

**IN THE FIRST TIER TRIBUNAL
HEALTH, EDUCATION and SOCIAL CARE CHAMBER
PRIMARY HEALTH LISTS**

Appeal Number: FHL 15246

**Professor Mark Mildred
Dr JN Chope
Mrs Jillian Alderwick**

BETWEEN

**Dr NHASSAR HUSSAIN
(GDC Registration Number 73304)**

Appellant

and

NHS BIRMINGHAM EAST AND NORTH

Respondent

Background

- 1. This Panel is appointed to hear an appeal by Dr Nhassar Ali Hussain against the decision of NHS Birmingham East and North (the “PCT”) of 15 January 2010 by its FHS Functions Committee to refuse his application to include his name on its dental performers list. That decision was communicated to him by letter dated 20 January 2010.**
- 2. The grounds for refusal were (a) criminal convictions in 1989, 1990 and 1996; (b) failure to obtain professional indemnity insurance between January 2005 and September 2006 and again between September 2006 and June 2008; (c) failure to make adequate provision for the continuation of care to his patients between the end of November 2006 and the closure of his practice resulting in suspension from the Dentists Register between 6 May and 16 October 2009 and (d) failure to provide information concerning an alleged overpayment of NHS monies.**
- 3. The Notice of Appeal dated 19 February 2010 contested all four grounds for refusal. The PCT opposed the appeal by a statement of opposition dated 24 March 2010.**
- 4. On the day before the hearing Dr Hussain’s advisers served a witness statement of 32**

paragraphs and a bundle containing 102 pages of documents. Later that afternoon the PCT's solicitors submitted by letter that this constituted an abuse of process and that the evidence should not be admitted. By this time Dr Chope and the Chair had read some or all of the documentation.

The hearing

5. The hearing took place at the Employment Tribunals at Phoenix House, Birmingham on 21 May 2010. The Appellant was represented by Mr Charles Foster instructed by Berrymans Lace Mawer LLP and the PCT by Miss Olivia Chaffin-Laird instructed by Bevan Brittan LLP.

6. The PCT renewed its objection on the basis that the standard directions sent out by the Tribunal Service required documents to be relied upon to be filed 14 days before the hearing and Dr Hussain's solicitors had promised in a letter dated 15 April 2010 to the Service to forward documents "shortly and at the latest 14 days prior to the hearing date".

7. No explanation had been provided for the delay and, since there had been no time to take instructions from the PCT, the hearing should be adjourned.

8. Mr Foster replied that the documentation expanded the existing material and would be helpful to the Tribunal. The PCT already had notice of the contents from the papers from the General Dental Council ("GDC") and the proceedings in the FHSAA arising out of Solihull PCT's removal of Dr Hussain from its performers list because he had not practised there for 12 months.

9. Given the time and resources involved in arranging for the disposal of these appeals and the various elements of the overriding duty to deal with cases fairly and justly, we ordered a short adjournment for the PCT to consider its position and for Miss Chaffin-Laird to try to take instruction by telephone.

10. Happily by 1100 the PCT was in a position to proceed and withdrew the applications for the adjournment and the rejection of the fresh evidence.

The PCT's evidence

11. The PCT relied upon the papers filed on its behalf and called no oral evidence.

The Appellant's evidence

12. In allowing the case to proceed and given the fact that Dr Hussain's statement was dated 19 May 2010 we directed that it should stand as his evidence in chief.

13. His evidence was that he qualified in 1997 and after vocational training and employment at three practices set up his own practice in Dorridge in 2004 acquiring 800 patients, of whom approximately 200 were NHS patients, by 2006.

14. In the first week of September 2006 Dr Hussain's wife was involved in a very serious accident and after emergency treatment was transferred to Copenhagen for ongoing treatment. By the end of September Dr Hussain made arrangements for a neighbouring dentist to give emergency or ongoing treatment to his patients and made telephone and signage arrangements to inform his other patients that he would be out of action.

15. Dr Hussain went back to Denmark in mid-October 2006, returning to England periodically to visit his children who were being looked after by his parents. When it was clear in February 2007 that his wife's condition was not going to be resolved in the short term Dr Hussain informed the PCT. He and his wife returned to England in August 2007 whereupon he closed his practice.

16. Dr Hussain began work at a practice in the area of the PCT in August or September 2008 and applied to be included on the PCT's dental performers list (since he had hitherto been on the Solihull PCT's list). Whilst this application was being considered Solihull PCT notified Dr Hussain that it intended to remove him from its performers list because he had not practised there for 12 months and would not delay this until his application to the PCT had been determined.

