Record of Determinations –
Medical Practitioners Tribunal

PUBLIC RECORD

Dates: 17/06/2019 - 19/06/2019
Medical Practitioner’s name: Dr Thomas MUEHLBERGER

GMC reference number: 3704163
Primary medical qualification: State Exam Med 1991 Freie Universität Berlin

Type of case
New - Misconduct

Outcome on impairment
Impaired

Summary of outcome
Suspension, 3 months.

Tribunal:

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<tr>
<th>Role</th>
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<tr>
<td>Legally Qualified Chair</td>
<td>Mr Angus Macpherson</td>
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<tr>
<td>Lay Tribunal Member:</td>
<td>Mr Peter Brown</td>
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<td>Medical Tribunal Member:</td>
<td>Dr Alastair McGowan</td>
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<tr>
<td>Tribunal Clerk:</td>
<td>Mr David Salad</td>
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Attendance and Representation:

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<th>Role</th>
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<tr>
<td>Medical Practitioner:</td>
<td>Not present and not represented</td>
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<td>Medical Practitioner’s Representative:</td>
<td>N/A</td>
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<td>GMC Representative:</td>
<td>Mr Charles Garside, QC</td>
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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
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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 - 18/06/2019

Background

1. Dr Muehlberger qualified in 1991 from the Freie Universität Berlin and moved to live and practise in the UK in about 1993, having obtained a licence to practise. He returned to Germany to practise in 2008, but thereafter continued to offer occasional medical services in London. He was registered as a specialist in plastic surgery in the UK in 2008. At the time of the events which are the subject of this hearing, Dr Muehlberger was practising as a Consultant Plastic Surgeon.

2. The Allegation that has led to Dr Muehlberger’s hearing concerns his treatment of Patient A, who was suffering from chronic migraines. Patient A states that she had seen various doctors for her condition, and after finding details of the ‘Migraine Surgery Centre’ on the internet and filling in an online questionnaire, she was offered a free consultation on 7 April 2017 at which she states that she was given a ‘single’ Botulinum toxin (‘Botox’) injection.

3. After subsequently being migraine free for four weeks, Patient A states she had a further appointment on 5 May 2017 at which she had six further Botox injections – three into each corrugator muscle. Following the second treatment she had three migraine attacks over a period of two weeks. Following a period of sick leave, Patient A was seen at the occupational health department where she worked. Occupational health staff discovered that Dr Muehlberger did not have a licence to practise in the UK and advised Patient A to contact the GMC. The Tribunal was informed that Patient A made a complaint to the GMC in June 2017.

4. The subsequent GMC investigation led to this Medical Practitioners Tribunal hearing.

The Outcome of Applications Made during the Facts Stage
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5. The Tribunal granted the GMC’s application, made pursuant to Rule 31 of the GMC (Fitness to Practise) Rules 2004 (the Rules), to proceed with the hearing in Dr Muehlberger’s absence. The Tribunal’s full decision is included at Annex A.

6. The Tribunal granted the GMC’s application, made pursuant to Rule 34(1) of the Rules, that extracts from Patient A’s medical records be admitted into evidence. The Tribunal’s full decision on the application is included at Annex B.

The Allegation and the Doctor’s Response

7. The Allegation made against Dr Muehlberger is as follows:

1. On one or more dates as set out in Schedule 1 you had a consultation with Patient A and you:
   a. prescribed botox injections to Patient A; To be determined
   b. injected botox into each of Patient A’s corrugator muscles; To be determined
   c. failed to record that you had:
      i. prescribed botox to Patient A; To be determined
      ii. administered botox to Patient A. To be determined

2. At the time of the consultations as referred to at paragraph 1 you:
   a. did not have a licence to practise; To be determined
   b. knew that you did not have a licence to practise. To be determined

3. Your actions as set out at paragraph 1 were dishonest by reason of paragraph 2. To be determined

And that by reason of the matters set out above your fitness to practise is impaired because of your misconduct. To be determined

Factual Witness Evidence
8. The Tribunal received evidence on behalf of the GMC in the form of witness statements from the following witnesses who were not called to give oral evidence:

- Ms B, Head of Revalidation – Registration and Revalidation Directorate, GMC;
- Ms C, Applications Advisor – Voluntary Erasure, Restoration and Licensing ('VERL') Team, GMC.

9. Dr Muehlberger submitted a letter dated 3 June 2017 and an email dated 28 November 2018 setting out his responses to the GMC’s evidence and the Allegation against him. He requested that these documents be treated as witness statements. There was no statement of truth appended to either document. The GMC did not appear to challenge the relevant chronology contained in Dr Muehlberger’s correspondence.

**Expert Witness Evidence**

10. The Tribunal also received a report dated 9 July 2018 written by Dr D, Consultant Neurologist at Addenbrooke’s Hospital, Cambridge, Queen Elizabeth Hospital, Kings Lynn, and Papworth Hospital. Dr D was not called to give oral evidence. Her expertise is in assessing patients with general neurological conditions, including headache, pain, multiple sclerosis and epilepsy. She expressed the view that it was not appropriate for Dr Muehlberger to administer Botulinum toxin for migraine treatment to Patient A without a valid licence to practise.

**Documentary Evidence**

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

- correspondence between the GMC and Dr Muehlberger between 10 September 2012 and 22 May 2017 including telephone notes, emails, letters, documents and pro formas regarding his licence to practise and revalidation;
- Medicines and Healthcare Products Regulatory Agency ('MHRA') – Supply and administration of Botox, Vistabel, Dysport and other injectable medicines in cosmetic procedures;
- Directive 2005/36/EC of the European Parliament and of the Council (of Europe);
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• National Institute for Health and Care Excellence (‘NICE’): Botulinum toxin type A for the prevention of headaches in adults with chronic migraine;

• extracts of Patient A’s medical records relating to consultations on 7 April 2017 and 5 May 2017.

