



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

**GENERAL OPTICAL COUNCIL**

**F(21)26**

**AND**

**FREDERICK KIMSEY (D-16083)**

**DETERMINATION OF A SUBSTANTIVE HEARING  
7-10 JUNE & 7 JULY 2022**

<b>Committee Members:</b>	Julia Wortley (Chair) Diane Roskilly (Lay) Sarah Hamilton (Lay) Philip Cross (DO) Judith Stodel (DO)
<b>Legal adviser:</b>	Sadia Zouq (7-10 June 2022) David Mason (7 July 2022)
<b>GOC Presenting Officer:</b>	Alex Lawson (7-10 June 2022) Tope Adeyemi (7 July 2022)
<b>Registrant present/represented:</b>	Yes, and represented
<b>Registrant representative:</b>	John Graham
<b>Hearings Officer:</b>	Terence Yates
<b>Facts found proved:</b>	1, 2 and 3 Proved by admissions 4(b) Found proved
<b>Facts not found proved:</b>	4(a) Found not proved
<b>Misconduct:</b>	Found
<b>Impairment:</b>	Impaired
<b>Sanction:</b>	2 months suspension (Without Review)
<b>Immediate order:</b>	None



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## ALLEGATION

That being a registered dispensing optician, the fitness to practise of Mr Frederick Kimsey is impaired by reason of misconduct, in that:

1. On or around 9 September 2019, you submitted a remake of spectacles for Ms 1 for coating failure;
2. On or around 14 September 2019, you:
  - a. removed pair of spectacles at a value of approximately £129 from the shop floor when you were unable to find Ms 1's spectacles; and/or
  - b. submitted a remake of the spectacles for coating failure;
3. Your actions as described in (1) and (2) above were inappropriate in that you did not follow the dispensing process and/or seek authorisation; and/or
4. Your actions as described in (1) and (2) above were dishonest in that you knew:
  - a. that the spectacles did not have a coating failure; and/or
  - b. you submitted the remake request/s in an attempt to gain a pair of spectacles for Ms 1 without you and/or Ms 1 paying for it.

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

## DETERMINATION

### Admissions in relation to the particulars of the allegation

1. The Registrant admitted particulars 1, 2 and 3 of the Allegation. Particulars 1, 2 and 3 are proved.

### Background to the allegations

2. The Registrant is a registered Dispensing Optician with the GOC since August 2016. He commenced employment with Specsavers [Redacted] on 3 September 2018 as a trainee contact lens optician.
3. On 7 January 2020 the Council received a telephone call from Mr A, the Retail Partner/Director at Specsavers [Redacted], raising concerns about the Registrant, who had been dismissed for gross misconduct. It is alleged that the Registrant dispensed and processed a pair of glasses as a remake due to an alleged coating failure for Ms 1, without payment. No Concern Handling Log (CHL) had been completed and no authorisation had been sought for the remake.
4. Mr A submitted a formal referral form to the GOC. The referral form stated:

*“Frederick Kimsey was investigated for a dispense conducted by him, for which no payment was taken.*

*When this matter was investigated, Freddie confirmed that he intended to obtain goods by deception to avoid payment.*

*The matter was passed to our independent store director who held the disciplinary meeting – the outcome was dismissal.*

*An appeal meeting was held with a different senior member of the organisation who upheld in full the dismissal”.*

5. Mr A reported to the GOC that on 29 September 2019 he conducted an investigation meeting with the Registrant. In the meeting the Registrant stated that on 9 September 2019, Ms 1 (former employee of Specsavers [Redacted]) told him that she had lost her glasses and asked him to put a remake through at the store. Mr A reported that the Registrant took a pair of frames from the store, and placed them in his drawer to process later. When he returned to his drawer and found the frames missing he took another frame from the store and processed it as a remake without following the correct procedure. Mr A reported that the Registrant agreed with him that he had attempted to take goods by deception. The Registrant stated that *“it just a stupid mistake”*.

6. On 12 October 2019 a disciplinary meeting was held by Mr B , the Retail Director of Specsavers [Redacted]. Also present was Mr A. In relation to the Allegation the note of the meeting records that the Registrant stated:

*“the girl that used to work here damaged her glasses & she asked me to look into the breakdown because she worked here. I asked the Lab Manager who worked here what happened with glasses. I took glasses from store but I was never going to use the frame until she found hers. [Redacted] saw that [Ms 1] give me her own glasses. She was going to pay for them if she couldn’t find her own glasses”.*

*“I should have done a CHL (Concern Handling Log) but didn’t. I have never had the staff handbook”.*

*“I never stole anything why would I do that”.*

7. The Registrant also stated that he was never provided with a copy of the staff handbook, that he felt intimidated by Mr A at the investigation interview and that the notes taken at that interview were inaccurate. The Registrant was shown the investigation notes and it was put to him that he admitted the allegation six times during the investigation interview:

*“KM: I took a pair but was never going to use it. I was put in situations where I was never in.*

*[Mr B]: Why did you admit 6 times?*

*KM: Repeat again?*



*[Mr B]: Do you feel there is a difference between feeling pressured & admitting to this allegation?*

*FK: If I was stealing them they would have left the store*

*[Mr B]: There is a concern of not following procedure & concern for [Mr A]*

*FK: I felt this was the case. Frame 1 was given to me was [Ms 1]. I never used store frame. Everyone keeps calling her [Ms 1] but she's a customer. Everyone knows why I was suspended because someone told the staff. Everyone knows which is depressing (not legible) because I have to go on placement for Uni."*

8. Following the disciplinary meeting the Registrant was dismissed without notice for gross misconduct. The Registrant appealed the decision. The appeal hearing was held on 4 December 2019. In relation to the investigation interview, the Registrant stated:

