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This guidance is a 'living document', which will be updated and revised as the need arises. Please email any comments or suggestions for consideration for further revisions to the Hearings Manager at [dhenley@optical.org](mailto:dhenley@optical.org).

## **Introduction**

The aim of this document is to assist all individuals when sitting on the Fitness to Practise Committee to understand their individual and collective responsibilities leading to the making of fair and just decisions. The professional and lay personnel appointed to sit on the Committee exercise their own judgments in making decisions but must also take into consideration the standards of good practice the General Optical Council has established.

Throughout this document reference is made to “Registrants”. The term “Registrants” relate to optometrists, dispensing opticians, student optometrists, student dispensing opticians and business registrants.

### **Human rights**

The General Optical Council is a public authority for the purposes of the Human Rights Act 1998. The Council will seek to uphold and promote the principles of the European Convention on Human Rights in accordance with the Act.

### **Equality and Diversity**

The Council is committed to promoting equality and valuing diversity and to operating procedures and processes which are fair, objective, transparent and free from discrimination. This includes setting out in guidance, by way of the Code of Conduct for Individual Registrants and the Code of Conduct for Business Registrants, the attitudes and behaviours expected of the optometrist and dispensing optician. Promoting equality is also a requirement under current and emerging equality legislation – everyone who is acting on behalf of the Council is expected to adhere to the spirit and letter of this legislation.

Members of the profession are required to treat both patients and colleagues fairly to the best of their ability and without discrimination.

### **Fitness to Practise and what it means**

Optometrists and dispensing opticians must demonstrate safe and competent practice. To do this they must establish and maintain proper and effective relationships with patients and colleagues alike. Their position in society as a respected professional gives them access to patients from all walks of life, including those who may be vulnerable, and therefore trust from both parties is paramount but should that trust be brought into question through the registrant’s conduct, it may be considered that he should not continue to work in unrestricted practice.

The public expect their optometrist or dispensing optician to be fit to practise and are entitled to a good standard of care and indeed the majority achieve and maintain such standards but there will always be a minority who fail to maintain standards.

It is for that reason the Council has the powers to take appropriate action where it appears that there may be an impairment of an optometrist's or a dispensing optician's fitness to practise and it is for the Fitness to Practise Committee to determine an appropriate sanction.

## **The Public Interest**

When determining sanctions in relation to the registration of an optometrist or a dispensing optician, the Fitness to Practise Committee should consider whether their decision would be for the protection of members of the public or in the wider public interest as they are both closely linked i.e. the particular need to protect the patient and the collective need to maintain confidence of the public in their professional.

Public interest includes: protection of patients; maintenance of public confidence in the profession and declaring and upholding proper standards of conduct and behaviour and therefore a Fitness to Practise Committee should bear those factors in mind when considering an appropriate sanction regarding an optometrist's or a dispensing optician's registration.

## **What this guidance is for**

This guidance has been developed by the Council for use by its Fitness to Practise Committee when considering what sanction to impose following a finding of impaired fitness to practise.

The Indicative Sanctions Guidance is an authoritative statement of the Council's approach to sanctions issues. This guidance is not an alternative source of legal advice. When appropriate, the Legal Adviser will advise you on questions of law, including questions about the use of this guidance and the approach you should take to it. Each case is different and should be decided on its unique facts and merits.

## **Who this guidance is for**

Although this guidance is addressed to the members of the Fitness to Practise Committee, it will be useful to others involved personally or professionally in fitness to practise cases, including:

- Patients who are considering making a complaint to the regulatory body about a registrant
- Registrants who are subject to fitness to practise procedures
- Organisations and agencies which are considering making a referral to the regulatory body, or whose own procedures interact with the regulatory body's
- Factual and expert witnesses
- Organisations, firms and advocates representing complainants and respondent professionals
- Assessors and examiners (medical, legal, professional)

- Other regulatory bodies, including the Council for Healthcare Regulatory Excellence
- The Courts

## **Responsibility for decisions**

As independent Fitness to Practise Committee members, you are asked to keep this guidance in mind when considering cases. The publication of this guidance does not undermine your independence or the separation of responsibilities which exists between the Council in setting policy and you as members of the Fitness to Practise Committee.

This guidance provides a crucial link between two key regulatory roles of the GOC – setting standards for the profession and of taking action on registration when a registrant’s fitness to practise is called in question because those standards have not been met. The professional and lay members appointed to sit on committees exercise their own judgement in making decisions but must take into consideration the standards of good practice the GOC has established. Decisions taken by committee members in relation to sanction are at their discretion and the members should refer to this guidance when making their decisions.

## **Standard of proof**

Rule 50A establishes the standard of proof to be applied by the Fitness to Practise Committee when making findings of fact:

“50A. The standard of proof applicable in any proceedings before the Fitness to Practise Committee where the Presenting Officer has addressed the Fitness to Practise Committee in relation to each allegation in accordance with Rule 45 (Presentation of the Presenting Officer’s case) on or after 1 November 2008 is the standard of proof applicable to civil proceedings.”

The standard of proof used in criminal proceedings, and used in Fitness to Practise proceedings by the General Optical Council before 1 November 2008 was proof beyond reasonable doubt. In civil proceedings, the standard of proof is proof on the balance of probabilities; a fact will be established if it is more likely than not to have happened. The civil standard of proof is used in Fitness to Practise proceedings by GOC from 1 November 2008 when Rule 50A came into force.

