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TIER TRIBUNAL OF THE TRIBUNALS SERVICE
HEALTH EDUCATION AND SOCIAL CARE CHAMBER
PRIMARY HEATH LISTS CASE PHL/15379

Professor M Mildred - Chairman
Dr S Ariyanayagam – Professional Member
Ms J Alderwick - General Member

BETWEEN

DR KLAUS GODER
(Registration Number 6102527)

Appellant

and

NEWCASTLE PRIMARY CARE TRUST

Respondent

DECISION WITH REASONS

The Appeal

1.By a letter received by the Tribunal on 15 April 2011 Dr Klaus Goder ("Dr Goder") appeals against the decision of the Respondent ("the PCT") made on 10 February 2011 to remove his name from its Medical Performers List ("the List").

2. The decision was made under paragraph 10(6) of the National Health Service (Performers' List) Regulations 2004 (as amended) ("the Regulations").
Paragraph 10 (6) provides "*where a performer cannot demonstrate that he has performed the services, which those included in the relevant list perform, within the area of the Primary Care Trust during the preceding twelve months, it may remove him from his list*".

Background

3. Dr Goder is a German national and is based in Germany. He was conditionally included in the List on 16 June 2006, restricted to working in the Out of Hours Service ("OOH") known as Northern Doctors Urgent Care ("NDUC"). The last time he worked in the PCT's area was in August 2009. In November 2010 the North East

Family Health Services Agency on behalf of the PCT sent him an annual performance proforma for completion.

4. Dr Goder recorded in his reply dated 15 November 2011 that he had worked in the last 12 months in Worcestershire and Suffolk; whilst he had not worked in the PCT's area he had undergone an appraisal by the PCT on 1 March 2010. He stated that he did not wish to be removed from the List.

5. On the basis of this information the PCT began removal proceedings of which notice was sent to Dr Goder on 6 December 2010. Dr Goder replied by email dated 14 December 2010 asking that he be retained on the PCT's List until June 2011 so that he could apply to join another List, for example the Blackpool PCT's List in whose area he intended to work in future.

6. This request was considered but the PCT notified Dr Goder by a letter dated 10 February 2011 that it had decided to remove him under Regulation 10(6). Dr Goder appealed, as set out above, on the grounds that he had been on the List for many years and had worked continuously during the last years in the Newcastle area especially in OOH where doctors were urgently needed. He had lost the opportunity to work in the Newcastle area since NDUC had in the last year engaged more of their own salaried doctors. Accordingly he had worked in other areas of the UK but had been appraised in Newcastle.

Dr Goder's case

7. Dr Goder asserted that removal would be against EU regulations providing for free migration and working of doctors, especially general practitioners, within the member states, particularly in cases such as his where he had complied with all conditions, examinations and requirements including appraisal. He asked to remain on the PCT's List pending transfer to the List of another PCT. He was in the process of applying to B;ackpool PCT where Medical Consulting and Diagnostics (presumably an agency for who he worked) is a supplier.

The PCT's case

8. The PCT opposed the appeal on the basis that its decision was reasonable and proportionate, relying on Regulation 10(6). It had considered all Dr Goder's representations and noted that there was no indication that he would return to work in the Newcastle area.

9. Whilst the PCT had a discretion to allow a doctor in Dr Goder's position to remain on its List, it took the view that it was important that the List comprise only those who actively work in its area in respect of whom it can provide support and advice and, where necessary, investigate any concerns regarding performance.

10. It bore in mind the Department of Health publication Primary Medical Performers List: Delivering Quality in Primary Care – Advice for PCTs on List Management which states at paragraph 24: "24.3 However there are benefits to performers in being on the Medical Performers List of the PCT in whose area they do the most work. This allows them to take better advantage of the support the PCT offers in terms of continuing professional development, appraisal arrangements and through involvement in local service development activity" and "24.4 It would be good

practice if PCTs were to review their Performers Lists periodically in order to maintain contact, to confirm that entries are up to date, and to ensure that individual members continue to perform services in the area. PCTs have the ability to remove from their list any GP who has not performed services in the PCT area in the preceding 12 months".

11. It concluded that it was Dr Goder's responsibility to ensure he is included in a List for the area in which he carries out most of his work.

12. In his witness statement Neil Morris, Deputy Medical Director of the 3 North of Tyne PCTs including Newcastle PCT, described the PCT's policy of regularly reviewing the status of the GPs on the List who do not hold full-time positions in the area by sending out the questionnaire referred to in paragraph 3 above. The purpose is to ensure the PCT has an up to date record of doctors on locum contracts or providing OOH services who can be appraised and appropriately investigated where there are any performance concerns.

13. A PCT will have obligations in relation to a GP even where he is not working in the area. The appraisal of Dr Goder had cost and resource implications for the PCT for which there was no countervailing benefit. It was undesirable and demanding of resources for the PCT to be responsible for investigating performance concerns in relation to services performed in a different area.

