

## **Care Standards**

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

**Heard on 11 October 2017 and 8 March 2018**

**[2017] 3131.EA-MoU**

#### **BEFORE**

**Ms Siobhan Goodrich (Judge)  
Mr James Churchill (Specialist Member)  
Mr Mike Flynn (Specialist Member)**

#### **BETWEEN:**

**FORTRESS SUPPORTED LIVING SERVICES LTD**

**Appellant**

**and**

**CARE QUALITY COMMISSION**

**Respondent**

### **DECISION AND REASONS**

#### **Representation:**

The Appellant: Mr Lawson, counsel, instructed by Hill Dickinson

The Respondent: Dr Godson Lawal, the nominated individual, in person.

#### **The Appeal**

1. This is an appeal by Fortress Supported Living Services Ltd brought under section 32 (1) of the Health and Social Care Act 2008 (the Act) against two decisions made on 24 August 2017 by the Care Quality Commission by which conditions on registration were imposed pursuant to section 31 of the Act.

#### **Restricted Reporting Order**

2. 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 service users and staff members in this case, so as to protect confidentiality and privacy.

3. Consistent with this, the names of service users and staff have been anonymised in this decision, the legend for which appears, (as further annotated), in the bundle.

### **The Background**

4. The basic background and chronology is as follows:
  - i. Dr Godson Lawal is the owner and director of Fortress Supported Living Services Ltd. The company was registered with the CQC on 13 August 2013 to provide the regulated activity of “Personal Care” from the Appellant’s home address. The nominated individual for the company is Dr Godson Lawal. The Registered Manager is his wife, Mrs Naomi Lawal, who is a registered nurse. Dr Lawal has a law degree. He also has a Master’s degree and a doctorate.
  - ii. On 6 July 2017 Enfield Social Services wrote to the CQC to alert them to a safeguarding incident which was under investigation by Enfield Social Services Integrated Learning Disabilities team.
  - iii. On the same day Catherine Wilson of Enfield Social Services wrote to Dr Lawal. Her letter set out her summary of the investigation of the safeguarding incident to date by Royacare and explained why the safeguarding enquiry remained open.
  - iv. Royacare is a care staff agency run by the Appellant and operated from the same address. It is not regulated by the Respondent.
  - v. An inspection was carried out by Ms Boatwright and Ms Day, inspectors with the CQC. Ms Boatwright was the lead inspector. Ms Boatwright and Ms Day made a visit on 9 August, and Ms Boatwright on her own on 17 August 2017.
  - vi. The CQC made written requests for further information regarding staffing and service user numbers on 10 and 18 August 2017.
  - vii. On 21 August 2017 a letter of intent regarding possible enforcement action under section 30 and 31 of the Act was sent to Dr Lawal by email. This detailed the serious concerns held regarding breaches of the Regulations. These included a failure to provide comprehensive accurate and current information regarding the number current staff and service users; a failure to establish recruitment procedures; failure to investigate incidents. Four specific questions were asked regarding current care packages and staff in the last two months. Dr Lawal was informed that when considering the use of the serious and immediate powers under the Act the CQC contacts the registered provider to give an opportunity to put forward documentary evidence to provide reassurance that risks are being mitigated.
  - viii. Dr Lawal responded by email on 22 August 2017. He complained about the inspectors and refused to provide any information.
  - ix. A further visit was made on 23 August 2017 when was accompanied by Ms Lella Andrews. On 25 August 2017 Ms Boatwright and Ms Day carried out a further visit when they spoke to service users.

## **The Decisions under Appeal**

5. On 24 August the CQC issued two decisions to impose conditions on an urgent basis both of which are the subject of the appeal before us. The rationale for both sets of condition was that these were necessary in order to protect vulnerable service users from any potential risk of harm.
6. In one letter two conditions were imposed as follows:
  1. *The registered provider must ensure that anyone who is the subject of an open safeguarding investigation must not work with service users of Fortress Care Services.*
  2. *The registered provider must ensure that no person delivers personal care who is subject to criminal convictions without a full risk assessment as to their suitability to deliver care. A copy of that risk assessment to be supplied to the Care Quality Commission; and the registered provider must ensure that no person delivers care unless and until written confirmation from the Commission that they are satisfied is given to the registered provider.*
7. The factual circumstances underpinning this view were that:
  1. On 23 August 2017 the CQC were made aware that X, the subject of an open safeguarding investigation, had been carrying out a regulated activity with Fortress Care Services and providing care to a vulnerable person as part of a live-in care package funded by Norfolk County Council.
  2. During the inspection visit carried out on 17 August 2017 the CQC became aware that Y, a care staff member, had a history of criminal convictions for serious offences, the most recent conviction dated 23 May 2016. No risk assessment had been undertaken to establish if Y was safe to work with service users.
8. The other letter dealt with the further condition imposed on an urgent basis and was that:

