

Care Standards

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

[2015] 2448.EA

Heard on 19 and 20 October 2015 at Colchester Magistrates Court

Before:

**Ms Melanie Lewis - Tribunal Judge
Ms Caroline Joffe - Specialist Member
Ms Sallie Prewett - Specialist Member**

BETWEEN:

PAULINE JOAN KENT

Appellant

-v-

CARE QUALITY COMMISSION

Respondent

DECISION

1. Pauline Kent ('the Appellant') appeals against a decision of the Care Quality Commission ('CQC') made on 29 May 2015 to cancel the Appellant's registration in respect of the regulated activities: accommodation of persons who required nursing or personal care; diagnostic and screening procedures; and treatment of disease, disorder or injury at Kent Lodge Residential Home, Suffolk. The appeal is only against accommodation of persons who required nursing or personal care.

2. The Appellant was first registered with the Care Quality Commission, hereafter the Respondent, on the 1st October 2010 in relation to the above named three regulated activities. The registration required that each of the three regulated activities is managed by an individual who is registered as a manager in respect of the activity, as carried on at or from the location Kent Lodge Residential Home by 1st April 2011. It also placed a limit on the number of service users to be accommodated at Kent Lodge Residential Home as 30 persons.

Representation:

3. The Appellant attended in person and was accompanied by her son Ian Kent. She called no witnesses.

4. The CQC was represented by Mr Rush, Counsel instructed by CQC Litigation. Their witnesses were Deborah Kerr Inspector, Deborah Wilcox Inspector, Jennifer Pattinson Inspection Manager. Joanna Govett Inspection Manager, Cecilia McKillop, Inspector, Claire Scotford Inspector, Jemima Burnage Head of Inspection Adult Social Care and Vicki Wells Head of Inspection for Primary Medical Services. Inspection Manager.

Preliminary matters:

5. On day one the hearing was adjourned early part heard at 3.30pm to give Mrs Kent and her son Ian a chance to return after they had left the building in response to evidence that was given by Ms Scotland about the position of Steve Trump the Manager. An Order was sent offering them an opportunity to return and present their case, which they did the following day.

Documentation:

6. The Tribunal considered the main bundle tabs A to E which ran to 544 pages. Mr Rush provided a Case Summary. A Scott Schedule had been prepared by the Respondent according to Directions issued on 30 September 2015 but this was not completed by Mrs. Kent.

7. On day two Mrs. Kent made an application to produce the following documents which we allowed. Mr Rush made no strong resistance on the basis that we would accord them such weight as we saw fit, save that if Mrs Kent was seeking to suggest that CQC witnesses had intimidated her staff then that had not been put to the witnesses and was strongly denied. The documents were: -

- i. Notes of Staff meeting 27 March 2015. Manager Steve Trump with staff.
- ii. Letter Redcrier training dated 16 December 2013 re outcome of a legal case, but submitted to show that the Home had used their services.
- iii. 2 x weekly shopping orders.
- iv. Letters handwritten by staff re CQC inspections. Not addressed but we were told they were prepared for the local newspaper.

The parties' positions:

8. The Respondent's position as set out in the case summary is that failings were identified before the core period which was identified as the period 14 May 2014 to 30 April 2015 with the final Inspection taking place on 9 September 2015, so since the decision to cancel the Appellant's registration. In 2015 there were 5 Inspections; each identified serious concerns. Even after the decision was taken and there was a promise of change the most recent inspection on 9 September 2015 rated the Home

'Inadequate' overall where it had been for the whole of 2015, so no real improvement. Change had been promised but had not materialised and there was no evidential basis to conclude that Mrs Kent understood what needed to happen and her responsibilities as a registered provider.

9. The Grounds of Appeal repeat the representations made when the Notice of Intention was served to remove the Appellant's registration. She stated that she had been frank and truthful in accepting that she has failed to recognise CQC's concerns and that she had been at fault for not intervening in the management of the Home earlier.

10. The Grounds set out the background namely that Mrs. Kent had been the owner of the Home for 37 years and that she had always had a good relationship with the Local Authority who placed a number of the service users at the Home. She referred to dedicated staff and that many families choose the home as it was small and friendly although she accepted that this placed particular challenges on the Home which needed to change. She was concerned if elderly residents had to move from their home. Her strong view was that regulation has overtaken people and that small homes like hers were penalised.

