



Neutral Citation Number: [2022] EWHC 1582 (Admin)

Case No: CO/2579/2021

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/06/2022

Before :

UPPER TRIBUNAL JUDGE ELIZABETH COOKE, SITTING AS A DEPUTY HIGH COURT JUDGE

Between :

Dr NATHAN SANDLES

Claimant

- and -

**NATIONAL HEALTH SERVICES LITIGATION
AUTHORITY (PRIMARY CARE APPEALS)**

Defendant

- and -

**(1) NHS COMMISSIONING BOARD
(2) SECRETARY OF STATE FOR HEALTH AND
SOCIAL CARE**

**Interested
Parties**

Mr Matthew Barnes (instructed by **Radcliffes Le Brasseur**) for the **Claimant**
Mr Adam Fullwood (instructed by **Hill Dickinson**) for the **First Interested Party**

Hearing dates: 8 June 2022

Approved Judgment

Upper Tribunal Judge Elizabeth Cooke sitting as a Deputy High Court Judge:

1. The Claimant Dr Sandles is a general practitioner and on 19 August 2020 he was suspended from practice for 18 months by an order of the Medical Practitioners Tribunal Service. On 9 September the Claimant and his partners executed a document, the effect of which was that he ceased to be a partner with effect from 31 August 2020. On 7 October 2020 the NHS Commissioning Board, also known as NHS England (the First Interested Party) decided that the Claimant is not entitled to suspension payments after his retirement from the partnership. The Claimant appealed to the Defendant, NHS Resolution (the operating name of the National Health Service Litigation Authority) which refused his appeal on 27 April 2021.
2. The Claimant seeks judicial review of the Defendant's decision, on a number of grounds. In summary, the Claimant says the Defendant has misconstrued the instrument that sets out the circumstances in which suspension payments are to be made.
3. The Claimant was represented by Mr Matthew Barnes of counsel. The Defendant has not taken part in the proceedings because it regards itself as playing a judicial role in these circumstances, similar to the situation where a tribunal's decision is reviewed. The First Interested Party, has taken part and was represented by Mr Adam Fullwood of counsel. The Secretary of State, the Second Interested Party, has played no part in the proceedings.

The legal background

4. Regulation 12 of the Performers List Regulations 2013 provides that while a medical practitioner is the subject of an interim suspension order – such as the one made against Dr Sandles on 19 August 2020 – he or she is to be suspended from the performers' list, so that he cannot practice for the duration of the interim suspension order.
5. A doctor who cannot practice in these circumstances has not been found to have committed any misconduct. The suspension is necessary for the protection of the public but it is not supposed to be punitive and the allegations alone are not a reason why he should be unable to earn. Accordingly regulation 13 provides:

“(1) During a period of suspension under regulation 12, payments may be made by the Board to, or in respect of, a Practitioner in accordance with a determination by the Secretary of State.”
6. “The Board” is the First Interested Party. The Secretary of State for Health and Social Care has published a determination entitled Payments to Medical Practitioners Suspended from the Medical Performers List 2015 (“the 2015 Determination”). Paragraphs 3, 4 and 5 of the 2015 Determination set out the conditions for entitlement to a suspension payment, and prescribe the amount payable, as follows:

“3(1) A medical practitioner may be entitled to receive payments from the Board by virtue of this determination if sub-paragraphs (2) and (3) apply to that medical practitioner.

(2) This sub-paragraph applies to a medical practitioner who-

(a) is suspended; and

(b) immediately prior to the suspension (or the circumstances giving rise to the suspension) is or was

(i) a contractor (including a partner in a partnership which is a contractor), ...”.

(3) This sub-paragraph applies to a medical practitioner to whom sub-paragraph (2) applies who, apart from the suspension, and any suspension from the register of medical practitioners which does not provide grounds for removal from the medical performers list under regulation 28 of the 2013 Regulations (grounds for removal from the medical performers list), is able and permitted to perform primary medical services.”

7. Pausing there: paragraph 3 defines, in sub-paragraphs (2) and (3) a class of persons who “may be entitled” to suspension payments.

8. Paragraph 4 then tells us who is entitled to a suspension payment in relation to a given month or part of a month:

“4(1) A medical practitioner to whom paragraph 3(2) and (3) applies (“a suspended medical practitioner”) is, subject to the following provisions of this Determination, entitled to payments from the Board in respect of any complete calendar month, or part of a calendar month, for which-

(a) where the suspended medical practitioner is a contractor who is an individual medical practitioner, that practitioner’s normal monthly payments (or a pro rata amount in the case of a part month) are withheld or deducted by the Board in accordance with the terms of the contractor’s primary medical services contract;

(b) where the suspended medical practitioner is one of two or more individuals practising in a partnership, that medical practitioner is not entitled to receive at least 90% of the normal monthly drawings (or a pro rata amount in the case of a part month) from the partnership account, whether or not that medical practitioner is actually in receipt of those drawings;

(c) where the suspended medical practitioner is or was employed or engaged by a contractor, other than as a locum, that medical practitioner is not entitled to receive at least 90% of that medical practitioner’s normal monthly NHS earnings from work as a performer of primary medical services (or a pro rata amount of such earnings from such work in the case of a part month,) whether or not that medical practitioner is actually in receipt of at least that amount from the contractor, or

(d) in a case where the suspended medical practitioner is a locum ...”

