

First-tier Tribunal Care Standards

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

NCN: [2023] UKFTT 577 (HESC)

Surbiton Home Care Management Limited

Appellant

v

Care Quality Commission

Respondent

[2022] 4710.EA

Before

Mr Laurence Bennett (Tribunal Judge)

Ms Jane Everitt

Mr John Hutchinson

Dates of hearing: 2 - 5 May 2023 at Royal Courts of Justice, London

Appeal

1. Surbiton Home Care Management Limited (Surbiton) appeals under Section 32 of the Health and Social Care Act 2008 (the Act) against the cancellation by the Care Quality Commission (CQC) dated 26 August 2022 of its registration as a Service Provider of Personal Care and under Section 28(3) of the Act in respect of the regulated activity, personal care at Surbiton, 94 Alexandra Drive, Surbiton, Surrey KT5 9AG issued pursuant to Section 1(1)(c) of the Act.

Background

2. On 3 August 2017 Surbiton was registered to provide the regulated activity of personal care.

3. Following CQC inspection in October 2019, Surbiton was placed and remains in special measures on 20 November 2019 and on 5 May 2020 in accordance with a consent order following appeal of a Notice of Decision to cancel registration, conditions were placed on Surbiton's registration.
4. Following CQC inspections during 2022, CQC issued a Notice of Decision to cancel Surbiton's registration as a Service Provider on 26 August 2022. This decision is the subject of this appeal entered on 21 September 2022.
5. On 18 October 2022 CQC conducted an unannounced inspection of Surbiton and on 31 March 2023, a further inspection took place.
6. In compliance with directions CQC has submitted a case summary and Scott Schedule. A revised Scott Schedule specified findings of successive inspections of the service since 2018 and following inspection on 7 April 2022, a failure to identify issues, make significant improvements, ensure collaborative working with stakeholders and ensure implementation of guidance provided by healthcare professionals. The Schedule identifies and enumerates breaches of Regulations 7, 12, 13, 17 and 18, following the 18 October 2022 inspection and Regulations 12, 17 and 18 and Section 33 following the 31 March 2023 inspection. It also specifies failures found on these inspections. At the hearing Ms Deignan recorded an amendment in respect of ground 66 to refer to failures identified from January 2023 and not October 2022.
7. The hearing bundle was submitted in electronic form PDF count 1,703. This included copies of witness statements, exhibits relevant to the appeal and case management and registration orders.
8. Page references in this decision relate to the paginated hearing bundle.

The hearing

Attendance

9. Mrs Fola Burrell Director and Registered Manager of Surbiton attended the hearing. She was represented by Miss Elizabeth Burrell, her daughter and subsequently Mr Keith Burrell, her husband.
10. Ms Mary-Teresa Deignan, a Barrister represented CQC. Ms Saima Qureshi, CQC Solicitor was in attendance. Its witnesses were Miss Louise Harrold, CQC Lead Inspector, Miss Sarah Hawkins, CQC Inspector and Miss Natalie Gourgaud, CQC Inspection Manager.

Proceedings

11. Oral evidence was given on oath or affirmation.
12. The Respondent presented evidence first.
13. There was insufficient time for the Tribunal to deliberate on the hearing dates. The Tribunal convened without the parties to determine the appeal.