It is only in relation to findings of fact that the standard of proof has any relevance.

The standard of proof is not relevant for Interim Orders where no findings of fact are made. Nor is it relevant where there is no dispute as to the facts. The standard of proof is only relevant where there are facts in dispute between the parties.

## The process

In cases where there are facts in dispute, the following process is to be followed. Once the Fitness to Practise Committee has heard the evidence, it must decide:

- (1) Whether the facts alleged have been found proved;
- (2) Whether, on the basis of the facts found proved, the registrant's actions amount to misconduct, deficient professional performance, or that he or she has adverse physical or mental health (where the allegation relates to a criminal conviction, stages 1 and 2 are in effect merged as a conviction is itself a ground for impairment)<sup>1</sup>;
- (3) Whether the misconduct, conviction, deficient professional performance, or adverse physical or mental health, leads to a finding of impaired fitness to practise<sup>2</sup>;
- (4) What sanction (if any) is to apply.

The application of the civil standard of proof applies to (1) only. Questions as to whether or not, in the light of those findings, the registrant has acted in a way which amounts to misconduct, deficient professional performance, or has adverse physical or mental health are a matter of judgement in respect of which the standard of proof is not relevant. The same is true regarding the decision as to whether the defendant's fitness to practise is impaired and what sanction is to apply.

## The application of the standard of proof

When reaching a decision on whether the facts alleged have been found proved, the Fitness to Practise Committee must have in mind the seriousness of the allegations and the potential consequences for the registrant if the allegations are found proved. The application of the civil standard of proof was considered by the House of Lords in the case of *In re Doherty [2008] UKHL 33*. Lord Carswell cited approvingly from an earlier judgment of the Court of Appeal, which stated:

“Although there is a single standard of proof on the balance of probabilities, it is flexible in its application. In particular, the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before the court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be

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<sup>1</sup> Where the registrant is a business registrant, the Committee must judge whether there is misconduct by the business registrant or one of its directors, or whether there were practices or patterns of behaviour occurring of which the registrant knew or ought reasonably to have known of which amount to misconduct or deficient professional performance.

<sup>2</sup> In the case of business registrants, the judgement to be made is whether the registrant's fitness to carry on business as an optometrist or dispensing optician is impaired. For student registrants, the judgement is whether the student's fitness to undertake training is impaired.

required for an allegation to be proved on the balance of probabilities.”  
*R (N) v Mental Health Review Tribunal [2006] QB 468.*

In the *Doherty* case in the House of Lords, Lord Carswell followed on from approving the above passage by stating:

“...in some contexts a court or tribunal has to look at the facts more critically or more anxiously than in others before it can be satisfied to the requisite standard. The standard itself is, however, finite and unvarying. Situations which make such heightened examination necessary may be the inherent unlikelihood of the occurrence taking place..., the seriousness of the allegation to be proved or, in some cases, the consequences which could follow from the acceptance of proof of the relevant fact. The seriousness of the allegation requires no elaboration: a tribunal of fact will look closely into the facts grounding an allegation of fraud before accepting that it has been established. The seriousness of consequences is another facet of the same proposition: if it is alleged that a bank manager has committed a minor peculation, that could entail very serious consequences for his career, so making it less likely that he would risk doing such a thing. These are all matters of ordinary experience, requiring the application of good sense on the part of those who have to decide such issues. They do not require a different standard of proof or a specially cogent standard of evidence, merely appropriately careful consideration by the tribunal before it is satisfied of the matter which has to be established.”

Considering the potential consequences for the registrant during the fact finding stage does not mean that the Committee makes a decision on sanction at this stage. The potential consequences for the registrant are simply a corollary of the seriousness of the allegations presented to the Committee. Any final decision in relation to sanction can only be taken by the Committee at the final stage of the process once both parties have had an opportunity to make further submissions on the appropriate outcome.

## Decision-making

**Giving reasons in determinations.** In the judgment on the registrant appeal against the GOC decision in the case of *Threlfall* it was held that there are obligations at common law and pursuant to Article 6 of the European Convention on Human Rights for a Disciplinary Committee, in any case in which a decision is made to impose a disciplinary order, to give adequate reasons in good time. The Judge stated: *“There is a further practical reason why disciplinary committees should give adequate reasons for their decisions, and that is to enable the Council for the Regulation of Health Care Professionals to consider whether to exercise its powers under section 29 of the 2002 Act”.*

Generally, failings in this regard tend to fall into three main areas:

- a. Failure to explain what the allegations are in sufficient detail to enable the reader to understand the seriousness of the allegation;

- b. Failure to explain why allegations have or have not been found proved;
- c. Failure to explain why the committee feel that a particular sanction is the most appropriate sanction for them to apply.

**How detailed does a determination have to be?** The amount of detail will depend on the complexity of the case. The determination should clearly set out what the facts of the case are with sufficient detail to enable the reader to understand the nature and seriousness of the allegations.

**Findings of fact.** If a decision turns on the credibility of one witness as opposed to another, then the reasons for the decision could be commensurately brief. In cases where a finding may appear to be inexplicable in relation to the evidence received by the Fitness to Practise Committee, then there would be a compelling need for detailed reasons.

