



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

GENERAL OPTICAL COUNCIL

F(21)27

AND

ZBIGNIEW ASHLEIGH (01-20086)

**DETERMINATION OF A SUBSTANTIVE HEARING
MONDAY 06 MARCH – THURSDAY 09 MARCH 2023**

Committee Members:	Ms Eileen Carr (Chair/Lay) Ms Carolyn Tetlow (Lay) Mr David Abbott (Lay) Ms Ann Barrett (Optometrist) Mr Christian Dutton (Optometrist)
Legal adviser:	Ms Aaminah Khan
GOC Presenting Officer:	Ms Tope Adeyemi
Registrant present/represented:	Yes and represented
Registrant representative:	Ms Katie Holland AOP Mr David Claxton - Presenting
Hearings Officer:	Ms Abby Strong-Perrin
Facts found proved:	1, 2(i), 2(ii), 2(iii)
Facts not found proved:	None
Misconduct:	Found
Impairment:	Impaired
Sanction:	Four-month suspension (Without Review)
Immediate order:	No Immediate Order

ALLEGATION

That being a registered optometrist, the fitness to practise of Mr Zbigniew Ashleigh is impaired by reason of misconduct, in that:

1. *On 25 November 2020 you sent an unsolicited e-mail which contained the following:*

“Where were you born? I’d like to know if you have a UK passport, a dual passport or none”.

2. *The language used as set out in charge 1 above was inappropriate as:*

(i) it was capable of being understood as discriminatory and/or racist; and/or

(ii) it was discriminatory and/or racist; and/or

(iii) it was intended to be discriminatory and/or racist.”

AND that by reason of the matters alleged above your fitness to practice is impaired by reason of your misconduct.

DETERMINATION

Admissions in relation to the particulars of the allegation

1. The Registrant admitted particulars 1, 2(i) and 2(ii) of the allegation. Particular 2(iii) was denied and therefore the Committee proceeded to hear evidence in relation to whether the language used by the Registrant was intended to be discriminatory and/or racist.

Background to the allegations

2. The Registrant is an Optometrist, who first registered on 13 May 2003. The Registrant is a proprietor of **REDACTED**.
3. On 25 November 2020, Ms A, a Member of Parliament and shadow Minister, participated in an interview, which was televised on the BBC. The interview related to the Government’s 2020 spending review, which Ms A was commenting upon. The Registrant had watched the interview and shortly thereafter, he sent an email directly to Ms A via her parliamentary inbox.
4. The Registrant’s email to Ms A stated as follows:

“Hi

You were quite evasive in your responses to the BBC interviewer’s repeated questions at 2:14 today about where money was coming from to support your figures (30 billion). Why so? Did you just pluck a figure out of your head (like most of you do) but didn’t reason logically how it could be paid for?

Also ... where were you born? I’d like to know if you have a UK passport, a dual passport or none.

Bish Ashleigh

Bish Ashleigh

BSc. (Hons.), MSc. (Clin. Ophthal), MCOptom.

Director

REDACTED

5. On 17 March 2022, the Council received a complaint referral from Ms A regarding the email. Ms A set out in her referral how she considered the second paragraph of the email, which enquired about her nationality and passport status, to be offensive and racist.
6. The Registrant accepts that he sent the email, that the language used in his email was inappropriate and was discriminatory and/or racist, or capable of being understood as such. However, the Registrant denies that he intended for his email to be discriminatory and/or racist.

Findings in relation to the facts

7. The Committee read the witness statement of Ms A, whose evidence was not challenged by the Registrant and accordingly she was not required to attend for cross-examination.
8. In summary, in her witness statement Ms A described how the email that she had received from the Registrant on 25 November 2020 was unsolicited and came into her email inbox, which was monitored by her staff. Ms A explained that the interview that she gave was following the Chancellor’s spending announcement, made that day, and it related solely to economic policy. It did not, either directly or indirectly, concern immigration or nationality issues.
9. Ms A described that she is “...*easily identifiable, in both appearance and name, as an MP of British African origin*”, which she believed was what prompted the questions regarding her nationality and passport from the Registrant. Ms A stated in her complaint that she accepted that as a public figure and politician, she may receive adverse comments from the public. However, she considered the comments in the Registrant’s second paragraph of his email, asking where she was born and her passport status, were an ‘*intrusive and unpleasant personal query*’, which she felt would not have been asked of a white MP.
10. Ms A also produced a number of documentary exhibits, which included the email that she had received from the Registrant, a copy of her GOC

complaint form, the video clip from the BBC interview (which was watched by the Committee) and information used to confirm the identity of the Registrant.

