

Care Standards

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

[2019] 3842.EA

Remote Hearing by Video [V Kinly]
on 31 March, 1 April and 23 April 2020
Panel deliberation hearing on 29 April 2020

Before

Tribunal Judge McCarthy
Specialist Member Cairns
Specialist Member Jacobs

AZJ HEALTHCARE SERVICES LTD

Appellant

-v-

CARE QUALITY COMMISSION

Respondent

DECISION

The Application

1. The Tribunal received the application for appeal on 30 September 2019. The appeal is against the respondent's decision dated 4 September 2019 to cancel the appellant's registration as a provider in respect of the following regulated activities: diagnostic and screening procedures, surgical procedures and treatment of disease, disorder or injury.
2. To avoid confusion, we mention that when we refer to the appellant we are referring to the registered provider, namely AZJ Healthcare Services Limited. Mr Jan is the Registered Manager and Nominated Individual for the provider's activities.

Remote hearing

3. As a result of the restrictions on movements imposed in response to the coronavirus pandemic, the Tribunal with the agreement of the parties arranged for this appeal to be heard using video conferencing. During the three days of

hearing, we were alert to technical difficulties encountered by those attending and ensured these did not prevent the giving of evidence or argument by allowing suitable breaks and providing appropriate technical advice and support. At the end of the hearing both parties confirmed they had been able to present their cases and participate effectively despite the physical distance.

Attendance

4. The appellant was represented by Mr Akhtar Zeb Jan, the Registered Manager of AZJ Healthcare Services Ltd. The respondent was represented by Dr M T Deignan of Counsel.
5. Also attending were the respondent's witnesses: Ms Victoria Marsden (Inspection Manager), Mr Jonathan Weeks (Compliance Inspector, BDS Qualified), Mr William Black (Dental Advisor) and Dr Tim Ballard (National Clinical Advisor in Primary Medical Services (General Practice, Independent Health and Online Care)). There were no witnesses for the appellant other than Mr Jan.

Background

6. The appellant registered with the respondent on 27 October 2011 to provide regulated activities of diagnostic and screening procedures, surgical procedures and treatment of disease, disorder or injury. The Certificate of Registration is dated 2 November 2011, which is also the date when Mr Jan was registered as the Registered Manager.
7. The written evidence includes a description of the site, which is a renovated Victorian property comprising of: on the ground floor, a reception, surgery room, decontamination room and an operating theatre; on the first floor, a consultation office, two surgeries and a bathroom; and on the third floor, domestic accommodation. Mr Jan said the third floor was separate from the practice but we were not advised whether it had separate access.
8. The respondent carried out inspections of the appellant's Park Clinic on 17 January 2012. Because the appellant was found not to be compliant with several requirements, a focussed follow-up inspection took place on 3 May 2012. Ongoing concerns remained regarding cleanliness and infection control, which led to a second follow-up inspection occurring on 24 July 2012. The respondent's report issued in August 2012 reveals the appellant was found to be fully in compliance.
9. The respondent undertook an unannounced inspection on 19 March 2013, during which it focused on consent to care and treatment. In the report issued in April 2013, the appellant was found to be compliant.
10. On 15 December 2015, the respondent carried out a comprehensive inspection according to its revised methodology. The report was published on 10 March 2016. The appellant was found to be in breach of the safe care and treatment requirement and the good governance requirement. Requirement notices were issued. A follow up inspection took place on 28 July 2016, which concluded the

appellant was compliant.

11. The respondent carried out an announced comprehensive inspection on 27 February 2019 and found the services provided were not safe, effective or well-led. Warning notices were issued. A focused follow-up inspection was undertaken on 2 July 2019 and the respondent again concluded services were not safe, effective or well-led. As a result, on 11 July 2019, the respondent issued a Notice of Proposal to cancel the appellant's registration. The appellant responded on 19 July 2019.
12. After reviewing all the evidence and considering the appellant's representations, the respondent made its decision dated 4 September 2019 to cancel the appellant's registration.

