IN THE FAMILY HEALTH SERVICES APPEAL AUTHORITY **CASE 14620**

Professor M Mildred - Chairman
Dr R Sadek - Professional Member
Mr AJ Lloyd - Member

BETWEEN

DR ANDREW GILBEY
(Registration Number 274211)
Appellant

and

NEATH PORT TALBOT LOCAL HEALTH BOARD
Respondent

DECISION WITH REASONS

Background

1. By a letter dated 10 June 2008 the Respondent ("the LHB") removed the Appellant ("Dr. Gilbey") from its Medical Performers List on the ground of efficiency under regulations 10(3) and 10(4)(a) of the National Health Service (Performers Lists) (Wales) Regulations 2004 ("the Regulations") and for failure to comply with a condition imposed on his contingent removal imposed upon him on 10th January 2008 under Regulation 12(3)(c). By his notice of appeal dated 2nd July 2008 the Appellant appeals against that decision.

2. Dr Gilbey worked from 1 April 1988 at the Cwmllynfell Practice, which comprises two modern surgeries in which he has invested his own funds, whose list is about 2,800 patients. In addition he has undertaken some hospital and out-of-hours work. In July 2006 the LHB received a letter from the manager of Cwrt Enfys Nursing Home in Ystradgynlais complaining about a number of matters including Dr Gilbey's reluctance to make visits, prescribing and referrals.

3. An inquiry was carried out by the Medical Director of Bridgend LHB since Dr Gilbey was reluctant for Powys LHB (in whose district the Home was) to be involved. As a result of this report and a Performance Panel, and despite many criticisms of the process by Dr Gilbey, there was an agreement that Dr Gilbey would undergo a formal NCAS assessment. In the light of the draft report the LHB suspended Dr Gilbey on 4 September 2007 for 6 months.

4. The help of the Cardiff Deanery was enlisted and an Advanced Training Practice ("ATP") was found for Dr Gilbey to provide 6 months retraining in the light of the recommendations of the NCAS. Dr Gilbey entered into a Service Level Agreement with the Deanery for this purpose on 15 January 2008. On 10 January 2008 the LHB lifted the suspension and contingently removed Dr Gilbey from its List subject to satisfactory completion of 6 months retraining and Dr Gilbey not otherwise practising medicine during that period. On 23 April 2008 this was terminated by the ATP without notice. As a result of which the LHB removed Dr Gilbey from its List as set out in paragraph 1 above. It is fair to record that Dr Gilbey has complained loudly and at length about each stage of these procedures.

Procedural history

5. Dr Gilbey was initially unrepresented and raised a number of questions concerning procedure and the evidence to be led at the hearing of the appeal. We dealt with these in a Note on Procedure dated 7 August 2008. By the time of a directions hearing on 28 August 2008 it had become clear that the number and complexity of the issues in the appeal rendered the proposed length of the hearing (estimated at 2-3 days) unrealistic and we directed that the appeal should

be listed for 5 days. We also gave directions for disclosure and exchange of factual and expert evidence.

6. The preparation for the appeal was complicated by a further unusual interim matter in respect of which we have made three further decisions. As part of his retraining imposed by way of his contingent removal DVD recordings were made of Dr Gilbey's consultations with patients of the ATP. It appears that when the retraining was terminated Dr Gilbey took with him four DVDs of these recordings. He instructed a medical expert Dr Silk to give evidence on his behalf and wished Dr Silk to view and report upon the content of these DVDs. The LHB objected to this on the grounds that (a) the removal was for failure to comply with the conditions of Dr Gilbey's contingent removal (not for deficient consultation skills) so that any such evidence would be irrelevant to the question of efficiency that is before us (in the LHB's view his inability to accept criticism and learn from retraining) and (b) the patients concerned gave a limited consent to the recording that does not cover the intended use of the DVDs: any such use would breach the patients' right to confidentiality and would prejudice the basis on which Advanced Training ("AT") is made available to the disadvantage of patients, doctors and the NHS alike.

7. On 13 October 2008, having had written submissions from the parties, we decided that limited disclosure of the DVDs should be made and invited further submissions on whether the Panel should (a) receive the expert opinion on the DVDs by way of reports alone, or (b) whether the writers of those reports should be subject to cross-examination, (c) if so, whether the advocates should view the DVDs concerned and (d), if so, whether the Panel should also view them.

8. On 21 October 2008 we ruled that the expert evidence should include any views the parties wish to advance on the quality of Dr Gilbey's consultation skills as evidenced by the DVDs and that after exchange of expert reports and witness statements Counsel should attempt to agree which parts, if any, of the DVD evidence the Panel should view. If that could be agreed, we would hear submissions at the beginning of the hearing on 1 December. We directed that Dr Silk and any person giving opinion evidence on Dr Gilbey's consultation skills on behalf of the LHB should attend for cross-examination. In the event the LHB has not provided any specific expert evidence over and above the professional witnesses called to give evidence concerning the course of Dr Gilbey's retraining at the Old School Surgery ("OSS").

9. On 22 October 2008 in response to a request from Dr Gilbey's Counsel we authorised (insofar as we had the power so to do) Counsel for both parties to view the DVD recordings of Dr Gilbey's consultations with patients of the OSS.

<u>The hearing</u>

10. The hearing took place at the Cardiff Marriott Hotel from 1st to 4th December 2008. Dr Gilbey was represented by Mr Philip Engelman instructed under the Bar Public Access Scheme. The LHB was represented by Mr Jeremy Hyam instructed by Messrs Morgan Cole. Both Counsel provided helpful written opening submissions. Members of the Panel confirmed to the parties that they had no conflict of interest in hearing the appeal.