11. The Registrant gave evidence to the Committee. In addition, he submitted a bundle of documentary evidence, including his witness statement and certificates of online training that he had undertaken into the use of social media and unconscious bias in optometric practice.
12. In his evidence, the Registrant apologised for his actions in sending the email to Ms A, which he stated that he deeply regretted. He explained that he was a follower of politics and after he had watched Ms A's television interview, he had questions regarding the figures that she had quoted. He also wanted to understand more about Ms A's background and "*formative years*", which he believed would help him understand her political stance. The Registrant explained that he strongly believes that a person's life experience, background and cultural identity informs their policy. On watching the interview, he wanted to learn whether Ms A held a UK passport, dual passport or none, as he considered that this could form an important part of someone's identity and political views.
13. The Registrant's evidence was that he had no intention of causing Ms A to feel discriminated against but he understood that his actions had led to Ms A feeling that way, which he was utterly dismayed about. He explained that his email was sent in haste, without proper thought as to how it could be received and he accepted that he should not have worded it in the way he did. He described it as having been clumsily worded. The Registrant further gave evidence in relation to his own childhood experiences of racism, which led him to **REDACTED**, to explain that he would not intentionally act in a discriminatory or racist manner.
14. The Registrant gave evidence regarding his unblemished career, and that this was the first complaint that he had ever received. He had no history of any previous complaints to the Council.
15. In cross-examination, the Registrant explained that he had followed politics for many years and watched a lot of interviews with politicians. He had only ever asked one other politician about their ethnicity when he contacted an MP from a German background, as he was interested in them having become an MP. He explained that he had a friendly exchange with her.
16. The Registrant explained that it was because of listening to the figures given by Ms A in the interview, which he thought must be grossly inaccurate due to the size of the figures quoted, that he decided to contact her. Before doing so, he said that he looked her up on the internet to find out more about her background, but could not find out any information about her formative years, which he was interested in. He stated that he had found reference in the Ghanaian Times to two Ghanaian people becoming MPs in the UK in 2018. The Registrant stated that by knowing about a person's formative years it helps him to understand their policy and motivation.
17. The Registrant accepted that the tone of his email to Ms A was impolite and blunt, however he would normally write emails in a brief manner. His evidence was that he had hoped to get a response from Ms A as to where the figures that she had quoted in the interview had come from, as they were

not logical. He explained that in the interview she had avoided answering the question that she was asked several times. When asked about the purpose of asking Ms A where she was born and her passport status, he answered that he was trying to find out more about her formative years. He accepted that in hindsight, he should have written the email differently.

18. The Registrant expanded in cross-examination upon his own experiences of discrimination in his childhood and that he tries to treat everyone equally. He denied that he had intended to communicate in language that was discriminatory or racist. He had spoken to a number of friends and colleagues about his email and they said that he could have phrased things better, which he agreed with but that they did not say that there was anything to worry about and it surprised them that the complaint had got so far.
19. The Committee questioned the Registrant regarding what he had learnt from the courses and research that he had undertaken, and he explained that he had learnt quite a bit about unconscious bias. He explained, when asked what he felt the public and profession would think of the language used in his email, that without seeing the interview as background, they would take a “50/50” view of it. If they had seen the interview, they would have reacted in the same manner that he had reacted, and may have the same questions. He acknowledged that he had to be careful how to say things and that as he was 74 years old and from the UK, lots had been ingrained in him, which he was now unlearning.
20. During their closing submissions both parties addressed the Committee on definitions of the terms ‘discriminatory’ and ‘racist’. Ms Adeyemi, on behalf of the Council, made reference to *Section 9 of the Equality Act 2010*, which states that race includes colour, nationality and ethnic or national origins. In addition, both representatives referred to *Section 13 of the Equality Act*, which sets out the principle of direct discrimination, namely where a person treats another less favourably than they would others, due to a protected characteristic, such as race.
21. Mr Claxton, on behalf of the Registrant, additionally referred the Committee to the meaning of ‘racially aggravated’ in *Section 28 of the Crime and Disorder Act 1998*, which involved hostility based on the victim’s membership (or presumed membership) of a racial group.
22. The Committee accepted the advice of the Legal Adviser that the burden of proving a disputed allegation was on the Council, to the civil standard of the balance of probabilities. In particular, the Legal Adviser gave advice regarding considering the paragraphs of the Allegation separately, that intention can be inferred from the surrounding circumstances and in relation to the Registrant’s good character, as he had no previous regulatory findings against him.
23. The Legal Adviser referred the Committee to the case of *Professional Standards Authority for Health and Social Care v General Pharmaceutical Council and Ali* [2021] EWHC 1692 (Admin), which gives guidance on how to approach the Allegations in a case of offensive language, depending upon whether intent was alleged, as here. This case held that where the allegation against a Registrant is that they used language which they had intended to

be offensive or racist, then the focus (for that part of the allegation) would be on the Registrant's intent rather than the objective meaning of the language.

