

## Primary Health Lists

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

[2015] 2458.PHL

BETWEEN:

**DR ANDREW GILBEY**

Applicant

AND

**ABERTAWE BRO MORGANNWG  
UNIVERSITY LOCAL HEALTH BOARD**

Respondent

BEFORE (ON THE PAPERS)

Melanie Lewis	Judge
Dr Rajendra Rathi	Specialist Member
Mr Colin Barnes	Specialist Member

Sitting on 8 October 2015

### DECISION

1. The Applicant has applied for a review of his national disqualification in an application dated 28 June 2015.

Background and Procedural History

2. This case has a long history which it is necessary to summarise to see what has happened in the past and what has changed. Dr Gilbey was a sole practitioner GP who had a strong measure of support from his patients in the community he served.

3. Dr, Gilbey was referred to NCAS which provided a full report in September 2007 identifying 8 areas of unsatisfactory performance and 6 areas of inconsistent performance. The 8 areas related to assessment of patient condition, examination technique, management of patients, infection control, prescribing, record keeping, obtaining consent and keeping up to date. NCAS recommended that the Applicant

complete a period of supervised re-training and that he should not practice unsupervised until that re-training had been completed.

4. A placement was arranged at an Advanced Training Practice: Old School Surgery. That failed after 2 months due to concerns about the Applicant's failure to engage with the training programme. That led to the Applicant being removed from the Performers' List by the Respondent.

5. On 8 December 2008 there was a full hearing before the Family Health Service Appeal Authority, the predecessor of this Tribunal. The Tribunal found that the Applicant had caused prejudice to the efficiency of the service and imposed a condition that

*The Applicant should not from the date of the decision work in any capacity as a NHS General Practitioner except under the supervision of a work place supervisor*

6. These conditions were subject to a minor variation by a decision of the FHSAA dated 30 March 2009 and 15 May 2009 but the condition in each case retained the wording set out above.

7. The Applicant relies upon the fact that he underwent a full assessment of professional performance by the GMC in January 2009. That found that he had acceptable practice in 5 areas but was a cause for concern in 3 others, which overlapped with concerns identified by NCAS in 2007. A GMC Fitness to Practice Panel imposed conditions on the Applicant in July 2010 extended them in June 2011 but these were lifted in 2012.

8. By application dated 6 April 2011 the Applicant sought to revoke the conditions imposed by the FHSAA 2008/9. The Respondent submitted that the conditions should be varied to reflect as a minimum the requirements imposed on a GP returning to practice after a career break of more than 2 years. These were incorporated into a consent order dated 23 April 2011 and approved by the Tribunal on 26 April 2011. Again, the conditions required the Applicant to undertake successful retraining in an ATP practice prior to resuming work as a GP on its Performers List.

9. In accordance with the consent order, the Respondent arranged for the Applicant to undergo an assessment by the Welsh Deanery. The Respondent was concerned because the assessment produced low scores in respect of problem solving and low scores for integrity, empathy and communication which mirrored the concerns identified by NCAS in 2007 and the GMC in 2009.

10. In early 2012 the Applicant sought to vary those conditions. He was not successful for reasons set out in the Tribunal's decision chaired by Judge Hillier of 13 June 2012: [2012] PHL 1458. The Tribunal agreed that there would be significant risks to the public by a GP who had remediation needs and who had been away from practice without at least 6 months in an ATP practice.

11. The Applicant did not complete a period of supervised re-training and during the currency of the conditional inclusion he worked unsupervised in primary care at an out of hour's service in Cwm Taf between September to October 2012.

12. The Respondent sought Dr Gilbey's removal from the list. This was the subject of an appeal. The decision dated 25 June 2013 of the First Tier Tribunal

chaired by Judge Tudur upheld the Respondent's decision after a full hearing: [2012] PHL 15549. They found that the Applicant's actions in working for the out of hours service were not 'an error of judgement' but a conscious decision to flout the conditions which showed strategic thinking and cunning. They imposed a national disqualification, being concerned in particular that his suggestion that he return to work as a salaried GP did not acknowledge any need for refresher training, was wrong to consider that being salaried allowed for greater supervision and vicarious liability for his actions from his employers showed a lack of understanding of the post which would require independent work as it was not a training position.

