Case Number 13331

IN THE FAMILY HEALTH SERVICES APPEAL AUTHORITY

Panel
Mr D Pratt (Chair)
Mr Davinderpal Kooner (Professional Member)
Mrs M Harley (Member)

BETWEEN:

MAREK WOJCIECH SCHUBERT (GDC No 84586)

Appellant

-and-

MORECAMBE BAY PRIMARY CARE TRUST

Respondent

DECISION AND REASONS

1. This is an appeal by a dentist, Mr Marek Wojciech Schubert ("Mr Schubert"), against the decision of Morecambe Bay Primary Care Trust ("the PCT") to remove him from its Dental Performers List pursuant to Regulation 10 (4) (a) of the NHS (Performers List) Regulations 2004, as amended, on the ground that his continued inclusion in the List would be prejudicial to the efficiency of the services which those included in that Performers' List performed (an "efficiency" case). The Panel met to consider the appeal on 8 December 2006.

DECISION

2. The unanimous decision of the Panel is that this appeal be dismissed and that Mr Schubert be removed from the Performers List of this PCT pursuant to Regulation 10 (4) (a) of the NHS (Performers List) Regulations 2004, as amended ("the Regulations"), on the ground that his continued inclusion in the List would be prejudicial to the efficiency of the services which those included in that Performers' List perform.

REASONS

3. Mr Schubert did not personally attend the PCT hearing which considered his case, and the decision was contained in a letter from the PCT to him dated 10 August 2006. Morecambe Bay PCT remains the Respondent in this case by virtue of paragraphs17 and 18 of Schedule 1 of the NHS (Performers List) Amendment Regulations 2005, even though there has been a reorganization of Primary Care Trusts as a result of which Cumbria Primary Care Trust is the statutory successor to Morecambe Bay PCT and (subject to this appeal) it is Cumbria which now maintains the List on which Mr Schubert's name appears.

4. The parties have both consented in writing to our determining this appeal without an oral hearing, and so we have proceeded under Regulation 38 (1) of the Family Health Services Appeal Authority (Procedure) Rules 2001 ("the Rules") to consider the appeal on the papers. We had available:
    a. The bundle of papers lodged by Mr Schubert with his letter of appeal dated 31 August 2006;
    b. A bundle prepared by the PCT containing:
        i. Appeal documentation numbered A1 – A9 including Mr Schubert's appeal letter dated 13 August and further letter of submissions dated 27 September 2006, the PCT's letters of response from their solicitors, dated 29 September and 16 November 2006.
        ii. Reports, numbered B1 – B16, which had been available to the PCT when it made its decision which is the subject of this appeal, namely:
            Report of Mr Nigel Wilson (the dentist who employed Mr Schubert);
            Report of Mr David Tyson (the PCT's Dental Services Implementation Manager);
            Response of Mr Schubert to those reports, dated 12 April 2006.
        iii. Witness statements (numbered C1 – C40)on behalf of the PCT from:
            Mr Nigel Wilson;
            Mr David Tyson;
            Mr John Mellor (the PCT's Clinical Director of Dental Services)
        iv. Correspondence (including the Minutes of the Performers Panel Hearing held by the PCT on 27 July 2006) numbered D1 – D24
        v. Department of Health Guidance, numbered E1 – E 119, comprising:
        "International Recruitment Project – Recruiting Dentists from Poland"
        "Primary Care Performers Lists – delivering Quality in Primary Care".
    c. We also had a further response from Mr Schubert to the documents contained within this bundle, in the form of a letter dated 28 November 2006 (placed with his appeal bundle and given the number 36-37).

<u>Background</u>

5. Except where indicated, Mr Schubert has not disputed the facts set out in this section of our decision.
6. Mr Schubert responded to a recruitment exercise conducted on behalf of the NHS in Poland. It appears from the documents we have seen that the system involved a period of adaptation training and language course in Poland before successful candidates took up offers of employment in England. This was 8 weeks long and one weekend workshop. It was in two parts: an online course and "flying University" and a campus-based course. Following

relocation, the employer was expected to run an induction programme for the new employee: see E4.