11. Mrs Kent wanted to draw a line under the past difficulties and move forward in confidence that the necessary changes would be made.

12. At the commencement of the hearing the Tribunal highlighted that the limited evidence submitted by Mrs Kent did not cover how she intended to address the accepted breaches of the Regulations, a plan for how and when this would happen and how it would be funded. We were also concerned that she was reliant on her current manger Steve Trump but we had no evidence from him, save on a mental capacity issue. We guided her at this and a number of points during the hearing to address these points. We had in mind that she was not represented, but we further explained that if we were not clear what her plan was we could not ask questions about it to make sure that we had a full understanding.

Evidence:

12. The chronology emerges from the evidence, which we set out in some detail to understand what has happened. A CQC witness gave evidence re each key event but there was little challenge from Mrs Kent either in the written or oral evidence. We have included Mrs Kent's responses in the body of the evidence to aid clarity.

13. The CQC carried out an inspection of Kent Lodge Residential Home in November 2011. This inspection found that the service was not meeting 4 of the required regulations. These were inadequate care records, inadequate provision of prescribed medication, no evidence of effective staff training, support and supervision and a lack of a robust quality assurance and monitoring system.

14. A further inspection took place on the 19 April 2013. Care records continued to be inadequate.

15. On the 20 August 2013 an inspection found that whilst there had been some improvements made to the adequacy of the system relating to care records, service users remained at risk of not receiving adequate fluid and nutrition.

16. Mrs Kent had a manager who stayed for thirty years and accepts that she relied on the manager to run things, stating that was why she paid them. She squarely places the blame for more recent failings on the two managers Lorette Edmunds and Roger Johnson, but we had no evidence of their view.

17. Despite being required, as a condition of registration, to have a manager registered by the Respondent from the 1st April 2011, this condition was never complied with. Mrs Kent said that both those individuals had sent in an application but it had been lost but later said she accepted responsibility for not making sure it was done.

18. In December 2013 CQC issued a Fixed Penalty Notice to the Appellant fining her in relation to this breach of condition. On the 24 January 2014 a solicitor made representations that she had been let down by her manager and that she was unable to pay this fine of £4,000. In the circumstances the Respondent substituted a simple caution and reiterated the requirement to have an appropriately registered manager. She confirmed that this was the only time she has sought legal advice and that the reference to selling the Home was not her current intention.

19. On the 14 May 2014 a further inspection took place. During this inspection Deborah Kerr found that the Appellant was reliant on the manager Roger Johnson, which she accepts. There had been a gap. He was appointed in February 2014 to replace the outgoing manager Ms Edmunds who left in October 2013.

20. The inspection identified a lack of governance, quality assurance, staff support and supervision. After the Appellant had left the premises the inspection continued and identified failings with regard to fire safety and the stair lift being in a potentially dangerous condition. Following a Management Review Meeting on the 15 May 2014 the Appellant was provided with feedback on the 20 May 2014 identifying the areas of concern and invited to respond with proposed improvements. No reply was forthcoming.

21. Ms Kerr referred her concern to the Fire who prepared a Fire Service safety inspection on the 22 May 2014. Mrs Kent did respond on the fire point. The one locked door which had caused concern had an override lock, confirmed by the Fire Officer whom Ms Kerr contacted, accepting she was not an expert. He was told that an evacuation drill had taken place recently, which was not what Mrs Kerr had been told by staff.

22. As the Home moved into 2015 concerns continued. On the 12 January 2015 a “Whistleblower” contacted Deborah Wilcox. The information concerned the fact that the night before had been dangerously understaffed with only one carer dealing with 21 residents. Deborah Wilcox raised her concerns with Suffolk County Council via a safeguarding alert.

23. A further safeguarding alert was raised on the 4th February 2015 by a District Nurse concerned about the care plan for a gentleman suffering with an untreated Grade 3 pressure ulcer. The pressure relieving equipment prescribed and provided to alleviate his suffering was mistakenly applied by Kent Lodge to a different patient with the same first name, and he was not given pain relieving medication, prescribed by the GP. We read a statement from the deceased’s son very upset that his late father had been exhumed and talking in positive terms of the care his father had revived at Kent Home.

