

PUBLIC RECORD

Dates: 19/06/2023 - 27/06/2023

Medical Practitioner's name: Mr Rajeev KUSHWAHA

GMC reference number: 4207337

Primary medical qualification: BChir 1995 University of Cambridge

Type of case	Outcome on facts	Outcome on impairment
New - Misconduct	Facts relevant to impairment found proved	Impaired
New - Caution	Facts relevant to impairment found proved	Impaired

Summary of outcomeSuspension, 9 months.
Review hearing directed**Tribunal:**

Legally Qualified Chair	Mr Colin Chapman
Lay Tribunal Member:	Miss Susan Hurds
Medical Tribunal Member:	Dr Becky McGee

Tribunal Clerk:	Ms Keely Crabtree
-----------------	-------------------

Attendance and Representation:

Medical Practitioner:	Present and not represented
GMC Representative:	Ms Jennifer Ferrario, Counsel

Attendance of Press / Public

In accordance with Rule 41 of the General Medical Council (Fitness to Practise) Rules 2004 the hearing was held partly in public and partly 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 and Impairment - 23/06/2023

1. The Tribunal agreed, in accordance with Rule 41 of the General Medical Council (GMC) (Fitness to Practise Rules) 2004 as amended ('the Rules'), that parts of this hearing should be heard in private where the matters under consideration are confidential, XXX. As such, this determination will be read in private but a redacted version will be published following the conclusion of this hearing, XXX.

Background

2. Mr Kushwaha qualified in 1995 from the University of Cambridge. Since 2009 Mr Kushwaha has held an NHS Consultant post as a colorectal, general, and laparoscopic surgeon at the Manchester Royal Infirmary ('MRI'). In addition to his work at the MRI, Mr Kushwaha has undertaken work for private hospitals. In 2019, Mr Kushwaha held private clinics at the Oaklands Hospital (operated by Ramsay Health Care UK).

3. The allegation that has led to Mr Kushwaha's hearing can be summarised as that on or around 14 August 2019 Mr Kushwaha falsely claimed payment for undertaking proctoscopies on five patients at the Oaklands Hospital when he did not carry out the procedures. It is alleged that Mr Kushwaha's actions were dishonest.

4. It is further alleged that on 27 September 2021 at Swinton Police Station, Mr Kushwaha accepted a caution for fraud by false representation in that between January 2019 to July 2019 he dishonestly made false claims of work to the NHS, intending to make a gain, namely £180, for himself, contrary to sections 1 & 2 of the Fraud Act 2006.

5. The misconduct leading to the caution was discovered on 15 August 2019 when staff at Oaklands Hospital discovered several opened but unused proctoscopes in a waste bag following a clinic of Mr Kushwaha’s at the Oaklands Hospital. A decision was made to suspend Mr Kushwaha on 21 August 2019 pending an internal investigation. A letter confirming the suspension was sent to the doctor the following day.

6. On the 26 September 2019, Ramsay Healthcare wrote again to Mr Kushwaha stating that his work at the Oaklands Hospital had been terminated, and a referral was made to the GMC and to the police.

7. Following an internal and a police investigation, Mr Kushwaha accepted a police caution on 27 September 2021 whereby he admitted committing fraud by false representation contrary to the Fraud Act 2006.

The Outcome of Applications Made during the Facts Stage

8. The Tribunal granted Mr Kushwaha’s application, made pursuant to Rule 41 of the Rules, for the hearing to be heard in private when discussing matters relating to XXX. The Tribunal’s full decision on the application is included at Annex A.

The Allegation and the Doctor’s Response

9. The Allegation made against Mr Kushwaha is as follows:

That being registered under the Medical Act 1983 (as amended):

1. On or around 14 August 2019 you falsely claimed payment for undertaking proctoscopies on the patients set out in Schedule 1 at Oaklands Hospital, when you did not carry out these procedures. **Admitted and found proved**
2. You knew your actions at paragraph 1 were false as you:
 - a. had not carried out the proctoscopies; **Admitted and found proved**
 - b. knew you couldn’t charge for work that you hadn’t carried out. **Admitted and found proved**
3. Your actions as described at paragraph 1 were dishonest by reason of paragraph 2. **Admitted and found proved**

4. On 27 September 2021 at Swinton Police Station, you accepted a caution for fraud by false representation in that between January – July 2019 you dishonestly made false claims of work to the NHS, intending to make a gain, namely £180, for yourself, contrary to sections 1 & 2 of the Fraud Act 2006. **Admitted and found proved**

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

- a. misconduct in respect of paragraphs 1 – 3; **Admitted and found proved**
- b. caution in respect of paragraph 4. **Admitted and found proved**

The Admitted Facts

10. At the outset of these proceedings, Mr Kushwaha made admissions to all paragraphs and sub-paragraphs of the Allegation, as set out above, in accordance with Rule 17(2)(d) of the Rules. In accordance with Rule 17(2)(e) of the Rules, the Tribunal announced these paragraphs and sub-paragraphs of the Allegation as admitted and found proved.

Witness Evidence

11. The Tribunal received evidence on behalf of the GMC in the form of witness statements from the following witnesses during the facts stage:

- Ms F, Health Care Assistant at Oaklands Hospital, Ramsey Healthcare dated 1 January 2019;
- Ms G, Staff Nurse at Oaklands Hospital, Ramsey Healthcare dated 14 February 2021;
- Mr H, case manager for the internal investigation into Mr Kushwaha following concerns raised by Ramsey Healthcare dated 9 March 2021;
- Ms I, Ward Manager at the Oaklands Hospital, Ramsey Healthcare dated 22 March 2021;
- Mr J, Finance Manager at Oaklands Hospital, Ramsey Healthcare dated 25 March 2021;
- Mr K, Consultant Orthopaedic Surgeon at Oaklands Hospital, Ramsey Healthcare dated 17 June 2021;
- Ms L, Head of Clinical Services (Matron), Oaklands Hospital, Ramsey Healthcare dated 11 March 2022;
- Patient A dated 8 April 2022;

- Patient B dated 6 April 2022;
- Patient C dated 11 April 2022;
- Patient D dated 8 June 2022;
- Patient E dated 31 March 2022.

