

First-tier Tribunal Primary Health Lists

The Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care) Rules 2008

IN THE MATTER OF AN APPEAL UNDER THE NATIONAL HEALTH SERVICE (PHARMACEUTICAL AND LOCAL PHARMACEUTICAL SERVICE REGULATIONS 2013

[2023] 5063.PHL

Hearing: 13 February 2024 at Liverpool County Court

BEFORE
Judge Meleri Tudur
Ms M Tynan (Lay Member)
Mrs S Govani (Professional Member)

BETWEEN:

W1386 Healthcare Ltd

Applicant

v

NHS Cheshire and Merseyside Integrated Care Board

Respondent

DECISION

Appeal

1. The appeal is made by the Appellant pursuant to Regulation 33(5)(b) of the NHS (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 against the decision of the Cheshire and Merseyside Integrated Care Board to refuse the application of the Appellant for inclusion in the pharmaceutical list of Cheshire West Health and Wellbeing Board on grounds of fitness to practice, namely that the Respondent was not satisfied with the references given by the Appellant in accordance with Regulations 33(2)(a).
2. On the 26 April 2022, the Appellant, W1386 Healthcare Limited applied to the Respondent to open a distance selling pharmacy in the Respondent's area.
3. Dr Ana Lurdes Pires Cadavez Pedro, a registered pharmacist with the General Pharmaceutical Council (GPhC) is the sole director and the superintendent pharmacist, in respect of which the application for registration was made for a distance selling pharmacy. In support of the application to register, as a pharmacist, she was required to provide the names of two suitable referees who would be able to demonstrate her fitness to practice. From the date of the application to the date of the decision on the 12 July 2023, she had been unable

to do so. The application was therefore refused under Regulation 33(2) on grounds of fitness to practice.

4. The requirement is that the pharmacist must provide the names and addresses of two referees who must meet identified criteria and are willing to provide references in respect of two recent posts as a pharmacist, which lasted at least three months without a significant break or where this is not possible, details of why and the names and addresses of alternative referees, who are acceptable to the NHS commissioning body.
5. On the 26 July 2023, Primary Care Support England notified the Appellant by letter that the Respondent had considered the fitness to practice information provided in support of the application and concluded that the information did not meet the necessary criteria under regulation 33(2) and the application was therefore rejected.
6. The appeal was made on the 26 July 2023.

Preliminary Issues

7. There were two preliminary issues for consideration at the start of the hearing. On the 30 January 2024, the Appellant had submitted an application for production of late evidence in the form of a document setting out a research proposal for digital blister packs. The Respondent did not object to the application and confirmed that it could be dealt with on the papers, although querying the relevance of the evidence to the issues in the appeal.
8. On the morning of the hearing the Respondent produced further evidence, namely an attachment to an email dated 2 December 2022 from Adrian Hodges, UK Team Manager of Clarity Locums, which was a reference form submitted by him to the Respondent, together with the covering email, and an email thread between Nicki Dickinson, Primary Care Project Officer and Pharmacy Market Entry Administration Services, pertaining to the references sought.
9. Dr Pedro did not object to the evidence being accepted because she wanted to challenge the veracity of the comments made in it.
10. The Tribunal admitted all the late evidence and directed that it should be added at the end of the tribunal bundle.

Issues in the appeal

11. The issue for determination in the appeal is very narrow, and it is whether the Appellant has provided the names of appropriate referees in compliance with Regulation 33 of the National Health Service (Pharmaceutical and Local Pharmaceutical Services) Regulations (the Regulations) and has been able to demonstrate her fitness to practice.

The Law

12. The National Health Service (Pharmaceutical and Local Pharmaceutical Services) Regulations, Regulation 33 provides:

‘(2) An application for inclusion in a pharmaceutical list by a person who is not already included may be refused if the NHSCB—

 - (a) having contacted the referees mentioned in paragraph 3(8) of Schedule 2, is not satisfied with the references given;’

13. Schedule 2 para. 3 of the regulations provides as follows:

‘(1) Subject to paragraph 5, the information mentioned below in this paragraph must be included in all routine and excepted applications for inclusion in a pharmaceutical list, as regards any person (P) who is.....

 - (c) a director or (if A is seeking entry in the list mentioned in regulation 10(2)(a)) superintendent of the body corporate that is making the application.

