

HEARING IN PRIVATE ON PAPERS

Professional Conduct Committee Review Hearing

1 December 2023

Name: KUSMIEREK, Pawel Adam

Registration number: 102194

Case number: CAS-171547-G4D7Q8

General Dental Council: Rochelle Williams, IHLPS

Registrant: Unrepresented

Fitness to practise: Impaired by reason of adverse health and misconduct

Outcome: Indefinite suspension

Committee members: Margaret Wolff (Chair, lay member)
Caitriona Walsh (Dentist member)
Pamela Machell (DCP member)

Legal Adviser: Trevor Jones

Committee Secretary: Jennifer Morrison

1. This is a Professional Conduct Committee (PCC) review hearing of Mr Pawel Kusmiererek's case, pursuant to Section 27C of the *Dentists Act 1984 (as amended)* ('the Act').
2. The purpose of this hearing is for this Committee to review Mr Kusmiererek's case and to determine what action to take in relation to his registration. His registration is subject to an order of suspension.
3. The members of the Committee, as well as the Legal Adviser and the Committee Secretary, conducted the hearing remotely via Microsoft Teams in line with current General Dental Council (GDC) practice.

4. Neither party is present today, following a request made by the GDC for the review of the suspension order to be conducted on the papers. The Committee received written submissions from the GDC in respect of the review.
5. The Committee first considered the issues of service and proceeding with the hearing in the absence of Mr Kusmerek and any representatives for either party. The Committee accepted the advice of the Legal Adviser on these matters.

Decision on service of Notice of Hearing

6. The Committee considered whether the Notice of Hearing ('the Notice') had been served on Mr Kusmerek in accordance with Rules 28 and 65 of the '*General Dental Council (Fitness to Practise) Rules Order of Council 2006*' ('the Rules').
7. The Committee received from the GDC an indexed PCC review hearing bundle of 56 pages. This hearing bundle contained a copy of the Notice, dated 2 November 2023, which was sent to Mr Kusmerek's registered address by International Tracked and Signed post.
8. The Committee considered that there is no requirement within the Rules for the GDC to prove delivery of the Notice, only that it was sent. However, it noted from the Royal Mail 'Track and Trace' receipt provided that the Notice was delivered on 13 November 2023.
9. The Committee also noted that on 2 November 2023, a copy of the Notice was sent to Mr Kusmerek as a secure attachment to his registered email address.
10. The Committee was satisfied that the Notice sent to Mr Kusmerek contained proper notification of this review hearing. It contained information about, amongst other things, the date and time of the hearing and the GDC's intention for the hearing to take place on the papers unless Mr Kusmerek requested an oral hearing. Mr Kusmerek was informed of his right to adduce evidence and of the Committee's powers to proceed in his absence.
11. On the basis of all the information provided, the Committee was satisfied that notice of the hearing had been served on Mr Kusmerek in accordance with the Rules and the Act.

Decision on whether to proceed with the hearing in the absence of the registrant and on the papers

12. The Committee next considered whether to exercise its discretion under Rule 54 to proceed with the hearing in the absence of Mr Kusmerek and any representative for either party. The Committee took into account the factors to be considered in reaching its decision, as set out in the case of *R v Jones* [2003] 1 AC 1HL, and as affirmed in subsequent regulatory cases.
13. The Committee considered the need to be fair to both Mr Kusmerek and the GDC, as well as the public interest in the expeditious review of the substantive order.
14. The Committee considered that in the Notice, Mr Kusmerek was asked to confirm whether he would be attending or be represented. He was invited to provide the Committee with written

submissions or any documents that he felt would be relevant to the review hearing by 16 November 2023. The Committee noted that Mr Kusmirek had not responded to the Notice or to an email from the GDC dated 23 November 2023 asking him to confirm whether he objected to the hearing being conducted on the papers.

15. The Committee was satisfied that Mr Kusmirek's absence from these proceedings is voluntary. It considered that it did not receive a request for an adjournment from either party, and noted Mr Kusmirek's long history of minimal engagement with these proceedings.
16. The Committee had no information before it to indicate that adjourning the hearing would secure Mr Kusmirek's attendance on a future date and concluded that an adjournment would serve no meaningful purpose. In reaching its decision, the Committee also bore in mind its statutory duty to review the current substantive order before its date of expiry.
17. In all the circumstances, the Committee determined that it was fair and in the public interest to proceed with the hearing in the absence of both parties.

Background

18. This is the seventh review of a substantive order initially imposed on Mr Kusmirek's registration on 17 November 2015. At the initial hearing, which Mr Kusmirek did not attend, the PCC found proved allegations that Mr Kusmirek had a number of adverse health conditions that were likely to impact on his clinical practice, and that he failed to cooperate with the GDC's investigation into his fitness to practise.
19. The initial PCC determined that Mr Kusmirek's fitness to practise was impaired by reason of adverse health and misconduct and imposed a six-month suspension order on Mr Kusmirek's registration with a review before the end of the period of suspension. In reaching its decision on sanction, the initial PCC determined that in the absence of Mr Kusmirek's cooperation, conditions of practice would not be proportionate or workable. It was satisfied that the issues identified could be suitably addressed through a period of suspension, and suggested that a future reviewing Committee might benefit from up-to-date medical reports and a reflective piece from Mr Kusmirek.

