

PUBLIC RECORD

Dates: 14/12/2020 - 18/12/2020

Medical Practitioner's name: Dr Mathias GRUBER

GMC reference number: 6139070

Primary medical qualification: State Exam Med 1997 Universitat des Saarlandes

Type of case	Outcome on facts	Outcome on impairment
XXX	XXX	XXX
New - Misconduct	Facts relevant to impairment not found proved	Not Impaired

Summary of outcome

XXX

Tribunal:

Legally Qualified Chair	Mrs Linda Lee
Lay Tribunal Member:	Ms Wanda Rossiter
Medical Tribunal Member:	Professor Robert Mansel
Tribunal Clerk:	Mr Edward Kelly

Attendance and Representation:

Medical Practitioner:	Not present and not represented
Medical Practitioner's Representative:	N/A
GMC Representative:	Ms Katie Jones, 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 private.

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 Facts - 15/12/2020

THE FACTS

1. The Tribunal determined that, pursuant to Rule 41 of the General Medical Council (GMC) (Fitness to Practise) Rules 2004, as amended ('the Rules'), the determination will be announced in private given that it contains matters relating to XXX. The Tribunal's full decision on the privacy application is included at Annex B.

Background

2. Dr Gruber qualified in 1997 from Universitat des Saarlandes and, prior to the events which are the subject of the hearing, Dr Gruber had worked as a Consultant Radiologist in North West Anglia NHS Foundation Trust ('NWA') since 2009.
3. It is alleged that on 6 September 2018, Dr Gruber had undertaken a breath test that day which, at 2.45pm, had recorded an alcohol level of 22 mcg/100ml. Mr A, XXX, further informed Dr B, (NWA's Medical Director) that a repeat test taken within an hour indicated an alcohol level of 15 mcg/100ml.
4. On 6 September 2018, Dr Gruber told Dr B that he had been out drinking with a friend until midnight the previous day and could not remember how much alcohol he had consumed. Dr Gruber said during this discussion that he had only been doing Supporting Professional Activities ('SPA') on the morning of 6 September 2018. However, it is understood that Dr Gruber had in fact reported on a CT scan earlier on that morning of 6 September 2018.
5. These events occurred after Dr Gruber had already been subject to a NWA investigation in 2018, regarding his consumption of alcohol. After this investigation, Dr Gruber agreed to a number of measures designed to monitor and support him, including being subject to random breath tests.

6. Following the results of the positive breath test on 6 September 2018, the NWA carried out a second investigation. As a consequence, Dr Gruber was dismissed on 12 March 2019. On 15 March 2019, the NWA referred Dr Gruber's case to the GMC.

The outcome of applications made during the facts stage

7. Dr Gruber was neither present nor represented during the proceedings. The GMC made an application to proceed in the doctor's absence. The Tribunal determined that notice of this hearing had been served, pursuant to Rules 15 and 40 of the Rules. It subsequently determined to proceed in the absence of Dr Gruber. The Tribunal's full decision on the application is included at Annex A.
8. As set out above, the Tribunal determined to grant the GMC's application, made pursuant to Rules 41 of the Rules for the entirety of these proceedings to be heard in private.

The allegation and the Doctor's response

9. The Allegation made against Dr Gruber is as follows:

1. On 6 September 2018 whilst working a shift for the for North West Anglia NHS Foundation Trust that commenced in the morning you were breathalysed at:
 - a. 14:42 when you recorded a positive reading of 22mcg/100ml of breath; **To Be Determined**
 - b. 15:23 when you recorded a positive reading of 15mcg/100ml of breath. **To Be Determined**
2. XXX
3. XXX

And that by reason of the matters set out above your fitness to practise is impaired because of your:

- a. misconduct in relation to paragraph 1; **To Be Determined**

b. XXX

The Facts to be Determined

10. In light of the absence of a response from Dr Gruber to the Allegation made against him, the Tribunal is required to determine whether he did test positive for alcohol use 6 September 2018 while at work XXX.

Documentary Evidence

11. The Tribunal received witness statements on behalf of the GMC from Ms C, Matron for Paediatrics and Neonatal Services at the NWA.

