

## **Primary Health Lists**

### **The Tribunal Procedure (First-Tier Tribunal) (Health, Education and Social Care) Rules 2008**

**Heard at HMCTS, Pocock Street, London**

#### **BEFORE**

**Mr A Harbour (Tribunal Judge)  
Dr J Chope (Specialist Member)  
Ms M Frankel (Specialist Member)**

#### **BETWEEN:**

**JAMES SPENCE**

**Appellant**

**and**

**NHS ENGLAND  
(Wessex Area Team)**

**Respondent**

**[2014] 2330.PHL**

#### **DECISION**

References in the body of the text, for example D53, are to the page numbers in the trial bundles.

#### **Appeal**

1. Mr Spence appealed against the decision of NHS England (Wessex Area) made on 12.11.14 to remove him from the Dental Performers List.

2. The appellant, Mr Spence, was represented by Mr McGee of counsel. The respondent, NHS England, were represented by Mr Mylonas QC. The hearing commenced on 5.10.15 and ended on 8.10.15.

#### **The law**

3. The tribunal considered its powers under Regulation 17 of the NHS (Performers Lists) (England) Regulations 2013. Regulation 17(4) provides that, on appeal, the First Tier Tribunal may make any decision which the Board (the National Health Service Commissioning Board) could have made. This included restoring to the list, removal from the list or the imposition of conditions on a practitioners continued inclusion on the list. The appeal is by way of redetermination of the case.

4. NHS England based its case against Mr Spence on a finding of 'inefficiency' under Regulation 14(3)(b). This regulation states that the Board (and the First Tier Tribunal) may remove the performer where his continued inclusion in the Performers List would be prejudicial to the efficiency of the services which those included in the relevant performers list perform. It is for the Board to satisfy the tribunal that the case is proved on the evidence before it on the balance of probabilities.

5. Regulation 15(5-6) sets out the matters to which the tribunal must have regard when considering removal under 14(3)(b). These include amongst other things: the nature of any incident(s) which were prejudicial to the efficiency of the services which the practitioner performed, the length of time since the last incident occurred and since any investigation was concluded, any action taken by a regulatory body as a result of any such incident and the relevance of the incident to the practitioner's performance of the services which those included in the relevant performers list perform, and the likely risk to patients or to public finances.

6. Regulation 15(6)(g) provides that where a practitioner has been included in a list subject to conditions the following must be considered: 'the facts relating to the incident which led to such action and the reasons given for such action by the holder of the list.'

## **Background**

7. Mr Spence was a dentist practicing on the Isle of Wight. He was first included in the Isle of Wight's PCT (Primary Care Trust) dental performer's list on 23.5.05. (A16) He had a special interest in children's dentistry and orthodontics, and was one of the largest providers of children's dentistry on the island.

8. On 15.1.10 he was contingently removed from the Isle of Wight's PCT (Primary Care Trust) dental performer's list on the grounds of efficiency. (C83-87)

9. Parallel with the 2010 performer's list proceedings the PCT decided to request a NCAS (National Clinical Assessment Service) assessment. Mr Spence agreed to participate in the assessment and the NCAS report was completed on 21.1.11. (C97-178)

10. On 23.7.12 Mr Spence was removed from the Isle of Wight's PCT (Primary Care Trust) dental performer's list. (C180-186) Mr Spence appealed against the 2012 decision to the First-Tier Tribunal (the tribunal).

11. On 28.7.13 the tribunal decided to contingently remove Mr Spence from the performer's list. The order is attached as **Annex 1** to these reasons. At a meeting on 12.11.14, NHS England (Wessex) decided to remove Mr Spence from the performer's list. (B1-B10) Mr Spence appealed against that decision to the tribunal; the current proceedings arise from that appeal.

### **The 2013 Appeal to the First-Tier Tribunal**

12. The tribunal was provided with the decision of the 2013 tribunal. (C188-219) The 2013 tribunal sat for 9 days and heard from 18 witnesses. The written evidence included 3900 pieces of correspondence filling 32 lever arch files.

13. There were three key areas of Mr Spence's practice which the PCT alleged prejudiced the efficient running of the Dental Performers' List. These were:

- a. The volume of correspondence produced by Mr Spence which the PCT stated to be 'extraordinary and unreasonable';
- b. the method and style of Mr Spence's communication; and
- c. the fact that Mr Spence had not in reality successfully completed the NCAS remediation programme or reached the NCAS milestones because he had failed to truly engage with the process and had failed to put his apparent learning into practice.

14. The 2013 tribunal made a number of adverse findings in relation to a. and b. The tribunal did not make any adverse findings in relation to c. and found that in relation to the NCAS report that Mr Spence's insight, whilst by no means complete, had improved very significantly over the past 12 months and even during the course of the hearing.

15. Some of the adverse findings that were of most relevance to the current appeal were as follows.

- a. The sheer volume of the documents generated by Mr Spence made it difficult to keep track and the administrative time dealing with Mr Spence had at times outweighed the time spent on the primary role of managing contracts.
- b. There had been a war of attrition waged by Mr Spence, he knew that others found his correspondence badgering and unnecessary yet he persisted with it regardless.
- c. He disregarded the advice and decisions of consultants such as Mr Mackenzie.

- d. Mr Spence had not given sufficient thought to the effect that his correspondence would have on Mr McDowall, or the patients in his care.
- e. Referrals in respect of several patients to Mr McDowall were likely to have been without justification.
- f. Some of the reflective logs written by Mr Spence were misleading, inaccurate and self serving.

16. In writing about the nature of the incidents which were prejudicial to efficiency the tribunal wrote:

The panel decided that Mr McDowall's evidence encapsulated the real issue with Mr Spence's judgment. Some of the correspondence sent by Mr Spence, when looked at on an individual basis, was justified and appropriate. Some of the clinical matters Mr Spence raises are legitimate concerns and matters which should be looked into. Unfortunately, the main experience of colleagues and consultants over time has been that a large proportion of correspondence and requests for 2<sup>nd</sup> opinions has been unjustified, which means that they cannot rely on his judgment and have wasted a good deal of time and resources in responding to unnecessary queries and requests for second opinions. (C213-214)

#### Contingent removal

17. The 2013 tribunal was satisfied that contingent removal was appropriate for the following reasons.

We have concluded that the effect of the conduct we have found proved is sufficient to justify removal, but that immediate removal would be disproportionate in the circumstances of this case. Mr Spence plays a very important role in the lives of many of the children on the Isle of Wight and has always sought to promote their interests, albeit in a very inappropriate manner on occasions. If that role can be maintained in circumstances which do not prejudice the efficiency of the body replacing the PCT and without risk to patients the result would be proportionate, fair and just.

We have therefore considered whether it is appropriate to address the inefficiency by the imposition of conditions at this stage. In his closing submissions Mr Mylonas QC stated that the time when conditions may have addressed the inefficiency had passed and that there was now no alternative to removal from the list. He also submitted that the burden on the PCT of monitoring conditions and taking action if those conditions were not adhered to would be a further, unacceptable, burden on resources. We disagree. We find that the changes in the circumstances of orthodontic provision on the Isle of Wight, including a waiting list hotline which means there is much less need for Mr Spence to become involved in discussions about waiting times, additional consultants and a changed referral system, taken with the apparent recognition by Mr Spence of his need to change mean that there is a real opportunity to address the issues and to protect against future prejudice to efficiency. (C216)

18. The order of the 2013 tribunal, dated 28.7.13 is annexed to this decision.  
**(Annex 1)**

### **The position of the parties in relation to the appeal**

19. NHS England sought particular findings (A30-31) which were linked to the order of the 2013 tribunal. These findings were that Mr Spence:

- a. had failed to fully comply with contractual conditions as required by condition A1;
- b. had failed to comply with NICE guidance as required by condition A2;
- c. had failed to refrain from criticising colleagues to patients as required by condition A3;
- d. had failed to use his mentor to discuss clinical, procedural or administrative matters that he may feel challenged by before engaging with the second party as required by condition A5;
- e. and had failed to maintain a log recording the justification of the content of each letter he has sent out and any discussion he has had with his mentor or other colleagues regarding each letter as required by condition B1.

20. Mr McGee's response was straightforward. In the skeleton submissions submitted on Mr Spence's behalf, Mr McGee wrote that: 'the 2013 FTT decision lays out the type and breadth of evidence on which a decision to remove a performer (complete or contingently) from the list can properly be taken in an efficiency case. There is no such evidence in this case.'

### **Evidence**

#### Introduction

21. The following gave evidence on behalf of the NHS England area team: Ms Easterby-Smith (dental adviser NHS England) and Ms Copage (assistant director revalidation NHS England South (Wessex)). Ms Copage covered all areas of the evidence relied upon by NHS England. Ms Easterby-Smith's evidence was confined to an analysis of Mr Spence's correspondence and related documents. Mr Spence gave evidence and called no witnesses on his behalf.

