

In the Family Health Services Appeal Authority case no: 15221

Heard at Manchester	
On 15 January 2010	

Before

Mr J D Atkinson (Chairman)
Dr S Sharma
Mr Rhodes

Between

Dr M Humayun

Appellant

and

Heywood, Middleton and Rochdale Primary Care Trust

Respondent

Representation:

For the Appellant: Mr Ali of Counsel

For the Respondent: Mr Fitzpatrick, Hempsons

DECISION AND REASONS

The Appeal

1. This is an appeal by Dr Humayun against the decision of the respondent dated 8 September 2009 to include the appellant on the respondent's performers list subject to conditions.

The Proceedings

2. Dr Humayun qualified as a medical practitioner in the 1960s.
3. On 16 December 2008 the appellant made an effective application for inclusion on the respondent's performers list.

4. By letter dated 8 September 2009 the respondent notified the appellant that the application for inclusion on the list was granted subject to the following conditions
 - i. The appellant must confine his medical practice to NHS general practice posts under the supervision of a named GP Principal to be approved by the PCT
 - ii. The appellant must seek a report from his supervisor for consideration by the PCT prior to any review of the conditions
 - iii. The appellant must allow the PCT to exchange information with the GMC and any organisation for which he provides medical services
 - iv. The appellant must inform the PCT of any professional appointments he accepts which are conditional on his being included on a PCT performers list
 - v. The appellant must inform any prospective employer or organisation for which he provides medical services of the conditions of his inclusion in the PCT's performers list.
5. The reasons given for the imposition of conditions may be summarised as follows.
 - i. At the time of decision there was an outstanding GMC investigation into the appellant
 - ii. The appellant has not agreed to a GMC request for the appellant to undergo a formal assessment
 - iii. The appellant had been subject to consideration by a GMC fitness to practice panel on 30 October 2008. That panel had not considered the allegations brought by another doctor, Dr Hamid, nor did it conclude that Dr Hamid's allegations were vexatious and unsubstantiated
6. By letter dated 6 October 2009 the appellant gave notice of appeal against the decision of the respondent.
7. Appeals to the FHSAA are by way of redetermination.
8. The Panel notes here that with effect from 18 January 2010 the FHSAA transfers into a new tribunal structure under the Tribunals Courts and Enforcement Act 2007. The present determination was made on 15 January 2010, prior to the transfer of the FHSAA.

The Law

9. The relevant law is to be found in the Health Services Acts as amended

together with associated regulations. Extracts of the relevant law as set out in National Health Service (Performers Lists) Regulations 2004, as amended may be summarised as follows:

Regulation 8 (1)

A PCT may determine that if a performer is to be included in its performers list, he is subject, while he remains included in that performers list, to the imposition of conditions, having regard to the requirements of... preventing fraud or prejudice to the efficiency of the service

The documents and evidence considered

10. The Panel had before it the originating documentation from the appellant numbered to A6 and the respondent's response numbered to R8; a bundle filed on behalf of the appellant indexed and paginated to 282; and a bundle for the respondent indexed and paginated to 233.
11. At the hearing, the Mr Ali accepted that the appellant's bundle did not contain all the documents set out in the index. He also provided a schedule of further documents numbered to A26 which included amongst other things a chronology, a skeleton argument and further appeal submission. He accepted that the presentation of the documentation had been unsatisfactory.
12. Mr Fitzpatrick at the hearing filed a witness statement from L Mort dated 12 January 2010 and a chronology.
13. At the outset of the hearing the parties indicated that they had entered into negotiations with a view to a settlement. The Panel allowed time for negotiations to continue. After a number of hours a draft agreement by the parties had been negotiated. The handwritten document was also entered into the record and the appellant gave due consideration to withdrawing the appeal.
14. The parties subsequently indicated that agreement had been reached on all conditions as set out in the draft agreement save as to condition 2.
15. The Panel notes here that the draft agreement set out 6 conditions on inclusion. In brief the conditions made provisions as follows

Condition 1 that the appellant be supervised for 3 months

Condition 2 that the decision be reviewed within terms of components labeled a, b, and c

