

Care Standards

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

Heard on the Papers on 9 March 2017

[2017] 2948.EA-MoU

Before

Judge Jane McConnell

Mr Jeff Cohen (Specialist Member)

Mrs Wendy Stafford (Specialist Member)

BETWEEN:

Smile Care Agents Ltd

Appellant

V

Care Quality Commission

Respondent

DECISION

1. This matter was listed for consideration on the papers. That is permissible under rule 23 of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care) Rules 2008 ('2008 Rules') however not only must both parties consent, which they have in this case, but the Tribunal must also consider that it is able to decide the matter without a hearing. In this case, we have sufficient evidence regarding the allegations made and the conclusions reached after investigations, and there appears to be no substantial factual dispute which might affect our decision. In the circumstances, we consider that we can properly make a decision on the papers without a hearing.
2. The Appellant appeals to the Tribunal against the Respondent's decision dated 27 January 2017 pursuant to section 31 of the Health and Social Care Act 2008 to impose a condition on their registration as a service provider in respect of the regulated activity of providing personal care. The condition was that the Appellant must not provide personal care to any new (or returning) service user until it is compliant with the Health and Social Care Act (Regulated Activities) Regulations 2014.

3. The Appellant submitted late evidence to be considered in the appeal after the final evidence deadline. It consisted of copies of e-mails dating from November 2016 concerning care arrangement for service providers; applications made to CDC dated February 2017 concerning the location of the Appellant's offices; applications for references for employees dated February 2017 and details of a training course to be run by the London Borough of Barnet in April 2017. This evidence had been copied to the Respondent. After consideration of the content of the evidence, we decided that it would be fair and just to allow it to be admitted as the Appellant is unrepresented and it could add clarification to the case he is making in the appeal.

Restricted reporting order

4. The Tribunal makes a restricted reporting order under Rule 14(1)(a) and (b) of the 2008 Rules, prohibiting the disclosure or publication of any documents or matter likely to lead members of the public to identify the vulnerable adults or their families in this case to protect their private lives.

Events leading to the issue of the notice of imposition of condition.

5. The Appellant has been a registered provider of a regulated activity since March 2013 to provide Personal Care. They were the subject of a previous inspection in January 2014 which found that they met all the five standards considered as part of the inspection. There are two conditions imposed on the Appellant's registration which are that regulated activities are managed by an individual who is registered as a manager and that the regulated activity may only be carried out from the location registered with the Care Quality Commission (CQC) which was in Leyton E10 7JQ. On the 14 January 2017, the provider moved address to N12 0BT without approval to allow it to operate from that location. As a consequence, an announced inspection was carried out on the 19 January 2017 of Smile Care Agents Ltd.
6. On the 24 January 2017, a further inspection was carried out by an Expert by Experience from the CQC, who contacted service users and their relatives by telephone to gather their views on the services provide by the Appellant.
7. The CQC immediately shared their concerns with the London Borough of Barnet who were the largest, and as it subsequently turned out, the only commissioners of care services from the Appellant.
8. CQC also sent the Appellant a letter of intent in which they set out their concerns and indicated that they were considering making an application to the court under the Health and Social Care Act 2008 Section 30 to seek an Order immediately cancelling registration. The Appellant was asked to provide information detailing action taken to address the risks raised by the inspection on the 26 January 2017 by the presentation of an action plan.

9. On 27 January 2017, inspectors from CQC met with Mr J Mbadzo, the registered manager of Smile Care Agents Ltd to discuss the action plan and steps already taken by the Appellant to address the issues raised, as well as future plans.
10. On the 27 January 2017, the CQC published their detailed findings in a Notice of Decision to impose a condition setting out nine separate breaches of Regulations in relation to safe care and treatment, fit and proper persons employed, good governance, staffing and person centered care. It recorded that they considered the contents of the action plan provided to them only added to their concern that there was a lack of appreciation of the level of risk and how these risks could be appropriately mitigated in a sufficiently timely way to ensure the safety of service users. In addition, the responses of Mr Mbadzo at the meeting on the 27 January 2017 further added to concerns about the Appellant's ability to properly understand and address the risks to service users and ensure that they were safe.
11. On the 20 February 2017, the Appellant registered an appeal against the decision and the appeal has proceeded under the Tribunal's expedited procedures.

