IN THE FIRST TIER TRIBUNAL **PHL15343**
HEALTH EDUCATION AND SOCIAL CARE CHAMBER
PRIMARY HEALTH LISTS
Heard at York House, Leeds
18 to 22 July 2011

BEFORE

JUDGE ATKINSON

DR R RATHI

MR C BARNES

BETWEEN

DR E HERRERA -GILTHORPE
(Reg no 4664668)

(Appellant)

and

BARNSLEY PRIMARY CARE TRUST

(Respondent)

Representation:

For the Appellant: None
For the Respondent: Mr Tyrell of Counsel

DECISION AND REASONS

The Appeal

1. This is an appeal by Dr Herrera-Gilthorpe against the decision of the respondent notified on 12 November 2010 to remove him from the respondent's performers list under the Health Services Act 2006 (as

amended) and associated regulations on the grounds that he is unsuitable to be included on the respondent's medical performers list and had failed to comply with conditions imposed on him by the respondent.

The Background and Proceedings

2. The appellant was born in Mexico on 4 August 1967. He underwent five years undergraduate medical training in Mexico and worked as a registrar before coming to the United Kingdom and working on surgical rotation. In or about 2004 the appellant was admitted on to the respondent's performers list.

3. The appellant worked in general practice in the Barnsley area.

4. The appellant first came to the attention as a cause for concern in 2007. The respondent was concerned about: the appellant's behaviour to himself and to others; and his health.

5. On 28 September 2007 the appellant told the respondent that he had a personality disorder.

6. The appellant was referred for an occupational health assessment. The respondent also sought advice from NCAS.

7. On 17 June 2008 the respondent brought their concerns to the attention of the General Medical Council (GMC).

8. On 27 June 2008 the respondent suspended the appellant from the performers list while it considered whether or not to exercise its powers to remove him on the grounds of suitability. The respondent was concerned about the appellant's failure to engage with its assessment process and issues relating to the appellant's fitness to practise.

9. In the course of 2008 the appellant was subsequently assessed by a number of medical experts. They were of the view that the appellant had a personality disorder.

10. On 21 August 2008 a GMC interim orders panel imposed a number of conditions on the appellant's registration in order to protect members of the public. The conditions were reviewed and varied by the GMC on a number of subsequent occasions.

11. On 26 March 2009 the respondent decided to contingently remove the appellant. The conditions imposed by the respondent largely mirrored the conditions imposed by the GMC but with additional conditions to reflect the respondent's concerns.

12. The conditions imposed by the respondent and GMC continued to be subject to review and amendment.

13. On 1 April 2010, following a hearing on 25 February 2010 the appellant became subject to conditions which are the subject of the present appeal. The relevant conditions are :

Condition 1 : [the appellant] must notify the GMC promptly of any professional appointment he accepts for which registration with the GMC is required and provide the contact details of his employer and PCT on whose medical performers list he is included

Condition 10 a)…
b)…
c) ….

d) not to undertake any out of hours work except supervised telephone triage for an out of hours service and/or work in the Rotherham GP walk in centre, within the hours of 8am to 9pm, where your work will be supervised at all times by Dr D Wilson Local Medical Director of Rotherham GP walk in centre or his nominated deputy. Supervised at all times means that either Dr Wilson or his nominated deputy will be present in the building whilst ever you are consulting. The nominated deputy is to be one named doctor who has been fully appraised of your personality disorder, the GMC conditions, and these conditions, and who has formally accepted in writing his/her responsibilities for your supervision when Dr Wilson is not present.

Condition 13 A requirement to submit a weekly return to a named person at NHS Barnsley declaring any primary care employment/out of hours employment/non employment and, where employed, such return to be signed by a principal in the practice/medical director or his designate in an out of hours organization, to confirm that the information was correct, that there had/had not been any concerns and that you have been supervised at all times by the GP principal/medical director Dr Wilson or his nominated deputy

14. Also on 1 April 2010 a GMC fitness to practice committee determined that the appellant's fitness to practise was impaired by reason of adverse physical or mental health and imposed conditions on the appellant's registration.

15. Over the course of the summer of 2010 concerns began to emerge from the appellant's various employers about his working practice and schedule.

16. By a decision notified on 12 November 2010 the respondent made the decision which is now the subject of this appeal. The respondent decided to remove the appellant from its medical performers list on the following grounds:

    i. the appellant is unsuitable to be included on the respondent's performers list
    (Regulation 10(3) and (4)(c))

    ii. the appellant had failed to comply with conditions imposed on his inclusion on the performers list (Regulation 12(3)(c))

17. The reasons the respondent came to that decision may be summarized as follows:

    - the appellant had breached the conditions imposed on him by simultaneously undertaking telephone triage for two organizations and failing to submit timely and accurate returns about the work he was engaged in

    - the appellant lacked insight

    - the appellant was reckless about his compliance with respondent's conditions

    - the breaches demonstrated a lack of probity

18. On 3 December 2010 the appellant appealed to the tribunal.

19. Appeals to the tribunal are by way of redetermination.

The Law

20. The relevant law is to be found in the 2006 Health Services Act as amended together with associated regulations. Reference to the performers regulations means to the relevant law as set out in The National Health Service (Performers Lists) Regulations 2004. It is not necessary to set out the relevant extracts in full. In brief

    Regulation 10 (3) and (4)(c) provides for the removal of a

performer where they are ‘ unsuitable’ to be included on the performers list

Regulation 12 provides for contingent removal from the performers list; the imposition of conditions; and removal from the list where such conditions are breached

The documents and evidence

21. The respondent submitted two bundles indexed and paginated. It is not necessary to set out the contents of the bundle in full. For convenience it is noted that bundles contained material from both parties and included a number of reports from medical experts.

22. In the course of the hearing both parties produced a number of additional documents. For convenience they are listed on a schedule entitled ‘Papers produced during the appeal hearing’. Those documents have also been integrated into the main bundle with appropriate additional pagination.

23. Mr Tyrell on behalf of the respondent indicated that the respondent would also rely on the oral evidence of: Mrs S Bentley, executive director of the respondent PCT; and Dr Ball, GP and acting chair of the respondent’s professional executive committee and member of its reference committee.

24. The tribunal also heard oral evidence from the appellant and from Dr Bowen. Dr Bowen is a consultant forensic psychiatrist working within the national health service and a medical psychotherapist. Whilst he was called to give evidence by the appellant, it was clear to the tribunal that Dr Bowen, as a forensic psychiatrist understood the nature of his duty in giving evidence to the tribunal as an expert witness.

Preliminary matters

25. At the outset of the hearing the tribunal noted that the appellant was unrepresented and therefore took particular care in adopting an informal approach to the hearing in accordance with the tribunal’s overriding objective under the procedural rules to deal with cases fairly and justly. The tribunal also indicated to the parties that it was under a duty to enable the appellant to participate fully in the proceedings.

26. The appellant also indicated that Dr Bowen had other professional commitments and asked that this be taken into account when considering the order of evidence.

27. As a consequence the tribunal made arrangements to hear oral evidence from Dr Bowen first. In the event, Dr Bowen gave evidence in two parts over

two days.

Opening submissions on behalf of the Respondent

28. Mr Tyrell in opening outlined the background to the appeal. He also submitted that the respondent no longer intended to rely on the alleged breach of condition 1 of the conditions imposed by the respondent with effect from 1 April 2010. Mr Tyrell made a number of further submissions which may be summarised as follows.

29. The appellant had come to the attention of the respondent in 2007 as a result of concerns about his behaviour and health. The appellant had diagnosed himself as having a narcistic personality disorder and had started to receive therapy. The appellant had been referred to the GMC who had imposed conditions on the appellant's registration. The PCT had also imposed conditions which mirrored the conditions imposed by the GMC but with additional local conditions.

30. The appellant had breached condition 10d) of the conditions effective from 1 April 2010 by providing a home telephone triage service for an organization known as Primecare Cleveland without notifying the respondent. In those circumstances it was unclear what arrangements had been made for the appellant to be supervised.

31. The appellant had also engaged in medical work for other employers. The appellant worked for an organization known as Care UK for whom he worked in a walk in centre in Rotherham. The appellant had also undertaken telephone triage work for Care UK. In addition the appellant undertook telephone triage work for an organization known as Primecare Birmingham.

32. The appellant was in breach of the respondent's conditions because the appellant had worked for Primecare Birmingham without informing Care UK that he was working for Primecare. It was a contractual condition as evidenced at page 115 of the bundle that the appellant obtain written from Primecare UK to work for another employer. The appellant had not obtained the required written consent.

