

First-tier Tribunal Care Standards

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

[2022] 4753.EA
NCN: [2023] UKFTT 605 (HESC)

Heard on 4 July 2023 by Videolink

BEFORE

Mr H Khan (Judge)
Ms K Marchant (Specialist Member)
Ms D Rabbetts (Specialist Member)

BETWEEN:

De-Lighthouse Homes Limited

Appellant

-v-

Care Quality Commission

Respondent

DECISION

The Appeal

1. De-Lighthouse Homes Limited (“the Appellant”) appeals against the Care Quality Commission’s (“the Respondent”) Notice of Decision, dated 13 October 2022, to cancel its registration as a service provider in respect of the regulated activity of Personal Care (“the Regulated Activity”), carried on from De-Lighthouse Homes Ltd, 2 Cross Street, Erith, Kent, DA8 1RB (“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 (200 pages).

Attendance

3. The Appellant was represented by Mr Bolaji Michael (Director of Appellant company). Ms Victoria Adejo also dialled and gave evidence.

4. The Respondent was represented by Ms Lee-Ann Frampton-Anderson. It's sole witness was Ms Julia Spencer Lewis (Senior Specialist). Mr T Buxton attended as an observer.

Preliminary issue

5. The Appellant made an application on the morning of the hearing for Ms Victoria Adejo to give her evidence orally. Ms Adejo had not submitted a witness statement. The application was made on the basis that Ms Adejo had recently returned from maternity leave (two weeks prior to the hearing) and had not had an opportunity to prepare a witness statement as she was busy with the child.
6. The application was opposed by the Respondent. This was on the basis that no witness statement had been provided, it was not clear what evidence was going to be given, any evidence that would be given would be of limited value given Ms Adejo had been on maternity leave for 6 months. The Respondent would not have the opportunity to take instructions.
7. We took into account the overriding objective including ensuring, so far as practicable, that the parties are able to participate fully in the proceedings, 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 noted that the Appellant was aware of the requirement for any witness who sought to give evidence in these proceedings to provide a witness statement. The Respondent made it clear that these points had been emphasised in the recent Telephone Case Management hearing. It was somewhat disappointing that an application had been made on the day of the hearing and had been made without a draft witness statement being prepared.
9. However, we considered the specific circumstances of the application and in particular that Ms Adejo had recently returned from maternity leave. We gave the Appellant the benefit of the doubt on this occasion but this was a finely balanced decision. Our reasons for doing so are that the Appellant explained that Ms Adejo was responsible for trying to obtain clients in order to provide regulated activity. We therefore directed the Appellant to provide a written statement and allowed the Respondent an opportunity to consider it in advance of Ms Adejo's oral evidence.

Restricted reporting order

10. 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.

The Appellant

11. The Appellant is a provider of domiciliary care to people in their own homes and was registered with Respondent in respect of the regulated activity on 4 July 2018.

The Respondent

12. The Respondent was established on 1 April 2009 by the HSCA 2008. 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

13. On 4 July 2018 Appellant registered with Respondent in respect of the regulated activity.
14. On 1 August 2022, the Respondent sent an email to the Appellant requesting confirmation on the status of the Regulated Activity Personal care from the location since the Appellant's registration.
15. On 7 September 2022, the Appellant responded confirming that the Regulated Activity had not been delivered since its registration.
16. On 21st September 2022 the Respondent issued a Notice of Proposal to cancel the Appellant's registration based on dormancy. On 6 October 2022, the Appellant submitted written submissions in response to this Notice of Proposal.
17. On 13 October 2022, the Respondent issued and served a Notice of Decision adopting the Notice of Proposal to cancel the Appellant's registration. The Notice of Decision was issued on the basis that the Appellant had been dormant, meaning it had not been carrying on the Regulated Activity, for a period of more than twelve months.

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 ("HSCA 2008"). The Respondent is the independent regulator of health and social care services in England.

20. The HSCA 2008 requires all providers of regulated activities in England to register with the Respondent, and to comply with the requirements and fundamental standards set out in regulations made under the HSCA 2008.
21. 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 services*".
22. Under section 17(1)(e) of the HSCA 2008, the Respondent is entitled to cancel a provider's registration as a service provider "*on any ground specified by regulations*".
23. 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.
24. 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.
25. 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

26. 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. We also considered the bundle of documents provided. 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.
27. Ms Spencer Ellis stated that no regulated activity had been carried out since registration on 4 July 2018. Ms Spencer Ellis acknowledged that there was no expectation that service providers following registration would start providing regulated activity immediately. She explained that most service providers would undertake regulated activity within 18 months of registration.
28. In addition, the Respondent would make some allowances if regulated activity hadn't been provided for a continuous period of 12 months. 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.