#### Legal Framework and Approach to the Evidence

13. The Applicant's national disqualification was made pursuant to Regulation 18A of the NHS (Performer List) Wales Regulations 2004 with the consequence that the Applicant should not be included in either a Welsh or English NHS Performers' List, the relevant primary legislation is Section 115 NHS (Wales Act 2008).

14. Pursuant to Regulation 18A (6) the FtTT may at the request of a person on whom has been imposed a national disqualification review that disqualification and not do so before the end of a period of 2 years. On a review under 18A (6) the Tribunal may confirm or revoke that disqualification.

15. The Respondent submits that in the event the FtTT upholds the national disqualification then the Tribunal should utilise its powers under Regulation 19 (2) of the NHS Performers List (Wales) Regulations 2004 to extend the period of review so that the Respondent is not required to respond to annual applications.

16. The issues for the Tribunal to determine are:-

- (i) Whether it can be satisfied the Applicant has demonstrated that he no longer continues to pose a significant risk to patients and the efficiency of the service, such that the national disqualification can be revoked, and
- (ii) Whether it can be satisfied, that in revoking the national disqualification, prospective employers and patients will be adequately protected by placing the Applicant in the position where he would be free to apply for inclusion on a Performers' List.

17. In our view the over-arching issue for us to determine is the Applicant's suitability for inclusion in the National Performers' List in light of all the evidence available to us at the date of the hearing of this matter on the papers.

#### The Evidence

18. We read 2 bundles of written evidence, running to some 500 pages. The bulk of the evidence was submitted by the Respondent and was historic.

19. Both parties had filed detailed submissions. Dr Gilbey had submitted an additional submission in response, stating that he in the light of the submission from the Respondent he reluctantly felt compelled to go over history prior to the decision of the FtTT of June 2013.

20. Essentially the case for the Applicant is as follows:-

- a) That it is no longer proportionate or necessary for him to subject to a national disqualification. Any public interest in not declaring the conditions when he worked as an out of hours doctor has been marked by a warning issued by the GMC.
- b) He has produced evidence of ongoing professional development, good references from non-NHS employers, satisfactory annual appraisals.
- c) If the national disqualification was to be lifted, his intention would be to apply to the Local Health Board in Wales and they would have to determine whether to include him on the Performers List.
- d) If the national disqualification were revoked the Applicant proposes that he would be conditionally included on a Performers List until he successfully completes a Deanery Assessment similar to that undertaken in 2011.

### Findings

21. After carefully considering all the evidence available to us together with the detailed representations from both parties, we have concluded that the Applicant's national disqualification remains appropriate and proportionate in this case. We set out our reasons for reaching this conclusion in more detail below. In doing so we have not considered it appropriate to address each point made by the parties in detail although we have considered every point made in the context of the evidence and history.

22. The starting point is the decision of the previous Tribunal in June 2013, which in turn drew of findings of previous Tribunal, which we have considered and find it necessary to refer to, to explain our conclusions. We accept the submission made on behalf of the Respondent that decisions of the First Tier Tribunal and Upper Tribunal stand. The Respondent put in the history because we accept it is relevant, in particular to the number of chances Dr Gilbey has had to remediate. Dr Gilbey has in his additional Response sought to challenge the history. This further hearing is not the opportunity to reopen those issues. It is the opportunity to show what has changed.

23. The relevance of the history is that in our view it shows that Dr Gilbey has been given a number of 'chances' and indeed even 'last chances'. Considerable resources and support of colleagues has been put in place to remediate him. Our overview is that as time moves on it is inevitably more difficult for him to go back into NHS GP practice. As a specialist Tribunal we are aware of the difficulties of setting up Advanced Training Practice which has financial implications and may require a person seeking to remediate themselves to look for support. Our overview of the history of this case is that Dr Gilbey has been able to call on support from colleagues but he has not taken advantage of those opportunities.

24. We accept the Respondent's submission that the findings of NCAS and the GMC in 2000 and 2009 set out the concerns which have been the focus of the various conditions aimed at remediation. The NCAS recommended that Dr Gilbey complete a period of supervised re-training. In our view it is relevant that he was a sole practitioner. The condition was that he should not practice unsupervised. Dr Gilbey was able to call in support from colleagues. We find it relevant that as a fact the placement at Old School Surgery failed after just 2 months due to his failure to engage with the training programme. Inevitably it is difficult for an experienced GP to be supervised by younger doctors but that is what had been deemed to be necessary.

