



## Primary Health Lists

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

Dr Andrew Gilbey

v

Abertawe Bro Morgannwg University Health Board

[2012] PHL 15549

Before:

Judge Meleri Tudur

Dr Gopal Sharma

Mrs Linda Thurlow

Hearing

11-13 June 2013 Cardiff Magistrates Court

Dr Gilbey represented himself, assisted by Mr Powell.

The Respondent was represented by Mr Jeremy Hyam of counsel and Ms Whitman of Morgan Cole, solicitors.

Dr Waskett, Dr Jane Harrison and Dr Gilbey gave oral evidence.

### Decision

#### Appeal

1. Dr Gilbey applies to the Tribunal pursuant to The NHS (Performers Lists)(Wales) Regulations 2004 ("the Regulations") against the decision of the Respondent made under Regulation 15(6)(b) of the Regulations to remove him from its performers list on the basis that the Applicant had failed to comply with the conditions of his contingent removal from the list imposed under a consent order made on the 26 August 2011.

#### Background

2. Dr Gilbey worked at the Cwmllynfell and Ystalyfera practices from 1988 until 2007. Following a complaint against him in 2006, he underwent an NCAS assessment and a report was issued dated 24 September 2007, identifying six areas of inconsistent performance and eight areas of unsatisfactory performance. The recommendation of the report was that Dr Gilbey should not practice independently until he had completed a period of targeted, monitored and supervised retraining of up to 12 months. It was further recommended that Dr Gilbey be

placed with an advanced training practice (ATP) to be arranged by the Welsh Deanery. He was suspended from the performers list on the 4 September 2007.

3. On the 10 January 2008, the suspension was lifted and Dr Gilbey was contingently removed from the performers list subject to the condition that he undertook a six month training placement at an ATP. A placement was commenced on the 4 February 2008 but was terminated on the 23 April 2008 and the local health board decided to remove Dr Gilbey from the list.

4. On the 2 July 2008, Dr Gilbey appealed the decision to the Family Health Service Appeals Authority (FHSAA), the then appellate jurisdiction, and on the 8 December 2008, the FHSAA upheld the decision to contingently remove and set out four conditions relating to a placement at an ATP.

5. Dr Gilbey subsequently applied to the FHSAA for the addition of another condition requiring the local health board to fund locums at his practice and following difficulties finding a suitable ATP placement, he further requested the FHSAA to vary the condition requiring the placement at an ATP.

6. The FHSAA hearing on the 27 March 2009 varied the contingent removal condition to reflect the new proposed retraining package and removing the requirement of an ATP placement. The local health board appealed the decision to the High Court and the decision was upheld on the 3 July 2009.

7. In parallel proceedings before the General Medical Council (GMC) Fitness to Practise panel, Dr Gilbey's fitness to practice was found to be unacceptable in five areas with another three giving cause for concern. A hearing in June and July 2009 concluded that conditions should be imposed on his registration for a period of 1 year. The conditions were reviewed in 2011 and renewed in broadly similar terms for a further year. The conditions were again reviewed in July 2012 when they were removed.

8. On the 1 May 2011, Dr Gilbey issued an application to revoke the FHSAA conditions of the 30 March and 15 May 2009 on the basis that the GMC conditions were sufficient to ensure he could practice safely as a general practitioner (GP).

9. On the 26 August 2011, the First-tier Tribunal Primary Health Lists (the Tribunal) approved a consent order imposing an agreed set of conditions replacing those imposed by the FHSAA in March and May 2009.

10. On the 27 January 2012, Dr Gilbey made an application to revoke or vary the conditions contained in the consent order. The local health board opposed the application.

11. In a decision issued on the 13 June 2012, the Tribunal refused the application and dismissed the appeal indicating that it was not satisfied on the balance of probabilities that the contingent removal should be revoked or that the conditions should be varied or amended as submitted by Dr Gilbey.

12. On the 14 December 2012, following a Performance Panel, the Respondent decided to remove Dr Gilbey's name from its performers list under Regulation 15(6)(b) of the Regulations concluding that he had failed to comply with the conditions of the contingent removal. The decision relied upon two breaches of the conditions set out in the consent order of August 2011 namely that:

- 1) he had not complied with the condition to take up an ATP placement at Pontcae Surgery or any other ATP placement and in consequence had also not complied with conditions 6.4-6.10 of the consent order and
- 2) he had worked unsupervised from the 23 September – 29 October 2012 for an out of hours GP service in contravention of paragraphs 5. 6.3 and 6.5 of the consent order.

13. Dr Gilbey appealed against the decision on the 20 December 2012. In the notice of appeal he set out alleged procedural irregularities in that the grounds of removal did not specify either efficiency or unsuitability as grounds for the removal thus failing to comply with Regulation 10(8)(b) of the Regulations. He submitted that the FHSAA was never entitled to consider whether the local health board can prove on the evidence that the efficiency ground or the unsuitability ground is made out and was only empowered to take into account those matters specified in Regulation 11(6). He submitted that the previous decisions to remove or contingently remove him were unlawful.

14. The Respondent opposed the appeal and requested in the response that if the Tribunal concluded that Dr Gilbey should be removed, then the Tribunal would also be asked to consider a national disqualification under Regulation 18A.