*"FK: in the first meeting. Investigation of things ie prior warnings...shot myself in the foot in the 1<sup>st</sup> meeting. Saying things that Were not true. Didn't want to be in the room just wanted to leave.*

*[Redacted] says I admitted 6 times which isn't true.*

*[Redacted] Did you read and sign*

*FK: yes, as I wanted to leave. When he said about the GOC I got worried about it. Much bigger company. Do things differently. Come from an independent.*

*[Redacted] Do you offer legal  
Do you believe correct process was followed?*

*FK: No handbook.....But yes, it was".*

9. The Registrant was asked why he considered the allegations to be false:

*"FK: More that I was accused of deceiving the company + obtain goods by not paying. I can see after first meeting. When I thought about it + told My story They have still reached the same conclusion. I can explain what did happen. Got new evidence to [redacted]. Told I didn't give new evidence.*

*FK: whole.....[Mr A] didn't like me + [Ms 1]. Anyone elses specs. Found a bag with a slip. Had an audit trail. Why would I steal. [Ms 1] bought paid specs with discount. 2 year guarantee. Coating damage. Took a look at them at home + lost them. Wanted new specs.....Took frame off system + put....she would pay if specs not found. Put frame in a bag to wait until it found. Went to lab L – asked her what would happen to return damaged lenses. Told by L We don't throw damaged lenses. Found lost specs. Put frame + lenses in different bag. Found frame not lenses. Asked L if needed lenses. She said no. she trusted that I had seen them.*

*FK: At this time someone went into my room. CL Room + Taken the frame, bag etc. I printed off new slip. Took frame down to lab. Easier at that point if CS Had them to ask me."*

10. It was put to the Registrant in his appeal hearing that the investigation notes made clear he admitted the allegation six times, to which the Registrant stated that he is “*quite open in meetings*” and that he found Mr A intimidating and wanted to leave. When asked why he acted as alleged in view of his desire to progress in his optometry career, the Registrant stated that he wanted to “*help someone at what I know I can see. If I was older, maybe I would have seen it*”. The Registrant expressed his concern of the impact and reputational damage the Allegation will have on his career.
11. On 20 December 2019 the Registrant was informed by his former employers that the decision to dismiss on the ground of gross misconduct had been upheld.

### **Application for an adjournment**

12. Mr Lawson, on behalf of the GOC, applied to adjourn the hearing on Day 1 to 11am on Day 2 due to the absence of the GOC’s witness, Mr A.
13. Mr Lawson informed the Committee that Mr A had been warned to attend Day 1 of the hearing on 4 April 2022. There was no response from Mr A to this communication. Mr A was contacted by the Hearings Officer on Day 1. He stated that he was unable to attend the hearing due to personal commitments but was available to attend the hearing at 11am on Day 2. Mr Lawson referred to the criteria from *CPS v. Picton* [2006] EWHC 1108 and submitted:
  - An adjournment of one day was not critical to the proceedings. The Committee had sufficient time remaining to reach its decision on facts;
  - The allegation is serious and there is a public interest in it being tried thoroughly and fairly;
  - The Registrant cannot present his response to the allegation fairly without hearing Mr A’s evidence first;
  - The GOC is not withdrawing proceedings;
  - A previous adjournment was granted due to the late admissibility of evidence from the Registrant.
14. In response to the GOC’s application, Mr Graham on behalf of the Registrant, submitted:
  - The public interest requires those who put forward complaints to the GOC are to engage and co-operate with proceedings;
  - The GOC should consider withdrawing proceedings;
  - The Registrant has booked time off work to attend the hearing;
  - The Registrant wants the hearing to proceed and conclude;
  - The previous adjournment was not concerned with the admissibility of evidence but the insufficient time available to conclude proceedings.
15. The Committee accepted the advice of the Legal Adviser. She referred to Rules 35 and 36, the criteria in *CPS v. Picton* and advised that the discretion to grant an adjournment should consider fairness to the parties and the public interest in the timely and efficient disposal of the Allegation.
16. Prior to retiring to consider the GOC’s application, the Committee asked the parties if there was any alternative to an adjournment. Mr Lawson stated that the Committee could



consider Mr A's statement without Mr A being called to give live evidence, but this would be unfair as it deprived the Registrant of his right to cross examination; or the Committee could adjourn the entire proceedings to a fresh set of dates in the future. Mr Lawson submitted that neither of these options were being put forward by the GOC. Mr Graham had no further observations.

### **The Committee's decision**

17. The Committee considered that Mr A's evidence was crucial, and the Registrant had questions to ask him in cross examination. The allegation is serious and the GOC's request is for an adjournment of one day. The request for an adjournment has not arisen due to the fault on the part of either party, and in their submissions the parties were keen to ensure that this matter proceeded expeditiously in the time remaining. Mr A has confirmed that he is available to attend the hearing on Day 2. In the circumstances, and having explored alternative ways to proceed, the Committee was satisfied that it was fair to the parties and in the public interest to adjourn the hearing to 11am on Day 2.

### **The Hearing**

#### **Evidence**

18. The GOC's bundle contained the following documents:

- Witness statement of Mr A
- Registrant's employment contract
- Photocopies of two dispense slips and two spectacle frames
- Computer print out of an order history
- A blank Concern Handling Log (CHL)
- Staff Handbook
- Investigation meeting notes
- Disciplinary meeting notes
- Registrant's appeal letter
- Appeal hearing notes
- Specsavers correspondence
- GOC referral form.

19. The Registrant provided the following documents:

- Witness statement of Registrant
- Witness statement of Ms 1
- Four character references.

