IN THE FIRST TIER TRIBUNAL **PHL15250**
HEALTH EDUCATION AND SOCIAL CARE CHAMBER
PRIMARY HEALTH LISTS
Heard at Manchester Civil Justice Centre
3 June 2010

BEFORE

JUDGE ATKINSON

DR I LONE

MR C BARNES

BETWEEN

DR SIDO JOHN
(Registration number 4730570)

(Appellant)

and

STOCKPORT PRIMARY CARE TRUST

(Respondent)

Representation:

For the Appellant: Ms Meehan, Ryan Solicitors
For the Respondent: Mr Fitzpatrick, Hempsons

DECISION AND REASONS

The Appeal

1. This is an appeal by Dr John against the decision of the respondent notified on 11 February 2010 to remove him from the respondent's medical performers list under the Health Services Act 2006 (as amended) and associated regulations.

The Background and Proceedings

2. The appellant was awarded his primary medical qualification in 2000. The appellant's application for inclusion on the respondent's performers list was approved with effect from 3 August 2005.

3. The appellant worked as a locum GP at various times including within the respondent's area until 23 December 2007.

4. On 23 December 2007 the appellant fell whilst on the stairs and sustained a head Injury .The appellant has not worked as a GP since.

5. By a decision notified on 11 February 2010 the respondent removed the appellant from their performers list under regulation 10(6) of the NHS Performers Lists) Regulations 2004 on the grounds that he could not demonstrate that in the preceding 12 months he had performed services In the respondent's area, which those included in the list perform

6. On 10 March 2010 the appellant appealed to the tribunal.

7. Appeals to the tribunal are by way of redetermination.

The Law

8. The relevant law is to be found in the 2006 Health Services Act as amended together with associated regulations. Extracts of the relevant law as set out in The National Health Service (Performers Lists) Regulations 2004 as amended are as follows:

   Regulation 10(6) where a performer cannot demonstrate that he has performed the services, which those included in the relevant performers list perform, within the area of the primary care trust during the preceding 12 months , it may remove him from the performers list.

   There are limited exceptions to the 12 month requirement as set out in 10(7) which are not material to the present appeal.

The documents and evidence

9. The appellant and respondent submitted originating documentation which was compiled into bundles marked A and R. A is paginated to A8 and R is paginated to R4.

10. For the hearing the respondent produced a bundle indexed and paginated

to 7.27; a note in relation to GMC proceedings inserted as document 59A; and various extracts of the relevant law and general published guidance on the meaning of unsuitability, efficiency and fraud cases and recently published guidance on the need of PCT's to review their procedures on removal.

11. For the hearing the appellant produced a number of documents which need not be itemised here. In brief they included a statement from the appellant; a report from Dr Sheldrick, consultant clinical neuropsychologist dated 15 December 2009 with an up date of 28 May 2010; a letter from Dr B Lewis Director of Post Graduate Education at the North Western Deanery and a selection of professional references and certificates of training.

12. Mr Fitzpatrick on behalf of the respondent indicated that the respondent would also rely on the oral evidence of Dr Allan, medical director for the respondent.

13. Ms Meehan on behalf of the appellant Indicated that they would rely on the oral evidence of the appellant but were unable to call Dr Lewis because of other commitments.

Preliminary matters

14. Mr Fitzpatrick objected to the admission of the reports of Drs Sheldrick and Dr Lewis on the grounds that the contents of those documents were not agreed and their authors were not available for cross examination. He further submitted that a number of matters mentioned in those documents touched on matters relating to contingent removal from the list; however the present appeal should be limited to determining the single question of whether or not the appeal against the respondent's decision should be allowed or dismissed.

15. The tribunal retired to deliberate without needing to trouble Miss Meehan for a response.

16. The tribunal subsequently directed that the appeal should proceed on the basis that, by virtue of regulation 15 of the performers lists regulations, it had the power to make any decision which the respondent could have made and noted that such decision included that of contingent removal; that the written evidence of Drs Sheldrick and Lewis be admitted because of their materiality; and that the documents would be assessed and appropriate weight attached to them, taking into account the fact that their authors had not been available for cross examination.