9. Paragraph 5 deals with the amount to be paid to someone so entitled:

“(5)(1) Subject to the following provisions of this Determination, if a suspended medical practitioner is entitled to payments from the Board in accordance with

paragraph 4, the amount of those payments, in respect of each complete calendar month or part month during the period of the suspension, is –

(a) where a contractor is an individual medical practitioner, an amount which the Board considers is a reasonable approximation of what, immediately before the suspension, amounted to 90% of the medical practitioner’s normal monthly payments under the contractor’s primary medical services contract;

(b) where a contractor consists of two or more individuals practising in partnership and the suspended medical practitioner is or was a partner in the partnership immediately before the circumstances giving rise to the suspension, an amount which represents 90% of the medical practitioners normal monthly drawings (or a pro rata amount in the case of part months) from the partnership account;

(c) where the suspended medical practitioner is or was employed or engaged by a contractor, other than as a locum, and amount which, immediately before the suspension, amounted to at least 90% of that medical practitioner’s normal monthly NHS earnings from work as a performer of primary medical services (or a pro-rata amount of such earnings from such work in the case of a part month);

(d) where the suspended medical practitioner is a locum, an amount which the Board considers is a reasonable approximately of what immediately before the suspension amounted to 90% of the suspended medical practitioner’s normal monthly NHS profits (or a pro rata amount in the case of part months) from locum work as a performer of primary medical services.”

10. The 2015 Determination is not a statutory instrument. It is a statement of policy by the Secretary of State. It was suggested at the hearing that it is comparable to the Immigration Rules, save that it has not been laid before Parliament.

The facts

11. The facts are straightforward and can be summarised briefly. On 19 August 2020 the Claimant’s registration as a GP was suspended on an interim basis by the Medical Practitioners Tribunal Service following an allegation of misconduct. On 24 August 2020 he was suspended on an interim basis from the GP Performers List, with the effect that he is not able to do any NHS work during that suspension.
12. On 21 August 2020 the Claimant’s two partners sent him a letter headed “Notice of Compulsory Retirement” which stated that they had agreed by unanimous vote to require him to retire pursuant to clauses 22 of the Deed of Partnership. The letter sets out clause 22, which lists a number of instances of misconduct, and then sets out facts which are said to establish those grounds for retirement.
13. On 9 September 2020 the Claimant and his partners signed a document stating that with effect from 31 August 2020 he was no longer a partner.

14. The Claimant now says (in his Statement of Facts and grounds for Judicial Review) that he signed the document without fully understanding the situation and while suffering from ill health. That of course is not an issue in the judicial review and is not relied upon as a reason why the decisions of NHE England and of the Defendant were wrong. However, as will be seen, it is part of the Claimant's reasoning that he did not choose to retire.
15. Subsequently the Claimant claimed suspension payments under the 2013 regulations. He was refused payment for the period after 31 August 2021.

The Defendant's decision

16. The decision made by the Defendant, upholding that of NHS England, was that the Claimant is not entitled to suspension payments after his retirement from the partnership. The decision rests upon paragraph 4(1)(b) of the 2015 Determination; in respect of any month after 31 August 2021 it is not the case that the Claimant "is one of two or more individuals practising in a partnership", and therefore although the Claimant falls within the broader group identified by paragraph 3 he is not among those entitled to a payment under paragraph 4.
17. The Claimant has five grounds of review; each is a reason why it is said that the Defendant erred in law in its construction of paragraph 4(1)(b).