20. Mr A, the Retail Partner/Director, at Specsavers [Redacted] gave evidence. He carried out the investigation for the dispense in September 2019. Mr A stated that he was repairing equipment in a room used solely by the Registrant, and in a drawer he found a dispense slip with a pair of glasses which he considered was unusual. Mr A recognised the customer's name on the slip as that of Ms 1, a former employee of the store. Having

visually inspected the frames Mr A formed the view that they were brand new. Mr A stated that the Registrant also confirmed the frames were new in his investigation interview in which he stated he had taken the frames from the store. All dispensing jobs were put in a cupboard (behind the till) for lab staff to collect on an ad-hoc basis and frames are not usually taken to the lab by the optics team. Mr A removed the frames from the drawer in the Registrant's room with the intention of speaking to the Registrant about this. However, before he had the opportunity to speak to the Registrant, a second pair of frames had been removed from the store.

21. A photocopy of two dispense slips was provided to the Committee but was not entirely legible. Mr A stated that both dispense slips had a newer prescription than the prescription for the original spectacles that had been purchased by Ms 1 on 28 November 2018. In Mr A's view the Registrant was therefore attempting to dispense a new prescription with a frame taken from the store.
22. Mr A stated that a Concern Handling Log is used to record any issues with a previous dispense, be it a visual or product problem. The CHL is then signed off by another member of the team. No CHL was completed by the Registrant in relation to this dispense. The Registrant was aware of the process of completing a CHL as he had completed CHL's in the past. Mr A stated to the Committee that Ms1 was not eligible for a remake, as the damaged glasses had not been provided.
23. Mr A referred to the Specsavers staff handbook, specifically the section concerning serving family and friends - staff should refer family or friends to another member of the team, rather than serving them, and that if this is unavoidable a manager should be asked for assistance. Mr A stated that the Registrant would have been provided with a copy of the staff handbook as part of his induction process. The staff handbook was also available on Specsavers' intranet and referenced in the Registrant's contract of employment. Mr A accepted there was no evidence that the Registrant was provided with a copy of the staff handbook and the contract of employment does not refer to employees not serving friends and family.
24. The Registrant gave evidence on affirmation. He stated he was aged 24 at the time of the incident. He has recently passed his optometry degree and is due to start his pre-registration year next month.
25. The Registrant stated that Ms 1 visited his home as they are friends. She mentioned the issue with her glasses in conversation, specifically that her lenses had suffered a coating breakdown. They took the lenses out of the frames and looked at them together. Ms 1 subsequently came into the store to give the Registrant the glasses to sort out. She initially spoke to another member of staff, Ms A, and handed the Registrant the glasses in front of Ms A.
26. The Registrant stated that he had subsequently discovered that Ms 1 had not dropped the lenses off at the store with her frames and that the lenses were misplaced either by himself or Ms 1. The Registrant stated that he asked the lab manager what the process was for dealing with a coating fault under a guarantee and putting the lenses coating error through the system as a remake. The lab manager told the Registrant she did not

require the lenses. The Registrant stated that he did not look any further for the lenses because the lab manager told him they were not required.

27. The Registrant placed Ms 1's frames in a drawer in his testing room. A short while later he discovered the frames were missing from the room along with the dispense slip. The Registrant concluded that the frames had either been taken or lost by someone in the store and this is why he took a frame from the store to put through a remake. The Registrant deemed it appropriate to take a new frame as the originals could not be located. When asked in cross examination why he did not ask colleagues or a manager in the store whether they had removed the frame from his drawer, the Registrant replied that it was more likely someone had taken them to the lab to be processed. The Registrant could not recall whether he messaged Ms 1 regarding the missing frames. He stated that had Ms 1's frames not been removed from the drawer in his room, they would have been remade as he believed Ms 1 was entitled to a free remake because of the coating failure.
28. The Registrant was subsequently interviewed by Mr A. He stated that he was asked by a colleague to go to A's office and was not given any prior warning by Mr A of the reason why. He told the Committee that he felt intimidated by Mr A and uncomfortable during the investigation interview because he had "*never been in that situation before and just wanted to leave*". It was put to the Registrant in cross examination that his first comment in the investigation interview was "*These are [Ms 1's] glasses she gave them to me to put through – I think she paid for them*", so he was aware of the reason for the investigation interview.
29. The Registrant stated that he regretted not having someone present with him in the investigation interview, that he felt Mr A had already "*made his mind up*" and that he "*had a problem....because the glasses were for [Ms 1]*". The Registrant had not realised the gravity of the situation he had found himself in. Once he returned home and reflected on what he had said in the interview, and how he had said it, he "*realised the situation I'd put myself in*".
30. It was put to the Registrant that he had provided an honest account in his investigation interview and his responses in the disciplinary and appeal interviews differed because he had realised the consequences of the alleged conduct. The Registrant stated that his account in the investigation interview was "*muddled*", and he was not able to give a clear account of what had happened. He provided correct answers in the disciplinary and appeal interviews and maintained that he had not intended to do anything that was dishonest.
31. The Committee also heard evidence from Ms A. She confirmed that her glasses, purchased through Specsavers [Redacted], suffered a coating breakdown. As there was a two-year warranty on the lenses, she approached the Registrant to replace the lenses for free. She subsequently dropped the frames off at the store where she also spoke to Ms A. In response to a question from the Committee, Ms A said that early on she had

exchanged text messages with the Registrant where he asked her if she had the lenses. They established that neither of them had the lenses. Ms 1 confirmed that this exchange of text messages was before she took the frames into the store. The Registrant told Ms 1 that the lab manager had told him the lenses were not required. Ms 1 did not look for the missing lenses.