Opening submissions on behalf of the Respondent

17. Mr Fitzpatrick's opening submissions may be summarised as follows. The respondent had removed the appellant under regulation 10(6) because he had not performed services within the respondent's area since December 2007. The appellant had not made any representations on being put on notice of the respondent's consideration of exercising its discretion under regulation 10(6). The appellant had been suspended from practise by order of an interim orders panel of the GMC with effect from 17 February 2010 following the respondent's referral of the case to the GMC on 20 January 2010.

Oral Evidence on behalf of the respondent

Summary of oral evidence of DR Allan

18. Dr Allan in oral evidence adopted his statement of 19 May 2010 as evidence in chief. His further oral evidence may be summarized as follows.

19. Since the making of his statement of 19 May 2010 Dr Allan had seen the letter of Dr Lewis from the north western deanery dated 26 May 2010. Dr Allan had previously spoken to Dr Lewis and had understood that Dr Lewis had said that the appellant would need to undergo a cognitive assessment which the deanery was unable to provide, but which could be undertaken by the GMC. However Dr Lewis in his letter of 26 May 2010 now appeared to suggest that the deanery would offer such an assessment. In Dr Allan's view a return via the deanery should be a separate assessment from the cognitive assessment. Dr Allan could see no reason why the appellant could not be assessed by the deanery if he were not included on the performers list.

20. Since the making of his statement Dr Allan had also seen the report of Dr Sheldrick dated 26 May 2010. This report did not indicate the extent of the appellant's progress.

21. Since making his statement Dr Allan had also seen the appellant's statement. The suggestion in that statement that there was limited contact between the respondent and the appellant were denied. Dr Allan had contemporaneous notes of telephone conversations and the extent of email contact was set out the respondent's bundle.

22. Dr Allan had great personal sympathy for the appellant, but removal of his name from the Performers' List had been raised with him in the early stages of their communications.The appellant had made significant steps but the improvements had not come as quickly as hoped and so the respondent decided to remove under regulation 10(6). The respondent had waited to see if the appellant had improved sufficiently and would have been delighted to have a young GP back working. However the reports of Dr Sheldrick and the occupational health Adviser, Dr Menzies, showed that the improvements were

not sufficient to enable the appellant to return to work. The respondent had a duty to protect the public and should continue with the removal process until assessment by the deanery and the GMC.

23. Dr Allan accepted that he was not qualified to undertake a cognitive and reasoning assessment of the appellant. Dr Menzies, consultant in occupation health services at Stockport NHS foundation Trust, had contacted Dr Sheldrick, as treating physician, in order to obtain an opinion on the appellant's condition. The respondent also wanted an independent assessment report. The respondent had not obtained an independent report because of delays in the process with Dr Sheldrick.

24. The respondent had not needed to obtain an independent report in order to remove the appellant because the removal was made on regulation 10(6) grounds, and as the GMC would carry out an assessment, it was not necessary to pursue such a report.

25. The respondent had moved towards making a decision under regulations 10(6) two year after the accident in 2007. The respondent had been advised that after two years out of practice a person wishing to re-enter practise would need to undergo a return to work programme. In the light of some improvement in the appellant's condition the respondent moved to consider removal under regulation 10(6). The respondent could have removed the appellant after 12 months but exercised its discretion not to do so.

26. Dr Allan noted that Dr Sheldrick was of the opinion that the appellant could return to work. Dr Allan disagreed given that the appellant needed further therapy and Dr Menzies' view that the appellant should not return to work for several months because he was unable to function at the level required of a GP.

27. It was denied that the respondent wished to remove the appellant regardless. It was accepted that Dr Allan had not seen the report of Dr Sheldrick until the papers for the present appeal had been compiled.

28. The respondent had decided to remove the appellant shortly before the respondent's letter dated 14 January 2010. The decision was made in a conversation that Dr Allan had with an associate director, Mrs Mullins on either 12 or 13 January 2009. Dr Allan is not aware of any minutes being taken. The decision was made on an informal basis. There was no documentation showing what considerations had been taken into account.

29. The final decision letter was issued on 11 February 2010. If the appellant had made representations before then or asked for an oral hearing, the respondent would have agreed to hold such a hearing or would have taken into account the representations. However no such steps were taken by the

appellant.

