



Primary Health Lists

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

Dr Elbishari

V

NHS Cambridgeshire

[2011]PHL 15492

DECISION

Judge	Nancy Hillier
Professional member	Dr `Raj Rathi
Independent member	Ms Kate Wortham

Heard at Cambridge Magistrates Court on 25 October 2012

Dr Elbishari was represented by Mr Uberoi of Counsel
The Respondent was represented by Mr Grey

Appeal

1. By application dated 18 June 2012 Dr Elbishari appeals against the decision of NHS Cambridgeshire dated 22 May 2012 to remove him from their Performers List under Regulation 10(6) of the NHS (Performers List) Regulations 2004. Paragraph 10 (6) provides “*where a performer cannot demonstrate that he has performed the services, which those included in the relevant list perform, within the area of the Primary Care Trust during the preceding twelve months, it may remove him from his list*”.

Background

2. Dr Elbishari has worked in the UK since 1998, undertaking his GP Registrar year in 2005. He has been on the Cambridgeshire PCT list since that time. In 2010 he worked regular out of hours shifts in Cambridgeshire, until approximately September 2010. He then took work more local to his home in Ipswich, working in Suffolk, Essex, Norwich and Yarmouth.
3. On 29 June 2011 Dr Elbishari was convicted of using a vehicle while uninsured, resisting/obstructing a Police Officer in the execution of his duty and driving otherwise than in accordance with a licence. On 7 October 2011 he was convicted of driving otherwise than in accordance with a licence and for using a vehicle while uninsured. Dr Elbishari was apparently driving on an international licence for longer than allowed. The matter was referred to the GMC.
4. Dr Elbishari was formally appraised in November 2011 by Cambridgeshire NHS. No clinical concerns were raised.
5. In December 2011 the PCT wrote to Dr Elbishari asking for information as to where he had worked for the past 12 months and giving him warning of the discretion to remove him from the list if he had not performed services in their area in the last 12 months. It is common ground that by no later than February 2012 Dr Elbishari was aware of their request and he therefore asked the Out of Hours service which had given him work in the past to supply him with work. They refused pending the outcome of the GMC investigation and have since confirmed that they are not willing to give him any further work. He has not been offered any locum work in the area.
6. On 27 March 2012 the PCT wrote to Dr Elbishari informing him that they were commencing a formal removal process. Dr Elbishari emailed them explaining that he could not find work in Cambridgeshire pending the outcome of the GMC enquiry, and asking them to postpone the decision. On 22 May the PCT confirmed that it had decided to remove him from the Performer's list, which decision he appealed on 18 June 2012. The PCT

confirmed its decision to remove Dr Elbishari from the list by letter dated 22 May 2012. This letter included the following reasons for this decision:

7. *“You have provided no evidence of any work in the PCT’s area from 23 December 2011 to date, a period of approximately 16 months, and your email dated 24 April 2012 indicates that you are not likely to be providing any services in the area until the GMC investigation is complete. The PCT considers that it is reasonable and proportionate to remove your name from its List, bearing in mind that you have the option to re-apply in future when your employment circumstances are clearer. The PCT does not consider it to be reasonable to allow practitioners who have not provided services in its area for a period of 12 months or more to remain on the List for indeterminate periods of time.”* The reference to 2011 is a typographical error and should read 2010.
8. On 19 June 2012, the GMC issued Dr Elbishari with a formal warning in respect of the driving offences for a period of 5 years. The warning reads: *“This conduct does not meet with the standards required of a doctor. It risks bringing the profession into disrepute and it must not be repeated. The required standards are set out in Good Medical Practice and associated guidance. In this case, paragraphs 57 and 58 of Good Medical Practice are particularly relevant...Whilst these failings in themselves are not so serious as to require any restriction on his registration, it is necessary in response to issue this formal warning.”*
9. Dr Elbishari has continued to work in Sussex and Essex during 2012, making applications for more permanent positions. The appeal was stayed from 24 July until 5 September to give Dr Elbishari opportunity to pursue a position in Cambridgeshire. He was unsuccessful, and applied in August to Suffolk PCT to be admitted to their list, providing references as required. The appeal was listed for trial at a directions hearing on 5 September. NHS Suffolk agreed on 16 October to take up a reference and organise a meeting with Dr Elbishari and Mr Hassan. They were unable to complete this before the hearing but indicated that if the hearing were postponed

they would pursue the matter with an aim to report to a formal meeting on 20 November.