**What makes a good determination?** The Fitness to Practise Committee should explain fully why they have come to the decision that has been reached and why that outcome is more appropriate than any other possible outcomes. The Committee should consider the following before making a determination and a full explanation should always cover:

- a. A description of the allegations (a reference to the Code of Conduct may be made);
- b. An explanation of why each factual allegation was or was not found proved;
- c. An explanation of any important background facts which led the Committee to reach its conclusion;
- d. Confirmation or otherwise that you have accepted any legal advice you have been given by the Legal Adviser (it is particularly important to give a full explanation of your position in relation to any advice you have not accepted);
- e. Your conclusions on the main submissions made to you by the parties or their representatives;
- f. Whether, on the basis of the facts found proved, the registrant's actions amount to misconduct, deficient professional performance or that he or she has adverse physical or mental health, and why ;
- g. Whether the fitness to practise of a registrant is currently impaired, and if so, why;
- h. Why and what sanctions are being imposed and how the sanction imposed protects the public;
- i. Why you rejected the other sanctions available;
- j. Make mention of any details of good character that have been submitted;
- k. In a case where the registrant has conditions placed on registration and there will be a review, an explanation of the sort

of evidence the registrant would be expected to provide at the review hearing;

- I. Where conditions or a suspension has been imposed and the Committee has not directed a review hearing, reasons why and what factors led the Committee to decide that the registrant will be fit to return to unrestricted practice when the conditions or suspension lapse;
- m. Where an order for immediate conditions or suspension is made, the reasons for it and which of the grounds in Section 131 (1) or (2) the Committee is relying on;
- n. A review hearing determination should include details of the initial allegations against the registrant, a brief summary of the initial findings and the actions taken by the registrant since the last hearing; it should also include any decisions made by the Committee as to any directions or orders made and its reasons for them;
- o. Where a matter has been adjourned and an interim order imposed, quote the powers under which the order has been made.

There are many reasons that the Committee could provide and it will aid all interested parties to understand the decision. Additionally, a committee that feels obliged to give reasons is more likely to come to a reasonable outcome and it is in the Committee's own interest to produce a well reasoned decision as it is far less likely to result in the CHRE asking for additional information unless the decision appears to be clearly inappropriate.

In summary, whatever the Fitness to Practise Committee decides in a case, it needs to explain its reasons. The Committee needs to explain why it has or has not found allegations proved and why it has or has not imposed a sanction. The public, witnesses and the parties will be able to see why a particular course has been taken, even if they disagree with the outcome. The registrant and, as mentioned previously, the CHRE may have the right to appeal against the Committee's decision. A complainant might also wish to apply for leave for judicial review of the decision. A full explanation of the reasons for the Committee's decision will help them decide whether to exercise that right and will help the Court which has to consider any appeal.

## **Mitigation**

### **What counts as mitigation and when to take it into account**

Mitigation evidence can include evidence about the circumstances leading up to the incidents in question as well as evidence about the registrant's previous good character and history. It may include evidence about the time lapse since the incidents occurred and evidence of actions taken to apologise for and/or address the concerns which resulted in the proceedings being brought. A demonstration of insight of those concerns coupled with actions taken to avoid repetition of them may also be regarded as mitigating factors. Whether a factor is a mitigating circumstance or not is entirely a matter for the Committee to determine. In each case, the Committee must consider both mitigating and aggravating features as set out in the evidence they have heard. They should also take into account any representations about these matters made on behalf of the Council and the registrant; but bearing in mind always that representations are not evidence.

### **Generic Mitigating and Aggravating features**

- Impact on victim – to include both harm and potential harm
- Whether offence at work or outside work
- Whether the actions involved an abuse of trust
- Whether or not the registrant has shown insight and remorse
- Whether the offence was premeditated or spontaneous
- Whether the conduct was a one off or repeated
- Whether the registrant attempts to cover up wrongdoing
- Whether the offending has occurred in the light of previous warnings
- Whether registrant has complied with any previous assessment or conditions

### **Absence of evidence**

The Fitness to Practise Committee should only take account of evidence (for example testimonials) that is put before it and should not draw inferences from an absence of such evidence, because

- there may be cultural or other reasons why a registrant would not solicit testimonials from colleagues or patients, and
- in any event, such inferences would be likely to be influenced by the Committee's assumptions about the sort of references that might have been produced, assumptions which are untested.

### **Personal mitigation and testimonials**

The Fitness to Practise Committee should consider testimonials in the light of the factual findings that have been made. Testimonials prepared in advance of a hearing need to be evaluated in the light of the factual findings made at the hearing. The Committee should consider whether the authors of the

testimonials were aware of the events leading to the hearing and what weight, if any, to give to them.

The Fitness to Practise Committee should consider the relevance of testimonials, mitigating circumstances, remorse and apologies in relation to the primary issue of fitness to practise. If a registrant's conduct shows they are fundamentally unsuited for registration as a health care professional, no amount of remorse or apologies – or indeed positive personal qualities in other respects – can “mitigate” the seriousness of that conclusion and its impact on registration. Persuasive evidence of rehabilitation and a credible commitment to high standards in the future will be directly relevant to the question of fitness to practise, to the registrant's credit, even though there may have been a lapse in the past, possibly a serious one.