22. The tribunal was provided with two lever arch files of written evidence and the bulk of this material was essential to understanding the cases of both parties. Exhibited to Ms Copage's statement dated 8.7.15 were documents including logs and correspondence submitted to NHS England by Mr Spence on 30.6.15. (C589-708) Ms

Easterby-Smith was unable to review this correspondence and the parties did not subject this additional material to detailed scrutiny.

23. The tribunal have listed their analysis of the evidence under the following headings:

- a. Contract compliance, the breach of Mr Spence's General Dental Service Contract.
- b. Assessment of Mr Spence's compliance with the conditions imposed by the 2013 tribunal to meet with NHS England area team for review.
- c. The proceedings before the General Dental Council
- d. Mr Spence's criticism of colleagues to patients.
- e. The maintenance of a log and copies of outgoing correspondence
- f. The maintenance of a log reflecting his discussions and meetings with his mentor

24. In addition there were two particular areas of evidence which were addressed at length by the parties. These were firstly Mr Spence's engagement with his mentor and secondly Mr Spence's correspondence with other professionals.

#### Contract compliance - dental records

25. On 8.5.14 Mr Spence's records were subject to a routine check by the NHS England Business Service Authority. The report by Mr Critchlow, a clinical adviser, concluded that on the basis of the records assessed 'the general standard of record keeping remains unsatisfactory'. (C230) The records were handwritten and he described them as generally difficult to read and interpret. 'The records regarding the use of local anaesthesia were often particularly difficult to read...' As a result Mr Spence was served with a breach notice which carried with it a financial sanction; he accepted the breach notice subject to payment of £1000. (C308)

#### Assessment of Mr Spence's compliance with the conditions imposed by the 2013 tribunal

26. To assess compliance the 2013 tribunal directed that Mr Spence 'attend a 6 monthly meeting with NHS England AT to review logs, complaints, and compliance with contractual terms, to be reviewed no later than December 2014'.

27. One of Ms Copage's roles was the 'management of performance concerns' (C65) in relation to all primary care performers on the NHS England Performers Lists. She had been involved in considering performance concerns about Mr Spence since 2009.

28. Ms Copage had the lead responsibility for liaising with Mr Spence following the imposition of conditions by the 2103 tribunal. She met with Mr Spence twice, on 25.4.15 and 2.2.15, to discuss his progress in complying with the conditions of the 2013 tribunal. The tribunal was provided with minutes of their meetings. Ms Copage's assessment of their meetings was that she and Mr Spence had interesting conversations. She felt he lacked some insight insofar as he still felt there had been a campaign against him and his ways of treating patients was right. In relation to the requirement for him to keep a log and copies of all correspondence and referrals sent out she considered that he had complied, albeit he had not provided a justification for each item as directed by the 2013 tribunal.

#### The proceedings before the General Dental Council

29. Mr Spence had been involved in proceedings before the General Dental Council (GDC). The GDC's investigating committee considered matters relating to his practice in May 2008 and February 2011. In May 2012 he appeared before the Professional Conduct Committee. His fitness to practice was not found to be impaired as a result of any of these deliberations.

30. Between November 2013 and October 2014 the GDC's Professional Conduct Committee considered a number of charges against him. The Committee made findings against him in relation to 19 patients, the treatment taking place between 2006 and 2011. Their findings, in the main, related to clinical matters. The Committee determined that his fitness was currently impaired and imposed conditions on his registration for a two year period. (The decision was communicated to Mr Spence on 2 October 2014.)

#### Criticism of colleagues to patients

31. Ms Copage referred to two letters in which she considered Mr Spence was criticising colleagues to patients which breached AS5 of the conditions imposed by the 2013 tribunal. The two letters were dated 24.9.14 (C238) and 13.10.14 (C239). Ms Copage also identified Mr Spence's entry on the NHS Choices website which she regarded as a clear example of Mr Spence criticising clinicians in a public forum. This matter was also identified and analysed by the GDC in their Fitness to Practice proceedings.

#### The maintenance of logs and copies of correspondence

32. To monitor behaviour Mr Spence was required by the 2013 tribunal to keep two sets of logs and related material. Condition B1 was to keep a log and copies of all correspondence and referrals that he sent out including details of patient identifier, the addressee, content, justification of content and any discussion he had with his mentor or other colleagues regarding the letter. Condition B2 was to keep a log and reflection of his discussions and meetings with his mentor.

33. In relation to B1 the tribunal was supplied with copies of various logs originating from Mr Spence's practice. Ms Easterby-Smith conducted her initial assessment of Mr Spence's correspondence on the basis of these logs and the correspondence attached to the logs. Because the material supplied to her related to single items of outgoing correspondence to conclude her assessment she had to obtain further correspondence and, on occasion, clinical records.

Mentoring - using the mentor and keeping a log and reflection of his discussion and meetings with his mentor

34. The condition imposed by the 2013 tribunal 'to promote engagement' was for Mr Spence to seek a mentor and enter into a mentoring relationship. Mr Spence was assisted in identifying a mentor by Dr Brooks (Postgraduate Associate Dental Dean Health Education Thames Valley and Wessex). The mentor appointed was Mr Brady. (Regional Advisor - Continuing Registration NHS Health Education Thames Valley/NHS Health Education Wessex) Dr Brooks envisaged that Mr Spence would primarily work with Mr Brady by telephone. (C439) Mr Brady agreed to act as mentor at the end of September 2013. He was provided with a copy of the 2013 tribunal decision.

35. The tribunal was provided with various emails dealing with the appointment of Mr Spence's mentor. In one email to Dr Brooks, Mr Spence wrote: 'I only think I will require mentoring assistance should I need to challenge any plans but I have not had to do so for some three months or so'. (C431)

36. The minutes of the first meeting with Mr Brady outlined Mr Spence's understanding of the need for a mentor which was 'to discuss and reflect on contentious issues prior to me writing to the second party (consultant etc)'. (C452) Mr Brady sent an email to Mr Spence dated 16.10.14 where he outlined, briefly and retrospectively, the purpose of the two face-to-face meetings that had taken place. (C371). 'On 3.10.13 in Otterbourne when we discussed the conditions set by the First Tier Tribunal, namely that you have a mentor to liaise with before you contact any local colleagues or the Local Area Team'. The second meeting was on 3.10.14 in Chalfont St Giles 'when we discussed conditions imposed by the GDC at your recent hearing.'

37. Mr Spence had a number of face-to-face meetings with Mr Brady. These were on 3.10.13, 3.10.14, 7.11.14, 12.12.14, 24.4.15 and 5.6.15. The only comprehensive record of any of these meeting was made by Mr Brady following the meeting on 3.10.13. (C452-454)

38. No minutes of the 3.10.14 meeting were provided and in any event the meeting appeared to deal with the GDC conditions. Mr Spence disputed that and said that discussion of specific cases took place however he accepted that his email to Mr Brady on 9.10.14 only referred to GDC matters and nothing else (C372). The meetings in November and December 2014 were to deal with the GDC conditions. In April and June 2015 there were meetings which were recorded in pro-forma documents entitled 'practitioner support contact reports'. (C416c-f and C416g-l) Mr Spence also provided



an email dated 25.4.15 (C416a) which he described as being a 'draft reflection' on his meeting with Mr Brady the previous day.

39. It was a condition imposed by the 2013 tribunal that 'to monitor behaviour' Mr Spence had to 'keep a log and reflection of his discussions and meetings with his mentor'. As outlined above the only meeting with Mr Brady that was extensively minuted was the 2013 meeting. The notes of that meeting served to evidence reflection on some of the matters he discussed with Mr Brady. After this meeting, however, no comprehensive minutes were taken concerning their face-to-face meetings.

40. In the main communication from October 2013 onwards between Mr Spence and Mr Brady was by way of email, copies of which were made available to the tribunal. For example on 24.10.15 Mr Spence emailed Mr Brady to seek his advice on a matter that was of concern to him which was that he was not always being notified when his patients started orthodontic treatment with particular provider. Mr Brady emailed back on 14.11.15 recommending that Mr Spence wrote to the central management team asking them to copy him into any referral letter to the specialist. (C358-359)

#### The correspondence

41. Ms Easterby-Smith told the tribunal that she was able to access all the logs and correspondence provided by Mr Spence out of which she selected some items of correspondence for more detailed analysis. Following directions made by Judge Plimmer on 4.6.15 (A45-A48) additional material including clinical notes and further correspondence was provided. Her three statements contained 32 exhibits with each exhibit containing at least one letter from Mr Spence. Some of the exhibits contained a run of correspondence and clinical notes.

42. She described in her statement her approach to analysing the material. 'I have provided comments from the point of view of what I consider it would be reasonable for a general dental practitioner in Mr Spence's position to raise in correspondence with specialist or other general dental practitioners.' (C3) When she was asked whether her interpretation of condition 5 imposed by the 2013 tribunal (the requirement to discuss specified matters with his mentor) was that 'he should refer everything to Mr Brady to cover his own back' she agreed that she would have done so if she had been in Mr Spence's circumstances.