32. Approximately two weeks later the Registrant made contact again and told Ms 1 that her frames had gone missing, and he had taken another frame off the shelf. When asked in cross examination whether the store should contact a customer to tell them their frames are lost, Ms 1 stated “*no, if the exact same frame is available in the store*”. Ms 1 stated that the condition of worn frames is “*very subjective*” and that her “*spectacles were kept in very good condition*”. Ms 1 explained to the Committee that the coating fault was in the exact same places on both lenses hence she knew it was a coating error. Ms 1 did not consider that completion of a CHL was required for a coating breakdown. A CHL would be required for vision and fitting issues to prevent a mistake from being repeated.
33. Ms 1 explained the history of her employment at the store, and her relationship with Mr A. She stated that at no point was she attempting to obtain a free pair of glasses from Specsavers as the warranty meant that she was entitled to a replacement at no cost.
34. The Committee also received references from four individuals attesting to the Registrant’s honesty and integrity.

**Closing submissions: Facts (Particular 4)**

35. The Committee heard closing submissions from Mr Lawson on behalf of the GOC and Mr Graham on behalf of the Registrant.
36. Mr Lawson submitted that the Committee can properly conclude that the Registrant’s conduct was dishonest in accordance with the test as set out in the case of *Ivey v. Genting Casinos* [2017] UKSC 67. He invited the panel to consider the Registrant’s responses in his investigation interview, and his immediate acceptance that the frames presented by Mr A were Ms 1’s glasses. He referred to the absence of a CHL and the Registrant’s explanations of frames being lost and broken. Mr Lawson stated that the Registrant professed in the investigation interview but thereafter put forward different explanations in the disciplinary and appeal hearings. It was the GOC’s position that the Registrant’s subsequent accounts have been concocted with the benefit of hindsight.
37. Mr Lawson submitted that it was a matter for the Committee how they dealt with the Registrant’s shifting narrative. In relation to the Registrant feeling intimidated by Mr A, Mr Lawson stated that he could have sought support at any time and request a break to reflect and collate his thoughts. However, when asked by Mr A whether he had any questions, the Registrant replied, “*no you hit nail on the head there I didn’t think about what I had done and your being really nice about it*”. Mr Lawson submitted that this comment from the Registrant does not reflect someone who is lacking experience and feeling under pressure. Following this comment, the Registrant went on to accept several statements put forward by Mr A, including admitting to obtaining goods by deception. In

conclusion Mr Lawson submitted the investigation interview is the Registrant's honest account and Particular 4 can be found proved.

38. Mr Graham submitted that the starting point for the Committee is to consider Ms 1's oral evidence and her witness statement. He referred to the CHL and Ms 1's evidence that one was not required for a coating failure. Mr Graham submitted there were numerous deficiencies in the investigation undertaken by Mr A which placed the Registrant at a disadvantage. He stated that once Mr A became aware of the frames in the drawer, he had an opportunity to contact the Registrant and ask him about the frames. Instead, he placed the Registrant in a difficult position by removing the glasses and not notifying him he had done so. Mr A also had an opportunity to contact Ms 1 for her account, and to conduct an audit trail and stock check of the frames. It was not disputed that there was a conversation between the Registrant and the lab manager, but this was not documented in Mr A's investigation. Instead, Mr A proceeded like a "*bull in a china shop*" and made assumptions and reached conclusions based on the physical presentation of the glasses.
39. In relation to the investigation interview, Mr Graham submitted that Mr A was "*dogmatic, unreasonable and manipulative*". Mr A did not disclose the purpose of the interview to the Registrant. It was therefore not surprising that the Registrant felt intimidated, struggled at times, and wanted to get out of the room. Mr Graham submitted that it would be wrong for the Committee to conclude that the Registrant was dishonest based on a deficient investigation and the investigation interview notes. The Registrant denies the allegation and he was only trying to help a former colleague. The Registrant has worked hard in the optical industry and has impeccable character references. In conclusion Mr Graham invited the Committee to find Particular 4 not proved.

#### **Findings in relation to the facts**

40. The Committee accepted the advice of the Legal Adviser. She advised that the burden of proof lay on the GOC and there was no burden on the Registrant to prove or disprove anything. The standard of proof to be applied was the balance of probabilities. With regard to dishonesty, the test to be applied was set out by the Supreme Court in *Ivey v Genting Casinos* [2017] UKSC 67. Where dishonesty is in question the fact-finding tribunal must ascertain, subjectively, the actual state of the individual's knowledge or belief as to the facts. The reasonableness of that belief is a matter of evidence going to whether they held the belief, but it was not an additional requirement that the belief had to be reasonable; the question is whether it was genuinely held. When the state of mind has been established the question whether the conduct was honest or dishonest is to be determined by applying the objective standards of ordinary decent people. There is no requirement that the person concerned must appreciate that the conduct was dishonest by those standards. The Committee was also advised regarding the Registrant's good character as a factor to be taken into account when assessing whether the Registrant's evidence was to be believed and whether it was likely he had done what was alleged. Evidence of good character cannot afford a defence in itself, and the weight to be attached to character evidence remained a matter for the Committee, assessing it in all the circumstances of the case.

41. The Committee carefully considered all the documentary evidence, oral evidence from the witnesses and the Registrant and the submissions made by Mr Lawson and Mr Graham. The Committee noted that it was for the GOC to prove Particular 4 and that the standard of proof was on the balance of probabilities.
42. Applying the guidance in *Ivey v Genting Casinos* the Committee first considered the Registrant's state of mind at the time of the events. Having considered the Registrant's understanding and belief, it applied an objective test, and considered whether the Registrant's conduct was honest or dishonest by the standards of ordinary decent people.

Particular 4(a)

4. *Your actions as described in (1) and (2) above were dishonest in that you knew:*
- a. that the spectacles did not have a coating failure; and/or*

43. The Committee was not provided with Ms 1's lenses or any photographs of them. There was therefore no evidence before the committee to confirm there had *not* been a coating failure. The Committee concluded that the GOC had not discharged its burden.

