

PUBLIC RECORD

Date: 10/07/2024

Medical Practitioner's name: Dr Andrzej KOCIALKOWSKI

GMC reference number: 3634549

Primary medical qualification: Lekarz 1982 Poznan

Type of case

Review - Misconduct

Outcome on impairment

Impaired

Summary of outcome

Erasure

Tribunal:

Legally Qualified Chair	Mr Sean Ell
Lay Tribunal Member:	Dr Amit Jinabhai
Medical Tribunal Member:	Dr Hazel Busby-Earle

Tribunal Clerk:	Mx Nate Caruso-Kelly
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Attendance and Representation:

Medical Practitioner:	Not present, not represented
GMC Representative:	Mr Salek Ahmed, 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 - 10/07/2024

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 Kocialewski's fitness to practise is impaired by reason of misconduct.

The Outcome of Applications Made during the Impairment Stage

2. The Tribunal determined that there has been effective service of the notice of this hearing in accordance with Rules 20 and 40 of the Rules. The Tribunal determined to proceed with the hearing in Dr Kocialewski's absence in accordance with Rule 31 of the Rules. The Tribunal's full decision on these matters is included at Annex A.

Background

3. Dr Kocialewski 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').

The 2023 Tribunal

4. Dr Kocialewski'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 Kocialewski 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 Kocialewski 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 Kocialewski. 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 Kocialewski'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 XXX. 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 XXX, that he failed to make a record of obtaining informed consent and that he had also prescribed anti-platelet drugs and an emollient cream XXX. 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 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.

The March 2024 Review Hearing

15. The March 2024 Tribunal (the first review) review Dr Kocialkowski's case and noted that there had been no material change in the circumstances on the case since it was heard by the 2023 Tribunal. The March 2024 Tribunal was not provided with any evidence by Dr Kocialkowski of the current state of his insight, reflection or remorse for his misconduct, nor did he provide evidence of relevant CPD. The March 2024 Tribunal concluded that Dr Kocialkowski appeared to have disengaged from the regulatory process.

16. The March 2024 Tribunal therefore concluded that Dr Kocialkowski's fitness to practice remained impaired. The March 2024 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. The March 2024 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.

17. The March 2024 Tribunal determined to suspend Dr Kocialkowski's registration for a further period of four months. The March 2024 Tribunal determined to direct a review of the case and stated that a future Tribunal might be assisted 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.

Today's Review Hearing

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

The Evidence

19. The Tribunal received the determination of the 2023 Tribunal, the determination of the March 2024 Tribunal, and the GMC's Proof of Service bundle, as set out in Annex A.

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

Submissions

21. On behalf of the GMC, Mr Ahmed submitted that Dr Kocialkowski's fitness to practise remains impaired. Mr Ahmed submitted that there is no evidence which can demonstrate that Dr Kocialkowski has achieved sufficient levels of insight or remediation. Mr Ahmed reminded the Tribunal of the documents which the March 2024 Tribunal suggested Dr Kocialkowski provide at this hearing and that no such evidence has been provided. Mr Ahmed submitted that there is no evidence to show any change in the circumstances of this case since the March 2024 hearing. Mr Ahmed therefore submitted that there remained a risk of repetition of serious misconduct.

22. Mr Ahmed further submitted that Dr Kocialkowski has in the past, and is liable in the future, to bring the profession into disrepute. Further, that he has in the past, and is liable in the future, to act so as to put a patient at unwarranted risk of harm. Mr Ahmed submitted that proper professional standards and public confidence would not be upheld if a finding of

impairment was not made, and such a finding of impairment was required in respect of all three limbs of the overarching objective.

The Relevant Legal Principles

23. 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.

24. This Tribunal must determine whether Dr Kocalkowski's fitness to practise is impaired today, taking into account Dr Kocalkowski'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

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

26. The Tribunal noted that there has been no material change in the circumstances of this case since it was reviewed by the March 2024 Tribunal. There has been no evidence provided by Dr Kocalkowski, either in accordance with the recommendations of the 2023 Tribunal or the March 2024 Tribunal. The Tribunal therefore has no evidence on which to form a view as to the current state of Dr Kocalkowski's insight, reflection or remorse into his conduct. The Tribunal further noted that Dr Kocalkowski's registration has now been suspended for nine months and it had no evidence to show that Dr Kocalkowski has kept his skills and knowledge as an orthopaedic surgeon up to date.

27. In the absence of any information to indicate that Dr Kocalkowski has developed insight into his misconduct or taken steps to remediate it, the Tribunal concluded that there remains a risk of repetition and a continuing risk to patient safety.

28. The Tribunal therefore determined that a finding of impaired fitness to practise is necessary to protect, promote and maintain the health safety and wellbeing 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.

29. The Tribunal has therefore determined that Dr Kocalkowski's fitness to practise remains impaired by reason of misconduct.

Determination on Sanction - 10/07/2024

30. 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

31. 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

32. On behalf of the GMC, Mr Ahmed submitted that erasure is the appropriate sanction in this case. Mr Ahmed submitted that taking no action would not be appropriate as there are no exceptional circumstances. Mr Ahmed further submitted that conditions would not be workable as Dr Kocialkowski's disengagement indicates that he would not comply with conditions on his registration.

