Care Standards

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

Sitting at Newcastle Magistrates Court on 4th, 5th & 6th March 2019

Before:

Judge G K Sinclair
Specialist member D Rabbetts
Specialist member M Diamond

[2018] 3442.EA

Between:

Allcare Community Care Services Trafford Ltd

Appellant

V

Care Quality Commission

Respondent

DECISION

Representation

Appellant : Mr Oakden (director)
Respondent : Mr K Ross (counsel)

The appeal

1. The appellant company is a provider of domiciliary care. By application dated 17th August 2018 it appeals against the notice of decision by the Care Quality Commission dated 23rd July 2018 to cancel its registration as a service provider of personal care.

Background

2. The appellant company was incorporated on 1st September 2014 and Mr

Oakden has at all material times been its principal director and shareholder. Despite the company name hinting at a business connection with that geographical area in Greater Manchester, and occasional references to Wallsend as being a "branch", Tyneside is the only location from which it has operated since first being registered as recently as 7th July 2017.

3. From the outset there was a condition imposed that :

> The registered provider must ensure that the regulated activity Personal Care is managed by an individual who is registered as a manager in respect of that activity at or from the location.

4. Louise Woodhall had worked with the appellant's principal director and shareholder for a few years at Ark Home Healthcare Ltd and Promedica Plus UK Ltd[1] (two other care providers). On 19th July 2016 she submitted an application for registration as manager for the company's proposed service at Wallsend. She had been registered as manager of a care provider twice before, but on this occasion the CQC served notice on her dated 7th March 2017 of a proposal to refuse the application. She submitted no written representations, the proposal was put into effect, and the decision was never appealed.

5. When the appellant company obtained registration as provider of a regulated activity on 7th July 2017 it was therefore with a different registered manager, Andrew Cain.

6. In late 2017 the first reports of concern were received by the CQC, and in January 2018 a report was even made to the police about the neglect of a vulnerable adult as the result of misuse of a Conveen catheter causing severe and obvious infection. The CQC was notified of the incident in early January, Andrew Cain applied for his own deregistration as registered manager, and the appellant was written to, enquiring why it had failed to notify the CQC about the allegation of abuse. The response from Mr Oakden was that it had, but when the police decided in March 2018 to open an investigation into the incident the CQC wrote again to the appellant, to which it replied that it kept no records of proof of its sending the notification.

7. An unannounced inspection of the appellant took place in early May, following which :
   a. A letter of intent was sent notifying the appellant of concerns and an intention to take urgent action restricting new care packages; and
   b. On 23rd May 2018 a notice of decision was served, imposing as a new condition on the registration that :

> > The registered provider must not accept any new referrals or enter into any new private arrangements for packages of care without the prior written permission of the Care Quality Commission.

[1]Mr Oakden was also appointed a director of another Ark company during the same period : September 2014 to October 2015. He then became director of three Promedica companies from December 2015 until October 2016. He seemed somewhat surprised when this information was put to him.

8. Many of the appellant's care packages were "end of life care", so the inability to take on new care packages could quickly and seriously affect the viability of the service.

9. As the appellant had been operating without a registered manager in post since Andrew Cain had resigned as manager in January, and with a view to resolving all of the CQC's concerns about management of the provider, Mr Oakden himself applied in May 2018 for registration as manager – appreciating that he would need to spend much more time at the business on Tyneside instead of at his home in the Wirral. That application was not finally resolved until early 2019, but the manner in which this application was dealt with featured heavily in Mr Oakden's oral evidence.

10. Following a joint meeting at the end of May Mr Oakden requested a further inspection. On 18th June 2018 a notice of proposal to cancel was sent to the appellant, followed shortly by the draft report of the May 2018 inspection for a factual accuracy check (to which the company responded). The final inspection report was published on 10th July 2018, rating the service as Inadequate. Upon consideration of his representations a notice of decision to cancel was then served on 23rd July 2018, but despite this – and perhaps unusually – the planned announced inspection took place in the first half of August. As its time for appealing against the decision had at that stage yet to expire the company was still able to continue providing its service.

11. The announced inspection therefore took place between 8th and 10th August 2018. The report, not published until 1st October 2018, still rated the service as Inadequate.

12. The appellant appealed on 17th August, at that stage not knowing the outcome of the second inspection but believing, from comments made during the inspection, that things had improved. Save that the inspectors no longer alleged a breach of regulation 12, the eventual report was little better and raised again the same failings.

Material legal provisions

13. By section 4 of the Care Standards Act 2000 (as amended):

> (3) "Domiciliary care agency" means, subject to subsection (6), an undertaking which consists of or includes arranging the provision of personal care in their own homes for persons in England who by reason of illness, infirmity or disability are unable to provide it for themselves without assistance.

