

Care Standards

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

Heard on 24 September 2015 at Employment Tribunal Watford

BEFORE:

**Judge Melanie Lewis
Specialist Member Marilyn Adolphe
Specialist Member Denise Rabbetts**

BETWEEN:

[2015] 2492.EA-SUS

Striving For Independence Homes LLP

and

[2015] 2493.EA-SUS

Deborah Pinnock-Daley (Formerly Whittick)

and

[2015] 2494.EA-SUS

Dorothy Pinnock

Appellant(s)

-v-

Care Quality Commission

Respondent

FURTHER AMENDED DECISION

Representation

The Appellants were represented by Ms Rickard Counsel. Ms Wood Solicitor was in attendance. Ms Deborah Pinnock-Daley and Ms Dorothy Pinnock attended.

The Respondent was represented by Adjoin Counsel. Mr Lester Solicitor was in attendance. Ms Bauers, Mr Lim, Mr Paterson attended and Mr Furamera who was the only witness to give oral evidence.

Background:

1. Striving for Independence Homes LLP (the Provider) has been providing care to service users with learning disabilities and other complex needs for around 20 years. The Provider operates three care homes namely, Honister Gardens Care home, Pettsgrove Care Home and College Road Care Home.

2. Dorothy Pinnock and her daughter Deborah Pinnock-Daley are members of the Provider. Dorothy Pinnock has been the Registered Manager of College Road for 21 years and Deborah Pinnock –Daley the Registered Manager of Honister for 13 years. She has applied to be the Registered Manager of Pettsgrove but his has been put on hold pending the outcome of the case.

3. Both Deborah Pinnock-Daley and Dorothy Pinnock were arrested on 2 July 2015 following an allegation fraud by abuse of position. It is alleged that they had been taking service users Department of Work (DWP) Pensions payments for themselves.

4. Ms Pinnock-Daley and Ms Pinnock are subject to Police Bail that they must not deal with service users personal accounts from 12 July 2015 onwards. The delay was to allow alternative arrangements to be made. The police granted an extension to 7 August 2015 as there were difficulties in arranging for the various Local Authorities being appointees for the Service users, and controlling the larger sums relating to the service user contribution for care but with the homes retaining about £25 pw for each service user to cover their daily needs We learnt that Bail has now been extended to 11 December 2015.

Notices of Decision

5. Deborah Pinnock-Daley: Registration as a registered manager in respect of Honister Gardens suspended form 10 August 2015 until 1 October 2015.

6. Dorothy Pinnock: Registration as a registered manager in respect of College Road suspended form 10 August 2015 until 1 October 2015. The telephone case management hearing on 18 September 2015 the CQC confirmed that they did not oppose the appeal against the decision subject to the imposition of conditions. It was agreed that the appeal against those conditions would be heard together with the other two appeals rather than a separate discrete hearing.

Legal framework

7. The appeal is brought under section 31 of the Health and Social Care Act 2008 ('the 2008 Act') against the CQC's suspension decision.

Section 31 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 (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. Section 32 Appeals to the Tribunal

(1) An appeal against—

(a) any decision of the Commission under this Chapter, other than a decision to give a warning notice under section 29, or

(b) an order made by a justice of the peace under section 30, lies to the Tribunal.

(2) No appeal against a decision or order may be brought by a person more than 28 days after service on the person of notice of the decision or order.

(3) On an appeal against a decision of the Commission, other than a decision to which a notice under section 31 relates, the Tribunal may confirm the decision or direct that it is not to have effect.

(4) On an appeal against an order made by a justice of the peace the Tribunal may confirm the order or direct that it is to cease to have effect.

(5) On an appeal against a decision to which a notice under section 31 relates, the Tribunal may confirm the decision or direct that it is to cease to have effect.

