

PUBLIC RECORD

Dates: 10/04/2024

Medical Practitioner's name: Dr Htay KYWE

GMC reference number: 2463906

Primary medical qualification: MB BS 1976 Med Inst (III) Mandalay

Type of case
Restoration following
disciplinary erasure

Summary of outcome
Hearing adjourned to be considered by a new Tribunal

Tribunal:

Legally Qualified Chair	Miss Debi Gould
Lay Tribunal Member:	Mrs Lorna Taylor
Medical Tribunal Member:	Dr Nigel Langford
Tribunal Clerk:	Miss Racheal Gill

Attendance and Representation:

Medical Practitioner:	Not present, not represented
Medical Practitioner's Representative:	n/a
GMC Representative:	Ms Janet Ironfield, 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 Service and Proceeding in Dr Kywe's absence – 10/04/2024

1. Dr Kywe was neither present nor represented at this hearing.
2. 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'). The Tribunal could not go on to determine whether to proceed in Dr Kywe's absence unless it first concluded that service had been undertaken in accordance with the Rules.
3. On behalf of the GMC, Ms Ironfield, Counsel, submitted that proper service had occurred. She took the Tribunal to documents from which she submitted the Tribunal could conclude that Dr Kywe had properly served in accordance with the requirements of the Act and the Rules.
4. The Tribunal was provided with a service bundle which included a screenshot of the GMC database showing Dr Kywe's registered address and email address.
5. Ms Ironfield referred to extracts from Dr Kywe's restoration application, dated 26 October 2023 and 1 November 2023, which included his postal address and email address. She submitted that as the details of Dr Kywe's addresses were consistent with the GMC's database it was a reasonable inference that these contact details are up to date. She submitted that there was no evidence that suggested that any of those addresses are outdated or are ineffective.
6. Ms Ironfield further submitted that, following receipt of Dr Kywe's restoration application, the GMC emailed him advising that his application has been received and would be reviewed by the Fitness to Practise Team. Ms Ironfield also directed the Tribunal to emails from Dr Kywe back to the GMC using the same email address.

7. The Tribunal was provided with a copy of Medical Practitioners Tribunal Service (MPTS) Case Management Notification letter, dated 4 January 2024, which had been emailed to Dr Kywe. Information contained within this email included but was not limited to, the date of today's hearing, a request to attend a telephone Pre-Hearing Meeting with a MPTS Case Manager and suggested dates and times for that meeting. Dr Kywe did not respond to the MPTS email, nor did he attend the MPTS Case Manager meeting.

8. The Tribunal was provided with a copy of the GMC Information letter and Draft Hearing Bundle dated 26 February 2024, which was emailed and posted to Dr Kywe's postal address by Royal Mail Special Delivery the same day. Information within the GMC Information letter included, but was not limited to, the date of today's hearing and notification that if he did not attend the hearing, the Tribunal may continue in his absence and without his involvement. Royal Mail Track and Trace documentation confirmed that these GMC documents were delivered and signed for by Dr Kywe on 27 February 2024.

9. The Tribunal was also given a copy of the MPTS Notice of Hearing (NoH) letter, dated 26 February 2024, which was emailed the same day to Dr Kywe's email address. Information contained within the NoH included, but was not limited to, the date and time today's hearing was to start, for Dr Kywe to confirm that he had received the letter and to indicate whether he proposed to attend or whether he would be represented. The MPTS sent a chaser NoH email to Dr Kywe requesting acknowledgment on 27 February 2024. Following no response from Dr Kywe to either of the MPTS's emails, the NoH Letter was then posted to Dr Kywe's registered address by Royal Mail Special Delivery on 28 February 2024. Royal Mail Track and Trace documentation indicated that the NoH arrived at the nearest delivery office to Dr Kywe's address but did not provide evidence it was delivered to his home. When the MPTS telephoned Royal Mail enquiring about this, Royal Mail emailed back stating that *"unfortunately this item would have been considered as lost from the 7th march 2024"*.

10. Ms Ironfield submitted that Royal Mail's email was unhelpful, and, in the circumstances, a number of reasonable inferences could be drawn as to the delivery of the NoH letter. She suggested that the NOH may have been delivered and signed for, but that no record made of that or that any record made because this had not been uploaded. She further suggested that the Tribunal would have personal experience that not all special delivery items were signed for but were simply put through a letterbox. Ms Ironfield submitted that the NoH may therefore have been delivered despite the absence of any record confirming its delivery.

