First-tier Tribunal Care Standards

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

NCN: [2023] UKFTT 965 (HESC)
[2022] 4768.EA

Heard on 9-12 October 2023
At Beverley Magistrates Court

Before

Judge Clive Dow

Miss Rachael Smith (Specialist Member)

Miss Suzanna Jacoby (Specialist Member)

Between:

Mrs Kim Crosskey
(Pearson Park Care Home)

Appellant

V

Care Quality Commission

Respondent

AMENDED DECISION AND REASONS

The Appeal

1. This is an appeal by Kim Crosskey (the Appellant) brought under Section 32 of the Health and Social Care Act 2008 (the Act) against the decision of the Care Quality Commission (CQC or Respondent) on 24 October 2022 to cancel the Appellant's registration as a provider of residential care at Pearson Park Care Home, Hull, because the service is in breach of Regulations made under the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 (the 2014 Regulations).

The Hearing

2. The Appellant was represented by Laura Nash (Counsel), instructed by Stephensons Solicitors LLP. Mrs Crosskey, who is the Registered Person or Provider, gave evidence on her own behalf. Her husband John Crosskey (General Maintenance and Improvements' Manager) and Laura Charlston (Deputy Manager) gave oral evidence for the Appellant.

3. Oliver Connor (Counsel), instructed by ~~Stephensons Solicitors LLP~~ Hill Dickinson LLP, represented the Respondent. The Respondent's oral witnesses were Laura Boyes (Inspector), Charlotte Armstrong (Inspector), Alison Chilton (Deputy Director of Operations) all employees of the Respondent and Elizabeth Jamil (Strategic Lead for Quality and Partnerships) of Hull City Council.

4. We considered written statements by Sophie Hargan (Inspection Manager) on behalf of the Respondent and Sarah Cunningham (Business Administrator) on behalf of the Appellant. We note that the Appellant would have preferred to ask questions of Ms Hargan but she was not available for medical reasons. Ms Hargan instead answered questions put in writing by Miss Nash in a further statement. Where relevant to our determination of the issues, we comment on the weight we were able to place on Ms Hargan's evidence in our findings and conclusions below.

5. The documents that we were referred to are in the electronic hearing bundle provided in advance of the hearing (comprising 1853 digital pages) and those we admitted as late evidence (detailed below). We also considered the parties' skeleton arguments and a floor plan of Pearson Park Care Home, provided by Mrs Crosskey at our request.

Preliminary Matters

6. When the appeal was first brought to a final hearing on 22 June 2023, the Tribunal was asked to admit a substantial volume of late evidence from both the Appellant and Respondent in relation to the Respondent's further inspection of Pearson Park Care Home on 10 and 15 May 2023. Since there was insufficient time for either the Tribunal or the parties to consider the late evidence and then to hear the oral evidence within the planned hearing window, the Tribunal adjourned the final hearing and made directions (in an order dated 22 June 2023) allowing the parties time to consider, update and exchange further evidence.

7. In the course of the hearing which resumed on 9 October 2023, the Appellant applied to admit further late evidence. Applying Rule 15 of the Tribunal's Procedure Rules and determining in each case that the document was relevant, its admission caused no obvious prejudice to the other party and would assist us in reaching a fair determination of the issues, we admitted the following documents as late evidence in the course of the hearing: a Feedback Summary dated 28 September 2023 and undated Draft Report of a visit to Pearson Park Care Home by Hull City Council's Care Quality Assurance Team on 26-28

September 2023.

8. The Tribunal visited Pearson Park Care Home on the morning of 9 October 2023. A record of our questions and the answers provided by Mr and Mrs Crosskey, in the course of our visit, was kindly taken by Toby Buxton ~~(Stephensons Solicitors LLP)~~ of the Respondent and shared with the parties. We are grateful to him for agreeing to undertake that role.

9. In this decision, references to specific Regulations are references to the 2014 Regulations unless otherwise stated.

Background & Chronology

10. Pearson Park Care Home is a residential care home in Hull. It was registered in accordance with the terms of the Act on 1 October 2010 to provide accommodation for up to 24 persons requiring personal care.

11. The Appellant's Service has been inspected regularly since its registration. Of relevance, the Service was inspected in September 2019 and was rated as 'Good' in all domains and 'Good' overall. However, that is the only occasion where it achieved a 'Good' rating overall.

12. The Service was the subject of a focussed inspection on 18 June 2021 and then a comprehensive inspection on 22 June 2021. The inspection report identified breaches of Regulations 9, 11, 12, 13, 15, 17, 18 and 19. Overall, the Service was rated 'Inadequate'.

13. On 16 July 2021 a Notice of Proposal (NoP) to cancel the Appellant's registration was issued. On 24 July 2021 an Urgent Notice of Decision (NoD) was issued, imposing a condition on the Provider's registration prohibiting any new admissions without the prior written agreement of the respondent. The Appellant appealed against the urgent NoD and NoP. Following a further targeted inspection of the Service in September 2021, the Respondent decided not to oppose the appeal against the urgent NoD and no condition was imposed on the Appellant's registration. The NoP to cancel the Appellant's registration was withdrawn.

14. A further inspection was carried out on 31 March 2022. Breaches of Regulations 12, 15, 17 and 18 were identified during the inspection. An inspection report was published on 17 June 2022. The Service was rated 'Inadequate' overall with ratings of 'Inadequate' in the domains 'Safe', 'Effective' and 'Well-led' while the domains 'Caring' and 'Responsive' were rated as 'Requires Improvement'.

15. On 12 May 2022 the Respondent issued a further NoP to cancel the Appellant's registration. The Appellant submitted written representations on 6 July 2022, setting out concessions in respect of the findings and outlining changes made in the Service to meet the Respondent's concerns.

16. The Respondent issued a NoD cancelling the Appellant's registration on 24 October 2022. That NoD is the subject of the current proceedings, following the

Appellant's application to appeal made on 21 November 2022.