The Tribunal’s Approach

12. In reaching its decision on 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 Muehlberger 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.

13. In its deliberations on paragraph 3, which alleges dishonesty, the Tribunal applied the test set out by Lord Hughes in Ivey v Genting Casinos (UK) Ltd t/a Crockfords [2017] UKSC 67 (‘Ivey’). It bore in mind that it should first ascertain the actual state of Dr Muehlberger’s knowledge or belief as to the facts and should then decide whether his conduct was honest or dishonest by applying the objective standards of ordinary decent people.

14. The Tribunal noted Mr Garside’s acknowledgment that no previous findings of impairment have been made against Dr Muehlberger. It was therefore appropriate for it to consider that he is of previous good character. The Tribunal bore this in mind as a factor in Dr Muehlberger’s favour when assessing the credibility of his account and the likelihood of his behaving in the manner alleged.

15. The GMC did not adduce any evidence from Patient A.

16. The Tribunal did not hear oral evidence from either of the GMC officers who have provided sworn witness statements, or from Dr Muehlberger. The Tribunal took this into account in deciding the weight it should attach to the evidence before it, particularly that of Dr Muehlberger in respect of his letter dated 3 June 2017 and his email dated 28 November 2018. Dr Muehlberger indicated in correspondence that he did not have any questions to ask of the GMC witnesses.

The Tribunal’s Analysis of the Evidence and Findings
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17. The Tribunal has considered each outstanding paragraph of the Allegation separately and has evaluated the evidence in order to make its findings on the facts.

Paragraph 1

*Sub paragraphs 1a and 1b*

18. The Tribunal noted that these sub paragraphs allege that on 7 April 2017 and 5 May 2017, Dr Muehlberger prescribed Botox injections to Patient A and injected Botox into each of her corrugator muscles.

19. The Tribunal noted that Dr Muehlberger accepted in his email of 28 November 2018 that he ‘...provided the treatment as identified by Patient A.’

20. The Tribunal took the view that, in the circumstances of a private clinic such as the Migraine Surgery Clinic, administering Botox to Patient A will have meant that Dr Muehlberger both prescribed and injected Botox into Patient A’s corrugator muscles. It referred to the extracts of Patient A’s medical records provided in which an electronic note states as follows:

   *7 April, following last (external) Botox significant heaviness due to frontalis paralysis, lowered eyebrow position, bit corr not paralyzed, only minimal dosage (10 units) of Botox to corr free of charge [sic]*

   *05. May. no migraines since last botox, today corr regular dosage, still constant headache, desperate [sic]*

21. The Tribunal accepted the expert evidence of Dr D that the references to ‘corr’ in the records referred to Patient A’s corrugator muscles. It noted that the consent forms for the 7 April 2017 and 5 May 2017 consultations list Dr Muehlberger as the Consulting Physician with the proposed treatment set out as: ‘injection with botulinum.’

22. Taking into account the documentary evidence, alongside Dr Muehlberger’s acceptance as set out above, the Tribunal found sub paragraphs 1a and 1b proved.

*Sub paragraph 1c*
The Tribunal noted that sub paragraph 1c alleges that Dr Muehlberger failed to record that he had prescribed and administered Botox to Patient A. It took into account that in order for it to find that Dr Muehlberger had failed, he must have had a duty to act as alleged.

The Tribunal noted that Dr D expressed no view in her report as to whether Dr Muehlberger was under a duty to record his treatment of Patient A. However the Tribunal noted that Good Medical Practice (2013 edition) ('GMP') imposed a duty upon doctors with regard to clinical records as follows:

21 Clinical records should include:

a ...

b the decisions made and actions agreed, and who is making the decisions and agreeing the actions

c ...

d any drugs prescribed or other investigation or treatment

e who is making the record and when.

The Tribunal therefore found that Dr Muehlberger was under a duty to record his treatment of Patient A.

Having established that Dr Muehlberger had a duty to include the aspects above in Patient A’s records, the Tribunal moved on to decide whether or not he had failed to do so. In the same manner as in its consideration of sub paragraphs 1a and 1b, the Tribunal determined that prescription and administration of Botox were, in these circumstances, the same. It took into account Dr Muehlberger’s email of 28 November 2018 in which he stated:

I accept that the records made by me were not signed and I apologise for not signing them and for not making it plain in the records that it was me who had administered the Botox treatment. I also accept that I did not set out what the “full dose” is and apologise for this.
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26. The Tribunal noted that the stem of sub paragraph 1c specifically uses the word ‘you’ referring directly to Dr Muehlberger. Dr Muehlberger accepted, in the text above, that he did not record that it was he who had prescribed/administered the Botox to Patient A.

27. In these circumstances, the Tribunal found sub paragraph 1c proved in full.

Paragraph 2

28. The Tribunal noted that sub paragraphs 2a and 2b allege that at the time of his consultations with Patient A on 7 April and 5 May 2017, Dr Muehlberger did not have a licence to practise and knew that he did not have a licence to practise.

29. The correspondence between Dr Muehlberger and the GMC available to the Tribunal includes a ‘Note of telephone call’ as follows:

   DATE: 11 June 2015
   FROM: Dr Muehlberger

   Dr called for guidance to apply online for RLTP – he couldn’t find application – also advised about pro rata refund.