43. All the material exhibited to Ms Easterby-Smith's statements were scrutinised by the tribunal with a view to determining what light, if any, they shed on Mr Spence's compliance with the conditions imposed by the 2013 tribunal. The tribunal's findings were based on their review of this material and the oral and written evidence of Ms Easterby-Smith and Mr Spence.

44. The core of NHS England's case was based on Ms Easterby-Smith's analysis of correspondence. This meant that, unlike the 2013 tribunal, the tribunal had to 'trawl' through individual items of correspondence. When undertaking this task the tribunal

took into account the words of caution from one of the witnesses at the 2013 tribunal, which was that 'when you look at the individual letters the effect is lost'. (C206)

#### Correspondence

45. The tribunal have made findings in relation to each item of correspondence.

#### Correspondence with patients

46. C 238 On **24.9.14** Mr Spence wrote to a patient advising that 'you may have been misled by the MaxFac department that there is no NHS pathway for corrective treatment on your recession'. Mr Spence wrote about this letter that: 'I did not mean to suggest that the patient had been deliberately misled, merely that she had been given incorrect information'. (D12)

47. Whatever meaning Mr Spence may have intended to convey in this letter he used the word misled. The tribunal was satisfied that this was a matter which fell within the condition imposed by the 2013 tribunal (A3) that he should 'refrain from criticising colleagues to patients'.

48. C 294 On **13.10.14** Mr Spence wrote to the parents of two children. The children had a dentist in Portsmouth. Mr Spence wrote to their parents and told them that both children 'have problems with the work done there.' He said that he treated them both, restoring the problem for one and advising that the other 'needs to really see the dentist who did this work to put it right'. Ms Easterby-Smith's analysis in her May statement (C262) was that he criticised the treatment by the Portsmouth dentist. She advised obtaining the clinical records which were obtained. (C542-548 and D91-94) She then concluded that: 'Mr Spence is clearly of the view that the patients have been failed by their dentist in Portsmouth' and he should have written to the dentist in Portsmouth. Ms Copage also dealt with this matter in her statement (C71) Mr Spence made no comment in his statement about criticising a colleague, he said he treated the children 'as far as he could' and could not contact the previous dentist in the UK as he did not know their identity. (D83)

49. The tribunal was satisfied that the letter that Mr Spence wrote was critical of the work done by another dentist. He should have discussed this matter with his mentor before the letter was sent. If the discussion had taken place after the letter had been sent he should have reflected on the likely response of the children's parents to his letter which criticised the practice of another dentist in relation to the dental treatment of their children and then advised them that 'you stay with the same dentist'. The tribunal was satisfied that this was a matter which fell within the condition imposed by the 2013 tribunal (A3) that he should 'refrain from criticising colleagues to patients'.

#### Correspondence with professional colleagues other than Mr McDowall

50. C290 On **25.6.14** Mr Spence wrote to Dr Hartridge (specialist orthodontist) about a patient who came to him for review and was 'quite distressed'. Mr Spence wrote that he thought the problem may have been with Dr Hartridge's radiograph and asked him to reconsider his view. He ended the letter by stating that her family 'seem unhappy with the consultation with you.'

51. Ms Easterby-Smith's initial appraisal in her May statement (C260-261) was that Mr Spence was criticizing a colleague. Her appraisal in July (C458-459) was that, following her review of further records (C520-532), that Mr Spence did not take the correct action. He logged the patient's mother email 'as a complaint' whereas it was a complaint about another practitioner which 'can be challenging'. She considered that Mr Spence should have discussed the matter with Mr Brady.

52. In his statement Mr Spence wrote that the patient's mother had submitted a complaint the preceding year about Mr Robinson (D89-90). At the time he had sought 'to diffuse the situation' and had not taken any further action. In relation to the present matter he said that he had 'an open discussion' with the complainant. Prior to this discussion he had however logged the complaint. His rationale for doing this was twofold. Firstly because he thought it had the potential to become a complaint against him because he had referred the case to Dr Hartridge. Secondly he was also aware of the condition upon him to keep a complaints log. (D82) When he was asked about the case he said that all he had to do in this case was to take an x-ray that showed the teeth were not a problem and she had treatment subsequently privately when over 18.

53. Mr Spence's response to this 'complaint' was muddled. He correctly identified that this was a complaint about another practitioner however he logged it as a complaint against his practice. The relevance of the previous complaint made to him against Mr Robinson was unclear. The 'condition' imposed on him to keep a complaints log was not imposed upon him by the First-tier Tribunal or the GDC, it would have been a part of his contract with NHS England. The tribunal agreed with Ms Easterby-Smith that a patient raising concerns about another practitioner was challenging and considered that Mr Spence should have discussed the problem with Mr Brady.

54. C292 On **7.7.14** Mr Spence wrote a letter to Ms Roman, a locum consultant oral surgeon at St Mary's Hospital. He wrote: 'I am surprised that LS had gross caries in May as it was not clear in the April BW'? (The tribunal inserted the underlined word 'not' as this must have been omitted by mistake when Mr Spence wrote the letter.) Mr Spence went on to request the return of the radiographs. Ms Easterby-Smith analysed this letter twice, first in her May statement (C261) and then in her July statement (C459) after she had been provided with additional material. The material included additional correspondence and clinical notes. (C 534-541). Ms Easterby-Smith's criticism was that 'he is criticising or at least second-guessing a colleague who had diagnosed caries on clinical examination'. (C459) She considered that this was a matter that should have been discussed with Mr Brady. Mr Spence's response was that Ms Roman had diagnosed caries in May whereas he had not identified the condition in April. He said

that he wanted to review the radiographs 'as I was concerned I may have missed something'. (D82)

55. The clinical notes indicated that the Mr Spence received the radiographs on 17.7.14 although there was no entry in his clinical records that he reviewed them once received. Mr Spence did however examine an OPG on 22.7.14 (C541) An OPG is a radiographic scan of the upper and lower jaws showing all the teeth and roots. This OPG would have been taken by Ms Roman on 28.5.14. There was no record in the clinical notes of the outcome of this examination. The tribunal agreed with Ms Easterby-Smith's analysis. The tribunal was satisfied that Mr Spence was challenging a consultant colleague about the treatment she provided to his patient. This should have been discussed with his mentor prior to the letter being sent as it raised the possibility of negligent treatment. The review of the radiographs should also have prompted a discussion, and a record of his reflection on that discussion, with Mr Brady.

56. C296-297 On **10.11.14** Mr Spence referred a patient to Ms Webley for a 'second opinion'. The patient had previously been treated by Mr McDowall and he had written to Mr Spence on 17.2.14 describing the treatment he had undertaken, saying the patient had been happy with the outcome and he would see her in 6 months time for review. In her May statement Ms Easterby-Smith wrote that 'Mr Spence appears to criticise Mr McDowall's treatment'. (C262) She advised further records being obtained. (C550-563) In her July statement she stated that: 'the appropriate thing for Mr Spence to have done in these circumstances would have been to write to Mr McDowall explaining the patient's concerns in November 2014 rather than refer her on elsewhere'. (C480)

57. In his July statement Mr Spence wrote: 'I did not consider it appropriate to write to Mr McDowall again as he had already set out his position and there would therefore have been nothing to gain in sending the patient back to him.' (D83) He was asked why he did not discuss the case with his mentor, he replied that the patient was entitled to a second opinion at any stage and if there was disagreement between Ms Webley (second opinion provider) and Mr McDowall then that would be the time to speak to the mentor. 'Mr McDowall had exhausted his options'. He then went on to explain that following the referral he was later told the case was not suitable for Ms Webley. There was no letter from Ms Webley available and Mr Spence thought she might have told him about the outcome of her assessment.

58. The tribunal agreed with Ms Easterby-Smith's analysis. At the date of the referral to Ms Webley the patient was due her review with Mr McDowall and Mr Spence should have written to him to explain the patient's difficulties. If after the review the patient did not feel happy with the outcome she could then have requested a second opinion. Given Mr Brady's position contained in his email to Mr Spence (C371) 'that you have a mentor to liaise with before you contact any local colleagues or the Local Area Team' the tribunal was satisfied that Mr Spence could, and should, have liaised with him before he contacted either Mr McDowall or Ms Webley.

59. C 278 On **4.9.13** Mr Spence wrote to Ms Webley (specialist orthodontist) about a patient they were both treating. In his letter he wrote that 'I fundamentally disagree with their [St Mary's Hospital Maxillofacial Unit] expression of risk assessment'. In his statement Mr Spence wrote that: '[c]onsidering alternatives to a colleague's approach is not criticism of it in a professional collaborative context'. (D81) Mr Spence was asked about this letter and in particular whether he had discussed the letter with Mr Brady. He said that he had discussed the letter which had been logged in his correspondence log, there was however no record of any discussion with Mr Brady at the meeting they had on 3.11.13.