14. However, the bulk of the material statutory provisions is to be found in the Health and Social Care Act 2008. The first Part of the Act deals with the establishment and role of the Care Quality Commission as regulator. This is divided into a number of Chapters and, in Chapter 2, section 8 defines "Regulated activity" as follows :

> (1) In this Part "regulated activity" means an activity of a prescribed kind.
> (2) An activity may be prescribed for the purposes of subsection (1) only if–
> (a) the activity involves, or is connected with, the provision of health

or social care in, or in relation to, England, and

(b) the activity does not involve the carrying on of any establishment or agency, within the meaning of the Care Standards Act 2000 ©. 14), for which Her Majesty's Chief Inspector of Education, Children's Services and Skills is the registration authority under that Act.

(3) For the purposes of subsection (2), activities connected with the provision of health or social care include, in particular–

(a) the supply of staff who are to provide such care;

(b) the provision of transport or accommodation for those who require such care;

(c) the provision of advice in respect of such care.

15. Section 9, which defines both “health care” and “social care”, explains the latter in sub-section (3) :

> “Social care” includes all forms of personal care and other practical assistance provided for individuals who by reason of age, illness, disability, pregnancy, childbirth, dependence on alcohol or drugs, or any other similar circumstances, are in need of such care or other assistance.

16. By section 10 any person who carries on a regulated activity without being registered under Chapter 2 of the Act in respect of the carrying on of that activity is guilty of an offence, and section 11 provides that a person seeking to be registered as a service provider must make an application to the Commission (the CQC).

17. Also pertinent in the instant case is section 13, which provides that :

(1) The registration under this Chapter of a person (“S”) as a service provider in respect of a regulated activity must in prescribed cases be subject to a registered manager condition.

(2) In deciding whether to impose a registered manager condition under section 12(3) or (5), in a case where subsection (1) does not require such a condition to be imposed, the Commission must have regard to prescribed matters.

(3) For the purposes of this Chapter, a registered manager condition is a condition that the activity as carried on by S, or the activity as carried on by S at or from particular premises, must be managed by an individual who is registered under this Chapter as a manager in respect of the activity, or the activity as carried on at or from those premises.

18. Cancellation of registration is dealt with by section 17 :

(1) The Commission may at any time cancel the registration of a person (“R”) under this Chapter as a service provider or manager in respect of a regulated activity–

(a) on the ground that R has been convicted of, or admitted, a relevant offence;

(b) on the ground that any other person has been convicted of any relevant offence in relation to the regulated activity;

(c) on the ground that the regulated activity is being, or has at any

time been, carried on otherwise than in accordance with the relevant requirements;

(d) on the ground that R has failed to comply with a requirement imposed by or under Chapter 6;

(e) on any ground specified by regulations.

(...)

(4) In this section "relevant requirements" means–

(a) any requirements or conditions imposed by or under this Chapter, and

(b) the requirements of any other enactment which appears to the Commission to be relevant.

19. If considering cancellation the CQC must comply with the procedural steps set out in sections 26 to 28, namely the service first of a notice of its proposal to cancel (s.26). The notice must inform the recipient of the right, within 28 days of service, to make written representations about any matter which that person wishes to dispute (s.27), during which time the CQC must not determine the matter. When it does so, taking into consideration any representations made, if it decides to adopt a proposal of which it was required to give notice under section 26 it must give notice in writing of its decision to any person to whom it was required by section 26 to give notice of the proposal. The notice must also inform the recipient of the right of appeal to this tribunal under section 32 (s.28).

20. By section 32(3), on an appeal against a decision of the CQC, other than one to which a notice under section 31 relates, the tribunal may confirm the decision or direct that it is not to have effect.

21. In seeking to cancel the appellant's registration the respondent has sought to rely upon a number of regulatory breaches found at the first and/or second inspections. These can be found in the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014[2], of which the respondent alleged breaches of regulations 12 (safe care and treatment), 16 (complaints), 17 (good governance), 18 (staffing) and 19 (fit and proper persons).

22. Although not formally part of the reasons mentioned in the Notice of Proposal, the appellant's application also raised – and part of the evidence referred to – an alleged inconsistent view within parts of the CQC as to whether the appellant had failed to notify it of the death of service users "whilst services were being provided in the carrying on of a regulated activity", contrary to regulation 16 of the Care Quality Commission (Registration) Regulations 2009.[3]

Hearing and evidence

23. The tribunal was presented with a bundle comprising two over-stuffed lever arch files, the 1 030 pages of which did not comply with the directions issued by the tribunal. In addition a 19 page Scott Schedule was produced, detailing every allegation. As the appellant company's defence largely took the form known in legal circles as "confession and avoidance" this schedule was of very

[2]SI 2014/2936

[3]SI 2009/3112

limited use.

