

**IN THE FIRST TIER TRIBUNAL Case No PHL 15406**  
**HEALTH EDUCATION AND SOCIAL CARE CHAMBER**  
**PRIMARY HEALTH LISTS**  
**NHS PERFORMERS LIST REGULATIONS 2004**  
**TRIBUNAL PROCEDURE (FIRST TIER TRIBUNAL) (HESC) RULES 2008**  
**BETWEEN:**

**RAFAL STEFAN SCHELLER**

**GDC Ref No 101518**

**Appellant**

**and**

**HULL PCT**

**Respondent**

Before

Judge L Saffer

Dr J Chope

Mr C Barnes

Sitting at Beverly Magistrates Court on 6 October 2011

**The appeal**

1. This is an appeal by Mr Scheller pursuant to Regulation 15(1) of the 2004 Regulations against the decision of the Hull PCT (the PCT) on the 29 June 2011 under Regulation 6.1(a) of the 2004 Regulations to refuse his application to join their Dental Performers list. The PCT concluded that he was not suitable as he had failed to disclose that he had been the subject of a fitness to practice investigation where the outcome was adverse by the General Dental Council (GDC). It is the view of the PCT that he acted either dishonestly or negligently in failing to disclose the matter.

**Legal framework**

2. 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.

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...

(a) having considered the declaration required by regulation 4 (4) and (if applicable) regulation 4 (5) and any other information or documents in its possession relating to him, it considers that he is unsuitable to be included in its performers list.

Regulation 6.4 provides that where the PCT is considering a refusal of the performers application under paragraph (1) or (2), it shall consider all facts which appear to it to be relevant and shall in particular take into consideration...

(d) any action or penalty imposed by the licensing, regulatory or other body, the police or the courts as result of any such offence, incident or investigation and

(g) ...whether he has been refused admission to, or conditionally included in, or removed, contingently removed or is currently suspended from, any list or any equivalent list, and if so, the facts relating to the matter which led to such action and the reasons given by the PCT or equivalent body for such action...

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 his profession on the one hand and the possibility of risks to patients on the other.

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” .

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.

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

3. Secretary of State for the Home Department v R (app S) [2007] EWCA Civ 546 states that it was a well-established category of public law illegality, that, a public authority could not adopt a policy which precluded it from considering individual cases on their merits, nor could it allow its treatment of applications be dictated by agreement with another government body. Although the principle was normally applied to substantive decisions on applications, there was no reason why it should not apply equally to a procedural decision to defer a whole class of applicants without good reasons and without consideration of the effects on the applicants.

## **Evidence**

4. The evidence in this matter consisted of the bundle produced by the PCT (which contained both parties' papers) and the oral evidence of Mr Scheller, Mr Richard Berry, the Professional Lead for Dentistry at Hull PCT, and Dr Elizabeth Dobson, the Assistant Medical Director of NHS Hull. The evidence was largely uncontested and can be summarised briefly.

5. Mr Scheller qualified as a dentist in 1995 in Poland having qualified as a doctor in 1986. He had worked in Poland as a dentist from 1995 to 2006, in Hull from April 2006 to May 2007, in Poland from June 2007 to October 2010, and from October 2010 to June 2011 he was working in Londonderry. He applied for inclusion on the NHS Hull Dental Performers List on 1 June 2011. It is recorded in the statement of Imogen Robson, Primary Care Support Manager, that he attended at her office on 1 June 2011 to complete the application, and she offered him help in doing so. He read and answered each of the questions aloud before confirming his answer on paper and had ample time to consider each of the questions.

6. On 9 November 2010 he received a letter from the GDC saying that the Investigating Committee on 9 October 2007 had considered the matter referred to in their letter dated 21 June 2007 and were not referring the matter to the Council's Practice Committee but decided to issue a written warning and warned him to approach the treatment of children with more sensitivity and care and to improve his communication skills.

7. In the grounds of appeal Mr Scheller said that he forgot to inform the PCT that he received a warning letter in 2007 from the GDC. He had informed the NHS in Tayside in Scotland and the Dental Defence Union (DDU) when he applied for professional indemnity and it was not a deliberate mistake. He was so happy that he had a chance to get on the list that he did not check all the questions properly. It was not his intention to lie to anybody.

