

## NHS TRIBUNAL (SCOTLAND)

### STATEMENT of the TRIBUNAL

In the case of

**GRAMPIAN HEALTH BOARD**, a Health Board constituted under Section 2 of the National Health Service (Scotland) Act 1978 (COMPLAINER)

Against

**WILLIAM GAMBA**, having a place of business at 2 Balgownie Road, Bridge of Don, Aberdeen, AB23 8JP (RESPONDENT)

The Tribunal, having considered all representations, evidence and submissions, finds as follows:

1. Preliminary issue: Proceeding in Absence

Rule 16 sets out a two stage process for proceeding in absence, the first step of which requires the Tribunal to be satisfied that the Respondent has received notice of today's hearing.

The Clerk to the Tribunal had formally intimated the commencement of the Inquiry on the Respondent, by way of service of a Form 4, prior to the procedural calling on 30<sup>th</sup> June. Following that calling, at which today's hearing was fixed, the Clerk again wrote to the Respondent by Recorded Delivery on 1<sup>st</sup> July. With that letter, the Clerk sent him a copy of the Order dated 30<sup>th</sup> June. The letter was signed for by "Gamba" on 2<sup>nd</sup> July. In all the circumstances, the Tribunal was satisfied that the Respondent had received notice of today's hearing.

The Tribunal then went on to consider whether to proceed in absence or not, taking into account all of the circumstances, including any explanation offered for the absence.

In determining whether or not to proceed in his absence, the guiding principle for the Tribunal was one of fairness: not only to the Respondent, but also to the Complainers and indeed the public interest in having matters of this sort dealt with expeditiously. The Tribunal was mindful that applications to proceed in absence should always be considered most anxiously and Tribunals should proceed warily, erring on the side of caution. However, The Respondent has not engaged with NHS Grampian or with these proceedings in any way whatsoever. He was therefore considered to have absented himself from today's hearing voluntarily. The Tribunal had also made it clear to the Respondent in its Order of 30<sup>th</sup> June that it would proceed in his absence today if he did not avail himself of the further opportunity to engage which was being afforded to him. The Tribunal therefore determined that no useful purpose would be served by adjourning these proceedings. Rather, the Tribunal determined that it would be appropriate to proceed in the Respondent's absence.

2. Facts

- (i) Found proved that the Respondent is a Dental Practitioner. This was clear both from the evidence of Mr Alkado and it was inherent from the correspondence between the parties. Although the Respondent has not engaged to any meaningful extent with the Complainers, it

was clear from the documentation available that the Respondent is a Dental Practitioner on whom the obligations referred to below are incumbent.

- (ii) Found proved that the Respondent has been listed on the Performers' List of Grampian Health Board since 1 January 1994. The Tribunal accepted the evidence of Mr Alkado in that regard.
- (iii) Found proved that the Respondent is required to adhere to the terms of service set out in Schedule 1 to the National Health Service (General Dental Services) (Scotland) Regulations 2010 ("the Regulations"). This finding follows from facts (i) and (ii) found proved above.
- (iv) Found proved that paragraph 40 of the said Schedule to the Regulations provides that a Dental Practitioner shall undertake at least 15 hours of Quality Improvement Activities during "the relevant period". This finding follows from fact (iii) found proved above.
- (v) Found proved that prior to 26 October 2017, Quality Improvement Activities were known as Clinical Audit Activities. The Tribunal accepted the evidence of Mr Alkado in this respect and it also comes within judicial knowledge.
- (vi) Found proved that Quality Improvement Activity is described in the Regulations as a process involving "the systematic, critical and reflective analysis of the quality of dental care provided by the Dentist, and of any changes made by the Dentist to bring about improvement in quality of care, patient experience, patient safety and clinical effectiveness, (including the processes used by that Dentist for diagnosis, intervention and treatment and use of resources)." This too is within judicial knowledge.
- (vii) Found proved that the relevant period for the purposes of sub-paragraph (iv) above is described in the Regulations as: 1 August 2010 to 31 July 2013 (inclusive) and each successive period of 3 years thereafter. The Tribunal accepted the evidence of Mr Alkado in that connection and it too is a matter within judicial knowledge.
- (viii) Found proved that the Respondent has failed to undertake 25 hours of Quality Improvement Activities over the 3 year cycles for 2013 to 2016 and 2016 to 2019. The Tribunal accepted the evidence of Mr Alkado, and over and above the numerous emails produced and the evidence of a face to face meeting and phone calls, it had regard in particular to (a) the letter from the Complainers to the Respondent dated 31 January 2020 (annex 7 to Mr Alkado's written witness statement) and (b) the letter from the Complainers to the Respondent dated 16 December 2020 (annex 11 to Mr Alkado's written statement), both of which make explicit reference to this shortfall.
- (ix) Found proved that the Respondent has failed to engage with the support offered by the Complainers to help the Respondent meet the requirements stated in sub-paragraphs (iv) to (v). The Tribunal accepted the evidence of Mr Alkado and noted the terms of the numerous items of correspondence which had been sent to the Respondent in which he was offered support. In particular, the Tribunal noted no fewer than 17 communications including support packs and several offers of assistance as set out in annexes 1 to 12 attached to Mr Alkado's written witness statement.
- (x) Found proved that the Respondent has failed to provide any explanation to the Complainer for his failure to comply with his Terms of Service. The Tribunal accepted the evidence of Mr Alkado. With the exception of two emails set out at annex 1 and annex 6 attached to Mr Alkado's witness statement, which expressed an intention to comply but neither of which was followed up by any action, it noted that there has been no proactive engagement by the Respondent whatsoever.