Legal Framework

13. The appeal is brought under section 32 of the Health and Social Care Act 2008.
14. Two of the allegations made by the respondent relate to the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014. The respondent alleges the appellant is in breach of regulation 12(1) (safe care and treatment) and regulation 17(1) (good governance). The final allegation made by the respondent relates to the Care Quality Commission (Registration) Regulations 2009. The respondent alleges the appellant is in breach of regulations 12(1), (2) and (3) (statement of purpose).
15. It is for the respondent to prove that it is more likely than not that the appellant is in breach of one or more of these regulations. This is that standard of proof we have applied throughout this decision.

Evidence

16. The documentary evidence was contained in a joint bundle of 1,214 pages. There was no late evidence. All present had the same bundle, either as a printed version or in digital form. During the hearing, we listened to the witnesses in the order they are listed above. We do not rehearse all the evidence here but have drawn from the documentary evidence and our notes of the oral evidence when making our findings below.

The Tribunal's conclusions with reasons

17. We begin by considering three issues that permeate this appeal.

General matters

18. The first, is whether the respondent actions were fair in that the July inspection went further than its description of being a follow up inspection. The appellant alleges this is evident by the fact the issues arising from the July inspection went beyond the concerns raised in the February inspection. As such, it could not be properly characterised as a follow up inspection and therefore the appellant was misled.

19. We do not find this allegation to be made out. The appellant has not identified any law or policy document that limits the ambit of a follow up inspection. We recall that section 3(1) of the 2008 Act states that, “The main objective of the [Care Quality] Commission in performing its functions is to prevent and promote the health, safety and welfare of people who use health and social care services.” This statutory requirement underlies every action of the respondent.
20. We acknowledge that the description, “follow up inspection” could in isolation be understood to limit the actions of the respondent to re-inspect what was previously found to be non-compliant but in the context of section 3(1) such an interpretation is misplaced. In context, we find the description, “follow up inspection” to be no more than an indication that because of non-compliance previously an additional inspection is required within a short period to ensure compliance. We do not find the description limits what actions the respondent can take.
21. The second general allegation is that the respondent’s staff conspired against the appellant because Mr Jan complained about them to the Chief Executive in a letter dated 28 March 2018. We have seen that letter and the subsequent email exchanged between Ms Marsden and Mr Jan before she visited the practice with Mr John Milne (CQC Senior National Dental Adviser). Mr Jan has stated throughout that he did not understand the purpose of this visit despite the email exchanges and he did not take the opportunity to elaborate on his concerns regarding the respondent in general or in relation to the February 2019 inspection. We understand from Mr Jan’s evidence that he received a response to his complaint on 20 June 2019 from Dr Janet Williamson (Senior CQC Manager) but we have not seen that response because it was not included in evidence.
22. We find the evidence reveals the respondent took the complaint seriously and followed its complaints procedure. There is no indication of bias against the appellant or against Mr Jan. We find no evidence that the respondent’s staff involved in this appeal acted other than as independent professions because the allegation is based on speculation and has no evidential foundation. The assessments and reports contained in the bundle show positive and negative factors, which suggest open-mindedness and integrity. All conclusions are drawn from evidence from various sources, including observations, records and interviews, which indicates the respondent’s staff acted with impartiality and integrity.
23. The third is whether the inspection teams were suitably qualified and experienced to comment on the appellant’s practice. We find this allegation is a failure of Mr Jan to recognise that it is for the respondent to decide who carries out an inspection and it is for the respondent to decide if the inspection teams are suitable. This is to maintain the independence and integrity of the inspection process.

Scott Schedule

24. We turn next to the Scott Schedule, which summarises the allegations made by the respondent and the appellant’s responses. We take each heading in turn

and examine the competing evidence and arguments.

