

**IN THE FIRST TIER TRIBUNAL**

**Case No PHL 15314**

**HEALTH EDUCATION AND SOCIAL CARE CHAMBER**

**PRIMARY HEALTH LISTS**

**NHS PERFORMERS LIST REGULATIONS 2004**

**TRIBUNAL PROCEDURE (FIRST TIER TRIBUNAL) (HESC) RULES 2008**

**BETWEEN:**

**DIMITRINA MARINOVA**

**GDC Ref No 182860**

**Appellant**

**and**

**CORNWALL AND ISLE OF SCILLY PCT**

**Respondent**

Before

Judge J Burrow

Dr J Chope

Mrs J Neylon

Sitting at Victory House 30 – 34 Kingsway London WC2B 6EX on 13 January 2011

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**1. The appeal**

1.1 This is an appeal by Ms Marinova pursuant to Regulation 15(1) of the 2004 Regulations against the decision of the Cornwall and Isle of Scilly PCT (the PCT) on the 24

September 2010 under Regulation 6(1)(b) of the 2004 Regulations to refuse her application to join their Dental Performers list. Ms Marinova had supplied a number of clinical references under regulation 4(2)(f) of the 2004 Regulations but the PCT concluded that there were not two that were suitable as required by the Regulations. The central issue for this appeal was whether the references, or at least two of them were in fact acceptable under the 2004 Regulations

## **2. Legal framework**

The legal framework for this appeal is largely contained in the NHS Performers List Regulations 2004, which sets out the criteria by which references are to be considered.

2.1 Regulation 4(1) of the 2004 Regulations provides

“An application by a performer for the inclusion of his name in a performers list shall be made by sending the PCT an application in writing which shall include  
(f) names and addresses of two referees who are willing to provide clinical references relating to two recent posts (which may include any current post) as a performer which lasted at least three months without a significant break and where this is not possible, a full explanation and the names and addresses of alternative referees.”

2.2 Regulation 6(1) of the 2004 Regulations provides that

“The grounds on which a PCT may refuse to include a performer in its performers list are...

(b) having contacted the referees provided by him under regulation 4(2)(f) it is not satisfied with the references.”

2.3 Regulation 6(3)(b) provides that

“Before making a decision on the performers application the PCT shall

(d) take up the references that he provided under regulation 4(2)(f)..

2.4 Regulation 6 (4) provides that

“Where the PCT is considering a refusal of the performers application under paragraph (1) it shall consider all facts which appear to it to be relevant.

2.5 Regulation 6 (5) provides

“when the PCT takes into consideration any of the matters set out in paragraph (4) it shall consider the overall effect of all matters being considered.

2.6 We further had regard to the proportionality of making an order refusing to allow a performer to join a list, taking into account all the relevant evidence in the case and considering the applicants interest in pursuing her profession on the one hand and the possibility of risks to patients on the other.

2.7 Regulation 8(1) provides that

“A PCT may determine that, if a performer is to be included in its performers list, he is to be subject, while he remains included in that list, to the imposition of conditions” .

2.9 Regulation 8(2) provides that

“If a performer fails to comply with a condition, which has been imposed by the PCT, it may remove him from its performers list.

2.10 Regulation 15(1) provides that appeals are to be heard by way of redetermination. Regulation 15(3) provides that the PHL may make any direction which the PCT could have made. Thus the PHL steps into the shoes of the PCT and redetermines the issues. Shortcomings in procedural matters by the PCT may be cured by the process of redetermination of the issues by the PHL tribunal. New evidence arising since the determination by the PCT may be admissible at the PHL appeal hearing.

### **3. Evidence**

3.1 By agreement with both parties this case was heard under rule 23 of the 2008 Rules without an oral hearing – that is to say on the papers. The evidence in this matter consisted of the bundle produced by the PCT (which contained both parties’ papers), and subsequent correspondence on the Interim Conditions Order imposed on Ms Marinova’s employer EZS by the General Dental Council (GDC), and the referral of Ms Marinova to the GDC over allegations she had treated NHS patients without being on the performers list.

3.2 Ms Marinova is a dentist who practised in Bulgaria for many years, but on 1 May 2010 she commenced working at a dental practice in St Blazey in Cornwall, and on the same date applied to be admitted onto the PCTs dental performers list. In the application form she named two referees Mr BB and Ms MP. These were intended to be the two references required by Reg 4(2)(f) of the 2004 Regulations.