7. Mr Schubert took up an offer of employment (dated 18 May 2005) as a salaried assistant with Mr Nigel Wilson and Mrs Angela Wilson (the Wilsons), who ran a dental practice at Dalton-in-Furness, Cumbria. He obtained registration with the General Dental Council, for which purpose he would have been required to provide satisfactory evidence of his qualifications and their equivalence to the qualifications and standards achieved by dentists qualifying to practise in this country. He arrived to take up his post some time in July 2005.
8. There is a dispute about whether he received induction training from the Wilsons over the first three weeks or so of his stay in Cumbria. In particular it is in issue whether he was shown how to use the x-ray equipment at the Wilsons' dental surgery, whether he told them he had no previous experience of taking dental x-rays, and whether he was asked whether any of the procedures demonstrated in the surgery were different from those to which he was accustomed. In any event he practised at the Wilsons' surgery from July until 29 September 2005 when he went on holiday and again on his return from about 10 October to 26 October, when, on advice, the Wilsons removed him from all clinical care of patients. On 7 November 2005 Mr Nigel Wilson wrote to Mr Schubert terminating his contract on 12 weeks' notice.
9. This period of a little over 3 months involvement with patients gave rise to a number of return visits to the Wilsons' practice, by patients who had previously been seen and treated by Mr Schubert, and also some patient complaints. These were summarised in a "Report regarding the clinical performance of Mr Marek Schubert" compiled by Mr Nigel Wilson on a date in October 2005 (B1-B6). Some 38 cases were there described, of patients who had originally been seen (sometimes on several occasions) by Mr Schubert and had then come back and been seen by the Wilsons with problems or alleged failures of management. Although described as an audit they were merely fortuitous examinations. According to a subsequent report compiled by Mr Tyson, Mr Wilson estimated that about 50% of the patients seen by Mr Schubert had caused concern about defective management of some sort (see B8). We have considered the each complaint about clinical standards and (where Mr Schubert provided them) his comments or explanations, and set out our findings below.
10. On 29 September 2005 Mr Wilson raised a number of concerns with Mr Schubert, just before he left on holiday, and these are set out in more detail in his report at B1 and in his witness statement. During Mr Schubert's holiday, further concerns came to light. As a result Mr Wilson contacted Mr J Mellor (Clinical Dental Director of the PCT) on 3 October and agreed that he would provide an in-house training programme for 3 weeks with the aim of providing benchmarks for his performance, after which a formal report would be made to the PCT. If no improvement was evident, the PCT would contact the NCAS.

11. Mr Wilson spoke also to Mr Tyson on 10 October and later that same day he and Mrs Wilson met with Mr Schubert and informed him of their concerns and "confronted" him with his lack of cavity preparation before placing a filling. Mr Wilson later recorded that he did not put up any case for the poor cavity preparation but felt he was too busy. Mr Schubert was also noted as being of the opinion that his radiographic technique was improving. To this point he had largely seen new patients. It was agreed he would no longer see new patients or emergencies but concentrate on his own treatment plans. In addition he would spend a day a week attached to Mr or Mrs Wilson to observe.
12. In-house observation and training sessions took place on three days of the following week, but further problems were becoming apparent, as Mr Wilson explains in his witness statement (paragraph 15). Therefore on 24 October he contacted the PCT and was put in touch with an adviser from the National Clinical Advisory Service ("NCAS"), who suggested a range of possible responses including retraining or secondment to a Dental Access Centre. Mr Wilson was also advised to contact Dental Protection (his professional indemnity organisation) who advised that Mr Schubert be immediately removed from patient care. On 26 October 2005 Mr Wilson explained to Mr Schubert that he was removing him from all patient care but would allow him to return to the surgery to prioritise his patient cards and to return the following week to observe treatment given to patients by the Wilsons.
13. On 7 November 2005 Mr and Mrs Wilson gave Mr Schubert 12 weeks' paid notice to terminate his contract of employment (see D2).
14. On 13 December 2005 the PCT requested the North West Public Health Department to issue an alert letter in respect of Mr Schubert, which was done on 31 January. Meanwhile Mr Wilson had written to the PCT on 13 January 2005 raising further clinical concerns which had come to light (see C17-18). The PCT decided to consider suspending Mr Schubert from the Performers List and for that purpose convened a hearing by its Performers Panel on 31 January 2006. We find that Mr Schubert attended this hearing and gave oral evidence to it, despite his suggestion (see A2) that he "did not participate" and "learned of no accusations against [him]". There is ample evidence to the contrary. Not only does the evidence of Mr Tyson state in terms that Mr Schubert and Mr Wilson both gave oral evidence to the PCT Panel (see C 22), but the PCT letter of 2 February which set out its decision to Mr Schubert thanks him for coming along to the hearing. The decision of the PCT was to suspend.
15. Following the suspension, Mr Tyson was required by the PCT to prepare a report. He had face to face interviews with Mr Wilson but spoke to Mr Schubert by telephone because the latter returned to Poland. Mr Tyson says "He failed to acknowledge that there was any problem with the treatment he had provided other than that which resulted from his inability to take x-rays" (see para 12 of Mr Tyson's statement).

