

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

GENERAL OPTICAL COUNCIL

F(21)19

AND

MARK DAVIS (D-11774)

**DETERMINATION OF A SUBSTANTIVE HEARING
13 APRIL – 14 APRIL 2022**

Committee Members:	Mr Graham White (Chair/Lay) Mr Ian Hanson (Lay) Mr David Abbott (Lay) Ms Clare Hayes (Dispensing Optician) Mr Philip Cross (Dispensing Optician)
Legal adviser:	Ms Emma Boothroyd
GOC Presenting Officer:	Mr John Greany (3 Raymond Buildings)
Registrant present/represented:	Yes and represented
Registrant representative:	Mr Martin Hadley – VHS Fletchers
Hearings Officer:	Ms Abby Strong-Perrin
Facts found proved:	1
Facts not found proved:	N/A
Misconduct:	Found
Impairment:	Not impaired
Sanction:	Warning for a period of two years

ALLEGATION

The Council alleges that in relation to you, Mr Mark Jeffrey Davis (D-11774), a registered dispensing optician:

- 1. On or around 2 November 2020, you were administered with a simple caution for Possession of Extreme Pornography;*

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

DETERMINATION

Admissions in relation to the particulars of the allegation

1. At the outset of the hearing the Registrant admitted the factual particulars of the allegation. The Chair announced that those facts had been found proved on the basis of the Registrant's admissions.

Background to the allegations

2. On 23 January 2020, the Registrant was arrested and questioned by **redacted** Police on suspicion of possessing indecent images. Further enquiries and an analysis of the Registrant's media devices revealed that he had downloaded 7 videos to his computer which depicted grossly offensive sexual acts including intercourse with animals. The Registrant admitted downloading this material in his interview. On 2 November 2020, the Registrant accepted a simple caution for Possession of Extreme Pornography and accordingly no charges were brought.

Findings in relation to misconduct.

3. Having found the facts of the allegation proved the Committee went on to determine whether the facts amounted to the ground of misconduct.
4. The Committee heard submissions from Mr Greany on behalf of the Council and from Mr Hadley on behalf of the Registrant. The Council submitted that the Registrant had breached the law and the nature of the videos downloaded by the Registrant were such so as to be seen as disgraceful by a reasonable person and had brought the profession into disrepute. On behalf of the Registrant, it was accepted that the conduct did amount to misconduct.

5. The Committee has accepted the advice of the Legal Adviser who referred to the case of *Roylance v General Medical Council (no2) [2000] 1 AC 311* and *Nandi v GMC [2004] EWHC 2317 (Admin)* and *Spencer v General Osteopathic Council [2012] EWHC 3147 (Admin)*. The Committee was reminded and accepted that misconduct was a matter for its professional judgement and no burden or standard of proof applied.
6. The Committee considered the “Council’s Standards of Practice for Optometrists and Dispensing Opticians” (April 2016). The Committee considered in particular Standard 17 which states, “Do not damage the reputation of your profession through your conduct.” The Committee was in no doubt that the conduct of the Registrant in downloading multiple images of extreme pornography which amounted to a criminal offence would be considered deplorable by fellow practitioners. The Committee considered that the Registrant, by his actions, had damaged the reputation of the profession and brought it into disrepute. The Committee considered this behaviour was a significant falling short of the standards expected of a professional.
7. The Committee therefore found that the admitted facts amount to misconduct.

Findings regarding impairment

8. The Committee next went on to consider whether the Registrant’s fitness to practise is impaired by virtue of the misconduct. The Committee heard submissions from Mr Greany on behalf of the Council who submitted that a finding of impairment was required to uphold proper standards of conduct and behaviour. Mr Greany made it clear that this was not a case which gave rise to a risk to patients.
9. Mr Hadley on behalf of the Registrant submitted that the Registrant’s fitness to practise was not impaired given the significant level of insight and remediation demonstrated. Mr Hadley submitted that there was no necessity for a finding of impairment to be made in these circumstances. Mr Hadley referred the Committee to the case of *CHRE v NMC & Paula Grant [2011] EWHC 927* and stated that the power to warn the Registrant would be available (unlike in the Grant case) and so a finding of no impairment would not amount to a complete acquittal.
10. The Committee accepted the advice of the Legal Adviser who advised the Committee that the question of impairment was a matter of its independent judgement taking into account all of the material 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 NMC & Paula Grant [2011] EWHC 927* and *Cohen v GMC [2008] EWHC 581 (Admin)*.
11. The Committee had regard to the oral evidence of the Registrant who set out all the steps he had taken to prevent a repeat of his misconduct. The Committee considered that the Registrant was open and transparent in his evidence and answered difficult questions truthfully. The Committee also took into account the Registrant’s written statement and reflection and the reference from **redacted**.

