

Care Standards

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

Heard on the Papers on 24 September 2018

BEFORE

Mr Laurence Bennett (Tribunal Judge)
Ms Denise Rabbetts (Specialist Member)
Dr Howard Freeman (Specialist Member)

BETWEEN:

Dr Zaheer Hussain
(Fulham Cross Medical Centre)

Appellant

v

Care Quality Commission

Respondent

[2018] 3458.EA-MoU

DECISION

Appeal

1. Dr Zaheer Hussain appeals under Section 32 of the Health & Social Care Act 2008 (the Act) against the imposition of conditions on his registration under Section 31 of the Act as a Service Provider in respect of regulated activities:
 - Treatment of disease, disorder or injury
 - Diagnostic and screening procedures
 - Maternity and midwifery services

Preliminary

2. By order of Judge H Khan made 14 September 2018 this appeal was listed for hearing on the papers. Directions provided for submission of statements and evidence upon which it is intended to rely 21 September 2018.
3. Neither party requested variation of the directions or an oral hearing.
4. Noting the submissions of the parties we find sufficient evidence to determine the appeal without a hearing.

5. The Tribunal convened without the parties to make its decision on 24 September 2018.
6. Page references in this decision relate to the paginated hearing bundle.

The Decision

7. The Respondent's decision imposing conditions on the Appellant's registration is dated 16 August 2018 (p.12). There are 11 conditions including restriction of registration of new patients and requiring actions and provision of information by the Provider to the CQC by 22 August 2018, save for one condition to be fulfilled by 1 November 2018. The "Urgent notice of decision" sets out the reasons for that decision and gives notice of the right of appeal.
8. Dr Hussain's appeal application is dated 13 September 2018 (p.7). It and subsequent submissions include reasons for appeal, a spreadsheet separating and responding to the reasons provided by CQC, documentary evidence referred to and Dr Hussain's statement dated 19 September 2018. This sets out an inspection history and commentary on the reasons referred to by Dr Hussain as "allegations" within the CQC notice of decision.
9. Dr Hussain submitted a letter dated 21 August 2018 written at his request by Ms Vicky Ferlia, Director GP Support Services at Londonwide LMCs (p.53) seeking clarification and commenting on the practice inspections, expectations, usual practise and querying requirements.
10. CQC's response to the appeal (p.349) sets out its reasons which include a table of the conditions imposed and current position (p.355). The response "Adopts and relies upon the reasons provided within the Urgent Notice of Decision dated 16 August 2018 in its entirety." Submissions are made about the role and function of the Respondent, ongoing concerns and that its decision to impose conditions was and remains entirely reasonable and proportionate.
11. CQC submitted witness statements, Professor Ursula Gallagher, Deputy Chief Inspection Primary Medical Services and Integrated Care of City Gate, Gallowgate, Newcastle upon Tyne (p.363) dated 20 September 2018, Ms Jill Taylor, CQC Inspector dated 20 September 2018 (p.369) and Ms Brenda Lawrence, CQC Inspector dated 21 September 2018 (p.375).

The Law

12. Section 31 of the Act - Urgent procedure for suspension, variation etc

(1) If the Commission has reasonable cause to believe that unless it acts under this section any person will or may be exposed to the risk of harm, the Commission may, by giving notice in writing under this section to a person registered as a service provider or manager in respect of a regulated activity, provide for any decision of the Commission that is mentioned in subsection (2) to take effect from the time when the notice is given.

(2) Those decisions are—

- (a) a decision under section 12(5) or 15(5) to vary or remove a condition for the time being in force in relation to the registration or to impose an additional condition;
- (b) a decision under section 18 to suspend the registration or extend a period of suspension.

(3) The notice must—

- (a) state that it is given under this section,
- (b) state the Commission's reasons for believing that the circumstances fall within subsection (c) specify the condition as varied, removed or imposed or the period (or extended period) of suspension, and
- (d) explain the right of appeal conferred by section 32.”

13. Section 32 of the Act - Appeals to the Tribunal

(1) An appeal against—

- (a) any decision of the Commission under this Chapter, other than a decision to give a warning notice under section 29, or
- (b) an order made by a justice of the peace under section 30, lies to the Tribunal.

(2) No appeal against a decision or order may be brought by a person more than 28 days after service on the person of notice of the decision or order.

(3) On an appeal against a decision of the Commission, other than a decision to which a notice under section 31 relates, the Tribunal may confirm the decision or direct that it is not to have effect.

(4) On an appeal against an order made by a justice of the peace the Tribunal may confirm the order or direct that it is to cease to have effect.

(5) On an appeal against a decision to which a notice under section 31 relates, the Tribunal may confirm the decision or direct that it is to cease to have effect.