24. The Committee considered all of the evidence in this case, including the documentary evidence, the agreed evidence of Ms A, the live evidence of the Registrant, as well as the closing submissions from the parties.

Particular 2(iii)

25. This particular of the allegation related to the intention of the Registrant when he sent the email in question. The Committee noted that the evidence of Ms A could not directly go towards this issue, as it was a matter of what was in the Registrant's mind when he sent the email.
26. The Committee considered the evidence given by the Registrant as to his actions and explanation of his thinking processes at the time of sending the email, which he expanded upon when giving live evidence.
27. The Committee also noted that other parts of the allegation had been admitted by the Registrant relating to the nature of the language he used, namely that it was discriminatory and/or racist and that it could be understood to be discriminatory and/or racist (as it had been by Ms A). It was confirmed by Mr Claxton that the Registrant although he denied that he had intended his language to be discriminatory and/or racist, he was not seeking to go behind his admissions that objectively the language was discriminatory and/or racist.
28. The Committee considered that the definitions, which the parties had referred them to in the *Equality Act 2010* and the *Crime and Disorder Act 1998*, were helpful. The Committee considered the context of the email, including the topic of Ms A's BBC interview (the Chancellor's spending review). It concluded that the Registrant had asked Ms A questions regarding where she was born and her passport status, which he would not have asked a person that he perceived to be indigenous to the UK. The Committee considered therefore that he had treated Ms A differently on the basis of her race.
29. The Committee went on to consider the Registrant's stated reasons for asking these questions of Ms A in his email, which was that he had wanted to know more about Ms A's formative years, as he believed that may establish her "drivers". The Registrant had given the example of another non-white politician who had a difficult childhood and that this person was now a successful politician, explaining that her difficult childhood had motivated her to succeed in politics. The Registrant also expressed the view that 24 percent of the population of Ghana come from deprived backgrounds and that in asking where Ms A was born he was seeking to establish if she had come from such a background. However, the Committee considered that the questions that the Registrant had asked Ms A would not answer that question, as there was no equivalence between where someone had come from and the nature of their background. Had the Registrant wanted to know more about Ms A's formative years or why she had entered politics, he could have simply asked her such questions directly.

30. The Committee also noted that the questions that the Registrant asked Ms A regarding her birth and passport, had nothing to do with the content of Ms A's interview, which was about economic policy. The Committee considered that it was relevant context that the interview had nothing to do with race or nationality, and that Ms A was speaking on behalf of the Labour Party. The questions that the Registrant asked Ms A in the second paragraph of his email were irrelevant to the interview or the first part of his email, where the Registrant had commented on the figures quoted.
31. The Committee found that the tone of the Registrant's email was one of irritation, which is likely to have been prompted by the interview in which he found the figures to be grossly disproportionate and his annoyance that Ms A did not answer a question put to her by the interviewer several times.
32. The Committee also considered the Registrant's evidence that he had experienced discrimination himself during his childhood, and due to this experience he maintained that he would not treat others in that way. The Committee was mindful of this aspect of the evidence throughout, as well as the Registrant's good character and its relevance to credibility.
33. The Committee considered the evidence of the Registrant on the point made by him that he had asked another UK politician of German origin about her background, however the Committee did not find that this issue assisted it. The Committee had not seen evidence of this exchange, and did not know the context of the communications nor how the reasons for asking the questions had been expressed.
34. Having considered all of the above matters, on balance, the Committee determined that it did not accept the evidence of the Registrant as to why he included the questions regarding birth and passport status in his email, as it found the Registrant's evidence on these matters to be unconvincing and implausible.
35. The Committee considered that the Registrant may not have decided in advance to be overtly discriminatory and/or racist to Ms A when he started his email to her. However, in the Committee's view, his choice of questions in the second paragraph of his email revealed his true intention. By including that second paragraph, asking personal questions of where she was born and what passports she held, which had no relevance and was language that was objectively discriminatory and/or racist, it was more likely than not that he then intended the language he used to be discriminatory and/or racist.
36. Therefore, the Committee determined that on the balance of probabilities the language used by the Registrant in the second paragraph of his email to Ms A, was intended to be discriminatory and/or racist.
37. Particular 2(iii) is therefore found proved.