Steam penetration tests

25. We find the respondent has proven that the appellant did not regularly carry out the required steam penetration tests of the autoclave.
26. Our first reason is that there are significant inconsistencies between the handwritten and typed records provided by the appellant. When asked about these discrepancies, Mr Jan presumed they were transcription errors made by the person who provided the typed record. The failure of Mr Jan to check that the transcription was accurate and reliable before submitting it in evidence indicates a level of carelessness that raises concern.
27. Our concern is raised more significantly by the following difficulties with the appellant's evidence. In his written and oral evidence, Mr Jan was confused between the self-testing capability of the autoclave and the need for steam penetration tests to be run prior to each sterilisation cycle. We make this finding because he repeatedly told us in answer to questions put by Dr Deignan that the autoclave had an automatic vacuum test cycle which sufficed and there was no need to carry out steam penetration tests. We are satisfied from the user manual produced in evidence and by the GDC Standards that this is not the case. In addition, we record that the appellant has not provided evidence to rebut the respondent's evidence on this point.
28. We reach the same conclusion from the fact that the handwritten records and type transcript of sterilisation cycles provided do not show that a vacuum test cycle was run each time a sterilisation cycle took place. In oral evidence, Mr Jan tried to blame his employees for a lack of accuracy in the records. We do not accept this explanation because in his initial written response to the February 2019 inspection he wrote that he would resume the required testing. This implies to us that he knew the required steam penetration tests were not being undertaken. In addition, we recognise that on some days when a sterilisation cycle was run, there was an accompanying record of a steam penetration test, whereas on other dates there was not.
29. The fact the appellant could not provide evidence during the July inspection to show that the required testing had been resumed reinforces us in our view that Mr Jan did not and does not understand the requirement to carry out the steam penetration test according to guidelines; and by not conforming to the requirement, the appellant did not provide safe care and treatment to patients.

Failure to date stamp instrument bags with use by date

30. We do not find the respondent has discharged the burden of proof in relation to this allegation. We found the evidence relied on by the respondent to be weak because it lacks clarity because it did not engage with the appellant's explanations.
31. We recall that Mr Jan's explanation was that the date stamping errors could be the result of many factors. He was aware that some of the dental nurses did

not always finish the work on the day instruments were sterilised and they would write the date the following working day. He knew there were problems with the date stamp equipment at times. He pointed out that an undated implement bag would be rejected in surgery.

32. Although we find these explanations to be weak because they are not supported by independent or documentary evidence, we accept they are plausible on their face. The failure of the respondent to consider the explanations means the respondent's allegation on this issue is not sufficient to discharge the burden of proof.

Wrong date stamp on instrument bag

33. We are satisfied the respondent has proven this allegation, which relates to an instrument bag being found on 2 July 2019 in the circumcision cupboard bearing a 2017 date stamp. Our reasons for finding this allegation is proven are as follow.
34. We note that in the Scott Schedule the appellant denies this allegation. The appellant says what was found was a dental instrument tray and they are used within weeks. We understand the appellant to be saying that a dental instrument tray would not be left unused since 2017. The appellant then admits the wrong date had been endorsed because the date stamp had been wrongly adjusted. The appellant also mentions that the circumcision trays were unpacked in August 2018 and that they are bulky and covered by a drape and paper. We are unsure what the appellant means from these comments but infer that they were stored covered with paper.
35. The issue raised by the respondent is that the wrong date stamp was on a dental instrument bag and that the 12-month use-by period had expired. The issue is not related to circumcision instruments. We regard the appellant's comments as an admission that a dental instrument bag was dated in 2017, which meant by 2019 it had expired.

Legionella risk assessment

36. We are aware of the Legionella risk assessment dated 8 November 2018, which is in the bundle of documents.
37. We accept the respondent's allegation that the appellant failed to act in accordance with the risk assessment provided. The risk assessment indicates the outlets where the water temperature had to be measured and the hot water temperature that had to be reached. These are described as sentinel taps and the risk assessment requires the hot water temperature to be tested on the furthest sentinel outlet, which is in the third-floor toilet, and the cold-water temperature to be tested in the nearest sentinel outlet, which is in the first-floor toilet. The risk assessment required the hot water temperature to be above 50°C and the cold water to be below 20°C. The records provided show that the relevant outlets were not being checked and the required hot water temperature was not being reached.

38. In addition, we found that Mr Jan's oral evidence obfuscated the situation. He sought to deflect our attention from the two key points identified by the respondent by saying the practice did not have access to the third floor because of a tenant and that the practice complied by running taps for much longer than the one minute required in the risk assessment. The first issue was not relevant because Mr Jan later admitted that there was access to the third-floor toilet. The requirement was for hot water to be run for at least one minute, which means running for longer is irrelevant. This obfuscation undermined Mr Jan's evidence because it showed he was aware of the risk assessment requirements but was not willing to answer questions about it honestly.
39. We find the appellant's failure to act according to the relevant risk assessment means that the appellant did not provide safe care and treatment to patients.