- (6) *On an appeal against a decision or order, the Tribunal also has power—*
- (a) to vary any discretionary condition for the time being in force in respect of the regulated activity to which the appeal relates,*
 - (b) to direct that any such discretionary condition is to cease to have effect,*
 - (c) to direct that any such discretionary condition as the Tribunal thinks fit shall have effect in respect of the regulated activity, or*
 - (d) to vary the period of any suspension.*

(7) *In this section—*

- *“discretionary condition”, in relation to registration under this Chapter, means any condition other than a registered manager condition required by section 13(1);*
- *“the Tribunal” means the tribunal established by section 9 of the Protection of Children Act 1999 (c. 14).*

9. The burden of proof is upon the CQC to establish that the relevant test in section 31 of the 2008 Act is met.

10. The Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 set out a number of important requirements that a registered provider must comply with.

Procedural Issues:

11. This appeal of the Provider was heard with the appeal of Dorothy Pinnock [2015] 2494.EA-SUS and Deborah Pinnock–Daley [2015] 2493.EA-SUS. The evidence and submissions were related. For that reason we have prepared one decision but have carefully examined each case individually.

12. Mr Adjei submitted that we should put ourselves in the shoes of the decision maker at the time the decision was made and in the light of the information that the decision maker had or ought reasonably to have had before it at the date of decision. He relied on a recent decision of the FtTT which of course is not binding and that the is approach had recently been endorsed in the Court of Appeal in the case of Rotary Yorkshire v Hague [2015] EWCA Civ 696 in what he argued were related field of health and safety regulation.

13. We agreed with the submissions made by Ms Rickard that Section 32 (6) (a) 2008 Act directs us to look at discretionary conditions for the time being in force, so the present time. We must look at risk of harm and whether as of today conditions are justified necessary and proportionate. This has long been the practice of this specialist tribunal: see Ofsted v GM and WM [2009] UKUT 89 (AAC). This specialist tribunal bring their own experience to the case and one non binding case does not suggest otherwise nor do

authorities relating to different legislation. We of course give due weight to what was in the mind of the decision maker but we are making the decision anew and not reviewing it. We would only comment at that as a result of the Memorandum of Understanding the time lines in these appeals are short.

14. The Respondent failed to send the Bundle in the related field of Dorothy Pinnock [2015] 2494.EA-SUS by 5pm 21 September 2015. Instead it arrived by post on 23 September 2015. The Respondent accepted they had no good reason. Whilst not condoning this lateness in an appeal where of necessity the timelines are tight, we concluded that there was no substantial disadvantage as the bundle in this appeal and the related appeal of Deborah Pinnock–Daley [2015] 2493.EA-SUS had been sent by the due date of 18 September 2015, so no material prejudice was made out. No additional statements were filed and the additional evidence was handwritten notes from Mr Furamera and Mr Lim from the most recent inspection on 24 July 2015.

15. By joint application of the parties and the Tribunal, being satisfied that we had sufficient written evidence, the appeal proceeded by way of submissions. We were assisted by full submissions from both Counsel which we have taken into account in reaching our conclusions.

16. The current suspension ends on 1 October 2015 and we learnt that CQC will go in again before then and make an inspection of each premises.

Current Conditions:

17. The current conditions are : -

1. Deborah Whittick, nominated individual and registered manger of the location Honister Gardens Care Home, must not exercise control over the possessions or finances of people who use the service.
2. Dorothy Pinnock, registered manager of the location College road Care Home, must not exercise control over the possessions or finances of people who use services.
3. You must ensure that people's finances are managed in accordance with the Mental Capacity Act 2005.
4. You must arrange that (a) Striving for Independence Homes LLP manager, other than Deborah and Dorothy Pinnock, takes responsibility for safeguarding the possessions of each person that uses services (b) that money belonging to each person using services is kept securely locked place with the key held by the person in charge of each shift (c) that records of receipt in of money and expenditure for each person using services are kept and that each transaction is countersigned by a second member of staff (d) that a financial audit is kept for each person using services and that this audit trail is made available for inspection by persons authorised to see it.

Evidence:

18. In advance of the hearing we considered the three bundles of written evidence.

19. We additionally had an updating statements from Ms Bauers (the CQC Decision Maker) and hand written notes from Mr Furamera (Lead Inspector) and Mr. Lim. He gave evidence on the key points where the handwritten notes was not clear. We then gave a break for Ms Rickman to take instructions and the cross examination followed.