15. Directions were given for progressing the case to final hearing and Judge Nancy Hillier on the 5 February 2013 dealt with an application by Dr Gilbey for further directions to be made, restricting the parties from referring to previous decisions and a request to move the hearing from Cardiff to Neath or Swansea. Judge Hillier refused both applications.

16. Dr Gilbey sought permission to appeal the decision, and when refused, renewed the application for permission to the Upper Tribunal. Judge Edward Jacobs refused the application for permission to appeal, issuing a decision on the 14 May 2013. The decision notice set out the issues for consideration in the appeal: the first issue being whether Dr Gilbey failed to comply with directions contained in the consent order of August 2011 and secondly, whether it is appropriate in all the circumstances or proportionate to remove him from the list.

### **The Law**

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

*“Persons performing primary medical services*

*(1) 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 regulation by a local health board”*

18. The relevant regulations are the NHS (Performers Lists) (Wales) Regulations 2004.

19. Regulation 15(6)(b) provides that where the Tribunal on appeal decides to impose a contingent removal

*“b) the local health board may remove the performer from its performers list if it determines that the performer has failed to comply with any such conditions.”*

20. Regulation 15(1) provides a right of appeal (by way of redetermination) to the Tribunal against a decision of a local health board mentioned in paragraph (2) and contained in paragraph 2(d) of the same regulation is a decision to remove the performer under Regulation 15(6)(b).

21. Regulation 15(3) provides that on appeal the Tribunal may make any decision which the local health board could have made.

22. The terms of the consent order entered into between Dr Gilbey and the Respondent on the 23 August 2011 were as follows:

- “1. That the Applicant remain contingently removed from the Respondent's Performers' List subject to the conditions set out at paragraph 6.*
- 2. Notwithstanding this order, the Applicant to notify the Respondent, in writing, within 28 days of the date of this order whether he wishes to be included on the Performers List subject to the conditions set out at paragraph 6, in accordance with Regulation 15(4) of the NHS (Performers List)(Wales) Regulations 2004.*
- 3. Upon compliance being demonstrated with each and every condition as set out at paragraph 6, the Applicant's contingent removal shall be revoked and the Applicant shall be included in the Performers List without condition.*
- 4. In accordance with Regulation 15(6) of the NHS (Performers List)(Wales) Regulations 2004 the Respondent may remove the Applicant from its Performers List if it determines that the Applicant has failed to comply with any of the conditions set out at paragraph 6.*
- 5. The conditions at paragraph 6 are subject at all times to the requirements of the GMC and to compliance with the conditions imposed by the GMC's Fitness to Practise Panel on 8 July 2011 (the GMC conditions)*
- 6. The Applicant shall be contingently removed from the Respondent's Performers List subject to the following conditions. There shall be permission to vary the timetable set out within these conditions subject to written agreement by the Applicant, Respondent and Welsh Deanery.*
  - 6.1 Subject to paragraph 6.8 the Applicant will undergo such pre-placement assessments as may be deemed appropriate by the Welsh Deanery, to determine his learning needs with a view to his taking up an Advanced Training Practice (ATP) placement. The assessments will be organised by the Deanery and external assessors from England will be engaged in an observer capacity. Such assessments are to take place by mid October 2011. The Applicant shall cooperate fully in the performance of the assessments*
  - 6.2 The outcome of the assessments referred to at paragraph 6.1 together with the Applicants PDP and the specific deficiencies in practice identified in GMC Condition 7 shall form the basis of the educational programme for an ATP placement*
  - 6.3 Following completion of the assessments described at paragraph 6.1, the Applicant to take up and complete an ATP placement at the Pontcae Surgery in Merthyr Tydfil beginning in mid February 2012 (the precise date to be agreed). Such placement shall consist of 2 ½ days a week for up to 12 months. The precise duration of the placement to be determined by the Applicant's progress to be assessed by way of monthly review as set out in paragraph 6.5. Appropriate Service Level Agreements to support this placement will be entered into between (1) the Applicant and the Welsh Deanery (2) the Welsh Deanery and the Respondent and (3) the Welsh Deanery and the ATP.*
  - 6.4 Ongoing support is to be provided to the Applicant by Drs Goodwin and Williams. It is envisaged that Drs Williams and Goodwin will perform the role of mentor with the approval and support of the Welsh Deanery as required by GMC condition 6.*
  - 6.5 A partner from the ATP practice will be appointed to act as the Applicant's "workplace reporter/supervisor" as required by GMC conditions 2 and 10.*
  - 6.6 There will be documented monthly reviews of the progress of the ATP placement involving the Applicant, the Respondent, the Welsh Deanery, Drs Goodwin and/or Williams and the ATP supervisor.*
  - 6.7 The Applicant will continue to be supported with the updating of his PDP by the Welsh Deanery during the course of the ATP placement in accordance with the requirements of the GMC Condition 7 and the outcomes of the pre-placement assessments.*

