

## **Primary Health Lists**

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

**Dr Jutta Christian**

**Appellant**

**V**

**Cwm Taf University Local Health Board  
(NHS Wales)**

**Respondent**

**[2014] 2312.PHL**

**Before (on the papers)** Judge Melanie Plimmer  
Dr Howard Freeman  
Ms Libhin Bromley

**Sitting on** 21 May 2015

### **DECISION**

1. The appellant appeals against the respondent's decision dated 18 September 2014 to remove her from its performers list pursuant to the NHS (Performers List) (Wales) Regulations 2004 (as amended) ('the 2004 Regulations').

#### **Background**

2. The background to this matter is set out in skeleton arguments provided by each party and the chronology included in the bundle. It is sufficient to simply summarise the background at this point. A more detailed picture of the relevant facts is set out when we make our findings below.
3. The appellant is an experienced doctor who specialised in paediatrics from 1995. She secured her first GP role in 2005 when she joined the respondent's Primary Care Support unit, which remains her employer. This provides an additional resource to GP practices and involves rotation between surgeries.

4. The appellant accepts that she found the process of completing her appraisals to be difficult and has missed annual appraisals and completed late appraisals for a lengthy period dating back to 2007. This has resulted in the respondent referring the appellant to panels in 2011, 2013 and most recently in September 2014. The 2014 panel decided that the appellant failed to comply with the contingent removal conditions set by the 2013 panel, and removed the appellant from the performers list. This took effect on 15 October 2014, and the appellant was suspended by her employer for this reason.

### **Legal framework and approach to the evidence**

5. The local health board may remove a performer from its performers list if satisfied that the inclusion of that performer would be prejudicial to the efficiency of the services which those included on the performer's list perform – see Regulations 10(3) and (4) of the 2014 Regulations. Where a board is considering removal in an efficiency case, it must take into account all the relevant matters listed at Regulations 10(5) and 10(6).
6. In an efficiency case the Board may, instead of deciding to remove a performer, decide to remove the performer contingently by imposing conditions with a view to removing any prejudice to the services in question – see Regulations 12(1) and 12(2). Where the performer has failed to comply with a condition the Board may vary the conditions, impose new conditions or remove the performer from the performers list – Regulation 12(3).
7. The appeal before us is by way of redetermination (Regulation 15(1)) and we may make any decision, which the local health board could have made (Regulation 15(3)). Both parties have invited us to ignore evidence that post-dates the 2014 panel's decision. We do not consider that is the proper approach to redetermine the case. We have redetermined the appeal on the basis of the information available to us at the date of the hearing and have not restricted our assessment of the evidence to that available to the 2014 panel.
8. We are grateful to both parties who have worked together to provide us with detailed evidence set out in a well-prepared bundle. We reconsidered the appropriateness of dealing with this case without an oral hearing decided that in all the circumstances it is appropriate to do so.
9. The overarching issue for us to determine is whether in all the particular circumstances of this case it is appropriate for the appellant to be removed from the respondent's performer's list, and if not whether she should be subject to conditions contingent on removal or conditions.
10. We consider that the most appropriate way to deal with this case is to make findings relevant to the chronology of events first and then to assess all the relevant factors before determining whether removal is proportionate and if not whether any alternative sanction is appropriate in

all the circumstances. Both skeleton arguments have invited us to consider other decisions of the First-tier Tribunal involving related issues to those in the instant case. Whilst we have read those decisions, they turn on their own facts, and we have therefore considered the particular circumstances of this case against the relevant legal framework when reaching our findings.

