

**BEFORE THE FITNESS TO PRACTISE COMMITTEE
OF THE GENERAL OPTICAL COUNCIL**

GENERAL OPTICAL COUNCIL

F(22)31

AND

BHARAT AGGARWAL (01-9535)

**DETERMINATION OF A SUBSTANTIVE HEARING
18-20 April 2023**

Committee Members:	Sara Fenoughty (Chair) Diane Roskilly (Lay) Victoria Smith (Lay) Ann Barrett (Optometrist) Kalpana Theophilus (Optometrist – recused on 18 April 2023)
Legal adviser:	Austin Stoton
GOC Presenting Officer:	Deborah Tompkinson (Counsel)
Registrant present/represented:	Present and represented
Registrant representative:	George Heimler (Counsel)
Hearings Officer:	Terence Yates
Facts found proved:	1, 2 and 3a and 3 c
Facts not found proved:	4a and 4c
Misconduct:	Not found

ALLEGATION (Original)

The Council alleges that you, Bharat Aggarwal (01-9535), a registered optometrist whilst working at Boots Opticians:

1. *On one or more occasions between 23 November and 28 December 2019, caused or allowed the ordering of trial contact lenses at the [redacted] practice for your own personal use*
2. *On or around 13 December 2019, caused or allowed the ordering of trial contact lenses at the [redacted] practice for your own personal use: and/or*
3. *Your actions in 1 and 2 above were inappropriate in that you:*
 - a) *ordered contact lenses, without a Boots [redacted] or, as appropriate, Boots [redacted] practice patient record or prescription, for your personal use: and/or*
 - b) *took contact lenses from the trial bank without consent for your personal use*
 - c) *did not pay for some or all of the contact lenses*
4. *Your actions in 1 and 2 above were dishonest in that you:*
 - a) *ordered contact lenses, without a Boots [redacted] or, as appropriate, Boots [redacted] practice patient record or prescription, for your personal use: and/or*
 - b) *took contact lenses from the trial bank without consent for your personal use*
 - c) *did not pay for some or all of the contact lenses*

and by virtue of the facts set out above, your fitness to practise is impaired by reason of misconduct

ALLEGATION (as amended)

The Council alleges that you, Bharat Aggarwal (01-9535), a registered optometrist whilst working at Boots Opticians:

1. *On or around 28 December 2019, caused or allowed the ordering of trial contact lenses at the [redacted] practice for your own personal use.*
2. *On or around 13 December 2019, caused or allowed the ordering of trial contact lenses at the [redacted] practice for your own personal use: and/or*
3. *Your actions in 1 and 2 above were professionally inappropriate in that you:*
 - a) *ordered contact lenses, without a Boots [redacted] or, as appropriate, Boots [redacted] practice patient record or prescription, for your personal use: and/or*
 - c) *did not pay for some or all of the contact lenses*
4. *Your actions in 1 and 2 above were dishonest in that you:*
 - a) *ordered contact lenses, without a Boots [redacted] or, as appropriate, Boots [redacted] practice patient record or prescription, for your personal use: and/or*
 - c) *did not pay for some or all of the contact lenses*

and by virtue of the facts set out above, your fitness to practise is impaired by reason of misconduct

DETERMINATION

Recusal Determination

Ms Theophilus was called to sit as a Registrant member of the Fitness to Practise Committee. The papers in the case were provided to the Committee members on the morning of the 18 April 2023 the day the hearing was due to commence. On reading the papers it became apparent to Ms Theophilus that one of the Boots Ltd witnesses, a Ms B was known to Ms Theophilus, albeit under her former name of [redacted]. Ms B was for some three years the manager of Ms Theophilus when Ms Theophilus was in practice at Boots. Ms Theophilus left Boots after thirty years employment with them 'following discussion' in relation to her position.

Ms Theophilus apprised the parties of her potential conflict and, following time for consideration, the parties both ultimately submitted that Ms Theophilus should recuse herself. The Committee accepted the Legal Adviser's advice on the relevant considerations of bias and the appearance of bias. Ms Theophilus individually and the Committee collectively determined that there was a real possibility that the fair minded observer would conclude there was real possibility of apparent bias on the specific facts of this case. Following this, Ms Theophilus recused herself from sitting as a committee member.