17. Since the appeal proceedings were commenced, the Respondent has carried out two further targeted inspections following its key lines of enquiry into the 'safe', effective' and 'well led' domains. The inspection on 13 December 2022 found breaches of Regulations 9, 12, 15 and 17. A further inspection on 5 and 10 May 2023 identifies improvements in some areas but also found new or ongoing breaches of Regulations 9, 10, 12, 15, 17 and 18 and continued to rate the 'Safe', 'Effective' and 'Well-led' domains as 'Inadequate'.

18. There is no Registered Manager at the home. Mrs Crosskey is responsible for the day-to-day management of the home as the Registered Person. There is a deputy manager, Laura Charlston, and a business administrator and office manager, Sarah Cunningham, who is Mrs Crosskey's daughter. Mr John Crosskey, Mrs Crosskey's husband, is the general maintenance and improvements' manager.

The Law

19. The Respondent regulates the Service provided by the Appellant in accordance with Sections. 2 & 3 of the Health and Social Care Act 2008 (the Act).

20. S.17(1)(c) of the Act provides that the Respondent may cancel a Registered Person's registration as a service provider in respect of a Regulated Activity *"on the grounds that the regulated activity is being, or has at any time been, carried on otherwise than in accordance with the relevant requirements."*

21. Relevant requirements include:

    a. Conditions imposed by or under Chapter 2 of the Act;
    b. Requirements of any other enactments which appear to be relevant to the Respondent, i.e. those made by the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 (the 2014 Regulations) or the Care Quality Commission (Registration) Regulations 2009 (the 2009 Regulations).

22. The power of the Respondent to grant or refuse the registration of a service provider is set out in s.12(5) of the Act, which also permits the Respondent to *"impose any additional condition"* at any time.

23. Since the Respondent 'may' exercise such a power, it follows that the power is discretionary. As such, the Respondent (or the Tribunal which decides the matter afresh in the circumstances pertaining at the time of its decision) must exercise such a power fairly and proportionately.

24. In appeal proceedings, the burden of proof rests with the Respondent to prove, on balance, that its decision was justified. The burden of proof rests with the Respondent throughout.

The Respondent's Enforcement Policy and Decision Tree

25. We summarise the main elements of the guidance below. We recognise that the Decision Tree must be read in the context of the Enforcement Policy (EP). Both policies provide guidance but emphasise the need for judgement in the individual circumstances of each case.

The Enforcement Policy

26. The Introduction to the Enforcement Policy recognises that:

> *"there will be occasions, when, depending on the facts of an individual case it will not be appropriate to follow the precise steps described in this policy. It should be read as a general guide to good practice when carrying out or considering enforcement action. It cannot substitute for judgement in individual cases."*

27. The purpose and principles of enforcement are described at pages 7 and 8 of the policy. The main features of the Enforcement Policy are that:

    a) The two primary purposes of the CQC are:

        1. To protect people who use regulated services from harm and the risk of harm to ensure they receive health and social care services of an appropriate standard.

        2. To hold providers to account for failures in how the service is provided.

    b) The principles that guide the use of enforcement powers make clear that the starting point for considering the use of all enforcement powers is to assess the harm or risk of harm to people using the service.

    c) As to Proportionality section 3 (at page 9) of the Enforcement Policy states:

    "We will only take action that we judge to be proportionate. This means that our response, including the use of enforcement powers must be assessed by us to be proportionate to the circumstances of an individual case. Where appropriate, if the provider is able to improve the service on their own and the risks to people who use the service are not immediate, we will generally work with them to improve standards rather than taking enforcement action. We will generally intervene if people are at an unacceptable risk of harm or providers are repeatedly or seriously failing to comply with their legal obligations."

The Decision Tree

28. Stage 3 of the Decision Tree (DT) which concerns the selection of appropriate

enforcement action; amongst other matters this states:

> *"…the decision-making process seeks to ensure that we take consistent and proportionate actions without being too prescriptive. It should not result in mechanistic recommendations but should guide decision makers to reach appropriate decisions."*

29. This stage uses two criteria which are:

- *"Seriousness of the breach; and*
- *Evidence of multiple and/or persistent breaches".*

30. The Decision Tree then addresses Stage 3A (1) "Potential impact of the breach" which concerns the assessment of the level of the potential impact that would result if the breach of the legal requirements was repeated. *"The focus is on reoccurrence to assess if we should act to protect people using regulated services from harm in the future."* It provides three categories: Major, Moderate and Minor.

31. "Major" is defined as:

"The breach, if repeated, would result in a serious risk to any person's life, health or wellbeing including:

- *permanent disability*
- *irreversible adverse condition*
- *significant infringement of any person's rights or welfare (of more*
- *than one month's duration) and/or*
- *major reduction in quality of life"*

32. "Moderate" is defined as:

"The breach, if repeated, would result in a risk of harm including:

- *temporary disability (of more than one week's but less that one month's duration)*
- *reversible adverse health condition*
- *significant infringement of any person's rights or welfare (of more than one week but less than one month's duration); and/or*
- *moderate reduction in quality of life."*

33. "Minor" is defined as:

"The breach, if repeated, would result in a risk of:

- *Significant infringement of any person's rights or welfare (of less than one week's duration); and/or*
- *minor reduction in quality of life*
- *minor reversible health condition."*

34. The next stage 3A (2) refers to the assessment of *"Likelihood that the facts that led to the breach will happen again"*. The likelihood should be based on the control measures and processes in place to manage the risks identified, including changes in practice.

35. Stage 3A (3) deals with the *"Seriousness of the breach".* It provides a chart which, by reference to the assessment of the potential impact of the breach (3A (1) above), and the likelihood that the fact giving rise to the breach will happen again (3A(2) above), produces a description of the potential impact in grid form ranging from low, medium, high to "extreme".