60. The tribunal agreed with Mr Spence that this was a matter that he needed to discuss with Mr Brady. Unfortunately he did not record any discussion. There was also no record of him mentioning any 'fundamental disagreement' during his meeting with his educational mentor, Dr Brooks, on 16.09.13. The tribunal was satisfied that this matter evidenced a breach of the condition imposed by the 2013 tribunal (B2) that Mr Spence 'keep a log and reflection of his discussions and meetings with his mentor.

61. C21 On **17.4.14** Mr Spence wrote a letter to Mr Anand (consultant maxillofacial surgeon) about the removal of the wisdom teeth, known as the 8s, of a patient. (The correspondence was confusing as Mr Spence's letter was dated 17.4.14 yet he thanks Mr Anand for his letter of July 2014.) The letter requests that the wisdom teeth removal should be conducted under Scottish Intercollegiate Guidelines Network (SIGNs) guidelines. He writes that he is concerned that the guidelines are followed because of risk to the second molars, known as 7s. He also emphasised his wish for orthognathic surgery to be avoided.

62. Ms Easterby-Smith's criticism was threefold: there was no need to refer a consultant to guidelines, his reference to second molars breached the 2013 tribunal's findings and his reference to orthognathic surgery had challenged him in the past, and therefore should have been referred to Mr Brady. (C5-6)

63. Mr Spence in his statement suggests that Ms Easterby-Smith had misread his letter to Mr Anand in that he was referring to 8s, not 7s as she suggested. He in fact misread her statement. She understood the treatment in question was for the removal of 8s (her paragraph 17). Her concern was that he had also raised in the letter an issue with the 7s. Mr Spence provided a form which confirmed that the 8s had been removed. (D34)

64. The tribunal was satisfied that this letter should have been discussed with Mr Brady. Firstly he was giving the consultant, Mr Anand, instructions on how to remove the 8s and also how to avoid damaging adjacent structures. This would have been a standard procedure for Mr Anand and it was therefore inappropriate and unnecessary to have written to him in these terms. Secondly the tribunal considered that Mr Spence should have realised that any reference to second molars in a letter to another professional, regardless or not whether there was an extraction proposed, had to be approached with caution.

Letters C23 on 21.11.13 and C27 on 14.8.14 have been be dealt with together as they both deal with the same matters, that is Mr Spence's theories on second molar extraction.

65. C23 On **21.11.13** Mr Spence wrote to Dr Turnbull (specialist orthodontist) thanking him for helping a patient. He invited Dr Turnbull to enter into a discussion with him about the extraction of second molars. Dr Turnbull's advice was contained in a letter dated 15.11.13 where he concluded that he would avoid removal of the 7s as this 'cannot give a predictable guaranteed outcome'. (C23A) Ms Easterby-Smith wrote that in her view 'he should have discussed this with his mentor before raising it with another clinician'. (C7)

66. Mr Spence wrote that his letter was a response to specific advice that Dr Turnbull had provided which he felt was contrary to established evidence and concerned this specific patient. He also wrote that that 'the evidence base in relation to this particular issue is clear; I did not therefore feel challenged by it and did not think that Mr Brady's input was required.' (D8) When Mr Spence was asked: 'if his [Dr Turnbull's] advice appears to be wrong, should that not be brought to his attention?' he replied 'I was told by the FTT not to challenge consultants' It was then suggested that he should have discussed the matter with his mentor. He said that he did not think such a discussion would gain anything 'it was just for the future'. Mr Spence told the tribunal that Mr Turnbull had written to him in response to this letter saying that 'it may breach your conditions if we meet, so better not'. A copy of this letter was not shown to the tribunal.

67. C27 On **14.8.14** Mr Spence wrote to Dr Turnbull. He was asking for some advice about the treatment of a patient. He then suggested two treatment options, one of which involved second molar extraction. In relation to this option he wrote that 'the literature' suggested a favourable outcome. He received a reply from Dr Turnbull which recommended that Mr Spence did not remove the molars. (D47) Ms Easterby-Smith wrote that in her view he should have discussed this issue with his mentor before raising it with another clinician. (C7)

68. In his statement Mr Spence maintained that in this letter he had not entered a discussion about 'extraction policy' rather he had made a specific request for advice about definitive treatment for the patient's molars. (D8) When questioned he said 'under the NHS there are only two choices for looking after 7s in children, it is extraction or gold crowns...'. He also said that he did speak to his mentor who advised him 'leave it alone'. On further examination it appeared that Mr Spence was referring to a conversation that took place at the meeting on 3.10.13 when they had a general discussion about the evidence base for his theories on second molar extraction.

69. Mr Spence was attempting to enter into discussions with a colleague about a matter which had been the focus of detailed attention at the 2013 tribunal. The 2013 tribunal heard evidence about Mr Spence's views concerning the extraction of second molars. Mr MacKenzie (consultant oral and maxillofacial surgeon) told the 2013 tribunal

that he had made it clear in 2009 that until there was empirical evidence of a need to change current practice he did not believe that ...'the practice of removing second molars warranted any further discussion'. Mr McGee had cross-examined Mr Mackenzie about Mr Spence's views on second molar extraction. He suggested that his client's views were not outlandish. Mr Mackenzie responded: 'intuitively it would seem a great plan but the reality doesn't bear that out. You need space at the front, not the back, and if the lower wisdom teeth don't behave as expected you may have to remove them after all.' (C193) The 2013 tribunal accepted Mr Mackenzie's views, and the views of two other consultant oral and maxillofacial surgeons, that Mr Spence was unable to accept the expert view on the need for second molar extractions.

70. The tribunal was satisfied that Mr Spence should have discussed both these cases with Mr Brady before he entered into correspondence with Dr Turnbull. Mr Spence was inconsistent and confused about his contact with his mentor concerning discussions about second molar extractions. In relation to the first letter to Dr Turnbull he maintained that he had not had any discussion with his mentor yet in relation to the second letter he maintained that he had a general discussion with Mr Brady on 3.10.13 (C452-454) who advised him to leave it alone. Mr Spence then referred to the discussion that he had with Dr Brooks on 16.9.13 (C451) where it was minuted that he explained that 'I would not raise this matter [his theories on second molar extractions] again locally with the consultant team by way of peer review...' (C451)

71. The tribunal was satisfied that Mr Spence had been 'warned off' discussing his theories on second molar extraction either in September 2013 by Dr Brooks or October 2013 by Mr Brady. He therefore received clear advice prior to sending the letters to Dr Turnbull which he ignored.

72. Both letters (C23 and C27) related to Mr Spence's theories about the extraction of second molars. One of the conditions imposed by the 2013 tribunal was for Mr Spence not to discuss his theories regarding second molar extraction with patients. Mr Spence also gave evidence that 'he would confine his discussion of second molar extraction to an academic thesis...rather than raising it with patients or colleagues'. (C216) The tribunal did not consider Mr Spence breached direction A2 as that only related to patients. The tribunal was however satisfied that he should have discussed these contentious cases with Mr Brady, and the uncertainty as to whether or not he discussed the cases, evidenced the confusion caused by his failure to maintain proper records about his discussion with his mentor.

#### Correspondence with Mr McDowall

73. C463-472 On **22.8.13** Mr Spence wrote to Mr McDowall (C 466) He wrote: 'it is some 4 and a half years since I wrote to Steve Robinson about this treatment which is suboptimal'. Mr Spence wrote in his statement (D80-81) that he discussed the case in detail with Mr Brady. There is record of that discussion in the meeting that Mr Spence had with Mr Brady on 3.10.13. '4-5 years on waiting list since poor treatment outcome reported by JS. These study models were examined and Malcolm agreed that the

patient would benefit from treatment'. (C454) Ms Easterby-Smith's analysis was that Mr Spence was criticizing a professional colleague and should have raised this with his mentor 'in the first instance who could have advised him whether it was appropriate to express this view to Mr McDowall and, if so, in what terms.' (456) It was apparent that Mr Spence had written to Mr McDowall before he had discussed the case with Mr Brady. When questioned about the role of his mentor - Mr Brady had not yet been appointed - Mr Spence replied that there was nothing that the mentor could help with. The issue so far as Mr Spence was concerned was the patient's poor treatment.

74. Mr Spence's letter was unclear. He said in his statement that his comment about 'suboptimal treatment' was not in relation to treatment provided by Mr Robinson but to past treatment. If it was accepted therefore that he was not criticizing Mr Robinson he was still criticizing a colleague. According to the dental records the patient did receive some orthodontic treatment between 13.5.11 (C463) when Mr Robinson wrote to Mr Spence and 22.8.13 (C466) when Mr Spence wrote to Mr McDowall. This was relevant information which Mr Spence did not provide to Mr McDowall. .

