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In the Family Health Services Appeal Authority

case no: 14773

Heard at Harrogate

**On 28 November 2008 and 30 January 2009
And 23 March 2009**

Before

**Mr J D Atkinson (Chairman)
Dr S Sharma
Mr C Barnes**

Between

**Dr N Parwar
(GMC no 3237533)**

Appellant

and

EAST LANCASHIRE PRIMARY CARE TRUST

Respondent

Representation:

For the Appellant: Mr Kempster of Counsel
For the Respondent: Mr McCartney of Counsel

DECISION AND REASONS

The Appeal and hearing

1. This is the second part of the determination of the appeal by Dr Parwar against the decision of the respondent dated 14 August 2008 to remove him from the respondent's medical performers list under the Health Services Act 1977 (as amended) and associated regulations.

2. The Panel made findings of fact as set out in the first part of the determination. The hearing was adjourned to allow consideration of whether or not there are appropriate conditions that may be imposed with a view to removing any prejudice to the efficiency of the services in question.
3. This second part of the determination must therefore be read together with the first part of the determination. It is not necessary to repeat the Panel's findings in detail. In brief the Panel on the last occasion found that the evidence adduced showed amongst other things that the appellant had breached the terms of the conditions imposed on him by the PCT but had not done so deliberately or willfully.
4. The Panel's previous findings as set out in the first part of the determination are not challenged; however they were subject to an application for review which was rejected. That refusal is annexed to this determination.

Further documents and evidence considered

5. For the adjourned hearing, the appellant filed a variety of documents. It is not necessary to itemize those documents here and are a matter of record on the FHSAA file. The documents included a written submission on behalf of the appellant.
6. For the hearing the respondent filed 5 further documents which similarly need not be itemized, and also included a written submission and a witness statement from Dr Lewis 11 March 2009.
7. In addition, in the course of the hearing the Panel the respondent provided a handwritten note of an estimate of the costs involved if Dr Pawar were to remain on the list and retrain.

Further Submissions on behalf of the Respondent

8. Mr McCartney relied on his further written submissions and made further oral submissions that may be summarized as follows. In considering contingent removal consideration should be given to the circumstances at the time of the present hearing and not at the time of the respondent's decision on 14 August 2008.
9. The respondent is of the view that the appellant presents a serious risk on a clinical basis such that there is prejudice to the efficiency of services. In considering contingent removal it would be wrong to impose any condition that would give rise to another inefficiency; that is an inefficient use of NHS resources such that the measures would require disproportionate expenditure.

10. In addition, any conditions that might be imposed would need to be sufficient to meet the degree of risk identified, and such conditions would need to be 'available'; that is they must be conditions that are capable of being met.
11. In this case the respondent's primary submission is that, given the identified training needs, the difficulties in finding a suitable clinical placement and the amount of expenditure in meeting the costs involved, there are no suitable conditions that may be imposed.
12. The Panel invited the respondent to identify conditions that would be sought should the primary submission as noted above be rejected. The respondent was unable to assist on this matter.

Further Oral Evidence on behalf of the respondent

13. The Panel heard oral evidence on behalf of the respondent from Dr Barry Lewis. Dr Lewis is the director of post graduate GP education for the north west deanery. He adopted as evidence in chief his statement dated 11 March 2009.
14. Relevant extracts of his further oral evidence in examination in chief may be summarised as follows. Dr Lewis as director of post graduate GP education is responsible for *the interface between training and service*. The deanery does not provide fully funded training schemes.
15. The NCAS assessment of the appellant shows that there are areas of basic practice relating to communication, clinical management and core clinical skills, in which Dr Pawar needs retraining. It is unlikely that the required improvements would be achieved in under 6 months, and are more likely to take 12 months. The level of performance required at the end of the programme would be that of the MRCGP such that it could be said that the appellant was suitable for independent practice.
16. In order to achieve that level of competence in practice the appellant would require close supervision in a deanery accredited training placement. In a letter dated 9 July 2008 to the respondent, Dr Lewis had indicated a period of training of less than 6 months, but it was now considered that a longer period was required because the appellant had been out of practice, and experience with other doctors requiring remediation showed that a longer time was required.
17. Dr Lewis had undertaken steps to ascertain the availability of appropriate placements. He had written to all 260 GP trainers in the deanery indicating the nature of the placement required. Only two had expressed an interest. One subsequently withdrew without taking the process further. The second

requested further information, and subsequently withdrew in the light of that information. A further e-mail had been sent round the trainers with no expressions of interest. In addition the directors of other deaneries have been contacted but no one has come forward with a placement.