*“the Registered provider must not provide any new care packages without the prior written agreement of the CQC.”*
9. The factual basis underpinning the imposition of this condition included:
  - a) A lack of transparency led the inspectors to doubt the quality and safety of the care provided.
  - b) There were safeguarding concerns - see above re X and Y. No provider assessment had taken place with regard to this. Dr Lawal informed the CGC that he supervised Y’s work and he was not left alone. However, three service users had said that Y supported them on his own. A third member of staff also has convictions and there was no risk assessment. This demonstrated a failure to act on and mitigate known risks.
  - c) Staffing arrangements for four service users were not in place when the permanent staff member was not at work. During the staff members recent

two-week holiday Service User D (SU D) had received no care visits for three days as Fortress were unable to provide care staff. SU D said that the replacement carer had dropped her four times whilst attempting to support the transfer to a stair lift. The staff member did not inform anyone of the incident although it was briefly noted in the daily notes. Dr Lawal was informed of the incident on 9 August by CQC but by 17 August there was no record of any investigation and no formal meeting with the staff member had taken place.

- d) Records did not indicate that staff members received a structured induction which ensured that they knew people's specific needs and how to meet them.
- e) Training records could not be located. The CQC could not be assured that all staff had received appropriate training they needed to support people safely.
- f) 17 staff files were reviewed. Recruitment procedures were not robust. Full employment histories were not in place and one reference was taken up for most staff.
- g) Disclosure and Barring checks for Dr Lawal and two other staff members could not be located.

### **The Appeal**

10. In section H of the appeal application form Dr Lawal requested the Tribunal to declare that the conditions should cease to have effect. They should never have been imposed in the first place if due diligence had been observed. Under the section I entitled "Reasons for appeal" he said that the CQC were wrong in their hasty decision to impose such business paralysing conditions. He contended that:

- The reasons for imposing the conditions were not true.
- The reasons for the imposition of conditions were impliedly and expressly prejudicial.
- The conditions were absolutely unnecessary and unfair
- The imposition of conditions was too hasty and unjustified
- The conditions were equivalent to cancellation.
- The so-called inspection was ill-motivated, not genuine, not thorough, misdirected and a mistake.

To some extent Dr Lawal has resiled from some of these contentions at the hearing on 8 March 2018 and we will return to this in due course.

11. The balance of the reasons given in the appeal application form sets out Dr Lawal's account of the circumstances surrounding the inspection. Amongst other matters he contends that:

- a) The inspection visit on 9 August 2017 was unannounced and came at a time when there were three major issues. Firstly, his wife had undergone a major operation and required support for everything, including personal care. Secondly, the appointment arranged previously to replace the

flooring in the office fell through and everything was scattered in the office. It was impossible to lay his hands on anything. Thirdly, they had decided to scan all paper documents onto the computer and in the process some papers were mixed up. He explained this to the Inspectors and expected them to postpone the inspection in the name of human consideration, sympathy and dignity but they decided to go ahead.

- b) Meeting and maintaining essential standards in the interests of vulnerable persons involves team work. The CQC are meant to guide but their guidance as to standards and procedures are generalised. This causes confusion. *“It is not right to be toying and playing try and error with care needs of service users and bullying care providers.”*
- c) The condition regarding new care packages is ineffective, unnecessary and punitive. Fortress is still supporting the same set of service users, apart from those whose care contract has ended as planned. No one has been put at risk or injured or abused so what is the essence of this condition except to punish unduly? Fortress have been supporting vulnerable adult for several years and have had several inspections. Nothing has changed *“rather we are getting even better improvement. All our staff members have gone through our rigorous recruitment process; they are all competent, well trained, well focussed, caring, reliable and very helpful”* as evidenced by the SU feedback reports.
- d) The condition regarding new care packages is tantamount to cancelling registration or closing down the business. Fortress have a service contract with Norfolk County Council (NCC) apart from a few private contracts. The contract with NCC is a spot contract which means that Fortress have to struggle with over a hundred agencies for whatever is left over by the block contract holders. So there will never be the opportunity to write to the CQC for permission as there is usually just a few minutes to respond to a request. Fortress is at an additional natural disadvantage because it is very difficult to keep or retain care staff given that it has never had up to 10 regular service users at any one point. Any additional condition will definitely kill the company.
- e) As to the facts regarding the CQC visit on 9 and 17 August 2017 it was not surprising that information was not provided because he had explained that the files were in disarray. There was nothing to hide. When Fortress were able to lay hands on the various files they were handed over and the Inspectors found that everything was in order. There was no problem with the documentation, processes and policies.
- f) The CQC was *“dishonest by trying to cover up their original intention to investigate a matter and camouflaging it as an unannounced inspection.”*
- g) The CQC were *“sent by the Social Worker (CW) from Enfield Council who was leading the safeguarding matter in the matter of service user [our own annotation M.] The social worker was angry with me because I dare to expressly point out some errors that was being made in handling the safeguarding matter. So it was very easy for the Enfield Social Worker to*