30. The appellant would have difficulty in returning to work. The deanery has no funding for a returner programme.

31. It was open to the appellant to apply to be included on any performers lists by making a de novo application. Each application is assessed on its own merits. The fact that the appellant would not be able to supply recent references would not be an insurmountable obstacle for the appellant to be included on the list. Special consideration would be given to the particular circumstances as to why a recent reference was not available.

32. If the appellant were to be contingently removed then any conditions would reflect the matters outlined in Dr Lewis letter and the decisions of the GMC.

33. The respondent does not have sufficient resources to found a returner programme for this appellant. Such schemes usually extend over a 6-12 month period. It was accepted that lack of PCT funds did not amount to a mandate for removal.

34. It was accepted that the appellant's circumstances were such that they could classed as an efficiency case under the performers regulations. It was also accepted that his circumstances overlap with an 'unsuitability' case under the regulations, but Dr Allan would need to take further advice on that.

Oral evidence on behalf of the appellant

Summary of oral evidence of Dr John

35. The appellant gave evidence on his own behalf. He adopted as evidence in chief his statement of 28 May 2010. The appellant's further oral evidence may be summarised as follows.

36. The appellant worked as a locum GP in the respondent's area and neighbouring districts. The appellant had not worked since December 2007. The appellant has engaged in observational sessions with colleagues.

37. The appellant had been subject to annual review of his inclusion on the list. In 2008 he had not responded to a review request from the PCT because he was in hospital following the fall. In the course of 2008 he had had discussions with Dr Allan and had been seen by Dr Menzies.

38. The appellant would like to return to work. After the accident he had only been able to say his mother's name. The appellant still has problems with word finding. The appellant's vision has continued to improve. It was accepted that the respondent had made it clear that they were to consider

removal from the list.

39. The appellant understood from the letter of 14 January 2010 that he had been removed from the list. The appellant at the time however wanted to concentrate on the rehabilitation process with a view to returning to work. After receiving the letter of 11 February 2010 the appellant realised that he needed help beyond the rehabilitation process and that he should appeal the decision. The appellant therefore discussed his position with Dr Lewis.

40. The appellant had also attended a meeting at the GMC which had resulted in suspension on health grounds. The decision of the GMC is subject to review every 6 months.

41. The appellant had not discussed with Dr Lewis any dates on which he could start on the returner programme. If the PCT did not have funds then the appellant would pay for it himself.

42. The appellant had originally applied to be on the respondent's list because he had trained in Manchester and that was the list that was most convenient for someone in his position.

The Respondent's closing submissions

43. Mr Fitzpatrick, on behalf of the respondent, relied on the response to the notice of appeal and made a number of further submissions which may be summarized as follows.

44. The respondent had correctly exercised its discretion under regulation 10(6) to remove the appellant from the list because he had not performed relevant services within the preceding 12 months. In a letter dated 14 January 2010 the appellant had been offered the opportunity to make representations or provide oral evidence on the matter of his removal but had chosen not to do so.

45. It is not disputed that the appellant has not worked as a GP since December 2007. The documentation showed that the appellant had been engaged in a lengthy recovery period but that his rehabilitation was not complete. The appellant was still the subject of assessment by the GMC who had suspended him from practice on an interim basis for an 18 month period.

46. The appellant's removal from the list was not unfair. The respondent had given the appellant every opportunity to recover. The removal was not disproportionate because the appellant would be able to apply for inclusion on the list once his condition had improved.

47. The discretion under regulation 10(6) was not limited by reference to any

matters other than those set out within the regulation itself and the exceptions in regulation 10(7). Nor was there any published guidance on the exercise of such discretion, although it was accepted that with effect from 1 April 2010 there was guidance indicating that the objective of minimising risk to the public should be taken into account when making such decisions.

48. In the present case the appellant had not worked since December 2007; he was currently suspended from practise by the GMC; and if his condition improved and the GMC suspension lifted, he would be able to apply for inclusion on a performers lists with the respondent or any other PCT.

49. It was accepted that if the appellant were to be on a performers list , then he should be subject to conditions in terms as set out by Dr Lewis. There were also other concerns that would need to be addressed: these included the availability of places on any returner programme and where the burden of costs in such matters should fall. The PCT did not have any available funds. It was submitted that the Deanery also had no such funds.