33. Further, the appellant had undertaken simultaneously home telephone triage work for both organizations, without those organizations knowing that he was working for both of them at the same time. The number of occasions this so called overlapping working had occurred was set out in a schedule at page 29A of the bundle and totalled 21 occasions over the period April 2010 to July 2010.

34. It is further alleged that Primecare Birmingham (denoted at times within the documentation as CTP – central triage) is a different organization from

Primecare Cleveland; and that PrimeCare Birmingham was not aware that the appellant was working for Primecare Cleveland.

35. As a consequence of the appellant's actions Care UK had suspended the appellant's contract for working in the walk in centre as set out at pages 306 and 307 of the bundle: and Primecare had placed the appellant on its alert register as shown at page 290A of the bundle.

36. It was further submitted that the appellant's working of overlapping shifts on telephone triage amounted to dishonesty on the part of the appellant. Further probity issues were raised by: the appellant's failure to declare that he was working for Primecare Cleveland; and the submission by the appellant of employment returns setting out his working/non working days that did not match the records held by his employer, as set out in the table at page 97 of the bundle.

<u>Oral Evidence on behalf of the respondent</u>

Summary of oral evidence of Mrs S Bentley, an executive director of the respondent

37. Mrs Bentley in oral evidence adopted her statement, to be found at tab 2 of the bundle, as evidence in chief. It is not necessary to fully rehearse the contents of her statement here. In brief Mrs Bentley as corporate secretary for the respondent was the executive director to whom the respondent's investigating officer, Sue West, reported. Mrs Bentley is also a member of the respondent's reference committee, that being the committee responsible for dealing with matters relating to the performers list. The minutes of the respondent's meetings for the period from July 2007 to September 2010 are set out at pages 52 to 97 of the bundle.

38. Relevant extracts of Mrs Bentley's further oral evidence may be summarized as follows. The respondent relied on the additional documents now produced and paginated 29A and 97A et seq [the documents are particularized in the schedule headed 'Papers produced during the hearing'].

39. These additional documents showed amongst other things:

> the hours and dates that the appellant had worked simultaneously for two different organizations on 21 occasions;
>
> that the appellant had declared to the respondent that he had not worked for Primecare Birmingham on various dates but omitted to state that he had been working for Primecare

Cleveland on those same dates

that the appellant had signed declarations about his work on 6 occasions between April 2010 and June 2010 that were either false or concealed the extent of his working

40. The documentary evidence showed that the appellant had been working overlapping shifts: that is the appellant was working for Care UK on telephone triage and at the same time was also working for Primecare doing telephone triage. This happened on 21 occasions between April and July 2010 as set out on document 29A.

41. This double working raised issues of patient safety because neither organization, Care UK nor Primecare, knew that the appellant was working for the other organization at the same time. The call handlers would be under the impression that the appellant's working time was dedicated to their organization. This could give rise to problems if both organizations received urgent calls at the same time, or in close proximity to each other. The appellant would not be able to deal with both calls at once, and thereby the patients would be at risk.

42. The double working also raised issues of dishonesty and probity. Care UK did not know that the appellant was working for Primecare and Primecare did not that the appellant was working for Care UK. It was a term of the appellant's contract with Care UK, as set out at page 115, that he not work for another organization without written consent from Care UK. It was accepted that the records did not show that there had been an occasion when two such calls came in over the period in question; however each organization were entitled to know what staff resource was available to them when providing a service.

43. In addition, the respondent were unaware of the appellant working for Primecare Cleveland, as opposed to Primecare Birmingham, and therefore could not be satisfied that the appropriate supervisory arrangements were in place. The paramount issue for the respondent was that of patient safety,

44. There were other concerns about the appellant's working for the two organizations. The records at 97F/G show that on 10 May 2010 the appellant had worked a shift at the walk in centre for Care UK. The appellant had agreed to extend his shift by working beyond 21.00; however at 21.00 the appellant had said that he was not going to do the extended hours. The appellant then went on to undertake a shift for Primecare from 01.00 to 08.00.

45. The respondent was also concerned that the appellant had not been accurate when telling Dr Bowen about his work. Dr Bowen's report of 29 March 2001 (page 570) records that Dr Bowen was told by the appellant that the

appellant's income had dropped by 30% since he had stopped working as a GP. However the documents (313A-B) showed that his average income in the last 6 months of his working as GP to be £13,250 per month and his monthly income since then to be in the range of £12,000 to £15,000. It was accepted that the appellant's post GP working arrangements meant that his hourly rate of work reduced from £65 per hour to £43 per hour; and that if he had worked 60 hours per week his monthly income would have been in the region of £17,000. It is possible that there was a misunderstanding between the appellant and Dr Bowen.

Summary of Oral evidence of Dr S Ball, acting Chair PEC

46. Dr Ball is a GP and acting chair of the respondent's professional executive committee and a member of its reference committee. Dr Ball has held other posts including as an examiner for the RCGP, deputy director of postgraduate GP education and a national assessor for trainees. He adopted his statement dated 7 June 2011 as evidence in chief. It is not necessary to rehearse its full contents here. In brief, Dr Ball notes the stressors in the appellant's life, the GMC guidance on trust probity and integrity, and the lack of insight demonstrated by the appellant. He concludes by noting the pervasive nature of the appellant's disorder, that the appellant's past behaviour is the best indicator of the appellants future behaviour and that the appellant's working of double shifts, false declarations, resistance to compliance with conditions, lack of insight, response to stress, breach of the respondent's conditions and the lack of confidence in the appellant together show that the appellant should be removed from the list on the grounds of suitability.

47. Relevant extracts of Dr Ball's further oral evidence may be summarized as follows. Dr Ball was pleased to note Dr Bowen's description of the progress made by the appellant. The appellant's exact diagnosis is not central to the series of behaviours, but does provide an explanation. The appellant had not been frank about his double working whilst on telephone triage; he had not recognized that this raised a patient safety issue; and he had not disclosed his work for Primecare Cleveland which had the effect of disabling the respondent's reporting structures because they were not aware that the appellant was engaged in work that should have been supervised.

48. It is noted that the appellant now says that his working arrangements were inappropriate; however what is required is insight at the time of the events and not afterwards.

49. Dr Ball's main concern were the issues of probity arising from the appellant's behaviour.

50. It is axiomatic that the appellant's past behaviour is indicative of future

behaviour. It was pleasing to note Dr Bowen's views about the appellant's improvement in insight and improvement in his behaviour in the conduct of his relationships and his reaction to the concealment of work. However the best judge is the behaviour of the appellant rather than the suggestion of improvement from some one with a therapeutic interest. The lack of reporting by the appellant and the double working is behaviour which is indicative of future behaviour.

51. There is a difference between the work of a GP and the work of a doctor in A and E. Most GPs practise on their own; they deal with a wide variety of issues; they deal with people in distress; they offer support; they are aware of boundaries; they work in people's home; and they have a relationship with patients over a long period of time - sometimes over generations of families.

52. By comparison in A and E, most work is undertaken in a cubicle; there are many nurses and junior staff around; there is more support to the doctor and general intrusion by other staff; and finally patients come and go with no long standing relationship.

53. In Dr Ball's view insight can be measured by considering a person's ability to understand the effects of their actions on others and themselves; and how that fits into an efficient and moral framework. The best judge of the appellant's insight is to look at the bevaviour he has engaged in rather than conversations or possible learnt behaviour. Stress would also have an effect on the capacity for insight. The problem for practitioners is to retain self awareness.

54. In Dr Ball's view the appellant had made grave professional errors. The most striking was the appellant taking Sharon's contact details from the medical records in order to pursue a personal relationship. It was also a grave error not to comply with the conditions imposed on him.

55. Dr Ball's view about the significance of the appellant's diagnosis of narcissistic personality disorder had changed. The main issue as far as he was concerned was the appellant's behaviour which was unprofessional.

56. Dr Ball was also concerned about issues of patient safety which had involved a number of issues over the years. The double working could be regarded as a patient safety issue, although it was accepted that no harm had been done as yet. There had been the potential for harm. The appellant could have called or raised the query with a colleague. The issue was: what was the level of risk that needed to be managed.

57. Dr Ball, in the context of the evidence showing the need for continuing therapy, could not identify any conditions that could be imposed that would allow the appellant to work as a GP. Dr Ball had only been involved in the

case since September 2010: but any conditions would need to be workable, and the appellant had breached 2 conditions imposed by the respondent.

58. It was accepted that Dr Bowen's evidence was that the appellant had shown a large improvement, but the appellant had engaged in double working which did not show a huge improvement.

59. The appellant's failure to work the extended hours on 10 May 2010 as evidenced at page 97F was also a professional error. Alternatives could have been arranged.

