

First-tier Tribunal Care Standards

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

[222] 4754.EA

NCN: [2023] UKFTT 832 (HESC)

Heard on 27 September 2023 by Videolink

BEFORE

Mr H Khan (Judge)

Mrs B Graham Specialist Member)

Ms L Owen (Specialist Member)

BETWEEN:

Actus Healthcare Limited

Appellant

-v-

Care Quality Commission

Respondent

DECISION

The Appeal

1. Actus Healthcare Limited (“the Appellant”), a provider of domiciliary care to people in their own homes, appeals against the Care Quality Commission’s (“the Respondent”) Notice of Decision dated 18 October 2022 to cancel the Appellant’s registration as a service provider in respect of the Regulated Activity of Personal Care (“the Regulated Activity”) at or from Actus Healthcare Limited, 22 Barton Road, Leicester, LE3 9BB (“the Location”).
2. The Respondent’s Notice of Decision was issued pursuant to Section 17(1)(e) of the Health and Social Care Act 2008 (‘2008 Act’) and Regulation 6(1)(c) of the Care Quality Commission (Registration) Regulations 2009 (‘2009 Regulations’).

Video Hearing

3. 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 (182 pages).

Attendance

4. The Appellant was represented by Mr W Mugumbate (Director of Appellant Company) & Ms H Mugumbate (Director and Registered Manager of Appellant Company).
5. The Respondent was represented by Mr D White (Counsel). Its sole witness was Ms Julia Spencer Lewis (Senior Specialist – Adult Social Care). Ms Antwi and Ms L Frampton- Anderson dialled in as observers.

Restricted reporting order

6. 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 any service users in this case so as to protect their private lives.

Preliminary Issue

7. The Appellant objected to the attendance of the observers on the basis that they felt “*outnumbered*”. We took into account the overriding objective including ensuring, so far as practicable, that the parties are able to participate fully in the proceedings and dealing with the case in ways which 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.
8. We reminded ourselves that under rule 26 of The Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 (as amended) (“2008 Rules) all hearings must be held in public unless the exemptions apply. Although we acknowledge that there were observers from the Respondent, we did not consider that the reasons put forward in relation to being “*outnumbered*” would require the exclusion of any of the observers. We made it clear to the Appellant that the panel would deal with any issues with the observers if they arose. In any event, the hearing proceeded without any issues arising.

The Appellant

9. The Appellant was registered to provide the Regulated Activity on 21 May 2021.

The Respondent

10. The Respondent was established on 1 April 2009 by the 2008 Act. The Respondent is an independent regulator of healthcare, adult social care and primary care services in England. The Respondent also

protects the interests of vulnerable people, including those whose rights are restricted under the Mental Health Act 1983.

Events leading up to the decision.

11. The chronology of key events is set out below.
12. On 21 May 2021 – The Appellant registered with the Respondent in respect of Regulated Activity Personal Care.
13. On 3 August 2022 - The Respondent sent an email requesting confirmation on the status of the regulated activity of personal care from the location, Actus Healthcare since 21/05/2021.
14. On 3 August 2022, the Respondent received an email from confirming the regulated activity of personal care had not been delivered from the location Actus Healthcare since 21/05/2021.
15. On 1 September 2022, the Respondent issued a Notice of Proposal (“NoP”) to cancel the Appellant’s registration as a service provider in respect of the Regulated Activity of Personal Care at Actus Healthcare, 22 Barton Road, Leicester, LE3 9BB based on dormancy.
16. On 30 September 2022, the Appellant submitted written representations and evidence in response to NoP.
17. On 18 October 2022, the Respondent served a Notice of Decision (“NoD”) adopting the NoP to cancel the Appellant’s registration based on dormancy.

Legal Framework

18. 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.
19. The Respondent was established on 1 April 2009 by the Health and Social Care Act 2008 (“the 2008 Act”) as the independent regulator of healthcare, adult social care, and primary care services in England. The Respondent, in its role as the independent regulator, also protects the interests of vulnerable people, including those whose rights are restricted under the Mental Health Act.
20. Section 3 of the 2008 Act sets out the Respondent’s main objective, which is ‘to protect and promote the health, safety and welfare of people who used health and social care services’.
21. Under section 17(1)(e) of the 2008 Act, the Respondent has the jurisdiction to cancel a provider’s Registration as a Service Provider

and/or a Registered Manager's Registration in respect of a Regulated Activity 'on any ground specified by regulations.'