Staff training

40. We find this part of the respondent's allegation is proven because no evidence of staff training was provided in either inspection. Mr Jan's evidence was that all staff members had to complete a mandatory training book and blamed the inspection teams for not requesting it. We do not accept this explanation because the training book described has never been provided in evidence. A mere assertion that a training book was available is not evidence that staff had completed required training. Nor do we accept that the inspection teams were at fault because they identified training issues in the initial feedback report provided to the appellant after the February 2019 inspection. This strongly indicates to us that the issue was raised during that inspection, contrary to Mr Jan's evidence.

National patient safety and medicines alerts

41. We find the respondent's case on this point is proven. Mr Jan admits the appellant does not subscribe to the MHRA alerts. He repeatedly stated that it was unnecessary since he was updated about changes through other subscriptions (e.g. BNF) but provided no evidence these issued alerts. He said that no doctor used the MHRA alerts, which we find to be misleading since the MHRA alerts are a requirement for providers to ensure they deliver safe care and treatment.
42. Despite Mr Jan being given many opportunities to clarify his answers, he repeatedly deflected the questions and did not answer how the sources he stated provided the alerts provided by the MHRA. For example, he told us at one point that updates were not needed because the practice would usually refer patients to their GPs for any prescriptions. He also suggested that his work as a locum consultant meant he received updates from hospitals. We recall that we are not considering whether Mr Jan was updated but whether the appellant, which is the practice, had in place the appropriate arrangements to ensure the provision of safe care and treatment to its patients. We find it did not.

Segregation of clinical waste

43. It is appropriate for us to consider the issues relating to the management of clinical waste together because the allegations are related. We record that there is no dispute that Mr Jan was shown unsegregated clinical waste during the inspections in February and July 2019.
44. Mr Jan has repeatedly suggested that the finding of clinical waste by inspectors in domestic waste may have been the result of human error in relation to the piece of matrix band but that the salivary ejectors and other clinical waste found among domestic waste was planted by the inspection team. Mr Jan relied on circumstantial evidence. He stated that the inspection team asked whether surgery 2 was covered by CCTV and only after being told it wasn't did the inspectors find the unsegregated clinical waste. He stated that the salivary ejectors used in surgery 2 would have been blue in colour and not the clear ones allegedly found by the inspectors. He stated that he had questioned staff and all had denied having placed the salivary ejectors in the wrong waste. He noted the inspectors knew where to find the salivary ejectors, which suggested they had been planted. He was surprised four salivary ejectors were found because they are rarely used and only one would be used per patient.
45. Because of this counter allegation, before we can examine the respondent's allegation, we must consider whether the unsegregated clinical waste was planted by the inspection team.
46. We recall that it is a fundamental principle that it is for the person making an allegation to prove their case. Although the overall burden of proof in relation to this appeal lies on the respondent, in relation to the allegation made by Mr Jan on behalf of the appellant, it is for him to prove. We take into consideration that Mr Jan has a lot to gain from making the allegation whereas the inspection teams have nothing to gain and a lot to lose by planting evidence. This means we must take Mr Jan's allegations with a certain amount of circumspection and caution. We recall that circumstantial evidence will not be sufficient to show that it was more likely than not that the inspectors acted in the way alleged by Mr Jan.
47. We have seen no evidence to support Mr Jan's claim that the salivary ejectors used in surgery 2 were blue in colour. We also take into consideration the fact that the appellant did not identify the colour of the ejectors as an issue until he made his statement in November 2019. We find it odd that the allegation was not made immediately on being notified of the discovery by the inspectors. This reduces the weight we can place on Mr Jan's assertions and we find them to be unreliable.
48. Nor do we have any evidence to support Mr Jan's claim that he carried out an investigation into the discoveries made by the inspection teams. We find Mr Jan's actions to be at odds with the allegations he makes. If the salivary ejectors found were the wrong colour, there would be no point in him carrying out an investigation. Similarly, if the wrong number of salivary ejectors were found, he would have no reason to pursue enquiries with his staff. This further weakens the assertions made by Mr Jan.

