remove a performer from its Performers List where any of the conditions set out in paragraph 4 is satisfied". So far as relevant, paragraph 4 provides that "The conditions mentioned in paragraph 3 are that the .. (c) performer is unsuitable to be included in the Performers List ("an unsuitability case")".
6. Pursuant to Regulation 11(1) the LHB in considering whether to remove a performer in an unsuitability case shall (inter alia)
 - (a) consider any information relating to the performer which it has received in accordance with any provision of Regulation 9 (see later);
 - (b) consider the matters referred to in paragraph 2 and in particular the nature of any offence, investigation or incident; the length of time since any such offence, investigation or incident; whether there are other offences, incidents or investigations to be considered; any action taken or penalty imposed by any licensing or regulatory body; the relevance of any offence, incident or investigation to the performance of any relevant primary service by the performer and any likely risk to patients or to public finances; whether the performer has been refused admittance to any list and the facts relating to such.

Pursuant to paragraph 7, in making any Decision under Regulation 10 the LHB has to take into account the overall effect of any relevant incidents and offences relating to the performer of which it is aware.

7. Regulation 4(3) provides that the performer shall provide an undertaking " (b) to notify the LHB within 7 days of any material changes to the information provided in the application..at any time when the performer's name is included in that list". Paragraph 2 of Regulation 4 refers to the information which must be provided as including details of any list to which the performer has been refused admission.
8. Regulation 9(1) provides that a performer must make a Declaration in writing within 7 days of the occurrence of various matters and in particular if the performer:
 - "(h) is informed by any licensing regulatory or other body of the outcome of any investigation into the performer's professional conduct and there is a finding against the performer.
 - (i) becomes the subject of any investigations into the performer's professional conduct by any licensing regulatory or other body.
 - (j) becomes subject to an investigation into the performer's professional conduct in respect of any current or previous employment or is informed of the outcome of such investigation if adverse.
 - (l) becomes the subject of any investigation by another Local Health Board or equivalent body which might lead to the performer's removal from any list or any equivalent list.
 - (m) is removed, contingently removed or suspended from, refused permission to or conditionally included in any list or equivalent list".

Paragraph 6 provides that a performer included in a relevant Performer's List shall act in accordance with the undertakings that a performer is required to provide when applying for inclusion in that list.

9. Regulation 2 provides various definitions for interpretation of the regulations. In particular we note that an "equivalent body" includes a Primary Care Trust in England and an "equivalent list" means a list kept by such body. "Licensing or regulatory body" means a body that licenses or regulates any profession of which the performer is or has been a member. In the context of the present case it is plain that the Bristol PCT is an equivalent body and that the General Medical Council is a licensing or regulatory body.
10. We note that the removal of a performer is discretionary (Regulation 10(3)).
11. The burden of proving the allegations against Dr Akano rests upon the LHB. When considering whether we are satisfied on the balance of probabilities that an allegation is established we bear in mind that the more serious the allegation, the less likely it is that it occurred and the stronger should be the evidence before we conclude that the allegation is established.

HISTORY OF THE CASE

12. The appeal was initiated by the letter of Dr Akano of 27th October 2008 to which the LHB responded by letter of 27th November 2008 which enclosed the statement of Sian Richards, the LHB Chief Executive, as setting out the grounds on which the LHB relied. Such statement had 10 annexes.
13. The LHB letter of 27th November 2008 included the indication that the LHB supported the matter being considered on the papers.
14. On 23rd December 2008 the Panel gave directions in the case requiring confirmation that no further documents were relied upon by either party or alternatively producing copies of any further documents by 7th January 2009. We further directed that the LHB should confirm by 7th January 2009 that no witnesses were relied upon save for Sian Richards or alternatively serve a statement of any such witness by such date. We directed that the Appellant should serve a statement by himself or any other person upon whose evidence he intended to rely or alternatively confirm that he relied only on the matters in his letter of 27th October 2008.
15. By letter of 22nd December 2008 (received after the Order) the LHB indicated that they waited to hear if Dr Akano was content with the appeal to be heard on the papers alone and indicated that if it was not to be heard on the papers they would attend with legal representation and intended to call Dr Brendan Lloyd.
16. An Appeal Officer of the FHSAA enquired of Dr Akano by e-mail whether he would confirm that he intended to attend the hearing and he replied on 19th December 2008 that "I shall be available to attend the hearing". Following a reminder in relation to the directions we issued he sent an e-mail on 9th January 2008 : "I confirm that I am not sending in any more documentation and happy for the hearing to go on with the documents already available".
17. It was our understanding that in the foregoing circumstances Dr Akano was not relying upon any other evidence than that in his letter of 27th October and was intending to be present at the hearing.
18. On the morning on which the hearing was listed (14th January 2009) the LHB attended together with Counsel. There was no attendance by Dr Akano. Contact was made with Dr Akano by telephone by an Officer of the FHSAA and he indicated that he did not intend to appear before the Panel and (in effect) intended that his e-mail of 9th January 2009 referring to him being happy for the hearing to go on with the documents already available was an indication not only that there were no further documents to disclose but that he was content for the hearing to be decided by the

