

**IN THE FIRST-TIER TRIBUNAL  
(HEALTH, EDUCATION AND SOCIAL CARE CHAMBER)  
PRIMARY HEALTH LISTS**

**Case No: PHL/15257**

**Tribunal Members**

<b>Mrs Debra Shaw</b>	-	<b>Chairman</b>
<b>Mr Philip Wray</b>	-	<b>Professional Member</b>
<b>Mrs Jillian Alderwick</b>	-	<b>Member</b>

**BETWEEN**

**SUFFOLK PRIMARY CARE TRUST**

**Applicant**

**and**

**DR DAVID BURTON**  
GDC No: 54876

**Respondent**

**Considered on 28<sup>th</sup> June 2010**

**DECISION WITH REASONS**

**The Application**

1. This is an application by Suffolk PCT (“the PCT”) for national disqualification of Dr David Burton (“the Respondent”) under section 18A(3) of the National Health Service (Performers Lists) Regulations 2004 (as amended) and associated regulations (“the Regulations”).

**History**

2. The PCT commenced an investigation into the Respondent’s clinical performance in 2008 when it came to its attention that serious issues had been raised regarding the care of some of the Respondent’s previous patients.
3. The PCT’s clinical investigation had reached a conclusion during 2009 and a PCT panel hearing was due to take place on 17<sup>th</sup> September 2009 to consider the Respondent’s suspension from the PCT’s dental performers’ list, but was deferred at the Respondent’s request due to his ill health. The Respondent was informed that a suspension panel would be reconvened when he returned from sick leave, but he remained on sick leave until his voluntary withdrawal from the GDC Register in January 2010.

4. On 18<sup>th</sup> January 2010 the PCT became aware that the Respondent had applied to the GDC for a voluntary withdrawal from their Register due to ill health. The PCT wrote to the GDC to inform it of the serious nature of its investigations and findings and to appeal against the Respondent's voluntary withdrawal from the GDC Register, but on 4<sup>th</sup> February 2010 the GDC accepted the Respondent's voluntary withdrawal on the grounds he had applied for retirement from NHS dentistry on medical grounds and stated matters concerning his fitness to practise would not now be considered. However, the GDC did confirm that if in future the Respondent applied to restore his name to the Register, these outstanding fitness to practise matters would be taken into account.
5. On 5<sup>th</sup> February 2010 the PCT removed the Respondent from its dental performers' list pursuant to Regulation 10 of the Regulations.
6. On 6<sup>th</sup> April 2010 the PCT lodged an application with the Primary Health Lists of the Tribunal Service (formerly the FHSAA) for national disqualification of the Respondent on the grounds it wished to prevent potentially severe consequences for patients resulting from the very serious and significant inadequacies in the Respondent's clinical practice which it had identified, specifically:
  - Failure to provide appropriate treatment to meet the patients' needs
  - Failure to properly diagnose and treat patients who had presented with infection
  - Failure to ensure patients were dentally fit and had received all the treatment they were willing to undergo
  - Failure to maintain adequate records
  - Failure to have proper procedures to enable radiographs of good diagnostic value to be taken
  - Failure to take and/or update medical histories
  - Failure to inform patients of all available treatment options under the NHS to allow them to make fully informed choices in respect of their health care
  - Failure to provide periodontal treatment
  - Poor quality treatment and inappropriate care.
7. The parties subsequently agreed to the Tribunal considering the application on the papers alone and the Panel proceeded in the absence of the parties on 28<sup>th</sup> June 2010.

### **The Law**

8. The relevant law is set out in section 18A(3) of the Regulations. It provides, inter alia, for a PCT to make an application to the FHSAA for a national disqualification to be imposed on a performer which it has removed from its performers' list.