### 3.3 Reference MP

Ms MP submitted her reference on the Cornwall and Isle of Scilly's "General Dental Practitioners Reference" form which is a pro forma designed to elicit the necessary information to enable the PCT to ascertain if the referee is suitable to be a referee and to enable the PCT to obtain the necessary information about the applicant and in particular about her clinical skills. The form was dated 21 July 2010.

3.4 The form indicated Ms MP was a dentist practising in Bulgaria. Some parts of the form were not filled in at all. The dates of Ms Marinova's service were said to have begun in 1980 and to have continued to the present day. Ms MP had ticked boxes on the form to say she both was and was not aware of any proceedings that might raise questions about Ms Marinova's conduct – that is to say it was contradictory. The form was filled in with one word answers giving the minimum possible information about Ms Marinova. There was no indication on the form that she had ever worked with Ms Marinova.

3.5 The PCT contacted Ms MP for more information. She replied by email dated 29.7.10 and said "*I am sorry but my English is not perfect*". In answer to the question "Is/was the dentist directly employed by you or your organisation she answered *No*. Ms MP said that because of this answer the questions on the form as to when Ms Marinova's service began and ended and her position during the period of service was irrelevant. She said "*Me and Dr Marinova know each other since our university years. We studied dentistry together. Since then we have been close as friends and colleagues. She has also been my personal dentist for many years.*" Ms Marinova added in an email dated 22 August 2010 that Ms MP "*has been hundreds of times in my practice when I was working.....we have discussed thousands of clinical cases during the years*".

3.4 On 9 August 2010 the PCT sent an email to Ms Marinova saying that they were unable to accept the reference from Ms MP "*because it would seem she is a personal friend. In view of this she is unable to comment on your professional competence*". In a further email of 10 August 2010 the PCT asserted that Ms MP had stated that she had not worked with Ms Marinova.

3.5 In the PCT notification of refusal letter dated 8 October 2010, the PCT expanded on the grounds of refusal saying they were unable to accept Ms MP because she stated she did not have a good level of English therefore they were uncertain if they understood the form. Also they said the referee was a friend and did not answer any of the clinical questions. In the PCT's response to the appeal dated 9 November 2010 the PCT stated that Ms MP said her English was not perfect therefore the PCT had no guarantee that she understood the reference form and stated there were questions she could not answer as they had only studied dentistry together and have since been close friends and colleagues therefore her reference was insufficient for the PCT to accept.

3.6 In reply Ms Marinova said in her grounds of appeal that the PCT had used a number of criteria to assess whether a reference was suitable which were not contained in the 2004 Regulations and which had not been disclosed to her. For example they had interpreted the reference to “recent” in Reg 4(2)(f) as meaning “2 years” without telling Ms Marinova they had adopted this definition until after Ms Marinova had obtained the reference from Ms MP. This information was contained for the first time in an email dated 31 August 2010.

3.7 Also in the same email there was reference to “the last clinical post” as being another criteria used to constitute a “recent” reference. In an email of 9 August 2010 there was a reference to the fact Ms MP was a friend, which the PCT stated made her unsuitable. In the same email there was a reference to “the most recent employer” as a requirement. In an email of 10 August 2010 there was a reference to a requirement that the reference should be from a clinical post where she was last “employed”. Also the PCT had failed to inform her about the provision in Reg 4(2)(f) by which an applicant, if they cannot meet the strict requirements of the Regulation may provide an alternative reference and an explanation.

3.8 Ms Marinova complains that all these requirements, which she says she was not previously aware of, were confusing and unfair. It seemed to her the PCT were imposing hidden criteria which were not contained in the Regulations and had not been disclosed to her. The phrase “last clinical post” to her meant the position she had held from 2000 to 2009 as a self employed dentist in Bulgaria as shown by her CV which had been submitted to the PCT. The “last employed post” meant the period from 1991 to 2000, which was the last time she was employed as a dentist, again as shown on her CV.

3.9 She also queries how the PCT could ascertain that Ms MP did not have an adequate level of English, or that this is a proper criteria to apply. She said the PCT should have sent the Reference Forms in Bulgarian. They should have treated Ms MP as an “alternative” reference with an explanation under Reg 4(2)(f). The PCT never asked her for an “explanation” as provided for in Reg 4(2)(f). She said this was one of 6 very positive references she had supplied. She further suggested that the PCT could and should have visited her at the dentist practice in St Blazey Cornwall, to ascertain for itself the level of her clinical competence.

