

**IN THE FIRST TIER TRIBUNAL
HEALTH EDUCATION AND SOCIAL CARE CHAMBER
PRIMARY HEALTH LISTS
Heard at Byron House
Nottingham
On 16 May 2011**

PHL15353

BEFORE

JUDGE ATKINSON

DR P WRAY

MRS S BROUGHAM

BETWEEN

DR MISTRY

(Appellant)

and

NOTTINGHAM PRIMARY CARE TRUST

(Respondent)

Representation:

For the Appellant: Mr K Beaumont (non-legal representative)
For the Respondent: Mr Choongh of Counsel

DECISION AND REASONS

The Appeal

1. This is an appeal by Dr Mistry against the decision of the respondent notified on 23 November 2010 to remove the appellant from the respondent's dental performers list under the National Health Service Act 2006 (as amended) and associated regulations.

The Background and Proceedings

2. The appellant is a performer on the respondent's dental performers list. The appellant is also a provider of dental services to the respondent under a General Dental Services contract. The appellant has a practice in the respondent's area, known as the Grange, Mansfield Road, and a number of other practices in other PCT areas.
3. On 20 September 2010 the respondent notified the appellant that it did not have a record of his having performed NHS dental services in the area in the preceding 12 months; and invited representations from the appellant.
4. In representations dated 14 October 2010 the appellant accepted that he had not performed in the respondent's area in the preceding 12 months and indicated that he wishes to remain on the list as a back up dental surgeon to his practice.
5. By a decision notified on 23 November 2010 the respondent removed the appellant from the respondent's list under regulation 10(6) of the performers regulations on the ground that the appellant had not performed relevant services in the respondent's area. The rationale provided for that decision was that
 - i. The appellant had not performed relevant services within the 12 month period and
 - ii. The appellant had not provided evidence of his commitment to provide routine NHS care within the area
6. On 15 December 2010 the appellant appealed to the tribunal.
7. In the course of these proceedings the respondent has put forward a further basis for exercising its discretion to remove the appellant namely:
 - iii the appellant has failed to submit evidence to show that he is up to date with his continued professional development (CPD)
8. Appeals to the tribunal are by way of redetermination.

The Law

9. The relevant law is to be found in the 2006 Health Services Act as amended

together with associated regulations. Reference to the relevant law as set out in The National Health Service (Performers Lists) Regulations 2004 is made within the body of the determination.

10. Regulation 10(6) of the performers regulation reads as follows

Where a performer cannot demonstrate that he has performed the services, which those included in the relevant performers list perform, within the area of the PCT during the preceding 12 months, it may remove him from the performers list

The documents and evidence

11. The tribunal was provided with a bundle indexed and paginated to 129, comprising all the material on which both parties sought to rely together with other background materials. At the hearing neither party adduced additional documentary evidence.

12. Mr Choong on behalf of the respondent indicated that the respondent had not filed witness statements but that Mr P Murphy, non-executive director and Mrs A Berry, primary care commissioner manager, were available to give oral evidence if required.

13. Mr Beaumont on behalf of the appellant indicated that the appellant had filed a form of witness statement and intended to give oral evidence.

Preliminary matters

14. At the outset of the hearing Mr Beaumont objected to Mr Choong appearing on behalf of the respondent because appropriate notice of the details of the respondent's representative had not been provided as required under the regulations.

15. The tribunal, having heard briefly from Mr Choong, found that the appellant had not been prejudiced by lack of such notice and directed that the tribunal proceed.

16. Mr Beaumont attempted to renew his application. The tribunal indicated that the hearing would proceed and stood the matter down for 5 minutes to allow Mr Beaumont to consider his position. On reconvening the tribunal, Mr Beaumont indicated that he was prepared to follow the directions of the tribunal and the hearing continued.

Opening submissions on behalf of the Respondent

17. Mr Choong in opening referred to his written opening statement and made

further submissions which may be summarised as follows. The respondent had a discretion to remove the appellant as conferred by regulation 10(6) of the regulations. The appellant accepted that he had not performed relevant services in the respondent's area between 21 May 2008 and the date of decision of 16 November 2010. There was no approved or published guidance as to how the discretion should be exercised, save for the due process provisions of regulation 10(8).

18. The respondent took the view that the appellant, having not performed in the respondent's area for the relevant period, had not demonstrated why he should not be removed. Further the appellant would not say what work he would do in the area, save that if his associate was not available to perform services the appellant would act as a back up.
19. It was further submitted that the respondent had a statutory duty to review the performers lists with a view to, amongst other things, keeping the list up to date and reflective of the reality of the actual performers in the area.
20. Mr Choong accepted, following questions from the tribunal, that a relevant factor for the respondent to take into account with regard to concerns about the appellant's practise would be a claim that private dental work was being undertaken by the appellant; however it was submitted that the appellant had not put forward such an argument at that time.
21. Mr Choong also accepted that the original decision notified on 23 November 2011 made no mention of there being any concerns about the appellant's clinical competence. Mr Choong indicated that questions relating to the appellant's continuing professional development (CPD) had emerged only after the respondent's decision; and that the provision by the appellant of additional evidence relating to his CPD had been mentioned in the context of seeking a compromise to the present litigation.

