First-tier Tribunal
(General Regulatory Chamber)
Information Rights
Decision notice FS50871523

Appeal Reference: EA/2020/0148

Considered on the papers

Before

JUDGE CHRIS HUGHES

TRIBUNAL MEMBERS

MALCOLM CLARKE & KATE GRIMLEY EVANS

Between

WILLEM VISSER

Appellant

and

INFORMATION COMMISSIONER

First Respondent

NHS-ENGLAND

Second Respondent

DECISION AND REASONS

Background to the request

1. Dr Visser is a GP. The process of his professional revalidation for the purposes of his maintaining his registration with the GMC (a new regulatory requirement) was started in 2013. There was a breakdown in relations with the Responsible Officer of NHS-E, Dr Fryer, who oversaw the process. She

deferred the conclusion of the process to enable Dr Visser to get the information he was submitting into a more complete and appropriate form; raising an issue about his approach to a question of a patient's mental capacity. As a result, Dr Visser subsequently refused to meet Dr Fryer and the process was drawn out over several years.

2. Dr Visser complained against Dr Fryer and his complaints were independently investigated; This request for information arose out of the 2018 report of Dr Foulkes giving the outcome of that independent investigation. The introduction sets out its purpose:-

   The independent investigation is being commissioned at the request of the NHS England London Higher Level Responsible Officer Dr Vin Diwakar under Regulation 17(4) of the Responsible Officer Regulations (January 2011, amended April 2013). GP Dr Willem Visser has made a complaint against Dr Fryer who is the NHS England South London Local Team Responsible Officer and has a prescribed connection to the NHS England London region.

3. The report is lengthy (132 pages) and detailed. It noted that Dr Visser and Dr Fryer had never met. It provided an introductory summary which set out brief details of how difficulties arose, of Dr Visser refusing to meet Dr Fryer, of repeatedly asking for her to be replaced due to an unfounded claim of conflict of interest, his non-attendance for an occupational health assessment leading to a suggestion in early 2016 that he be referred to the GMC, which Dr Fryer blocked *"because of a satisfactory appraisal and record review"* (paragraph 1.14) It continued:-

   "…In April 2016 Dr Visser was recommended for revalidation by Dr Fryer.
   (1.16) In August 2016, Dr Visser wrote to the GMC complaining about (name redacted) (associate medical director). The GMC wrote to Dr Visser and advised him to have his complaint investigated locally.

   (1.17) In January 2017 Dr Visser took this complaint to NHS England. He also asked NHS England to investigate potential breaches of the Guidance for Responsible Officers and Suitable Persons (GMC) Fourth edition (May 2015) (1.18) The purpose of this report is to examine this complaint and answer the concerns that Dr Visser has raised. The appendix to the terms of reference contains 31 concerns covering a period between 2014 and 2016."

4. The evidence for each allegation was tested to see whether they raised significant issues which should affect the GMC registration of Dr Fryer. The report author stated:-

   "5.31 This investigation has looked carefully at the evidence that is available and interviewed relevant parties. Alleging that colleagues are dishonest, criticising their personalities or suggesting they are party to gross professional misconduct is a serious matter and in the view of the investigator should not be raised unless there is

unequivocal evidence of this. This investigation has found no evidence that any of the revalidation team have been dishonest or acted without integrity."

5. The report found:-

"Dr Fryer and her colleagues used their professional judgment and made correct decisions about recommendations for revalidation (deferrals) and then revalidation and followed the regulations and guidance. The evidence obtained supports that they applied this consistently and fairly and did not deal with Dr Visser in a dissimilar way to any other doctors requiring revalidation decisions. As discussed in the relevant sections of this report, there have been some instances when either alternative actions or a different approach could have been considered, but this is not the same as concluding that these suggestions meant that the revalidation team made poor decisions. The author of this report recognises the benefit of hindsight and further years of cumulative experience in dealing with revalidation and performance issues."

6. In its conclusion:-

6.10 Both NHS England and Dr Visser should reflect upon this and consider whether there were other opportunities they could have taken to help to resolve this situation in a timelier manner. The investigation can come to no other conclusion that this has been an unnecessarily time consuming and poor experience for both Dr Visser and the revalidation team.

