

First-tier Tribunal Care Standards

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

[2023] 4848.EA
Neutral Citation number: [2023] UKFTT 732 (HESC)

Hearing 05 September 2023 by video-link

BEFORE
Ms M. Lewis (Judge)
Mr. M. Cann (Specialist Member)
Ms D Rabbetts (Specialist Member)

BETWEEN:

R & K Care Services Limited

Appellant

-v-

Care Quality Commission

Respondent

DECISION

The Appeal

1. R & K Care Services Limited (“the Appellant”) appeals against the Care Quality Commission’s (“the Respondent”) Notice of Decision, dated December 2022, to cancel its registration as a service provider in respect of the regulated activity of Personal Care (“the Regulated Activity”), carried on from 28 Woodlands Road, Romford, Essex RM1 4HD. (“the Location”).

Video Hearing

2. This was a remote hearing. The form of remote hearing was by video. The documents that we were referred to are in the electronic hearing bundle (310 pages).

Attendance

3. The Appellant attended and presented his own case.

4. The Respondent was represented by Mr Donoghue Counsel. Its sole witness was Ms Julia Spencer Ellis (Senior Specialist). Ms Karen Antwi Legal Trainee and Ms. Leanne Frampton Anderson attended as Observers for training purposes and played no part in the proceedings.

Preliminary issues

5. Mrs Rabbetts Specialist Member dropped out for part of Ms. Spencer Ellis's evidence in chief. Judge Lewis had a full note of what she had said, which she read back. Mr Donoghue and the witness agreed this was an accurate account.

6. Having read the papers in advance, the Tribunal indicated the areas it would be assisted by hearing oral evidence on. It was agreed by the Appellant that that since being registered on 27 September 2021, no regulated activity had been delivered. Mr Hanyana had explained in his appeal that this was due to his wife having cancer and that he needed to focus on supporting her and their two daughters. We guided that as this was accepted by CQC as being an extenuating circumstance, he did not need to develop that issue. His wife is now well again and working part time.

7. Mr Hanyana the 'Nominated Individual' has over 30 years' experience as a mental health nurse, so has relevant experience in the area he seeks to be regulated in. In correspondence with CQC on 26 September 2022 and 11 October 2022, he accepted that the service was dormant.

8. The Notice of decision is dated 30 December 2022. It was noted that the Appellant was now attempting to resume the service but he could not demonstrate that the service was being carried on or that resumption of service was imminent.

9. Having heard the evidence of Ms Spencer Ellis, the Appellant agreed that the two contracts he had submitted were essentially invitation to tender to a Local Authority for services not a firm offer of a contract. The only contract that seemed more certain was in relation to AB, for whom there were some detailed care assessments. During the hearing it became clear that offering personal care to AB was not imminent. What CQCs written evidence did not highlight as clearly as the oral evidence was that AB, who had a long standing history of drug and mental health issues did not require personal care, so no regulated activity would be provided. Mr Hanyana agreed. In any event, he had not secured a contract to provide services to AB.

10. Having heard the evidence of Ms Spencer Ellis, Mr Hanyana gave his evidence. He said he was focussing on securing contracts with Southend BC and had been asked to assess 3 service users, one of whom required personal care. Mr Hanyana had not understood he could apply to submit late evidence and that the Tribunal would consider the evidence as of the date of the hearing. He had not attended the final telephone Case Management Hearing on 23 August 2023 and could not remember having notice of it. The Tribunal adopted a flexible approach and allowed Mr Donoghue to re-examine Ms. Spencer Ellis on this updated information.

11. Additionally. the Tribunal asked questions on how close Mr Hanyana was to being awarded these contracts. The Tribunal raised the possible need to adjourn. Having considered the matter over lunch we accepted Mr Donoghue's arguments. There was no evidence that a contract for personal care was imminent. Mr Hanyana had carried out one detailed assessment but accepted he could provide no more evidence than that. He had been told that there was a delay in convening a funding panel but had no other evidence on this point. He had no evidence that his service would be the recommended one, whether there would be other bidders or any real

idea of a timeframe. He agreed that with spot purchasing contracts as used in this authority, several bids might be put to the funding panel. Those reasons are essentially the same as set out in our conclusions on dismissing the appeal.

12. The Tribunal applied the overriding objectives set out in Rule 2 of the Tribunal Procedure Rules which require us to consider the evidence in ways are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and avoiding delay, so far as compatible with proper consideration of the issues. There was no clear evidence that adjourning the case part heard for a few weeks or even longer would produce evidence that a contract for personal care was imminent. A Tribunal must decide a case on all the evidence and there is a clear risk that memories fade, if there is a prolonged adjournment. Neither party suggested that there should be.

Restricted reporting order

13. 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 any service users in this case so as to protect their private lives. For that reason, we have given only bare details about possible service users and family issues

Legal Framework

14. There was no dispute as to the applicable law as set out in the written submissions prepared by Respondent's legal representatives. We have adopted the legal framework as set out in the Respondent's submissions.