First review of the order on 6 May 2016

20. The suspension order against Mr Kusmirek's registration was first reviewed on 6 May 2016. Mr Kusmirek did not attend and was not represented. The reviewing PCC noted that Mr Kusmirek had failed to respond to correspondence from the GDC in relation to the proceedings or to requests for updated information about his health. The reviewing Committee determined that Mr Kusmirek's fitness to practise remained impaired and extended the period of suspension for a further 12 months with a review.

Second review of the order on 31 May 2017

21. The reviewing PCC conducted its second review of the order on 31 May 2017. Mr Kusmirek was again not present and not represented at the hearing. In the absence of any meaningful

engagement from Mr Kusmierek or evidence of a change in circumstances, the reviewing Committee determined that his fitness to practise remained impaired and extended the period of suspension by nine months.

Third review of the order on 9 March 2018

22. The order was again reviewed at a hearing on 9 March 2018. Mr Kusmierek was neither present nor represented. Given Mr Kusmierek's persistent lack of engagement and the ongoing risks of harm arising from the complete absence of any evidence from him, the reviewing PCC determined that Mr Kusmierek's fitness to practise remained impaired.
23. The reviewing Committee was not satisfied that imposing a further fixed-term period of suspension would serve any meaningful purpose and directed that Mr Kusmierek's registration be suspended indefinitely.

Fourth review of the order on 26 May 2020

24. Mr Kusmierek exercised his right under Section 27C(4) of the Act and applied for the indefinite suspension to be reviewed. He attended the resuming hearing but was not represented. At the hearing, Mr Kusmierek apologised for his lack of engagement and gave reasons for this. He told the reviewing Committee that he understood the importance of cooperating with his regulator and how his lack of engagement may have been perceived.
25. The reviewing PCC noted Mr Kusmierek's apology and considered that in the light of his developing insight, the risk of repetition had reduced. However, it determined that some risk to the public remained should he be allowed to practise without restriction. The reviewing Committee further determined that in the absence of up-to-date evidence about Mr Kusmierek's health, his fitness to practise remained impaired.
26. As Mr Kusmierek was now engaging, the reviewing Committee was satisfied that workable and proportionate conditions could be formulated and replaced the suspension order with a conditions of practice order for a period of 18 months.

Fifth review of the order on 9 December 2021

27. Mr Kusmierek did not attend this review, nor was he represented. The reviewing PCC noted that Mr Kusmierek had provided a medical certificate, but it had not been accepted by the GDC. In his written representations, Mr Kusmierek stated that it was his understanding that the conditions of practice would no longer be operative after 18 months' time and asserted that he had not been under a duty of the conditions, given the use of the word 'may'.
28. The reviewing Committee did not accept Mr Kusmierek's interpretation and determined that his fitness to practise remained impaired. It was not satisfied that Mr Kusmierek would comply with conditions, given his lack of insight and continued limited engagement. The reviewing PCC imposed a suspension order for a period of 12 months.

Sixth review of the order on 13 December 2022

29. The sixth review of the order was held in the absence of both parties on the papers. The reviewing PCC noted that there had been no change in circumstances since the review hearing of 12 months prior. In its decision on impairment, the reviewing Committee stated:

'The Committee first considered whether Mr Kusmierek's fitness to practise as a dentist continues to be impaired by reason of his misconduct. Mr Kusmierek is not currently engaging in these proceedings and therefore provides no evidence of any remediation. His misconduct was limited in scope and was clearly remediable through adequate evidence of reflection and learning. There is no such evidence before the Committee.'

Misconduct of the nature found proved by the initial PCC in November 2015 is not remediable simply through the passage of time. Mr Kusmierek must demonstrate to the reviewing PCC adequate remedial steps, to include evidence of remorse, reflection and insight. He is still yet to demonstrate any such steps some seven years later at this sixth review hearing. The Committee today is in no different a position than that of the last reviewing PCC 12 months ago. In the absence of any evidence of remediation the Committee cannot be satisfied that the risk of repetition is low and the Committee cannot be satisfied that the wider public interest considerations have been satisfied. There would continue to be a significant risk to the public and to the reputation of the profession should Mr Kusmierek be allowed to resume practice without any restriction on his registration. Accordingly, the Committee determined that Mr Kusmierek's fitness to practise as a dentist continues to be impaired by reason of misconduct on both public protection and wider public interest grounds.

The Committee also determined that Mr Kusmierek's fitness to practise continues to be impaired by reason of his adverse physical or mental health, as there continues to be no information regarding his current health available to the Committee owing to Mr Kusmierek's limited engagement in these proceedings.'