Oral Evidence on behalf of the respondent

22. Mrs Berry gave oral evidence which may be summarized as follows. Mrs Berry is the primary care commissioning manager for dental and optical services and has been in post since late 2008. Prior to that Mrs Berry had been involved in contractual matters relating to the provision of national health services.
23. The appellant has been a provider of dental services under a General Dental Services contract since 2006, following the implementation of the relevant regulations. There had been no changes to those contractual arrangements with the appellant, who held the contract as an individual.

24. Mrs Berry was unable to say whether or not the appellant performed services outside the respondent's area without checking records which were not before the tribunal.
25. The tribunal also heard oral evidence from Mr P Murphy which may be summarized as follows. Mr Murphy joined the PCT as a non-executive director on 1 January 2007 and has held the chairmanship of the performance decision making group since that year. Mr Murphy chaired the decision making group meetings of September and November 2010 where the appellant's case was discussed and where the ultimate decision was made against which the appellant now appeals.
26. The decision making group which Mr Murphy chaired meet between 4-9 times a year, considering typically 6-8 cases on each occasion. Mr Murphy was not aware of any review of the appellant's performance prior to the considerations of September 2010 meeting, but presumed that another group, which forwarded matters of concern to his decision making group, had looked at such issues at an operational level. Mr Murphy had no personal knowledge of any review in the period of the appellant's non-performance in the preceding two years, save for those of September and November 2010.
27. The decision making group of 16 November 2010 did not take its decision on the grounds of there being concerns about the appellant's clinical competence. The group had asked for evidence from the appellant following the meeting in September. In November there was not evidence about such issues before the group. It was accepted that the group in coming to its decision was under a duty to act reasonably and proportionately.
28. In the present case there was a lack of evidence about the appellant's work. If it had been forthcoming the respondent could have revisited the decision to go back on the list.
29. However, it was accepted that at the time of the decision in November 2010 the issue of the appellant's clinical competence was not considered. That was an issue that had emerged only in the process of preparation for the present proceedings before the tribunal. At the back of the groups mind there was an awareness that the level of the appellant's competence was not known.
30. Mr Murphy from his own knowledge was unable to say whether or not the appellant had been asked for such evidence. A letter was sent to the appellant in September 2010 asking for representations which were then considered in November.

The Appellants opening submissions

31. Mr Beaumont in opening referred to his written opening statement and made further submissions which may be summarized as follows.
32. It was accepted that the respondent had a discretionary power to remove the appellant. However the respondent's motivation for raising the issue of the appellant's non-performance in the area was unclear given that the appellant had not performed services for nearly 2 and ½ years.
33. The appellant had been a provider of services in the area for 16 years and had been performing NHS work outside the respondent's area. The respondent's original rationale for removal was that the appellant had not done any relevant work. Then the respondent had said that the rationale for the decision was that the appellant accepted that he had not undertaken any relevant work. The respondent's third rationale was that the appellant had not shown his commitment to the NHS.
34. The appellant was a provider of NHS dental services. He had continued to be a provider even though his company had gone into liquidation. Since the respondent's decision the appellant had performed dental services in the respondent's area.
35. There should be no doubts as to the appellant's clinical competence. He had run 6 practices undertaking both NHS and private work. With the demise of the appellant's company structure the appellant was required to make good any shortfall in his practice in the respondent's area. If the appellant were removed his patients would not receive dental care.

The Appellant's oral evidence

36. Dr Mistry adopted his statement dated 17 March 2011 as evidence in chief. It is not necessary to rehearse the details of that statement here. In brief, the appellant has run the dental practice known as Grange dental practice in Nottingham since 1989. In 2006 the appellant entered into a contract with the respondent to provide dental services. In 2008 the appellant business grew to the extent of having 5 surgeries, with a further surgery in 2009. Routine dentistry was left to his associates. The appellant offered specific private treatment in each of the practices. Since January 2011 the appellant has been involved in carrying out more NHS work at the Grange in order to meet contractual targets.
37. The appellant's further oral evidence may be summarized as follows. Since January 2011 the appellant has undertaken 170 units of dental activity at the Grange.
38. The appellant has run 5 practices with the practice in Eastbourne being the

site where the predominance of the NHS work was carried out. The appellant's practice as a whole was predominantly private but some NHS work was undertaken. The appellant had provided emergency cover for the Grange practice over the Christmas period.

