

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

GENERAL OPTICAL COUNCIL

F(22)15

AND

GARY MARSHALL (D-6494)

**DETERMINATION OF A SUBSTANTIVE REVIEW
WEDNESDAY 17 MAY 2023**

Committee Members:	Ms Jayne Wheat (Chair/Lay) Mr Ben Summerskill (Lay) Ms Vivienne Geary (Lay) Ms Jessica Shrimplin (Dispensing Optician) Ms Catherine Kimpton (Dispensing Optician)
Legal adviser:	Ms Tracy Ayling KC
GOC Presenting Officer:	Ms Laura Stockdale
Registrant:	Not present and unrepresented
Registrant representative:	N/A
Hearings Officer:	Ms Abigail Strong-Perrin
Outcome:	Fitness to practise impaired – Six months suspension with a review

Proof of service

1. The Committee heard an application from Ms Stockdale for the Council for the matter to proceed in the Registrant's absence. First, the Council was required to satisfy the Committee that the documents had been served in accordance with Section 23A of the Act and Rule 61 of the Fitness to Practise Rules 2013 ("the Rules"). The Committee accepted the advice of the Legal Adviser.
2. The Committee had regard to the documentation before it in relation to service. It noted that the Registrant had been served the notice of hearing on 29 November 2022 via post and email, both methods of service permitted by Section 23A of the Act and Rule 61 of the Fitness to Practise Rules 2013. It had regard to the contents of the notice, which included the date of this review, together with the requirements set out in Rules 56 and Rule 28(1)(b) to (e), namely the right to attend and be represented, the power of the Committee to proceed in absence, the right of the Registrant to adduce evidence, and the Committee's powers of disposal.
3. The Committee was satisfied that notice was served in accordance with the Rules and that reasonable efforts have been made to notify the Registrant of the hearing.

Proceeding in the absence of the Registrant

4. The Committee then went on to consider whether it would be in the public interest to proceed in the Registrant's absence in accordance with Rule 22. The Committee accepted the advice of the Legal Adviser.
5. The Committee was satisfied that the Registrant was aware of the date of this review and had decided not to attend. It noted that he had not engaged with the process since April 2021. The Committee considered that he had voluntarily absented himself in the full knowledge of the nature of the hearing and the powers of the Committee.
6. The Committee was not satisfied that an adjournment would secure his attendance on a future occasion. The Registrant had not requested such an adjournment. The Committee was also satisfied that the Registrant had been given the opportunity to attend but had decided not to do so. The Committee was mindful that this was a mandatory review of a suspension order currently in place which is due to expire on 28 June 2023 and so there was a public interest in proceeding.
7. The Committee determined that it would be in the public interest for the hearing to proceed in the Registrant's absence.

DETERMINATION

Background

8. Mr Gary Marshall (“hereafter the Registrant”) was employed by REDACTED at the company’s REDACTED branch from 13 March 2000 to 28th December 2020.
9. An investigation was conducted by Regional Operations Supervisor, Optical and Hearing, Mr A on 24 November 2020, due to the number of concerns which had arisen as a result of the number of spectacle remakes being required at the company’s REDACTED branch. Mr A reviewed a number of patient records. It was during this review that concerns became apparent with the working practices of the Registrant.
10. It was identified that the Registrant had made changes to patients’ prescriptions, had advised some patients to revert to using previous prescriptions and in other cases had advised a new prescription. The Registrant’s employers could find no evidence contained within the records that either a registered Optometrist or person authorised to carry out a sight test had issued a new prescription. Neither could they find any evidence that any such person had provided the requisite authorisation to enable the Registrant to form the conclusions he had reached with respect to new prescriptions or the actions he undertook.
11. The Registrant is not an Optometrist or a person training to be an Optometrist. The Registrant does not fall within the category of Registrants who are permitted to carry out eye tests. There were a number of records identified by Mr A that indicated that patients did not appear to have been issued with a written statement which set out their updated prescription.
12. On 28 November 2020 Mr B, the General Manager REDACTED and Mr A met with the Registrant, during which the Registrant conceded that he had carried out refractions and that he should not have done so. The Registrant was suspended with immediate effect.
13. An investigatory meeting was conducted on 7 December 2020 by Assistant Warehouse Manager, Mr C, with the Registrant. At this meeting the Registrant again appeared to accept that he had carried out the refractions but asserted that all changes were approved and checked by the resident Optometrist and that the resident Optometrist had failed to record these changes.
14. An investigatory meeting was conducted on 9 December 2020 with the resident Optometrist, Mr D, during which Mr D contradicted the account provided by the Registrant. The Registrant attended a disciplinary hearing on 12 December 2020 and was subsequently invited to attend a meeting so that the outcome of the disciplinary meeting could be communicated to him in person. The Registrant did not attend the subsequent meeting.
15. On 18 December 2020 a letter was sent to the Registrant by Mr B to inform him of the decision reached following the disciplinary hearing, namely Mr B:
 - a. Had considered the Registrant’s conduct to have substantially failed to meet the standards expected by REDACTED in his position as a registered professional.

