

The First-tier Tribunal
(Health, Education and Social Care Chamber)
Primary Health Lists

Appeal Number: PHL/15304

Before :

Mr Brayne (Judge)
Dr Freeman
Mrs Barducci

Between

Dr Amit Bhattacharya
(GMC registration number 2278706)

Appellant

and

NHS City and Hackney

Respondent

DETERMINATION AND REASONS

The Appeal

1. By notice dated 29.2.2010 Dr Bhattacharya appeals against the decision of the Respondent made on 14.9.2010 to remove his name from its performersList.
2. The decision was made under Regulation 10(6) and 10(3) and (4) of the National Health Service (Performers' List) Regulations 2004 as amended (referred to below as the 2004 Regulations).

The legal framework

3. Regulation 10 (6) of the 2004 Regulations provides as follows:

Where the 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 its performers list.

4. Regulation 10(3) provides as follows:

The Primary Care Trust may remove a performer from its performers list where any of the conditions set out in paragraph (4) is satisfied.

5. The relevant subparagraph of Regulation 10(4) provides as follows:

(a) his continued inclusion on its performers list would be prejudicial to the efficiency of the services which those included in the relevant performers list perform (“an efficiency case”).

Background to the respondent’s decision.

6. The following chronology is based on that prepared by the respondent for the Tribunal. We have seen the relevant documents; in any event the appellant has not disputed any of the following. The history which we now set out can therefore be accepted as factually accurate.
7. On 29.4.2010 the respondent wrote to the appellant, as it did to all other GP locums on its performers list, as part of its annual census, in order to establish where GP locums have worked during the period 1.4.2009 to 31.3.2010. A questionnaire was enclosed.
8. No reply was received. The respondent sent a follow-up email to the appellant on 20.5.2010, with further copy of the questionnaire.
9. On 21.5.2010 the appellant replied stating that he was finding it difficult to obtain a GP locum post within the PCT, and was therefore finding it difficult to fill in the details of activities over the past year. He gave details of attempts to secure positions with GPs and other work. He said he was working as a freelance, was maintaining his clinical education by attending all GP study days, and had a substantive part-time clinical assistant job in women’s health at the Whittington Hospital. He wished to remain on the respondent’s medical performers list as he had done all his appraisals with the Trust, and would continue to ‘find’ (presumably he meant ‘seek’) a suitable post to resume his work with the respondent.
10. On 26.5.2010 the respondent wrote to the appellant requesting a meeting. Following a number of emails to clarify the purpose of the meeting, this took place on 10.6.2010. SheeYLar Macey, Interim Clinical Director in the Primary Care Commissioning Directorate, attended on behalf of the respondent, together with Aysha Patel, the respondent’s Primary Care Workforce Manager.
11. An internal file note of the meeting on 10.6.2010 records that the appellant said he had worked a GP session the previous week in Haringey; he said he had applied for a GPwSI (GP with Special Interest) post in February

- 2010; he had applied unsuccessfully for over 100 jobs in the past 12 months; he said he had last worked in a substantive post at Oldhill Medical Centre in 2008; he said he was last appraised by Dr Dow Smith; he said he was working one session a week at the Whittington Hospital; and he said he had sent his cv to a member of the Trust, but could not remember who. Amongst other things, it was noted that the respondent asked for details of where the appellant had worked in primary care during the year 1.4.09 to 31.3.10, with contact details; details of the person to whom he had sent his cv; and a copy of his previous years PDP (personal development plan). This was confirmed in an email sent the same day with a request for the information to be provided by 24.6.2010.
12. On 22.6.2010 Ms Macey wrote to the Medical Director at the Whittington Hospital seeking information as to whether the appellant's work there involved him in a GP role. The Director replied on 12.7.2010 that the appellant had worked one session a week since November 2007, but in this role he did not need to be a GP on a performers' list.
 13. In her reply to the Medical Director at the Whittington, Ms Macey indicated an intention to remove the appellant from the respondent's performers list. This email was not copied to the appellant. However, a letter indicating the intention to remove the appellant from the performers list was sent to the appellant by letter dated 10.8.2010.
 14. The appellant sent representations to the respondent, received on 17.8.2010. He outlined what he described as a long record of serving City and East London FPC and the respondent Trust since 1986, and referred to his levels of experience, his interest in obstetrics, and services to the Women's National Cancer Control Campaign. He referred to his authorship of many articles and to his current substantive employment as clinical assistant at the Whittington Hospital since 1987. He said he had provided practice-based detoxification at Hackney Hospital. He said his work was recognised by fellow clinicians. He referred to difficulties gaining employment as a GP during 2009/10. He said he had had regular appraisals with the respondent. His most recent appraiser had failed to find a solution to his employment problem. He enclosed his PDP. He said he had not been subject to any complaint, and had kept his expertise up to date. He asked to be permitted to remain on the performers list for a further 12-24 months. He provided a list of jobs applied for by email, and surgeries contacted. He provided testimonials from Dr SP Gupta, Oldhill Medical Centre (dated 8.9.2006) and Dr H Begum, The Alam Practice, dated 23.12.2003,
 15. On 31.8.2010 the respondent wrote to the appellant to point out that the appellant had not provided any evidence that he had worked in the NHS City and Hackney Area for well over 12 months, or of when he had last provided services in that area. He had failed to provide evidence that he had provided any GP services during the period 1.4.2009 to 31.3.2010. It was stated, amongst other matters, that his work at the Whittington was

