

# PROFESSOR v CV THERAPEUTICS

## Conduct of representative

A hospital professor complained that a sales representative from CV Therapeutics Europe (recently acquired by Gilead Sciences Europe) had tried to use the offer of a memory stick as an inducement to gain an interview with him.

The complainant stated that he had completed a card in connection with Ranexa (ranolazine) which offered him a memory stick. The representative in question, accompanied by an unknown colleague, arrived without an appointment and asked to see the complainant. The complainant's secretary told the representative that the complainant was busy but that he would be grateful if information about ranolazine, together with the memory stick was left. The representative left product information but refused to leave the memory stick without seeing the complainant.

The detailed response from Gilead is given below.

The Panel noted that the parties' accounts differed: it was extremely difficult to know exactly what had transpired. A judgement had to be made on the available evidence and the balance of probability, bearing in mind that extreme dissatisfaction was usually required on the part of an individual before he or she was moved to complain.

According to the complainant the representative had asked to see him in relation to the completion of the reply paid card. Both the complainant's PA and secretary had spoken to the representative. The complainant's secretary had told the representative that the complainant was busy and requested that the information about ranolazine and the memory stick be left. The representative had clearly stated that she would not leave the memory stick without seeing the complainant. The complainant stated that he had not crossed the box on the reply paid card asking the representative to call.

According to Gilead, when advised by the complainant's PA that the complainant did not have to see the representative, the representative replied along the lines of 'I know and I will get one to you'. Gilead acknowledged that the failure to provide the memory stick at the first visit could have been perceived as only providing it in return for a call. The representative had only called on the complainant because he had requested information. The representative had the information in her bag but in error did not have the memory stick.

The Panel considered that it was most unfortunate that the representative had not had the memory

stick with her at the initial call. Particularly as the representative was calling in conjunction with the reply paid card completed by the complainant. The fact that the representative did not have a memory stick with her at the initial call was not in itself necessarily a breach of the Code. However, the impression given was important; a clear and unambiguous explanation should have been given.

According to Gilead a memory stick had been left later that day for the complainant; this had not reached the complainant. Both parties agreed that one had been sent by post. The Panel noted Gilead's submission that representative had made every effort after the brief meeting with the complainant's secretary to ensure the complainant received a memory stick and to rectify her error. The Panel noted the parties did not agree on the content of the conversation between the representative, the complainant's PA and the secretary. It appeared that the representative had not clearly explained the situation. The Panel was concerned that there did not appear to be any specific comment from the representative's line manager regarding what had happened at the first visit to the centre.

The Panel considered that the representative's failure to deliver the requested memory stick and the information at the same time together with the fact that the complainant was unable to see the representative might have given the impression that the memory stick was being used as an inducement to gain an interview. This poor impression was compounded by the fact that according to the information before the Panel the representative did not clearly state that she had inadvertently left the memory stick in her car and that she would deliver it later that day. Taking all the circumstances into account the Panel considered that the representative had in effect, albeit in part due to her error in leaving the memory stick in the car, given the impression that it was being used as an inducement to gain an interview as acknowledged by Gilead and a breach of the Code was ruled.

It was not possible to determine precisely what had been said. On the basis of the parties' submissions the Panel did not consider that, on balance, there was sufficient evidence to show that on the balance of probabilities the representative had failed to maintain a high standard of ethical conduct. The impression given by failing to leave the memory stick at the outset was covered by the ruling of a breach of the Code above. Both parties agreed that, at the very least, a memory stick had been sent by post the following day. The Panel

ruled no breach of the Code. This ruling was appealed.

The Appeal Board noted the further evidence submitted by each party. Differences in the parties' accounts remained. A judgement had to be made on the balance of probabilities.

The Appeal Board considered that it was most unfortunate that the representative had not had the memory stick with her at the initial call. The Appeal Board was also very concerned that at the appeal hearing the representative's line manager stated that he had not heard of what was said between the representative and the complainant's PA during the first visit to the centre, despite being in close proximity to the parties.

