IN THE PRIMARY HEALTH LISTS TRIBUNAL CLAIM NO: PHL 15450

BETWEEN

DR RICHARD BIRCH

APPELLANT

~and~

ANEURIN BEVAN LOCAL HEALTH BOARD

RESPONDENT

DECISION

Before:	Judge Meleri Tudur Mr Tim Bennett (Independent Member) Dr P Garcha (Professional Member)
Hearing:	**7, 8 and 29 August 2012**
Venue:	**Cardiff Combined Court Centre**
Representation:	**Dr Birch was unrepresented** **Mr M Barnes, counsel, represented the Aneurin Bevan Local Health Board.**

The Tribunal heard oral evidence from Dr Rhodes, Dr Taylor and Ms Evans and from Dr Birch.

Appeal

1. Dr Birch is a general practitioner who has been employed from June 2005 until the 14 December 2010 under the GP Retainer Scheme at Carreg Wen and Tudor Gate Surgeries Blaenafon, an Approved GP Training Practice.

2. On the 13 December 2011, the Aneurin Bevan Local Health Board Reference Panel imposed upon him conditions of contingent removal from its Medical Performers' List.

3. On the 16 December 2011, the Tribunal received an appeal from the Appellant against the decision of the Reference Panel.

The Law

4. The NHS (Wales) Act 2006 s 49(1) provides:

   "Persons performing primary medical services
   Regulations may provide that a health care professional of a prescribed description may not perform any primary medical service for which a Local Health Board is responsible unless he is included in a list maintained under the regulations by a Local Health Board."

5. The relevant regulations are the National Health Service (Performers Lists) (Wales) Regulations 2004 (as amended). Regulation 10 sets out the grounds where the Local Health Board must remove the performer from its performers list and where it may do so.

6. Regulation 10(3) provides that a Local Health Board may remove a performer from its performers list where any of the conditions set out in paragraph (4) is satisfied.

7. The conditions set out in paragraph (4) are that the:

   "(a) continued inclusion of that performer in the Local Health Board's performers list would be prejudicial to the efficiency of the services which those included in the relevant performers list perform ("an efficiency case");

   (b) performer is involved in a fraud case in relation to any health scheme; or

   (c) performer is unsuitable to be included in the performers list ("an unsuitability case").

8. Regulation 11 provides the criteria for a decision on removal and Regulation 11(5) states:
   "Where a Local Health Board is considering removal of a performer from its performers' list under Regulation 10(3) and (4)(a) ("an efficiency case"), it shall –

(a) Consider any information relating to the performer which it has received in

accordance with any provision of regulation 9;
(b) Consider any information held by the Assembly as to any record about past or current investigations or proceedings involving or related to that performer which information it shall supply if the Local Health Board so requests; and
(c) In reaching its decision shall take into account the matters referred to in paragraph (6)"

9. Regulation 11(6) provides:
"The matters referred to in paragraph (5)(c) are –
(a) The nature of any incident which was prejudicial to the efficiency of the services which the performer performed;
(b) The length of time since the last incident occurred and since any investigation into it was concluded;
(c) Any action taken by any licensing, regulatory or other body, the police or the courts as a result of any such incident;
(d) the nature of the incident and whether there is a likely risk to patients;

(e) whether the performer has ever failed to comply with a request to undertake an assessment by the NCAA;

(f) whether the performer has previously failed to supply information, make a declaration or comply with an undertaking required on inclusion in a list ;

(g) whether the performer has been refused admittance to, conditionally included in, removed or contingently removed or is currently suspended from any list or any equivalent list, and if so, the facts relating to the matter which led to such action and the reasons given by the Local Health Board or the equivalent body for such action; and

(h) whether the performer is, has in the preceding six months been, or was at the time of the originating events, a director of a body corporate, which was refused admission to, conditionally included in, removed or contingently removed from, any list or equivalent list, or is currently suspended from any such list, and if so, what the facts were in each such case and the reasons given by the Local Health Board or equivalent body in each case for such action.

(7) In making any decision under regulation 10, the Local Health Board shall take into account the overall effect of any relevant incidents and offences relating to the performer of which it is aware, whichever condition it relies on.

(8) When making a decision on any condition in regulation 10(4), the Local Health Board shall state in its decision on which condition it relies.

10. The burden of proof is on the Appellant, Dr Birch, to demonstrate on a balance of probabilities that the contingent removal should be revoked or that the conditions should be varied or revoked.

Issues

11. The issues for determination by the Tribunal were set out in a schedule of findings sought by the Respondent dated 7 March 2012. The Respondent sought that all the conditions imposed on the 13 December 2011, should be confirmed as reasonable, appropriate and proportionate.

12. The Appellant sought to have all the conditions imposed on the 13 December 2011 removed on the basis that they were not reasonable, appropriate or proportionate.

Interlocutory Matters

13. Before the start of the hearing applications were made for submission of further documentary evidence. The Respondent applied to submit further documents supporting the NCAS assessment report and correspondence between it and the Appellant. Dr Birch opposed the application.

14. The Tribunal considered the request and concluded that the documentation had been available to Dr Birch in advance of the hearing and its admission would not prejudice his ability to present his appeal. The evidence was admitted.