- 6.8 *The Deanery and Respondent will make arrangements for the Applicant to be provided with the support of an Occupational Psychologist for an appropriate number of sessions over the course of the placement.*
- 6.9 *The Applicant to sit the Royal College of General Practitioners' Applied Knowledge Test on the first available date after the conclusion of the ATP placement and in any event within 3 months of completing said placement.*
- 6.10 *The Respondent agrees to make the following funds available for the ATP placement. This arrangement will be paid monthly and is subject to monthly review following receipt and consideration of a copy of the monthly reviews performed in accordance with paragraph 6.6*
- 6.10.1 *The Applicant and the Respondent to share equally the costs of the training grant payable to the ATP practice the Welsh Deanery's administrative fees and the fees of the Occupational Psychologist identified at paragraph 6.8*
- 6.10.2 *The Respondent will pay the Applicant an educational grant of £2,500 per month for the duration of the placement up to a maximum of 12 months or £30,000. The Applicant to use this educational grant to fund his 50% share of the costs identified at paragraph 6.10.1 The Respondent to deduct the Applicant's monthly contribution to the costs identified at paragraph 6.10.1 of £1,408.33 at source, with the Applicant receiving the remainder.*
- 6.10.3 *The Applicant to fund the fee for undertaking the Royal College of General Practitioners Applied Knowledge Test out of the educational grant payable under paragraph 6.10.2.*
- 6.10.4 *The Applicant to have the benefit of the remainder of the educational grant payable under paragraph 6.10.2 once the charges expenses and fees identified under paragraphs 6.10.1 and 6.11.3 (stet) have been met."*

23. The conditions imposed by the GMC following the hearing on the 8 July 2011 and incorporated into the consent order in paragraph 5, were as follows:

- "1. You must notify the GMC promptly of any post you accept for which registration with the GMC is required and provide the GMC with the contact details of your employer or if applicable the PCT or the Local Health Board/Health and Social Care Board if employed in Scotland, Wales or Northern Ireland.*
- 2. At any time that you are providing medical services which require you to be registered with the GMC you must agree to the appointment of a workplace reporter nominated by your employer or contracting body and approved by the GMC.*
- 3. You must allow the GMC to exchange information with your employer or any contracting body for which you provide medical services*
- 4. You must inform the GMC of any formal disciplinary proceedings taken against you from the date of this determination;*
- 5. You must inform the GMC if you apply for medical employment outside the UK*
- 6. You must continue to work with a mentor as approved by the Postgraduate Dean or Director of Postgraduate General Practice Education (or their nominated deputy)*
- 7. You must continue to work with a Postgraduate Dean or Director of Postgraduate General Practice Education (or his/her nominated deputy) to update your personal development plan to address the deficiencies in the following areas of your practice:*
- a) relationships with colleagues/GPs/teamwork*
  - b) communication with patients, listening to patients, respecting their views and providing comprehensible information,*
  - c) respect for patients, politeness, respect and confidentiality including respecting patients rights to decline treatment or for a second opinion*

8. *You must forward a copy of your updated Personal Development Plan to the GMC within three months of the date on which these conditions become effective*
9. *You must allow the GMC to exchange information about the standard of your professional performance and you progress towards achieving the aims set out in your Personal Development Plan with the Postgraduate Dean or Director of General Practice Postgraduate Education (or his/her nominated depute) and any other person involved in your retraining and supervision.*
10. *Your work must be supervised by a registered medical practitioner of consultant grade or equivalent*
11. *You must inform the following parties that your registration is subject to the conditions listed at (1) to (10) above*
  - a) *Any organisation or person employing or contracting with you to undertake medical work*
  - b) *Any locum agency or out of hours service you are registered with or apply to be registered with at the time of application*
  - c) *In the case of locum appointments your immediate line manager at your place of work at least 24 hours before starting work*
  - d) *Any prospective employer or contracting body at the time of application”*

24. The power to make an order for national disqualification is to be found in Regulation 18A of the regulations. It arises whenever the Tribunal dismisses an appeal against removal made by a practitioner. It is freestanding power and is not dependent upon any application by the Respondent.

25. National disqualification is intended to protect the public and to protect the resources of the NHS where the facts giving rise to the removal are not essentially local in nature.

### **Preliminary issues and applications**

26. In advance of the hearing on the 11 June 2013, Dr Gilbey made a further application on the basis of the decision of Judge Mark Rowland dated 13 January 2013 for the Tribunal to consider that a contingent removal could properly be revoked by the Tribunal if it were satisfied that the original decision had been made without jurisdiction.

27. The application was one of several considered by the Tribunal at the start of the hearing. Dr Gilbey sought to have the Tribunal examine the LHB evidence and conclude that the December 2008 decision of the FHSAA should be revoked. He relied on Judge Rowland's endorsement of the FHSAA decision at paragraph 74, which Dr Gilbey submitted confirmed that the case should be redetermined engaging Regulation 11 and that there was no incident within the meaning of Regulation 11 and the case should be struck out. In support of the application, he produced a bundle of further documents to be considered by the Tribunal.

28. Dr Gilbey sought permission from the Tribunal to produce another supplementary bundle of evidence in support of his appeal. Mr Hyam did not oppose the application and the evidence was admitted.

29. Mr Hyam made an application to submit a replacement version of Ms Hilary Dover's statement, which was not complete and not in the correct order. Dr Gilbey did not object to the application and the statement was admitted.