12. The Tribunal had regard to all the documentary evidence adduced during these proceedings. This evidence included, but was not limited to:

- Fitness to Practise Referral Form, dated 5 March 2019;
- North West Anglia NHS Foundation Trust Investigation Report, dated 27 December 2018;
- XXX;
- Cansford Test Results, dated 23 July 2019;
- XXX
- XXX

The Tribunal's approach

13. In reaching its decision on the facts, the Tribunal has borne in mind that the burden of proof rests on the GMC and it is for the GMC to prove the Allegation. Dr Gruber does not need to prove anything. The standard of proof is that applicable to civil proceedings, namely the balance of probabilities, i.e. whether it is more likely than not that the events occurred as alleged.

14. The Tribunal reminded itself that it must form its own judgement about the evidence before it, and the reliability of such evidence. It noted that it must decide whether to accept or reject such evidence, and, where it is accepted, what weight to attach to it.

15. The Tribunal also bore in mind that it should assess and determine each paragraph and sub-paragraph of the Allegation separately. It noted that while it can draw inferences

from the evidence, it must not speculate as to any further evidence that has not come before it.

16. The Tribunal took account of the requirement to give sufficient and clear reasons for its determination.

The Tribunal's analysis of the evidence and findings

17. The Tribunal has considered the entirety of the Allegation and has evaluated the evidence in order to make its findings on the facts. The Tribunal had regard to the evidence before it and the documents referred to by Ms Jones, GMC Counsel.

Paragraphs 1 a and 1 b

18. The Tribunal first considered whether, at work on 6 September 2018, Dr Gruber recorded positive readings of 22mcg/100ml of breath and later for of 15mcg/100ml. The Tribunal had regard to the witness statement of Ms C in which she detailed the administration of the breathalyser test on 6 September 2018, as follows:

"I do not remember what the results were for Dr Gruber. According to my report at [attached exhibit], the first reading was taken at 14:42hrs and recorded 22mcg of alcohol in 100ml of breath. The second reading was taken 20 minutes later at 15:23hrs and recorded 15mcg in 100ml of breath. The Trust regards a positive breathalyser reading as problematic as if a person is on duty, but is positive for the presence of alcohol this may mean they are not safe to complete their duties."

19. The Tribunal referred to the evidence of Dr Grubers blood tests from Synlab, in relation to his haematology and biochemistry results.
20. The Tribunal noted the evidence provided in relation to the details of the tests and the calibration of the equipment. It further noted the result of the breathalyser equipment which is the same tool used by the Police to determine the level of alcohol. On the basis of the evidence provided, the Tribunal concluded that the readings from the blood tests taken by Ms C were accurate. The Tribunal accepts the authenticity of the test results and notes that the results were neither contested or denied by Dr Gruber.
21. Taking into account all of the documentary evidence before it, the Tribunal determined that there is sufficient clear and cogent evidence that Dr Gruber was tested on 6

September 2018 and that the test results were as detailed in the Allegation. The Tribunal also took into account evidence from Dr Gruber, from his witness statement to NWA, dated 29 October 2018, in which he confirmed that he had been drinking the evening before the tests, as follows:

“When the test showed positive I was disappointed...”

“I was asked what I had been drinking prior to the breath test. I had been out to dinner with a friend the night before during which we shared a bottle of wine. We then went on to a pub and I do not recall how much I drank there.”

22. The Tribunal therefore found paragraphs 1 a and 1 b of the Allegation proved.

Paragraphs 2 and 3

23. XXX.

24. XXX.

25. XXX.

26. XXX.

27. XXX.

28. XXX.

The Tribunal’s overall determination on the facts

29. The Tribunal has determined the facts as follows:

1. On 6 September 2018 whilst working a shift for the for North West Anglia NHS Foundation Trust that commenced in the morning you were breathalysed at:

- a. 14:42 when you recorded a positive reading of 22mcg/100ml of breath;

Found Proved

b. 15:23 when you recorded a positive reading of 15mcg/100ml of breath.