Panel on papers. The LHB were informed of the conversation and (in our view very properly and correctly) indicated that on the basis that there was a genuine misunderstanding and that Dr Akano believed he had agreed to their suggestion that there should be a hearing on the papers only they would make no submissions. That is what occurred. We heard no oral evidence from the LHB. We heard no submissions from the LHB. The LHB left the hearing after the confirmation that Dr Akano was not to attend and after their own indication that they would not make submissions. The Panel then considered the matter on the papers.

FACTS/EVIDENCE

19. We summarise the facts and evidence in the context of the allegations relied upon by the Respondent, namely
 - (a) Dr Akano failed to disclose to Cardiff LHB the termination of his employment with Gwent Health Care NHS Trust ("Gwent") as required by Regulation 9(1)(j);
 - (b) Dr Akano failed to declare such termination of employment when applying to join the Bristol PCT Performers List;

- (c) The registration of Dr Akano with the General Medical Council was suspended for 18 months following both Cardiff LHB and Bristol PCT informing the GMC of the failure to declare dismissal by Gwent when applying to Bristol PCT.
20. The evidence available to us is in several regards very limited so far as detail is concerned.
21. Dr Akano joined the Performers List of Cardiff LHB in February 2005. We have no documents relating to such period. For example, there is no documentation in relation to the Declaration made and any documents provided to Dr Akano as to his obligations in relation to matters to be reported.
22. The work pattern of Dr Akano after February 2005 is not described in the documents in any detail but it appears he had a full time Out of Hours appointment with Gwent and more limited work with two other providers.
23. On 24th September 2007, Dr Akano was suspended by Gwent. The only evidence in such regard is contained in the letter of 24th September 2007 from Gwent to Dr Akano which followed a meeting of the same date. Such sets out the allegations in brief terms but gives no indication of the evidence relied upon or the argument/issues raised by Dr Akano. The three allegations which were considered were:
- (a) Dr Akano's safety and wellbeing could be jeopardised by the number of hours and the shift patterns that he was working and was planning to work;
 - (b) The working pattern presented a potential risk to patients safety;
 - (c) Dr Akano's timekeeping was fraudulent.

He was suspended according to a Trust disciplinary policy and procedure (not produced to us) and informed in the letter of 24th September 2007 that (inter alia) the suspension was "not disciplinary action or punishment" and was "pending investigation or requiring further investigation of the allegations".

The letter also indicates that Dr Akano was reminded of his professional obligations relating to the actions he was obliged to take having been suspended from a medical post as detailed in the General Medical Council's "Good Medical Practice 2006". What if any particular obligations were referred to is not set out.

24. Dr Akano did not inform the LHB of his suspension by Gwent. It does not appear that this is relied upon by the LHB. The reliance relates to notification of the termination which will be referred to later in this Decision.
25. On 27th November 2007 there was a meeting between Dr Akano and Dr Brendan Lloyd, the Respondent's Medical Director. The evidence in such regard is contained in a letter of 29th November 2007 which was a confirmation of the main points covered at the meeting and which was (with one express revision) agreed by Dr Akano. We set out the summary of points raised:
- (a) Dr Akano had a full time Out of Hours contract with Gwent from 1st February 2005;
 - (b) Since that time he also worked on a sessional basis for RCT and Primecare out of hours providers;
 - (c) He was suspended on full pay by Gwent on 24th September 2007;
 - (d) He was still awaiting a final hearing at Gwent;
 - (e) Primecare had notified Dr Akano that they would not employ him for further work whilst suspended;
 - (f) RCT indicated they were happy to continue employing him whilst suspended;
 - (g) Although Dr Akano had not given formal notice in writing both RCT and Prime Care were aware of the suspension before any further sessions were worked after the suspension;

