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In the Family Health Services Appeal Authority

case no: 14502

Heard at Napier House, 24 High Holborn, London

On 13 March 2009

Before

**Mr J D Atkinson (Chairman)
Dr G Sharma
Miss K Wortham**

Between

NOTTINGHAM CITY PRIMARY CARE TRUST

Appellant

and

Dr RONALD BERGAUER

Respondent

Representation:

For the Appellant: Mr M Mylonas of Counsel
For the Respondent: Mr J Leonard of Counsel

DECISION AND REASONS

The Application

1. This is an application by Nottingham City Primary Care Trust for National Disqualification of Dr Bergauer following his removal from the performers list under the NHS Act 1977 and the NHS (Performers List) Regulations 2004 as amended.

The Background and Proceedings

2. The respondent was born on 2 April 1960 at Mazquit in Turkey. The respondent worked as a general medical practitioner in Austria from 1996 to 2005. The respondent came to the United Kingdom in 2005.
3. On 14 October 2005 the respondent was included on the applicant's supplementary medical performers list.

4. On 29 November 2005 the respondent was removed from the applicant's performers list as a salaried GP.
5. On 30 November 2005 the respondent was included on the applicant's medical performers list as a non principal locum subject to various conditions.
6. On 19 March 2007 the applicant conducted a removal hearing attended by the respondent and Counsel. A decision was deferred pending a GMC hearing.
7. On 8 May 2007 the applicant removed the respondent from its performers list on the grounds of unsuitability and inefficiency.
8. On 1 June 2007 the respondent appealed to the Family Health Services Appeal Authority.
9. In a decision handed down on 12 February 2008 the FHSAA directed that Dr Bergauer be removed on the grounds that he is unsuitable to be included in the performers list. The reasons for that decision may be summarized as follows
 - i. the respondent had failed to give a truthful account of certain events and had sought to mislead
 - ii. the respondent had given an account that was inconsistent and implausible
 - iii. the respondent had made an unsubstantiated allegation of racism
 - iv. the respondent had failed to demonstrate necessary powers of reflection
 - vi. the respondent has a tendency to blame others and not take responsibility for his own actions
 - vii. the respondent has a deep seated attitudinal problem and a persistent lack of insight
10. On 18 March 2008 Dr Bergauer exercised his right of appeal to the Administrative Court. The appeal was subsequently withdrawn in or about January 2009.
11. On 2 April 2008 the applicant formally removed the respondent from its performers list.
12. On 12 May 2008 the applicant made the present application notwithstanding appeal proceedings in the Administrative Court. By consent the current application was stayed pending the outcome of those proceedings.
13. As noted above, Dr Bergauer withdrew his appeal to the Administrative Court in or about January 2009

The Law

14. The relevant law is to be found in the 1977 Health Services Act as amended together with associated regulations. It is not necessary to set out those provisions here.

The documents and evidence considered

15. The applicant and respondent submitted documentation which was compiled into bundles marked A and R. A is paginated to A2 with enclosures 1-3 including the FHSAA decision of 12 February 2008 . Bundle R is paginated to 2.
16. For the hearing Mr Mylonas on behalf of the applicant and Mr Leonard on behalf of the respondent produced skeleton arguments. Annexed to the skeleton argument on behalf of the respondent were 4 attachments
17. In addition, in the course of the hearing the Panel gave leave to the respondent to file 13 certificates of completion of learning relating to BMJ internet study modules dated between 11 December 2008 and 10 March 2009, and a letter from City and Islington College dated 10 March 2009 relating to the respondent's involvement in an English language course (IELTS) since September 2008.

Submissions on behalf of the Applicant PCT

18. Mr Mylonas relied on his skeleton argument and made further submissions that may be summarized as follows. It is accepted that there is limited guidance on the making of an order for national disqualification.
19. The FHSAA has found that the respondent is unsuitable on the basis of the respondent's lack of probity and capacity for insight. In those circumstances national disqualification is necessary to protect patients. The grounds for removal have no discernible local element.
20. The respondents unsuitability is not remediable. The GMC decision through its Interim Orders Panel, resulting in the lifting of restrictions on the respondent, had not made its decision on the basis of the probity issues identified by the FHSAA; and considerations as to what was in the minds of the IOP should be treated with caution. Whilst it was accepted that the respondent had produced evidence showing private study since December 2009, in the past he has failed to take up offers of development, education and support made by the PCT.
21. Taking into account the nature and seriousness of the findings against the appellant and the lack of a local nexus, national disqualification is a necessary measure to protect the interests of patients.

Submissions on behalf of the Respondent's Dr Bergauer

22. Mr Leonard, on behalf of the respondent, relied on his skeleton argument and made further submissions which may be summarized as follows.
23. In order to make an order for national disqualification the FHSAA must be satisfied that the circumstances concerning the respondent are so serious that national disqualification is necessary.
24. However the GMC, through its Interim Orders Panel, shows that there is no surviving suggestion that the respondent's fitness to practise is impaired. On 29 October 2008 the order for suspension of the respondent was substituted enabling the respondent to practise with conditions. On 11 November 2008 the GMC indicated that there was no basis upon which the GMC could sustain an allegation that the respondent's fitness to practice was impaired.
25. The IOP in making its decision had before it the FHSAA determination of 12 February 2008 and it would be fanciful to say that it was not considered. It was accepted that the GMC decision letters on their face did not deal with issues of probity as found by the FHSAA;

however none of the PCTs had made complaint to the GMC on the basis of the FHSAA findings.