24. The respondent filed witness statements by, and called to give oral evidence :
    a. Kelly Smith – CQC lead inspector (2 statements)
    b. Cherelle Lyons – inspection manager
    c. Ros Sanderson – Head of Inspection for Adult Social Care, North East and Coast region).

25. The appellant filed witness statements by, and called to give oral evidence :
    a. Louise Woodhall – operations manager at the time
    b. Russell Oakden – director
    c. Fozia Tabasum – consultant, Elite Care Management.

26. A brief witness statement was also filed on behalf of John Innes, but he did not attend.

27. The case lasted three days simply because it was assumed that cross-examination of the respondent's witnesses would take longer than it did; so after calling Ms Sanderson and then the lead inspector, Kelly Smith, Mr Ross had to wait until day two before Ms Lyons was available. Mr Oakden also gave evidence that day but his other two witnesses, Ms Woodhall and Ms Tabasum, could only attend on the Wednesday.

28. The appellant admitted at the outset that the breaches identified on the first inspection were accepted, but that it was relying on the administrative work it had carried out since then to demonstrate that :
    a. It had improved between first and second inspections
    b. Although flawed, the second inspection showed improvement
    c. With the assistance of Ms Tabasum's consultancy that improvement in record-keeping, etc would improve even further;

    and so, cancellation of registration was unjustified and unnecessary, at a time when even more care provision was required locally by service commissioners who (with the exception of the catheter incident over the 2017 Christmas period) had had no complaints about the service provided by the appellant but were rightly nervous about the potential for its financial collapse.

29. In saying this, it should be stressed that this appeal relates only to the cancellation of registration and, were it to be successful, the condition forbidding the appellant to take on any new care packages without the CQC's consent would still remain in force. The decision to impose that condition had never been appealed.

30. In view of the approach taken by the appellant Ms Sanderson concentrated on what were said to be the salient issues, namely breaches of regulations 16, 17, 18 and 19.

31. Regulation 19 (fit and proper persons) concerned the recruitment of staff. Some had criminal convictions, there was no evidence of checking, and references in many cases were given by staff at Allcare, so the appellant was

effectively vetting its own staff. Some convictions were for drink driving, and fraud. There was evidence that complaints had been made but not investigated.

32. On regulation 18 (staffing), when it was put to her that all staff went through a week-long induction course before being released into the community Ms Sanderson responded that the training matrix was not up to date. Staff spoken to had said that they were not trained on certain aspects. There was no evidence of competency checks. Information requested was not provided within the required timescale, and when received it was incomplete.

33. Regulation 17 (good governance) was an overarching one. There were no audits, and no paper trail.

34. As for regulation 16 (receiving and acting on complaints), when service users make complaints they should be investigated and reported on, but the provider should also learn from them. Service users and relatives were left without an outcome, as their complaints had not been investigated. It was critical that users are safe, and that staff are safe as well; so there was a great risk to users from this provider.

35. On Ms Woodhall's role in the appellant company, when asked whether she is entitled to work in the business, as she is today, Ms Sanderson replied that the point is that she is regarded as the manager but the CQC had refused her application for registration. If the CQC's view is that she is not fit, why is she in that role anyway?

36. Despite questioning by Mr Oakden her position remained that those receiving care were at risk of very poor care. In re-examination she explained the CQC's enforcement policy and how its application led to the instant decision to cancel registration. It had two purposes :
    a. First, to protect service users from harm and risk of harm, by making sure they receive services to the required standard; and
    b. To hold providers and individuals to account; that is the CQC's criminal powers.

37. There is a decision tree framework that is followed [see C460, starting at 462] : stage 1, stage 2, then stage 3. This is subdivided into : 3A (seriousness - impact and likelihood), 3B (multiple or persistent breaches), and 3C (whether criminal action is necessary).

38. In this case all the breaches were assessed at a risk level of High, except regulation 19, which was Extreme.

39. Ms Smith gave evidence about the conduct of the two inspections and the problems found, especially concerning gaps in documentation. On training records, there was discussion about "care certificates". Experienced staff who had already been trained and in the job for some years did not require them but all new staff did – or training to the same 15 standards. The care certificate can be resourced from an external provider or a provider can use its own member of staff to provide training, but it must be able to prove the trainee's assessment

as competent.

40. Mr Oakden confirmed that his external training provider (Kate Robertson) is self-employed. She was not known to the CQC, or to any local Clinical Commissioning Groups. Elements of the care certificate were being delivered, it was but clear that the training provider was using certain aspects. There should be 15 booklets with questions and fill-in answers/scenarios. This should be checked by the training provider, signed by it, counter-signed by the trainee and then the by registered manager or specified person at the service provider (in this case Mr Oakden). There should be 3 signatures. In many cases there were none, but in one example Ms Woodhall had signed as manager. In each there should be a competency page at the end.

