

First-tier Tribunal Care Standards

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

[2022] 4666.EA
NCN: [2023] UKFTT 591 (HESC)

Hearing held by video link
on 20 June 2023

Before

**Tribunal Judge Brandon
Specialist Member Horsford
Specialist Member Walsh-Heggie**

Restore Care Services

Appellant

-v-

Care Quality Commission

Respondent

DECISION

The Application

1. Restore Care Services Limited (RCS/the appellant) appeals against the decision of the Care Quality Commission (the CQC/the respondent) contained in its Notice of Decision dated 29 June 2022 to cancel the Appellant's registration as a Service Provider pursuant to section 28(3) of the Health and Social Care Act 2008 (the 2008 Act).

Attendance

2. Mrs Spiwe Muzira, registered manager of Restore Care Services (RCS), attended and represented the appellant.
3. Ms Mary-Teresa Deignan of Counsel represented the CQC. The CQC called one witness, Ms Julia Spencer-Ellis, Senior Specialist (formerly Inspection Manager).
4. Also, in attendance from CQC were; Miss Faith Salih, Senior Lawyer, Ms Lee-

Ann Frampton-Anderson, Senior Lawyer (CQC) and Miss Georgia Deacon, Paralegal. They took no part in the hearing but attended as observers and note-takers.

Late Evidence

5. In advance of the hearing Mrs Muzira sent additional documents to the tribunal. These were sent by CQC again to the tribunal on the morning of the hearing, together with further material sent by Mrs Muzira direct to the CQC, in a bundle of 84 pages. The bundle contained 20 documents which included email correspondence between the parties, evidence relevant to the appellant's application to postpone the hearing on two grounds; her ill health and to allow the appellant to provide the regulated activity to a service user. Mrs Muzira requested that this material was admitted in evidence.
6. Later in the hearing, after she had given evidence, Mrs Muzira sent additional material to the CQC and the tribunal, namely a passport for a proposed employee, a residence permit for the same individual, and an email concerning a Disclosure and Barring Service (DBS) check carried out in 2019.
7. In respect of all of the material submitted, the CQC noted its lateness, but made no particular objection to the material being admitted. If the tribunal admitted it, the CQC asked that they be allowed to respond to it in the form of oral evidence from Ms Spencer-Ellis and that the name of the proposed client of the appellant be redacted.
8. We concluded that it was in the interests of justice to admit all the material in late evidence as it was relevant to the issues in the appeal and would assist the tribunal in reaching its decision. We granted the CQC permission to respond to the late evidence in the oral evidence of Ms Spencer-Ellis.

Order under Rule 14(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care) Rules 2008

9. We make an order prohibiting any person from disclosing or publishing any matter likely to lead members of the public to identify the proposed service user named in the late evidence. Although the hearing was public, no members of the public in fact attended to observe the hearing and so the only people who heard or read the name of the service user were those referred to in the "attendance" section of this decision.

Application to postpone the hearing

10. Mrs Muzira applied to postpone the hearing on the grounds she was suffering from ill health and that the appellant had obtained one client. She provided a contract for personal care services said to be between the appellant and an individual, due to start on 3 July 2023, some parts of a hospital letter dated 9 May confirming she had been seen at hospital on 20 April and an appointment letter indicating she had an appointment on 22 June 2022. She also relied upon a reference, DBS check, passport and residence permit relating to a

proposed employee who would assist in delivering the regulated activity to this service user. When asked, Mrs Muzira told us that she was unable to attend a hearing for any longer than one hour due to health difficulties.