*convince them to take up the assignment of doing whatever it takes to afflict the maximum punishment on her "enemy."*

- h) He took the responsibility to give X some work for Fortress because he had seen that *"the safeguarding matter will not achieve anything it was not being led properly or professionally."* Dr Lawal made several points that regarding his view of the safeguarding investigation which included that X *"is known to me very well and had been working for us on and off for over four years. [X] is a complete gentleman, a responsible married man with children. He can be trusted that he will never hurt a service user."*
- i) *"Due to the failure of the safeguarding leader to handle the matter carefully and professionally from the outset she was later desperate to look for a scape goat and expecting him [i.e. Dr Lawal] to do some "magic" that would provide them with the required or expected information."* He has asked X all the necessary questions and had reported back.
- j) As to the recruitment of Y, he employed him on probation and a thorough and rigorous recruitment process was undertaken. Y had explained the circumstances of each of his convictions and Fortress has assessed these fully. The most recent offence was for battery which Y said *"was unbelievable and unfortunate because four hefty men came to his house to attack him but he as a single person got the blame. He said it was a time he was fully rehabilitated and moved with his life when suddenly these four men got him into trouble."* Dr Lawal decided to give him a second chance instead of rejecting him which may alienate him from society, but on the basis that he would be under close monitoring and supervision for three months in the first instance.
- k) It was not true, as claimed by the three service users, that Y has been supporting them on his own. After induction and introduction of Y to the SUs, Dr Lawal had stayed outside in his car every day for 14 days while Y gave personal care but had gone back into the homes of the SUs every day to find out if they were happy with Y's performance. He had only received positive feedback.
- l) After the CQC had claimed on 21 August that the SUs had expressed concern about the quality and reliability of staff members during the 2 weeks relief cover Dr Lawal sent out a feedback form and had received positive comments from SUs.
- m) CQC inspectors are used to *"confusing service users or their representatives by trying to put words in their mouth or trying to "bully" them into saying things to please them which are usually negative things."*
- n) There were staffing arrangements in place to cover the two weeks holiday relief. Y attended 3 SU's under supervision for the whole 2-week period.
- o) SU D needed a female carer. Two members of staff understudied the carer role with the permanent carer. Unfortunately, the two carers unexpectedly pulled out. Fortress arranged for a carer from London but she had to pull out after two days as she did not plan for that emergency cover. Arrangements were made for another experienced staff to take over but she was not available for three days. Dr Lawal told SU D's husband

that he could get another carer if he did not mind having several different types of carers coming in and out of the house. Fortunately, the husband suggested that he would attend to his wife as he was on holiday for those three days. There was nothing wrong in allowing the husband to support his wife.

- p) He had not been informed about the dropping of SU D until the CQC told him. He was shocked. He spoke to SU D and her husband who said it was not due to incompetence but due to stress for both SU D and the carer. The dropping was not intentional but the stair lift did not get to the last level of the stair case for SU D to be transferred onto her wheelchair. He spoke to the carer who said she regretted not mentioning it to Dr Lawal. She had only agreed to take on the work as a mark of respect for him because he was desperate to find someone. Her son was seriously ill at the time and had since died.
- q) As to training he is a qualified trainer and has great experience as he has been providing various training course for qualified nurses, Healthcare Assistants and Care support workers since 1999. (SM A) is an example of good training. Fortress provide their own induction training. Recruitment is thorough and rigorous.
- r) He could not find his own DBS certificate when the Inspectors asked. It was not current and he had applied for and obtained a new one.

## **The Hearing**

- 12. We had received and read a large indexed and paginated bundle which included a number of witness statements, supported by documents.
- 13. In the course of the evidence on 11 October 2017, we received further documents which were added to the bundle. During the course of the hearing on 11 October 2017 the Tribunal was informed that a further inspection report had been served which was still subject to the fact checking stage. The judge made clear that it was a matter for Dr Lawal to decide if he wanted to rely on any aspect of the further inspection report in the appeal against the imposition of conditions which was before us.
- 14. The hearing was adjourned part heard due to lack of time and when there were still two witnesses for the CQC to be heard. Directions were then issued regarding the further attendance of witnesses and regarding additional documentation that Dr Lawal was requesting. In the event disclosure issues were resolved between the parties and Dr Lawal decided that he did not seek to cross examine Ms Andrews and Ms Day.
- 15. On 3 November 2011 Dr Lawal wrote to the Tribunal by email. He sought the withdrawal of the new Notice of Proposal of cancellation which had been issued by the Respondent and which he attached. He stated that *“The new notice letter as we believe is a disregard to the efforts of the Honourable Judges as its effect*

*will prejudice the ongoing appeal that was adjourned till the 20 December 2017.”* He sought an order to the Respondent to immediately withdraw the letter proposing to cancel the registration and to desist from any other action or activities that could prejudice the ongoing appeal hearing. He also raised the issue of joining any new issues with the extant appeal.