41. If care certificates had been awarded then copies should have been on the employment files of carers. If a carer had previously been employed elsewhere and had completed the care certificate it would have been brought with them and should be on file. Ms Smith found only one on the records checked. Normally inspectors would do only 10%, but because of anomalies found, she and her colleague checked 35 out of 59 available.

42. She went on that training in general catheter care awareness can be delivered to care staff, but specialist catheters need to be demonstrated by a nurse – size, type, how regularly changed, etc. Usually a district nurse would show this to a senior team of care workers, who could later cascade that. She believed that one member (the one who was off over Christmas) had received such training, but no evidence of this was recorded on file. The care worker had actually told her, and the local CCG had said, that she had received training from a nurse.

43. Ms Smith had wanted to check the records of office staff, but they were not available. No employment records for Louise Woodhall were to be found at the office either.

44. She gave her initial inspection feedback form to Mr Oakden after the second site visit in May. He had no real queries. It was more about asking for further information required, and asking Ms Woodhall. Initially Ms Smith gave him 24 hours, but he then asked for an extension. Given that it was a Bank Holiday weekend she did agree until 16:00 on the following Tuesday, but she still did not receive all the information asked for.

45. She explained that when a service is rated inadequate it is placed in special measures. It must be reinspected within 6 months, and take into account the views of CCGs and other service users. She had received 16 contacts from service users and staff, with some whistleblowing allegations. She had also had a discussion with Andrew Cain, who told her he was prevented from managing as he wanted, was prevented by Ms Woodhall from using parts of the systems, and rostering had been changed by her. He felt that he had no autonomy or control over the service, even though at the time he was the registered manager.

46. Asked about the efforts by the new advisor who had been brought in, she stated that they were what one would expect to see; but while Mr Oakden had systems in place to manage the service, they had not been applied properly or consistently by the appellant. Her view was that he will carry on as before. No registered manager was in place from January 2018, and Mr Oakden had been refused on the basis of skills and competence of the person most senior in the organisation.

47. Mr Oakden asked for a quick reinspection. He asked at a meeting, as he was concerned about business viability if it were unable to take on more end-of-life care. The business had already lost 300 hours since the previous meeting. Some staff had left, and he would have to consider the future of the business.

48. Following her second inspection in August 2018 Ms Smith presented Mr Oakden with her new electronic feedback form. It was more detailed than she would usually provide, as he had not been present on the second day and she wanted him to be absolutely clear of the problems and what the findings were. These were summarised at paragraph 80 of her statement. There had been an improvement to the support plans, which were now typed up, more personalised and more detailed about risks users faced. She did think they were good and a significant improvement had been made with support plans.

49. Asked directly, she said that if there had been significant improvement she would have used the decision tree to downgrade the seriousness of allegations, and withdraw the notice of proposal.

50. Dealing with points raised by Mr Oakden in his short statement, she disagreed with his comment [on D11] that in his 25 years in this sector he had "not had any issues before at any time of this nature." She commented that he is also the nominated individual for a CQC registered organisation called Penkett Lodge, in the Wirral (a residential care home for up to 27 residents). This had been in and out of compliance, and had repeated complaints. He is the registered provider and nominated individual.

51. She also stated that Mr Oakden was a director of Snow Peak Ltd, a company that had been closed down because of two inadequate inspections and a notice of decision to cancel. That was adopted, with the appeal being withdrawn before a tribunal hearing took place.

52. Cross-examined by Mr Oakden about the company's response to the catheter incident that had been referred to the police, she disagreed that the appellant had complied with requirements. No investigation had been carried out, no carers interviewed or witness statements provided. Nobody got in touch with the service user's wife. She said she was aware that the carer concerned was asked to come in for interview but instead resigned, and that the appellant referred the carer to the DBS. She had raised it with Mr Oakden in her breach letter in January 2018 and he had submitted in mitigation that the letter was on file but had not been sent on, or signed. He said that it had been referred to the DBS. When she inspected in May she learnt that it had not been referred until the end of February. In the carer's police statement he said that he must have done some catheter training but he was not aware when. Louise

Woodhall could not provide details of his date of attendance from the files.

53. On the difference between the first and second inspections, and improvements in the care plans, Mr Oakden asked whether it was the CQC's case that a lot more should have been done, with a nurse working flat out on this topic for three months, so she could not go out on field work? Ms Smith's answer was Yes. He had Ms Woodhall as operations manager, three co-ordinators (later reduced to two), an HR person and a qualified nurse working full-time. Care plans had improved in presentation, etc. but still risk assessments were missing. On the second inspection CQC didn't find any impact on people so did not deem this a breach of regulation 12, treating it more as a question of record-keeping, so proceeded under regulation 17 only.