11. The CQC objected to both grounds of the application to postpone the hearing, arguing that the appellant had provided no evidence to support the assertion that her health issue prevented her from preparing for attending the hearing, that the information contained in hospital letter submitted indicated that her condition was of an episodic nature, there was no indication Mrs Muzira has been prevented from earning her living, no evidence she has taken time off work for this condition, and was providing documents up to 1:30am on the morning of the hearing, and that Mrs Muzira had had time to request an adjournment but did so at the last minute. Ms Deignan submitted there was a concern on behalf of the CQC that Mrs Muzira's objective in making this application was to continue to delay the hearing.
12. In relation to the second ground, Ms Deignan argued that the company had been registered for three years, regulation 6(1)(c) contained no discretion and although there had been effort put in to commence the business, the CQC was concerned with the regulation and improvement of health and social care services, the efficient and effective use of resources in their provision, and the assessment of the appellant's ability to provide the regulated activity took place in 2020, there was no evidence of provision of the regulated activity, the CQC could not be assured of the appellant's current ability to provide those services and there needed to be an adjudication of the ability of the service to provide the regulated activity without further delay.
13. The hearing was previously listed on 9 May 2023 and was vacated for similar reasons relating to the health of the registered manager of the appellant. This was therefore the second listing of the appeal and we considered that there was a strong interest in proceeding, that this was concordant with the overriding objective of deciding cases fairly and justly including avoiding delay so far as it compatible with proper consideration of the issues. Although the appellant provided evidence of health concerns and appointments, Mrs Muzira had not offered any evidence to substantiate her inability to attend the hearing on health grounds. We accepted the submissions of the CQC in this regard. We noted that the condition had been in existence for at least two years, during which time Mrs Muzira had not been prevented by it from flying to Zimbabwe, which was no doubt a long flight involving extended periods of time when Mrs Muzira would be required to remain in her seat.
14. We concluded it was not in the interests of justice to postpone the hearing because there was a strong interest in the appeal proceeding, there had been a stay of one month to 31 October 2022 to allow the business to find new clients and the business had been registered for three years.
15. During the hearing regular breaks were taken to ensure the comfort of all participants and several other recesses occurred whilst the panel met to deliberate on applications to postpone hearing or admit late evidence, including mid-way through the day. The panel was satisfied that all parties

including Mrs Muzira were able to take a full part in proceedings.

Timeliness

16. Section 32(2) of the Health and Social Care Act 2008 states that no appeal against a decision or order may be brought by a person more than 28 days after service on the person of notice of the decision or order. The appeal was lodged on 1 August 2022 using incorrect forms outside the time period for the appeal to be lodged, which expired on 29 July 2022, the notice of decision having been served on 30 June. The appeal was reconstituted in the correct format a few days later, on 11 August 2022.
17. The respondent accepted that in correspondence with the appellant after the notice of decision was served, on 28 July 2022, the CQC misinformed the appellant that they had until 1 August 2022 to make representations in response to the decision (when in fact such representations are only possible in respect of a proposal, the step before a decision is taken by CQC). Although this correspondence repeated the correct information, also included in the notice of decision, that any *appeal* had to be lodged with the tribunal within 28 days, the CQC did not seek to pursue the point that the appeal was issued out of time as this communication may have caused the appellant some confusion. Indeed, the appellant informed the tribunal that the reason for the appeal being made late was that the CQC had informed them they had until 1 August. The tribunal considered in the circumstances and having regard to the decisions of *Pomichowski v Poland* [2012] 1 WLR 1604 and *R (on the application of Adesina) v the nursery and Midwifery Council* [2013] that these were exceptional circumstances, that there was evidence that the correspondence from CQC to the appellant had misled Mrs Muzira to the impression she had until 1 August 2022 to lodge the appeal and we considered it significant that this was the date the appeal was in fact lodged. The form which the appellant used was of less significance; it was clear from the initial form what the decision was which the appellant intended to appeal. We considered that in these circumstances the appellant had done all it could to bring the appeal timeously and therefore it was fair, just and proportionate to extend time and consider this appeal.
18. The respondent argued that because the appeal had been lodged late, it had proceeded on the basis that no appeal was being lodged and accordingly, prematurely, cancelled the appellant's registration effective from 12 August 2022. Cancellation would not normally take effect until the outcome of the tribunal proceedings was known. This was reversed on 16 September 2022 and registration re-instated.
19. The respondent acknowledged this error and made an application to the tribunal, the result being that proceedings were stayed for one month during the appeal process until 4pm on 31 October 2022 by order of Judge Khan dated 5 April 2022, giving the appellant a further opportunity to provide evidence of carrying on regulated activity and to seek business in this regard.