### **The relevance of mitigating circumstances**

Evidence of mitigating circumstances surrounding proven misconduct can be helpful in forming a picture of how a registrant has responded to stresses in life and professional practice, which may be significant in relation to the question of fitness to practise. Evidence that lapses have been associated with extreme circumstances which no longer exist may give some degree of reassurance. But the risk of recurrence of stressful circumstances may be relevant to the evaluation of risk (and hence to your choice of sanction).

### **At what stage should the Committee receive personal mitigation and testimonials?**

The Committee will need to consider what is the appropriate stage for them to take account of personal mitigation and testimonials.

Where there is an allegation of dishonesty, it may be appropriate for them to take into account testimonials as to a registrant's good character at the fact-finding stage, when deciding the issue of dishonesty. This is because such evidence, while not a defence in itself, may be relevant to the registrant's credibility and propensity to do what is alleged (*Donkin v The Law Society [2007] EWHC 414 (Admin)*)

Letters of testimonial which attest to the steps taken by the registrant to remedy the conduct which led to the hearing (for example from professional colleagues) and evidence of the registrant's current fitness to practise will be relevant at the point when the Committee is considering the issue of impairment. Such evidence should not be left to the sanction stage. As Mr Justice McCombe said in *Azzam v General Medical Council [2008] EWHC 2711*:

*“It must behove a FTP Panel to consider facts material to the practitioner's fitness to practise looking forward, and for that purpose to take into account evidence as to his present skills or lack of them and any steps taken, since the conduct criticised, to remedy any defects in skill. I accept ... that some elements of reputation and character may well be matters of pure mitigation, not to be taken into account at the “impairment” stage. However, the line is a*

*fine one and it is clear to me that evidence of a [practitioner's] overall ability is relevant to the question of fitness to practise”*

# Fitness to Practise Committee

## Interim Orders (s13L)

The Fitness to Practise Committee may feel that the public interest requires that an interim order be made.

The circumstances which may lead the Committee to the view that interim measures are necessary are likely to involve allegations which show a real present or likely future risk to a member or members of the public. The public interest may also require that the practitioner themselves be protected from future practice and the Committee may consider that ground as sufficient to make either order. There may be other relevant matters which you must consider bearing in mind the interests of the practitioner and weighing the Committee's obligation to protect the public and to uphold the good name of the profession of optician.

These orders may be made without the registrant present; in such a case the Committee should bear in mind that the registrant has not been present to defend his or her position and you should be careful to make such an order only where there is clear evidence of real risk to the public and/or to the registrant or some other strong public interest requires the action in question.

Where the Fitness to Practise Committee is satisfied that it is necessary for the protection of the public or in the public interest or the interests of the registrant, for his/her registration to be suspended or made subject to conditions, or an entry relating to a speciality or proficiency to be removed temporarily or made subject to conditions, you may make the following orders:

- a. Suspension of registration;
- b. Temporary removal of an entry relating to a speciality or proficiency

for a specified period not exceeding eighteen months (an interim suspension order); or

- c. The registrant's registration or the entry relating to a speciality or proficiency made conditional on the registrant's compliance for a specified period not exceeding eighteen months with such requirements as the Committee think fit to impose (an order for interim conditional registration).

When deciding whether to impose an interim order, the Committee must take into account the effect which any order might have on the registrant. The Committee must balance the need for an order against the consequences which an order would have for the registrant and satisfy themselves that the consequences are not disproportionate to the risk from which they are seeking to protect the public (*Madan v General Medical Council [2001] EWHC Admin 57*).

When setting the length of an interim suspension or conditional registration order, the Committee should bear in mind the length of time the Council requires to bring the matter to a final substantive hearing which can, in some

cases, be over 12 months. If a substantive hearing in the matter cannot be held before 18 months expires from the setting of the interim order (or before the expiry of an order that is imposed for less than 18 months), the Council will be required to apply to the High Court for an extension.

Where an order is to be made, the Committee should ensure that a date for a 6-month review is always included in the determination.

### **Revocation of Interim Orders**

Any existing interim order will not automatically lapse on the making of a subsequent substantive order. The Committee must therefore revoke any interim order immediately after it has determined the allegation (Section 13L (11) of the Opticians Act 1989)

### **Fitness to practise not impaired (warning) (s13F(5))**

A warning may be given in a case where the fitness to practise of a registrant is found **not** to be impaired. When issuing a warning, the Fitness to Practise Committee will need to consider whether a date of expiry of the warning should be set. A warning does not directly affect a registrant's ability to practise but is published on the Council's website and disclosed if anyone enquires about the registrant's fitness to practise history.

It should be borne in mind that a warning has no direct effect on practice rights. This might be appropriate if the registrant's character and circumstances are such that, whatever the history, you are confident that there is no risk to the public or to patients which require practice rights to be restricted.

A warning may be appropriate where concerns raised by the case are sufficiently serious to require a formal response, but do not reach the threshold for impairment.

Factors when a warning may be appropriate:

- Evidence that the behaviour of the registrant would not have caused patient harm;
- Early admission of facts alleged and/or:
  - insight into failings;
  - isolated incident which was not deliberate;
  - genuine expression of regret/apology.
- Acting under duress;
- Previous good history;
- No repetition of behaviour since incident;
- Appropriate rehabilitative/corrective steps have been taken; and
- Relevant and appropriate references and testimonials.