### **The parties' submissions**

9. The Respondent's representatives have submitted that the legislation does not empower the Tribunal to nationally disqualify the Respondent if he cannot be defined as either a healthcare professional or performer, and he is no longer a healthcare professional as he is not registered with his professional body. The PCT removed him from its performers' list under Regulation 10(1)(e) of the Regulations, which states:

- (1) *The Primary Care Trust must remove the performer from its performers list where it becomes aware that he-*  
(e) *is no longer a member of the relevant health care profession.*

10. They have further submitted that as the Respondent is no longer on the GDC Register and is no longer able to practise as a dentist, either privately or for the NHS, he cannot be included on any PCT performers' list nationwide. They have also contended section 28(2) of the National Health Service Act 2006 defines "dentist" as a dental practitioner who is registered in the dentists' register so the Respondent cannot be described as a dentist.

12. As Regulation 18A(1) states:

(1) *In this regulation and in regulation 19 "national disqualification" means the disqualification of the performer.....*

the Respondent's representatives have submitted as the Respondent is neither a performer within the meaning of the Regulations, nor a healthcare professional or dentist, it is not within the Tribunal's power to nationally disqualify him.

13. The Respondent's representatives have also contended that it is disproportionate for The Tribunal to nationally disqualify the Respondent, on the basis the Department of Health Guidance ("the Guidance"): "Delivering Quality in Primary Care: Primary Care Trust Management of Primary Care Practitioners' Lists for General Dental Practitioners" published in 2004 advises at Section 8 that:

*8.1.1 A decision by a PCT to remove a dentist from its list is only a local decision. It applies only within that PCT and whilst other PCT's must consider the facts behind the decision they can reach a different conclusion. Though it must be emphasised that in doing so they are recommended to consider how they would justify this different approach if asked to do so by the public, especially if there were an adverse incident.*

*8.1.2 Where the facts of the case are serious it would be wrong to allow the dentist to offer his services to every PCT in turn in the hope that he will find one willing to accept him. The FHSAA can issue a national disqualification to prevent such a practitioner joining the list of another PCT.*

*8.1.5 A PCT can ask the FHSAA for a national disqualification within three months of removing the dentist from a list or within three months of refusing to admit, nominate or approve the dentist to/for a list. PCTs are reminded of the benefits of a national disqualification both for the interests of patients and for saving NHS resources. Unless the grounds for the decision were essentially local it would be normal to give serious consideration to such an application. The FHSAA (Procedure) Rules 2001 govern this procedure.*

The Respondent's representatives have submitted that the Respondent's position is very different from the circumstances covered in the Guidance in that he cannot be admitted to an alternative list as he is no longer a dentist, member of a healthcare profession or performer and that it is therefore unnecessary and disproportionate to nationally disqualify him and to do so would serve no practical purpose. They have

contended this is not the type of case that the Regulations and Guidance are drafted to cover in that the Respondent can no longer represent any risk to the public given that he is no longer able to practise dentistry either privately or for the NHS.

14. They have also pointed out that the PCT has not removed the Respondent after a hearing to decide the facts of the allegations and the Panel is therefore unable to rely on a decision of the PCT about the actual allegations when considering national disqualification. They have submitted the position is the same with regard to the GDC which also did not proceed with any investigation or make any decision as to any allegations against the Respondent.
15. Whilst the Respondent's representatives have conceded that it is theoretically possible that the Respondent could reapply to be restored to the GDC Register, they have contended that his readmission is highly unlikely given that a GDC investigation was ongoing at the time of the erasure and it would consider any outstanding fitness to practise issues before approving any application for readmission to the Register. In these circumstances, they have submitted that national disqualification would not be a proportionate act given that the Respondent is unlikely ever to practise as a dentist again.
16. Finally, in the alternative, should the Tribunal see fit to impose a national disqualification on the Respondent, his representatives have invited the Tribunal to limit his disqualification to PCT dental performers' lists only and not to exclude him from all PCT performers' lists as identified in the National Performers' List Regulations, given that the issues raised in respect of the Respondent's clinical practice are essentially dental in nature.
17. The PCT has submitted the findings of its investigation have shown serious concerns with regard to patient safety and a poor standard of clinical treatment and considers that national disqualification of the Respondent would be appropriate and proportionate. It has pointed out that it would also prevent the Respondent from applying to another PCT's performers' list and quoted paragraph 8.1.2 of the Guidance that where the facts of the case are serious it would be wrong to allow the dentist to offer his services to every PCT in turn in the hope that he will find one willing to accept him. The Tribunal can issue a national disqualification to prevent such a practitioner joining the list of another PCT.