The Appeal Board noted from the representative that later in the day she had tried unsuccessfully to telephone the hospital centre where the complainant worked. Unable to make telephone contact (due to a wrong number) the representative stated that she had then returned to the centre with a memory stick from her car. The representative could not recall how she had entered the centre however it was most likely that another person was using the door or the door was open. The representative stated that the reception was deserted so she left the memory stick together with a post-it note on the inside of the reception screen. The representative stated that she had not gone further into the centre as she considered that this would have made her an uninvited visitor. The Appeal Board noted that the complainant had stated that it was not possible to enter the reception when it was unmanned without ringing a bell and being let in. In any event the memory stick had not reached the complainant.

The Appeal Board noted from the representative that she had accessed her voicemail at 1.55pm but had not received a voicemail left by the complainant's PA (asking her to return to leave a memory stick) until 4pm, when she was on her way home. According to the representative this delay was apparently not unusual and was due to pockets of poor mobile telephone reception. On her return to home the representative had posted a further memory stick to the complainant together with the reply card, a note and her business card. The representative had not thought to include in her note that she had already left a memory stick at the centre.

The Appeal Board noted that both parties agreed that, at the very least, when the representative first visited the centre she had not got a memory stick with her but one had subsequently been sent by post and received by the complainant. It was not possible to determine precisely what had been said or taken place in the intervening time. There was a direct conflict of evidence. On the basis of the parties' submissions the Appeal Board did not consider that the complainant had satisfied the burden of proving that, on the balance of

**probabilities, the representative had failed to maintain a high standard of ethical conduct. The Appeal Board upheld the Panel's ruling of no breach of the Code. The appeal was not successful.**

A hospital professor complained about the conduct of a contact sales representative working for CV Therapeutics Europe Ltd. CV Therapeutics had recently been acquired by Gilead Sciences Europe Ltd.

## COMPLAINT

The complainant noted that he had previously completed a card in connection with Ranexa (ranolazine) which offered him a memory stick. On Friday, 17 July, the representative in question, accompanied by a male colleague, arrived at the complainant's hospital centre without an appointment and asked to see him in connection with the completion of this card. The complainant's secretary told the representative that the complainant was busy but that he would be grateful if she left some information about ranolazine, together with the memory stick. The representative left information about the product but refused to leave the memory stick without seeing the complainant. This appeared to be a clear breach of Clause 15.3 regarding the use of inducement or subterfuge to obtain an appointment with a medical practitioner.

When writing to CV Therapeutics Europe the Authority asked it to respond in relation to the requirements of Clauses 15.2 and 15.3.

## RESPONSE

Gilead responded to the complaint and stated that both it and the contract company recognised their responsibilities with regard to the conduct of representatives and took any alleged breach of the Code very seriously. There had been a full investigation. Unfortunately there were few facts available and Gilead was limited to the representative's recollection of the day.

Gilead submitted that the complainant had completed a reply paid card which offered a memory stick and had asked for more information on Ranexa. The representative in question had a lunchtime meeting arranged in another department in the hospital on 17 July. She took this opportunity to call on the complainant before her other meeting but the receptionist told her that he was unavailable. The representative left some information on Ranexa but did not leave a memory stick as she should have done. The representative had admitted that she did not have the memory stick with her at the time as she had not checked her bag before the call. However, after her other meeting, somewhere between 2.30 – 3pm, the representative returned to the hospital centre to rectify this. Unfortunately the reception counter was unmanned so the representative left a memory stick on the counter with a note attached as to who it should go to.

The complainant's secretary had also called the representative after her initial visit and left a message on her telephone. The representative only listened to this message at about 4pm later that day after she had left the site. As she assumed that the complainant had not got the first memory stick she posted a second one to him. Gilead did not know if the complainant had received either of these memory sticks.

Gilead submitted that there was never any intention of only providing a memory stick in return for a call, although the representative recognised that her failure to provide the stick at the first visit could have been perceived in that way. She took appropriate action to ensure that she rectified her error by returning to the unit later the same day, and also by posting a memory stick after a call from the complainant's secretary. Gilead therefore denied a breach of Clause 15.3.

Gilead submitted that the representative had passed the ABPI Medical Representatives Examination and had worked in the industry for a number of years. She was a well regarded member of the contract team with a good record. Although Gilead could not verify her version of events, it had no reason to doubt her. The representative recognised that she made a mistake by not having a memory stick available at the first visit, but made every effort to rectify this. In this regard, she had maintained a high ethical standard of conduct and therefore had not breached Clause 15.2.