## **Impaired fitness to practise**

This guidance is designed to inform your consideration of the available options. The paragraphs which follow are therefore relevant when there has been a finding that the registrant's current fitness to practise is impaired and the issue is what to do about that. Where you conclude that the registrant remains fit to practise and does not require any restriction on his or her registration, none of the rest of this document will be relevant to your discussions and the decision of the Fitness to Practise Committee will be to take no further action but reasons will have to be given by the Committee in its determination.

### **Definition of impaired fitness to practise (s13D(2-3))**

#### **Registered individuals (including students)**

A finding of impaired fitness to practise against a registered individual can be based on any of the following:

- a. Misconduct;
- b. Deficient professional performance (not in the case of a registered student);
- c. A conviction or caution in the British Islands for a criminal offence, or a conviction elsewhere for an offence which, if committed in England and Wales, would constitute a criminal offence;
- d. The registrant having accepted a conditional offer under section 302 of the Criminal Procedure (Scotland) Act 1995 (fixed penalty: conditional offer by procurator fiscal) or agreed to pay a penalty under section 115A of the Social Security Administration Act 1992 (penalty as alternative to prosecution);
- e. The registrant, in proceedings in Scotland for an offence, having been the subject of an order under section 246(2) or (3) of the Criminal Procedure (Scotland) Act 1995 discharging him absolutely;
- f. Adverse physical or mental health; or
- g. A determination by any other UK health regulatory body that fitness to practise is impaired.

#### **Business registrants**

A finding of impaired fitness to practise against a business registrant can be based on any of the following:

- a. Misconduct (by the business registrant or a director);
- b. Practices or patterns of behaviour occurring within the business which:
  - The registrant knew or ought reasonably to have known of; and

- Amount to misconduct or deficient professional performance.
- c. The instigations by the business registrant of practices or patterns of behaviour within the business where that practice or behaviour amounts, or would if implemented amount, to misconduct or deficient professional performance;
- d. A conviction or caution in the British Islands of the business registrant or one of its directors for a criminal offence, or a conviction elsewhere for an offence which, if committed in England and Wales, would constitute a criminal offence;
- e. The registrant or one of its directors having accepted a conditional offer under section 302 of the Criminal Procedure (Scotland) Act 1995 or agreed to pay a penalty under section 115A of the Social Security Administration Act 1992;
- f. The registrant or one of its directors, in proceedings in Scotland for an offence, having been the subject or an order under section 246(2) or (3) of the Criminal Procedure (Scotland) Act 1995 discharging it or him absolutely;
- g. A determination by any other UK health regulatory body that:
  - The business registrant's fitness to carry on business as a member of that profession is impaired; or
  - The fitness of a director of the business registrant to practise that profession is impaired.

There is no statutory definition of impairment of fitness to practise. It is clear from case law that the decision on impairment should be a separate decision from the decision on whether what has been found proved amounts to misconduct, deficient professional performance or adverse physical or mental health, etc. Having made that decision, the Committee must go on to determine whether, as a result, fitness to practise is impaired. It may be that despite a registrant having been guilty of misconduct, for example, a Committee may decide that his or her fitness to practise is not impaired.

The Committee must also take into account in determining impairment whether the conduct which led to the allegation is remediable, whether it has been remedied and whether it is likely to be repeated. Certain types of misconduct (for example cases involving clinical issues) may be more capable of being remedied than others.

In coming to a conclusion on impairment, the Committee must look forward, not back. It may be that what the registrant has done is so bad, that looking forward the Committee is persuaded that the registrant is simply not fit to practise without restrictions or maybe at all. On the other hand, what the registrant has done may be such that, in the context of an otherwise unblemished career, and taking into account remedial steps taken by the registrant, the Committee may conclude that ,looking forward, fitness to practise is not impaired despite the misconduct.

(The above guidance on impairment is taken from *Cohen v General Medical Council [2008] EWHC 581*; *Zygmunt v General Medical Council [2008] EWHC*

*2643; Azzam v General Medical Council [2008] EWHC 2711; Cheatle v General Medical Council [2009] EWHC 645; Yeong v General Medical Council [2009] EWHC 1923;*

### **Available Sanctions (s13F(3) (a)-(c) and s13H)**

Where fitness to practise is found to be impaired, the Fitness to Practise Committee may impose a sanction. The purpose of any sanction is not to punish the registrant but to protect patients and the wider public interest (See section on The Public Interest above)

The sanctions available to the Committee in ascending order starting at the least severe are:

- Financial penalty (except in a health case)
- Conditions (ordinarily to be followed by a review) for up to 3 years
- Suspension (ordinarily to be followed by a review) for up to 12 months
- Erasure (except in a health case)

Where impairment is found on the ground of deficient professional performance, and the deficiency relates to the performance of a specialty or proficiency particulars of which are entered in the register, the Committee may direct that the entry relating to that specialty or proficiency be subject to conditions (for up to 3 years, removed temporarily (for up to 12 months) or removed (s13F(4)).

### **Proportionality**

The sanction should be proportionate. This means that the sanction must be appropriate bearing in mind the interests of the public and the interests of the registrant and the seriousness of the allegations found proven against the registrant. Whatever sanction you decide on should be reached after considering all of the facts of the particular case. This includes taking account of any aggravating and mitigating features of the allegation, together with any personal mitigation put forward by the registrant. In deciding what sanction is appropriate, the Committee should consider them in ascending order, starting with the least severe.

