

Care Standards

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

[2014] 2209.EA

Mr Ariyanayagam Uruthiraneson
T/A Ascot Nursing Home

Appellant

-v-

Care Quality Commission

Respondent

Before:

Andrew Lindqvist (nominated Judge)
Jennifer Cross
Sallie Prewett.

Heard on 4th – 7th November 2014

DECISION

1. Mr Ariyanayagam Uruthiraneson appeals by a notice dated 20th May 2014 against the decision of the Care Quality Commission ('CQC') of 17th April 2014 to cancel his registration as service provider at the Ascot Nursing Home, 9 -- 11 Hutton Avenue, Hartlepool, Cleveland. TS26 9PW. The regulated activities were,
Provision of accommodation for persons requiring nursing or personal care,
Diagnostic and screening procedures,
Treatment of disease, disorder or injury.

2. The appeal was heard at Willesden County Court on 4th, 5th and 6th November 2014. Mr Mark Ruffell of counsel appeared for the appellant and Mr Paul Spencer of counsel for the respondent. At the beginning of the hearing, Mr Ruffell told the Tribunal that two of the appellant's witnesses were in Hartlepool; it proved possible to arrange a video link so that they could give oral evidence. For that reason the hearing on the final day, 7th November, was at Pocock Street. The Tribunal heard, for the respondent, Cherrelle Lyons, Katie Tucker, Christine Wharton, Deborah Westhead and Dianne Chaplin. Mr Ruffell called the appellant and Karen Collins and Linda Wray (by video link). The evidence of Pam Elder was contained in a short written statement, she did not give oral evidence.

3. The Ascot Nursing Home was established in Hartlepool some years ago. On 10th March 2008 it was bought as a going concern by Mr Ariyanayagam Uruthiraneson. He is widely known as Mr Neson and the Tribunal, with his agreement, gratefully adopts that appellation. Soon after Mr Neson's purchase, the manager, Julie

Buckland, left and Judith Metcalf became the registered manager. The home at that time had the benefit of guidance from Margaret Humberston, the previous manager, whose mother was a resident in the home. According to Mr Neson there were 32 staff members, 6 nurses, 17 carers, 3 housekeepers, 4 kitchen staff, a handyman and an activity coordinator. The CQC carried out regular inspections, which, until late in 2013 disclosed nothing untoward.

4. In the summer of 2013 Mr Neson became concerned about the performance of Judith Metcalf, the registered manager. Perhaps because of her then forthcoming marriage, her concentration and commitment to her work lapsed with the result that her employment ended on 15th August 2013, leaving the Ascot Nursing Home without a registered manager. There were telephone calls between the home and the CQC -- it was proposed that an existing employee, Karen Collins be promoted to registered manager; on 29th August the CQC wrote for formal confirmation of the arrangements by 6th September.

5. On 5th September, Karen Collins submitted an application for registration as manager of the Ascot Nursing Home. It failed because she had no current Disclosure and Barring Service certificate (the former 'CRB' check) and because there was a discrepancy between the home's registered activities as set out in her application and those in respect of which Mr Neson was registered as provider.

6. According to Mr Neson there were problems because Karen Collins's passport was in her maiden name, Hartlepool Borough Council took a long time to provide a Council Tax statement and it proved very difficult to log in to the CQC's on-line application system. In the event, Karen Collins never did achieve registration.

7. On 8th November 2013 CQC inspected the Ascot Nursing Home. Hartlepool Borough Council had expressed concerns about the home's care, records and staffing levels and, because of those concerns, there was a voluntary suspension of further admissions to the home. The inspection, carried out over two days, on 8th November by Cherrelle Baker (who, although she had become Mrs Lyons by the date of the hearing, we will continue to refer to by her maiden name) and on 11th November by Cherelle Baker and Suzanne McLeod, disclosed deficiencies.

8. Of greater concern were deficiencies in care and welfare of service users, assessing and monitoring the quality of the service and record keeping. Cooperation with other providers, requirements relating to workers, staffing and support of workers were also recorded as inadequate. In respect of the matters of greater concern, the CQC served warning notices requiring remedial action by 24th December, 31st December 2013 and 7th January 2014 respectively. Mr Neson was required to send to the CQC by 18th January 2014, a report setting out his action to comply with the other requirements.