17. Dr Hussain's appeal against that removal was overtaken by a decision of the GDC on 30 April 2009 to suspend him for 6 months for failure to arrange indemnity cover, failure adequately to reply to correspondence and failure to make adequate arrangements for the care of his patients during his absence.

18. At a review hearing on 16 October 2009 Dr Hussain's name was restored to the GDC Register without conditions. He had used the interim period in undertaking extensive CPD in clinical and non-clinical areas, in reflection on his shortcomings and how to deal with them and in observing a local dentist, all with the help of the West Midlands Deanery.

19. Dr Hussain acknowledged his criminal convictions which he regretted and which reflected a wholly different person as a young man in with a bad crowd. He said the offences were minor and a very long time ago.

20. He accepted that the GDC had not been satisfied with the arrangements he made after his wife's accident but said the GDC had accepted he had learnt from his mistakes and he himself had no intention of undertaking any managerial or administrative role in dental practice.

21. Dr Hussain said that the financial dispute with Solihull PCT was purely the result of software problems that had resulted in a failure to upload to the PCT records of activity he had performed. The default judgment against him had been set aside and negotiations to resolve the position were under way.

22. He was now working in Melton Mowbray 3 days per week. This was highly inconvenient because of the travelling distance and he was under pressure to treat NHS patients which at present he was unable to do. He is still providing domestic and childcare services owing to his wife's continuing problems.

23. In cross-examination Dr Hussain accepted that two dental members of the PCT Functions Committee had considered that he was unsuitable but countered that the GDC, by the time of its review hearing, had not.

24. He disputed the relevance to his suitability of convictions at a time when he was not a professional.

25. Dr Hussain accepted that practising without indemnity cover was a serious matter and that this had occurred between January 2005 and September 2006 (before his wife's accident). He said this had begun when he changed banks and, because his old bank had not made the last payment, his new bank was not able to make payments for the policy. It began as an administrative banking error but escalated to a period of 20 months. Dr Hussain acknowledged that the GDC had not been wholly satisfied with this explanation.

26. The Interim Orders Committee of the GDC had directed him on 30 January 2008 to obtain cover as soon as reasonably practicable but Dr Hussain was called away by his sister 3 days later to go to Pakistan where his nephew was fatally ill. He had applied to two insurers for cover immediately upon his return.

27. Dr Hussain said that his failure to respond to the GDC was because he was abroad and because the letters were sent to his practice address where he no longer was. Patients' calls were redirected to his practice manager until November 2008 and there was a prominent laminated sign next to the front door of the practice explaining his absence.

28. Dr Hussain said he was very sorry about what had happened but these were extreme circumstances and he acted as best he could in his patients' interests as was later accepted by the GDC. He had acknowledged his failures and learnt from them.

29. He accepted that the dispute with Solihull had been protracted but said that it had been difficult to extract the software in question because of the lapse of time.

30. In re-examination Dr Hussain confirmed the evidence given to the GDC on 25 April 2009 describing in detail the telephone and signage arrangements notifying patients of his absence.

Submissions of the parties

31. Miss Chaffin-Laird submitted that the regulations and Department of Health Guidance imposed a heavy duty to safeguard patients such that we should exercise extreme care and caution taking all the grounds of complaint together and gauging their overall effect. We should give full consideration to the fact that the PCT Functions Committee included two dental members who had taken the view that Dr Hussain was unsuitable to be included on the list.

32. We should take into account the nature and number of the convictions for offences committed in Dr Hussain's twenties, not as part of a teenage rebelliousness: there was a course of dishonesty over 7 years including possession of an offensive weapon. The failure to arrange indemnity cover was a serious breach of professional obligations and not simply an administrative failure.

33. Dr Hussain's shortcomings were as much before as after his wife's accident and he had shown a disregard of his obligations: for example, a bank error could not possibly justify so long a delay in arranging indemnity cover and there was no excuse for failing to respond to the GDC or to comply with its direction to arrange indemnity cover without delay.

34. His attitude to his patients and the regulator and lack of professionalism over time raised stark questions about his suitability. He ceased having indemnity cover 20 months before his wife's accident and he delayed contacting the software company in relation to his dispute with Solihull PCT. The catalogue of failures justified a finding of unsuitability.

35. Mr Foster submitted that the GDC proceedings had considered the questions of professional competence, patient safety and public confidence in the profession and that, although exercising different statutory powers, we should be very careful before going behind their conclusions.

