

PUBLIC RECORD

Dates: 05/03/2024

Medical Practitioner's name: Dr Andrzej KOCIALKOWSKI

GMC reference number: 3634549

Primary medical qualification: Lekarz 1982 Poznan

Type of case	Outcome on impairment
Review - Misconduct	Impaired

Summary of outcome

Suspension, 4 months.
Review hearing directed.

Tribunal:

Legally Qualified Chair	Mrs Julia Oakford
Lay Tribunal Member:	Ms Gail Mortimer
Medical Tribunal Member:	Mr Ian Crighton

Tribunal Clerk:	Miss Racheal Gill
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Attendance and Representation:

Medical Practitioner:	Not present, not represented
Medical Practitioner's Representative:	n/a
GMC Representative:	Ms Jennifer Ferrario, Counsel

Attendance of Press / Public

In accordance with Rule 41 of the General Medical Council (Fitness to Practise) Rules 2004 the hearing was held in public.

Overarching Objective

Throughout the decision making process the tribunal has borne in mind the statutory overarching objective as set out in s1 Medical Act 1983 (the 1983 Act) to protect, promote and maintain the health, safety and well-being of the public, to promote and maintain public confidence in the medical profession, and to promote and maintain proper professional standards and conduct for members of that profession.

Determination on Impairment - 05/03/2024

1. At this review hearing the Tribunal now has to decide in accordance with Rule 22(1)(f) of the General Medical Council (GMC) (Fitness to Practise) Rules 2004, as amended ('the Rules') whether Dr Kocalkowski's fitness to practise is impaired by reason of misconduct.

The Outcome of Applications Made during the Impairment Stage

2. The Tribunal determined that service of the notice of this hearing had been effected in accordance with Rule 40 of the Rules. The Tribunal determined to proceed with the hearing in Dr Kocalkowski's absence in accordance with Rule 31 of the Rules. The Tribunal's full decision on this matter is included at Annex A.

Background

3. Dr Kocalkowski qualified in 1982 in Poznan. At the time of the events which are the subject of this hearing, he was working as a Consultant Orthopaedic Surgeon at Central Manchester University Hospitals NHS Foundation Trust ('the Trust').

4. Dr Kocalkowski's substantive case was initially considered by a Medical Practitioners Tribunal (MPT), at a hearing which took place 14 to 29 March 2023 and 25 to 27 September 2023 ('the 2023 Tribunal'). Dr Kocalkowski was not present and was not legally represented. The findings of the 2023 Tribunal can be summarised as follows.

5. On 7 April 2016 Dr Kocalkowski was found to have carried out a left knee arthroscopy on Patient L and failed to keep an adequate and appropriate operative record. While there was no evidence of actual injury to Patient L, the 2023 Tribunal considered that an inadequate record would pose a risk to Patient L, due to the difficulties for any surgeon operating after Dr Kocalkowski. The 2023 Tribunal also considered that physiotherapy being conducted prematurely or too vigorously would pose a risk of injury, pain or delayed recovery to Patient L. The 2023 Tribunal considered that Dr Kocalkowski's failure to keep an adequate

or appropriate operative record of Patient L's left knee arthroscopy involved omissions which fell short of what would be proper in the circumstances. Due to the risk to Patient L and potential impact on public confidence in the medical profession, the 2023 Tribunal concluded that Dr Kocialkowski's failure in relation to Patient L amounted to serious misconduct.

6. On 6 October 2016 Dr Kocialkowski was found to have carried out a right knee ACL reconstruction on Patient M, and failed to carry out a clinical examination. The 2023 Tribunal considered that in all the circumstances the deficit in record-keeping, in itself, did not amount to serious misconduct.

7. Dr Kocialkowski had a close personal relationship with Patient T in that Patient T was a relative. On 15 December 2017, Dr Kocialkowski was found to have undertaken a skin biopsy on Patient T and he failed to record consent from Patient T. Dr Kocialkowski was also found to have prescribed medication to Patient T on two occasions. The 2023 Tribunal noted that Dr Kocialkowski immediately acknowledged, when asked by the Trust, that he had undertaken a biopsy in a non-emergency situation for a close relative, that he failed to make a record of obtaining informed consent and that he had also prescribed anti-platelet drugs and an emollient cream to that relative. Dr Kocialkowski had apologised to the Trust for doing so. The 2023 Tribunal considered Dr Kocialkowski was not likely to treat, or write a prescription again for, a relative or friend. The 2023 Tribunal concluded that Dr Kocialkowski's actions in relation to Patient T did not amount to serious misconduct.