### **Consideration and Conclusions**

18. We have carefully considered all of the evidence before us. We note the submissions of the Respondent's representatives that that the legislation does not empower us to nationally disqualify the Respondent as he can no longer be defined either as a healthcare professional as he is not currently registered with his professional body, or as a performer since the PCT have removed him from their performers' list. We also note their further submission that as he is no longer on the GDC Register and is no longer able to practise as a dentist, either privately or for the NHS, he cannot be included on any PCT performers' list nationwide. They have also referred to section 28(2) of the National Health Service Act 2006 (which we believe should be a reference to section 128(1) of the National Health Service Act 1977) which defines "dentist" as a dental practitioner who is registered in the dentists' register, which they

- have contended no longer applies.
19. We find it unusual that despite the PCT informing the GDC of the serious nature of its investigations and findings and appealing against the Respondent's voluntary withdrawal from the GDC Register, that the GDC accepted the Respondent's voluntary withdrawal on the grounds that he had applied for retirement from NHS dentistry on medical grounds and that it stated matters concerning his fitness to practise would not now be considered (although we note that the GDC confirmed that if in future the Respondent applied to restore his name to the Register, these outstanding fitness to practise matters would be taken into account). Whilst we recognise the GDC came to this decision as a result of the Respondent's serious ill health, we consider its decision does appear to conflict with the spirit of the provisions of section 18(1) of the Regulations which prevent a performer from withdrawing from a PCT list in which he is included where the PCT is investigating him, until the matter has been finally determined by the Trust. However, we are aware that professional registration by the GDC and the exercise of the powers of the Tribunal Service are and must be kept distinct. Accordingly, notwithstanding the Respondent's submissions, we consider that we should also consider the PCT's submissions and the relevant factors in seeking national disqualification.
  20. First, we note the requirement to consider the public interest and whether there would be any risk to patient safety in allowing the performer to make an application to another PCT as emphasised in the Guidance, which points out (at 8.1.2) that where the facts of the case are serious, it would be wrong to allow the dentist to offer his services to every PCT in turn in the hope that he will find one willing to accept him and also reminds PCTs (at 8.1.5) of the benefits of a national disqualification both for the interests of patients and for saving NHS resources. Given that we are expected to act in the wider interests of the NHS and the public, whilst we note the contention on behalf of the Respondent that he no longer represents any risk to the public given that he is no longer able to practise dentistry either privately or for the NHS, we are concerned that should the Respondent in future wish to return to dentistry and successfully apply to have his name restored to the GDC Register, he could then apply to another PCT, indicating the reason for his previous withdrawal was his voluntary erasure from the GDC Register. Whilst this would be correct, it would not reveal the PCT's investigation and concerns relating to the Respondent's clinical practice, although we accept that the timetable of events mean these concerns disrupted the PCT's process and were never been placed before a PCT panel for a determination to be reached.
  21. Second, the Guidance stipulates (at 8.1.5) that unless the grounds for the decision were essentially local it would be normal to give serious consideration to such an application. We consider that the risks posed by the Respondent are not restricted either to the geographic area in which the PCT offers services or to any one single list.
  22. Third, we are aware of the view that national disqualification can be viewed as an integral part of the process of removal, that is, it is a natural extension to the removal process irrespective of the status of the performer.
  23. We note that the Respondent's representatives have submitted that the Respondent's position is very different from circumstances covered in the Guidance in that he



