



OUTER HOUSE, COURT OF SESSION

[2019] CSOH 112

P1138/19

OPINION OF LORD PENTLAND

In the petition

ALISTAIR GAIR

Petitioner

for

JUDICIAL REVIEW

Petitioner: Duncan QC; Clyde & Co
Respondent: Khurana QC; NHS Scotland Central Legal Office

27 December 2019

[1] On Friday 13 December 2019 the petitioner moved for *interim* suspension of a decision made on 3 December 2019 by Dumfries and Galloway Health Board, the respondents, to suspend him with immediate effect from its dental list. Having heard oral submissions from Mr Duncan QC on behalf of the petitioner, I continued the motion until Wednesday 18 December 2019 at the request of Mr Khurana QC, who appeared for the Board, so that he could take further instructions and obtain additional information. Having heard both sides at the continued hearing, I announced my decision to grant the petitioner's motion. The following is a revised version of the reasons I gave at that time. The substance of my reasoning has not been changed.

[2] The background to the motion may be summarised as follows. The petitioner is a registered dentist. He has been in practice in the United Kingdom since 1994 having graduated from the University of Glasgow in 1987 and having then spent a spell working in Trinidad and Tobago. He seeks judicial review of a decision taken by the respondents on 3 December 2019 to suspend him from its dental list.

[3] In terms of regulation 4 of the National Health Service (General Dental Services) (Scotland) Regulations 2010 (“the 2010 regulations”), the Board requires to prepare and maintain a list known as the dental list. Included within the dental list are the names of those persons who have undertaken to provide general dental services in the Board’s area and whom the Board has approved to assist in the provision of such services.

[4] Regulation 10 provides *inter alia* that a dentist included on the dental list requires to “exercise a reasonable standard of professional and clinical judgment, behaviour, skill, knowledge and care towards patients” and that the dentist requires to comply with the terms of service provided for by the relevant part of the 2010 regulations.

[5] Regulation 11 makes provision for suspension from the dental list. It provides *inter alia*:

“(1) If a Health Board is satisfied that it is necessary to do so for the protection of members of the public, or is otherwise in the public interest it may suspend a dentist ... from its dental list in accordance with this regulation –

- (a) while it considers whether to remove that person from its dental list under regulation 12;
- (b) while it waits for a decision affecting that person of a court anywhere in the world, or of a licensing or regulatory body;

...

(2) In paragraph (1)(b) ‘decision’ means the final determination of the relevant proceedings, after any appeal or other review procedure has been exhausted.

...

(14) The Health Board shall notify the dentist or body corporate (as the case may be) of its decision and the reasons for it (including any facts) relied upon within 7 days of making that decision.”

[6] The petitioner has been on the respondents’ dental list since 1994. He avers that he joined the St Andrews Street Dental Surgery in Castle Douglas as an associate in April 1994. In 1999, upon retirement of the then practice principal, the petitioner purchased the business. He continued to work in the practice as a single-handed principal until February 2018. At that time he sold the business to a couple, one of whom was a dentist. The petitioner avers that he agreed to continue working as an associate within the practice, which the new owners rebranded as Dental Bees. Unfortunately, according to the petitioner’s averments, relations between him and the new owners soured. He determined to resign. Shortly after his resignation the petitioner secured employment with a different practice, the Blue Door Practice, in Dumfries. He worked for that practice one day a week, while for the other four days, he worked his three month notice period with Dental Bees.

[7] The petitioner goes on to aver that relations with the owners of Dental Bees deteriorated further at this point. His wife contacted the Dental Bees’ practice manager to complain that the petitioner was being bullied. The following day the practice manager provided the petitioner with a box and instructed him to clear his desk and to leave.

[8] The petitioner’s averments continue by stating that he immediately began work with the Blue Door Practice on a full-time basis. He says that soon after he commenced and without any solicitation on his part former patients from his previous practice sought appointments with him at the Blue Door Practice.

[9] Shortly after that, according to the petitioner’s averments, on 16 November 2019 he received a letter dated the previous day from the respondents. The letter advised that concerns had been raised with the respondents about aspects of the petitioner’s care and

treatment. The letter further stated that a number of patient records had been provided to the respondents, that these had been reviewed by Mr Peter Ommer, Director of Dentistry, NHS Ayrshire and Arran, and that Mr Ommer had reported to the respondents that from the evidence reviewed by him he had identified serious concerns about the petitioner's clinical performance. Finally, the letter stated that the respondents' dental reference committee had considered matters on 14 November 2019, that it had considered an allegation that Mr Ommer's findings amounted to breach of the dental list terms of service provided for in the 2010 regulations and that it had determined that there should be a reference to the General Dental Council ("GDC") and that the petitioner should be invited to attend an oral hearing to consider a suspension from the dental list pending the outcome of the referral to the GDC.