15. The parties made an application by consent to admit the redacted version of the GMC Fitness to Practise Panel decision issued on the 27 July 2012. The application was allowed.

16. During the hearing, Mr Barnes made an application for the GMC Multi-source Feedback Questionnaires Guidance prepared on the 1 February 2012 to be admitted in evidence to refute oral evidence given by Dr Birch. Dr Birch did not object to the application and the Tribunal concluded that in the circumstances it was relevant evidence going to a point in issue at the hearing and that it was in the interests of justice for it to be admitted.

17. Following the conclusion of the oral hearing, both parties sought permission to adduce further documentary evidence with their written submissions.

18. The Tribunal considered the applications and concluded that it was not in the interests of justice to admit further documentary evidence upon which the parties would be unable to make further submissions and refused both applications. Other than the written submissions themselves directed by the Tribunal, no further documentary evidence was admitted after the conclusion of oral evidence.

Background

19. Dr Birch worked as a GP Retainer in two practices, the costs of which were shared between the Health Board and the practices. The Retainer Scheme is educationally supportive and designed to enable GPs to retain clinical skills on a part-time basis. GPs on the scheme are approved by the Deanery and are usually on the scheme for a maximum of five years.

20. Dr Birch's request to the Deanery for his retainership to be extended beyond the five years from 4 June 2010 was refused.

21. In 2008, Dr Wayne Lewis, Senior Partner at Carreg Wen Surgery raised concerns with the Respondent about the practice of the Appellant.

22. On the 19 October 2009, Dr Hamilton Kirkwood, Torfaen Clinical Director for the Respondent, determined to undertake a review of Dr Birch's clinical practice at Carreg Wen Surgery, due to the nature and extent of the concerns raised by Dr Lewis, which warranted further exploration.

23. On the 18 December 2009, an informal screening panel, attended by Dr Birch, recommended a full, thorough and independent investigation into Dr Birch's clinical practice at both practices where he was employed, namely Carreg Wen and Tudor Gate Surgeries, by the Primary Medical Care Advisory Team (PMCAT) due to significant disagreement between Dr Birch and Dr Hamilton Kirkwood regarding the findings of the initial review of his clinical practice.

24. On the 27 April 2010, the reconvened Screening Panel, on the strength of the PMCAT independent investigation indicating a cause for concern regarding Dr Birch's performance, recommended that Dr Birch's case should progress to the next stage, which was a Reference Panel.

25. On the 12 May 2010, Dr Hamilton Kirkwood referred Dr Birch to the General Medical Council (GMC) on an unrelated probity matter.

26. On 2 June 2010, the Reference Panel met and Dr Birch did not attend. The Panel decided to contingently remove Dr Birch from the Medical Performers' List based on the findings of the independent PMCAT investigation conclusion that Dr Birch frequently exhibited criteria associated with the "unacceptable GP" as defined in the Royal College of General Practitioners' guidance 2002 and 2008.

27. The conditions of contingent removal were :

    (a) Full co-operation with an assessment to be undertaken by National Clinical Assessment Service (NCAS).
    (b) Restriction of professional practice to Tudor Gate Surgery where the NCAS assessment would take place;
    (c) Full implementation of the recommendations from NCAS assessment report within a mutually agreed timeframe
    (d) Work and co-operate with the Health Board to develop and implement a development plan within a mutually agreed timeframe.

28. The Respondent agreed to fund a clinical attachment for Dr Birch at the Tudor Gate surgery, in the first instance for up to three months to allow the NCAS assessment to be completed. The arrangement started in June 2010 and was extended to the 15 October 2010 to enable the completion of the clinical assessment visit by NCAS.

29. NCAS representatives met with Dr Birch and representatives of the referring body on the 20 July 2010 and on the basis of the information received, concluded that assessment would be an appropriate way forward.

30. NCAS received the “Agreement to NCAS assessment and follow-up action” signed by Dr Birch, a representative of the referring body and an NCAS representative on the 20 July 2010.

31. In November 2010, the Reference Panel decided to vary the conditions of contingent removal to allow Dr Birch to seek employment within a supervised environment, a decision made pending the publication of the final NCAS Assessment Report.

32. The NCAS assessment report was issued on the 25 November 2011

33. Further consideration of the issues at reconvened Reference Panel meetings were deferred in January, February and March 2011 at the request of Gwent Local Medical Committee, citing concerns about Dr Birch’s health.

34. On the 6 June 2011, Dr Birch was suspended from the GMC register by a GMC Interim Orders panel for a period of eighteen months, preventing him from working in any capacity that requires registration with the GMC. The suspension was without prejudice to allow for further investigation.

35. The meeting of the Reference Panel scheduled for July 2011 was deferred at the instigation of the Respondent.

36. On the 13 December 2011, the Reference Panel reconvened to review the variation of his conditions of contingent removal.

