

**UNIVERSITY HOSPITAL BIRMINGHAM NHS FOUNDATION TRUST (“UHBFT”)**

**TERMS OF REFERENCE FOR A “FIT AND PROPER PERSON” INVESTIGATION AS TO  
DR DAVID ROSSER**

Pursuant to Regulation 5 of the Health and Social Care Act 2008 (Regulated Activities)  
Regulations 2014

Investigation into the actions of Dr David Rosser, Chief Executive, in respect of:

- A. The management of matters relating to the termination of employment of [REDACTED] and the findings of the subsequent Employment Tribunal and Employment Appeal Tribunal proceedings; and
- B. Allegations made by [REDACTED], regarding an MHPS process and a referral to the GMC.

**1 Background**

- 1.1 In 2016 UHBFT was instructed to intervene in the management of the former Heart of England NHS Foundation Trust (“HEFT”), and during this period an allegation of potential gross misconduct was made in respect of the conduct of [REDACTED]
- 1.2 Dr Rosser was the Joint Medical Director of both UHBFT and HEFT at the relevant time.
- 1.3 Dr Rosser was a member of the disciplinary panel which heard the evidence against [REDACTED] in respect of the alleged misconduct. The disciplinary panel determined that [REDACTED] had committed an act of gross misconduct and imposed the sanction of summary dismissal with effect from [REDACTED]
- 1.4 [REDACTED] did not appeal the decision to dismiss him, but subsequently issued Employment Tribunal proceedings. The Judgment of Birmingham Employment Tribunal, issued to the parties on [REDACTED] held that [REDACTED] had been wrongfully and unfairly dismissed, but that he had not been automatically unfairly dismissed for raising protected disclosures.
- 1.5 The Tribunal Judgment contained a number of criticisms of the disciplinary panel. As Dr Rosser was the sole witness for UHBFT in the Tribunal proceedings, much of those criticisms were levelled against him, as the representative of UHBFT.

- 1.6 The Trust presented an appeal to the Tribunal decision, but in a Judgment from the Employment Appeal Tribunal dated 1 May 2020, the appeal was rejected.
- 1.7 The criticisms of Dr Rosser in the Employment Tribunal and Employment Appeal Tribunal judgments have resulted in this investigation under Regulation 5 of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014. (“**the Regulations**”)
- 1.8 Subsequently, the CQC have forwarded to the Trust allegations made by [REDACTED], which are to be included within the scope of the investigation.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

## **2 The Statutory Framework and guidance to be applied**

2.1 The Regulations impose upon UHBFT obligations to ensure that each of its directors (or anyone performing an equivalent function) is a Fit and Proper Person (“**FPP**”) to hold office. This investigation is into the question of whether Dr Rosser, UHBFT’s current Chief Executive, is a Fit and Proper Person to hold that office.

2.2 The FPP test is set out in Regulation 5 of the Regulations and provides as follows:

*Fit and proper persons: directors*

*5.—(1) This regulation applies where a service provider is a health service body.*

*(2) Unless the individual satisfies all the requirements set out in paragraph (3), the service provider must not appoint or have in place an individual—*

*(a) as a director of the service provider, or*

*(b) performing the functions of, or functions equivalent or similar to the functions of, such a director.*

*(3) The requirements referred to in paragraph (2) are that—*

*(a) the individual is of good character,*

*(b) the individual has the qualifications, competence, skills and experience which are necessary for the relevant office or position or the work for which they are employed,*

*(c) the individual is able by reason of their health, after reasonable adjustments are made, of properly performing tasks which are intrinsic to the office or position for which they are appointed or to the work for which they are employed,*

*(d) the individual has not been responsible for, been privy to, contributed to or facilitated any serious misconduct or mismanagement (whether unlawful or not) in the course of carrying on a regulated activity or providing a service elsewhere which, if provided in England, would be a regulated activity, and*

*(e) none of the grounds of unfitness specified in Part 1 of Schedule 4 apply to the individual.*

*(4) In assessing an individual's character for the purposes of paragraph (3)(a), the matters considered must include those listed in Part 2 of Schedule 4.*

*(5) The following information must be available to be supplied to the Commission in relation to each individual who holds an office or position referred to in paragraph (2) (a) or (b)—*

*(a) the information specified in Schedule 3, and*

*(b) such other information as is required to be kept by the service provider under any enactment which is relevant to that individual.*

*(6) Where an individual who holds an office or position referred to in paragraph (2)(a) or (b) no longer meets the requirements in paragraph (3), the service provider must—*

*(a) take such action as is necessary and proportionate to ensure that the office or position in question is held by an individual who meets such requirements, and*

*(b) if the individual is a health care professional, social worker or other professional registered with a health care or social care regulator, inform the regulator in question.*

2.3 The requirement that appears to be most relevant to the criticisms made by the Employment Tribunal is that at paragraph 3(d), relating to serious misconduct or mismanagement. Should the Investigator consider that any other provisions of the Regulations set out above are also relevant, the Investigator is asked to address them in the investigation report.

2.4 The CQC has also issued guidance for service providers as to how the Regulations and the FPP test should be approached.

### **3 Appointment and Timetable**

3.1 [REDACTED], has been appointed by the Chair, Rt Hon Jacqui Smith, to conduct this investigation, supported by an

appropriately experienced solicitor from a law firm that has not been involved in the case. This individual's role will be to provide an added element of external independence and technical legal support (together, "the Investigators"). The Investigators shall conduct the FPP investigation and produce a confidential investigation report as soon as reasonably practicable for the Chair and members of UHBFT's Executive Appointments and Remuneration Committee ("**EARC**").

#### **4**     **Methodology**

- 4.1     The Investigators shall review the Judgments of both the Employment Tribunal and the Employment Appeal Tribunal in so far as they relate to Dr Rosser, in accordance with the statutory framework and guidance referred to in paragraph 2 above, as well as UHBFT's policy with regard to the FPP test.
- 4.2     The Investigators shall consider any professional advice provided to Dr Rosser regarding the matters which are the subject of the FPP investigation. It is not, however, the intention of UHBFT to waive legal privilege in respect of any legal advice received.
- 4.3     Interviews should be held with, or written responses to questions obtained from, relevant witnesses and any relevant documentation relating to the FPP concerns to be investigated should be collated to establish the facts and to enable an investigation report to be produced.
- 4.4     The Investigators should produce notes of any meetings with witnesses, and if any aspect of the investigation is not covered by meeting notes, the Investigator should ensure that the oral evidence is fully set out in the investigation report.
- 4.5     The Investigators must ensure that the investigation is conducted confidentially and that breaches of confidentiality are avoided as far as possible. Witnesses must be informed that they must observe confidentiality in relation to the investigation and associated matters.
- 4.6     The Investigators have a discretion as to how the investigation is carried out, but the purpose of the investigation is to ascertain the facts in an unbiased and fair way.

#### **5**     **Outcome**

- 5.1     The Investigators should produce an investigation report for EARC, which should include a written record of the investigation, setting out the facts established by the

investigation in respect of the FPP allegations and which reports the Investigator's findings.

- 5.2 The Investigators shall make a recommendation as to whether or not the Investigators believe the fit and proper person criteria continue to be met.
- 5.3 The investigation report should provide sufficient information for a decision to be made by the Chair and the EARC as to what further action, if any, should be taken in accordance with the FPP test.
- 5.4 The Chair shall advise the CQC as to the process followed and the determination reached.

24 September 2020

Chair, Rt Hon Jacqui Smith

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