

PUBLIC RECORD

Dates: 02/12/2022

Medical Practitioner's name: Dr Frederick DONALDSON

GMC reference number:	4008710
Primary medical qualification:	MB BS 1992 University of the West Indies
Type of case	Outcome on non-compliance
New - Non-compliance with a performance assessment	Non-compliance found

Summary of outcome

Suspension for 12 months
Review hearing directed
Immediate order imposed

Tribunal:

Legally Qualified Chair	Mr Damian Cooper
Lay Tribunal Member:	Mr Gareth Davies
Medical Tribunal Member:	Dr John Garner

Tribunal Clerk:	Mrs Olivia Gamble
-----------------	-------------------

Attendance and Representation:

Medical Practitioner:	Not present and not represented
GMC Representative:	Mr Robin Kitching, 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 consideration of non-compliance 02/12/2022

Outcome of Applications Made at the Outset of Proceedings

1. The Tribunal accepted the General Medical Council (GMC)'s submissions, made pursuant to Rule 40 of the GMC (Fitness to Practise) Rules 2004, as amended ('the Rules'), that notice of this hearing had properly been served on Dr Donaldson, and granted its application, made pursuant to Rule 31 of the Rules, that this hearing should proceed in his absence. The Tribunal's full decision is included at Annex A.

Background

2. On 16 December 2020, the GMC was notified by the Cwm Taf University Health Board ('the Health Board') that Dr Donaldson was assessed by the Practitioner Performance Advice Service ('PPAS'), who found that Dr Donaldson was practising below the level expected of a speciality grade anaesthetist/ITU doctor. Deficiencies were identified in some core areas of his practice and his performance was deemed to be inconsistent and was poor in a number of areas.

3. The Health Board attempted to put an action plan in place in response to the assessment report, but Dr Donaldson attended only one meeting and failed to comment on either the assessment report or the action plan (which has remained in draft format as it was never agreed). Dr Donaldson failed to attend three further meetings and did not engage with the action plan for retraining.

4. Dr Donaldson was noted by the Health Board to not have a CRB/DBS certificate on record. He refused to address this matter and produce a DBS certificate.

5. Following Dr Donaldson's dismissal from its employment the Health Board referred the matter to the GMC, informing the GMC of both the dismissal and the Health Board's concerns about Dr Donaldson's clinical competence.

6. On 17 May 2021, Dr Donaldson was directed under Rule 7(3) and Schedule 1 of the General Medical Council ('GMC') Fitness to Practise Rules 2004, to undertake an assessment of his performance.

Record of Determinations Medical Practitioners Tribunal

7. On 16 June 2021, Dr Donaldson was invited by email to undertake a Performance Assessment. On 23 July 2021, Dr Donaldson confirmed by email that he agreed to undergo a performance assessment. On 16 November 2021, by email, Dr Donaldson began to question the methodology and purpose of the performance assessment, concluding that if an assessment was necessary, it should be put to the MPTS.
8. On 17 November 2021, the GMC emailed Dr Donaldson providing a copy of the referral letter, seeking to discuss the matter with him and recommending that he attend the performance assessment. On 24 November 2021, by email, Dr Donaldson confirmed that he would not be cooperating with the assessment.
9. On 19 December 2021, Dr Donaldson provided questions which were subsequently answered by the GMC on 21 December 2021. On 23 February 2022, the GMC sent Dr Donaldson a more extensive response to the queries he had raised, specifying what would happen if he did not complete the assessment.
10. On 4 March 2022, Dr Donaldson sent two emails which reiterated the queries. The GMC responded to these queries by email on 8 March 2022. This email asked Dr Donaldson to confirm if he would comply with the direction for a performance assessment and explained what would happen if he did not complete the assessment.
11. On 8 March 2022, Dr Donaldson again reiterated his questions by email. On 9 March 2022, the GMC provided a further response to Dr Donaldson's queries and asked him to confirm in writing if he would undertake the assessment.
12. On 9 March 2022, Dr Donaldson provided a further query by email. On 10 March 2022, the GMC responded and confirmed that Dr Donaldson's queries had already been answered repeatedly in previous correspondence. On 10 March 2022, Dr Donaldson emailed confirming that he would attend a GMC Performance Assessment.
13. On 17 March 2022, Dr Donaldson was directed under Rule 7(3) and Schedule 1 of the General Medical Council ('GMC') Fitness to Practise Rules 2004 to undertake an assessment of his performance. By emailed letter, dated 21 March 2022, Dr Donaldson was invited to undertake a performance assessment following which he engaged, providing documentation.
14. On 15 June 2022, during a telephone call with the GMC, Dr Donaldson confirmed that he would not be attending the performance assessment.
15. On 4 July 2022, the GMC called Dr Donaldson, but the call was terminated. The GMC followed up with an email asking to speak with the doctor and asking him to confirm by the next day whether he was attending the performance assessment.
16. On 5 July 2022, the GMC cancelled the arrangements for the performance assessment as Dr Donaldson had not replied to the previous communication.