Background

20. Restore Care Services Ltd (RCS) is a company which was set up with the intention of providing domestic care services. Mrs Spiwe Muzira is the registered manager of this company. RCS registered with the Care Quality Commission as a service provider in the area of personal care, a regulated activity under the Health and Social Care Act 2008, on 4 May 2020. This registration was conditional upon the company having a registered manager and a location from which the regulated activity could be carried on.
21. The CQC has a process for assessing whether service providers are “dormant”. This involves contacting the service providers and in response to the first contact on 3 September 2020, the appellant confirmed no regulated activities were being delivered by RCS. At subsequent points this contact was repeated and the appellant either failed to respond or confirmed that no regulated activities were being delivered.
22. The CQC served the appellant with a notice of proposal which indicated their intention to cancel the registration of the appellant, on 20 May 2022. It was dated 17 May 2022. CQC received no representations against that notice and went on to issue a notice of decision to cancel the registration of the appellant which was served on 30 June 2022.
23. At the hearing it was common ground between the parties that no regulated activities had been delivered at any point since registration, a period of over three years, and that no regulated activities were currently being delivered by RCS.

Legal Framework

24. Section 17 of the Health and Social Care Act 2008 states:

(1) The Commission may at any time cancel the registration of a person (“R”) under this Chapter as a service provider or manager in respect of a regulated activity—

(a) on the ground that R has been convicted of, or admitted, a relevant offence;

(b) on the ground that any other person has been convicted of any relevant offence in relation to the regulated activity;

(c) on the ground that the regulated activity is being, or has at any time been, carried on otherwise than in accordance with the relevant requirements;

(d) on the ground that R has failed to comply with a requirement imposed by or under Chapter 6;

(e) on any ground specified by regulations.

25. In this matter section 17(1)(e) was relied upon by the CQC.

26. The relevant regulation was Care Quality Commission (Registration) Regulations 2009/3112 reg. 6 Cancellation of registration:

(1) The grounds specified for the purposes of section 17(1)(e) of the Act as

grounds on which the Commission may cancel the registration of a registered person in respect of a regulated activity are that the registered person—

- (a) has made a statement which is false or misleading in a material respect, or provided false information, in relation to any application for—*
 - (i) registration, or*
 - (ii) the variation or removal of a condition in relation to their registration;*
- (b) has failed to pay any fees payable under provision under section 85 of the Act; or*
- (c) if the registered person is a service provider, is not, and has not been for a continuous period of 12 months ending with the date of the decision to cancel registration, carrying on that regulated activity.*

27. The CQC relied upon regulation 6(1)(c).

28. Section 32(3) of the 2008 Act sets out the powers of the Tribunal when deciding an appeal against a decision. The First-tier Tribunal may confirm the decision or direct that it is not to have effect. Section 32(6) 2008 Act provides that the First-tier Tribunal also has power to:

- a) vary any discretionary condition for the time being in force in respect of the regulated activity to which the appeal relates,
- b) direct that such discretionary condition shall cease to take effect,
- c) direct that any such discretionary condition as the First-tier Tribunal thinks fit shall have effect in respect of the regulated activity, or
- d) vary the period of any suspension.

29. The CQC requested that we uphold the decision, the appellant requested we direct it is not to have effect and neither party requested any condition.

Positions of the parties

30. In support of the appeal the appellant argued that:

- a) In part, human error contributed to the appellant not responding to the notice of proposal,
- b) The notice of proposal did not reach the provider,
- c) As the appellant put effort and resources into obtaining registration, more time should be allowed,
- d) The appellant has been actively looking for work and there are some barriers to entry which are outside their control,
- e) That they put on hold processes of negotiation and tendering on receipt of the notice of proposal,
- f) The appellant had previously approached the council and other providers for work and was currently implementing suggestions made by the council,