Found Proved

2. XXX

3. XXX

And that by reason of the matters set out above your fitness to practise is impaired because of your:

a. misconduct in relation to paragraph 1; **To Be Determined**

b. XXX

Determination on Impairment - 17/12/2020

1. This determination will be read in private. However, as this case concerns Dr Gruber's *misconduct*, a redacted version will be published at the close of the hearing with those matters relating to XXX removed.
2. The Tribunal now has to decide in accordance with Rule 17(2)(l) of the Rules whether, on the basis of the facts which it has found proved as set out before, Dr Gruber's fitness to practise is impaired by reason of misconduct XXX.

The Evidence

3. The Tribunal has taken into account all the evidence received during the facts stage of the hearing.

Submissions

4. On behalf of the GMC, Ms Jones submitted that Dr Gruber's fitness to practise is currently impaired by reason of his misconduct XXX. She reminded the Tribunal of the relevant case-law to be applied.
5. She referred to GMP (2013):

- “11. You must be familiar with guidelines and developments that affect your work.*
- 12. You must keep up to date with, and follow, the law, our guidance and other regulations relevant to your work.”*

6. Ms Jones submitted that there was misconduct, and the misconduct was serious, therefore the Tribunal should consider if Dr Gruber’s fitness to practise was impaired. Dr Gruber had gone to work under the influence of alcohol. Dr Gruber’s view that he was fit for work on the morning of 6 September 2018, despite consuming an unknown quantity of alcohol the night before, and his view that he did not present a potential risk to patients that morning, illustrated reckless behaviour, a lack of insight and called in to question his judgement. Dr Gruber relied on his own assessment as to whether or not he was fit for work that day and he did not consider consulting with a colleague, even though there was a potential risk of harm to patients. Ms Jones conceded that no actual harm had occurred, but she emphasised there was a risk of harm.
7. Ms Jones further submitted that Dr Gruber had failed to communicate with GMC since July 2019 and there was no evidence XXX to show remediation for his actions. Ms Jones submitted the failure of communication encourages the notion that Dr Gruber did not recognise the seriousness of his actions. She stated this lack of acknowledgment XXX by Dr Gruber creates the likelihood of Dr Gruber repeating this misconduct, should he be placed in the same environment again.
8. Ms Jones noted that Dr Gruber said he was surprised when he was told the reading of the breath test was positive. XXX.
9. Ms Jones stated that following the earlier incident involving alcohol, Dr Gruber had been offered a significant amount of support from his colleagues, yet he did not utilise this to his advantage. As such Dr Gruber is impaired by reason of misconduct.
10. XXX.
11. Ms Jones said Dr Gruber admitted that he had gone out drinking the night before he went to work the following morning. She asserted Dr Gruber was under the influence and this demonstrated a clear lack of insight from Dr Gruber. His attitude to his drinking habits and his complete lack of awareness of how his performance could be affected by alcohol, indicated he had no insight. He did not appear to understand the extent that alcohol

could impact on his ability to perform his job effectively and consequently the risks this posed to patient safety. XXX.

12. XXX.

13. Ms Jones confirmed that there had been no backward extrapolation of the breath alcohol results but common-sense suggested that Dr Gruber had been over the drink drive limit on the morning of 6 September, given the level of alcohol in his system later that day. She submitted this could be confirmed by the NHS statistics showing the average length of time for alcohol to be broken down by the body.

14. Ms Jones was unable to assist the Tribunal with guidance as to the level of drinking, which was acceptable to the NWA, but she agreed that it was not suggested that he should be totally abstinent. XXX.

15. Ms Jones submitted it would bring the reputation of the medical profession into disrepute if Dr Gruber's fitness to practise was not found to be impaired. She submitted that such a finding was necessary to protect patient safety and protect the reputation of the profession.

16. Dr Gruber did not provide written or other submissions at the impairment stage in the proceedings.

The Relevant Legal Principles

17. The Tribunal reminded itself that at this stage of proceedings, there is no burden or standard of proof and the decision of impairment is a matter for the Tribunal's judgement alone.