16. The Respondent made representations pointing out that the new notice of proposal and the extant appeal concerned separate processes and address different concerns.
17. In the event Dr Lawal did not pursue the withdrawal of the cancellation proposal or the issue of joinder.
18. The part heard appeal was due to be heard on 20 December 2017. Dr Lawal applied for an adjournment on the basis of ill health. Following an oral case management hearing on 19 December 2017 conducted by the judge with both parties in attendance by telephone the adjourned hearing was vacated and was re-fixed for 8 March 2018.
19. On 8 March 2018 we heard oral evidence from Dr Lawal. Thereafter we received sequential oral submissions from Mr Lawson and Dr Lawal.
20. The judge made clear that the panel had not read the Notice of Proposal re cancellation that had been provided by Dr Lawal on 3 November 2017 in case it contained material that might be prejudicial to Dr Lawal’s appeal against the imposition of conditions. It was also made clear that the appeal before the panel involves a different decision threshold than that involved in cancellation.

### **The Legal Framework**

21. The Respondent’s main objective as prescribed by statute is to protect and promote the health, safety and welfare of people who use health and social care services (section 3(1) of the 2008 Act). The Respondent must have regard to the need to protect and promote the rights of people who use health and social care services (section 4(1)(d)). They must also ensure that action by them in relation to health and social care services is proportionate to the risks against which it would afford safeguards and is targeted only where it is needed (section 4(1)(e)).
22. A range of measures is available to the Respondent in seeking to discharge its functions under the Act. This appeal concerns the imposition of conditions on registration under section 31. This provides as follows:

#### **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;

.....

(3) The notice must—

- a) state that it is given under this section,
- b) state the Commission's reasons for believing that the circumstances fall within subsection (1),
- c) specify the condition as varied, removed or imposed or the period (or extended period) of suspension, and
- d) explain the right of appeal conferred by section 32.

23. An appeal against a decision lies section 32(1)(b) of the 2008 Act. On consideration of the appeal the Tribunal may confirm the decision or direct that it is not to have effect (section 32(5) HSCA 2008). Under section 32 (6) the Tribunal also has power to vary any discretionary condition for the time being in force in respect of the regulated activity to which the appeal relates. "A "discretionary condition" means any condition other than a registered manager condition required by section 13(1)).

### **The Burden and Standard of Proof**

24. In so far as any past facts are in issue the Respondent bears the burden of proof and the standard is the balance of probabilities.

25. The overarching issue to be addressed by the panel is whether as at today's date the Tribunal has reasonable cause to believe that unless conditions are imposed any person will or may be exposed to the risk of harm.

26. The burden of satisfying us that the threshold is met lies 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 would believe that any person (i.e. a service user) will or may be exposed to the risk of harm if conditions are not in place.

27. This is a lower threshold than that involved in cancellation.

28. The ultimate issue involves a judgement as to the existence and significance of any risk, as viewed today on the basis of all the material before us, including any findings we may make in relation to past facts.

### **Our Consideration and Findings of Fact**

29. It is common ground that we are required to determine the matter de novo and make our own decision on the evidence as at today's date. This can include new information or material that was not available when the decisions under appeal were made. It is, for example, open to any appellant in any given case to rely on evidence to show that the evidence was wrong and/or that the issues have since been addressed. We have considered the statements of Ms Boatwright, Ms Hannelly, Ms Day, Ms Andrews and Ms Butterfield and that of Dr Lawal, as well as all the documents on which reliance is placed by both parties.

30. The redetermination in this appeal includes consideration of the more detailed evidence provided by both sides in this appeal as well as the oral evidence which has now been subjected to cross examination over two days. We will not set out the oral evidence of Ms Boatwright, Ms Butterfield and Dr Lawal but will refer to parts of it when giving our reasons. We have considered all the evidence and submissions before us. If we do not refer to any particular aspect of the evidence/submissions it should not be assumed that we have not taken this into account.

31. We find that the basic facts in terms of the overall chronology of events are as set out in [4] above. We will make additional findings below.