11. We decided after short argument that in principle we would hear and adjudicate upon the contending opinions of expert and professional witnesses in relation to Dr Gilbey's consultation skills rather than watch the DVDs ourselves. This was intended to maintain a proportionate approach to the rights to confidentiality of the patients whose consultations had been recorded but we reserved the position in case there were particular aspects that required viewing by the Panel.

12.Mr Engelman relied upon his written opening and in particular confirmed that he relied upon procedural irregularities on the part of the LHB such that the appeal should be allowed. Mr Hyam addressed us by referring us to a number of documents that set the background to the appeal in context. We had already directed that witness statements should stand as evidence in chief

unless otherwise ordered. In this decision, however, we attempt to record evidence on contested matters in adequate detail.

The LHB's evidence

13. The first witness was Dr Andrew Goodall, the Chief Executive of the LHB. His witness statement was dated 15 October 2008. He was cross-examined on behalf of Dr Gilbey. He was aware on arrival at the LHB of difficulties between Dr Gilbey and Powys LHB and that that was why the investigation of the Cwrt Enfis complaints had been undertaken by an officer of Bridgend LHB. The Clinical Risk Group of the LHB considered such an investigation was necessary (rather than local resolution) because of the nature of the complaints and the relationship between the Matron of the Home and Dr Gilbey.

14. He said that the LHB had supported Dr Gilbey by using the referral to NCAS to attempt to help him back into practice, giving financial support and trying to understand the problems giving rise to clinical issues, balancing the LHB's duty to safeguard patients against that support. When he received Dr Gilbey's letter of 16 October 2006 complaining about Dr Kirsop's conclusions he had reviewed the process although he had not taken notes of that review, talking to Rosemary Fletcher and Dr Richard Quirke.

15. He was firmly of the view that Dr Gilbey's behaviour at the ATP had caused the breakdown and thus the failure to comply with the conditions of the contingent removal. Dr Goodall accepted that the LHB's first letter of 7 May 2008 summoning Dr Gilbey to a Panel on 9 June 2008 did not contain details of the allegations against him, although the further letter of 14 May did. He considered that Dr Gilbey's change of heart during the Panel in acknowledging development needs was the result of advice given to him in a break in the proceedings. Dr Goodall took no steps to find another ATP for Dr Gilbey.

16. Re-examined by Mr Hyam, Dr Goodall said that the investigation report was before the Performance Panel and had been offered to Dr Gilbey who had refused to accept it. Dr Gilbey had been supported at the Panel by Dr Millington form the LMC, Dr Goodwin and Dr Phillips. He pointed out that the LHB preferred to use assessment by NCAS consensually rather than by exercising its power of referral for such assessment.

17. Mrs Hilary Allman, the Director of Primary Care and Partnership of the LHB gave evidence, her witness statement being dated 16 October 2008. Cross-examined by Mr Engelman she said that on her arrival at the LHB the Primary Care team was involved in supporting Dr Gilbey and that there were no particular problems between April 2003 and July 2006. Problems in 2003 had been resolved by a good Practice Manager. The LHB had been unable to provide extra funding for Dr Gilbey to employ a second GP since that was his responsibility from his existing practice funding.

18. The clinical concerns raised by the Matron of the Nursing Home caused the LHB to implement its Managing Concerns Policy, especially since the Matron did not want a local resolution owing to her relationship with Dr Gilbey. Although Dr Gilbey was not involved in the decision he agreed to be referred to NCAS. A Screening Panel of the LHB had decided to ask Dr Kirsop of Bridgend LHB to investigate the complaints before the Panel decided to seek the help of NCAS.

19. Mrs Allman did not accept that Dr Gilbey had inadequate resources to run his practice but said that the problems with his practice were well known and he had been advised to reduce his hours and get support in 2007. Dr Gilbey knew what complaints had been made by the Matron of Cwrt Enfys and about the Terms of Reference of Dr Kirsop's investigation. Mrs Allman said that the LHB had been advised that evidence from NCAS for this appeal was unnecessary. One of the NCAS assessors had been familiar with the Vision software used by Dr Gilbey but the other had had to ask for help on occasions. The LHB had asked a staff member to help the assessors, if they had queries about the software.

20. Dr Gilbey had been informed the day before he was suspended of the LHB Panel meeting and the reason for it. She was unable to say whether he had had a full 24 hours notice of the hearing. Mrs Allman accepted that the ATP had not strictly adhered to the letter of the SLA requirements in terms of the timetabling of activities but explained this by references to a discretionary leeway and the difficulty of fixing meetings at times convenient to all involved.

21. She had heard "rumblings" when the mid-term review meeting to discuss the ATP placement was being fixed that all was not well but was otherwise surprised at the breakdown of the placement. All concerned told her that this had been caused by Dr Gilbey's clinical problems and difficulties in his behaviour. She had asked the Deanery whether another ATP placement could be arranged but was told this was very unlikely. Mediation between Dr Gilbey and the LHB was proposed but this was nothing to do with the obligation on Dr Gilbey to undergo retraining before returning to his practice. Nor was mentoring proposed because of that same obligation for Dr Gilbey to be retrained.

22. Re-examined by Mr Hyam, Mrs Allman confirmed that Dr Gilbey was at liberty to recruit a salaried partner and that the LHB had paid for a full-time locum to keep the practice open and that there was no suggestion that the ATP placement broke down because of any technical breaches of the timetable of reporting obligations.