18. A prerequisite for the placement would be the appellant undertaking and passing the multiple choice questionnaire (MCQ) test used to assess students at 2-3 years post qualification. This test is used to identify those who are suitable for recruitment onto the GP training programme.
19. The costs of retraining are made up of a number of elements. The costs of paying a trainer over a 12 month period, initially assessed at £8,000 per annum, should in the light of experience be uplifted by 50 -100%. The costs of a locum incurred by the trainer would also need to be taken into account on the basis of 8-9 sessions per week for a 2 to 3 month period. There were also costs involved in providing locum cover into the practice where Dr Pawar had been working. In the meantime Dr Pawar was also receiving a salary.
20. Relevant extracts of Dr Lewis's further oral evidence on cross examination may be summarised as follows. The number of GP trainers had expanded in recent years and was currently 313. They are paid £8,000 for that role as independent principals. All placements to August 2009 had been filled but there was a possibility of places becoming available after then due to, for example, maternity leave or sickness or where a trainee vacates.
21. In his letter of 9 July 2008 Dr Lewis had been more optimistic about the period of time required in retraining than is the case now. That was attributable in part to the passage of time in which the appellant had been out of practice. In addition, experience had shown that the intensity of remediation training meant that a longer period of retraining could be expected. Further, on reflecting on the NCAS assessment, given the lack of detail in some areas, more assessment would be required than initially thought.
22. The proposed 12 week period as set out in the letter of 9 July 2008 was Dr Lewis' initial assessment. It was not appropriate to proceed on that basis now for two reasons. First, it was only a initial assessment and was used as a basis for advertising for trainers, which produced no takers. Second, the extent of the on going support which would be required, involving assessment, remediation and further assessment.
23. The training practice that had responded to the first advert and had requested further information had withdrawn because of their previous experience in supervising a failing trainee who had had specific cognitive impairment. The extract of the NCAS report which had been provided to that trainer had referred to further assessment of this aspect of the appellant's circumstances.

It was accepted by Dr Lewis that since the NCAS report, Dr Hipkin's had provided a report on cognitive impairment. That assessment met the concerns only up to a point. A trainer may still have doubts on the issue of cognitive impairment.

24. The NCAS report did not make mention of requiring the appellant to undertake the MCQ; however that was part of the deanery process to ensure that a base line measurement is provided.
25. Dr Lewis's reply to questions put in re-examination may be summarised as follows. The reference in the 9 July 2008 letter to the period of training and costs were only an estimate. Dr Lewis undertook to place the advert for GP trainers at the same time as that letter. At the time of reply in September and October 2008 places were 98% full. There would be fewer places now.
26. Dr Lewis' reply to questions from the Panel may be summarised as follows. GP trainers are paid £8,000 per annum following allocation of a trainee. The costs of £9,000 identified in the letter of 9 July 2008 relates to locum and trainee grant on a pro rata basis over a 12 week period. There is little by way of publication dealing with issues of remediation training, although in due course it may be that Dr Lewis will be able to publish his own findings. The available evidence showed that the degree of input required for remediation was high because of the high levels of confidence doctors had in their ability and the difficulties experienced doctors had in asking for help. Dr Lewis had contacted the local directors of other deaneries about placements within the last fortnight and had circulated an email on a nationwide basis.

Oral evidence on behalf of the appellant

27. No further oral evidence was adduced on behalf of the appellant.

The Respondent's closing submissions

28. Mr McCartney, on behalf of the respondent, relied on his previous submissions and made further submissions in the light of the evidence now adduced which may be summarized as follows.
29. The only evidence on the necessity of training, its availability and the costs involved was that of Dr Lewis. In order to retrain the appellant and meet the risks to patient safety the respondent would have to undertake expenditure that would of itself amount to a further inefficiency in the provision of medical services because of the costs involved. Given that the costs involved were disproportionate, it could not be said that there were conditions available to be imposed on the appellant.

30. In addition, the evidence of Dr Lewis showed that there were no conditions available which could be applied, given the extent of the appellant's training needs.
31. The FHSAA decision in the Khadri case was an illustration of how in similar circumstances, it may not be possible to identify appropriate conditions to be imposed on a performer.