44. Accordingly, the Committee found Sub-Particular 4(a) not proved.

Particular 4(b)

4. *Your actions as described in (1) and (2) above were dishonest in that you knew:*
- b. you submitted the remake request/s in an attempt to gain a pair of spectacles for Ms 1 without you and/or Ms 1 paying for it.*

45. In relation to Particular 4(b) the Committee accepted the evidence of Mr A which it found credible and reliable. It was satisfied that it could attach weight to the documents produced by Specsavers.

46. The Committee considered the circumstances in which this conduct arose and Specsavers procedures. Mr A described the process that should be completed when a remake of spectacles is required due to a coating fault. This included completion of a CHL which required sign off. The Registrant had completed CHL's in the past and signed off CHL's for junior colleagues at the store, so he was aware of the process. Had he completed a CHL for Ms 1's remake, a senior colleague or member of the management team would need to have signed it off.

47. The Committee considered the photocopies of the dispensing slips, and the order history exhibits. The Registrant had processed the remake of Ms 1's glasses to a different prescription to the original prescription that had been dispensed in November 2018. It

accepted the evidence of Mr A who stated that a remake for a coating failure should always be made in accordance with the original dispensed prescription.

48. The Committee considered the Registrant's various accounts and his oral evidence. It concluded that at the investigation interview the Registrant was aware of the gravity of the situation he found himself in, as he also confirmed in his oral evidence to the Committee, and was aware of the inferences that could be drawn from his conduct as described by Mr A in that interview. The Registrant had read the interview notes and signed them as accurate. He had declined to be accompanied at the interview and was offered an opportunity in the interview to compose himself.
49. The Committee noted the Registrant's admissions and responses to questions in the investigation interview. At the outset the Registrant volunteered the frames were Ms 1's and were given to him "to put through – I think she paid for them". The Registrant told the Committee he accepted that no CHL was completed and he had offered to pay for the lenses. The Committee had regard to the following exchange:

*"[Mr A] So what I think I just heard lost the glasses*

*FK Yes she lost her glasses*

*[Mr A] Your story has more holes in it then*

*FK Ive never done this before I said I would pay for them but*

*[Mr A] When you put that dispense through you thought you were going to pay for them?*

*FK I was gona pay for them*

*[Mr A] Freddie you have put them through as a remake so you weren't going to pay for them*

*FK Yes that's what she told me to put it through as*

*[Mr A] She told you – Im not satisfied with explanation cuz it doesnt make any sense. This couldn't look dodgier*

*FK I don't want to get anyone else into trouble*

*[Mr A] Who are you going to get into trouble?*

*FK [Ms 1]*

*[Mr A] Have you ever hear of theft from employer*

*FK Yes I didn't want to do this*

*[Mr A] Freddie you have done this can you just take a few moments to compose yourself and let me know the true version of events*

*FK She lost specs, told me to get a frame put it through as remake*

*[Mr A] Thank you. So that pair you have in your hand you of your own admission took frame off shelf and processed as a remake*

FK Yes

*[Mr A] So took glasses put remake through a coating error put them in your drawer to process later. You went back to your drawer then not found glasses so then took another frame reprinted gave to [Redacted] a 2nd lot whilst she was on lunch*

FK Yes (NoddinG).”

50. The Committee rejected Mr Graham’s submission that the Registrant was forced by Mr A to accept leading questions. For example, it was the Registrant who volunteered the explanation that Ms A “*lost her specs, told me to get a frame, put it through as remake*”. Also the Committee noted that the Registrant had volunteered the statement that he did not want to get Ms A into trouble.
51. The Committee noted the accounts provided by the Registrant subsequently in his disciplinary and appeal interviews differed from the account he provided in the investigation interview, and at times were also inconsistent with his oral evidence before the Committee. For example, in his disciplinary interview the Registrant stated Ms 1 had “*damaged her glasses*” and asked him to “*look into the breakdown because she worked here*” yet initially he said Ms 1 had lost her glasses. The Registrant said that the frames were given to him by Ms 1 and those found by Mr A were not store frames. He also stated that Ms 1 was going to pay for the glasses yet in his investigation interview he said, “*I was gona pay for them*”, then later in the same interview he stated there was no intention for payment to be made by anyone.
52. In his appeal interview the Registrant also contradicted his initial account by denying taking a second frame from the store, stating that he “*must have got muddled up. I didn’t take the second frame*”. In response to the following question from the Committee “*if the second frame had been made up, would you have told anyone you had taken a pair off the shop floor*”, the Registrant responded, “*I believe I had told the lab manager I had taken them from the shop floor*”.
53. In his evidence before the Committee the Registrant stated that he took the second frame from the store after assuming the frames from his drawer had been taken by a colleague to the lab. The Committee found it incredible that the Registrant could not recall whether he told Ms 1 that her frames had gone missing from his drawer, that he did not check with colleagues if they had removed the frames from his drawer and he did not inform management. Nor did he look for the missing glasses. Instead, the Registrant took a second pair of frames from the store without documenting what had happened. The Committee also noted inconsistencies between the Registrant’s witness statement prepared for these proceedings and his oral evidence. For example, in his witness statement he stated that he felt intimidated during the interview because Mr A said he was going to report the matter to the GOC, whereas in his oral evidence he said the comment about the GOC was made by Mr A after the interview had concluded, when the Registrant was clearing out his locker.

54. The Committee concluded that the Registrant's account in his investigation interview was generally an accurate account of what he had done and why, and found inconsistencies with the alternative accounts and explanations of his actions put forward at the disciplinary and appeal interviews, and in oral evidence. The Committee concluded that the Registrant's various accounts were not internally consistent and his account was not consistent with that of Ms 1. For example, their accounts did not agree as to when they had discussed the missing lenses. A further example is when the Registrant in his investigation interview stated that Ms 1 had lost her glasses and in his disciplinary interview he stated that Ms 1 had damaged her glasses. Ms 1 told the Committee that she had not told the Registrant that she had lost or damaged her glasses at any time.
55. In conclusion, even taking into account the Registrant's otherwise good character, the Committee did not think his account in evidence was credible.
56. The Committee was satisfied that the Registrant's knowledge and belief at the time of the incident was that he was attempting to obtain a pair of spectacles for Ms 1 so that he and/or Ms 1 could obtain the spectacles without making any payment. The Committee concluded that the Registrant's behaviour would be seen as dishonest by the standards of an ordinary decent person. Therefore, the Committee reached the conclusion that the Registrant was dishonest.
57. The particular of dishonesty in Particular 4(b) was found proved on the balance of probabilities.