23. On Tuesday 2 December we heard from three partners in the Old School Surgery Practice in Pontyclun, the ATP. Dr David J Robinson (whose witness statement was dated 31 October 2008), the Senior Partner and Educational Supervisor of Dr Gilbey identified his optimistic "second" (in fact 4th) week report and mentor's report on Dr Gilbey's placement and the clinical observation tool ("COT") analyses of the videos of Dr Gilbey's consultation upon the recordings of which he himself had given Dr Gilbey feedback.

24. Cross-examined by Mr Engelman, Dr Robinson said that the second week report had been delayed because Dr Gilbey had not initially undertaken any consultations and because they were awaiting the paperwork from the Deanery. He said that he was able to delegate his supervisory role to partners with skill in a particular area and confirmed that Dr Gilbey had attended regularly. Dr Gilbey had not shown him his reflective reports. Dr Robinson had shown colleagues from other ATPs DVDs of Dr Gilbey's consultations at a 2-day meeting of ATPs in February 2008.

25. Dr Robinson said that the partners had discussed hundreds of consultations with Dr Gilbey and that he had not taken the RCGP Applied Knowledge test because Dr Gilbey's main problem was with attitude rather than substantive skills and that he had discussed this with the Occupational Psychologist, Dr Melody Rydderch. Dr Rydderch had shown her reports to Dr Gilbey but Dr Robinson had not shown his.

26. Dr Robinson accepted that the "2-week" report was optimistic about the placement and that he had told Dr Gilbey that he would not have let him see patients of the Practice, if he had not regarded him as competent. By the 6-week report on 17 March 2008 the partners were willing to continue the ATP but had some doubts about Dr Gilbey, expecting better results whilst sensitive to Dr Gilbey's position. Dr Robinson felt Dr Gilbey had regressed and that most of his reflections were that the NCAS report was wrong.

27. Dr Robinson was taken to the records of a number of Dr Gilbey's consultations and agreed that some were perfectly acceptable, but he was not at all consistent. By a partners' meeting on 21 April 2008 the partners had serious doubts about the utility of continuing the AT as they found Dr Gilbey's attitude and behaviour very stressful, in particular his undermining of the Practice in front of patients. They decided to give Dr Gilbey two more weeks effectively on trial but had not told of him this decision.

28. On 23 April Dr Varma was very upset by Dr Gilbey in his morning review session with her and Dr Sullivan from the Deanery because he had undermined her (as he had previously undermined Dr Robinson) in front of patients. The partners had decided to terminate the AT not because Dr Varma was upset but because there was ample evidence that he was unable to change his practice to eradicate the problems identified by NCAS.

29. Re-examined by Mr Hyam, Dr Robinson said that he had now read Dr Gilbey's reflective e-mails (which he had not seen at the time) and now regarded them as defensive and as evidence that there was no determination on the part of Dr Gilbey to make progress. He complained about NCAS and compared his computer system and his own skills favourably to those of the ATP on an almost daily basis. NCAS had given the ATP a specific agenda that the partners of OSS had discussed with Dr Gilbey and had spent time with him on a daily basis. He refuted Dr Gilbey's criticisms of the ATP by reference to the assessments of the Practice and the fact that the LHB had put in hundreds of hours analysing the prescribing of OSS as a model practice.

30. Dr Robinson described Dr Gilbey's knowledge as generally good and his clinical skills as good, but not as good as he thought they were and said that Dr Gilbey ignored or dismissed patients' symptoms where they did not accord with his preconceptions. He accepted the pressures of single-handed practice but said Dr Gilbey needed to learn appropriate delegation to properly trained staff. Dr Gilbey had not had permission to remove copies of the DVDs and the ATP had reported this to the GMC.

31. Dr Gilbey did not complain of procedural breaches of the SLA at the time but said that he was being treated well and looked forward to coming into work. The partners had studied the NCAS report in advance and Dr Robinson agreed with it.

32. Dr Robinson spoke to Dr Matthews of the Deanery for 10-15 minutes on the afternoon of 23 April saying that the partners at OSS were at the end of their tether. His view was that attitudes were hard to alter and that Dr Gilbey had caused havoc and upset everyone at OSS.

33. In reply to Dr Sadek Dr Robinson said that they had tried endlessly to change Dr Gilbey's attitude to patients and to his interaction with the Primary Healthcare Team so that he could learn to delegate. He accepted that his letter to the Deanery dictated on 23 but dated 28 April was heartfelt and a little bitter; he accepted that he had gaps in his knowledge but said his prescribing had never been criticised. There was no question that Dr Gilbey was capable of being a safe doctor, if he chose and was motivated to exercise that capability.

34. Dr Andrew Duffin-Jones (whose witness statement was dated 19 August 2008) reviewed the original DVD referred to in Dr Silk's supplementary report against the copy provided by Dr Gilbey to Dr Silk and the ATP and said that it was to be inferred from the original that Dr Gilbey had not washed his hands or put on gloves before taking an intimate swab from the patient with cystitis. The copy DVD provided by Dr Gilbey ended some time before the swab was taken.

35. Otherwise Dr Duffin-Jones generally agreed with Dr Silk's conclusions but said that Dr Gilbey was wrong to take the patient with diabetic backache off 4 drugs (that had been recommended by a hospital specialist) at once and said there was an implicit criticism of the patient's care by the ATP. Dr Duffin-Jones thought that Dr Gilbey had absorbed suggestions from the ATP for about 4 weeks but then learnt no further lessons so that all the trainers were going over the same points with him. Dr Gilbey was defensive and turned advice he was given into criticisms of the ATP: he needed much more than weekly mentoring and specific training in, for example, gynaecology and dermatology.