39. The appellant was unable to say how many units of dental activity he had undertaken at the other practices but would estimate about 20-30 per month.
40. The appellant had not decided to transfer to the performers list in Eastbourne because such a transfer did not make sense. The appellant's main job was to manage the Eastbourne practice where he acted as clinical head.
41. As to the appellant's career in dentistry: he had qualified in Sheffield in 1984; worked for 3 years as an associate with a further one year of voluntary work in India. The appellant purchased the Grange practice in 1989 and had expanded his business to practices in Lincoln, Boston, Spalding and Eastbourne.
42. The appellant had been requested to provide evidence of his CPD by the respondent only after the decision of November 2010. The appellant had not provided that information because he had wanted the respondent to rescind their removal decision, but the PCT officer who had made the request was said not have the authority to do that. The appellant could provide that information but he did not have a good relationship with the respondent.
43. The appellant had not been aware of the performers regulations, so far as they related to the issue of performance in a PCT area in a 12 month period, until he received the respondent's letter in September 2010. The appellant had responded to the request for representations on 12 October 2010. The appellant had not argued that he should remain on the list because he had performed NHS services elsewhere.
44. The appellant had not provided evidence about his CPD because the relationship between the appellant and the respondent had broken down. The appellant did not trust the respondent and was concerned about what the respondent would do, whatever the appellant said about his CPD.

The Respondent's closing submissions

45. Mr Choong, on behalf of the respondent, relied on the written submissions and made a number of further submissions which may be summarized as follows.
46. Regulation 10(6) was engaged. The respondent had exercised its power to remove correctly. It was accepted that the respondent needed to take into account all relevant considerations. The appellant had not put forward

evidence to support his position save to say that he should remain on the list in order to be able to provide relief cover for his associate. In the absence of evidence about the appellant's CPD the respondent had been right to remove the appellant. It was for the appellant to put forward evidence showing his competence to perform services. The underlying concern of the 12 month rule in regulation 10(6) was that the performers list should reflect the reality on the ground of who was performing services and where.

47. The respondent was happy to revisit its decision in the light of any evidence relating to the appellant's CPD or other evidence relating to his private work or practice elsewhere. That evidence however, had not been provided either to the respondent or to the tribunal. The respondent was not content to rely on the appellant's account of his work without supporting documentary evidence.
48. It was hoped that the tribunal would give guidance on the proper application and approach to regulation 10(6).
49. In summary: the respondent had made the right decision at the time; there was an absence of evidence from the appellant about his competence; it had been suggested that it was open to the tribunal to put conditions on the appellant remaining on the list however it was accepted that there were reservations about the possibility of imposing conditions in the light of the statutory framework; and finally matters relating to the appellant as a provider of services were not relevant to issues relating to the appellant as a performer.

The Appellant's closing submissions

50. Mr Beaumont on behalf of the appellant relied on his written submissions and made a number of submissions that may be summarized as follows.
51. It was disingenuous of the respondent to suggest that there was no link between the appellant's position as a performer and his position as a provider of services. The appellant as a provider of services had reduced the number of practices within his business with the effect that there were fewer resources to attend to administrative matters.
52. The respondent's decision making process in September and November 2010 was flawed. It was now the respondent's case that there were concerns about the appellant's clinical competence; yet those concerns had not been put to the appellant prior to the decision being made. It was wrong to criticise the appellant for not answering questions which had not been put to him.
53. The appellant has performed relevant services in Nottingham since the respondent's decision of November 2010 and remains committed to so doing

in the future.

54. The appellant has not provided further evidence about his CPD because that was a matter that was only raised at a late stage by an officer in the context of attempting to resolve the present proceedings without a hearing.

Assessment of evidence and findings of fact

55. The tribunal considered all the evidence and the submissions.

56. At the outset of the hearing it became apparent that a significant number of facts were not in dispute. In particular, there is no dispute that the appellant did not provide relevant services in the respondent's area in the 12 months preceding the decision issued on 23 November 2010. It is accepted by the parties that regulation 10(6) is thereby engaged.

57. It therefore follows that the main issue between the parties is whether the discretion conferred by regulation 10 (6) should be exercised with the consequence that the appellant is removed from the performers list.

58. Given that the core of the dispute is therefore a question of judgement the tribunal makes brief findings of fact as set out below.

59. The appellant has been on the respondent's performers list for a number of years.

60. The appellant has been the owner of a dental practice in the respondent's area, and known as the Grange, since 1989. The appellant entered into a general dental services contract with the respondent in 2006.