17. Accordingly, it is alleged that Dr Donaldson has failed to comply in full with the GMC's direction and further alleged that there is no good reason for his failure to comply with the GMC's direction.

The Evidence

18. In reaching a decision on the matter of non-compliance, the Tribunal has given careful consideration to all of the evidence adduced in this case.

Documentary Evidence

19. The Tribunal received a bundle of documentary evidence which included but was not limited to:

- Original referral bundle containing an email from UHB to the GMC attaching the GMC decision, NHS Assessment Report and the decisions of the inquiry panel;
- Covering email containing performance assessment invitation letter to Dr Donaldson – dated 16 June 2021;
- Return receipt for that email – dated 17 June 2021;
- Various correspondence between the GMC and Dr Donaldson in relation to the performance assessment;
- Telephone call note between the GMC and Dr Donaldson about the IOT hearing – dated 15 June 2022;
- Telephone call note between the GMC and Dr Donaldson to verify contact details – dated 4 July 2022;
- Email to Dr Donaldson with draft timetable for the performance assessment – dated 4 July 2022;
- Correspondence from the GMC to Dr Donaldson – performance assessment cancelled due to non-compliance – dated 5 July 2022;
- Non-compliance decision – dated 19 August 2022;
- Receipt from Dr Donaldson's email addresses – messages undeliverable – dated 31 August 2022;
- IOT bundle – dated 16 June 2022;
- IOT determination – dated 16 June 2022.

Submissions of Mr Kitching, on Behalf of the GMC

20. On behalf of the GMC, Mr Kitching submitted that it was clear from the documentary evidence that Dr Donaldson was aware of the direction made for him to undertake a performance assessment. He has not complied with that direction.

21. Mr Kitching submitted that Dr Donaldson's approach has been 'wholly capricious'. He further submitted that given the concerns that have been raised in relation to Dr Donaldson's practice, and given the doctor's response to those concerns, there is clearly no good reason

that Dr Donaldson has not undergone a performance assessment by now. The concerns the doctor had repeatedly raised about the performance assessment and the basis upon which it had been directed, had been answered by the GMC on numerous occasions.

22. Mr Kitching concluded that it is a reasonable direction by the GMC for Dr Donaldson to undergo a performance assessment. He has not complied with the direction, and he has now withdrawn from the process altogether with no good reason.

The Tribunals' Determination on Non-Compliance

23. The Tribunal is aware that the burden of proof rests on the GMC and that it is for the GMC to prove non-compliance. The Tribunal is also aware that the standard of proof is that applicable to civil proceedings, which is the balance of probabilities.

24. The Tribunal accepted the advice provided by the Legally Qualified Chair and noted that it should ask itself the following questions:

- has the doctor failed to comply with the GMC's direction or request to provide information?
- if so, is there a good reason for the doctor's failure to comply?

25. In making its determination, the Tribunal had regard to the MPTS Non-compliance guidance ('NCG'). The Tribunal noted paragraph A17 of the NCG:

'There does not need to be culpability on a doctor's part for the tribunal to conclude there is evidence that the doctor has 'failed to comply.' At this stage, the tribunal is simply considering whether there is evidence to show, as a matter of fact, the doctor has not complied with the GMC's direction or request to provide information.'

26. The Tribunal noted that it had seen the Assistant Registrar's decision that a performance assessment should be directed. It had also seen the correspondence in which that decision had been clearly communicated to Dr Donaldson. The Tribunal was of the view that the GMC had taken all reasonable steps to encourage Dr Donaldson to comply, as evidenced by the many reminders sent by email.

27. To date, Dr Donaldson had not undertaken the required performance assessment. Further, in June of 2022 Dr Donaldson had made it clear in a telephone call with the GMC that he was "... done with the GMC". Other than to decline to accept a further telephone call from the GMC in July 2022, Dr Donaldson had ceased all communication with the GMC since that point.

28. The Tribunal was satisfied that the GMC had properly notified Dr Donaldson of the requirement to undergo an assessment of his performance and that Dr Donaldson has not done so, and therefore had failed to comply.