36. Cross-examined by Mr Engelman, Dr Duffin-Jones said that Dr Gilbey needed 10 sessions mentoring per week and more education about child health and psychiatric problems. He accepted he had described a consultation by Dr Gilbey on 15 April as competent and the

consultations he had reviewed as “not too bad” although he made detailed strictures about some of them.

37. In relation to termination of the AT Dr Duffin-Jones said he doubted by 18 April 2008 whether the AT was doing any good. At the minuted partners’ meeting on 21 April feelings about the placement were shared: for the last 6 weeks there had been open criticism of the Practice and the partners, constant criticism of the computer system and of NCAS and questions in relation to Dr Duffin-Jones’ surgical fees in front of Practice staff. On 18 April Dr Duffin-Jones had asked Dr Gilbey to prepare for a tutorial on 23 April on either prescribing or data entry. If he did not engage with this, the ATP would have discussed with the Deanery their reservations about continuing the placement. On 21 April the partners had decided in any event to speak to the Deanery, if there was no improvement in the next fortnight.

38. When Dr Duffin-Jones came back to the ATP on 23 April he found Dr Varma very distraught in the Practice Manager’s room. The partners (in Dr Davies’ absence) decided they were not prepared to carry on with the placement and Dr Duffin-Jones told Dr Gilbey at the beginning of the planned tutorial. Dr Gilbey said that his career had been wrecked by the decision and Dr Duffin-Jones said his placement at the ATP was over but that his training was only halfway through. Dr Gilbey asked him whether he could access to DVDs of his consultations and Dr Duffin-Jones left this to the Practice Manager to sort out with the Deanery since he was unsure of the position.

39. The crucial factor at the 23 April meeting was not that Dr Varma was upset but that the partners felt they were not getting anywhere with Dr Gilbey (who deflected feedback into aggressive criticism of the ATP) but that the upset to Dr Varma was the “last straw”. Otherwise he would have carried on with the 14 day review period.

40. Dr Mair Hopkin (whose witness statement was dated 7 November 2008) disagreed with Dr Silk’s assessment of Dr Gilbey’s consultation with the 31 year old patient on the grounds that there was no assessment of any suicide risk and that the patient’s drinking and domestic violence had not been dealt with. Dr Gilbey’s silence had not been appropriate and the consultation was disjointed. She described his prescription of an antibiotic to a 4 year old with a probable viral infection as a capitulation that reflected his compliance with well-spoken demanding patients. An antibiotic given as a reserve was not in itself unreasonable but was part of a pattern.

41. She also differed from Dr Silk in criticising Dr Gilbey’s consultation with a patient with relapse of her asthma and the suggested use of iron in a 4 year old without evidence from a blood test of anaemia. She said that Dr Gilbey was able to practise safely but it was a separate matter whether he could achieve that consistently: the ATP had failed to make progress with him and he certainly needed a period with 10 training sessions per week.

42. Cross-examined by Mr Engelman, Dr Hopkin described the practice meeting on 21 April as a discussion of Dr Gilbey’s progress as the time for another report to the Deanery approached. There was consensus that after initial progress a plateau had been reached on which all the trainers were telling him the same things in respect of the same clinical and attitudinal problems. They decided to stick with it a little longer but, if there was no improvement, they were unsure that they could carry on supporting him and would speak to the Deanery. She described his attitude as arrogant and disparaging to patients whom he regarded as intellectually inferior and said that all partners found it tiresome that any reference to a matter contained in the NCAS report would provoke criticism of the ATP or an individual partner.

43. On 23 April Dr Hopkin received a telephone call at lunchtime to say that there was a partners’ meeting because of a problem. The meeting in the Practice Manager’s room lasted about 20 minutes and was not minuted because it was an emergency: the decision was that, in the light of the discussions of 21 April and Dr Varma’s experience that morning, the ATP could not continue the arrangement with Dr Gilbey.

44. Asked by the Chair what was the chance of Dr Gilbey being a safe and efficient GP, Dr Hopkin said that he could be good but not consistently so and there was a question how he could progress in this direction. Asked what was the chance of Dr Gilbey completing AT at another practice, she replied that Old School Surgery was the most accommodating ATP in Wales.

45. On 3 December we first heard from Dr Martin James Sullivan (whose witness statement was dated 9 August 2008), an Associate Dean at the Cardiff Deanery and a GP in Swansea. He had reviewed five of Dr Gilbey's recorded consultations and recalled two clearly. He had noted disorganised history-taking, early assumption of a hypothesis, communication issues and issues with consent and discussing steps to be taken with the patient. He was in overall agreement with the NCAS recommendations, saying that there were several issues with Dr Gilbey's safety to practise and that, since the ATP placement had failed, he did not believe weekly mentoring would be adequate.

46. In reply to Mr Engelman, Dr Sullivan conceded that he had only met Dr Gilbey once on 23 April for about 90 minutes and had not read the NCAS report (over and above its conclusions) but believed the recommendations provided sufficient basis for his opinion. He had seen the DVDs after reading Dr Silk's report. He was aware that Dr Varma was shaken on 23 April but would not have described her as visibly upset.

47. Dr Gilbey made the session very difficult by his preoccupation with the NCAS report and the systems at the OSS; it had been difficult to provide feedback because Dr Gilbey was set on talking about the NCAS report and his own experience in practice. He was not aware of the OSS partners' meeting of 21 April but was not entirely surprised when he heard that the placement had been terminated.