25. We also find it relevant that the Tribunal chaired by Professor Mildred gave Dr Gilbey a chance. We have carefully read those decisions. By their decision dated 8 December 2008 following a full hearing in which Dr Gilbey was represented, he was contingently removed. They balanced his clear lack of reflection, his inability to let go of the past, the cost to the LHB against his 20 years of practice in challenging circumstances which had provoked striking loyalty from his clients. We were struck by the balance they reached in their conclusion at paragraph 87 where they commented on his lack of insight and that whether the process succeeded was in his hands. The prospect of a further last chance was 'vanishingly small' : paragraph 87 refers.

26. The further decision of the FHSAA dated 30 March 2009 concluded that again on fine balance Dr Gilbey should have one last chance to remediate himself: paragraph 122 refers.

27. The decision of the Tribunal chaired by Judge Tudur in their decision dated 25 June 2015 made similarly clear but robust findings. In particular they found that the admitted period of employment by the out of hours service breached several of the conditions. At paragraph 68 they found:-

*'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 his 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 as a self 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 out of hours service known about his contingent removal then they would have refused to offer him the post. We do not accept the strategy and failure to inform the agency or the Local Health Board was therefore an error of judgement: it was his parts 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, position particularly when applying for posts'.*

28. This failure was compounded by the fact that Dr Gilbey did not inform the GMC of the First Tier Tribunal's decision of 11 June 2012 when it came to consider his conditions in 2012.

29. Dr Gilbey makes a stark argument that he is either '*allowed to continue the journey or pushed into the sidings*' Acknowledging the 'Catch 22' position that somebody like Dr Gilbey can find himself in, when he has not been able to work in GP practice, Dr Gilbey has worked in hospital emergency services. He has undertaken a number of we accept relevant e-learning courses. His clinical skills have not been the thing in issue. We accept the Respondent's submission that these do not deal with the primary concerns about his practice which relate to his communication, empathy and decision making skills. Since last working in general practice in 2007 he has had a variety of locum and short term junior doctor jobs in hospital and worked on cruise ships. There is a very great difference to working in general practice. He is currently subject to GMC conditions which require him to obtain their approval in respect of any post for which he applies including overseas approval.

30. We accept the Respondent's submission that it is unlikely that Dr Gilbey would be successful at this point given the chances he has had in obtaining inclusion on the Performers List. He has compounded that by a failure to disclose. His suggestion that he could be conditionally included pending a Deanery assessment again gives rise to a risk of prejudice to the efficiency of the service. In the past the financial implications of a Deanery assessment have been gone into but the Applicant has not put forward how he would see that being funded and it is clear that he would expect the Health Board to cover that cost. It is not clear why he would say he would undertake it at this time when in the past it has failed. We are clear that any doctor or GP who has been out of practice for more than 2 years would certainly need to want to do some remedial training. Attempts have been made to secure a placement for the Applicant on 4 different occasions. The First Tier Tribunal found that the prospects were 'vanishingly small' in 2008. We see no grounds for optimism now.

31. We accept the Respondent's submission on proportionality and necessity that seen against the background and the very considerable resources that have already been expended seeking to remediate Dr Gilbey that the national disqualification was proportionate in 2013 and it remains necessary for the proper safeguarding of patients and NHS resources.

32. Finally we conclude that we should extend the period of review to 3 years. Nothing has substantially changed and conclude that there is no realistic prospect of success of further review being successful if held within a period of three years beginning with the date of our decision on this review. We accept the argument put forward by the Respondent that to necessitate the Respondent to respond to annual applications would be a disproportionate use of resources.

## **Order**

Application dismissed.

1. The directions dated 25 June 2015 that pursuant to Regulation 18A of the NHS (Performers Lists) (Wales) Regulations 2004, Dr Andrew Gilbey is 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 Boardand
2. That 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.

ARE HEREBY CONFIRMED

3. Pursuant to Regulation 19 (2) Regulations 2004 no request for review of that disqualification may be made before the end of the period of three years beginning with the date of the this decision on the last review.

**Judge Melanie Lewis**

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

**Date Issued: 14 October 2015**