30. The Tribunal heard representations from both parties regarding the issues to be considered at the hearing. Dr Gilbey submitted that the appeal should consider all of the matters set out in Regulation 11(6) in order to reach a decision on removal and that the decision of the FHSAA in 2008 should be overturned on the basis that the proper procedure had not been followed by the LHB in reaching its original decision. He argued that there was a valid

point of law in considering what constitutes “redetermination” of the previous decision and claimed that the rules for considering the appeal had changed. He further submitted that any removal should be the outcome of an identified “incident” and the subparagraphs of Regulation 11(6) applied to the facts to decide the issue. He submitted that in his case, there was no issue upon which to base the removal.

31. Mr Hyam opposed the application on the basis that the issues had already been previously considered by another tribunal and Dr Gilbey is not free to undo what has been previously decided. He had been legally represented by counsel in 2008 and had not cross appealed the LHB appeal to the High Court on the basis that the decision was a nullity because the tribunal did not have jurisdiction to deal with the appeal. The argument had been run out before two judges of the Upper Tribunal and both concluded that there was no null decision and the current Tribunal did not have jurisdiction to reopen it. In relation to the issue of consideration of Regulation 11(6) by the Tribunal, Mr Hyam submitted that there was no reference to removal under Regulation 15(6) in Regulation 11 and that its application was not therefore necessary.

32. We considered the application in the context of the Regulations and the circumstances of the present appeal. The chronology is not in dispute and the current position is that the Tribunal in June 2012 imposed a contingent removal upon Dr Gilbey, having dismissed his appeal seeking amendments or revocation of the conditions. The Respondent then concluded on the 12 December 2012 that Dr Gilbey had both failed to comply with the conditions imposed and had breached a condition of his contingent removal, and pursuant to Regulation 15(6) exercised its discretion to decide that he should be removed from the performers list.

33. It is that decision that Dr Gilbey has appealed in the current proceedings, and that is the only issue for consideration by the Tribunal.

34. We accepted the submission of Mr Hyam that the matters set out in Regulation 11(6) are not relevant to the current appeal. Furthermore, it is not within the Tribunal’s jurisdiction to reopen the decisions of previous tribunals, which should have been challenged through the appropriate appellate jurisdiction at the time. We concluded that it will not assist in the determination of the relevant issues to consider the contents of the NCAS report dated September 2007 and Dr Gilbey’s disagreements with its findings.

35. The Tribunal permitted the applications for submission of late evidence and the additional documents were added to the Tribunal bundle.

36. Dr Gilbey made a further application for a direction for disclosure of all the patient records relied upon by Dr Harrison in her review, because it was submitted that if the Tribunal undertook a review of the patient records, then Dr Gilbey would be shown to have been practicing competently throughout his time working for the local health board from August 2011 to December 2012.

37. We noted that Dr Harrison had confirmed in her witness statement that no harm to individual patients had been identified during the period of Dr Gilbey’s recent employment by the Respondent and we concluded that to order disclosure of the patient records was not proportionate and in any event would not assist the Tribunal in deciding the relevant issues before it.

38. Dr Gilbey applied to have a copy of the LHB’s response to the GMC letter regarding complaints made against him since January 2013 to be disclosed. Mr Hyam confirmed that the letters regarding two complaints had been included in the evidence only to raise awareness of the fact of their existence and not with any intention of relying upon their contents to try to show clinical deficiencies in Dr Gilbey’s practice. We concluded that the document would not assist

the Tribunal in dealing with the relevant issues and noted that a copy of the complaints to the GMC had been included only to raise awareness of the fact of the complaint and no further.

39. During the course of the first day, Dr Gilbey confirmed that he had technically breached the conditions by taking up an out of hours GP post in the autumn of 2012 and on the strength of his own admission, confirmed that he did not require oral evidence from Ms Hilary Dover since he did not dispute the fact of the breach in relation to the out of hours post. It was agreed that he would consider overnight what issues of dispute he had for Dr Harrison, and limit his cross-examination to those matters.

40. At the end of the first day, the panel asked of Dr Gilbey whether he was proposing an alternative course of action for the Tribunal to consider other than a removal from the list. It was confirmed that he should consider his position overnight and inform the Tribunal and the Respondent as soon as possible if it was his intention to suggest an alternative course of action.

41. At the start of the second day of the hearing, Dr Gilbey produced a written statement of his own evidence and applied to have it admitted. Mr Hyam did not object to the request and the statement was added to the Tribunal's bundle and accepted as Dr Gilbey's evidence in chief.

42. At the close of the second day of the hearing, Mr Hyam confirmed that he would be inviting the Tribunal to make an order for national disqualification in respect of all LHB lists in Wales and the single list in England. Dr Gilbey sought confirmation of whether this would be considered by the panel at the current hearing or would be subject to further submissions. It was confirmed to him that the issue would be dealt with within the current proceedings, and that he would be able to make submissions on the issue to the panel at the close of the current hearing and could consider his thoughts on the issue overnight.

43. Following consideration of the preliminary applications by Dr Gilbey, the Tribunal concluded that the issues for consideration in the current appeal were very narrow, and that they were the two issues set out by UT Judge Jacobs in his decision namely:

- b) whether Dr Gilbey had breached the conditions set out in the consent order approved by the Tribunal on the 26 August 2011;
- c) if he had so breached the conditions, was it a proportionate response to remove his name from the performers list?

44. A third issue for consideration in the event that the tribunal concluded that the removal should be upheld was whether Dr Gilbey should be the subject of a national disqualification as requested in the Respondent's response to the appeal.

## **Evidence**

Did Dr Gilbey comply with the conditions imposed upon his contingent removal?