(8) If P is a pharmacist, names and addresses of 2 referees who are willing to provide references in respect of 2 recent posts (which may include any current post) as a pharmacist which lasted at least 3 months without a significant break, or where this is not possible, details of why and the names and addresses of alternative referees who are acceptable to the NHSCB.’

14. Further guidance regarding the contents and focus of the references is contained in the Pharmacy Manual Chapter 4 paragraph 35 and 36:
 - a) ‘Recent posts should be posts within the previous two years although posts from before this time are acceptable if there are good reasons.
 - b) The referee should be a pharmacist registered with the GPhC or the PSNI and must be able to comment on the pharmacist’s knowledge, skills and competence’

15. Since 1 April 2023, NHS England has arranged for its relevant statutory functions to be exercised by Cheshire and Merseyside Integrated Care Board (the Respondent) in accordance with section 65Z5(1) of the National Health Service Act 2006. The Respondent took the decision under appeal and, under section 65Z5(6), any liabilities incurred in respect of that decision are enforceable against the Respondent (and no other person).

16. The right of appeal against the decision of the Respondent lies to the First-tier Tribunal Primary Health Lists. The jurisdiction of the Tribunal is to consider afresh the information provided and remake the decision. The First-tier Tribunal must decide whether it is satisfied with the references given and the evidence of fitness to practice. Pursuant to regulation 33(3), the Tribunal must take into consideration all facts which appear to be relevant.

17. The Tribunal had in evidence a hearing bundle running to 995 digital pages, together with the late evidence admitted and heard oral evidence from Ms Jacqueline Jasper and Dr Pedro.

Evidence

18. In her initial grounds of appeal, Dr Pedro indicated that she would like to be granted more time to seek and provide two references from Tesco Pharmacy as she had started working locum shifts for Tesco in Chester and Northwich on 14 July 2023 and proposed to remain there for at least three months without a significant break. She confirmed in her appeal form, the comments made to the Respondent in the email of the 26 July 2023, when she responded to the decision letter and confirmed that she did not have any suitable referees because she works mainly alone as a locum. She requested an extension of time to at least 13 October 2023 to allow her time to complete three months of work for Tesco without a significant break, so that she could identify two different Tesco pharmacists as appropriate referees. She expressed her dissatisfaction with the pharmacy system in the UK because she believed the pharmacists should always be required to work in pairs.
19. The Tribunal heard oral evidence from Ms Jacqueline Jasper, Primary Care Manager for the Respondent, who was a co-opted (non-voting) member of the Cheshire and Merseyside Pharmaceutical Service Regulations Committee which made the decision to refuse the application to register. In oral evidence, Ms Jasper confirmed the truth of the contents of her two witness statements dated 18 October 2023 and 13 November 2023.
20. In her first witness statement, Ms Jasper had set out the chronology of events from the receipt of the application to register to the decision on the 12 July 2023 and had set out in detail the attempts made to secure appropriate referees for Dr Pedro. Exercising the discretion afforded by the regulations where a pharmacist has explained the reasons for any difficulties in identifying referees in compliance with the requirements, she confirmed that the Respondent had instructed the Primary Care Support England team to obtain a reference from Ms Charlesworth, although she had not worked with Dr Pedro since 2018 and on the 15 November 2022, requested PCSE to contact all of the referees provided so that there was a range of responses.
21. Ms Jasper's written statements set out the statutory requirement to make and maintain a list of pharmacies, appliance contractors and Local Pharmaceutical Services contractors and her own role in relation to consideration of the application for registration and the process for dealing with applications. She set out the 14 criteria which the references must address on aspects of the applicant's practice and the importance of verifying with the individual referees the truth and accuracy of the information provided. The fitness to practice

procedures must be completed satisfactorily to ensure that only fit and proper persons gain entry to the pharmaceutical lists and once satisfied the market entry element of the application to set up the distance selling pharmacy is determined under the relevant procedure. The fitness to practice element is therefore only the first step in consideration of the full application.