14. Dr Goder should apply to another PCT, in this case Blackpool, for inclusion on its List. It was 6 months since Dr Goder had requested a 6-month extension but he had still not applied for inclusion on Blackpool or any other PCT's List. The PCT was not infringing any EU regulations: it would have treated a British doctor in exactly the same way. Dr Goder was not being prevented from working in the UK: he simply had to join the List of another PCT in whose area he intended to work.

Our powers on appeal.

15. A decision to remove a performer s name from the list maintained by any PCT on any of the grounds provided under the Regulations is subject to appeal to the Health and Social Care Chamber of the Courts and Tribunals Service.

16. The powers of this Panel are to be found in paragraph 15 of the Regulations which (as amended) provides as follows:

(1) *A performer may appeal (by way of redetermination) to the First-Tier Tribunal against a decision of a Primary Care Trust as mentioned on paragraph (2) by giving notice to the First-Tier Tribunal*

(2) The Primary Care Trust decisions in question are decisions-

......

(d) to remove the performer under regulations 8(2), 10(3) or (6),.....

(3) On appeal the First-Tier Tribunal may make any decision which the Primary Care Trust could have made.

The Hearing

17. The parties both requested a hearing on paper alone. This was ordered to take place with consequential directions on 19 May 2011 and the hearing took place on 30 June 2011.

Our Consideration

18. We considered all of the material before us. In so far as any facts are in issue the burden of proof is on the PCT and the standard of proof is the balance of probabilities.

20. We accept that the general background to the decision and appeal is as set out above. We find that Dr Goder last provided services in the PCT area in August 2009.

21. We have considered the Regulations as a whole and the Guidance provided by the Department of Health in *Delivering Quality in Primary Care* .

22. The aim of the Regulations is to provide a structure by which doctors are admitted to the Performers List of one Primary Care Trust. No general practitioner can provide NHS primary care services in any part of England and Wales unless he is on an NHS Performers List somewhere. He may work in more than one PCT area but the ongoing responsibility for the efficiency of his services and his suitability to provide services is that of the PCT on whose List his name appears. A GP may choose to work in a different locality. In that case, it is usual for him to make an application within a reasonable time to be accepted onto the List of the PCT where he mainly works.

23. The PCT upon whose List a performer currently appears has obligations in relation to his performance even if he does not practice in that locality. It is usual for a performer to be formally appraised on a regular basis and this process has cost and resource implications for the PCT on whose List the performer appears.

24. In our view it is undesirable that a PCT retains responsibility for a general practitioner who has not practised in its area for some time. It is wasteful of the resources of that PCT and poses the risk that performance issues that might arise on regular appraisal or otherwise will not be noticed or acted upon. If any issue does arise there are obvious difficulties, if action has to be taken in relation to matters alleged to have occurred elsewhere.

25. It is plainly in the public interest and in the interests of patient safety that the PCT where the performer actually works has that responsibility. It is in these circumstances the PCT has been given the discretion to remove a performer from its list when he has not performed services in that area for a period of twelve months.

26. There is no reason to suppose that there are issues concerning Dr Goder's performance but there is a clear public interest of any such issues that might arise should be dealt with locally.

27. Dr Goder attended the Directions hearing on 19 May 2011 and was well aware of the issues in the appeal. He was directed to file any witness statements and documentary evidence by 2 June but has provided nothing since March. It would have been of value to the Panel to hear the progress that Dr Goder's application to Blackpool (or any other) PCT had made. The Panel could then have considered whether a deferred removal or allowing the appeal on an undertaking to resign from the List when he was successful elsewhere could have been an equitable outcome.

28. In the absence of any further information we are faced with the question whether there are any matters that should cause us to exercise our discretion in Dr Goder's favour. In the absence of any information concerning the current position it is hard to see what these might be,

29. We have looked at matters entirely afresh in our own redetermination. We are mindful that we have a complete discretion. In all the circumstances described above it is our view that it is fair, just and proportionate is that Dr Goder's name is removed from the list of Newcastle PCT.

The Decision

30. The appeal is therefore dismissed. Dr Goder is removed from the List under Regulation 10(6). If it has not already done so, the PCT shall notify the various bodies referred to in paragraph 16 of the Regulations.

Rights of Review and/or Appeal.

31. The parties are hereby notified of the rights to appeal this decision under section 11 of the Tribunals Courts and Enforcement Act 2007. They also have the right to seek a review under section 11 of the Act. Pursuant to paragraph 46 of the Tribunal Procedure (First- tier Tribunal) Health, Education and Social Care Chamber) Rules 2008 (SI 2008/2699) a person seeking permission to appeal must make a written application to the Tribunal no later than 28 days after the date that this decision was sent to the person making the application for review and/or permission to appeal.

Mark Mildred
Judge of the First-tier Tribunal
1 July 2011