Gilead hoped that this explained the circumstances that led to the complaint. Gilead accepted that the representative's mistake could have led to the perception that the memory stick would only be given if the doctor accepted an appointment, but believed that her subsequent actions on the same day demonstrated that this was not the case.

#### **FURTHER COMMENTS FROM THE COMPLAINANT**

In response to a request for his comments on the above, the complainant stated that the secretary who initially spoke to the representative (and who had dealt with this correspondence), his PA and he were shocked at Gilead's response because it was untrue. The complainant noted that the representative arrived in his department accompanied by a male colleague.

The complainant explained that he and his PA were based upstairs in the hospital centre; the PA went down to speak to the representative and explained that the complainant would be grateful if she would leave some information. When asked if she could leave the memory stick the representative clearly stated that she would not leave it without seeing the complainant; there was no suggestion that she did not have a memory stick with her. The representative told the complainant's secretary that she had a meeting on site and left Ranexa literature together with her business card which included her mobile telephone details. When the complainant

heard the representative's response, he asked his secretary to telephone her with the message that it was not acceptable for her to say that she would only leave the memory stick if the complainant saw her and that she should return to leave the memory stick. No response was received to this message which was left around lunchtime.

The complainant stated that the representative could not have returned to the hospital centre and found the reception counter unmanned; if reception was unmanned then the doors into the centre were locked. Furthermore it was not possible that the representative left a memory stick on the counter with a note attached because it would have been passed on to the complainant; the department in which he worked was small and secure, there was no question that the memory stick could vanish into thin air. Furthermore if the representative did not have a memory stick with her in the first instance how did she manage to produce one without apparently leaving the hospital site?

The complainant stated that when he submitted the complaint (Monday, 20 July) he had heard nothing from the representative but on Tuesday, 21 July he received a memory stick that had been posted on Saturday, 18 July. The memory stick was in a small box and attached to the original card which he had completed. The card stated 'please send me: a USB memory stick containing further information about Ranexa' and the complainant had crossed this box. There was another box on the card regarding a Ranexa representative call which the complainant had not crossed. Attached to this card was the representative's business card which stated 'Apologies! Please find enclosed the memory stick'. There was no suggestion on this card that she had previously left a memory stick. The complainant presumed that if she had left a stick in his department she would have attached his card to this rather than to the one that was posted.

The complainant wished to raise the issue about representatives trying to insist on appointments with doctors to hand over things such as memory sticks. He was disappointed therefore that it had now been compounded by the representative's dishonesty which would seem to be a more serious issue than the one he originally raised! The complainant was also disappointed that the representative's version of events had in effect cast doubt on both what his PA reported and the reception staff who did not leave the department unmanned with the door open.

#### **FURTHER COMMENTS FROM GILEAD**

Gilead explained that the representative was accompanied by her line manager who had arrived at the hospital to support her; the representative had two lunchtime meetings booked. Afterwards the representative and her manager spent time in the hospital following up on leads generated from the meetings. They finished at around 2 – 2.30pm. The line manager was with the representative when

she visited the complainant's hospital centre on the first occasion.

The representative would not ordinarily have called on the complainant if she had not received a reply paid card. The representative had visited the complainant because he had requested information. It was a speculative call; the representative expected to just leave the information but wanted to give the complainant the option of an appointment. The representative had not heard of the hospital centre where the complainant worked and wanted to know more about it. Neither the representative nor her manager had visited the centre before.

The representative and her manager recalled the centre as an annex outside of the main hub of the hospital and not easy to find. They recalled a reception area, with a sliding window in the wall on the left hand side. A receptionist was on the other side of the window. The representative asked at the window if she could see the complainant. The receptionist called the complainant's PA who came down the stairs. The representative walked to the foot of the stairs to talk to the PA.

The whole interaction with the PA lasted just a few minutes. The representatives asked to make an appointment or to see the complainant. The PA said no, as the complainant was in a meeting until lunchtime. The representative offered to call back (she was on her way to lunchtime meetings elsewhere in the hospital) but the PA said no, the complainant did not want to see her. By this time the representative had read the notice board and it appeared that the centre was more about another disease rather than cardiology. The representative said to the PA that she was not sure that Ranexa was of interest to the complainant, however she would leave the literature and if it was of interest to him he could call her. The representative therefore left her business card.