not GP work, that his references were out of date and not acceptable for other reasons: Dr Gupta has accepted voluntary erasure from the GMC register, and no Dr Begum could be located at the address given. It was stated that there was no evidence of the appellant's name appearing on the locum bank maintained by the respondent.

16. On 14.9.2010 the respondent wrote to say the appellant's name would be removed from the performers list with immediate effect. This is the decision under appeal.

The appellant's case

17. Dr Bhattacharya indicated in advance of the hearing that he would not attend the appeal, or be represented. His case therefore has to be identified from the documents. The most significant of these are the following: the representations, which we have already summarised above, before the respondent's decision whether to remove him from the performers list; the notice of appeal; his statement of 20.11.10, which was in reply to the response of the respondent to the appeal; the further information provided on 9.12.10 in response to the respondent's request; his response of 23.12.10 to directions issued by the Tribunal; and a final statement dated 26.1.10.
18. The content of the representations have already been summarised. The appellant repeated many of these points in subsequent documents. Therefore in what follows, we identify only those matters which raise, or potentially raise, additional evidence or argument.
19. In his appeal the appellant referred to the guidance from the Department of Health as to the meaning of 'efficiency' in Regulation 10(4)(a). The Guidance is entitled *Primary medical performers lists: delivering quality in primary care – advice for primary care trusts on list management*. The appellant referred to paragraph 7.4 which states the following:

*These grounds may be used when the inclusion of the doctor on the PCT's list could be "prejudicial to the efficiency of the service" that is performed. Broadly speaking, these are issues of **competence and quality of performance** (emphasis added by the appellant). They may relate to everyday work, inadequate capability, poor clinical performance, bad practice, repeated wasteful use of resources that local mechanisms have been unable to address, or actions or activities that have added significantly to the burdens of others in the NHS (including other doctors).*
20. He further referred to paragraph 7.5 of the Guidance, which refers to inadequate capability and poor performance. He referred to being a well-established general practitioner, vocationally trained in 1984, with substantial experience in penal establishments, and maintaining good clinical practice through his maternity services for 23 years. He referred to experience with the respondent Trust going beginning in 1986, when he

worked in general practice for the respondent's predecessor body. He had been involved as a troubleshooter for the FPC for a practice in London N16. He had a great deal of experience and had been looking for employment during the past 12 months in the City and Hackney Teaching PCT. He had continued to attend regular GP update academic courses at the Whittington; he had sought to pursue teaching activities within the respondent trust; he had been offered a part time clinical attachment pending resolution of this matter (presumably the appeal). There were no issues of probity or integrity, or issues of efficiency during his career. He had not been told what the efficiency allegations were.

21. He stated that he was not in breach of the guidelines at paragraph 17.8 and 17.9 of the above guidance.
22. He agreed, however, with reference to the removal under Regulation 10(6) of the 2004 Regulations, that he had been "unable to provide general medical services within the Trust's borders for 12 months", though he had worked in the Whittington, which was within the Trust area. This did not mean he was lacking determination to find work. If he remained on the performers list he could continue to seek work. He had voluntarily relinquished his appraisee fee, with the aim of reducing the cost incurred by the respondent.
23. He referred to the fact that failure to provide services as a GP within the Trust area in the preceding 12 months led only to discretionary removal, emphasising the word "may" in Regulation 10(6). He asked for a final opportunity to work in the Trust area before retirement in a few years.
24. In his reply to the respondent's response to the appeal he raised the following additional matters.
25. The respondent had initially put barriers of neglect in his way, and later negatively targeted him which led to the closure of career avenues.
26. The respondent had referred to "repeated requests to establish" what services the appellant had provided, but the appellant had made clear he had been unable to obtain a locum post. He had always accepted that he had carried out no GP work in the past 12 months. He had provided the requested information in the form of a cv, which had been overlooked, and he would have clarified any aspect on request. The fact that the respondent had to maintain good clinical governance did not mean he had acted to the detriment of the respondent's efficiency.
27. He had not provided oral evidence prior to the decision of the respondent, as the respondent had already suggested that a decision had been made in the meeting [on 10.6.2010]. The email to the Clinical Director at the Whittington showed Ms Macey's mind was already made up. The respondent had not followed up the meeting with the promised contact with the GMC and the LMC for careers advice on behalf of the appellant.