6.11 The investigation has found no credible reason or motive why Dr Fryer or the revalidation team would have wanted to delay or compromise Dr Visser's revalidation. Nor did the investigation find any evidence that the standards applied to Dr Visser were any different to those applied to other doctors.

7. The report included an independent review dated 27 March 2018 by Dr Caesar (an experienced appraiser of GPs) of the appraisal materials submitted by Dr Visser throughout the process and how they were considered. This concluded:-

"Dr Visser has demonstrated that he has engaged fully with medical appraisals for revalidation and worked hard to try to meet the GMC requirements and RCGP recommendations as he understood them.

Dr Fryer has demonstrated a commitment to a quality assured appraisal process with clear and consistent guidance to her appraisers about what she wanted to know about in order to make robust revalidation recommendations. She had an early policy of interpreting the GMC requirements strictly and appears to have implemented this consistently across her NHS England area.

Dr Visser has sometimes responded to queries and suggestions about how to improve his portfolio as criticisms requiring a vigorous defence and clearly misunderstood the neutral nature of a deferral recommendation. In this way, the relationship between Dr

Visser and the appraisal team and his RO broke down. There were missed opportunities to resolve concerns, both at an early stage and subsequently."

8. The final paragraphs of Dr Foulkes' report Dr Caesar's conclusion was endorsed and the way forward indicated:-

"6.13 In her overview Dr Caesar concludes: "Dr Visser has demonstrated that he has engaged fully with medical appraisals for revalidation and worked hard to try to meet the GMC requirements and RCGP recommendations as he understood them. Dr Fryer has demonstrated a commitment to a quality assured appraisal process with clear and consistent guidance to her appraisers about what she wanted to know about in order to make robust revalidation recommendations. She had an early policy of interpreting the GMC requirements strictly and appears to have implemented this consistently across her NHS England area".

6.14 It is not within the investigations terms of reference to make recommendations, but would expect Dr Fryer and the revalidation team to review this report and consider any further changes they may need to make to prevent a similar situation arising in the future. Similarly, the investigation would hope that this has helped Dr Visser to understand the actions and decisions of the revalidation team and appreciate the reasons the team came to those decisions."

9. The report of the investigation was sent to Dr.Visser and then considered, with his detailed comments, at a meeting of the HLRO Local Decision Making Group on 4 July 2018. The minutes of that meeting are succinct:-

"NHS England London
HLRO Local Decision Making Group
Wednesday 4th July 2018

Minutes
Attendees:
Dr Vin Diwakar, HLRO/RMD, NHS England London (Apologies)
Dr Ruth Chapman, AMD (Revalidation) & Regional Appraisal Lead, NHS England London
XXXX
XXXX
XXXX
XXXX
XXXX
Apologies: XXXX

***Discussed**:*

The final report into the allegations that Dr W Visser raised about Dr Jane Fryer, Medical Director for South London local team.
The e-mail to Dr Ruth Chapman dated 30th June 2018 from WV was also shared with the local Decision Making Group.

***Conclusion**:*

The allegations made were not up held by the investigation and no actions are to be taken against Dr Fryer however, nineteen opportunities for improvement to the local team's appraisal and revalidation system and its implementation were identified.

Actions from meeting

To send WV the final report with a covering letter apologising for the experience he had through the revalidation process and explaining that NHSE has identified opportunities to learn. Also to offer a meeting with Vin Diwakar to discuss anything further."

10. This outcome was communicated to Dr.Visser in a letter of 13 July signed by Dr Diwakar the Regional Medical Director which stated:-

"…Firstly I would like to thank you for raising your complaint which I and the local Decision Making Group have taken very seriously. I apologise for the experience you have had through the revalidation process.

The allegations made were not up held by the investigation, however we have identified nineteen opportunities for improvement to the local team's appraisal and revalidation system and its implementation going forward…."

The information request which is the subject of this appeal

11. Unsurprisingly Dr Visser asked:-

"Would you please release to me under the Freedom of Information Act the 'nineteen opportunities for improvement to the local team's appraisal and revalidation system and its implementation' as identified. by the HLRO local decision making group of 4.7.2018 as stated in the attached minutes.