The representative looked in her bag for the literature, which would have included the product monograph and the memory stick, which broadly contained the same information as in the product monograph; it could also include a selection of other literature and a leavepiece. At this point the representative realised that she did not have the memory stick. The PA saw the representative was looking for one, and said something like 'he does not have to see you to get a stick'. The representative replied along the line of 'I know that and I will get one to you'. The representative believed that the PA thought she would not go back with the memory stick.

The representative left the centre to attend her lunchtime meetings and switched her telephone off for the meetings. The representative returned to her car at around 2.30pm and found a data stick with her other materials in the boot of the car. It was still raining heavily and the representative was keen to start her drive home. The representative tried several times to call the hospital centre reception to

ask if she could post the memory stick on (to avoid walking back through the rain). When the representative was unable to get through, she walked back over to the centre and took the stick with her.

The representative was clear that she was able to access the centre through the main door. The representative cannot recall anyone in the vicinity and she could see no-one on the other side of the sliding window. The representative left the stick just inside the sliding window. This whole process took only a couple of minutes. The representative did not enter the hospital centre and therefore this was not inconsistent with the fact that the centre was locked when the reception desk was unmanned.

The representative arrived home around 6pm (a journey of around 3.5 hours) and she picked up a telephone message from the complainant's secretary at about 4pm regarding the memory stick. By this time the representative had left one at the hospital centre. However, within 10 minutes of getting home the representative wrote her apologies to the complainant on the reply paid card and posted it, together with a second memory stick. The representative recognised that she should have had a memory stick in her bag at the first visit however she acted to rectify her error.

Gilead submitted that it could find no evidence to support the complainant's allegation that the representative's version of events was untrue. In particular, it was now clear that the representative could have entered the hospital centre reception when it was unmanned and left the memory stick as she stated. The representative did not claim to have entered the centre itself which, as the complainant stated, would not have been possible.

As such, Gilead did not believe that the representative's actions were in breach of Clauses 15.2 or 15.3. While the representative was wrong to have not had the memory stick with her at the first visit, she made very effort to rectify this and at no time intended only to provide the memory stick only if an appointment was granted.

## **PANEL RULING**

The Panel noted that the parties' accounts differed: it was extremely difficult in such cases to know exactly what had transpired. A judgement had to be made on the available evidence and the balance of probability, bearing in mind that extreme dissatisfaction was usually required on the part of an individual before he or she was moved to complain.

According to the complainant the representative had asked to see him in relation to the completion of the reply paid card. Both the complainant's PA and secretary had spoken to the representative. The complainant's secretary had told the representative that the complainant was busy and requested that the information about ranolazine and the memory



stick be left. The representative had clearly stated that she would not leave the memory stick without seeing the complainant. The complainant stated that he had not crossed the box on the reply paid card asking the representative to call.

According to Gilead, when advised by the complainant's PA that the complainant did not have to see the representative, the representative replied along the lines of 'I know and I will get one to you'. Gilead acknowledged that the failure to provide the memory stick at the first visit could have been perceived as only providing it in return for a call. The representative had only called on the complainant because he had requested information. The representative had the information in her bag but in error did not have the memory stick.

The Panel noted that Clause 15.3 stated that representatives must not employ any inducement or subterfuge to gain an interview. No fee should be paid or offered by a representative for the grant of an interview.

The Panel considered that it was most unfortunate that the representative had not had the memory stick with her at the initial call. Particularly as the complainant had completed the reply paid card and the representative was calling in conjunction with that reply paid card. The fact that the representative did not have a memory stick with her at the initial call was not in itself necessarily a breach of the Code. However, the impression given was important; a clear and unambiguous explanation should have been given.

According to Gilead a memory stick had been left later that day for the complainant; this had not reached the complainant. Both parties agreed that one had been sent by post. The Panel noted Gilead's submission that representative had made every effort after the brief meeting with the complainant's secretary to ensure the complainant received a memory stick and to rectify her error. The Panel noted the parties did not agree on the content of the conversation between the representative, the complainant's PA and the secretary. It appeared that the representative had not clearly explained the situation. The Panel was concerned that there did not appear to be any specific comment from the representative's line manager regarding what had happened at the first visit to the centre.

