

FIRST TIER TRIBUNAL
PRIMARY HEALTH LISTS

25 May 2010

Mr Duncan Pratt	Tribunal Judge
Dr H Freeman	Professional Member
Mrs M Harley	Member

BETWEEN:

WARWICKSHIRE PRIMARY CARE TRUST

Applicant/ Appellant

-and-

DR JONATHAN IVAN MILLER
(GMC Registration No. 3627600)

Respondent

DECISION AND REASONS

The application

1. This is an application, by letters dated 18 March 2010 and 28 April 2010, by Warwickshire Primary Care Trust ("the PCT") for an extension of the period of suspension imposed on Dr Jonathan Ivan Miller ("Dr Miller") under the terms of regulation 13 of the National Health Service (Performers Lists) Regulations 2004 ("the Regulations"). The PCT's application (as amended) is for an extension for 6 months from 23 March 2010.
2. By his letter of 7 April 2010 Dr Miller states he does not oppose the application "at this stage".

Preliminary matters – consideration without an oral hearing

3. By its letter of 28 April 2010 the PCT asks for the matter to be considered on the papers without an oral hearing. Dr Miller's letter dated 15 April 2010 states he is happy for the application to be considered on the papers only. He further stated he has no further documentation of his own to submit. The application was made under the Family Health Services Appeal Authority (Procedure)

Rules 2001 (“the old Rules”). By Rule 38 (1) of the old Rules, we may determine this application on the documents provided by the parties, without an oral hearing, if they so agree in writing. Since the application was lodged, new procedural rules have come into force: The Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008. (“the new Rules”). By Rule 23 of the new Rules we must hold a hearing unless each party has consented to the matter being decided without a hearing. We are enabled by paragraph 3 of Schedule 5 of the Transfer of Tribunal Functions Order 2010 to apply any provision in procedural rules which applied before the transfer date, or disapply any provisions of the new Rules. While we consider that Rule 23 of the new Rules would be satisfied, it is appropriate to consider this issue under the old Rules which prevailed when the parties made or responded to the application. Rule 38 (1) of the old Rules is satisfied. We have therefore determined the application without an oral hearing. The Panel considered the application on 25 May 2010 at the Upper Tribunal Centre, 43-45 Bedford Square, London.

Factual background

4. Dr Miller is a General Medical Practitioner registered with the GMC. On 12 September 2009 he was providing “out-of-hours” medical services and was called to the home of Ms H, a NHS patient, whom he had never previously met. While in her home, it is admitted that he had unprotected sex with her, when he ejaculated inside her vagina.
5. Later that day Ms H made a complaint of rape against him. Rape is denied. Her account has a number of features which are in dispute, and may never be proved.
6. Dr Miller’s account to the police was that there had been sexual intercourse, which Ms H had initiated, and was entirely consensual. He told police she was probably “a bit tipsy”. He had gone to the bathroom to use her toilet. A bath was already run. She entered the bathroom while he was using the toilet, made suggestive remarks and touched him. She then asked for assistance into the bath, which he did. She then asked him to wash her hair, which he

did. She then became inappropriately familiar and kissed him, after which he undressed and joined her in the bath, where sex took place.

7. We have been provided with a Crown Prosecution Service review of this evidence dated 26 October 2009. The CPS decided the case did not meet the criteria for pursuing a prosecution because of a variety of weaknesses and inconsistencies in Ms H's evidence.
8. At the date of this application the PCT had recently discovered the CPS was taking no further action. It had suspended Dr Miller for six months, following a hearing which he attended and at which he was represented, on 23 September 2009. The suspension therefore would have expired at the end of 22 March 2010 (not 23 March as suggested in the PCT letter). The PCT had not undertaken a separate investigation while the police action was pending.
9. Once it was realised that the CPS was not proceeding with a criminal case, the PCT considered the position itself and on 28 April 2010 wrote to Dr Miller to notify him that it proposed to remove him from the Performers List on the grounds of unsuitability under Regulations 10 (3) and 10 (4) (c) of the NHS Performers List Regulations 2004, as amended. That notice quite properly gives Dr Miller 28 days to make written representations and to request an oral hearing. That period has not yet expired, and is due to do so on 26 May 2010.
10. The PCT therefore bases its request for an extension for 6 months on the need to accommodate this statutory period of notice so that Dr Miller may request a hearing or lodge submissions. It also relies on the possibility that he may exercise his right of appeal to the First Tier Tribunal if an adverse finding is made.
11. Meanwhile, we are told by the PCT's letter of application that the General Medical Council has suspended Dr Miller from the Register and he currently remains suspended.