30. The Tribunal was informed by Mr Garside that ‘RLTP’ in this context refers to an application for a doctor to relinquish their licence to practise. The Tribunal has also been provided with a copy of Dr Muehlberger’s completed online application form to relinquish his licence to practise dated 11 June 2015 and an email dated 11 June 2015 from GMC Registration Services to Dr Muehlberger. The email informs Dr Muehlberger that his licence to practise would be removed from 11 June 2015.

31. The Tribunal noted that Dr Muehlberger’s next recorded contact with the GMC was via a telephone call made by him on 22 May 2017 during which he asked how to restore his licence to practise. The Tribunal was satisfied that the documentary evidence provided by the GMC was sufficient to prove, on the balance of probabilities, that Dr Muehlberger did not hold a licence to practise between 11 June 2015 and (at the earliest) 22 May 2017 – a period which covers the dates of his consultations with Patient A. It therefore found sub paragraph 2a proved.
32. Further, having taken into account the above correspondence between Dr Muehlberger and the GMC with regard to his licence to practise, the Tribunal was satisfied, on the balance of probabilities, that Dr Muehlberger knew that he did not have a licence to practise at the time of the consultations with Patient A. It therefore found sub paragraph 2b proved.

Paragraph 3

33. The Tribunal noted that paragraph 3 alleges that Dr Muehlberger’s actions in his consultation with Patient A, including administering Botox to her, were dishonest in that he carried them out whilst he knew that he did not have a licence to practise.

34. In addressing this paragraph, the Tribunal employed the test set out in *Ivey*. It therefore first set out to ascertain, subjectively, the actual state of Dr Muehlberger’s knowledge or belief as to the facts.

35. As set out above, the Tribunal has already determined that, at the time that he held the consultations with Patient A, Dr Muehlberger knew that he did not have a licence to practise. It appears from his letter to the GMC dated 3 June 2017 that he accepts this. The Tribunal therefore examined the reasons advanced by Dr Muehlberger as to why, having chosen to relinquish his licence to practise, he nevertheless practised in the UK in April and early May 2017. In doing so, it first considered the steps leading up to his relinquishing his licence to practise in June 2015.

36. Dr Muehlberger stated in his letter to the GMC dated 3 June 2017, that he was granted a UK licence in 1993, subsequently joining the specialist register in 2008. Although he returned to Germany to practise full time in 2008, he retained his licence to practise in the UK.

37. In December 2012, the GMC introduced a requirement for all fully licensed doctors in the UK to demonstrate on a regular basis that they are up to date and fit to practise in their chosen field and able to provide a good level of care. The process in which doctors demonstrate their fitness to practise is known as revalidation. To retain their licence to practise, doctors will normally revalidate every five years.

38. Licensed doctors are required to have an annual appraisal based on Good Medical Practice and must reflect on all of the required supporting information they have collected. Where a licensed doctor does not have a connection to a designated
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body (such as a NHS Hospital Trust or similar) and wishes to keep their licence to
practise, they must send information and evidence to the GMC on an annual basis to
demonstrate they are up to date and there are no outstanding concerns regarding
their fitness to practise. This is called an annual return. In addition, doctors may be
required to undertake and reach the required standard in a revalidation assessment
once every five years.

39. Evidence provided by staff from the GMC’s Registration and Revalidation
Directorate sets out that Dr Muehlberger’s original revalidation date was 10 April
2015. In September 2012 he informed the GMC by telephone that he did not have a
connection to a designated body or a suitable person for his revalidation. He stated
that he worked one day a month in London and needed a licence to practise. He
later confirmed to the GMC in February 2014 that he would be revalidating without a
designated body connection and, in March 2014, the GMC emailed him to let him
know what he was required to do to revalidate.

40. Between December 2014 and April 2015, the GMC and Dr Muehlberger
corresponded with regard to the requirements for his annual return. Dr Muehlberger
provided the GMC with appraisal information but this did not meet the GMC’s
criteria. As a result, on 21 May 2015, the GMC gave Dr Muehlberger notice that it
was minded to withdraw his licence to practise. As set out above, Dr Muehlberger
subsequently applied to relinquish his licence to practise and it was withdrawn on 11
June 2015.

41. In his letter to the GMC of 3 June 2017, Dr Muehlberger stated that he
relinquished his licence to practise when he learned about the European Law
Directive 2005/36/EC (‘the EU Directive’), stating:

The recognition of professional qualifications laid down in this directive
enables the free movement of professionals such as doctors within the EU.
The rules apply to the temporary or occasional nature of activities of a self-
employed person in another EU country. My clinic work in the UK comprises a
very small number of days per year and consists mainly of advising patients
on the treatment of migraine...

With the start of the Brexit negotiations, I got worried that the European Law
cited above would not apply anymore at some future point. I contacted the
General Medical Council four weeks ago to initiate the re-application process
to regain my UK license [sic].
42. Mr Garside, in his submissions on behalf of the GMC, stated that it had been too complicated for Dr Muehlberger to provide the necessary material to obtain revalidation and therefore he was prepared to ‘take a chance’ by practising without a licence to practise. Further, he contended that nobody in the medical world could genuinely believe that they could practise medicine in the UK without holding a licence to practise. He added that there was no evidence that Dr Muehlberger took any steps to inform Patient A that he did not have a licence to practise, observing that, likewise, the consent forms which Patient A was asked to sign did not mention that Dr Muehlberger did not hold a licence to practise.