The Panel considered that the representative's failure to deliver the requested memory stick and the information at the same time together with the fact that the complainant was unable to see the representative might have given the impression that the memory stick was being used as an inducement to gain an interview. This poor impression was unacceptable and was compounded by the fact that according to the information before the Panel, the representative did not clearly state that she had inadvertently left the memory stick in her car at the hospital and she would deliver it after her lunchtime meetings. Taking all the circumstances into account

the Panel considered that the representative had in effect, albeit in part due to her error in leaving the memory stick in the car, given the impression that it was being used as an inducement to gain an interview as acknowledged by Gilead and a breach of Clause 15.3 was ruled.

It was not possible to determine precisely what had been said. On the basis of the parties' submissions the Panel did not consider that, on balance, there was sufficient evidence to show that on the balance of probabilities the representative had failed to maintain a high standard of ethical conduct. The impression given by failing to leave the memory stick at the outset was covered by the ruling of a breach of Clause 15.3 above. Both parties agreed that, at the very least, a memory stick had been sent by post the following day. The Panel ruled no breach of Clause 15.2. This ruling was appealed.

## **APPEAL FROM THE COMPLAINANT**

The complainant alleged that the representative's account of events was untrue and so he appealed the ruling of a breach of Clause 15.2. If her account was to be believed, then someone within his own department had taken the memory stick that she claimed to have delivered.

The complainant noted that the representative described the interaction with his PA who she claimed said that the complainant did not want to see her. The complainant stated that this was not the case, since the representative (and her line manager) arrived without an appointment but his PA stated that it would not be possible that day. The representative also claimed that she realised that she did not have the memory stick and that his PA then said something like 'he does not have to see you to get a stick'. This was untrue as it was not until the complainant's PA returned and spoke to him later, and told him what had happened, that he explained to her that it was not necessary for him to see the representative to get the memory stick. As a result, the complainant then asked his PA to telephone the representative, whom they understood was still in the hospital at other meetings, to make the point that he did not need to see her to receive the memory stick and could she return and leave the memory stick in addition to the product literature that she had already left.

The complainant noted that the representative claimed that after she had attended her lunchtime meeting in another part of the hospital she had tried several times to call the hospital centre reception but was unable to get through. The complainant submitted that this was unlikely since there were five lines but in any case there was an automatic answering service which took messages but no message was left.

The representative stated that she was clear that she was 'able to access the centre through the main door'. The complainant noted that this was correct but from a photograph of the building (provided),

this meant that she could not actually enter the centre at all. When no-one was at the desk in the entrance area, the outside door was locked and it was necessary to press the bell and wait for this to be opened. It was therefore impossible for the representative to have entered the building and leave the memory stick where she stated. Once someone was inside the building, there were no locked doors whatsoever and the representative would have easily been able to enter the main part of the centre and have spoken to other members of staff who would have been around. The complainant particularly resented the fact that the representative had suggested that she left a memory stick just inside the sliding window. Clearly, if she had done this and the complainant did not receive it, it implied that one of the staff must have taken the stick and not passed it on to him.

The complainant noted that the representative, once home, had posted a memory stick to him which he subsequently received on Tuesday after he had already written to the Authority. The complainant enclosed a copy of what the representative had sent him. The memory stick was attached to the card he had originally completed, as was a business card from the representative. Surely if the representative had left a memory stick within the department as she claimed, she would have already left the card which representatives normally brought with them when they followed up on one of these responses? On a note the representative had written on her business card she apologised but did not mention that she had already left a memory stick within the department.

The complainant noted Gilead's submission that it could find no evidence to support his allegation that the representative's version of events was untrue. Gilead then stated that in particular, it was now clear that the representative could have entered the hospital centre reception when it was unmanned and left the memory stick as she stated. The representative did not claim to have entered the centre itself, which as Gilead stated, would not have been possible. Clearly, from its comments Gilead failed to understand the nature of the centre and the fact that the representative could not have entered any part of the centre and that if she had entered any part of the centre, she then could have entered the whole of the department as there were no other locks. The complainant therefore alleged that the representative's actions and Gilead's response to his complaint were clearly in breach of Clause 15.2 of the Code.