- (h) The main concerns raised by Gwent related to the number of hours worked and the fact that consecutive sessions were worked for different providers. The latter aspect raised the question of travelling time;
- (i) The allegations were refuted by Dr Akano who felt that he had not worked excessive hours, had never worked consecutive sessions without agreement of either management or clinical colleagues, and that travel time would be covered by another clinician;
- (j) Dr Akano felt he had been treated unfairly and that other doctors had worked consecutive sessions from different Centres;
- (k) Dr Akano also felt that Gwent had failed to respond appropriately to a previous complaint of racial abuse;
- (l) Dr Akano was not previously aware of his responsibility to inform Cardiff LHB of the suspension but was now fully aware of his duties in such "area";

The statement of Sian Richards indicates that Dr Lloyd became aware of the suspension because of information given to him by the Medical Director of Gwent. Such statement also clarifies that Dr Akano was informed of his duties to provide information pursuant to the regulations. We have already set out the regulations relied upon and it appears appropriate to understand the statement of Sian Richards to the effect that the undertaking to notify the LHB of material changes to the information provided in the application included (Regulation 9(4)(l)) any adverse outcome from an investigation into the performer's professional conduct in respect of any current or previous employment.

26. On 22nd January 2008, Dr Akano was summarily dismissed from his employment with Gwent. We have no direct evidence relating to such hearing and it is not referred to in the witness statement. The only broad reference is in the Decision letter of May 2008. The letter of May 2008 is in our papers as an appendix to the investigating officer's statement which was relied upon by the Cardiff LHB at the hearing of 14th October 2008. The investigating officer's statement expressly says that the LHB was notified of the termination by the Medical Director of Gwent but no details are given. The termination of January 2008 was the subject of an appeal by Dr Akano and a disciplinary appeal hearing was held on 1st and 12th May 2008. The letter of May 2008 refers to evidence which is not before us but the findings were under the following headings:

- (a) Dr Akano was found to have claimed occupational sick pay when at the end of the period in question he worked a shift for another organisation rather than a shift with Gwent;
- (b) Dr Akano misled his Managers within Gwent by failing to inform them of his work commitments with others (presumably RCT and Primecare) and failed to heed the implications of working excessive hours and the need to reduce working hours to an acceptable level;
- (c) There was fraudulent timekeeping on the basis that the end of a shift with Gwent was the same time as the beginning of a work shift with another organisation at a different geographical location. We interpose the observation that it is not made plain whether the finding was that he worked less hours than he claimed for from Gwent or whether he arrived late for the other employer, nor whether there was any indication that the other employer consented to any late start nor the amounts of time involved (e.g. the necessary time for travel between the unidentified locations);
- (d) Dr Akano worked excessive hours such that might jeopardise both his own safety and wellbeing and the safety of patients. The essence of the finding was that in June the average hours worked per week were 96.25 hours. The letter refers to Dr Akano making reference to other GP's working excessive hours and that such was normal practice and it is not plain whether Gwent accepted such proposition. It is only recited that it was unacceptable for all employees and that issues had been "addressed" with other individuals in the past. It is not made plain whether other individuals had been dismissed on such basis or what the general approach to excessive hours had been.

The conclusion of the hearing in May 2008 was summarised as a finding of gross misconduct.

27. The statement of Sian Richards indicates that the Cardiff Medical Director, Dr Lloyd, had received confirmation on 15th May 2008 that the employment had been terminated and received such information from Gwent. It is indicated that he received such information following a request in the context of himself being asked for information as to whether he was aware of any investigations or conditions relating to Dr Akano following his application to join the Medical Performers List of Bristol PCT. Dr Akano was not legally represented and in such context it is right that we note that the obligation under Regulation 9 was to give information within 7 days of the occurrence of the event. It is plain that the LHB were aware of the dismissal within 7 days and it is not made plain in the statement of Sian Richards whether it is simply alleged that Dr Akano had not informed the LHB of the termination of his employment prior to 15th May or whether he never gave such information. In his letter of 27th October 2008, Dr Akano says that Dr Lloyd was informed of the outcome of the investigation. Such is put in very general terms but appears to include the "dismissal" which is referred to in the previous sentence of his letter.
28. The documents available to us in relation to the application to Bristol PCT are those attached to the letter to the GMC from Bristol PCT dated 11th July 2008. The only copy document relating to the application to Bristol PCT is a copy of the Declarations which broadly follow the wording of the regulations and include negative Declarations in relation to any investigations into professional conduct by licensing, regulatory or other body or by PCT or equivalent body; removal from a list or refusal of admission to a list by a PCT; and also as to whether there had been an adverse outcome of any investigation into professional conduct in respect of any current or previous employment. Those Declarations are dated 24th January 2008 (namely two days after the initial summary dismissal and prior to the Gwent disciplinary appeal hearing in May 2008).
29. Following referral to the GMC by both Bristol PCT and Cardiff LHB, Dr Akano was on 19th August 2008 made the subject of an interim suspension for a period of 18 months. The letter dated 19th August 2008 notifying such Decision to Dr Brendan Lloyd expressly says the suspension will be reviewed within six months and "I must stress that this is an Interim Order and there has been no finding against Dr Akano".
30. Within the Respondent's documents there is no direct reference to Bristol PCT refusing Dr Akano's application to join the Performers List although this is implicit throughout. Dr Akano's appeal letter of 27th October 2008 confirms that his application was refused because he refers to his appeal against such Decision. We have no further details as to the Decision by Bristol PCT save that it is plainly implicit that one matter which concerned them was the failure to declare his dismissal by Gwent.
31. The Respondent gave Dr Akano notice of its intention to consider his removal from its Performers List by letter of 12th September 2008 and we have already set out the nature of the allegations and the Decision reached (and which is the subject of this appeal). The Decision was reached following a hearing which Dr Akano did not attend but of which he had been given notice and informed that he had the opportunity to attend and put his case.
32. In his letter of 27th October 2008, Dr Akano agrees the fact of the GMC suspension but (in effect) contends that such is not a basis for removal of a name from the Performers List. He states that the Respondents were aware of the outcome of the investigation by Gwent. He contends that Cardiff LHB acted prematurely in not awaiting the outcome of his appeal against the Decision of Bristol PCT before making their own Decision by reference to it. Dr Akano also puts forward the argument that the investigation and dismissal by Gwent was not in relation to "professional misconduct" but was in relation to "personal conduct".