The grounds of review

(1) Paragraph 4(1)(b) does not limit entitlement

18. The Claimant's first ground is that the Defendant has simply misconstrued the opening words of paragraph 4(1)(b) as a limitation upon entitlement. The Claimant's entitlement is set out in paragraph 3. He clearly falls within paragraph 3(2) because he "is or was ... a contractor (including a partner in a partnership which is a contractor)". A contractor is defined as a person with whom NHS England has entered into a contract for the provision of medical services and it is not in dispute that the Claimant and his partners were a contractor. And it is not in dispute that he falls within paragraph 3(3). The opening phrase of paragraph 4(1)(b) should not be read as imposing a further limitation on entitlement; instead it should be regarded as an introductory signpost indicating simply that paragraph 4(1)(b) is about partners (rather than employees or locums).
19. Mr Barnes argued that if the introductory words to paragraph 4(1)(b) were intended to be a restriction on entitlement then different words would be used. The word "where" would not appear and the word "and" would be used, so that the sub-paragraph would read: "(b) the suspended medical practitioner is one of two or more individuals practising in a partnership, and that medical practitioner is not entitled [etc]...". I agree that that would be another way of putting it, but that makes no difference to the plain meaning of the words. The words "the individual is entitled to payment for a month in which, where x is the case, y is the case" means the same as "the individual is entitled to payment for a month in which both x and y are the case".
20. Paragraph 4(1)(b) sets out the conditions for entitlement to a suspension payment for a given month or part of a month. That is the effect of its plain words.

21. I do not think it is possible to regard the opening words of paragraph 4(1)(b) instead as an introductory signpost. Moreover, paragraph 4(1)(c) uses different words in relation to employees; it applies to a practitioner who “*is or was* employed or engaged as a contractor” (my emphasis). If the idea was to use the open words as a signpost just to indicate whether the sub-paragraph is about partners, employees, locums (sub-paragraph 4(1)(d)) or individuals who are contractors (4(1)(a)) then the sub-paragraphs would each be introduced in the same words. The fact that different words are chosen in 4(1)(c) indicates that these are deliberately chosen words which go to entitlement.

(2) Absurdity arising from inconsistency with paragraphs 3 and 5

22. Next, Mr Barnes argued that the Defendant’s construction of paragraph 4(1)(b) gives rise to an absurdity because it is inconsistent with paragraphs 3 and 5 which each identify a wider class of persons. He says that there is no reason why paragraph 4 should interpose a narrower class.
23. So far as paragraph 3 is concerned I regard that argument as untenable. The relationship between paragraphs 3 and 4 is easy to discern; paragraph 3 sets up a class of person; paragraph 4 then says which members of that class are entitled to suspension payments in respect of a particular month or part of a month. This is a familiar drafting technique. The decision-maker is to ask first whether, immediately prior to the suspension, the practitioner is or was a contractor (including a partner), or an employee or a locum (3(2)(b)(i) to (iii)); then as regards the month in question the decision-maker is to ask whether the practitioner (a) is an individual contractor or (b) is a member of a partnership or (c) is or was an employee or (d) is a locum. There is no inconsistency or absurdity arising from the inter-relationship of the two paragraphs in this way.
24. It is also said that for paragraph 4 to operate in this way would be absurd because it would be inconsistent with paragraph 5.
25. Paragraph 5 tells us that “if a suspended medical practitioner is entitled to payments from the Board in accordance with paragraph 4, the amount of those payments, in respect of each complete calendar month or part month during the period of the suspension, is ... (b) where ... the suspended medical practitioner is or was a partner in the partnership immediately before the circumstances giving rise to the suspension, an amount which represents 90% of the medical practitioners normal monthly drawings (or a pro rata amount in the case of part months) from the partnership account.”
26. I see no inconsistency here. I believe the various instances of “is” and of “is or was” can be explained as follows. Take an imaginary doctor who was suspended in January, retired from partnership on 1 March and in April claimed suspension payments for February and March. Throughout that period he falls within paragraph 3(2) because he “is or was” a partner. In February he falls within paragraph 4(1)(b) because he is a partner. In March he does not because he is not a partner. In April it is known that he is entitled to payment for February, and paragraph 5(1)(b) applies because although he is not currently a partner he was a partner immediately before suspension, and therefore the formula set out in that sub-paragraph sets out how much he gets for February. There is no inconsistency with paragraph 4(1)(b) so far as March is concerned; paragraph 5 is irrelevant to the claim for March because there is no entitlement to a payment for March and therefore the March claim never gets to be analysed under paragraph 5.

(3) Absurdity and unfairness if partners are treated differently from employees or locums

27. Third, it is argued that the Defendant's construction of paragraph 4(1)(b) is absurd and unfair because it leads to partners being treated differently to others without justification.
28. Mr Barnes points to the words of paragraph 4(1)(c) which deals with employed doctors. Such a doctor is entitled to a suspension payment for a given month if he "is or was employed." So the employed doctor who is dismissed following his suspension can claim an interim payment. So can a locum, under paragraph 4(1)(d), who cannot practise as a locum because of his suspension. The word "is" is used in paragraph 4(1)(d) and I take it that the fact that a doctor has an established practice as a locum means that he falls within the sub-paragraph even though he is not working during his suspension.
29. I see no unfairness here. The employed doctor has no choice if he is dismissed in those circumstances, subject to any claim for unfair dismissal which will not yet have been determined. He or she is not going to be able to get another employed position during the suspension and it is fair that he or she gets an interim payment. Likewise a locum will simply be unable to work during suspension. A partner by contrast retires by his own choice, either because the terms of the partnership to which he signed up require it or at the request of his partners to which he accedes.
30. Mr Barnes argued that Dr Sandles too had no choice. But it is no part of these judicial review proceedings for the court to determine whether Dr Sandles was indeed obliged to retire on the basis of allegations which had not been proved. It is not obvious that the terms of the partnership deed would have required retirement in those circumstances. Indeed it is Dr Sandles' position that he was coerced into retiring. He could therefore have chosen not to comply with the request; or he could have agreed to resign on terms that his partners took him on as an employee during his suspension so that he could claim under paragraph 4(1)(c).
31. Moreover, the construction for which Mr Barnes argued would mean that a doctor who retired from partnership during his suspension because he had reached retirement age would also be entitled to suspension payments. That is not the objective of the legislation, which seeks to make provision for those who cannot be paid because of their suspension rather than for any other reason.