45. By his own admission in the telephone case management hearing on the 17 May 2013 and again at the final hearing, Dr Gilbey accepted that he had not fulfilled the condition that he should attend an ATP placement.

46. At the hearing, Dr Gilbey explained that he perceived the difference between failing to comply with conditions and breaching conditions to be one of intent. He had assumed that failing to comply with the conditions entailed an element of intent not to comply and that breaching a condition involved doing something active or deliberate contrary to the condition imposed. Having considered his position, he had realised that technically he had not fulfilled the condition imposed upon him to attend the ATP placement and that by failing to notify the Respondent of his taking up a position with the Out of Hours GP Service for Cwm Taf local



health board in September 2012, he had technically breached a requirement imposed by the inclusion of the GMC 2011 conditions in the consent order. On the basis of his acceptance of the technical breaches, he confirmed that it would not be necessary to call oral evidence from Ms Dover.

47. Dr Waskett gave evidence about the Out of Hours Service recruitment processes and on cross-examination confirmed that had he understood that Dr Gilbey was contingently removed from the Performers List, then he would not have been appointed to the Out of Hours Service. He further confirmed his view that a contingent removal is a restriction on practice and consequently, a practitioner contingently removed should be informing a prospective employer of that fact and the conditions in compliance with GMC Good Medical Practice guidance.

48. At the time of his recruitment through the Medac Agency, Cwm Taf Local Health Board did not know of the contingent removal and the issue had not been drawn to the attention of the employer until another GP recognised Dr Gilbey's name and drew the fact to the attention of the Health Board.

49. Dr Waskett expressed his view that out of hours work is high risk work and that it is not appropriate for a contingently removed doctor to be undertaking that work. When a doctor is contingently removed, the name of that doctor is removed from the online list where the Out of Hours service check for listing. Dr Gilbey applied for the out of hours post through the Medac agency, had obtained a hard copy through a Freedom of Information request of the Local Health Board's Provider List which included his name but with a direction to contact Shared Services. On the Agency's recommendation and on the assumption that the appropriate checks had been carried out, the out of hours service did not further check the list and accepted the information provided by the Agency. Dr Waskett confirmed that had he seen the hard copy of the list indicating opposite Dr Gilbey's name "contact shared services partnership" then he would have immediately realised that he had been contingently removed and refused his application for a post.

50. He drew attention to the requirement of the GMC and Good Medical Practice guidance that a doctor should be entirely and utterly open about any conditions imposed upon his practice. He confirmed his view that Dr Gilbey, because of his contingent removal was "...absolutely unqualified" to work for the out of hours service. If Dr Gilbey had informed the service that he had been contingently removed from the list then the service would not have entertained using him.

51. During the period with the out of hours team, Dr Gilbey had seen 359 patients and once the information had been received that he was contingently removed, Dr Waskett had seen all of their records to notify their GPs that they should ensure that they had come to no harm. He confirmed that there was no evidence of actual harm to those patients, although two informal complaints had been received. Dr Waskett concluded that he was not satisfied with the service provided by Dr Gilbey, that he was not qualified to do the work and caused a great deal of work for the service once he had been found out. Dr Gilbey had fallen at the first hurdle of the clinical governance framework which is to ensure that the service uses staff who are appropriately qualified and experienced to the work.

Is the removal of Dr Gilbey's name from the Performer's List a proportionate response?

52. In a witness statement prepared by Hilary Dover, locality director for the Respondent, Ms Dover confirmed that on the 31 October 2012 the Respondent had become aware that Dr Gilbey had been working unsupervised as an agency doctor in an out of hours service provided by the neighbouring Cwm Taf local health board. The Respondent was concerned about this information for two reasons: the potential patient safety issues and the confirmation it provided that Dr Gilbey was prepared to disregard the conditions imposed upon him. The Respondent formed the view that there was evidence that Dr Gilbey had breached his conditions and due to

the potential risk to patient safety, did not consider that it could delay putting the matter before a Performance Panel to determine what action should be taken.

53. Dr Gilbey was given notice of the intention to consider removal and on the 1 December 2012 indicated that he did not wish to have an oral hearing, providing written submissions for consideration by the panel. The panel's decision made on the 14 December 2012 was that Dr Gilbey's name should be removed from the performers list on the basis that he had not secured an ATP placement as required by condition 6.3 of the consent order and had worked unsupervised in general practice between the 23 September and 29 October 2012 contrary to paragraphs 5, 6.3 and 6.5 of the consent order.

54. Dr Harrison, Assistant Medical Director (Primary Care) for the Respondent gave evidence of the reasons for the decision to remove Dr Gilbey's name from the Performers List: he had breached the conditions of his contingent removal, regard for patient safety was not uppermost in his mind and he had not fulfilled the requirements of the conditions. She explained in her statement that Dr Gilbey had been separately assessed by NCAS, the GMC and the Welsh Deanery between 2007 and 2011 and on each occasion deficiencies were found in his practice. She acknowledged that the work undertaken by Dr Gilbey in various hospital posts and the Foundation Year 2 position was sufficient to enable him to comply with his GMC conditions (which were not concerned with remediation back to general practice) but was not sufficient to deal with the issues identified by NCAS and the deep seated behaviours which she described as "...much more difficult to remedy than clinical skills alone."