<u>Oral evidence on behalf of the appellant</u>

Summary of oral evidence of Dr Bowen

60. Dr Bowen is a consultant forensic psychiatrist and also works as a medical psychotherapist. In the course of his involvement with the appellant and the GMC he has written 7 reports on the appellant between October 2009 and March 2011 (pages 417, 503, 509, 553, 554, 563, 568, 570). The appellant had not given notice to the tribunal or the respondent that Dr Bowen would be called to give oral evidence.

61. When Dr Bowen was called to give oral evidence before the tribunal it emerged that he had produced a further report dated 16 June 2011 at the request of the GMC in contemplation of a further GMC fitness to practise hearing in October 2011 on issues relating to the appellant's probity. The respondent had not seen Dr Bowen's report of 16 June 2011 and wished to take advice from its own medical witness, Dr Ball. Accordingly, arrangements were made to enable Dr Ball to attend the hearing and consider this new evidence and Dr Bowen's oral evidence. In consequence Dr Bowen's oral evidence was heard over a two day period with the oral evidence of Mrs Bentley interposed.

62. Relevant extracts of Dr Bowen's oral evidence may be summarized as follows. Dr Bowen first became involved with the appellant in September 2008 as a result of a referral for assessment by the respondent's occupational health department asking him to prepare a report on the appellant's mental health. From October 2009 Dr Bowen's involvement changed to that of a treating psychiatrist, seeing the appellant as an out patient in a supportive role. No specific treatment had been formulated and in-depth psychotherapeutic work was to be undertaken by professionals other than Dr Bowen.

63. Dr Bowen's view in September 2008 was that the appellant satisfied the criteria for a diagnosis of personality disorder within ICD-10 and that the condition was best described as narcistic personality disorder under DSM-IV.

Aspects of the appellant's behaviour which gave rise to this diagnosis may be summarized as follows:

> - the appellant in 2002, entered into a relationship with a woman known as Sharon, whose details he had obtained from medical records arising from Sharon bringing her son to the A and E department in Huddersfield. At the time the appellant was married to a woman known as Gisella who was undergoing IVF treatment. The appellant told Sharon that he was divorced.
>
> - in or about 2003 the appellant told Sharon that he had testicular cancer in the hope of ending their relationship. The appellant later made a surgical incision to his scrotum which he stitched up in order to convince her that he had a testicular operation.
>
> -the appellant also told Sharon that he required radiotherapy to his lungs. In order to maintain the subterfuge the appellant went to a tattoo parlour and had marks made to convince her that he was going to have radiotherapy.
>
> - the appellant's wife having fallen pregnant by the appellant and given birth to a son began divorce proceedings after she found out about the appellant's relationship with Sharon
>
> -Sharon fell pregnant by the appellant. When she was 7 months pregnant the appellant started looking for a new relationship. The appellant and Sharon separated In 2007
>
> -the appellant then established a relationship with a woman known as Donna. He told her that he had had cancer. He did not tell her that he had a daughter by Sharon.
>
> -in 2008 in order to avoid going on holiday with Donna the appellant told her that his son had meningitis. He found a picture on the internet which he printed off and passed off as his son.

64. In summary, Dr Bowen's view in September 2008 was that the appellant had a grandiose sense of self importance; was engaged in exploitative relationships; had created of a web of deceit; and that he would need a long period of psychotherapeutic support.

65. Dr Bowen's view as set out in his report of 26 June 2011 was that the appellant no longer met the criteria for a diagnosis of personality disorder but that the underlying narcissistic personality traits will continue for the foreseeable future: that is the appellant will tend to exhibit a grandiose sense of his self importance; a wish to be admired; and to behave in an exploitative

manner within interpersonal relationships.

66. Following the interposing of other oral evidence relevant extracts of Dr Bowen's further oral evidence may be summarized as follows. The appellant was engaged in undertaking sessions with a group analyst known as Isobel Conlon. Arrangements had been made for the appellant to see Isobel Conlon in March 2010. Dr Bowen understood the appellant to be seeing Isobel Conlon weekly on an individual basis and that his sessions had re-started in May 2011, there having been an interruption in the sessions following the appellant's fracture of his leg earlier in the year.

67. Dr Bowen's view was that the outcome of psychotherapeutic treatment was variable. It was the only treatment available for disorders of this nature, but the area was not well researched. As a result of a conversation with Isobel Conlon Dr Bowen understood that the appellant was beginning to engage in the process. The plan had been for the appellant to progress to group therapy.

68. The appellant had been continuously improving since the referral to occupational health. The appellant at first had an intent to show how clever he was at sessions; showed egocentric opinions and had difficulty listening to advice. There have been gradual changes: the appellant was now more relaxed, more receptive to advice and more open and honest in presentation.

69. As to the appellant's dishonesty, everyone had the capacity for dishonesty. The appellant has underlying personality traits which make him vulnerable to act in certain ways. What has changed is the expression into behaviour - and that is why the diagnosis has changed. However the appellant's personality has not changed overnight. What has changed is the expression into behaviour

70. Dr Bowen accepted that his expertise was limited to that of a forensic psychiatrist and did not extend to matters relating to the general practice of a doctor. Dr Bowen's role over the period of his involvement with the appellant had changed in that following the initial referral he had subsequently become a treating psychiatrist. Before the involvement of the GMC, Dr Bowen had been a supervising psychiatrist. Dr Bowen had agreed to see the appellant as an out patient.

71. Dr Bowen's view was that it is clear that when under stress the appellant's behaviour is out of control. It is a cardinal rule that in assessing future behaviour that past behaviour is the strongest predictor. It is Dr Bowen's view that the appellant is entirely culpable for his behaviour. This gave rise to a difficulty because the GMC had chosen to go down the route of treating the appellant's behaviour as a health issue rather than an issue of probity. The appellant had a free choice about his behaviour.

72. Dr Bowen had offered the appellant a prescription for SSRIs as an antidepressant. The appellant was under a lot of stress because he had filled in the PCT's forms inappropriately; there was a bankruptcy issue; also the appellant was preoccupied with his ex-wife moving to Mexico with the potential for loss of contact with his son; the appellant was also unemployed at the time.

73. The appellant had told Dr Bowen that there were 4 forms where the appellant had stated that he not worked, when he had worked. The reason the appellant gave for so doing was that he had not been able to get anyone to counter sign the forms and that he had been sent warning letters by the PCT. There was no mention at that point that the appellant had tried to conceal aspects of his working for more than one organization. At that time the appellant did not feel that he had done something wrong. He felt that he had not breached the conditions and that he should have got advice from the GMC. In retrospect the appellant felt that he had behaved inappropriately and that the appellant now accepted that It was wrong not to seek advice.

74. The appellant sees the signing of the forms as incorrect behaviour and that he should not have done it. The appellant accepts that he should have sought advice about having two employers; but he sees it as a technical matter.

75. For Dr Bowen's part, he did not see the appellant's behaviour as a technical matter and was concerned that the appellant saw his behaviour in those terms. The fact that the appellant did not see that it was necessary to contact the GMC about his working arrangements is an underlying expression of his fragility. It would be obvious that he should have sought clarification. The appellant was also wrong not seek advice from the PCT. The fact that he had not mentioned it all was an expression of his personality: that is the appellant's belief that he knows best.

76. The appellant has learnt from this experience. His acceptance of responsibility has increased. If it occurred to him now he would seek advice so that the appellant has moved forward.

77. Dr Bowen accepted that during the period March to September 2010 [when the appellant had signed forms inappropriately] the appellant was in a relatively stress free time given that the appellant had by then a contract of employment with guaranteed hours of working with Care UK and the GMC fitness to practise committee was behind him.

78. The appellant's behaviour during that time was on different scale to that which had occurred before. Before, the appellant had bizarre behaviour including self mutilation; now the issues related to matters of probity which is not an unusual issue: that is to say a lot of people behave inappropriately but the

appellant's previous behaviour was off the scale. The appellant's underlying traits may lead to inappropriate behaviour on probity issues but that is not a major expression of behavioural disturbance.

79. Dr Bowen had written at page 570 that the appellant had told him that his income had dropped 30% since stopping work as a GP. Dr Bowen's contemporary note showed the appellant had said he had wanted to increase his work from 60 to 70 hours a week on an occasional basis because his income had reduced by 30% as he was not working as a GP; and in that way could make up the shortfall. Dr Bowen at that time was not aware that the PCT was paying the appellant at a rate of 90% of his previous income. Dr Bowen did not feel that he had been misled about that. Dr Bowen had thought that the appellant's income had stopped on removal. That was Dr Bowen's misunderstanding. Dr Bowen had believed that the appellant's income had dropped by 30 % since the appellant had begun work in A and E.