The Appellant's closing submissions

32. Mr Kempster, on behalf of the appellant, relied on his written submissions and made a number of further submissions that may be summarised as follows. It would be appropriate for the appellant to remain on the list subject to the same conditions that had been previously imposed and in line with the conditions imposed by the GMC.
33. The appellant accepted the NCAS report and its recommendations. The appellant accepted the evidence of Dr Lewis so far as it related to the training environment the appellant required, but did not accept that the time required might extend to 12 months. The appellant was committed to implementing the NCAS report. It was to be expected that the respondent, as an employer, would offer support and guidance. The respondent had previously accepted the appellant should be retrained subject to conditions.
34. The estimate of the costs involved in retraining as provided to the Panel at the hearing was a snapshot and should be treated with caution. The costs would be less if the training took 6 months, and the respondent had previously indicated a 3 month period of retraining. Credit should also be given to the fact that in undertaking remediation training the appellant would also be providing a benefit to the NHS by working for the respondent. In addition, the estimate included costs that would be incurred in any event to provide cover for the appellant. In those circumstances the costs were proportionate. It was wrong in principle to suggest that the costs of retraining in themselves gave grounds for a fresh finding of inefficiency; the costs fell to be considered as part of the overall test of proportionality.
35. It is accepted that it would be difficult for a suitable training place to be identified, but that is always the case. Finding a place would not be easy but the prospects of finding a place are not hopeless. Given the report of the psychologist Dr Hipkins, indicating that the appellant did not show signs of cognitive impairment, such an issue need no longer be considered in finding a place.

Decision and Reasons

36. The Panel considered all the evidence, the submissions of the representatives and finds as follows.
37. The Panel directs that the appellant be contingently removed from the respondent's list because his continued inclusion would be prejudicial to the efficiency of the services which those included in the list undertake to provide.
38. The conditions imposed with a view to removing any prejudice to the efficiency of the services in question are as set out in the paragraph below. The reasons for the Panel's decision are set out thereafter and incorporate the findings in the first part of the determination. The need for remediation training is not disputed. The further issues may be conveniently considered under the broad headings of the availability of suitable training placements and the costs of retraining.

Contingent Removal – the conditions imposed on the appellant

1. The appellant within a reasonable time undertake and satisfactorily pass the recruitment and selection screening MCQ test papers on clinical problem solving and situational judgment prior to undertaking a retraining/remediation placement.
2. The respondent to make arrangement in conjunction with other appropriate bodies and persons for the appellant to undertake appropriate retraining/remediation training in a deanery accredited practice.
3. The appellant is not to practise as a GP without close supervision unless and until he has demonstrated that he is safe to return to independent practise as a GP.
4. The appellant is not to undertake any activity which requires registration with the GMC without prior consultation with the respondent and the making of appropriate arrangements for supervision.
5. For the avoidance of doubt and without prejudice to the generality of conditions 3 and 4 above, the appellant is not to work as a locum, for any out of hours service or on call without prior consultation and, where appropriate, approval from the respondent.
6. The appellant will allow the respondent to exchange information with the appellant's employer or any organization for which the appellant provides or proposes to provide medical services and any individual involved in retraining and supervision.

The availability of training places

39. The Panel accepts the uncontradicted evidence of Dr Lewis insofar as it relates to the appropriate components of a remediation package for the appellant. The appellant requires close supervision in a deanery accredited training placement. The Panel finds it is appropriate that the appellant be required to undertake an assessment in the form of the MCQ, in order to provide a baseline measurement and given that it is seen as an appropriate indicator of suitability for GP training.
40. The evidence of Dr Lewis shows that the identification of a suitable training place, given the needs to be addressed as set out in the NCAS assessment, is difficult. The evidence shows that the vast majority of training places under the auspices of the deanery have been allocated, but that vacancies may occur for a variety of reasons. There is therefore a small pool of potential trainers. Within that pool there may be some trainers who are willing to take on the more onerous supervisory requirements of remediation, rather than the usual demands of a student/registrar trainee.
41. The respondent's experience of the round of advertising previously undertaken, which produced 2 expressions of interest, does not show that there would be no trainers willing to come forward. The Panel further finds that the issue of cognitive impairment raised in the NCAS assessment, which may have had a significant chilling effect on the willingness of potential trainers to engage in the process, has to a certain extent been met by the subsequent assessment of Dr Hipkins, who is of the opinion that on her assessment there is no evidence of cognitive impairment.
42. The Panel finds that the number of potential trainers within the deanery is therefore small; however the Panel is of the view that there is a real chance that a suitable placement could be found. The prospects of a suitable placement are commensurately increased when account is taken of the potential trainers outside the north west deanery. Inquiries on a nationwide basis, said to be at the level of director of deanery are too recent and inchoate as to have rendered reliable information on the availability of places outside the north west deanery.
43. Accordingly, the Panel finds that there is a real chance that a suitable placement may be identified for the appellant and that the specific requirements of retraining in this case do not amount to an insurmountable obstacle in so doing.

The issue of costs

44. In considering the imposition of conditions, the Panel is of the view that consideration must be given to the costs involved, and that the measures to

be taken must be proportionate, both as to their effect on the appellant and the respondent. In this context the Panel notes, as a matter of principle, that there is a duty on respondent PCTs to make arrangements to provide retraining in appropriate circumstances, albeit subject to issues of proportionality and reasonableness.