### 3. Grounds for Disqualification

Section 29 of the 1978 Act sets out the conditions for disqualification. The complainers in their Representations contend that the facts found proved engage the first condition for disqualification, namely that the continued inclusion of the Respondent in the list would be prejudicial to the efficiency of the services which those included in the list perform or undertake to provide or are approved to assist in providing. The Representations also aver that the third condition for disqualification is also met, namely that the Respondent is unsuitable by virtue of personal or professional conduct to continue to be included in the list.

The Respondent has neither admitted nor denied all of the facts underlying the Complainers' representations. He has failed to engage with the Health Board or with these proceedings in any way. He offers no explanation as to why he failed to adhere to his Terms of Service. He offers no mitigation and offers no assurance that he will undertake outstanding Quality Improvement Activities.

The Solicitor for the Complainers submitted that the first and third conditions for disqualification had been met and that disqualification would be the appropriate disposal. The Tribunal reminded itself that the issue of disqualification is a question for the professional judgement of the Tribunal in exercise of its discretion, rather than being a matter on which there is an evidential burden.

The Tribunal takes account of the purpose of paragraph 40 of the Regulations, which is to ensure quality improvement in the delivery and organisation of the services which the Respondent is engaged to provide. The process is mandatory and is not unduly burdensome. The importance of continual improvement is clear from the fact that there is a requirement to undertake such activity within the Regulations. Such activity is designed to ensure and improve efficiency in the NHS. A structured and mandatory quality improvement programme, emphasising the need to continually improve; and the keeping of accurate records relating to that, are important facets of ensuring and improving the efficiency of the NHS. Among other reasons for this is the need to ensure best value for the resources spent on the provision of such services by the National Health Service. It is important for all practitioners to comply with their Terms of Service in this regard. The Respondent having failed to do so, the Tribunal is satisfied that the first condition for disqualification is met.

With regard to the third condition for disqualification, the Tribunal considers that the Respondent's conduct in failing to undertake the Quality Improvement Activities was wholly unacceptable, in view of the benefits which practitioners such as the Respondent can derive from inclusion in the NHS Approved Providers List. No reason or excuse was offered for failing to undertake these activities. The required activities are not onerous but they are mandatory. The Respondent appears to have been aware of the requirement to undertake them, and has been offered considerable support and assistance to enable him to do so. However, it appears to the Tribunal on the evidence available that he has not availed himself of such support, even in the face of these proceedings being brought against him, in which he has failed to engage. The Respondent has demonstrated no insight and made no effort to remedy this failure. In all of the circumstances, the Tribunal considers that the third condition for disqualification is met.

### 4. Disposal

Having found that the first and third conditions for disqualification are met, the Tribunal then considered the appropriate disposal. The Tribunal first considered whether conditional disqualification would be appropriate. However, it came to the view that conditions in this case would serve no useful purpose in light of the Respondent's failure to engage. The imposition of conditional disqualification should only occur where the Tribunal is satisfied that the Respondent has both the desire and the capacity to comply with the conditions imposed. In the present case, the Tribunal cannot be so satisfied, and in all of the circumstances, it concluded that conditional disqualification would not be an appropriate disposal. In this case, absolute disqualification would be the only proportionate and just disposal. Such disqualification is necessary in view of the prejudicial effect of the Respondent's actions on the efficiency of the National Health Service. The Tribunal also considered that, by his repeated failure to comply with his Terms of Service without reasonable excuse and without any attempt to remedy that failure, the Respondent is not a suitable person to be included in the approved providers list.

Accordingly, the Tribunal hereby DISQUALIFIES the Respondent from inclusion in the list. Should a review be required, this shall be triggered by an application made to the Tribunal through the Clerk.

5. Expenses

In respect that these proceedings were justified, the Tribunal hereby finds the Respondent liable to the Complainers for payment of the whole expenses of this process, as the same may be taxed in accordance with Schedule 1 to the Act of Sederunt (Taxation of Judicial Expenses Rules) 2019.



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J. Michael D. Graham, Chairman

4 August 2021