36. Stage 3A (4) is then used to reach an initial recommendation about which enforcement powers should be used to protect people using the service from harm or the risk of harm. The initial recommendation where the seriousness of the breach has been identified as "Extreme" is:

    a) *"Urgent cancellation*
    b) *Urgent suspension*
    c) *Urgent imposition… of conditions."*

37. Where the risk is judged to be "high" the initial recommendation is for the same actions as above but on a non-urgent basis.

38. Stage 3B involves "Identifying multiple and/or persistent breaches." This can result in a change to the initial recommendation for enforcement action by increasing or decreasing the severity. This stage involves consideration of the 3B factors:

    a) *3B (1) Has there been a failure to assess or act on past risks?*
    b) *3B (2) Is there evidence of multiple breaches?*
    c) *3B (3) Does the provider's track record show repeated breaches?*
    d) *3B (4) Is there adequate leadership and governance?*

39. The Decision Tree sets out that, depending on the answers to each of the above, inspectors should make an overall assessment about the most appropriate action to take. The answers to the Stage 3B questions above may increase or decrease the severity of any recommended enforcement action.

The Issues

40. As set out in the Appellant's grounds of appeal and skeleton argument this is, in essence, a proportionality case; both in the sense that the Respondent is said not to have acted proportionately in its application of its own enforcement policy, and in the sense that cancellation now would be disproportionate because of the improvements made by the Appellant since the Respondent's decision and the impact of cancellation on the Appellant, her employees and the Service Users.

41. By the conclusion of the final hearing, the Appellant had consolidated the issues

into four overlapping grounds, in that the cancellation of her registration is not proportionate because:

42. First, the Respondent's assessment of the severity of the breaches and the need to take enforcement action did not afford sufficient weight to the impact of the COVID-19 pandemic on the Appellant.

43. Second, the Respondent's most recent assessment of the severity of the breaches and the need to take enforcement action was weighted too heavily towards the Appellant's previous enforcement action.

44. Third, the Respondent's most recent assessment of the severity of the breaches and the need to take enforcement action was based upon evidence that was not robustly challenged at a senior level.

45. Fourth, the Respondent's continuing position that cancellation is justified ignores the improvements that have been implemented by the provider at the time of the appeal (and is capable of making in the future).

46. The Respondent resists the appeal on the basis that its approach to the Appellant has, at all times, been transparent and procedurally fair; its decisions have been based on fair and accurate reporting and application of its enforcement policy and that cancellation is proportionate to the Appellant's ongoing and long-term breaches of Regulations. To the extent that the Appellant may have improved and resolved some of the previously reported breaches, the Respondent submits that the Appellant cannot sustain any improvement without continuing support and does not have the capacity to further improve to provide a 'Good' service across all domains within a reasonable period.

47. We are grateful to both Counsel for their measured and skilful advocacy.

Oral Evidence

48. The evidence we heard was recorded and it is not necessary to reproduce or extensively summarise it in this decision. As a result, this decision is somewhat shorter than would be expected in a case of its length and relative complexity. The oral and written evidence is referred to only as necessary to explain our findings and conclusions.

Findings and Conclusions

49. For the reasons set out below, we uphold the Respondent's decision to cancel the Appellant's registration and dismiss the appeal.

How our decision is set out

50. The Appellant's and Respondent's respective closing submissions are set out with differing structures, each to some extent consolidating or conflating (albeit differently) the grounds of appeal and response.

51. While we frame our findings around the Appellant's grounds of appeal, the burden of proof remains with the Respondent throughout.

Grounds 1-3: Was the Respondent's assessment that the Appellant was in breach of Regulations, its assessment of the severity of those breaches and the need for enforcement action flawed?

52. This question covers the first three substantive grounds of the appeal, all of which go to the Respondent's decision-making process, either in deciding to cancel the Appellant's registration or in maintaining its position that cancellation is justified, necessary and proportionate in the course of these proceedings.

53. We deal with this question reasonably shortly because, even if the Respondent's decision making was flawed in the way the Appellant submits, that would not in itself mean that the appeal must succeed. These are not review proceedings. While such flaws as the Appellant identifies might (if we accept them) lead us to a different decision, flaws in the Respondent's decision making are effectively remedied by our making the decision afresh based on the information available to us at the time of the final hearing.

Did the Respondent make material errors of fact in its inspections or inspection reports?

54. Although by the end of the hearing and in final submissions the Appellant's challenge to the factual findings of successive inspections (as distinct from its challenge to the evaluative judgements made based on those findings) appeared to have receded, it is important to record that we are satisfied, based on our evaluation of both parties' written and oral evidence as a whole, that the Respondent's factual findings were true and fair. We found Ms Armstrong was a credible and reliable witness. In relation to the most recent inspection, on which we place particular weight in our assessment of whether and to what extent the Appellant is in breach of Regulations at the time of our decision, we found Ms Armstrong's written and oral evidence to be fair and balanced.

55. In relation to disputed findings of fact as reflected in the Scott Schedule, we accept, for example, Ms Armstrong's account of the meal service in relation to Regulation 9 because it reflected our own assessment of the relatively limited choices even within the four-week cycle and the fact that the same limited menu Ms Armstrong criticised appeared to be available on the day of our visit. We accept Ms Armstrong's account of the conversation between staff and a service user which criticised another service user's behaviour in relation to Regulation 10 because we can find no reason why she should have invented or misrepresented that incident. By contrast, given the criticism of them, it is perhaps not surprising that the staff members denied it when Mrs Crosskey asked them about it. Mrs Crosskey had previously complained about inspectors but there was no complaint about Ms Armstrong and no suggestion made by the Appellant that Ms Armstrong acted in bad faith. For the same reasons, we also accept Ms Armstrong's account of her engagement with service user 'A' about the rash on her back and her account of an incident where staff did not

appear to notice that a service user had been incontinent of urine.