Documentary Evidence

12. The Tribunal had regard to the documentary evidence provided by the parties. This evidence included, but was not limited to, the following:

- Letter from Oaklands Hospital to Mr Kushwaha dated 18 September 2019;
- Letter from Ramsay Healthcare to Mr Kushwaha dated 26 September 2019;
- Terms of Reference for Ramsay Healthcare Investigation;
- Investigation Report by Ramsay Healthcare dated August 2020;
- Investigation Report by Oaklands Hospital dated 26 February 2020;
- Email from NHS Counter Fraud dated 26 September 2021;
- Voluntary statements made by Mr Kushwaha during the police investigation dated 28 and 29 June 2021;
- Police caution dated 27 September 2021;
- Letter from Gordons Partnership Solicitors dated 25 August 2022;
- Mr Kushwaha's Curriculum Vitae dated May 2023;
- Mr Kushwaha's XXX, one dated 24 March 2021 and one on which the date is undecipherable because of the poor quality of the copy;
- Mr Kushwaha's Maintaining Professional Ethics certificate showing the course was completed on 18 to 20 April 2023.

13. The Tribunal also received character references on behalf of Mr Kushwaha from six witnesses.

Impairment

14. With no facts remaining in dispute, the Tribunal had to decide in accordance with Rule 17(2)(l) of the Rules whether, on the basis of the facts which it has found proved, Mr Kushwaha's fitness to practise is currently impaired by reason of his misconduct and caution.

Witness Evidence

15. The Tribunal took into account the evidence which had been presented at the facts stage.
16. Mr Kushwaha provided a reflective statement dated 11 June 2023 and also gave oral evidence at the hearing.
17. In his evidence Mr Kushwaha stated that:
- he accepted that his fitness to practice was impaired;
 - he is deeply shameful and regretful;
 - he recognises the impact his conduct has had on others and that it has undermined the confidence and trust that patients and the public place in the NHS;
 - he had told himself it was okay to improperly charge for the procedures;
 - he admitted fraudulent behaviour as soon as he was challenged and has continued to admit wrongdoing at every stage;
 - he co-operated with all the police, private health providers, NHS Trust, GMC and MPTS;
 - in total he gained between £1,000 - £2,000 from his fraudulent activity;
 - he knew what he was doing was wrong;
 - there was no impact on patients;
 - he was not acting with sound judgment when he committed the fraudulent activity because of the stress caused by the events in his personal life;
 - XXX
 - he has also opened up to other people about what happened and has become a committed member of the church;
 - he has attended a Professional Ethics Course and used a definition of 'insight' to create a Development and Restoration Plan;
 - he has recommitted to his core values and to the profession.

Submissions

18. On behalf of the GMC, Ms Ferrario submitted that two statutory grounds of impairment are relied upon under Section 35C of the Medical Act 1983, namely misconduct and the caution administered by the police. Ms Ferrario submitted that Mr Kushwaha's fitness to practise is currently impaired by reason of both.

19. Ms Ferrario made submissions on the relevant legal principles involved in considering whether there is current impairment.

20. With regard to the misconduct admitted, Ms Ferrario referred the Tribunal to Good Medical Practice (GMP) in particular paragraphs 1, 65, 66, 68 and 71. Miss Ferrario submitted that the misconduct admitted was a serious departure from these standards, that dishonesty is a breach of a fundamental tenet of the medical profession, and that members of the public would consider the misconduct deplorable even in mitigating circumstances of this case. The misconduct fell far short of what was to be expected and amounted to serious misconduct.

21. Ms Ferrario reminded the Tribunal that the statutory ground of the caution is also relied upon by the GMC.

22. Ms Ferrario submitted that Mr Kushwaha's fitness to practice is currently impaired. Ms Ferrario acknowledged there is some evidence of insight, remediation and low risk of repetition, but that there was a need to balance these factors against the over-arching objective and in particular the public interest in maintaining standards and public confidence in the profession.

23. Ms Ferrario referred to Mr Kushwaha's reflective statement but stated that the GMC has difficulty in accepting the mitigation offered by way of Mr Kushwaha's domestic circumstances because alternative explanations for the misconduct have been offered at different times. Ms Ferrario stated that it was a little disingenuous of Mr Kushwaha to rely now on his domestic situation and asked how an ordinary fully informed member of the public would react if they were informed of these different explanations.

24. Ms Ferrario accepted that Mr Kushwaha had not hidden behind his actions. However, she noted that the misconduct only stopped when he was found out. It was accepted that he has provided evidence of insight, remediation to try and remove any risk of a repetition and seems to have taken on board changes needed in his behaviour after attending a course. Ms Ferrario submitted that it was very difficult to remediate dishonesty, but that Mr Kushwaha has clearly made some efforts to try and understand why he did what he did. However, some of his explanations are inconsistent. Until he fully explains the reasons behind his conduct and takes full responsibility, there is only partial insight.

25. In any event, Miss Ferrario submitted, at a public interest level, there still needs to be a declaration for the wider public of current impairment of fitness to practise because of the seriousness of the dishonesty and the subsequent caution.