43. The Tribunal paid specific attention to the provisions of both the EU Directive and the Medical Act. It noted that Article 5 of the Directive refers to the rights of doctors to practise in other member states on a ‘temporary and occasional’ basis. Further, Section 18 of the UK Medical Act 1983 (as amended) (‘the Medical Act’) sets out provisions for ‘Visiting Medical Practitioners from Relevant European States’ to practise in the UK on an occasional basis. The Tribunal noted that there are specific requirements set out in the Medical Act for doctors intending to provide such ‘occasional’ services. These include providing various proofs of nationality, qualifications and details of insurance cover. However, it appears there is no mention in either the Medical Act or the EU Directive that these practitioners require a licence to practise.

44. The Tribunal noted that, in his email to the GMC of 28 November 2018, Dr Muehlberger set out that the EU Directive had come to his attention in November 2015 rather than at the time of relinquishing his licence to practise in June 2015. There was therefore an inconsistency between Dr Muehlberger’s accounts. The Tribunal noted that there was no evidence that Dr Muehlberger had practised in the UK between relinquishing his licence to practise in June and November 2015. Moreover, the Tribunal bore in mind that, by June 2017, when he wrote his letter of explanation to the GMC, some two years had elapsed since the events of 2015. Bearing this in mind, the Tribunal did not consider it appropriate to attach significance to this inconsistency.

45. The Tribunal went on to consider the logic of Dr Muehlberger’s explanation. It noted that the wording of Dr Muehlberger’s letter to the GMC of 3 June 2017 was similar to that of the EU Directive. Further, it noted that, pursuant to Schedule 2a of the Medical Act, providing a visiting doctor submits certain required documentation to the Registrar of the GMC in advance, it appears they may provide occasional
medical services in this country without a licence to practise. It considered that this added weight to his explanation that he had relied upon the EU Directive as a basis for practising without a licence to practise.

46. The Tribunal noted that Dr Muehlberger’s explanation for his enquiry to the GMC on 22 May 2017 about restoring his licence to practise was that it was prompted by his concerns about the start of the Brexit negotiations and the potential implications for the EU Directive. The Tribunal was satisfied this was an apparently plausible explanation for his enquiry.

47. Although the specific date of Patient A’s complaint to the GMC was not provided in evidence to the Tribunal, Mr Garside informed it that the complaint was received by the GMC in June 2017. This post-dates Dr Muehlberger’s enquiry to the GMC which was on either 22 May 2017 or some four weeks before 3 June 2017. Being aware of the complaint may have provided a potential alternative reason for Dr Muehlberger to contact the GMC to ask about the restoration of his licence to practise. However, there is no evidence that Dr Muehlberger was aware of the complaint before making the enquiry.

48. Taking all of the above into account, the Tribunal determined that the GMC has failed to satisfy the burden of proving that Dr Muehlberger’s knew, at the time of his consultations with Patient A, that his lack of a licence to practise meant that he should not have been practising at all, and that he was ‘taking a chance’ as he had found it too difficult to complete the requirements for revalidation. Rather, the Tribunal accepted that, on 7 April and 5 May 2017, Dr Muehlberger thought that he was able to practise in the UK on an occasional or visiting basis by virtue of the provisions of the EU Directive and the Medical Act. In making this finding, the Tribunal bore in mind that Dr Muehlberger is of good character, and this weighs in his favour when assessing the credibility of his account.

49. On the basis of the existence of these parts of the EU Directive and Medical Act, the Tribunal did not accept Mr Garside’s submission that nobody in the medical world could genuinely believe that they could practise in the UK without a licence to practise. It appears, from the legal documentation before the Tribunal, that practising medicine in this country without a licence to practise may be permissible in specific circumstances and with certain documentation provided by the practitioner to the GMC in timely fashion.
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50. The Tribunal did not therefore accept the GMC’s case that when Dr Muehlberger treated Patient A in April/early May 2017 he was ‘taking a chance’ as he knew that he was not entitled to do so without a licence to practise. It accepted Dr Muehlberger’s explanation that he believed he was entitled to offer occasional medical services in this country as a visiting doctor by virtue of the EU Directive.

51. Having established, subjectively, Dr Muehlberger’s knowledge or belief as to the facts at the time of the consultations with Patient A, the Tribunal moved on to decide whether his conduct was honest or dishonest by applying the objective standards of ordinary decent people. Although Dr Muehlberger did not take appropriate steps to fully inform himself of, or comply with, the requirements for doctors from an EU state to practise in the UK as described above, that is not a finding that his actions were dishonest.

52. The Tribunal acknowledges that Dr Muehlberger may have been poorly advised by a third party on the requirements of the EU Directive and the Medical Act, or he may simply have acted without due caution in the belief that he was covered to treat Patient A with Botox under the legislation for visiting and occasional work. Although the Tribunal cannot make any finding in respect of this, it was satisfied that ordinary decent people would not consider his actions, which the Tribunal has found were based upon his erroneous understanding of the EU Directive, to be dishonest.

53. In all the circumstances, the Tribunal found that Dr Muehlberger’s actions at paragraph 3 were not dishonest. It therefore found paragraph 3 not proved in relation to paragraph 1 by reason of paragraph 2.