80. Dr Bowen was of the view that the appellant would gain further benefit from long term therapy. The period of time envisaged would be years, that is more than two years. It would not be possible to monitor the appellant's progress by reporting by the psychotherapist. Psychotherapists would maintain confidentiality and would refuse to provide a report. A psychotherapist might contact an outside monitor for example where there is a deterioration In behaviour or suicide risk, but the full details would not be passed on. In turn Dr Bowen would be bound to pass on concerns that were high level related to the appellant's health, but not about probity issues. It is not Dr Bowen's role to intervene in matters of probity. Dr Bowen would not be able to pass his concerns to the PCT without the appellant's permission.

Summary of the oral evidence of the appellant

81. At the outset of taking oral evidence from the appellant he was asked whether or not he wished to adopt his statement of 9 pages, set out within a letter dated 25 April 2011 (at tab 1), as evidence in chief. The appellant said that he wished to rely on it only subject to major amendments. He indicated that he no longer wished to rely on certain passages; and having been given the opportunity for further reflection, following the tribunal rising for a short period, he concluded that the following passages were to be excised:

Page 3 paragraphs 3,4,5,8,9,10
Page 4 in its entirety
Page 5 paragraphs 3,6,7,8
Page 6 paragraphs 1-5
Page 8 paragraph 2

82. The appellant said that the reason for those amendments was that his perception of the respondent's justifications for taking action was incorrect. Those paragraphs which were excised related to matters of bad faith on the part of the respondent. The appellant now understood that not to be the case. The appellant thought that the lack of legal advice available to him also had a bearing on this.

83. In brief, the remainder of the statement on which the appellant relied may be summarized as follows. It was accepted that he had breached condition 13 relating to the issue of submitting returns of his weekly work. It was disputed that there was a breach of condition 10.

84. It was accepted that the appellant had shown a gross lack of insight. There was no intention on the appellant's part to be dishonest. There was only one incident regarding inappropriate behaviour towards a female and that was in 2002 when he obtained Sharon's telephone number from the hospital records.

85. The appellant's further oral evidence may be summarized as follows. As to the events of 10 May 2010, where it is said the appellant had left the walk in centre at 21.00 despite having said he would work beyond that time his response was as follows. Such events were frequent. He was often asked to stay on for an additional hour or two and he had done so many times. Sometimes he stayed on without being asked. On 10 May 2010 he had agreed to stay on but there had been no work for him to do – so he had left. The appellant had said that he would stay on only if it was busy. There were no patients for him to deal with so he went home. The arrangement he had made was only informal.

86. It is disputed that the appellant's failure to mention his work for Primecare Cleveland is a breach of conditions. That is because Primecare is a single organization which should be viewed as a whole which ever area you worked for. The appellant worked for Hereford, Cleveland, Dudley, Birmingham, Walsall. All the doctors worked as part of the central triage pool (CTP) and at times were then allocated work in those areas. The appellant could not recall the details of the dates when he worked in other areas but it was possible for example that he worked at Hereford every week, or Dudley every week for the sessions as collated at page 97V1.

87. The appellant had become aware of the possibility of working for Primecare Cleveland as a result of his contact with another part of that organization known as Primecare Locums and also as a result of his general contact with the rota coordinators. The appellant therefore perceived Primecare as one organization and therefore did not see any need to advise anyone of his work for Primecare Cleveland. There was in place a work place reporter as a result of the GMC conditions. The appellant accepted in retrospect that he should

have asked for advice about this.

88. The appellant accepted that he had worked for both Care UK and Primecare UK and that it was stupid thing to have done. The rationale was that the contract for Primecare had clauses 4.1 to 4.2 and 4.4 as set out at page 108 which stated that the appellant was an independent contractor, who is not restricted in the provision of services to others and will provide services as required. The appellant said that he did not understand the reference to a schedule of times in clause 4.4, but subsequently stated that he had never been provided with a rota showing times he was to provide services. The appellant therefore saw himself as an independent contractor.

89. The appellant's attention was drawn to the Care UK contract at page 115 which stated that the whole of his working time was to be devoted to Care UK and that he should work for no other company without prior written consent. In response the appellant said that he was not aware of that term.

90. The appellant had been working for both organizations since October 2009; however he had only worked overlapping shifts from April 2010. It was also questionable in any event that Care UK did not know that he was working for Primecare because they were the same organization. Care UK and Primecare used to the same organization, then they were taken over. It was therefore implied that the appellant could work for the out of hours service at Rotherham.

91. The appellant accepted that he should have asked for permission to work overlapping shifts as a matter of courtesy. At the time he thought the double working would not be contentious. The appellant was baffled as to why he did this. The appellant did not see his actions as being dishonest because he had no intent to be dishonest. The appellant's work was being monitored.

92. The appellant did not accept that patient safety had been compromised by the overlapping work. That was because the doctor resources exceeded the number of patients to be treated. Priority calls had a 20 minute time limit. If two calls came in close together it was possible to deal with the two calls without breaching the 20 minute time limit. The triage work was easy. It was possible to sleep during the shifts and awaken when a call came in. Dr Mellor for Care UK confirmed at page 313E that he was not aware of any breaches as a result of the overlapping work. The appellant had been assessed as working to a good overall standard and with 99% satisfaction rates.

93. Turning to the issue of the respondent's requirement that the appellant submit weekly returns of his employment, the appellant accepted that he had been less than transparent. The appellant accepted that he knew the consequences of not sending in the returns as required by the respondent. The appellant had opted to act dishonestly and took a risk fully aware that the

consequences would probably lead to his removal, but thought that one or two forms would go unnoticed. It was accepted that the documents at 97W, 97X, 97Y, 97Z, 97AA and 97AB stated that the appellant had not worked at those time, when he had actually been working. It was an unnecessary transgression. The appellant should have stepped away. He had not asked colleagues for advice because he knew what he was doing was dishonest. The only explanation the appellant could offer was that he felt ashamed and embarrassed.

94. The appellant said that he had not worked hours in excess of the conditions imposed by the GMC. He had signed a form opting out of the EU working time directive which restricts an employees hours to 48 hours per week.

95. The appellant's attention was drawn to clause 4.11 of the Primecare contract (page 109) which refers to clinicians not working more than 58 hours per week with 11 hours rest in a 24 hour period. The appellant did not accept that clause 4.11 was a form of advice to clinicians not to work more than 58 hours per week. Clause 4.11 was not relevant. The appellant had agreed to work 60 hour per week for Care UK: 20 hours at the walk in centre and 40 hours on telephone triage. The clause in any event had not been made known to the appellant and was not applied to out of hours providers.

96. It was put to the appellant that given his extensive reference in earlier oral evidence to clauses 4.1 4.2, 4.3, 4.4 and 4.5 in his contract with Primecare, he would have read paragraph 4.11 as well. The appellant said that he did not think that he had read that clause. The appellant could not recall reading the contract before signing it. The appellant could not recall having signed the document, although he might have signed a schedule attached to it.

97. The appellant accepted that it was a happy day for him when he entered into the contract with Care UK to work 20 hours per week at the walk in centre. At around the same time the GMC fitness to practice committee had also issued its decision which enabled him to carry on working.

98. The appellant accepted that the Care UK contract at page 115 required the prior written consent of Care UK to the appellant's accepting an appointment or undertaking other work. The appellant accepted that he did not obtain Care UK's prior written consent. However the coordinator for Care UK knew that the appellant was working for Primecare. In addition, the appellant had not read the contract and did not sign it, although it was accepted that he was under a duty to obtain consent. The appellant accepted that in the absence of such consent Care UK would have thought that he was not working for some one else.

99. The appellant accepted that condition 13 of the respondent's conditions required him to provide weekly details of his work; and that if he did not

provide those details the conditions would fall apart. The appellant accepted that the respondent was unable to be satisfied that the appellant's work was being supervised if the respondent did not know what work the appellant was engaged in.

100. The appellant accepted that his declaration of 12 April 2010 at page 97W did not refer to the fact that he had worked for Primecare Cleveland in the period 5 April to 11 April when he had worked for Primecare Cleveland in that time. However it correctly stated that he had not worked for Primecare Birmingham. The appellant had not declared the Cleveland work because he had difficulties in getting his declaration countersigned by a suitable person from his employer. The appellant presumed that the Cleveland work would be signed by someone from Primecare Birmingham because Primecare Birmingham had put the appellant in touch with some one from Cleveland. The appellant had told Primecare Cleveland that they would need to run his working for them by Primcecare Birmingham. The appellant had then been told that there was no problem. The appellant accepted that his contact with Primecare Cleveland included Richard Cooper who worked for a separate agency dealing with locums. The appellant did not interpret the conditions imposed on him as requiring his work for Cleveland to be supervised by someone from Cleveland.

