

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

GENERAL OPTICAL COUNCIL

F(21)31

AND

MARY DOCHERTY (01-14899)

**DETERMINATION OF A SUBSTANTIVE REVIEW
24 MAY 2023**

Committee Members:	Sara Fenoughty (Chair/Lay) Jackie Alexander (Lay) Sarah Hamilton (Lay) Caroline Clark (Optometrist) Danielle Ellis (Optometrist)
Legal adviser:	Graeme Henderson
GOC Presenting Officer:	Dean Taylor
Registrant:	Not present but represented
Registrant representative:	Nick Hall Cassandra Dighton (Association of Optometrists)
Hearings Officer:	Terence Yates
Outcome:	Impaired but no further action taken (no order)



DETERMINATION

Background

1. On 19 July 2019, NHS [Redacted] (“the Complainant”), informed the Council that a whistle blower had contacted them regarding the care the Registrant had provided to nine patients. The Registrant was informed of this and that the General Ophthalmic Services Performance Review Group (“PRG”) would be reviewing these patients’ files. The PRG found concerns in 8 of the 9 cases. The PRG looked at a wider sample of 60 random records and found concerns in 14 of them, identifying ‘multiple incidents of inadequate patient management, some potentially resulting in long term harm’.
2. Specifically, the concerns included:
 - A wide range of clinical issues and patient safety incidents, some of which potentially resulted in harm. These incidents included, but were not limited to, papilledema, uveitis, glaucoma, and paediatric management, often with more than one isolated incident identified.
 - Multiple incidents of patients receiving refraction but no ocular examination. This does not comply with the Opticians Act 1989 requirements on the testing of sight.
 - Patients were often prescribed new spectacles at short intervals with small changes in prescription.
 - Several standards of practice in the GOC Code of Conduct have been breached.
3. On 8 November 2019, the Registrant was made subject to an interim order of conditions for 18 months. At the interim order hearing she made reference to a Personal Development Plan and the view of the Committee was she had taken a commendable approach to address areas of practice in which she needed additional support.
4. However, on 24 April 2020 at the First Interim Review hearing, the Committee was concerned about the absence of any further remediation.
5. On 9 July 2020, the Registrant sent an email to the Council explaining she was no longer in practice and had no intention of returning to practice.
6. On 25 October 2021, the Registrant was notified that the matter had been referred to the Fitness to Practise Committee (FTPC).
7. On 7 December 2021, the Council’s case was served on the Registrant.
8. On 17 December 2021, the FTPC continued the interim order of conditions.
9. In the Hearings Questionnaire dated 18 January 2022, the Registrant admitted to all the allegations and explained that she had retired from practice.

10. On 26 January 2022, the Council received confirmation from the Registrant's legal representative that the Registrant accepted she is currently impaired.
11. The Registrant was invited by the Council to sign a voluntary undertaking to the effect that:
 - a) She has not practised as an optometrist since 1 August 2019;
 - b) She has retired from practice;
 - c) She will not apply to renew her GOC registration;
 - d) She will not use any title or conduct any activity restricted to GOC registrants; and
 - e) She will not seek retention on, or restoration to, the GOC register.

Nature of the Recommended Disposal

12. Upon the Registrant's admissions and upon the Council and Registrant agreeing to the recommendation, the parties jointly sought and recommended to the FTPC that this matter was disposed of by a determination on the following basis:
 - i. All of the particulars of the allegations are admitted and found proved;
 - ii. That the particulars of the allegations amount to misconduct and/or deficient professional performance;
 - iii. That the Registrant's fitness to practise is impaired by reason of misconduct and/or deficient professional performance; and
 - iv. The appropriate and proportionate sanction is a 12-month suspension with review.