22. Regulation 6(1)(c) of the Care Quality Commission (Registration) Regulations 2009 (the 2009 Regulations) permits the Respondent to cancel a Service Provider's Registration if the Service Provider has not carried on the Regulated Activity it is registered to provide for a continuous period of 12 months.
23. Section 28(6) of the 2008 Act provides that a decision of the Respondent to adopt a proposal under section 26(2) or 26(4) takes effect (a) at the end of the period of 28 days referred to in section 32(2), or (b) if an appeal is brought, on the determination or abandonment of the appeal.
24. Section 32(3) of the 2008 Act provides that on 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.
25. 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.
26. 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.

Evidence

27. We took into account all the evidence that was presented in the bundle and at the hearing. We heard evidence from a number of witnesses at the hearing. The following is a summary of the evidence that was presented at the hearing and in no way is it meant to reflect everything that was said at the hearing by the witnesses.
28. Ms Spencer Ellis stated that no regulated activity had been carried out since the Appellant's registration on 21 May 2023.
29. Ms Spencer Ellis made it clear that the Respondent recognised (as was set out in the legislation) that the Appellant would not start providing regulated activity immediately. She explained that most service providers would undertake regulated activity within 6-12

months after registration. Any provider that had not carried out regulated activity (as with the Appellant) for around 18 months, was unlikely to carry out regulated activity.

30. Ms Spencer Ellis accepted that there were workforce pressures. She explained that the Respondent recognised the recruitment challenges facing the domiciliary care sector and closely monitors such workforce pressures as part of its regulatory work. She accepted that there were issues with regards to recruiting staff. The Respondent recognised that whilst this was a pressure, other providers had managed to recruit staff.
31. Ms Spencer Ellis made it clear that it was not the role of the Regulator to provide business support to the providers other than to signpost them to those who could assist.
32. Ms Spencer Ellis acknowledged that there had been a contraction in demand when Covid 19 pandemic was first declared in March 2020. In her experience, family members had taken over care but by Autumn of that year, the demand had returned. At present, there was a “*significant demand*” for such services. Furthermore, although the Respondent recognised that the Appellants had tried to secure Local Authority contracts, there was a strong private market available to the Appellant.
33. Ms Spencer Ellis also outlined the difficulties that not providing regulated activity can have in keeping policies up to date. The Appellant had referred to the challenges they have faced in recruiting suitable staff and outlined that they had concerns about their ability to comply with “Outcome 13 which reflects the requirements of Regulation 22 of the Health and Social Care Act 2008 (Regulated Activities) Regulation 2010.” According to Miss Spencer Ellis, this demonstrated that the Appellant has failed to stay up to date with best practice and guidance as this legislation was superseded by the HSCA 2008 (Regulated Activities) Regulation 2014. The Respondent has not used Outcomes since they transitioned to using the Key Lines of Enquiry in 2015.
34. Furthermore, as part of determining whether or not it was proportionate to cancel the registration, the Respondent would consider whether or not the regulated activity was “*imminent*”. This would occur, if for example, the contract had been agreed, needs assessed and the provider was waiting for the regulated activity to begin. This would mean that the provider has done what it can and was waiting for matters outside of its control. However, in this case, that was not the case.
35. Ms Spencer Ellis denied that the action taken was motivated by any other factor other than the Appellant not providing regulated activity.

36. 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. Furthermore, there would be no fee payable unless the Appellants were registered.
37. Mrs Mugumbate explained that since registration, they had faced challenges beyond their control. They had received referrals and expressed interest in taking up these referrals but lost out to more established services.
38. Mrs Mugumbate explained that they had regularly reviewed their policies in consultation with other service providers to ensure that its policies were relevant and kept up with the minimum requirements. The Appellant had paid all the fees.
39. Mrs Mugumbate did not agree with the rationale of the Respondent in focusing its efforts on services that were trying to “*put their feet in the door*” whilst other service providers were not inspected. The Appellant felt that, having spoken to a lot of ethnic minority owned services, they felt they were not being supported.
40. Mr Mugumbate explained that it took a lot of effort and resources to get to a point of registration. It was not an easy process. There were other charges which were incurred such as charges for the DBS certificate.
41. Mr Mugumbate explained under cross-examination that he still wasn't aware of the 2014 regulations.