18. The Tribunal must determine whether Dr Gruber's fitness to practise is currently impaired, taking into account Dr Gruber'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.

19. The Tribunal was mindful that consideration of impairment is a two-stage process. First, whether the facts found proved are sufficient to amount to misconduct which is serious. Secondly, whether as a consequence of the misconduct, Dr Gruber's fitness to practise is currently impaired.

20. The Tribunal noted that although misconduct is not defined by statute, guidance can be found in case law and it includes acts or omissions that fall short of what would be proper in the circumstances. Furthermore, to amount to misconduct the acts or omissions must be sufficiently serious to be described as going to fitness to practise and/or sufficiently serious to bring the profession into disrepute and/or conduct that a fellow practitioner would find deplorable. The Tribunal noted that whilst GMP sets out the duties expected of a doctor, not every omission or wrongdoing necessarily constitutes misconduct. A departure from the standards as set out in GMP is a starting point and is relevant; but it is not determinative of misconduct and does not create a presumption of misconduct.
21. The Tribunal reminded itself of the statutory overarching objective which is 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.
22. The Tribunal was mindful that it is Dr Gruber’s current fitness to practise which must be determined, taking into account his conduct at the time of the events and other relevant factors such as the evidence of remediation, the level of his insight relative to the conduct and any risk of repetition.
23. The Tribunal noted the familiar guidance given by Lord Bingham MR in *Bolton v The Law Society* [1994] 1 WLR 512 to the effect that the reputation of a profession is more important than the fortunes of any individual member. Membership of a profession may bring many benefits, but membership comes at the price of liability to sanctions to maintain the reputation of the profession.
24. The Tribunal took into account the observations of Dame Janet Smith in the fifth report of the Shipman inquiry as set out in the case of *CHRE v NMC and Grant* [2011] EWHC 927 (Admin) which states:

“Do our findings of fact in respect of the doctor's misconduct, deficient professional performance, adverse health, conviction, caution or determination show that his/her fitness to practise is impaired in the sense that s/he:

...

has in the past brought and/or is liable in the future to bring the medical profession into disrepute; and/or

has in the past breached and/or is liable in the future to breach one of the fundamental tenets of the medical profession.”

The Tribunal’s Determination on Impairment

25. The Tribunal considered whether Dr Gruber’s fitness to practise is currently impaired by reason of his misconduct XXX.

Misconduct

26. In reaching its decision in relation to Dr Gruber’s misconduct the Tribunal had regard to Good Medical Practice 2013, in particular paragraph 1 of 2013 which provides:

1. *“Patients need good doctors. Good doctors make the care of their patients their first concern: they are competent, keep their knowledge and skills up to date, establish and maintain good relationships with patients and colleagues, are honest and trustworthy, and act with integrity and within the law.”*

27. The Tribunal asked the GMC for guidance as to the appropriate level of breath alcohol expected by the NWA and any information or policy provided to Dr Gruber as to the level of alcohol intake the NWA expected of Dr Gruber, but the GMC were not in a position to provide this information.

28. The Tribunal noted the alcohol breath testing NWA consent form in the bundle. This was unsigned but the Tribunal concluded that this was the basis on which the test was undertaken on the 6 September. The form states that consent is given to disclose the results to the employer if the breath alcohol level was at current Road Traffic Act levels (drink/drive limit), which was 35 micrograms/100ml of breath. Given that consent was limited to a breath alcohol level equivalent to these levels, it is not clear why Mr A,XXX, gave Dr Gruber’s test results to the NWA Medical Director. This appears to exceed the implied authority given by Dr Gruber as both Dr Gruber’s test results were below this level. It does not appear that the correct process was followed by NWA as the consent form states that *‘if alcohol is still detected the result must be confirmed with a urine collection sample for alcohol.’* It further states that *‘for the purpose of evidence the second result is the true breath alcohol level... to eliminate any possibility of mouth alcohol interference.’*