49. Finally, we record we have not been given any written evidence to support the assertion that Mr Jan carried out an internal investigation with his staff about the segregation of clinical waste. We know nothing of the methodology he might have used and we have no statements from any of the staff involved in the investigation.
50. We conclude we have been given insufficient evidence on which we can find there is merit in Mr Jan's assertions and we reject them.
51. We move on to consider whether the respondent's allegations have been proven to the required standard, which is whether the allegations are more likely than not to be accurate. We recall our rejection of the appellant's allegations about the inspectors is not a reason for us to find the respondent's allegations to be more likely than not to be accurate.
52. As indicated above, we record there is no dispute that the inspectors found part of a matrix band and the salivary ejectors in non-clinical waste. This agreement between the parties means we accept the inspectors' accounts relied on by the respondent. We find the inspectors found unsegregated clinical waste during their inspections.
53. Mr Jan accepts the description of the notices posted in the practice about what should go into clinical waste. Therefore, we accept the accounts relied on by the respondent about the contents of the notices. We accept that the notices are misleading in that they refer to the need to segregate blood contaminated products only and not to all used products that should be segregated into clinical waste.
54. The final part of the respondent's allegation relating to clinical waste is that the inspectors found clinical waste in the domestic waste bins in the practice's yard. We note Mr Jan's objection to this but he has provided no evidence to substantiate his objection. We are aware the inspectors obtained evidence with the consent of the appellant of the collection of clinical waste from the practice and found it was low, since only three bags were collected from January 2018 to January 2019 (one on 14 February, 29 May and 19 October 2018). We accept this supports the respondent's allegation because it is an unusually low amount in a relatively busy practice carrying out mostly surgical procedures. This indicates to us that clinical waste was being disposed in other ways.
55. Looking at all the evidence and arguments in the round, we are satisfied the respondent has proven the allegation regarding the appellant's failure to appropriately segregate clinical waste. Taking these findings together, we find the respondent has proven its allegation that clinical waste was not appropriately segregated and we find this raises concerns about maintaining safe patient care and treatment.
56. We also find the failures of the practice to have appropriate systems in place to segregate clinical waste is evidence that it was not adhering to good governance practices. We move on to look at other issues raised by the respondent about the appellant's governance.

Soap dispensers

57. The respondent alleges the appellant failed to wall-mount soap dispensers by the sinks. Mr Jan says, on behalf of the appellant, that the soap dispensers were on the sinks and there was no need to wall-mount them. Although we accept there is no evidence that wall-mounted soap dispensers are a requirement, we are aware this is not the allegation made by the respondent. The allegation is that after the February 2019 inspection, an infection and prevention control audit was carried out in which the appellant recorded it was necessary to wall-mount the soap dispensers. The issue of concern is that the appellant did not carry out the remedial actions it identified and deemed necessary. This is not good governance. We find the allegation made by the respondent to be proven on this point.

Member of staff not immunised against Hepatitis B

58. The appellant acknowledges that one member of staff was not immunised against Hepatitis B. Mr Jan explained that she was not immunised on advice from her GP when she became pregnant.
59. Mr Jan informed us that the member of staff in question was employed in November 2018 and had her child in October 2019. He understands she became pregnant towards the end of January 2019. He was unable to explain why the appellant did not ensure the member of staff was immunised when not pregnant in those initial months of employment.
60. The inability of Mr Jan to explain this issue leads us to be concerned with the accuracy and truthfulness of his evidence on this point. We keep in mind the fact the appellant has not provided any evidence confirming the GP's advice or any statement from the staff member in question. The lack of supporting evidence weakens Mr Jan's oral evidence.
61. For all these reasons, we reject Mr Jan's evidence on this issue and find there is no good reason why the staff member was not properly immunised against Hepatitis B.

No risk assessment of pregnant member of staff

62. Arising from the fact a member of staff was not immunised is the allegation that the appellant failed to risk assess the pregnant member of staff. The only written risk assessment we have is dated 5 July 2019, which is after the last inspection. The risk assessment says that the member of staff was informed verbally to avoid contact with contaminated sharp instruments when the appellant was advised she was pregnant and could not be immunised. The risk assessment states that she would not be permitted to handle contaminated instruments in the decontamination process and sets out what duties she would be allowed to perform or observe.
63. Undermining the statements in this risk assessment are the following factors. There is no statement or other evidence from the member of staff to confirm she was verbally advised of the change in duties because of a risk assessment.