DECISION

33. We deal first of all with the Respondents reliance upon the suspension of Dr Akano by the GMC. The Panel is not restricted to considering evidence which would be admissible in proceedings before a Court of law and we refer generally to Rule 41(6) of the Family Health Service Appeal Authority (Procedure) Rules 2001. We are entitled to take account of Decisions of other tribunals and bodies which appear to be relevant to the issues before us and will give appropriate respect to such Decisions albeit not necessarily be bound by them. The Decisions of the GMC will be given respect and we would in principle be entitled to rely upon such Decisions as evidence of the facts decided by them.
34. In the present case the reliance of the Respondent upon the Decision of the GMC is in our opinion misguided. The Decision in question is one of the Interim Orders Panel. It is a hearing which (as we understand its procedure) will not have involved the full consideration of all potentially relevant evidence and is by its nature an Interim Decision. As indicated in the letter of 19th August 2008 it is expressly a Decision in which there has "been no finding against Dr Akano". We do not understand how we can rely upon a Decision which does not involve any finding.
35. We consider the other two grounds relied upon by the Respondent at greater length.
36. We first consider the allegation relating to the non-declaration to Cardiff LHB. As already indicated we understand this allegation to relate to the termination of employment by Gwent and not to the suspension by Gwent.
37. The provisions of Regulation 11 make plain that the categories of information which are relevant to Declarations under Regulation 9 are relevant to the issue of unsuitability and may be held to render a performer unsuitable. On the other hand the failure to give information pursuant to the Regulations does not necessarily render a performer unsuitable. We are willing to accept that many performers may not recall the detail of all matters which are the subject of any Declaration on admission to a list and/or which are required under the regulations. Depending upon the circumstances, certain matters might be thought to be self evidently relevant to be the subject of a Declaration whereas others might appear to be less clearly so. In the context of the present case we are willing to accept (in the absence of any detailed documentation) that Dr Akano may reasonably have thought that there was a valid distinction between matters which could be categorised as "professional conduct" and matters which could be categorised a "personal conduct" and that disputes as to the number of hours worked and/or as to the propriety of claims to payment might be considered personal rather than professional in distinction to matters which relate to the clinical aspects of treatment of and advice to patients. In our opinion the distinction is probably a false one in the present context and professional conduct should be understood to relate to all matters arising in the course of performing the agreed professional services but until the issue was drawn to Dr Akano's attention he might reasonably have made the distinction. As the case was by consent of both parties heard upon the documents alone we have no further basis for making an assessment of Dr Akano. The situation did in our view change after the meeting in November 2007 when Dr Akano was put upon general notice by Dr Lloyd that he had a responsibility to inform the LHB of the suspension and therefore by plain implication to inform them of any termination. As already indicated in our review of the evidence it appears that the LHB was aware of the termination in any event within 7 days of its happening and it is not clear one way or the other as to whether Dr Akano also informed the LHB. The statement of Sian Richards is silent upon such matter and Dr Akano in his letter contends that he informed Dr Lloyd of the outcome of the investigation. In these circumstances we are not satisfied that the Respondents have provided sufficient evidence to satisfy us that there was a failure by Dr Akano to declare the termination of employment with Gwent to Cardiff LHB.