Preliminary application

14. At the start of the hearing Mrs Burrell made an application for the hearing to be postponed. Although she was represented until shortly before the hearing, she had been informed by her Solicitor representatives that following the March 2023 inspection report her insurers will no longer cover representation.
15. Mrs Burrell stated she had been in contact with other Solicitors but because of Bank Holidays and the need for time to look at the papers, she had not been successful in obtaining representation. She gave some details of how she might fund representation hoping to take a loan for the purpose.
16. Ms Deignan objected to the application. She submitted it was obvious at an early stage this was a merit's appeal and there had been time for preparation. Despite this, there was only one witness statement from Mrs Burrell together with a brief comment from the son of a service user. The allegations and grounds in the Scott Schedule were denied but had not been the subject of specific response.
17. Ms Deignan pointed to the lack of a response following the inspection in March 2023 although she acknowledged that Mrs Burrell sought amendments in respect of factual information within that inspection. She highlighted the lack of detail of Mrs Burrell's case within the Scott Schedule.
18. Ms Deignan pointed to CQC's difficulties arranging attendance of witnesses. They are no longer employed by CQC. She also detailed how the Respondent could assist Mrs Burrell in identifying significant documents and accommodating her requirements to allow her to present her evidence.
19. The Tribunal adjourned in order to deliberate upon the application. It was noted that Mrs Burrell was represented until a week before the hearing after all documents had been prepared. It took into account the Tribunal's overriding objective and the potential prejudice to the parties both in respect of Mrs Burrell's participation and the Respondent's witnesses. The Tribunal kept in mind its ability to ensure Mrs Burrell could participate in proceedings and present her case and adjustments that could be made in the timing and pace of the appeal.
20. Taking into account the above, the Tribunal dismissed Mrs Burrell's application.
21. Following adjournment until lunchtime, Mrs Burrell made an application to withdraw her appeal.
22. The Tribunal set out ways in which it could construct the proceedings to ensure Mrs Burrell was able to participate and at that point adjourned until 3 May 2023 to give time for her to further consider her application. At the opening of the hearing on 3 May 2023 Mrs Burrell voiced her reservations whether she could express her opinions and present evidence. Following appointment of her daughter to speak on her behalf, she asked the appeal be heard.

Evidence

23. Miss Louise Harrold
Miss Harrold is currently Head of Quality Assurance of a large care organisation. At the relevant time she was an Inspector with CQC. She confirmed the contents of

her first and second witness statements (C45, C2065) to which she exhibited the parties' signed consent order dated 5 May 2022 comprising a previous Notice of Decision and appeal together with audited Action Plans, inspection reports and documents arising from inspections. Her second witness statement appended emails including items from Kingston upon Thames Local Authority.

24. Miss Harrold detailed her role and responsibilities with CQC. She was assigned Inspector for Surbiton on 28 July 2017 and noted the history of inspection, supervision and conditions and her own involvement in inspections including that of 7 April 2022 leading to the Notice of Decision now appealed.
25. Miss Harrold gave details of observations and evidence during the 7 April 2022 inspection matched against regulatory requirements. She gave similar information in respect of the inspection following the lodging of the appeal which took place October 2022 and conclusions reached.
26. In response to Mrs Burrell's questions regarding medicine administration records (MARs) for January, February and March 2022 observed during inspection, Miss Harrold stated she was not aware of other information or records which were not apparent from the MAR chart. On re-examination, she confirmed there was no evidence of records relating to Paracetamol.
27. In response to questions from the Tribunal, Miss Harrold gave information of the Birdie electronic system used by the Mrs Burrell and the scope of its basic functions. She commented that records about the number of service users did not always match and there was a possibility of a recording error in one instance. She clarified that it would not be good practice to have two MAR systems of record as this might produce inconsistencies. She explained her conclusion that placing conditions on registration was not appropriate as inspections revealed Mrs Burrell did not comply with earlier conditions. Actions plans had not been followed and Miss Harrold does not believe that Mrs Burrell has the skills to make the improvements necessary to ensure patient safety.
28. Miss Harrold explained difficulties caused by failures to attend service users at the appointed time. If unpredictable, this might affect the taking of medication and routines for example, getting out of bed. She restated that open and honest Action Plans are vital to ensure compliance and to monitor a service; it is clear that any conditions and plans would be monitored by CQC.

Witness:

Miss Sarah Hawkins

29. Miss Hawkins is now a Regional Quality Provider for a Housing Association. At the relevant time she was an Adult Social Care Compliance Inspector at CQC. Miss Hawkins confirmed the contents of her first and second witness statements (C2048, C2080) to which relevant inspection documents were exhibited.
30. Miss Hawkins set out her involvement in inspection of Surbiton on 2 April 2019. On other occasions she was second Inspector with Miss Harrold as Lead. She pointed to inspection evidence, findings and conclusions in respect of failures amounting to breaches of regulations.