The Tribunal’s Overall Determination on the Facts

54. The Tribunal has determined the facts as follows:

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

1. On one or more dates as set out in Schedule 1 you had a consultation with Patient A and you:

   a. prescribed botox injections to Patient A; **Determined and found proved**
b. injected botox into each of Patient A’s corrugator muscles; **Determined and Found proved**

c. failed to record that you had:
   i. prescribed botox to Patient A; **Determined and found proved**
   ii. administered botox to Patient A. **Determined and found proved**

2. At the time of the consultations as referred to at paragraph 1 you:
   a. did not have a licence to practise; **Determined and found proved**
   b. knew that you did not have a licence to practise. **Determined and found proved**

3. Your actions as set out at paragraph 1 were dishonest by reason of paragraph 2. **Determined and found not proved**

And that by reason of the matters set out above your fitness to practise is impaired because of your misconduct. **To be determined**

**Determination on Impairment - 19/06/2019**

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

**The Evidence**

2. The Tribunal has taken into account all the evidence received during the facts stage of the hearing. No further evidence was adduced at this stage.

**Submissions**

3. On behalf of the GMC, Mr Garside QC submitted that Dr Muehlberger’s fitness to practise was impaired by reason of his misconduct. He told the Tribunal that, on the basis of the Tribunal's findings at the facts stage, Dr Muehlberger may not have been dishonest, but he was certainly negligent to a serious degree. He stated that, regardless of the degree of informal advice Dr Muehlberger may or may not have
received regarding the EU Directive, he could have made a simple phone call to the GMC at any stage and this would have allowed him to discover the procedure by which he could formalise his position to practise in the UK. Mr Garside said that, if what Dr Muehlberger had previously been told was correct and the type of registration available in the EU Directive and the Medical Act accorded with his pattern of practice, then he would have had the benefit of practising lawfully and the public would have had the benefit of a degree of protection, which in the event they did not have. Mr Garside stated that the lack of any appropriate enquiry demonstrated a high degree of carelessness on Dr Muehlberger’s behalf. He submitted that not having a licence to practise or other authority may also have affected the validity of Dr Muehlberger’s insurance. He submitted that, in these circumstances, practising without a licence to practise constituted serious misconduct.

4. With regard to impairment, Mr Garside accepted that Dr Muehlberger had apologised for his actions, but he submitted that this apology was nothing more than a formal acknowledgement of guilt. He stated that Dr Muehlberger had not set out that he now realises how important it is for the protection of the public for doctors to be properly licensed before practising in the UK. He submitted that, whilst there was no allegation that Dr Muehlberger was not a competent practitioner, his attitude to the Allegation, whilst cooperative and frank, was not that of someone who would never do the same thing again in similar circumstances. He stated that, in any case, the maintenance of public confidence in the profession and the upholding of proper professional standards and conduct for the profession requires the Tribunal to make a finding of impairment and proceed to determine which sanction, if any, to impose. He submitted that this was the kind of misconduct that ‘strikes at the heart’ of the overarching objective and requires attention from the Tribunal to decide on the appropriate response.

5. In respect of Dr Muehlberger’s failure to adequately record his prescription and administration of Botox to Patient A, Mr Garside conceded that were this the only matter of complaint, it would not reach the requisite level of seriousness for a finding of misconduct.

The Relevant Legal Principles

6. 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.
7. In approaching the decision, the Tribunal was mindful of the two stage process to be adopted: first whether the facts as found proved amounted to misconduct and that the misconduct was serious and then whether the finding of that misconduct which was serious could lead to a finding of impairment.

8. The Tribunal must determine whether Dr Muehlberger’s fitness to practise is impaired today, taking into account Dr Muehlberger’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 whether there is any likelihood of repetition.

The Tribunal’s Determination on Impairment

Misconduct

9. The Tribunal first considered whether Dr Muehlberger’s actions amount to misconduct. Misconduct can be found in circumstances where there have been serious departures from expected standards of conduct and behaviour, which can be identified by reference to Good Medical Practice (2013 Edition) (‘GMP’).

10. With regard to Dr Muehlberger’s conduct, the Tribunal identified that the following paragraphs of GMP are relevant:

12 You must keep up to date with, and follow, the law, our guidance and other regulations relevant to your work.

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

11. The Tribunal noted that it found record keeping failures in Dr Muehlberger’s treatment of Patient A. It was of the view that, in the light of its findings that there was no dishonesty present in this case, these failings, which principally concerned Dr Muehlberger not clearly identifying in the medical records that it was he who had administered Botox to Patient A, were not sufficient to amount to misconduct.

12. The Tribunal next turned to Dr Muehlberger’s conduct in treating Patient A in London on 7 April 2017 and 5 May 2017 without a licence to practise. It has already determined that Dr Muehlberger believed that the provisions of the EU Directive permitted him to practise in the UK on an occasional basis without a licence to
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practise as the EU Directive and the Medical Act appear to show this is possible under certain, limited circumstances. However, the Tribunal did not accept that Dr Muehlberger is absolved of responsibility for his error by virtue of his being found not to have been dishonest. He had a duty to the public and to the medical profession to ascertain that he was indeed permitted to practice in the circumstances which prevailed. The Tribunal accepts that information relevant to his right to practise was readily available to him from the GMC. Whatever advice or information he received, and Dr Muehlberger has not disclosed the source of it, he should have confirmed that it was accurate.

13. Dr Muehlberger had previously been in repeated contact with the GMC by phone and email with regard to his attempts to revalidate. It would have been straightforward for him to contact the GMC to check the information he had received elsewhere and confirm whether the circumstances of his practise allowed him a route to practise on an occasional basis in the UK without a licence.