For clarification, the requested information is a list of the 19 items, where there were opportunities to learn and take action, the local team were asked to go through."

12. The request was initially refused on the grounds that he already had the information. He sought review on the basis that:

*the requested information is not in any of the documents I hav*e. *The requested information was generated by the local decision making group on 4.7.2018 and therefore did not exist before that date. For that reason the information could not be and is not in any documentation that is dated before 4.7.2018.*

The documentation I have that is dated 4.7.2018 or later consists of an extract of the minutes of the meeting of the local decision making group of 4.7.2018, a letter from Dr

Diwakar dated 13.7.2018 and correspondence in relation to requests for information made by me after 4.7.2018. None of this correspondence lists the nineteen opportunities for improvement to the local team's appraisal and revalidation system and its implementation.

13. Dr Diwarkar subsequently wrote to him:-

"Opportunities to have dealt with your case differently are recorded throughout the text of the report and the author does not list them"

14. NHS-England in responding to the request for a review maintained its view that *you do have reasonable access to the information you have requested* and warned him that it might consider future requests vexatious.

15. Dr Visser complained to the Information Commissioner who gathered the arguments of both sides and reached her conclusion.

16. She reviewed all the material and found that NHS-England did not hold the information:-

20. Having reviewed the report, the Commissioner does not consider that it holds the requested information. This is because the 19 items which present opportunities for learning – as the complainant has interpreted those items from their reference in the meeting minutes - are not identified anywhere in the report. It is therefore open to judgement as to what those 19 items could be. In correspondence to the Commissioner the complainant identified what they consider the 19 opportunities might be; however, someone else might identify a different set of opportunities from the report.

21. Because a degree of assessment and judgement is needed to identify learning opportunities in the report – 19 definitive items are not identified through numbering or listing anywhere in the report – the 19 items the complainant has requested cannot be said to be held in the report. The requested information was therefore not accessible to the complainant in the report that had previously been provided to them. NHSE therefore wrongly applied section 21(1) of the FOIA to this information.

17. She had asked NHS-England to explain how the learning opportunities could be addressed if they were not listed. NHSE explained that the words of the minutes of the meeting as reflected in the letter to Dr Visser *"may not entirely match the information which is actually held"* and the complexity of the documentation may have caused some confusion. Dr Visser disputed this pointing out that the meeting had also considered his comments and would have had other information. He argued that 19 opportunities had been identified and the team had been advised to reflect on them, so they must exist.

18. The Commissioner reflected on the meeting process (paragraph 32) and in the light of that:-

33. The Commissioner reviewed the report again. She noted that under paragraph 3.5.3 of the report, there is a table containing a list of "core guidance and policies" to which the investigation referred. There are 19 items in that list. It would therefore not be unreasonable to assume that the individual in the meeting was referring to that list of guidance and policies. That would align with the minuted Action for the local team "…to go through the 19 items where there were opportunities to learn and take action." It seems likely to the Commissioner that the local team was being advised to review the relevant guidance and polices and learn from these as appropriate.

19. She suggested this to both parties, Dr Visser did not accept the idea. NHSE confirmed that no specific list of 19 learning opportunities existed and that it had mishandled the request.

20. The Information Commissioner found that NHS-England had erred in saying that it held the information and concluded:-

36 The report contains a list of 19 relevant policies and guidance; it does not contain a list of 19 specific opportunities that were identified as a result of the investigation, and from which the local team might learn in the future. The Commissioner does not consider such a list is held elsewhere either and does not consider there is anything to be gained from considering this matter further.

…

38. If it is the case that the table of 19 items at paragraph 3.5.3 of the report are indeed those items referred to in the meeting minute – it is not definite but seems likely - the Commissioner makes the point that it took her a matter of a minute or two to identify that table and make the connection. Had NHSE taken a little more time to consider the complainant's request, the information in the report, and all the circumstances of the request it might have been able to clarify and resolve the situation with the complainant at an early stage. That would have made their complaint to the Commissioner unnecessary.