16. Mr Tyson reviewed the options of retraining, which were judged to be impractical in light of the profoundly deficient standard of dentistry, and unacceptably expensive, Mr Tyson asked the PCT to Panel to remove Mr Schubert from the Performers List.
17. On 12 April 2006 Mr Schubert wrote to the PCT setting out the submissions he wished them to take into account in considering his removal. He also commented on the reports of Mr Wilson and of Mr Tyson (see B10-14). He made two general points. Firstly that he was not trained in carrying out x-rays which were only performed by technicians in Poland, and "without x-ray photo analysis there is virtually no possibility to cure patients". The second was that despite what he regarded as a clear written commitment by the Wilsons to enable him to take part in training in doing x-rays in this country, they had failed to do so. He vigorously disputed that they had shown him how to use the particular x-ray machines in their surgery. He also responded in detail to 16 of the 38 allegations of clinical deficiency raised against him in Mr Wilson's report.
18. The PCT Health and Social Care Act Panel met to consider the proposed removal on 27 July 2006. Mr Schubert consented to its proceeding in his absence. Evidence was taken from Mr Wilson, in addition to the reports to which we have referred, and he was specifically questioned about the matters challenged by Mr Schubert in his letter of 12 April 2006. The PCT Panel reached a decision to remove Mr Schubert from the performers list, expressing the opinion that the decision was based on patient safety and his lack of clinical competence.

<u>The appeal and response</u>

19. Mr Schubert's grounds of appeal may be summarised as follows:
    a. He was the victim of failures by his employers to honour promises to train and support him.
    b. One of these unfulfilled promises was to send him on a Deanery Induction Programme.
    c. Such training would have provided practical training in performing x-rays, which Polish dentists such as Mr Schubert did not do – indeed there were no x-ray machines in their surgeries.
    d. His working conditions obliged him to work too intensively, seeing from the first day up to 40 patients a day, receiving a list of 1400 patients, including a number of emergency patients, and he was therefore unable to spend more than 10 minutes with each patient.
    e. He never had a single conversation with his employer colleagues about professional matters.
    f. He was expressly forbidden to send patients to "specialist doctors" because such a doctor "would not be able to solve the problem anyway".

g. His employer made no contributions to the NHS pension Scheme, and failed to provide monthly payslips.
h. He did not participate in the hearing on 31 January 2006 and did not learn of the accusations against him until two months later when he received an email from the PCT.
i. He had not received a promised report from the PCT.

20. The PCT responded by two letters dated 29 September [A4 – 5] and 16 November 2006 [A6 – 9] giving its amplified grounds of response. The PCT contended that:
    a. Mr Schubert's grounds of appeal raised a number of employment related issues, and the Wilsons, not the PCT, were his employer. The PCT did not respond to those private law complaints.
    b. A Panel of the PCT had heard representations from Mr Schubert at a hearing to consider suspension from the Performers List on 31 January 2006, and considered written submissions from him at a hearing to consider his removal on 27 July 2006, as well as the reports from Mr Tyson and Mr Wilson mentioned above.
    c. On the question of substantive fairness, the PCT said that:
        i. Within a short time of staring to treat patients, his employers had become aware of wide-ranging deficiencies in the quality of his care, including failure adequately to prepare teeth prior to fillings, failure to treat abscesses and failure to use local anaesthetic.
        ii. Following consultation with the PCT, the National Clinical Assessment Services and with Dental Protection, his employers removed him from patient care on 31 October and terminated his employment on 7 November 2005, and on the basis of the report written by Mr Wilson, Professor Ashton, Regional Director of Public Health, considered him to be "a serious risk to patient safety" and issued an Alert letter. The PCT had commissioned a report from Mr Tyson who had contact with the Wilsons and Mr Schubert
        iii. Undergoing an induction course organised by the North West Deanery was not a prerequisite to commencing work in a dental practice (see para 3 of Mr Tyson's witness statement, page C20) and in any event the extent of Mr Schubert's deficiencies could not have been remedied by an induction course.
        iv. Mr Schubert had complained that he had not been trained by Mr and Mrs Wilson in the use of x-rays, so restricting the treatment he could give. However, he had asked the Wilsons for training in the use of the x-ray machine at the surgery and they had shown him how to use it. At no time had he volunteered that he had ever previously taken x-rays until directly