31. Miss Hawkins' second witness statement includes her response to Mrs Burrell's stated decision to restructure Surbiton and overhaul paperwork and governance. She observed that this statement had been made after three earlier inspections and that Miss Hawkins is not assured that "The Provider is competent and understanding of the governance and oversight required to manage the Service....." Miss Hawkins made further observations upon Mrs Burrell's statement evidence.
32. In response to Tribunal questions, Miss Hawkins made observations and pointed to shortcomings on Care Plans. She found that a service user's death had occurred sometime after a 6 minute visit by Surbiton carers but the CQC had not been notified. She also cast doubt that this might have been investigated by Surbiton but without a record.
33. Miss Hawkins referred Surbiton to a CQC Management Review Panel to consider an appropriate level of enforcement. In this case it was agreed that the action taken, cancellation was proportionate based on the Risk Matrix. Miss Hawkins specified that service users were at risk of harm and there was the highest level of concern.
34. Miss Hawkins acknowledged there may have been difficulties with the Birdie system and by way of clarification that she expected a safeguarding referral to the Local Authority following the death of a service user as is a requirement for a Registered Provider.

Witness:

Miss Natalie Gourgaud

35. Miss Natalie Gourgaud was Inspection Manager at the CQC at the relevant time and is now a Senior Specialist, Social Care Inspection Directorate in the London Region responsible for inspecting providers across the area.
36. Miss Gourgaud confirmed the contents of her first and second witness statements (C1, C2085) and set out details of her inspection on 31 March 2023 "In order to provide an up-to-date view to the Commission and to the Tribunal." She noted a lack of notifications of events affecting the Service or incidents involving service users since the October 2022 inspection and the lack of audited Action Plans and staff rotas as required by Conditions of Registration agreed 11 May 2020.
37. Miss Gourgaud mentioned the discrepancies in MAR sheets, particularly in relation to service user B and the lack of a record in her care plan of choking risk. Similarly, she pointed to instances where the two care staff required for service users A and B who had hoists were not always in attendance at the same time, for example but her analysis of two weeks' worth of calls, showed attendance by only one worker on 14 February 2022.
38. Miss Gourgaud mentioned continued failures to monitor staff and provide the appropriate levels of service. She highlighted a failure to obtain prospective employee references for staff currently employed in care and noting the tasks to be completed during service user visits, could not see how they could be undertaken by one care worker during a seven minute visit. She concluded that such visits could not be reliable to deliver required input. She made additional comments arising from her analysis of the records.

39. Miss Gourgaud first became involved with Surbiton on 3 August 2017 following completion of its registration. She explained the direct monitoring approach instigated during Lockdown. On 23 February 2022, an assessment took place which led to the inspection on 7 April 2022. Following that inspection breaches of requirements were found and severity was assessed. An appropriate regulatory response was considered and it was decided to recommend a Notice of Proposal to Cancel Mrs Burrell's registration issued 26 August 2022.
40. Miss Gourgaud referred to concerns raised by Royal Borough of Kingston upon Thames (Kingston) relating to skills, understanding, competence and seeming inability to improve. She noted that Kingston has effected an embargo and no new service users have been placed since October 2019.
41. Miss Gourgaud said she felt the conditions imposed by the agreement concluding the earlier appeal would cover aspects of a well led service which at the time the Care Co-ordinator felt could be complied with. However, this was not to be the case and subsequent inspection has shown a lack of understanding of the duty of care, safeguarding and ensuring service users are respected. She felt that senior staff at Surbiton do not understand the regulations and are not able to work within them. Although Mrs Burrell "Deeply cares about the people she supports" this does not translate to a capacity to provide a well led service. Although users may be happy with those who come to their home, the level of service was not satisfactory.
42. Miss Gourgaud gave additional details of her findings on analysis of the sample two weeks records. She said Birdie is a well-regarded system with a low failure rate and should provide excellent management information records and alerts. Clearly, now the service only has two users it is not required but if in place it should be used. If that is not possible or if it proves unreliable, paper records should be available. She observed there was a level of disorganisation at Surbiton apparent throughout and staff did not have the capacity to effectively manage the provision. Despite opportunity and the passing of three years since the initial Notice to Decision to cancel Surbiton's registration, this persists and there is no observed improvement.
43. In response to Mrs Burrell's questions, Miss Gourgaud explained that the recruitment policy requires previous Healthcare Employer references for people who had previously worked in healthcare. She said that Mrs Burrell had not told her that she did not want to disturb existing employment relationships but in feedback said that she does not seek professional references.
44. In response to Tribunal questions, Miss Gourgaud acknowledged that a factual accuracy objection had been intimated in respect of the most recent inspection although no additional evidence had been submitted. She repeated that on her analysis of the fortnight, she was struck by the proportion of visits where only one care worker had attended and at the brevity and lateness of calls. Miss Gourgaud noted that Mrs Burrell had ten days' notice of the 23 March 2023 inspection. She said she was surprised when Mrs Burrell was registered as Manager in 2020 as she does not believe she has the skills. She wrote to the Head of Registration as she considered this was a failure of the system. She commented on the practicality of providing the required monthly reports and commented that the two weeks she had analysed were representative of the records she had seen. She had not seen such a high level of Manager attendance despite only two or three service users.