9. On 18th and 20th November 2013, Hartlepool Borough Council expressed further concerns about the home and called a 'Serious Concerns' meeting, which Katie Tucker and Cherrelle Baker attended on behalf of the CQC. Mr Neson, in response to a question from Katie Tucker, said that he understood that compliance with all relevant regulations was his responsibility as sole provider. He said that he and the staff were doing all they could and would be compliant in a matter of weeks.

10. The approach of the festive season and probably exacerbated staffing problems, inter-alia, caused Hartlepool Borough Council further concerns and a meeting took place on 10th December. Cherrelle Baker told the local authority that warning notices had been issued but the time for response had not yet expired. Mr Neson did not attend the meeting of 10th December, but on the following afternoon another meeting took place at which he was present. Jean Freund of the local authority Clinical Commissioning Group raised with Mr Neson her concerns about staffing levels over the Christmas period and he answered that he would contact recruitment agencies, recruitment might take one or two weeks. Jean Freund offered to arrange for nursing staff to be available in the home for full-time clinical oversight. Karen Collins and Jo Owen, a nurse and the home's clinical lead, welcomed that offer, and Mr Neson agreed.

11. A further unannounced inspection took place at 5 a.m. on 13th December. The standards of particular concern were those relating to safeguarding service users, cleanliness and infection control and safety and suitability of the premises. The other matters covered in the report of the inspection of 8th and 11th November, in respect of which response was awaited from Mr Neson, were not looked at again. Safeguarding service users and suitability of the premises were found to be satisfactory but the standard of cleanliness was poor; there was no effective deep cleaning programme.

12. A meeting was called by the local authority on 19th December, because of concerns about the care plans. It took place at the home and Cherelle Baker asked Mr Neson why nothing had been done to improve cleanliness. He replied that he was unaware of any such need but Karen Collins said that she had shown him the areas of concern, to which he made no response, exacerbating the local authority's concerns about a lack of management and responsibility.

13. On the following day, the CQC issued a Fixed Penalty Notice to Mr Neson because of his continuing breach of the registered manager condition. The notice said that no application had been received since Karen Collins's application was rejected on 9th September 2013 and that Mr Neson could escape prosecution by paying a penalty of £4,000.

14. Another meeting took place on 23rd December, between Cherrelle Baker and Katie Tucker and Mr Neson and Karen Collins. Mr Neson said that he intended to assume greater control of the home and was confident that that would ensure satisfactory operation. It would be compliant by the next inspection. A follow-up call was made on 31st December, Karen Collins said that progress had been made.

15. On 8th January 2014, a further inspection was undertaken with a view to investigating the deficiencies which had been the subjects of the three warning notices. It was found that there were still serious deficiencies in care recording, that assessment and monitoring needed further improvement and that record-keeping was not adequate to minimise the risk of inappropriate treatment. It was also found that mental capacity assessments were lacking, or at best, inadequate. Some improvements had evidently been initiated but in many instances had not continued. For example, there was a new format for some records, but the content remained poor.

16. After that meeting, feedback was communicated to Mr Neson, Karen Collins, Jo Owen and Julie Reed (one of the two nurses from the agency called ' Thornbury ', introduced at the suggestion of Jean Freund). Mr Neson said that the home would be fully compliant in a couple of weeks. In relation to the Fixed Penalty Notice, Karen Collins said that she had yet to submit another application for registration. Mr Neson was concerned about possible enforcement action and Katie Tucker explained the options open to the CQC.

17. There was a meeting on 3rd February 2014 between Christine Wharton and Katie Tucker and Mr Neson and Julie Reed. Christine Wharton pointed out that despite three warning notices and one Fixed Penalty Notice, the home was not compliant at the recent inspection and said that the next step would be a Notice of Proposal to cancel Mr Neson's registration. He would need to ensure compliance very quickly to prevent this.