24. CQC inspectors carried out a comprehensive inspection on the 13th and 17th February 2015. These inspections uncovered major concerns in a number of areas. These included: the management of people’s medicines; the lack of systems to identify, assess, and manage emerging risks affecting people’s health and wellbeing; failure to monitor the quality and safety of the service provided; Breaches of Regulations 11 safeguarding service users from abuse; 12 cleanliness and infection control; 13 management of medicines; 14 meeting nutritional needs; 15 premises and equipment; 17 respecting and involving service users; 18 consent to care and treatment; 21 requirements relating to workers; 22 staffing; 23 supporting workers. The overall assessment was “Inadequate”.

25. A Management Review Meeting took place on the 18 February 2015 and a warning notice was issued with an Action Plan required by 26 February 2015. A meeting took place with the Appellant on the 24 February 2015. Mrs Kent said she had put her faith in a manager who was ‘useless’ and she did not have the money to put into the home. She also said and again has continued to say that she could not run the Home and would not know what a manager does. The meeting directed Mrs. Kent to sources of free help such as the Suffolk County Council Quality Improvement team. In response to questions from the Tribunal Ms Wilcox agreed that training and a good manager capable of bringing about change were likely to cost money.

26. Joanna Govett led on liaising with Suffolk County Council who was also concerned about the situation at the Home and who were funding a number of residents there. Suffolk CC informed her they had arranged for and provided staff over the weekend of 28/29 February as they had found 5 shifts were uncovered, along with other serious concerns. Roger Johnson had resigned as manager but CQC were told that on the week end of 28 February 2015, he worked 36 hours without a break to cover for a number of shifts which had not been covered. The Management Review Meeting on the 3 March 2015 issued an Urgent Notice of Decision to prevent any fresh admissions to Kent Lodge because of the CQC’s concerns regarding the safety and welfare of the residents, and the risk of harm. Mrs Kent says this has ruined her business, as she accepted the Home is not viable with the current 14 residents. An

Action Plan was requested which was drafted by Mr Johnson on his last day on 6 March 2015, which we read but it lacked detail on timelines, resources and outcomes.

27. During the course of a further inspection on 4 March 2015 the Inspectors noticed an unlocked entrance to the building, open access to the kitchen and a potentially dangerous cellar entrance left open despite signage requiring it to be locked. Concerns came from other agencies.

28. On the 5 March 2015 Suffolk County Council were in contact with Joanna Govett relaying concerns expressed by the District Nurses about the level of care being received by a service user (PL) and about a 'best interest' decision taken by Roger Johnson. On 6 March 2015 the Environmental Health Department made an Inspection and it recorded speaking to Mr. Johnson on what appears to have been his last day. This inspection identified serious concerns in relation to the lack of management control and the lack of adequate staff training. Further significant concerns were found with regard to food safety, unsafe storage of food, lack of cleaning equipment, poor standards of cleanliness and a lack of system for structural cleaning. This inspection resulted in a down grading in the home's Food Hygiene Rating from 5 (very good) which in her evidence Mrs Kent said it has always had been to 1 (major improvement necessary).

29. Mrs Kent was by now in day to day charge but acknowledging that she did not have the knowledge to be in that position. The response from CQC was to go in more, which she saw as them being 'on her case' and not supporting her. She did acknowledge some help from Suffolk County Council who supported her to identify a new manager Steve Trump and took part in the interview process. She spoke of the difficulties of recruiting a good manager locally.

30. An inspection took place on the 9 March 2015 and was carried out by Deborah Wilcox and Cecilia McKillop. This inspection concluded that the overall rating of the service remained 'Inadequate'. Specific concerns identified included: pressure care needs; fluid intake monitoring; lack of staff training; quality and safety monitoring; breaches of Regulation 9 care and welfare of service users; 10 assessing and monitoring quality; 15 safety and suitability of premises; 18 consent to care and treatment; 23 supporting workers.