55. She gave evidence that considerable time and resources had already been expended to facilitate Dr Gilbey's return to be a fit and safe practitioner. The Respondent had concluded that it was unable to support Dr Gilbey any further or incur further expense. She was at a loss to understand why Dr Gilbey had not understood the dangers of out of hours practice when this had been highlighted orally at a previous Tribunal hearing and included in the written decision of the Tribunal. She did not accept Dr Gilbey's explanation of his actions as an error of judgment, but considered the action to be duplicitous and deliberate.

56. Dr Harrison stated in oral evidence that she regarded Dr Gilbey's inability to understand the limits of his own competence as going to the heart of the problem. She referred to the triangulation of assessment by NCAS the GMC and the Deanery all reflecting that patient harm was a huge risk, yet, Dr Gibey continues to state that he felt he could demonstrate safe practice from his work record. He had not addressed the issues identified in the assessment of communication and empathy. She suggested that the fact that Dr Gilbey believes that his work record could demonstrate safe practice in the context of all the issues identified, of itself showed a lack of insight. He had shown no understanding or acceptance of the remediation of his needs and feels that he is good and safe. The assessment evidence had shown that that is not the case and that there is a problem with his insight and understanding. She explained that Dr Gilbey's belief that unless someone has been harmed there is no need for action misses the point of the importance of patient relationships, that goes to the heart of general practice. In her view, the health board and the Deanery had tried very hard to address the needs of Dr Gilbey but it is very difficult to remediate deep seated behavioural problems. She regarded his breach of the ATP placement condition as a critical part of the failure.

57. Responding to Dr Gilbey's proposal that he should be permitted to return to practice on condition that he should only be employed as a salaried GP, she stated that she found the proposal frightening, suggesting that Dr Gilbey was under the impression that all his needs and the need for remediation had disappeared. She explained that a salaried GP works alone without supervision or mentoring, needing all the skills and requirements of an independent GP. In her view, even a supervised GP placement would be a long way away from the recommended remediation and she expressed her concern that despite all the assessments and attempted placements, Dr Gilbey still showed no greater understanding of the problems.

58. On cross examination, Dr Harrison stated that the standards for fitness to practise are set by the GMC but that basic fitness to practice requirements does not include GP requirements, which is an additional specialism built onto the basic requirements. She remained firm in her view that Dr Gilbey is not fit to practice as a GP without undertaking the remediation recommended by the NCAS assessment in 2007. She further expressed her view that the Respondent had explored many avenues over a long period of time, in its attempts to remediate the problems, but the problems exhibited go to the heart of general practice. In her view, the Fitness to Practice Panel stated that there was now no problem with Dr Gilbey working as a doctor within a team but that it had not confirmed his fitness to practise as an independent GP.

59. Dr Gilbey produced a witness statement at the start of the second day of the hearing, apologising for the alarm, distress or inconvenience he caused by working in the Rhondda Cynon Taf out of hours service. He stated that he had been under the impression that following the removal of conditions on his registration by the GMC in July 2012, he was lawfully entitled to do so. He explained his failure to publicise the conditions of contingent removal as an error of judgment. He did not consider that he would be working outside the limits of his competence having completed his Personal Development Portfolio. He stated that since he had been unable to secure a placement in an ATP, he felt that if he were actually able to work in primary care he would be able to demonstrate safe practice in that discipline. He described the principal reason for the strategy to be the stalemate that existed concerning his performers list conditions. He acknowledged that such a strategy was misconceived and caused a reaction that he had not envisaged.

60. In oral evidence, he confirmed that the pre-placement assessments had been carried out by the Deanery but did not consider that they had been carried out in compliance with the condition. He was dissatisfied with the way in which the tests were conducted, not observed by external assessors but undertaken by them instead. He had subsequently been told by the Deanery that they were unable to assist him further and he did not consider that they had prepared a full retraining programme to meet his identified needs as required by the conditions. He confirmed that conditions 6.3, 6.5, 6.8 and 6.9 had not been complied with and that he had not completed an ATP placement as required by 6.3.

61. In oral evidence, Dr Gilbey did not accept that the out of hours service placement was in breach of conditions. He did not consider that there was a condition not to perform medical services at the same time as the contingent removal condition and considered this to be an oversight by the drafter of the consent order for the Respondent. He acknowledged that if his working in the out of hours service was a breach of his conditions then the Respondent would be within their rights to remove him. He gave evidence that in an ideal world, he would wish to work as a salaried GP in an academically approved environment but without any other conditions imposed upon him. He regarded a salaried position to be subject to more governance than an independent GP and since there is no statutory requirement to undertake retraining when returning to practice, he did not consider that he required any further training before he returned. He has done work in communication with clinical experience and a stint in general practice would allow him to do the work within his capabilities. It was his view that he has more skills now than when he left general practice in 2007.

62. On cross-examination, Dr Gilbey confirmed that a copy of the Tribunal decision dated 11 June 2012 had not been presented in evidence to the GMC Fitness to Practise Panel and that he had not notified the GMC of his application to work in the out of hours service. He confirmed that he would not have asked the LHB directly to employ him in the out of hours service because he knew that he would be refused outright. He confirmed that he did not accept the finding of the previous Tribunal that the failures of the Lampeter and Pontcae placements had been down to him, but that rather the placements were frustrated by the misconceptions of

various people. He described himself as having to go “underground” to show that he was a safe practitioner. He regarded there to be a loophole in the conditions that permitted him to work in the out of hours service. He confirmed that he had worked as the medical officer in a gold mine in the Sahara between February and April 2013 but that he had not told them about the conditions, nor did he mention them to any other prospective employers. He did not inform the GMC of his taking up the appointment.