Under The General Optical Council (Committee Constitution) Rules 2005, Rule 25 provides for the continuation of the hearing the Committee being quorate.

Determination of the Council's application to amend allegation 1, 3, 3b, 3c, 4 and 4b

The Council applied under Rule 46 (Order of Proceedings) paragraph 20 to amend allegation 1, 3, 3b, 3c, 4 and 4b.

The Committee carefully considered the submissions of both Ms Tomkinson, on behalf of the Council and Mr Heimler, on behalf of the Registrant. The application was agreed by the Registrant. The Committee concluded that partially acceding to the application was in the interest of justice. The Committee was minded that this case has been ongoing for several years.

The Committee agreed to the amendments to particular 1 and the stem of particular 3, it agreed to the deletion of particulars 3b and 4b, it did not agree to the deletion of 3c. It did not agree to the amendment of the stem of particular 4 by insertion of the words "(namely, by the standards of ordinary decent people)" after the word "dishonest".

The Committee did not find that acceding to the application prejudiced the Registrant. The evidence relied on by the Council has not altered and the thrust of the Council's case has not changed. The Committee did not consider that the Registrant would be prejudiced by the amendments. The Committee further considered that the amended allegations adequately covered the extent of the breaches advanced by the Council.

Evidence

The bundles of evidence before the Committee included witness statements from:

Mr A

Ms A

Ms B

The Registrant

Background to the allegations

The Registrant had worked as a locum optometrist for Boots and other companies since he left private practice in 2003. On 3 January 2020, Mr A, the practice manager at Boots Opticians in [redacted], was approached by Ms A a student optometrist. She was worried about the Registrant having ordered trial contact lenses. The Registrant asked her to order the trial lenses. Ms A asked him if they were for him and he said yes. Mr A said she had asked the Registrant for a patient record but he didn't have one. The Registrant asked Ms A to order 6 packs of trial lenses (30 pairs) and to leave them in the drawer and he would pick them up next time he was in the store.

The contact lens trial order form is used in the [redacted] branch to order trial contact lenses. Mr A said there was no formal process for keeping this order form it would be dependent on the circumstances of the patient in each case. The specification section of the order form records the contact lens details, the base curve, the diameter, the type of lenses required and how many lenses are required. He added that normally, with a trial lens, an order would be placed for a ten-day supply of a reusable lens for each eye. He said there is no policy within Boots which specifies the maximum number of trial contact lenses which can be given to an individual patient, however it would be rare for a patient to receive trial contact lenses which would last 30 days, usually the trial period is considerably less than this at approximately 10 days.

Mr A emphasised that the form was not an official Boots form. It was:

"...something we used in the [redacted] store to counterbalance the number of orders we had to put through the system and to make sure there is an easy system we can use to track orders and show that things are being done well and properly."

Mr A said that, in the [redacted] store when optometrists carry out a sight test and they want trial contact lenses to be ordered they would fill out contact lens trial order form to say what they wanted, who it was for and what actions needed to be done. They would hand the form to the clinic manager and the manager would get an assistant to make the order. The order is done through an online ordering service to the supplier of the lenses. Once the lenses have arrived, they would be checked by a registrant. The order would be checked by cross referencing with the patient's record card.

Ms A ordered the contact lenses. She later spoke to Ms C an optician and assistant manager. Mr A evidenced that on the 28 December 2019 the Registrant had given an

order form for 30 pairs (6 packs of ten) of daily trial lenses with a prescription of minus 3. Mr A stated that 30 pairs was a lot for a trial as normally the store would order 10 pairs for a trial (1 pack of ten). Mr A was unable to find a copy of the Registrant's spectacle prescription in the store's clinical paper records, nor a record of an eye test, nor whether the Registrant had undergone a contact lens assessment. He was unable to find any clinical records for the Registrant.