31. A further Management Review Meeting was convened on 10 March 2015 and adjourned over three days. The primary concern was whether in fact the Respondent should exercise its powers under S. 30 of the Health and Social Care Act 2008 to take urgent action and close Kent Lodge. The MRM concluded that there had been some mitigating action by Mrs. Kent and that Suffolk County Council were involved in putting protection orders in place for the home's two most vulnerable residents. It was decided, however, to issue a Notice of Proposal to cancel the service having invited representations.

32. The Notice of Proposal was served on the 25 March 2015 by Joanna Govett and Claire Scotford. By this time the new manager Steve Trump was in place.

33. Community Health staff were continuing to visit Kent Lodge on a daily basis to monitor the health and welfare of people at risk of developing pressure sores. On the 9 April 2015 Deborah Wilcox was informed of concerns raised by community nurses that a high risk individual had developed two Grade 2 pressure sores and had been found having been left sitting all day in breach of the protection plan.

34. The following day, the 10 April 2015, the Appellant served her response to the Notice of Proposal. She said she had a new Manager. Mrs Kent confirmed when questioned that she had been told what to say in that document by Steve Trump. She agreed that she only wished to be the registered provider for accommodation for persons who require nursing or personal care. She agreed that she had *'failed to appreciate the seriousness of the situation.'* She wrote that she had *been naive in putting all of her faith in Mr Johnson and should have kept a close control of matters once they had been raised'* Regarding the new manager she said *'there will be no financial restrictions placed on him'* and that *'she would employ the services of an appropriately qualified Independent Auditor initially working on a six monthly basis who will identify any failings of shortcomings in the service and ensure that in future we remain compliant with the fundamental Standards'* When questioned by Mr Rush about those statements she agreed she had no access to additional funds. CQC had suggested she approach her Bank and although she spoke of a good relationship with her Manager, we clarified that she had not asked for a loan or if they could assist with business advice. No auditor had been engaged due to a lack of funds.

35. Given this response and the presence of the new manager in post it was decided to carry out a further focused inspection to measure the progress of improvement. This inspection was scheduled to take place on the 30 April 2015.

36. On 28 April 2015, a fire safety audit was carried out at Kent Lodge. A number of deficiencies were discovered in this inspection some picking up from the visit in May 2014. These included a lack of Fire risk Assessment and fire safety arrangements. Mrs Kent again cited lack of funds and that she could not afford to update the alarm system or make any modifications or maintenance to the layout. This did not reach CQC until 6 May 2015.

37. A focused inspection took place on 30 April carried out by Deborah Wilcox and Claire Scotford. The inspection again concluded that the service remained 'inadequate'. Whilst some improvement was found the following deficiencies were noted: failure to take action to monitor medicines safely; lack of systems in place to identify, assess and manage emerging risks affecting people's health and wellbeing; lack of systems in place in regard to the monitoring of the quality and safety of the service; breaches of Regulations 9 care and welfare of service users; 12 cleanliness and infection

control(new Regulation 12(1) of new Regulations); 14 meeting nutritional needs (new Regulation 14(1) of new Regulations); 17 respecting and involving service users (new Regulation 10 of new Regulations); 18 consent to care and treatment (new Regulation 11 of new Regulations); 20A of the 2014 Regulations failure to display earlier assessments.

38. Deborah Wilcox and Jennifer Pattinson met with the Appellant on the 19 May 2015 to discuss the most recent inspection and concluded that the Appellant remained unable to address the concerns identified from the most recent inspection and showed a continued lack of understanding of the issues arising.

39. Vicki Wells Head of Inspection for Primary Medical Services and Integrated Care Directorate for the Central Region was the decision maker. Her decision was to adopt each of the three Notice of Proposals as a proportionate and justified response to the non-compliance.

40. A further inspection of Kent Lodge was undertaken on the 9 and 10 September 2015. Mrs Kent was not present on either day due to another appointment. The summary records that they found improvements with regards to implementation and review of care plans, medicine managements and supervision of staff. Major concerns remained in relation to a lack of action taken by the provider to plan for continuous improvement of the service, training of staff, no registered manager, no ongoing plans for the financial stability for the service and lack of a safe system for recruiting staff. Concerns remained in relation to nutrition, a risk of pressure ulcers, dehydration and still concerns over pressure ulcers. Fire Doors continued to be wedged open. Food and hygiene practices continued to be ignored.