21. Dr Visser appealed to the tribunal. He reiterated the contents of the minutes he had seen, identified an alleged motivation of NHSE to withhold information, and referred to Dr Diwakar's letter which referred to the 19 opportunities. He argued that the Information Commissioner had decided the case on insufficient evidence, was wrong in her suggestion concerning the table of 19 items and the need for the local team to reflect on the case and present its reflections at a future meeting.

22. In resisting the appeal, the Information Commissioner noted that the report had been prepared independently and that the allegations of Dr Visser were that there had been criminal activity for which he had no evidence. She did not consider that there was any evidence that NHSE was trying not to disclose information or any evidence of bad faith.

23. NHSE in resisting the appeal gave details of its searches and actions it had taken to reply to the FOIA request and an associated subject access request. It

noted that while the minutes of the meeting sent to Dr Visser were marked draft, Dr Diwakar did not hold a finalised copy of the minutes, any finalised version of the minutes would have been found and disclosed. There were no grounds for the allegation of criminal conduct. The letter from Dr Diwakar was drafted carrying over the contents of the minutes. The searches for the information had been proper and appropriate and further fruitless searches had been carried out. The Information Commissioner's suggestion of the source of the reference to 19 was plausible. No further information had been located despite numerous searches.

24. Dr Visser concluded his reply to the cases of the Information Commissioner and NHSE by alleging that Dr Diwakar was motivated by a desire to ensure that the investigation came to nothing and that "*The 19 opportunities for improvement the local decision making group identified were a spanner in the wheel and are therefore now denied against the evidence"*

Consideration

25. As a result of Dr Visser's complaints NHSE found it necessary to conduct an investigation into his allegations against Dr Fryer. That investigation found all these weighty claims of misconduct unfounded. All the material considered by the HLRO meeting has been sent to Dr Visser. He knows all these documents and has contributed to them considerably. Although it concluded that Dr.Visser's complaints were unfounded the investigation report stated (para 6.14). *It is not within the investigations terms of reference to make recommendations, but would expect Dr Fryer and the revalidation team to review this report and consider any further changes they may need to make to prevent a similar situation arising in the future*.

26. Dr Diwakar signed the letter bearing the conclusions of the meeting, which he did not attend. The report (paragraph 6.14) enjoined both Dr Visser and NHSE to review the report and learn lessons. The minutes of the meeting refer to *nineteen opportunities for improvement to the local team's appraisal and revalidation system and its implementation were identified*. That reflects some comment or discussion in the meeting which considered the report. Section 3 of the report is entitled "Methodologies" and has sections on

    - 3.1 terms of reference,
    - 3.2 evidence assessed,
    - 3.3 interview schedule,
    - 3.4 case investigator
    - 3.5 guidance and policies
    - 3.6 assessment criteria

27. At 3.5.3 is a table of the *core guidance and policies* which the investigator drew on in conducting his investigation and which included a range of documents from the GMC, the Royal College of GPs, NHS England and concluding with the statutory instruments concerning Responsible Officers, *The Medical Profession (Responsible Officers) 2010 and (Amendment) Regulations 2013*. There were 19 entries. The suggestion of the Information Commissioner that what the minutes capture is a reference to this table in the context of trying to *prevent a similar situation arising in the future* is, it seems to the tribunal, highly probable. A committee, faced with the outcome of a long (no doubt expensive and time-consuming) investigation which has found no misconduct in the person complained against, is likely to consider that the best advice it can give is "follow the guidance".

Conclusion

28. It appears to the Tribunal that Dr Visser has throughout this period consistently interpreted any check or disappointment as an attack motivated by bad faith, and this appeal is perhaps the latest example of that. In this appeal he has produced no meaningful evidence that NHSE holds information within the scope of his request which it is deliberately and mendaciously withholding, other than a very literal reading of the minutes of the HLRO meeting.

29. We find that the conclusion of the Information Commissioner to explain the reference to 19 items is entirely probable. However, like the Commissioner, the Tribunal would wish that NHSE having come to the end of an arduous process, would have devoted a little more thought to how it drafted its minutes and responded to the information request.

30. The Tribunal accepts that the Information Commissioner's decision is correct and dismisses the appeal.

Signed Hughes

Judge of the First-tier Tribunal
Date: 6 January 2021