63. In his closing submissions, Dr Gilbey stated that he had that day been told that he had been successful in the examination part of an application for inclusion in the North Somerset performers list and his name was now put forward for a test in a simulated surgery. He opposed the request for a national disqualification because it would prevent him from taking up such a position and was in his view a disproportionate response to the not very serious breach of condition, to which he had admitted.

### **Tribunal’s conclusions with reasons**

64. We considered the evidence presented in the tribunal bundle together with the oral evidence at the hearing and the submissions made by both parties.

65. We accept and agree with Dr Gilbey’s admission of the failures to comply with the conditions imposed by the consent order of August 2011 and find on the evidence of Dr Waskett that his failure to disclose his contingent removal to the out of hours service in September 2012 and his working unsupervised in that service to be a further breach of the conditions imposed upon him.

66. We base that conclusion on the terms of the conditions imposed by the GMC in 2011 which were clearly incorporated at paragraph 5 of the consent order and no provision having been made for their removal in the event that the GMC reviewed and removed the conditions at some subsequent date.

67. The failure to complete an ATP placement was not in dispute – it was a fact that the condition had not been fulfilled leading to a failure to comply with the other conditions that flowed from the placement.

68. The period of employment by the out of hours service breached several of the conditions and is a more complicated matter altogether given the issues arising from it. The means by which Dr Gilbey secured the post, involved his being recruited by an agency on the basis of a hard copy of the extract from the published performers list. Its acquisition required planning and careful execution, and the language of Dr Gilbey’s evidence in relation to his strategy, referring to his “going underground” to prove himself a safe practitioner are indicative of a mindset of strategic planning and cunning. He was clear in his own evidence that he was aware that had the local health board or the out of hours service known about his contingent removal, then they would have refused to offer him the post. We do not accept that the strategy and failure to inform the agency or the local health board was therefore an error of judgment: it was part of his strategy and a means to an end and directly contrary to paragraph 64 of the Good Medical Practice Guidance which states “You must always be honest about your experience, qualifications and position particularly when applying for posts”.

69. We conclude that Dr Gilbey has failed to fulfil the conditions of his contingent removal , has breached the conditions and has been in contravention of the GMC Good Medical Practice guidance.

70. Is the removal of Dr Gilbey’s name from the performer’s list a proportionate response to the failure to comply with conditions and the breach of conditions? In his closing submissions, Dr Gilbey suggested that there was no intent on his part to fail to comply with the conditions or

to breach them, but the evidence provided by Dr Waskett and by Dr Gilbey himself are at odds with that submission.

71. We have set out above our conclusions about Dr Gilbey's actions in securing the out of hours service post and Dr Gilbey's own evidence that he was aware that if the LHB were aware of his contingent removal they would have refused to employ him underlines his determination to secure the post. We have already concluded that his actions reflect a conscious decision to flout the conditions in order to try to prove through his performance that he was a good GP. In addition to this he has failed to comply over a period of six years with the conditions imposed upon him by the FHSAA and within the consent order approved by the Tribunal.

72. The active incorporation of the GMC conditions into the consent order underlined the importance of them to the Respondent in seeking to enable Dr Gilbey to return to safe practice. There was also another element to be taken into consideration, namely the requirements of the GMC's good medical practice recommendations which should have been a feature of his practice throughout. Dr Gilbey clearly did not incorporate all of the good medical practice guidelines into his practice and his failure to do so is a further cause for concern.

73. Although he accepted the technical non-compliance with the conditions he referred in his evidence to his feeling of "double jeopardy" in being the subject of the performers list proceedings and the GMC proceedings at the same time. It should be clear to Dr Gilbey that the two processes are entirely separate and run parallel to each other: the performers list proceedings apply specifically to his work as a GP and take into consideration the efficiency issues relevant to the Respondent. The GMC proceedings dealt specifically with his general fitness to practise and take into consideration the protection of the public, consequently, there is no justification for a perception of double jeopardy. His practise had been assessed and found wanting by two different bodies and confirmed by the Deanery assessment.

74. We were satisfied on the evidence that there has been clear non compliance with the specific requirement of an ATP placement imposed by the consent order and the other conditions flowing from that placement. The evidence also supports the conclusion that there was not only a breach of the GMC's requirements of good medical practice but also breach of the GMC conditions imposed in July 2011, as incorporated into the consent order. The evidence further supports the conclusion that there is a further probity issue in relation to the application for inclusion in the Medacs list and other job applications and that evidence was directly from Dr Gilbey himself.

75. Good Medical Practice Guidance provides at paragraph 59, under the heading "Probity" which is defined as "...being honest and trustworthy and acting with integrity..", "If you are suspended by an organisation from a medical post, or have restrictions on your practice you must without delay inform any other organisation for which you undertake medical work and any patients you see independently." We accepted Dr Waskett's view that the imposition of conditions should have been disclosed and that Dr Gilbey's failure to do so calls into question his probity and the extent to which he could be regarded as being honest and trustworthy and acting with integrity.