75. Although Mr Spence felt the case was sufficiently challenging for him to discuss with his mentor at their first meeting (and the dental records contained references to at least four letters/email to the MDDUS – the Medical and Dental Defence Union of Scotland) he did not recognise that this letter, to Mr McDowall, was precisely the sort of letter at which the restrictions/conditions imposed by the 2013 tribunal were directed. This letter was sent within a month of the 2013 tribunal decision. The tribunal was satisfied that in the absence of a mentor Mr Spence should have delayed sending a letter of this nature until a mentor was appointed, or alternatively discussed it with Dr Brooks who was advising Mr Spence pending Mr Brady's appointment.

76. C17. On **30.10.13** Mr Spence wrote to Mr McDowall. Prefacing his letter he wrote 'what should I do please'. Mr Spence was seeking guidance on the 'process' to follow about a re-referral for orthodontic treatment which had been provided to one of his patients. Mr McDowall replied on 5.11.13 (D30) that Mr Spence should re-refer the case to the orthodontist who undertook the initial treatment. Ms Easterby-Smith considered that it would be the 'usual practice in such cases to engage with the other provider in the first instance'. (C4) Mr Spence, in his statement, wrote that he did not discuss the matter with his mentor because he was not challenged by it. (D7) When he was cross-examined on this matter he described the re-referral process as 'quite complex.'

77. Ms Easterby-Smith's analysis was contained in her statement, written prior to her seeing Mr McDowall's reply to Mr Spence (D30), in which he advised Mr Spence to make contact with the primary care provider. Mr Spence accepted that, with reference to the 2013 tribunal, that Mr McDowall had been 'utterly sick' of loads of correspondence yet this was a letter written to Mr McDowall 3 months after the tribunal hearing had concluded and following the recent appointment of a mentor. In relation to this matter Mr Spence said that he was quite confident that Mr Brady would have advised him to communicate with Mr McDowall. The tribunal disagreed and considered



that this was precisely the sort of matter that a practitioner in Mr Spence's circumstances should have discussed with his mentor, particularly as he regarded it as being procedurally 'quite complex'. When Mr Spence was cross examined about this case he refused, even with the benefit of hindsight, to accept the point that his first port of call was to go back to the treating dentist. The tribunal was satisfied that this was an unnecessary referral to Mr McDowall and it not only demonstrated his failure to use his mentor it evidenced his difficulties in taking into account the views of others and modifying his position accordingly.

78. C 280 On **12.11.13** Mr Spence wrote to Mr McDowall requesting further information about a patient who had seen Mr Robinson. In the letter he asserted that he had not heard from Mr Robinson. Mr Robinson had in fact responded to Mr Spence in a letter dated 13.12.12. (C485) This letter was identified by Ms Easterby-Smith. Ms Easterby-Smith analysed the letter in her May statement (C257-258) and returned to it in her July statement (C457-458). Her analysis was that it was misleading for Mr Spence to say that Mr Robinson had failed to update him. Mr Spence's comments are set down in his July statement (D81) where he stated that 'we knew that Mr Robinson in fact had written to me around 6.11.12' however at the time he wrote to Mr McDowall the letter could not be located. He then referred to a letter from Mr Robinson dated 6.11.12 (D87) which was sent to him on 20.7.15, presumably to assist him in the preparation of his statement. The relevant letter that he should have been sent was the letter dated 17.12.12 from Mr Robinson identified by Ms Easterby-Smith. (C485) This letter was not marked as received by the Spence practice.

79. The tribunal considered that this was an unnecessary and misleading letter to Mr McDowall. When Mr Spence wrote to Mr McDowall he said in his statement that 'we knew' he had written a letter and so to write he 'does not seem to have written' was misleading. His practice could have simply contacted St Mary's Hospital, as was done in July 2015, advising them that the letter had been mislaid and requesting a copy be provided.

80. C19 **26.3.14** Mr Spence wrote to Mr McDowall about the treatment options in relation to one of his patients concerning her FPMs (first permanent molars). One of the treatment options he identified was saving the FPMs and using, 'prophylactically', stainless steel crowns. He went on to write that 'I have had a real problem in the past having Stainless Steel Crowns done at St Mary's under GA [general anaesthetic] – Gretel has generally not been able to provide them.' Gretel was a reference to Ms Stanley, a dental surgeon. His explanation for writing the letter was his concern about the 'policy or practice' at St Mary's Hospital which resulted in such crowns not being provided. There was no record of Mr McDowall responding directly to Mr Spence, rather he sent him a copy of his response to Dr Hickey, a primary health orthodontic specialist who was providing therapy for the patient. (D32) Mr McDowall's response did not address any of the matters raised by Mr Spence. Ms Easterby-Smith in her statement (C5) identified a number of issues which she considered were raised by this letter: criticism of Ms Stanley, Mr Spence's pre-occupation with a particular treatment and his desire for protocols.

81. When cross-examined Mr Spence accepted that he had read the scientific paper which he had referred to in his letter to Mr McDowall. The paper was published in the British Dental Journal in 2005 and contained an analysis of GDPs views on the use of stainless steel crowns to restore carious primary molars. One of the results of the study was that only 7% of the 93 dentists interviewed reported that they would fit a stainless steel crown. The context of the study was that the British Society of Paediatric Dentistry (BSPD) guidelines indicated that a child with carious lesions should be treated with a stainless steel crown and the results of the paper suggested that the BSPD guidelines did not reflect the views of the majority of GDPs. (General Dental Practitioners)

82. Mr Spence said that the paper only dealt with primary molars and the treatment for the patient he was concerned with was for First Permanent Molars (FPMs). He went on to say that the current proceedings were about efficiency and he saved teeth by using stainless steel crowns. It was then put to Mr Spence that he had accepted that he was an outlier with respect to the treatment of placing stainless steel crowns on permanent teeth, a treatment which he advocated. He replied by stating 'you can't put GIC (glass ionomer cement) on permanent molars'. He accepted that his views could be contentious but he remained adamant that he did not accept that this case should have been discussed with his mentor. He was asked why and he replied: 'I'm happy to send 50 letters to Mr Brady. He'd do nothing. I do stainless steel crowns nearly every day. The child was sent to the mainland and had to pay for their treatment. I don't see anything contentious at all.'

83. The paper that he referred to was not directly relevant to the treatment in question. It did however highlight Mr Spence's ready acceptance that he was an outlier in relation to the treatment that he was advocating for his patient. When giving evidence Mr Spence failed to recognise that making the dogmatic statement 'you can't put GIC (glass ionomer cement) on permanent molars' challenged the current practice of the majority of his peers. The tribunal was satisfied that in this case Mr Spence should have recognised that the clinical views he expressed in the letter, together with the perception of challenge to Ms Stanley, meant that he needed to discuss the case with Mr Brady before corresponding with Mr McDowall. The tribunal also considered that his dismissal of the value of consulting his mentor displayed arrogance and a lack of awareness of the need to listen to colleagues, particularly in relation to a clinical matter where he was an outlier.

84. C 33 On **11.9.14** Mr Spence wrote to Mr McDowall about a patient 'you will shortly see' who removed a lip mole herself. He wrote: 'I have a concern which I would like you to share with Mr Al Gholmy that kids are doing this themselves because they think the hospital won't do it'. Mr Spence continued that: 'we should discuss this at a postgraduate meeting next time you organise one'. Ms Easterby-Smith (C9) suggested that the letter contained an implied criticism of the thresholds for treatment provided by Mr Al Gholmy and it was a matter that should have been discussed with Mr Brady. She also questioned the reasons why the letter was written. Mr Spence was asked why he did not discuss the letter with his mentor. He replied that this was a simple matter that

could be dealt with quickly and therefore did not merit a discussion with his mentor. 'Malcolm Brady would not have appreciated receiving all these letters.'

85. This was a clinical matter that Mr Spence felt sufficiently concerned about to want it placed on the agenda at the next postgraduate meeting. The tribunal considered that his response to the suggestion that he should have discussed the matter with Mr Brady demonstrated a lack of awareness of the reason that his correspondence was being monitored, particularly as this letter was to Mr McDowall. The tribunal was satisfied that he should have discussed this letter before it was sent.

86. C 35 On **13.10.14** Mr Spence wrote to Mr McDowall about a patient he had last seen in March 2013 and had, in the meantime, received some orthodontic treatment. He asked Mr McDowall to take over the case or discuss 'the ongoing management' with a primary care provider. Mr McDowall replied on 27.10.14 (C36) that as the patient was not under his care Mr Spence should address his concerns to the treating orthodontist. He copied his reply to Ms Bondoc, a specialist orthodontist working in primary care.

87. The tribunal regarded this as an example of an unnecessary referral. Mr Spence should have taken steps to identify the treating orthodontist, with whom he could have discussed the case, without contacting Mr McDowall. In the event Mr McDowall signposted Mr Spence to the treating orthodontist, whose identity Mr Spence could have discovered himself.