Impact of COVID-19

56. We accept that COVID-19 impacted on the Service in the way described in the Appellant's witness evidence and as summarised in the Appellant's closing submissions, including on its ability to carry out maintenance and improvements and the pressures on staffing, which in turn impacted on the extent to which Mrs Crosskey and her deputy needed to remain involved in delivering care. It is common sense that we should also acknowledge that every care home was impacted by the pandemic. However, we should also acknowledge that the pressures will have been different depending on the circumstances for each Service. We accept that a family-run, single site Service in the Hull and East Riding area may have faced greater pressure than, for example, a Service run as part of a corporate enterprise with greater resources or in a part of the country with a more ready supply of trained and experienced staff.

57. However, to the limited extent it was pursued, we reject the submission that the impact of COVID-19 should have led the Respondent to ignore any fact which might give rise to a breach or else set aside, moderate or otherwise modify its assessment of whether the Service was in breach of any given Regulation following an inspection. To our mind, such a requirement would be entirely at odds with a Regulator's statutory duties to carry out its role in an objective way and apply the same standards to all Services which fall within its ambit.

58. To the extent that the Respondent's assessment of the seriousness of any breach requires (at Stage 3A) a consideration of the likelihood that the fact giving rise to the breach will happen again, we accept that COVID-19 may be a relevant factor in that assessment. We accept that a breach of Regulation 15, for example, which can properly be attributed to the difficulties of admitting contractors during a period of 'lockdown', may be less likely to happen again because the Provider will address it promptly as soon as conditions allow.

59. Based on their oral evidence, we are satisfied that successive inspectors including Ms Boyes and Ms Armstrong did take some account of such circumstances, as did Ms Chilton in her role as decision maker. Although the Appellant criticised their somewhat bare responses when asked about how this had been achieved, we accept that for the inspectors, inspection manager and decision maker, COVID-19 was but one of a large number of factors to be weighed in when assessing risk, which must to some extent rely on the judgement of those involved, rather than any algorithmic approach. We also accept that while the Appellant describes the 'longer-term' impact of COVID-19 on maintenance and staffing, the Respondent was entitled to take into account (as do we):
    a) The Appellant, like any other service, retained a duty to mitigate the impacts of these difficulties so far as possible;
    b) the impact of such difficulties must carry less weight in more recent inspections, and particularly in late 2022 and mid 2023, more than a year after the most recent outbreak of COVID-19 in the home;
    c) their experience that other care homes of a similar size and model and

in broadly similar circumstances had managed to remain compliant with Regulations and maintain at least a 'Good' standard across all domains;

d) that the Appellant had herself managed to effect substantial improvements in her Service between inspections in June and September 2021 (albeit she could not maintain them); and
e) that while COVID-19 might have impacted on some aspects of the Service's operation, there was no compelling reason why care could not remain person-centred, why staff could not be trained or otherwise, expected to treat service users with appropriate dignity or good governance could not or should not continue, particularly where the Service benefited from an administrator who was never required to deliver care herself.

60. For these reasons, we attach no criticism to the Respondent for the limited extent that it has taken into account the impacts of COVID-19 in its assessment of the seriousness of breaches or its decision to seek to cancel the Appellant's registration in response to those breaches.

61. For our part, as we essentially re-make the Respondent's decision, we would put no greater weight on COVID-19 than the Respondent did. Even if that was a pressing factor in March and December 2022, we can find no compelling reason why COVID-19 should be responsible for the breaches evident in May 2023, still less as we assess the situation in October 2023, there having been more than sufficient time and opportunity, in our view, between the NoP and the date of our hearing to address those shortcomings identified in the Respondent's inspections.

The weight placed on the Appellant's inspection history

62. The Appellant submits that in the absence of robust evidence from the Respondent's witnesses about how each breach was evaluated at Stage 3A of its Decision Tree, the Respondent must have relied heavily on the Appellant's inspection history (at Stage 3B) in order to arrive at its conclusion that the risk to service users in each case was 'high' and that cancellation was the most appropriate enforcement action.

63. Ms Chilton accepted in her evidence that in arriving at a judgement that the overall risk posed by the breaches of Regulations in May 2023 was 'high' and that part of this assessment in each case was the Appellant's inspection history.

64. The Appellant invites us to take into account the ratings of earlier inspections as well as its more recent inspection history, including its overall 'Good rating' and the assessment of 'Good' across all domains in 2019, as well as individual domain ratings of 'Good' in the domains of 'Effective' and 'Caring' in 2016 and 2017. We do so. However, while those ratings are to the Appellant's credit and establish that the Appellant was at those times capable of complying with Regulations and achieving a 'Good' standard, equally it cannot be overlooked that between 2014-2018 the Appellant was rated 'Requires Improvement' overall on four occasions and that since March 2022, the Appellant has been found in breach of at least four Regulations at each targeted inspection and

rated as ‘Inadequate’ in each of the inspected domains on each occasion. We also take into account, in the same way as the Respondent did, that the Respondent was found in breach of a greater number of Regulations in May 2023 than in March 2022 and as such, appeared to be regressing, rather than progressing against the regulatory standards required. These were factors which the Respondent was entitled to weigh heavily at Stage 3B (2) and (4) of its Decision Tree.

65. So far as progress following the June 2021 inspection is concerned, there was very little evidence available to us regarding the circumstances of the June 2021 inspection, the NoP to impose an urgent condition and NoP to cancel the Appellant’s registration or the subsequent withdrawal of those notices. Accordingly, we can afford relatively little weight either way to those circumstances. The Respondent’s letter of 10 December 2021 states that the NoP to cancel the Appellant’s registration is not pursued because it is accepted that it would not be proportionate in light of the Appellant’s challenges to the factual accuracy of that inspection and because of the improvements made in the Service since that inspection. However, the letter does not offer any clarity as to the relative weight afforded to either of those factors. What we can say is that whatever improvements the Appellant may have made between July and September 2021 (and we accept by inference that these improvements must have been substantial to avert cancellation), they were clearly not sustained, as demonstrated by the findings of the December 2022 and May 2023 inspections. As such, it was reasonable for the Respondent to place weight on the Appellant’s apparent failure to assess or act on past risks at Stage 3B (1) and clearly did so.