questioned about it when the problems with his practice became apparent. The PCT took the view that the onus was on Mr Schubert to make clear to his employer the extent of his lack of training and to seek whatever training he felt necessary. In any event the issues arising form Mr Schubert's treatment were much more wide ranging than could be explained by an inability to take x-rays.

v. Mr Tyson (and subsequently the PCT panel) had given due regard to NCAS guidance as to retraining individuals where appropriate, and had concluded that the extent of his deficiencies made such an option impractical.

vi. Mr Schubert had failed to produce any evidence to support the assertion that many of his patients were happy with his treatment. The evidence seen was to the contrary.

vii. We were referred to the Department of Health's Guidance Document – "Primary Medical Performers Lists – Delivering Quality in Primary Care" paragraph 7.4 for examples of conduct which might be regarded as prejudicial to the efficiency of the service, including "issues of competence and quality of performance" in relation to "everyday work, inadequate capability, poor clinical performance [and]bad practice". We were also referred to Appendix E of that document and reliance was placed on examples of inadequate standard of care such as "out of date clinical practice", "inappropriate clinical practice arising from a lack of knowledge or skills that puts patients at risk" and "incompetent clinical practice".

d. On the question of procedural fairness, the PCT said that the requirements of Regulations 10(8) and 10(10) of the Regulations had been complied with:

i. *He had notice of the allegations against him,* in that the report of Mr Tyson and of Mr Wilson had been provided to Mr Schubert, and these contained the detail of the alleged clinical deficiencies.

ii. *He had notice of what action was being considered and on what grounds* by the PCT's letter of 2 February 2006, taken together with its letter of 26 January 2006.

iii. *He had the opportunity to make written representations* which he did, by a letter dated 12 April 2006.

iv. *He had the opportunity to put his case at an oral hearing*, as he was given the opportunity to attend the hearing on 27 July 2006, but declined to do so.

v. *He was informed of the decision taken by the PCT along with the reasons for that decision and his right of appeal* by a letter dated 10 August 2006.

The relevant law and regulations

21. The relevant provisions of the National Health Service (Performers Lists) Regulations 2004, as amended by the NHS (Performers Lists) Regulations 2005 are Regulations 10 (3):

    "*The Primary Care Trust may remove a performer from its performers lists where any of the conditions set out in paragraph (4) is satisfied."*

    And Regulation 10 (4):

    "The conditions mentioned in paragraph (3) are that –

    (a) his continued inclusion in its performers list would be prejudicial to the efficiency of the services which those included in the relevant performers list perform ("an efficiency case")".

    And Regulations 11 (5), 11 (6) and 11(7), by which when considering removal on grounds of efficiency, the matters to be taken into account (so far as relevant to this appeal) include:

    "(6) (a) the nature of any incident which was prejudicial to the efficiency of the services, which the performer performed;

    (b) the length of time since the last incident occurred and since any investigation into it was concluded;

    (c) any action taken by any licensing, regulatory or other body …

    (d) the nature of the incident and whether there is a likely risk to patients;

    …..