- b. Had a reasonable belief that the Registrant had acted outside of his scope of practice as a Dispensing Optician and in such a manner jeopardised patient safety.
 - c. Was satisfied that the Registrant's actions amounted to gross misconduct and fundamentally damaged the company's trust and confidence in him.
16. Mr B outlined within the letter that there were sufficient grounds to justify the termination of the Registrant's employment contract without notice.
17. However, REDACTED advised that the Registrant would be removed with immediate effect from the Optical Department, but would be permitted to work as a Cashier at another location due to his length of service within the organisation; with the view to his returning to his position subject to the determination of any GOC investigation. REDACTED considered that the concerns identified in respect of the Registrant's practice were sufficiently serious to justify an escalation to the GOC, pursuant to "Standards for Optical Businesses".
18. REDACTED instructed registered Optometrist, Ms A to provide a clinical opinion in respect of the relevant records. Ms A agreed with the concerns identified by Mr A and recommended that the affected patients be recalled for a further eye examination.
19. The Allegations against the Registrant were as follows:

The Council alleges that in relation to you, Mr Gary Marshall (D-6494), whilst employed as a Contact Lens and Dispensing Optician at REDACTED located in REDACTED:

1. On one or more occasions between September 2018 and December 2020, you:

a. failed to obtain the necessary authorisation from an Optometrist when altering the prescription of a patient;

b. inappropriately modified the previous spectacle prescriptions of patients;

c. failed to arrange for appropriate checks to be made by an Optometrist when dispensing new prescriptions;

d. failed to undertake a dispensing triage;

e. failed to keep an adequate record of your consultation with a patient, including but not limited to failing to record the patient's:

i. visual acuity;

ii. ocular history;

iii. medical history;

f. failed to refer a patient to an optometrist for further examination and/or checks where clinically indicated;

g. failed to refer a patient for a new sight test where clinically indicated.

2. On one or more occasions between November 2020 and April 2021, you stated, when asked, that you had obtained the required approval from the resident Optometrist, Mr A, on each occasion that you had altered the prescription of patients between September 2018 and December 2020.

3 a. you had not obtained the required approval from Mr A to alter the prescriptions of patients on one or more occasion between September 2018 and December 2020;

b. you knew that you had not obtained the required approval from Mr A to alter the prescriptions of patients on one or more occasion between September 2018 and December 2020;

c. you knew that you should not have altered the prescription of any patient without obtaining the required approval from an Optometrist.

4. Your actions as set out at paragraphs 2 and 3 above were dishonest

20. Between 15 and 22 November 2022, at the Substantive Hearing, the Fitness to Practise Substantive Committee (“the 2022 Committee”) found the facts proved in their entirety, including dishonesty, except in relation to paragraph 3c. The 2022 Committee also found misconduct and that the Registrant’s fitness to practise was impaired.

21. The 2022 Committee concluded that the appropriate sanction was a 6 month period of suspension with a review to take place before the expiry of the substantive order.

22. This Committee took account of all the findings of the 2022 Committee.

23. The period of suspension is due to expire on 28 June 2023.

24. To assist in making the decision of the issue of impairment at any review hearing, the Registrant was advised by the 2022 Committee that any subsequent Committee would be assisted by the following:

- The Registrant’s engagement in any future hearing;
- The Registrant’s demonstration of insight into the regulatory concerns arising from the allegations found proved;
- Records of any training undertaken;
- Up-to-date references where available.

Submissions

25. The Committee heard submissions from Ms Stockdale on behalf of the Council.
26. Ms Stockdale submitted that the Council have seen no evidence of insight from the Registrant. The Registrant has not provided the Council with any of the items referred to above and the Committee cannot confidently conclude that the registrant has addressed insight into the misconduct. She submitted that the conclusion made by the 2022 Committee at the substantive hearing, having considered the full evidence must remain the same. She referred to the determination of the 2022 Committee at paragraph 160.

