IN THE FIRST TIER TRIBUNAL **Case No PHL 15335**

HEALTH EDUCATION AND SOCIAL CARE CHAMBER

PRIMARY HEALTH LISTS

NHS PERFORMERS LIST REGULATIONS 2004

TRIBUNAL PROCEDURE (FIRST TIER TRIBUNAL) (HESC) RULES 2008

BETWEEN:

RICHARD MROZINSKI

GMC Ref No 1735565

Appellant

and

TRAFFORD PCT

Respondent

Before

Judge J Burrow

Dr S Ariyanayagam

Mrs V E M Barducci

Sitting at Field House 15 Breams Buildings London on 7 April 2011.

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1. The appeal

1.1 This is an appeal by Dr Mrozinski pursuant to Regulation 15(1) of the 2004 Regulations against the decision of the Trafford PCT (the PCT) on the 21 September 2010 to remove him from the Performers List on efficiency grounds. Dr Mrozinski had previously been contingently removed subject to conditions under Regulation 12 and it was alleged he had failed to comply with the conditions. The PCT determined that his actions had significantly added to the burdens of others in the NHS and that his continued inclusion in the performers list was prejudicial to efficiency. The central issues for this appeal were whether his actions were prejudicial to efficiency and whether the decision to remove was correct and proportionate.

2. Legal framework

2.1 The legal framework for this appeal is largely contained in the NHS Performers List Regulations 2004, which inter alia sets out the criteria by which appeals are to be considered.

2.2 Regulation 10(4) (a) provides that a performer may be removed where his continued inclusion in the performers list would be prejudicial to the efficiency of the service which those included in the relevant performers list perform.

2.3 Regulation 11 sets out the matters to which the PCT (and the PHL) should have regard, including the nature of any incident which is prejudicial to efficiency, the length of time since the incident, any action taken by the regulatory authority, risk to patients, and the overall effect of any relevant incidents.

2.4 Regulation 12 provides that the PCT (and the PHL) may remove a practitioner contingently, and impose conditions which can remove any prejudice to efficiency. If the performer fails to comply with the conditions the PCT (and the PHL) may vary the conditions, or impose new ones or remove the performer from the list.

2.5 Regulation 15 provides that the appeal to the PHL is by way of redetermination, and the PHL can make any decision which the PCT could have made.

2.6 We also took into account the relevant sections of the "Primary Medical Performers Lists Delivering Quality in Primary Care Department of Health 2004" including paragraphs 7 and 17. Paragraph 7.4 states in respect of efficiency grounds "*they may relate to every day work, inadequate capability, poor clinical performance, bad practice, repeated wasteful use of resources that local mechanisms have been unable to address, or actions or activities that have added significantly to the burden of others in the NHS (including other doctors)*".

2.7 We further had regard to the proportionality of the decision appealed against, taking into account all the relevant evidence in the case and considering the applicants interest in pursuing his profession on the one hand and efficiency to the service on the other.

2.8 The burden of proof of an issue is on the party who alleges it and the standard of proof is on the balance of probabilities.

3. Evidence

3.1 By agreement with both parties this case was heard under rule 23 of the 2008 Rules without an oral hearing – that is to say on the papers. The evidence in this matter consisted of the bundle produced by the PCT (which contained both parties' papers).

3.2 On 28 June 2004 Patient K complained to the PCT in respect of a prescription issued by Dr Mrozinski on 3 June 2004 for amoxicillin, an antibiotic of the penicillin family. Dr Mrozinski was acting in a locum capacity for the patient's GP at the time. According to the inquiry by the Health Ombudsman, Patient K suffered a significant adverse reaction while on her honeymoon. She asked for an apology and compensation for her ruined holiday. She had a history of penicillin allergy based on her account of a previous reaction. The history was marked on her medical summary card, on her Lloyd George paper record and on her computer records.