29. The Tribunal then considered whether there was a good reason for Dr Donaldson's failure to comply. The Tribunal noted the NCG at paragraph A24 was relevant to its deliberations:

'A24 Examples of good reason for failing to comply with a GMC direction or request to provide information could include, but are not limited to, where:

a there is objective evidence that demonstrates a doctor's adverse physical or mental health prevented them from complying with a GMC direction or request to provide information, and there is a realistic prospect of the doctor being able to comply in a reasonable timeframe in the future

b a doctor can demonstrate they did not receive the GMC's direction or request to provide information and, since its existence came to the doctor's attention, they have not been provided with an opportunity, and / or sufficient time, to comply

c a doctor can demonstrate they are not, or could not reasonably be expected to be, in possession of the information requested by the GMC

d a doctor can demonstrate that, in all the circumstances, it was not reasonable for them to comply with the GMC's direction or request to provide information (see below)

e a doctor can demonstrate that their failure to comply does not create a risk to public protection because the GMC can still investigate the concern'

30. Without having received any communication or submissions from Dr Donaldson, the Tribunal considered that sub-paragraphs A24d and e of the NCG may be of particular pertinence in this case. The Tribunal examined the evidence for the GMC direction that Dr Donaldson undergo a performance assessment and was satisfied that there were reasonable grounds for the direction. Long-standing and wide-ranging concerns about Dr Donaldson's clinical competence had been identified and, in the Tribunal's view based on the evidence, it was appropriate and reasonable for the GMC to invite Dr Donaldson to undergo an independent assessment of his performance in order to assess his fitness to practise.

31. The Tribunal also considered the concerns raised by Dr Donaldson in relation to the direction for him to undergo a performance assessment, including those relating to the earlier PPA report undertaken during his employment at the Health Board and his concerns about the nature of the performance assessment itself. However, the Tribunal was satisfied that Dr Donaldson's concerns had been addressed clearly and adequately by the GMC and none of his concerns provided justification for his non-compliance. On that basis, there was no good reason for Dr Donaldson's failure to comply.

32. The Tribunal was of the view that when considering the concerns surrounding Dr Donaldson's practice, there is a risk to public protection in this case. It noted that these

concerns cannot be allayed by any other means than for the GMC to have Dr Donaldson undergo a performance assessment. The Tribunal determined that this was the only way in which the GMC could make an assessment of Dr Donaldson's competence and provided an independent and objective means of doing so.

33. The Tribunal also considered the fact that Dr Donaldson is under a duty both to allow his regulator to monitor concerns raised in relation to his practice and to co-operate with the legitimate processes and procedures used by his regulator in carrying out its functions. The Tribunal was concerned that Dr Donaldson had clearly withdrawn any cooperation with the GMC, its specific performance assessment direction and now with these MPTS proceedings.

34. In all the circumstances, the Tribunal concluded that Dr Donaldson had failed to comply with the GMC direction and was unable to provide a good reason for his failure to comply. The Tribunal therefore determined that non-compliance had been found.

Determination on sanction and immediate order 02/12/2022

35. Having determined that there was non-compliance by reason of Dr Donaldson's failure to undertake a performance assessment in accordance with Schedule 1 of the Rules; the Tribunal went on to consider what sanction, if any, to impose.

Submissions of Mr Kitching, on behalf of the GMC

36. On behalf of the GMC, Mr Kitching submitted that the appropriate sanction in this case is one of suspension.

37. Mr Kitching submitted that there is a significant risk to patient safety in this non-compliance case, and the GMC did not believe that a further order of conditions was workable. Further, considering the wider evidence, Dr Donaldson's '*attitudinal problems*' were clear. For those reasons, Mr Kitching submitted that conditional registration is not the way forward at this stage in proceedings.

38. Mr Kitching drew the Tribunal's attention to paragraph C12 of the NCG, which indicates that conditions should be appropriate, proportionate, workable and measurable. Mr Kitching stated that this is difficult to envisage when dealing with a doctor who has completely disengaged from the proceedings.

39. Mr Kitching submitted that Dr Donaldson has had many opportunities to comply with the GMC's direction that he undergo a performance assessment. He referred the Tribunal to the relevant paragraphs of the NCG and invited the Tribunal to suspend Dr Donaldson's registration. Mr Kitching submitted that the provisions of paragraph C24 of the NCG fitted neatly in this case:

C24 Suspension is likely to be appropriate where a doctor has explicitly refused to comply with a direction or request to provide information or has failed to respond to a

direction or request to provide information, and there is no mitigating information to suggest that conditions are likely to be sufficient.