32. We have considered the email sent by Dr Lawal on 22 August 2017 in response to the letter of intent sent by email by on 21 August. We need not set Dr Lawal's response out in full. Suffice to say that Dr Lawal referred to "*lines of untruthfulness*", evidence of a scheme, and harassment of himself and his wife on 9 and 17 August 2017. His viewpoint was that there was not one iota of truth in all the statements made in Ms Boatwright's letter which were all "*fabrications and imaginations.*" He considered that Ms Boatwright lacked the knowledge, skills, ability and competency to work as an inspector. He accused Ms Boatwright of lack of transparency and that she came under the guise of an unannounced inspection "*whereas you were there for undisclosed investigation.*" He considered that had "*been sent by someone or certain people and not CQC per se to come and disturb them at all cost.*" He further stated: "*there is absolutely nothing wrong with our service provision or anything that we are doing.*"

33. Much emphasis was placed in Dr Lawal's evidence upon the fact that the Inspectors declined to postpone the inspection on 9 August 2017 although that Mrs Lawal was recovering from major surgery and the office was in disarray. We bear well in mind the serious nature of the surgery that had been undertaken on about 5 June 2017 (which we do not set out in detail so as to preserve confidentiality). In our view, it was reasonable for the CQC to continue with the

inspection. Whatever disarray there was on that day Dr Lawal was given plenty of opportunity to provide further information throughout the whole inspection period.

34. The CQC had not been informed of the absence of the Registered Manager as required under the Act and so a late statutory notification was completed on 15 August 2017. This stated that Dr Lawal had been acting on behalf of the registered manager since absence began on 5 June 2017. Mrs Lawal also stated that she had been still able to consult with Dr Lawal regarding the regulated activities within a few days of the operation.

35. In our view what lies at the heart of Dr Lawal's response in his appeal application to the imposition of conditions is that he maintains that the inspection of the CQC in August 2017 only took place because of the safeguarding issue in Enfield. He considers that he was at a disadvantage to responding to the concerns raised. We find, however, that an inspection of the Appellant's regulated activities was overdue and has been scheduled to take place in any event. We find that the safeguarding issue raised by Enfield inevitably fell to be considered in the course of the routine inspection. We do not accept that the inspection took place because the Respondent was ill-motivated towards the Appellant. We also do not accept that the inspection processes employed were the product of any malice or ill will. Rather we find that CQC was fulfilling the statutory function under the Act.

36. In the course of cross examination Dr Lawal told us that he now regretted sending the email on 22 August 2017 and had since written to the Respondent withdrawing the same. It was apparent from his evidence that this withdrawal took place after the hearing on 11<sup>th</sup> October. He told us he has taken advice from a consultancy firm in social care who have been helping him address issues concerning policies.

37. Given the change in position regarding some aspects of his evidence the judge took Dr Lawal back to the reasons for his appeal as set out at [18] above to give him the opportunity to clarify which parts of the reasons for his appeal he still maintained. He said that the reasons for imposing the conditions were not true *in part* and the inspection was not genuine and was mistaken *in part*. It was clear that Dr Lawal still fundamentally disagreed with the assessment made by the CQC for various reasons. We will deal with the main thrust of these aspects below.

38. We have made every reasonable allowance for the strain under which Dr Lawal operated and recognise the difficulties involved. We will examine some aspects of his evidence by reference to the main concerns held by the inspectors.

### **The use of X as a carer when there was an open safeguarding investigation being conducted by Enfield Social Services**

39. We find that Dr Lawal had attended safeguarding meetings at Enfield in his capacity as owner of Royacare concerning an incident on or about 4 April 2017. He received an email from Ms Wilson on 6 July 2017, the salient features of which were as follows:

- i. On 4 April 2017 M made an allegation against Royacare staff member X, a waking night carer. Royacare were subcontracted from Caretech. The allegation was of physical and potential sexual abuse. M had bruising and blood on his testicles and blood on his nose. This was discovered by the daytime carer.
- ii. On 5 May 2017 a planning meeting was held attended by Royacare who were asked to do an internal investigation by interviewing their staff member to find out what had happened. Royacare were subsequently provided with the Caretech daily care logs. Royacare sent a report and interview dated 10 and 14 April 2017.
- iii. Ms Wilson stated *“At the safeguarding meeting on 6 July 2017 it became apparent that Royacare had not questioned X about the details in the records – X had kept a behaviour chart on the night of 04.04.17 but no written records to explain this. It appeared that Royacare had not interviewed X satisfactorily and X will be called in for interview by myself and Caretech. Therefore the safeguarding enquiry remains open.”*
- iv. Royacare had also told Enfield SS *“that X has been suspended which implied that they were a permanent staff member, however it transpired today that they are bank/agency staff and merely had not been re-booked. This raises concerns about work that X could have been doing for other agencies during this time.”*
- v. Dr Lawal essentially maintains that he had conducted his own risk assessment and it was appropriate to engage X as a live-in carer with Fortress even though the Enfield safeguarding investigation was still open.
- vi. We have considered the assessment on which Dr Lawal relies regarding recruitment of X to work for Fortress. We noted that this simply consisted of his gathering the account of X without cross referencing to any care notes. What shines through the assessment, and Dr Lawal’s evidence, is that his approach was wholly influenced by his belief that X was a married man, with a wife and children and could not have behaved inappropriately. He may or may not be right in this. The fact is that the exercise conducted by Dr Lawal was not a proper risk assessment.
- vii. It was apparent to us that Dr Lawal still does not understand why the exercise he undertook was wholly inadequate to safeguard vulnerable service users receiving care from Fortress against possible risks. He remains of the view that the social worker at Enfield did not know how to do her job properly although he accepted that he is not a trained social worker. The overwhelming impression of the limited steps that he took when engaging X to work at Fortress was that his focus and pre-occupation was on the needs of X rather than any risk posed to any potential service user.