The Committee made the order sought and stated that it was likely that a reviewing Committee would be assisted by either:

- i. Evidence of remediation in the event that the Registrant changed her mind about returning to practice or
- ii. An indication of her intention, at that time regarding her future registration with the Council

FTPC Review Decision

13. The Registrant's registration was suspended for 12 months following the substantive APD hearing held on 30 May 2022. The order is due to expire on 27 June 2023 and the Committee met to review the order. In advance of the hearing the Committee was supplied with a bundle of documents by the Council which contained the determination to be reviewed and supporting documents. In

addition, a bundle of documents was supplied by the Registrant which consisted of a Witness statement from her, as well as supporting documents.

Findings regarding impairment

14. The Committee has heard submissions from Mr Taylor, on behalf of the Council and from Mr Hall, on behalf of the Registrant.
15. Mr Taylor invited the Committee to find that the Registrant's fitness to practise remained impaired. Mr Hall also invited the Committee to make such a finding.
16. The Committee accepted the advice of the Legal Adviser. He advised the Committee that there was a persuasive burden on the Registrant to satisfy the Committee that she was no longer impaired (*Abraheam v General Medical Council* [2008] EWHC 183 (Admin)). The fact that the Registrant had provided evidence of her retiring from practice could not be regarded as material which would support the conclusion that she was no longer impaired (*General Optical Council v Clarke* [2018] EWCA Civ 1463) (*Clarke*).
17. The Committee recognised that it had first to consider whether or not the Registrant's fitness to practise was currently impaired. It was aware that the issue of current impairment involved considering fitness of the Registrant to practise, at the date of the review. The Committee was required to exercise its professional judgement.
18. The Committee found that the fitness of the Registrant to practise as an optometrist remained impaired as at the date of the review. The Committee had careful regard to her witness statement and supporting documentation. The Committee considered that the Registrant had previously demonstrated some insight into her past failings. However, the Registrant had also made it clear that she no longer wished to remain in the profession. She considered that it would be better for her to continue in her new career as a [Redacted]. She produced excerpts from pages in social media where her services as [Redacted] were advertised. This demonstrated the extensive nature of her success, and her commitment, to her new career. In light of the fact that she had allowed her registration to lapse and was no longer keeping her skills and knowledge up to date, the only reason that she remained on the Register was due to these professional disciplinary proceedings continuing.

Sanction

19. The Committee had heard submissions from Mr Taylor, on behalf of the Council and from Mr Hall, on behalf of the Registrant. Both representatives invited the Committee to exercise its professional judgement by taking no further action. This would mean that the existing suspension order would expire. Once the existing

order expired the Council would then be able to remove the Registrant from the register.

20. In response to Committee questioning, Mr Taylor explained that should the Registrant change her mind and reapply to return to the Register her application would be considered on the basis that the finding of current impairment remained in addition to issues of whether or not she had the requisite skills and knowledge to resume practice.
21. Mr Hall submitted that other sanctions open to the Committee were less appropriate. An order for erasure would be harsh and punitive. He submitted that, in the current climate, it was neither in the interest of the Registrant or her regulator for there to be a further order of suspension. Such an order would involve further expense and would not be appropriate given the Registrant's future intentions.
22. The Committee accepted the advice of the Legal Adviser. The Legal Adviser referred to the cases of *Clarke* and *Khan v General Pharmaceutical Council [2017] 1 WLR 169*. He drew the attention of the Committee to the fact that these decisions involved successful appeals of decisions referred to in the Council's Hearings and Indicative Sanctions Guidance (November 21 edition)(the guidance) at paragraphs 24.1 and 21.31.
23. The Committee bore in mind the overarching objectives of the Council and the fact that its role was to uphold them. The Committee accepted that the overarching objective of the Council in exercising its functions was to protect, promote and maintain the health, safety and well-being of the public, the protection of the public by promoting and maintaining public confidence in the profession and promoting and maintaining proper professional standards and conduct.
24. The Committee considered the sanctions available to it from the least restrictive to the most severe (no sanction, financial penalty, conditional registration, suspension, erasure).
25. The Committee started by considering taking no further action. It noted that the guidance contained the following advice:

21.3 Where a registrant's fitness to practise is impaired, the FtPC would usually take action to protect patients, maintain public confidence in the profession and uphold proper standards of conduct and behaviour.