54. Asked by the tribunal about the reasons for the CQC's concern about Ms Woodhall as a registered manager, she said that she had in her possession, and was permitted to adduce, the Notice of Proposal to refuse her application. This was added to the bundle at the back of section C, as pages [C603–608].

55. Challenged about Snow Peak Ltd, which Mr Oakden said was a property company which owned the building – and that Pensby Hall Ltd was the operating company, she insisted that she was relying upon CQC records. In response Mr Oakden said that this featured in the questions asked at his registered manager interview and would form part of his appeal. In consequence, although questions were asked during the hearing about various corporate interests and the nature of each business as recorded at Companies House, this tribunal has no wish to interfere with any such appeal and so will say no more.

56. The last witness on the first day of the hearing was Cherelle Williams. The only question was asked by the tribunal, in answer to which she confirmed that when, in paragraph 8 of her statement, she refers to "agreed breaches" she meant "agreed by CQC internally" and not that the appellant had conceded that breaches had taken place.

57. The respondent's final witness was William Woodhouse, a Strategic Commissioning Manager for Adult Care at North Tyneside Council. He confirmed that it was a local authority that had approached the appellant to provide services. The first concern arose when raised by the CQC following its first inspection. After that there were a number of minor issues, but nothing strategic or safeguarding issues. There was nothing to suggest anything of an organisational nature. The council's concern was about Allcare closing down, creating a sudden need to move care to other providers at short notice.

58. A series of meetings took place involving the CQC, Clinical Commissioning Groups and another local authority. A number of issues had been raised, including the quality of record keeping concerning care plans, and safeguarding matters that had been raised previously. Throughout the meetings there were still safeguarding matters ongoing.

59. There were things being looked and picked up with the CCG and social work

teams. By the third meeting the council was getting to a point when it was having significant concerns about the viability of the organisation. It had no new business coming in, there was a reduction in work as packages were coming to an end, and a turnover of staff. All these were key indicators of concern about the sustainability of the organisation going forward.

60. He agreed with Mr Oakden that until the CQC approach there was nothing of concern that he was aware of, other than specific safeguarding matters that social workers were taking care of.

61. Mr Oakden gave evidence first. As a layman unfamiliar with court or tribunal procedure his contribution was a mixture of evidence and argument/closing submissions.

62. Confirming the content of his statement, he began by saying that he felt the appellant had been treated harshly by the CQC. However, when it came to issues of documentation that the appellant should have maintained efficiently he said more than once that "we hold our hands up," accepting that the appellant had failed to maintain adequate records on staff references, vetting, qualifications and training, and on following up on complaints.

63. In his witness statement, at [D9] he also said, rather equivocally :

> *We accept now that we should have reported deaths even when expected. We do not however accept that we should report all deaths. The CQC guidance states and a confirmation call with the CQC also confirms that we should only report deaths if we are present or we are the first to discover the event...*
>
> *...We have subsequently been fined two separate fines of £1 250 each for the non-reporting of deaths which whilst within the remit of the CQC, it appears given the circumstances that this is an extremely draconian response to what was an honest, open and declared mistake.*

The accuracy of the information provided by a call handler had been checked and found wanting when referred to more senior officers within the CQC, which stood by the wording of regulation 16 of the Care Quality Commission (Registration) Regulations 2009.[4]

64. Cross-examined, Mr Oakden considered that the second inspection took place too soon, before the improvements that had been implemented in the interim could take effect. This was despite the fact that he had asked for an early re-inspection. On the concern about documentary failings, and despite earlier holding his hands up, he relapsed into comments such as

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[4](1) Except where paragraph (2) applies, the registered person must notify the Commission without delay of the death of a service user—
(a) whilst services were being provided in the carrying on of a regulated activity; or
(b) which has, or may have, resulted from the carrying on of a regulated activity.
(2) *[not relevant]*
(3) Notification of the death of a service user must include a description of the circumstances of the death.

> *We felt that all the documents were in the office and we were comfortable with it. What let us down was the ongoing reporting and documentary evidence*

and

> *We had a different perception of the documentation in place. Our issue was "where was it, was it found, when was it sent?" The first review did not take into account all the documentation in place.*

65. It was as a result of the first inspection that the appellant engaged a nurse and began rewriting all the care plans. Having now engaged an external consultant he was revising them again.

66. Asked about Ms Woodhall, who had been refused registration by the CQC as a manager on the grounds of her non-compliance with :
    a. Regulation 7(2)(a) and 7(3) : Good character; and
    b. Regulation 7(2)(b) : Competence, skills and experience,

    Mr Oakden said that he had a different view of Ms Woodhall, that he had worked with her in two organisations, and he would not fire her for one spurious reference, i.e. the allegations made by her last employer, which had dismissed her.