50. On the question of removing the appellant contingently from the list, it was noted that such removal could not occur in cases of unsuitability; but it was accepted that the appellant's present circumstances could be framed In terms of an efficiency case where contingent removal is permitted.

51. However in the present appeal it would be difficult to identify appropriate conditions particularly in the light of the GMC suspension of the appellant. It was therefore submitted that the grounds for contingent removal were not established and that the appeal should be dismissed.

52. In the event of the appeal being allowed outright the respondent would need to consider its position and decide what steps to take including considering contingent removal. In any even the appellant had been suspended from practise by the GMC.

The Appellant's closing submissions

53. Ms Meehan, on behalf of the appellant, relied on the notice of appeal, drew the tribunal's attention to the relevant statutory framework, rehearsed the appellant's history and made a number of further submissions that may be summarised as follows.

54. The respondent had not acted fairly or proportionately in coming to its decision under regulation 10(6). The appellant had been presented by a fait accompli as set out in the respondent's letter of 14 January 2010 which was misleading. The respondent should have adopted a 'step-wise' approach to removal. Using that approach the respondent could have contingently

removed the appellant.

55. The appellant, having gained his medical qualifications despite the difficulties of having meningitis as a teenager, had been included on the respondent's list in 2005 and worked within that area until 2007.

56. As a result of the accident in December 2007 he had suffered a serious head injury and had not been discharged from hospital until April 2008. Dr Sheldrick had provided a helpful critique of the appellant's condition. Dr Sheldrick's reports showed that the appellant had made significant progress in his recovery but that a full assessment was required. The respondent had not undertaken any independent assessment of the appellant's condition.

57. It was accepted for the moment that the appellant could not return to work as a GP. The appellant hoped to return to work under a phased return with the approval of his advisers. The appellant also accepted his recovery may be limited to the extent that such an approach may not come to fruition.

58. Dr Lewis in his letter of 25 May 2010 was of the view that the appellant's career would effectively be at end if the appellant were removed from the list and had set out a number of conditions that would need to be applied as the appellant returned to work.

59. The GMC were currently assessing the appellant. Two psychiatric assessment had been undertaken and a neuropsychological assessment was awaited. In the light of those reports, when completed, it may be that the appellant would seek to have the interim suspension reviewed.

60. In summary, the appellant was moving towards remediation; the appellant had been reviewed annually by the respondent in the light of his accident but at the eleventh hour had decided to remove the appellant.

61. The appeal should be allowed.

Assessment of Evidence

62. The tribunal considered all the evidence and the submissions of the representatives. The tribunal notes that there is only limited evidential dispute as to the primary facts. Matters of judgment and the resolution of conflicting interpretations, so far as they are material, are set out in subsequent

paragraphs under the heading decision and reasons.

63. The evidence adduced by the parties show matters such as the appellant's qualifications and the sequence of events following the accident are not largely in issue. Accordingly the tribunal makes the following findings of fact.

Findings of Fact

64. The appellant was awarded his primary medical qualification by Manchester University in 2000. The appellant was due to take his MRCGP examinations in January 2008.

65. The appellant was included on the respondent's performers list with effect from 3 August 2005.

66. On 23 December 2007 the appellant fainted and fell whilst on the stairs to his flat. Following admission to Manchester Royal Infirmary investigations showed that he had a left fronto-parietal subdural haemtoma with subarachnoid haemorrhage. The appellant's condition subsequently deteriorated but he was eventually transferred for neuro-rehabilitation on 4 February 2008.

67. In August 2008 Dr Allan contacted the appellant as part of inquiries into matters relating to the respondent's performers list. The appellant told Dr Allan of recent events. Dr Allan indicated that if the appellant wished to return to work he would need to be re-assessed.

68. The appellant underwent further neurosurgery in January 2009.

69. In January 2009 Dr Allan told the appellant that he would make arrangements for a consultant in occupational health medicine to prepare a report on the appellant.

70. The respondent collected various information about the appellant from a variety of sources and confirmed on 9 June 2009 that the respondent would require a full occupational health assessment in the light of the available information.

71. In August 2009 the appellant indicated that he would contact Dr Menzies in order to make arrangements for his assessment. Arrangements were made for Dr Menzies to see the appellant on 19 October 2009 .