45. The Panel further note in this context Mr McCartney's submission to the effect that, where the costs involved are excessive, this in itself may become a source of inefficiency. The Panel reject the submission that the costs of remediation themselves should be considered as a separate head of inefficiency giving rise to removal from the performers list. Rather the correct approach is to consider the question of costs as part of the assessment of proportionality and reasonableness in imposing conditions. It is to that, that the Panel now turn.
46. The respondent has not provided a comprehensive schedule of costs involved. In the course of the hearing a handwritten note was produced giving an indication of the areas of expenditure arising from the appellant being retrained. There are 5 broad heads to be considered. The Panel have considered both each head separately and their cumulative effect. Mr McCartney rightly indicated that it was not possible to identify a precise sum because of the number of variables involved and in particular the possible variations in the period of time required for the appellant to attain and demonstrate his competence to the appropriate standard.
47. The first head relates to the payment of a suitable fee to the training supervisor. On an annual basis this was initially quantified as £8,000. The Panel accepts that experience shows that the task of remediation is more onerous than previously thought and that the input from trainers is commensurately greater. The Panel is of the view that an uplift of between 50-100% in fees is appropriate recognition of this and that the true cost should be considered to be in the region of £16,000.
48. The second head relates to locum costs for the trainer. Weekly locum fees are in the region of £3,000. Dr Lewis originally identified an initial assessment period with some improvements to be achieved by 12 weeks, although on reconsideration his view is that whole process may take longer. The minimum cost under this head is therefore in the region of £36,000.
49. The third head relates to the salary costs of the appellant himself. The Panel note here as a matter of public record, that the performers list system as devised, envisages that payment in appropriate circumstances will be continued to be made to performers who are subject proceedings.
50. The fourth head relates to ancillary costs such as travel expenses. No quantification has been offered on this.

51. The final head of costs relates to the locum costs that are attributable to locum cover in the practice where the appellant used to practice but has not done so during the currency of these proceedings. The Panel notes here, as under the third head, that the present regulatory framework envisages such costs to be met by PCTs. It is for the PCTs to manage these costs as best they can; it is not necessarily the case that a PCT would need to pay for a locum, given the various ways in which primary health services are commissioned and delivered.
52. In looking at all these heads both separately and in aggregate, the Panel notes the regulatory framework as currently structured inevitably requires that PCTs shoulder costs involved in such matters. The question the Panel has to determine is whether in the present appellant's circumstances such a burden is so great that they are disproportionate or unreasonable.
53. The Panel finds that it is not unreasonable to expect the respondent to pay a GP trainer fee that rightly recognizes the size of the task. Similarly, it is reasonable to envisage that the costs associated with payment of a locum to cover the trainer's own practice should be met. In this context account should also be given to the fact that the appellant whilst undertaking retraining will also be treating patients; in other words the expenditure undertaken also produces a gain in terms of patients actually being treated.
54. The Panel also takes account of the fact that the costs involved under the other heads of expenditure whilst significant, arise from the inherent nature of the statutory regulation regime now in place.
55. Accordingly, looking at the expenditure involved in the round, taking account of the variation in the estimate of the period of time involved in remediation training, and the duties of the respondent in meeting certain costs, the Panel finds that the costs involved are not so great as to make the imposition of conditions disproportionate or unreasonable.
56. In passing, the Panel note here that no submissions were made as to the extent to which a performer could be reasonably expected to meet the costs involved in retraining and the Panel specifically declines the opportunity to take a view.

Summary

57. The Panel directs that Dr Pawar be contingently removed from the East Lancashire Primary Care Trust's performers list on conditions as noted

above.

58. In accordance with Rule 42 (5) of the Rules the Panel hereby gives notice that a party to these proceedings can appeal this decision under Sec 11 Tribunals & Inquiries Act 1992 by lodging notice of appeal in the Royal Courts of Justice, The Strand, London WC2A 2LL within 28 days of receipt of this decision.

Signed

Date

Mr J D Atkinson, Chairman

Appendix attached

Appendix to determination

Appeal against contingent removal from the Performers list

Case no 14773

Dr Pawar

And

East Lancashire PCT

On considering the application for review dated 5 March 2009 by the respondent, the Panel makes directions as follows:

1. The Panel is satisfied that its decision was not wrongly made as a result of an error made by the panel. The decision of the Panel remains unchanged.

REASONS

2. The evidence at page 382-3 of the respondent's bundle must be viewed in the context of the evidence as a whole. At best the evidence at 382-3 is evidence that a letter was written, not that the appellant received and read the letter or had its contents communicated to him.

signed

dated 15 March 2009

Mr J D Atkinson
on behalf of the Panel