26. Mr Kushwaha stated that he was not going to argue about the levels of misconduct, and that this was for the Tribunal to decide upon. Mr Kushwaha said that he had already

admitted what he had done to everyone and to himself. He has also admitted that his fitness to practice is impaired, having read guidance on the GMC and MPTS websites.

27. Mr Kushwaha stated that he had addressed his wrongdoing in his reflective statement and that his aim throughout the whole process was to be as open and transparent as possible.

28. Mr Kushwaha stated that from the very start, in August 2019, he had not tried to defend his actions or pretend that it was all a mistake. He said that there were different levels of wrongdoing which converted into fraudulent charging. However, his explanations have consistently been accompanied by admissions of fraud and apologies.

29. As to the cause of the dishonesty, Mr Kushwaha did not think that the Tribunal should be concerned that there was more than one explanation as his explanations had evolved over time and in light of legal advice. He thought that he had been thinking very illogically, XXX, and he considered there to be minutiae of the decision making in the clinic. Mr Kushwaha said that the money involved was not a huge amount but that it was an opportunity to make more, and he just took it.

30. Mr Kushwaha said that XXX is well known to impact on judgement, but this was only a partial explanation for his illogical thinking and not an excuse.

31. Mr Kushwaha stated that XXX. He said that he had fully engaged with a personal development plan, which encompasses his profession, albeit he is not currently working but that he was speaking to a medical mentor. It also engages with friends and responsible adults who he talks to about matters of concern. Mr Kushwaha stated that religion was also at its heart as well. This has helped guide him throughout his time recovering. He considered that he does have a strategy for the future.

32. Mr Kushwaha said that he could have hidden behind a barrister for this hearing but had chosen not to in order that the Tribunal could decide on his character and what he had done in terms of insight and remediation.

The Tribunal's Approach

33. The Tribunal accepted the Legally Qualified Chair's advice. The decision on impairment is a matter for the Tribunal's judgment alone. The Tribunal has given careful consideration to all of the evidence that has been adduced during the course of these proceedings.

34. Regarding misconduct, the Tribunal was mindful of the two-stage process to be adopted: first whether the facts as found proved amounted to misconduct and whether any misconduct found was serious and then, whether the finding of serious misconduct led to a finding of impairment.

35. The Tribunal has borne in mind all three limbs of the statutory overarching objective: to protect and promote 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 the medical profession.

36. The Tribunal must determine whether Mr Kushwaha's fitness to practise is impaired today, taking into account his conduct at the time of the events in question and any relevant factors since then such as whether he has shown insight, whether the matters are remediable and have been remedied and the likelihood and risk of repetition.

37. In considering impairment, the Tribunal was assisted by the guidance provided by Dame Janet Smith in the Fifth Shipman Report, as adopted by the High Court in *CHRE v NMC & Grant (2011) EWHC 927*. In particular, the Tribunal considered whether its findings of fact showed that Mr Kushwaha's fitness to practise is impaired in the sense that he:

- a. *'Has in the past acted and/or is liable in the future to act so as to put a patient or patients at unwarranted risk of harm; and/or*
- b. *Has in the past brought and/or is liable in the future to bring the medical profession into disrepute; and/or*
- c. *Has in the past breached and/or is liable in the future to breach one of the fundamental tenets of the medical profession;*
- d. *Has in the past acted dishonestly and/or is liable to act dishonestly in the future.'*

38. The Tribunal has borne in mind that it will be an unusual case where dishonesty is found not to impair fitness to practice, and that, in dishonesty cases, it is particularly important for the Tribunal to give appropriate weight to the second and third limbs of the over-arching objective. The Tribunal has considered whether professional standards and public confidence would be undermined if a finding of impairment is not made when a doctor has behaved dishonestly.

The Tribunal's Determination on Impairment

Misconduct

39. The Tribunal first considered whether the facts found proved are a sufficiently serious departure from the standards of conduct reasonably expected of Mr Kushwaha as a registered medical practitioner, to amount to misconduct.

40. The Tribunal deliberated carefully on all of the evidence and the circumstances of Mr Kushwaha's misconduct and criminal caution. The Tribunal accepted that there was no evidence of direct harm to patients.

41. The Tribunal noted that Mr Kushwaha has fully accepted that his misconduct was serious. In his reflective statement, he described it as 'obviously and egregiously wrong'.

42. The Tribunal considered the extent of the misconduct. It noted that the paragraphs relating to misconduct referred to only five patients on 14 August 2019, but that the caution related to dates between January 2019 and July 2019. It noted that Mr Kushwaha has been candid with the Tribunal that he had dishonestly claimed for proctoscopy procedures carried out before 14 August 2019 and probably since March 2019.

43. Mr Kushwaha told the Tribunal that he thought he had gained between £1,000 to £2,000 from his dishonesty, which the Tribunal considered to be consistent with the number of times he worked at the hospital between March 2019 and August 2019 and the number of patients he was likely to have seen. The Tribunal noted that a much higher figure was suggested in the evidence provided at the facts stage, but this was not pursued either by the police or the GMC in its allegations.

44. The Tribunal noted that the police caution involved a figure of £180. Mr Kushwaha explained that this lesser figure was reached in negotiations between the police, the NHS Fraud investigator, and his solicitor at the time of the caution being administered. The Tribunal accepted this explanation but noted that in the voluntary statements he made to the police leading to the caution, Mr Kushwaha did not appear to be as fully open and candid about the extent of his criminality as he has been with the Tribunal.

45. However, the Tribunal accepted that Mr Kushwaha admitted his dishonesty when first approached by his Medical Director in August 2019 immediately after he was caught, that he has continued to do so, and that he has done so in these proceedings.