101. The appellant had not mentioned these arrangements before because he considered Primecare to be a single organization. Primecare knew that he was subject to GMC conditions.

102. The appellant was specifically asked whether or not he had told Primecare about the conditions imposed by the PCT rather than those imposed by the GMC. In reply the appellant said that he had told Primecare Birmingham that he had GMC conditions; and that when he contacted Primecare Cleveland he told then they needed to run it by the people in Birmingham.

103. The appellant was asked why he had stopped working for Primecare Birmingham in April 2010. In reply the appellant said that he knew that the conditions of the GMC restricted his working to 60 hours. He had a contract and triage work with Care UK for 60 hours which meant that he would not be able to work elsewhere. The appellant needed the income because he had lost his home, his company, had insurance problems and the restricted hours all influenced his judgement.

104. The appellant said that he held up his hands to his work in Cleveland not being supervised; but the forms were sent to Birmingham. The respondent has not produced all the forms for the relevant period showing this.

105. It was put to the appellant that not only did the

respondent not know that he was working for Prime Cleveland but also Care UK did not know that he was working for Primecare. In reply the appellant said that the Care UK coordinator Sue Farrrell and Dr Mellor the care UK local medical director knew of his work for Primecare.

106. Dr Mellor's letter of 24 August 2010 (97D) stating that he had only recently become aware of the appellant's working for Primecare was put to the appellant. The appellant said that Dr Mellor had known that he was working for Primecare , despite that letter.

107. Primecare's letter dated 2 August 2010, page 251, and signed by the general manager, Maureen Jameson was also put to the appellant. This stated that she had only just become aware of the appellant's work for Primecare. In response the appellant said his working for Primecare was known from the start.

108. The appellant was asked why he had signed declarations specifically stating that he not worked for Primecare Birmingham at a time when he was working for Primecare Cleveland, if it had not been his intention to conceal his work for Primecare Cleveland. In reply the appellant said that he had no intent to conceal the Cleveland work: he regarded Primecare as one organization.

109. The appellant was asked about the changes made to the deadline by which he had to report to the respondent the work he had been engaged in on a weekly basis. The appellant's attention was drawn to the respondent's letter of 19 November 2009 (page 180) which said that the weekly deadline had moved from Mondays to Fridays. The appellant said that he had sought clarification of the terms of that letter because he liked to *cross the t's and dot the i's.*

110. The appellant was asked about the hours he worked in the walk in centre. The appellant confirmed that he worked at the walk in centre for 20 hours per week in addition to the hours worked for the period April to July 2010 as set out at pages 29A-C. It was then put to the appellant that he had worked for over 60 hours in breach of his conditions on a number of occasions given that he was working 20 hours at the walk in centre, 40 hours triage for Care UK and was working additionally for Primecare. The appellant said that he was careful not to work more than 60 hours and that it was incorrect to say that he has worked 60 hours for Care UK and then additional hours for Primecare as set out on the documents at 29D to F. That was because his contractual hours at the walk in centre were 20 hours; but this did not mean that he actually worked 20 hours in a week. There was some variation between the weeks. The appellant had thought that, when he was asked to confirm the hours at 29A to C and his work at the walk in centre,

he was being asked about his contractual hours, rather than the hours worked.

111. The appellant said that he accepted that past behaviour was the best indicator of future behaviour as long as action is not taken to modify that behaviour. The action the appellant has taken above engaging in therapy is reading books and articles on narcissism and morality, and being more methodical in his daily life. The appellant also said the he had become *inwardly retentive.* He used to push things aside and not deal with them. The appellant is no longer dependent on having someone to be in a relationship with. The appellant is taking better care of himself and his children.

112. The appellant accepted that he had self mutilated, but said that such inappropriate behaviour had happened independently of his professional probity. The appellant accepted that the way he had met Sharon was completely wrong and that he was ashamed of that behaviour. Dr Gopfert's evidence was that the past response to treatment was indicative of future response to treatment.

113. The appellant felt that he was capable of returning to work as a GP subject to the conditions imposed by the GMC and the PCT. He accepted that his lack of probity and past behaviour were of concern. The appellant's probity was one element. The main issue was patient safety. There had been no misbehaviour with patients or staff; and there were no allegations of malpractise.

The Respondent's closing submissions

114. Mr Tyrell made a number of submissions which may be summarized as follows. The appellant should be removed from the performers list on the grounds of suitability and for his breach of conditions 10d) and 13 of the respondent's conditions effective from 1 April 2010 (pages 334-335).

115. The assessment of suitability should be taken in the context of the GMC guidance at paragraphs 1, 22, and 56 and 57 dealing with issues of honesty, trust, integrity and probity; and the DoH guidance on the meaning of suitability and the consequential broad discretion exercisable under the regulations.

116. The respondent's conditions of 1 April 2010 had not been appealed and the appellant understood the conditions and their importance. The appellant had stopped working for Primecare Birmingham in April 2010 and at the same time had started working for Primecare Cleveland; but did not inform the respondent of this. The inference to be drawn is that such a change was a calculated move on the part of the appellant. The appellant only returned to working for Primecare Birmingham when his working

overlapping shifts and failure to disclose the true extent of the number of his employers blew up. The documentary evidence shows that the local medical director at Care UK, Dr Mellor (page 97d), the medical director of the walk in centre run by Care UK, Dr Wilson (page 97h) and Maureen Jamieson Care UK general manager (page 251) all writing in August 2010 had only recently become aware of the appellant's work for Primecare and his pattern of work. In consequence the appellant was put on Care UK's alert register (290a) which prevented the appellant from undertaking work for Care UK.

117. The appellant's declaration of his work as shown at pages 97Wi and the file note at 97S, by failing to mention Primecare Cleveland, show that the appellant was deliberately seeking to conceal his work for Primecare Cleveland. The motivation for this behaviour may have been that he wanted to undertake more work than was recommended under his contract with Primecare which at clause 4.11 (page108) referred to hours being limited to 58 per week.

118. The appellant's working of overlapping shifts for Care UK and Primecare put patient safety at risk. Care UK was of the view (page 290) that such a working arrangement placed the provision of services at considerable risk. The appellant's arrogant view is that working double shifts is safe.

119. In addition, the appellant's pattern of work put patients at risk. For example in the period of 10-11 May 2010 the appellant worked overlapping shifts for Care UK and Primecare Cleveland between 00.00hrs and 08.00 hrs, drove a number of hours home to the walk in centre and back, and worked a shift from 13.00 to 21.00 making a total 16 hours worked; followed the next day with shifts from 01.00 to 08.00 for Cleveland Primecare, 08.00 to 13.00 for the walk-in centre and further telephone triage from 23.00 to 24.00: a total of 29 hours over 2 days. The appellant said that working like that gave him a buzz. The appellant accepted that he slept whilst working on telephone triage.

120. Turning next to the medical evidence, Dr Bowen was of the view that the appellant was aware of the conditions under which he worked and was able to choose whether or not to comply with them. Dr Bowen had noted that the GMC could have chosen to take action on the basis of the appellant's conduct rather than dealing with his circumstances by going down the medical route based on the appellant's ill health.

121. Dr Bowen's most recent assessment is based largely on the appellant's own self reporting, given that the structure and nature of psychotherapeutic treatment means that details of treatment and progress remain confidential. Dr Bowen's evidence is that whilst the appellant may no longer meet the diagnostic threshold for narcissistic personality disorder, the

underlying personality traits will continue for the foreseeable future and the appellant will require treatment for at least a further 2 years.

122. However the appellant has not been forthright will Dr Bowen. The appellant told Dr Bowen that his income had reduced by 30% following his suspension: however the documentary evidence shows otherwise. In addition, the appellant told Dr Bowen that he had lied on 4 forms he had submitted to the PCT [the actual figure is 6] and had failed to mention that he had concealed his working for Primecare.

123. Dr Ball's evidence was that the appellant lacked insight, particularly in relation to identifying time when he needed to obtain advice from others. The triggers or stressors for the appellant's behaviour, such as financial difficulties, the buzz of work, and the strains of meeting working conditions would continue.

124. Finally, it was submitted that the respondent no longer placed significant reliance on the appellant's delay in submitting his work returns on time; however the false statements as set out at pages 97W-AB were highly significant.