40. In relation to the length of the period of suspension, Mr Kitching submitted that 12 months would be the appropriate duration. He stated that it is clear that full compliance, involving Dr Donaldson agreeing to undergo a performance assessment, would take many months and therefore, given Dr Donaldson's current disengagement, a 12 month period of suspension is the appropriate order.

41. Mr Kitching invited the Tribunal to direct a review hearing in this case.

42. In relation to the matter of an immediate order, Mr Kitching submitted that there will undoubtedly need to be an immediate order placed on Dr Donaldson's registration as the GMC invited the Tribunal to revoke the current interim order of conditions. Mr Kitching concluded that in the circumstances, an immediate order would be necessary in order to protect public safety and the wider public interest.

The Tribunal's Decision

43. The Tribunal was aware that the decision as to the appropriate sanction, if any, to impose on Dr Donaldson's registration was a matter for this Tribunal exercising its independent judgment. In reaching its decision, the Tribunal has taken account of the NCG, and the general principles set out in the Sanctions Guidance (November 2020). Throughout its deliberations, the Tribunal applied the principle of proportionality, balancing Dr Donaldson's interests with the public interest.

44. The Tribunal also kept foremost in mind the provisions of the overarching objective, which includes:

- a. protecting, promoting and maintaining the health, safety and well-being of the public,
- b. maintaining public confidence in the profession
- c. promoting and maintaining proper professional standards and conduct for the members of the profession.

45. The Tribunal bore in mind its finding of non-compliance, alongside the evidence already adduced and the submissions of Mr Kitching.

No Action

46. The Tribunal first considered taking no action in the case of Dr Donaldson. However, it determined that in view of its findings on non-compliance, it would be neither sufficient, proportionate nor in the public interest to conclude this case by taking no action.

Conditions

47. The Tribunal next considered whether it would be appropriate to impose a period of conditions on Dr Donaldson's registration. It has borne in mind that any conditions must be appropriate, proportionate, workable and measurable.

48. The Tribunal considered the C14 of the Guidance:

'C14 Conditions are unlikely to be appropriate where a doctor has explicitly refused to comply with a direction or request to provide information or has failed to respond to a direction or request to provide information, and there is no mitigating information available.'

49. The Tribunal noted that Dr Donaldson has failed, without good reason, to comply with a reasonable request by the GMC that he undergo a performance assessment. In addition, the Tribunal noted that Dr Donaldson had not been working in a clinical setting for some considerable time, and the Tribunal had not seen any evidence from him in relation to any ongoing continuing professional development ('CPD'). The Tribunal also noted Dr Donaldson's complete disengagement from the GMC and its investigation process, and consequently from these proceedings. In the Tribunal's view, Dr Donaldson's disengagement amounted to a tacit refusal to comply with the GMC direction, and it could not identify any mitigation on the doctor's behalf. The Tribunal was therefore not satisfied that an order of conditions was workable or was the appropriate or proportionate order to make in the circumstances. It was also not satisfied that Dr Donaldson would comply with any conditions imposed upon his registration.

Suspension

50. The Tribunal then went on to consider suspension of Dr Donaldson's registration and considered the following paragraphs of the NCG relevant to this case:

'C23 When considering whether a period of suspension is a proportionate response to a doctor's non-compliance, the tribunal may want to take into account the previous opportunities the doctor has had to comply and the level of the doctor's engagement with the fitness to practise process.'

C24 Suspension is likely to be appropriate where a doctor has explicitly refused to comply with a direction or request to provide information, or has failed to respond to a direction or request to provide information, and there is no mitigating information to suggest that conditions are likely to be sufficient.'

51. The Tribunal accepted Mr Kitching's submissions that Dr Donaldson had had many opportunities, indeed an ongoing opportunity, to comply since the direction for a performance assessment was first made in 2021. He had failed to do so and had now entirely

disengaged from all dealings with the GMC and MPTS. Further the Tribunal also agreed with Mr Kitching that paragraph C24 of the NCG applied squarely in this case. In the Tribunal's view, there was a risk to patient safety in allowing a doctor back to practise who had questions raised over his competence, whose skills had not been assessed by means of a performance assessment and who had been out of practise for some time without providing evidence of CPD. In addition, a period of suspension sent an appropriate message to the profession about the gravity with which the Tribunal viewed non-compliance with a reasonable direction of the GMC over an extended period of time.

52. Therefore, the Tribunal determined that an order of suspension was appropriate and proportionate order to make. In relation to the length of the period of suspension, the Tribunal was mindful of Dr Donaldson's current disengagement, the time realistically required to arrange and undertake a performance assessment (even if Dr Donaldson complied in a timely manner following this determination) and the time needed for any review hearing then to be arranged. It determined that a period of 12 months' suspension was necessary, appropriate and proportionate for the protection of the public and in the public interest.