#### **Referee Mr BBB**

3.10 This reference was one of those included on the original application form dated 1 May 2010. The PCT Reference Form was filled in by Mr BBB and was dated 23 July 2010. The form indicated that he was a medical department chief where Ms Marinova had worked as a dentist in Sofia in Bulgaria. The form indicated that Ms Marinova’s service ran from 1991 to 2000 which was in accord with her CV. The form was filled in with the minimum information with just single word answers. The PCT requested information from the Bulgarian Dental Register which showed BBB had never been registered as a dentist. It appears he is a medical doctor who worked as a Medical Audit and Accounts Officer. On 9 August 2010 the PCT notified Ms Marinova that the reference was unacceptable because he had not worked with her since 2000 and he had never been a registered dentist.

3.11 In reply Ms Marinova in the grounds of appeal queried why a clinical physician who was her supervisor for 10 years could not give her a clinical reference. She says there is nothing in Reg 4 (2)(f) to state that only dentists can give a clinical reference to another dentist. She said there was no requirement to give detailed clinical assessments relating to matters such as crowns or dentures, merely a general clinical reference. She said in an email of 9 August 2010 that BBB was her last clinical boss. She also says that the PCT were wrong to interpret 2 years as the requirement for a “recent” reference and were wrong not to tell her they were utilising this definition.

### **Reference BK**

3.12 This was one of the additional references obtained by Ms Marinova after the two references included on the application form had been rejected by the PCT. This reference was submitted on a standard PCT reference form, dated 23 August 2010. The form stated that she and Ms Marinova were colleagues between 1995 and 1997. The form was again filled in with minimal one word answers. Some of the questions had been wrongly answered. In response to the question “Please describe your professional relationship with the applicant she had answered “No”. In response to the question “Do you believe the applicant to be a conscientious honest and trustworthy and acts with integrity”, she had answered “No”. Other important questions in the form had not been answered at all.

3.13 This reference was rejected by the PCT because she had not worked with the applicant since 1997 and also because she did not complete the clinical assessment section of the form. Ms Marinova suggested in the grounds of Appeal that the PCT should have accepted Ms BK as an alternative reference under Reg 4(2)(f) with an explanation.

### **Reference SSA**

3.14 This reference was submitted on the standard PCT reference form dated 13 August 2010. It indicated that SSA was a dentist who had been a work colleague during 2000, although she had not employed Ms Marinova. Ms SSA said it was a successful working relationship and she would gladly work with her again. More information was provided in this reference than some others. Ms Marinova suggested that this should be accepted as an “alternative” reference with an explanation.

3.15 The PCT rejected this reference because the referee had not worked with Ms Marinova for some 10 years.

### **Reference IDS**

3.16 This reference was submitted on a PCT reference form dated 8 September 2010. It indicated that IDS was a dentist who was not an employer but who was a colleague who had worked in an equal position with her in IDS’s practise from March 2007 to December 2008 part time 4 days a week. He had seen many treatments by her. He was satisfied that she was

honest, conscientious and trustworthy and had never been subject to any disciplinary proceedings in Bulgaria. He indicated she performed better than expected in all clinical areas, although he was unsure of her knowledge of NHS Regulations. Although the form was endorsed by the PCT “reference period out of date and is not acceptable”, in the PCTs decision letter of 8 October 2010, the PCT said this reference was acceptable provided another referee could account for the applicant’s time since 2008.

### **References JPS and EZS**

3.17 Ms Marinova pointed out that since May 2010 she had been working in Cornwall at a dental practice, as the PCT knew, and that the practitioners at the practice were willing to back her up. She submitted further references from JPS the practice manager and EZS the principle dentist and practice owner who is currently employing Ms Marinova. EZS said in a letter dated 15 October 2010 that Ms Marinova supplied a very good quality of work and is very professional and passionate about her job. She said she works hard, is proactive and a good communicator.

3.18 The PCT said that neither of these additional references were acceptable. JPS was not acceptable because he was not a dentist and could not comment on her clinical skills, and because the reference from him was not on the standard PCT proforma. EZS was not acceptable because, (so the PCT initially said in an email dated 10 August 2010), “the position you are applying to join is for EZS”. It later transpired (as set out in the Response to the appeal) that this was not the real reason the PCT had for rejecting her – the real reason was that she was subject to an Interim conditions of practice Order imposed by the GDC. The PCT said in their view it had not been appropriate to tell Ms Marinova the true reason because she was Ms Marinova’s employer. The PCT said that the fact EZS was subject to the conditions raised questions “about her strength for clinically commenting on a colleague”. In other words they appeared to be saying her clinical judgement was impaired and she could not be relied on for a reference.