64. We draw on the evidence of Mr Weeks who spoke with the member of staff during the July 2019 inspection. She told him that she carried out decontamination duties despite not being immunised against hepatitis B. Mr Weeks also records that Mr Jan told him no risk assessment of this member of staff had been carried out. Mr Jan questioned Mr Weeks' methodology and suggested the member of staff was confused. The lack of evidence from the member of staff means we give no weight to Mr Jan's assertion, which we find was made in an attempt to deflect us away from the central issue of safety.
65. In addition, we find there is no evidence a risk assessment was undertaken from when the member of staff was employed until the appellant was informed she was pregnant and concerns were raised about her being immunised. The record sheets provided by the appellant regarding decontamination processes indicate that the member of staff regularly operated the autoclave during February to June 2019 when the decontamination cycle (Universal 134) was run. Mr Jan said this member of staff merely pressed the start button on the autoclave and then would deal with sterilised instruments. Not only do we find this to be very unlikely but we give no weight to Mr Jan's comment because it is more likely than not that he provided this explanation to cover up the failure to carry out a risk assessment.
66. For all the above reasons, we find the respondent has proven this allegation.

Failure to take remedial action in relation to infection and prevention control audit

67. We find the respondent has proven this allegation based on the available evidence. The appellant has provided an audit dated 26 May 2019, in which the appellant confirmed that, "All surfaces in clinical and decontamination areas are impervious and easy to clean."
68. The respondent identified that a fabric covered chair was in a clinical area during the July 2019 inspection. Mr Jan explained that the chair was placed in the room temporarily for a relative to observe and usually would be kept by reception. He also stated that the chairs were steam cleaned. We find Mr Jan's explanation to be an admission that a fabric chair was in a clinical area. A fabric chair will be permeable and therefore should not be present in a clinical area because of the difficulties in cleaning and preventing infection.

Failure to audit dental care records

69. We find the respondent has proven this allegation because the appellant was unable to provide dental care records audits during the inspection in February 2019 or the inspection in July 2019. We are fortified in this conclusion because the only audit provided by the appellant is dated 7 July 2019. We find the audit was carried out in response to the fact the inspection had identified no audit record had been provided, which is in effect an admission there had been no earlier audit.

Evidence in dental care records to show patients given options

70. We find the respondent's allegation on this point to be proven because the records provided by the appellant during the inspections fail to record the options that had been discussed with patients. It is immaterial that Mr Jan says it was standard practice for him and others in the practice to discuss options with patients, since such discussions were not recorded.
71. Consent forms are not an alternative because they serve a different purpose. In addition, we reject the oral evidence of Mr Jan that there was a second page to the consent form where options were recorded because he did not produce those pages either in relation to queries raised during the inspections and has not provided them subsequently.

Failure to carry out an antibiotic prescribing audit

72. We find the respondent has proven this allegation because no audit was provided during either inspections and the audit subsequently provided is dated 5 July 2019. We find this audit was carried out in response to the fact the inspection had identified no audit record had been provided, which is in effect an admission there had been no earlier audit.
73. We have considered Dr Jan's comment that patients were usually referred to their GP for prescription of antibiotics but find it does not reduce the need for the appellant to carry out an antibiotic prescribing audit. There is no dispute that the appellant issues some prescriptions.

Failure to carry out prevention and control audits on a six-monthly basis

74. As already indicated above, the appellant has provided a prevention and control audit dated 26 May 2019. Another audit, dated 24 March 2019 (which refers to auditing carried out between 18 and 24 March 2019), has been provided, which is in a different format and looks at different issues. There is no evidence other audits were undertaken earlier. Mr Jan states two audits based on clinical data were provided to the inspectors and we assume he is referring to these two documents. No other audits have been provided. We find, therefore, the allegation to be proven because there is no evidence of auditing since the appellant first registered until 24 March 2019.