Witness

Mrs Burrell

45. Mrs Burrell confirmed her statement (D1). She stated she has turned a new page both in respect of audits and compliance. However, this is done in a different way adding gradually into the system. She said that currently she drives carers to service user appointments and picks them up after visits. Birdie is used as a smartphone but she directly observes staff as she is with them. She said there is a small training room in the office and carers have practical training including hoist training. New carers undergo an induction period and training is provided by video. This amounts to three days training to ensure safety. Mrs Burrell said that she accompanies staff for a period of two weeks to observe if they are happy. She would not leave them on their own until trust has been earned.
46. Mrs Burrell gave a history of the establishment of the business and acknowledged that Surbiton's paperwork was "not so great" but she had attempted to employ people for that purpose. She mentioned one employee paid £60,000 p.a. who was familiar with compliance but who unfortunately left. She has an employee who recruits staff and provides training. Mrs Burrell likes to go into the field in order to carry out assessments and know her service users. The two remaining service users have refused to leave.
47. Mrs Burrell said she respects CQC and pays to hire skills where she is lacking. She was concerned that CQC were looking to criticise her but every month something is sent to CQC. Mrs Burrell spoke about changes made to the office including staff and client folders, risk assessments, the use of Birdie and medicine records.
48. On referral by Mrs Deignan to the response to the Scott Schedule consisting in each case of 'deny' Mrs Burrell said she didn't accept the allegations, she denies them all and disagrees with CQC's findings. When taken through each of the issues identified, she disputed that the service is inadequate and considers CQC's findings in error or without proper basis.
49. Further evidence and submissions are referred to in our conclusions below.

The Law

50. The Regulatory Scheme and legal framework law is summarised in the skeleton argument prepared on behalf of the Respondent. The Tribunal is satisfied it is correct.
51. Section 3(1) of the Health and Social Care Act 2008 (HSCA 2008) provides that the main objective of the CQC in performing its functions is to "protect and promote the health, safety and welfare of people who use health and social care services."
52. Section 20 of the HSCA 2008 provides for the Secretary of State to make regulations in relation to regulated activities. The Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 set out the Fundamental Standards which providers must comply with when carrying out a regulated activity.
53. The relevant regulations in this appeal are regulations 7, 9, 11, 12, 13, 17, 18, 19 of the 2014 Regulations.

54. Regulation 21 of the 2014 Regulations provides that the registered person must have regard to the guidance issued under section 23 HSCA Act 2008. In relation to Adult Social Care, there is also guidance issued to CQC.
55. Cancellation of a provider's registration is contained in section 17 of the HSCA 2008, specifically that:
56. (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)..... (b)..... (c) on the ground that the regulated activity is being or has it any time being, carried on otherwise in accordance with the relevant requirements.
57. A regulated activity is defined as an activity of a prescribed kind by Section 8(2) of the HSCA 2008 as "the activity involves or is connected with, the provision of health or social care"
58. Section 4 HSCA of the 2008 provides that the CQC must have regard to various matters including the need to protect and promote the rights of people who use health and social care services and to ensure that action taken by them in relation to health and social care services is proportionate to the risks against which it would afford safeguards and is targeted only where it is needed.
59. The burden of proof is upon CQC who must establish the facts upon which he relies to support cancellation on the balance of probabilities.
60. The powers of the Tribunal on an appeal are set out in section 32 HSCA 2008. The issue is determined afresh and is not a review of the Respondent's decision. The Tribunal may take into account circumstances and evidence since the Notice of Decision was issued. It may confirm that decision to cancel or direct that it shall not have effect. In the latter case the Tribunal may impose conditions on the Appellant's registration or remove any of the current conditions.
61. In essence the Tribunal has to determine and make findings of fact about breaches of Relevant Requirements and If so, whether Cancellation of Registration is a proportionate and necessary step.

