Care Standards

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

IN THE FIRST-TIER TRIBUNAL CARE STANDARDS

[2014] 2255.EA

Heard on 16 September 2014 in Birmingham

BEFORE

JUDGE MELANIE PLIMMER
SPECIALIST MEMBER MR GRAHAM HARPER
SPECIALIST MEMBER MR MIKE FLYNN

BETWEEN

MU'GBORTIMA CARE SERVICES

Appellant

-v-

CARE QUALITY COMMISSION

Respondent

DECISION

Representation

The Appellant was represented by Mr R Tyson (Counsel)
The Respondent was represented by Mr I Macdonald (Counsel).

1. Mu'Gbortima Care Services ('MCS') is a limited company registered with the CQC to provide regulated activities in three areas: (i) accommodation for persons who require nursing or personal care; (ii) personal care; (iii) treatment of disease, disorder or injury. MCS appeals against a decision dated 21 July 2014 to impose a condition on its registration as a service provider of those regulated activities. The condition is as follows:

> *"Until 18 January 2015, the Registered Provider must not admit any service users to [MCS] nor provide any personal care without the prior written agreement of the [CQC]."*

Hearing

2. The parties agreed at an earlier directions hearing that the appeal before us would proceed by way of submissions only. We reconsidered this issue after receiving detailed evidence contained in three lever arch files, together with outline written submissions from both representatives. We decided that it was appropriate for the appeal to proceed by way of submissions only, with which both representatives agreed. Over the course of a day we heard detailed submissions from both representatives.

3. At the beginning of the hearing we permitted Mr Tyson permission to rely on a witness statement from Ms Murby that had not been filed in accordance with directions. The witness statement was filed and served very late. This is to be regretted particularly since its contents relate to the inspections that took place back in July 2014. We do not consider that the statement causes the CQC any real prejudice as Mr Macdonald acknowledged that he was in a position to make submissions on its contents and to take the Tribunal to evidence that had already been served in order to address its contents.

4. MCS seeks a finding that, having regard to all the circumstances, the condition imposed is disproportionate and that no conditions are necessary. Alternatively, MCS proposes a number of other conditions for the Tribunal it considers appropriate for the Tribunal to direct. The CQC submits that the concerns are sufficiently significant and immediate to justify the condition imposed and the appeal should be dismissed.

5. At the end of the submissions we reserved our decision, which we now provide with reasons.

Legal framework

6. The legal framework is agreed between the parties. The appeal is brought under section 31 of the Health and Social Care Act 2008 ('the 2008 Act') against the CQC's decision to impose an additional condition.

7. Section 31 provides:

> *"**Urgent procedure for suspension, variation etc.***
>
> *(1) If the Commission has reasonable cause to believe that unless it acts under this section any person will or may be exposed to the risk of harm, the Commission may, by giving notice in writing under this section to a person registered as a service provider or manager in respect of a*

regulated activity, provide for any decision of the Commission that is mentioned in subsection (2) to take effect from the time when the notice is given.

(2)Those decisions are—

(a) a decision under section 12(5) or 15(5) to vary or remove a condition for the time being in force in relation to the registration or to impose an additional condition;

(b) a decision under section 18 to suspend the registration or extend a period of suspension.

(3)The notice must—

(a) state that it is given under this section,

(b) state the Commission's reasons for believing that the circumstances fall within subsection (1),

(c) specify the condition as varied, removed or imposed or the period (or extended period) of suspension, and

(d) explain the right of appeal conferred by section 32."

8. The Health and Social Care Act 2008 (Regulated Activities) Regulations 2010 (SI 2010/781) set out a number of important requirements that a registered provider must comply with. The most relevant regulations to this case are summarised below.

9. Regulation 8 imposes a requirement on the service provider that it "*must*, *in so far as they are applicable, comply with the requirements specified in regulations 9 to 24 in relation to any activity in respect of which they are registered*".