3.3 Patient K gave an account that Dr Mrozinski had asked her if she was allergic to antibiotics and she replied not that she was aware of, not having associated antibiotics with penicillin. A five day course was prescribed by Dr Mrozinski and a few days later on holiday she developed a serious rash and other symptoms. On return to this country she consulted her GP who told her that Dr Mrozinski had written on her notes that he had asked her if she was allergenic to penicillin and that she had answered no. This was disputed by Patient K.

3.4 On receipt of the complaint the PCT forwarded it to the GP to deal with, who sought to convene a meeting with Dr Mrozinski, but the doctor failed to appear. He wrote a letter dated 17 July 2004 to the PCT in response to the complaint. There was no attempt in the letter to provide an account of his actions or explain why he had prescribed antibiotics, and it was not forwarded to Patient K. The PCT thereafter made several attempts to persuade Dr Mrozinski to engage in the complaints process but he failed to do so.

3.5 Patient K thereafter referred the matter to the Health Commission which investigated the complaint, and who wrote three times to Dr Mrozinski asking for a response, but none was received. The matter was thereafter referred to the Health Service Ombudsman who also investigated the matter. They referred to the GMC's "Good Medical Practice' which requires doctors to explain fully and promptly what has happened and appropriately apologise. They also referred to the NHS Complaints Procedure for General Practices which states that GPs must "*listen carefully and understand the persons perspective - emphasise"*.

3.6 The Ombudsman's clinical advice was that it was not certain that amoxicillin was the cause of Patient K becoming unwell. Although Mrs K was unaware of it, she had twice been prescribed penicillin with no ill effect in 1994. However the Ombudsman found that Dr Mrozinski should not have totally disregarded the allergy warnings or over ridden the computer warning without discussion with her. The report, dated 13 August 2006, concluded

that *" Dr Mrozinski's initial response to the complaint was unhelpful, negative and belligerent in tone and his threat of a counterclaim did not comply with NHS complaints regulations and GMC guidance. It was only after we contacted Dr Mrozinski about Mrs K's complaint that he provided a response to the substance of it, but there was no explanation of why he had not provided an earlier explanation and no apology. "*

"He should not have prescribed antibiotics without further discussion and should have told her that it was recorded that she was allergic to penicillin. Dr Mrozinski's handling of the complaint was completely unacceptable, his repeated refusal to respond to the substance of her complaint put her to unnecessary time and trouble and added to her distress"

3.7 The Ombudsman recommended that Dr Mrozinski send Patient K a written apology and pay £250 compensation. Dr Mrozinski refused to do so and questioned the Ombudsman's authority to investigate clinical matters. The PCT later paid the compensation themselves.

3.8 Patient K thereafter referred the matter to the GMC who issued their decision letter on 2 July 2007. They said "*It was unreasonable for Dr Mrozinski to have ignored the letters from the Healthcare Commission ….The Healthcare Commission and the Health Service Ombudsman have a legitimate interest in such matters. In considering whether Dr Mrozinski is in breach of Good Medical Practice the Case Examiners consider that it was unwise for him not to have responded in a more detailed way to the nature of Mrs B's (sic) complaint. It was however unreasonable for him to ignore subsequent correspondence from the Healthcare Commission whose jurisdiction he did not apparently appreciate"*. The GMC did not find his fitness to practice impaired but did issue formal advice that he should ensure that he complies more closely with Paragraph 31 of Good Medical Practice.

3.9 Thereafter the matter was referred by the PCT to the NCAS for advice as to how best to get cooperation of Dr Mrozinski. Arrangements were made by the NCAS for meetings with the doctor and the PCT but two were cancelled by the doctor at short notice. Thereafter the National Patient Safety Agency wrote to the PCT on 16 June 2008 advising that the PCT now needs formally to consider list action.

3.10 The PCT established its own investigation in the matter by Dr Q. He compiled a report which was placed before the Family Health Service and Contract Committee on 18 November 2008. Following consideration of the report the PCT concluded that Dr Mrozinski had not complied with paragraph 31 of the Good Medical Guide , had failed to comply with the local resolution process and had failed to cooperate with the PCT investigation. They said there was no evidence of reasonable, considered and balanced responses to the PCT or to the Healthcare Commission or to the Ombudsman and Dr Mrozinski had shown no insight into complying with regulatory requirements which are in place to improve patient welfare.