## Findings

11. In making our findings we have considered the appellant's detailed witness statement and the statements lodged on behalf of the respondent. The vast majority of the evidence is undisputed. Where there is a dispute as to the facts we prefer the evidence of the appellant. She has provided detailed independent evidence to support her claims and has been very candid in accepting that she is to blame for the position she finds herself in. We accept that she is remorseful and appreciates the unnecessary work she has caused the respondent.
12. It is clear from the chronology, and accepted by the appellant that she has not complied with the requirements to submit an annual appraisal within her allocated quarter (the first quarter of the year) for a lengthy period. From 2007 to 2009 her appraisals were completed out of the quarter. We understand that some GPs were provided with greater flexibility in submitting appraisals in the first few years of the commencement of the system. We also note that the respondent has not attached significant weight to the appellant's late submission of her appraisals from 2007 to 2009. We however still bear this in mind when considering the matter in the round.
13. The respondent places particular emphasis on the appellant's failure to complete appraisals at all in 2010 and 2011. This is admitted by the appellant but she has explained that that as she was intending to emigrate to India at that time, she saw little point in completing the appraisal process. She recognises now with the benefit of hindsight that this was an error and that she made things difficult for those managing the process. She accepts that she did not follow advice from Dr Dharmasena who was encouraging her to complete the appraisals.
14. Toward the end of 2011 the appellant changed her mind about emigrating to India. The plan had been to join her husband there but he lost his job and was ill (suffering from longstanding chronic alcoholism). He was diagnosed with hypertension and liver cirrhosis and returned to the UK in November 2011 to be cared by her. We accept that this was a difficult time for her as she was caring for her husband and son. We accept that she found the appraisal process challenging because she failed to keep the relevant evidence she needed, combined with the personal difficulties she was facing at the time. The appellant regrets she did not provide the respondent with any details regarding her personal difficulties. She also accepts that she was wrong to '*bury her head in the sand*' and should have attended the panel hearing in December 2011. The panel

contingently removed the appellant requiring her to complete a satisfactory appraisal by 31 March 2012 and to complete satisfactory annual appraisals in the relevant quarter.

15. The appellant completed the 2012 appraisal in time and it was deemed satisfactory in February 2012. Shortly after this her husband died in very upsetting circumstances. Their 13-year-old son discovered him. The appellant claims and we accept that she found this very difficult to deal with. We accept the appellant's evidence that she found this period very difficult due to the bereavement process and the symptoms of depression she was suffering from at the time. There is some support for this in the psychiatric report prepared by Dr Oyebode dated 5 April 2015, albeit of course the appellant was not seeing a psychiatrist at the relevant time. We note that the appellant did not rely upon any clear evidence that her health was adversely affected after her husband died, when she appeared before the panels in 2013 and 2014. We accept the appellant's regret about this. The appellant did not complete her 2013 appraisal within quarter. Whilst she has outlined credible mitigating circumstances for this, she accepts she should have completed the appraisal in time and we accept that she is genuinely ashamed that she did not do so. The appraisal was completed and deemed satisfactory shortly after the end of the quarter, on 7 May 2013. We note that the 2013 panel considered the appellant's position on 8 May 2013 but were unaware that the appraisal, which took place on 3 May 2013, was completed satisfactorily.
16. The 2013 panel made recommendations designed to assist the appellant to comply properly with the requirements of the appraisal system. This involved meeting with an allocated mentor. We accept that the appellant chased the appointment of a mentor but Dr O'Dwyer was not appointed until August 2013. We do not accept the respondent's submission that the appellant did not engage with the mentorship process. The initial meeting with Dr Dwyer was delayed but from the evidence we have seen that should not be attributed to the appellant. Indeed we note that Dr Dwyer has not sought to do so in his witness statement.
17. We accept the appellant encountered difficulties finding an appraiser throughout 2014 but it also appears that the appellant once again delayed. She accepts that she did not get in touch with Dr Bassett until after her quarter deadline. The appellant has not offered any specific explanation for this failure but it is implicit that she still had her 'head in the sand' and had not properly recuperated from the bereavement process and depressive symptoms.
18. We accept that it is to the appellant's credit that she continued to make efforts to complete her 2015 appraisal in time although she was removed from the performers list and suspended from employment. She did not give up as she had done in the past. Whilst there appears to have been some delay at the beginning of January 2015, as described by Dr Adams, the appellant completed her appraisal satisfactorily and in time for the

purposes of the 2015 appraisal, albeit very late for the purposes of the 2014 appraisal (which was missed altogether).