11. Ms Ironfield referred to the case of *GMC v Adeogba [2016] EWCA Civ 163* and reminded the Tribunal that the GMC are not required to prove receipt of the notice of the

hearing by a doctor. She submitted that the GMC have complied sufficiently with the Rules for the Tribunal to properly find that service has been effected through the material contained in the GMC information letter.

12. Ms Ironfield additionally submitted that the Tribunal could take into account that Dr Kywe historically had not engaged with the GMC or MPTS during the investigation of the misconduct which had led to his erasure from the Medical Register. She also submitted that Dr Kywe has a history of not engaging, referring to the last Fitness to Practise proceedings in 2009 and 2010 when he did not attend any hearing and pointed to his lack of engagement and responses with the GMC at that time. Ms Ironfield submitted that as this was a restoration application initiated by Dr Kywe himself, it was reasonable to expect the doctor to be pro-active in managing his own case.

13. Ms Ironfield submitted that, given Dr Kywe had raised a complaint about the GMC not progressing matters within its optimum 28-day response time, he had, in all likelihood, known the date of today's hearing for some time and that, at least on 4 January 2024, was capable of pursuing email inquiries.

14. Ms Ironfield submitted that taking account of all the matters she had advanced, Dr Kywe's lack of communication with, and non-attendance at, this Tribunal is '*part of a pattern starting 18 years ago*'. Ms Ironfield submitted that the GMC only had to show proof of posting of the Notice of Hearing not proof of delivery. She submitted that despite the correspondence from Royal Mail indicating that they considered the NOH had been lost, the Tribunal could still conclude that proper service had taken place.

15. Finally, Ms Ironfield submitted that it was fair and reasonable for the Tribunal to conclude that service had been properly effected, that Dr Kywe had either received the Notice of Hearing described by Royal Mail as being lost or that he had been given sufficient notification of the matters required by Rule 15 to enable the Tribunal to conclude that notice had been effected in accordance with the Rules. In this regard, Ms Ironfield reiterated her submissions that Dr Kywe's previous lack of engagement with the investigation and Tribunal process and failure to respond to most of the GMC's correspondence in relation to these proceedings were relevant matters for the Tribunal to take into account.

The Tribunal's determination

16. The Tribunal considered whether notice of this hearing had been properly served on Dr Kywe in accordance with the Rules. In reaching its determination, the Tribunal bore in mind the relevant provisions of Rules 15, 23 and 40 of the Rules, and of paragraph 8 of Schedule 4 to the Medical Act 1983, as amended ('the Act'), in particular:

Rule 15.

(1) After an allegation or non-compliance matter has been referred to the MPTS for them to arrange for it to be considered by a Medical Practitioners Tribunal under rule 17 or 17ZA (as the case may be)—

(a) the Registrar shall give notice to the practitioner of—

(i) the allegation against the practitioner and the facts upon which it is based;

...

(b) the MPTS shall serve a notice of hearing on the practitioner—

(i) specifying the date, time and venue of the hearing,

...

Rule 23.

...

(2) At least 28 days before the hearing before a Medical Practitioners Tribunal to consider his application—

(a) the MPTS shall serve upon the applicant a notice of the hearing complying with paragraph (4); and

(b) the Registrar shall provide to the applicant a copy of any statement, report or other document the General Council has obtained which has not previously been sent to the applicant or his representative and which is relevant to the question whether the applicant's name should be restored to the register.

...

(4) The notice referred to in paragraph (2)(a) shall—

(a) specify the matters set out at rule 15(1)(b)(i) to (iv);

(b) request that the applicant notify the MPTS, within 14 days of the date of the notice, whether he wishes to attend the hearing;

(c) invite the applicant, if he chooses not to attend the hearing, to make written representations to be received by the MPTS no later than 14 days before the hearing;

(d)...(e)

Rule 40.

(1) Any notice of hearing required to be served upon the practitioner under these Rules shall be served in accordance with paragraph 8 of Schedule 4 to the Act.

(2) Subject to paragraph (1), any notice or document required to be served upon the practitioner under these Rules may be served—

- (a) by ordinary post; or*
- (b) by electronic mail to an electronic mail address that the practitioner has notified to the Registrar as an address for communications.*

...

(4) The service of any notice or document under these Rules may be proved by—

- (a) a confirmation of posting issued by or on behalf of the Post Office, or other postal operator or delivery service;*
- (b) a confirmation of receipt of the notice or document sent by electronic mail;*
or
- (c) a signed statement from any person serving the notice or document confirming that the notice or document was delivered to, sent to or left at—*
 - (i) the practitioner’s proper address;*
 - (ii) the practising address or electronic mail address of the practitioner’s solicitor; or*
 - (iii) the business address or electronic mail address of the practitioner’s trade union or defence organisation.*

Paragraph 8 of Schedule 4 to the Act

...