21.4 There may, however, be exceptional circumstances in which a Committee might be justified in taking no action. An impairment finding with no further action is a way to mark the seriousness of the misconduct in the public interest, where a restrictive sanction cannot be justified.



21.5 *In R v Kelly (Edward) [2000] QB 198, Lord Bingham said:*

“We must construe ‘exceptional’ as an ordinary, familiar English adjective, and not as a term of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special, or uncommon. To be exceptional a circumstance need not be unique or unprecedented, or very rare; but it cannot be one that is regularly, or routinely, or normally encountered.”

21.6 *The Committee must give reasons as to what the relevant circumstances are, why they are considered exceptional and why they mitigate against action being taken.*

21.7 *No action might be appropriate in cases where the registrant has demonstrated considerable insight into their behaviour and has already completed any remedial action the Committee would otherwise require them to undertake. The Committee may wish to see evidence to support the action taken.*

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

26. The Committee had careful regard to the guidance and formed the view that this was an exceptional case where the Committee could take no further action:

27. The Registrant had been subject to a 12- month suspension order for the maximum period. This meant that the public interest had been served by demonstrating that her misconduct was wholly unacceptable.

- The only reason for the Registrant remaining on the Register was as a result of these proceedings keeping her there. If no further action was taken, the Council would be able to remove her name from the Register.
- Public protection concerns would be met by the fact that this Committee had made a finding of current impairment. In the event that the Registrant decided to reapply to the Register this finding, together with training and competency issues, would be addressed by the Council.
- The Committee noted that this Sanction was consistent with the decision of the Court of Appeal in the case of *Clarke*.
- The Committee considered that this case could be described as “exceptional”, within the terms of the guidance, on the basis that it was not a situation that was normally encountered. The scheme of the sanctions guidance envisaged sanctioning a practitioner who wished to remain in the profession. This was a situation where the Registrant had been engaged in an alternative career for some time.

28. Prior to reaching its decision the Committee considered all other sanctions that were open to it. The imposition of a financial penalty order was not appropriate. Conditional Registration was inappropriate as the Registrant would not be able to comply with conditions as she has no intention of returning to practice.
29. The Committee accepted the submissions of Mr Hall that, as it would not serve any useful purpose, it was not in the public interest for these proceedings to be continued by the imposition of a further suspension order. This would be likely to result in a further hearing where her circumstances had not changed.
30. The Committee considered whether or not it should impose an order for erasure. It determined that such an order would be harsh and punitive. It was also concerned that such an order could be construed as a determination that the period of suspension imposed by the previous committee was too lenient (*Khan*). The Committee considered that the Registrant's removal from the Register could be achieved by allowing the existing order to lapse on expiry.
31. Accordingly, the Committee directed that, although it has made a finding of current impairment, no further action should be taken.

Chair of the Committee: Sara Fenoughty

Signature



Date: 24 May 2023

Registrant: Mary Docherty

Signature *not presented but represented*

Date: 24 May 2023



FURTHER INFORMATION
Transcript
A full transcript of the hearing will be made available for purchase in due course.
Appeal
Any appeal against an order of the Committee must be lodged with the relevant court within 28 days of the service of this notification. If no appeal is lodged, the order will take effect at the end of that period. The relevant court is shown at section 23G(4)(a)-(c) of the Opticians Act 1989 (as amended).
Professional Standards Authority
<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 www.professionalstandards.org.uk or by telephone on 020 7389 8030.</p>
Effect of orders for suspension or erasure
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.
Contact
If you require any further information, please contact the Council's Hearings Manager at 10 Old Bailey, London, EC4M 7NG or, by telephone, on 020 7580 3898.