14. Dr Muehlberger chose to go ahead and practise without either a licence to practise or obtaining authority by another route. The Tribunal considered that such a course constituted serious negligence on Dr Muehlberger’s part. As set out in paragraph 12 of GMP, he had a duty to keep up to date with, and follow, the law, GMC guidance and other regulations relevant to his work. On these occasions in April and May 2017, he did not do so. The Tribunal was of the view that ignorance of the detail of the proper legal position was not an excuse for simply proceeding as he did, and demonstrated a serious disregard for the regulatory system on Dr Muehlberger’s part.

15. The Tribunal considered that such actions were seriously below the standards of behaviour expected of doctors. It therefore concluded that Dr Muehlberger’s conduct fell so far short of the standards of conduct reasonably to be expected of a doctor as to amount to misconduct.

Impairment

16. The Tribunal having found that the facts found proved amounted to misconduct, went on to consider whether, as a result of that misconduct, Dr Muehlberger’s fitness to practise is currently impaired.

17. The Tribunal considered that Dr Muehlberger’s conduct, although serious, was remediable in the sense that he could develop understanding and insight into his error.
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It noted that, in his email to the GMC of 28 November 2018 he has stated that he deeply regrets his mistake and expressed his apologies that he had ‘...inadvertently fallen foul of the necessary requirements.’ The Tribunal accepted that this acknowledgment of fault, along with the level of engagement with the GMC he has shown in the course of the regulatory process, demonstrates a significant amount of insight on his part. Further, it notes that he has stated that he no longer wishes to work in the UK at all. Whilst the Tribunal recognised that Dr Muehlberger may change his mind on this point in the future, it was of the view that his level of insight into his error means that the risk of him repeating such an action with regard to being properly licensed is negligible.

18. Notwithstanding its finding that Dr Muehlberger is very unlikely to repeat such behaviour, the Tribunal considered that the negligence he displayed in practising without obtaining proper authority in April and May 2017 warrants consideration as to whether his fitness to practise is impaired. Although Dr Muehlberger did not harm Patient A, and it appears that he is otherwise a clinically competent doctor who poses no risk to patients, his actions in treating Patient A without a licence to practise undermine both the regulator and the public’s confidence in it.

19. It is unacceptable for doctors to practise in the UK without a licence to practise or without proper authority pursuant to the provisions of the EU Directive and the Medical Act for practising on an occasional basis. Doing so creates a potential risk to patients. The GMC has an important role in protecting the public by ensuring that only doctors who are fit to practise and safe hold a licence. Patients have a right to trust that doctors treating them have the proper credentials. Undermining of that trust is inherently serious in that it undermines public confidence in the medical profession and the GMC’s efforts to promote and maintain proper professional standards and conduct through robust registration and licensing procedures.

20. In these circumstances, the Tribunal is of the view that, despite the level of insight Dr Muehlberger has demonstrated into his actions, a finding of impairment is nevertheless necessary to promote and maintain public confidence in the medical profession, and to promote and maintain proper professional standards and conduct for members of the profession.

21. The Tribunal has therefore determined that Dr Muehlberger’s fitness to practice is impaired by reason of misconduct.
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Determination on Sanction - 19/06/2019

1. Having determined that Dr Muehlberger’s fitness to practise is impaired by reason of misconduct, 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

2. The Tribunal has taken into account evidence received during the earlier stages of the hearing where relevant to reaching a decision on sanction. No further evidence was adduced at this stage.

Submissions

3. On behalf of the GMC, Mr Garside submitted that the appropriate sanction in this case was one of suspension. He said that, in the light of the Tribunal’s findings, taking no action in this case would be inappropriate. He stated that it was difficult to see how the Tribunal could formulate any workable conditions that could be imposed on Dr Muehlberger’s registration that would be an appropriate response to his misconduct.

4. Mr Garside told the Tribunal that the GMC does not consider Dr Muehlberger’s actions to be fundamentally incompatible with continued registration and that a period of suspension of whatever length the Tribunal considers appropriate would be the proportionate response to their findings. He drew the Tribunal’s attention to aspects of the Sanctions Guidance (February 2018) (‘the SG’), highlighting sections including paragraph 97 (set out in the Tribunal’s decision below) which lists factors which may indicate that suspension is the appropriate sanction. He stated that, should the Tribunal determine to suspend Dr Muehlberger’s registration, it may consider that a review hearing was not necessary as the suspension was sufficient to mark the seriousness of Dr Muehlberger’s misconduct.

The Tribunal’s Determination on Sanction

5. The decision as to the appropriate sanction, if any, is a matter for this Tribunal exercising its own judgment. In reaching its decision, the Tribunal has taken account of the SG and the statutory over-arching objective. The Tribunal recognises that the purpose of a sanction is not to be punitive, although it may have a punitive effect.
6. Throughout its deliberations the Tribunal has applied the principle of proportionality, balancing Dr Muehlberger’s interests with the public interest. It reminded itself that it should only impose the minimum sanction necessary to achieve the over-arching objective. In deciding what sanction, if any, to impose the Tribunal considered each of the sanctions available, starting with the least restrictive. It also considered and balanced the mitigating and aggravating factors in this case.

**Aggravating and mitigating factors**

**Aggravating factors**

7. Dr Muehlberger’s negligence in not confirming with the GMC whether or not he had a right to practise in the UK.

**Mitigating factors**

8. Dr Muehlberger has shown the timely development of insight in acknowledging his mistake and expressing regret for his actions. He has also cooperated in an appropriate manner with the GMC’s investigation.

9. The Tribunal noted that no previous findings have been made against Dr Muehlberger, nor has he acted in such a manner since the incidents leading to this hearing. The Tribunal has already determined that the risk of Dr Muehlberger repeating his actions is very low.