The Registrant also worked at another Boots store near [redacted]. Mr A said he called and spoke to Mr B, the store manager there. Mr B also identified an order on the [redacted] store system in the Registrant's name dated the 13 December 2019 for four packs of ten (20 pairs) trial lenses. Mr B confirmed that his store did not have clinical records for the Registrant.

The trial contact lenses that were received to fulfil the order of the 28 December 2019 were concealed by Mr A from the Registrant. To continue his investigation Mr A took a statement from Ms A on the 7 February 2020. Ms A stated to Mr A that the Registrant had asked her *"if she had seen any contact lenses for him"*. After she had pleaded ignorance of their whereabouts the Registrant said that he would give her a replacement order form.

At around 4.10pm on the 7 February Mr A went to speak to the Registrant. He says he saw another order form in the testing room where the Registrant was located. Mr A sat down and held up the box of trial lenses with the original order form attached to it. When Mr A held them up, he says that the Registrant's first response was *'oh great you've got them'* he then went to take them from Mr A. The Registrant told Mr A that the lenses were for personal use for him to use whilst he was on holiday.

Mr A said he asked the Registrant why he thought he had the right to order the lenses, and the Registrant stated that they were free lenses. Mr A replied that they were not free and were the property of J&J and they are used to help the store fit customers with new lenses in order to sell them. Mr A observed that the Registrant was quite shocked because he believed that they were free. Mr A stated that staff are expected to pay so a locum would not be allowed them for free. Mr A said he explained to the Registrant that the store had no clinical record for him. He said the Registrant then offered to make a record so there was something on file. Mr A declined that offer on the basis that *"we shouldn't be forging clinical information after the event."*

After their discussion, Mr A said that the Registrant took further lenses from the trial bank which were sitting on the side in the test room. Mr A took them back from the Registrant. The Registrant gave Mr A the impression that he thought he was being:

"a bit stupid for raising the issue of taking the lenses. He didn't see it as an issue at all. He commented that he believed that they were free lenses and I shouldn't be making a big deal about it. He definitely thought he was in the right because he commented again that they were free lenses and I shouldn't have an issue with it and that he should be allowed to take the lenses."

Ms A was at the time a student dispensing optician. She evidenced that:

"It is against Boots guidelines and policies for staff to order their own products. A manager would order and authorize it. Also, he shouldn't be ordering contact lenses without a prescription or clinical record card."

Ms A stated that at the end of January or the beginning of February 2020 the Registrant had asked her where the lenses were that he had earlier ordered on the 28 December 2019. The Registrant was unable to find the trial lenses. He then went on to ask her to order a further 30 lenses. He asked her to order lenses with a prescription of minus 3. She asked the Registrant for a record card, her evidence was that:

“he said he didn’t need one and I told him he shouldn’t be ordering contact lenses, but he said it was fine.”

Later on the same day whilst Ms A was talking to Mr A, she said the Registrant approached her again about ordering more lenses. She said the Registrant asked her whether he should give the completed order form to either her or to Ms D, the Clinic Manager.

Mr A said that trial lenses are provided to opticians by suppliers. Johnson and Johnson (“J&J”) provided the trial lenses to the Boots [redacted] store. Boots does not charge for trial lenses. J&J provide a free supply of trial contact lenses. He said there is no policy within Boots which specifies the maximum number of trial contact lenses which can be given to an individual patient, however it would be rare for a patient to receive trial contact lenses which would last 30 days, usually the trial period is considerably less than this at approximately 10 days.

Ms B is the Professional Services Officer for Boots Opticians. She produced the Contact Lens standard operating procedure (SOP) Supply of Contact Lens 2016. The Committee is not sighted of any evidence that that policy was ever provided directly to the Registrant or that the Registrant was ever trained on the policy. The Committee notes that that policy refers to the clinical and administrative requirements for fitting contact lenses.

Admissions in relation to the particulars of the allegation

The Registrant admitted particulars 1, 2, and 3 of the allegations.

Legal Advice

The sole consideration for the Committee at this stage is whether or not the allegations are made out. It must approach its task by considering all of the evidence. The standard of proof is the balance of probabilities, and the burden of proving the Allegation remains on the Council.