Submissions

- CQC
62. Ms Deignan's closing submissions on behalf of CQC refer to the skeleton argument and Scott Schedule. She put forward an amendment of the Respondent's case in respect of Scott Schedule item 74 to include a breach of Regulation 19 and as mentioned above, restricted the alleged failure in item 66 to since January 2023. In summary, she highlighted the history of seven inspections and responses to Action Plans which did not correlate with the matters to be addressed. Ms Deignan submitted that there was no documentary evidence supporting Mrs Burrell's assertion that failures could be attributed to faults in the Birdie system.
 63. Ms Deignan submitted that CQC does not dispute Mrs Burrell feels passionately about her service and provision to service users but she has responsibility for compliance and there has been a consistent failure which has not been fully

acknowledged nor had concerns been accepted. Accordingly, CQC concludes that Mrs Burrell lacks understanding of the regulations and the ability to comply.

Surbiton

64. Mrs Burrell's closing submissions restated evidence she gave about her methods of recruitment practices, training in the use of slings and hoists and her observations of carers when attending service users with them.
65. Mrs Burrell submitted that she follows the rules and regulations and she is neither attempting to avoid them nor denies they are appropriate. She said that inspections had not probed sufficiently to understand the efforts she has made nor did the results reflect the way she feels. She considers that on the occasions of inspection, CQC had predecided what they were going to find to justify cancellation. She commented about Birdie which she believes has some "unbalanced" functions.

Tribunal's findings

Witnesses:

66. We found the presentation of factual evidence provided by CQC witnesses as might be expected based on their inspection format and direct involvement. It was given in a straightforward and cogent manner, witnesses also reacted to evidence and information arising during the hearing, for example, in respect of ICT aspects (Birdie). Overall, we found witnesses giving evidence on behalf of CQC credible in respect of fact and their explanation of their opinions and judgement underlying theirs and CQC's actions.

Mrs Burrell

67. Mrs Burrell did not provide detailed evidence in ordered fashion. However, the Tribunal was able to elicit that her overall view is that she does not dispute the need for regulations but had endeavoured to comply in a way which had not been understood or found by CQC. Her evidence was vague in nature and whether intended or inadvertent lacked the detail that could be applied directly to issues for example, training, recruitment, practices, punctuality and duration of attendance on service visits. Her factual evidence was difficult to discern, vague and permeated with subjective feelings, all of which combined to cast doubt on its reliability. In some aspects Mrs Burrell appeared to develop positions as she progressed, for example the matters set out in this paragraph. In others, vagueness developed into somewhat contradictory evidence such as the possibility of taking another service user. This casts doubt on her veracity and reliability.

Scott Schedule

68. The numbering of allegations within this section correspond with the Scott Schedule which for convenience forms an annex to this decision.
69. Mrs Burrell's written response endorsed on Scott Schedule is denial. No further details were provided at that stage. Her written statement did not cast light on the reasons for denial nor provide an insight into the nature of her rebuttal of CQC's scheduled grounds. She acknowledged in her sworn oral evidence that previous inspection findings were matters of record although we note she queries the factual accuracy of the latest inspection, shortly prior to the hearing.