10. The Tribunal recognised that interpretation of the EU Directive is difficult and this may provide some limited mitigation as to why Dr Muehlberger misinterpreted its provisions. It does not, however, excuse him from proceeding to practise in the UK without seeking proper clarification of the legal position from the GMC.

**No action**

11. The Tribunal first considered whether to conclude Dr Muehlberger’s case by taking no action with regard to his registration. The Tribunal has already determined that Dr Muehlberger’s fitness to practise is impaired by reason of his misconduct. It determined that, in the absence of any circumstances which could be regarded as exceptional, it would be inappropriate to conclude this case by taking no action.
Conditions

12. The Tribunal next considered whether it would be sufficient to impose conditions on Dr Muehlberger’s registration. It has borne in mind that any conditions imposed should be appropriate, proportionate, workable and measurable.

13. The Tribunal gave consideration to the formulation of a condition mandating that, before Dr Muehlberger returns to practise in the UK, he informs the GMC of his intention to return and of the nature, duration and frequency of his intended work, seeks guidance from the GMC as to the appropriate methods by which he should obtain the necessary authentication or licence to do so, and follows that guidance. However, although it considered that such a condition may be workable, it did not consider that it was appropriate as it sets out steps which Dr Muehlberger should be following in any case.

14. Ultimately, the Tribunal was of the view that it could not formulate appropriate conditions to address the issues raised by Dr Muehlberger’s misconduct. Further, given the seriousness with which it views his actions, the Tribunal determined that a period of conditional registration would not adequately protect public confidence in the profession nor uphold proper standards of conduct for members of the profession.

Suspension

15. The Tribunal moved on to consider whether it would be sufficient to impose a period of suspension on Dr Muehlberger’s registration. The Tribunal has borne in mind the SG in relation to suspension, including paragraphs 91 and 92 in which it states:

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
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appropriate for conduct that is serious but falls short of being fundamentally incompatible with continued registration (ie 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).

16. The Tribunal identified the following factors as set out in paragraph 97 of the SG as relevant in Dr Muehlberger’s case, indicating suspension may be appropriate where there is:

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 a suspension would not be sufficient to protect the public or maintain confidence in doctors.

b ...

c ...

d ...

e No evidence that demonstrates remediation is unlikely to be successful, eg 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.

17. The Tribunal has set out its findings on the seriousness with which it regards Dr Muehlberger’s failure to adhere to proper licensing arrangements in its determination on impairment. It will not rehearse these findings here, other than to state that such actions are inappropriate for a registered medical practitioner.

18. Although Dr Muehlberger’s actions represented a serious departure from the provisions of GMP, the Tribunal acknowledged that there are a number of strong
mitigating factors present in this case. These include the significant degree of insight Dr Muehlberger has demonstrated into his actions, the apologies and expression of regret for his behaviour present in his correspondence to the GMC, and that he is otherwise of good character.

19. In all the circumstances, the Tribunal determined to suspend Dr Muehlberger’s registration for a period of three months. In deciding on this period of time, its primary focus was the need to demonstrate clearly to Dr Muehlberger, the profession and the public that it is unacceptable to practise in the UK without a licence to practise or proper authority pursuant to the provisions of the EU Directive and the Medical Act for practising on an occasional basis. The Tribunal was satisfied that such a sanction would be sufficient to promote and maintain both public confidence in the profession, and standards and conduct for members of the profession.

20. The Tribunal took the view that although Dr Muehlberger’s misconduct was serious, his behaviour falls short of being fundamentally incompatible with continued registration. It considered that erasure would be a disproportionate and punitive sanction.

No review hearing

21. The Tribunal gave due regard to paragraph 164 of the SG which states: ‘in some misconduct cases it may be self-evident that, following a short suspension, there will be no value in a review hearing.’ The Tribunal is satisfied that Dr Muehlberger appreciates the gravity of his actions, has developed sufficient insight and that he is very unlikely to repeat them. In these circumstances, the Tribunal was satisfied that a review hearing would serve no useful purpose and therefore determined not to direct such a hearing.

Determination on Immediate Order - 19/06/2019

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

Submissions

2. On behalf of the GMC, Mr Garside QC submitted that the GMC did not seek the imposition of an immediate order in this case.
The Tribunal’s Determination

3. In deliberating on the matter, the Tribunal took into account the paragraphs of the Sanctions Guidance (February 2018) which deal with the matter of immediate orders, in particular paragraph 172 which states:

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.

4. The Tribunal had regard to the principle of proportionality and balanced Dr Muehlberger’s interests with the public interest. It was of the view that the substantive suspension of three months was sufficient to uphold public confidence in the profession and to promote and maintain proper professional standards and conduct. The Tribunal has found no risk to patient safety in this case, and is satisfied in these circumstances that an immediate order is not necessary to protect the public interest.

5. This means that Dr Muehlberger’s registration will be suspended 28 days from when notice of the Tribunal’s decision is deemed to have been served upon him, unless he lodges an appeal. If Dr Muehlberger does lodge an appeal he will remain free to practise unrestricted, subject of course to appropriate authorisation, until the outcome of any appeal is known.

6. There is no interim order to revoke.

7. That concludes this case.

Confirmed
Date 19 June 2019

Mr Angus Macpherson, Chair
ANNEX A – 17/06/2019

Service of Notice of the hearing and Proceeding in the doctor’s absence

Service of Notice of the Hearing

1. Dr Muehlberger is neither present nor represented at this hearing.

2. Mr Garside, QC, acting on behalf of the GMC, provided the Tribunal with documents regarding service of Notice of the Hearing on Dr Muehlberger. This included a Notice of Allegation email dated 8 May 2019, which included a copy of the Allegation made against Dr Muehlberger. Dr Muehlberger replied by email on 8 May 2019 to confirm receipt of this email and indicate that he would not be attending the hearing.