- g) significant resources and efforts had been put in place,
 - h) that Covid 19 had a significant impact as Mrs Muzira lost friends and relatives therefore a longer grace period should be afforded,
 - i) that the appellant had invested in resources and learned lessons,
 - j) that the appellant had continued to pay their registration fee and other subscriptions,
 - k) that the appellant had employees waiting to start work as soon as the appellant obtained service users.
31. The CQC rejected the submissions, arguing that many of them were not relevant to the considerations of the tribunal. They argued that whether or not human error played a part in the appellant not responding to the notice of proposal was not relevant, the material consideration was whether the appellant was now and had been in the last 12 months carrying out the regulated activity, and it had not.
32. The CQC submitted there was no evidence that the notice of proposal had not reached the appellant.
33. The CQC argued it was not relevant that the appellant had invested effort and resources and that the time period is relevant to the power to cancel registration in this matter were prescribed by statute and statutory regulations. In this regard, and in relation to the argument that the appellant had staff ready to start as soon as service users were obtained, the CQC noted that the respondent remained registered pending the conclusion of tribunal proceedings and therefore had a further opportunity to obtain work and demonstrate that it was providing the regulated activity.
34. The CQC submitted it was irrelevant that the appellant had continued to pay their registration fee, as this was a requirement of all service providers.

Evidence

35. The panel had regard to a bundle of 198 pages, provided in digital PDF format, a further bundle of 84 pages comprising late evidence submitted by the appellant, and documents contained in an email sent by Mrs Muzira to the CQC at 1:43 PM on the day of the hearing.
36. Oral evidence was heard from Mrs Muzira and Ms Spencer-Ellis.
37. Mrs Muzira gave evidence, adopting her statement, that the main reason to uphold her appeal was that failure to start was not about a lack of effort on her part, she felt that there was a need for her service and she needed to be given an opportunity to carry out the regulated activity. She had opportunities to sell on the business, but had not done so, because she was passionate about the

area and felt she could make a difference. She had made monetary investments, indicating, she said, her commitment to keep the company and provide the services. She had been on “precontract”, a website where she could enter into tenders, but her business being small was a challenge to obtain work. She stated that her health issues were not just an excuse, and had impacted on her. Covid-19 had also impacted her, and being registered at the beginning of covid had impacted on her, support was not provided to small businesses such as hers at that time.

38. Mrs Muzira stated she was now in a better position, having gone through the last three years, to look forward for a positive outcome in her business. She described some of the difficulties she had faced; she had a reaction to the Covid vaccine and suffered facial paralysis which had affected her. Her sister who lives in South Africa had been in a car accident and her niece had died. She had been to Zimbabwe, this was not a holiday but a trip to her second home, she said, and she had lost a close friend last October whose funeral she was involved in arranging. During this time, she was still trying, she stated, to engage a service user.
39. Mrs Muzira was asked by the panel how she had supported herself without any service users. She stated that she works as a contract manager on a remote basis reviewing terms and conditions and advising on them. This is a full time role. She had previously worked full time in the care industry, then worked during the week as a buyer and weekends in care services.
40. Under cross-examination Mrs Muzira accepted RCS had not carried out the regulated activity for last 12 months and indeed since registration, though not, she said, for lack of trying. She accepted that the assessment of her ability to carry out the regulated activity took place on 4 May 2020. She was asked whether there had been no opportunity for the CQC to assess her ability for more than three years. She responded there were challenges with the process but there had been no assessment by the CQC of her in the last three years.
41. Mrs Muzira was asked whether the care plan submitted by her in late evidence did not include assessment of the care-user’s ability to physically move. She replied this was not a complete document as the contract was signed the day before the hearing and that there had not been an opportunity to carry out the full assessment.
42. She was asked if this care plan did not provide enough information for a carer to look after the service user. She accepted that it was incomplete as a care plan.
43. She was asked if the proposed service user had capacity. She replied that she had, from talking to her. She was taken to page 34 of the bundle which showed the signature page of the contract and said in manuscript “signed on behalf of service user”. She stated this had in fact been signed by the service user themselves. Ms Deignan put to Mrs Muzira that the name of the service user was spelled in different ways in the contract and was asked why this was. She replied this was a typing error which had been corrected and she was confident

of the identity of the service user.