33. Turning to suspension and erasure, Mr Ahmed reminded the Tribunal that Dr Kocialkowski has already been subject to two periods of suspension totalling nine months, and he has not engaged at all with the process. He has provided no evidence of CPD despite being out of practice for nine months. Mr Ahmed submitted that Dr Kocialkowski has consciously disengaged from the process and therefore his remediation is an ongoing concern. Mr Ahmed reminded the Tribunal that the March 2024 Tribunal stated that the more Dr Kocialkowski prolongs proceedings by not engaging, the harder it will be for him to return to unrestricted practise. Mr Ahmed submitted therefore, that given the lack of engagement from Dr Kocialkowski, a further period of suspension will serve no practical purpose and is unlikely to prompt Dr Kocialkowski to reengage. Mr Ahmed therefore submitted that the only appropriate sanction is erasure.

34. Mr Ahmed submitted that erasure is necessary to maintain public confidence in the profession. Mr Ahmed submitted that Dr Kocialkowski has shown a deliberate disregard for the principles set out in GMP by failing to adhere to his obligation to engage with the GMC. Further, Mr Ahmed submitted that Dr Kocialkowski has shown a persistent lack of insight in his wilful non-engagement with the regulatory process.

The Tribunal's Determination

35. 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.

36. 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 Kocalkowski'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

37. Given that there has been no material change in the circumstances of this case since it was heard by the March 2024 Tribunal, the Tribunal considered that the aggravating and mitigating circumstances remained the same.

No action

38. 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.

39. 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

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

41. Due to Dr Kocalkowski's continued lack of engagement, the Tribunal could not be satisfied that Dr Kocalkowski 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

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

43. The Tribunal bore in mind the findings of the March 2024 Tribunal, that the seriousness of the misconduct had been marked by the initial period of suspension and that the further period imposed was intended to give Dr Kocialkowski the opportunity to reengage with the GMC and provide evidence of insight and remediation. The Tribunal found that although this further period of suspension is now approaching its end, Dr Kocialkowski has failed to provide any evidence or engage in any way with the GMC or these proceedings.

44. The Tribunal therefore considered whether there would be any practical purpose in imposing a further period of suspension. The Tribunal found that there is no indication that Dr Kocialkowski may engage in the future and therefore a further period of suspension was unlikely to encourage him to do so. The Tribunal was concerned that a further period of suspension would not result in Dr Kocialkowski reengaging in the process. It noted that the last inbound contact Dr Kocialkowski had with the GMC was on 11 August 2020.

45. The Tribunal considered the factors which indicate that suspension may be appropriate at paragraph 97 of The Sanctions Guidance (2024) ('SG'), and considered these factors in particular to be absent:

'97 Some or all of the following factors being present (this list is not exhaustive) would indicate suspension may be appropriate.

...

e No evidence that demonstrates remediation is unlikely to be successful, eg because of previous unsuccessful attempts or a doctor's unwillingness to engage.

...

g The tribunal is satisfied the doctor has insight and does not pose a significant risk of repeating behaviour.'

46. The Tribunal found that Dr Kocialkowski's lack of engagement has now persisted for almost four years, and this is evidence that remediation is unlikely to be successful, having not occurred in that time. The Tribunal further found that it had no evidence that Dr Kocialkowski has developed any insight into his misconduct and therefore he poses a significant risk of repeating his behaviour. The Tribunal considered a further period of suspension, in the absence of any engagement by Dr Kocialkowski or an indication from him of an intention to engage, was not in the public interest.

47. The Tribunal therefore determined that suspension would not be appropriate nor proportionate in this case.

Erasure

48. The Tribunal considered the factors set out at paragraph 109 of the SG that indicate erasure is the appropriate sanction, and found the following to be of relevance:

'109 Any of the following factors being present may indicate erasure is appropriate (this list is not exhaustive).

...

j Persistent lack of insight into the seriousness of their actions or the consequences.'

49. The Tribunal, as set out above, has no evidence that Dr Kocalkowski has developed insight into the seriousness of his misconduct or the consequences. He has continued to be unwilling to engage with the GMC or in these proceedings. The Tribunal was mindful that the misconduct which was found proved at the 2023 Tribunal was a clinical matter which would not be difficult to remediate. However, Dr Kocalkowski has not engaged with these proceedings, and provided no evidence whatsoever of his insight into the misconduct or his efforts at remediation. There had been no indication from Dr Kocalkowski that he ever intends to reengage.

50. The Tribunal bore in mind the significant impact that erasure would have on Dr Kocalkowski, however it balanced this against the reputation of the profession as a whole and found that erasure was the appropriate and proportionate sanction in this case. The Tribunal found that Dr Kocalkowski has been given opportunities to show insight and remediate the concerns about his practice, however he has shown no willingness to engage and provided no evidence that he is fit to return to practice. The Tribunal determined that a sanction of erasure would also send a message to the profession that such continued disengagement with the GMC and persistent lack of insight into serious misconduct will end with the ultimate sanction.