[10] Thereafter, an oral hearing took place before a committee of the respondents on 28 November 2019. The committee was not accompanied or supported by a legal advisor or assessor. The petitioner was represented by Mr Graham Watson, solicitor of Messrs Clyde and Company. The petitioner avers that Mr Watson provided a detailed oral submission on a number of matters: the legal basis and test for suspension from the dental list, whether the test was met in the petitioner's case, the factual background to the concerns raised and the petitioner's response to these. The petitioner states in his averments that Mr Watson submitted that, in the whole circumstances, the test for suspension was not met, that an order for suspension would be premature and that the concerns raised were at the lower end of seriousness and presented no evidence of a real risk of harm to patients. The petitioner's averments state that in support of those submissions Mr Watson drew attention to certain evidence, including the petitioner's personal development plan, assessments of treatment by

the dental reference officer and various testimonials and thank you letters from colleagues and patients.

[11] Under cover of a letter dated 3 December 2019 the respondents provided the petitioner with written notice of their decision to suspend him from the dental list. The notice advised that the petitioner was suspended and would remain so pending the outcome of the referral to the GDC. The notice also provided that “in the event of the outcome of the referral to the GDC the petitioner will remain suspended for an additional period of two weeks”.

[12] Section 4 of the notice was headed “Reasons for Suspension”. It was in the following terms:

“In accordance with the provisions of NHS (GDS) Regulations 2010, Regulation 11, suspension of the Dentist, Mr Alistair Gair, will take effect (sic) immediate effect pending the outcome of a referral to the General Dental Council on the grounds that there has been a breach of paragraph 22 (a) and (d) of the Terms of Service, as set out in Schedule 1 of the NHS (General Dental Services) (Scotland) Regulations 2010. It is alleged that the practitioner has not: (a) employed a proper degree of skill and attention; and (d) not provided the care and treatment to such extent and at such intervals and (sic) may be necessary to secure and maintain the oral health of the patient.”

[13] It is important to note that regulation 11(1) of the 2010 regulations makes clear that a Health Board’s discretionary power to suspend a dentist may only be exercised if the Board is satisfied that it is necessary to do so for the protection of members of the public or is otherwise in the public interest. Whilst Mr Khurana was instructed that the Board had considered the statutory test in its deliberations, he frankly acknowledged that the reasons contained in the notice failed to address the test and were inadequate. In my view, that concession was properly made and was indeed inevitable. The reasons fail to engage with the statutory test. Moreover, there is nothing in the five page record of the proceedings at the hearing which touches on the statutory test or suggests that the committee considered it.

In these circumstances, Mr Khurana fairly accepted that the petitioner had set out a *prima facie* case in the petition. I agree. It seems to me that the petitioner has a strong *prima facie* case that the respondents have failed to comply with the requirements of regulation 11(1) of the 2010 regulations.

[14] Where a petitioner has a strong *prima facie* case it will often be convenient to grant *interim* relief. Nonetheless, Mr Khurana submitted that the respondents' decision should not be suspended *ad interim*. He referred to the fact that an independent investigation had been conducted by Mr Ommer, who is the director of dentistry at Ayrshire and Arran Health Board. Mr Ommer had reviewed the records of ten patients whom the petitioner had previously treated and had identified a number of failings on the part of the petitioner; he considered that these amounted to serious concerns regarding the petitioner's clinical performance. The difficulty is, however, that on the evidence which has been produced to the court, Mr Ommer did not support the view that it was necessary for the protection of members of the public or in the public interest to suspend the petitioner. Moreover, it seems to me that there is force in the submissions made by Mr Duncan that to a large extent the criticisms relate to matters of record keeping and to the petitioner's practice in regard to the taking of x-rays.

[15] Mr Duncan submitted that the suspension would have a serious effect on the petitioner's reputation and on his ability to earn a living. Whilst the petitioner would be free to do private work whilst suspended from the dental list, he does not have a significant private practice.

[16] In my opinion, the suspension of a dentist from the dental list is likely to have a serious impact on his standing and reputation, as well as on his ability to practice his profession. It is, therefore, important to ensure that such a step is taken in accordance with

the applicable statutory framework. Unfortunately, on the evidence before me, that has not been done in the present case. I consider that the right course for the court to take, in the whole circumstances, is to grant the petitioner's motion for *interim* suspension of the Board's order of 3 December 2019.