29. 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.
30. Miss Spencer Ellis explained, was that it had been assessed at registration and there were no concerns about its ability to provide regulated activity at that stage. However, that was five years ago and it was not clear now whether or not the Provider had kept up with best practice. There had been key developments in this area with regards to infection control, medicines management and record keeping. Matters had moved forward in the last five years and the absence of regulated activity meant the Appellant could not be assessed to see if it had kept up. Furthermore, the Respondent was unable to assess the Appellant's understanding of the fundamental standards of quality.
31. There was a great demand for personal care. Local Authorities were reporting a significant demand for regulated activity in the home. Some Local Authorities would look at a provider rating. It was up to each Local Authority to take its own stand. There had been a contraction in demand when Covid 19 pandemic was first declared in March 2020 when family members had taken over care, However, by Autumn 2020, the demand had returned.
32. Ms Spencer Ellis also explained that there was a strong private market in South-East London. It was therefore not clear as to why the Appellant had not been able to provide regulated activity.
33. 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.
34. Mr Bolaji explained that he has worked in the care industry for the past 12 years. He had set up the Appellant organisation in 2018. Covid 19 affected the Appellant's ability to provide regulated activity. Local Authorities were not referring individuals to "care homes" during this period.
35. He explained that the Appellant was currently bidding for contracts with the Local authorities and private clients. However, the absence of a rating from the Respondent was impacting on their ability to provide regulated activity. In 2021, they had been shortlisted by the London Borough of Barking and Dagenham but had been outbid by another provider. Mr Bolaji explained that the Appellant had paid its fees, kept his policies up to date even though it has not provided any regulated activity.
36. Mr Bolaji did not consider that cancellation was appropriate. This would involve having to reapply. As there was no detriment to the

Respondent, Mr Bolaji felt that the Appellant's registration should continue.

37. Ms Adejo explained that she had been working directly with different Local authorities across South-east London where the company is located to secure a regulated activities for the company. She had visited private client and the Local Authorities to secure a client in order to provide regulated activity.
38. Ms Adejo explained that it had been difficult to secure contracts due to the fact that the Appellant was not rated by the Respondent which was important for some clients.

The Tribunal's conclusion with reasons

39. 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.
40. We wish to place on record our thanks to Mr Bolaji, Ms Frampton-Anderson and all the witnesses for their assistance at the hearing.
41. 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.
42. We concluded that we would confirm the decision of the Respondent. Our reasons for doing so are set out below.
43. We found the evidence of Ms Julia Spencer Ellis to be credible. Ms Spencer Ellis was knowledgeable about the Appellant's case and demonstrated an in-depth knowledge of the provider situation in London. We found her evidence to be well reasoned, clear, and measured.
44. We acknowledge the evidence of Mr Bolaji and in particular the concerns he set out with regards to the difficulties they have had with providing regulated activity over the last five years. Whilst we acknowledge that giving evidence can be difficult, we found his evidence to be vague and unclear in places. For example, Mr Bolaji made reference to negotiating with a number of unspecified Local Authorities and individuals and no persuasive documentary evidence was provided to support this. Ms Adejo's evidence was more of a general nature rather than setting out specific efforts that have been made to secure regulated activity.
45. 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. By coincidence, it was exactly 5 years to the day at the hearing since the Appellant was registered. In short, no regulated activity had been carried out since 4 July 2018.

46. 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 decision 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 4 July 2018.

47. We therefore found that the grounds for cancellation were made out. The issue then follows was whether or not 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

48. We acknowledge the Appellant's submissions that Covid 19 had impacted on its ability to provide regulated activity. However, whilst this may have provided an explanation for March 2020 onwards, we did not consider that this provided an adequate explanation as to the period leading up to March 2020. It also failed to provide an explanation as to what had happened since the Covid restrictions were eased. Furthermore, we noted that the evidence of Ms Spencer Ellis was that initially there had been a contraction in the private client market as family members had taken over the care of service users. However, Miss Spencer Ellis made it clear that this was only until autumn 2020. Following on from that, we had no reason to doubt Ms Spencer Ellis's unchallenged evidence that Local Authorities were reporting that there was a "*significant*" demand for the provision of home care (which the Appellant was registered for) as well as care homes (which the Appellant was not registered for).