Findings in relation to misconduct

38. The Committee proceeded to consider whether the facts, as admitted and found proved, amount to misconduct. No further material was put before the Committee at this stage.
39. The Committee heard submissions from Ms Adeyemi on behalf of the Council and from Mr Claxton on behalf of the Registrant.
40. Ms Adeyemi submitted that the Registrant's behaviour amounted to misconduct. By sending an email that was discriminatory and/or racist, the Registrant had acted contrary to the standards expected of Optometrists and Dispensing Opticians.
41. Ms Adeyemi invited the Committee to have regard to the "*Council's Standards of Practice for Optometrists and Dispensing Opticians*," effective from April 2016. She submitted that the Registrant has departed from the following standards by virtue of his conduct:
- *Standard 13: Show respect and fairness to others and do not discriminate.*
 - *Standard 13:2: Promote equality, value diversity and be inclusive in all your dealings and do not discriminate on the grounds of gender, sexual orientation, age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief.*
 - *Standard 17: Do not damage the reputation of your profession through your conduct.*
 - *Standard 17:1: Ensure your conduct, whether or not connected to your professional practice, does not damage public confidence in you or your profession.*
 - *Standard 17:2: Ensure your conduct in the online environment, particularly in relation to social media, whether or not connected to your professional practice, does not damage public confidence in you or your profession.*
42. Ms Adeyemi submitted that the Registrant's conduct fell squarely short of these standards and far below the standards expected. She submitted that the conduct was serious, as it is well known that discrimination and racism can have a harmful effect upon the recipient and public confidence in the profession.
43. Ms Adeyemi referred the Committee to the Council's statement on inclusion and commitment to treat all persons equally and fairly. She submitted that the Registrant's conduct ran contrary to this. Further, she submitted that it had brought the profession into disrepute.
44. On behalf of the Registrant, Mr Claxton conceded that the conduct did amount to misconduct. However, he submitted that it was a matter of degree, that there was a range of seriousness, and that the conduct in this case fell towards the lower end of the spectrum.
45. Mr Claxton described the '*mischief*' of the conduct as the Registrant asking questions of Ms A somewhat abruptly and that these were questions that he would not have asked a person who he perceived to be '*indigenous*' to the

UK, therefore he treated her differently by putting her under extra scrutiny. Whilst he did not seek to excuse the conduct, he submitted that it was a 'world apart' from the type of case where racial slurs had been used, such as in the case of *Professional Standards Authority for Health and Social Care v General Pharmaceutical Council and Ali* [2021] EWHC 1692 (Admin). The Registrant had not been making any positive assertions at all about Ms A or attributing any quality to her because of her racial group.

46. Mr Claxton highlighted that the email in question was not sent in a professional context and the Registrant was not acting as an optometrist when he engaged with Ms A, and she was not his patient. Although Ms A had raised a concern about discrimination and/or racism potentially affecting his patients, the risk of this was low, as the incident had occurred in an entirely private setting. On this basis, he invited the Committee to find that this conduct was at the lower end of the spectrum of seriousness.
47. The Committee accepted the advice of the Legal Adviser who referred to the case of *Roylance v General Medical Council (no2)* [2000] 1 AC 311 regarding the two principal kinds of misconduct, either conduct linked to professional practice or conduct that otherwise brings the profession into disrepute. The Committee was reminded that misconduct was a matter for its own independent judgement and no burden or standard of proof applied. Further, that the Committee needed to consider whether the conduct was sufficiently serious to amount to professional misconduct.
48. Although the Committee heard submissions in respect of misconduct and impairment together, it considered and determined the issue of misconduct first.
49. The Committee considered the "Council's Standards of Practice for Optometrists and Dispensing Opticians" and the standards which it had been referred to by the Council, namely 13, 13.2, 17, 17.1, 17.2. The Committee considered that all those standards were breached in this case by the Registrant's conduct.
50. The Committee considered Mr Claxton's submission that the conduct, whilst amounting to misconduct, was at the low end of the spectrum. The Committee noted that this was a one-off incident, with no evidence of any other similar complaints in the almost 60 years of the Registrant's career. The Committee also agreed that the type of discrimination and/or racist language used by the Registrant was not as serious as racial slurs or the conduct in the case of *Professional Standards Authority for Health and Social Care v General Pharmaceutical Council and Ali*.
51. Nonetheless, the Committee considered that the Registrant's conduct fell far short of the standards expected of a professional, contravening all the standards referred to above. Ms A was carrying out her role as a public servant when she had received the unsolicited email from the Registrant. Ms A had found that the questions asked by him to be disturbing and offensive.
52. Whilst the Committee did not have detailed information regarding the impact upon Ms A, it appeared that she had taken considerable effort to reflect upon the email, track the Registrant down and make a formal complaint to the Council.

53. Taking everything into account, the Committee was in no doubt that the conduct of the Registrant in sending an email containing language that was intended to be discriminatory and racist, which caused the person receiving it to feel disturbed and offended, was serious. The Committee also concluded that this conduct is damaging to the reputation of the profession and has brought it into disrepute. Therefore, the Committee concluded that the conduct was sufficiently serious to amount to misconduct.
54. The Committee therefore determined that the facts found proved amount to misconduct.