10. An application dated 23 October, received by the Tribunal on 24 October, to postpone the hearing for 28 days to await the outcome of the NHS Suffolk decision was refused by Judge Hillier on the day before this hearing.
11. At the commencement of the hearing the panel admitted an email from Suffolk NHS regarding Dr Elbishari's application to them and a letter dated 1 August 2008 from the Respondent to Dr Elbishari into evidence with the agreement of both parties. We also received a skeleton argument from Mr Uberoi out of time.

Law

12. Our powers on appeal are to be found in paragraph 15 of the Regulations which (as amended) provides as follows:

(1) A performer may appeal (by way of redetermination) to the First-Tier Tribunal against a decision of a Primary Care Trust as mentioned on paragraph (2) by giving notice to the First-Tier Tribunal
(2) The Primary Care Trust decisions in question are decisions-
(d) to remove the performer under regulations 8(2), 10(3) or (6),.....
(3) On appeal the First-Tier Tribunal may make any decision which the Primary Care Trust could have made.

13. PCTs have since 2004 been required by the government to maintain local lists of primary care performers, including GPs, as an important part of the overall regulatory system of doctors who provide general practice services. This function, usually known as "list management", is distinct from the regulation of all doctors carried out by the General Medical Council. It is also separate from any contractual arrangements that may exist between a PCT and a GP, and from any employment relationship that may exist between a PCT and a GP.

14. The aim of the list management function is set out in guidance published by the Department of Health in 2004, entitled "*Primary Medical Performers Lists – Delivering Quality in Primary Care.*"

15. Paragraphs 2.1 and 2.2 of that document state as follows:

"2.1 The NHS (Performers Lists) Regulations provide a framework within which PCTs can take action if a medical performer's personal and/or professional conduct, competence or performance gives cause for concern.

2.2 Protection of patients should be the overriding consideration when considering whether a performer should be admitted to a list, suspended or removed from a list, whether restrictions should be placed on a performer's position on a list, or whether the performer should be excluded from all lists (disqualification).

16. The burden of proof rests on the Respondent to demonstrate that the removal is justified on the evidence. The relevant standard of proof is on the balance of probabilities.

17. In this case Dr Elbishari accepts that he has not performed services in the area since September/ October 2010. The PCT acknowledge that this Regulation is the sole ground on which they seek to remove him from their list and that they are not aware of any clinical concerns about him.

The evidence/submissions

18. The sole issue for consideration by the panel was whether it was a reasonable and proportionate exercise of discretion to remove Dr Elbishari from the list.

19. Mr Grey called Dr Niall Bacon to give evidence on behalf of the PCT.

20. Dr Bacon is the Medical Adviser for the PCT and as part of that role advises on admissions and removals of doctors to and from the Performer's List including reviewing all applications and references. He is

a partner in a GP practice in Cambridgeshire with 24 years experience in general practice. He advised the Decision Making Group in respect of Dr Elbishari.

21. Dr Bacon gave evidence that there are a number of reasons why it is important for PCTs to ensure that their lists are kept “up to date”. PCTs are responsible for monitoring the performance and conduct of doctors on their Performer’s List, and for responding to concerns and complaints regarding individual doctors, which may come from many sources. Where a body of concerns arise about an individual practitioner, the PCT is obliged to investigate these and take appropriate action to protect patients. The Decision Making Group (DMG) is the principle PCT committee which assesses concerns it receives and takes action. In his view, where a PCT is responsible for a GP who has not practised in its area for some time, it is considerably less likely that a PCT will be made aware of any performance or conduct issues that might arise, as the mechanisms for concerns to reach the DMG are essentially local to the PCT area. This makes it much more likely that performers in respect of which action should be taken will escape scrutiny, particularly in the case of peripatetic locums who may work across several PCT areas, with resultant increased risk of patient harm.
22. Dr Bacon also gave evidence that there are resource implications for a PCT in keeping on its list a practitioner whose work is entirely carried out elsewhere. In common with all PCTs, Cambridgeshire PCT carries out an annual appraisal of all GPs on its medical performers list. He stressed that almost two years have elapsed since Dr Elbishari last undertook GP work in Cambridgeshire and that there is apparently no realistic prospect of him working in the Cambridgeshire area in the near future
23. Mr Grey submitted that The PCT contends that not only was the decision on 22 May 2012 reasonable, but nothing has changed since then that should persuade us to find that Dr Elbishari should stay on the list. He stated *“On the contrary, a further five months have now passed since Dr Elbishari last worked as a GP in Cambridgeshire. The arguments in favour of his removal from the list are even stronger than they were in May.”*