Legal framework

12. The statutory framework for the registration of providers of regulated services is set out in the Health and Social Care Act 2008. Section 32 provides a right of appeal to the Tribunal against any decision made pursuant to Chapter 2 of the Act and specifically provides as follows:

“(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.”*

13. When deciding whether to impose a condition, the test is set out in section 31 as follows:

“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.”

14. The powers of the Tribunal are set out in section 32 and it stands in the shoes of the Commission, so that the question for the tribunal is whether at the date of its decision, it reasonably believes that the continued provision of the regulated activity without the condition imposed, by the registered person will or may expose any person to the risk of harm.
15. The burden of proof is on the Respondent. The standard of proof ‘*reasonable cause to believe*’ falls somewhere between the balance of probability test and ‘*reasonable cause to suspect*’. The belief is to be judged by whether a reasonable person, assumed to know the law and possessed of the information, would believe that any person might be at risk.

Evidence

16. We took into account all the evidence that was presented in the bundle plus the late evidence admitted in the appeal. We have summarised the evidence we considered most relevant.
17. The Appellant’s position as outlined in their grounds of appeal is that they seek to have the condition removed in order that they can prove that they have put in place changes addressing the issues raised by the CQC inspection. They contend that, as a consequence of the condition imposed, they no longer have any clients and therefore cannot obtain evidence of improvement. The London Borough of Barnet, being their sole commissioner of services had, as a result of the findings of the CQC inspection, terminated their contract with the Appellant. The Appellant seek to rely on the fact that they have had no major complaints from commissioners of services or service users or their families besides lateness of visits.
18. A further letter dated 20 February 2017 contends that the inspection was within days of the Appellant having moved offices which meant they were not as organised as usual and they had no working telecommunications. In addition, they submit that the Inspector had caused additional nerves and stress by referring to a previous inspection in which she had been involved where a provider had been closed. They refer to the fact that they had just contracted with the London Borough of Barnet to provide services as being a reason why staff had not been appropriately Disclosure and Barring Service (DBS) checked as to their fitness to work with service users. Attached to the letter were blank examples of the forms that the Appellant

proposed would be used once they commence providing services again including an Appraisal Meeting Outcome; Appraisal Review Questionnaire; Fundamental Standards monitoring Checklist; Customer Feed Back Form; Enablement Referral Form; Risk Assessment Form; Service User Plan; Manual Handling Risk Assessment Form.

19. Evidence submitted to the Tribunal dated 20 February 2017, includes copies of e-mails sent since the date of the inspection seeking to change the registered location of a provider with the CQC and references for a member of staff from previous employers. In the document entitled Appeal Response, the Appellant seeks to outline the steps he will take to address the specific breaches identified by the inspection. These include care plans being completed within a few days of the a service user being accepted into their care; a service user/family survey being sent out to gather feedback about the improvements that should be made; staff without full references and/or DBS checks “shadowing” other staff members until checks are completed; being in the process of revising the recruitment process; a commitment to keep secure, accurate, complete and detailed records; an endeavor to provide dignified person-centered care; a commitment to staff training and the introduction of weekly supervision of staff with yearly appraisals.
20. A copy of the Appellant’s Action Plan was included in the documentary evidence.
21. The Respondent sets out nine detailed concerns raised by the inspection. These included that there were no risk assessments of the 18 people that the service supported and that the Registered Manager confirmed during the inspection that no risk assessments had been completed. There were no effective recruitment procedures in place and staff were working without, or no up to date, DBS certificate being obtained. In one case, where there was a DBS certificate from a previous employer, it recorded a conviction against the member of staff and no risk assessment had been carried out. Full references had not been obtained for seven staff and the Registered Manager confirmed that this had not been done. Care plans were not person centered. All had been written by referrers and not updated by the Appellant. There were no effective systems or processes in place to effectively monitor the quality of service provided. Staff were provided with inadequate induction when starting employment. There was no evidence of staff supervision to assess and monitor performance. As a result of these omissions, the Inspector concluded that people supported by the service were not protected from risks to their health, safety and welfare as a result of lack of effective management oversight relating to governance of the service. People were therefore at real and immediate risk of harm due to the Appellant’s lack of processes and systems to enable them to identify, assess and mitigate any potential risks.
22. A witness statement from Ms L. Hulka, the CQC inspector, outlines the methodology used in the process of inspection. To support her finding of a breach of the Health and Social Care Act (Regulated Activities) 2014

Regulation 9 – Person-centered Care - the Inspector provides details relating to five individual service users of a lack of Care Plan in place or the inadequacy of Care Plans developed by referring agencies, which were subsequently adopted by the Appellant.