10. Regulation 9 requires that proper steps are taken to ensure that each service user is protected against the risks of receiving care or treatment that is inappropriate or unsafe by means of inter alia, assessments and planning. The Regulation requires that care is planned and delivered in such a way as to ensure not just the "*safety*", but the "*welfare*" of each individual service user.

11. Regulation 10 requires appropriate systems in place to assess and monitor service quality and to "*identify, assess, and manage*" risks relating to the "*health, welfare and safety of service users and others who may be at risk from the carrying on of the regulated activity*".

12. Regulation 14 requires service providers to ensure that service users are adequately protected from the risks of inadequate nutrition and hydration.

13. Regulation 21 requires suitability of workers employed as well as the requirement to ensure that a written explanation of any gaps in previous employment is available and that a criminal record certificate is available. Regulation 23 requires the service provider to support staff appropriately and to enable those staff to deliver care and

treatment to service users safely and to an appropriate standard including by receiving appropriate training, supervision, professional development and appraisal.

14. The powers of the Tribunal can be found in section 32 of the 2008 Act. Essentially the Tribunal may either confirm the CQC's decision or direct that it shall not have effect (s 32(5)). The Tribunal also has the power to vary any discretionary condition, to direct that any such discretionary condition is to cease to have effect and to direct that any such discretionary condition as the Tribunal thinks fit shall have effect (s 32(6)). The burden of proof is upon the CQC to establish that the relevant test in section 31 of the 2008 Act is met. The Tribunal must decide for itself whether that test has been met and what conditions if any should be directed on the basis of all the evidence available at the date of hearing.

15. Mr Tyson emphasised that section 31 is an urgent procedure and the question for the Tribunal is whether on the date of hearing the Tribunal has reasonable cause to believe that unless conditions are imposed urgently there may be a risk of harm. Mr Macdonald agreed with this approach and we have approached our findings with this test in mind.

Background

16. The background history can be summarised because it is largely agreed.

17. MCS was registered to provide personal care from 2009. This service was subject to an unannounced inspection in 2012 and an announced inspection in 2013. Both inspections found that the provider was meeting all the requirements. From 5 February 2014 MCS was registered by the CQC to provide accommodation for persons requiring nursing or personal care and treatment of disease, disorder or injury. In order to be registered the CQC was obliged to inspect the premises and conduct an interview. These found that MCS met the relevant requirements for registration of the additional activities and after this MCS began to operate a care home in Northampton. The first service user arrived in May 2014 and stayed for 10 days and two other service users arrived after this. MCS continued to provide personal care in service users' own homes.

18. MCS is owned by Ms Smith. She is a Registered Mental Health Nurse ('RMHN') and worked in hospitals and care homes for many years before setting up MCS in 2009.

19. As early as June 2014 and when the care home only had two residents, Ms Smith realised that she had taken on too much. In her own words she "*took her eyes off the ball*". On 27 June 2014 the relevant Clinical Commissioning Group ('CCG') informed the CQC of concerns about the service provided by MCS. These concerns

included issues with documentation such as missing or inadequate care plans and assessments in addition to a general lack of policies and procedures.

20. On 30 June and before the CQC contacted Ms Smith she requested a voluntary block on further service users in order to put appropriate systems in place. On 4 July Ms Smith instructed BKR Care Consultancy Ltd ('BKR') to advise and implement measures to meet the relevant requirements.

21. The CCG's concerns also prompted the CQC to inspect the care home on 7 and 8 July. This inspection found conditions justifying the concerns expressed by the CCG and in turn prompted an inspection of the personal care regulated activity on 9 July 2014. This disclosed serious shortcomings such as defects with the staffing rota for the provision of care.

22. On 9 July 2014 the two resident service users at the care home were transferred to alternative accommodation by the CCG and arrangements were made for all users receiving personal care from MCS to receive alternative provision. The CQC made a decision to impose a condition with immediate effect pursuant to section 31 of the 2008 Act. Notice of that decision was sent to MCS on 21 July 2014 and this was appealed on 18 August 2014.