66. Beyond Ms Chilton’s apparent lack of familiarity with the detail of the Respondent’s reasons for its 2021 NoP or the circumstances in which that NoP came to be withdrawn, we can find nothing to criticise in the weight the Respondent has placed on the Appellant’s inspection history. While Ms Chilton was not able to explain in detail her assessments of risk for each breach in her oral evidence, neither was there anything in her answers which suggested she had placed any disproportionate reliance on the Appellant’s poor inspection history, or failed to take into account those occasions when it had met its Regulatory obligations in full or in part.

Challenge in the decision-making process

67. The Appellant submits that the evaluation of the facts and evidence as found by Ms Armstrong was not robustly tested, and was done before all potentially relevant evidence was gathered, rendering Ms Chilton’s judgements about the seriousness of the breaches unreliable or at least, less reliable.

68. The Appellant relied on the accepted circumstances that the Management Review Meeting (MRM) which followed the December 2022 and May 2023 inspections took place on the next working day, where the inspectors had requested additional documentary evidence from the Appellant but not yet received it, demonstrated that the Respondent had not troubled to collect all potentially relevant evidence before reaching evaluative judgements about

other breaches.

69. We accept that in the case of the May 2023 inspection, Ms Armstrong was alone and so it is inevitable that the Respondent must have placed a lot of weight on her factual findings. We also accept that the MRMs following the December 2022 and May 2023 inspections took place on the day following the final day of those inspections and, at least in the case of the May 2023 inspection, Ms Armstrong had requested, but not yet received, some further documentary evidence from the Appellant.

70. We agree that the timing of each MRM was somewhat rushed, given the need for inspectors to consider and triangulate the substantial volume of evidence before them, and ideally to have received all the evidence they had asked for. However, we accept the Respondent's reasons for doing so were, on balance, justified because on both occasions, important stages in these appeal proceedings were approaching and the Respondent was entitled (expected even) to keep its position under review in time to give instructions to its legal representatives about whether to continue to oppose the appeal and, if so, to ensure the Tribunal was able to consider the most up-to-date evidence.

71. In both cross-examination and in the Appellant's closing submissions, Ms Chilton was criticised for her inability to explain in detail how she challenged Ms Armstrong's evidence gathered during the May 2023 inspection.

72. For the reasons set out above, and in circumstances where Ms Armstrong's findings were robustly tested before us, not least by Miss Nash's cross examination, we accept Ms Armstrong's findings. As a result, any criticism of Ms Chilton for a failure to challenge Ms Armstrong about her factual findings is effectively rendered moot.

73. As to the evaluative judgements which were made on the basis of the factual evidence or findings, the Appellant submitted that some evidence, such as Ms Armstrong's observation of the incident where a service user had been incontinent, or her observation that service users were led to specific chairs in the lounge without consultation, either did not reflect any breach of Regulations or was treated more seriously than was warranted. Miss Nash contended that had Ms Chilton robustly interrogated or challenged Ms Armstrong's conclusions then the evaluations at Stage 3A (1) would have resulted in no breach or only 'minor' breaches being identified. Further, the Appellant criticised Ms Chilton's inability to explain in any detail which breaches she had assessed as presenting a high risk (at Stage 3A (3)), or the detail of how she had made such assessments.

74. We accept these submissions only to a limited extent. We did not consider it reasonable or proportionate for Ms Chilton to offer us a forensic breakdown of how each assessment was made. While we accept that in the specific case of service users being guided to chairs, a failure on every occasion to consult a service user who is elderly, suffering from dementia and a long-term resident about their preferred seat in the lounge does not seem to us a matter of particular concern. We would make similar observations about some other

judgements made by the Respondent, in relation for example to the decorative state of bannisters and window frames and the condition of the flooring in the office. However, neither can it be said that these matters are of no significance at all. The real issue, then, is whether the Respondent's reliance on these matters at all undermines the reliability of other evaluative judgements, or whether the Respondent relied on relatively trivial matters to justify its findings of moderate or major breaches of the Regulations.

75. In our reading of the Respondent's inspection report, together with Ms Armstrong's and Ms Chilton's evidence, we are satisfied that that the Respondent has neither exaggerated the significance of evidence nor put undue weight on less serious matters in reaching their overall conclusions. We too would categorise the great majority of the breaches identified by the Respondent as at least moderate in seriousness. An important feature in assessing risk is the degree of dependence of the service users upon the main provider of care. The Appellant is the provider of care to service users who are wholly dependent on the Appellant for the delivery of care on a 24/7 basis. Such service users are vulnerable by reason of their age and stage in life and in most cases by their dementia. Even leaving aside the Appellant's inspection history, we would weigh in the Appellant's apparent minimisation of the seriousness of these breaches and the lack of effective oversight and governance to support conclusions that in respect of each breach, the likelihood of recurrence was high.

76. We accept and weigh in that the Respondent does not appear to have placed much weight on improvements which the Appellant was able to demonstrate, including an overhauled training programme between December 2022 and May 2023. However, we did not consider those improvements were sufficient to address the overall likelihood of the breaches recurring because it was clear that such training was not embedded by May 2023, nor did the training seem to have addressed the cultural issues which, in our view, contributed to a task-based, rather than person-centred approach to important matters such as meals, fluids and pain management. Nor would improvements such as training mitigate the serious concerns the Respondent had (and continues to have) over the effectiveness of oversight and governance.

Conclusion on the first three grounds

77. Overall, we are satisfied that the Respondent followed its own enforcement policy faithfully and with due care, and took into account factors such as the impact of COVID-19 to a proportionate extent. We are satisfied that the Respondent's reasons for its judgements are at least adequately explained in its inspection report following the March 2022 inspection and then in its NoP and NoD, and that the Respondent was then entitled to maintain that position on the basis of its May 2023 inspection.