3.19 Ms EZS’s conditions were imposed in May 2009 and continued after a review in September 2010. They largely concerned conditions to notify, conditions to record complaints and a condition to only treat patients with a nurse present. There were no conditions requiring her to be monitored or mentored, or restricting her clinical practice in any way. The conditions were imposed after a series of complaints to the PCT by patients and staff about her clinical practices in 2009. The PCT first suspended her in April 2009 but later lifted the suspension in October 2009 when the GDC allowed her to continue to practise conditionally.

### **Reference VKH**

3.20 This reference was submitted on a PCT proforma reference form. All the relevant sections had been filled in and a reasonable amount of information had been provided. VKH was an independent dentist who had worked with Ms Marinova from the beginning of

February 2005 to the end of November 2005 - a period of some 9 months. VKH accepted that Ms Marinova was conscientious, honest and trustworthy and had not been subject to any relevant disciplinary proceedings in Bulgaria. The clinical skills section had been filled in carefully, with distinctions being made between different categories. Ms Marinova was described as a very good professional, caring with patients and a team player.

3.21 The reference was dismissed by the PCT because it related to a “short period 5 years ago”.

#### **4. Consideration by the Tribunal**

##### **Reference MP**

4.1 We concluded that the PCT were correct to refuse to accept this reference as one of the two references required by Reg 4(2)(f). This is for two reasons. The first reason is that in our view there was evidence on which the PCT could properly have doubts about the ability of Ms MP to fully understand the requirements of the reference form. She herself had said her English is not perfect. The form was completed inadequately, with some sections not filled in and answers to important clinical questions filled in with a single word. In our view there was doubt about her understanding and/or her readiness to give adequate responses in the reference form.

4.2 Secondly we concluded that there was evidence to suggest that Ms MP had never actually worked in the same practice or alongside Ms Marinova in a clinical capacity and was not therefore in a position to adequately comment upon her clinical capabilities sufficiently for the purposes of a recent clinical reference.

4.2 We felt it was regrettable that not all the criteria upon which a reference will be considered were included on the application form, but we accepted that the PCT had allowed further applications after the requirements had been made apparent to Ms Marinova.

4.3 We did not think that without more the mere fact that Ms MP and Ms Marinova were colleagues and friends would necessarily disqualify Ms MP as a referee, although a friend with no direct clinical experience of the applicant would not be acceptable. We did accept that the reference gave important background information about Ms Marinova – including the fact she had been Ms MP’s own personal dentist for a number of years, and that they had discussed cases together, and that there was no suggestion that there was any deficiency in Ms Marinova’s clinical abilities. We concluded that it would be proper to take these matters into account in determining the overall appropriateness of her application to join the performers list and the proportionality of the PCT’s decision to refuse to allow her on the list.



### **Reference BBB**

4.4 We concluded that the PCT were justified in refusing to accept BBB as one of the two references required by Reg 4(2)(b). This was because BBB's experience of working with Ms Marinova ended in 2000, some 10 years ago. In view of the stipulation in Reg 4(2)(f) that the reference must be "recent", we concluded that a reference relating to experience some 10 years old was not sufficiently recent and did not meet the requirement. Furthermore we did not accept that in the circumstances of this case the fact that BBB was a medical doctor not a dentist was acceptable. BBB answered the reference form questions with single word answers. The information provided was minimal. We did not know how much experience and knowledge of clinical dentistry BBB had, how close his supervision of Ms Marinova had been, and whether his judgement of the clinical competency of a dentist was reliable.

4.5 We did however note the reference provided important background information about Ms Marinova and some confirmation that there was no question about Ms Marinova's clinical abilities. As before we accepted it would have been better if the PCT had revealed the manner in which they had interpreted "recent" before this reference was obtained, but again we noted the PCT allowed further references after they had revealed this requirement to Ms Marinova.

### **Reference BK**

4.6 We concluded that the PCT were correct not to accept this reference as one of the two references required by Reg 4(2)(f). This was because it was too old and because the form was filled in so poorly. Important sections were left blank. Others were filled in in a slipshod manner indicating the reference had been provided with little thought or care. We considered this reference was wholly inadequate.

### **Reference SSA**

4.7 We considered that this reference was unacceptable because it relied on experience that was 10 years old and did not constitute a "recent" reference. It did however represent useful background information including the fact that there appears to be no suggestion of any inadequacy of Ms Marinova's clinical skills at the time.

### **Reference IDS**

4.8 We noted that this reference extended into the 2 year period which the PCT regarded as acceptable to constitute a recent reference. We noted also all the boxes on the reference form had been filled in, including the important boxes concerned with clinical competence. The form showed IDS had worked with her as a colleague for some 9 months. The reference is a good one and IDS says he would be willing to work with Ms Marinova again or employ her. We concluded that this was an acceptable reference.