### **The Sanctions**

The following section of this guidance sets out the basis of each of the sanctions in turn.

#### **Financial penalty orders (s13H)**

The Fitness to Practise Committee has the power to impose a financial penalty order of any sum not exceeding £50,000. The order may be made in addition to, or instead of an erasure order, suspension or conditional registration order. However, for a case where the events occurred before 1 July 2005, the penalty must not exceed £1600 (this being the maximum

financial penalty available to the Disciplinary Committee prior to the inception of the amended Act).

When making a financial penalty order the Committee must specify the period or date within which the sum is to be paid.

Where the Committee is considering making such an award against an individual registrant, the registrant's ability to pay should be taken into account.

### **Conditional registration (maximum 3 years)**

#### **Consider: Will imposing conditions be sufficient to protect patients and the public interest?**

The primary purpose of conditions should be to protect the public. This means that the conditions should impose a requirement for the registrant to be under strict supervision in either his practice or other places of work. It should also be taken into consideration that the registrant may change his field of practice so the conditions placed upon him should not be restricted to just his current field of practice.

Conditions might be most appropriate in cases involving a registrant's health, performance, or where there is evidence of shortcomings in a specific area or areas of the registrant's practice.

Conditions on the registrant's registration may be imposed up to a maximum of three years. Conditional registration allows a registrant to return to practice under certain conditions – no longer being able to carry out certain procedures, for example. In some cases, the Committee may decide that further training, in addition to conditional registration, is required and which may assist in rectifying the problem.

Where the Fitness to Practise Committee has identified that there are significant shortcomings in the registrant's practice or evidence of incompetence exists, the Committee should satisfy itself that the registrant would respond positively to retraining which would thus allow the registrant to remedy any deficiencies in practice whilst protecting patients. When assessing the potential of using conditions, the Committee would need to consider objective evidence submitted on behalf of the registrant or such evidence that is available to them about the registrant's practice.

The objectives of any conditions placed on the registrant should be made clear so that when a review hearing takes place the Committee will be able to ascertain the original shortcomings and the exact proposals for their correction; with these established it will be easier to evaluate whether the aims have been achieved. Any conditions should be appropriate, proportionate, workable and measurable and should be discussed fully by the Committee before imposing them.

In drafting conditions, the Committee should place the onus of complying with them on the registrant; the Committee should not draft conditions which require a third party (including the Council) to undertake specific tasks, since the Committee has no jurisdiction over those third parties.

A bank of conditions which can be considered by a committee is shown in Annex A to this section.

This sanction may be appropriate when most or all of the following factors are apparent (this list is not exhaustive):

- No evidence of harmful deep-seated personality or attitudinal problems.
- Identifiable areas of registrant's practice in need of assessment or retraining.
- Evidence that registrant has insight into any health problems and is prepared to agree to abide by conditions on medical condition, treatment and supervision.
- No evidence of general incompetence.
- Potential and willingness to respond positively to retraining.
- Patients will not be put in danger either directly or indirectly as a result of conditional registration itself.
- The conditions will protect patients during the period they are in force.
- It is possible to formulate appropriate and practical conditions to impose on registration and make provision as to how conditions will be monitored.

### **Conditions - educational**

Before imposing educational conditions the panel should satisfy itself that:

- The problem is amenable to improvement through education.
- The objectives of the conditions are clear.
- A future panel will be readily able to determine whether the educational objective has been achieved and whether patients will or will not be avoidably at risk.

When imposing conditional registration it is also normally appropriate to direct a review hearing (see section below on Review Hearings).

If the Committee directs conditional registration, (or in cases based on deficient professional performance, a direction that an entry relating to a specialty or proficiency be made conditional) it should also consider whether the conditions should take effect immediately, and give reasons for its decision (see section below on Immediate orders for conditions or suspension (where direction made for conditional registration, suspension or erasure) (s13I))

### **Immediate orders for conditions or suspension (where direction made for conditional registration, suspension or erasure) (s13I)**

Financial penalties, conditional registration, suspension and erasure orders cannot take effect until the end of the appeal period or, if an appeal has been made, before the appeal has been concluded. In practice therefore, if a registrant appeals, the sanction imposed may not come into force for some months. However, the Fitness to Practise Committee has the power to

impose immediate suspension or conditional registration to cover the appeal period.

If the Fitness to Practise Committee has made a conditional registration order, it should consider whether there are reasons for imposing immediate conditions. Before doing so the Committee must be satisfied that to do so is necessary for the protection of members of the public, otherwise in the public interest or in the best interests of the registrant

If the Committee has made a direction for suspension or erasure (or removal of an entry relating to a speciality or proficiency) it should consider whether there are reasons for ordering immediate suspension. Before doing so the Committee must be satisfied that to do so is necessary for the protection of members of the public, otherwise in the public interest or in the best interests of the registrant.

If the Committee thinks there may be grounds for immediate conditions or suspension, it must inform the individual of these concerns and invite representations on this issue. (The individual should have been informed in the Notice of Inquiry of the possibility of an interim order being applied for at this stage). The Fitness to Practise Committee must then decide whether or not to impose an immediate order and give its reasons in the usual way.