48. In reply to questions from the Panel, Dr Sullivan said that Dr Gilbey very defensive and accusatory throughout: Dr Sullivan thought Dr Gilbey knew he was present to facilitate the feedback session, rather than to assess Dr Gilbey.

49. Dr Philip Lyndon Matthews, the Deputy Director of General Practice and Sub-Dean of the Cardiff Deanery (whose witness statement was dated 23 August 2008), confirmed that Dr Robinson had showed the six-monthly meeting of ATPs a DVD of two of Dr Gilbey's consultations to try to provoke discussion about how to help him. He had had a private discussion with Dr Robinson at which the latter felt there had been some improvement. On the basis of 10 years experience of training and assessment of GPs and having read the entire NCAS report, Dr Matthews felt Dr Gilbey had very significant learning needs in the areas of diagnosis, healthcare outcomes, not allowing patients to complete their account, early hypothesis generation, not understanding patients' agendas and very little engagement of the patient.

50. Dr Matthews confirmed that he had first approached another of the 12 ATPs in Wales. That practice had been unable to take Dr Gilbey on for retraining owing to its current workload and the scope of work required, according to NCAS, in Dr Gilbey's case. He would fully disclose the history of the placement, if asking another ATP to take Dr Gilbey on and pointed out that the Deanery could not compel an ATP to take a GP on. He described the chance of securing another ATP for Dr Gilbey as "nigh on impossible".

51. Cross-examined by Mr Engelman, Dr Matthews said he had discussed the case with Dr Duffin-Jones and Dr Hopkin. The latter had around the beginning of April said there had been initial improvement but this had not been sustained and that there was by then regression. Dr Matthews accepted that the 2 week report on Dr Gilbey was delayed but said this was not uncommon. The mid-term meeting was being arranged at the time of the termination. The OSS Practice Manager told Dr Matthews shortly before 23 April that they were very concerned about the placement.

52. The RCGP Applied Knowledge Test was scheduled for later in the placement. Dr Matthews asserted that triangulation of views could be achieved by involving partners within the Practice as well as outsiders. Dr Matthews was aware that strains were developing and was only mildly surprised when the placement was terminated. He had decided not to attempt to secure another placement because of what he saw as Dr Gilbey's breach of confidentiality in removing DVDs from OSS. In addition Dr Matthews had been concerned that OSS might leave the ATP programme.

53. In reply to questions from the Panel Dr Matthews said that the OSS partners were level-headed, skilled and altruistic and that he did not think the strains occurred for want of effort on the part of the OSS: the cause of the breakdown was Dr Gilbey's negative commentary. He is clearly intelligent but unwilling to accept the need to change or for advice; it was not productive to carry on because Dr Gilbey does not perceive there is a problem to be dealt with.

54. Dr Matthews said he was disappointed Dr Gilbey had not been shown the 2 and 6 week reports from the Practice. The OSS was very different from Dr Gilbey's own practice. He had initially found Dr Gilbey hostile and obsessed with the unfairness of the NCAS report. He had encouraged OSS to carry on with the placement, realising it had become an issue by 21 April 2008.

Dr Gilbey's evidence

55. Dr Andrew Graham Gilbey (whose witness statement was dated 10 November 2008) began his evidence by saying that Dr Duffin-Jones told him on 23 April that he could take the 4 DVDs with him when he left. He said he had looked forward to his ATP: he thought he had been doing a good job in his own practice but wanted to learn new ideas and ways of doing things and thought it would be nice not to be responsible for a change. He could not see that he could have done any more than he did at OSS.

56. He was very surprised at what he saw in terms of lack of continuity and the time taken trying to recap a patient's history. He said he could understand why OSS liked the EMIS computer system but that he had thought hard about how to keep records on a system where the records were searchable by a search engine. The patients at his practice were more working class and Welsh speaking and there was more continuity of care of the elderly in his practice.

57. He accepted that he had been critical of the OSS partners but only in private clinical feedback sessions. He felt there was repeated narrow-spectrum criticism of him and that the allegations of doctor-centredness and lack of safety netting were hypocritical. Faults in his own practice by the NCAS were endemic in the OSS. He was never told that his criticisms irritated the OSS partners. Dr Robinson never raised concerns about his ability to change and his conversation with Dr Duffin-Jones on 23 April came as a completely devastating shock. The placement had not worked out because the partners had no concept of his experience and did not have the skills to address his case. He accepted that he had learning needs and was prepared to accept further mentoring and another ATP placement.

58. Cross-examined by Mr Hyam, Dr Gilbey said that he did not believe there were substantial deficiencies in his abilities and that he wanted to use the placement to show that he was a competent doctor. He did not agree that he was under strain in May 2002 from anything to do with patient care although there were financial constraints affecting the practice. He had had successful relations with Dr Guerero and then Dr Jenkins as colleagues in the practice.

59. Dr Gilbey complained that the Cwrt Enfys complaints in 2006 were dealt with under the LHB in-house Managing Concerns policy rather than under the General Medical Regulations. His comments to Dr Kirsop, the investigating officer from Bridgend LHB were never looked at so that he was never able to respond. There was legal action going on about the "medical and bureaucratic anarchy" in Ystradgynlais for which the Executive of Powys LHB should be held responsible.

He had agreed to engage with NCAS as he had to, as a professional but they had not properly considered his comments on the draft report. There was no basis for the finding that his prescribing was unsatisfactory or inappropriate. He accepted that not washing his hands was a serious allegation but said he was at the time under the strain of being observed by the NCAS assessors.