3. In addition the Tribunal was provided with a copy of the Medical Practitioners Tribunal Service (MPTS) Notice of Hearing letter, dated 8 May 2019, which was sent to Dr Muehlberger’s registered postal address by Special Delivery mail, and was also sent to him via email.

4. The Tribunal has been provided with documents from Royal Mail which confirmed delivery and signed receipt of the Notice of Hearing letter at Dr Muehlberger’s registered postal address on 9 May 2019. The postal address corresponds with Dr Muehlberger’s registered address.

5. Mr Garside submitted that there was evidence of delivery of the relevant notice and of the documentation to be used in this case demonstrating that Notice of the Hearing had been effected.

6. The Tribunal noted that Dr Muehlberger had replied to the Notice of Allegation email to confirm receipt, and that the Royal Mail information proved that the Notice of Hearing letter had been signed for at Dr Muehlberger’s postal address. Having considered the documentary evidence provided, the Tribunal was satisfied that notice of the hearing had been served on Dr Muehlberger in accordance with Rule 40 of the the General Medical Council (Fitness to Practise Rules) 2004 as amended (‘the Rules’) and paragraph 8 of Schedule 4 to the Medical Act 1983, as amended.

Proceeding in Dr Muehlberger’s absence
The Tribunal went on to consider whether it would be appropriate to proceed with this hearing in Dr Muehlberger's absence pursuant to Rule 31 of the Rules. 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.

The Tribunal noted an email dated 8 May 2019 in which Dr Muehlberger confirmed to the GMC that he would not be attending the hearing. In addition it took into account an email of 18 March 2019, in which Dr Muehlberger informed the GMC that he no longer had a legal representative in the UK and an email dated 27 March 2019 in which he indicated that he was content for the witnesses who the GMC were going to call to give evidence not to attend and stated that he had no issues with any of the documentation. Further, it took into account an email sent by Dr Muehlberger to the GMC at 09:19 on 17 June 2019, immediately before this hearing was due to start, in which Dr Muehlberger answered a query posed to him by the GMC regarding an unrelated matter.

Mr Garside stated that Dr Muehlberger had been cooperative and had engaged with the GMC via email, addressing parts of the case he accepted as well as those he challenged. He stated that Dr Muehlberger had been informed of today’s date and had made a conscious and firm decision not to attend. Mr Garside told the Tribunal that Dr Muehlberger had been given a further opportunity this morning to respond to the GMC's email regarding another matter, to inform the GMC that he now wished to attend or was requesting an adjournment, but he had not done so. Mr Garside invited the Tribunal to exercise its discretion, submitting that it would be appropriate for it to proceed in Dr Muehlberger absence.

The Tribunal had regard to the emails from Dr Muehlberger, in which he stated clearly that he was not going to attend this hearing, and no longer had a legal representative in the UK.

The Tribunal was conscious that Dr Muehlberger was aware that this hearing would be going ahead and he has been provided with adequate time to arrange to attend. It has been presented with a bundle of documents including two letters which Dr Muehlberger has stated that he wishes to function as his witness statement.
Although Dr Muehlberger has never explicitly stated the reasons why he does not wish to attend this hearing, the Tribunal inferred from his correspondence with the GMC, that he has voluntarily absented himself from these proceedings. It considered that he has been made aware of the nature of the case against him as is proper. The Tribunal could see no value in an adjournment as it could not be satisfied that this would result in Dr Muehlberger’s attendance on a future hearing date. Further, it was of the view that it was in the public interest for these matters, which involve an Allegation of misconduct, to be heard expeditiously.

In all the circumstances, the Tribunal determined that it was in the interests of justice to proceed in Dr Muehlberger’s absence. It will take into account the documents that he has provided as part of its consideration of this case.
Application to admit evidence

1. On day one of the hearing, Mr Garside QC, acting on behalf of the GMC, made an application for the admission of extracts from the medical records of Patient A. He submitted that these documents should have been included in the hearing bundle for the Tribunal and had been provided to Dr Muehlberger, who had commented upon them in an email to the GMC dated 28 November 2018. He contended that they were relevant to the hearing. He referred the Tribunal to Dr Muehlberger’s email of 17 June 2019 in which stated that he had no objection to the documents being provided to the Tribunal.

2. The Tribunal noted that Rule 34(1) of the GMC (Fitness to Practise) Rules 2004 (‘the Rules’) states as follows:

   34.

   (1) The Committee or a Tribunal may admit any evidence they consider fair and relevant to the case before them, whether or not such evidence would be admissible in a court of law.

3. The Tribunal noted that that the medical records had been served upon Dr Muehlberger before the hearing, and he had commented upon them in an email to the GMC dated 28 November 2018. The Tribunal was satisfied that these documents were relevant to these proceedings as they constituted a record of his treatment of Patient A on 7 April 2017 and 5 May 2017. Further, it took into account the fact that Dr Muehlberger did not object to the documents being provided to the Tribunal in response to the GMC’s specific enquiry of him, accepting that he had been provided with a fair opportunity to comment upon the documents.

4. In these circumstances the Tribunal considered that it was both fair and relevant for it to grant Mr Garside’s application and admit the documents.
SCHEDULE 1

7 April 2017

5 May 2017