61. The appellant is the owner of a number of other dental practices in Lincoln, Boston Spalding and Eastbourne.

62. The preponderance of the appellant's practise is made up of private work, with associates undertaking NHS work.

63. The appellant was available to provide back up cover at the Grange practice; however the appellant did not perform relevant services at the Grange in the period from 21 May 2008 to 23 November 2010.

64. The appellant has performed emergency dental activity on 27 occasions in the period from December 2010 to early January 2011.

65. Since January 2011 the appellant has undertaken in the region of 170 units of dental activity with a view to enabling the Grange practice to meet the specifications of the GDS contract.

Decision and Reasons

66. The question for the tribunal is: on the evidence now available to the tribunal should the appellant be removed from the list.

67. Looking at the evidence as a whole and taking into account the submissions of the parties, the tribunal directs that

**the appellant is NOT REMOVED
from the performers list**

68. In coming to this decision the tribunal reminds itself that it proceeds by way of redetermination; that is to say that it must determine matters afresh on its own merits and is not limited to a mere review of the respondent's decision. The reasons for the tribunal's decision are set out below.

69. The thrust of the respondent's rationale for removal is essentially threefold: that the appellant has not performed services for the relevant period; that he has not demonstrated commitment to the provision of NHS services in the area; and that there is a lack of evidence about the appellant's CPD status thereby raising issues of the appellant's clinical competence.

70. Turning first to the issue of lack of performance in the preceding 12 months, the tribunal notes that this is a condition precedent for the exercise of the discretion under regulation 10(6). The meeting of this condition is therefore little more than a starting point. In exercising the discretion conferred by regulation 10(6) account must be taken of all the relevant circumstances. The respondent has not advanced the proposition, that in the circumstances of the present case, the meeting of the condition precedent is of itself a sufficient basis for removing the appellant.

71. Turning next, to the issue of the appellant's intention. The tribunal notes that regulation 10(6) focuses on the performer's actual performance of NHS dental services and not the performer's intentions.

72. As is well understood, defining a person's intention has inherent difficulties. Nevertheless to the extent that intention may indicate what the appellant is going to do in the future, it is a potential factor to be taken into account, depending on the circumstances of the case.

73. A person's intention can be inferred from what they say and what they do. In the present case, the appellant has said that he wished to provide back up NHS services at the Grange practice and that he will undertake dental activity to enable the practice to meet the contract specifications.

74. As to his actions, the appellant has provided emergency services and other dental activity after the respondent's decision of November 2010.
75. The tribunal finds that the appellant's actual performance of relevant services, albeit commencing a couple of weeks after the respondent's decision, is a relevant factor that tends to weigh against the removal of the appellant. The respondent submits that the performers list should reflect what is happening on the ground in their locality. In that context, the reality is that the appellant is performing dental activity in the respondent's area.
76. The final aspect of the respondent's case is that of the appellant's CPD and the integral issue of clinical competence.
77. The tribunal notes that this rationale formed no part of the respondent's explicit decision as set out in the notice of decision issued on 23 November 2010, nor in the record of the decision as set out at page 36 of the bundle.
78. Although this aspect of the respondent's case was not an operative factor at the time of the decision, given the nature of the tribunal's task to redetermine, de novo, the issues, it is a matter that falls for determination by the tribunal.
79. The tribunal finds that the evidence before it on this aspect is very limited. The appellant has refused to provide evidence of his CPD because he feels that in the light of the history of decision-making by the PCT, the respondent cannot be trusted. The appellant also submits that given his extensive private practice and his registration with the general dental council, that a proper inference to be drawn is that he is up to date with his CPD.
80. The respondent submits that on the evidence available, relating to the appellant's CPD, there are public safety concerns such that the appellant should be removed. The tribunal rejects the respondent's submission as set out in more detail below.
81. The tribunal finds that the available evidence is not so cogent to show that there is sufficient concern about the appellant's clinical competence that the appellant should be removed. There is effectively an absence of evidence on this point; however absence of evidence is clearly not the same as evidence of absence.
82. To the extent that the PCT have concerns about the appellant's clinical competence, these are matters that it is entitled to investigate as part of its statutory duty to regulate performers.
83. It is not for the present tribunal to step beyond its adjudicative role and to investigate this issue by calling for more evidence. The tribunal is wary of becoming a tool for investigation at the behest of the PCT. The task of the

tribunal is to weigh the evidence before it and exercise good judgement.

84. The judgement of the tribunal in the present case is that on the evidence available to it, the matters raised by the respondent, whether taken singly or cumulatively, do not give grounds to remove the appellant under regulation 10(6) of the performers regulations.

Summary

The tribunal directs that Dr Mistry is not to be removed under Regulation 10(6) of the performers lists regulations.

The appeal is allowed.

Signed

Judge Atkinson

Judge of the First Tier Tribunal

Dated 25 May 2011