### **Misconduct and Impairment**

58. The Registrant gave evidence at the stage of misconduct and impairment. He told the Committee that since leaving Specsavers in 2019 he has continuously worked at a Boots store where he is the only dispensing optician. He has recently passed his optometry degree with an upper second grade and is due to begin his pre-registration year next month. At university he undertook an additional module called Medical Retina which he hopes will allow him to work in hospital optometry in the future. When asked how the Committee's findings will impact his career progression, the Registrant replied that it may delay his pre-registration year.
59. The Registrant was referred to his witness statement where he expressed remorse. He stated that he did not follow correct procedures and realised he should have made inquiries rather than rush to help out a friend. He understood the importance of policies and procedures in the optical environment and provided examples of how he follows procedures in his current workplace. The Registrant stated that these proceedings have been a learning curve, that he has been strict on notes and record keeping at Boots, and that his work is verified and that he also verifies others work. He now seeks management authorisation where required and ensures that things are properly done. In relation to learning and development the Registrant stated that Boots has an online learning site for each individual staff member to log onto and complete learning modules that are flagged to management if not completed. The Registrant explained that in a new working environment he would request the staff handbook and would not rely on others to provide him with correct documentation. He accepted that he was in charge of his own practice.

60. The Registrant was taken through his four character references. He told the Committee that he is a better version of who he was in 2019 and that he would not repeat the conduct found proved. When asked why he would not, he replied that he has seen where such conduct can, and has, led to for him.
61. The Registrant stated that he understood the public placed trust in him and how the Committee's findings impacted both patients and public trust and confidence in the profession. When asked how important is the reputation of the profession, the Registrant replied "*it's massive, having a good reputation is everything*". He understood it was important how the public perceived dispensing opticians.
62. The Committee heard submissions on behalf of the Council and the Registrant.
63. Mr Lawson, on behalf of the GOC, submitted that the Registrant's dishonest conduct fell far below the standard required of registered dispensing opticians. He submitted that the Committee's finding of dishonesty is serious and referred the Committee to the Standards of Practice. He reminded the Committee of the relevant case law and concluded that that Registrant's actions were sufficiently serious to amount to misconduct. In relation to impairment, Mr Lawson submitted that dishonesty is hard to remediate and evidencing that remediation is also difficult. It was a matter for the Committee as to whether the Registrant had remediated and if there was a risk of repetition of dishonest conduct in the future. Mr Lawson submitted that the Registrant's conduct was a one-off isolated incident and there has been no repetition of such conduct since 2019. Mr Lawson submitted that his submissions centred on the public interest and maintenance of public confidence in the profession and the upholding and reaffirming of standards of dispensing opticians. Mr Lawson submitted that a reasonable person fully informed of the facts in this case would be surprised if no impairment was found following the Committee's finding of dishonesty.
64. Mr Graham, on behalf of the Registrant, submitted that the admitted particulars did not breach any element of the standards and would not of themselves amount to serious misconduct. There was no public interest in relation to finding current impairment in relation to the admitted particulars. In relation to the dishonesty found proved, Mr Graham submitted that there is a scale of dishonesty and the Registrant's conduct was at the lower end of seriousness on that scale. He stated that the conduct was one off, not repeated and there was no financial gain to the Registrant, and no loss to his employer.
65. In relation to impairment, Mr Graham submitted that the Registrant's conduct since the incident has been exemplary and this is supported by independent and experienced individuals within the industry who have provided character references attesting to the Registrant's integrity. He submitted that the dishonest conduct has been remedied and has not been repeated since. Looking forward the Registrant has told the Committee how he wants to continue, develop and be an asset to the profession. The Registrant has displayed a positive attitude, shown genuine remorse in his witness statement, and demonstrated to the Committee what he would do differently. He has co-operated with the GOC, engaged with these proceedings and gave evidence. The Registrant has displayed insight which is an evolving and developing process. In conclusion Mr Graham submitted the Registrant is not currently impaired, and that whilst there may be a distaste for the Registrant's actions in 2019, any decent member of the public would be encouraged by the Registrant's conduct and development since.

66. The Committee accepted the advice of the Legal Adviser.

### **Misconduct**

67. The question of whether the facts constitute misconduct is for the judgment of the Committee and there is no burden or standard of proof.

68. There is no statutory definition of misconduct, but the Committee had regard to the guidance of Lord Clyde in *Roylance v GMC* (No 2) 1 AC 311: “*Misconduct is a word of general effect, involving some act or omission which falls short of what would be proper in the circumstances. The standard of propriety may often be found by reference to the rules and standards ordinarily required to be followed by a practitioner in the particular circumstances...*”. The conduct must be serious. In *Nandi v General Medical Council* [2004] EWHC 2317 (Admin) per Collins J it was held that “*the adjective ‘serious’ must be given its proper weight, and in other contexts there has been reference to conduct which would be regarded as deplorable by fellow practitioners.*”

69. In relation to the admitted Particulars, 1, 2 and 3, the Committee concluded that not following dispensing processes and not seeking authorisation before submitting a remake of spectacles for a coating failure and removing a pair of spectacles from the store because the customers original spectacles could not be located, did not reach the threshold of serious professional misconduct.