22. Ms Jasper was cross examined by Dr Pedro, regarding the composition of the Cheshire and Merseyside Pharmaceutical Service Regulations Committee, which met on the 12 July 2023 and considered the paper addressing the issue of the production of references for Dr Pedro. In oral evidence, Ms Jasper provided further detail about the process of dealing with the application, explaining that her colleague Nicola Dickinson had prepared a paper for consideration by the committee dated 6 July 2023, setting out the attempts made to secure references from the nominated referees. Copies of the relevant email correspondence was embedded in the paper and could be accessed by the panel. Ms Jasper confirmed that she was present at the meeting as a non-voting member of the committee as was Ms Dickinson, as the author of the paper, so that she could answer any queries arising. The two committee members then considered the fitness to practice information and Ms Jasper confirmed the names of the Chair and independent member. The process allows the chair of a two person panel to have a casting vote, but the decision in this matter was the unanimous decision of them both. The reasons for the decision are recorded in the Minutes of the meeting, which were disclosed to Dr Pedro with the decision letter.
23. The decision letter dated 23 July 2023, set out the reasons for the decision and stated: "*The committee considered the information provided in the committee report regarding the failure of the applicant to provide two satisfactory references in line with FTP standards. The committee acknowledged that whilst one reference was provided it did not provide sufficient level of detail to be considered a satisfactory reference. All other referees have either failed to provide a reference or declined to give a reference on the basis that they do not know the applicant well enough. **Decision:** The committee determined that this Fitness to Practice application be refused under Regulation 33(2)(a) **Action:** PCSE to notify the applicant.*"
24. In cross examination, Ms Jasper confirmed that it was not a requirement that members of the committee should provide written reasons for the decisions made, the minutes of the meeting standing as the record of the decision. She confirmed that paragraph 3(8) of Schedule 2 provided a discretion for the regulator to accept alternative referees they consider acceptable where there was good reason to depart from the standard requirements. Ms Jasper interpreted the discretion to mean that the Respondent could accept for

example, a reference from a job which lasted ten weeks rather than three months or was slightly older than two years and the pharmacist had not been working for good reason. She did not consider it possible to change either the number of references or to waive the information required in the reference.

25. It was not in dispute that Dr Pedro had provided the names of two proposed referees at the time of the application and explained that she was unable to provide a referee who had worked with her during the previous two years because she did not work as a pharmacist during the years 2020 – 2021 and worked as a pharmacist alone in 2021-2022 as a locum. She had provided the name of Lesley Charlesworth who worked with her during 2018 and Simon Clark, the division manager from Tesco where she had worked many shifts with different pharmacists, including Andy Lawley from 2017 – 2018.
26. Ms Charelsworth completed the template reference form on the 1 September 2022 and answered all the questions. The Respondent initially accepted the reference by Ms Charlesworth but by the time it was considered she was no longer a registered pharmacist. She confirmed that she had worked with Dr Pedro many times between 2017 and 2021 whilst a locum pharmacist in a patient facing role. She indicated in eight of the 14 questions that she had insufficient knowledge to form a judgement on that aspect, which included pharmaceutical care, keeping records and work practices. She expressed a view that Dr Pedro's communication skills were good and was very trustworthy in her relationship with patients. Her ability to avoid discrimination and prejudice against patients was described as "good to excellent" and it was confirmed that she always showed empathy and sensitivity towards patients. She stated however that she had insufficient knowledge to form a judgment on whether Dr Pedro had an understanding of the NHS terms of service and was open and honest in their financial and commercial dealings.
27. Dr Pedro subsequently provided the name of Ms K Roberts, a pharmacy technician and manager, who had appraised her in 2018 but in respect of whom, Dr Pedro had made disparaging comments regarding her honesty and conduct in her application form. Dr Pedro also referred the Respondent to Ms R King of Clarity Locums, who was on maternity leave when enquiries were made and unable to supply a reference. Mr A Hodges responded on her behalf and in an email dated 2 December 2022 explained that the company is an employment agency which facilitates shifts for community pharmacy clients for locum pharmacists and do not work in a dispensary setting.
28. Ms E Russell on behalf of Phoenix Medical the HR administrators on behalf of Rowlands Pharmacy sent an email dated 6 December 2022 confirming that Dr Pedro had been employed from the 3 January 2019 to the 16 April 2019 as a full time pharmacist but declined to provide a reference.