Condition 3 that monthly reports on the appellant be provided

Condition 4 that the PCT be able to exchange information with other bodies and would put the appellant on notice of such exchange

Condition 5 that the appellant inform the respondent of professional appointments

Condition 6 that the appellant for 3 months inform prospective employers of the conditions attached to inclusion

16. The Panel indicated that given the number of hours taken to reach this point it intended to proceed to determine the appeal on consideration of submissions only, with the appellant having effectively conceded in principle that conditional inclusion in the list was appropriate; and that the material facts were as set out in the chronologies prepared by the parties. Accordingly, the Panel did not hear oral evidence.
17. The Panel also drew the parties' attention to the limits of its powers in imposing conditions: namely that the conditions attached necessarily to the appellant, and not the respondent. The parties were invited to deal with such issues in their submissions.

The Respondents' submissions

18. Mr Fitzpatrick on behalf of the respondent made a number of submissions that may be summarized as follows. Draft condition 2 was the only matter which had not been agreed on. This relates to the review of the conditions. The respondent's preferred option for the framing of this condition is that there be only one component to this condition. That component (a) being simply that there be a review in about 3 months time on the basis that the continuing GMC investigations were likely to have been completed within that time period.
19. The parties had been unable to come to agreement about the terms of condition 2 that would be appropriate if the GMC investigation continued beyond its expected duration. The appellant therefore proposed component b to condition number 2: to the effect that on review no further conditions would be imposed unless there was a change in circumstances.
20. The respondent however was concerned about the lack of clarity of component b and therefore proposed a further component (c): providing for clarification of the meaning of change of circumstances in component (b),

particularly as it related to the GMC investigation potentially extending beyond the envisaged 3 month period.

21. Mr Fitzpatrick accepted that the Panel was unable to impose a requirement on the respondent to carry out a review or, in relation to draft condition 4, to require the respondent to give notice of certain matters.

The Appellant's submissions

22. Mr Ali, on behalf of the appellant, made submissions that may be summarised as follows. The appellant in principle accepted that supervision was required; however the supervisory need arose from his being out of practice and not because of the allegations that were subject to GMC investigation. The appellant took the view that those allegations were of no substance and that they had been considered by 3 reviews none of which found the allegations to be substantiated.
23. As to the terms of the conditions, all were accepted save for condition 2: the appellant's primary submission was that condition 2 should be deleted in its entirety because the PCT had the power to review in any event.
24. If that submission were not accepted that the appellant's subsidiary submission is that component (b) is necessary. It is not accepted that components (b) and (c) would be a fetter on the respondent's discretion.

Findings of Fact

25. The Panel considered all the evidence and noted the chronologies provided by the parties. The following facts are taken from the chronologies of the parties, which were not materially disputed, and the record of action taken by the GMC .
26. The appellant qualified as a medical practitioner in the 1960s
27. On 25 April 2005 the appellant and respondent entered into a PMS agreement.
28. In or around October 2006 a GMC fitness to practise panel suspended the appellant from the medical register for a period of 6 months on the basis of concerns relating to a circumcision undertaken in March 2005.
29. On 31 October 2006 the PMS agreement between the parties was varied with Dr Hamid becoming a party to the agreement.
30. In November 2006 Dr Hamid raised concerns about the appellant. The GMC began an investigation.

31. In January 2007 the GMC imposed interim conditions on the appellant.
32. On 4 June 2008 the GMC suspended the appellant.
33. On 9 June 2008 the respondent removed the appellant from the medical performers list.
34. In June 2008 the PMS agreement was varied with the effect that the appellant was removed from the agreement.
35. On 1 October 2008 the GMC wrote to the respondent indicating that it was investigating a complaint from Dr Hamid about the appellant relating to 12 issues ranging from inappropriate medical treatment of patients, misdiagnosis, provision of medical cover in absence, inappropriate prescribing, and improperly carrying out circumcisions.
36. On 30 October 2008 the GMC reviewed the appellant's fitness to practise.
37. On 17 November 2008 the appellant applied to be re-instated on the respondent's performers list.
38. On 4 December 2008 the GMC suspension period imposed on the appellant was completed.
39. 16 December 2009 the appellant submitted an amended application to join the performers list.
40. On 26 August 2009 the GMC confirmed that inquiries were continuing into the complaint about the appellant relating to 12 issues raised by Dr Hamid.
41. On 8 September the respondent made the decision against which this appeal is brought.
42. On 16 September 2009 the GMC confirmed that an investigation officer was continuing to make inquiries into the 12 issues raised by Dr Hamid.
43. At the date of the present hearing the GMC investigations had not been concluded.