18. On 12th February an inspection was conducted by Katie Tucker and Michelle Fearon, the latter focusing particularly on the administration and recording of medication. That and the meeting of residents' nutritional needs were found not to be of the required standard, and Mr Neson was given until 18th March to take and report on remedial steps. A concern was the management of two residents' Percutaneous Endoscopic Gastrostomy ('PEG') feeding; a further inspection was carried out on 25th February. In eight areas, the home was found not to be meeting the required standards. Of particular concern was the oral feeding of the two residents designated as ' nil by mouth '. It was decided that their safety was at risk, a condition was imposed on Mr Neson's registration precluding nutrition by PEG and the two residents in question were accommodated elsewhere. The CQC decided to issue a Notice of Proposal to cancel Mr Neson's registration as provider. Mr Neson was informed of this a week or two before the notice was actually issued on 19th March, and evidently realised the gravity of the home's situation. He engaged Phoenix Care Consultants to help with the necessary improvements.

19. On 18th March 2014 Cherrelle Baker spoke by telephone with Yvonne Tomlinson of Phoenix Care Consultants, who was not fully aware of all the circumstances. Cherrelle Baker explained that there were breaches of twelve regulations, some repeated and that deadlines set by warning notices in respect of three matters had passed. Yvonne Tomlinson asked about the procedure and Cherrelle Baker explained that after the issue of the Notice of Proposal, which was then imminent, there was a period of 28 days for the home to improve and the CQC might inspect at any time during that period, and as often as it thought fit.

20. The Notice of Proposal was issued on 19th March and the CQC carried out an inspection on 26th March. Mr Neson was not present, Karen Collins seemed unimpressed with the impact of Phoenix Care Consultants, but Jo Owen said they had given Mr Neson an action plan. Cherrelle Baker saw the action plan, although it is not in the original bundle it was produced to the Tribunal as extra evidence. At the inspection, twelve breaches were identified by the inspectors as requiring action and it was noted that Phoenix Care Consultants had identified those (and other) breaches of the regulations.

21. Hartlepool Borough Council remained very concerned about the residents and called a meeting on 3rd April. Cherrelle Baker and Katie Tucker attended and explained that Mr Neson had a right to make written representations against the

Notice of Proposal. If he did not, or if his representations were not upheld, the Notice of Proposal would be converted to a Notice of Decision against which Mr Neson could appeal to the Tribunal within 28 days after its issue.

22. On 17th April, no written representations having been received from Mr Neson, the Notice of Proposal was converted to a Notice of Decision, which was sent to Mr Neson on 22nd April. Yvonne Tomlinson telephoned immediately to express disappointment at the decision and at the CQC's not visiting the home again after the inspection of 26th March. Cherrelle Baker replied that they had not done so as no written representations had been received and repeated that Mr Neson now had 28 days to appeal to the Tribunal. Mr Neson, on the same day, sent an e-mail to Cherelle Baker saying, ' We fully accept your findings and do not dispute them ', and attached a copy of the home's action plan ' so that you can see the work we have completed and how we are now hoping to move the home forwards '.

23. Mr Neson's acceptance of the CQC's findings makes it unnecessary for the Tribunal to examine them in detail, although the Tribunal heard and read a great deal of evidence about what the inspectors discovered at the various inspections.

24. Section 17(1) of the Health and Social Care Act 2008 provides that the CQC may cancel the registration of a service provider in respect of a regulated activity at any time on the ground that the regulated activity is being, or has at any time being, carried on otherwise than in accordance with the relevant requirements. In the light of Mr Neson's acceptance of the CQC's findings, that might have been thought to be the end of the matter. The appellant, however, had other ideas.

25. Mr Ruffell submitted on Mr Neson's behalf that a statutory regulatory authority such as the CQC had a duty to be fair and open, accountable and transparent. He said that in various ways the CQC had misled the appellant, and that its decision to issue the Notice of Decision on 17th April 2014 was consequently unfair and illegal.

26. Before examining the appellant's case in detail, it is appropriate to record the Tribunal's impressions of the witnesses. In doing so, it is important to keep in mind that any Tribunal's acquaintance with a witness is necessarily short and is in an artificial environment, which may be strange to the witness. The only two witnesses, the Tribunal saw at sufficient lengths to form any reliable impression were Cherrelle Baker, who was in the witness box for the best part of two days and the appellant, Mr Neson, himself. Two witnesses could hardly have been more different. Cherrelle Baker was careful and precise, she answered questions clearly, was prepared to make appropriate concessions and to say so plainly when something was outside her knowledge. Mr Neson was voluble and verbose, he found it very difficult to listen to a question, consider it and provide a concise answer. The Tribunal struggled with his evidence to such an extent that Mr Spencer, at the Tribunal's suggestion, abbreviated his cross-examination at a point where he had ceased to be able to elicit any information of use to the Tribunal. In the few instances of need to resolve a conflict in their evidence, the Tribunal without hesitation preferred the evidence of Cherrelle Baker.