    (7) In making any decision under regulation 10, the Primary Care Trust shall take into account the overall effect of any relevant incidents and offences relating to the performer of which it is aware …"

22. We have had regard to those provisions and to the Department of Health Guidance to which our attention was drawn by the PCT, while not limiting our consideration of factors to those mentioned in the guidance, and we have considered all the factors urged on us in this appeal.
23. The question for us is whether we are satisfied that the PCT has proved that the continued inclusion of Mr Schubert in its dental performers list would be prejudicial to the efficiency of those services. The burden of showing that lies on the PCT.
24. The standard to which we must be satisfied is whether facts or allegations are proved on the balance of probabilities; in other words whether it is more likely than not to be true. The panel recognises that where serious allegations are raised, cogent and compelling evidence is required if they are to be found proved. When considering whether we are satisfied on a balance of probabilities that an allegation is established we bear in mind that the more serious the allegation, the less likely it is that it occurred and the stronger should be the evidence before we conclude that the allegation is established
25. The Panel has reminded itself that:

a. By Regulation 15 of the Regulations, this appeal is a redetermination by us, and therefore any alleged procedural unfairness at the stage of the PCT's decision may be cured by the process of this appeal.
b. This Panel may make any decision which the PCT could have made: Regulation 15 (3).

Findings

26. We have considered each and every allegation raised in the reports by Mr Wilson and Mr Tyson, in the light of the rebuttals, or explanations raised by Mr Schubert. We have also considered them in the light of the other evidence particularly that contained in the witness statements from Mr Wilson, Mr Tyson and Mr Mellor.
27. We noted that Mr Wilson's report alleged substandard management in relation to 38 patients (identified by number) from what was described as an audit. This was not a true audit since it depended on the fortuitous fact of whether these patients had re-presented with problems after having been treated by Mr Schubert. Elsewhere Mr Wilson estimated that about half the patients seen by Mr Schubert later returned with problems. We also noted that Mr Schubert had not specifically commented on, or raised a defence in relation to 19 of the allegations in Mr Wilson's report, except that he raised the general defences of being inadequately trained in the use of x-rays and was working under undue time pressure. This group (whom we shall call "group A") comprised patients 2, 5 – 9, 13, 14, 17, 20, 23 – 26, 28 – 31, 33, 35, 37.
28. Of this group of patients we took the view that on the information available we were unable to draw any adverse conclusions against Mr Schubert from his treatment of patient 33. We find the complaints of unacceptably poor clinical management to be proved in the case of the other patients in group "A". We were concerned that some common features were apparent in many of them. Mr Schubert had in most cases undertaken no adequate investigation of the cause of the presenting problem, or "work-up" of proposed treatment. He also attempted inadequate active management or only superficial and undemanding treatment, and demonstrated serious lack of technique and competence in very basic areas of dentistry such as doing fillings, and managing infection or abscesses. On some occasions Mr Schubert treated a presumed cause of pain without discovering the true cause in adjacent parts of the mouth.
29. Examples from group "A" will suffice:

    Patient 6: patient treated for 3 weeks by Mr Schubert for an infected root. He intended to refer to the hospital for its removal but the patient subsequently presented to Mr Wilson who found that the root was simple to remove, but the cause of the pain was a large cavity in the adjacent tooth, which was cleaned and dressed.

    Patient 8: filling done and lost immediately.

    Patient 9: a missed abscess in a child.

Patient 14: patient who presented with fractured cusp was offered option of having it removed or glued together, and chose the latter, but Mr Schubert effected the repair by applying a thin line of chemfil along the cusp margin: this would be insecure even for a temporary repair.

Patients 24 and 25: failure to undertake any instrumentation of root canals, simply dressing the tooth instead. In the first case the tooth was grossly abscessed and the patient had attended for 3 visits, when it was re-dressed. The advice given by Mr Schubert to that patient was that if the tooth became painful, she should flick the dressing out to relieve the pain, which advice was quite wrong. Dressing an infected tooth without instrumenting the root canal to remove infected material cannot be defended.

Patients 29 and 35: Mr Schubert recorded 1 mm pockets on the pocket chart in each case. In the first case, Mr Wilson found pockets of 6-7 mm soon afterwards, and in the second case found pockets of 2 – 5 mm. This represents, particularly in the case of Patient 29, advanced periodontal disease of long standing, which Mr Schubert had failed to identify or treat. This is basic dentistry.

Patient 31 had impressions taken by Mr Schubert for dentures, when in fact the teeth were mobile because of periodontal disease. It should have been treated so as to stabilise the teeth before proceeding to make and fit dentures.

30. In the remainder of cases within the Wilson report, which we shall call "group B", Mr Schubert raised objections or explanations to the allegations, all of which we have considered carefully. We felt that the allegations were not proved to the required standard in relation to patient 32 and the (un-numbered) allegation that he had tested for infection by smelling a probe in front of the patient.