15. The Respondent was established on 1 April 2009 by the Health and Social Care Act 2008 ("HSCA 2008"). The Respondent is the independent regulator of health and social care services in England.

s.17 of the Health and Social Care Act 2008 ("the 2008 Act") states that:

(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—

.....

(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.

16. Regulation 6 (i) (c) of the Care Quality Commission (Registration) Regulations 2009 ("the 2009 Regulations") is relied on:

(c) if the registered person is a service provider, is not, and has not been providing services for a continuous period of 12 months ending with the date of the decision to cancel

17. Section 3 of the HSCA 2008 sets out the Respondent's main objective which is *"to protect and promote the health, safety and welfare of people who use health and social care.*

18. s.32(3) of the 2008 Act provides that, on appeal against a decision, the Tribunal may confirm the decision or direct that it is not to have effect. S.32(6) of the 2008 Act gives the Tribunal power to attach conditions.

CQC's registration and inspection framework

19. When any service provider applies to register with the CQC, that provider undergoes a registration assessment in which the CQC assesses the provider's ability to comply with the regulations relevant to the care of service users, with a focus on the CQC's five key domains of 'safe', 'effective', 'caring', 'responsive' and 'well-led'.

20. During that assessment process, the CQC is ultimately assessing the provider's governance and staffing arrangements to ascertain whether the CQC can have the necessary assurance that the provider is able to comply with the requirements of the relevant regulations. Of relevance in such applications is the provider's ability to comply with the requirements of the Health and Social Care Act 2008 (Regulated Activities) Regulations. This includes commencing offering services, close to the time they were interviewed so that their understanding of the regulations and best practice is still current. If they were offering a regulated activity, they would then be transferred to the inspection team, but there was no hard and fast rule on time scales for the inspection.

21. Where a Registered Provider has registered but the service has remained dormant, the CQC is unable to carry out that inspection process and most, if not all, of the key lines of enquiry are unable to be reviewed. In those circumstances, the CQC is unable to obtain the necessary assurance that the Registered Provider is complying with and is able to comply with the relevant regulations.

22. The Tribunal makes its decision on the basis of all the evidence available to it at the date of the hearing and is not restricted to matters available to the Respondent when the decision was taken.

23. The onus of satisfying the Tribunal that the criteria was met falls on the Respondent and that the relevant standard is a civil standard, namely on a balance of probabilities.

Discussion of Evidence

24. We took into account all the evidence that was presented in the bundle and at the hearing. For the reasons stated above it was necessary to carefully examine the evidence around possible contracts being awarded to the service very shortly. What follows is a brief summary, but as we have set out most of the key points were not disputed.

25. Ms Spencer Ellis stated that Respondent would and had in this case make some allowances if regulated activity hadn't been provided for a continuous period of 12 months. The Appellant had presented evidence of extenuating circumstances.

26. Ms Spencer Ellis explained that the Respondent could not rate a provider that wasn't providing any regulated activity. However, a provider could be rated even if it was only providing regulated activity to a single service user.

27. Even over the last two years there had been key developments in this area with regards to restraint and seclusion. Mr. Hanyana agreed that was the case.

28. In response to the one real issue raised by Mr Hanyana, she was able to helpfully explain the different funding models employed by different local authorities. As a result Mr Hanyana agreed that the contracts he had exhibited to his statement (undated but probably May 2022) were Framework contracts, which specifically stated they were not guarantees of work, so just an invitation to tender.

29. Whilst not familiar with Southend BC commissioning arrangements unlike other London authorities where she had worked or had dealings with, she displayed good knowledge of spot purchasing contracts. It was up to each Local Authority to take its own stand, but she had a good overview.

30. She gave the Tribunal assistance on what she would look for to conclude commencement of a regulated activity was imminent. This would include a detailed assessment of staffing arrangements including a rota. It would need to be understood if the Health Authority or the Local Authority were to fund the placement. She would expect to see a transition plan if the service user was moving into a supported living arrangement. The only issue outstanding would be the approval process, including funding but in some cases, you could see evidence that there was a strong likelihood this would be granted as the provider was being strongly recommended by the relevant team. She acknowledged the difficulty of getting started in this area without a track record with Local Authorities. However, there was a high demand for personal care post the restrictions imposed by Covid 19 and the possibility to start regulated activity with privately paying clients.

31. Ms Spencer Ellis explained that the Appellant could apply to register again in the future. This was not punitive sanction and any cancellation on the grounds of dormancy would not be prejudicial to the Appellant.

32. Mr Hanyana explained that he has worked as a registered mental health nurse for 31 years. He hoped to draw on that background and provide more intense support in supported living placements. He and his wife would do the work and had identified several other people who would work with them, but they could not draw up contracts or a rota at this point. These potential workers were currently in other paid work, until he was in a position to offer them a contract.

33. He had been asked to do 3 assessments of service users, one of which would include personal care and at least two of them appeared to have an urgent need as they were leaving hospital and another was being evicted from their current supported living arrangement. He had had difficulty in speaking to the relevant officers at the Local Authority and as stated had no clear idea of a timeframe for a decision on these cases, despite their apparent urgency,

34. He acknowledged that he could provide services for non-regulated activities but some Local Authorities preferred to award contracts to Providers rated by the Respondent.