19. This is a case in which the respondent has repeatedly had to be actively involved in getting the appellant to do that which she ought to have done without intervention. We accept that the appellant's approach to the appraisal process was prejudicial to the efficiency of services, as described in Dr Quirke's witness statements. The appellant's failings took place over a number of years. The respondent has provided the appellant with two 'second chances': the 2011 and 2013 panels ordered contingent removal as opposed to removal. Notwithstanding this the appellant continued to be dilatory regarding the appraisal process from 2013 to 2014. We accept that the appraisal process if implemented properly is capable of reducing risks to patients, and it is therefore important that it is adhered to and respected.
20. On the other hand, there are a number of factors which, when considered cumulatively, lead us to the conclusion that removal is a disproportionate sanction.
21. First, this is not a case in which substantive performance issues have been raised with any conviction. We note that although Dr Dharmasena has outlined in her witness statement recent concerns regarding the appellant's referrals and other concerns up to 22 March 2013, in a reference dated 1 May 2013 she described the appellant as being held in high regard by her practice and popular with patients. In his second witness statement Dr Quirke outlines the ways in which it is claimed that the appellant has breached the *Good Medical Practice* dated 25 March 2013. We do not accept that any of the conclusions reached at paragraph 8 are justified in relation to the appellant's more recent conduct on the evidence available to us. Furthermore the appraisals that were completed were of a satisfactory standard and she has undertaken an appropriate amount of CPD / educational activities.
22. Second, the appellant has shown credible insight into her past failings and acknowledged that much of her present plight is attributable to her own failures. She told Dr Tahir that she feels guilty about her failure to fully engage and repeats this in her witness statement. The appellant accepts that those working with her were entitled to feel frustrated and let down. By way of example, instead of blaming others at the beginning of 2014 for a perceived lack of support she regarded it as understandable that everyone's patience with her had run out. This insight and self-reflection gives us optimism that past failings will not be repeated.
23. Third, the appellant appears to be in a much better position personally. The psychiatric report confirms that the more serious symptoms she previously reported are no longer present. Importantly, in contrast to the past, the appellant has recently reached out for help and is accessing support from the BMA. She is undergoing cognitive behaviour therapy and there is sufficient evidence to support her claim that she has moved

beyond the denial / avoidance stage regarding appraisals and other matters, and is committed to working with the respondent generally, and specifically to meet all conditions relevant to the appraisal process.

24. Fourth, whilst the appellant's approach to the appraisal process has not been commendable over a lengthy period, we are satisfied for the reasons we have set out above that there are credible, cogent mitigating circumstances. Further, the appellant's failures cannot be described as absolute and deliberate. She has demonstrated that at various points she was able to comply (for example the 2012 appraisal) and in more recent years has demonstrated increasing desire and commitment to complying and a willingness to change. She arranged for her 2015 appraisal to be completed in time even though the decision had been made to remove and her employer suspended her. The appellant has been able to demonstrate both in the past and more recently that when she puts her mind to it she is both willing and able to successfully comply with the requirements of the appraisal system.

25. Fifth, we accept the submission made on behalf of the appellant that she understands the lack of trust in her but that she wishes to rebuild relationships. We accept this is realistic. The appellant has not unnecessarily blamed others but demonstrated a clear willingness to move forward and rebuild good working relationships.

26. We consider a more appropriate and proportionate approach is to remove the appellant contingently once more. In doing so we accept that this will be the appellant's 'third chance'. We believe that the following conditions are achievable and should be imposed with a view to removing prejudice including addressing the difficulties the appellant has demonstrated in complying with the timetable of the appraisal process.

- (i) The appellant shall provide the respondent with confirmation of an appraiser able to conduct appraisals for the next three annual appraisals, before 31 July 2015;
- (ii) The appellant shall by 30 November 2015 complete her appraisal folder / online appraisal portfolio;
- (iii) The appellant shall confirm the date of the 2016 appraisal with the appraiser by 31 December 2015;
- (iv) The appellant shall complete a satisfactory annual appraisal in the first quarter of each year.

## **Decision**

27. We allow the appellant's appeal.

## **Order**

28. It is ordered that

- (1) The decision to remove the appellant from the respondent's performers

list is rescinded.

- (2) The appellant shall be conditionally removed from the performers list subject to the four conditions set out at paragraph 26 above.
- (3) There shall be no order as to costs.

**Judge Melanie Plimmer**  
**Lead Judge Care Standards and Primary Health Lists**  
**First-tier Tribunal (Health Education and Social Care)**

**Date Issued: 22 May 2015**