44. Mrs Muzira accepted there had not been a full needs assessment and attributed this to a lack of time. She accepted she would be expected to carry out a full needs assessment before carrying out the regulated activity with a service user. She was asked whether she accepted she was not in a position as of today to carry out the regulated activity. She replied that the contract is due to start on 3 July and she was not in a position to start the regulated activity.
45. She accepted that the passport provided relating to her proposed employee had expired on 6 March 2021 but stated that there was another valid passport which had not been submitted (this was submitted later during the hearing and admitted as evidence by the panel). She accepted that the DBS document supplied for this individual was from a previous employer dated 3 August 2022 and she had not provided an updated DBS check for this proposed employee. She stated the DBS in question had originally been applied for by Restore Care Services (this document was also subsequently supplied in late evidence and bore a date preceding the registration of RCS, in 2019). She was asked if she had obtained a reference from the person's most recent employer and accepted that, saying the application had been made two years ago.
46. Ms Spencer-Ellis gave evidence adopting her two witness statements which were included in the bundle. She stated there was nothing she had heard in the hearing or read in the late evidence which caused her to change her opinion that the cancellation of registration was appropriate.
47. She stated that the care plan contained in the late evidence was incomplete and preparatory work which she would expect to be done had not taken place, including an assessment of needs and plans of how to meet those needs laid out, assessments of risk and plans to mitigate those risks in the provision of the care. She stated in her opinion no preparatory work had been done, there was no detail of the care-user's needs and the plan of how to meet them. The care plan was not complete, lacking in detail of the needs, the reason for them and detail of the practical support that would be required by the care worker. It detailed that support with medicines was required, that there would be a medication support plan, this was absent and there was no list of medications or contraindications. If a care worker was to take this plan to care for a service user, she stated, she would be very concerned the worker would not have enough information to provide the regulated activity safely and put them and the service user at risk. The latter risks would include unsafe use of medicines, moving and handling and receiving care which is not person-centred.
48. She stated there was not enough information even to deduce that this was a regulated activity, as no detail was provided of the type and level of care required. She gave the example of showering – it was not clear if physical assistance was required, or the user simply needed support to set up the bathroom.
49. Ms Spencer-Ellis was concerned about the proposed employee and the processes used in recruitment, application forms were not signed and dated

where appropriate, a reference had been sought not from the most recent employer. She stated that the contracts did not indicate a regulated activity had been carried out and in her experience, it was highly unusual to see someone agreeing to a package of care where that care had not been defined in a care plan. She stated she would expect to see a comprehensive needs assessment and a plan to meet them, including risks, mitigation of risks, and a record of the care user's preferences, for example whether they preferred the bath or the shower and which products they would prefer to use.

50. Mrs Muzira, at 13:50, sent a new copy of the passport of her proposed employee, and a DBS check, showing that she had initiated the application. As described above, these documents were admitted as late evidence.
51. Ms Spencer-Ellis addressed the further late evidence and stated that there were still inconsistencies in the documents submitted, whilst the identity documents were now in date, the reference supplied showed employment between 2017-2022 but they were recruited to work with RCS in 2019, that being a discrepancy, and there were issues with the availability of a person who was recruited 4 years ago, before RCS was registered, to carry out this proposed package of care.
52. Ms Spencer-Ellis stated that on an inspection with this evidence she would not be satisfied that safe recruitment had been conducted.
53. Ms Spencer-Ellis stated that CQC had a policy of not inspecting services if they were dormant as without the regulated activity being carried on there was no way of assessing the relevant standards had been met. This has rarely been done for services where they have a different regulated activity for instance residential services which were empty, as the premises can be assessed. In this case, she stated, with personal care, there was no such other matter to assess.
54. Mrs Muzira asked Ms Spencer-Ellis if inspections had been annual since COVID-19. She replied over that period inspection was conducted on a risk basis, with inspections being ceased in the early phase and resumed for other services lately, still maintaining a risk basis.
55. Mrs Muzira asked what had changed since her registration, where was the risk? Ms Spencer-Ellis stated that best practice develops over time and gave the example of good infection control, which had evolved a lot in the last 3 years. She could not be confident that Mrs Muzira had stayed up to date with best practice and could not assess it, as the regulated activity was not being delivered.
56. Mrs Muzira asked if Ms Spencer-Ellis had come across other care services owned by people who had grown up locally experiencing difficulty in getting work. She stated that she had, that commissioning arrangements were made by local authorities, and it was for each provider to research their local area. There were also other sources of work such as self-finding clients.