31. The cases on which Mr Schubert commented were, in the main, not outright denials of the findings in relation to each patient after he had treated them. Mostly he was explaining or excusing the findings.

32. In relation to the condition of the patients and efficacy of his treatment, credibility has not therefore been as important in this case as might have seemed at first blush. We have avoided, as far as possible, basing our findings on the credibility of the parties, given that we are determining this appeal on the papers. However, on issues where it has been unavoidable to do so we have preferred the evidence of the PCT's witnesses. We found that in two respects there was evidence on the documents that Mr Schubert's evidence was not reliable:

    a. In his notice of appeal Mr Schubert said [A2] "*On 31 January 2006 a panel hearing was held in which I did not participate. However, at the time I learned of no accusations against me. I was only made aware of them in detail two months later in an email received from the PCT…"* Contemporary documents and a witness contradict this. On 2 February 2006 the PCT wrote to Mr Schubert [D11] saying

"Thank you for coming along to the … hearing on 31 January 2006". The evidence of Mr Tyson (paragraph 11) is that "*The evidence before the panel [on 31 January 2006] consisted of Nigel Wilson's report of November 2005 along with his further letter to the PCT dated 13 January 2006.* ***The appellant and Mr Wilson both gave oral evidence****, after which the Panel decided …"* [C22]

b. In his notice of appeal, Mr Schubert refers in the penultimate paragraph [A2] to the report prepared by Mr Tyson. He says: "*I asked for permission to read that report, and although I was assured that I would be able to analyse it, I have not received it."* In fact Mr Schubert responded to it in his letter of 12 April 2006 to the PCT [B10-14 and D14-18] in which he said [B10] "*I have received the report on the 5th April from David Tyson, for what I thank him.*"

33. We find that the remainder of the allegations set out in the report of Mr Wilson are proved. We further find that these represent serious clinical failings on a large number of patients over a relatively short space of time (about 3 ½ months).
34. There were further examples of inadequate preparation of teeth to receive fillings within group B, with the result that the fillings came out almost immediately. In relation to patient 4, who presented with a large swelling and in pain, Mr Schubert gave no treatment but sent the patient to hospital, as he said he wasn't sure if the swelling was of dental origin. We make no finding (on the information available to us) as to whether it was of dental origin or not, but it is clear that sending the patient for review at hospital was not so urgent as to preclude any form or dental investigation first, including dental x-ray, so as to exclude or confirm whether it was of dental origin. In any event we find it was unacceptable to send the patient to hospital without any form of referral letter, so that the hospital had to ring up the dental surgery.
35. We found that some of the explanations given by Mr Schubert in his own defence were themselves revealing, and tended to expose other causes of concern. By way of examples:
    a. Patients 1 and 3: allegation that fillings were lost within a few days because of a failure to prepare the cavity properly. Explanation that in England patients often lose parts of fillings and there are no symptoms of caries and therefore no need to prepare the teeth. Mr Schubert alleged that where this happened it was not caries causing the loss of the filling, but mechanical pressure put on the teeth. In our view the fact that a filling has come out requires the competent dentist to investigate why this has happened. If satisfied that caries is not the culprit, the loading on the teeth should be checked to establish if there is indeed undue pressure. There is no acknowledgment by Mr Schubert in his explanations, of the need for investigation, and modification of the treatment accordingly.
    b. Patient 11: allegation that a grossly over-opened denture had been fitted with teeth positioned in a severe Class 2 relationship. The second impression was grossly

deficient in the upper labial section to the extent that the try-in would not fit. Mr Schubert did not dispute or comment on the allegation but contented himself with saying that generally speaking he made dentures well. In so doing he suggested that a dentist always has time for making necessary corrections to eventually make the dentures fit perfectly. If Mr Schubert was suggesting that this particular set of dentures could have been adjusted to fit perfectly, it shows failure of insight. If he was suggesting that there is ample time and several appointments to get the fitting right, then there is no excuse for the result in this case. Taking an impression for dentures is a basic skill. In this case the second impression (which is more definitive than the first) was grossly defective.