27. The CQC, said Mr Neson, had misled him into thinking that it had no great concerns about his lack of a registered manager. It had done this, he said, by issuing the Fixed Penalty Notice on 20th December saying that he could escape prosecution by paying a penalty of £4,000 but taking no action when he did not pay the penalty.

It had tacitly approved of Jean Freund's plan to recruit two agency nurses, and therefore bore some responsibility when, as Mr Neson said, the plan failed. The CQC had given him the impression that, after the Notice of Proposal, he had 56 days to make the home compliant and thus avoid any adverse consequences. It had also led him to think that there would be an inspection in mid April before a Notice of Decision was issued. The CQC should, said the appellant, have regarded Phoenix Care Consultants' action plan as written representations in response to the Notice of Proposal. The CQC was at fault in not carrying out a further inspection.

28. It appeared to the Tribunal that Mr Neson was not well acquainted with how a home such as Ascot Nursing Home should be run. Until August 2013, there had been senior staff with the knowledge and ability properly to run the home with little input from the registered service provider (contrary to the spirit, at least, of the 2010 Regulations). On the departure of Judith Metcalf, there was no one to assume that role; the Tribunal was not convinced that Karen Collins, whom Mr Neson appointed to fill the vacancy, had either the qualifications or experience to enable her to do so effectively. Mr Neson was inclined to delegate the running of the home, in particular to the nurses; he even said that, as professionals with professional qualifications, nurses should not be subject to supervision or checks, he felt that they could and should be left to 'get on with it' and that interference by him was not appropriate -- he had no expertise in their sphere. This was reflected in his attitude to Julie Reed, who, in his rather oversimplified view, was tasked with making the home compliant and failed to do so. Likewise, Mr Neson did not discuss the inspection reports with the staff -- he pinned the reports to a notice board and told staff that anyone with a problem to discuss should speak with him. It seemed to the Tribunal that the appellant did not appreciate the duties of a registered service provider and too much resembled an absentee proprietor.

29. One of Mr Neson's complaints was that he was not told how to appeal against, or object to the Fixed Penalty Notice. This too betrays a lack of understanding, maybe encouraged by a slight misnomer. The Fixed Penalty Notice is, in this instance, not really notice of a penalty; the CQC does not have power to impose any penalty for failure to have a registered manager. What it can do is prosecute for breach of the regulations and it also has the power to offer not to prosecute (on certain terms) if a penalty is paid. It is obviously not necessary for there to be a route of appeal against an offer, it can be either accepted or rejected. If it is rejected, the CQC may or may not prosecute, in Mr Neson's case it did not. It is hard to see anything from Mr Neson to complain about in that outcome. His complaint that such failure to prosecute led him to think that the CQC were not concerned about the lack of a registered manager is, in the Tribunal's view, disingenuous and unjustified.

30. The Tribunal heard that about 12% of homes needing a registered manager do not, in fact, have one. Mr Neson correctly pointed out that the piece of paper confirming registration added little to the effective running of a care home, but that misses the point that a home needs effective leadership, which registration is intended to ensure. The Tribunal was not convinced that Mr Neson had done all he could to provide that leadership, some of the reasons advanced for the failure of Karen Collins's applications seemed particularly weak. It was suggested that a passport issued in her maiden name accompanied by a certificate of marriage was rejected as proof of identity, it even being suggested by Mr Neson (in his e-mail letter to Deborah Westhead of 16th January 2014) that a counter clerk at the Post Office had rejected it. It was said that it took a long time for Hartlepool Borough Council to

provide a Council Tax statement as proof of address, but any correspondence with the local authority about Council Tax would surely have sufficed. Another reason advanced for delay was difficulty in logging in to the CQC website, easily overcome by using Internet Explorer, rather than Google Chrome.