70. In relation to Particular 4(b), the Committee concluded, having found that the Registrant had attempted to gain a pair of spectacles without payment, that the Registrant’s conduct amounted to serious professional misconduct. The Committee viewed the Registrant’s conduct as pre-meditated and was an abuse of his position as an employee and as a dispensing optician to attempt to obtain a pair of spectacles for a customer and friend without payment. It was satisfied that fellow members of the dispensing optician profession would view the Registrant’s behaviour as deplorable.

71. The Committee considered the following aspects of the standards and bore in mind that not every breach of the standards will result in a finding of misconduct; however, it noted that the code is indicative of behaviour expected of a registered dispensing optician. The Committee concluded that the Registrant’s actions breached the following principles and standards of the GOC Standards of Practice for Optometrists and Dispensing Opticians (effective from April 2016) so as to amount to misconduct.

#### ***Standard 16. Be honest and trustworthy***

*16.1 Act with honesty and integrity to maintain public trust and confidence in your profession.*

#### ***Standard 17. Do not damage the reputation of your profession through your conduct***

*17.1 Ensure your conduct, whether or not connected to your professional practice, does not damage public confidence in you or your profession.*

## **Impairment**

72. The Committee accepted the advice of the Legal Adviser and had regard to the Hearings and Indicative Sanctions Guidance (November 2021). She advised that, in approaching the question of impairment, the test was expressed in the present tense (*GMC v Meadow* [2006] EWCA Civ 1319). The Committee was advised to have regard to the guidance provided by the relevant authorities and, in particular, the cases of *Cohen v GMC* [2008] EWHC (Admin) and *CHRE v NMC and Grant* [2011] EWHC 927 (Admin). The Legal Adviser also referred the Committee to the cases of *GMC v. Awan* [2020] EWHC 1552 [2020] EWHC 147 (Admin) and *Blakely v GMC* [2019] EWHC 905 which emphasised that it would be unfair for panels to automatically equate denial of a proven allegation with a lack of insight, and individuals have every right to deny an allegation.
73. The Committee carefully considered the Registrant's evidence, submissions of the parties and the case law it had been referred to. The Committee read the four character references from professional colleagues of the Registrant, all of whom were aware of the nature of the regulatory proceedings brought by the GOC.
74. The Committee considered impairment in the context of Dame Janet Smith's comment in the *5th Report to the Shipman Inquiry* and concluded that the Registrant had acted in the past so as to (b) bring the dispensing optician profession into disrepute (c) breach a fundamental tenet of the dispensing optician profession and (d) has acted dishonestly.
75. The Committee was aware that it is difficult for someone to demonstrate remediation in cases of dishonesty. However, there was evidence of remediation in the Registrant's oral evidence to the Committee at this stage of the proceedings as summarised at paragraphs 58 to 61 above, and also in the reflective paragraphs of the Registrant's witness statement dated 28 March 2022, submitted for this hearing. The Registrant told the Committee that he has been ensuring in his current employment at Boots how his previous conduct has not, and will not, be repeated.
76. The Committee considered that the Registrant had now developed sufficient insight into the nature of his misconduct and its implications such that he was unlikely to repeat an act of dishonesty in the future. The Committee noted that the incident took place in 2019 and has not been repeated since. The Registrant told the Committee of his current position and future career plans in optometry. The Committee was impressed with the Registrant's career progress and his commitment to the profession.
77. The Committee concluded that the Registrant had acquired sufficient insight into his shortcomings and was reassured by the measures he had been taking to ensure there would be no recurrence of his misconduct. Accordingly, the Committee considered that the Registrant was, in the future, unlikely to (b) bring the optometry profession into disrepute (c) breach a fundamental tenet of the profession and (d) act dishonestly.
78. The Committee then reminded itself of the public interest considerations including the need to maintain public confidence in the profession and uphold standards of conduct

and behaviour (*Council for Healthcare Regulatory Excellence v (1) NMC (2) Grant* [2011] EWHC 927 (Admin)).

79. Dishonesty is serious and is likely to undermine public confidence in the profession, particularly when it involves an abuse of a position of trust and an attempt to deceive ones employer financially. In this case the Registrant's conduct amounted to a departure from the required standards of dispensing opticians. The Committee decided it was necessary to make a finding of current impairment of the Registrant's fitness to practise in order to declare and uphold proper standards of conduct in the dispensing optician profession, as well as maintaining confidence in and the reputation of the profession.
80. The Committee therefore concluded that the Registrant's fitness to practise was currently impaired by reason of his misconduct.
81. In view of the above findings, the Committee proceeded to consider the issue of sanction

### **Sanction**

82. The Committee heard submissions on sanction.
83. Mr Lawson, on behalf of the GOC, referred to the Hearings and Sanctions Guidance ("Guidance") and reminded the Committee of the principle of proportionality. He submitted that sanctions of no further action and a financial penalty were not appropriate in view of the Committee's findings at previous stages. A conditions of practice order was not practicable nor workable given the dishonest conduct. Mr Lawson submitted that a suspension order for six months satisfied the public interest considerations in this case.
84. Mr Graham, on behalf of the Registrant, referred to the GOC's skeleton argument which referenced the established case of *Bolton v. Law Society* [1994] 2 All ER. He distinguished the dishonesty found proved in that case from the Registrant's case and submitted that the relevant principle from the *Bolton* case for the Committee to consider in these proceedings was the importance of the reputation of the profession.
85. Mr Graham referred to the Guidance and reminded the Committee that the central function of sanction was the protection of the public. The Committee had found current impairment on public interest grounds only. Mr Graham referred to the mitigating features of this case, namely that the dishonest conduct was a one-off isolated incident from three years ago and has not been repeated. He reminded the Committee of the positive character references submitted on behalf of the Registrant.
86. Mr Graham informed the Committee that the Registrant is due to commence his pre-registration year on 11 July 2022. Should a sanction of suspension be imposed the Registrant will be at a disadvantage as he will not be able to commence this placement.
87. In conclusion Mr Graham submitted that the dishonesty found proved is at the lower end of the scale of seriousness and the Committee should take a proportionate approach to sanction. He submitted that in view of the insight demonstrated by the Registrant, the appropriate and proportionate sanction was no further action.
88. The Committee accepted the advice of the Legal Adviser. The Committee should consider any aggravating and mitigating factors in the case; act proportionately; consider the range of available sanctions in ascending order of seriousness; remember that the purpose of sanction is not to be punitive, but is to protect the public, maintain public confidence in the profession, and declare and uphold proper standards of conduct and behaviour. She further advised the Committee to take into account the factors set out in the GOC's Hearings and Indicative Sanctions Guidance, to consider the seriousness of the misconduct and the need for a nuanced approach to dishonesty. The Legal Adviser