29. Dr Pedro then provided the names of Mr G Roberts, of Tesco, Holyhead and Mr Roger Balshaw of Well Pharmacy at Shotton. The named referees were all approached for a reference: Ms Charlesworth submitted a completed form as did Mr Hodges, but neither were accepted by the Respondent as a suitable reference. Mr Balshaw of Well pharmacy stated in an email dated 9 May 2023 that he did not know Dr Pedro well enough to provide a reference. Mr Roberts did not respond to the request.
30. Dr Pedro had submitted a written witness statement which set out her position in relation to the suitability of the referees which she had named and explained her difficulties in obtaining references. She relied on information about her own reporting of several different pharmacies and pharmacists to NHS England and the police due to problems with NHS smartcards and NHS111 referrals. She is also pursuing proceedings brought in the Employment Tribunal regarding her employment by Rowlands Pharmacy. In the witness statement, she requested additional time to find additional referees and suggested that her reports to GPhC, Betsi Cadwaladr University Health Board and police authorities about pharmacies and pharmacy staff, as well as her scientific articles about pharmacy and clinical pharmacy services should also be considered as references towards obtaining the NHSE contract. Dr Pedro also made a request for action that was not within the Tribunal's power namely that the Tribunal transfer her NHS England contract application to Greater Manchester Integrated Care Board for a second opinion because she challenged the Respondent's process for considering her application. In an email dated 27 November 2023 addressed to the Tribunal she also mentioned: "*I have additional proposals to transfer 50% of my company shares to NHSE (possibly transfer the other 50% to Portuguese NHS later) and to implement and work together with NHS in different new clinical services and R&D projects as I mentioned in my statements*" and expressed her anticipation that the Tribunal would decide in her favour in respect of that and other aspects of her appeal.
31. Dr Pedro gave oral evidence challenging the contents of the email and completed form produced in late evidence from Mr A Hodges. She asserted that the email was inaccurate and untrue and that on the basis of comments made by Ms King in a reference she prepared to support Dr Pedro's application to join medical school, he could have obtained feedback from the pharmacies where Dr Pedro had worked as a locum in order to compile and complete the reference form. She asserted that the letter from Rhiann King confirmed that agencies received feedback from pharmacy teams about the performance of individual locum pharmacists and this would have been sufficient for him to complete the reference form.

32. Dr Pedro had submitted in evidence the appraisal form completed by Ms Roberts dated 1 April 2018. The report summarised Dr Pedro's performance as follows: "Ana from day 1 has shown how keen she is to provide all service and how passionate she is to bring her proposals to head office to maybe work on these in the future. We need to concentrate souly (sic) on what Rowlands wants us to do currently." The report identified that "Improvement required" in the quality of work and relationship with colleagues.
33. Dr Pedro challenged the Respondent's decision that the information provided in Kelly Roberts' appraisal was insufficient to provide a fitness to practice reference and gave evidence that she considered the information in it to cover all the relevant areas in the template reference form. She made the same argument regarding Rhiann King's letter of support to UCAS in 2021 and challenged the assertion that it did not provide sufficient information in response to the 14 questions set out on the standard reference form provided by the Pharmacy Manual. Dr Pedro expressed her view that the information in the letter and the reference to the provision of services in the appraisal form were sufficient to satisfy the requirements of the regulations. She did not accept that the appraisal by Kelly Roberts and comments contained in it should be treated with caution given Dr Pedro's own allegations of dishonesty and lack of integrity in her application form in respect of Kelly Roberts. Dr Pedro's evidence was that the committee should have exercised its discretion and accepted Kelly Roberts' appraisal as sufficient evidence of her suitability and fitness in a clinical context.
34. Dr Pedro sought to rely on the reference of Lesley Charlesworth, who confirmed by email dated 31 August 2022 that she was content to do so, but was by then fully retired and no longer on the pharmacy register. Dr Pedro gave evidence that it was her view that the 8 questions which were marked as "insufficient information to form a judgement" to be an error on the part of Ms Charlesworth because of the positive comments added by her.
34. Mr Anderson cross examined Dr Pedro on the contents of the reference forms completed by Ms Charlesworth seeking her confirmation that the answers provided did not support the conclusion that the reference was satisfactory. Dr Pedro insisted that the answers to each of the questions provided sufficient information.
35. Mr Anderson, in closing, emphasised that the regulations require two references and information collated from responses to 14 questions set out in the standard template reference form. Whilst it is not compulsory for the reference to be in the template format, all the 14 areas covered by the form had to be addressed and he submitted that the information from Ms King and Ms

Charlesworth did not cover all the relevant criteria and that Dr Pedro had not provided appropriate referees.