37. Dr Birch did not attend the meeting and was not represented. He did submit a written statement to the panel for their consideration by email dated 1 December 2011. The statement was as follows: “I wish to inform you that I will not be requesting an oral hearing. I appreciate the responsibility of the panel in considering the evidence before them, gathered over many months. I do not wish to add to the complexity of the task by adding evidence at this late stage. I have co-operated fully throughout this process and remain ready to answer any questions. I would caution the panel against acting, whilst there is no verification of their derivation, upon the conclusions of the NCAS report by imposing conditions that are disproportionate. These comments do not in any way constitute an acceptance on my part of the accuracy of any of the information held by ABHB.”

38. The Reference Panel decided to impose the following conditions upon Dr Birch’s contingent removal from the providers’ list:

    a) Dr Birch to remain registered for medical care with an NHS GP and informs him/her that he is subject to these procedures and continuing investigation by the GMC.
    b) Dr Birch to keep the Health Board, via the Assistant Medical Director for General Practice (AMD-GP), fully informed of the progression of the consideration of his case by the GMC.

c) Dr Birch to notify the Health Board of any application for medical employment outside the agreed practice setting in the UK and also if he applies for medical employment outside the UK
d) Dr Birch to inform all prospective employers of the conditions herein and any subsequent conditions determined by the Health Board or the GMC
e) Dr Birch to allow the Health Board to exchange information with any future employer or any organisation for which he provides medical services and any individual involved in his supervision
f) Dr Birch to inform the Health Board if he applies for inclusion in another Medical Performers' List.
g) Dr Birch will undertake an independent occupational health assessment, funded by the Health Board, when the GMC outcome is determined and prior to recommencing clinical duties, the arrangements for this to be determined by the Health Board and further reassessments if deemed necessary by the AMD-GP.
h) Dr Birch will comply with an NCAS developed Action Plan at his own expense; to start within a defined timescale from the date of any determination by the GMC which permits this; this timescale to be agreed by the ABHB. Upon satisfactory completion of the Action Plan the Reference Panel will reconvene to review the conditions of the contingent removal.
i) Dr Birch to restrict his professional practice to an NHS Advanced Training Practice under the supervision of a GP supervisor approved by the Deanery and ABHB and that specifically he does not provide any locum or Our of Hours services and does not undertake any private practice.
j) Dr Birch to limit his medical practice to an agreed number of sessions per week to be determined in discussion with the Occupational Health Adviser undertaking the assessment. The number of sessions may be varied subject to further occupational health assessment or review of the conditions of contingent removal upon satisfactory completion of the NCAS developed Action Plan.
k) Dr Birch to meet at least monthly with the AMD-GP (or a nominee of the AMD- GP) to discuss the progress of his case unless it is determined by the AMD-GP that the meeting can be postponed.
l) Dr Birch permits the Health Board to disclose the above undertakings to any appropriate person requesting information as to this registration status as determined necessary by the Health Board.

39. Dr Birch was formally notified of the conditions imposed by letter dated 14 December 2011.

40. A conference call was held on the 22 December 2011 to discuss the draft action plan prepared following the distribution of the NCAS report and Dr Birch participated.

41. Dr Birch appealed to the Tribunal against the conditions imposed.

42. On the 24 – 27 July 2012, the GMC Fitness to Practice Panel met in Manchester and concluded that the NCAS report provided "..an insufficient basis upon which it might determine, within the context of fitness to practice

and with regard to the standards defined in Calhaem v GMC that your professional performance has been unacceptably low as a result of reference to a fair sample of your work."

43. The panel concluded that Dr Birch's fitness to practice is not impaired by reason of his performance and in conclusion recorded : "In response to the recommendation of the NCAS Assessors that:- "Dr Birch will need to complete a significant programme of work to address the areas for improvement identified during the NCAS assessment – this should include increasing the number of sessions he works to facilitate adequate development in a reasonable length of time" you stated in your evidence that the next steps proposed by NCAS were both desirable and feasible." The panel removed the suspension.

Evidence

44. The Tribunal had before it a substantial bundle of documents which included the appeal, response and directions made prior to the final hearing; the Appellant and Respondent's further documentary evidence, witness statements, extracts from the relevant legislation, the decision of the GMC Fitness to Practise Panel and GMC Multi-source Feedback Questionnaire Guidance prepared on the 1 February 2012.

45. Dr Martin Rhodes, Senior Assessment Adviser for NCAS, in a witness statement and in oral evidence outlined the responsibilities of his role and explained the processes implemented by NCAS in considering referrals and in the preparation and finalising of reports. He set out the data gathering process and the number of different sources for the information obtained. He confirmed his involvement in Dr Birch's assessment in quality assuring the behavioural report and the peer and patient feedback, although he had not met Dr Birch or attended his surgery. His oral evidence was that the NCAS report needs to be looked at as a whole and that the opportunity to unpick individual issues within the report is at the draft report stage, when a copy is sent to the interested party and an opportunity given for feedback prior to the report being finalised.

46. On cross-examination, Dr Rhodes maintained that the NCAS report was written for developmental purposes and for a different purpose to that required by the GMC at the Fitness to Practice Panel, that it was written to include positive comments as well as criticism and that the report is written taking into account all of the information available. He confirmed that the Occupational Health Assessment had concluded that Dr Birch's health condition had no adverse effect on his performance and made recommendations for monitoring, which he concluded to be a "low end" recommendation.