24. Mr Grey relied upon the evidence of Dr Bacon to make two primary submissions. Firstly, that the purpose of medical performers lists is to enable PCTs to be made aware of concerns about GPs' professional conduct, competence or performance, and then to investigate those concerns and take action if necessary. He said that PCTs will not normally act in response to isolated complaints, unless they are extremely grave. They will, however, investigate if a number of concerns about a GP are made known to them, which is far less likely to happen if a GP is working in a different area.
25. Secondly, since PCTs conduct annual appraisals of GPs on their list it is a waste of resources for a PCT to have to conduct appraisals of GPs who do not work locally and therefore do not contribute to the local health economy.
26. He referred us to the case of **Dr Joseph Brand -v- Hampshire & Isle Of Wight PCT** [2012] UKFTT 29 (HESC), as follows:

“The Tribunal was of the opinion that, in balancing protection of the public against the Applicant’s own interests, protection of the public prevails in this case. In the Tribunal’s opinion, Regulation 10(6) of the Regulations exists to protect the public from out of date medical practitioners and the public has a right to expect that to be upheld by PCTs. Where this requirement is not met by a practitioner, this can be dealt with by way of removing him from the relevant Performer’s List”.

27. He also referred us to the case of **Dr Klaus Goder -v- Newcastle PCT** PHL/15379,

“23. The PCT upon whose List a performer currently appears has obligations in relation to his performance even if he does not practice in that locality. It is usual for a performer to be formally appraised on a regular basis and this process has cost and resource implications for the PCT on whose List the performer appears.

24. In our view it is undesirable that a PCT retains responsibility for a general practitioner who has not practised in its area for some time. It is wasteful of the resources of that PCT and poses the risk that performance issues that might arise on regular appraisal or otherwise will not be noticed or acted upon. If any issue does arise there are obvious difficulties, if action has to be taken in relation to matters alleged to have occurred elsewhere.

25. It is plainly in the public interest and in the interests of patient safety that the PCT where the performer actually works has that responsibility. It is in these circumstances the PCT has been given the discretion to remove a performer from its list when he has not performed services in that area for a period of twelve months.”

And to the case of **Dr Monaf Khudurun -v- Suffolk PCT** PHL/15230:

25. The PCT upon whose list a performer in fact appears has obligations in relation to his performance even if the reality is he does not practice in that locality. It is usual that a performer is formally appraised on a regular basis and this has cost and resource implications for the PCT upon whose list the performer appears. An important feature of the national list system is that the efficiency and suitability of performers is a matter that is regulated by the local PCT on whose list the performer's name appears. It is only the PCT on whose name a practitioner appears that can consider removal on the grounds of either suitability or efficiency, or contingent removal on efficiency grounds.

26. In our view it is obviously undesirable that a PCT retains responsibility for a general practitioner who has not practised in their area for some time. It is wasteful of the resources of that PCT and poses the risk that performance issues that might arise on regular appraisal or otherwise will not be noticed or acted upon. If any issue does arise there are obvious difficulties if action has to be taken in relation to matters alleged to have occurred elsewhere. It is plainly in the public interest and in the interests of patient safety that the PCT where the performer actually works has that responsibility. It is in these circumstances the PCT has been given the discretion to remove a performer from its list when he has not performed services in that area for a period of twelve months.

27. *In this case the PCT, in accordance with the Guidance, afforded Dr Khudurun a reasonable period of grace to secure his inclusion to the Redbridge List. We noted that, although first made aware that his future on the Suffolk performers list was in question in April 2009, he did not take any decisive action to submit his application until the threat of imminent removal by Suffolk PCT was made in October 2009...*

...31. *We have looked at matters entirely afresh in our own redetermination. We are mindful that we have a complete discretion. In all the circumstances described above it is our view that it is fair, just and proportionate is that Dr Khudurun's name is removed from the list of Suffolk PCT.*

28. Dr Elbishari filed a statement and also gave evidence to the panel. He explained that he had been unable to apply to Suffolk PCT whilst the GMC referral was being considered and that he had used his best endeavours to obtain work in the Cambridgeshire area, both full time and out of hours.

29. He told the panel that he had tried to satisfy the Cambridgeshire PCT requirements and that when it became clear that he did not have prospects of work in the area he had made a timely application to Suffolk which he was pursuing. He is the sole earner in his family and relies on the income from his GP locum work to pay his mortgage and family outgoings.