At OSS he was not defensive and did not blame others. He was always glad to receive constructive criticism but criticisms of attitude were hard to rebut. His only complaints to NCAS were about the process and not about the opinions expressed. He did not accept that Professor Scotland had considered his complaints in detail or that the assessors were able to use the VISION software in his practice during the assessment. He was denied an independent review of the process.

60. Dr Gilbey did not accept the substantive criticism of his practice by the OSS but said he had gone there to learn and not to dwell on the NCAS report. He accepted that he had written in several of his reflective comments that the trainer was in the wrong.

61. After 4 weeks the Practice Manager gave Dr Gilbey forms for a weekly reflective report to the Deanery. He said that the form was incorrect because he was not having tutorials but after some research composed his own form that he put on the network drive to show that he was learning from every consultation. He made honest reflective diary entries that he e-mailed to himself to provide an audit trail. He was advised by Dr Rydderch not to show them to the OSS partners. Dr Gilbey accepted that these entries were full of criticisms of the OSS but said that his behaviour was professional in every way and he maintained that he had complied with everything that was asked of him.

62. After lunch Dr Gilbey said he had hoped NCAS would not accept the referral and then renewed his complaint about Dr Kirsop's report and Mrs Allman's letter to NCAS. He pointed out that Dr Hopkin had said that he would pass the RCGP summative examination. He could not account for what the OSS partners had said about him. He said that Dr Quirke's role in the Performance Panel was not impartial and that Mrs Allman had predetermined an NCAS assessment for him before that Panel had met to discuss his case. He proposed he should return to his practice with a (preferably female) medical colleague and undergo weekly mentoring.

63. In reply to Mr Engelman, Dr Gilbey said he would accept another ATP placement and co-operate with it. He then renewed his criticisms of the ability of the NCAS assessors with Vision software. He showed examples of learning from several of his consultations (at W95, 120, 121, 122 and 125). He was aware of no difficulty in communicating with his patients and said he treated them with respect.

64. In reply to the Panel Dr Gilbey accepted that he should have "toed the line" but said it had never been his intention to fall out with anyone. He would love to get AT behind him and move on. He could undergo another 6 months placement but there would be financial considerations. He recognised the need to change and that he could initially come across as awkward. He said that he would of course accept the NCAS agenda for a new ATP placement but thought the evidence for the NCAS assessment was not accurate and thus the conclusions may not be entirely robust.

65. Dr Nicholas Silk, who provided an expert report dated 10 November and a supplementary report dated 24 November 2008, said that he had not seen Dr Gilbey's reflective diaries when he wrote his report: they now made him slightly more worried about Dr Gilbey's ability to change but had not affected his view that he is a capable practitioner. He still believed that two half-days mentoring per week would be adequate since Dr Gilbey had functioned for 20 years without significant difficulties and had very loyal patients. The evidence from the assessment was not very convincing and NCAS had not looked at many cases: if 6 patients were removed, the impact

of the report would be lessened. He accepted Dr Kirsop's criticisms and the NCAS criticisms of consultations and record-keeping but said most could be readily addressed.

66. Cross-examined by Mr Hyam, Dr Silk accepted he had not undertaken video assessment for 10 years and had not used COTs and that he had seen 16 of many hundreds of recorded consultations. He said that Dr Hopkin had used the yardstick of best practice as opposed to acceptable or satisfactory practice and accepted that OSS partners had criticised Dr Gilbey's attitudes and doctor-centredness rather than his safety.

67. He also accepted that the reflective diary entries were very disappointing and a challenge to the trainers. He did not accept that Dr Gilbey had been subjected to institutional bullying as he alleged. He accepted that the NCAS assessors were very experienced, that the process was sound and that it was very difficult to go behind their conclusions. He accepted the concerns expressed concerning length of examination, examination technique, history taking or recording of examination details, record keeping, consent and chaperone policy. He said, however, that the assessors had seen an open access clinic that would have produced more emergency (and thus potentially shorter) consultations.

68. He was surprised by Dr Gilbey's comments on the NCAS criticisms of his infection control. Hand washing does not appear on the DVDs although Dr Silk thought that Dr Gilbey does obtain consent.

69. Dr Silk accepted that, if Dr Gilbey did not accept the concerns expressed by NCAS and others, further training would be "pretty hopeless" but, despite the evidence of the OSS placement, there is a prospect of remediation. Being defensive would, however, make more training very difficult. Some initial progess was made at OSS but it was not maintained. Dr Gilbey would be safe with two half days per week of AT since he would be determined to succeed after his salutary experience at OSS.

70. In reply to the Panel Dr Silk acknowledged that listening to Dr Gilbey giving evidence had raised anxieties about his attitude, as had reading the reflective diaries but he would be surprised, if he could not buckle down in another ATP where problems could readily be addressed.

71. Five of Dr Gilbey's patients then gave evidence: Mr Leonard Gabriel, Mrs Gloria Norman, Mr William Powell, Mr Joffrey Durham and Mrs Emily Durham. They were unanimous in their praise for Dr Gilbey and in particular his consultation skills, respect shown to them, readiness to visit, compassion, diagnostic sharpness and communication skills. Examples were given of life-saving treatment, gentleness and understanding.

72. The bundles also contain a large number of individual testimonial statements and a petition in Dr Gilbey's favour with an unusually impressive number of signatures.