(4) Inconsistency with the Secretary of State's policy

32. The 2015 Determination was made as a result of a consultation paper, *Performers Lists and Suspension* dated 11 February 2015, in which the consequences of an interim order of suspension by the GMC were explored. The Performers List Regulations 2013 were amended as a result of the outcome of that consultation, with the effect that an interim order of suspension now results in suspension from the performers list rather than removal (as was formerly the case). It was clearly stated in the consultation paper that an interim order of suspension is a neutral act and that the consequences should not be punitive.

33. Mr Barnes argued therefore that if someone in Dr Sandles' position is not able to receive suspension payments that is contrary to the Secretary of State's policy and the 2015 Determination cannot have been intended to have effect and should not be so construed.
34. There are two answers to that argument. The first is that whilst it may be open to me to use policy to construe a regulation where it is ambiguous (*AA (Nigeria v SSHD* [2010] EWCA 773, paragraph 70, in relation to the Immigration Rules), there is no ambiguity in this case. As discussed above, the words of the 2015 Determination are clear.
35. The second is that the outcome is not contrary to policy. Partners are in a very different position from employed doctors and locums. The latter are likely to be deprived by their suspension of their ability to work. By contrast, partners are unlikely to be forced to retire on the basis of allegations that are neither admitted nor proved; it would be very surprising if the partnership deed required that. The partnership deed is not in evidence before me and I make no comment as to whether Dr Sandles was in fact obliged to retire; but as a matter of policy it is unsurprising that the 2015 Determination treated partners differently from other practitioners in this way.
36. The fifth and final ground relates to the Defendant's construction of the word "entitled" in paragraph 4(1)(b) of the 2015 Determination. The Defendant at its paragraph 5.12 stated:

"I consider that where paragraph 4(1)(b) states "not entitled to receive at least 90% of normal monthly drawings", the reference to "not being entitled" must mean by virtue of the suspension, not for any other reasons."
37. Mr Barnes argued that the Defendant was wrong about this. The 2015 Determination does not appear to make provision only for suspension payments to be made where the loss of earnings is the direct result of the suspension; it is perfectly possible for an employed doctor to lose his job after suspension for a reason unrelated to it, yet he would nevertheless be entitled to a suspension payment. It is unfair that a partner who retires after suspension would be in so different a position.
38. I agree that the 2015 Determination would enable an employed doctor to get suspension payments in circumstances where he or she was not earning for a different reason – perhaps by virtue of having reached a compulsory retirement age or because of serious ill-health. In that sense the 2015 Determination has something of a broad-brush effect. However, for the reasons already given it makes sense for partners to be treated differently because they have choice and control that is not available to employed doctors and locums.
39. If it was the Defendant's view that it is necessary to read into paragraph 4(1)(b) the words "as a result of the suspension" after the words "not entitled", then that is a misconstruction. The words are clear and require no addition. If that is what the Defendant was saying then that is incorrect, but it makes no difference to the outcome of the appeal because the Defendant's decision was correct for the reasons already given. I agree with the Defendant that it is clearly the policy of the 2015 Determination to make provision for suspension payments where a practitioner is unable to earn because of the suspension, and the 2015 Determination will generally achieve that aim.
40. As the Defendant put it at paragraph 5.14:

“From the date that the Appellant ceased to be a partner in the Practice, he ceased being entitled to his normal partnership income. Not as a result of his suspension but as a result of him not being a partner. If the Appellant is not a partner, he cannot be entitled to partnership income. Therefore, NHS England cannot compensate him for income lost as a result of him no longer being a partner and I consider that to do otherwise would go against the purpose of the 2015 Determination, which in my view is to compensate practitioners who are unable to practice as a result of their suspension and not if they lose income for some other reason.”

41. That is undoubtedly correct.

Conclusion

42. For the reasons given above, the Defendant’s construction of the 2015 Determination is clearly correct, and the appeal fails.