30. Mr Uberoi provided the panel with a skeleton argument and made submissions on behalf of Dr Elbishari. He relied on the case of **Dr Mistry v Nottingham PCT** [PHL15353], where the satisfaction of the Regulation 10(6) twelve month condition precedent was described as "*little more than a starting point*" by Judge Atkinson and referred us to a remark in **Dr Brand v Hampshire and Isle of Wight PCT**

"The tribunal also reminded itself that it must exercise the principle of proportionality at all times, balancing protection of the public and the wider public interest, including public confidence in the profession and the need to uphold and maintain the standards of the profession against the Applicant's own interests in being able to continue to practice in his chosen profession" .

31. Mr Uberoi concluded his submissions as follows: "*The Tribunal is therefore invited to allow the Appeal. It is submitted that public confidence*

would not be affected by such a decision. Indeed an objective observer would conclude the decision was plainly a sensible one, as it would avoid a competent doctor being deprived of the ability to treat patients. Further, such a decision is plainly in Dr Elbishari's interests, as it would allow him to continue to earn a living. To remove Dr Elbishari would be disproportionate and entirely unnecessary."

Decision with reasons

32. We carefully considered the bundle of evidence, the additional material and the oral evidence and submissions made on behalf of the parties. We applied the law as set out above and bore in mind the need to exercise our discretion in a proportionate manner. We considered the range of options open to us, including immediate removal, deferred the removal and allowing the appeal.
33. We agreed with Mr Uberoi that FTT decisions on this area are not binding on us and are very fact specific, and that Dr Elbishari's circumstances are separate and distinguishable. For example, Dr Brand had not been working for 19 months before the hearing, and Dr Goder delayed for 6 months in applying to a neighbouring PCT. Indeed, in that case the Panel commented: *"It would have been of value to the Panel to hear the progress that Dr Goder's application to Blackpool (or any other) PCT had made. The Panel could then have considered whether a deferred removal or allowing the appeal on an undertaking to resign from the List when he was successful elsewhere could have been an equitable outcome."* Further, in the case of Dr Khundrun, he had been accepted onto another list by the time of the hearing.
34. We placed into the balance the need for PCT's to be able to monitor the GP's on their lists for obvious safety and administrative reasons. We are satisfied that it becomes harder for PCT's to act on "soft" information when a GP is working in another area, and matters such as appraisal become more burdensome. We find that under the current system, members of the public would have concerns about the practicalities and safety of a PCT monitoring a GP who had not worked in their area for 2 years, and would lack confidence. We also find that it is reasonable for a GP to apply to the

area where he predominantly works, especially when he has no real prospect of working in the area where he is listed.

35. Against that we balanced the fact that Dr Elbishari has apparently been working as a locum in other areas without any concerns being raised, which lowers the assessable risk to patients, and that he had a satisfactory appraisal in 2011. We are also aware that he is the sole breadwinner for a family of 4, and whilst he could work in a hospital or other setting, he wishes to practice as a GP. He also applied promptly to Suffolk PCT in August when it became clear that the chance of work in Cambridgeshire was highly unlikely and it seems that that application will be finalised in the next few weeks. Dr Elbishari has agreed that he will resign from the Cambridgeshire list forthwith on successful completion of the application to Suffolk.

36. We concluded that it would be unsatisfactory for the situation of Dr Elbishari continuing to be on the list of an area where he has not practiced for 2 years for very much longer, and that the matter should be finally resolved for the reasons outlined above, but we have decided that it is disproportionate to remove him from the Cambridgeshire list pending the processing of his application to Suffolk PCT. We have therefore decided that a proportionate response to this particular factual situation is to defer removal from the Cambridgeshire list until 31st January 2013. That should give time for the Suffolk decision and for a smooth transition to that list. We are aware that if the Suffolk application is delayed or is unsuccessful that Dr Elbishari would be at least temporarily unable to work as a GP, however we have concluded that it is necessary to put an end stop to the current unsatisfactory situation and that removal at that stage i.e. on 31 January 2013 is proportionate and fair in all the circumstances of this case. We urge Suffolk PCT to process the application without delay.

Accordingly:

Cambridgeshire PCT are directed to remove Dr Elbishari's name from the Cambridgeshire Performers List on 31 January 2013 pursuant to Regulation 10(6) of the NHS (Performers List) Regulations 2004

Judge Nancy Hillier

Lead Judge Care Standards and Primary Health Lists.

29 October 2012