(6) On an appeal against a decision or order, the Tribunal also has power—

- (a) to vary any discretionary condition for the time being in force in respect of the regulated activity to which the appeal relates,
- (b) to direct that any such discretionary condition is to cease to have effect,
- (c) to direct that any such discretionary condition as the Tribunal thinks fit shall have effect in respect of the regulated activity, or
- (d) to vary the period of any suspension.

(7) In this section – “discretionary condition,” in relation to registration under this Chapter, means any condition other than a registered manager condition required by section 13(1).

14. The burden of proof is upon the CQC to establish that the relevant test in section 31 of the 2008 Act is met.

15. The Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 set out a number of important requirements that a registered provider must comply with.
16. The Tribunal is required to consider the appeal on the evidence available at the time of the hearing.

Evidence and submissions

17. The inspection history within Dr Hussain's statement (p.334) notes an unannounced inspection on 7 October 2014 and an unannounced inspection on 10 November 2015 after which his registration was suspended for a period of 3 months, subsequently stayed on appeal. Following inspection on 4 February 2016, Dr Hussain was placed in special measures, lifted on 15 September 2016. CQC carried out a review on 17 July 2017 resulting in a rating of "Good overall with required improvement in the well lead domain." Dr Hussain quotes key findings following inspection on 17 July 2017. Recent inspection took place on 24 July and 6 August 2018 when breaches of regulations 12 and 17 of the 2014 Regulations were identified.
18. Dr Hussain's inspection history is consistent with that understood by Ms Ferlia, writing on his behalf (p.59). This also mentions 2 separate medical record reviews by NHS England leading to voluntary undertakings by Dr Hussain.
19. CQC's reasons for opposing the appeal includes details of findings following the July and August 2018 inspections:
 - Lack of clear systems to reduce the likelihood of a safety incident
 - Limited evidence that Dr Hussain has reviewed the effectiveness and appropriateness of the care provided
 - Insufficient evidence to improve the number of carers identified
 - Failure to respond to patient's needs by providing safe and effective care
 - Lack of clear systems to assess, monitor and improve the quality and safety of service
20. The Urgent Notice of Decision includes the CQC's reasons (p.12) "We have taken this urgent action as we believe a person will or may be exposed to the risk of harm if we do not do so." Its response to the appeal (p.358) includes: "It is not accepted (nor has it been pleaded in the Grounds of Appeal) that the conditions place an onerous task on the Appellant. The conditions themselves are, in the majority, for the Appellant to provide urgent information to the Respondent in order for the Respondent to satisfy itself that service users are not at risk of imminent harm. Given that these processes should already be in place and readily available, the Respondent does not consider that the short timeframe would be in any way detrimental to the Appellant." Further, that its decision to impose these conditions upon Dr Hussain's registration was and remains entirely reasonable and proportionate.
21. The reasons within the Urgent Notice of decision gives specific information behind the inspection findings and the practice responses during the inspection. The 11 conditions imposed, save in respect of limited registration of new patients require information, plans and review in respect of shortcomings found during the inspection.

22. CQC reasons for opposing the appeal include a table of the conditions (p.355) with a note of action taken. Save for a comment that to the best of Dr Hussain's knowledge, the restricted registration of new patients has been observed, it is stated: "Not complied with, no reason for non-compliance given." We note the time for completion has passed save for condition 8.
23. The CQC's witness statements in support give detail of its decision making process. Professor Gallagher has reflected on the number of conditions and the short timescale with her conclusion that unless a decision was made to close the practice, then the Commission needed to ensure that the practice urgently addressed the most significant risks (p.367).
24. Ms Taylor's and Ms Lawrence's statements comment on involvement in inspections of the practice, contact with NHS England and the voluntary undertakings and particular detail of inspections on 24 July and 6 August 2018. Ms Lawrence detailed the role of the CQC, breaches of regulations previously found and concerns in relations 12 and 17 (p.432).
25. Dr Hussain's table of the CQC's reasons include attachments of evidence referred to in the response to the reasons within the Urgent Notice. The attachments to the table are extensive comprising approximately 200 pages.
26. The table of responses (p.23) explains staff experience, their reaction to inspection interviews, the increase in the practice patient list over the year from 1 April 2017 and improvement from previous cytology levels. Statistics provided arise from a search on the practice clinical system. The response identifies registers available in the practice.
27. Dr Hussain states: "He does not recall questions within the CQC reasons and provides responses." Information is given in response to specific patient queries and the extent of services available for patients. Further information has been provided about patient safety alerts, availability of appointments, patient prescription records, regular meetings with the practice pharmacy, pathology result handling, staff training in relation to Red Flag, training of staff and the role and availability of the Healthcare Assistant and Practice Nurse.
28. Dr Hussain's statement reflects intervention on his behalf by Ms Ferlia including (p.335). "While we fully accept there are areas for ongoing improvement we believe many of the reasons provided by the CQC are factually inaccurate, not based on evidence and misleading. In the short time frame, it is difficult to challenge the overwhelming concerns made by the CQC, however we would like to specifically point to the following."
29. Dr Hussain stated his belief that concerns relating to specific patients were fundamental to the CQC's decision to impose urgent sanctions but that information was inaccurate. Further, actions have been taken by him in respect of other concerns and there is an implementation plan.