31. Although promises were made that further applications were imminent, Karen Collins never in fact became registered; though there was some dispute which the Tribunal was unable to resolve as to the fate of her application pending when the home's residents were withdrawn. That series of events did nothing to encourage confidence in the management of the home. It seemed to the Tribunal that while the CQC might be lenient about lack of registration where there appeared nonetheless to be effective management, there was no effective management at Ascot Nursing Home and the CQC were rightly concerned at the failure to have a registered manager for a period of six months or more.

32. Mr Neson relied on the CQC's tacit approval of Jean Freund's plan to appoint two nurses to provide clinical oversight as making the CQC responsible to a degree when that plan failed. Again, this is, in the Tribunal's view, disingenuous, Mr Neson is able to delegate functions and tasks, indeed, as he fairly points out, he has to -- he is not a nurse. What Mr Neson cannot delegate is his responsibility as registered service provider. Jean Freund helpfully offered Mr Neson a way of discharging his responsibilities. Neither she nor the CQC were offering (or were able to offer) to assume any of Mr Neson's responsibilities as registered service provider. The Tribunal finds no substance in that aspect of the appeal.

33. There is little more substance in Mr Neson's assertion that he thought he had 56 days to make the home compliant. The minutes of the ' Serious Concerns ' meeting convened by Hartlepool Borough Council on 29th January 2014 indicate that the proprietor and the regulator are to meet in the next week and a decision is to be made about future action on the civil or criminal route. The note continues, ' whatever route is decided there will be a 56 day appeal period and if the home becomes compliant within that time period any further action will be stopped '. It is clear from those minutes (and from the minutes of a previous meeting on 9th January) that the local authority's main concern is for the residents it had placed in the home. Although Katie Tucker attended the meeting of 29th January, she did not, according to her statement, see the minutes afterwards. She says that, in response to a question from the chairman, she explained that the Notice of Proposal would provide a 28 day window for written representations and could be withdrawn if compliance was demonstrated. If the Notice of Proposal were not withdrawn, a Notice of Decision would be issued after the 28 days and that would give a further 28 day period for an appeal to the Tribunal.

34. Katie Tucker said that the chairman of the meeting discussed the appeal period in terms of 56 days and she corrected him, and also that Mr Neson and Jo Owen were present and understood the options open to the regulator and what would be involved. Mr Neson criticised Katie Tucker's somewhat exiguous manuscript note of that meeting. He said that Katie Tucker, and not Hartlepool Borough Council had mentioned 56 days and nothing was said about two 28-day periods. In his witness statement, Mr Neson said that he discussed the 56 day period with Christine Wharton at the meeting on 3rd February 2014. She told him that if the home were not compliant at the next inspection, the CQC would serve a Notice of Proposal, and there would then be 56 days to get compliant as well as to appeal. Mr Neson said

that the home was already compliant, and the CQC could inspect immediately. Christine Wharton's note of that meeting contained no mention of a 56 day appeal period. Mr Neson also claimed that a similar discussion took place between him and Christine Wharton on 29th July 2014 in which she confirmed the 56 day period to appeal and become compliant. Christine Wharton said that she had no recollection of any such conversation, and though Mr Neson claimed to have a recording, no recording or transcript was produced to the Tribunal.

35. The Notice of Proposal of 19th March 2014 says plainly that if Mr Neson does not agree with anything in the notice he may make written representations within 28 days. The Notice of Decision of 17th April 2014 refers to the absence of any such written representations and says that Mr Neson may appeal to the Tribunal within 28 days. Both Karen Collins and Linda Wray, who gave evidence by video link on the Friday, were clear about a period of 28 days after the Notice of Proposal in which to make the home compliant (and Karen Collins appreciated the enormity of the task). The Tribunal has no doubt that the position was made quite clear to Mr Neson.

36. In the Tribunal's view, this is another example of Mr Neson thinking in a muddled way and misinterpreting events for his own ends. For reasons already given the Tribunal prefers the evidence of Katie Tucker and Christine Wharton, and does not accept that either gave Mr Neson any assurance about a 56 day appeal period. It may be that that period was of significance to the local authority, because if Mr Neson submitted no written representations in response to the Notice of Proposal and did not appeal against the Notice of Decision, his registration would expire after those 56 days and the local authority would then have to find other homes for the residents it had placed at Ascot Nursing Home.