referred to the cases of *Lusinga v. Nursing and Midwifery Council* [2017] EWHC 1458 (Admin), *Bolton v. Law Society* [1994] 2 All ER 486, and *SRA v. Imran* [2015] EWHC 3058 (Admin).

89. The Committee has borne in mind that any sanction imposed must be appropriate and proportionate and, although not intended to be punitive in its effect, may have consequences for the Registrant.
90. Before making its decision on the appropriate sanction, the Committee established the aggravating and mitigating features in this case. In terms of aggravating factors the Committee considered the following were relevant factors:
- the Registrant had abused his position of trust as an employee and a dispensing optician
  - the Registrant's dishonest conduct was pre-meditated.
91. The Committee took into account the following mitigating factors:
- the Registrant's previous good character
  - the positive character references provided on the Registrant's behalf attesting to his ability and integrity
  - the length of time since the misconduct, combined with the lack of any repetition of it
  - the Registrant has developed sufficient insight and remediation
  - the Registrant has expressed remorse.
92. The Committee carefully considered the sanction of 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. The sanctions of no further action and a financial penalty order were not proportionate or sufficient given the Committee's findings at each stage of the proceedings regarding dishonesty.
93. The Committee concluded that conditional registration would not be practicable due to the nature of the misconduct, which did not involve identifiable areas of practice in need of assessment or retraining. Dishonest conduct is attitudinal in nature, and the Committee was unable to formulate workable, enforceable and measurable conditions to uphold the public interest.
94. The Committee next considered suspension and had regard to paragraphs 21.29 to 21.31 of the Guidance. The Committee took into account the fact that dishonesty was a serious matter, and in this case, the dishonesty was pre-meditated.
95. The Committee balanced the dishonesty it found proved against the Registrant's recent reflection and remediation. In his oral evidence at the impairment stage the Registrant demonstrated an understanding of the need to act with honesty and integrity. He told the Committee how these proceedings had been a learning curve and how, since the incident, he ensures that he follows set procedures and processes at his current place of work. This understanding by the Registrant, together with his previous unblemished record, his positive character references, and the lack of repetition since the incident in 2019, led the Committee to conclude that a suspension order was the appropriate sanction in this case. The Committee considered that a reasonable member of the public,

in possession of all the facts, would accept that a suspension order was a proportionate sanction in the Registrant's case.

- 96. The Committee did consider erasure, but was of the view that this would be disproportionate and excessively punitive, in light of the Registrant's insight and remediation, very low risk of repetition, and that erasure was not the only sanction that could protect the public interest in the circumstances of this case.
- 97. The Committee therefore concluded that a suspension order was sufficient to address the public interest concerns and to declare and uphold proper standards of conduct and behaviour and maintain confidence in the profession.
- 98. The Committee gave consideration to the length of the order and concluded that two months was the appropriate length to address the seriousness of the dishonesty and the public interest concerns it had identified.
- 99. The Committee decided, in this instance, not to order a review hearing. This was on the basis that a suspension order for a period of two months is imposed to uphold the public interest, the Committee already having found that the Registrant had developed insight and not repeated the misconduct since 2019. The Committee was satisfied that the public interest will be served once the suspension order comes to an end.
- 100. The Committee therefore imposed a suspension order for a period of two months and did not direct a review.

**Immediate order**

- 101. The Committee heard submissions from Mr Lawson, on behalf of the GOC, that should it impose a sanction of suspension, then under Section 13I of the Opticians Act 1989, the GOC applied for an immediate suspension on the grounds that it was otherwise in the public interest. Mr Graham, on behalf of the Registrant, opposed the imposition of an immediate suspension stating that there are no public protection concerns and risks to patient safety identified in this case.
- 102. The Committee accepted the advice of the Legal Adviser
- 103. The Committee decided not to impose an immediate suspension. It was not satisfied that an immediate order was required otherwise in the public interest, nor was an order necessary for the protection of the public.

**Revocation of interim order**

- 104. There was no interim order in place.

**Chair of the Committee: Julia Wortley**

**Signature**

**Date: 7 July 2022**

**Registrant: Frederick Kimsey**

**Signature present via video**

**Date: 7 July 2022**

<b>FURTHER INFORMATION</b>
<b>Transcript</b>
A full transcript of the hearing will be made available for purchase in due course.
<b>Appeal</b>
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).
<b>Professional Standards Authority</b>
<p>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.</p> <p>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).</p> <p>Further information about the PSA can be obtained from its website at <a href="http://www.professionalstandards.org.uk">www.professionalstandards.org.uk</a> or by telephone on 020 7389 8030.</p>
<b>Effect of orders for suspension or erasure</b>
To practise or carry on business as an optometrist or dispensing optician, to take or use a description which implies registration or entitlement to undertake any activity which the law restricts to a registered person, may amount to a criminal offence once an entry in the register has been suspended or erased.
<b>Contact</b>
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.