28. He referred to the resolution of an Employment Tribunal case in June 2008. This had taken up a great deal of his time. After this he had been neglected by the PCT.
29. He had given details of his recent clinical attachment, which he started while this case was ongoing, and which the respondent could have followed up.
30. He had always attempted to work constructively with the PCT. The PCT was a teaching Trust, and could have assisted him to maintain good clinical practice.
31. He submitted it would have been appropriate to consider a contingent removal, giving him a further 6-12 months to collaborate with the respondent.
32. In his response to the respondent's request, dated 9.12.10, for further information, the appellant said that the respondent had been engaged in requesting superfluous information, which was not related to Regulations 10(6) or 10(4). This was what had caused any inefficiency. It was the lack of support from the PCT which had led to the vicious circle whereby he was unable to obtain employment within the Trust area. He referred to a case determined by the FHSAA, the predecessor to this Tribunal: *Tibble v Hackney PCT*, March 2007, case number 13339, in which the Trust had provided assistance to the appellant to achieve the required standards, rather than removing him from the performers list.
33. The appellant submitted a final statement dated 26.1.11. He reiterated many of the above points. He referred to the "vindictive" nature of the meeting with the respondent's representatives on 10.6.10 and said Ms Macey had said "I will remove you from the Performers List." She had failed to take into account the appellant's educational achievements.

The respondent's case

34. The outlines of the respondent's case are contained in the summary of the decision to remove the appellant from the performers list set out above. The respondent's written submissions to the Tribunal are dated 27.1.11. The essential details are found in paragraph 11. We summarise these as follows.
35. The respondent repeatedly requested the appellant to provide evidence that he had provided services in the PCT area, and he had failed to do so, provided unclear information, or provided inconsistent information. The respondent had expended valuable resources seeking this information, or clarification of this.
36. The appellant had failed to engage constructively with the PCT. His attitude and conduct indicated that if he remained on the performers list it would be prejudicial to the efficiency of services.

37. Information that he worked as a salaried GP from 2006 to 2009, and that he had more recently taken on a clinical attachment, had not originally been provided.
38. The appellant's work in the Whittington Hospital was within another PCT area.
39. GPs who are not providing services, but who remain on the performers list, required monitoring and appraisal, the cost of which is substantial, and which is relevant to efficiency.

Modification of the respondent's case at the hearing

40. The Tribunal was aware of Dr Bhattacharya's decision not to attend. It therefore could not anticipate further evidence or submissions from him. The panel formed a preliminary view on the papers that the appeal would not succeed under Regulation 10(6), for reasons set out below. We also formed a preliminary view that, if the matter were decided on the papers the respondent would not succeed under Regulation 10(4). Judge Brayne informed Mr Thomas, who represented the respondent, before the commencement of the hearing, that this was the panel's preliminary view. Mr Thomas then took instructions from the respondent.
41. At the commencement of the hearing Mr Thomas submitted that the respondent did not withdraw the ground of decision under Regulation 10(4), but would no longer rely on it in the appeal, given the panel's indication that the appeal would be dismissed under Regulation 10(6). He therefore made no further submissions and adduced no further evidence.

Our powers on appeal

42. A decision to remove a performer's name from the list maintained by any PCT on any of the grounds provided under the NHS Regulations is subject to appeal to the First-tier Tribunal.
43. The powers of this panel are to be found in Regulation 15 of the 2004 Regulations, which provides as follows:
 - (1) *A performer may appeal (by way of redetermination) to the FHSAA against a decision of a Primary Care Trust as mentioned on paragraph (2) by giving notice to the FHSAA*
 - (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 FHSAA may make any decision which the Primary Care Trust could have made.*

The Hearing

44. We have already noted that the appellant informed the Tribunals Service in advance that he would not attend the hearing. This was because he was not well enough, and could not afford a representative. Judge Brayne advised The Tribunals Service to reply to him as follows:

"Thank you very much for your faxed letter dated 15th February. We are sorry to learn of your difficulties in obtaining representation, and in attending the hearing. You have made clear that you wish the hearing to go ahead without your attendance. The Tribunal has the power to do so. You must be aware, however, that the respondent will still be entitled to be represented at this hearing and both to submit evidence and make submissions.

The hearing will proceed in your absence. However, if you find you are in fact able to attend, or to be represented, or both, we would ask you to kindly inform the Tribunals Service at the earliest opportunity.

This letter is copied for information to the respondent."