- viii. In our view it is of great concern that Enfield SS were initially informed that X had been suspended by Royacare (i.e. would not be working with vulnerable service users for whom Royacare provided care pending the conclusion of the safeguarding inquiry). Moreover, Ms Wilson had clearly expressed her concern to Dr Lawal regarding the possibility that X could still be working for *other* agencies. We find that, despite this, Dr Lawal went on to engage X via Fortress to work as a live-in carer even though he knew that the Enfield safeguarding enquiry was still open. We find that Dr Lawal's actions lacked transparency. The effect of his evidence was that he was justified because he did not believe in the process Enfield Social Services pursued. We find that his attitude was arrogant, and his actions in employing X were irresponsible and wholly unacceptable. The fact that the Enfield safeguarding inquiry was ultimately closed on 25 September 2017 does not, in our view, vindicate Dr Lawal's opinion or excuse his lack of transparency.
- ix. On 25 August SU B made an allegation of abuse against X to Inspectors. X had worked for Fortress at the home of SU B between 17 and 22 August 2017 as a 24 hour live in carer. The CQC referred this allegation to the safeguarding team at Norfolk CC for investigation. We were informed at the October hearing that this was still open.

### **The engagement of Y to work as a carer for vulnerable adults**

40. We find as follows:

- i. The Disclosure and Barring Service (DBS) certificate dated 8 June 2017 regarding Y had noted multiple convictions. These included theft (1986); assault occasioning actual bodily harm (1991), common assault (May 2001), Harassment (November 2012), criminal damage (September 2013) and Battery (May 2016). Y's employment contract with Fortress is dated 19 June 2017. Dr Lawal has produced an account provided by Y at the final interview stage on 14 June 2017. This sets out Y's account of his criminal convictions. We need not set out all the detail but observe that a feature running through many of the offences is that Y had evident difficulty managing relationships with people. His account of his offences was largely exculpatory and, in relation to his last conviction in May 2016, he said that he was in his house "*when four hefty men came in to attack him. At the end of the day he was judged to be wrong against them. It was inconceivable but I accepted the judgement because I wanted to get on with my life.*" According to Dr Lawal's record of interview the issues raised by the DBS record were discussed, analysed and risk assessed. Dr Lawal told us that he understood the last conviction was related to an incident concerning a failed relationship. In our view this chimed with Y's account of his convictions in 2012 and 2013 and begged obvious questions as to Y's emotional capacity to respond appropriately to challenging situations.

- ii. A further handwritten note by Dr Lawal on the interview record of 14 June 2017 stated: *“Though unspent, may not have impact on the nature of the job. However, he will be under supervision most of the time for the next three months before he’s left alone to attend vulnerable adults.”*
- iii. We do not accept that that anyone with any knowledge or true understanding of safeguarding could have reasonably reached the conclusion that Y’s convictions “may not have an impact on the nature of the job.” There were obvious features that presented a clear risk, not least because a repeated theme in the offending pattern concerned repeated violence and difficulties with getting on with people. Anyone with knowledge and understanding of safeguarding considering the record and account given by Y in an objective manner would entertain significant concerns as to Y’s suitability. It is also difficult to see how someone is rehabilitated when he does not accept that he was truly guilty of the last offence – of which Y had been convicted just over one year before.
- iv. Dr Lawal’s case is that he considered it reasonable to give Y the chance to further rehabilitate himself given that he would be supervised. He has said that he was always outside in his car during the short period that Y worked and checked with the SUs after the visits. However, the SUs informed the inspectors that Y was always on his own. We do not accept that Dr Lawal supervised Y as claimed. Even if the facts on which Dr Lawal relies did take place, this does not, in our view, amount to adequate supervision.