Review Hearing

53. The Tribunal directed that a review hearing should take place. A Tribunal will review Dr Donaldson's case at a hearing to be held before the end of the period of suspension. It will then consider whether it should take any further action in relation to Dr Donaldson's registration. Dr Donaldson will be informed of the date of that hearing, in which he will be expected to participate. The Tribunal reviewing Dr Donaldson's case would be assisted by receiving the following:

- Evidence that Dr Donaldson has undergone a performance assessment;
- Information that Dr Donaldson has kept his medical skills and knowledge up to date;
- Any further information Dr Donaldson considers will assist the Tribunal.

Immediate order

54. Having determined that Dr Donaldson's registration be subject to suspension, the Tribunal has considered, in accordance with Section 38 of the Medical Act 1983, as amended, whether his registration should be subject to an immediate order.

55. Having considered Mr Kitching's submissions and in light of all the circumstances of the case, the Tribunal was satisfied that it was necessary in the public interest for Dr Donaldson's registration to be suspended with immediate effect. In reaching this decision, the Tribunal was concerned that there was a significant risk to patient safety if Dr Donaldson was allowed to return to unrestricted practise pending any appeal, when there were outstanding unresolved concerns about his clinical competence. In addition, it was of the view that public confidence in the profession would be undermined if an immediate order were not made. In its view, all three limbs of the overarching objective were invoked.

Record of Determinations
Medical Practitioners Tribunal

56. This means that Dr Donaldson's registration will be made subject to immediate suspension from the date on which notification of this decision is deemed to have been served upon him. The substantive direction, as already announced, will take effect 28 days from the date on which written notification of this decision is deemed to have been served, unless an appeal is made in the interim. If an appeal is made, the immediate order will remain in force until the appeal has concluded.

57. The interim order is hereby revoked.

58. That concludes this hearing.

Annex A - 02/12/2022

Determination on Service and Proceeding in Absence

Service

59. Dr Donaldson is not present today at this Medical Practitioners Tribunal ('MPT') hearing. The Tribunal therefore considered whether the relevant documents had been served in accordance with Rule 40 of the General Medical Council ('GMC') ('Fitness to Practise') Rules 2004 ('the Rules') and paragraph 8 of the fourth Schedule to the Medical Act 1983.

60. Mr Robin Kitching, Counsel, on behalf of the GMC, provided the Tribunal with various documents regarding service of Notice of the Hearing of Dr Donaldson. This included:

- A screenshot of Dr Donaldson's registered address;
- A notice of hearing issued by the MPTS, addressed to Dr Donaldson's registered address – dated 31 October 2022;
- Proof that the notice of hearing was signed for by Dr Donaldson on 1 November 2022.

61. Mr Kitching submitted that in the GMC's view, service has been effected and Dr Donaldson has voluntarily absented himself from today's proceedings. Mr Kitching further submitted that adjourning the hearing today will not resolve matters relating to the doctor's attendance. He stated that Dr Donaldson has not sought an adjournment and therefore has effectively waived his right to attend. Mr Kitching concluded that the Tribunal should be satisfied that it can proceed in his absence.

62. The Tribunal had regard to the documents before it and the submissions made by Mr Kitching and was satisfied that notice of this hearing had been served in accordance with Rule 40.

Proceeding in Absence

63. Having been satisfied that notice was properly served upon Dr Donaldson, the Tribunal then considered whether to proceed with this hearing in his absence, in accordance with Rule 31 of the Rules. The Tribunal 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.

64. The Tribunal has evidence before it that Dr Donaldson was aware of the hearing commencing on 2 December 2022. The Tribunal noted that since July 2022, Dr Donaldson had wholly disengaged from communication with the GMC. This included any

Record of Determinations
Medical Practitioners Tribunal

correspondence in relation to today's proceedings. The Tribunal determined that Dr Donaldson has chosen to voluntarily absent himself from this hearing. Furthermore, it has not received any indication that Dr Donaldson has requested an adjournment in order to engage at a later date. In light of Dr Donaldson's disengagement, the Tribunal could not be satisfied that, were there to be an adjournment, Dr Donaldson might engage with proceedings at any later date.

65. The Tribunal concluded that it is in the public interest and in the interests of justice to proceed with this hearing today.

66. Accordingly, the Tribunal determined that it was fair and reasonable to proceed in Dr Donaldson's absence.