36. When we considered Dr Hussain's convictions we should reflect for the purpose of Regulation 6(4) that they were 14 to 21 years old and could not render Dr Hussain unsuitable.

37. The failure to obtain indemnity cover was the most important concern. The GDC, however, having considered all the evidence, concluded that the suspension should be lifted and no conditions need be imposed on Dr Hussain's registration. It took into account the retraining efforts Dr Hussain had made and decided that much of Dr Hussain's failure could be attributed to the exceptionally traumatic events that had led him to act out of character. He was clearly a competent and successful dentist.

38. The PCT should have taken all these matters into account but failed so to do. No impropriety was alleged in his dispute with Solihull PCT. Conditions on his inclusion on the list were unnecessary: Dr Hussain had no interest in single-handed practice and inclusion on the list would not entitle him so to practise.

39. Mr Foster reserved his position on costs, if the appeal succeeded.

Discussion

40. It is clear that the PCT had grounds for concern about Dr Hussain's suitability for inclusion on its dental performers list and we consider them in order.

41. His convictions did indeed span 7 years between the ages of 20 and 27. They took place before he qualified as a dentist but comprised 10 shoplifting offences and one possession of an offensive weapon. Dr Hussain described these as pranks undertaken when he had fallen in with a bad crowd. The weapon offence, according to his uncontroverted evidence, related to his having a small penknife in his pocket when arrested for shoplifting.

42. Criminal behaviour of this type and frequency is unacceptable but it is 14 years since the last offence during which Dr Hussain has become a good dentist, married and brought up five children. He has always been open in declaring these convictions in professional applications and there is no doubt that Solihull PCT was prepared to include him on its list some years before he applied to this PCT.

43. The GDC understandably took an adverse view of Dr Hussain's failure to arrange indemnity cover. Even accepting that the period following his wife's accident was one of great stress, the fact remains that he was without cover for a very long period of time before it. That is an extremely serious matter that the PCT was entitled to take into

account.

44. We have heard Dr Hussain giving evidence and accept that he sincerely regrets his default and has had time to reflect upon his shortcomings and appreciates that he may not be cut out for single handed practice and that he needs to pay more attention to the non-clinical aspects of being a dentist. At this point we should say that there is no dispute that he is a skilful dentist with a flair for attracting and satisfying patients.

45. The evidence we heard suggests that Dr Hussain did the best he could to inform and protect his patients when he had to opt out of treating them after his wife's accident. With hindsight it is possible that he could have made more comprehensive arrangements and it is certain that he could have made a better job of keeping the GDC informed. Given the extreme family circumstances we would not condemn him for the steps he in fact took.

46. There is no evidence of dishonesty in relation to the disputed fee claim to Solihull PCT. The fact that the default judgment was set aside (and that the parties are apparently now in negotiation) is some evidence for the proposition that this was a genuine accounting error rather than any attempt to overclaim payment.

47. There is no doubt that Dr Hussain has brought a large part of these problems upon himself and has tried the patience of the PCT and the GDC alike. The substantive hearing before us was concluded in an hour and a half – very substantially shorter than the GDC proceedings. Although the two jurisdictions have different statutory bases and functions the facts being considered are to a very great extent the same and we cannot fail to be impressed by the change between the attitudes to Dr Hussain exhibited by the GDC in its first hearing and the second. The GDC decided on the second occasion and in the light of the totality of the evidence that Dr Hussain was fit to practise without conditions.

48. We are in no sense bound by that decision but, on the basis of all the evidence we have heard and read, agree with the GDC in concluding that Dr Hussain has learnt a painful lesson and expecting that he will take his professional responsibilities more seriously and discharge them more effectively in the future. We commend his insight into the fact that he will be better concentrating on exercising his undoubted clinical skills rather than seeking to shoulder the managerial and administrative burdens of proprietorship of a practice (to which in any event his presence on the PCT's list would not entitle him). We cannot conclude that Dr Hussain is unsuitable to be included on the PCT's list.

Decision

49. In all the circumstances our decision is that Dr Hussain should be included on the PCT's dental performers list.

50. Any application for costs arising out of this decision should be made in writing and filed at the Tribunal Service, Darlington by 1700 on 14 June 2010.

Review and appeals

51. The attention of the parties is drawn to Part 5 of the Tribunal Procedure (First –tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008, 2008 S.I. No. 2699 in relation to reviews of and appeals from this decision.

Dated the 27th day of May 2010

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Mark Mildred

Tribunal Judge