**Staffing arrangements for four service users were not in place when the permanent staff member was not at work**

41. We find as follows:

- i. Dr Lawal’s evidence was that he had arranged for two staff members to shadow the permanent staff member in her care of 4 SUs but these arrangements fell apart for reasons beyond his control. When this evidence was probed it transpired that one of the two staff involved was an administrative staff member who had been engaged relatively recently and who did not have a DBS certificate. For reasons that are not entirely clear to us the end result was that both the two carers decided that they would not work.
- ii. One of the particular difficulties that arose when a new carer was then brought in to provide cover related to the care of SU D, who had a degenerative condition and impaired mobility. In the course of transfer from wheelchair to stair lift she was dropped four times over two days. It appears that bruising occurred. On one occasion an ambulance was called but was then stood down.
- iii. The care notes for SU D provided no instruction to assist or guide a new carer in how to effect transfers nor as to any limitations or constraints regarding the stair lift.

- iv. It is of concern that the carer did not inform Dr Lawal of the difficulties encountered. In our view this suggests that the replacement carer had not been properly inducted.
- v. It is unsurprising that when informed by Dr Lawal that a succession of different carers could attend over the next three days, the husband of SU D decided that he would cope with his wife's care on his own. Dr Lawal relies on this as being the husband's choice. The simple fact is that Fortress were unable to provide the care that was considered necessary and had been commissioned by Norfolk CC.
- vi. We have taken account of the feedback forms completed by SUs at Dr Lawal's request. We attach more weight to the views expressed by the SUs to the Inspectors. We consider it likely that SUs would have felt more able to speak freely to inspectors and, further, that the account relayed at the time of inspection was likely to be an accurate account of their views at that time.
- vii. We recognise the challenges involved in providing staff when the permanent carer is on holiday. However, we find that the arrangements for cover to replace the permanent staff member whilst she was on holiday were inadequate.

### **General Matters relevant to the quality and provision of care**

#### 42. We find that:

- i. Records did not indicate that staff members received a structured induction which ensured that they knew people's specific needs and how to meet them. The facts regarding SU D also bear this out.
- ii. We accept the evidence of the inspectors that training records could not be located. We find that the records of training that have been produced by Dr Lawal do not enable us to be assured that the training provided to staff was, or is, adequate. Dr Lawal told us, and we accept, that he underwent a "Train the Trainer" course some years ago. When his own knowledge base was probed he was unable to adequately explain the basis on which he was able to train staff in issues such as moving and handling, infection control, basic first aid etc. As we understand it Dr Lawal also trained staff in safeguarding but, as we have found, his understanding of safeguarding principles was (and remains) very poor. In our view if training in the areas said to have been delivered by Dr Lawal was robust it would be relatively straightforward to provide detail as to the contents of the training delivered but this has not happened.
- iii. We accept that the inspectors reviewed 17 staff files. We find that the recruitment procedures were not robust. Full employment histories were not in place and only one reference was taken up for most staff. We find that DBS certificates for Dr Lawal and two other staff members could not

be located. We recognise that the provision of his own DBS certificate has been remedied re Dr Lawal.

- iv. We accept that the care plans seen by the inspectors were generic in nature. The client information forms documented only the most basic information about care needs.
- v. SU B's care plan stated that staff should assist them to access the community and take part in social activities. The Inspectors visited SU B on 25 August and were told by SU B that they had only been out of their house once in the month of August and that most days they were supported back to bed after lunch sometimes at 13.05pm and against their choice.

43. We have considered all of the evidence in the round. We find that Ms Boatwright and Ms Butterfield were reliable witnesses as to the facts regarding the inspections. They also gave opinion evidence regarding the issue of risk. We find that they were both measured, conscientious and thoughtful witnesses who did their level best to provide an open and honest account of the facts as they saw them. We accept that the opinions expressed by the inspectors were sincere and honestly held. In so far as there is any conflict regarding the facts surrounding the inspection we prefer the evidence of Ms Boatwright and Ms Butterfield to that of Dr Lawal. We found the evidence of Dr Lawal was unsatisfactory in many respects. His evidence was often internally and externally inconsistent. It is unfortunate, to say the least, that in August 2017 Dr Lawal decided to respond to the sincerely held concerns of the inspectors by attacking their motives, competence and good faith. In taking up a combative and defensive stance he failed to appreciate that the inspectors were inviting him to provide information that might have enabled matters to move forward in a constructive manner.

44. Ultimately the assessment of risk as at today's date falls to the panel to decide. Dr Lawal has expressed his regret that he responded to the concerns raised as he did, but we are unable to accept that his regret provides any reassurance that he now fully understands or truly accepts the breadth and seriousness of the issues that led to the imposition of conditions. We find that Dr Lawal has, even today, an extremely poor understanding of the importance or principles of safeguarding. He also has a very poor understanding of the function of the CQC. We acknowledge that some carers employed by Fortress provided good care. However, we find that the concerns held the inspectors about the quality of the care provided overall were fully justified.