76. On the basis of Dr Gilbey's own oral evidence and the contents of his written statement, we have concluded that the strategy to obtain an out of hours placement was clearly planned and thought through and he took steps to get a copy of the published lists in order to pull the wool over the eyes of the agency and ultimately the LHB as well.

77. Having made those findings we considered the issue of the reasonableness of the decision and the question of the proportionality of removal from the list. We considered whether there were other courses of action available: Dr Gilbey has now been out of general practice since 2007, a period of six years. The problems identified are not confined to a single area of

his performance but are widespread as evidenced by the NCAS assessment, the GMC assessment and the Deanery's pre-placement assessments. The evidence presented at the hearing indicates an ongoing lack of insight on the part of Dr Gilbey, reflected in his statement that he is now a better practitioner than he was in 2007, despite the fact that he has not practiced as a GP other than the short period with the out of hours service.

78. The only proposal put forward in the appeal was Dr Gilbey's suggestion that he could be employed as a salaried GP with his position reviewed by the Respondent every three months. Although not a consideration in the appeal, the issue of efficiency remains a live one for the Respondent and the continuation of supervision and review of Dr Gilbey's practice on a three monthly basis would inevitably involve further expenditure of time and resources without a guaranteed return.

79. Dr Harrison confirmed that there was no alternative course open to the Respondent other than removal and that she had been unable to think of an alternative safe and workable condition.

80. We have taken into consideration the fact that Dr Gilbey has failed to comply with the previous conditions or with the requirements of the Good Medical Practice guidance over a period of six years, and even if there was an alternative workable condition devised, his past performance suggests that he would probably not comply with that either. Although his evidence was that he had complied with the GMC conditions when imposed by the Fitness to Practise Panel, these had taken two years to resolve and it seems likely that the panel did not have before it all the relevant information to consider the position in July 2012. Furthermore, Dr Gilbey has within months been the subject of further complaints and a further GMC referral. It was unclear from the evidence whether he had told the GMC of the Tribunal decision although the Panel decision refers to his having made an appeal, despite the fact that the decision had been promulgated several weeks before the GMC hearing. There is significant evidence of a pattern of either partial or non disclosure of relevant information which is contrary to the principles of good medical practice and an indicator of ongoing problems which have still not been resolved.

81. On the basis of the evidence of Dr Harrison and Dr Gilbey himself we have concluded that it is not a reasonable proposal to allow Dr Gilbey to return to practice without conditions and retraining. We accept the evidence of Dr Harrison that patient safety must be a paramount consideration and that the exercise of the discretion to remove Dr Gilbey from the performers list was justified in the circumstances of the case and is a proportionate response to the findings of failure to comply with the conditions of contingent removal.

82. We then considered the request for a national disqualification. The proposal by Dr Gilbey that he should be allowed to take up a salaried GP post is a cause of concern, firstly because he has already put in several applications for employment without any disclosure of his current conditions and by his own evidence, has made it clear that he does not acknowledge any need for a returners' course or retraining, even after six years of absence from practice. It is usually a GMC requirement for returners to attend a course after only two years out of practice, yet Dr Gilbey's evidence was that he is a better practitioner now than when he left practice in 2007.

83. Secondly, Dr Gilbey considers that being salaried allows for greater supervision of his work and vicarious liability for his actions by his employer. The suggestion indicates a lack of understanding of the nature of a salaried GPs work which requires independent work without supervision because it is not a training placement. It also fails to acknowledge the risks that he would place upon his employer. The proposal that the conditions should be the subject of a review by the LHB does not reflect an understanding of the use of resources required to undertake the exercise and would have further impact upon the efficiency of the service.

84. Dr Gilbey's proposal that he should avoid a national disqualification in order to pursue his request to be placed on the performer's list in North Somerset is a clear indication that he does not take seriously the Respondent's concerns about his practise or their attempts to remediate his problems and highlights the risks that he poses to patient safety and the efficiency of the services in England and Wales. The issues identified by the various assessments around patient safety and efficiency are peculiar to Dr Gilbey and not the Respondent and they continue to be relevant given the lack of compliance with conditions imposed upon him. We have concluded that the difficulties displayed are deep seated and intractable and that it is necessary for Dr Gilbey to be the subject of a national disqualification.

### **Order**

Appeal dismissed.

1. The decision to remove Dr Gilbey's name from the Abertawe Bro Morgannwg University Health Board Performers List is confirmed.

2. We direct pursuant to Regulation 18A of the NHS (Performers Lists) (Wales) Regulations 2004 that the Appellant, Dr Andrew Gilbey is hereby nationally disqualified from inclusion in:

- a. a performer's list; and
- b. a list referred to in section 49N(1) prepared by a Local Health Board

3. Dr Andrew Gilbey shall be the subject of a National Disqualification pursuant to Regulation 18A of The NHS (Performers Lists)(Wales) Regulations 2004 and should not be included in the performers lists in England.

4. **Consequential direction**

We direct the Respondent to send a copy of this decision to the National Assembly of Wales, the Secretary of State for the Department of Health and the Registrar of the General Medical Council.

25 June 2013  
Judge Meleri Tudur,  
Tribunal Judge Primary Health Lists