47. The Tribunal had in evidence before it the full NCAS report dated 25 November 2010, prepared following the assessment of Dr Birch. The report recorded that the referral to NCAS had been made following concerns about the performance of the practitioner in respect of good clinical care and in particular, his assessment of the patient's condition and record keeping. At

the time of the assessment, Dr Birch was working at the Tudor Gate practice on a part time basis, working four clinical sessions per week and not undertaking any home visits or out of hours work although he was responsible for attending to emergencies arising while he was working in the practice.

48. The report introduction sets out the "Purpose of the Assessment" as follows: "The purpose of the NCAS assessment was to provide and independent view on the performance of the practitioner with the wider context of their practice; identify satisfactory practice and any areas of concern; identify factors that may be contributing to these concerns and make recommendations for addressing any difficulties identified."

49. The assessment was multifaceted and included a clinical review record, observation of practice, case based assessment and peer multi-source feedback. Dr Birch was interviewed at the conclusion of the assessment and was the subject of a behavioural assessment and an occupational health assessment.

50. The report recorded that in the final interview, "..Dr Birch said that he felt that the NCAS assessment had been very comprehensive and that he had a good deal of respect for the process. He said that the methodology was clear to him and that the rigour of the process made it a fair one. He said that he had an opportunity to show the way he worked and to learn along the way. He said that "a good deal of learning had occurred"."

51. Based on the assessment results, the NCAS recommendations were:

"Given the breadth and depth of the concerns about Dr Birch's performance in the core areas of his practice, the Respondent should in the interests of patient safety ensure that appropriate safeguards are in place. In particular, the Respondent should continue the current restrictions until such time that the Respondent is satisfied that Dr Birch is able to practise in an unsupervised environment."

52. The report identified the following areas that Dr Birch needed to improve:
    - Record keeping
    - Infection control
    - Working in teams/sharing information with colleagues
    - Assessment of the patients' condition
    - Providing and arranging investigation
    - Clinical management
    - Use of resources
    - Communication and the practitioner-patient partnership
    - Maintaining good medical practice

53. The report set out 45 examples of poor record keeping, with several of the examples citing replication of the same example in numerous cases. In relation to infection control, only two examples of poor practice were identified and both were challenged as to their accuracy by Dr Birch.

54. The conclusion of the report under the heading “Overview of performance” was that “Dr Birch’s performance was found to be below the level expected of a general practitioner. In particular, in a number of core areas of good clinical care Dr Birch’s performance were either inconsistent or poor. The poor standard of Dr Birch’s record keeping along with his idiosyncratic approach in this area meant that it was difficult to follow the care that patients had been given. This also meant that continuity of care provided to patients by another practitioner could have been compromised as they may not have been able to understand what Dr Birch had recorded. His referral of clinical decision making to colleagues on several occasions rather than himself making a clear decision was also of concern.”

55. The report identified Dr Birch’s practice as poor in the areas of record keeping, infection control, working in teams and sharing information with colleagues. His performance was inconsistent in the six other areas bulleted.

56. The report set out the proposed next steps which suggested that : “Dr Birch will need to compete a significant programme of work to address the areas for improvement identified during the NCAS assessment and that should include increasing the number of sessions he works to facilitate adequate development in a reasonable length of time.”

57. The report went on: “The referring body will need to consider the feasibility and appropriateness of developing a remediation programme in light of Dr Birch’s current working pattern and employment arrangements. A different placement would be advisable and this may be sourced either through the Deanery if they have the resources to support Dr Birch or through other local arrangements.

    If remediation and/or reskilling are considered practicable and appropriate then NCAS can provide support and guidance to develop an action plan with clear and timetabled objectives and actions to be taken if there is inadequate engagement from the practitioner or objectives are not achieved.”

58. The report was considered by the Reference Panel on the 13 December 2011. Dr Birch had confirmed that he would not be present but had submitted a written statement which was circulated to the panel members in advance of the meeting.

59. Dr Liam Taylor, ADP-GP at the Aneurin Bevan Health Board gave evidence about the chronology of the case and confirmed that the usual period for a GP retainer placement is four years. Its purpose is to enable GPs to maintain their clinical skills and the Health Board makes a contribution to the cost of the placement, sharing the cost of the placement equally with the practice. He confirmed the chronology of events as set out in his written statement and clarified that he regarded the Draft Action Plan as a working document to be worked on by the Health Board and the practitioner.

60. He described his own attempts to engage with Dr Birch, reflecting to him a balanced view, urging him to seek independent advice on his position and not

to make rash decisions. He described himself as having done his best and afforded Dr Birch every opportunity to engage in the process. He confirmed that Dr Birch had been prepared to engage at one stage, reflected in Dr Birch's email of the 27 December 2010 when he confirmed his preference for the conditions proposed to removal from the performers' list. However, Dr Birch had not responded to the offer of an opportunity to comment on the conditions proposed nor had he offered conditions that he perceived as appropriate and it was not until the appeal was under way and the telephone hearing in March 2012 that Dr Birch had made his position clear that he did not consider any condition to be appropriate.