Relevant law

12. Dr Miller's suspension from the Performers list was made under Regulation 13 (1) (a) of the Regulations which provides:

“If a [PCT] is satisfied that it is necessary to do so for the protection of members of the public or is otherwise in the public interest, it may suspend a performer from its performers list in accordance with the provisions of this regulation –

...(a) while it decides whether or not to exercise its powers to remove him under regulation 10 or contingently remove him under regulation 12;”

By Regulation 13 (4):

“The period of suspension under paragraph (1) (a) or (b) may extend beyond six months if –

(a) on the application of the [PCT], the FHSAA [now First-Tier Tribunal] so orders; or

(b) the [PCT] applied under sub-paragraph (a) before the expiry of the period of suspension, but the FHSAA has not made an order by the time it expires, in which case it continues until the FHSAA makes an order”.

By Regulation 13 (5) if the [First-Tier Tribunal] does make an order under 13 (4), “it shall specify –

(a) the date on which the period of suspension is to end;

(b) an event beyond which it is not to continue; or

(c) both a date on which it is to end and an event beyond which it is not to continue, in which case it shall end on the earlier of that date or that event, as the case may be.”

Consideration and decision

13. We must be satisfied that it is necessary to extend the suspension for the protection of members of the public or that it is otherwise in the public interest. We are satisfied on both counts. The case involves serious matters, even on Dr Miller’s account, which impact potentially on patient welfare. We are therefore satisfied in principle that an extension of suspension is warranted.

14. The next question is for how long. The PCT has not concluded its decision and the timetable for doing so under the Regulations has not yet expired, and may be subject to delay in the event that Dr Miller requests a hearing, or any

such hearing is itself subsequently adjourned. Therefore the minimum length of any extended suspension should be to the date on which Dr Miller is notified that the PCT has decided not to remove him from the List, if that is their decision. If the PCT should decide to remove Dr Miller from its List, he has a statutory right of appeal which must be exercised by him within 28 days. There is no automatic suspension which comes into force while he considers whether to appeal. Therefore, if the decision is adverse to him, the minimum length of any extended suspension should be to 28 days after notification to Dr Miller of a decision to remove him.

15. There is, however, some apparent delay. Dr Miller has been suspended from all clinical practice (and medical employment, so far as we are aware) since 23 September 2009. It is unfortunate that the PCT did not take steps to discover that the CPS had decided not to prosecute Dr Miller well before the end of 2009. Lengthy suspensions are not in the interests of either party or the public.
16. We have therefore placed a “long-stop” date for this extension, at 6 months from the expiry of the original period of suspension, namely 22 September 2010. The PCT is free to make a further application for extension if it considers that it is not possible to conclude its own proceedings before that date. However the Tribunal hearing any further application will expect to see evidence of the steps which have been taken to complete the investigation, those remaining and why the delay has continued.
17. We therefore consider that it is appropriate to make an order in alternative form as prescribed by Regulation 13 (5) (c) [see above].

DECISION AND ORDER

18. Dr Miller’s suspension from the Performers List shall be extended until the earliest of the following:
 - a. Notification to him of any decision by the PCT not to remove him from the Performers List; or

- b. 28 days after notification to him of any decision by the PCT to remove him from its Performers List (whether conditionally or absolutely); or
- c. 22 September 2010.

A handwritten signature in dark ink, appearing to read "Tribunal Judge".

Tribunal Judge

Dated 25 May 2010