

Care Standards

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

Heard on 5 October 2017 at the Birmingham Civil and Family Justice Hearing Centre Birmingham.

[2017] 3125.EA-MoU

BEFORE

Miss Maureen Roberts (Tribunal Judge)
Mr Michael Flynn (Specialist Member)
Ms Bridget Graham (Specialist Member)

BETWEEN

Clarendon Care Group Limited

Appellant

-v-

Care Quality Commission

Respondent

DECISION

Representation: Mr Archer, Solicitor Ridouts Professional Services Plc represented the Appellant. He was assisted by, Ms Cox, Solicitor from Ridouts. Ms Pepper, Operations Manager, Ms Lee, Quality and Compliance Director, Ms Pugh, Home Manager and Mr James Managing Director, all of Clarendon Care Group Ltd, attended and gave evidence. Ms Guys Operations Director, Clarendon Care Group attended the hearing but did not give evidence.

The Respondent was represented by, Ms Rickards of Counsel, instructed by Ms Qureshi solicitor from the legal department CQC. Mr Playdell trainee solicitor attended.

The tribunal heard evidence from Ms Miller Inspector, Mr Ingles Inspector, and Mr Burrows Inspection Manager.

The background, chronology and appeal

1. The Appellant operates a nursing home, Myford House Nursing Home, in Telford. It has a potential occupancy of 57 service users. There have been a number of inspections of the home by the Respondent. On 1 February 2016 the inspection rated their home as inadequate. On 14 September 2016 an inspection rated the home as requiring improvement overall. On 24 and 30 January 2017 an inspection over two days, rated the home as requires improvement. There was a breach of regulation 17 and the home was asked

to submit an action plan to set out how they would comply with the regulation. The action plan was dated 12 June 2017 and stated that it would be compliant by 20 August 2017.

2. The report for the January 2017 Inspection, was not received by the Appellant, until May 2017. Pending receipt of the report the management of the home decided that the then manager should be replaced, and a new manager took over in May 2017.
3. The most recent comprehensive inspection of the nursing home took place on the 14 and 15 August 2017 (the August inspection). The outcome of the inspection was that the home required improvement.
4. The Respondent decided that the overall risk was high and that the home would be placed into special measures. On the 21 August 2017 the Respondent served an, 'Urgent notice of decision to impose conditions on your registration as a service provider in respect of a regulated activity'.
5. The condition imposed was, 'The registered provider must not admit any service users to the location Myford House without the prior written agreement of the Care Quality Commission. This includes service users who require to use the service for respite care. The term "admit" includes readmission of any service user. This condition should be understood to apply to any service user who has been resident at the home at any time'. The condition came into force immediately.
6. The Appellant submitted a Risk Reduction Plan on 18 August 2017. This plan was reviewed on 21 September 2017. The Appellant also submitted a Quality Audit Improvement Plan in respect of the storage and administration of medication. This was dated 8 September 2017.
7. The Appellant appealed against the imposition of the condition on 15 September 2017.

The Law

8. The Respondent is a statutory organisation set up under the Health and Social Care Act 2008 (the Act). It has the statutory responsibility to inspect regulated activities. The regulated activity in this case is providing 'accommodation for persons who require nursing or personal care'.
9. The Act, in sections 12 (5) and 31, provides that the Respondent may 'vary or remove any condition for the time being in force in relation to a person's registration as a service provider or impose any additional condition'.
10. Section 31 provides that 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.... provide for any decision of the Commission that is mentioned in subsection (2) to take effect from the time when the notice is given.
11. In this case, the condition quoted above, was applied as an urgent measure, to prevent any further admissions without written permission from the Respondent.

12. The tribunal has the power to confirm the decision of the Respondent, direct the decision of the Respondent to have no effect and to direct the imposition of any such discretionary condition as it thinks fit.
13. Tribunal considers the appeal on the basis of the available evidence at the time of the hearing.

