

Care Standards

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

Heard on 12 and 13 May 2016 at the Employment Tribunal, London EC4
Deliberation 16 May 2016.

[2016] 2643.EA-MoU

BEFORE:

**Judge Melanie Lewis
Specialist Member Caroline Joffe
Specialist Member Denise Rabbetts**

BETWEEN:

Ms. Saima Raja

Appellant

-v-

Care Quality Commission

Respondent

DECISION

Representation

The Appellants were represented by Ms Wilkinson Counsel attended by Mr Lenehan Legal Adviser. Ms Saima Raja attended and Ms Patricia Lyon the Manager of Victoria Lodge Care Home attended as their witness.

The Respondent was represented by Mr Cyril Adjei Counsel attended by Ms Regina Allanah Paralegal CQC. Ms Sarah Powell Lead Inspector, Ms Tracy Mistry Team Manager for the Safeguarding Adults Hub for Doncaster Evidence (by telephone), Mr Steven Crane Compliance Inspector, Ms Julia Gordon Inspection Manager and Mr Kieron Jones Pharmacist Specialist attended as their witnesses. The attendance of Ms. Grant Head of Inspection CQC North Central was not required.

The Appeal:

1. This is the appeal of Ms Saima Raja against the Notice of Decision dated 24 February 2016 imposing the following condition;

The Registered Provider must not admit any service users to Victoria Lodge Residential Care Home without the prior written agreement of the Commission.

Background/ Chronology:

2. With effect from 1 October 2010 the Appellant has been registered to provide the regulated activity of “accommodation for persons who require nursing and personal care”. One of these locations is Victoria Lodge Residential Home, Thorne Road, Edenthorpe, Doncaster (“the Home”). The Respondent was aware that she was also the registered provider at Braemar Lodge in Southend, Essex. The Appellant has not challenged the imposition of a similar condition at this address. We learnt that she is also registered to provide care at a Home in Scunthorpe and in respect about which she told us there are no concerns.
3. Victoria Lodge residential home provides accommodation for older people who require personal care. It also accommodates people who have dementia.
4. There are two conditions that are applicable to the Home:
 - a. the Appellant must only accommodate a maximum of 24 service users at the Home;
 - b. the Appellant must not provide nursing care under accommodation for persons who require nursing or personal care at the Home.
5. Since the autumn of 2013 Ms. Patricia Lyon has been the Registered Manager of the Home. Prior to that she was Deputy Manager for 18 months.
6. Since the current registration there has been a poor history of regulatory involvement, which is relied on by the Respondent. The Home has been inspected on twelve occasions since registration in October 2010 but has only achieved full compliance on two inspections. These were in May 2013 and August 2014. However, both occasions were follow up inspections which focused on a breach of regulation that had been identified in the previous inspection.
7. On 26th February and 12th March 2015 the CQC conducted a comprehensive inspection of the Home. This inspection followed a previous inspection in August 2014 at which the Appellant was found to be in compliance with regulations. The inspection found 4 breaches of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2010 (“the 2010 Regulations”). The Appellant’s service was rated at “Requires improvement”.

8. The Appellant was required to submit a written report to the CQC setting out when and how compliance would be achieved. It stated in this report that compliance would be achieved by the end of September 2015.

9. A comprehensive inspection was conducted on 13th and 14th January 2016 in order to see whether improvements had been made and sustained, led by Ms Powell. The inspection identified 4 breaches of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 (“the 2014 Regulations”). In particular, two of these breaches were continued non-compliance; in the sense that they were continued breaches of regulation that had been identified in the previous inspection.

10. The CQC applying their ‘Enforcement Tree’ assessed these breaches as having a moderate impact on service users and the likelihood of the breaches reoccurring as probable. As a result of this the level of seriousness of the concerns was identified as high. The reason that it was probable that the concerns would reoccur was because there were limited or ineffective control measures or processes in place to manage the risks. In turn this meant that service users were exposed to risk of harm.