46. However, having considered these facts, the Tribunal considered that the dishonesty was not an isolated incident but was persistent and had occurred over a prolonged period of

several months. The Tribunal noted that the misconduct stopped only because it was discovered by staff at the hospital.

47. The Tribunal noted that Miss Ferrario confirmed that Mr Kushwaha is of good character, and that there has been no repetition or other misconduct since these events.

48. The Tribunal had regard to Good Medical Practice (GMP) and considered that the following paragraphs were engaged in this case:

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.

65. You must make sure that your conduct justifies your patients' trust in you and the public's trust in the profession.

77. You must be honest in financial and commercial dealings with patients, employers, insurers and other organisations or individuals.

49. The Tribunal concluded that, in dishonestly making false claims of work to the NHS, Mr Kushwaha's misconduct breached a fundamental tenet of the medical profession and has brought the profession into disrepute. In these circumstances, the Tribunal concluded that Mr Kushwaha's actions, as set out in the Allegation, amounted to serious professional misconduct.

Impairment by Reason of Misconduct

50. Having determined that the facts admitted and found proved amounted to serious misconduct, the Tribunal went on to consider whether, as a result of this, Mr Kushwaha's fitness to practise is currently impaired by reason of the misconduct.

51. In considering impairment, The Tribunal considered Mr Kushwaha's insight into his actions. It found that Mr Kushwaha has been genuinely ashamed by his actions and has been remorseful. He has demonstrated that he understands the gravity of his actions and the impact they have had, or potentially may have had, on others and the public. He has shown an understanding that his actions fell far below the standards required and how they impact public confidence. He has accepted that his fitness to practice is impaired.

52. The Tribunal also accepted that Mr Kushwaha has begun a process of self-reflection, which has included providing a personal action plan, talking to others about his feelings, and being open when experiencing stress rather than bottling things up. The Tribunal noted that he has taken steps to provide reassurance that he will not offend again, including reflections about his core values and that he has re-committed himself to those core values.

53. XXX.

54. Whilst identifying several stressful events leading up to the misconduct, the Tribunal found that Mr Kushwaha had not demonstrated that he fully understood or explained why he had behaved dishonestly. It noted that his explanations had varied. For example, his initial explanations to the police were that there had been mistakes. Then, later, he said it was because his judgement was affected by the stressors in his personal life XXX. Then, at the Tribunal, he provided yet another explanation that he held a form of ‘resentment’ against ‘the system’ which led him to commit the fraud. The Tribunal considered these explanations to be inconsistent.

55. Throughout the hearing, whilst taking responsibility for his actions, Mr Kushwaha has consistently put them in the context of the issues of his private life. The Tribunal accepted that there were challenging issues in his private life, but it was mindful that many doctors routinely face stressful periods in their personal and professional lives, and do not go on to behave dishonestly as Mr Kushwaha did. It noted that his judgement was not otherwise affected in his clinical practice, and that the only lack of judgement related to conduct which benefitted him financially.

56. The Tribunal considered that Mr Kushwaha had not adequately explained this and was not able to demonstrate that he fully understood what made him act as he did. It was of the view that, until Mr Kushwaha demonstrates that he fully understands what led him to be dishonest, his insight remains incomplete.

57. Having reached this conclusion, the Tribunal was not satisfied that Mr Kushwaha had sufficient tangible actions in place to cope with future stressors. It accepted that he is unlikely to defraud the NHS again, but that given his developing, but incomplete insight, there remains a risk that he could repeat similar conduct in the future. XXX

58. The Tribunal noted that in his reflective statement Mr Kushwaha set out the steps he has taken to remediate his misconduct, including accepting his wrongdoing, confessing to his friends and family, seeking guidance through religion, and completing a three-day professional ethics course. The Tribunal noted that the course was relatively recent, and the personal and

restoration plan is even more recent. It noted that some of the actions in the plan are backdated but that no outcomes from those actions are recorded, for example, the outcomes of discussions with his GP mentor or the reflections made in his self-reflection log. The Tribunal considered there to be a lack of evidence of progress against these actions.

59. For these reasons, the Tribunal considered that Mr Kushwaha's fitness to practise is impaired.

60. The Tribunal also concluded that a finding of impairment was necessary to maintain public confidence in the medical profession and to uphold proper professional standards and conduct for members of the profession. It considered that a reasonable and well-informed member of the public would expect a finding of impairment to be made in this case.

Impairment By Reason of A Caution for a Criminal Offence

61. The Tribunal determined that, for the purposes of S35C of the Medical Act 1983, the fact of a caution for a criminal offence had been established at the facts stage.

62. The Tribunal considered that accepting a caution for a criminal offence engaged paragraph 1 of GMP as well as those paragraphs of GMP already cited in relation to Misconduct.

63. The Tribunal noted the seriousness of the particular caution accepted by Mr Kushwaha, namely fraud by false representation. Although Mr Kushwaha was not prosecuted in the criminal courts, the admission of criminal offending sufficient to receive a caution is nonetheless a very serious matter.

64. In light of those elements, coupled with the fact that the dishonesty was with a view to personal gain from the NHS, the Tribunal determined that a finding of impairment of fitness to practise was justified on the grounds that it is necessary to reaffirm clear standards of professional conduct so as to maintain public confidence in the practitioner and in the profession.

65. The Tribunal therefore determined that Mr Kushwaha's fitness to practise is impaired by reason of a caution for a criminal offence.

Determination on Sanction - 27/06/2023

66. Having determined that Mr Kushwaha's fitness to practise is impaired by reason of misconduct and caution for a criminal offence, the Tribunal now has to decide in accordance with Rule 17(2)(n) of the Rules on the appropriate sanction, if any, to impose.

The Evidence

67. The Tribunal has taken into account evidence received during the earlier stages of the hearing where relevant to reaching a decision on sanction.