72. On 26 October 2009 Dr Menzies wrote to the respondent and indicated the outstanding matters requiring further clarification before he was able to find the appellant ready to resume work.

73. On 13 January 2010 Dr Allan spoke to Dr Menzies to obtain an up date. Dr Allan also spoke to the appellant indicating that the respondent would now consider whether to remove him from the list and that a referral would be made to the GMC

74. On 14 January 2010 the respondent wrote to the appellant in the following terms:

Further to your conversation yesterday with Dr Allan, medical director, NHS Stockport PCT has made the decision to remove you from the medical performers list under regulation 10(6) ……

The letter continued by setting out the terms of the regulations, inviting representations or election for an oral hearing and right of appeal to the FHSAA.

75. On 20 January 2010 Dr Allan contacted the GMC to refer the appellant for consideration of his fitness to practise.

76. On 11 February 2010 the respondent wrote to the appellant and stated that the respondent had made the decision to remove him under regulation 10(6).

77. On 17 February 2010 the appellant was suspended by order of the GMC for a period of 18 months.

Decision and Reasons

78. Looking at the evidence as a whole and in the light of the above findings, the tribunal directs that

the appellant is not to be removed from the respondent's performers list under regulation 10(6)

and

declines to contingently remove the appellant

for the reasons given below.

79. In coming to this decision the tribunal reminds itself that it proceeds by way of redetermination; that is to say that it must determine matters afresh on its own merits and is not limited to a mere review of the respondent's decision. Within that framework it is often unnecessary for the tribunal to dwell on alleged procedural unfairness because such matters can be corrected in the course of the appeal. Notwithstanding this, the tribunal feels compelled to note the inadequacies in the respondent's decision making process because

it emphasises the lack of an evidential base to determine the considerations weighed by the respondent in exercising its discretion to remove the appellant.

80. In the present appeal the evidence from the respondent shows a less than robust process in decision making. In particular, Dr Allan was of the view that he had made the decision on either 12 or 13 of January 2010 as supported by the respondent's letter of 14 January 2010, an extract of which is set out in preceding paragraphs. However, the respondent has framed its notice of appeal on the basis that the decision was taken on 11 February 2010 as supported by a letter of the same date.

81. On being asked for clarification about such matters Dr Allan said that he had made the decision with Mrs Mullins, that there was no record of the meeting and that no minutes were taken.

82. The tribunal notes that there are obvious difficulties arising from such informal decision making. Such difficulties are exacerbated by there not only being no record of the decision itself, but also by the failure to set out in the decision letter the considerations that were weighed in the balance in arriving at the decision.

83. The tribunal therefore finds the basis on which the decision to remove was taken is unclear. Be that as it may, the tribunal now turns to the substantive issues in the appeal.

84. Regulations 10(6) as noted above confers a wide discretion on a decision maker: removal if a performer has not performed services in the area in the preceding 12 months. Other than exceptions in 10(7) there is no explicit mention within the regulations themselves of the matters to be taken into account. The tribunal however is of the view that it is a necessary and integral part in the exercise of such discretion that the decision is reasonable and proportionate in all the circumstances.

85. Mr Fitzpatrick on behalf of the respondent submitted that removal would not be disproportionate in this case. The appellant accepted that he could not practise at the moment, and the appellant would be able to apply for inclusion on the list in due course in the light of any further improvements in his functioning. The respondent was under a duty to keep its list up to date and had waited 2 years to remove the appellant whereas the regulations allowed removal for non performance within 12 months.

86. The tribunal rejects those submissions for the following reasons.

87. The removal of the appellant would not be proportionate because such a step would be significantly more than the minimum required in order for the

respondent to meet its objective. The respondent is able through its own processes to keep the list up to date by noting that the appellant is the subject of special circumstances which for the time being means he cannot practice. There is no evidence before the tribunal that the respondent would incur any significant marginal cost in taking that approach.

88. The available evidence, as noted below, does not show that the point has been reached where the prospects of the appellant's rehabilitation and remediation are not reasonable.

- Dr Sheldrick, the appellant's treating neuropsychologist, in a letter dated 15 December 2009 was of the view that the appellant had made significant progress since his accident but that there were some difficulties in his returning to work. Dr Sheldrick recommended that the appellant be allowed to observe GP colleagues for 1-2 months, with supervised performance for a further 2-3 months with appropriate support. Dr Sheldrick accepted that such a process would require further discussion with other professionals.