(2) Any such notice may be so served -

- (a) by delivering it to him;*
- (b) by leaving it at his proper address;*
- (c) by sending it by a registered post service;*
- (d) by sending it by a postal service which provides for the delivery of the notice by post to be recorded; or*
- (e) by sending it to an email address which the person provides for the purpose of fitness to practise proceedings.*

(3) For the purposes of this paragraph and of section 7 of the Interpretation Act 1978 in its application to this paragraph, a person’s proper address shall be—

- (a) his address in the register; or*
- (b) if the conditions in sub-paragraph (4) below are satisfied, his last known address.*

....

(6) For the purposes of this paragraph, service of a notice sent by email is effected only if there is an electronic receipt showing that the email has been opened (or if the recipient acknowledges receipt in some other way).

17. The Tribunal accepted Ms Ironfield's submission that, technically, the GMC had complied with the Rules as to service of the Notice of Hearing by providing proof of posting pursuant to Rule 40(2)(a) and Rule 40(4)(b). However, the Tribunal noted that the purpose of this is to protect the GMC against doctors who seek to evade the service. The GMC acknowledged that Dr Kywe appears to have kept his registered postal address up to date. The GMC purported to comply with the service requirements and delivered the NOH to the Royal Mail in the proper way, expecting it would be delivered. Regrettably, and through no fault on the part of the GMC, Royal Mail then advised that it had lost the MPTS NoH letter. Royal Mail further advised that the GMC could claim compensation for loss of the item. The Tribunal considered that, in light of that, it was unfair and inappropriate for it to go behind the communication from Royal Mail, infer that the NoH letter had, in fact been delivered, or determine that service had been effected.

18. The Tribunal considered that the case of *Adeogba* was not an analogous situation. In that case the Registrant had left the U.K. without changing his address on the Medical Register. Letters sent to the Registrant at the address on the Register were returned as undelivered, but that arose because of the fault of the Registrant in not updating the records.

19. In this case, Dr Kywe appears to have kept his details up to date on the Register. The Tribunal considered that it would be inappropriate and unfair to ignore the accepted failure on the part of Royal Mail and conclude, despite Royal Mail describing the letter as lost, that proper service had been effected because the GMC has proved that the letter was posted.

20. In this regard, the Tribunal bore in mind the rights afforded to Dr Kywe by Article 6 of the European Convention on Human Rights. The Tribunal concluded that Dr Kywe's right to a fair trial included a right to be properly notified of the hearing and that, in this case, although the form of the Rules concerning service had been complied with, the spirit had not. The Tribunal considered it would be unfair to the doctor to accept that service had been properly effected when Royal Mail had advised the GMC that the NoH had been lost.

21. The Tribunal was mindful that although there has been other correspondence delivered to Dr Kywe that indicate some of the information which Rule 15 and Rule 23 require is conveyed in the NoH letter has been provided, the NoH is the only letter that deals with all of the matters required by Rule 15 in the form required. The Tribunal further accepted Ms Ironfield's submission that Dr Kywe had been sent the NoH in email form,

however, as there is no read receipt, service cannot be deemed to have been effected by email. Finally, the Tribunal noted that, save for a complaint about slow progress of the case by Dr Kywe, he had not responded to any emails, telephone calls or letters concerning his case from either the GMC or the Registrar. The Tribunal considered, however, this did not permit it to deviate from the strict rules concerning service.

22. The Tribunal concluded that it would not be fair to take the pragmatic approach invited by the GMC and commence hearing the substantive application today and that the GMC should comply with the notice requirements set out in the Act and in the Rules.

23. The Tribunal therefore determined that notice of this hearing had not been served on Dr Kywe in accordance with Rule 40 of the GMC's (Fitness to Practise) Rules 2004, as amended ('the Rules'), and paragraph 8 of Schedule 4 to the Medical Act 1983, as amended.

24. Given the Tribunal's determination that service of the Notice of Hearing had not been properly effected on Dr Kywe, it did not go on to consider whether to proceed in his absence pursuant to Rule 31 of the Rules.

25. Dr Kywe is strongly encouraged to engage with future Tribunal proceedings and the decision should be provided to the next Tribunal.

26. That concludes this hearing.