30. The reviewing Committee extended the period of suspension for a further 12 months.

Today's review

31. Today is the seventh review. In comprehensively reviewing this case today, the Committee considered all the documentation presented to it and took account of the submissions made. The Committee accepted the advice of the Legal Adviser.
32. The GDC submitted that whilst it has not received any information to suggest that Mr Kusmierek has been working in breach of his suspension, it has received no information to suggest that he has been engaging in the process and with the recommendations of previous Committees.
33. The GDC submitted that Mr Kusmierek's fitness to practise remains impaired by reason of misconduct and adverse health. It submitted that in the absence of any evidence of insight into the importance of cooperating with his regulator, there is a high risk of repetition of the

misconduct. The GDC submitted that as Mr Kusmierek has failed to provide up-to-date information about his health, his fitness to practise in this respect cannot be determined. Accordingly, the GDC submitted that a risk of harm to the public remains, and that Mr Kusmierek's fitness to practise is impaired on public protection and public interest grounds.

34. The GDC submitted in the light of Mr Kusmierek's persistent lack of engagement, lack of insight and failure to demonstrate taking steps toward remediation, conditions of practice would not be appropriate. It further submitted that given Mr Kusmierek's history of non-engagement, a further fixed period of suspension is unlikely to serve any purpose. Accordingly, the GDC submitted that in the circumstances, the only appropriate and proportionate sanction is one of indefinite suspension.

Decision on current impairment

35. The Committee considered whether Mr Kusmierek's fitness to practise remains impaired by reason of his misconduct and adverse health. In doing so, it exercised its own independent judgement. It had regard to the over-arching objectives of the GDC: the protection, promotion and maintenance of the health, safety and well-being of the public; the promotion and maintenance of public confidence in the dental profession; and the promotion and maintenance of proper professional standards and conduct for the members of the dental profession.
36. The Committee bore in mind that at a review hearing, there is a persuasive burden on the registrant to demonstrate that their fitness to practise is no longer impaired. The Committee has seen no evidence to indicate that Mr Kusmierek's position has changed over the past 12 months. Mr Kusmierek has been guided as to what future reviewing Committees may find useful in its assessment of his fitness to practise and has repeatedly failed to provide this information. Furthermore, he has failed to engage with previously imposed conditions of practice on his registration.
37. The Committee determined that this reflects Mr Kusmierek's persistent lack of insight into the importance of cooperating with his regulator and engaging with its processes, and as such, he cannot be said to have remediated in this respect. Therefore, there is a high risk of repetition. Accordingly, the Committee determined that Mr Kusmierek's fitness to practise remains impaired by reason of misconduct.
38. The Committee considered that in the absence of any up-to-date evidence about Mr Kusmierek's health, it has insufficient information to determine whether his health concerns continue to impact upon his ability to practise safely. Accordingly, the Committee determined that Mr Kusmierek's fitness to practise remains impaired by reason of adverse health.

Sanction

39. The Committee next considered what direction, if any, to make. It had regard to the GDC's *Guidance for the Practice Committees including Indicative Sanctions Guidance* (effective October 2016, revised December 2020).

40. The Committee has borne in mind the principle of proportionality, balancing the public interest against Mr Kusmirek's own interests. The public interest includes the protection of the public, the maintenance of public confidence in the profession, and declaring and upholding proper standards of conduct and performance within the profession.
41. The Committee first considered whether it would be appropriate to allow the current order to lapse at its expiry or to terminate it with immediate effect. The Committee determined that this would be inappropriate in the light of its finding of current impairment.
42. The Committee next considered whether a period of conditional registration would be appropriate in this case. The Committee has no confidence that Mr Kusmirek would comply with conditions of practice, given his history of non-compliance and ongoing lack of engagement.
43. The Committee then went on to consider whether to direct that the current period of suspension be extended for a further period. It considered that Mr Kusmirek has failed to meaningfully engage with these proceedings for a considerable amount of time. In the absence of any evidence of insight or remediation from Mr Kusmirek, the Committee concluded that a further time-limited period of suspension would serve no useful purpose.
44. The Committee was satisfied that the power to impose an indefinite suspension under Section 27C(1)(d) of the Act was available, as Mr Kusmirek has been subject to an order for suspension for a period of at least two years. The Committee concluded in these circumstances that an indefinite period of suspension is necessary, appropriate and proportionate for the reasons outlined above. It is required in order to maintain public protection and to maintain confidence in the profession. It therefore directs that Mr Kusmirek's registration be suspended indefinitely.
45. The Committee considered that the onus should now rest with Mr Kusmirek to contact the GDC if and when he is willing to engage with its processes. It noted that he can request a review of the indefinite suspension order when at least two years have elapsed since the date on which the direction takes effect.
46. Unless Mr Kusmirek exercises his right of appeal, his registration will be suspended indefinitely, 28 days from the date that notice of this direction is deemed to have been served upon him. In the event that he does exercise his right of appeal, the suspension order currently in place on his registration will remain in force until the resolution of the appeal.
47. That concludes this determination.