8. Mr Scheller accepted in evidence that Imogen Robson had given an accurate description of the meeting. The incident that was the subject matter of the complaint was over 4 years ago. He treated a girl who was aged about 10. He realised at the time that the mother of the child was disappointed with the way the treatment was being conducted and this led to complaints to the practice manager, a letter to the GDC, and the warning. She did not complain at the time of the treatment and he first became aware of a complaint about 2 weeks later. He instructed the DDU and saw the response that they made to the complaint. He cannot remember if he was aware of the GDC committee meeting in October 2007. He returned to Poland in 2007 to try to resurrect his marriage but unfortunately that attempt did not succeed and he returned here in 2010. He also had his equipment stolen in Poland.

9. When he was seeking to apply for indemnity insurance he told the DDU about the warning and this is what prompted the letter of 9 November 2010 which was simply a copy of the letter that he had received some 3 years earlier. When he was told that there was work available in Hull and he completed the application, he did not read it properly. It was a significant and stupid mistake. He was so happy that he could start soon that he did not read it properly.

10. He is currently working as a dentist in Dundee, Tayside, and disclosed to them about the warning. He also disclosed it when he applied for a job in Oxford. As a result of the warning letter he has attended a communication course in Poland and had meetings to improve his communication skills in Dundee. He accepts that there may be a difference in mentality between different people in different parts of the country and in different parts of Europe. He has a lot of children who are patients of his. He now asks the child's parents before he does anything and if the child says they do not want a particular treatment he asked the parents what to do and if necessary will either refer to a specialist or make a further appointment. He is so sorry he made a mistake.

11. The statement from Christopher Celegrat, a Recruitment Manager for Professional Dental Services, states that Mr Scheller told him about the warning he had from the GDC in April 2010 and said he was told that Mr Scheller had no chance to reply to the complaint. Mr Celegrat records his own dealings with the practice saying that they were rude and unpleasant and put the phone down. He would not be surprised if the practice had not informed Mr Scheller about the complaint being made.

12. Mr Berry told us that it was standard procedure to reject an application if it contains a false declaration. In a case like this where a risk has been identified such as a warning letter, had they been aware of it, they would have taken it into consideration and conducted a risk assessment along with the Deanery and assessed the position over time. There may be elements of conditions including extra supervision clinically. The GDC warning would not stop the application but would be likely to lead to a conditional inclusion. If he applied now they would look at this process. They have made no enquiries themselves concerning the circumstances that led to the warning letter.

### **Consideration by the Tribunal**

13. We are satisfied that Mr Scheller was well aware that he had a warning that he had to disclose to Hull PCT but chose not to do so. We are not satisfied that this was as a result of negligence but because he thought it may slow down his ability to start to work given the financial difficulties he told us he was having.

14. We place no weight on the evidence of Mr Celegrat in relation to what Mr Scheller did in relation to the original complaint, because, contrary to what Mr Celegrat asserts, Mr Scheller told us not only was he aware of the subject matter of the complaint made against him in 2007 but that he instructed the DDU to make submissions in relation to it.

15. We accept that Mr Scheller did disclose to Tayside PCT and the DDU what had happened in 2007 and that he had received a warning, because he has received support from Tayside PCT in dealing with the subject matter of those complaints. We accept that the support he is receiving is relevant and appropriate.

16. We are satisfied that Hull PCT acted unlawfully in applying a blanket policy of refusing his application to be included on the list of performers as result of nondisclosure of the warning letter when the regulations make clear that they have a discretion. The Court of Appeal guidance (see paragraph 3 above) is clear that a blanket policy that takes no account of individual circumstances is unlawful where the PCT have a discretion and they did not consider the impact on the applicant.

17. We are satisfied that it is appropriate to include Mr Scheller on the list of performers of Hull PCT as, had they been aware of the incident complained of and investigated the matter, they would have been aware that he had disclosed it to other forums, and that the subject matter of the complaint was a matter that could be dealt with through appropriate support as has happened in Tayside PCT, and that the public would accordingly be protected.

18. We are satisfied that the exclusion was a disproportionate interference with Mr Scheller's right to work given the nature of the complaints and the fact that they could be dealt with through appropriate support.

**Conditional inclusion**

19. We are satisfied that Mr Scheller's inclusion on the list of performers of Hull PCT should be subject to a condition that for 12 months from taking up such employment he is;

(1) only employed in a dental practice that is fully compliant with Hull PCT procedures,

(2) supervised by a suitably experienced dental practitioner approved by Hull PCT, and

(3) subject to a Deanery assessment who may make further recommendations as to any specific training, monitoring, or supervision that may be required.

**We therefore order**

20. That Mr Scheller shall be conditionally included on the dental performers list of Hull PCT subject to the above conditions.

Judge Saffer

10 October 2011