Evidence

23. The CQC relies upon witness statements from the four officers who were involved in the July inspections. Each of them gives detailed evidence, supported by contemporaneous notes, of the conditions found at the care home and the lack of systems and leadership in place at MCS. That evidence is also summarised in the decision notice.

24. MCS relies upon three statements: a lengthy and detailed statement from Ms Smith, and two from BKR consultants. Ms Keane-Rao's statement exhibits a document referred to as an "action plan". This indicates that steps can be taken to place MCS in a compliant position by 1 October 2014. The action plan also includes an assessment of MCS's current position, which is described in the following terms:

> *"The current position for Mu'Gbortima Care Services is that it is not ready to admit any client for the following reasons:*
> - *Staff group are not ready, they require training, DBS checks etc.*
> - *Lack of leadership*
> - *Required paperwork is not fit for purpose*
> - *There remains issues regarding the transport of food and medication upstairs from the kitchen in the basement"*

25. Ms Murby's statement supports the assessment of Ms Keane-Rao that the CQC interrupted the process of rectifying the deficits at MCS. They both assert that there was no immediate reason to remove service users from the care of MCS.

26. Although we have not specifically referred to every single document in this decision we have paid particular attention to the documents brought to our attention in the written and oral submissions (including MCS's tabular response to itemised issues in the notice letter) but have also read and taken into account all the evidence in the three bundles.

Findings of fact

Ms Smith

27. We acknowledge and have taken into account a number of impressive aspects of Ms Smith's role as a carer and provider of registered activities. First, from 2009 Ms Smith provided entirely compliant domiciliary care services. The service provider was inspected in 2012 and as recently as October 2013. Those inspections speak about the service provision in very favourable terms. These inspections conclude inter alia that there were adequate systems in place to ensure the safety and welfare of service users.

28. Second, domiciliary and residential service users and their family members have provided detailed, personal and touching supportive testimony of the services they received from Ms Smith and MCS. The CQC accept that this is not a case in which any service user came to any harm and the credibility of the service users' supporting evidence has not been questioned. Mr Tyson invited us to find that this evidence amounted to very powerful cogent testimony of the excellent services provided. We agree that this is an important factor to take into account but we do not regard this evidence as determinative of the issues we must decide. All relevant evidence must be considered in the round.

29. Third, Ms Smith has recognised that by June 2014 there were a number of serious difficulties at MCS. We accept that she took important steps to rectify these difficulties and has demonstrated some insight into the nature and extent of the problems. She asked the local authority to place a 'voluntary block' on new residents and she engaged a consultant. Mr Tyson has asked us to regard it as crucial that these steps were taken before the CQC inspections. That is correct but must be seen in context. The relevant CCG had already contacted the local authority because of serious and extensive concerns. These included systematic omissions and concerns regarding assessments and staff. There were also specific concerns relating to a failure to conduct a pre-admission assessment for one service user and as such the care home was unaware of his swallowing difficulties.

30. We do not accept on the evidence available that there is any reason to impugn Miss Smith's honesty and integrity. Ms Smith was very upset during the course of the inspections and we consider this probably explains any misunderstandings that arose. We note that it is alleged that Ms Smith indicated that she was a Registered General Nurse ('RGN') in addition to being a RMHN. We have been taken to the relevant documents to demonstrate that Ms Smith has been honest about her nursing qualifications and we consider that on the evidence available to us any discrepancies in her qualifications that arose was not intentional. There was no requirement for MCS to have a RGN, although it was necessary for there to be a registered nurse. Ms Smith fulfilled this requirement by being a RMHN.

31. We have concluded that Ms Smith is a person who is willing and potentially able to work with others so as to properly provide the relevant regulated activities in accordance with the relevant Regulations. We are nonetheless very concerned that although Ms Smith was able to enjoy a sustained period of compliance whilst running a smaller organisation providing personal care, a large number of serious failings and breaches of the Regulations have been identified during the July 2014 inspections, many of which are now accepted.