57. Mrs Muzira stated that she knew of other services which had been given 6-month periods to prove they could obtain work and carry out the regulated activity. Ms Spencer-Ellis stated that this was covered in her witness statement which expressed CQC's process in monitoring dormant services.
58. Mrs Muzira asked if there was a better way to monitor dormant services, not to rush to cancel registration but to reassess. Ms Spencer-Ellis stated she was bound by the Act which allowed 12 months and in fact RCS had received 3 years since registration. Ms Spencer-Ellis stated that the date the CQC cancelled the registration was 12 August 2022, having not been made aware that Mrs Muzira had appealed the decision, late. This was reinstated on 16 September 2022. Mrs Muzira stated that she had, during the 2 years and 3 months after her registration, been making attempts to contact CQC, but found this difficult as she was in another country. The initial cancellation came to her attention whilst working with a potential business partner, she stated.
59. Mrs Muzira asked Ms Spencer-Ellis whether the fact the care contract had been signed very recently and the lack of time she had not carried out an assessment of needs was significant, bearing in mind she was a new provider and small. Ms Spencer-Ellis replied the standards were the same for all providers and if RCS was saying it was in an imminent position to provide care, she would expect a full care plan, the question was whether RCS was delivering the regulated activity.
60. Ms Spencer-Ellis was not aware of demand and supply in the service area of Warrington specifically.
61. Ms Spencer-Ellis stated that the CQC website showing that RCS was registered was done overnight on 16 September 2022. She stated that this was the means by which local authorities check that a service is registered.

Closing submissions

62. Ms Deignan reminded the panel that Regulation 6(1)(c) permits the CQC to cancel registration if the provider had not carried on the regulated activity for a continuous period of 12 months and was not for the time being providing it. She submitted that there was no discretion in the regulation, the requirements of which for cancellation of registration remained met. Even on Mrs Muzira's own case, she argued, the grounds for cancellation of registration are met, and by 12 August of 2022, when the erroneous cancellation took place, the required dormancy period of 12 months had been exceeded by some margin. The importance of the 12-month period was emphasised in the evidence of Ms Spencer-Ellis as after that period the CQC cannot be satisfied the provider was up to date with best practice and guidance and this places service users at risk, opposite to the objective of the CQC. The CQC was concerned that there has been no assessment of the proposed service user's needs upon which a care plan could be based, and the regulatory activity provided. Even the preparatory steps are not in place, Ms Deignan submitted, some 36 months after the assessment prior to 4 May 2020. If care was provided on the documentation provided there would be a risk to the service user and the carer. She pointed

the panel to the evidence of Ms Spencer-Ellis that, if the appellant was inspected, the conclusion would be that the proper processes on recruitment had not been provided.

63. The CQC argued that the original decision to cancel registration was justified proportionate and reasonable and there was no change at the date of the hearing because there had been no provision of the regulated activity, it therefore remained reasonable, justified and proportionate to confirm the decision.
64. Mrs Muzira in closing said she honestly believed she can provide the service without endangering service users and asked that the panel consider some of the factors affecting her service were outside of her control, that she had evidenced the steps she took to contact care commissioners, she had done as much as she could to get the service users on board, signed up on a website to obtain contracts and followed up on 26 leads. Her proposed employee worked in a domiciliary care agency and was good at teaching in the field. After meeting the service user and their family, she formed the impression they were educated, and she felt that it was a good indication that they had chosen RCS to provide their care. She asked that the panel consider the knowledge she had obtained over the last period.
65. Mrs Muzira asked that we consider her health problems, she said there had been lessons learned over the period of RCS' registration and she was in a better place now, she was willing to meet requirements to ensure that the care was client-based. There was, she submitted, a pool of available staff to employ.

The Tribunal's conclusions with reasons

66. Regulation 6(1)(c) states that the CQC may cancel the registration of a service if it is not now delivering and has not for the last 12 months delivered the regulated activity. We found as a fact that RCS was not currently providing the regulated activity. There was some evidence of an agreement to provide personal care services in the coming few weeks, but this did not in our conclusion show that the regulated activity was being carried out currently, indeed Mrs Muzira confirmed this at the hearing. Mrs Muzira also accepted, and we found as a fact, that RCS had not delivered the regulated activity for the preceding 12 months. Indeed, it was agreed that RCS had never provided personal care in over 3 years since it was registered.
67. We did not accept Ms Deignan's submission that regulation 6(1)(c) contained no discretion. The wording of the regulation clearly provides the respondent, and the tribunal on appeal, a discretion whether to cancel the registration. Regulation 6(1) describes grounds on which the Commission *may* cancel the registration of a registered person in respect of a regulated activity. The respondent indeed, had not cancelled registration automatically after 12 months of dormancy, but had exercised its discretion and done so after a period of over 25 months, during which repeated contacts were made with the appellant to check whether it had started delivering the regulated activity.