67. When it was put to him that she was sacked for fraud he responded firmly that the reality was that he had been chief executive of that organisation just prior to this incident. She was sacked by her incoming boss, who had already appointed his chosen successor for her. She was due a large bonus and was sacked in an underhand way of avoiding having to make that payment.

68. He had met her while he was recruiting at Ark, where she built up the service provision in the north east. Then she worked briefly for Promedica. Having overseen her for the past three years, when starting Allcare he approached her. He suspected that there was no formal application or interview, because she was effectively head-hunted. She had completed a CV and DBS. Her reference came from Narbia Virk, her former line manager at Promedica. That was a positive reference.

69. On the subject of training records he insisted that all staff received generic 5-day training, which appeared on their staff files, although he accepted that confirmation that training had been completed satisfactorily was poor. At one time twenty staff members were going through training. It was always going on. Specialist training was given if a service user needed it. He accepted that there had been a gross failure in oversight on his part, but that he had now engaged Elite Care Consultancy – run by an ex-CQC inspector, and she was working to ensure that the appellant has the best paperwork possible. He said that she pulls it all together.

70. Asked about his proposals for the future, he stated that he would remain as nominated individual and, as such, one of the major roles is overseeing the service, knowledge of regulations, strategic development, but not necessarily the day-to-day running of the service on site. He stressed the importance of good governance, which encompasses all aspects of the service – viability,

costs, revenues, staffing throughput, service delivery, hours delivered, any gaps due to non-attendances, and lack of continuity of calls. He said that he was doing work involving mental health, etc.

71. Louise Woodhall had filed a two page witness statement, the content of which she confirmed. It dealt largely with her recollection of events and questions asked during the two inspections, and her impression of how well they went. She said that she is now the Care Services Regional Manager for Synergy Homecare, providing domiciliary care and end-of-life care and long complex care. The company was in the process of taking over new services, with various tenders outstanding. Her employer was aware of the circumstances of the CQC's refusal of her application to be a registered manager, and that she was attending the tribunal that day.

72. Asked about her time at Ark, she said that she had targets to hit, and bonuses to get. She should have got two lots of £7 500, as if she managed to win contracts for 2 000 hours of care work in the first year she would get a second bonus. However, by that time a new director had come in, with a new line manager. Having tried to check what care visits were not required by service users over Christmas she left on Christmas Eve for a two week holiday, returning to be told that she should not have put on a buffet for care staff, even though she had been told to organise a buffet for a directors' meeting and had paid for the staff party herself. Her line manager said she was letting her go for gross misconduct. She challenged for her bonus and went to ACAS, but was told that because of the short length of time she had been employed there she could not do much other than appeal to the company's better nature.

73. At her CQC interview she was told she had been fraudulent, based on what her an Ark representative had put in a letter, but she had never done anything wrong before. (No complaint was ever made to the police about defrauding the company). She had been registered manager for Pulse Community Healthcare in North Yorkshire, which was scored as Good (before the change in grades), and the CQC had a positive reference from Norbia Virk.

74. Concerning Andrew Cain's allegations that she had been guilty of constant interference, she said that this was untrue. She went off on maternity leave in October 2017 and had her son on 8th November 2017. She returned to employment in January. She had had a C-section and was a first time mum, so work was not her priority. She had one call with Andrew Cain who said a safeguarding issue had arisen, asking what he should do. she told him what to do and who to call. Then he contacted her and said that this role was not for him, he could not do it and was stepping down from it. She thought he had done the role before. He continued for a while as a member of the care staff.

75. Ms Woodhall refuted the allegation that she was unfit, asserting also that she did not interfere with any rotas. She had not been there as she was on maternity leave. On the subject of care certificates she stated that all staff got a care certificate if new to the role when coming in, but many of the staff had 15 years experience. They would have their CVs on file, plus their applications, and any past certificates held. For those doing 5-day training, the test results

would be on file. She disputed the allegation that those staff members with criminal records had not been adequately risk assessed. She carried them out, and Mr Oakden was privy to them. They went through them together, and made the decision together. She also was happy that all references were obtained. 17 were from in-house people who had been their previous line managers before they had moved over to Allcare, but she did accept that some had no independent references.

76. On the subject of staff supervision she said that she would carry out supervisions, which were structured. The staff member would have to come in and discuss what they had been doing in the previous three months. Challenged that she did not provide copies of these supervisions on the first day of the inspection she accepted that, but said that the appellant could supply the supervisions, but they were not on the same file. On the second day they were able to produce 17 from the computer.