Failure to accurately complete an infection prevention and control audit

75. We record that Dr Deignan withdrew this item in the Scott Schedule because it was repetition of allegations already made. We agree and accept that change.

Failure to provide documentary evidence that oral hygiene instruction and dietary advice had been provided to patients

76. We find the respondent has proven this allegation because the appellant has not provided any evidence to the contrary. Mr Jan misses the point in his response to this allegation because he relies on the instruction and advice being given but he fails to address the failure to record the instruction and advice. This means another dentist would be unable to see what instruction or advice had previously been given and therefore would be unable to assess the

patient's level of compliance.

77. In addition, we recorded during oral evidence that Mr Jan said that such instruction and advice would be given during a second appointment. This puzzled us but that is immaterial because Mr Jan provided no evidence to show advice and instruction had been given during a second appointment.

Failure to carry out x ray audits for all dentists

78. Once again, we find that the appellant relies on an x ray audit carried out after the July 2019 inspection as evidence of compliance. The only x ray audit provided is dated 10 July 2019, although says it was started on 9 March 2019. The audit is for one dentist only. We have concerns about the time taken for the audit to be completed because the notes about methodology includes, "The proposed timetable for this activity [audit] should not usually exceed three months." We have been given no explanation why the audit took significantly longer than three months.

79. However, these concerns were not raised by the respondent and we mention them merely as part of the background to the allegation that has been made. We find that allegation is proven because although we know the appellant has more than one dentist working in the practice, we only have this one audit. In addition, we note it was completed after the July 2019 inspection. This fortifies us in our conclusion that the appellant did not carry out the necessary x ray audits because it seems to us that the audit was commenced in response to the February 2019 inspection but then abandoned, only to be resumed following the July 2019 inspection.

Failures regarding radiographs

80. We find the respondent's allegations regarding the failure to always take a post-operative radiograph, to consistently report radiographs and in one case failure to record all areas of disease, are made out because they are supported by the evidence. The explanations provided by Mr Jan do not justify the failures and errors. The appellant has not provided any rebuttal evidence.

Failure to explain the process for grading radiographs

81. We find the respondent's allegation to be well made because Mr Jan's written and oral evidence and responses indicate to us that he is unclear about how radiographs are graded.
82. Mr Jan contends that the grading is automatic using software, which will indicate when a radiograph must be repeated. This is about the quality of a radiograph which is one aspect of grading. We take note of the x ray audit provided, which identifies three aspects for grading: positioning, exposure and digital processing. This enables radiographs to be graded as being excellent, diagnostically acceptable or unacceptable.
83. Mr Jan also says the grading is done in the case notes on the digital file but did not show those to the inspectors and has not provided screenshots or other

printouts to confirm his assertion. Bald assertion is insufficient to rebut an allegation.

Staff appraisals

84. We find the respondent's allegation is well made because the appellant failed to carry out appraisals of all staff.
85. We are satisfied that appraisals are a requirement under standard 6.6.1 of the General Dental Council's Standards for the Dental Team, effective since 30 September 2013.
86. The respondent relies on information gathered by its inspectors. We note that the inspectors recorded that during the inspection in July 2019, Mr Jan said that no staff had been appraised because it was not a GDC requirement. In Mr Jan's complaint to the respondent's CEO in March 2019, Mr Jan stated that the, "inspectors did not know that at present the General Dental Council requires appraisals for salaried dentists (NHS) only.", and as an independent practice appraising staff was not required. Given what is stated in the Standards for the Dental Team we have recorded above, we reject that explanation.
87. The inspectors recorded that they saw an appraisal for the urologist but no other appraisal. (We comment that we have not seen that appraisal.) The inspectors also recorded that staff told them they had not been appraised. We note that when asked about staff appraisals during the February 2019 inspection, Mr Jan is recorded as telling the inspectors that they had not been given all records relating to staff. Since that time, the appellant has not provided any evidence to show that any appraisal was carried out until after the July 2019 inspection.
88. Mr Jan has provided appraisal reports for himself (dated 7 July 2019), a trainee dental nurse (dated 15 July 2019), and an associate dental practitioner (dated 9 July 2019). Obviously, all three appraisals were conducted after the July 2019 inspection. No other appraisal reports have been provided. The respondent questions whether the reports provided are in fact appraisals because none includes an assessment of the appraisee's performance. Mr Jan says he was guided by the GDC and followed its recommendations about appraisals and adopting its template. We have not been shown this template or any other contact between the appellant and the GDC regarding appraisals. We find the reports do not meet what would be expected of an appraisal because they contain no assessment of performance. We find the reports though described as appraisals are in fact a personal development plan.
89. Mr Jan alleges that his requests to the respondent for guidance about appraisals were met with silence. We do not see that the respondent had any duty to advise the appellant about appraisals and therefore do not find Mr Jan's reliance on this failure to respond as undermining the respondent's case.
90. We find that Mr Jan has given various explanations why there was no evidence of staff appraisals prior to the July 2019 inspection. The variety of explanations undermines the reliability of his account. The other evidence all points in the