## **References JPS and EZS**

4.9 The PCT said they would require information about her recent practice since 2008 before they could consider the reference from IDS to be an acceptable reference. We considered therefore the references from JPS and Ms EZS, her current employer. We accepted that the reference from JPS was not adequate as he could not comment of Ms Marinova's clinical ability. We considered the reference from EZS and the complaints and conditions on her GDC registration. It was these matters which has caused the PCT to reject her as a referee. We considered whether her clinical judgement was so impaired that her assessment of a colleague for the purposes of a reference could not properly be relied on.

4.10 We were concerned about the number and nature of the complaints against her in 2009 but we also noted that these had been considered in detail by the GDC who had allowed her to continue to practise, albeit under conditions. We noted also the fact the number of complaints against Ms EZS had substantially diminished in 2010. Furthermore the conditions imposed by the GDC did not seem to be particularly onerous. Of concern was the fact that the conditions had been continued after the review in September 2010. On the other hand she had been allowed to continue to practise under conditions. We bore in mind that the allegations had not been tested by the IOC and that some may be denied.

4.11 It was apparent that there were conflicting factors in the case and that the information we had was far from complete. We did not know for instance what matters had been taken into account at the GDC review hearing in September 2010. We did not know what if any of the allegations were contested. We concluded that it was neither possible nor necessary to reach a conclusion as to whether EZS's judgement was so impaired that she could not provide a reliable reference for a colleague under Reg 4(2)(f). It was not possible because we did not have adequate information in the case. It was not necessary because we concluded, as set out below, that another of the references was acceptable, and it was not therefore necessary for Ms Marinova to rely on the reference from EZS.

4.12 We did accept however that the references from JPS and EZS provided some information as to Ms Marinova's current activities. She was practising within the area of the PCT, and the PCT were not apparently suggesting there had been any complaints about Ms Marinova's clinical competence during this time.

## **Reference VKH**

4.14 We considered this reference carefully. It was correct that it did not meet the 2 year criteria used by the PCT to determine whether a reference was recent or not. On the other hand it was in our view a thoughtfully written reference, providing realistic and useful information about Ms Marinova. The period was for 9 months which was longer than the three months required by Regulation 4. We reminded ourselves of the provision in Regulation 4 (2) (f) that where it is not possible to meet the usual criteria, a reference might be acceptable with a full explanation. Here Ms Marinova had provided an explanation as to why it was difficult for her to find recent references.

4.15 This was because from 2000 to 2009 she was in independent practice working as a sole dentist with only occasional colleagues working with her. She had put forward two of these, one of whom had been rejected by the PCT as being too old. The other had been accepted. More recently she had worked in the St Blaizy practise but the PCT were refusing to accept references from there. Whatever conclusions might be drawn about the suitability of EZS her employer as a referee, blame could not be attributed to Ms Marinova for her employer's difficulties.

4.16 Taking all the evidence in the case together, including the fact she had worked in the PCT's area for the last 7 months and that there was no suggestion in any of the 8 references or by the PCT itself that her clinical abilities were anything other than good, we concluded that this reference was acceptable. Therefore there were two references that were appropriate under reg 4(2)(f).

## **5. Conditional inclusion**

5.1 When Ms Marinova had first started practice in the St Blazey practice, a complaint had been made by a staff member that EZS her employer had gone on holiday and Ms Marinova had treated NHS patients in her absence. This would be wholly unacceptable because she was not on a performers list. The PCT said it had received FP17s from the practise during the holiday period when only Ms Marinova was present. Ms Marinova (and EZS) denied she had treated patients as a dentist but only in a capacity as a nurse. On the information provided to us we did not feel able to reliably draw a conclusion as to whether Ms Marinova had or had not treated NHS patients, but the allegation was of concern to us.

5.2 This matter, coupled with the fact that neither of the references accepted under regulation 4(2)(f) covered the most recent period of practice, caused us to conclude that Ms Marinova's inclusion on the list should be subject to a condition that she satisfy the PCT after practising for between 4 to 6 months that she can be admitted unconditionally to the list without prejudice to the efficiency of the service.

### **We therefore ordered**

1. That Ms Marinova be conditionally included on the Cornwall and Isles of Scilly PCT's dental performers list subject to the following condition:

That after four months of practise as from the date of this decision letter, and before the lapse of six months from the date of this decision letter, Ms Marinova must satisfy the PCT that her unconditional inclusion on the dental performers list would not be prejudicial to the efficiency of the service.

John Burrow

Judge HESC/PHL

16 January 2011