26. In addition, the FHSAA, following its findings of 12 February 2008 had not, of its own motion made a national disqualification, nor had the applicant made such an application at or before that stage.
27. In summary, the respondent's circumstances were not so serious that national disqualification should be ordered. It was not suggested that the FHSAA were bound to follow the GMC decision, but there was no surviving basis on which to find the respondents practise was impaired. To impose a national disqualification would be perverse, illogical and not in keeping with national guidance.

Assessment of Evidence and Findings

28. The Panel considered all the evidence and the submissions of the representatives.
29. The Panel first considered whether or not there had been a material change in circumstances that would have a significant impact on its previous findings in its determination of 12 February 2008. It is not necessary to set out those findings in full. As noted above, in broad terms they relate to issues of lack of probity and lack of insight; and the judgment that those matters meant that the respondent was unsuitable to be included on the performers list.
30. Since this Panel's determination of 12 February 2008, the GMC Interim Orders Panel have lifted the suspension of the respondent in October 2008, and in November 2008, removed all conditions relating to the respondent's practise.
31. In addition, the respondent has obtained certificates of completion of a number of BMJ internet study modules between the period December 2008 and March 2009; and has been enrolled on an English language course since September 2008.
32. The Panel finds that events since February 2008 do not show that the deficits found by this Panel have been ameliorated for the following reasons. The IOP decisions do not amount to positive evidence that the issues of the respondent's probity and capacity for insight have been addressed by the respondent. On the face of the IOP decision letters, no mention is made of the specific findings of the FHSAA determination or of engagement with the detail of those concerns.
33. Further, the private study of the respondent, on matters for example of the diagnosis of asthma or back pain, does not engage with the issues of lack of probity or insight. To the extent that the respondent might suggest that this is evidence of remediation, the Panel finds that such a suggestion is in itself a demonstration of a lack of insight into the concerns about the respondent's suitability.

Decision and Reasons

34. The Panel have considered the FHSAA findings as a whole and appropriate criteria for national disqualification including the seriousness of the matters giving rise to unsuitability, the nature of the unsuitability finding, the need to protect the public and the proportionality of any decision.
35. The Panel considered the extent to which it might be said that there is a local nexus between the deficits giving rise to unsuitability and the applicant PCT, and which might suggest that the respondent is unsuitable to practise as a GP only in the PCT local area as opposed to nationally.

36. The Panel finds that there is no local nexus showing that the deficits identified relate only to 'local' difficulties between the applicant PCT and the respondent. The respondent has shown a lack of probity and insight in his dealings with two PCTS, in events relating to a number of GP practices and before the FHSAA. The Panel finds that the deficits found are inherent to the respondent and cannot be described as local. They would apply in any circumstances in which the respondent were to practise as a general practitioner.
37. In determining whether or not a national disqualification is necessary the Panel have considered the issue of proportionality and the fact that GMC Interim Orders Panel have decided that the respondent be allowed to practise without conditions.
38. The Panel notes the decisions of the IOP and in assessing what weight to attach to those decisions takes account of a number of factors.
39. The Panel notes that the IOP in coming to its view is applying a set of criteria wholly different from this Panel in applying the unsuitability provisions of the performers list. In addition, not only are the criteria applied by the IOP significantly different, the purpose of the IOP is significantly different from that of the FHSAA. In particular, the IOP is effectively a screening body and by definition makes no findings of fact. Thus, unlike the FHSAA which is a full judicial appeal body, the IOP not only does not make any findings of fact, it also does not have the benefit of hearing oral evidence.
40. Further, the letters from the IOP show that consideration of the various allegations made by a number of patients known as A,B,C and D together with a number of other matter were considered. However, on the face of those letters, no explicit consideration is given to the findings of the FHSAA on issues of probity and insight. In that sense there is no material inconsistency between the FHSAA findings on probity and insight and the IOP consideration of matters which, as set out in the letters, do not relate to probity and insight.
41. Further, as well as there being no inconsistency between the views of the IOP on the specific allegations concerning A,B,C and D and the FHSAA as set out in its earlier determination, the IOP letters, in not referring to the FHSAA findings, do not show what weight was attached to the FHSAA's own findings on probity and insight.
42. Accordingly, the Panel takes account of these matters in assessing the significance of the IOP decisions, and finds that relatively little weight should be attached to those decisions in the context of national disqualification.
43. The Panel also attaches relatively little weight to the timing of the application for national disqualification. What is more significant is the substance of the findings in respect of the respondent, rather than procedural issues about how they should be addressed.
44. The Panel in looking at all the matters in the round, finds that the imposition of a national disqualification is a necessary and proportionate measure in order to protect the public.
45. In summary, the Panel finds that there are no material changes having an impact on its previous finding that the Dr Bergauer is unsuitable to be on the performers list; that the deficits identified leading to a finding of unsuitability are not limited to local issues but are of such a nature as to arise wherever the respondent might practise; and that in all the circumstances it is necessary and proportionate to impose a national disqualification on the respondent in order to protect patients interests.

Summary

The FHSAA hereby decides that a national disqualification order be imposed on Dr Bergauer.

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

Mr J D Atkinson, Chairman

Date March 2009