The issues

14. There were a number of issues of fact and interpretation that were in dispute between the parties. The panel focused on the concerns of the inspectors at the time and the response of the Appellant to those concerns. We were assisted in this task because we had all the documentation from the inspections, inspection reports and witness statements.
15. The panel had the letter dated 21 August 2017, regarding the imposition of the condition set out above. That letter recorded the main concerns of the Respondent. We did not reinvestigate the factual account of these concerns but heard evidence to weigh up the potential risk of harm arising from the Respondent's concerns.
16. Further the panel considered the current evidence both written and oral as to the management and running of Myford House nursing home at present.
17. The Respondent said that the current proceedings were not about cancellation but about the condition not to admit service users without written consent from the Respondent. The Respondent noted the recent compliance history, which has been inadequate or requiring improvement for two years. They noted the concerns that had been raised in the August 2017 inspection.
18. The Respondent submitted that in light of the findings of the inspection in August 2017, the imposition of the condition was proportionate. It also noted that the condition is flexible and can be varied or removed upon the home's application to the Respondent. It pointed out that the Respondent had agreed to the readmission of a resident last Friday.
19. The Appellant submitted that the tribunal should consider the position of the home today and that if the condition ceased, would admission or readmission to the home result in harm to any person. The Appellant contested the proportionality of the condition. In addition it was the Appellant's submission that in the past 6 1/2 weeks since the August inspection the management team have been working hard to implement improvements. They said that, as of today, there was no risk to justify continuing the condition.
20. The Appellant also noted that the Respondent has not been back to re-inspect or visit the home in the past few days and that therefore it had no current evidence to challenge the improvements that have been made by the Appellant.
21. The Appellant said that currently, they have 32 service users in the home. The majority of their service users come from the local authority and they would normally receive between 5 and 6 referrals each week and take 2 or 3 persons subject to their assessment.

22. The Appellant submitted that such a wide ranging condition was having an immense impact both on their financial situation and on the morale of staff in the home. It was submitted that a more limited condition such as the number of persons to be admitted per week would have been more appropriate. The Appellant also submitted that a warning notice would have been a more proportionate response to the findings of the August inspection.
23. The panel noted that there were a number of incidents reported by the inspectors involving service users, which they were relying on in respect of risk. The inspectors had concluded that one person (A), with COPD, had been neglected because her complaints about her health, had not been acted on by staff and the doctor had not been called.
24. An agency nurse who had come on duty for the first time on the first day of the inspection had given PRN medication to two patients (B and C) and failed to record the administration of the medication. Further one of the patients (B) had a heart condition and a pacemaker. The inspectors said that the records were not sufficient to explain how the person's condition was managed or how the person was kept safe.
25. The main complaints from the Respondent were about no clear clinical leadership in the home and they cited lack of knowledge about person A's ill health. The inspectors stated that ineffective and unsafe governance remained in the home, and cited the three persons already mentioned in respect of A's ill-health not been noted and PRN medication not being recorded.
26. This hearing was an expedited hearing in respect of the condition imposed by the Respondent.

Evidence

27. The tribunal had the benefit of reading the bundle which included all the inspection reports since 2016, together with the factual accuracy comments submitted by the Appellant, handwritten notes of the inspectors findings at the time of the August inspection, correspondence between the parties, minutes of management review meetings, minutes of the local authority safeguarding meetings, and copies of care plans and records for the residents.
28. We had the Appellant's documents recorded in paragraph 6 of this decision. We had two recent safeguarding issues. A complaint with the outcome of the investigation and the report of an outbreak of scabies at the home with the measures being taken. The panel also had witness statements from the Respondent's and Appellant's witnesses.
29. The panel heard from the witnesses present who confirmed their statements and answered questions.
30. Ms Miller was the lead inspector in August 2017. She had observed person A who had a persistent cough and was complaining about feeling unwell. She was told that the person A, repeatedly did this and that she was due to see the doctor on Wednesday. She said that because of her concerns the Appellant contacted the Doctor who visited and prescribed antibiotics.