July inspections

32. We are satisfied that MCS was in breach of a number of Regulations, as set out in the CQC inspection report. We find that the evidence supports the robust assessment of Ms Hannelly, the interim Head of Inspection for Adult Social Care in the Central Region, when she visited the care home on 8 July. She found "*there was a complete absence of managerial and clinical leadership*" and that the provider was clearly failing to evidence she was safeguarding people in her care thereby placing them at risk of harm [5]. She also found that "*the care and staffing records in the home were in such disarray that it was impossible to build a picture of the individual people in the home, their needs and whether these were being met*" [4].

33. We note that in a number of important respects, Ms Smith accepts the criticisms made in the inspections especially those regarding the paperwork surrounding staff rotas, domiciliary service users and insufficiently detailed care plans and assessments.

34. It is also significant that the independent analysis conducted by BKR supports many of the key CQC findings.

Our key concerns

35. The CQC has divided its concerns about MCS into five areas. We however wish to emphasise that we have reached our decision having considered all the evidence on a cumulative basis. We are particularly

concerned about the absence of systems / assessments to ensure the care and welfare of service users, together with the poor leadership and management demonstrated at the service provider.

36. We agree with the CQC that there were serious deficiencies in documentation and procedures which were crucial to the care and welfare of the two residential service users who were in occupation at the time of the inspection. This included, inter alia: no documentation to show that a pre-admission assessment had been carried out; no risk assessments in relation to the effects of pressure on the body; no nutritional risk assessments or assessments relating to swallowing or choking risks; no assessment of the risk of entrapment in bed rails; limited risk assessments relating to moving and handling patients and care plans for these were contradictory; inadequate documentation to monitor the fluid intake by patients; inadequate policies and procedures generally.

37. We acknowledge that the above failures did not lead to any actual harm and it appears that the two service users were happy with their care. We accept Ms Smith's assertion that day to day care met the relevant standards. The requirement for assessments and compliance with procedures and policies is not merely bureaucratic. These are explicit requirements within the relevant Regulations. Their absence increases the risk of mistakes based on ignorance of important issues. The purpose of these requirements is to ensure that appropriate levels of care are provided and can be evidenced, and in order to avoid risk of harm in the future. We regard the nature and extent of the deficiencies to be very serious indeed. Ms Smith has indicated that she did carry out pre-admission assessments for the two residents but they were not recorded in writing. Records are important to ensure that all staff provide good quality and consistent care in accordance with identified needs. Where such records are absent there is an obvious and immediate risk of harm by staff unfamiliar with the specific needs of that person.

38. The absence of clear and effective systems / paperwork and management / leadership within the care home can also be found in MCS's provision of personal care in the community. We acknowledge that previous inspections found that the requirements were being complied with. It is however our view that Ms Smith was simply unable to effectively manage <u>both</u> residential and domiciliary care and this led to a significant deterioration in the systems in place to effectively manage the domiciliary care aspect of the organisation, notwithstanding the extremely positive references from those service users.

39. Ms Smith was unable to provide the inspectors with the exact number and names of the service users to whom MCS provided domiciliary care. This should have been easy to check if proper systems were in place. We accept that the staff rota supplied did not refer to one of the

service users at all. This is admitted by Ms Smith but she asserts that "*care calls would have gone ahead regardless of what was contained in the rota*". We agree with the CQC that this is a worrying assertion, because it suggests that Ms Smith did not expect her staff to pay any attention to the rota, but expected them to maintain their own schedule of calls.

40. There was also inadequate documentation in place for a number of these service users. This included out of date manual handling instructions, an absence of risk assessments relating to pressure ulcerations and important information being absent from care plans.