Decision and Reasons

44. In the light of all the evidence and submissions and given the findings above the Panel finds that the evidence shows that there are grounds for imposing conditions on the appellant's inclusion in the respondent's performers list in order to prevent prejudice to the efficiency of the service.

45. The appellant is the subject of an investigation by the GMC into 12 issues giving rise to complaint against him. The issues subject to complaint range across a number of areas of concern and are of such a nature that supervision of the appellant's practice is a proportionate response, despite the appellant's confidence that the allegations cannot be substantiated.

46. In addition, as accepted by the appellant, supervision of the appellant is necessary and proportionate because he has been out of general practice since his suspension by the GMC in June 2008.

47. The conditions imposed on the appellant are as follows:

- i. The appellant for a period of three months from the the date of promulgation of this determination shall confine his medical practice to NHS General Practice posts under the supervision of a named GP Principal, namely Dr Anglin.
- ii. The appellant will arrange for the named GP in i above to provide monthly update reports for consideration by the respondent and a clinical supervisors report prior to any review of these conditions.
- iii. The appellant for a period of three months from the promulgation of this determination must inform the respondent of any professional appointment he accepts which are conditional on him being included on the respondent's performers list.
- iv. The appellant for a period of three months from the date of promulgation of this determination must inform any prospective employer or organisation for which provides medical services of the conditions of his inclusion in the respondent's performers list

48. Condition i. as set out above provides for the appellant's supervision for a period of 3 months. The time limit is imposed in anticipation that the GMC investigation, as advised by the representatives before the Panel and as reflected in the draft agreement, is likely to end within 3 months.

49. The draft agreement by draft condition 2 provided for a review of the respondent's decision. The Panel finds that it would be inappropriate to attempt to impose a condition relating to review because the statutory regulatory framework makes provision for review and it is for the parties to work within that framework. It would be improper for the Panel to attempt to either fetter the respondent's discretion or to restrict the appellant's rights. Draft condition ii has therefore been deleted from the list conditions as imposed by the Panel.

50. Conditions ii (formerly draft condition 3), iii (formerly draft condition 5) and iv (formerly draft condition 6) as set out above reflect the agreed draft conditions on matters relating to the provision of reports, the appellant taking up other professional appointments, and the appellant providing information to prospective employers or organizations.

51. Draft condition 4 has effectively been deleted from the list of conditions. The draft condition 4 attempted to impose a duty on the respondent to give the appellant notice of certain matters. Such a proposal lies outwith the powers available to the Panel. However for the parties convenience and at their request it is noted here that the respondent undertook to give the appellant notice of exchange of information with other bodies as set out in draft condition 4.

Summary

52. The Panel directs that the appellant be included on the performers list subject to the following conditions

- i. The appellant for a period of three months from the date of promulgation of this determination shall confine his medical practice to NHS General Practice posts under the supervision of a named GP Principal, namely Dr Anglin.
- ii. The appellant will arrange for the named GP in i above to provide monthly update reports for consideration by the respondent and a clinical supervisors report prior to any review of these conditions.
- iii. The appellant for a period of three months from the promulgation of this determination must inform the respondent of any professional appointment he accepts which are conditional on him being included on the respondent's performers list.
- iv. The appellant for a period of three months from the date of promulgation of this determination must inform any prospective employer or organisation for which provides medical services of the conditions of his inclusion in the respondent's performers list

Signed

J D Atkinson

Dated