41. Mrs Kent had prepared a witness statement and gave oral evidence. Her case is that she trusted her manager Mr Johnson who assured her all was well but he let her down. Similarly she had trusted Ms Edmunds who again let her down. When the case of the late Mr LF had been referred to the Local Authority for safeguarding due to his pressure ulcer this resulted in an embargo being placed on the numbers of residents and four residents had moved, which affected her income and meant she did not have the funds to bring about significant change. Mr LF's son had given a statement confirming that his late father had received excellent care in the Home.

42. In oral evidence we asked Mrs Kent to set out her plans for the future, reminding her that we would judge the case on the present situation not the date of the CQC decision. She clearly felt under pressure and became upset when asked to explain how the Home would improve and how this would be funded and the time scale for change. When asked if she was ready for change and wanted to make that investment of time and effort at the age of 70 she referred to her son taking over. We did not hear formal evidence from him as he acknowledged he had no clear plan. We had read that he has supported his mother this year in driving her to and attending meetings, doing the shopping for the Home with her and doing odd jobs around the Home. He had made a number of interjections during the hearing but did not claim to

have any particular experience or qualifications in the Care sector or of financial planning.

The Law:

43. Section 17(1) of the Health and Social Care Act 2008 (the Act) gives the Respondent the discretionary power to cancel the Appellant's registration in respect of a regulated activity "*at any time*" when one or more of the grounds prescribed in Section 17(1) applies. The Respondent relies upon the ground contained in Section 17(1)(c) namely "*the regulated activity is being, or has at any time been, carried on otherwise than in accordance with the relevant requirements*".

44. The "*relevant requirements*" for the purposes of section 17 of the 2008 Act are "*any requirements or conditions imposed by or under this Chapter*", and, "*the requirements of any other enactment which appears to the Commission to be relevant*" (section 17(4) of the 2008 Act). The requirements imposed under that Chapter include requirements in Regulations. These have been made in the form of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2010 (SI 2010/781) and the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 (SI 2014/2936).

45. The powers of the Tribunal can be found in Section 32 of the Health and Social Care Act 2008. The Tribunal may either confirm a decision of the Respondent or direct that it is not to have effect. The Tribunal is also empowered to direct any such discretionary condition as it thinks fit. The Tribunal considers the appeal on the basis of evidence available at the time of the hearing.

Conclusion and Reasons:

46. The decision by CQC to cancel Mrs Kent's registration as service provider in respect of the regulated activity on 29 May 2015 was based upon: a failure to meet the requirements of the Regulations since 15 May 2014; the provision of "Inadequate" services since 13 and 17th February 2015; the Appellants agreement and acknowledgement of the seriousness of the situation; the ongoing significant failings despite 5 inspections identifying the failings and actions required to remedy them, written and face to face meetings between the Appellant and the Respondent; the Appellant's continuing failure to improve the service.

47. We have set out the evidence and the chronology in some detail. We conclude that the evidence clearly shows that the regulated activity was being carried but not in accordance with the relevant requirements at the time of each inspection. This placed the safety and well being of the residents at risk.

48. It shows repeated failures over a long period with serious consequences to the residents. Our overview is that it shows that Mrs Kent had a number of 'warning shots' and chances to change but does not show the insight or ability to sustain change. We conclude that CQC acted in a measured and

proportionate way and properly balanced such important considerations that the Home has been a local resource for over 30 years and that closure would mean that elderly residents would have to move, against a mounting catalogue of concerns.

49. The decision was not just based on Inspections. It was also based on concerns raised by the Fire Service, Environmental Health and the Local Authority whom Mrs Kent accepted had tried to support her, including helping her put a new Manager in place. Had it not been for that support and monitoring from the Local Authority, it is clear that CQC would have moved to apply for an Order under Section 30 2008 Act which if granted would have led to the residents moving immediately. We see that as further evidence of a measured approach by CQC.