88. C39 On **23.10.14** Mr Spence wrote to Mr McDowall. He asked him to review his patient's case as she 'has not heard from you for 18 months'. Mr McDowall replied on 30.10.14 advising that she had been allocated to Mr Hickey, a specialist orthodontist working in primary care. Ms Easterby-Smith criticised this letter on the basis that Mr Spence used the letter 'to put forward his own views on molar extraction.'(C10) Mr Spence responded in his statement that he had not been informed that a referral had been made to Mr Hickey. (D9) He referred to a medical history form dated 6.7.12 which stated that she was 'under orthodontist at hospital'. (D57)

89. This letter raised two separate issues. Firstly was it reasonable to write to Mr McDowall as the records at Mr Spence's practice indicated that she had been referred to St Mary's Hospital? Second was it appropriate for Mr Spence to put forward his views on molar extractions? In relation to the first question the tribunal was satisfied that a telephone call from Mr Spence's practice to St Mary's Hospital would have been likely to have provided the information sought; if it had not then a letter could have been written. In relation to putting forward his views on molar extraction Mr Spence would have been aware that his views about removal of the 7s were regarded as having no scientific base and were not shared by Mr McDowall. He also knew that the 2013 tribunal had been concerned about his discussions with patients and colleagues about these theories. The tribunal was satisfied this letter should have been discussed with his mentor before dispatch.

90. C63-64 **24.2.15** Mr McDowall wrote to Mr Spence about treatment provided to one of Mr Spence's patients who had previously received specialist hospital treatment in Portsmouth, and then had emergency treatment at St Mary's Hospital. Mr McDowall outlined a treatment plan for Mr Spence to follow. On 26.2.15 Mr Spence wrote to Mr Cheshire (consultant in restorative dentistry) who had originally treated the patient. He wrote that he had treated the patient as Mr McDowall had advised. Mr Spence then wrote that his patient was 11 years old 'which we believe to be too young for an implant, but might not an implant in this case be best? If we should absolutely exclude an implant, what is the precise physiological reason for so doing?' (C62) Ms Easterby-Smith in her statement wrote that Mr Spence appeared to have been challenged by aspects of Mr McDowall's treatment plan. Mr Spence in his statement at paragraphs 81-83 stated he was not challenged, he followed Mr McDowall's treatment plan and then wrote to Mr Cheshire informing him of the treatment provided. He wrote that 'we' have never provided an implant to a child. (D10-11) One of Mr Cheshire's colleagues, Mr Dewan, then wrote to Mr Spence in response to his letter and addressed Mr Spence's query about an implant, advising it would be 'totally incorrect to provide an implant at this young age'. (D75-76).

91. Mr Spence was raising the possibility of an outlying treatment option which he accepted was not normal for a young patient, describing it in his statement as unique. He said however he was not challenged by the case. The tribunal was satisfied that he should have recognised this as a contentious case and should have dealt with it by reference to his mentor, prior to any letter being written. The tribunal considered it likely that Mr Brady would have confirmed Mr Dewan's opinion and advised Mr Spence not to take up consultant time in pursuing the matter further.

92. C58 On **25.2.15** Mr Spence wrote to Mr McDowall thanking him for seeing a patient. He then wrote that: 'you will see from his notes that I wrote to Steve Robinson on 22 October 2102 asking why in these cases we don't try an orthopaedic approach, but seem to prefer the invasive surgical route but had no answer'. He then went on to suggest collaboration on some research in this area. Ms Easterby-Smith's view was that this matter should have been discussed with Mr Brady. Mr Spence explained that his 2012 letter was written 'well before any conditions were laid down'. (D10)

93. Although on the face of it this appeared to be a courtesy letter from Mr Spence thanking Mr McDowall for his letter about a patient, the tribunal considered that in the context of the 2013 tribunal's requirements to curb his correspondence this was an unnecessary letter. It was also more than a courtesy letter; Mr Spence was writing about his own theories of orthodontic treatment for which he must have known that there was no accepted or common practice in his locality.

C42 **14.11.14**, C43 **25.11.14**, C44 **13.1.15**, C45-46 **2.2.15** C47-48 and C49 **27.2.15**  
These letters are interlinked and have therefore been dealt with together.

94. C 42 On **14.11.14** Mr McDowall wrote to Mr Spence. This letter was written without reference to any particular correspondence from Mr Spence. Mr McDowall

started the letter: 'It has become apparent that I am receiving referral letters from yourself for patients who are appropriate for primary care orthodontic treatment'. He went on to explain that he did not have the clinical capacity to assess and triage primary care routine orthodontic patients. He concluded by reflecting that although patients still had to wait for their assessment and treatment, within primary care the waiting time had reduced. Ms Easterby-Smith wrote in her statement that in this letter Mr McDowall was suggesting that Mr Spence was making 'inappropriate referrals to secondary care'. (C10) Mr Spence in his statement (D9-10) disputed the allegation that he had been inappropriately referring to Mr McDowall.

95. C 43 On **25.11.14** Mr Spence wrote to Mr McDowall. In response to the 14.11.14 letter Mr Spence in his letter provided some data to address Mr McDowall's concerns about referrals. He stated that 25% of his orthodontic referral load was to Mr McDowall and he would continue to work on reducing this percentage.

96. C44 On **13.1.15** Mr Spence wrote to Mr McDowall seeking his advice about the management pathway for one of his patients.

97. C45-46 On **2.2.15** Mr McDowall wrote to Mr Spence responding to the two letters dated 25.11.15 and 13.1.15. The key point he made was that : 'if you look at your NHS referrals only, referrals to me account for 33% of all your orthodontic referrals and I feel a more realistic figure would be at least half this amount'. Mr McDowall went on: 'I too have audited your referrals to myself and I note in the last 12 months you have averaged 5 referrals per month to myself. The number of referrals have increased towards the latter end of the year, hence my recent letter to you.'

98. C47-48 On **6.2.15** Mr Spence wrote to Mr McDowall. He stated that: 'I will try and reduce my referral rates to you directly'. He also wrote about his return to the tribunal, and the GDC, and comments 'it would be useful if we could meet before the order review/discharge and 'perhaps look at how better collaboration can benefit everyone.' Enclosed with this letter was a 'case review' written by Mr Spence. He wrote in the letter, with reference to this case review, that 'you may find the past level of collaboration informative'.

99. The case review was a single page document entitled 'Collaboration between the referring GDP and orthodontist - a case review', which summarised aspects of the treatment Mr Spence provided to a patient identified as KOK. Mr Spence wrote that 'despite my request and further advice, the orthodontist would not collaborate on the early removal of the other three FPM's, meaning extensive restorations had to be placed with teeth I had wanted to extract.' In the last paragraph of the review Mr Spence wrote: 'It has been a feature of the local NHS orthodontic managed clinical network [Central Service] that there has been little room for feedback or collegiate criticism and JS hopes to shortly discuss this example with the lead consultant to see if we might develop a regular 'casual communications' type CPD event to encourage better collaboration in the future.' (C48)

100. C49 On **27.2.15** Mr McDowall concluded this chain of correspondence by writing to Mr Spence clarifying an aspect of the referral process for orthodontic services. He declined to 'pass judgement' on the case review and said it was his hope to provide at least two CPD events a year 'to allow for improved collaboration between dentists and orthodontic providers.'

101. Mr Spence sent the letter and case review (C47-8) in an email dated 11.2.15 to Mr Brady. He wrote in the email that 'I am awaiting a meeting with him [Mr McDowall] but things are running better these days.' (C395) It was not until 5.3.15 that Mr Brady reviewed this email and replied to Mr Spence. Mr Brady had been abroad and had not received the email on the day it had been sent. In relation to the case review he emailed: 'The case would appear to criticise the local orthodontist's treatment planning skills, which under current circumstances is something you don't want to be seen to do. I get your idea of collaboration by meeting with the local orthodontists and discussing better methods of contact especially where difficult cases are concerned. However, I think you should try to make it sound less like they are at fault. I hope you see the subtleties of my reasoning.' (C404)

102. The tribunal considered that there was little room for doubt about the meaning of Mr McDowall's November letter. (C 42) It should have been a matter of note to Mr Spence that Mr McDowall considered it necessary to write an unsolicited letter to him about his referrals. Mr Spence did not send this letter to Mr Brady and did not discuss it with him until they met at the end of April 2015. Mr Spence and Mr Brady did discuss the referral process at a meeting they had on 25.4.15 (C416A) Mr Spence wrote, with reference to this meeting, that they had discussed the allegation 'that I was circumventing the referral process – I reflected that the evidence showed this allegation to be simply malicious or careless, and, as the evidence will verify, wrong'.