70. Mrs Burrell denies some specific matters although the nature of her denial is unclear, for example, she indicated there were alternative medical records in respect of inaccurate MAR sheets or that the type of medication need not be recorded. Similarly, she did not accept a connection between the service users death and her registration and reporting requirements under Section 33 of the Act.
71. We have considered each of the grounds set out within the Scott Schedule. In each case we have traced through the evidence within the bundle including source material such as care records, audits and action plans, witness statements and the oral evidence given at the hearing. We have commented regarding the death of a service user above. Save in respect of ground 39 in the Schedule, we find each are established by the evidence and show a breach of regulation specified.
72. Scott Schedule grounds relating to inspection findings prior to 7 April 2022 are matters of record. Whilst Mrs Burrell made comments of a general nature about their veracity, the evidence is plain and we consider them established.
73. Scott Schedule ground 39 refers to gaps in a training matrix, this is found at C122. We have noted the evidence provided by Miss Harrold however, we have insufficient information to be persuaded that a finding can be made on that point. The gaps do not appear apparent.
74. We find there have been continual failings over seven inspections. We are concerned at the risk of harm to the two current service users. Mrs Burrell's own evidence shows that their packages of care are not delivered appropriately. Analyses carried out by Miss Gourgaud in respect of the two week period in February 2023 (C2746) and data from July and August 2022 (C133) and February to March 2022 (B32) are self-evident. We note previous measures, particularly conditions on registration and placement in special measures have not been successful. The most recent inspection albeit subject to a factual accuracy check shows similar issues.
75. Mrs Burrell acknowledges she did not report the death of a service user. We note that it is not suggested there is a direct connection or causation with her service, however, Section 33 of the Act requires that such matters are reported. As she acknowledged, she has not done so; this is well founded. This also constitutes a failure under Regulation 18 of the Registration Conditions.

Tribunal's conclusions

Scott Schedule: Summary

76. We find each of the allegations relied on by CQC within the Scott Schedule were established save as noted above. We accept that some matters are serious and relate to fundamental requirements for CQC to be able to be satisfied the service provided by Mrs Burrell does not pose a risk to service users. Regulatory interaction should routinely benefit both the Registrant and the Regulator. This is clearly not the case; Mrs Burrell appears to have suspicion about regulatory interactions considering they are predetermined and do not take into account her approach to the service.
77. From our findings in relation to grounds within the Scott Schedule we conclude that there have been persistent breaches of the Regulations set out in paragraph 6

above. In particular we conclude on each inspection occasion there have been breaches in respect of Regulations 12 and 17 which relate to safe care and treatment and good governance.

78. The essence of Mrs Burrell's oral evidence is that she has taken some steps including the use of Birdie and hiring appropriate employees and that time should be allowed for the service to improve.
79. Taking into account the history we found that Mrs Burrell as the Registered Provider has not developed throughout her time operating the registered service. Although some matters are old, her continuing non-observation and reluctance to provide clear and accurate records, whether or not because of reluctance or lack of competence is entrenched. Mrs Burrell correctly points out there have not been complaints from a service user, we accept no evidence of such was put forward. Despite the opportunity of reflection since the Notice of Intention and prior since the agreement settling the previous appeal, we have little reason to conclude Mrs Burrell is either more aware or able to conform to CQC requirements.
80. We do not have confidence that Mrs Burrell has the competence, expertise or resources to adequately conform to requirements and we have no confidence in the continuing service to existing service users or its expansion to others being safe or well led.
81. We accept that Mrs Burrell is committed to her service and individual service users. She clearly has good intentions but the evidence that she is unable to effectively manage or provide a service that complies with expected standards to ensure the safety and wellbeing and her obligations to service users is overwhelming. Each of the inspections points to shortfalls; we have not found persuasive evidence that indicates those findings are in error or exaggerated.
82. Overall, we conclude Mrs Burrell's continued registration may place service users at risk and that cancellation of registration is both necessary and proportionate as conditions have not demonstrably or satisfactorily addressed the risks posed.
83. Accordingly, we conclude that the CQC's Notice of Decision was accurate and appropriate and should be confirmed.
84. Care requirements are not being delivered, for that reason we conclude it is proportionate that registration is cancelled.

Order

85. Surbiton's appeal is dismissed.

Judge Laurence Bennett

First-tier Tribunal (Health, Education and Social Care)

Date Issued: 04 July 2023