Tribunal's conclusions with reasons

36. We considered very carefully the information provided in the documentary evidence bundle and noted the detailed information Dr Pedro provided to support her own appeal, in the form of multiple certificates indicating her ongoing professional development and her new research proposal tendered in late evidence. She is obviously keen to develop her career as a pharmacist and to build on her already considerable training and knowledge.
37. The focus of the regulation is very narrow and required Dr Pedro, as the superintendent pharmacist to provide the names and addresses of two people who would be able and prepared to provide the relevant information about her professional clinical work and conduct as a pharmacist. We accept that it is more difficult for a locum pharmacist to provide the information than it is for someone who is working in a fixed post, but the regulations and the pharmacy manual provide both strict conditions and guidance, with the possibility of some flexibility to cover exceptional cases because the information is an important part of the validation of the suitability of applicant to provide pharmaceutical services under an NHS contract.
38. The role of a superintendent pharmacist is a responsible and important position. The responsibilities of the Superintendent Pharmacist include, but are not limited to, professional and clinical management of a pharmacy and the administration of the sale and supply of medicines; this includes monitoring and auditing medicines expenditure and by introducing new or revised working practices for all aspects of purchasing and the safe management of medicines. The Integrated Care Board must be satisfied about issues such as integrity, honesty, knowledge and practice before the individual can be approved as suitable and fit for the role.
39. We noted that Dr Pedro had been provided with extended opportunities over a period which up to the final hearing of the appeal was over 18 months to comply with the obligation to provide the names of suitable referees. She had provided first of all two referees, one of whom had provided information in 2018, out of time for the purposes of the guidance and a second, Ms Charlesworth, had provided a reference but had been very cautious in the information provided.
40. We did not accept Dr Pedro's evidence that Ms Charlesworth had been mistaken in her selection of the responses on the reference form: on some of the questions she had selected responses such as "Good to excellent" but on more than half the questions posed, she had indicated that she had insufficient

information to form a judgement, despite making positive comments in relation to some of them. We did not accept Dr Pedro's assertion of an error by Ms Charlesworth because we concluded that an experienced pharmacist completing a reference form would read the questions carefully and respond honestly and accurately. It is to be borne in mind that both Ms Charlesworth and Dr Pedro were working as locums and consequently, were not in the same position as full-time working colleagues. We conclude that we cannot go behind the form and accept that it was completed honestly and accurately and reflects Ms Charlesworth's perception of her situation in relation to forming a judgment on the questions in a more general context. The form concludes with a declaration of truth and it is not arguable that Ms Charlesworth signed that declaration without being confident that the form had been accurately completed. We therefore conclude that the Respondent's decision that the reference was not a satisfactory reference was justified.

41. The documentary evidence submitted by Dr Pedro at the time she made the appeal supported the conclusion that she had been unable to provide the names of two suitable referees. At that point, she accepted the basis of the decision but was seeking additional time to comply. In the course of the proceedings, her position had changed and at the final hearing she sought to argue that she had provided sufficient information to satisfy the fitness to practice element of the application through the various documents she had provided. Although Dr Pedro had participated in many training courses, producing certificates to demonstrate the many successful courses she had attended, the regulations and the Pharmacy Manual seek specific referees who are able to speak to the fitness to practice rather than the ability to attend training courses, which is only one element of the professional practice.
42. Dr Pedro had also provided two academic references from her days in university, but these too failed to comply with the requirement of demonstrating fitness to practice because the information contained in them was not relevant to the areas of work where fitness must be demonstrated.
43. We did not accept Dr Pedro's evidence that the information she had provided satisfied the fitness to practice criteria as required by the regulations and the Pharmacy Manual. The areas required to be covered were not covered by the appraisal form completed by Ms K Roberts and could not be tested by the Respondent speaking to the author because the company declined to provide a reference for Dr Pedro. We also noted that Dr Pedro's employment by the company had been terminated and since the appraisal pre-dated the dismissal, it could not be relied upon as an accurate reflection of Dr Pedro's performance overall. Furthermore, Dr Pedro had herself discredited Ms Roberts' honesty and integrity in her application form and consequently, it was reasonable for the Respondent to decline to accept the historical assessment. The appraisal was

also insufficient in the information provided because it did not cover the relevant areas; it was too old, having been written in 2018 and the Respondent was not in a position to test the information by speaking to the author.

44. We conclude that the Appellant failed to provide the names of two suitable referees to vouch for her fitness to practice in compliance with Regulations 33(2) and the appeal fails.

Order

Appeal dismissed.

The decision of the Respondent to reject the Appellant's application for inclusion in the pharmaceutical list on fitness grounds pursuant to Regulations 33 of the National Health Service (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 is confirmed.

**Judge Meleri Tudur
Deputy Chamber President**

First-tier Tribunal (Health, Education and Social Care)

Date Issued: 22 February 2024