Submissions

68. In the course of her submissions on behalf of the GMC, Ms Ferrario referred the Tribunal to relevant paragraphs in the 'Sanctions Guidance' (SG). In summary, Ms Ferrario submitted that the appropriate and proportionate sanction in this case is a period of suspension. Ms Ferrario submitted that such a sanction would promote and maintain public confidence in the medical profession and would promote and maintain proper professional standards and conduct for members of the profession.

69. Ms Ferrario stated that there were no exceptional circumstances for the Tribunal to take no action in this case, and that undertakings would not be appropriate because they would not reflect the seriousness of the conduct. Ms Ferrario submitted that conditions would not be appropriate because the tribunal would find it difficult, if at all possible, to impose workable conditions to ensure that Mr Kushwaha was not dishonest in the future.

70. Ms Ferrario submitted that suspension not only has a deterrent effect, but it also sends out a signal to the doctor, the profession and the wider public that this type of behaviour is unbecoming for a registered doctor. This is the signal that needs to be sent out in this case because it involves dishonesty and is very much concerned with public confidence. Suspension would be an appropriate response to misconduct that is so serious that action must be taken to protect members of the public and maintain public confidence but where the conduct falls short of being fundamentally incompatible with continued registration.

71. Ms Ferrario submitted that this case was borderline as to whether there should be suspension or erasure. She submitted that there are two features of this case that tip the balance in favour of a suspension order. Firstly, the fact that no one was harmed or put at risk of harm by Mr Kushwaha's actions. Secondly, that he has clearly taken steps to try and remediate. Although the Tribunal has found that insight is partial, Mr Kushwaha has clearly taken some time to try to remediate, but there is still work to be done. Miss Ferrario acknowledged that the risk of repetition is low, which may also have a bearing on the

Tribunal's decision on sanction. Further, that there was no evidence to suggest that a period of suspension in which Mr Kushwaha may make further efforts to remediate himself would be unsuccessful.

72. Regarding the length of suspension, Ms Ferrario stated that the GMC did not make a specific suggestion but what was important was to give Mr Kushwaha adequate time to fully remediate and acquire full insight. She submitted that, if the Tribunal decided to suspend, there should be a review hearing so that a future Tribunal could satisfy itself that Mr Kushwaha had gained full insight and was fit to return to unrestricted practice. Ms Ferrario reminded the Tribunal of Mr Kushwaha's evidence that he had not in the last two years undertaken any continuous professional development. She submitted that a reviewing Tribunal might also wish to consider whether his professional knowledge is up to date.

73. Mr Kushwaha re-stated that he was horrified by his actions. He agreed with Ms Ferrario's submissions and with the Tribunal's written determination on impairment. Mr Kushwaha said that he was on a journey and that he did not go on the Maintaining Professional Ethics course until relatively recently because he had spent so much time reflecting on his actions through the church. He had not engaged with solicitors until after August 2022 and it was only after this that he had received advice about the type of courses he might attend to gain insight and remediate. Before then, he had focussed on remediating and gaining insight through engagement with the church and friends.

74. Regarding insight, Mr Kushwaha knows what he did was wrong. He said that instead of hiding behind explanations or loopholes, as his solicitors have suggested, he has been honest for a long time in terms of admitting his wrongdoing. He has now taken the opportunity during this hearing to be as open, honest, and transparent as he can be and has not sought to limit his admissions to what was contained in the specific allegations against him. He added that he had not put patients at risk and that he loved his job.

75. Mr Kushwaha hoped that the Tribunal would agree with Miss Ferrario that he had clearly taken steps to remediate. He agreed that there was still work to be done in terms of understanding and that he was on a journey, especially having regard to what the Tribunal had written in its impairment determination about the stressors in his life. He agreed that perhaps he did not have enough in place at the moment in case he faces similar stressors in the future, but he could certainly work on this and show progress if he appeared before a Tribunal again.

76. Mr Kushwaha reiterated that he was horrified in his behaviour and would be shocked if anybody else was not.

The Tribunal's Determination on Sanction

77. The decision as to the appropriate sanction, if any, to impose is a matter for the Tribunal alone, exercising its own judgement. In reaching its decision, the Tribunal has taken GMP and the SG into account and has, at all times, borne in mind the overarching objective.

78. The Tribunal reminded itself that the main reason for imposing any sanction is to protect the public and that sanctions are not imposed to punish doctors, even though they may have a punitive effect. Throughout its deliberations, the Tribunal has applied the principle of proportionality, balancing Mr Kushwaha's interests with the public interest.

79. Before considering what action, if any, to take in respect of Mr Kushwaha's registration, the Tribunal considered the aggravating and mitigating factors in this case.

Mitigating Factors

80. The Tribunal considered the following to be mitigating factors in this case:

- There have been no previous adverse findings against Mr Kushwaha as a medical practitioner and his dishonesty has not been repeated since the index events;
- Mr Kushwaha is otherwise a person of good character;
- Mr Kushwaha admitted that he had behaved dishonestly from the outset and accepted responsibility for his actions since;
- Mr Kushwaha cooperated with the investigations conducted by the NHS, the police and the GMC;
- Mr Kushwaha made full and frank admissions at this hearing which went beyond what was specifically alleged by the GMC;
- Mr Kushwaha has expressed remorse and apologised for his behaviour;
- Mr Kushwaha has taken steps to reflect on his misconduct and to remediate as well as developing partial insight in the process;
- Mr Kushwaha was under personal stress at the time of his dishonest behaviour due to factors in his personal life;
- Mr Kushwaha has provided testimonials from six character referees who have confirmed his personal circumstances and who speak of his reflections with them about his misconduct and remorse, and also his integrity and trustworthiness in his personal dealings with them.