11. The CQC rated the service provided by the Home as “inadequate” and placed it into Special Measures.

12. One of the serious concerns identified during the inspection was that medication was not being administered as prescribed. This led the CQC to make 3 safeguarding alerts to the Doncaster Metropolitan Borough Council (“the Council”). As a result of this and other concerns that the Council had identified during a visit to the Home on 14th January 2016, the Council imposed an embargo preventing the admission of new service users to the Home. Ms Raja had raised a complaint against Ms Powell but was told this would be dealt with by way of the ‘Factual Inaccuracy’ feedback.

13. The Council has moved a number of service users from the Home because it considered that the Home cannot meet their needs. The 12 service users that remain are those that have low level needs.

14. The CQC received an action plan in respect of the Home on 8th February 2016. It was the CQC’s view that this did not go far enough and they were not confident in the light of the history that sustained change and compliance with the regulations would happen. A letter was sent to the Appellant later that day to inform her of the CQC’s intention to cancel registration.

15. Following the concerns raised by the Council, a focused inspection was conducted on 18th February 2016. At that time 20 people were living at the Home. It was observed that there were following concerns:

- (1) poor medicines management – no balance checks (controlled drugs), inadequate recording of fridge temperatures, incorrect

temperature storage of antibiotics, no PRN protocols; incorrect administration of inhalers and not asking the service user if they required the medication.

- (2) service users were put at risk of harm due to unsafe risk assessments – assessments not reviewed effectively, for example handling and moving assessments;
- (3) inadequate care plans – paperwork indicating that service users were not bathed sufficiently often, information concerning injuries was not followed up, not responsive to service users changing needs, some contained contradictory evidence which would cause confusion as to how to meet service users' needs;
- (4) insufficient staffing levels – deployment of staff not reviewed, registered manager unable to explain what people's dependency levels were or how staffing levels were determined, several accidents (falls) at night when night staff on duty but no analysis of reasons for falls and possible link to night staff deployment.

16. During the inspection the CQC also observed that a privately funded service user had been admitted after the Council's embargo.

17. The continence advisory team inspected the Home on 26th February 2016. As a result of this visit they were concerned that the home did not have any proper toileting plans in place and there was no provision in place regarding the monitoring of bowel habits.

18. On 10th March 2016 the Fire Authority carried out a fire safety audit of the Home. They observed that there was a breach of the Regulatory Reform (Fire Safety) Order 2005; in that the fire risk assessment was not "suitable and sufficient" and they issued an Enforcement Notice.

19. The concerns identified by the continence advisory team in their inspection on 26th February 2016 were still present during their further inspection on 11th March 2016.

20. On 23rd March 2016 the inspection report following on from the inspection on 18th February 2016 was published. The Home was rated 'inadequate overall'.

THE LAW

21. The CQC has an overriding duty under s.3(1) of the Health and Social Care Act 2008 ("HSCA") to safeguard the health, safety and wellbeing of persons using a service.

22. The power to impose an additional condition on a registered provider is set out in s.31(1) HSCA. The trigger for the imposition of an additional condition is that the CQC must have reasonable cause to believe that unless it acts under the section a person will or may be exposed to the risk of harm.

23. Once the CQC is of this view, it may serve a notice on the registered service provider informing them that a decision of the Commission mentioned in s.31(2) HCSA is to take effect from when the notice is given - s.31HSCA 2008.

24. The decision under s.31(2), which is relevant to this appeal, is a decision under s.12(5) or s.15(5) to impose an additional condition – s.31(2)(a) HSCA.

25. The burden of proof is upon the CQC to establish the relevant test in Section 31 of the 2008 Act. The standard lies somewhere between the balance of probabilities and 'reasonable cause to suspect'. Belief is to be judged by whether a reasonable person, assumed to know the law and possessed of the information believes that a person might be at risk.