Submissions of the parties and rulings on procedural issues

73. Both parties handed in closing submissions in writing to which they referred in making oral submissions. Mr Engelman again focussed on alleged procedural irregularities that, he said, effectively resulted in the purported decision of the LHB being a nullity and thus no decision and therefore no appeal was possible or necessary. He attacked the time at which and the detail in which notice was provided of the suspension hearing, the 10 January hearing and decision contingently to remove and the hearing and decision of 9 June 2008 to remove Dr Gilbey from the List.

74. In our opinion the LHB had a complete answer to this: the appeal is against the decision to remove and that decision is ineffective (because suspended by service of the Notice of Appeal) until our decision is made. Thus we will ourselves make any decision that the LHB could have made (for example, contingent or outright or no removal) on the basis of our redetermination of the case. That accords with the scheme we believe Parliament intended to introduce in the

Health and Social Care Act 2001 and is consistent with the plain words of Regulation 15(1) and (3). Dr Gilbey has plainly had adequate notice and details of the LHB case before us.

75. Next Mr Engelman relied on Rule 41(7) of the Family Health Services Authority (Procedure) Rules 2001 that, he submitted, appears to confine a respondent LHB to relying on evidence presented to it before or at the time (ie 9 June 2008) it took the disputed decision. Mr Hyam submitted that it was too late (in closing) to take the point and, in particular to take it in support of his submission on the procedural irregularities without inviting us to ignore any such evidence. That, he submitted, would be unfair and an abuse of process. He invited us either to read Rule 41(7) as including an obligation to deal with the appeal fairly (in which case we should allow the evidence) or effectively to take into account only the documentary evidence provided by the LHB available to it on or before 9 June together with the evidence of Mrs Allman and Dr Goodall (who had attended the 9 June meeting).

76. There is no doubt that Rule 41(7) creates difficulties of interpretation and practice. In our view a fair approach is to interpret it as allowing before us the LHB's evidence as originally given to support the allegations before the original decision-maker (the 9 June Panel), or further evidence elaborating upon it but not to allow evidence to be led that would or might additionally have persuaded the LHB to remove the practitioner (for example, a conviction for dishonesty or a subsequent grave clinical error).

77. In the light of this approach and of the fact that Mr Engelman did not in terms ask us to ignore any of the LHB's evidence, we propose to found our decision on all the evidence before us. In case we are wrong in our interpretation of Rule 41(7) we make it plain that the decision we reach below would have been identical, had we only considered the evidence before us put in by or on behalf of Dr Gilbey and that available to the LHB Panel on 9 June 2008.

78. Mr Engelman next submitted the processes of the LHB to an analysis redolent of a dispute over the terms and potential breaches of a contract. This again arose largely out the terms of letters from the LHB giving Dr Gilbey notice of proceedings against him. We do not find this approach helpful, partly for the reasons already given for leaving out of account procedural irregularities alleged against the LHB and partly because, as Mr Hyam submitted, Dr Gilbey was only party to a contract (strictly a Service Level Agreement) with the Deanery (not with the LHB) and that contract in any event permitted the Deanery, the ATP and Dr Gilbey to terminate the Agreement at any time without notice or reason.

Submissions of the parties on the merits

79. Mr Engelman candidly accepted that Dr Gilbey could be erratic and had plainly been irritating to OSS but submitted that there had also been failures on the part of the ATP. In particular he had not been shown the 2 and 6 weeks reports to the Deanery and had been given no notice after the 21 April meeting of the OSS partners that his placement was hanging by a thread: he had no chance to respond on 21 or 23 April. He is and was capable of being a competent doctor and it would be a waste of resources to remove him, particularly given his long service in a challenging geographical area and the esteem in which he was held by his patients.

80. Mr Hyam responded that the evidence of the NCAS was that Dr Gilbey is far from a competent GP and that his whole behaviour since 2006 has evidenced a serious lack of insight. He could and should have "toed the line" but was unable so to do by reason of his arrogance and lack of insight: his medical deficiencies might be remediable but there was no evidence that his personal faults could be cured. He had already had the benefit of massive NHS resources devoted to him and his continued presence on the List would be bound further to prejudice the efficiency of the LHB services.

Our conclusions on the "efficiency" ground

81. The evidence that Dr Gilbey has shortcomings in clinical skills, communication difficulties and behavioural problems is clear as is the fact that he has been greatly wasteful of NHS resources.

We have no difficulty in finding that the LHB has proved an "efficiency case" within the meaning of section 49F(2) of the National Health Service Act 1977 and Regulation 10(4)(a) against Dr Gilbey.

Disposal

82. We now turn to consider whether it would be just to impose conditions on Dr Gilbey's membership of the List with a view to removing the prejudice to the efficiency of the LHB's GP services. Mr Engelman made the following points in favour of a contingent removal of Dr Gilbey: (a) he had no warning of the impending termination of the placement; (b) the Deanery did not try to find another placement and there were at least 10 potential ATPs untried; (c) Dr Gilbey is willing to take on a female colleague and accept and co-operate with mentoring, or further retraining; (d) he would accept the NCAS criticisms of his practice and address them; (e) Dr Silk thought Dr Gilbey could be successful; (f) Dr Gilbey would realise that it was his last chance and would "buckle down" in another ATP; (g) there was consensus that Dr Gilbey was at least potentially a safe and competent doctor; (h) whose patients were satisfied with him; and (i) he was capable of improving his major shortcoming in relation to his communication skills.