c. Patient 21: allegation that an upper right incisor had been recemented by Mr Schubert but was not seated properly as it was too long. The patient later returned to complain and was told by Mr Schubert that the crown was fine but the other teeth were wearing down. When seen by Mrs Wilson it was found that the crown was incorrect and the excess cement had been left over the palatal margin covering the gap. Mr Schubert's explanation was that the post-crown had earlier been made by Mr Wilson, and during assessment before the crown was cemented it was found to be about 1 mm longer than the neighbouring teeth, but the patient had accepted this. He also said the reason for the discontent was that the crown was improperly made and was not his mistake. We find that this explanation demonstrates a poor approach to clinical responsibility and demonstrates lack of insight. A crown may be made by another person but the responsible dentist (in this case Mr Schubert) must assess it before cementing it and correct what needs correcting. Nor is there any acknowledgment that excess cement over the palatal margin was unacceptable.

d. Patient 22: allegation (which we find proved) that he treated the patient for 2 weeks for a dry socket whereas the problem was a pulpitis in an adjacent tooth. Mr Schubert's explanation was that when the patient points to the socket after a tooth extraction as the source of the pain, each dentist would surely consider this as the most probable place of the dental problem. In our view this does not relieve the dentist of the obligation to examine adjacent teeth, pain itself being difficult to source reliably. The explanation showed in our view significant lack of insight by Mr Schubert.

e. Patient 34: A patient complaining of pain since 18 August had been seen by Mr Schubert 4 times, and the treatment was: batwing x-rays were taken and gingival irrigation was undertaken with Corsodyl. The patient was advised to use mouthwash rather than brush that area. When later seen by Mrs Wilson a cavity at upper left 7 was diagnosed and treated. Mr Schubert said he did examine the patient and gave

advice on correct flossing. He also said this patient wanted a crown removed but in his view it was not the source of pain and therefore asked Mrs Wilson for another opinion. There are a number of troubling features of this. Having taken x-rays, Mr Schubert missed a cavity which was the source of persistent pain over 4 appointments. The advice he did give was poor management; Corsodyl is only an adjunct to good hygiene with a brush. Mr Schubert offers no explanation for his failure to diagnose the cavity.

f. Patient 36: a child with gross caries was seen by Mr Schubert in August. He made no attempt to stabilise or prioritise treatment and the child returned in pain. His explanation was that he was sure the parent was informed about the state of the child's dentition and about the way of maintaining proper oral hygiene and warned about the harmfulness of sweets. He excused the lack of prioritising treatment by saying that the date of the next appointment is always fixed at the reception office. In our view this again shows serious lack of insight. If there is gross caries, further work is needed but instead nothing was done. If nothing is done, the onset of pain is inevitable. This child's treatment needed to be prioritised. It is for the dentist to arrange priority of treatment. Trying to blame receptionists who have no information about whether the next appointment should be soon or not, shows in our view a serious lack of insight into his deficiencies.

36. We have also considered the general points advanced by Mr Schubert, namely lack of training in x-rays and pressure of time in this surgery. As to the x-ray training, we would be surprised if any dentist could obtain registration with the General Dental Council without producing adequate proof of basic training in taking and interpreting radiographs. If Mr Schubert did not have any such training, or competence, it was incumbent on him to make this clear to his prospective employers at interview, and in any event after taking up his post. We are not satisfied that he did any of those things. However, even if it were the case that he had no sufficient training in use of x-rays, the practical mechanics of taking x-rays (as opposed to understanding the physics) is not difficult, and there is evidence, which we accept, that he was shown how to perform x-rays on the equipment in this dental practice. Even where he had taken x-rays, there is evidence that Mr Schubert was unable to interpret them and so missed evidence of cavities (see Patient 34 above). In our view the alleged lack of training in the use of x-rays, which is proffered as a blanket excuse, cannot excuse the range and seriousness of his failures.

37. We do not accept that Mr Schubert was subjected to such a volume of patients that he had insufficient time to investigate, diagnose and treat them. We do accept that he had some time, at the beginning of his engagement, to observe the Wilsons at work, and familiarise himself with the practice. In any event lack of time cannot in our view excuse the deficiencies

we have found to exist. It is the responsibility of the clinician to perform to a standard of reasonable competence, and if more time is needed, to plan and book that time. We were struck by the fact that in many of these cases the patient had returned for multiple appointments without receiving proper treatment from Mr Schubert.