Aggravating Factors

81. The Tribunal considered the following to be aggravating factors:

- Mr Kushwaha's actions were a significant departure from the principles in GMP involving dishonesty involving financial gain for himself and a loss to the NHS;
- Mr Kushwaha's dishonesty was not an isolated incident but was premeditated, repeated and sustained over a period of months;
- Mr Kushwaha's dishonesty only came to light when he was caught.

82. The Tribunal noted paragraphs 120 to 128 of the SG which sets out factors to be considered when considering cases of dishonesty. In particular, paragraphs 120, 124 and 128:

120. Good medical practice states that registered doctors must be honest and trustworthy, and must make sure that their conduct justifies their patients' trust in them and the public's trust in the profession.

124. Although it may not result in direct harm to patients, dishonesty related to matters outside the doctor's clinical responsibility (eg providing false statements or fraudulent claims for monies) is particularly serious. This is because it can undermine the trust the public place in the medical profession. Health authorities should be able to trust the integrity of doctors, and where a doctor undermines that trust there is a risk to public confidence in the profession. Evidence of clinical competence cannot mitigate serious and/or persistent dishonesty

128. Dishonesty, if persistent and/or covered up, is likely to result in erasure...

83. Although the Tribunal considered that Mr Kushwaha's dishonest actions were persistent over several months, it did not consider there to be any attempt to cover up the dishonesty as Mr Kushwaha admitted his dishonesty as soon as it was discovered.

84. The Tribunal noted that Mr Kushwaha was acting under stress and pressure XXX. XXX. The Tribunal has already considered that his insight regarding his misconduct, although developing, is as yet incomplete as he has failed to fully explain why he committed the fraud. Nevertheless, the Tribunal considered that Mr Kushwaha has taken considerable steps to gain insight, and that his insight has developed such that the risk of repetition is low. The Tribunal was satisfied that in time, Mr Kushwaha can develop further insight.

85. With these factors in mind, although the Tribunal considered the misconduct and caution to be serious, behaviour which is unacceptable and wholly unbefitting a registered doctor, it did not consider the misconduct to be fundamentally incompatible with continued registration as a doctor. The Tribunal noted that this was not a case in which there are any concerns about patient safety.

86. The Tribunal has taken these factors into account in considering the appropriate sanction under the SG. It considered each sanction in ascending order of severity, starting with the least restrictive.

No Action

87. The Tribunal first considered whether to conclude the case by taking no action. Taking no action following a finding of impaired fitness to practise would only be appropriate in exceptional circumstances. The Tribunal determined that given its findings there are no exceptional circumstances in this case and that it would not be sufficient, proportionate, or in the public interest to conclude this case by taking no action.

Conditions

88. The Tribunal next considered whether to impose conditions on Mr Kushwaha's registration. In so doing, it bore in mind that any conditions imposed would need to be appropriate, proportionate, workable, and measurable. In the light of its findings, the Tribunal determined that it would not be possible to formulate a set of appropriate or workable conditions which could adequately address Mr Kushwaha's misconduct, namely his dishonesty. In any event, the Tribunal concluded that a period of conditional registration would not be a sufficient, appropriate, or proportionate sanction to satisfy the public interest.

Suspension

89. The Tribunal next considered whether it would be appropriate and proportionate to suspend Kushwaha's registration.

90. The Tribunal considered the SG in relation to suspension including paragraphs 91 and 92, which state:

'91. Suspension has a deterrent effect and can be used to send out a signal to the doctor, the profession and public about what is regarded as behaviour unbefitting a

registered doctor. Suspension from the medical register also has a punitive effect, in that it prevents the doctor from practising (and therefore from earning a living as a doctor) during the suspension, although this is not its intention.

92. *Suspension will be an appropriate response to misconduct that is so serious that action must be taken to protect members of the public and maintain public confidence in the profession. A period of suspension will be appropriate for conduct that is serious but falls short of being fundamentally incompatible with continued registration (i.e. for which erasure is more likely to be the appropriate sanction because the tribunal considers that the doctor should not practise again either for public safety reasons or to protect the reputation of the profession).'*

91. The Tribunal recognised that a sanction of suspension does have a deterrent effect and can be used to send a signal to Mr Kushwaha, the profession, and the public about what is regarded as behaviour unbecoming a registered doctor. It also acknowledged that suspension is an appropriate response to misconduct which is sufficiently serious that action is required in order to maintain public confidence in the profession, but which falls short of being fundamentally incompatible with continued registration.

92. The Tribunal also had regard to paragraphs 97 of the SG which sets out some of the circumstances in which suspension may be the appropriate sanction. The Tribunal considered a, e, f and g to be engaged in this case:

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

a A serious breach of Good medical practice, but where the doctor's misconduct is not fundamentally incompatible with their continued registration, therefore complete removal from the medical register would not be in the public interest. However, the breach is serious enough that any sanction lower than suspension would not be sufficient to protect the public or maintain confidence in doctors.

...

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

f No evidence of repetition of similar behaviour since incident.

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

93. The Tribunal was in no doubt that Mr Kushwaha's misconduct and criminal caution was sufficiently serious that action is required to maintain public confidence in the medical profession, and proper professional standards. The Tribunal considered that a message must be sent to the medical profession and the public that this behaviour is unacceptable in order to uphold professional standards and public confidence.