37. Mr Neson also quarrelled with the CQC's contention that he had not sent any written representations in response to the Notice of Proposal, contending that Phoenix Care Consultants' 'action plan' produced to the inspectors on 26th March constituted such representations. It is difficult to construe that document as any sort of representation against the Notice of Proposal, there is little if anything in it to contradict the contents of the notice, it accepts and in some instances amplifies what is set out in the notice. Incidentally, the document makes it clear that Phoenix Care Consultants were under no illusion about a 56 day period to make the home compliant -- 'the home must be able to show significant improvement and compliance, at the end of the 28 day period the CQC will then decide upon what additional action to take'.

38. The appellant argued that if that 'action plan', were not written representations, the omission was cured on 22nd April when part of the document was resubmitted by e-mail with the dates on which remedial steps were said to have been taken. No evidence was submitted relating to any such steps. The Tribunal was unable to accept the appellant's argument. The document of 22nd April was submitted more than 28 days after the Notice of Proposal, a few days after the Notice of Decision had been issued and on the very day it was sent to Mr Neson. It contained no more than the bare assertion (with dates) that some steps had been taken, but in relation to many deficiencies there was not even a date.

39. In the Tribunal's view the CQC was correct in its view that Mr Neson had not submitted any written representations against the Notice of Proposal and in issuing the Notice of Decision on 17th April. Mr Neson complained of a lack of any inspection

after 26th March, saying that he was sure significant improvement had been made, though he concedes that more time might have been needed for the home to become 100% compliant -- a rather mean concession in the light of the fact that the home had not had a registered manager for eight months and there was no prospect of there being one in the near future. Mr Neson does not suggest any definite promise to carry out a further inspection, but says that he was led to believe that there would be another inspection and that the CQC was aware of the strenuous efforts Phoenix Care Consultants were making to bring about massive improvement, if not full compliance.

40. The Tribunal felt that this was a further example of Mr Neson misinterpreting matters to suit his own ends. Ascot Nursing Home had failed to comply with many requirements over a long period. There had been repeated assurances over that period by Mr Neson that compliance was soon to be achieved. The CQC had extended considerable indulgence to Mr Neson, but Cherrelle Baker had warned that the CQC might re-inspect the home at any time between the Notice of Proposal and the Notice of Decision, once or more frequently as it saw appropriate. Katie Tucker had said much the same thing. It might be suggested that the CQC had been too lenient, but it is neither easy nor beneficial to move the elderly and infirm from their homes. The CQC has the difficult task of weighing that against the safety of residents. In the Tribunal's view the CQC cannot be criticised for concluding that by March 2014 Mr Neson had exhausted any indulgence to which he could lay claim and that as he clearly was not compliant and was very unlikely to secure compliance within a reasonable timeframe, the necessary steps should be taken to terminate his registration.

41. Mr Neson's final argument related to those necessary steps. He says that the CQC had a duty to consider all options on an escalating scale of which cancellation of his registration represents the peak. What lesser sanction might have been applied in the appellant's argument, was not wholly clear. It is difficult to see any alternative course which the CQC could have taken effectively in March/April 2014. Prior to that and since August 2013 the CQC had on a number of occasions given feedback after inspections, had issued a warning notices and a Fixed Penalty Notice. It had received from Mr Neson repeated assurances that the home was compliant or would be within a very short time. In the Tribunal's view the CQC gave Mr Neson not only an ample opportunity to comply with requirements, but also support in his efforts to do so. Although Mr Neson also had the benefit, from other sources, of advice (which the CQC could not offer), he nonetheless failed to make the home compliant over a period of eight months. The Tribunal finds without hesitation that this stemmed from a lack of effective leadership. Mr Neson was not lacking in enthusiasm, commitment or goodwill but was lacking in understanding how to channel those virtues into effective management and running of a care home.

42. It is right to record that many of the residents expressed satisfaction and commended the care they received from the staff, who were dedicated, friendly and caring. The problem was that without effective leadership, the staff, however committed to their work, could not provide safe and effective care. They needed supervision and guidance which was not available at the Ascot Nursing Home.

43. For those reasons, the Tribunal unanimously and without hesitation disallows Mr Neson's appeal and confirms the decision of the CQC to cancel his registration as service provider.

Judge Andrew Lindqvist
First-tier Tribunal (Health Education and Social Care Chamber)

Date Issued: 24 November 2014