61. Dr Taylor explained that the request for Dr Birch to fund his own retraining was as a result of the investment already made by the Health Board and the current situation of resources being finite and the focus being on patient care.

62. On cross-examination, Dr Taylor confirmed that Dr Birch had not failed to do anything required on him and had not disregarded any formal requirements of him but had not engaged in the process. For instance, Dr birch had not read the draft NCAS report sent to him nor had he made any comments on it. He confirmed that he, Dr Taylor, had personally taken the decision to defer the Reference Panel in February 2011because Dr Graham had made a request on grounds of Dr Birch's health. He further confirmed that he had not rushed the process of concluding the Reference Panel because he wanted Dr Birch to have time to reflect on his position when in full health. He considered it unfair to proceed to a hearing when Dr Birch was known to be ill and knowing that the condition of a placement at an Advanced Training Practice Placement was being sought.

63. Dr Taylor expressed his view that whilst Dr Birch was prepared to send emails, he was not prepared to have face to face meetings, which Dr Taylor considered a more appropriate means of discussing progress and moving the case forward. He maintained his position under cross-examination that although there had been some contact, Dr Birch had not engaged with him. He confirmed that in considering the NCAS report, the Health Board had looked at it in the round, on the basis that NCAS is a nationally recognised process for assessing doctors and making recommendations to remedy areas of weakness. He clarified that by mandating an Advanced Training Practice supported by the NCAS draft Action Plan, the Health Board had clearly indicated that it did not consider Dr Birch's career as irredeemable.

64. Dr Taylor could not confirm that Dr Birch's contract with the Health Board specified that he was to have 15 minute appointments with his patients rather than the usual 10. He confirmed that the Health Board did not accept Dr Birch's issues with the NCAS assessment and suggested that spending more than 10 minutes with a patient might be an inefficient use of resources.

65. It was acknowledged on behalf of the Respondent that condition (b) was no longer relevant since the GMC had issued its decision and raised the suspension prior to the final hearing of the appeal. Dr Taylor maintained however that the other conditions continued to be necessary and appropriate.

66. The Tribunal heard oral evidence from Mrs S Evans who was the chair of the Reference Panel who imposed the conditions on the 13 December 2011. She confirmed the process of considering the conditions and explained that every effort had been made to consider Dr Birch's point of view as he was not present and had not been represented.

67. Dr Birch's oral evidence was that he had been fully engaged in the process but that he did not accept the conclusions of the NCAS report because the assessment had not been validated or the data triangulated. He referred to the Multi-Source Feedback questionnaires to validate his conclusions, showing the difference in outcome depending on whether the mean or median score was applied. He confirmed that he would be very happy to act immediately on criticism on a question and answer format and that he looked forward to working through the cases raised with the assessors. He disagreed with the findings on the Multi-source Feedback, the conclusions about his insight, record keeping and infection control. He accepted that there is a clear division of opinion in the two practices and stated that he made strident attempts to resolve differences at Garreg Wen and sought support from the Deanery and Health Board. He expressed his desire to return to work and to address the issues. He confirmed that he had admitted to the GMC that the NCAS report had found and identified shortcomings in his practise but not that those shortcomings require the conditions identified to be imposed on his registration.

68. In the course of his evidence, Dr Birch explained that he had kept records of the patients seen and could cross reference the NCAS findings to his own records. He further confirmed that he had never sought to delay the process of the Reference Panel on health grounds: he stated that he has a chronic ongoing stable medical condition. Following the receipt of the NCAS report, he concluded that the expectation that he should deal with patients in 10 minute appointments was not attainable because he was no longer able to work in the arranged way where he saw patients at 15 minute intervals.

69. On cross-examination, he did not accept that he had not engaged in the process, referring to his attendance at the Referral Panel meeting as confirmation of his engagement in the process. He maintained that he was engaged in the process and that it would be much better for him to carry on with his continuing professional development than attend meetings where he concluded his engagement was ineffective. He accepted that some of his statements were not as forthcoming as they might have been but suggested that there was no evidence that he had not been engaged in the process, relying on his own evidence that he had done everything required of him. He confirmed that it was his view that the NCAS assessment was a good process, fair and thorough but confirmed his conclusion that the report was flawed although the assessment itself was a robust process. He confirmed that he had not read the draft NCAS report because he did not consider it necessary because it was a draft and not a final document.

70. He confirmed that he had told the GMC that he always aims to improve his practice and he is now in a position to take on extra sessions, as his son is in school and in his view it is the increase in numbers of sessions proposed that is both desirable and feasible. On cross-examination, he did not accept that the findings of the GMC had been to implement the training suggested by NCAS in its report. He did not accept that that was the correct interpretation of the GMC decision. He interpreted the GMC decision to imply that he should undertake directed self-learning. He clarified that he believed the next steps following the NCAS assessment would involve self directed learning and that his agreement (as recorded in the GMC decision) went no further than the statement quoted in the GMC report. His interpretation of the way forward was to look at the NCAS report at Tudor Gate surgery and increase the number of sessions worked, to provide adequate developments. There was no reliable evidence in his view that his practice fell below the standard of a reasonably competent GP but he acknowledged that that did not mean that he could not identify areas where he can improve his practice. He did not accept that there were deficits in his record keeping, infection control, working in teams and concluded that in none of those areas did he fall below the standard expected from a reasonably competent GP.