26. The powers of the Tribunal can be found in Section 32 of the Health and Social Care Act 2008. The Tribunal may either confirm a decision of the Respondent or direct that it is not to have effect. The Tribunal is also empowered to direct any such discretionary condition as it thinks fit. The Tribunal considers the appeal on the basis of evidence available at the time of the hearing.

27. 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:

28. With the agreement of the parties and accepting it was relevant to the issues that we had to decide, we allowed the Appellant to submit a second statement with attached confirmation from the Fire Service that she was now compliant and from the Pharmacy Service at Boots that they had always had a good relationship with the Home. We also accepted a statement from Tracy Mistry LA Safeguarding Officer on behalf of the Respondent.

29. Further to the Direction of the Tribunal dated 3rd May 2016 the parties had further worked on a Scott Schedule and narrowed the issues, ranked by CQC in order of seriousness. We make findings on each issue in our conclusions.

30. At the commencement of the hearing Mr Adjei confirmed that the CQC would move to issue a Proposal of Notice to Cancel registration within 7days in accordance with their procedures, given the length of time the concerns had been ongoing. The Appellant would have a right of Response. The CQC would be bound to carry out a further unannounced inspection by the end of June 2016.

31. We reminded the parties that we were not finding facts at this stage only making an assessment of risk on a lower standard of proof.

Discussion of the Evidence:

32. In advance of the hearing we considered the two bundles of written evidence. We summarise only the points necessary to explain our conclusions in the light of our limited jurisdiction at this point. Given the last inspection was in February 2016 we were interested to know what position the Local Authority now took and how they fed back or recorded their views as they went into the Home weekly.

33 We had detailed witness statements from each witness and save for a few supplementary questions they were cross examined only.

34. The Appellant had not raised issues of the Home's finances but as she is running at 50% of her previous capacity, we raised the issue. She confirmed the current position was not sustainable and she needs 17 to break even. In response to questions from us Ms Raja said that she would admit new service users at a rate of 2 per month if agreed but in final submissions her position was that she wanted a complete removal of the embargo.

35. Ms Mistry's statement is dated 25th April 2016 and set out that the Council had put an embargo on the admission of service users due to concerns with regard to Deprivation of Liberty, serious medication breaches notified by CQC, a lack of robust stimulation and continued failure to raise safeguarding alerts appropriately. Whilst some minor changes were acknowledged there was no intention to lift the embargo. Ms Mistry wanted to see sustained change. She had not personally visited the Home to make an assessment and was relying on reports from Tom Hymas the Contracts Officer who was going in weekly and looking at issues of medication, incontinence, which Ms Raja now said had been re assessed and was satisfactory, the environment which Ms Raja produced evidence to show was being updated and activities for which a new organiser had been appointed. We had no reports from Mr Hymas to confirm what progress was being made.

36. Ms Raja's extensive first statement was a detailed challenge to Ms Powell's conclusions. Ms Raja felt strongly that the fact that she had not been able to have an open dialogue with Ms Powell had meant that she could not be clear about what changes she needed to make. She had requested that Ms Powell be replaced as the Inspector. Ms Gordon had considered that request but rejected it as Ms Powell had an extensive knowledge of the home. Any decision had to pass through a review and was not just the view of Ms Powell. Ms Gordon had taken Ms Powell through the report as was standard and robustly challenged her to justify her conclusions

37. Further at the February 2016 Inspection, all the witnesses had attended so that it was not just the view of Ms Powell. The team had also been accompanied by an Expert by Experience. Ms Powell was taken in cross examination to a number of issues but denied that the 2015 Framework which she applied was subjective. It was suggested to her that the reference to 18 safeguarding alerts was misleading but she said that it was accurate until the

Local Authority reported back, although she understood that 4 alerts had been found to require further action, with three of those upheld. The formal report was awaited.