Findings regarding impairment

55. The Committee next went on to consider whether the Registrant's fitness to practise is currently impaired by virtue of his misconduct.
56. The Committee heard submissions from Ms Adeyemi on behalf of the Council, who submitted that the Registrant's insight into his conduct had been very limited in nature, as he lacked awareness of what was wrong with his behaviour. She submitted that it was apparent from his evidence that he had limited awareness that the questions that he had asked Ms A were considered by many to be discriminatory, racist and offensive. He had only sought feedback from his wife and friends. Further, comments made by the Registrant during his evidence, such as '*people can be sensitive*' showed his underlying attitude. Any reflection he had undertaken had not taken his remediation very far.
57. Ms Adeyemi acknowledged that the fact that the Registrant had undertaken some training was a positive, however this was only a first step, as he was unable to clearly articulate what he had learnt and the training appeared to have only had a very limited lasting impact. She submitted that this suggests a lack of commitment to making lasting changes in behaviour. There had been no courses undertaken on discrimination or racism. Ms Adeyemi also highlighted the lack of references provided by the Registrant.
58. Ms Adeyemi referred the Committee to the guidance in the case of *CHRE v (1) NMC and (2) Grant* [2011] EWHC 927 (admin) and the test that was formulated by Dame Janet Smith in the report to the Fifth Shipman Inquiry. Ms Adeyemi submitted that limbs (b)-(c) of this test are engaged in this case, namely conduct which brings the profession into disrepute, and conduct which breaches one of the fundamental tenets of the profession.
59. Ms Adeyemi referred to the public interest and stated that the need to uphold professional standards and maintain public confidence in the profession was paramount. She submitted that a reasonably informed member of the public would be concerned if no finding of impairment was made. Ms Adeyemi invited the Committee to make a finding of impairment, by reason of misconduct, in the wider public interest.
60. Mr Claxton focused his submissions on impairment upon the risk of repetition and the public interest. In relation to the risk of repetition, he submitted that this was a single incident, which was ill-tempered and spontaneous. He invited the Committee to put the incident in the context of a career spanning almost six decades, which involved daily encounters with a

diverse public. Mr Claxton submitted that the fact that there had been no other incidents in such a long period, or since, was clear evidence that there was no deep-seated attitudinal problem.

61. In relation to insight, whilst Mr Claxton accepted that this was a tool that Committees could use to assess impairment, it ought not to be unnecessarily elevated to itself being the test. He disagreed with Ms Adeyemi's submission that the Registrant's insight was limited and he highlighted a comment that the Registrant had made in his evidence that he was still unlearning that what had been ingrained in him over a long time. Mr Claxton submitted that this was significant evidence of insight, as it was an 'off the cuff' comment, which shows that the Registrant is still learning and he realises it is incumbent upon him to do so.
62. In relation to the training that the Registrant had undertaken, Mr Claxton invited the Committee to find that whilst the Registrant's recall of what he had learnt was not impressive, the fact that he was undertaking such learning at 73 years of age (as he was then), was evidence of an open mind, adaptability, and keenness to learn.
63. Mr Claxton highlighted that the Registrant had given a prompt apology to Ms A, long before these proceedings, and had made admissions to the Particulars. The Registrant had only disputed one Particular, as he did not accept that he had intentionally been discriminatory and/or racist, however he now fully accepted the Committee's findings. Consideration of all these matters, together with the Registrant's own experiences of discrimination, meant that the Committee could be assured that there would be no similar future conduct.
64. Mr Claxton invited the Committee to not hold the lack of references against the Registrant and that there should be no fixed expectation that these would be produced in every case. It was for the GOC to prove its case and to hold the absence of references against the Registrant would be to reverse the burden of proof.
65. In relation to the public interest, Mr Claxton submitted that he did not seek to suggest that the public interest was not engaged, however this ought to be tempered by his submissions regarding the gravity of the conduct.
66. The Committee accepted the advice of the Legal Adviser who advised the Committee that the question of impairment was a matter for its independent judgement taking into account all of the evidence it has seen and heard so far. She reminded the Committee that a finding of impairment does not automatically follow a finding of misconduct and outlined the relevant principles set out in the cases of *Cheatle v GMC* [2009] EWHC 645 (Admin), *CHRE v (1) NMC and (2) Grant* [2011] EWHC 927 (admin) and *Cohen v GMC* [2008] EWHC 581 (Admin).
67. The Committee first considered whether the Registrant's conduct was capable of being easily remediated, whether it had been remediated and whether there is a risk of repetition of the conduct in future.
68. The Committee was of the view that discriminatory and/or racist conduct can be attitudinal and become ingrained, making it difficult to be remediated, but not impossible. The Committee considered the level of insight demonstrated by the Registrant was limited and it was concerned, having heard the

Registrant's evidence, that he did not yet appear to have a full understanding of why his questions to Ms A were unacceptable.