If a registrant wishes to rely on a particular proposition, then there is an evidential burden upon him to satisfy the Committee of that proposition. However, there is no burden on him to disprove any part of the council’s case. That would amount to a reverse burden.

The Committee should consider whether a particular aspect or part of the evidence drives it to a conclusion that can be relied upon and assists in determining the allegations. Which parts of the evidence are compelling is a matter of judgement, and the weight applied to the written evidence, and its interpretation, is a matter for the Committee.

The law on dishonesty is found in *Ivey v Genting Casinos (UK) Ltd t/a Crockfords* [2017] UKSC 67:

“When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual’s knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held.”

The Committee must focus first on what the Registrant knew or believed to be the factual circumstances in which his conduct occurred, not on whether he believed his conduct was honest. The court went on to say:

“When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest.”

The Committee has a number of illustrations in the evidence which assist it in its first consideration, which is to ascertain the Registrant’s actual state of knowledge or belief as to the facts. Once it has dealt with that question, the second question falls to be determined.

The Committee is invited by the Council to draw a number of inferences from the written evidence. An inference is a conclusion based on evidence and reasoning. There is a difference between an inference and a conclusion of fact based on evidence. When considering whether to draw an inference it would normally be necessary to dispel any competing inference. If the facts are capable of supporting a number of different conclusions, the Committee should not be driven to make one particular inference in preference to others. Before drawing an inference, it is necessary to be sure that there is no coexisting evidence which would weaken or destroy the inference or conclusion the Committee is invited to reach.

Determination of the Facts

Ms Tomkinson for the Council correctly identified that the Committee had concerns about the complete lack of oral evidence. It is a matter for each party as to how they present their case, however, the Committee was concerned that it had been invited to draw inferences of fact from disputed evidence which could have been tested by calling the witnesses who the Committee was informed were available. Whilst it would have been very helpful to have heard from the Council’s witnesses and the Registrant, the Committee had ample undisputed evidence about the Registrant’s state of mind at the time of the allegation, and it was of the view that it could therefore reach a fair conclusion notwithstanding the absence of the oral evidence.

Particular 4:

The Committee finds that the Registrant’s reaction to being shown the trial lenses by Mr A was consistent with his understanding that he was permitted to order the trial

lenses. He later went on to ask Ms A to order more trial lenses in front of Mr A. This demonstrated to the Committee that there was no element of concealing his actions from his senior colleagues. Further the Registrant was, on Mr A's own evidence, quite shocked because he believed that the trial lenses were free. The Registrant's name was on the order forms, which was further evidence that he was acting openly in ordering the trial lenses. The Committee did not consider this to be consistent with a belief that his actions were impermissible.

In an email from Boots to the Council it is stated that:

“Mr. Aggarwal is not a Boots employed member of staff so would not be on our staff policies. We have a staff discount policy and security rules for purchases but again he is not someone who is entitled to use these benefits so would not be give [sic] the policy. However, he will have a contract he signed with head office as a locum with Boots.”

The Committee accepts that evidence and finds that the Registrant was not sighted of the Boots Contact Lens policy. The Council has not provided any evidence which would indicate that the Contact Lens policy was actively drawn to the Registrant's attention.

The Registrant had asked Ms A whether he should give the completed order form to either her or to Ms D, the clinic manager. The Committee finds this to be a further example of the Registrant's transparent conduct, and consistent with his evidence that he did not believe he was doing anything wrong at the time.

The Registrant was aware that trial lenses were freely supplied by J & J and the Committee finds that, whilst there was a relatively high number of lenses ordered under the trial scheme, he had acted on the basis that it was permissible to avail himself of the trial lenses as he did.

The Committee was asked to draw a number of inferences that, it was submitted, pointed to dishonesty. The Committee was unable to find any evidential basis upon which an inference of dishonesty could properly be based. The Registrant was aware that the trial lenses were freely supplied by J & J and had acted in the belief that he was permitted to use that service.

When challenged by Mr A, the Registrant accepted straight away that he made the orders. His response, when challenged, was consistent with the actions of a person who believed that his conduct had been acceptable, but was open to being challenged and corrected by a senior colleague.