Tribunal's conclusions with reasons

30. The Tribunal's task in this appeal is limited in respect of the finding of fact and is not to determine the Appellant's ultimate suitability or issues of cancellation. The matters for the Tribunal's determination in this appeal are set out within the Law quoted above. In essence, we are required to make a risk assessment. The position is that Dr Hussain's registration is conditional upon satisfaction of the conditions. However, any cancellation resulting from non-compliance is outside the scope of these proceedings.
31. We have considered in the light of the information available at the time of this determination if circumstances exist justifying and requiring the imposition of conditions and if so, whether the conditions are proportionate in respect of concerns raised.
32. The background history indicates there have been shortcomings and difficulties at the practice over the years. Dr Hussain has been the subject of suspension, requirements and special measures following previous inspections. He submits and has provided evidence that the practice has improved. His evidence also counters and challenges CQC's findings and conclusions from the July and August 2018 inspections, although he acknowledges there are areas for ongoing improvement.
33. We have noted CQC witness statements, particularly that of Ms Lawrence which gives a detailed account of the inspections. We are surprised there is no statement from either of the 2 CQC specialist GP advisers who were at the inspections given the nature of the clinical concerns which are potentially very serious. It is clear that during inspections Dr Hussain was given the opportunity to provide information although we accept some might not have been available within the immediate timeframe. His responses indicate that he does not consider he was asked. On balance, we are not confident in his assertion. We are reinforced in this view having regard to the table of action recorded by CQC in respect of many of the conditions. Even if Dr Hussain has appealed, we find the lack of compliance noteworthy.
34. A consistent theme of the intervention by Londonwide LMCs on Dr Hussain's behalf suggests that CQC has been over rigorous and should not have made such demands on inspection, limiting itself to smaller samples and accepting what was found as satisfactory. We do not accept this general criticism of an inspection regime. It implies that shortfalls should be overlooked, concentrating only on positive evidence.
35. The material supplied by Dr Hussain within his appeal statement and the table of responses is in many cases generic. Where it is specific such as patient prescription records, we have concerns that this was not available at the time of the inspection and noting from CQC witnesses events at the time, we are satisfied they had grounds for concern. We also note NHS England had concerns about aspects based on smaller sampling; they required undertakings. In the light of the appeal documents, whilst we accept some matters are clarified and explained, overall concerns remain about the practice as all failings have not been adequately and sufficiently addressed with evidence of continuing problems. This is also acknowledged to an extent by Dr Hussain.
36. We would have expected the practice to have had all the protocols ready for an announced inspection. Most of the documents submitted by Dr Hussain are not

protocols for managing patients. We agree with CQC and would expect any practice to have them.

37. In the circumstances, we conclude it appropriate for conditions to remain imposed on the Provider. We accept as submitted by CQC that these conditions reflect existing regulatory requirements. On that basis, they ensure that practice procedures and standards are improved to mitigate identified risks.
38. If as is implied in Dr Hussain's evidence there is compliance with an underlying requirement of a condition, it is appropriate the Regulator is informed to enable effective monitoring. For that reason, we consider it necessary that the conditions include reporting to CQC.
39. The conditions restrict expansion of the practice. We note Dr Hussain's appeal includes an explanation giving that expansion of the practice in the year from April 2017 is a factor to be taken into account when considering whether performance is adequate. On that basis, we find it appropriate to limit that expansion as specified in the existing conditions.
40. In respect of the remaining conditions, we find them appropriate save that they should refer to a future date as 22 August 2018 has passed. We conclude the conditions shall be imposed with a date 2 weeks from the date of the issue of this decision, save as follows:
 - Condition 3 shall be varied to impose a date 3 months from the date of the issue of this decision as we do not consider it is feasible within an earlier timescale.
 - Condition 8 shall be varied to impose a date 3 months from the date of the issue of this decision.
 - Condition 10 shall be varied to specify a review of all abnormal test results received since 1 February 2018 and in respect of cervical cytology results, received since 1 August 2017. It currently does not specify a start date.
41. We find the conditions proportionate and necessary to achieve sufficient compliance to ensure the safety of patients and effective monitoring by CQC.

Order:

42. The conditions imposed upon the Registered Provider, Dr Zaheer Hussain on 16 August 2018 shall continue as varied in paragraph 40.

Judge Laurence Bennett
Care Standards
First-tier Tribunal (Health Education and Social Care)

Date Issued: 25 September 2018