68. We therefore went on to consider whether it was reasonable and proportionate to allow RCS to continue to be registered on the basis it may soon commence providing care. We concluded this was not a reason to uphold the appeal. We were persuaded by the concerns of CQC relating to the safety of care being provided by the appellant on the basis of the documents supplied in late evidence which were of a poor standard and incomplete in nature. It was concerning that the appellant proposed to provide care to an individual but had not yet carried out a full care assessment. We agreed with CQC's conclusion that the material submitted by the appellant relating to the proposed employee was indicative of incomplete recruitment practices and that to provide care to a person on the basis of the material would be unsafe to the user and the carer because it did not provide detail of the care required or the risks to both the carer and client in delivering it, or how those risks might be addressed.
69. We were persuaded by the CQC's evidence that without the appellant delivering the regulated activity, inspections are not feasible and therefore the CQC is unable to assure itself of the ability of the appellant to comply with current best practice. The last time such an assessment was made was in the registration process in May 2020. Ms Spencer-Ellis gave evidence that practices and understanding of the delivery of personal care have changed in that time, and gave the example of infection control. We were not reassured by Mrs Muzira's assertions that she has subscribed to updates from CQC and kept her knowledge current. No documentary evidence was supplied of this and Mrs Muzira's evidence on the point was vague. She has been working full time in a different field, of contract management, and not delivering the regulated activity.
70. RCS was a company which had not delivered the regulated activity for a very long period of time, which was not able therefore through CQC inspection to demonstrate its current ability to meet required standards and which during the appeal had produced documentation relating to proposed personal care services which did not demonstrate that the correct processes of recruitment and care assessment were being followed currently.
71. We rejected the argument that the notice of proposal, a necessary precursor to the notice of decision, had not been received by the appellant. Firstly, the submissions made by the appellant in this regard were contradictory, on the one hand arguing that the notice had not been received, and on the other arguing that human error on the part of the appellant had led to a delay in responding to it. The notice of proposal was produced in evidence by the CQC and included in the bundle. It was dated 17 May 2022 and correctly addressed to the appellant's premises. We concluded it had been correctly served. We conclude that had there been any delay on the part of the appellant in responding to the notice of proposal, the very long period between that date and tribunal hearing had addressed any self-inflicted disadvantage suffered by the appellant, as it had had a long period of time in which to demonstrate that it was providing the regulated activity.
72. Mrs Muzira raised a number of matters in support of her appeal, such as difficulties she experienced in obtaining work, her health issues and family

trauma. We were not persuaded by these matters to exercise our discretion not to cancel RCS' registration. Whilst we had sympathy with these personal circumstances, Mrs Muzira had been allowed three years in which to demonstrate she could provide the regulated activity and had not done so. This was ample time in our view, accepting CQC's evidence that demand for such services had outstripped supply quickly after the ending of the Covid-19 lockdown and so there would have been opportunity to obtain work. Mrs Muzira gave evidence of following a number of leads generated through her subscription to websites advertising personal care work. We cannot speculate upon the reasons RCS was not successful in securing this work, but we conclude that there has been opportunity for the company to secure it notwithstanding the personal difficulties experienced by Mrs Muzira.

73. We were not persuaded that the fact that the appellant had expended resources and time in maintaining professional subscriptions and its registration fee was a reason not to cancel its registration. These expenses and fees would be expected of any business in the field, and the registration fee was mandatory. Again, a very considerable time had been allowed for the appellant to see the benefit of its investments by obtaining work, and it had not done so.

Decision:

1. The appeal is dismissed.
2. The decision of the Care Quality Commission to cancel the Appellant's registration as a Service Provider pursuant to section 28(3) of the Health and Social Care Act 2008 dated 29 June 2022 is confirmed.

Judge G Brandon
First-tier Tribunal (Health, Education and Social Care)
Date Issued: 05 July 2023