69. However, the Committee considered that the Registrant had, through his training in unconscious bias, and equality and diversity, and these proceedings, begun the process of understanding why his language was not acceptable. It noted his acknowledgement that he had more learning to do to reflect current thinking.
70. In particular, the Committee noted the evidence that the Registrant had given, that he was 74 years old and that there was '*lots ingrained in me that I am unlearning... things have changed and I understand that.*' The Registrant had described that he was beginning to educate himself in a changing world. The Committee concluded that the Registrant's insight into his conduct has continued to develop, however he still has work to do in this respect in order for the Committee to be reassured that he has remediated his misconduct.
71. The Committee accepted the submission that these proceedings have had a salutary effect upon the Registrant and it considered it quite unlikely that the Registrant would send another similar communication, asking discriminatory and/or racist questions regarding birth and passport status again. The Committee considered that it is likely that the Registrant will be much more careful with his use of language in future as a result. The Committee was also mindful of the fact that this was an isolated incident, which occurred in the context of a long career and that he had apologised to Ms A promptly.
72. The Committee considered that the use of discriminatory/racist language could be attitudinal in nature, and therefore can be difficult to remediate. The Committee noted that the Registrant's insight into his conduct is not yet fully developed and therefore whilst it is of the view that the risk of repetition is low, a risk remains.
73. The Committee next turned to consider the public interest and had regard to the case of *CHRE v (1) NMC and (2) Grant* [2011] EWHC 927 (admin) and the test that was formulated by Dame Janet Smith in the report to the Fifth Shipman Inquiry. The Committee agreed with the submission of Ms Adeyemi that limbs (b)-(c) of this test are engaged in this case, namely conduct which brings the profession into disrepute and breaches a fundamental tenet of the profession.
74. Although the Committee had concluded that overall the risk of repetition of similar conduct was relatively low, it was of the view that the public would be concerned if no finding of impairment was made, given the nature of the conduct and given that the Registrant's insight is still developing. The Committee determined that it was necessary to make a finding of impairment in this case in order to maintain confidence in the profession and in order to uphold proper professional standards.
75. The Committee found that the fitness of Mr Zbigniew Ashleigh to practise as an optometrist is impaired.

Sanction

76. The Committee next went on to consider what would be the appropriate and proportionate sanction, if any, to impose in this case. It heard submissions from Ms Adeyemi on behalf of the Council and from Mr Claxton on behalf of the Registrant.
77. Ms Adeyemi reminded the Committee that in imposing a sanction it was primarily concerned with protecting the public and with meeting the Council's overarching objective. She referred to the Council's '*Hearings and Indicative Sanctions Guidance*' (updated November 2021) ('the Guidance') and the sections on mitigating and aggravating factors.
78. Ms Adeyemi submitted that relevant mitigating factors were that the Registrant had made some admissions, had engaged in the proceedings, had made a prompt apology to Ms A and had undertaken courses in an attempt to remediate. She invited the Committee to find that it was an aggravating factor that the Registrant had not demonstrated the development of timely insight, bearing in mind that the email was sent in November 2020. In Ms Adeyemi's submission, she stated that more could have been achieved by the Registrant in terms of reflection and insight between 2020 and now.
79. Ms Adeyemi submitted that taking no further action would be wholly inappropriate, as there were no exceptional circumstances in this case. Ms Adeyemi contended that a financial penalty order was also not appropriate as it was generally only suitable for cases of financially motivated conduct.
80. In relation to an order of conditions, Ms Adeyemi submitted that conditions would serve no useful purpose, as it would be difficult to envisage workable conditions in this case.
81. Turning to suspension, Ms Adeyemi submitted that this was the most appropriate and proportionate sanction in the circumstances. She submitted that using intentionally discriminatory and/or racist language was serious misconduct, which went wholly against the standards expected of a Registrant and which was capable of causing serious reputational damage to the profession. Ms Adeyemi submitted that a period of suspension would mark the seriousness of the conduct, and protect the public interest.
82. Ms Adeyemi highlighted to the Committee paragraph 22.1 of the Guidance, which in reference to discrimination, states that:
- "Discrimination undermines public confidence in the profession and has the potential to pose a serious risk to patient safety. A more serious sanction is likely to be appropriate where a case involves direct or indirect discrimination against patients, colleagues or other people who share protected characteristics either within or outside their professional life."*
83. Ms Adeyemi acknowledged that the Registrant had no past complaints, which goes to his credit. She suggested, however, that victims of discriminatory and/or racist behaviour may be less confident in coming forward with complaints than an MP.
84. Ms Adeyemi invited the Committee to impose a period of suspension, as nothing less than a period of suspension would be appropriate in the

circumstances. Ms Adeyemi did not make submissions in respect of the length of such an order, which she submitted was a matter for the Committee.