29. The Tribunal determined that it had not been anticipated that Dr Gruber would not consume any alcohol whatsoever, but that he would adhere to drinking at a 'sensible level'.
30. The Tribunal noted that it had not been presented with any evidence that despite there being some alcohol in Dr Gruber's system, there was any impact on his performance. The Tribunal noted that a CT scan task which Dr Gruber had undertaken on the morning of the tests was accurately reported, as confirmed by a colleague who later reviewed the scan report.
31. The Tribunal noted that the NWA report, dated 27 December 2018 prepared by Case Investigator Mr H, contained a note of a conversation with Dr G, Dr Gruber's line-manager. Referring to the meeting between Dr G, and Dr Gruber on the morning of 6 September 2018:

"[Dr G] .. stated that he had no suspicion that Dr Gruber might have been under the influence of alcohol, that he looked really well and that he detected no odour. He reported that Dr Gruber appeared relaxed with no concerning behaviours exhibited and that staff had reported that Dr Gruber looked well. There had been no concerns raised with him by departmental or other clinical colleagues about Dr Gruber's behaviours at work or the quality of his clinical work since his return on 30 July"

32. The Tribunal did have concerns that Dr Gruber should have been aware that when he was working on a SPA session, he could have been called on to report on an urgent and important CT scan. Dr Gruber said in his statement 'I accept that this was a risk, but I believed that I would escape this risk as the breath testing had been quite rare.' This implies that he thought he could avoid detection because of the random breath tests. Dr Gruber had indicated however that he did not feel he was affected by the alcohol taken on the previous evening. Notwithstanding this, the Tribunal felt that this comment is indicative of limited insight XXX.
33. The Tribunal noted that the only way that Dr Gruber could have had a test result which showed no alcohol in his system would have been to not consume alcohol at all. It is clear from the evidence that this is not what was requested of Dr Gruber. He was not told to be fully abstinent XXX. The Tribunal notes that it would set an unrealistic precedent if the Tribunal considered it misconduct for any doctor to have drunk alcohol at any time before they were working. The Tribunal noted that the GMC seek to rely on the test

results of one day, 6 September 2018, which was below the legal limit for driving, as the basis for the assertion that Dr Gruber's behaviour represented serious misconduct.

34. The Tribunal was invited to infer that had Dr Gruber's breath alcohol level when he arrived at work been tested, it would have exceeded the drink/drive limit. The GMC had relied on the NHS statistics for the average length of time that alcohol remained in the blood and that the second test result was lower than the first.
35. The Tribunal noted that Dr Gruber had only had a breath alcohol test but, in any event, it had not been provided with any evidence as to how these averages applied to Dr Gruber on 6 September 2018. The Tribunal noted that the purpose of the second test had been to determine if Dr Gruber had been drinking that day. Mr_A reported that he had spoken to Synlab and was advised to, *'retest Dr Gruber after around 20 minutes in order to ascertain whether the level went up or down. If the second test result was lower that would confirm alcohol ingestion from the night before, whereas if it was higher it would confirm more recent drinking'*. The Tribunal did not find there was any evidence to support the assertion that he had been over the drink/drive limit when he arrived at work.
36. The Tribunal had also been provided with excerpts from a BMA document, 'Alcohol, drugs and the workplace' and a Health and Safety Executive document, 'Don't mix it'. Both of these documents indicated that judgment could be affected by levels of alcohol at a lower level than the current drink/drive limit. However, the Tribunal had not been presented with any evidence as to what level of alcohol would have been acceptable in the breath but given the contents of the consent form indicated that the results should only have been given to the NWA if they were at the drink/drive limit, it concluded that the breath alcohol readings alone could not constitute serious misconduct.
37. The Tribunal does have concerns regarding Dr Gruber's attitude towards drinking. It noted that he had had a previous episode concerning alcohol related issues which caused problems for him at work, XXX. Dr Gruber knew he could be subject to breath tests and still made the decision to drink, on his own evidence, more than he usually did, the day before working. The following day, he could not recall how much alcohol he had consumed. He relied on how he felt before deciding to go into work. He did not seek advice or assistance from his colleagues before making that decision. This could be considered irresponsible by fellow professionals. On this basis, the Tribunal considers that Dr Gruber knew his responsibilities to his employer and did not act fully in accordance with these expectations and therefore, his behaviour represented misconduct.