- Dr Lewis was also of the view that further assessment was required of the appellant and indicated the steps the appellant would need to take if he wished to return to practice.

- Dr Menzies, the consultant occupational health physical also noted a number of areas in the appellant's functioning that needed to be explored further.

- The appellant is the subject of continuing assessment by the GMC which is hoped will be concluded within a number of months.

89. The tribunal notes here that the respondent has not undertaken its own full occupational health assessment .

90. Thus the tribunal finds that the evidence shows that there is no concluded view as to the appellant's capacity to perform as a GP in the future. It may be he will be able to so perform. It may be that he will not be able to so perform. The assessment process has not yet been completed.

91. In these circumstances it is therefore particularly important, in determining the proportionality of a decision, to consider the effect on the appellant.

92. Dr Lewis in his letter dated 26 May 2010 was of the view that removal followed by a requirement to make a new application for inclusion would *in effect prevent him undertaking a return to work programme and therefore end his career.*

93. The tribunal did not hear oral evidence from Dr Lewis. His opinion in that regard is untested. It is unclear to the tribunal on what evidence Dr Lewis relied and the precise reasoning that led him to that opinion.

94. The tribunal notes that if removed the appellant would be able to apply for inclusion on the respondent's performers lists or any other PCT list. There is a requirement that such an application is accompanied by recent references. However, the regulations in effect allow for exceptional circumstances to be taken into account. It therefore cannot be said that failure to provide up to date references would be fatal to an application.

95. The tribunal therefore concludes that Dr Lewis has perhaps overstated the finality of the consequences of the decision to remove.

96. However, there is no doubt that the likelihood of the appellant's return to practise is significantly reduced if he is removed from the list. The tribunal comes to that view because following removal there are so many more procedural requirements that he would need to meet, that may result in a refusal to include or a delay in being included on a performers list, when compared to his remaining on the list. The additional procedures involved in making a new application, whilst in themselves not insurmountable, necessarily add up to a more complicated process with its own attendant difficulties.

97. The tribunal also takes into account the need to protect the public. This concern lies at the heart of the performers regulations. In the present case there are a number of factors in place to ensure the protection the public without the need to resort to removal.

98. First there is the appellant's own awareness, insight and sensitivity to his particular circumstances. There is not the slightest suggestion in any of the evidence before the tribunal that the appellant would do anything other than comply with the advice of professionals as to whether or not he is fit to practise.

99. Second, the appellant has been suspended by the GMC for 18 months whilst they undertake an assessment of his fitness to practise. In such circumstances it is not possible for the appellant to work as a doctor and thereby endanger the public.

100.Third, and finally, the respondent, if it considers appropriate, may itself contingently remove the appellant from the list.

101.In these circumstances the demands of public protection are met without the appellant being removed under regulation 10(6).

103.The tribunal therefore weighs the objective of the respondent in coming to this decision, the need of the public to be protected, and the extent of the detriment to the appellant. In so doing the tribunal is of the view that removal of the appellant under regulation 10(6) would be disproportionate. Accordingly, the tribunal does not direct that the appellant be removed under regulation 10(6).

104. The tribunal was invited to consider contingent removal of the appellant on the grounds of efficiency.

105.The tribunal declines to exercise its discretion in that regard. Whilst it may well be that the appellant meets the criteria for contingent removal, such a decision would require the identification of appropriate conditions to be imposed on the appellant. Such conditions would necessarily need to be clear, specific, viable and with clear time limits. The evidence available to the tribunal is not sufficiently detailed or wide ranging as to enable the tribunal to come to a properly considered view.

106. In these circumstances the most appropriate course is for the tribunal to avoid becoming immersed in the management of the respondent's list. It is for the respondent to now consider its position and make the appropriate decisions. It may be that a fresh decision will give rise to further appeal rights; but that is not a matter for this presently constituted tribunal.

Summary

The tribunal directs that Dr John is not removed from the Stockport Primary Care Trust performers list under Regulation 10(6) of the performers lists regulations where a performer cannot demonstrate that he has performed the services.

The tribunal makes no direction as to contingent removal.

The appeal is allowed.

Signed

Judge Atkinson Dated