

**IN THE FAMILY HEALTH SERVICES APPEAL AUTHORITY**

**Case No: FHS/15159**

Panel Members:

Mr Christopher Limb:	Chairman
Dr S Sharma:	Professional Member
Mrs C J Greene:	Lay Member

BETWEEN:

EAST LANCASHIRE PRIMARY CARE TRUST

Applicant

and

DR DESMOND HUGH FLEMING  
GMC Reg No 2277066

Respondent

**DECISION**

**Introduction**

1. The Respondent Dr Fleming was removed from the PCT Medical Performers List following a hearing on 19<sup>th</sup> February 2009. In this Decision “PCT” refers both to the Applicant Primary Care Trust and to its predecessors and in particular the Burnley Pendle & Rossendale Primary Care Trust. The Removal Decision was taken pursuant to Regulation 12(3)(c) of the National Health Service (Performers List) Regulations 2004 (the Regulations) on the basis of the Respondent having failed to comply with contingent removal conditions which had been previously imposed in April 2008 pursuant to Regulations 10(3) and 10(4)(a) on the grounds that his continued inclusion in the List was prejudicial to the efficiency of services which those included on the List perform. There has been no appeal against such Decision and any appeal would now be out of time. The Applicant seeks an Order for National Disqualification and this is our Decision upon the issue of National Disqualification.
2. The Panel sat to reach its Decision in Manchester on Friday 17<sup>th</sup> July 2009 pursuant to Rule 38 of the Family Health Services Appeal Authority (Procedure) Rules 2001 (the Rules). There is power to determine an appeal or application without an oral hearing if both parties agree in writing. The Applicant has indicated such agreement but there has been no communication

from the Respondent. There is power to reach a Decision without an oral hearing if no reply is received from a Respondent (pursuant to Rule 23) but in the circumstances in this case in which there was potential issue as to whether the Respondent had had all documents served upon him, the Panel considered that it was appropriate to have an oral hearing on the date which has been fixed. In the event neither party attended.

### **Legal framework**

3. Pursuant to Section 49N of the National Health Service Act 1977 as amended and Regulation 18A there is jurisdiction to impose a National Disqualification following removal of a practitioner from the Medical Performers List of a PCT.
4. There is no statutory guidance as to the principles to be applied when considering National Disqualification but it is in our opinion proper to consider National Disqualification in those cases where the findings against the practitioner are serious and are not by their nature essentially local in the sense of being objectively unlikely to have arisen had the practitioner been in a different geographical area. In considering whether to make an Order for National Disqualification it is appropriate to consider the background and grounds upon which the removal took place and the evidence if any as to the prospects of material change in the matters giving rise to the Decision to remove from the List.

### **Evidence**

5. Prior to considering the evidence on the substantive merits, we have considered the evidence in relation to service of documents on the Respondent and his consequent knowledge of the basis upon which the application is brought and the fact of this hearing. All communications from the FHSAA and from the PCT have been sent to 1 Wood Terrace, Clough Lane, Simonstone, Burnley and upon the papers as originally sent by the Applicant we had some concern as to whether Dr Fleming still lived at that address and would be aware of the various documents sent to him. We would in such circumstances have had to consider whether it was appropriate to continue with the hearing in any event in the absence of him having provided any alternative address to the PCT (or indeed the General Medical Council). It was in that context that we made an Order on 17<sup>th</sup> June 2009 requiring the Applicant to provide a statement setting out all steps taken to identify the current address of Dr Fleming and/or any other means of contacting him. We have recently received the statement of Mrs Rice-Jones dated 9<sup>th</sup> July 2009 in response to such Order.
6. The evidence of Mrs Rice-Jones is extremely helpful. In addition to confirming the service of documents either by ordinary first class post or by recorded delivery or (in all cases since October 2007) by hand delivery, Mrs Rice-Jones gives details of a telephone conversation with Dr Fleming on 3<sup>rd</sup>

July 2009. In that conversation Dr Fleming indicated that he would not be attending this hearing and (in essence) did not want to have any contact with this Tribunal or the PCT or the GMC. Dr Fleming also confirmed that he had received previous correspondence but had decided not to respond to it. He indicated in response to Mrs Rice-Jones' suggestion that he should contact the FHSAA to confirm his position that he would not do so and asked her to indicate that he did not want any contact with the FHSAA or the other professional bodies.