23. The Inspector found a breach of Regulation 12 – Safe Care and Treatment – based on evidence that the Appellant had no guidance on mitigating any known risks to ensure service users were kept safe. The Inspector cites evidence relating to nine individual service users. Of particular note was the lack of risk assessment relating to a service user who had HIV, Hepatitis B and C, a history of prison incarceration, as well as active on-going drug use of crack cocaine.
24. The Inspector relies on evidence of a breach of Regulation 17 – Good Governance – as being the lack of staff rotas, no safe staff recruitment practices being in place and the Registered Manager being unclear how many people the service supported or how many staff were employed by the provider on the day of the inspection.
25. A breach of Regulation 19 – Fit and Proper Persons Employed – was evidenced by the Registered Manager being unable to produce any documents relating to staff recruitment during the inspection. He was unclear how many staff were employed – initially stating it was ten and then later in the day he quoted the figure as six, with four in the process of being employed. This figure was further revised when the parties met on 23 January 2017 to five members of staff. Details of up to date DBS checks were also not available as well as the required two forms of identification for each member of staff was missing in a number of cases.
26. In the Inspector’s witness statement, she details the Action Plan submitted by the Appellant and the subsequent meeting with Mr Mbadzo as the Nominated Individual. It sets out in detail the continuing concerns and the remedial actions proposed by the Appellant and how she considered that they were neither detailed nor time specific.
27. The Inspector details six review meetings carried out by CQC between the 20 and 27 January 2017 which informed the decision reached regarding enforcement action.
28. A copy of the CQC Inspection report issued on the 21 February 2017 confirmed that the Appellants are rated overall as “inadequate”.
29. A report recording evidence of the telephone interviews carried out by Mr S. Kang on behalf of CQC, confirms that concerns had been raised on a number of occasions with the Appellant relating to the time keeping and consistency of staff.

Conclusions

30. We accepted the evidence of the CQC Inspector, which we concluded was based on a comprehensive assessment of the documentary evidence presented to her by the Appellant during the inspection period. Her detailed record of the issues arising in individual cases was persuasive. In respect of breaches to Regulations 9, 12, 17 and 19, we note that the Appellant has not sought to dispute that these breaches occurred but has instead looked to address the issues by the provision of blank template forms. We consider that the gravity of the issues raised by the inspection and the lack of evidence provided by the Appellant to challenge or dispute these findings lead us to conclude that they are serious enough for the condition to remain in place.
31. The fact that the Appellant claims as supporting evidence in the appeal that he has never received a complaint, except concerning time-keeping, is not supported by the provision of a current complaints log. In fact, the Inspector commented that a complaint log had not been provided as part of the inspection.
32. We do not accept that any comments made by the Inspector to the Appellant on the day of the inspection concerning her experiences in other inspections adversely effected the process to any discernable effect. The grounds for the CQC decision are not based on the Registered Managers responses on the day but a lack of written evidence provided in the areas of the service under inspection.
33. The fact that the Appellant no longer has any service users, whilst a consequence of the condition imposed, does not persuade us that the condition should be lifted. We conclude that the Appellant has other means available to them of evidencing that they have successfully addressed the CQC's concerns.
34. We accepted the evidence of the inspectors in relation to all the breaches of regulations set out in their response to the appeal. We do not deal in detail with each of them individually because we have concluded that the four issues outlined in paragraphs 22 -25 of this decision are of such gravity that they, of themselves, are sufficient to require the imposition of a condition to prevent the admission of further new (or returning) service users until the Appellant has improved the standards of care provided. We reasonably believe that the continued provision of the regulated activity without the condition imposed by the registered person will or may expose any person to a risk of harm.

Decision

The appeal is dismissed and the imposition of the condition that the registered person must not provide personal care to any new (or returning users) service users is confirmed.

**Tribunal Judge Jane McConnell
Care Standards
First-tier Tribunal (Health Education and Social Care)**

Date Issued: 15 March 2017