78. We have considered the overall context of the service provided and have considered the Enforcement Policy and the Decision Tree. It appears to us on the basis of all of the material before us that *"the risk of harm to which any service users will or may be exposed if enforcement measures were not*

imposed" was high as at the date of decision and that the analysis of each and every one of the Stage 3B (1) to (4) factors, and in particular the Appellant's record of repeated breaches, were not in the Appellant's favour.

Ground 4: Does cancellation remain justified, necessary and proportionate at the time of the final hearing?

79. We deal with this ground in two parts: considering whether the Service is compliant with Regulations as at the date of the final hearing and, if not, whether the Service should be afforded a further opportunity to achieve compliance.

80. We remind ourselves that in May 2023 the Respondent assessed the Service to be in breach of Regulations 9, 10, 12, 15, 17 and 18 and our conclusion, based on our rejection of the first three grounds of the appeal, that these assessments were correct and justified cancellation as a necessary and proportionate enforcement action.

Is the Service now compliant with Regulations?

81. The Appellant contends that the Service is now in compliance with Regulations. On that basis, the Appellant contends that if cancellation was ever justified, necessary and proportionate, that is no longer the case.

82. The Appellant relied on the evidence of its own staff, including Mrs Crosskey herself, Mr Crosskey and Ms Charlston, as well as the Local Authority's report of its Care Quality Assurance Team less than 14 days before our final hearing and the oral evidence of Elizabeth Jamil, Hull City Council's Strategic Lead for Quality and Partnerships.

83. While we carefully considered the considerable body of documentary evidence submitted by Mrs Crosskey, took into account everything she said in oral evidence, and placed considerable weight on her extensive experience as a carer and manager, we could place no particular weight on her view that the Service is in compliance with Regulations because it is ultimately her continuing competence to lead a safe and effective service and her capacity to recognise actual and potential breaches of Regulations on her own initiative which has contributed to the Service's precarious Regulatory position. To the extent that since the NoD she has supplemented her own expertise by retaining a consultant organisation called 'Caresolve', that gave us very limited additional confidence because, by the account of the Appellant's own witnesses, that did not appear to have been an entirely successful relationship and did not result, for example, in the adoption of audit templates or other records which met the needs of the Service and its users. We also note that Mrs Crosskey distances herself from Caresolve's report because she does not accept their characterisation of the serious shortcomings in documentary records before their involvement. We find her position on that matter reflects her general tendency to challenge, explain away, or at least minimise, shortcomings identified with the Service.

84. We were able to place greater weight on Ms Charlston's evidence for the

reasons set out in the Appellant's closing submissions including her continuing engagement with professional development, her relatively clear insight into past failings, her evidence of how and why the service needs to change and her desire to effect that change. We deal with those aspects of her evidence more fully below. However, as to the Service's current compliance with Regulations, the most notable part of her evidence, in our view, was her concession that if the Respondent inspected at the date of our hearing, she did not consider the Service would warrant an overall rating above 'Requires Improvement' because not all the necessary changes are in place or embedded. Based on our view of the evidence as a whole, we consider that was a realistic assessment of the current position.

85. The Appellant invited us to place considerable weight on the report of Hull City Council's Care Quality Assurance Team between 26-28 September 2023.

86. The report identifies 'significant' improvements in the Service since the Respondent's May 2023 inspection, including in the quality of documentation such as care plans and records, body-charts, PEEPS, PRN protocols, staff training records and evidence that induction, supervision and appraisals were being carried out. The assessors also comment favourably on the environment, the appropriate numbers of staff available, the dignified and engaged interaction between staff and service users, and the dispensation of medication at the correct times. The report also notes improvements in processes for reviewing risk assessments and monitoring charts and audits.

87. While we accept and credit the Appellant for all these observations, the weight that we could place on the report was limited because:

    a) the assessment was announced, meaning the Service had the opportunity to prepare for it;
    b) we did not know the credentials of the assessor;
    c) we could not assess with clarity what plans, records or other documents had been looked at;
    d) the assessment did not follow a clear methodology, or at least followed a substantially different methodology than the Respondent's methodology. It was unclear, for example, whether the Appellant or other staff accompanied the assessor. The assessor appears to have accepted the Appellant's assurances that some things which were not in place would soon be and did not identify those things as shortcomings in the same way the Respondent was bound to do;
    e) the assessment was done for a different purpose than the Respondent's inspections, in as much as it was not done specifically for the purpose of assessing the Appellant's compliance with Regulations; and
    f) although Ms Jamil said that the report was not done to support the Appellant's position in the proceedings, she also said that it was done specifically to address the Respondent's concerns. We found these statements somewhat contradictory and, given the thrust of Ms Jamil's evidence was that the Local Authority does not wish to see the Service close and does not support the Respondent's enforcement action, we were not able to treat the report as an independent assessment of the

setting or as equivalent to an inspection by the Respondent.

88. To the extent that we could place weight on the report's positive findings, we must place equal weight on the continuing shortcomings identified, including that care plans were still not presented in a consistent or clear format and did not reflect the service users' needs, despite those serious failings being identified by the Respondent in successive inspections since at least 2021. Other significant shortcomings remained including the absence of staff engagement with service users outside of organised activities. We also note, in particular that as in the May 2023 inspection, a staff member needed to be alerted by the assessor to a service user who required urgent attendance to their care needs. Finally, we found the relatively long list of breaches identified (presumably breaches of the Local Authority's own commissioning contract with the Service) somewhat at odds with the largely positive narrative of the report, which undermined our confidence in the balance of the narrative and whether all significant shortcomings had been described in the narrative. The breaches listed include some related to respect and dignity, workforce standards, fire safety and medication management, which tended to support a conclusion that a substantial number of shortcomings identified by the Respondent either remained, or that similar shortcomings had occurred since May 2023.

89. The Appellant asked us to place particular weight on the positive impact that the Appellant's newly engaged consultant Mrs Saunders has had since she was engaged at the end of August. We would have wished to do so. However, we were not asked to hear from Mrs Saunders and the Appellant did not choose to show us tangible evidence of her impact, for example by asking us to consider late evidence such as updated care plans, audit systems, staff records or new policies. Therefore, the weight we could place on her engagement as assurance that the Service is now meeting its Regulatory obligations was very limited.