51. The Tribunal concluded that erasure was necessary 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.

52. The Tribunal have directed to erase Dr Kocalkowski's from the Medical Register. The MPTS will send Dr Kocalkowski 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.

53. That concludes the case.

ANNEX A – 10/07/2024

Service and Proceeding in Dr Kocialkowski's absence

Service

54. Dr Kocialkowski was neither present nor represented at this hearing. The Tribunal first had to consider whether there had been effective service 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 Kocialkowski's absence.

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

56. The Tribunal was provided with a copy of the Medical Practitioners Tribunal Service (MPTS) Notification of Listing letter, dated 17 April 2024, informing Dr Kocialkowski of the date of this hearing. These MPTS documents were sent to Kocialkowski by First Class Mail on 17 April 2024 and were returned to sender on 8 May 2024, marked '*Addressee no longer lives at this address*'.

57. The Tribunal was provided with a copy of the GMC Information letter and Hearing Bundle dated 28 May 2024. These GMC documents were sent to Dr Kocialkowski's postal address by Royal Mail Special Delivery on 28 May 2024. Royal Mail Track and Trace documentation stated that the delivery was refused on 30 May 2024.

58. The Tribunal was also given a copy of the MPTS Notice of Hearing letter, dated 4 June 2024, which was posted on the same day to Dr Kocialkowski's GMC registered address by Royal Mail Special Delivery. Royal Mail Track and Trace documentation stated that the delivery was refused on 5 June 2024 and returned to sender on 6 June 2024.

59. The Tribunal also noted a record which indicated that an attempt was made to telephone Dr Kocialkowski on 4 June 2024 by the GMC. Dr Kocialkowski did not answer and there was no facility for the GMC to leave a message.

60. On behalf of the GMC, Mr Ahmed, Counsel, took the Tribunal to documents regarding service of these proceedings on Dr Kocialkowski. Mr Ahmed submitted that the rules of service under Rule 20 and 40 have been adhered to and all reasonable efforts have been made to provide Dr Kocialkowski with notice of today's hearing.

The Tribunal's determination

61. The Tribunal considered whether notice of this hearing had been properly served on Dr Kociałkowski in accordance with the Rules. The Tribunal had regard to the Proof of Service bundle provided by the GMC and Mr Ahmed's submissions.

62. The Tribunal found that the GMC Information Letter and MPTS Notice of Hearing which included details of the date and time of today's hearing were served by post to Dr Kociałkowski's GMC registered address. The Tribunal noted that multiple delivery attempts were refused or returned marked to indicate that Dr Kociałkowski is no longer at this address. Furthermore, it noted a telephone call was made by the GMC to Dr Kociałkowski, and he did not answer. The Tribunal therefore concluded that all reasonable efforts to serve notice of this hearing on Dr Kociałkowski had been made to Dr Kociałkowski's GMC registered address.

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

Proceeding in absence

64. Turning to proceeding in the absence of Dr Kociałkowski, Mr Ahmed submitted that under Rule 31, the Tribunal should proceed in Dr Kociałkowski's absence. Mr Ahmed submitted that Dr Kociałkowski has not engaged with any GMC proceedings, including the substantive hearing in 2023 and the review hearing in March 2024. Mr Ahmed stated that the last inbound contact Dr Kociałkowski had with the GMC was on 11 August 2020. Mr Ahmed submitted that Dr Kociałkowski has voluntarily waived his right to attend these proceedings.

65. Mr Ahmed further submitted that the onus is on Dr Kociałkowski to engage with the GMC, and he has failed to do so, without providing any reasons for that failure to engage. Mr Ahmed submitted that there is no indication that an adjournment will secure Dr Kociałkowski's attendance or any representations from him. Finally, Mr Ahmed submitted that it is fair and reasonable, in all the circumstances, to proceed in Dr Kociałkowski's absence.

The Tribunal's determination

66. The Tribunal went on to consider whether it would be appropriate to proceed with this hearing in Dr Kociałkowski's absence under Rule 31 of the Rules. The Tribunal accepted the legal advice and was conscious that in accordance with the principles in *R v Jones (2001) EWCA Crim 168* and *Adeogba (2016) EWCA Civ 162*, 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.

67. The Tribunal noted that Dr Kociałkowski did not attend the substantive hearing in 2023, nor did he attend the review hearing March 2024. The Tribunal determined that, having found that all efforts have been made to inform Dr Kociałkowski of the date of today's hearing, he has voluntarily absented himself from these proceedings. The Tribunal found that no reason was provided for Dr Kociałkowski's absence and there was no indication that an adjournment would secure his attendance at a future date.

68. The Tribunal further took into account the public interest in this hearing proceeding today, despite Dr Kociałkowski's absence. 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 Kociałkowski's absence.

69. Accordingly, the Tribunal therefore determined that it was fair and reasonable to proceed in Dr Kociałkowski's absence, in accordance with Rule 31 of the Rules.