#### **COMMENTS FROM GILEAD**

Gilead submitted that having carefully considered the appeal it could find no new evidence presented, rather it reiterated the complainant's previous comments. Gilead and the contract company had thoroughly investigated the complaint and had separately interviewed both the representative and her manager. Gilead had challenged their

statements in the light of the responses from the complainant. Throughout the process, their statements had been consistent.

Gilead submitted that the difficulty in cases such as these was that there was little hard fact on which to base an opinion. Much of what was being considered was the recollections of two people, particularly with reference to the conversation between the complainant's PA and the representative. Similarly, the representative claimed that after her meeting and left a memory stick on the reception desk; the complainant argued that it was impossible to do this as the door to the centre was always locked if the reception was unmanned. Again, with no witnesses to the event, Gilead was unable to ascertain fact.

In view of the above, Gilead and the contract company had sought evidence to refute or corroborate the representative's statement. Looking at the sequence of events, there was no dispute that the complainant had completed the reply paid card requesting information on Ranexa and a memory stick. Both parties agreed that the representative called upon the unit accompanied by her manager.

The differences in opinion regarding the conversation between the representative and the complainant's PA were difficult to assess, but it appeared that there was agreement that the representative had made clear that she was remaining in the hospital for other meetings, the complainant had stated that he then asked his PA to telephone the representative whom they understood was still in the hospital at other meetings. The representative's claims that she tried to call the hospital centre were confirmed by her itemised telephone bill which showed that she called the centre three times although at a time slightly earlier than she stated. The representative did not leave a message as she hoped to speak to the complainant or his PA to ask if she could post the memory stick due to the heavy rain, therefore she called the hospital switchboard to see if she could be transferred to the complainant directly on two further occasions. This was clearly documented in the itemised telephone bill (provided).

Gilead submitted that the representative then claimed to have returned to the centre, found the reception unmanned, and left a memory stick with a note. The complainant claimed that this would be impossible as the door would have been locked if reception was unmanned. With no witness or other evidence, it was impossible to determine the exact course of events. Even if there was a rule within the centre that the door should be locked if reception was unmanned, could the complainant be certain that on the day, at the time the representative stated that she returned, the receptionist had not left her desk for a few minutes and left the door open?

Gilead agreed that the PA left a voicemail message for the representative who, on retrieving it later that day, posted a second memory stick to the

complainant and included the reply paid card. This was on the evening of 16 July [sic], which meant that the collection would be the following day. This was consistent with the complainant's statement that he received the memory stick on the Tuesday.

As previously stated, there were limited facts available in this case. However, all of the facts available were consistent with the representative's statement and, indeed, the complainant's.

Gilead had accepted that the representative's failure to deliver the memory stick on the first visit gave the impression that it was being used as an inducement to gain an interview in breach of Clause 15.3.

While Gilead had made every effort to establish exactly what happened on the day in question, there remained much which was based on personal recollection. However, all of the facts available supported the representative's position. Thus Gilead agreed with the Panel's ruling of no breach of Clause 15.2.

#### **FURTHER COMMENTS FROM THE COMPLAINANT**

The complainant was astonished that Gilead claimed that no new evidence had been presented in his appeal and that it was a reiteration of his previous comments. The complainant noted that he had provided photographic evidence that showed the door which was kept shut was on the outside of the building and he was confident that this would be the case if the secretary was not there. The bell was then rung and it rang in other offices within the building and someone would then let the person in. If indeed, the representative had got into the building despite this, then no other doors within the building were locked and it would have been quite easy for her to enter another office and find someone to speak to.

The complainant noted that representatives usually brought a card like the one that he completed when they followed up with a visit. Gilead had not tried to answer the question of what happened to the memory stick and note that was supposedly left in the reception area. The complainant would have expected the representative to leave the memory stick with the card as would be usual practice. Instead the representative posted the card with a memory stick and her business card but with no suggestion that she had already left one in the department. The complainant thus concluded that the representative had not left anything before which was why she did not mention it in her note and why she sent the card by post. The complainant also strongly objected to the inevitable conclusion that the mythical memory stick that was left had somehow been taken, presumably by a member of staff together with the note!