71. He stated that he did not consider himself to have previous experience or qualification to respond to the draft NCAS report and confirmed that the report was finalised without any input from him. He further gave evidence that he did not read the draft report because he was unaware of any expectation to do so as the covering letter did not state that he was expected to read the report. He stated that he had not read the draft Action Plan and had not read it in preparation for the appeal hearing. He did not consider it to have been sensible to read it when he got it. He did not perceive the action plan to be for his shortcomings, the action plan was for the Health Board to review. He explained that from early in the process he had a responsibility to ensure that his engagement was effective and he had concluded that making comments was not effective engagement because the Health Board did not accept his comments. He had read final documents but had not read any draft documents. He confirmed that he did not consider any need for a further occupational health assessment, an assessment having been made and no issues identified.

72. In his statement dated 11 May 2012, Dr Birch had stated that he did not consider the contents of the NCAS report to be up for discussion because he had noted the action point in the minutes of the meeting on the 4 January 2012 that the NCAS assessment would be considered at a panel to consider the contingent removal conditions "..in the full knowledge that I was certified sick and "may not be available for work for several months".

Tribunal's conclusions with reasons

73. The issues for the Tribunal were whether the conditions proposed by the Respondent were appropriate, proportionate and necessary to ensure that Dr Birch could remain on the providers' list. The appeal was against the

Respondent's decision to contingently remove him because his practice is detrimental to the efficiency of the service.

74. In a contingent removal case, the burden of proof is on the Appellant to show that the conditions should not be imposed or that the conditions should be varied.

75. We have considered the evidence presented both in the documentation, orally at the hearing and the written submissions of the parties very carefully and find as a fact on the basis of Dr Taylor's evidence that there have been three expressions of concern about Dr Birch's practice during the period from 2008 to 2010. We further accept Dr Taylor's evidence that the PMCAT independent investigation concluded that there were sufficient concerns about Dr Birch's practice to refer the matter to a Reference Panel. We did not have the PMCAT report in evidence and note that Dr Birch disagreed with the content of the report.

76. We further find as facts that Dr Birch attended one hearing of the Reference Panel and that he participated in the conference call with NCAS and a representative of the Health Board on the 22 December 2011. His own evidence was to confirm that he has never read the NCAS draft Action Plan.

77. It is relevant to our considerations that Dr Birch has been on the GP Retainer Scheme for a period of five years and that since the termination of his employment in December 2009 and his period undertaking an assessment placement between June and October 2010, he has been suspended from practice as a doctor and has not undergone any supervised training or medical practice. We conclude that at the very least, in order to effect his return to practice, it will be necessary for Dr Birch to work with the Deanery to consider his current training needs and to identify areas which he will need to address as a result of his absence from practice.

78. In parallel proceedings, a GMC Fitness to Practice Panel considered, shortly before the final hearing of the appeal, firstly, a separate probity issue about which the Tribunal had no evidence and in respect of which the decision presented in evidence had been redacted and secondly, fitness to practice in the context of Dr Birch's clinical practice. The matters giving rise to his contingent removal from the Performer's List had not been referred to the GMC by the Health Board. It is important to state however, that the consideration of the issues by the GMC involved different evidence, to that before the Tribunal and the application of different regulations and criteria to those considered by the Tribunal. The Tribunal is not bound by the decision of the GMC because it addresses different considerations. The redacted decision was presented in evidence so that the Tribunal was aware of the outcome of that panel.

79. The conditions imposed by the Respondent on Dr Birch and against which he has appealed, fall broadly into three categories: those related to the then ongoing GMC proceedings, those related to his health and those pertaining to his practice.

80. At the hearing, it was confirmed that the conditions related to the GMC proceedings were no longer relevant in view of the GMC having issued their decision in the Fitness to Practice proceedings and the Respondent was no longer pursuing the case for the inclusion of those conditions and the conditions should be amended to omit any reference to the GMC proceedings.

81. Dr Birch's appeal was pursued on the premise that there was no basis for any conditions being imposed upon his continued inclusion in the Performers' List. Dr Birch's position can be summarised as being that his performance is satisfactory in all areas, although it can always be improved. We noted that whilst he had, as recorded in the GMC decision, indicated at that hearing that "..the next steps proposed by NCAS were both desirable and feasible.", in oral evidence before the Tribunal, he qualified his position stating that his only agreement was with the proposal that he should "increase the number of sessions worked to facilitate adequate development in a reasonable length of time." We also noted with interest that the representative at the GMC hearing had raised the issue of Dr Birch's engagement in the process there.