38. We now consider the matters relating to the failure to declare the investigation or findings of Gwent when applying to Bristol PCT. Dr Akano plainly declared "No" in the form of 24th January 2008 in answer to the question as to whether he was or had been the subject of any investigation into his professional conduct where the outcome was adverse in respect of any current or previous employment. By the time of such Declaration he had not only been suspended but had had the employment terminated (albeit that he entered an appeal). The wording is fairly plain except for any issue as to the meaning of "professional conduct" and we have already indicated our view that after November 2007, if not before, Dr Akano had been advised that the decision of Gwent was such as should be notified. In our view there is no realistic distinction that could be sensibly or genuinely made between a declaration to Cardiff LHB and a declaration to Bristol PCT. A declaration of an adverse outcome is distinct from an acceptance that the outcome was a just one or one that would necessarily be upheld upon the pending appeal. The fact of such an outcome is objectively something which the PCT would wish to know to enable it to make further investigations as to the underlying merits and/or relevance of the adverse outcome. The distinction between "professional" and "personal" may or may not provide an argument in such regard but the PCT should have been informed of the Decision so that they could consider the matter on its merits.
39. In the foregoing circumstances we are satisfied that the failure to make a proper Declaration to Bristol PCT could be considered and properly considered to make Dr Akano unsuitable within the meaning of the regulations. We agree that Dr Akano is on such basis properly to be considered "unsuitable".
40. The Decision to remove any practitioner from a Performers List is plainly a serious one and one that is to be very carefully considered. It is appropriate to consider whether it is reasonable and proportionate in the circumstances of each individual case and upon the evidence available. Regulation 10(3) makes plain that the LHB "may" and not "must" remove a performer following a finding of unsuitability. Regulation 11 sets out the criteria for a Decision upon removal as including information which has been the subject of a Declaration (and therefore implicitly information which should have been the subject of a Declaration) and the various matters set out in paragraph 2. We are in the present case very restricted in considering the nature of the "offence, investigation or incident" because of the paucity of evidence provided to us. The internal Decision of an employer is not to be considered comparable to the finding of a PCT or LHB in relation to admission to or removal from a Performers List or a final Decision of the GMC as to fitness to practice. Although the employer may have been an NHS Trust it is in principle no different to a commercial employer in such context. It is the substance of the evidence which is of potential importance to a tribunal such as ourselves and we have already indicated the paucity of evidence available to us. By way of example only it may be important to know whether any allegedly fraudulent claim in relation to consecutive shifts concerned only several minutes or more significant amounts of time and/or whether there was any agreement by the other employers. It may be of importance to consider the detail and extent of previous discussions as to allegedly excessive hours. Such are only examples of the type of issues which an LHB or a PCT to which a Declaration was made would want to consider but we have not been provided with the necessary evidence to come to any conclusion as to the relative seriousness of the individual facts of the case which was not declared to Bristol. Such may be of importance when any appeal in respect of the Bristol PCT refusal is heard. We expressly indicate that our Decision relates to Cardiff LHB and the evidence available to us and is in no aspect meant to pre-judge any of the issues which may be considered in the appeal against the Bristol PCT Decision.
41. We further note that pursuant to Regulation 11(7) the LHB (and therefore ourselves on an appeal) should take into account the overall effect of the relevant incidents and offences and that this is an extremely difficult task, if not an impossible task, when the detail and the evidence of the matters giving rise to the termination which was not declared have not been put before us.

42. We consider that the burden is upon the Respondent to satisfy us that it is appropriate to remove the Applicant from the Performers List. It is not sufficient to demonstrate that a finding of unsuitability is appropriate. We are not satisfied that it is appropriate to remove the Applicant from the list upon the evidence available to us.

43. The appeal is allowed albeit that we have made a finding of unsuitability.

SUMMARY

- (a) We find that Dr Akano was properly considered to be unsuitable albeit on only one of the three grounds relied upon by the Respondent. We do not consider that it was appropriate to remove Dr Akano from the list upon the evidence available to us.
- (b) The appeal against removal from the Respondent's Performers List is allowed.
- (c) The parties have rights of appeal pursuant to Section 11 of the Tribunals and Inquiries Act 1992 and may lodge an Notice of Appeal at the Royal Courts of Justice, Strand, London WC2A 2LL within 28 days from the date of this Decision.

Christopher Limb – Chairman

3rd February 2009