31. Ms Miller was concerned about service user B who had a pacemaker in that it was not clear how long she had had this and whether there was any care plan in respect of keeping her safe.
32. She was also concerned about the issue of the agency nurse who had administered PRN medication to two patients. The inspection report noted that she had said that she did not know the patients very well. It was agreed that she had failed to record the administration of the PRN.
33. Ms Miller was asked about the Risk Reduction Plan and the Quality Audit Improvement Plan that had been produced by the Appellant. She said she was reassured by the plans but was concerned that these may not have been fully implemented. She said that there was concern about the hygiene and care of patients.
34. Mr Ingles said his focus at the August inspection had been in respect of medication and he recorded that there were discrepancies in two of the medication stocks.
35. He accepted that certain changes have been made and things were starting to happen but he said that he not had sufficient assurance that these changes would be embedded. He referred to the fact that there was a recent report that 22 pain relief patches were missing and that medicine management should have been in place before the inspection.
36. Mr Ingles was critical of the agency nurse administering PRN medication to patients that she had only just met. He considered that the nurse should not have acted in isolation and he would have expected some consultation, with a nurse on duty, before the PRN medication was administered. He said that the administration of PRN medication, needed to be seen in context of the patient and their normal presentation and that there should be protocols for the administration of PRN.
37. He was also critical of the agency staff induction checklist form, which the home had used. He considered that the current, updated form was an improvement. He was also asked about the Risk Reduction Plan and the Quality Audit Improvement Plan, which address the issues raised in the inspection report. He was of the view that he did not have enough assurance that changes had been made and were embedded in the system for the condition to be removed.
38. The Head of Inspection, Ms Hannelly, together with Mr Burrows, the Inspection Manager, and the two inspectors took the final decision, regarding issuing of the condition. Mr Burrows spoke of an extreme level of risk i.e. that it would probably happen again and that it was an extreme breach. Under the Respondent's Enforcement Decision Tree a finding of an, 'extreme' seriousness of the breach, is required, to lead to the decision of an urgent imposition of conditions.
39. Mr Burrows noted that regulation 17, concerning governance of the home, had been in breach on every inspection. Asked why the Respondent had not gone back to look at the home prior to the hearing, he said that CQC would not go back to inspect or visit the home after such a short period of time. He noted that the inspection report had been published last week.

40. Mr Burrows also felt that 6 1/2 weeks was not enough time to demonstrate improvement that would be long-lasting. He was concerned about ongoing issues regarding medicines and non-compliance and believed that it was not appropriate to remove the condition.
41. He said that he was aware of the changes at the home in particular, that there had been a new management team from May 2017, but he was not confident that the systems were firmly in place and that there was still a potential risk of harm. He spoke of an inspection, with a view to re-examining the condition, within 6 to 12 months.
42. Ms Pepper, is the operational manager, for the Appellant. She said there had been a lot of changes in response to the inspection especially with a need to improve the keeping and administration of medication. She explained the changes that have been made, in that an operational manager does a weekly spot check of medication. In addition there is now a clinical lead at the home. The operational manager does the weekly audit and the home manager does a monthly audit.
43. She noted, and the panel had sight of, a recent CCG senior pharmacist's Medicines Management Review report dated 6 September 2017. She said that the report had raised no concerns. She also noted that the home has PRN protocols.
44. Ms Pepper said that the clinical lead was supernumerary and would supervise on drug rounds. The current treatment plans have been reviewed, DoLS are in place for patients who require them, and it is noted if patients require assistance with feeding and drinking. She also said that she had done a number of spot checks at night and at hand overs.
45. She noted that the GP still has a regular day to attend the home on Wednesdays but they will, and do, attend at other times if residents are unwell. She said that she considered the new documentation and systems were working and that the agency nurses were content with the handover system.
46. She said that the recruitment was robust and that they were very tight on interviews to make sure that prospective candidates would fit into the service and the care system. She also said that supervision had been completed for 22 of the members of staff.
47. She acknowledged that there could be some slippage. However she said that the home was doing everything in its power to lift the condition of the home and raise the service.
48. Ms Lee said that she had prepared the Risk Reduction Plan and had gone to the home to sign each item off. She said safeguarding, the local authority and the CCG were coming in. She noted the CCG recent Medicines Management Review report. She said she was overseeing quality and compliance and leading a programme measuring in all five domains that the Respondent's use in their inspections.
49. She is using a computer-based system to gather information about each domain and what needs to be done to improve the outcome for service users.