8. The 2023 Tribunal then considered whether Dr Kocialkowski's current fitness to practise is impaired as a result of that misconduct in relation to Patient L.

9. The 2023 Tribunal was aware that this misconduct occurred over seven years ago. As Dr Kocialkowski did not provide evidence of remorse or insight or reflection on his conduct in relation to Patient L, the 2023 Tribunal was unable to find that he had minimised the risk of repetition of his misconduct. He did not submit evidence of relevant Continuing Professional Development ('CPD') in relation to record-keeping, or a reflective statement. The 2023 Tribunal considered that Dr Kocialkowski's actions and omissions in 2016 had put Patient L at risk and also had potential to bring the medical profession into disrepute. Although the misconduct in relation to Patient L may be seen as remediable, Dr Kocialkowski had not provided evidence of concrete steps to ensure that his operative records would be appropriate and adequate in future.

10. The 2023 Tribunal concluded that a finding of impairment was necessary to protect the public, to uphold professional standards and to maintain public confidence in doctors. The 2023 Tribunal therefore determined that Dr Kocialkowski's fitness to practise was impaired by reason of misconduct.

11. The 2023 Tribunal considered the aggravating factors. It noted that Dr Kocialkowski did not provide evidence of any apology to Patient L or the Trust. He did not accept that he had made mistakes in relation to his operative record for Patient L, but nor did he seek to justify his failure to keep an adequate and appropriate operative record. Dr Kocialkowski did not engage with these proceedings. The 2023 Tribunal considered that his misconduct could have put Patient L at risk, but Dr Kocialkowski has not acknowledged this to his regulator. The 2023 Tribunal was not able to make a positive finding that he had insight in relation to Patient L.

12. The 2023 Tribunal considered the mitigating factors and took account of the lapse of time, of over seven years, since April 2016. The 2023 Tribunal gave some weight to this mitigating factor, but also took account of the lack of evidence of insight or remediation since 2016.

13. The 2023 Tribunal considered an order of suspension would have a deterrent effect, sending a clear signal to Dr Kocialkowski and the profession that this type of misconduct was unacceptable. Therefore, the 2023 Tribunal determined to suspend Dr Kocialkowski's registration for a period of five months. It was satisfied that five months was sufficient to mark the seriousness of Dr Kocialkowski's misconduct and also provide sufficient time for him to reflect, develop insight and remediate.

14. The 2023 Tribunal determined to direct a review of Dr Kocialkowski's case and stated that a future Tribunal might be assisted if Dr Kocialkowski provided:

- A reflective statement.
- Certificates of Continuing Professional Development.
- Evidence of keeping medical knowledge and skills up to date.
- Any other evidence of fitness to practise.

Today's Review Hearing

15. This is the first review of Dr Kocialkowski's case. He is neither present nor legally represented at this hearing.

The Evidence

16. The Tribunal received the Record of Determination from the 2023 substantive hearing and the GMC's Proof of Service bundle.

17. The Tribunal has taken into account all the material before it and was mindful that there was no new evidence from Dr Kocialkowski.

Submissions

18. On behalf of the GMC, Ms Ferrario, Counsel, outlined the background and the specific circumstances of Dr Kocialkowski's case.

19. Ms Ferrario submitted that there was no information in the bundle for the Tribunal to consider because Dr Kocialkowski has not been in contact with either the GMC or the MPTS. She submitted that both the GMC and MPTS have had significant difficulties trying to send any information to Dr Kocialkowski by recorded post. She submitted that there has been no evidence before it that Dr Kocialkowski has provided any relevant review documentation in the form of reflection and remediation as suggested by the previous Tribunal.

20. In the light of the lack of engagement by the doctor since the substantive hearing, Ms Ferrario submitted that there has been no change whatsoever to the material circumstances. Therefore, given the circumstances, she submitted that there was an ongoing risk of repeat conduct and as such Dr Kocialkowski's fitness to practise continues to be impaired.

21. No submissions were received from Dr Kocialkowski.

The Relevant Legal Principles

22. The Tribunal reminded itself that the decision of impairment is a matter for the Tribunal's judgement alone. As noted above, the previous Tribunal set out the matters that a future Tribunal may be assisted by. This Tribunal is aware that it is for the doctor to satisfy it that he would be safe to return to unrestricted practise.