3.11 They concluded he had acted in a way that had added significantly to the burdens of others in the NHS including other practitioners. They found that his continued inclusion in the performers list would be prejudicial to the efficiency of the service and they contingently removed him on the following conditions – that within 28 days he will discuss the matter with an out of area clinician, and that within 48 days he will undertake a complaints handling

training programme which will be monitored by an out of area clinician. He was also to apologise personally in writing to the patient and repay the PCT the £250.

3.12 He appealed the finding to the FHSAA who heard the appeal on 27 March 2009. The Tribunal concluded that Dr Mrozinski had failed to comply meaningfully with the patient's complaint, with the Healthcare Commission, with the ombudsman, or with the NCAS. The Tribunal rejected any allegation of bias on the part of Dr Q in preparing the investigation report. They adverted to the "considerable use of resources". Importantly they considered the conditions and concluded they were constructive, and far from onerous. They upheld the conditions (save for the payment of £250, in respect of which they noted Dr Mrozinski had not been given notice by the PCT) and upheld the contingent removal.

3.13 Thereafter it transpired that Dr Mrozinski did not comply with any of the conditions imposed by the PCT. In a hearing of the Primary Care List and Contracts Committee on 21 September 2010 the PCT considered removal. They took into account the doctor's submissions to the meeting (set out below) but noted he had not complied with any of the conditions even though the PHL had described them as "far from onerous". The concluded that he had acted in a way that has added to the burden of others in the NHS including other doctors, and that his continued inclusion in the performers list would be prejudicial to efficiency. They removed him from the performers list.

Dr Mrozinski's account.

3.14 In his initial letter of 17 July 2004 in response to the complaint by Patient K, Dr Mrozinski said that he had attempted to set up a meeting with the GP but was unsuccessful. He said he offered a batch of dates to the GP including a date in July 2004. He said he expected the GP to get back to him but he never did and hence his non-attendance. He said if the patient was questioning his clinical competence she should contact the GMC and if she was claiming medical negligence then she should contact a solicitor "and expect a possible counterclaim".

3.15 In his submission to the PCT hearing of 18 November 2008 at which he was contingently removed, he said correspondence by the PCT was "littered with inaccuracies, misinformation and failure of communication". He said his reply to the original complaint was prompt and clear. He appeared to criticise the PCT for insisting on following the NHS complaints procedure "even when the complainant made it clear that she did not want a further meeting".

3.16 He appeared to infer that only the GMC could deal with the complaint and not the Healthcare Commission or the Ombudsman. He suggested that the GMC had concluded the matter with no further action. He alleged that Dr Q, who had carried out the investigation for the PCT, was biased. He said removal from the PCT performers list was a restraint of trade. He said the problems could have been avoided if the PCT had forwarded his response to the complainant.

3.17 In his submission to the PHL appeal on 27 March 2009 dealing with the contingent removal, he said the complaint was old, that he had responded promptly to it and it was an administrative misunderstanding which has caused the meeting not to take place. He said the complainant did not want to follow the complaints procedure. He said he had engaged meaningfully. He said the complainant accepted that he had asked if she was allergic to antibiotics, and subsequent investigation showed that she was not allergic to penicillin.

3.18 He said the GMC accepted that his fitness to practise was not impaired and he made further allegations against Dr Q and again suggested bias. He said there was no failure to engage with the complaints process which would amount to a risk to patients or which constituted prejudice to efficiency. He said he had practised for 35 years and that he was a safe and competent doctor, and that since the complaint he had worked on occasion for the PCT.

3.19 In his submission to the PCT hearing of the Primary Care List and Contracts Committee on 21 September 2010, he reiterated issues made in previous submissions and criticised the PCT for "starting a paper chase". He referred to Dr Q, who had compiled the Investigation Report, in a derogatory manner and implied the report and the subsequent actions by the PCT were biased. He implied the conditions imposed in the contingent removal would be ineffectual in removing prejudice, and suggested the costs incurred in the PCT procedures were unreasonable. He said he had appealed to the High Court which appeared in fact not to be the case. He said if his letter had been forwarded to Patient K then money time and effort could have been avoided.