20. Mr. Furamera has inspected College Road twice, Pettsgrove four times and Honister three times.

21. In February 2015 he found three breaches; in relation to PRN medication, staff supervision and no effective systems for monitoring quality of service provision.

22. On 1 July 2015 he found that Regulation 13 was now complied with and the provider had put in place systems to ensure medicines were handled and administered safely and appropriately. The provider had also scheduled staff appraisals to meet the requirements of Regulation 23. He found that the provider has started to address the shortfalls related to Regulation 10, but still needed more time to demonstrate the service was well led.

23. The conditions sought relate to financial issues. Since March 2015 there has been an on-going police investigation into the directors of SFI. On 13 May 2015 Duncan Paterson (Inspection Manager) was contacted by Brent Council that the police were going ahead with arresting Dorothy Pinnock and Deborah Pinnock -Daley. CQC were asked not to interfere in case they contaminated evidence. We queried where the investigation had got to but neither counsel had any updating information and we gained no clear picture of what the allegations related to other than misusing service users money or over what period the allegations covered.

24. Mr Furamera received information from 'Whistleblowers' which related to safeguarding concerns on 7 occasions between 12 November 2014 and 2 April 2015. All were members of staff. None of the issues raised related directly to the handling of service users money. On 3 July 2014 in a Managements Review Meeting with Mr Paterson they applied their decision tree and determined that none of the risk met the urgent threshold.

25. The current conditions were applied because of what Mr Furamera and Mr Lim found on an Inspection report on 24 July 2015 when they were concerned that :

- (a) 3 service users A, B and C did not have a financial profile as part of their overall support plan
- (b) There were no policies or provisions for managing money belonging to service users

- (c) Mental Capacity Act 2005 'best interest' principles was not adopted where a decisions had to be made on behalf of service users
- (d) Transactions for A, B and C were not double signed
- (e) There was no secure storage of service user's money; and
- (f) There was no audit system in place.

26. Breaches of Regulation 12: Self Care and Treatment were found on 24 July 2015. The deputy manager was on duty. The concerns were:-

- a. There was no emergency evacuation plan
- b. The emergency light was not working.
- c. The Care Plan of Service User 'A' who was diabetic did not show regular monitoring for his blood glucose levels and answers given that they were done when he showed signs of weakness gave rise to concern. Neither did the Care Plan show he had background retinopathy.

27. The CQC team were concerned as these were not isolated incidents. A similar occurrence had been found at College Road on 9 March 2015 in relation to Service User 'D' who attended a urology clinic and whose care plan had not been updated with current or previous symptoms. He was not supported to attend a repeat test on 9 January 2015. This was dealt with by a Compliance Order and the submission of an Action Plan. A similar issue had also arisen at Pettsgrove Road on 11 and 12 December 2014 when the Care Plan did not indicate the need to monitor weight.

28. The meeting made a recommendation that Health Action plans were kept up to date, so an action short of so not a direction that had to be complied with.

29. Breaches were found in relation to Regulation 18 2014 Regulations as there were insufficient staff and staff said they worked shifts in succession without having statutory break periods. Warning Notices were served to Honister for breaches of Regulation 12 and 17 and Regulation 17 Pettsgrove in that care records and Health Action Plans were still incomplete even though the need to address this had been picked up on the earlier inspection.

30. Mr Furamera was cross examined by Ms Rickard. He agreed that he had a reasonable professional relationship with Ms Pinnock-Daley who has been responsive. He was aware that the staff member he spoke to had only been there one or two weeks but was concerned by their answers and they had only done on line training. Money was kept in the locked medicine cupboard but the keys were next to it. He was told there was no sharps bin but agreed Ms Pinnock-Daley had emailed him a picture that there was one. He had seen no evidence of PEEPS plans. He had asked for the Financial Management Policy and Procedure plans but they were not shown to him but he did accept that he may have missed them in the White folder. He agreed that there had not been much time to discuss things after he got back from his lunch as Deborah Pinnock-Daley was not available. It was suggested to him

that his concern around the application of the Mental Capacity Act were applying a 'gold standard' and were not specific enough.