94. However, the Tribunal was satisfied that Mr Kushwaha has readily and fully engaged in the regulatory process and that he has taken responsibility for his actions. Further, it was satisfied that Mr Kushwaha's apologies and expressions of remorse are wholly genuine and reflect not just his regret for having acted as he did, but also his determination not to let the profession down again. In addition, the Tribunal noted that Mr Kushwaha has made good use of the time since his misconduct and that he has since developed partial insight which was evident in the frank and contrite oral evidence he gave to the Tribunal, going beyond what was alleged by the GMC. There has been no repetition of Mr Kushwaha's misconduct, and the Tribunal was satisfied that Dr Mr Kushwaha's insight means any future repetition is unlikely.

95. In these circumstances, the Tribunal determined that a sanction of erasure would not be proportionate. It determined a period of suspension to be the appropriate and proportionate sanction to fulfil the overarching objective. It considered that a period of suspension would balance Mr Kushwaha's interests with the need to send a clear message that his behaviour was wholly unacceptable for a member of the medical profession.

96. The Tribunal therefore determined that Mr Kushwaha's registration should be suspended for a period of 9 months. The Tribunal was satisfied that a suspension of Mr Kushwaha's registration for this period will send a clear message to Mr Kushwaha, the profession, and the wider public that dishonesty constitutes behaviour unbecoming a registered medical practitioner and will be taken seriously. It will also give Mr Kushwaha adequate time to further remediate, gain full insight and complete any professional development needed in order to ensure that his medical knowledge is up to date.

97. The Tribunal determined to direct a review of Mr Kushwaha's case. A review hearing will convene shortly before the end of the period of suspension. The Tribunal wishes to clarify that at the review hearing, the onus will be on Mr Kushwaha to demonstrate how he has

remediated and developed full insight and that he is fit to return to unrestricted practise. It therefore may assist the reviewing Tribunal if Mr Kushwaha provides:

- A further reflective statement to include how Mr Kushwaha’s insight has developed and what he how he would respond differently in the future;
- Meaningful Continuing Professional Development to demonstrate that he has maintained his medical skills and knowledge;
- Mr Kushwaha may also provide any other information that he considers will support his case in showing that his fitness to practise is no longer impaired.

Determination on Immediate Order - 27/06/2023

98. Having determined to suspend Mr Kushwaha’s registration for a period of 9 months, the Tribunal has considered, in accordance with Rule 17(2)(o) of the Rules, whether Mr Kushwaha’s registration should be subject to an immediate order.

Submissions

99. On behalf of the GMC, Ms Ferrario stated that the GMC's position is that an immediate order is not necessary in the circumstances of this case to protect members of the public or otherwise in the public interest. Primarily this is because Mr Kushwaha does not have a license to practice. Ms Ferrario stated that there is currently an interim order of conditions in place and invited the Tribunal to revoke this order with immediate effect.

100. Mr Kushwaha made no submissions on the immediate order or the revocation of the interim order of conditions.

The Tribunal’s Determination

101. In making its decision the Tribunal had regard to the SG, including paragraph 172:

“The tribunal may impose an immediate order if it determines that it is necessary to protect members of the public, or is otherwise in the public interest, or is in the best interests of the doctor. The interests of the doctor include avoiding putting them in a position where they may come under pressure from patients, and/or may repeat the misconduct, particularly where this may also put them at risk of committing a criminal offence. Tribunals should balance these factors against other interests of the doctor,

which may be to return to work pending the appeal, and against the wider public interest, which may require an immediate order.”

102. The Tribunal determined that it would not be necessary to impose an immediate order to “*protect members of the public*”, “*in the public interest*”, or “*in the best interests of the doctor*”. It was not of the view that immediate action needed to be taken to protect public confidence in the medical profession, particularly given the mitigating and other factors which the Tribunal has outlined in its determination on Sanction. The Tribunal was conscious of the seriousness of the misconduct but determined that this was adequately addressed by the substantive suspension.

103. In all the circumstances, the Tribunal determined not to impose an immediate order of suspension on Mr Kushwaha’s registration.

104. This means that Mr Kushwaha’s registration will be suspended from the Medical Register 28 days from the date on which written notification of this decision is deemed to have been served, unless he lodges an appeal. If Mr Kushwaha does lodge an appeal, he will remain free to practise unrestricted until the outcome of any appeal is known.

105. For the same reasons, the Tribunal also determined to revoke the interim order of conditions with immediate effect.

106. Case concluded

ANNEX A – 19/06/2023

Application for parts of the hearing to be in private

107. At the outset of the hearing Mr Kushwaha made an application pursuant to Rule 41 of the General Medical Council (Fitness to Practise Rules) 2004 as amended ('the Rules'), for the hearing to be held in private session when discussing certain matters that relate to XXX. Mr Kushwaha provided both written and oral submissions.

108. Mr Kushwaha stated that within both the hearing Bundle and his reflective statement there are details of XXX. XXX.

109. XXX.

110. Mr Kushwaha stated that XXX which then impacted on his judgement when committing the fraud which is the subject of the Allegation.

111. Mr Kushwaha stated that he had thought hard about excluding any mention of XXX in his submissions to the Tribunal. However, he thought that it would not be possible to describe his state-of-mind to assist the Tribunal with context XXX.

112. Mr Kushwaha stated that XXX. He stated that the only reason for the details of XXX process being held in public would be to satisfy prurient and irrelevant interest by the press, media and the general public for gossip and tittle tattle.

113. Mr Kushwaha stated that this would affect both himself and XXX and would also affect his right to a private life and referred the Tribunal to Article 8, Human Rights Act.

114. Mr Kushwaha stated that the publishing and/or sharing of anything that could be used by the media, press and the general public XXX. Mr Kushwaha stated that he could not see how publishing or sharing anything identifiable XXX would reduce the case against him or how it would affect public confidence in the profession.