3.20 In his submission on the current appeal he said the PCT had used the power of removal as a "sword not a shield". He said it was the PCT who had acted in a manner which was prejudicial to efficiency by wasting money. He said the PCT may as well blame the complainant. He said it "reminds him of the drunks attacking the Salvation Army and pleading provocation as a defence until sense prevailed". By this remark he appeared to be suggesting he was the blameless party and the PCT and others had wrongly attacked or criticised him.

3.21 He suggested that the idea that "this could be negatived (sic) by an apology and a two week management course" was somehow inappropriate and he concluded by saying that "this seems disproportionate especially as the Appellant has been bought up in a culture of waste not want not and to do the right thing and never for the sake of expediency". He seemed to be suggesting by this remark that he would not comply with the conditions and that if he did so it would be merely as a matter of expediency on his part, and that he would not change his behaviour or attitudes as a result.

4. **Consideration by the Tribunal**

4.1 We considered the evidence with care. We concluded that, despite Dr Mrozinski's claim that he had replied promptly and clearly, his letter of 17 July 2004 in fact failed to

engage adequately with the complaint, did not provide an explanation of his acts, and did not offer an apology but on the contrary was belligerent and uncompromising. It did not comply with the GMC or NHS guidelines, and had the apology been sent to Patient K, far from avoiding subsequent difficulties, could only have aggravated the situation and caused her more distress.

4.2 Dr Mrozinski's failure to engage with the Healthcare Commission and the Healthcare Ombudsman were in our view, further examples of his unreasonable and entrenched attitude. He clearly did not accept the authority of these bodies to investigate the matter even though he was reminded by his own regulatory body that they do have such authority. Although the Ombudsman's clinical advice suggested that Patient K's illness could not be clearly attributed to the prescription of penicillin, Dr Mrozinski was criticised for his clinical actions in the Ombudsman's Report. We concluded that Dr Mrozinski did not show sufficient insight into those criticisms or appear to accept them or learn from them.

4.3 It also appears that Dr Mrozinski believes that he was exonerated by the GMC. He was in fact criticised for his handling of the complaint and was given formal advice that he must comply more closely with Paragraph 31 of the Good Medical Practice. We concluded that again he had shown significant lack of insight. Furthermore we noted that having been given this advice by his regulatory body, he then conspicuously refused to comply with it by refusing to engage with the NCAS or the subsequent investigation by the PCT.

4.4 Although he has made allegations that the report by Dr Q was biased, he has not suggested how the facts in the report are inaccurate or in what ways the opinions expressed were wrong or biased. We agree with the FHSAA appeal panel in rejecting these allegations. We also agree with the appeal panel that the conditions imposed by the PCT in the contingent removal were appropriate and were necessary, reasonable and proportionate.

4.5 We consider that the failure by Dr Mrozinski to comply with the conditions was wholly unreasonable on his part. We concluded this demonstrated a settled and apparently unalterable intent on his part to ignore the complaints process, and to refuse to remedy his shortcomings. This attitude appears only to be confirmed by his implied assertion that even if he were to perform the conditions it would be for expediency only and he would not change his actions or his attitude.

4.6 We accepted that a performer's ability to demonstrate insight, by accepting criticism and acting to remediate it is an important aspect of the improvement of standards and the protection of patients and is an important function of regulation by the PCT. A settled and apparently intractable refusal to engage with this process is a one which prejudices the efficiency of services. Furthermore the repeated refusal to engage by Dr Mrozinski constitute in our view actions by him which have added significantly to the burden of others in the NHS (including other doctors) and which causes prejudice to efficiency .

4.7 We concluded for these reasons that the decision by the PCT to remove was necessary, proportionate and correct and we rejected the appeal.

John Burrow

Judge HESC/PHL