85. Mr Claxton submitted that the appropriate sanction was a suspension for a relatively short period of between three to six months, with no need for a review hearing.
86. Mr Claxton agreed that this was not a case where taking no action would be appropriate. Similarly, a financial penalty order would also not be appropriate, as they were aimed at “*disgorging*” financial gain.
87. In relation to conditions, Mr Claxton submitted that these might answer the gravity of the case, but he accepted that it would be difficult to formulate meaningful and workable conditions. As a result, he suggested that the Committee was left with suspension as the most appropriate sanction by default.
88. Mr Claxton submitted that erasure would be disproportionate and that it simply “*was not an erasure case*”. Mr Claxton referred the Committee to paragraph 21.35 of the Guidance, and the list of factors therein which indicate that erasure may be appropriate, none of which he submitted applied to this case.
89. Mr Claxton submitted that there were significant mitigating factors. The Registrant has engaged throughout these proceedings, he gave a prompt apology to Ms A, he made admissions, he accepted the Committee’s findings on the one matter in dispute, had shown a willingness to learn, and was developing insight. In addition, the Registrant has had a long career, and was of previous good character, which was of the utmost relevance when considering sanction.
90. In relation to the lack of similar complaints and the suggestion made by Ms Adeyemi that complainants of this type of conduct may be less willing to come forward, Mr Claxton submitted that this should not be taken into account. The fact was that the Registrant does have a clear history and the Committee should not speculate about other matters without evidence, as that would be grossly unfair to the Registrant.
91. Turning to aggravating factors, Mr Claxton submitted that discrimination was the subject matter of the case and should not be additionally counted as an aggravating factor, as to do so would result in double counting.
92. In relation to whether a review was required, Mr Claxton submitted that it was his reading of the Committee’s decision on impairment that it considered that there was a relatively low risk of repetition. Further, that the essence of the case is not the protection of the public, but upholding standards and the public interest, which could be met with a period of suspension without a review.
93. The Committee accepted the advice of the Legal Adviser, which was for the Committee to take into account the factors on sanction as set out in the Guidance; to assess the seriousness of the misconduct; consider any aggravating and mitigating factors; and to consider the range of available sanctions in ascending order of seriousness. Further, the Committee is

required to act proportionately by weighing the interests of the registrant against the public interest.

94. The Committee took into account the following mitigating factors:
- 1) The Registrant's previous good character and long unblemished career;
 - 2) This was an isolated incident with no repetition of similar conduct;
 - 3) The Registrant had made admissions to most of the Particulars of the Allegations, accepted the Committee's findings on the one denied remaining Particular, and had engaged throughout the regulatory process;
 - 4) The Registrant's expression of remorse and regret, and the prompt written apology given to Ms A;
 - 5) The Registrant had taken some steps towards remediation (attending courses and reading) and was developing insight.
95. In the Committee's view, the aggravating feature in this case is that the Registrant has not yet developed full insight.
96. The Committee agreed with the submission that to include the fact that the conduct involved discrimination as an aggravating factor would be double counting, given that it was the subject matter of the allegation.
97. The Committee considered the sanctions available to it from the least restrictive to the most severe, starting with no further action.
98. The Committee considered taking no further action as set out in paragraphs 21.3 to 21.8 of the Guidance. It concluded that there were no exceptional circumstances to justify taking no action in this case. It considered that no further action was not proportionate nor sufficient given the seriousness of the case and the public interest concerns.
99. The Committee considered the issue of a financial penalty order, however it agreed with the submissions of both parties that such an order was not appropriate, given that there was no financial gain.
100. The Committee considered the Guidance in relation to the imposition of conditions. It was of the view that conditional registration would not be practicable due to the nature of the misconduct, which did not occur in the workplace or involve identifiable clinical areas of practice in need of assessment or retraining, which conditions often seek to address.
101. The Committee considered that the Registrant's conduct is attitudinal in nature, which would therefore be difficult to address with conditions. Further, conditions would not sufficiently mark the serious nature of his misconduct or address the public interest concerns identified, which were the predominant consideration in relation to the Committee's finding of impairment.
102. The Committee concluded that conditions could not be devised which would be appropriate, workable or measurable in this case.
103. The Committee next considered suspension and had regard to paragraphs 21.29 to 21.31 of the Guidance. In particular, the Committee considered the list of factors contained within paragraph 21.29, which are as follows:

**Suspension (maximum 12 months)**

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

- a. A serious instance of misconduct where a lesser sanction is not sufficient.*
- b. No evidence of harmful deep-seated personality or attitudinal problems.*
- c. No evidence of repetition of behaviour since incident.*
- d. The Committee is satisfied the registrant has insight and does not pose a significant risk of repeating behaviour.*
- e. In cases where the only issue relates to the registrant's health, there is a risk to patient safety if the registrant continued to practise, even under conditions.*

104. The Committee was of the view that the case fits all of the criteria listed in paragraph 21.29, apart from e), which is not relevant to the facts of this case.
105. In relation to a), sending an email with language that was intended to be discriminatory and/or racist was a serious instance of misconduct, where a lesser sanction was not sufficient.
106. In relation to b), whilst discriminatory conduct can be attitudinal in nature, given that this was an isolated incident, the Committee did not consider that there was evidence of harmful deep-seated personality or attitudinal problems.
107. In relation to c), there has been no evidence of repetition of the conduct since the incident in 2020.
108. In relation to d), the Committee is satisfied that the Registrant is developing insight and does not pose a significant risk of repeating his conduct, as the Committee found the risk of repetition to be low.
109. The Committee noted the Registrant's developing insight, attempts at remediation, his previous good character over a long career, and the lack of repetition. Nevertheless, the Committee concluded that a suspension order was appropriate to address the public interest concerns it had identified. It considered that a suspension order would mark the seriousness of the Registrant's conduct, maintain confidence in the profession and declare and uphold proper standards of professional conduct and behaviour.
110. The Committee was satisfied that a reasonable member of the public, in possession of all the facts, would consider that a suspension order was a proportionate sanction in this case.
111. Additionally, the Committee was of the view that erasure would be disproportionate in light of the low risk of repetition and the significant mitigation, including the Registrant's developing insight. It also agreed with the submission of Mr Claxton that none of the factors listed in the Guidance

at paragraph 21.35 (a)-(h), which lead towards the sanction of erasure being appropriate, applied in this case.

112. The Committee gave consideration to the appropriate length of the order of suspension and determined that, having balanced the mitigating and aggravating factors against the public interest, it would be proportionate to suspend the Registrant for a period of four months. The Committee was of the view that four months was an appropriate and proportionate period of suspension to sufficiently mark the seriousness of the Registrant's conduct, to send a signal to the public and the profession that such conduct was not acceptable and to address the public interest concerns it had identified.
113. The Committee considered whether to direct that a review hearing should take place before the end of the period of suspension. The Committee bore in mind that it had found that the risk of repetition was low and that the finding of impairment and sanction was predominantly to maintain public confidence in the profession and uphold proper standards. It took into account that this was an isolated incident, in a long unblemished career and that the Registrant's insight continued to develop. The Committee did not consider that in these circumstances it was necessary to direct that a review hearing take place.
114. The Committee therefore imposed a suspension order for a period of four months.

Immediate Order

115. Ms Adeyemi, on behalf of the Council, invited the Committee to impose an immediate suspension order under Section 13I of the Opticians Act 1989. Ms Adeyemi submitted that it would be in the public interest to make an immediate order given that a suspension of four months had been ordered, and if the Registrant appealed, that suspension would not come into effect for several months whilst the appeal was pending.
116. Mr Claxton, on behalf of the Registrant, opposed the imposition of an immediate suspension order. He submitted that such orders should be reserved for those cases where there was a necessity for an immediate order. He reminded the Committee that the Allegations in this case were "*somewhat old*" and the Registrant had not been made subject to any interim restrictions from the referral of the complaint until the present day. Mr Claxton submitted that this was not a case about patient risk, but about principles, which, although important, did not require an immediate order to be imposed.
117. The Committee accepted the advice of the Legal Adviser, which was that to make an immediate order, the Committee must be satisfied that the statutory test in section 13I of the Opticians Act 1989 is met, i.e., that the making of an order is necessary for the protection of members of the public, otherwise in the public interest or in the best interests of the Registrant.
118. The Committee had regard to the statutory test, which required that an immediate order had to be necessary to protect members of the public, otherwise in the public interest or in the best interests of the Registrant. The Committee noted that the concerns raised in this case did not involve a risk



of harm to patients or the public. In addition, no interim order had been made in respect of the Registrant throughout the proceedings.

119. Accordingly, the Committee was not satisfied that there was any necessity for an immediate order, nor would an order be appropriate in the public interest. It considered that the public interest had been adequately marked by the four month suspension order itself. The Committee decided not to impose an immediate suspension order.

Revocation of an interim order

120. There was no interim order to revoke.

Chair of the Committee: Ms Eileen Carr

Signature Eileen J Carr Date: Thursday 9 March 2023