38. Time was spent taking her to improvements including medication, fire safety and continence which in part she acknowledged but her point was that it should have been embedded good practice by now. If passports showing that individuals workers had a right to work were available, then she had not seen them when she inspected their files

39. Each witness on behalf of CQC spoke of issues of management and governance being at the heart of the difficulties of the Home to introduce and sustain change. Each witness wanted to see enduring change. Mr Crane estimated this would take approx 6 to 12 months to see if changes were permanent.

40. Mr Kieron Jones clarified that his role as a pharmacist specialist was not to see if the concerns raised in January 2016 had now been covered but to determine whether there was a serious risk. He concluded that there was not an urgent risk. His concern, which echoed that of the other witnesses, was that practice was reactionary. The medication for the additional respite resident should have been clarified with his GP before he came in, or failing that his family. Mr Jones observed senior staff wrongly administering an inhaler. If there was a PRN notice he had not seen it clearly displayed. The Audit tool being used was along the right lines but not enough. He agreed that the medication trolley was in order but there were no regular balance checks of controlled drugs, they were simply recorded on individual charts, so that there was no readily available overview.

41. We had a lot of evidence from the Appellant re medication errors. Mr Jones said he had been misunderstood if he was thought by the Appellant to have said medication errors were prevalent; what he said was that occasional omissions of signatures in Medication Administration Records (MARs) in themselves do not pose a risk but did highlight the importance of having adequate audit and monitoring systems in place to detect such omissions. What was absolutely not acceptable was for staff to subsequently sign the chart with no explanation. Mr Jones was clear that he had concerns that the fridge temperatures were not being accurately monitored.

42. Ms Raja's oral evidence was illuminative in that we learnt that whilst she lives in Essex, she did not see the distance to Doncaster as a problem as the other Home she owned in Scunthorpe was compliant. She herself is clinically trained and is a consulting Nurse prescriber. She will visit Victoria Lodge twice a month and rings in most days for an update. For the first time she mentioned that the Home was loosing £4,000 p.m. but without speaking with her accountant she did not have a date when it would no longer be viable to run the Home or she would need to make staffing cuts. We also learnt that all her service users are placed by the Local Authority and that she could not expect any private clients.

43. Her written evidence was detailed in that she made detailed challenges to the January 2016 report and had included a large number of documents to show that the findings made by CQC were wrong, subjectively biased or unduly harsh. These included a report from the Fire Service, Boots, Staff documents including appraisal records, training records,, MARS charts, stock balance for the controlled drugs and individual patient charts to show that they had been monitored for weight loss. The Home has had an environmental audit and we saw photographs of the changes made, which includes employment of a handyman. The Home now employs an activities co-ordinator and we read some positive feed back from families and friends of the residents. An issue had arisen about whether the Home was following best practise for dementia patients and Ms Raja put in evidence to show that they were following suggested colour schemes.

44. Ms Raja said she had confidence in her manager whom she was supporting to undergo further training and achieve her NVQ level 5. She believed that the Home was now medication compliant but they needed to keep working on improving documentation, the environment and staff knowledge.

45. Ms Lyon's written statement echoed that of Ms. Raja in that she felt there had been no open dialogue with CQC. In responses to questions from the Tribunal she acknowledged that a lot fell on her shoulders as the manager and she was a primary driver in bringing about change. In her oral evidence she accepted that experienced staff had altered a MARs chart, which she readily acknowledged was not acceptable but she said that they had panicked. She agreed when cross examined that she had no complaints about the CQC's findings in February 2016 and that the findings were accurate in January 2016 but that the Home had not had enough time then to bring about the changes they had been working on.

46. She wanted more break down on what the safeguarding alerts were but they were waiting for a report. In response to questions from the Tribunal she said that references in a DOLS report to the use of restraint were wrong, although she had written it. They were working on Care Plans to make them more robust. Ms Gordon had speculated that staff had been called in when told CQC were in but Ms Lyons denied that and said that staff often come in on their days off to complete requested shopping for residents or to take them out and saw nothing wrong with that.