The complainant noted that equally it was not just the recollections of two people, particularly with reference to the conversation between his PA and

the representative nor indeed was it true that 'there remained much which was based on personal recollection'. The receptionist heard the original conversation and it was reported back to the complainant within a few minutes (not recollected sometime later as was the case for the representative), the PA did not know the rules regarding needing to see a representative or not. Was it being suggested that this was not a true version of their account of the situation (and it was thus conversation with the PA that triggered the complaint in the first place)?

The complainant was surprised that the representative claimed not to have heard his PA's message until 4pm – would not a representative check the messages on their telephone after a meeting and before going home for the day? Was it more likely that this triggered the representative's attempts to telephone the centre and to ask if she could post the memory stick? Unfortunately, the representative did not call the centre three times as stated by Gilead – the number on the mobile telephone bill listed three times from 13.57 to 13.59 was the main hospital telephone and the centre did not have any telephone links with the hospital. The other number listed twice some minutes later (at 14.11 and 14.12) was not the centre's telephone number although it was similar. It still begged the question that if the representative was ringing to ask if she could post the memory stick – which was what happened – did she really come over to the centre; enter through a locked door that was apparently unlocked; leave a memory stick and note, neither of which had been found and subsequently post a reply card and memory stick with no mention of all of this?

The complainant alleged that having received the message on her telephone from his secretary, the representative decided to post the memory stick (and this was confirmed by her attempts to leave this message) and that no memory stick could have been left, or was left, in the centre without one of its staff knowing about it. Any other interpretation implied that two members of staff were not telling the truth and that someone in the department had taken the missing memory stick.

#### **APPEAL BOARD RULING**

The Appeal Board noted the further evidence submitted by each party. Differences in the parties' accounts remained. A judgement had to be made on the balance of probabilities.

The Appeal Board considered that it was most unfortunate that the representative had not had the memory stick with her at the initial call. The Appeal Board was also very concerned that at the appeal hearing the representative's line manager stated that he had not heard of what was said between the representative and the complainant's PA during the first visit to the centre, despite being in close proximity to the parties.

The Appeal Board noted from the representative that later in the day she had telephoned the hospital switch board and when she got through on the third attempt the hospital had given her the number for the centre. The representative had then twice tried to telephone the centre but no one had answered. It transpired that the number dialled was wrong by one digit. The representative stated that she had then returned to the centre. The representative could not recall how she had entered the centre however it was most likely that another person was using the door or the door was open. The representative stated that the reception was deserted so she left the memory stick that she had retrieved from her car together with a post-it note on the inside of the reception screen. The representative stated that she had not gone further into the centre as she considered that this would have made her an uninvited visitor. The Appeal Board noted that the complainant had stated that it was not possible to enter the reception when it was unmanned without ringing a bell and being let in. In any event the memory stick had not reached the complainant. The Appeal Board expressed concern that Gilead's written account of the telephone calls to the hospital and the centre differed from that of the representative at the appeal. However, the representative's account was consistent with the mobile telephone record provided by Gilead. The Appeal Board was also concerned that Gilead had not provided a comprehensive account in its initial response to the complaint. Each of Gilead's three submissions provided more detail.

The Appeal Board noted from the representative that she had accessed her voicemail at 1.55pm but had not received the voicemail left by the complainant's PA until 4pm, when she was on her way home. According to the representative this delay was apparently not unusual and was due to pockets of poor mobile telephone reception. On her return to home the representative had posted a further memory stick to the complainant together with the reply card, a note and her business card. The representative had not thought to include in her note that she had already left a memory stick at the centre.

The Appeal Board noted that both parties agreed that, at the very least, when the representative first visited the centre she had not got a memory stick with her but one had subsequently been sent by post and received by the complainant. It was not possible to determine precisely what had been said or taken place in the intervening time. There was a direct conflict of evidence. On the basis of the parties' submissions the Appeal Board did not consider that the complainant had satisfied the burden of proving that, on the balance of probabilities, the representative had failed to maintain a high standard of ethical conduct. The Appeal Board upheld the Panel's ruling of no breach of Clause 15.2. The appeal was not successful.

**Complaint received**                      **20 July 2009**

**Case completed**                              **15 October 2009**

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