90. On balance, we accept the Appellant's evidence, through its response to the Scott Schedule, in the written and oral evidence of Mr and Mrs Crosskey and Ms Charlston and taking into account the CQA report, that the Appellant has taken action in response to the findings of the May 2023 inspection. Although the Respondent made no admission on this point, we were persuaded by the Appellant's evidence overall that by the time of the hearing, the Appellant has probably taken sufficient action to address the specific concerns outlined in relation to Regulations 15 and 18.

91. However we were not persuaded, on balance, that the Appellant is now compliant with Regulations 9, 10, 12 and 17. We did not consider the Appellant has really understood, accepted or acted upon the Respondent's criticisms in relation to the delivery of person-centred care, or the importance of treating service users with dignity and respect. We considered the Appellant's response to Ms Armstrong's raising issues such as the staff comments about a service user or the incident where a service user's dignity was compromised were relatively superficial. In her oral evidence, Mrs Crosskey sought to downplay these incidents where instead we expected to see evidence of how she had set out her own expectations to all her staff and evidence of rigorous training to ensure no repeat. It was also disappointing, for example, to see that no

substantial action had been taken to re-consider the four-weekly menu or offer a broader range of alternatives to the main menu choice. We also weigh in evidence that despite repeated breaches for two years, the Appellant was still unable to assure us that all care plans have been updated so that they reflect that service users' needs.

92. As a result, we can have no confidence that sufficient oversight is in place to ensure breaches of Regulations 9, 10 and 12 do not reoccur. Similarly, although we have concluded that the service has acted to remedy breaches of Regulation 15, Mr Crosskey's admission that there is still no effective log of defects or record of action taken to address identified defects means we cannot be confident that the Service has the mechanisms in place to assure that compliance continues on a day-to-day basis. We did not consider Mr & Mrs Crosskey's assurances that they will pick up on any defects during daily walkrounds reflects any real improvement over their previous, ineffective approach or any real understanding of the Respondent's concerns about effective and auditable mechanisms for identifying and addressing concerns over the material state and cleanliness of the building, fixtures and fittings. As a result, and despite the clear evidence of improvements in some of the documentary aspects of the Service's governance, we cannot conclude that the Service is now compliant with Regulation 17.

Should the Service be given more time to improve?

93. We acknowledge that cancellation should be a last resort in the sense that a service provider must be afforded sufficient opportunity to demonstrate compliance with the Regulations and that it can attain and maintain at least a 'Good' service overall. However, this process cannot be open-ended. Cancellation may be justified in circumstances even where there is no imminent risk of serious harm (which would otherwise justify urgent cancellation). Such circumstances arise where ongoing breaches of the Regulations leaves service users at some risk of harm and where it is no longer proportionate for the Respondent to be expected to expend time and resource in inspecting with little or no prospect that the Service will achieve and sustain a good standard of care or governance.

94. The Appellant submits that the Respondent has placed too much weight on its relatively poor inspection history in deciding that cancellation is now justified, necessary and proportionate. For the reasons set out earlier in this decision, we disagree. We add here that the past regulatory history is highly relevant to the level of confidence that improvement measures will be actively monitored and improvement sustained. As we set out above, the credit we can attach to the Appellant's overall 'Good' Rating in 2019 and the improvements made post the June 2021 inspection is very limited because those standards the Appellant did attain did not result in sustained or embedded improvement. The issues identified over the three most recent inspections are overlapping and repeated. The Appellant has been very slow to acknowledge and address them. These factors alone undermine our confidence that the Appellant has the necessary insight and drive to deliver sustained improvement in the future.

95. In our view, the evidence as a whole tends to speak to an existing culture where person-centred care has become secondary to a task-driven focus. Mrs Crosskey's approach to care is, we regret to say, somewhat out of step with current expectations. While not wholly institutionalised, her approach prioritises an efficiency and economy of delivery over genuine choice. We accept that those at end-of-life may have fewer realistic choices and we weighed heavily the views of service users and their families who described feeling happy and well cared-for. We are sure those views are genuine and apply to the majority of service users, despite the two complaints made to the Respondent at the May 2023 inspection. However, as Ms Chilton said, rightly in our view, the Respondent's role (and the Tribunal's role when standing in the Respondent's shoes in appeal proceedings) is to protect those who cannot appreciate that the care they are receiving does not meet the expected standard. We are in no doubt that change is needed.

96. Albeit somewhat belatedly, the Appellant has recognised the need for change. Whilst we recognise the efforts made by the Appellant to improve the standards in the Service, and the steps it has now taken to engage support and address the issues, it cannot realistically be said that these improvements are embedded – indeed Ms Charlston conceded as much in her oral evidence. The CQA report invites the same conclusion. We also note that the current consultant, Mrs Saunders, had only been engaged for around 6 weeks at the time of our hearing.

97. In our finding, it will take considerable time to fully embed the necessary changes. We regret to say we are doubtful whether it can be achieved under Mrs Crosskey's leadership, even with ongoing support externally from the LA and Mrs Saunders, the consultant, and internally from Ms Charlson in particular. Although we think the necessary changes might be achieved through greater delegation to Ms Charlston (who we considered an impressive witness), we are not sure that she has the broad experience or has been afforded the leadership opportunities thus far at Pearson Park so that she can deliver the change required, at the speed required, before the Respondent's next inspection under the current special measures regime falls due. In any event, Mrs Crosskey made clear her intention to continue to lead the Service 'from the front' for the foreseeable future, which renders our contingent hopes somewhat moot.