The Committee had no information about whether the Registrant had ordered trial lenses for himself in any of the other practices within which he had worked over his long career. The Committee accepted his evidence that it was not unusual for optometrists to be offered trial lenses for personal use as part of the marketing strategy of the manufacturers, and that he understood that they were supplied to Boots free of charge for this purpose.

It was submitted on behalf of the Council that an honest person doesn't ask a student to make an order from them. The Committee struggled with the relevance of that submission. As a locum the Registrant did not have access to the Boots computer system to order lenses. In any event that submission does not account for the agreed

evidence that the Registrant had asked Ms A to order lenses but then went on to say that he could ask Ms D instead. Irrespective of whom he asked, the Committee finds that asking a Boots employee to place the order for him and having his own name registered against the order is not evidence of dishonest conduct.

The Committee was invited to make inferences from the fact that Ms A went to Person 1, a colleague, to express her misgivings about the request to place the order. The Committee did not find that this was evidence of dishonesty. At its highest it is evidence that Ms A was of the view that there may have been an excessive order being made. This is consistent with her statement, in which she said she thought the Registrant was “taking the p” and that if he needed more lenses, he should pay for them.

The Committee can find no basis to contradict the Registrant’s evidence that he thought he was allowed to order the free trial lenses as he did.

As to the order at the [redacted] store, the Registrant makes plain in his own evidence that

“I ordered’ the lenses on 13 December 2019. I spoke to the designated person [Ms E]. There were no forms to complete. I told her they were for myself. She put the order through. We both knew the intention and the purpose of the order for the provision of lenses for me.”

The Council ask the Committee to infer dishonesty from the Registrant not having called Ms E to evidence that order. The Committee observes that the burden of proof is on the Council to prove the case; there is no burden placed on the Registrant, save insofar as an evidential burden is required to advance the fact that the Registrant wishes to rely on.

The Committee struggled with the Council’s submission that producing evidence of the Registrant’s prescription would have been inappropriate. It was unclear why the Registrant was in fact not asked to produce his prescription, if that was the Boots requirement. The Registrant’s offer to “make a record” was not necessarily a suggestion of falsifying or backdating records. The production of the relevant in date prescription, from an examination elsewhere albeit after the event, could have assured Mr A that the lenses had been ordered in accordance with the correct prescription, had that been considered necessary.

The policy on lenses related to the clinical and administrative considerations of supplying lenses including trial lenses to patients, it did not deal with the limits on the personal use of trial lenses by registered staff including locums.

The Committee therefore finds that the circumstances of the Registrant’s actions did not amount to dishonesty; it finds that he had acted on the basis that he was entitled to do what he did. The Committee does not find the first part of the test for dishonesty to be proven. The Committee further determined that ordinary decent people who were aware of all of the facts of the case would not find the Registrant dishonest and that therefore the test in *Ivey and Genting* is not made out. The Committee therefore finds that allegation 4 is not proven.

Findings in relation to misconduct

The Committee carefully considered the submissions of both parties. On behalf of the Council, Ms Tompkinson submitted that the Registrant's conduct breached Standard 8 relating to patient records and Standard 17 in relation to conduct damaging the reputation of the profession.

The Legal Adviser advised that whilst there is no statutory definition of misconduct, misconduct is qualified by the word 'serious'. The concept of seriousness has been considered in a number of different authorities.

In *Nandi v GMC* [2004] EWHC 2317 (Admin) it was said that the acts or omissions in question must amount to "*conduct which would be regarded as deplorable by fellow practitioners*"

In *Meadow v GMC* [2007] EWCA Civ. 1390 it was said that the conduct must amount to an "*elementary and grievous failure*".

In *Preiss v GDC* [2001] 1 WLR 1926 at [28] it was said that the conduct must be "*sufficiently serious to call for the opprobrium that inevitably attaches to a disciplinary offence*":

In *Calhaem v General Medical Council* [2007] EWHC 2606 (Admin) it was held that A single negligent act or omission is less likely to cross the threshold of "misconduct" than multiple acts or omissions. Nevertheless, and depending upon the circumstances, a single negligent act or omission, if particularly grave, could be characterised as "misconduct".