45. At the outset of the hearing we again considered whether it was just to proceed, as we are empowered to do, in the appellant's absence. He had made no request for an adjournment, and made clear that he wished us to proceed in his absence. We considered, therefore, that it was just, and proportionate, to proceed in his absence, under The Tribunal Procedure (First-tier Tribunal)(Health, Education and Social Care) Rules 2008, Rule 27.

Our Consideration

46. We considered all of the material before us. In so far as any facts are in issue the burden of proof is in the Respondent and the standard of proof is the balance of probabilities. We have considered the NHS regulations as a whole and the Guidance provided by the Department of Health in *Delivery Quality in Primary Care*. We have carefully considered all of the evidence provided, including the documents supplied by the appellant.

47. The appellant removed the appellant from the performers list under two limbs of the 2004 Regulations: failure to demonstrate the relevant services in the preceding 12 months (Regulation 10(6)), and efficiency (Regulation 10(4)).

48. The appellant made clear on a number of occasions, noted above, that he had not provided services within the 12 months preceding the respondent's decision, and that he therefore was asking the respondent to exercise discretion, Regulation 10(6) giving a power of removal, not a duty of removal. His ground of appeal under Regulation 10(6) is therefore relating to the exercise of discretion; we cannot identify in any of the documentation any assertion that he provided GP services (as opposed to other services, training, or appraisal) during the relevant period and within the Trust's borders. The only question, then, is whether the respondent

- should have gone on to remove his name from the list, given that removal is not mandatory.
49. The appellant was entitled to ask for further time to try and find locum work, and to ask the respondent for help. He was entitled to ask this Tribunal, in exercising our powers, to determine that the respondent should have done so. However our view is that he has shown no acceptable reason why he should remain on the list, not having performed the services to which Regulation 10(6) clearly refers. He referred to the decision of the FHSAA in *Tibble v Hackney* but that is not a comparable situation. In that case the appellant could show that he was going to provide services in another area, and wished his name to remain on the list pending the start of his new position. He had also given acceptable reasons why there had been some delay. There were very clear reasons why a discretion could be exercised.
 50. The appellant's argument against removal is that he should be given a further chance and more support, so that he can find work within the Trust area and thereby keep his name on the list. He believes the Trust owes him a duty to do so. This is a very different circumstance from that in *Tibble v Hackney*. We cannot agree with this argument. There is no guidance before us which suggests such a duty. It is not implied in the 2004 Regulations. The purpose of these lists is to register those who perform services in the relevant area, and the purpose of the respondent's audit – which was clearly carried out in accordance with DoH guidance - was to ensure that the list remained accurate and up to date. We can see no merit in the respondent keeping on their lists a person who has not performed the relevant services during the past 12 months, and, after being given substantial opportunities to do so, has produced no evidence that he is likely to do so in the foreseeable future. If the appellant's claims are taken at face value, he has taken every possible step to obtain GP work, within the Trust area and beyond. It is not likely that any purpose would be served by keeping his name on the list, when he has not shown any realistic prospect of obtaining GP work in the respondent's area, or elsewhere. We therefore agree that under Regulation 10(6) his name was rightly removed from the respondent's performers list. There was no other reasonable decision the respondent could have made in the circumstances.
 51. The respondent could, indeed, have made that decision a good deal sooner, given the absence of any evidence of having provided services in the preceding 12 months. However, in so far as they sought to ensure that their discretion was properly exercised, they cannot be criticised for giving the appellant opportunity to bring forward information which might influence that discretion.
 52. Mr Thomas made clear that he would not pursue the alternative ground for removal from the list: that of efficiency. We do not, therefore, need to make a determination of that issue. The appeal fails in any event as we

have upheld the decision to remove the appellant's name from the respondent's performers list. The effect of this is that Dr Bhattacharya must, by virtue of Regulations 4(2) and (4) of the 2004 Regulations, declare in any future application for inclusion on a performers list the fact that he has been removed from the respondent's performers list under Regulation 10(6).

53. We do note, however, the indication from Mr Thomas that the respondent will consider whether to make a costs application. While such application will, if made, be considered on its merits, we do not criticise the appellant for appealing the decision. He made clear in his grounds of appeal under Regulation 10(6) that he relied on the discretion of the respondent. He was entitled to do so. It should have been clear on a careful reading of the grounds of appeal and subsequent documents that this was the essence of his case under Regulation 10(6). The Trust chose to pursue the efficiency ground, under Regulation 10(4), but did not pursue this at the hearing and therefore cannot rely on that ground in any costs application. Any costs application would therefore need to rely on the manner in which the appellant responded to requests for further information as to the exercise of the respondent's discretion under Regulation 10(6).

Order

54. The appeal against the decision to remove the appellant from the respondent's performers list is dismissed.

H Brayne

Judge of the First-tier Tribunal

9.3.2011