98. We bore in mind the evidence of Elizabeth Jamil that the Local Authority is no longer seeking to 'decommission' the Service and is optimistic that the Service can make and sustain the improvements needed. However, it remains the case that the Local Authority is not placing any new residents at the Service. She conceded that the care market in Hull is stressed so we could not discount the likelihood that the Local Authority's position is influenced by its own needs. We also observe that the Local Authority's role as service commissioner and its expectations under a contract for care are very different to those of the Respondent as Regulator.

99. For these reasons, we could not be confident that the Service will be compliant with Regulations within such a short time that it would not be proportionate to uphold the Respondent's decision to cancel the Appellant's registration.

Does the potential impact on service users mean that cancellation is disproportionate?

100. We were aware at the first hearing in June 2023 that many of the service users at Pearson Park are very elderly and living with dementia. For that reason, as part of our adjournment directions we asked the Respondent to gather evidence about what work the Local Authority had done to assess the needs of those users should they be required to move locations if Pearson Park were to close as a result of cancellation.

101. The Respondent obtained a statement from Ms Jamil which confirmed that Hull City Council has assessed the needs of the service users in preparation for a possible relocation and would support residents and their families to relocate, if that became necessary. The Local Authority had offered the service users the opportunity to move in case of cancellation. We noted that only one service user elected to move. Ms Jamil described the high needs of service users and the particular vulnerabilities of very elderly people living with dementia and other complex physical and mental health needs. She confirmed in her written and oral evidence that the care market in Hull is challenging, with a limited capacity for beds. She was unable to say whether some or all service users could be relocated within Hull and said some may need to move to other Local Authority areas.

102. Ms Jamil said that given these factors, any move was likely to have a detrimental impact on service users, and particularly the most elderly. She offered the view that at least one service user may not survive a move.

103. We carefully considered that sobering assessment but we could only attach limited weight to it because we were not able to examine the individual assessments and because we considered that Ms Jamil's assessment was influenced to a substantial degree by the Local Authority's own concerns about its capacity to relocate service users.

104. On a narrow balance, therefore, we do not consider the impact of closure would be so great as to render the decision to cancel the appellant's registration disproportionate because:

a. Although all of the service users are elderly and at least three of the service users are receiving end of life care, and they and others are living with dementia, there was nothing striking in the evidence, save for Ms Jamil's own view, which led us to conclude that it was inevitable that these service users would suffer a serious detrimental impact if moved;

b. We are satisfied that the Local Authority has plans in place to support service users to move to new accommodation in the event of Pearson Park Care Home closing;

c. We found reassurance in Ms Chilton's evidence that the Respondent

would work closely with the Local Authority and the Appellant to manage the cancellation, including by delaying it for a short period so as to maximise the opportunities for service users to be moved to the most suitable accommodation for their needs in a planned way;

d. Taking into account our findings about ongoing breaches of Regulations, the likelihood of further breaches or Regulations (as described below), we conclude that the risk of harm which attaches to such ongoing breaches or new breaches outweighs the impact the closure of the home would have had on the service users residing there.

Are there any conditions which would mitigate the risk to the safe care and treatment of patients while the Service strives to improve?

105. We gave careful consideration to the possibility of the Tribunal imposing its own conditions in order to create a framework to monitor the current level of risk and help implement the necessary improvements to avoid cancellation, including monthly reporting or by imposing constraints on the maximum number of service users or the rate at which the Service could take on new service users. We doubt an 'admissions' condition would have much impact because the Service is already operating at well below its capacity. Further, we cannot be sure that even with additional oversight from the Respondent, assistance from the Local Authority or Mrs Saunders, the Appellant's new consultant, the Service recognises or is able to address all of the Respondent's concerns or maintain a good standard across all domains. It is our conclusion that it is not a proportionate use of the Respondent's resources to maintain the Appellant's registration, nor is it proportionate for the Respondent to expend significant resources monitoring or otherwise supporting the Service in the hope (rather than confident expectation) that imposing conditions would lead to a good service across all regions and compliance with the Regulations.

Conclusion

106. We are satisfied that the Appellant's breaches of Regulations are as stated by the Respondent in successive inspection reports up to and including May 2023. The Respondent has satisfied us that the low threshold test for enforcement action under section 32 of the Act was met at the date of the decision on 24 October 2022 and that it continues to be met.

107. On the basis of such an extensive history of poor compliance with Regulations and in particular Regulations 9, 12 and 17, and considering the Appellant's ongoing inability to bring the service to a good standard in the domains 'Safe', 'Effective' and 'Well-led', and further taking into account the significant safeguarding concerns which continue to arise, we conclude that the service users at Pearson Park Care Home may be exposed to an ongoing risk of serious harm. That risk is not fully mitigated by external agency support or the Appellant's engagement of a consultant and it is not reasonable or proportionate for that support to continue indefinitely. Despite considerable investment in outside assistance and evidence of recent improvement, we find, on balance, that the Appellant does not have the capacity to bring the Service

into compliance with Regulations within a reasonable period.

108. Having balanced the impact of the decision on service users and the Appellant against the desirability that any Service should fully meet all regulatory requirements, including relevant Regulations, we are satisfied that the decision to cancel the Appellant's registration is justified, necessary and proportionate.

109. We wish to add as a post-script that we take no satisfaction in our decision. We recognise, so far as is commensurate with our duties, the human impact of our decision on service users, the Appellant herself, her family and the staff. We also recognise that the Appellant herself has dedicated her adult life to helping some of the most vulnerable in our society and in more recent years, to support them to live out their days in as dignified and comfortable a way as she has been able to offer them. We do not, for a moment, underestimate the physical energy or emotional and financial resources she and her family have invested in Pearson Park Care Home or the efforts that they have made latterly in order to bring the Service toward compliance with Regulations. We regret that those efforts have been rather too little, too late.

Decision

110. The appeal is dismissed. The Respondent's decision to cancel the Appellant's registration as Provider for Pearson Park Care Home is confirmed.

Judge C S Dow

First-tier Tribunal (Health Education and Social Care)

Date Issued: 13 November 2023
Amended Under Rule 44 Date Issued: 05 December 2023