The Appellant's closing submissions

125. The appellant on his own behalf made a number of submissions that may be summarized as follows. The appellant had been made subject to conditions by the GMC and respondent in order to protect patient safety following his behaviour in 2002 and his abnormal behaviour in 2004-2006. The appellant had been subject to psychiatric investigation and the GMC, in a fitness to practise hearing in March 2010, had found no evidence of patient harm, no clinical issues of concern, but that the appellant had been involved in matters relating to misconduct.

126. There had been no recurrence of behaviour concerning females and assessment of his performance showed him to be a caring doctor able to establish good rapport.

127. It was accepted that condition 13 had been breached; and that it was wrong for the appellant to have filled in 4 forms that were wrong [on clarification from the tribunal the appellant confirmed that he accepted that there were 6 or 7 forms that were false declarations].

128. The appellant also accepted that when he had been under stress, he should have sought help; and that he had failed the respondent, his employers, himself and his family.

129. The appellant did not accept that he had attempted to

conceal his work for Primecare Cleveland: that was because Primecare was a single organization with no real distinction between Primecare Birmingham and Primecare Cleveland. However it was now appreciated that he should have disclosed that he was working for Primecare Cleveland.

130. The appellant also deeply regretted working overlapping shifts and accepted that this showed a lack of insight. However, the infrastructure and nature of telephone triage meant that at the time he worked there was little work to do and the resources available were greatly under utilized: as such it was safe to work overlapping shifts in the way that he had.

131. The evidence of Dr Bowen showed that the appellant had greatly improved and no longer met the criteria for personality disorder, albeit that behavioural traits would continue. The appellant has developed insight into his behaviour. The appellant will improve in time.

132. Dr Gopfert, as shown by the transcript of the GMC proceedings at page D2/12 C-D, said that response to treatment in the past will be a good indicator of his response in the future.

133. At this point in the appellant's submissions the tribunal invited the appellant to consider the full wording of the transcript. This shows that Dr Gopfert did not say what the appellant had claimed. That claim had been put to Dr Gopfert as a question by counsel and Dr Gopfert had given a qualified answer, which the appellant had not mentioned in his submission. The appellant before the tribunal accepted that his submission had not set out the full response of Dr Gopfert.

134. The appellant has not recently engaged in the sort of behaviours that had occurred in 2004 and 2006. The current issues related to concerns about the appellant's probity. The appellant was unable to give a fool proof assurance about his future conduct but the remarks of Dr Gopfert as considered above should be noted. The appellant had engaged in therapy of his own volition and had followed the advice of the GMC and Dr Bowen. There are to be further assessments of the appellant in the light of the probity issues raised, which are to be considered by the GMC at a fitness to practise panel in October 2011.

135. The tribunal's attention is drawn to the fact that the appellant continued to undertake triage at Care UK until October 2010 despite the issues raised about probity and that the appellant had continued to work at the walk in centre until his contract was suspended as result of the respondent's decision in November 2010.

136. In summary, the appellant should be allowed to continue to work as a GP: there was no evidence of patient harm; the appellant was

undergoing therapeutic treatment; the appellant will continue to be under the close scrutiny of the GMC; the medical experts believe that the appellant is improving and that there is capacity for further improvement; and the appellant would be willing to work within the conditions imposed by the respondent pending review by the GMC.

Assessment of Evidence and Findings of Fact

137. The tribunal considered all the evidence and the submissions of the parties.

138. The tribunal finds the evidence of Mrs Bentley relating to the narrative of events to be consistent, detailed and supported by reliable documentation.

139. The tribunal notes that the appellant's original grounds of appeal, as set as elaborated at tab1, included allegations of bad faith on the part of the respondent. However, the appellant's challenge to the respondent on those grounds was withdrawn during the course of the hearing.

140. The tribunal finds that there is no significant evidence to support the allegation of bad faith and further finds that Mrs Bentley's evidence of the narrative of events to be reliable. As to Mrs Bentley's evidence on questions of judgement, these are dealt with in more detail as set out below.

141. The tribunal finds the evidence of Dr Ball, as to the narrative of events, to be based on the documentation available to him. Dr Ball did not play a key part in the decision making process that gave rise to the decision subject to appeal. Dr Ball has conscientiously drawn together the various threads of the evidence from a variety of sources. The tribunal accepts that he has expertise in the assessment of good practice in the performance of the duties of GPs. As with Mrs Bentley's evidence, the tribunal's views on Dr Ball's evidence on matters of judgement are set out in the paragraphs below.

142. The tribunal finds the evidence of Dr Bowen to be reliable. The tribunal finds Dr Bowen to be an expert witness who was aware of his responsibilities to the tribunal, whilst also being the appellant's treating psychiatrist. Dr Bowen answered all the questions put to him directly and demonstrated application of expert knowledge to the matters before him. Dr Bowen made clear in his evidence to the tribunal that his expertise did not extend to considerations of the appellant's fitness to practise or knowledge of the working practise of a GP.

143. The tribunal finds that Dr Bowen's evidence on the

appellant's diagnosis and treatment is not materially contradicted by other medical expert evidence. The tribunal notes that in written reports other medical experts may categorise aspects of the appellant's behaviour differently, for the purposes of diagnosis. However, the tribunal is of the view that the precise diagnosis is of limited importance. The importance of Dr Bowen's evidence relates to findings of the appellant having a personality disorder; improvement in the appellant's behaviour such that he may no longer meet the diagnostic criteria for personality disorder; that in any event the appellant will continue to have underlying narcissistic personality traits for the foreseeable future; and that the appellant should be held responsible for his conduct.

144. Given Dr Bowen's evidence on the nature of the appellant's behaviour, the tribunal's assessment of the appellant's evidence is set out below in the paragraphs dealing with the reasons for the decision.

145. In the light of its assessment of the evidence the tribunal makes the following findings of fact. The appellant was born in Mexico on 4 August 1967. He underwent five years undergraduate medical training in Mexico. The appellant subsequently came to the United Kingdom.

146. In 2002, the appellant, whilst working in A and E in Huddersfield obtained contact details of a patient's mother from medical records. The appellant subsequently entered into a relationship with the patient's mother, Sharon. At the time, the appellant was married to a woman known as Gisella who was undergoing IVF treatment. The appellant told Sharon that he was divorced.

147. In or about 2003 the appellant told Sharon that he had testicular cancer in the hope of ending their relationship. The appellant later made a surgical incision to his scrotum which he stitched up in order to convince her that he had a testicular operation.

148. The appellant also told Sharon that he required radiotherapy to his lungs. In order to maintain the subterfuge the appellant went to a tattoo parlour and had marks made to convince her that he was going to have radiotherapy.

149. In or about 2004 the appellant was admitted on to the respondent's performers list. The appellant worked in general practice in the Barnsley area.

150. The appellant's wife, Gisella, having fallen pregnant by the appellant and given birth to a son began divorce proceedings after she

found out about the appellant’s relationship with Sharon.

151. Sharon fell pregnant by the appellant. When she was 7 months pregnant the appellant started looking for a new relationship. The appellant and Sharon separated in 2007.

152. The appellant then established a relationship with a woman known as Donna. He told her that he had had cancer. He did not tell her that he had a daughter by Sharon.

153. The appellant first came to the attention of the respondent as a cause for concern in 2007. The respondent was concerned about: the appellant’s behaviour to himself and to others; and his health.

154. On 28 September 2007 the appellant told the respondent that he had a personality disorder. The appellant was subsequently referred for an occupational health assessment. The respondent also sought advice from NCAS.

155. In or about 2008 in order to avoid going on holiday with Donna the appellant told her that his son had meningitis. He found a picture on the internet which he printed off and passed off as his son.

156. On 17 June 2008 the respondent brought their concerns to the attention of the GMC.

157. On 27 June 2008 the respondent suspended the appellant from the performers list while it considered whether or not to exercise its powers to remove him on the grounds of suitability. The respondent was concerned about the appellant’s failure to engage with its assessment process and issues relating to the appellant’s fitness to practise.

158. In the course of 2008 the appellant was subsequently assessed by a number of medical experts. They were of the view that the appellant had a personality disorder.

159. On 21 August 2008 a GMC interim orders panel imposed a number of conditions on the appellant’s registration in order to protect members of the public. The conditions were reviewed and varied by the GMC on a number of subsequent occasions.

160. On 26 March 2009 the respondent decided to contingently remove the appellant. The conditions imposed by the respondent largely mirrored the conditions imposed by the GMC but with additional conditions to reflect the respondent’s concerns.

161. The conditions imposed by the respondent and GMC continued to be subject to review and amendment.

162. In or about March 2010 arrangements were made for the appellant to see a group analyst, Isobel Conlon, on a weekly basis.

163. On 1 April 2010, following a hearing on 25 February 2010 the appellant became subject to conditions imposed by the respondent which are the subject of the present appeal.