38. We have also considered whether there may be differences of management between Poland and the UK, but other than the management of x-rays, none is suggested, and it would still be necessary demonstrate basic skills.

Conclusions

39. In our view there is overwhelming evidence of a poor standard of dental practice by Mr Schubert, giving rise to unnecessary periods of pain for patients, poor results, the need for other practitioners to "re-do" work, and further unnecessary periods of treatment. There are some features which present a pattern:
    a. Poor conservative dentistry, marked by superficial management.
    b. Avoiding complex (but necessary) procedures: for example we could not find any real evidence that Mr Schubert was in fact able to carry out more extensive procedures such as root canal treatment, a routine part of dental management.
    c. Lack of adequate investigation of the cause of dental problems.
    d. Lack of any basic competence in either taking or interpreting x-rays.
    e. Poor charting and treatment of periodontal disease, poor record keeping and treatment plans.
    f. Lack of insight into the range and seriousness of the deficiencies which have been pointed out to him since October 2005, or earlier, and evidence that he is unwilling or unable to accept any responsibility at all for the catalogue of poor outcomes of treatment which were identified.

40. As a result patients were, in our view, exposed to risk at the hands of Mr Schubert, and it would not be safe to permit him to continue to practise on the PCT's performers list. We have no doubt that his continued presence on the performers list would prejudice the efficiency of the services offered by those on the list.

41. It is not for us to consider or suggest remedial training and in any event we find that the nature and seriousness of Mr Schubert's defects make it unlikely that retraining would be effective or of value, particularly because of our conclusions about his lack of insight. Moreover, the training required would be very extensive.

42. We therefore unanimously determine that this appeal be dismissed and Mr Schubert be removed from the dental performers list of Morecambe Bay PCT pursuant to Regulation 10 (3) of the Regulations, because his continued inclusion in that list would be prejudicial to the efficiency of the services which those included in the performers list perform, as provided by Regulation 10 (4) (a) of the 2004 Regulations.

43. We further direct that a copy of our decision be sent to the bodies mentioned at Rule 47 of the Family Health Services Appeal Authority (Procedure) Rules 2001, which in respect of the paragraph (e) shall be the General Dental Council.
44. We have not been asked by the PCT to consider National Disqualification of Mr Schubert under Section 49N of the National Health Service Act 1977 as amended, but it is our duty to do so. The parties have not had an opportunity to give us submissions on whether National Disqualification should or should not be imposed and we intend they should have that opportunity. We therefore direct that:
    a. By no later than 28 days after the date on which this decision is sent out, both parties shall (if they wish) lodge written submissions with the FHSAA, together with any further witness statements upon which they may wish to rely, on the issue of whether this Panel should impose a National Disqualification upon Mr Schubert. For his information, the effect of such an order is that he is removed from all performers lists maintained by PCTs within England and Wales, and no PCT may include him in any performers list from which he had been disqualified. The practitioner may not apply for a review of his disqualification until the end of two years from the date on which it was imposed, unless this Panel decides that a longer period of five years shall apply.
    b. The Panel shall reconvene on the first available date after the date for lodging written submissions and evidence, to consider the question of National Disqualification.
    c. Unless either party requests an oral hearing, the Panel shall consider the question of National Disqualification on the papers.
45. In accordance with Rule 42 (5) of the Rules we hereby notify the parties that either party to these proceedings may have a right to appeal this decision under Sec 11 Tribunals & Inquiries Act 1992 by lodging notice of appeal in the Royal Courts of Justice, The Strand, London WC2A 2LL within 28 days from the date of this decision. Under Rule 43 of the 2001 Rules a party may also apply for review or variation of this decision no later than 14 days after the date on which this decision is sent.

18 December 2006

Duncan Pratt
Chair of the Panel appointed to hear this appeal

Case Number 13331

IN THE FAMILY HEALTH SERVICES APPEAL AUTHORITY

Panel
Mr D Pratt (Chair)
Mr Davinderpal Kooner (Professional Member)
Mrs M Harley (Member)

BETWEEN:

MAREK WOJCIECH SCHUBERT (GDC No 84586)

Appellant

-and-

MORECAMBE BAY PRIMARY CARE TRUST

Respondent

DECISION AND REASONS