77. Challenged about staff not being supported in their role, she disputed that. They would call in. Some of the staff had worked for her for up to 15 years, the majority for 2 to 5 years. They had come from Allied, Pulse and Ark. Quality Assurance systems were in place, including reviews and telephone enquiries. On training, she knew the trainer, who is both excellent at training and is a qualified nurse.

78. When Mr Ross put to her that the carer involved in the catheter incident had not received specialist training she denied that. He had, and a certificate was given to CQC; on the first inspection she thought. She regarded the issue not as one of training but ignorance on his part. The appellant's carers were not the only persons going in. There were also District nurses, who later agreed that they should have checked the patient as well.

79. Questioned about the degree of supervision provided by Mr Oakden, who was on the premises infrequently, she stated that she spoke to him about 3-4 times per day on general queries; although when pressed she could not think of any specific issues that she was uncertain about and needed to ask him about.

80. Finally, Ms Woodhall confirmed that she had worked at Synergy since October 2018, as regional manager, and if the appeal were successful it is not her intention to return to Allcare.

81. Ms Fozia Tabasum, an ex-CQC inspector who realised after dealing with many tribunal appeals that there was a dearth of expert advice available to appellant service providers and so in 2017 left the CQC and set up her own consultancy, was the final witness for the appellant; and she confirmed the content of her statement. The large number of documents exhibited (including examples referring to areas in Sheffield) were those into which her team have had input. They were not created by or for the appellant.

82. Ms Tabasum explained her background as a qualified midwife, qualified in 1994. She was a CQC inspector for 2 yrs from 2015 to 2017, and before then worked for CQC as a clinical specialist for domiciliary and end-of-life care due

to her background. She worked in the Greater Manchester area, where she was the enforcement lead. As a consultant she has worked with seven providers that were inadequate and are now rated good. Four were domiciliary care services. She had worked during first involvement with the CQC, but with Allcare she has been brought it at a much later stage. She had been instructed for Allcare and Penkett Lodge as well on a long-term basis. This was on the basis of on-going support on a monthly basis; of Mr Oakden managing services to an acceptable level, and advising him what the regulations are about.

83. As for the documents she had supplied, these were just standard templates that he can use. They are not the be-all and end-all. One has to continue to drive improvement and quality. These are basic documents that she felt Allcare should have. She visited after the second inspection, holding discussions about governance and lack of governance. There is a need to introduce evidence of good governance. She could not say that she will deliver high quality support, but she can provide support and guidance. She will be available, and Mr Oakden had accepted that there have been failings. There was a lot of lack of understanding of the regulations by Ms Woodhall and Mr Oakden.

84. Asked directly by the tribunal whether she was surprised by this with Mr Oakden's 25 year experience, she replied that the regulations were constantly changing. As a CQC inspector she had struggled with them, and so do others still working there. Much was down to interpretation of the evidence that the inspector is looking at. One could not deny that there was a lack of evidence in this case. Mr Oakden, she said, needs someone there to manage it for him. He wouldn't be able directly to manage a domiciliary care agency. He would need support.

85. With no registered manager, and him being incapable of doing it, she was asked if there was any alternative to cancellation. If a registered manager were in place, and there was continued support, was there an alternative? She replied that Mr Oakden needs a registered manager. She did not think those in post were fit. They had no expertise in managing 40+ members of staff. She didn't feel Louise had that. There was a need to read the Regulations and Guidance, but as nominated individual Mr Oakden had agreed to invest and support the organisation. Her advice would be that the best type of manager to select would be from those who have gone out and worked as care workers in the community, rather than a desk top manager who sits in the office.

86. Questioned by Mr Ross, she said that her role was not to justify the past but to be in a supporting role for the future. Having been involved with Allcare only since November 2018, she expected that she would need a minimum involvement of six months to turn around the business. In that time she would see the monthly audits and would expect to spend a full day there on a monthly basis, plus telephone support on weekly basis. She had also been involved, also since November, with Mr Oakden's Penkett Lodge business and this was going well. She was aware of its last inspection, raising issues about dignity and respect, and governance issues. She concluded by saying that Mr Oakden and her have had frank discussions about moving forward and improving standards, and about significant major failings in the past.

87. In his closing submissions Mr Oakden said that it is difficult to rescue a small company from a spiral of decline. While he fully accepted its failures, he thought it fair to point out that clients did not leave because of the company's failures – a few minor breaches – but due to concern about its possible collapse and the need to relocate care packages. Newcastle and Gateshead were the last to leave, in October 2018, and they inspected clients. They quit because of the CQC decision.

88. As to the very serious catheter incident, he said that the carer was fully trained, Andrew Cain was in charge, but that the failure was in not contacting CQC (whether deliberately or otherwise). This was a documentation failure, but the situation did improve between inspections. This should have demonstrated that the appellant can improve, and can deliver a service which, in the main, is without incident and is good. The company's failure was a failure to document the service provision in the right way. He had now brought in a consultant to advise, which was a painful lesson and something that will not be permitted to happen on his watch should the appellant be permitted to restart.