31. The statement of Deborah Pinnock-Daley dated 17 September 2015 and exhibits attached was intended to 'fill in the gaps' and answer concerns raised by CQC. She did not personally handle money and the conditions do not affect her. There was a Management of Service Users Money and Financial Affairs Policy and it had been hard to prove the systems that they had in place as the police has taken away the laptop and the finance books, which were only returned after the July inspection. Money is kept in a locked tin.

32. Improvements were noted in the Inspection of 1 July 2015 and the Inspection of 24 July 2015 contained a number of errors which she was challenging via the Factual Accuracy Procedure. Mr Furamera accepted that he had based it on what he saw not what was then submitted, such as the photo of the sharps bin, petty cash procedures and evidence that transactions are counter signed by a second staff member. In short the case was that changes were on the way and insufficient time had been given to implement them.

Our conclusions on the current position

33. We specifically queried the outcome of six safeguarding concern referrals to Brent Local Authority between 12 November 2014 and 17 July 2015. One service user was moved. An earlier alert received by Brent Adult Safeguarding Team on 25 March 2015 was addressed on the same day by a visit to the home by a member of the safeguarding team and the police. They implemented an action plan and the case was closed. Another safeguarding alert was made in May 2015 which led to two service users being moved and an embargo of future placements. Brent is willing to lift the embargo pending the outcome of this case. They did of course know that CQC was actively monitoring the situation.

34. Both Dorothy Pinnock and Deborah Pinnock-Daley were arrested on 2 July 2015 and granted bail. To date neither has been charged and the CQC management review meeting on 3 July 2015 was mistaken in stating that they had been charged. That is incorrect. The police investigation is ongoing and we had no evidence as to what stage it had reached or a time line, other than a speculative suggestion that as it involved looking at a volume of written and electronic evidence it might take some time. We have seen a reference to systematic taking of service users money but we have no more detail than that.

35. As a specialist tribunal we accept the evidence of the Appellants that in the past it was encouraged by the Department for Work and Pensions and the local authorities for care managers to be made the appointees for service users that had been assessed as lacking mental capacity or the ability to deal with their finances. Many providers stopped this some years ago and the potential conflicts are easy to see, especially when as in this case the audit

was carried out by a close relative. It is of concern that until very recently transactions were not recorded and double signed for, even though the police were investigating allegations relating to the management of service users money.

36. We have noted that the sums involved were considerable, but since the new regime came into force the provider holds only £25 per week for each service user.

37. The conditions sought all relate to finance (set out in paragraph 17 above). The first two are unnecessary given the bail conditions. Neither Dorothy Pinnock nor Deborah Pinnock–Daley exercise control over finances and the condition we attach makes arrangements for this function to be carried out by others. We consider the reference to possessions too vague and the panel heard no evidence or suggestion that they or anyone else has breached this.

38. We accept the submission made by Ms Rickard that the condition relating to managing finances in accordance with Mental Capacity Act 2005 is too vague. The ability or capacity of a service user to handle money should be made on a daily basis in order to accurately assess and covered in the service users individual person centred Care Plan and adhering to the best interests 'checklist'. It is not we note a requirement of the Code of Practice that such assessments are written down.

39. We are satisfied that it is proportionate and necessary for the conditions set out in 17(4) to be imposed, save in relation to Dorothy Pinnock and Deborah Pinnock-Daley and the service user's possessions. We are aware of what is now sector standard practice for handling the money of vulnerable service users. There is a Policy and some evidence of double signing from April 2015 but this should have been readily available to the CQC team when they went in on 24 July 2015. It is accepted that the money was in a tin that was not locked. The cupboard it was kept in was locked but Mr Furamera observed the key hanging next to it. These we conclude are basic requirements and should have been in place and clear for any visitor to see. If there is an audit trail then this should be readily available on request. If as the Appellants assert this is all being done that the condition is not unduly onerous but we conclude is proportionate and necessary given the need to protect and safeguard vulnerable service users finances against a background where allegations have been made.