115. Mr Kushwaha stated that there would be no public interest served by the public knowing XXX.

116. Mr Kushwaha stated that he could see why there would be a public interest in sharing/publishing some general indication around context being considered at the "Sanction" stage of the Tribunal process.

117. Mr Kushwaha stated that not knowing XXX does not lessen the case against him, as the GMC counsel could still cross examine him and make submissions regarding his fraudulent behaviour. He stated that all he asked was that the specific sections regarding context and mitigation be heard in private and not shared.

118. Mr Kushwaha requested that certain sections of the hearing bundle and his reflective statement not be shared outside of this hearing process, either electronically or verbally during or after the hearing.

119. Mr Kushwaha stated that he was only requesting privacy for sections of the hearing bundle and his reflective statement that refer to XXX. He was not contending that the whole of the hearing be in private – only those parts in which reference is made to these matters.

120. On behalf of the GMC, Ms Ferrario provided both written and oral submissions.

121. Ms Ferrario stated that the GMC object to Kushwaha’s application. She submitted that it was in the public interest for the public to have access to mitigation that is not directly related to XXX.

122. Ms Ferrario invited the Tribunal to find that the Mr Kushwaha has not provided any cogent evidence for keeping his mitigation evidence confidential, other than direct evidence relating to XXX which the GMC agrees ought to be heard in private.

123. Ms Ferrario submitted that the Tribunal was invited to hear any evidence relating to the XXX in public in so far as it is possible, for the following reasons:

- XXX;
- XXX;
- Neither is there any evidence before the Tribunal by any other court or relevant person to indicate that information about the parties’ private lives or court proceedings ought to be treated as confidential;
- There will inevitably be public interest in certain hearing decisions that are published either in the media or on social media and this is not therefore in itself a sound reason for departing from the default position of public hearings;

- The hearing bundles are not ordinarily published, and it will be a matter for the Tribunal to determine at the conclusion of the hearing, the information to be included in the written decision and published;
- The mitigation does not provide evidence directly relating to XXX. There may be some overlap between Mr Kushwaha’s evidence about XXX and where there is a direct link the GMC accept that this evidence should be heard in private;
- The transparency principle of the Tribunal being seen to try and achieve the overarching objective ought to be such that if a member of the public is surprised by the outcome of this hearing, they can read the mitigation for themselves and understand why the tribunal reached the decisions that they did.

124. Ms Ferrario stated that whilst the GMC are not unsympathetic to Mr Kushwaha’s personal challenges and accept that some adverse publicity about him and XXX may be generated by the hearing, this ought not to be sufficient in itself to justify a departure from the default position. She stated that the GMC accepts that evidence about XXX ought to be heard in private. Any other evidence that can practically be heard in public, should be.

Tribunal’s Decision

125. The Tribunal had regard to Rule 41 of the Rules which states:

‘41.

(1) Subject to paragraphs (2) to (6) below, hearings before the Committee and a Medical Practitioners Tribunal shall be held in public.

(2) The Committee or Medical Practitioners Tribunal may determine that the public shall be excluded from the proceedings or any part of the proceedings, where they consider that the particular circumstances of the case outweigh the public interest in holding the hearing in public.

(3) Subject to paragraphs (4) to (6), the Committee or a Tribunal shall sit in private, where they are considering-

(a) whether to make or review an interim order; or

(b) XXX.

(4) Where it is considering an allegation or a non-compliance matter, the Medical Practitioners Tribunal may revoke an interim order in public.

(5) A Tribunal shall, where it is considering matters under paragraph (3)(a), sit in public where the practitioner requests it to do so.

(6) Subject to paragraph (5), the Committee or Tribunal may, where they are considering matters under paragraph (3)(a) or (b), hold a hearing in public where they consider that to do so would be appropriate, having regard to-

(a) the interests of the maker of the allegation (if any);

(b) the interests of any patient concerned;

(c) whether a public hearing would adversely affect the health of the practitioner; and

(d) all the circumstances, including the public interest.

(7) The Committee or Tribunal may deliberate in camera, in the absence of the parties and of their representatives and of the public, at any time.'

126. The Tribunal considered the submissions made by Mr Kushwaha and Ms Ferrario both orally and in writing, along with the evidence presented.

127. The Tribunal had regard to the significant weight to be attached to the public interest in hearing misconduct hearings in public to ensure transparency and accountability. The Tribunal carefully balanced the public interest against Mr Kushwaha's own interests in the circumstances he has outlined. It considered that those circumstances would be discussed in the XXX in private and not in public.

128. The Tribunal noted that XXX. The Tribunal noted that Mr Kushwaha's own evidence to the Tribunal during his submissions was to the same effect. The Tribunal also had regard to evidence from the character references which it has read, which also supports this contention.

129. On the basis of the evidence available to the Tribunal at this stage of the proceedings, the Tribunal was satisfied that XXX. Rule 41XXX dictates that when the Tribunal are considering matters relating to XXX, which is an exception to the general rule. It considered that the matters XXX are inextricably linked to XXX so that they are captured by the exception to the general rule provided for in Rule 41XXX.

130. Further, the Tribunal considered that, if the matters of concern to Mr Kushwaha were not heard in private, this might inhibit Mr Kushwaha in being as open as he might otherwise be in giving evidence to the Tribunal and in making submissions on his own behalf. The Tribunal considered that this could potentially lead to unfairness to him in presenting his case in these proceedings.

131. For these reasons, the Tribunal decided that when considering XXX, including the reasons for XXX, it will sit in private, but that any further considerations will be heard in public.

132. In practical terms, this is likely to mean that the Tribunal must hear some matters in public and then in private, but the Tribunal is used to doing this in any hearing XXX without difficulty, especially when the parties are able to identify in advance that private matters will be raised.