82. The Appellant's engagement with the assessment process and his insight into his own performance was an important issue for the Respondent. It was Dr Birch's position that he had fully engaged with the NCAS process: from the documentary evidence presented and the oral evidence of Dr Taylor, we conclude that his view is not supported by the evidence. We would interpret "fully engaged" to mean being proactive and co-operative in the procedures. Dr Birch's consistent submission that he had done "all that was required" of him, and had not failed to do anything that was required of him was confirmation that he had done the bare minimum in terms of engaging with the process of the assessment and had not been proactive in accessing the support offered to him by the Health Board. We noted that although the continuation of Dr Birch's licence to practice as a doctor was in question, he did not seek to proactively work with the Health Board, did not communicate with Dr Taylor, other than when there was an obligation upon him to do so. We found Dr Birch's evidence that he had not read the draft NCAS report because he had not been told to do so, of concern. On reading the NCAS instructions and agreement document, we noted that it is specified that the doctor should respond to the draft report (Dr Birch had signed up to the terms and conditions of the NCAS agreement as had the Health Board), a requirement with which Dr Birch did not, by his own evidence, comply.

83. We accept the submission by Dr Birch that he did not delay the conclusion of the proceedings at all, but noted that despite his claim of urgency to get the issues resolved by the Reference Panel, he did not convey this to the Respondent or set that out in an email or letter. We consider that the actions of the Respondent in delaying the consideration of the case until there might be an improvement in Dr Birch's health to be recognition of a principle of natural justice that he is entitled to an opportunity to a fair hearing and to participate in the hearing by presenting his case. We are satisfied from the evidence of Dr Taylor that he is a man of integrity and genuinely sought to

support Dr Birch as far as possible. We do not consider that in this case any criticism can be levelled at him for delaying the conclusion of the Referral Panel because he wanted to give Dr Birch an opportunity to participate effectively in the process. We are satisfied from the emails produced that he attempted to secure Dr Birch's engagement and to meet with him on a personal level to discuss the issues arising.

84. The evidence within the NCAS report was that Dr Birch had found the process robust, yet he was adamant that he did not accept the report's conclusions and he confirmed in his closing submissions that he did not accept the NCAS analysis of the data gathered. We noted that initially, in his evidence, Dr Birch appeared to accept that there were areas of his practice where he might need to make improvements, but during his oral evidence he retreated from that position, indicating that he did not accept any of the NCAS conclusions and did not accept their recommendations.

85. We have considered very carefully the contents of the NCAS report and Dr Birch's representations regarding its conclusions. We have considered Dr Birch's submissions that the data had not been triangulated and that the reports' conclusions were unsafe. We have also taken into consideration Dr Rhodes' evidence about the process of the NCAS assessment and how the report is compiled, the purpose of the assessment and report and the data gathering process.

86. We have concluded that the NCAS process is a nationally recognised and comprehensive assessment process, devised to support doctors and other medical professionals in their work. We are satisfied that the multi-faceted approach to the compilation of the information and reliance on five different information gathering processes and their evaluation by trained and experienced assessors to be sufficient to make the report reliable. We do not accept Dr Birch's submissions about the conclusions nor his objections to their validity because he has failed to consider the breadth of the data gathering process and the multi-faceted approach taken, focussing on the peer response data and a few individual examples of poor practice with which he takes issue. We have concluded that we accept the overall conclusions of the NCAS report based as they are on what even Dr Birch acknowledged to be robust data gathering processes and evaluation by experienced and expert assessors.

87. We have concluded that the NCAS report is good evidence upon which to consider Dr Birch's practice because it is based on a wide range of information gathered from various sources using different approaches and despite his concerns about individual items within the data, we have decided that the breadth of the report is such that we can rely on its conclusions.

88. Furthermore, the report reflects the conclusions of not one but a number of assessors bringing a breadth of experience and viewpoints to the table, and we are satisfied that its conclusions can be relied upon. We accept its conclusion that Dr Birch's performance in some areas was inconsistent and in others poor and in need of improvement. We have concluded that the

evidence of the NCAS report, the evidence of Dr Taylor, the fact that Dr Birch has been away from medical practice since December 2010 and his lack of insight into the weaknesses in his practice provide sufficient basis for the conclusion that on a balance of probability it is more likely than not that his practice is prejudicial to the efficiency of the service and that conditions should be imposed upon his remaining on the medical performers' list. We conclude that it is therefore appropriate, proportionate and necessary to impose conditions on his contingent removal.

89. Turning to the conditions, we have considered very carefully each of proposed conditions and asked whether the evidence provided supports the need for the individual conditions identified. Dr Birch's position was that there is no need for any condition at all upon his continued inclusion in the list. We disagree because he has been out of practice now for almost two years and we were not presented with any documentary evidence to show that he has undertaken any formal or supervised training during that period, although he confirmed in oral evidence that he had kept up with his continuing professional development. It is our view that it would be necessary for Dr Birch to consider his current learning needs and agree a period of training in which to address them in collaboration with the Deanery.

90. We have looked at each of the conditions individually and considered whether in the context of the NCAS findings and the other evidence presented, there is evidence to support their inclusion. It is our view that this is the exercise in which Dr Birch could have meaningfully engaged by reading the draft Action Plan when it was first sent to him and if he had considered what conditions might be appropriate in the event that the Tribunal did not agree with his standpoint that no conditions at all were necessary.