7. Mrs Rice-Jones also confirms and exhibits appropriate documentation to demonstrate that Dr Fleming is on the Electoral Roll for the above address.
8. In the context of the evidence of Mrs Rice-Jones we have no hesitation in concluding that Dr Fleming has received the various documents referred to in the Applicant's application and the documents sent to him by the FSHAA. We equally have no hesitation in concluding that Dr Fleming has consciously and firmly made a decision not to attend this hearing or participate in it. He has not attended today. In the circumstances it is entirely appropriate that we consider this case in the absence of either written or oral submissions or evidence from Dr Fleming.
9. The PCT Application for National Disqualification was served under cover of their letter of 23<sup>rd</sup> April 2009. The bundle of documents served with such letter comprise a very helpfully structured formal application which summarises the history relevant to the case and is accompanied by various exhibits of relevant documents. In addition to the evidence of Mrs Rice-Jones to which we have already referred, the PCT has subsequently sent a copy of the letter of the General Medical Council dated 7<sup>th</sup> May 2009 which indicates that "Dr Fleming has failed to keep an effective registered address as outlined under Section 30(5) of the Medical Act 1983 (as amended). Therefore he has been administratively erased from the Medical Register with immediate effect. My investigation has therefore ceased, however, should Dr Fleming apply for restoration in the future our investigation may resume prior to a decision being taken on any application". Such letter is written by an officer within the Fitness to Practice Directorate.
10. We set out a concise summary of the matters referred to in the application. Dr Fleming has been the subject of investigation relating to his clinical performance since 2003. In 2005 there was a contingent removal which imposed various restrictions upon his practice in relation to prescription of drugs and other matters but also included a requirement to undertake an assessment by the National Clinical Assessment Service (NCAS). Thereafter NCAS drew up a series of recommendations which amongst other matters set out a programme of professional education and subsequent monitoring and reporting. As part of such programme, Dr Fleming was to undertake a summative assessment examination. He failed most aspects of such examination.

11. In April 2007 other partners at Dr Fleming's Group Practice expressed concerns in relation to his clinical practice and indicated that they did not feel able to continue to provide further clinical supervision for him. The Reference Committee of the PCT met on 5<sup>th</sup> April 2007 and decided to investigate the concerns raised. At the same time as indicating the nature of allegations being made the PCT informed Dr Fleming that it was considering suspending him from the List pending the outcome of investigation. Suspension was ordered on 18<sup>th</sup> April 2007. The eventual outcome of the investigation was that some but not the majority of the concerns were upheld. Those concerns which were upheld related to what was accepted a serious error in relation to failure to respond appropriately to a raised prostate specific antigen on a laboratory report, the inappropriate prescription of drugs upon various occasions to a friend who was not a registered patient of the practice and not a resident within the area of the practice, and (partially upheld) a visit to a patient on hunger strike when the practice receptionist and other partners were unaware of such home visit.
12. Dr Fleming ceased to have practical involvement at his previous partnership in September 2007. The application indicates that he "resigned or retired". After the PCT felt it had fully investigated all necessary matters a further hearing was held on 10<sup>th</sup> April 2008 which imposed revised conditions of contingent removal. Such conditions were lengthy and detailed but in essence concerned an educational programme, the necessity for supervision by another GP principal, and notification of any professional appointment. Dr Fleming did not acknowledge receipt of the Decision, did not indicate that he accepted the conditions or would comply with its requirements, and in effect did nothing in response to the Decision. It is in such a context that a further hearing took place on 19<sup>th</sup> February 2009 which came to the conclusion that he should be removed from the PCT List. The Panel indicated in their Decision letter that there had been a failure to comply with the contingent removal conditions and there had been a demonstration of a lack of commitment to address the underlying performance concerns and in such a context a conclusion that he was no suitable to remain on the PCT Medical Performers List. As already indicated the removal was on the basis that his continued inclusion in the List was prejudicial to the efficiency of services.

## **Conclusion**

13. There has been no appeal against the findings of the PCT. As summarised above, the nature of the matters giving rise to the finding of inefficiency concerned (in particular) shortcomings in clinical practice and a refusal or failure to undertake the necessary steps in relation to education and supervision which might remedy such shortcomings. The only realistic conclusion is that Dr Fleming has come to a conscious and considered conclusion that he does not intend to address the shortcomings. It appears that he does not intend to practice further.

14. We are satisfied that an Order of National Disqualification is appropriate. We remind ourselves of the notable effect of an Order for National Disqualification upon Dr Fleming and the practical effect of preventing him pursuing his career within the NHS. We weigh such considerations against the risk to patients if an Order is not made. The failings of Dr Fleming are such that there is in our opinion a real risk to patients if no Order for National Disqualification is made. We consider an Order for National Disqualification reasonable, necessary and proportionate.
15. We Order National Disqualification from inclusion on all Lists prepared by all Primary Care Trusts and Health Authorities including but not limited to those referred to in Section 49N(1) of the National Health Service Act 1977 as amended.
16. We are not asked to consider making an Order extending the period after which an application for review may be made to five years under Regulation 19 of the 2004 Regulations as amended and we do not do so.
17. In the context of Dr Fleming not having solicitors or other professional representation we specifically refer to Rule 43 of the Rules and the possibility of review of a Panel's Decision in the circumstances there set out. We also notify the parties that any party to these proceedings can appeal this Decision under Section 11 of the Tribunals and Inquiries Act 1992 by lodging Notice of Appeal at the Royal Courts of Justice, The Strand, London WC2A 2LL within 28 days from receipt of this Decision.

**Dated the 17<sup>th</sup> day of July 2009**

**Mr Christopher Limb:**  
**Dr S Sharma:**  
**Mrs C J Greene:**

**Chairman**  
**Professional Member**  
**Lay Member**