23. This Tribunal must determine whether Dr Kocialkowski's fitness to practise is impaired today, taking into account Dr Kocialkowski's conduct at the time of the events and any relevant factors since then such as whether the matters are remediable, have been remedied and any likelihood of repetition.

The Tribunal's Determination on Impairment

24. The Tribunal considered that at these proceedings, there is a persuasive burden on Dr Kocialkowski to demonstrate that his fitness to practise is no longer impaired.

25. The Tribunal noted that there has been no material change in the circumstances of this case since it was heard by the 2023 Tribunal. There has been no evidence provided by Dr Kocialkowski as recommended by the 2023 Tribunal to inform its view as to the current state of Dr Kocialkowski's insight, reflection or remorse into his misconduct. Nor did the Tribunal receive any evidence of relevant CPD. The Tribunal concluded that Dr Kocialkowski appears to have disengaged from the regulatory process.

26. The Tribunal considered that no evidence has been received to indicate that Dr Kocialkowski was no longer impaired. In the absence of any new information from Dr Kocialkowski, the Tribunal determined that the need to meet the overarching objective required a finding of impairment in order to protect the public and to maintain public confidence and to uphold standards in the medical profession.

27. The Tribunal has therefore determined that Dr Kocialkowski's fitness to practise is impaired by reason of misconduct.

Determination on Sanction - 05/03/2024

28. Having determined that Dr Kocialkowski's fitness to practise is impaired by reason of misconduct, the Tribunal now has to decide in accordance with Rule 22(1)(h) of the Rules what action, if any, it should take with regard to Dr Kocialkowski's registration.

The Evidence

29. The Tribunal has taken into account the background to the case and the evidence received during the earlier stage of the hearing, where relevant, to reaching a decision on what action, if any, it should take with regard to Dr Kocialkowski's registration.

Submissions

30. On behalf of the GMC, Ms Ferrario submitted that a period of six months suspension was the most appropriate sanction in this case and referred the Tribunal to the relevant paragraphs of the Sanctions Guidance (2024)('SG').

31. Ms Ferrario submitted that it would be inappropriate to take no action in this case as there are no exceptional circumstances. She then submitted that a sanction of conditions would be unworkable as Dr Kocialkowski has disengaged from the regulatory process.

32. Ms Ferrario submitted it was unfortunate that inherently good doctors are restricted from practice when their misconduct did not fall under the more serious limbs. She submitted that this was a case where the 2023 Tribunal found one allegation that amounted to misconduct and that this conduct was capable of being remediable.

33. Ms Ferrario went on to submit that the appropriate sanction would be one of suspension as Dr Kocialkowski has provided no evidence of insight, remorse or remediation. She stated that a further period of suspension would provide Dr Kocialkowski with an opportunity to re-engage with the regulatory process and give Dr Kocialkowski a second opportunity to provide evidence relating to insight, remorse and remediation.

The Tribunal's Determination

34. The decision as to the appropriate sanction to impose, if any, in this case is a matter for this Tribunal exercising its own judgement. Throughout its deliberations, the Tribunal considered the statutory overarching objective, and the relevant sections of the Sanctions Guidance.

35. In deciding what sanction, if any, to impose, the Tribunal reminded itself that it must consider each of the sanctions available, starting with the least restrictive, to establish which is appropriate and proportionate in this case. Throughout its deliberations, the Tribunal applied the principle of proportionality, balancing Dr Kocialkowski's interests with the public interest. It kept in mind that the purpose of a sanction was not to be punitive, but to protect patients and the wider public interest, although the sanction may have a punitive effect.

Aggravating and mitigating factors

36. Given that there has been no material change in the circumstances of this case since it was heard by the 2023 Tribunal, the Tribunal considered that the aggravating and mitigating circumstances remained the same. The Tribunal have not received any evidence of an apology to Patient L or the Trust. It considered it could not give weight to insight given the absence of any evidence to it. Further it considered the lapse of time, which as of today is eight years since index events.

No action

37. In reaching its decision as to the appropriate sanction, if any, to impose in this case, the Tribunal first considered whether to conclude by taking no action.

38. The Tribunal determined that there were no exceptional circumstances to justify taking no action and that a sanction was necessary to protect patients and to maintain public confidence in the medical profession.