49. We took into account the Appellant's submissions that one of the obstacles to being able to provide the registered regulated activity was the lack of a rating from the Respondent. However, Ms Spencer Ellis made it clear that the Respondent can only award ratings to services that are delivering Regulated Activity but that the Respondent can provide a rating even with just one client. The difficulty the Appellant had was that it had never provided regulated activity to any client since registration.

50. We acknowledge the Appellant's submissions that it has made extensive efforts to begin providing regulated activity. This is in the form of bidding and networking. However, as the Respondent submits, preparation for carrying on the Regulated Activity does not amount to carrying on the Regulated Activity in and of itself. In addition, On Mr Bolaji's own evidence, it had been shortlisted after bidding on one

occasion in 2021 with the London Borough of Barking and Dagenham but in the end was outbid by another provider.

51. We would have taken a different view (and to this extent we agreed with Ms Spencer Ellis) had the Appellant been in the advanced stages of arranging to carry out regulated activity. For example, if a service users need have been assessed, contracts had been agreed and essentially, they were awaiting for confirmation of a date to start the regulated activity.
52. In our judgement, given the significant period of time in which the Appellant has not carried on the Regulated Activity, it is reasonable to conclude that it is unlikely to do so imminently. Furthermore, where, as in this case, regulated activities are not being carried out by the Appellant, no effective inspection can be undertaken. This is because there is no activity sufficiently analogous to the regulated activity of personal care that the service provider can carry out that will demonstrate its compliance with the relevant regulations. Whilst we acknowledge the submissions put forward by the Appellant that at the point of registration, where the Respondent assesses intent, there were no concerns about its ability to comply with regulations, the difficulty now was it was not possible to ascertain whether or not the Appellant had kept up with best practice. Ms Spencer Ellis made it clear that there had been changes over the last five years particularly around infection control, medicines management, record-keeping and manual handling. The Appellant asserted that it had kept up with changes through the policy document reviews and training, however, there was no way for the Respondent to check if this was the case.
53. 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. Further, given the length of time since the Appellant was registered, and the fact that an effective assessment cannot be carried out, we could not be assured that the Appellant understands the current standards of quality and safety that are required by a service provider retaining registration. The Appellant may well be keeping up to date with policies and training (albeit that we did not see any evidence of this) but the reality was that no regulated activity had been carried out since registration.
54. We considered the impact of our decision on the Appellant and the community. There are two individuals who work for the company and those are Mr Bolaji and Ms Adejo. The Appellant submitted that this would have an impact on the local community, however, there are no service users and no regulated activity has been provided in the community since registration.
55. We took into account that the Appellant had been made aware of the Respondent's concerns on a number of occasions and that there had been multiple attempts prior to the Notice of Decision by the

Respondent (over 10) to make the Appellant aware and for it to be given the opportunity to engage in regulated activity. In our view, the Appellant has had more than a reasonable opportunity to undertake regulated activity over a significant period of time.

56. The Appellant has now been dormant for a period of five 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. In our judgement, The Respondent has acted fairly and proportionately in allowing this extra time for the Appellant to begin carrying on the Regulated Activity.

57. 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's registration team, which is independent and not involved in the current proceedings. Ms Spencer Ellis made it clear that although that team would be aware that the Appellant had been previously registered, that information would not be prejudicial to the Appellant's application, particularly given that the Respondent has never identified failings or unsafe practices on the Appellant's behalf. The Respondent made it clear that it did not suggest that Appellant would fail to comply with the relevant standards if it were carrying out the Regulated Activity; the Respondent's position was that the Appellant has not carried out the Regulated Activity. We also reminded ourselves that any future decision on any new registration application would carry with it a separate right of appeal to the first-tier Tribunal.

58. 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 13 October 2022 to cancel the Appellant's registration as a service provider in respect of the regulated activity of Personal Care carried on from De-Lighthouse Homes Ltd, 2 Cross Street, Erith, Kent, DA8 1RB is confirmed.

Judge H Khan

Lead Judge

First-tier Tribunal (Health Education and Social Care)

Date Issued: 12 July 2023