She said that the trends each month were being monitored. She also said that the heads of department meet, with the manager, to look at the action plan for senior management, again, addressing the five domains.

50. She said that if the condition were lifted, new admissions would be robustly assessed and very controlled. She said that senior management would be aware of risks and that they would be very carefully managed with the resources available.
51. She noted that there had been a safeguarding meeting with the local authority on the 10 August 2017, and that on 31 August 2017, at a further meeting the risk had apparently been escalated because of the imposition of the condition by the Respondent. It also appeared that some cases reported had not been signed off. She is expecting a further meeting on 9 October 2017.
52. It was put to her that the Appellant could speak to local authority to get them to apply to have residents placed in the home by getting the permission of the Respondent. She said that the local authority took the view that they would automatically embargo the home because of the condition and therefore this was stopping 3 to 4 referrals every week. She said that she had kept the local authority up-to-date and that the appeal was not just about finances but also the fairness of the condition.
53. She said that she said that the issues identified were not of an extreme risk and that senior staff on the management team were putting in place systems to avoid risk but that there could not be a situation of zero risk in a care home because it involves people.
54. Ms Pugh, who is the current manager of the home, and who has been in post since May 2017, confirmed the changes and audits in respect of medication storage and administration. There had been an issue about morphine patches and she said that this has been addressed so that they are completely recorded.
55. She also said that agency staff are being shadowed for three shifts before they dispense medication or look after residents on their own.
56. She noted that the report from the January inspection had only been received by the home in May 2017. She said that she came into post at about the same time and she had begun to make changes. She said the changes were still being put in place when the home had the inspection in August 2017. She described the changes that she had introduced regarding dignity and dementia friendliness. She noted that changes had to be introduced slowly and considered that steady progress was being made.
57. She acknowledged that the three service users (A, B, and C) identified as being at risk of harm could have been dealt with differently but she considered the risk was low.
58. She also acknowledged that staff had been used to a system, and the previous manager, and that introducing changes needed to be done carefully and with staff understanding the rationale for the changes.
59. She also gave an account of the patient (A) who had been complaining about her chest and general health in that this was something that she did all the time. She appreciated why the inspectors had been concerned but she said

that this is a very ingrained pattern of behaviour for this resident. The doctor attended on the Tuesday and decided that no treatment was needed. When another doctor from the practice had made her routine visit on Wednesday, she had prescribed antibiotics as a precaution.

60. In respect of the patient with the pacemaker she said that it would not be usual to have a care plan specifically for the pacemaker. It needed to be noted. She said that the plan, seen in the bundle for the patient with a pacemaker, had been produced after the inspection because of the concerns raised. However following a cardiologist appointment the plan had been discontinued because the cardiologist said that the patient was doing well with the pacemaker, and would be reviewed in outpatient appointments.
61. Finally the manager said that agency staff are being phased out. The home has recently recruited a full-time night nurse and another night nurse is about to be appointed which will eliminate any agency staff at night.
62. During the day there are two full-time nurses and supernumerary nurse i.e. a clinical lead and another nurse. Currently she said only nine day shifts a week are covered by agency nurses and she is working towards a full staff complement which will obviate the need for agency staff. She also noted that currently, because of the changes being implemented, some additional care assistants are being employed, from an agency, to cover staff levels whilst the changes are embedded.
63. Mr James who is the proprietor of the home and managing director of the Appellant Company spoke about his concerns that the condition was affecting the morale of the staff, and that there was a risk of staff resigning or moving. He noted that the home has recruited a new night clinical manager and are keen not to lose momentum.
64. He said that the condition had, in effect, put a total block on admissions and the LA considered that they could not make any referrals. He did not think that was any, and certainly no extreme risk, for the service users currently.