### **Suspension (maximum 12 months) (s13F)**

**Consider: Does the seriousness of the case require temporary removal from the register? Will a period of suspension be sufficient to protect patients and the public interest?**

This sanction may be appropriate when some or all of the following factors are apparent (this list is not exhaustive):

- A serious instance of misconduct but where a lesser sanction is not sufficient.
- Not fundamentally incompatible with continuing to be a registered professional.
- No evidence of harmful deep-seated personality or attitudinal problems.
- No evidence of repetition of behaviour since incident.
- Panel is satisfied the registrant has insight and does not pose a significant risk of repeating behaviour.
- In cases where the only issue relates to the registrant's health, there is a risk to patient safety if the registrant was allowed to continue to practise even under conditions.
- When imposing a period of suspension it is also normally appropriate to direct a review hearing (see section below on Review Hearings).

If the Committee directs a period of suspension, (or in cases based on deficient professional performance, temporary removal of an entry relating to

a specialty or proficiency) it should also consider whether the suspension should take effect immediately, and give reasons for its decision (see section above on Immediate orders for conditions or suspension (where direction made for conditional registration, suspension or erasure) (s13I))

### **Review hearing (Fitness to Practise Rules 2005 Part 9)**

The Fitness to Practise Committee should direct that there be a review of an interim order.

The Committee should also normally direct that there be a review of a conditional order or a suspension order before they expire. This is because before a suspension or conditions are lifted, the Fitness to Practise Committee will need to be reassured that the registrant is fit to resume practice either unrestricted or with conditions or further conditions.

The Committee will also need to satisfy itself that the registrant has fully appreciated the gravity of the offence, has not re-offended and has maintained his or her skills and knowledge and that the registrant's patients will not be placed at risk by resumption of practice or by the imposition of conditional registration.

The Committee should consider whether the registrant has produced any information or objective evidence regarding these matters. Where the Committee has made a decision not to direct a review hearing, it should explain why and detail the factors which led it to decide that the registrant would be fit to resume unrestricted practice when the suspension or conditions expire.

At a review hearing, where a registrant has not shown tenacity in pursuing targets for attendance at relevant courses in connection with conditional registration and where the training institutions have offered to provide further tutorials to the registrant, the Committee should always consider elevating those recommendations into conditions.

At a review hearing, if the Committee considers that the registrant will not improve his/her performance through existing conditions without further supervision, the Committee should always consider imposing further educational or training conditions.

A review hearing will always be treated as a substantive hearing

### **Erasure (s13F)**

**Consider: Is erasure the only sanction which will be sufficient to protect patients and the public interest? Is the seriousness of the case compatible with ongoing registration? Can public confidence in the profession be sustained if this registrant is not removed from the register?**

Erasure from the register is appropriate where this is the only means of protecting patients and/or maintaining public confidence in the optical profession. The Privy Council (*Bijl v GMC (Privy Council Appeal No. 78 of 2000)*), however, has emphasised that a committee should not feel it necessary to remove:

*“...an otherwise competent and useful [registrant] who presents no danger to the public in order to satisfy [public] demand for blame and punishment.”*

But this should be weighed against the words of Lord Bingham (*Bolton v Law Society, adopted by the Privy Council in the case of Dr Gupta [2001]*):

*“The reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is part of the price.”*

The same judgement emphasised the Committee’s role in maintaining confidence in the profession and in particular that erasure was appropriate where, despite a practitioner presenting no risk:

*“...the appellant’s behaviour had demonstrated a blatant disregard for the system of registration which is designed to safeguard the interests of patients and to maintain high standards within the profession.”*

This sanction is likely to be appropriate when the behaviour is fundamentally incompatible with being a registered professional and involves **any** of the following (this list is not exhaustive):

- Serious departure from the relevant professional standards as set out in the code of conduct for registrants and business registrants.
- Doing serious harm to individuals (patients or otherwise), either deliberately or through incompetence and particularly where there is a continuing risk to patients.
- Abuse of position/trust (particularly involving vulnerable patients) or violation of the rights of patients.
- Offences of a sexual nature, including involvement in child pornography.
- Offences involving violence.
- Dishonesty (especially where persistent and covered up).
- Persistent lack of insight into seriousness of actions or consequences.

If the Committee directs erasure (or in cases based on deficient professional performance, removal of an entry relating to a specialty or proficiency) , it should also consider whether erasure or removal should take effect immediately, and give reasons for its decision (see section above on Immediate orders for conditions or suspension (where direction made for conditional registration, suspension or erasure )(s131))

**Sexual misconduct.** A wide range of conduct is encompassed in this category from criminal convictions for sexual assault, sexual abuse of children (including child pornography) to sexual misconduct with patients, patients' relatives or colleagues. The risk to patients is vitally important and the misconduct is particularly serious where there is an abuse of the registrant's special position of trust or where a registrant has been registered as a sex offender. In such cases erasure has been judged appropriate:

*"The public and in particular...patients, must have confidence in the [optical] profession whatever their state of health might be. The conduct as found proved...undoubtedly undermines such confidence and a severe sanction was inevitable. Their Lordships are satisfied that [removal from the register] was neither unreasonable, excessive or disproportionate but necessary in the public interest."*

**Cases involving child pornography.** In most cases where a committee has not imposed the most severe sanction, the CHRE has had concerns that the committee has failed to investigate the case sufficiently. It may well be that there is a natural reluctance to wish to know the full details in light of the distressing nature of the evidence. However, offences of this sort vary considerably according to the sort of material possessed and the committee need to know exactly what the registrant did possess. There is considerable difference between possession of pictures at the different levels of the Oliver scale (*R v (1) Oliver (2) Hartrey (3) Baldwin - [2003] EWCA Crim 2766*) and the committee should know how many pictures would be classified at each level (graded from 1 (lowest level) to 5 (highest level)).