41. The absence of proper management and systems is also reflected in concerns that arose regarding safe recruitment procedures and training and supervision of staff. We accept that two staff records contained no evidence of CRB or DBS checks. A further staff file only contained a DBS check from a previous employer. There were other deficiencies in terms of proof of fitness to practice and physical fitness to perform the relevant tasks. The majority of staff files contained no record of induction training and evidence of subsequent training carried no information as to the content or quality of that training. Although Ms Smith asserts that she has provided induction and training, BKR have clearly concluded that "*staff are not ready*".

42. BKR did not seek to distinguish between the residential and domiciliary care services. We agree that they were correct not to do so.

Section 31 test

43. Although no service user was caused harm, we find that there are reasonable grounds to believe that they were at risk of immediate harm such that the use of section 31 was justified and remains justified. We reject the submission that the concerns merely related to paperwork and are therefore insufficiently serious. The concerns were and remain systematic and wide-ranging. Absent appropriate systems in place the service users are at risk of harm notwithstanding the best intentions of Ms Smith.

44. We have considered the evidence from BKR that the risk of harm was not immediate and there was no need to take urgent action in July. We do not accept this evidence. It is patently inconsistent with BKR's own findings. After all, BKR's most up to date assessment is that staff are not ready, there remains a lack of leadership and the required paperwork is not fit for purpose. This is a simple and straightforward way of saying that MCS is not compliant with key Regulations and urgent steps are necessary to rectify these.

45. We also consider that BKR have been inconsistent regarding the timescale necessary to rectify the serious deficiencies identified. In her statement Ms Keane-Rao indicated that improvements had already

commenced and that without the involvement of the CQC all outstanding issues would have been successfully dealt with by 11 July i.e. within a period of five days. More recently Ms Keane-Rao has produced an action plan in order to outline inter alia a realistic time frame for achieving compliance. This provides a time frame of 1 October 2014 is realistic. This suggests that more than five days is necessary to make the required changes.

46. We also find that on the evidence available to us there is reasonable cause to believe that both residential and domiciliary servicer users may be exposed to the risk of harm, if the condition imposed were to cease to have effect at this juncture. If service users were to be permitted to return to MCS they would be returning to a provider which still has not rectified the identified deficiencies. That this is so is self evident from BKR's updated assessment. BKR have identified that sweeping changes need to be made before MCS can be said to be ready to admit service users. These include: a review of the environment; the introduction of care assessment tools; introduction of robust staff recruitment and rota procedures; comprehensive staff training; introduction of a robust quality assurance system; appointment of a manager. Unless and until robust changes are successfully implemented it is our firm view that there will be a breach of the Regulations and there is reasonable cause to believe that service users may be exposed to the risk of harm.

Premises

47. The CQC has drawn our attention to certain alleged deficits in the newly adapted building used to provide the residential care. It is troubling that the CQC has only sought to draw attention to these deficits in July 2014 when the very same building was inspected by the CQC in the course of MCS's successful application to provide additional regulated services in the form of residential care earlier in the year. This recommendation was signed off by a line manager. We are told that the CQC has commissioned an investigation into the registration process and that remains ongoing.

48. Mr Macdonald made it clear that the CQC did not suggest that the deficits in the premises on their own met the section 31 test but rather that all of the concerns together (including the premises) meant that the test was met. On the evidence available to us we are satisfied that it cannot be said that there are reasonable grounds to believe that the premises are such that there will always be an impermissible risk of harm. It seems to us that the CQC's more recent concerns regarding the premises can be addressed appropriately. Although there is a risk of falls given the three floors with stairs these could be addressed by risk management planning, safety equipment, correct allocation of rooms (there are two ground floor en suite rooms). We note that in recommending registration it was noted that risk management planning would be submitted. We are not clear why a passenger lift to the top floors is necessary when stair lifts are available. We consider that

concerns regarding the use of hoists and commode chairs are likely to be based on misunderstandings but are in any event remediable.