Conclusions and Decision

65. We carefully considered the written evidence submitted to the Tribunal in advance and the evidence given to us at the Hearing. We also took account of the legal provisions under the Health and Social Care Act 2008, the Regulations and relevant Case Law.
66. This was a one day hearing to make a decision as to the continuation of the condition imposed by the Respondent on 21 August 2017. We place on record that we were greatly assisted by the comprehensive bundles that were sent to us prior to the hearing because we had all the background information leading to the imposition of the condition and the response of the Appellant. We were also assisted by the advocates, and the witnesses, in managing to conclude this hearing within one day.
67. The panel observed the previous history of inspections. We also noted that the home has had a new management team since May 2017, who have been working to introduce the changes that the Respondent requires. We note the findings of the inspection report of August 2017. However we conclude that the two incidents of PRN medication by an agency nurse on her first shift not

being recorded, the resident complaining about her health, and medication stocks not being correct are examples of poor practice. They are of a low to medium risk, and have been addressed.

68. The complaints about clinical leadership and ineffective and unsafe governance were related to the incidents involving the three service users, A B and C and a question of weight monitoring. As noted these incidents are given different risk ratings by the parties. We conclude that they show poor practice and are of low to medium risk.
69. The panel had the CCG Medicines Management Review. We concluded that the report was supportive of the home's medicines policies and administration. The pharmacist had listed a number of issues that needed to be kept under review but these were not of significance to patient safety.
70. We also notice the complaint of staff not feeling supported and a lack of clear clinical leadership. We accept the evidence that staff, are being spoken to and involved in the implementation of change in the home. Appointments have been made of additional nursing staff and to ensure that there is always a clinical lead at the home. The panel also accepted the evidence that care plans have been revised.
71. We noted the prompt and comprehensive response by the Appellant in the Risk Reduction Plan and the Quality Audit Improvement Plan. It was put to the Respondent's witnesses that if these changes have been put in place would this allay their fears. They refused to answer the question directly and continued to say that there was no evidence that the changes had been made and that they would want a further period of time to make sure that the changes were embedded in the system. Having said that, they had not visited or made a re-inspection of the home prior to the hearing.
72. We do not doubt the integrity of the Respondent's inspectors, but they did not appear to be prepared to consider explanations that were given to them about their concerns, at the inspection. They were reluctant to accept documents that evidenced that change and improvement were in progress, but would take a period of time to achieve.
73. The Appellant's witnesses presented as committed and dedicated about the future of the home and the on going work needed. They were honest and candid about the plan of achieving long-term change. The home manager had spoken of needing between 12 and 18 months to change the home from noncompliant to compliant. We noted from her CV that she had achieved this outcome in her previous employment. The Appellant appears committed to achieving the changes required and, in particular, in respect of the inspection, had put in place a number of systems to achieve the change.
74. The Respondent submitted that the local authority should not put an embargo on admissions whilst the condition remains in place. The Respondent put to the Appellant's witnesses that this should be matter of discussion, and that the LA could approach the Respondent to get permission to place residents in the home. However we accept the Appellant's evidence that, in practice, while the condition is in place, the LA will not place residents in the home.
75. The central issue for the tribunal today is one of risk and the proportionality of the condition.

76. We conclude on the written and oral evidence before us today, that it does not support a conclusion, that 'a person will or may be exposed to the risk of harm', sufficient to justify a condition that no admission should be made without the written agreement of the Respondent.

Appeal Allowed

**Judge Maureen Roberts
Care Standards
First-tier Tribunal (Health Education and Social Care)**

Date Issued: 9 October 2017