40. We then turn to whether there is a real current risk to service users which justifies Deborah Pinnock-Daley being suspended. Our view is that this is a provider that has needed to address certain key issues and has gone forward and back in stages but we must look at whether that requires an urgent suspension pursuant to section 31 rather than another means of enforcement. It appears that she has responded and that there has been a reasonably co-operative response to the CQC inspectors.

41. On 1 July 2015 the focussed inspection found that improvements had now been made that satisfied Regulation 13 and 23 and was working towards demonstrating the shortfall relating to regulation 10 in that each service user had a key worker and care plans had been reviewed and updated. Things appeared to be moving forward, but still needed more time to demonstrate the service was well-led.

42. Regulation 12 2014 Regulations: Care and treatment must be provided in a safe way for service users. The Inspection on 24 July 2015 threw up some safeguarding concern issues. Explanations have been offered about how there were no Personal Emergency evacuation Plans in the newest form but this is being addressed. The provider thought the emergency lights had been fixed.

43. What is a real risk is that service user A's blood sugar was not monitored. The care plans for this service user were vague when addressing his needs relating to diabetes. Specific instructions and/or examples are required to assist staff in delivering an acceptable standard of care. Dietary requirements should be detailed. Other aspects e.g. exercise should also be highlighted. Without a coordinated plan of care, service user A was at risk of hypoglycaemia. The mitigation put forward is that the service user was not at the home full time, but that is not an excuse for what could have serious health and wellbeing consequences. This has caused us concern and needs to be urgently addressed. We have taken into the balance that this is not isolated and concerns were raised in the past about what should be basic checks as set out in CQC's evidence.

44. Safeguarding service users from abuse and improper treatment: Regulation 13 2014 Regulations again it is said that there was a PRN protocol on 24 July 2015 but it had been mis-laid. We have now seen one and additionally it has been arranged for Lloyd's pharmacy to undertake a medication audit imminently.

45. Good Governance; Regulation 17 2014 Regulations. It is accepted Health Action Plans were not always followed through and but that this is now being addressed. This is an example of a step back. In relation to a service user who fell four times it is asserted that a trend analysis is now in place but clearly what is needed is consistency in all aspects of service users care. Some evidence has been submitted of a clearing schedule and an infection policy

46 Staff issues have been ongoing, with staff being one of the sources of concerns being raised to CQC. There is not yet a consistently well led management structure in place to say that any improvement is secure.

47 Overall we take the view that CQC have worked have effectively and constructively with this provider since shortfalls were identified but some of them appear to be long standing and are only now being robustly addressed.

48 We have kept in mind that a further inspection will take place next week and if there are further concerns then no doubt CQC will take the appropriate action.

Proportionality/ Conclusion

49. In considering whether suspension is proportionate we have had regard to all the evidence available to us. We are not satisfied that there are reasonable grounds to believe that unless Deborah Pinnock-Daley is suspended, persons may be exposed to the risk of harm. That step is not justified by the Inspection on 24 July 2015 and the evidence filed in response given that some progress was being made

50. We consider that some discretionary conditions are appropriate at this stage as an alternative to suspension

Decision

1. We confirm that the decision to suspend the registration of Deborah Pinnock-Daley shall have no effect.

2. The discretionary conditions imposed on Dorothy Pinnock on 18 September 2015 in place of the suspension shall cease to have effect and are hereby removed.

3. We vary the discretionary conditions currently in force as follows in relation to Striving for Independence Homes LLP

You must arrange that: -

(a) a Striving for Independence Homes LLP manager, other than Deborah Pinnock-Daley and Dorothy Pinnock, takes responsibility for safeguarding the finances of each person that uses services

(b) that money belonging to each person using services is kept securely locked place with the key held by the person in charge of each shift

(c) that records of receipt in of money and expenditure for each person using services are kept and that each transaction is countersigned by a second member of staff

(d) that a financial audit is kept for each person using services and that this audit trail is made available for inspection by persons authorised to see it.

4. Such conditions will remain in force until further Order.

**Melanie Lewis
Tribunal Judge
First-tier Tribunal (Health Education and Social Care)**

**Date Issued: 30 September 2015
Amended: 2 October 2015 Rule 44
Further Amended: 19 October 2015 Rule 44**