83. Mr Hyam was entirely sceptical that Dr Gilbey was capable of change since he must have been either aware of his behaviour and the effect it was having at the ATP or, if not, entirely lacking in insight. He knew he had to "toe the line" but was incapable of so doing because of arrogance and self-belief: he had conspicuously failed to use the opportunity of retraining and could not accept criticism or deal with authority. He had not, contrary to what he said, accepted the NCAS conclusions or let go of his obsession with all the perceived injustices visited upon him by all the agencies whose paths he crossed.

84. He opposed the halfway house of contingent removal since it was unrealistic to expect that Dr Gilbey had the capacity to change and such an outcome would maintain an extra financial burden of approximately £120,000 per year on the LHB, in addition to all the management time and the other scarce NHS resources involved such as those of the Deanery and another ATP.

Discussion

85. We have very considerable sympathy with the LHB's position. Dr Gilbey's reflective diaries and other written materials were evidence of arrogance on the part of a person unable to let go of the past and put his best foot forward to meet the future. His evidence to us was unimpressive in both content and demeanour, even allowing for the stress of the occasion. At the end of his evidence he gave the following reply to a question from Dr Sadek: "Of course I would accept the NCAS agenda for a new ATP. I think the evidence for NCAS was not accurate and therefore its conclusions may or may not be entirely robust." On a merely textual construction this is scarcely reassuring evidence of readiness or openness to change or the ability to achieve it.

86. On the other hand it is clear that Dr Gilbey has put in 20 years service in general medical practice in demanding and challenging circumstances and provoked striking loyalty in his patients. Of course it may be said that both he and they have become set in their ways but we consider it a strong point in his favour, especially when combined with the potential for safe and competent practice and the unfortunate way in which his ATP placement was ended (for the last of which, however, we are satisfied that Dr Gilbey was overwhelmingly responsible).

87. Taking all these competing considerations into account and on a very fine balance we have decided that one more attempt should be made to bring Dr Gilbey back into safe, competent and insightful practice. There is no doubt that the last of these will provide the greatest challenge for all concerned, but particularly for Dr Gilbey who should be aware both that whether the process succeeds will be almost entirely his responsibility and that the prospect of a further "last" chance would be vanishingly small.

88. In coming to this conclusion we have taken into account both the financial burden on the LHB and the need for a further ATP placement. Dr Gilbey, wisely in our view, offered to meet the cost of a new ATP placement. We think the prospect of returning a remediated GP to the community

where he is valued justifies that burden (albeit on the finest balance). We are aware that the Deanery will be anxious about the effect of this decision and that we (and they) have no power to compel the offer to Dr Gilbey of a further placement. They have, however, great expertise and a richly deserved reputation in the field and we hope they will be able to find such a placement in one of the 10 or more remaining ATPs.

89. Without it, given the NCAS conclusions and the GMC restrictions on Dr Gilbey's practice, the purpose of this decision will be frustrated. Under the conditions referred to below, if an ATP placement cannot be found by 31 March 2009, the LHB can take such action as it thinks fit. If all conditions can be met, Dr Gilbey will be restored to practice by about October 2009 (reasonably consistent with the timetable imposed by the GMC): we consider this a proportionate approach to the competing claims in this appeal.

90. There was evidence in the hearing that Dr Gilbey has expended a very great deal of energy on complaints and appeals against decisions of several bodies and, indeed, a reference to legal proceedings. We have no power to suppress any of these activities but would record, if only as a matter of common sense, that unless Dr Gilbey can treat these as matters best left in the past and look forward, he will find it very difficult to make anything of this last chance to return to the GP fold.

Decision

91. Accordingly we decide that Dr Gilbey should be contingently removed from the LHB's Performers' List subject to the following conditions:

(a) he shall not from the date of this decision work in any capacity as a NHS General Practitioner except under the supervision of a workplace supervisor who shall be a GP trainer accredited by the Postgraduate Medical and Dental School of Cardiff University ("the Deanery") and approved by Neath Port Talbot Local Health Board and this condition shall remain in force until the expiry of a continuous period of six months from the date of any commencement in such work;
(b) he shall not during the period of supervised work under (a) above work for less than ten sessions (the nature of which shall be agreed between the LHB and the Deanery) per week except in case of certificated absence through illness;
(c) he shall on or before 31 March 2009 enter into a Service Level Agreement ("SLA") with the Deanery in terms substantially similar to the SLA between him and the Deanery dated 15 January 2008 and will pay the cost of the Advanced Training placement provided under that Agreement to a limit of £22,000;
(d) the Deanery may in its absolute discretion require Dr Gilbey to submit to it for approval a Personal Development Plan to address the deficiencies in his practice to include the following areas: interpersonal skills, communication skills and consultation skills by 24 April 2009;

92. The Panel reminds the LHB of its obligations to Dr. Gilbey under Regulation 15 (4) and draws the attention of Dr Gilbey to the consequences of failure to comply with these conditions contained in Regulation 15(6) of the 2004 Regulations.

93. In the circumstances we need not deal with the LHB's application for National Disqualification.

94. We direct, pursuant to Rule 47(1) of the Family Health Services Appeal Authority (Procedure) Rules 2001 that a copy of this decision is sent to the Secretary of State, The National Assembly of Wales, the Scottish Executive, The Northern Ireland Executive and the Registrar of the General Medical Council.

95. Any party to these proceedings has the right to appeal this decision under and by virtue of Section 11 of the Tribunals and Inquiries Act 1992 by lodging notice in the Royal Courts of Justice, Strand, London WC2A 2LL within 28 days from the date of this decision.

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Mark Mildred, Panel Chair
8 December 2008