Proportionality

49. In considering whether the condition imposed is a proportionate one we have had regard to all the evidence available to us. In our view the condition as currently drafted is necessary to avoid service users coming to a risk of harm and is in all the circumstances proportionate.

50. We have been invited to find that it would have been more appropriate to require MCS to comply with an action plan or to issue a warning notice. The CQC was obliged to consider whether or not urgent steps needed to be taken under section 31. We are satisfied that matters were so chaotic and remain so unsatisfactory that the only means of protecting service users was to take urgent action. We consider that this was largely supported by other agencies including the CCG and the local authority involved. The nature and extent of the concerns identified by the CCG are serious and they acted immediately to inform the relevant agencies of their concerns. The local authority was not content to give Ms Smith the 28 days she requested to put things right and gave a short window of seven days.

51. We note that BKR has been involved with MCS since 6 July. At that stage they considered that they could have the care home compliant by 11 July. This process was interrupted by the inspections but we have not been told why the process of making MCS compliant has not continued after that date and why at the date of hearing MCS seem to be no further forward in making improvements than they were in July. We have not been given any explanation why BKR were not instructed to begin work in August and September. We simply do not understand why systems have not been put in place already and why no steps have been taken to begin improvements. We asked Mr Tyson to clarify why the action plan had not been initiated. He was without instructions on this but conceded there was no evidence available to explain why the steps that were now being proposed now had not been taken in August and September.

52. This means that the Tribunal has no improvements to consider and is being asked to endorse conditions in relation to improvements which have not even begun, and which are hypothetical. We have given careful consideration to the alternative conditions suggested by Mr Tyson and BKR but we do not consider that the proposed conditions are satisfactory or appropriate at this stage. It is said that a manager will be appointed or provided by BKR but we have not been told who that is and when s/he can start. We have been told that a large number of policies and procedures can be introduced within two weeks. It has not been explained why it was believed this could have been done in a shorter time scale in July or why these have not already been introduced to enable us to consider them. We have been told

that staff will be trained but we have not been told which staff are available to be trained. In addition, the Tribunal has the disadvantage of not knowing whether the steps proposed will have the effect desired. Mr Tyson has submitted that the conditions he proposes would provide "*a practically risk free service".* We do not agree. The mere introduction of a manager, procedures / policies and staff training will not necessarily mean that the provider becomes compliant. Much will turn on the quality and effectiveness of these matters and there is simply insufficient evidence to assure the Tribunal that all of these matters can be fully and effectively completed within the timescale provided.

53. We consider that the proper way forward is not for the Tribunal to direct a number of prescriptive conditions but rather for MCS to make the improvements that it and MCS acknowledges are necessary and for an application in writing to be made to the CQC to admit service users on a gradual basis in light of the improvements. Mr Tyson was concerned that the CQC's position on the premises renders such a course impracticable. We have set out our findings regarding the premises above and consider that a number of adjustments can probably be made to ensure that the CQC's concerns are allayed.

Conclusion

54. We have no doubt that the CQC has displaced the relevant burden upon it. We also have no doubt that significant concerns remain. We are satisfied that there are reasonable grounds to believe that unless the condition remains in place persons will or may be exposed to the risk of harm.

55. We do not consider that it is appropriate for the Tribunal to direct the alternative conditions suggested by Mr Tyson or within the action plan. It remains open to MCS to make the relevant improvements and then seek the CQC's consent to the admission of new service users. We accept that for this reason the condition imposed does not unfairly restrict A's ability to trade. On the evidence currently available MCS has a long way to go in order to become compliant with the Regulations. It is necessary for MCS to take those steps and the Tribunal does not consider it is in a position on the evidence available to direct any other alternative conditions.

Decision

56. We dismiss the appeal and there shall be no order as to costs.

Judge Melanie Plimmer

First-tier Tribunal Judge (Health, Education and Social Care)
Lead Judge, Care Standards and Primary Health Care Lists

Date Issued: 22 September 2014