In some cases it may be necessary for the members to view some of the images. Possession of such images for the purposes of the committee's deliberation would not constitute an offence, although clearly the handling of such images, and particularly their circulation, would have to be done in a careful and sensitive way.

In the *Fleischmann* case the judge ruled that the sanction of 12 months suspension in a matter involving a conviction for possession of a large collection of child pornography at varying levels, including some at the highest levels, was unduly lenient; he felt that erasure was the only appropriate sanction in this case. The judge felt that the Committee had failed to appreciate the significance of the sentence imposed by the Crown Court. The judge went on to say that as a general principle where a practitioner has been convicted of a serious criminal offence or offences, he should not be permitted to resume his practice until he has satisfactorily completed his sentence.

The judge also expressed concern about the Committee taking account of the registrant's defence that he was suffering from depression at the time of the offences. He said that the gravity of such offending is not reduced by the asserted motivation. In short, other people who have suffered from depression have not resorted to such criminal behaviour.

**Dishonesty.** The Council's code of conduct for individual registrants states that the registrant must '*be honest and trustworthy*'. Dishonesty is particularly serious as it may undermine trust in the profession. Examples of dishonesty are:

- Defrauding an employer, a colleague or an insurance company;
- \*Defrauding the NHS;
- Improperly amending or changing the detail on patient records;
- Submitting or providing false references and information on a CV;
- Research misconduct;
- Failure to disclose to the Council or employer or PCT criminal convictions and cautions.

The term 'research misconduct' is used to describe a range of misconduct from presenting misleading information in publications to dishonesty in clinical trials. Such behaviour can undermine the trust that the public and the profession have in optometry as a science regardless of whether this leads to direct harm of the patient and because it has the potential to have far reaching consequences, this type of dishonesty is particularly serious.

\* *The Privy Council in Dr Shiv Prasad Dey-v-GMC (Privy Council Appeal No. 19 of 2001) has emphasised that:*

*'...Health Authorities must be able to place complete reliance on the integrity of practitioners; and the Committee is entitled to regard conduct which undermines that confidence as calculated to reflect on the standards and reputation of the profession as a whole.'*

**Failing to provide an acceptable level of patient care and persistent clinical failure.** Matters in this category are where the registrant has not acted in the patient's best interests and has failed to provide an adequate level of care, falling well below the professional standards expected of a registered optometrist or dispensing optician and where a persistent failure to provide clinical care is apparent.

A particularly important consideration in such cases is whether or not a registrant has (or has the potential to develop) insight into these failures. Where this is not evident, it is likely that conditions on registration or suspension may not be appropriate or sufficient (Dr Purabi Ghosh-v-GMC (Privy Council Appeal No. 69 of 2000 and Dr John Garfoot-v-GMC (Privy Council Appeal No. 81 of 2001)).

**No further action.** Where a registrant's fitness to practise is impaired the Fitness to Practise Committee would usually take action in order to protect the public interest (protection of patients, maintenance of public confidence in the profession and declaring and upholding proper standards of conduct and behaviour).

There may, however, be **exceptional** circumstances in which a Committee might be justified in taking no action. Such cases are likely to be very rare. No action might be appropriate in cases where the registrant has demonstrated considerable insight into his/her behaviour **and** has already embarked on, and completed, any remedial action the Committee would otherwise require him/her to undertake. The Committee may wish to see evidence to show that the registrant has taken steps to mitigate his/her actions.

In such cases it is particularly important that the Committee's determination sets out very clearly the reasons why it considered it appropriate to take no action notwithstanding the fact that the registrant's fitness to practise was found to be impaired.

### **Costs and expenses (Fitness to Practise Rules 2005 Part 8)**

The Fitness to Practise Committee has the power to summarily assess the costs of any party to the proceedings and order any party (*the GOC or the registrant*) to pay all or part of the costs or expenses of any other party.

Where the Committee is considering making such an award against an individual registrant, the registrant's ability to pay should be taken into account.

Before making an order for costs against the Council, the Fitness to Practise Committee should take into account the following:

- A professional regulatory body such as the Council is in a wholly different position from an ordinary litigant and the general rule in litigation that "costs follow the event" has no direct application;
- Unless the complaint is improperly brought, or, for example, proceeds, as a "shambles from start to finish", an order for costs should not ordinarily be made against [the Regulator] on the basis that costs follow the event;
- The "event" is a factor to consider but is not the starting point;
- The Council brings proceedings in the public interest and to maintain proper professional standards. "For [a Regulator] to be exposed to the risk of an adverse costs order simply because properly brought proceedings were unsuccessful might have a chilling effect on the exercise of its regulatory obligations, to the public disadvantage".

(Principles from *Baxendale – Walker v The Law Society [2007] EWCA Civ 233*)