103. Mr Spence accepted that he was clearly challenged about the case summarised in his case review. When he gave evidence he said that he felt that the case reflected on the efficiency of the whole service and the tribunal considered that the clinical concerns that he raised may well have been legitimate. He also sought the advice of his mentor by email. Unfortunately he did not talk to his mentor before he sent the case review to Mr McDowall. If he had done so he would have had the opportunity to amend the case review to make it appear less critical. This would have made it more likely that he could have achieved his objective which was to 'improve collaboration' between dentist and orthodontic providers.

## **Submissions**

### On behalf of Mr Spence

104. Mr McGee said that the situation prior to the 2013 tribunal was important to understand. He also acknowledged that the volume and tone of hundreds of letters sent to professional colleagues, supported by extensive live evidence led to the decision of the 2013 tribunal and the imposition of conditions. Mr McGee's primary submission was that the conditions had been effective. The volume of letters had massively

reduced and there was no evidence of adverse impact on clinicians. Mr Spence had changed his behaviour radically. There was no evidence of any ongoing problems, and now only a marginal impact on efficiency.

105. Mr McGee addressed the conditions imposed by the 2013 tribunal. In summary he identified: A2 - no breach; A3 - the entry on the NHS choices website could be seen as a criticism of a colleague which he did not intend, there were only two letters and therefore the scantest possible evidence; A4 - no breach; A5 - this condition was deliberately made to be subjective, NHS England and Mr Spence had differing views as to what was 'challenging' and the present case was not a case where the mentor had not been used; A6 - there was no evidence from Mr McDowall that he was dissatisfied with referrals; A7 - this condition did not say that Mr Spence and Mr McDowall must meet, since 2013, Mr Spence has navigated through these issues extremely successfully using his mentor and common sense; B1 - logs of letters had been kept, the time taken to monitor letters and conditions had reduced; B2 - he kept a log and reflections of his discussions with his mentor.

106. Mr McGee concluded that Mr Spence now demonstrated insight and a change in his behaviour. He still continued to feel passionately about certain things, for example second molar extraction. The conditions imposed by the FTT had cured or improved Mr Spence's behaviour. He did not invite the tribunal to do anything but accept the appeal.

#### On behalf of NHS England

107. Mr Mylonas QC said that issues concerning Mr Spence's performance were first raised in 2007 and Mr Spence continued to demonstrate no insight into the reasons why other dental professionals did not want to engage with him. He then cited the outcome of each of the investigations involving Mr Spence since 2007. He referred to the NCAS involvement in 2011 and the subsequent action plan. He also referred to the GDC proceedings hearing which had take eleven months, the conclusion being on 2.10.14, a year after Mr Brady had been appointed as Mr Spence's mentor. Mr Spence met with Mr Brady only for the second time on 3.10.14. The NHS England panel hearing (for alleged breaching of FTT conditions) started in November 2014.

108. In 2013, having only been in post for a few weeks, Mr McDowall was unable to manage Mr Spence's behaviour. Mr Mylonas QC argued that: Mr Spence has no radar as to what should be discussed with Mr Brady and he could not be relied upon to self-report; he was unable to engage with the remediation package put in place by the 2013 tribunal; he continually blamed everybody else; he floundered on, following his own ideas, which put professional colleagues in an impossible position; and he never responded appropriately by running things past his mentor.

109. Mr Mylonas QC submitted that Mr Spence should be removed from the performers list. NHS England did not consider any conditions could be imposed - the only way forward would be to have someone in his room as a working hours supervisor and this would only be reasonable if there were any prospect that Mr Spence would

change. He did not understand where he is going wrong. The scant resources of NHS England should not be spent trying to remedy Mr Spence any further.

### **Summary of findings in relation to efficiency**

These findings all relate to the conditions imposed by the 2013 tribunal. The tribunal do not make any findings in relation to A2, A4, A7, B3 and the last condition, which was to attending meetings with the NHS England area team.

#### The contract breach

110. The breach was a failure to keep full, accurate and contemporaneous records and was communicated to Mr Spence on 1.7.14. In assessing the seriousness of the breach the tribunal took into account the fact that Mr Spence did not dispute the breach notice. The tribunal also took into account two additional matters. Firstly although Mr Spence accepted the contract breach concerning his record keeping he added, when he was giving evidence, that the assessor was wrong saying 'we continue to improve...this report has major errors in it...he [Mr Critchlow] had not read guidance...he is wrong about the material.' Secondly the standard of Mr Spence's record keeping was assessed to be unsatisfactory as far back as 2009. In that year Ms Copage prepared a report for the Isle of Wight PCT which led to him being contingently removed from their performers list. She wrote in that report: 'an audit of 86 records identified that all records were difficult to decipher, writing was illegible...' (C80)

111. The tribunal was satisfied that Mr Spence had failed to fully comply with contractual conditions as required by condition A1 of the 2013 tribunal.

#### Criticising colleagues to patients

112. Two cases were reviewed (C238 and C239) and the tribunal was satisfied that in both cases Mr Spence had breached the condition imposed by the 2013 tribunal (A3) that he should 'refrain from criticising colleagues to patients'.

113. Mr Spence was criticised by the GDC's Professional Conduct Committee. (C348) They wrote '...the Committee has seen evidence that you are still engaging in unprofessional criticism of colleagues, despite the earlier work you had undertaken as part of your NCAS Action Plan'. Reference was then made to Mr Spence's initial response to Professor Deary's evidence and 'in your recent criticism of a dental colleague on the NHS Choice web page'. Mr McGee told the tribunal that he had not intended to criticise a colleague by his entry on the web page.

114. The tribunal was satisfied that Mr Spence had failed to refrain from criticising colleagues to patients as required by condition A3 of the 2013 tribunal.

#### The use of a mentor



115. The purpose of Mr Spence having a mentor was clear from the findings of the 2013 tribunal. Although some of his correspondence was justified and appropriate a large proportion was not. The function of a mentor was to allow Mr Spence, in the words of condition A5, to 'use the mentor to discuss any clinical, procedural or administrative matter that Mr Spence may feel challenged by before engaging with the second party either verbally or through any form of correspondence'.

116. At the conclusion of the 2013 tribunal hearing Mr Spence had sat through nine days of evidence and submissions where his relationships and communication with professional colleagues had been exhaustively analysed. It was therefore the view of the tribunal that having been through this experience Mr Spence should have been able to recognise what matters would be regarded as 'challenging'. In addition, given his position as a professional who had been involved in disciplinary and remedial proceedings since 2009, the tribunal considered he should have erred on the side of caution and have paid attention to the ways in which the decision of the 2013 tribunal needed to be implemented.

117. He should have established with his mentor the rules of their engagement and should, at least for a finite period, have referred to his mentor all correspondence to professionals other than standard referrals. After the first meeting with Mr Brady on 3.10.13 Mr Spence did not have any face-to-face meetings which systematically addressed the conditions established by the 2013 tribunal. The tribunal was satisfied that apart from the October meeting the further meetings that followed were primarily, if not exclusively, to deal with the proceedings before the GDC.

118. Mr Spence accepted in cross-examination that the purpose of the mentor was to create a filter. With one or two exceptions he did not use Mr Brady effectively for this purpose. In relation to the correspondence with Mr McDowall he often provided Mr Brady with partial information and failed to disclose to him matters that should have been openly discussed.

119. The tribunal was satisfied that Mr Spence had failed to use his mentor to discuss clinical, procedural or administrative matters that he may feel challenged by before engaging with the second party as required by condition A5.

#### The maintenance of logs and copies of correspondence

120. In reality the logs which were required to be kept under B1 simply indexed the correspondence and did not include any justification for the content, or details of any discussion Mr Spence may have had with mentor or other colleagues. In relation to B2 the log of Mr Spence's contact with his mentor was an index to a series of emails between him and Mr Brady.

121. In relation to B1 Mr Spence was criticised for not providing logs which contained any justification for the content of individual letters, or any reflections he may have had with his mentor or other colleagues. The tribunal was satisfied that the condition was breached however noted that the inadequacy of the records for the

purpose of external audit was not raised, or discussed, at the two meetings that he had with Ms Copage.

122. The tribunal was satisfied that Mr Spence had failed to maintain a log recording the justification of the content of each letter he has sent out and any discussion he has had with his mentor or other colleagues regarding each letter as required by condition B1.

123. Condition B2 required Mr Spence to keep a log and reflection of his discussions and meetings with his mentor. This condition intersected with B1 insofar as that condition required that a record be kept of any discussion he may have had with his mentor about the particular item of correspondence.

124. The tribunal was satisfied that this condition was breached. The records of discussions with his mentor were, with a few exceptions, inadequate. Apart from his first meeting in October 2013 the records of his meetings with Mr Brady were also inadequate. The documents submitted to the tribunal during the hearing (C416c-l) in relation to meetings in April and June 2015 simply demonstrated that meetings had taken place at which the primary focus was on the matters uppermost on Mr Spence's mind at that time, the GDC proceedings. The pro-forma of the April meeting did not mention any of the 'reflections' on the meeting contained in Mr Spence's email and was missing a number of pages. (416a-b).