164. Condition 10d) required amongst other things the appellant not to undertake any out of hours work except supervised telephone triage for an out of hours service and/or work in the Rotherham GP walk in centre, within the hours of 8am to 9pm, where the work would be supervised at all times by Dr D Wilson Local Medical Director of Rotherham GP walk in centre or his nominated deputy.

165. Condition 13 required the appellant to submit a weekly return to a named person at NHS Barnsley declaring any primary care employment/out of hours employment/non employment and, where employed, such return to be signed by a principal in the practice/medical director or his designate in an out of hours organization, to confirm that the information was correct, that there had/had not been any concerns and that the appellant had been supervised at all times by the GP principal/medical director Dr Wilson or his nominated deputy

166. Also on 1 April 2010 a GMC fitness to practice committee determined that the appellant's fitness to practise was impaired by reason of adverse physical or mental health and imposed conditions on the appellant's registration.

167. On 2 April 2010 and 3 April 2010 the appellant worked overlapping shifts for Care UK and Primecare Birmingham/CTP

168. On 11 April 2010 the appellant worked overlapping shifts for Care UK and Primecare Birmingham/CTP

169. On 12 April 2010 the appellant declared that he not worked for Primecare Birmingham in any capacity during the week 5 April to 11 April 2010, thereby omitting to state that he had worked for Primecare Cleveland on 11 April 2010; and on the same day worked an overlapping shift for Care UK

170. On 19 April 2010 the appellant declared that he had only worked for Primecare Birmingham telephone triage during the period 12 April to 18 April 2010; the appellant did not declare that he had worked for Care

UK on 12 April, 13 April, 14 April, 15 April, 17 April, 18 April 2010; and that he had worked an overlapping shift for both Care UK and Cleveland Primecare on 18 April 2010

171. On 4 May 2010 the appellant declared that that he had not worked in a primary care practice or for phone triage Primecare in the period 26 April to 2 May 2010, when in fact he had worked on Primecare phone triage on 26 April and 27 April 2010; and had worked on telephone triage for Care UK on 26 April, 27 April (both overlapping with Primecare); and also worked on the 28 April, 29 April and 30 April 2010

172. On 5 May 2010 the appellant worked overlapping shifts for Care UK and Primecare Birmingham/CTP

173. On 17 May 2010 the appellant declared that he had not worked in primary care practice during the period 10 May 2010 to 16 May 2010 and that he had not worked for phone triage Primecare; when in fact he had worked for Primecare Cleveland on 10 May, 11 May, 12 May; and had worked for Care UK telephone triage on 10 May, 11 May, 12 May (all 3 overlapping with Primecare Cleveland), and also worked on 14 May, 15 May and 16 May 2010

174. On 1 June 2010 the appellant declared that he had not worked for Primecare out of hours phone triage or in a primary care practice for Primecare Birmingham during the period 24 May to 30 May 2010; thereby failing to declare that he had worked for Primecare UK on 24 May, 25 May, 26 May, 27 May, 28 May, 29 May and 30 May 2010

175. On 14 June 2010 the appellant declared that he had not worked in out of hours telephone triage or in a health centre for Primecare from 31 May 2010 to 2 June and from 11 June to 13 June; when in fact he had worked for Care UK triage on 1 June and 2 June with an overlapping shift with Primcecare Cleveland on 2 June; and for Care UK triage on 12 June and 13 June 2010

176. On 28 June 2010 the appellant declared that he had not worked for Primecare during the period 21 June to 27 June 2010; when in fact he worked for Primecare Cleveland on 21 June, 22 June and 23 June 2010. He also declared that he not worked in a surgery or in telephone triage for the same period; when in fact he worked on telephone triage for Care UK on 21 June, 22 June, 23 June, 24 June and 25 June 2010

177. The appellant worked further overlapping shifts for both Care UK and Primecare Cleveland on 5 July 2010, 12 July 2010, 14 July 2010, 18 July 2010, 19 July 2010 and 21 July 2010.

178. Over the course of the summer of 2010 the appellant's various employers expressed concerns about the appellant's work arrangements about which they were only beginning to become aware of.

179. Following investigation and inquiries the respondent made the decision, notified on 12 November 2010, which is now the subject of this appeal. The appellant was removed on grounds of unsuitability and breach of conditions imposed on contingent removal.

180. In May 2011, the appellant's sessions with Isobel Conlon re-started following the appellant's fracture of his leg earlier in the year.

181. In a report dated 26 June 2011 Dr Bowen expressed the view that the appellant no longer met the criteria for a diagnosis of personality disorder.

182. The appellant has underlying narcissistic personality traits which will continue for the foreseeable future. The appellant will tend to exhibit a grandiose sense of his self importance; a wish to be admired; and to behave in an exploitative manner within interpersonal relationships.

183. The appellant requires long term therapy. The period of time envisaged is years. It is not be possible to monitor the appellant's progress by reporting by a psychotherapist.

Decision and Reasons

184. Looking at the evidence as a whole and taking into account the submissions, the regulatory framework, and the various guidance before the tribunal, the tribunal directs that

the appellant is removed from the Respondent's performers list because he is unsuitable to be included on that list
Regulation 10 (3) and (4)(c)

185. In coming to this decision the tribunal reminds itself that it proceeds by way of redetermination; that is to say that it must determine matters afresh on its own merits and is not limited to a mere review of the respondent's decision. The tribunal notes that the respondent's decision letter sets out the decision based on unsuitability and breach of conditions.

186. Given the nature of the evidence before the tribunal, it is

unnecessary to decide whether the appellant should also be removed on the grounds of breach of conditions under regulation 12. The substantive issues under this ground have been subsumed into the tribunal's considerations of unsuitability.

187. The tribunal in coming to its decision and in the light of its findings of fact, finds that the cumulative effect of the appellant's behaviour over a number of years together with his continuing underlying narcissistic personality traits show him to be unsuitable to be on the performers list as explained more fully below.

188. The facts as found by the tribunal show that the appellant has deep seated behavioural problems. The appellant was diagnosed by Dr Bowen in 2008 as having a personality disorder based on his bizarre behaviour. The appellant at that time had a grandiose sense of self importance; was engaged in exploitative relationships; and had created of a web of deceit.

189. The tribunal accepts the evidence of Dr Bowen both that the appellant has made considerable improvement since then and that the appellant has underlying narcistic personality traits which will continue for the foreseeable future. The appellant will continue to tend to exhibit a grandiose sense of his self importance; a wish to be admired; and to behave in an exploitative manner within interpersonal relationships. The appellant requires long term therapy.

190. The tribunal has assessed the appellant's evidence taking into account Dr Bowen's views, including the view that the appellant is responsible for his own conduct.

191. The tribunal finds a number of aspects of the appellant's evidence to be unreliable, which tends to undermine his credibility and which seem consonant with Dr Bowen's remarks about the appellant's underlying personality traits.

192. For example, the tribunal finds the appellant's evidence about his understanding of the contractual arrangements to be inconsistent, misleading and reflective of someone unable to accept responsibility for his actions. In this context the appellant in oral evidence sought to justify his actions in failing to tell Primecare and Care UK that he was working for the two of them at the same time. The appellant pointed out the detail of the contractual clauses in the contract with Primecare, at clauses 4.1 to 4.5 (page 108) and argued that the clauses showed him to be an independent contractor and therefore not bound or obliged to keep his employers informed of his other employment activities. The appellant also gave evidence showing that he liked 'to cross the t's and dot the i's' when clarifying his working

arrangements.

193. However, when counsel in cross examination took the appellant to other aspects of his contractual arrangements with Care UK (page 115) which set out the requirement for the appellant to provide prior written consent to work for another company, the appellant's response was simply that he had not read the contract.

194. Counsel also took the appellant to clause 4.11 of the contract that the appellant had been referring to at page 109 which stated that his employer recommended the appellant not to work more than 58 hours a week. The appellant in response at first said that the clause was irrelevant to him and that he did not regard it as advice. The appellant then went onto say that the contents of the clause 'had not be made known to me' .

195. The tribunal finds the appellant's evidence on these matters to be striking: the appellant appeared to be able to trawl through the detail of contracts to identify clauses justifying his behaviour, yet also claimed not to have read those bits of the contract that undermined his self justifications. It is not credible that appellant could on the one hand identify clauses in the contract supporting his position and at the same time claim he had not read the next few clauses in the same section which weighed against him. Nor is it consistent for the appellant to portray himself as a person who likes to cross the t's and dot the i's yet also claim that he had not read the contract or that the clause had not been made known to him.