45. In our view the need for prior written approval by the CQC for any new packages of care is justified. We say this because we find that an independent overview is required to ensure that the Appellant is actually able to provide the necessary care to a prospective new SU at an acceptable level. This covers areas of proven

deficiency regarding recruitment (including safeguarding and suitability), the provision of an adequate care plan geared to the needs of the individual SU, as well as adequate training and induction and contingency planning to ensure capacity to make the required number of visits.

46. We are satisfied that each and every one of the conditions imposed by the CQC was, and remains, necessary.
47. As set out above our consideration of the issues is made at today's date. The Respondent has satisfied us that the threshold engaged in section 31 was, (and is still), met because it appears to us that there is reasonable cause to believe that unless the Tribunal acts under this section any person will or may be exposed to the risk of harm unless conditions are imposed.
48. The fact that the threshold for the imposition of conditions under section 31 was, and is still, met does not mean that the power to impose conditions should necessarily be exercised. We have a discretion which must be exercised in accordance with the principle of proportionality.
49. We have considered the justification/necessity for each condition separately. We have considered the safeguarding conditions first.
50. In the event at the very end of the hearing Dr Lawal agreed that the safeguarding conditions were necessary and proportionate. For the avoidance of any doubt, we set out our findings. The matters that gave rise to the imposition of the safeguarding conditions were serious. In our view it is surprising that it was ever contemplated that it could seriously be said that the safeguarding conditions imposed by Respondent were unnecessary, disproportionate or unjustified. The fact that Dr Lawal objected to the imposition of such basic conditions, which did no more than formalise that which reflects standard practice, is a matter of significant concern indicating, in our view, his lack of understanding and lack of insight into the importance of safeguarding vulnerable service users from the risk of harm.
51. The concern of Dr Lawal regarding the condition regarding the prohibition on the acceptance of new care packages without the written consent of the CQC is that it was not warranted on the facts and it paralyses his business. We have found that the condition is necessary. We recognise that the condition regarding the acceptance of new care packages may well mean that there will be business opportunities that will be missed because of time constraints. However, we do not accept that the condition, in and of itself, presents any insurmountable obstacle to the acquisition of new service users. In our view the Appellant had, and still has, the opportunity to demonstrate that the service he seeks to provide can meet the core standards of safe care. We do not agree that it is the responsibility to CQC to show the Appellant how to do this. It is open to the Appellant to seek to demonstrate proactively that the service that will be provided will meet acceptable standards. In our view even if the conditions imposed do, or were to have, an adverse impact on the Appellant's business interests, the conditions are necessary in the public interest.

52. We address the **Razgar** issues for the avoidance of any doubt.
53. The appellant's interests are part of his and his wife's private lives and the interference involved in the decision is plainly such as to merit the protection of Article 8 of ECHR.
54. The Respondent has satisfied us that that the decisions taken were, and remain, in accordance with the law. We are also satisfied that each of the decisions regarding conditions are objectively justified and necessary in order to protect the public interest in the protection of the safety and well-being of service users and the maintenance and promotion of public confidence in the system of regulation.
55. In reaching our decision on the issue of proportionality, we took into account that the impact of the imposition of conditions.
56. We recognise that when assessing proportionality alternatives to the imposition of conditions should be considered. It is notable that the imposition of conditions is at the lower end of the enforcement measures available to the Respondent. The only other lesser measure available would be to issue a warning letter. We find that in the circumstances this would be a wholly inadequate response to the seriousness of the risks posed. The fact that the condition regarding safeguarding was ever objected to speaks volumes as to Dr Lawal's lack of understanding of safeguarding. In our view and based upon the material before us as at today's date the imposition of the condition regarding new care packages was, and is, proportionate.
57. In our view a warning letter would be ineffective to protect the public interest because of the lack of transparency shown by Dr Lawal in the past. A warning letter would not provide the necessary level of reassurance that any new care packages would be undertaken in accordance with a rational and measured appraisal of the ability of the service provider to provide care for a particular service user in accordance with the standards of care provided under the Act.
58. Our task is to confirm the decision to impose conditions or to state that any or all of the conditions imposed shall have no effect or should be varied. We have considered the issues of justification and proportionality by reference to other measures available to the Respondent in the exercise of its regulatory powers. Given our findings we are satisfied that the imposition of any lesser or varied conditions would not have been, and would not now be, effective in seeking to address the potential risks involved.
59. We have balanced the impact of the decision upon the Appellant's interests against the public interest. We consider that the facets of the public interest engaged far outweigh the interests of the Appellant. In our view the decision to impose conditions on registration on an urgent basis pending consideration of further action was (and remains) reasonable, necessary and proportionate to the legitimate public interest.

## **Decision**

60. The decision to impose conditions on registration is confirmed and the appeal is dismissed.

**Tribunal Judge Siobhan Goodrich  
First-tier Tribunal (Health Education and Social Care)**

**Date issued: 14 March 2018**