Conditions

39. The Tribunal next considered whether it would be appropriate to impose conditions on Dr Kocialkowski's registration. It bore in mind that any conditions imposed should be appropriate, proportionate, workable and measurable.

40. Due to Dr Kocialkowski's continued lack of engagement and no evidence of insight and remediation, the Tribunal could not be satisfied that Dr Kocialkowski would comply with any conditions imposed. As such, the Tribunal concluded that a sanction of conditions would be unworkable. The Tribunal therefore determined that conditions are insufficient to ensure protection of patients and to maintain public confidence in the medical profession.

Suspension

41. The Tribunal then went on to consider whether imposing a further period of suspension on Dr Kocialkowski's registration would be appropriate and proportionate.

42. The Tribunal was of the view that Dr Kocialkowski's substantive five months suspension had been served and it was sufficient to mark the seriousness of the misconduct, to act as a deterrent and to satisfy the public interest. However it also bore in mind that there has been no evidence of engagement from Dr Kocialkowski and the circumstances of this case have not changed since it was initially heard in 2023.

43. The Tribunal considered that without evidence of insight and remediation, it could not rule out a risk to public protection and action was needed on Dr Kocialkowski's registration.

44. The Tribunal considered that Dr Kocialkowski's misconduct was remediable. The Tribunal did not view Dr Kocialkowski's misconduct as being fundamentally incompatible with continued medical registration at this point and took the view that he should be given a second opportunity to re-engage with the regulatory process.

45. However, it was concerned about Dr Kocialkowski's lack of engagement and the length of time that he has been unable to practice unrestricted. The Tribunal can only encourage Dr Kocialkowski to avail himself of the opportunity to cooperate with the regulatory process to either demonstrate insight and remediation or to provide evidence as

to why he cannot do so. It considered that the longer Dr Kocialkowski prolongs the proceedings, the harder it will be for him to return to unrestricted practice, and he needed to take proactive steps.

46. The Tribunal therefore determined that a period of suspension would be an appropriate and proportionate sanction which would protect the public.

47. In considering the appropriate duration of suspension, the Tribunal was aware that the GMC proposed an extended six month suspension order. It determined that a shorter period of four months would be more appropriate in this case considering its finding that the substantive suspension had already served its deterrent effect. It considered that four months would give Dr Kocialkowski the opportunity to engage with the regulatory process and would be sufficient for him to provide evidence as to how he has developed insight into his actions and remediated his misconduct.

48. The Tribunal determined to direct a review of Dr Kocialkowski's case. A review hearing will convene shortly before the end of the period of suspension. The Tribunal wishes to clarify that at the review hearing, the onus will be on Dr Kocialkowski to demonstrate how he has developed insight and remediated. It therefore may assist the reviewing Tribunal if Dr Kocialkowski provided:

- A reflective statement from Dr Kocialkowski demonstrating his insight;
- Evidence of any Continuing Professional Development;
- Evidence that Dr Kocialkowski has kept his knowledge and skills up to date;
- Any relevant Testimonial evidence.

49. Dr Kocialkowski will also be able to provide any other information that he considers will be relevant to the review hearing.

50. The Tribunal have directed to suspend Dr Kocialkowski's registration for four months. The MPTS will send Dr Kocialkowski a letter informing him of his right of appeal and when the direction and the new sanction will come into effect. The current order of suspension will remain in place during the appeal period.

51. That concludes the case.

ANNEX A – 05/03/2024

Service and Proceeding in Dr Kocalkowski's absence

52. Dr Kocalkowski was neither present nor represented at this hearing. The Tribunal first had to consider whether service had been properly effected as required by the General Medical Council (Fitness to Practise) Rules 2004 as amended ('The Rules') and the Medical Act 1983 ('The Act'). If the Tribunal found service had been effected in accordance with the Rules, it would need to consider whether to proceed in Dr Kocalkowski's absence.

53. On behalf of the GMC, Ms Ferrario, Counsel, took the Tribunal to documents regarding service of these proceedings on Dr Kocalkowski.

54. The Tribunal was provided with a service bundle which included a screenshot of the GMC database showing Dr Kocalkowski's registered address.

55. The Tribunal was provided with a copy of the GMC Information letter and Hearing Bundle dated 25 January 2024. These GMC documents were sent to Dr Kocalkowski's postal address by Royal Mail Special Delivery on 26 January 2024. Royal Mail Track and Trace documentation confirmed multiple delivery attempts were made and they were delivered back to the sender on 19 February 2024.