The Registrant had not produced his own patient record or his own prescription when he requested the lenses on either occasion. The Committee found that the first order of the lenses from the [redacted] store on the 13 December 2019 was not inappropriate. However, the combined effect of ordering 100 lenses (50 pairs) crossed the threshold of propriety. By the time he ordered the trial lenses on the second occasion, it should have been reasonably apparent that his use of those lenses had gone beyond the purpose for which they were supplied to Boots. Although the Registrant may, in the past, have benefitted from a generous supply of free trial lenses when he was in practice for himself, there was no reason to suppose that, as a locum, he would be allowed to obtain a supply of contact lenses through this route. The number of lenses ordered was, by the evidence of Mr A, and the evidence of the Contact Lens Policy, significantly more than would usually be supplied to a customer as a trial.

The Committee considered, however, that there was no particular Boots policy which would have guided the Registrant as to what was and was not permissible insofar as ordering trial contact lenses was concerned. Neither was there any evidence that the Registrant had been advised of the extent to which trial lenses could be ordered for personal use. In that regard the transgression was as much related to an administrative failure as it was to a breach of GOC standards. However, and notwithstanding the lack of administrative guidance the Committee considered that the Registrant had inappropriately taken advantage of the J&J trial lens facility. The Committee found that as a matter of professional conduct and common sense a practitioner should be aware that a free sample has a limited scope for proper use.

There are aspects of an optometrist’s clinical practice where self-treatment would be either inappropriate or could amount to misconduct. In this case the mischief which the rules militate against is the risk to patient safety. The Registrant had failed to produce his prescription, so there was no complete contemporary audit trail of the transaction. Procuring contact lenses from an existing prescription does not amounts to a breach of the rules or a clinical failing. The Committee observed it was not part of the Council’s case that the Registrant did not have an in date prescription.

It was submitted to the Committee that an optometrist procuring contact lenses for themselves was analogous to a physician self-prescribing controlled drug. The Committee did not consider the two situations to be analogous or comparable. Neither did the Committee consider the level of risk between the two situations to be comparable. The Committee observed that there was no issue of clinical risk suggested in this case and could not see how on the facts of this case that any clinical risk could have arisen.

Whilst the Committee found the Registrant’s conduct, in the round, was not in keeping with the desired standard of behaviour of how a Registrant should conduct themselves, the Committee found that the Registrant’s conduct, in all the circumstances of this particular case fell short of the threshold of misconduct as described by the authorities above.

Chair of the Committee: Sara Fenoughty

Signature **Date: 20 April 2023**

Registrant: Bharat Aggarwal

Signature **Date: 20 April 2023**

FURTHER INFORMATION
Transcript
A full transcript of the hearing will be made available for purchase in due course.

Appeal

Any appeal against an order of the Committee must be lodged with the relevant court within 28 days of the service of this notification. If no appeal is lodged, the order will take effect at the end of that period. The relevant court is shown at section 23G(4)(a)-(c) of the Opticians Act 1989 (as amended).

Professional Standards Authority

This decision will be reported to the Professional Standards Authority (PSA) under the provisions of section 29 of the NHS Reform and Healthcare Professions Act 2002. PSA may refer this case to the High Court of Justice in England and Wales, the Court of Session in Scotland or the High Court of Justice in Northern Ireland as appropriate if they decide that a decision has been insufficient to protect the public and/or should not have been made, and if they consider that referral is desirable for the protection of the public.

Where a registrant can appeal against a decision, the Authority has 40 days beginning with the day which is the last day in which you can appeal. Where a registrant cannot appeal against the outcome of a hearing, the Authority's appeal period is 56 days beginning with the day in which notification of the decision was served on you. PSA will notify you promptly of a decision to refer. A letter will be sent by recorded delivery to your registered address (unless PSA has been notified by the GOC of a change of address).

Further information about the PSA can be obtained from its website at www.professionalstandards.org.uk or by telephone on 020 7389 8030.

Contact

If you require any further information, please contact the Council's Hearings Manager at 10 Old Bailey, London, EC4M 7NG or, by telephone, on 020 7580 3898.