91. We have considered the request to include within the conditions a placement at an Advanced Training Practice. We have concluded, based on the NCAS report and Dr Taylor's evidence that it is not in dispute that there are no major patient safety concerns, and that Dr Birch has previously worked for a considerable period within a standard Training Practice. The number of sessions worked within the practice were limited and we do not consider that the evidence is clear that the support offered by a standard training practice would not be sufficient to meet his needs. We conclude that such a practice would still be able to offer him the necessary supervision and that a placement at an Advanced Training Practice has not been shown to be necessary.

92. We were concerned about Dr Birch's reluctance to meet with the Respondent's representative and conclude that such face to face meetings are necessary to ensure that his retraining programme is on course and that he is ensured of access to the necessary support. To that end, we have concluded that it is reasonable to require such meetings to take place, albeit on a bi-monthly basis rather than the monthly meetings proposed by the Respondent.

93. We consider that it is reasonable and proportionate to require the Appellant's consent to the disclosure of information to other prospective employers and such a condition is properly included.

94. In considering the "health-related" conditions, we accepted Dr Birch's evidence that he suffers from a chronic condition and that he is sufficiently aware of his condition to ensure that he seeks medical advice and assistance when necessary without need for the imposition of a condition to that effect. The conclusion of the NCAS Occupational Health Assessment was that there were then no health issues affecting his ability to work, that his condition was well controlled since first diagnosis and Dr Birch has learnt how to control the symptoms. It was Dr Birch's evidence that his condition has not deteriorated since the assessment. However, he has been out of practice for almost two years and will require to undertake an independent occupational health assessment funded by the Health Board to enable decisions to be made about any necessary reasonable adjustments following a prolonged absence from work. To that end it will be necessary to include a condition for a further Occupational Health Assessment. We conclude that there will be no need for a condition that Dr Birch remains registered with an NHS doctor.

95. Now that the GMC proceedings have been concluded, it will be necessary to identify a timescale and Action Plan for retraining and facilitating a return to work. As already mentioned, the Appellant has been out of practice for a prolonged period and it will now be necessary to involve the Deanery in the identification of his current learning needs. The condition relating to compliance with the NCAS Action Plan will therefore need to be amended to include the involvement of the Deanery in the process. The difficulties encountered by Dr Birch have raised another aspect to his retraining not considered at the time the conditions were imposed and we have concluded that it would be beneficial for him to have a mentor who will act as a critical friend and assist in addressing the issues that may arise in retraining as well as assisting in addressing some of the issues that were raised during the evidence regarding the engagement without being judgemental or being involved in the assessment process.. Such meetings would be beneficially undertaken on a two monthly basis. This was not a condition put forward by either of the parties, but the Tribunal as an expert Tribunal considers that such a condition should be included to provide Dr Birch with the opportunity to discuss his progress and training programme with a trained mentor. Whilst we consider that it is necessary for Dr Birch to fund his own retraining, we have decided that the trained mentor should be funded by the Health Board because of the significant and onerous financial burden Dr Birch will obviously have in funding his retraining.

96. We acknowledge that the parties were not specifically asked to comment upon the proposal, but draw to the parties' attention their right to apply for a review of the decision if they consider that it contains an error of law and that they should have an opportunity to make representations in response to the amended conditions.

Order

Appeal dismissed.

The Appellant, Dr Richard Birch is contingently removed from the Performers' List subject to the following conditions:

Dr Birch shall

a) notify the Health Board of any application for medical employment outside the agreed practice setting in the UK and also if he applies for medical employment outside the UK.
b) Agree to inform all prospective employers of the conditions herein.
c) Agree to allow the Health Board to exchange information with any future employer or any organisation for which you provide medical services and any individual involved in your supervision
d) Agree to inform the Health Board if he applies for inclusion in another Medical Performers' List.
e) Agree to undertake an independent occupational health assessment funded by the Health Board to enable decision to be made about necessary reasonable adjustments following a prolonged absence from work.
f) Co-operate in the preparation of a new Action Plan based on a comprehensive learning needs assessment undertaken in consultation with the Deanery and to be approved by the Health Board, taking into consideration the NCAS recommendations and will comply with the plan at his own expense. Upon satisfactory completion of the Action Plan the Reference Panel will reconvene to review the conditions of the contingent removal.
g) Agree to restrict his professional practice to an NHS Training Practice under the supervision of a GP supervisor approved by the Deanery and ABHB and that specifically he does not provide any locum or our of hours services and does not undertake any private practice.
h) Conduct an agreed number of medical practice sessions per week to enable him to address his agreed training needs within a reasonable time, in consultation with the clinical supervisor and the Deanery. The number of session may be varied subject to a review of the conditions of contingent removal upon satisfactory completion of the Action Plan.
i) Meet at least bi-monthly with the Assistant Medical Director for General Practice (or a nominee of the Assistant Medical Director for General Practice) to discuss the progress of his case unless it is determined by the AMD-GP that the meeting can be postponed.
j) Meet at least bi-monthly with a trained mentor, selected in consultation with the Deanery and funded by the Health Board.
k) Agree to the Health Board disclosing the above undertakings to any person requesting information as to his registration status as determined necessary by the Health Board.

Dated 20 September 2012
Meleri Tudur
Tribunal Judge
Primary Health Lists