12. In the Committee's view, the Registrant has demonstrated insight into the seriousness of his misconduct and its potential impact on patients and the wider profession. The Committee considered that the Registrant's remorse and apology was sincere, and it was clear to the Committee from his evidence that the Registrant was committed to his profession and had a genuine understanding that his misconduct had damaged the reputation of his profession.
13. The Committee had careful regard to Silber J's guidance in *Cohen v GMC [2008] EWHC 581 (Admin)* that Committees should take account of:
 - Whether the conduct which led to the charge is easily remediable;
 - Whether it has been remedied; and
 - Whether it is highly unlikely to be repeated.
14. The Committee noted that behavioural issues of this kind can be difficult to remediate, especially if they are deep seated and have persisted for a lengthy period. The Committee noted that the videos were downloaded for sexual gratification and were stored on the Registrant's computer. However, the Committee had regard to the significant impact that the Registrant's arrest had on him and the steps he has taken to address his misconduct. The Committee heard extensive evidence from the Registrant about the steps he had taken to educate himself about extreme pornography and its impact on the individuals involved in making such videos. The Committee considered that the Registrant had developed a genuine insight and understanding about his misconduct and the reasons why it arose.
15. The Committee took into consideration that the Registrant had undertaken a number of online counselling sessions, both as an individual and in a group to address his pornography viewing. The Committee noted that the Registrant was candid that he had not ceased viewing pornography immediately. However, the Registrant stated he had felt shame and remorse and these feelings overtook any gratification and he has not watched pornography for a significant period of time. The Committee noted the steps the Registrant had taken to install software blockers on his home computer and mobile phone, with a password unknown to him. The Committee noted that the Registrant was open and honest with redacted and had support mechanisms in place to return to counselling if it was required.
16. The Committee also noted that the videos were downloaded over a relatively short period in 2018 and there has been no repetition of the misconduct. The Registrant has continued to work since the caution was administered and complied with the requirements placed upon his registration. He has an unblemished career of over 40 years.
17. The Committee took into account the character evidence submitted by the Registrant's redacted and considered that this demonstrated that [they] were aware of the Registrant's difficulties and was supportive of him.

18. In light of its findings in relation to insight and remediation, the Committee considered that there is a very low risk that the Registrant would repeat matters of the kind found proved.
19. The Committee went on to consider whether a finding of impairment is necessary on public interest grounds. In addressing this component of impairment, the Committee had careful regard to the critically important public issues identified by Silber J in the case of Cohen when he said:

“Any approach to the issue of whether fitness to practise should be regarded as ‘impaired’ must take account of...the collective need to maintain confidence in the profession as well as declaring and upholding proper standards of conduct and behaviour.”
20. The Committee considered this matter very carefully. The Committee concluded that whilst there was no harm caused to patients or the public the Registrant’s misconduct had the potential to seriously undermine public trust in the profession.
21. The Committee had careful regard to the remorse, remediation and significant insight shown by the Registrant and all the factors set out above. The Committee noted that the Registrant has been through an arrest and detention by the Police and a robust fitness to practise process. The Registrant has been open and transparent from the very outset and has given evidence before this Committee candidly. The Committee did not underestimate how difficult this process has been and it took into account the evidence that Registrant gave about the impact of his misconduct on his family. The Committee accepted that the Registrant had genuine and complete insight and had taken all reasonable steps to remediate his failings.
22. The Committee considered that public confidence in the profession and the regulator would not be undermined if a finding of current impairment was not made taking into account all of the circumstances of this case.
23. For these reasons the Committee finds that the Registrant’s fitness to practise is not currently impaired.

Declaration

24. The Committee makes a formal declaration that the Registrant’s fitness to practise is not impaired.

Warning

25. The Committee has heard submissions from Mr Greany on behalf of the Council who submitted that a warning should be issued in this case to uphold professional standards. Mr Greany referred to the relevant factors in the Indicative Sanctions Guidance and submitted that the circumstances of this case met the criteria for the imposition of a warning. Mr Hadley on behalf of the Registrant questioned whether a warning was necessary given the extensive remediation and insight

demonstrated by the Registrant which ensured that there would be no repetition of the misconduct.

26. The Committee accepted the advice of the Legal Adviser who referred it to the Indicative Sanctions Guidance and reminded the Committee that it was required to take account of all of the circumstances when deciding whether a warning was an appropriate and proportionate response.
 27. The Committee was satisfied that the Registrant has expressed genuine regret, has a previous good history and there has been no repetition of the misconduct. The Committee noted its earlier findings that the Registrant had developed genuine and meaningful insight and had taken effective steps to prevent any repetition.
 28. However, as the Committee has set out in its determination above the Registrant misconduct was serious and resulted in a police caution. The Registrant's conduct had fallen far short of the standards required of him and had brought the profession into disrepute.
 29. The Committee considered that although it had found that the risk of repetition is low, a repeat of the misconduct would likely result in a finding of impaired fitness to practice. The Committee noted that although the threshold of current impairment has not been reached there was a need to formally record its concerns in order to convey to the Registrant and the wider profession that his misconduct was serious and there should be no repetition.
 30. The Committee considered that the warning should continue for a period of two years. The Committee decided that this was a proportionate period and reflected the seriousness of the misconduct whilst also taking account of the mitigating factors referred to above.
 31. The Committee is of the view that it is appropriate to warn the Registrant as follows:

“Downloading and viewing extreme pornography is a serious issue. You are warned not to repeat the behaviour which led to your caution. Any future repetition would have an adverse effect on the public's confidence in the profession and may lead to a future finding of impairment by a Fitness to Practise Committee. You are specifically reminded to adhere to the standards of your profession, and in particular to:

 - 17.1 Ensure your conduct, whether or not connected to your professional practice, does not damage public confidence in you or your profession.”
31. This warning shall expire on 14 April 2024.

Chair of the Committee: Mr Graham White

Signature

Date: 14 April 2022

Registrant: Mr Mark Davis

Signature

Date: 14 April 2022

FURTHER INFORMATION
<p>Transcript</p>
<p>A full transcript of the hearing will be made available for purchase in due course.</p>
<p>Appeal</p>
<p>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).</p>
<p>Professional Standards Authority</p>
<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>
<p>Contact</p>
<p>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.</p>