56. The Tribunal was also given a copy of the Medical Practitioners Tribunal Service (MPTS) Notice of Hearing letter, dated 2 February 2024, which was posted on the same day to Dr Kocalkowski's GMC registered address by Royal Mail Special Delivery. Royal Mail Track and Trace documentation confirmed that the Notice of Hearing letter was delivered back to the sender on 26 February 2024.

57. On 22 February 2024, another GMC Information letter with a change of hearing date and Hearing Bundle was posted to Dr Kocalkowski's registered address by Royal Mail Special Delivery. Royal Mail Track and Trace documentation confirmed that the GMC Information Letter (new date) and Hearing Bundle was refused on the 23 February 2024 and delivered back to the sender on 26 February 2024.

58. Ms Ferrario also referred the Tribunal to records which indicated that two attempts were made to telephone Dr Kocalkowski, dated 2 February 2024 and 16 February 2024 by the GMC. Dr Kocalkowski did not answer either call and there was no facility for the GMC to leave a message.

59. Ms Ferrario reminded the Tribunal that it was Dr Kociałkowski's obligation to keep his details up to date with the GMC. She submitted that all reasonable efforts had been made to serve notice on Dr Kociałkowski who has continuously failed to engage. She submitted that service has been effected in accordance with the Rules.

60. Turning to proceeding the hearing in the doctor's absence, Ms Ferrario reminded the Tribunal that Dr Kociałkowski did not attend his substantive hearing last year. She submitted that Dr Kociałkowski had not engaged with the GMC or MPTS following its correspondence. She submitted that he had not provided any reason as to why he is not accepting any documentation or why he has chosen not to attend the review hearing.

61. Ms Ferrario invited the Tribunal to infer that Dr Kociałkowski had voluntarily absented himself from the hearing and therefore waived his right to attend. She submitted that adjourning the hearing would serve no purpose.

62. Ms Ferrario submitted it was fair and reasonable for the Tribunal to proceed in the absence of Dr Kociałkowski, under Rule 31 of the General Medical Council ('GMC') ('Fitness to Practise') Rules 2004 ('the Rules') the Medical Act 1983, as amended.

The Tribunal's determination

Service

63. The Tribunal considered whether notice of this hearing had been properly served on Dr Kociałkowski in accordance with the Rules.

64. The Tribunal had regard to the Proof of Service bundle provided by the GMC, as well as Ms Ferrario's submissions. From the information before it, the Tribunal was satisfied that the GMC Information Letter and MPTS Notice of Hearing included details of the date and time of today's hearing was served by post to Dr Kociałkowski's registered address. The Tribunal noted that multiple delivery attempts were made but were unsuccessful. Furthermore, it noted that two telephone call attempts were made by the GMC to Dr Kociałkowski, and he did not answer.

65. The Tribunal concluded that all reasonable efforts to serve notice of this hearing on Dr Kociałkowski had been made.

66. The Tribunal determined that notice of this hearing had been served on Dr Kociałkowski in accordance with the Rules.

Proceeding in Absence

67. The Tribunal went on to consider whether it would be appropriate to proceed with this hearing in Dr Kocalkowski's absence under Rule 31 of the Rules. The Tribunal was conscious that the discretion to proceed in the absence of a doctor should be exercised with the utmost care and caution, balancing the interests of the doctor with the wider public interest.

68. The Tribunal noted that Dr Kocalkowski had chosen not to attend his substantive hearing dated 14 to 29 March 2023 and 25 to 27 September 2023 and that the 2023 Tribunal determined that the substantive hearing was to proceed in Dr Kocalkowski's absence.

69. The Tribunal considered that Dr Kocalkowski knew or ought to have known that this review hearing was taking place today. Considering Dr Kocalkowski's complete lack of engagement, the Tribunal concluded that Dr Kocalkowski has voluntarily absented himself from these proceedings. There was no reason provided for his absence from these proceedings and there was no indication that an adjournment would secure his attendance at a future date.

70. The Tribunal was mindful that this was a review hearing and Dr Kocalkowski's order of suspension must be reviewed. The Tribunal balanced the principle of fairness to the doctor, the public interest, and the expeditious disposal of the case, and considered it was appropriate to proceed in Dr Kocalkowski's absence.

71. Therefore, in accordance with Rule 31, the Tribunal has determined to proceed in Dr Kocalkowski's absence.