89. Asked by the tribunal what the appellant company could offer, with no contracts or staff, as an alternative to cancellation, Mr Oakden proposed conditions that a registered manager be in place, and that the company commits to ongoing support.

90. In response, Mr Ross argued that the imposition of conditions would imply that one could have any confidence in what Mr Oakden says, so it was not appropriate.

Discussion

91. A great amount of time was occupied with evidence on matters which, while peripheral to the decision that the tribunal must make, cast long shadows over the case. The first concerns the decision reached by the CQC in early 2017 about Louise Woodhall's fitness to be registered as manager of the soon-to-launch Allcare business. The second relates to Mr Oakden's fitness as such, and whether his business history affects that.

92. On the first point, the tribunal did not find Ms Woodhall's witness statement impressive, and when told that the decision taken was on the grounds that she had defrauded her employer the mountain she had to climb became much steeper. However, when shown the content of the March 2017 CQC notice of proposal and hearing her oral evidence the tribunal formed a much more sympathetic impression. Lawyers know that fraud is a most serious allegation to make and, in civil proceedings, pleading such a claim without having evidence to justify doing so would be a breach of the Bar Code of Conduct. To place reliance on a single letter from an ex-employer that had not considered the matter serious enough to involve the police was bold, especially when she strenuously denied the allegation and provided a rival explanation.

93. For her to have failed to mention that employment (so that enquiries would not be made about it) was unwise, but not only had she built up insufficient time at

Ark to acquire employment rights and the ability to bring a claim for unfair dismissal, and legal aid is not available for wrongful dismissal in the County Court, but in regulatory matters involving the CQC and similar bodies there is a dearth of knowledgeable legal advice available at accessible cost. If she had the benefit of skilled advice one suspects that her application would have been presented rather differently and better, or that the decision made would have been appealed so that the evidence could be considered objectively by a tribunal. Should she apply for registration again it is hoped that the CQC will take a more holistic approach and balance her experience and the views of other referees against a single letter, the motivation and accuracy of which might require exploration.

94. In evidence there was some discussion of a number, and the function, of a number of companies with which Mr Oakden was or is involved as a director; especially those in the care business which may have received unfavourable reports. He also raised, by way of complaint, details of his lengthy interview/interrogation concerning his application for registration as manager of the Allcare business. An appeal against that decision has been filed and, if it proceeds to a hearing, no assumption can be made that this same tribunal may sit on it. This decision shall therefore make no comment on evidence which may form part of the matters to be determined on any such appeal.

95. Turning then to the issue at hand, the grounds relied upon by the appellant, set out in its application at page [A4], largely concern impressions it says were conveyed by CQC officials during the two inspections, notwithstanding the fact that the inspection report following the first inspection (the only one available at the date when an appeal could be brought) were negative. The final point raised was CQC's alleged lack of understanding of the limited duty to report deaths.

96. The tribunal has considered all the evidence, written and oral, and applied such weight to it as it considers appropriate. None of these grounds were supported by the evidence as a whole, or even by the appellant's expert consultant. While it may seem unfair that so much emphasis is placed on documentation rather than the substance of the care provided, in these litigious days it is often vital – in particular where employees attend clients' own homes to perform the contracted service on their own and unsupervised – that proof that references and possible criminal records have been checked, and that detailed notes are taken of training received, qualifications gained, and care or treatment administered. Insofar as the documentation was missing or incomplete, the evidence of the respondent is supported by Ms Tabasum, and to a large extent accepted by Mr Oakden himself.

97. He also appears to accept that his understanding of the duty to report death of any service user was incorrect.

98. What now? Many of the staff have since left the business as work has dwindled, including Ms Woodhall – in whose administrative skills Mr Oakden places excessive faith. She may be excellent at winning business, but someone else is required to provide essential support to the business as registered manager

(or as administrator, leaving the manager to focus on delivery of the business).

99. Had Mr Oakden involved Ms Tabasum much earlier and obtained the services of a good registered manager (even on a short-term basis) then he might have demonstrated some grounds for confidence that this provider could have been turned around. Not having done so, the business (which currently has no clients – and can't obtain any without consent of the CQC under the condition imposed in May 2018) needs to be rebuilt entirely and cancellation appears the only viable option at present.

FOR THE ABOVE REASONS IT IS DETERMINED THAT :

The appeal be dismissed and the Care Quality Commission's notice of its decision to cancel the appellant's registration as a care provider dated 23rd July 2018 be confirmed

Dated 21st March 2019

Graham Sinclair
First-tier Tribunal Judge