The Tribunal's conclusion with reasons

42. 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.
43. We wish to place on record our thanks to Mr and Mrs Mugumbate, Mr White and Ms Spencer Ellis for their assistance at the hearing.
44. 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.
45. We concluded, having considered the circumstances of the case, that we would confirm the decision of the Respondent. Our reasons for doing so are set out below.
46. We found the evidence of Ms Julia Spencer Ellis to be credible and sincere. We found her to be very knowledgeable about the Appellant's case. Her evidence was well reasoned and supported by the evidence

presented. Ms Spencer Ellis very fairly accepted any reasonable submissions made on behalf of the Appellant, for example, that there were recruitment issues affecting the market as a whole.

47. We acknowledge the evidence of Mr and Mrs Mugumbate which we found to be credible. We acknowledge that they were both very determined to succeed in this sector.
48. The Appellant accepted very fairly from the outset that they had not carried out any regulated activity for which it was registered for a continuous period of 12 months. There was no dispute between the parties that no regulated activity had been carried out since registration on 21 May 2021.
49. We considered the evidence before us. We also 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 NoD to cancel registration and at the date of our decision, carrying on regulated activity. We also found that the Appellant had not carried on regulated activity since 21 May 2021
50. We therefore found that the grounds for cancellation were made out. The issue was whether or not the Appellant's registration should be cancelled.
51. 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.
52. The Appellant accepted that it was unable to say when regulated activity would be provided. Ms Mugumbate accepted in cross examination that no regulated activity had been provided since registration (almost 2 ½ years ago) and she was not able to say at the hearing as to when it was likely that the Appellant would carry out regulated activity. Mr Mugumbate also accepted that it was very hard to say when the regulated activity would be provided. It would change on a day-to-day basis.
53. However, whilst we acknowledged that Mr Mugumbate was attending meetings with Local Authorities and acknowledge the evidence that they had approached/been approached by service users who had then changed their mind about commissioning their service, the difficulty was that there was no indication as to when regulated activity would be provided.
54. We considered the approach of the Respondent to be a reasonable and proportionate approach to such cases. For example, had the Appellant attended the hearing and provided evidence that the regulated activity would be provided "*imminently*" (for example, if a service users need had been assessed, contracts had been agreed and essentially, they

were waiting for confirmation of a date to start the regulated activity) the outcome may well have been different. However, the position at the hearing was in essence the same as the position at registration and as at the date of the NoD in that no regulated activity was being provided and it was not clear as to when it would be provided.

55. We found that the Respondent's approach in this case was measured and proportionate. We had no reason to doubt Ms Spencer Ellis's evidence that the action taken by the Regulator was motivated by anything other than the evidence which supported fact that in this particular case, regulated activity had not been carried out since registration on 21 May 2021.
56. We acknowledge the Appellant's submissions that Covid 19 had impacted on its ability to provide regulated activity. However, as Mr White submitted, the Appellant was registered over the year after the pandemic had been declared in March 2021. Furthermore, there was no challenge to Ms Spencer Ellis's evidence that although there was initial contraction in the market until Autumn 2020 when demand returned, there was now a "*significant demand*" for personal care. Furthermore, although we acknowledge the Appellant's efforts and liaison with Local Authorities, it did not explain the failure to provide any regulated activity in the private market, for which we were told there was a still a significant demand.
57. We acknowledge that the Appellants do not agree with the Regulations that allow for the cancellation in such circumstances. We acknowledge that in their view these regulations are counter-productive and do not recognise the difficulties that there are in getting registered in the first place. However, as both parties acknowledged, this Tribunal applied the law as it stood.
58. 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. We acknowledge that although the Appellants stated that they were keeping their policies up to date, Mr Mugumbate accepted in cross examination that even by the time of the hearing, he did not realise that the previous legislation (Health and Social Care Act 2008 (Regulated Activities) Regulation 2010) was superseded by the HSCA 2008 (Regulated Activities) Regulation 2014.
59. We considered the impact of our decision on the Appellant and the community. At present that there were no employees and there was no evidence that this would have an impact on the local community. Even if we had been persuaded that there would have been an impact on the local community, we would have considered any impact to be minimal given that there were no service users and no regulated activity has been provided since registration.

60. We noted that if Appellant's registration is cancelled, the Appellant retains the option of applying to be registered again in the future. Any such application would be considered by the Respondent on its merits and any new registration application would carry with it a separate right of appeal to the first-tier Tribunal.

61. 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 18 October 2022 to cancel the Appellant's registration as a service provider in respect of the regulated activity of Personal Care at or from Actus Healthcare Limited, 22 Barton Road, Leicester, LE3 9BB is confirmed.

**Judge H Khan
Lead Judge**

First-tier Tribunal (Health Education and Social Care)

Date Issued: 11 October 2023