The Tribunal's conclusion with reasons

35. We took into account all the evidence that was included in the hearing bundle and presented at the hearing. This includes the Appellant's and Respondent's evidence.

36. We wish to place on record particular thanks to Mr Donaghue for his measured and very fair presentation of this case and the assistance offered by Ms Spencer Ellis. Mr Haryana had a full opportunity to put his case which as we have stated evolved during the hearing but ultimately, he recognised his difficulties. His answers were admirably candid and his answers showed that he had a good understanding of people with mental health needs and a developing understanding of how contracts are awarded by Local Authorities.

37. We reminded ourselves that the Tribunal considers the circumstances as at the date of its decision and the onus is on the Respondent to satisfy the tribunal that the relevant standard, namely the balance of probabilities was met.

38. The starting point was that there was no dispute between the parties that the Appellant had not carried out any regulated activity for which it was registered for a continuous period of 12 months. In fact, both parties agreed that no regulated activity whatsoever had been carried out since the Appellant was registered with the Respondent in respect of regulated activity.

39. There were extenuating circumstances and we accept that some leeway was given to Mr Hanaway as he had to prioritise his wife and family. However, this is now a period of two years and there has been no opportunity for CQC to assess Mr Haryana's understating of current best practise which he acknowledged has changed.

40. We therefore found that the Appellant as a service provider was not and had not been for a continuous period of 12 months ending with the date of the decision to cancel registration and at the date of our decision, carrying on regulated activity.

41. We therefore found that the grounds for cancellation were made out. The issue then follows was whether the Appellant's registration should be cancelled. We concluded that it was reasonable, necessary and proportionate for the Appellant's registration to be cancelled. Our reasons for doing so are set out below.

42. We acknowledge the Appellant's personal difficulties and that his energies were directed elsewhere. He has an idea of the type of service he wants to provide, mainly longer hours support to clients with mental health needs living in a supported living arrangement. Like many start-up businesses, he has had a problem in getting clients and gaining a track record but he did not appear to have considered taking on private clients, which could be a first step to providing a regulated activity.

43. The difficulty the Appellant had was that it had never provided regulated activity to any client since registration. Even one would have been sufficient to satisfy the Regulations.

44. We gave very careful consideration as to whether there was evidence that a contract for regulated services was imminent. There is no formal definition of what that means or definitive list of factors but we give weight to the ones put forward by Ms Spencer Ellis. Mr Hanyana had put in some preparation for carrying on the Regulated Activity back in May 2023 when he submitted his statement and again more recently. However, as he had to concede, he had no evidence he could produce that even with extra time allowed, he would show regulated activity was imminent or just about to start. He did not know if he was the recommended provider. We had no evidence of a detailed costing of necessary provision, so that was needed was a formal approval. It had not reached the stage where he felt able to put in place logistical support with the team providing the care, clearly understanding the detail of what they would be delivering. His evidence on these points was as we have said admirably candid. It was far short of showing the provision of a regulated activity was imminent. It was aptly characterised by Mr Donaghue in his closing submissions as not “when” the contract(s) would start but “if”.

45. Mr Hanyana did not take the opportunity offered to make any closing arguments and said that *‘everything had been covered’*.

46. In summary no regulated activities are not being carried out by the Appellant, so no effective inspection can be undertaken. We did not consider that it was in the public interest for the Appellant to remain registered when there was no way for the Respondent to effectively assess the quality or safety of the service.

47. We considered the impact of our decision on the Appellant and the community. There are no service users and no regulated activity has been provided in the community since registration, so no users will be affected. The Appellant has a long experience in mental health nursing and he is not prevented from offering services in a supported living arrangement, only that he will not be able to offer personal care.

48. The Appellant has now been dormant for a period of 2 years. This is far in excess of the 12-month period in Regulation 6 of the 2009 Regulations, following which the Respondent could have made the decision to cancel the Appellant’s registration. The Respondent has acted fairly and proportionately in allowing this extra time for the Appellant to begin carrying on the Regulated Activity in the light of his family circumstances.

49. The Appellant could apply again if he wants to provide personal care or any other regulated activity. That application would be assessed at the time and any future decision on any new registration application would carry with it a separate right of appeal to the first-tier Tribunal. No failings had been identified against him; he simply was not able to satisfy the Regulations on providing a regulated activity.

50. We concluded that, having considered all the circumstances of the case and the evidence before us, it was reasonable, necessary and proportionate for the Appellant’s registration to be cancelled.

The Decision

1.The appeal is dismissed.

2.The decision of the Respondent dated 30 December 2022 to cancel the Appellant’s registration as a service provider in respect of the regulated activity of Personal Care carried on 28 Woodlands Road, Romford RM1 4H is confirmed.

Judge Melanie Lewis

First-tier Tribunal (Health Education and Social Care)

Date Issued: 11 September 2023