direction that staff appraisals were not undertaken despite it being a GDC requirement.

Medical emergency equipment

91. The respondent's allegation is that the appellant's medical emergency equipment did not include all the equipment recommended by the Resuscitation Council UK, not having portable suction equipment, bag valve masks for adults, children or infants, and no oxygen masks for children.
92. Mr Jan refers to an invoice dated 18 February 2019 as proof that he had all the above equipment. It does not include all of the above, referring to two different sizes of face mask, oxygen tubing and a pocket mask with oxygen inlet. As a result, we do not find the invoice to be satisfactory evidence of compliance and we therefore find the respondent's allegation to be proven.

Indemnity cover

93. Dr Deignan withdrew this allegation during the hearing after we enquired about what documentary or other evidence the respondent was relying upon. As there was none, the only finding we would be able to make was that this allegation could not be proven. For this reason, we accept Dr Deignan's withdrawal.

Statement of purpose

94. We find the respondent's application to be proven because the only evidence we have is that the appellant notified the respondent of a change to its statement of purpose only on 2 August 2019 in relation to circumcision services. Mr Jan said the appellant had sought to register the change in its statement of purpose much earlier and there was an error in the respondent's system. We do not accept this explanation because the process involved submitting an application form electronically. It was for the appellant to ensure that it had been submitted and properly acknowledged.

Our conclusions

95. Given the findings we have made, we are satisfied the respondent has shown that it is much more likely than not that the appellant has not complied with the statutory requirements to provide safe care and treatment, to ensure good governance or to adequately maintain its statement of purpose.
96. Although this is sufficient for us to confirm the decision to cancel the appellant's registration, we are fortified in our decision by the following. We find Mr Jan in effect is the appellant's persona, being the only director, its Registered Manager and its Nominated Individual. We have concerns about Mr Jan's understanding of the statutory requirements in running a practice, not in terms of his abilities in dentistry, but in terms of understanding, assessing and managing risks.
97. After considering his written and oral evidence, we were left concerned that pervading many of Mr Jan's comments was a failure to appreciate the extent to

which the inspection process is essential to ensure the health, safety and welfare of patients. Rather than cooperate with the inspections, he has taken umbrage and has sought to criticise and undermine the inspection teams rather than accept legitimate criticisms and put good what was found to be lacking. We also recognise that Mr Jan failed to demonstrate a satisfactory understanding of the need for clear, timely and accurate record keeping.

98. We have not given much weight to the outcomes of the pre-2019 inspections, although they do reveal a reluctance to respond adequately to serious concerns raised by the respondent. We have given significant weight to the fact that Mr Jan as the Registered Manager had not addressed most of the concerns identified in the February 2019 inspection by the time the follow up inspection took place in July 2019. His evidence during the hearing led us to conclude that he remained unwilling or unable to ensure the serious concerns raised by the respondent were properly addressed.
99. Taken together, these failures, unfortunately, lead us to conclude that he was not willing or able to put in place the necessary systems to ensure the safe care and treatment of patients, or to provide good governance. We find our conclusion is proportionate because there is no realistic alternative.

Decision:

The appeal fails.

The Tribunal confirms the respondent's decision dated 4 September 2019, which is to cancel the appellant's registration.

**Judge McCarthy
Judge of the First-tier Tribunal**

Date Issued: 12 May 2020