50. We must look at the situation at the date of hearing. As a specialist tribunal we accept that change in a failing care home may take some time. On the facts presented we conclude that Mrs Kent had no concrete plan to address the identified shortcomings, which for the most part she accepted.

51. We found the evidence given by each witness for CQC to be fair and measured. We read that the staff at the Home, many of whom we were told have been there a long time found them intimidating but given the mounting concerns we can see no other option than to increase the inspections. We conclude that the five inspections were a fair reflection of what they saw. Mrs Kent raised at the hearing that she felt Mrs Wilcox had it 'in for her' but she made no complaint at the time and the evidence given by Mrs Wilcox was corroborated by other sources.

52. Looking at the current situation the Inspection on 9 and 10 September 2015 identified some progress. We conclude that the new manager was having some effect in relation to care plans, medicine managements and supervision of staff. What had not been addressed was the long standing concerns re training of staff, Fire Doors continued to be wedged open and food and hygiene practices continued to be ignored. The Inspection was not challenged by Mrs Kent.

53. By her own admission Mrs Kent has been and continues to be dependent on a Manager. That is not sufficient. As a registered provider she has legal responsibilities which we conclude that she has failed to discharge but also failed to fully understand.

54. Some of the legal and day to day responsibility on her would be alleviated if she had a registered manager. The witnesses for CQC who had met with the current manager Mr Trump acknowledged his integrity. His CV was presented to us on Day Two and he appears to be someone with experience of being a 'change maker' manager. We had no evidence from him as to his 'action plan' for the Home or his own commitment to staying on to bring this about. What we had was hearsay evidence from Mrs Scotford that she had spoken with him and he had said he did not intend to register as the manager, his doubts over the suitability of Mrs Kent as the registered

provider and that he would not 'represent' her at the appeal. We bear in mind we did not have the opportunity to hear from Mr Trump directly. However, we infer from the fact that he has not made an application for registration, despite now being in post for eight months is evidence that he does not intend to do so.

55. In a situation of change a manager is only one part of the process. Resources are needed. We conclude that there are no financial resources available to be injected into the Home to bring it back to compliance and for it to run as a viable concern. We note the solicitor's letter of January 2014 referred to an intention to sell and that was at a point when the Home had 25 residents, although we found it telling that when questioned by Mr Rush even at a very basic level Mrs Kent had no grasp of the figures or the income that would be needed to make the Home viable. She has made empty promises. We have quoted her response to the Notice of Proposal in some detail in Paragraph 27. This was drafted with the help of Mr Trump and we conclude she had told him and in turn CQC that there were no financial constraints. There was no basis for that assertion.

56. Mrs Kent has been the owner of Kent Residential Lodge for 37 years. We acknowledge that like many smaller care homes it has had to adapt to increasing regulatory demands, although fees paid by Local Authorities have not markedly increased and we note that the rates she charged privately paying residents are not high by current rates. We further acknowledge that Mrs Kent spoke about the residents of the Home in a caring way and that she paid tribute to her loyal staff. The letters we read from them spoke of their concern for the residents if they had to move and how under threat they had felt by constant inspection. Having read and heard evidence over two days we conclude that Mrs Kent has no on going ability to change. She has not been able to objectively formulate plans to run her Home in the current environment, despite acknowledging that running a Home is very different from when she started. She acknowledges that change is needed to bring the Home into compliance but there was no real evidence of thought, planning, effort and finance into making that happen. Instead she saw herself as a victim.

57. The evidence put forward by CQC is overwhelming. The decision to cancel was and remains today proportionate and necessary. As there is no real Action Plan, we could not realistically consider any conditions. Accordingly we confirm the decision to cancel the Appellant's registration in respect of the regulated activities are confirmed.

ORDER

The decisions of the Care Quality Commission dated 29th May 2015 to cancel the registration of Mrs Pauline Kent in respect of the regulated activities:

1) accommodation of persons who required nursing or personal care 2) diagnostic and screening procedures and 3) treatment of disease, disorder or injury at Kent Lodge Residential Home, Suffolk.

Are CONFIRMED

The appeal is accordingly dismissed.

**Tribunal Judge Melanie Lewis
Care Standards
First-tier Tribunal (Health Education and Social Care)**

Date Issued: 23 October 2015