196. The tribunal also finds the appellant to have a tendency at times to make representations and give evidence minimizing his behaviour rather than accepting the extent of his behaviour. The tribunal finds the appellant in oral evidence and in submissions has a tendency to mislead or misrepresent the views of others.

197. For example, in oral evidence and closing submissions the appellant referred to the assessment of Dr Gopfert and claimed that Dr Gopfert's position was that past response to treatment was indicative of future response to treatment. However, when the tribunal looked at the evidence of Dr Gopfert at D2/12 of the transcript of the GMC fitness to practise hearing of 30 March 2010, it became clear that Dr Gopfert had not said what the appellant claimed. The transcript shows that a question in similar terms had been formulated and put to Dr Gopfert, who replied in qualifying terms: " to a degree, but you would also expect a leveling out after a while…"

198. The tribunal put the full extract of the exchange as set out in the transcript to the appellant, who then accepted that he had not fully set out Dr Gopfert's evidence.

199. By way of further example of the appellant's tendency to minimise the extent of his behaviour, the tribunal notes that the appellant in closing submissions accepted that he had breached condition 13 of the respondent's conditions by filling in 4 forms 'wrongly'. The tribunal drew the appellant's attention to the evidence (at pages 97W, 97X, 97Y, 97Z, 97AA and 97AB) that there were more than 4 forms that were in issue. The appellant then accepted that there were 6 or 7 forms that he had filled in wrongly.

200. The tribunal further finds that the appellant has not only a tendency to paint a less than complete picture for the tribunal, but that he has done so similarly with Dr Bowen. For example , not only did he tell Dr Bowen that he had only filled in 4 forms wrongly; he also created the impression in Dr Bowen's mind, as represented in Dr Bowen's report of 20 March 2011 (page 570), that the appellant's 'income has dropped by 30 % since he has stopped working as a GP'.

201. However, the figures for the appellant's income, as shown at pages 313A and 313B show that in the 6 months prior to his suspension, the appellant earned an average of approximately £13,250 per month; and in the period after his suspension his income varied (excluding weeks not worked) between £12,000 per month and £15,700 per month.

202. The appellant's explanation for his claim of a 30% drop was that it was based on a reduction in his hourly rate from £65 to £43 per hour and the reduction in the number of hours actually worked.

203. The tribunal does not find that to be a satisfactory explanation because it flies in the face both of the figures of his actual earnings and Dr Bowen's oral evidence that he believed that the appellant's income had dropped by 30% since working in A and E.

204. The tribunal finds that the appellant's undoubted deep-seated behavioural problems is a very significant matter that tends to weigh against his suitability to be on the performers list. Whilst the appellant has not recently engaged in the bizarre behaviour noted by Dr Bowen, he has continuing underlying traits of personality disorder, will continue to have them for the foreseeable future and requires long term therapy.

205. However, this is but one aspect of the various matters that tend to weigh against the appellant's suitability. The tribunal also finds that the appellant has engaged in behaviour which amounts to a serious departure from professional standards.

206. The GMC good medical practice guidance refers to

doctors not using their professional position to establish or pursue a sexual or improper emotional relationship with a patient or someone close to them. In the present case the appellant obtained information from a patient's medical records in order to enable him to pursue and enter into a relationship with the patient's mother.

207. In the tribunal's judgement such behaviour amounts to a very serious departure from professional standards and as such weighs against the appellant's suitability. The tribunal takes into account the fact that such events happened in 2002 and do not appear to have come to the attention of those in authority until revealed by the investigations of the respondent. To the extent that the passage of time is material, the tribunal finds that the passage of time since those events reduces the weight to be attached to them. Nevertheless, these events weigh significantly against the appellant.

208. A further aspect of the appellant's behaviour that tends to weigh heavily against his suitability is that relating to the issue of his probity. The tribunal takes probity to refer to matters of being honest, trustworthy and acting with integrity.

209. In this context, as noted previously, the tribunal accepts the evidence of Dr Bowen that the appellant is responsible for his own behaviour.

210. The appellant over the period April 2011 to July 2011, whilst under a duty to submit to the respondent a weekly declaration of the work he was undertaking as a GP, made a number of false and misleading declarations, as set out more fully in the tribunal's findings above. In summary the appellant failed to tell the respondent of times that he had worked for Care UK; the appellant failed to tell the respondent of times that he had worked for Primecare UK; the appellant failed to tell Care UK that he was working for Primecare; the appellant failed to Primecare that he was working for Care UK; and in addition there were 21 occasions when he worked simultaneously for both Care UK and Primecare without either of those organsiations knowing that he was working for the other organization on overlapping shifts.

211. The appellant has said that he is baffled by that bevaviour but that he did not intend to be dishonest. The respondent submits that the appellant did not disclose the full extent of his working because he wished to work more than the hours permitted by the GMC and PCT conditions.

212. It is unnecessary for the tribunal to make specific findings on the appellant's intent. It is sufficient to find that the appellant made false

declarations knowing them to be false. Such behaviour inevitably undermines the appellant's integrity and calls into question his honesty.

213. In addition, the tribunal finds that aspects of the appellant's account for his behaviour in making the false and misleading declarations is inconsistent. For example, the appellant claims that the reason why he did not tell the respondent about his work for Primecare Cleveland was that he considered Primecare Cleveland and Primecare Birmingham to be one organization, thereby making disclosure of the Cleveland work unnecessary. However, in the signed declarations at pages 97W and 97W1 the appellant specifically refers to 'Primecare Birmingham'; whereas at pages 97X and others he refers to for example 'phone triage Primecare'.

214. If it were the case that the appellant believed Cleveland Primecare to be the same as Primecare Birmingham and therefore with no requirement for disclosure to the respondent, then the declaration would only state 'Primecare' as his employer. The appellant has not advanced a satisfactory explanation as to why on some occasions he referred to Primecare Birmingham as opposed to Primecare, particularly as on some of those occasions he was working for Primecare Cleveland (eg 97W).

215. The tribunal finds that the appellant's failure to make proper disclosure of his work effectively undermined the effectiveness of the respondent's arrangements for the appellant to be adequately supervised. The respondent required the appellant to satisfy the respondent that he was undertaking work that was being properly supervised. However, the appellant's failure to tell the respondent of times when he was working, meant that the respondent was kept in ignorance of the extent of his work. In consequence the respondent was not able to monitor all of the appellant's work.

216. These failures on the part of the appellant not only raise issues about his integrity but also raise issues about his insight.

217. Whilst as noted previously, the appellant's behaviour has improved significantly from the time when it can be fairly be described as bizarre, at the time of these events in April to July 2010, it would appear that many of the more difficult periods in the appellant's life had begun to be less prominent. As counsel put it to the appellant, and as the appellant accepted, the April to July 2010 period was relatively stress free given that the GMC fitness to practise committee had met and allowed him to continue to practise with conditions; and he had a contract with Care UK which brought some security and stability to his working hours. Yet despite this more amenable environment with fewer stress triggers, the appellant engaged in the behaviour noted above.

218. As Dr Ball noted, and the tribunal accepts, an important aspect of insight is an ability to reflect on one's own practise and to seek advice from others. The tribunal notes that the appellant did not recognize the need to seek advice about the arrangements he entered into. As a consequence not only did the appellant make repeated false declarations about his work arrangements over a period of months; the respondent, in ignorance, was unable to be satisfied that the appellant's work was being appropriately supervised; and the appellant's employers were effectively deprived of the opportunity to carry out a risk assessment of the appellant's working simultaneously on overlapping shifts. In respect of this latter point Dr Mellor's view (page 290) was that the appellant's actions in working overlapping shifts 'put the service at Care UK at considerable risk'.

219. These are all further matters that weigh heavily against the appellant when considering the question of suitability.

220. The tribunal in applying its own expertise, and which corresponds in large measure with Dr Ball's evidence about the nature and distinctive characteristics of GP practise as opposed to for example work in A and E, notes that GPs are required to work with a high degree of independence; to deal with a wide variety of issues and with people in distress; to offer support; to be are aware of boundaries; to work in people's home; and to develop a relationship with patients over a long period of time.

221. Taking into account the characteristics required of being a GP and the findings on the appellant's deep seated behavioural problems; the appellant's serious departure from professional standards in abusing his access to patient records; and the significant doubts about the appellant's probity, the tribunal finds that the cumulative effect of all these matters are such that the appellant is unsuitable to be on the respondent's performers list.

Summary

The tribunal directs that Dr Herrera-Gilthorpe be removed from Barnsley PCT's performers list because he is unsuitable to be included on the respondent's performers list under Regulation 10 (3) and (4)(c)of the performers lists regulations.

The appeal is dismissed.

Signed Judge of the First Tier Tribunal
Dated 11 August 2011

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