47. She told us that a leader had to have eyes every where and be always checking. Her view was that they had made major improvements on medications, that Mr Hymas the LA Contracts officer had agreed that there were no issues with Incontinence, they were working on the environment and the other issue he looked at, activities had also improved. He did not look at DOLs issue's she had made 10 safeguarding alerts since February 2016 but none were for major issues.

Submissions

48 We briefly summarise the final position taken by each party but have fully considered them together with all the written and oral evidence.

49 On behalf of the Appellant it was submitted that the concerns had been taken seriously and action was being taken. Whilst there could always be room for improvement there was no reasonable likelihood of risk. Ms Raja had not been told the detail of safeguarding concerns so could not act on them. It was requested that we make a recommendation that Ms Powell be removed from the case so that a more active dialogue could be established between a provider who was keen to make change and the regulator.

50. The essential point in the submission on behalf of CQC was that there was no cogent evidence of change. Whilst it was acknowledged that change had taken place there was no confidence that change was embedded given the history. The Home would be inspected within the next month and whatever our decision the evidence of the Local Authority was that they would not place service users at this time. Therefore if we found for the Appellant our decision would have no practical effect.

Our conclusions on the current position

51. We are looking at whether there is reasonable cause to believe there is or may be a risk of harm to a service user today. At the current time the Home has 12 low level of need service users but if we lift the embargo they could go to full capacity. Any assessed level of need in this context may change quickly, so to restrict the intake to low level of need service users may not be practical. We have taken into account that the Home filed a very detailed 'factual inaccuracy' response to the January 2016 inspection but we are not making findings of fact at this stage.

52. We conclude that the embargo should not be lifted at this time and in reaching that conclusion have balanced a range of factors which we set out below.

53. We have set out the history of non compliance in some detail as we find it concerning that a Home has a history of being reactive not proactive in meeting minimum requirements. The provider is both a trained nurse and experienced in this sector. We gained no clear picture as to why one of her homes is compliant and one is not. The manager has been working in the Home since 2006 but this is her first management role and the history is that to date she has not been able to lead it into compliance.

54. There is a duality of roles in this case: CQC and the Local Authority who contract with the Home. We raised the issue that it might be thought to be in the Authority's interest to have a Home in their area who accept service users at the rate of £450 per week, which as a specialist tribunal we are aware is in the lower range of current fees. We only had evidence from the Regulator not from the Local Authority yet both rely on the actions of each other. We heard that the Local Authority are in weekly contact with the Home but we had no written evidence of what Mr Hymas found on his weekly visits

and an analysis of his current concerns. We must also bear in mind he is a Contracts officer and we do not know the level of his expertise. The Respondent provided no evidence of the current situation in the Home despite attending weekly meetings with the Local Authority.

55. Ms Raja had not thought it worthwhile to make an application to CQC to admit additional service users as she 'knew what the answer would be'. That exemplifies the lack of trust in this case.

56. The emphasis of the Appellant's case has been to submit detailed evidence to challenge the findings of CQC particularly in January 2016 but we had no evidence from the Local Authority save via Ms Mistry who was clear that the Local Authority did not see the time as yet right to admit more service users. We had only the reported views of Mr Hymas but no direct evidence from him despite the fact he has been into the Home once a week. The Appellant feels very strongly that CQC's findings are tainted by an adverse mind set lead by Ms Powell but the Appellant produced no independent report, although she said she had consulted a consultant. We raised issue of financial viability but the Appellant had not raised this with CQC nor did she submit any detailed financial evidence about the point about which the Home would not be viable.

Findings on Scott Schedule:

1. Admitting an additional service user/removal service users by Local Authority. .

57. The service user admitted on 18th January 2016 was privately paying and was not a breach of the Local Authority embargo in force at the time. We are concerned that Ms Mistry and others thought it was a breach, as that kind of inaccuracy can cloud later judgements. Looking at the particular case, the needs of the service user was to come for respite to a familiar setting which his family wanted, so we do not accept it was a breach of the spirit of the embargo. Mr Adjei accepted in submissions that this was not the best point, although first in the list of prioritised issues. It was however concerning that the Home's own admissions policy was not followed and the service user's medication was not clarified before he was admitted.