38. The Tribunal determined that Dr Gruber’s conduct was misconduct, however it was not so egregious to be considered serious misconduct. The Tribunal is not satisfied that the GMC has proved that Dr Gruber’s conduct was serious misconduct and accordingly, he is not currently impaired by reason of misconduct.
39. However, the Tribunal found that, taking all the evidence in its totality, Dr Gruber’s conduct did not constitute serious misconduct and therefore there is no impairment in relation to the Allegation of misconduct.

XXX

Confirmed
Date 18 December 2020

Mrs Linda Lee, Chair

ANNEX A – 14/12/2020

Determination on service and proceeding in absence

Service

1. Dr Gruber is neither present nor represented at this Medical Practitioners Tribunal ('MPT'). The Tribunal therefore considered whether the relevant documents had been served properly in accordance with Rules 15 and 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.

2. On behalf of the GMC, Ms Katie Jones, made submissions in relation to service. She directed the Tribunal's attention to Dr Gruber's registered email address and registered mail address held by the GMC. She also referred to the Medical Practitioners Tribunal Service (MPTS) Notice of Allegation ('NoA') letter, dated 2 November 2020, which was sent to Dr Gruber's email address detailing the time and date of the proceedings. The letter was returned to the GMC, unsigned for. The onus is on Dr Gruber to keep his registered address up to date with his regulator. Proof of service was sent to Dr Gruber on 26 November 2020. There has been no communication or acknowledgement from Dr Gruber to these communications.

3. Ms Jones submitted that all reasonable efforts had been made to serve Dr Gruber with notice of this hearing ('NoH') and that the Tribunal should be satisfied that service had been effected in accordance with the rules.

4. In the circumstances, the Tribunal is satisfied that notice of this hearing has been properly served in accordance with Rules 15 and 40. It is clear from the correspondence after 18 August 2020 (and the supporting evidence) that the NoH was served on Dr Gruber at his registered address.

Proceeding in Absence

5. Having been satisfied that the NoH has been properly served, the Tribunal went on to consider whether to exercise its discretion under Rule 31 of the Rules to proceed with the hearing in Dr Gruber's absence. 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.

6. Ms Jones invited the Tribunal to proceed in Dr Gruber's absence. She submitted that Dr Gruber has given no indication that he is willing to engage with these proceedings. Ms Jones referred the Tribunal to the cases of *R v Jones* [2003] 1AC 1 and *General Medical Council v Adeogba; General Medical Council v Visvardis* [2016] EWCA Civ 162. Ms Jones

submitted that Dr Gruber had voluntarily absented himself from these proceedings. Further, she submitted that there is no evidence to suggest an adjournment would prompt Dr Gruber to attend these proceedings, either with or without legal representation. Ms Jones submitted that there was no unfairness to Dr Gruber in proceeding in his absence. It would be in accordance with the overarching objective to proceed today. Dr Gruber has not engaged with his regulator in a year, and he has not provided any information in relation to XXX any other matter. There is a clear public interest in proceeding and there is nothing to suggest that it would serve any purpose to adjourn proceedings.

7. The Legally Qualified Chair briefly indicated the relevant legal principles to the Tribunal and took into account the case law that Ms Jones made reference to.

8. Whilst fairness to the doctor is a prime consideration, the Tribunal was satisfied that Dr Gruber had voluntarily absented himself from these proceedings. Further, it concluded that there was no evidence before it that an adjournment would serve any useful purpose. The Tribunal noted that Dr Gruber has not engaged with the GMC in over a year and there is no evidence to indicate that he may re-engage with the process.

9. Considering the public interest in the matter being dealt with in a timely way, the Tribunal determined that it was in the interests of justice to proceed with this hearing. Therefore, in accordance with Rule 31, the Tribunal has determined to proceed in Dr Gruber's absence.

ANNEX B – 14/12/2020

Application for the entirety of proceedings to be heard in private

XXX