125. The tribunal was satisfied that Mr Spence had failed to keep a log and reflection of his discussions and meetings with his mentor as required by condition B2.

### **Tribunal decision with reasons**

#### Correspondence

126. Mr McGee argued that the conditions imposed by the 2013 tribunal had worked insofar the amount of correspondence for which Mr Spence was responsible had been massively reduced. The tribunal accepted, as did Ms Easterby-Smith and Ms Copage that the volume of correspondence emanating from Mr Spence had reduced since the 2013 tribunal hearing. This was partly a reflection of the fact that the provision of orthodontic services had changed since 2013 making it less likely that Mr Spence needed to engage in correspondence. Mr Spence also appeared to exercise some control over the volume of his correspondence.

127. The volume however was only one of the problems that the 2013 tribunal had addressed. The 2013 tribunal found that the nature of some of Mr Spence's correspondence had been unnecessary and unprofessional. This problem then continued, albeit at a reduced rate. Following the 2013 hearing themes emerged in Mr Spence's correspondence all of which had been the subject of scrutiny by the 2013 tribunal. These included criticism of colleagues, unnecessary referrals and references

to colleagues about clinical matters which pre-occupied Mr Spence despite having little scientific basis.

128. The 2013 tribunal was so concerned about the problems created by Mr Spence's correspondence that it decided to attach conditions to 'promote engagement' and 'monitor behaviour', with Mr Spence's mentor as the key person to 'promote engagement'. Mr Spence did not properly comply with these conditions.

129. Mr McDowall was an important witness at the 2013 tribunal hearing. He was a consultant orthodontist and clinical director of the orthodontic service. When he gave evidence at the tribunal he had recently taken over from Mr Robinson, with whom Mr Spence had a poor relationship. The 2013 tribunal regarded his evidence positively: 'The panel found that Mr McDowall has acted conscientiously and appropriately throughout and agreed with his concern that raising unnecessary requests for second opinions can cause significant problems'. [C210]

130. Mr McDowall continued to be a focus of Mr Spence's correspondence following the 2013 hearing. Although the volume may have reduced, Mr Spence continued to engage Mr McDowall in unnecessary correspondence and referrals. The number of these referrals also started to increase towards the end of 2014.

131. The 2013 tribunal made the following observations about Mr Spence's correspondence with Mr McDowall. 'It was in our view clear that he [Mr Spence] had not given sufficient thought to the effect that his correspondence would have on Mr McDowall or the patients in his care'. [C209] The present tribunal was satisfied that still remained the case.

#### Had Mr Spence changed?

132. In imposing conditions the 2013 tribunal took into account Mr Spence's apparent recognition of the need to change his conduct. It concluded that Mr Spence had genuinely taken on board the effect that his behaviour was having and had shown remorse and insight as a result.' (C215) In relation to the current proceedings it was argued on Mr Spence's behalf that he had changed. The tribunal was unable to accept that to be the case. The tribunal concluded that the behavioural concerns that had been identified during the various regulatory and disciplinary hearings that Mr Spence had been involved in since 2009 had not gone away and became apparent during the present hearing. Examples of these concerns included:

- a. His inability to reflect. After admitting the contact breach in relation to his record keeping he stated that the assessor had got it wrong.
- b. His perception that he was being unfairly singled out. His email dated 25.4.15 (C416A) in which he said that the allegation that he was circumventing the referral process was malicious, careless and wrong;

- c. His lack of insight. He maintained and promulgated his attachment to particular clinical theories despite being warned not to do so by the 2013 tribunal. He refuted the suggestion that he criticised professional despite evidence to the contrary.
- d. His inability to listen to, or accept the views of, others. The GDC's Professional Conduct Committee commented on his unprofessional criticism of Professor Deary's evidence at the 2014 hearing. Professor Deary was an expert witness at the hearing.

133. Mr Spence had a dysfunctional working relationship with NHS England. He maintained that he had changed his approach to working with NHS England however the evidence indicated otherwise. In July 2014 he wrote about his experiences of the PCT in removing his contract, and his subsequent experiences before the 2013 tribunal. The tribunal considered that his comments on the GDPUK online forum (a website only accessible to registered members who are dental professionals) were misleading. (C241-250) In particular his comments that he went to court and had his contract reinstated at significant cost to the PCT omitted to mention that his return was subject to stringent conditions and the PCT had invested a significant amount of money to assist him in his remediation.

#### Efficiency

134. Ms Copage was asked about the financial impact of working with Mr Spence. In general terms she talked about the resources available to her team which had reduced in number whilst the geographical area they had to cover was expanding. She said 'I have a small team who carry a huge caseload'. She was asked about specific costs for the period 2009-2013 in managing Mr Spence. A figure of £70,000.00 including the cost of the NCAS assessment was put to her, and she did not disagree. She said that there was no problem giving support to practitioners where improvement could be seen, however in Mr Spence's case the evidence of improvement was not apparent.

135. Regulation 15(5-6) sets out the matters to which the tribunal must have regard when considering removal under 14(3)(b). One of the matters that the tribunal must consider was the risk to public finances. The tribunal was satisfied that cost of supporting and monitoring Mr Spence had a quantifiable impact on the NHS budget which posed a risk to public finances. If there was evidence that a practitioner could change then the investment of public funds might be justified.

#### The tribunal's findings

136. Some of the matters on which the tribunal made findings were not necessarily serious in themselves. The findings in relation to the logs of Mr Spence's correspondence needed to be seen alongside the fact that the inadequacy of the logs as an audit tool could have been addressed with Mr Spence during his first meeting with

Ms Copage. The two cases and the online posting evidencing Mr Spence's breach in relation to criticising colleagues with patients did not amount to a serious breach compared to others. The contract breach relating to poor recording was accepted by Mr Spence. If these had been the only matters relied upon by NHS England in removing Mr Spence from the performers list then his appeal might have succeeded. The tribunal findings in relation to the other matters identified in these reasons were much more serious and the overall effect of all the matters found proved satisfied the tribunal that Mr Spence's conduct and behaviour continued to have a detrimental impact on the efficiency of services that the NHS could not continue to sustain.

#### The imposition of conditions

137. The tribunal considered whether there might be any conditions that would mitigate the efficiency issues. If conditions were to be imposed the conditions would need to be more stringent than the conditions imposed by the 2013 tribunal and would require continuing public expenditure. The tribunal was satisfied, however, that there was not any realistic prospect that the imposition of further conditions would result in sustainable change. Mr Spence has now been involved in regulatory and disciplinary proceedings since 2009. He had failed to comply with the bulk of the conditions imposed by the 2013 tribunal.

#### **Order**

138. Mr Spence is removed from the Performers List forthwith

139. No person shall publish in any media anything which would identify the patients referred to in this decision.

**Tribunal Judge Anthony Harbour  
Primary Health Lists  
First-tier Tribunal (Health Education and Social Care)**

**Date Issued: 17 November 2015**

## Annex 1

### Order

Mr Spence is contingently removed from the Performers' List subject to the following conditions:

A: To promote engagement Mr Spence should:

1. Fully comply with contractual conditions.
2. Comply with QAH extraction policy and NICE guidance and not discuss his own theories regarding second molar extraction with patients, save in exceptional circumstances and with the written approval of his mentor.
3. Refrain from criticising colleagues to patients and act in a professional manner when explaining options.
4. Attend CPD events and keep a log of his attendance.
5. Seek a mentor through Health Education (Wessex) and approved by the Dental Dean (if possible an orthodontic consultant independent of the Isle of Wight) and enter into a mentoring relationship no later than 1 September 2013. Mr Spence should use the mentor to discuss any clinical, procedural or administrative matter that Mr Spence may feel challenged by before engaging the with the second party either verbally or through any form of correspondence. He should bear the cost of the mentoring relationship if any.
6. To communicate with Mr McDowall on professional matters as a general rule in writing save in emergency situations.
7. Request a formal meeting with Mr McDowall to establish Mr McDowall's expectations of him once the GDC proceedings have concluded to attend any future meetings requested by Mr McDowall

B: To monitor behaviour Mr Spence should:

1. Keep a log and copies (redacted of identifying personal information) of all correspondence and referrals that he sends out including details of patient identifier, the addressee, content, justification of content and any discussion he has had with his mentor or other colleagues regarding the letter;
2. Keep a log and reflection of his discussions and meetings with his mentor.
3. Submit the logs and copies he is required to keep to NHS England AT least every 3 months and/or within 7 days of written request so that NHS England AT can satisfy itself as to attendance at CPD events, the tone and volume of the correspondence and referrals made.

To assess compliance:

1. To attend a 6 monthly meeting with NHS England AT to review logs, complaints, and compliance with contractual terms, to be reviewed no later than December 2014

28 July 2013