58. As a fact the Local Authority removed service users and those that remain have needs assessed as being at a lower level. The Local Authority did so primarily relying on the reports of CQC but also their own observations, both of which the Appellant disagrees with.

1.Safeguarding Alerts :

59. We have reminded ourselves that safeguarding alerts may be in relation to a wide range of issues. We acknowledge that there are severe backlog delays but the verbal evidence we had was that 3 referrals will be upheld. That, we find, supports that service users may be at risk of harm.

2. Failure to analyse incidents in order to identify themes or trends/adequate staff at all times.

60. Whilst we had some evidence that there is a 'falls schedule' in place since at least November 2015 and Ms Lyon said they were now in touch with the specialist Falls Team, the evidence overall supports a lack of regular and ongoing analysis of a risk. Our view is that the effort has to go into ensuring the paper work is compliant and the next stage will be more robust analysis. This is a risk factor as this is a Home which the history shows has been unable to make sustained change.

3. Enforcement Notice served by South Yorkshire Fire and Rescue following a fire safety audit on 10 March 2016.

61. We accept that this has now been complied with but we accept the submission of CQC that this should not have happened.

5. Care Plans

62. We heard detailed evidence on this point. We can easily accept that decisions in respect of a service user must be made day to day but the choices to be made e.g. accompanied by one or two staff when mobile need to be made clear in written form. We have noted that some changes have been made but at this point the concern is still that good practise has not been embedded.

6 and 7: Medication / Alteration of MARS chart.

63. We were assisted by the evidence of Mr Jones, a specialist pharmacist who saw improvements but still had some areas for concern. Again this is an area where the current concern relates to the Home being reactive not proactive and where more time is needed to see if good practice is embedded.

64. We agree with the evidence of Ms Lyon that it can never be acceptable for staff to later sign MARs charts and here it was experienced staff. We can of course accept that staff may forget or be too busy to sign at the time but the record should make that clear.

8. Governance

65. Each witness for CQC said that the root of the problem in this case was a lack of leadership and governance. We heard that Ms Raja will visit twice monthly but daily calls are not a substitute for being there herself observing and modelling good practise. The same manager will remain and whilst she is undertaking further training and working to attaining a NVQ level 5 the Home has not achieved compliance to date under her management.

Proportionality/ Conclusion

66. We conclude that at this point in time there is evidence that if we lift the embargo there is reasonable cause to believe, that a service user may be at risk of harm but we accept that there may be given that the Home is still putting in place measures that on a view of the history should have been in place some time ago. Overall we accept changes have been made but that there is no cogent evidence that at this point in time the concerns raised by CQC in February 2016 have been over come.

67. We have considered whether we should impose a condition that service users could be admitted at a slow rate to test change but that is not what we are asked to do by the Appellant and we cannot be clear that in itself that would allow the Home to be financially viable as the clear evidence is that the Local Authority, the only source of service users, will not place anyone at this point in time. We have balanced that against the fact the Home will be inspected by the end of June 2016.

68. We decline to make a recommendation, as requested, that Ms Powell is removed as lead inspector. We have no power to make binding recommendations. Given the cost of enforcement proceedings and the cost of any subsequent appeal no doubt CQC will re –consider if a change of inspector and a ‘fresh pair of eyes’ would be a sensible course. If that inspector, and we accept that they are only one part of the decision process, reached the same conclusion then it would be more difficult for the Appellant to argue that there was an infected mindset. CQC is the regulator but we would expect them to liaise closely with the Local Authority whom we would think would want this local resource to remain operating if it can be brought into safe compliance.

Decision

1. We confirm that the Notice of Decision dated 24 February 2016.
2. The appeal is dismissed.

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

Dated: 25 May 2016