'The Committee considered that it had no evidence before it that the Registrant had demonstrated insight into the nature and extent of his misconduct, or its consequences for colleagues, other members of the profession, or public confidence in the profession and the Council as regulator. Further, the Committee considered that the Registrant had not demonstrated any regret or remorse.'
27. She highlighted the fact that the expert Mr Hunter, called on behalf of the GOC at the substantive hearing, had identified 15 cases where he believed that the Registrant's standards of care were not that expected of a reasonably competent Dispensing Optician. Also that in 10 other cases he felt that the standards of care fell seriously below the standard to be expected.
28. Ms Stockdale's skeleton argument set out that no further evidence had been provided by the GOC or the Registrant since the substantive hearing. She pointed out that the Registrant had not engaged with the GOC and so there was no material or information relevant to remediation, such as testimonials, reflection, continuing professional development (CPD), or insight. She submitted that this was despite the recommendations of the 2022 Committee signposting the types of information which may assist a future review Committee.
29. Ms Stockdale submitted that without such information, the Committee could not be satisfied that the Registrant had remedied his misconduct and therefore the risk of repetition remained. She further submitted that the nature and gravity of the dishonesty was at the serious end of the spectrum and together with his non-engagement and absence of remediation, the public interest required a finding of current impairment.
30. Ms Stockdale set out three reasons for the Committee to find that the matters were serious. First the competency concerns as the Registrant was clearly acting outside his scope of practice. Secondly that the allegations were over a substantial period of time, two years. Thirdly that the dishonesty was described by the substantive panel as "deplorable".
31. Ms Stockdale therefore invited the Committee to make a finding of impairment as there was a real risk of repetition in the circumstances.

Findings regarding impairment

32. The Committee had no written submissions or information from the Registrant for the purpose of this review.
33. The Committee accepted the advice of the Legal Adviser, In reaching its decision, the Committee was mindful of the wider public interest elements of declaring and upholding proper standards of conduct and behaviour and maintaining public confidence in the profession. The Committee exercised its own judgement in relation to the question of whether there was current impaired fitness to practise.
34. The Committee considered that nothing had changed since the last review. There was no information from the Registrant since before the substantive hearing in November 2022. In fact, the Registrant had not engaged with the GOC since 2021.
35. The Committee acknowledged that it was difficult to evidence remediation in dishonesty cases. Nevertheless, the 2022 Committee had given recommendations which might assist a future reviewing Committee, and which signposted for the Registrant the types of information he might wish to provide to a reviewing Committee to demonstrate remediation and so discharge the persuasive burden on him. Whilst the Committee understood that these were recommendations and not requirements for the Registrant, the position was that the Committee had no information before it at all to demonstrate that he had developed any insight or that he had remedied his misconduct.
36. With reference to those recommendations, the Committee noted that the Registrant had not engaged with the GOC at all. He had not provided any reflective statement to explain his actions or the factors that led him to act as he did. There was no demonstration by him of his appreciation of the gravity of his actions and the potential impact of his dishonesty on public confidence in the profession.
37. He had not provided any recent testimonials or evidence that he had undertaken any remediation.
38. The Committee had no evidence that the Registrant had undertaken any CPD since the substantive hearing in November 2022 and so had no information to satisfy it that he had been keeping his knowledge and skills up to date.
39. In the absence of any information to demonstrate insight and remediation, the Committee could not be satisfied that the Registrant had remedied his misconduct. Therefore, it concluded that the risk of repetition remained. Given the nature and gravity of the “deplorable” dishonesty, together with the non-engagement, lack of evidence of remediation, and consequent risk of repetition, the Committee concluded that both patient safety and the wider public interest required a finding of current impairment.
40. Accordingly, the Committee found that the fitness of Mr Gary Marshall to practise is currently impaired on patient safety and public interest grounds in order to maintain public confidence in the profession and to uphold professional standards.

Sanction

Submissions

41. The Committee heard submissions from Ms Stockdale on behalf of the Council. She submitted that the case was too serious for the Committee to take no action and that conditional registration was not workable. With a case of dishonesty, conditions would be problematic to formulate and they were not appropriate because the Registrant was not engaging. Ms Stockdale repeated her submissions in relation to the seriousness of the case and suggested that a suspension order was appropriate and proportionate. She referred to the mitigating features as identified by the 2022 Committee which were the long and unblemished career of the Registrant and the lack of management of the Registrant by REDACTED. She further submitted that erasure was not proportionate at this stage in the circumstances of this case. She submitted that the length of any subsequent suspension was at the discretion of the Committee.

Decision on Sanction

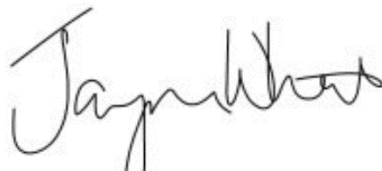
42. The Committee accepted the advice of the Legal Adviser. It had regard to the Indicative Sanctions Guidance.
43. The Committee considered the sanctions available to it from the least restrictive to the most severe, as set out in section 13(7) of the Opticians Act 1989, namely no sanction, conditional registration, suspension, and erasure. The Committee applied the principle of proportionality by weighing the Registrant's interests with the public interest.
44. The Committee concluded that in the absence of any insight and remediation, it would be inappropriate to take no action, as that would not be sufficient to address either public protection or the public interest elements of maintaining public confidence and upholding the reputation of the profession.
45. The Committee did not consider that conditional registration was appropriate in this case. The issues and findings of the 2022 Committee relate both to competency concerns in that the Registrant had acted outside his scope of practice and that he had been dishonest. The Committee did not consider that it was possible to formulate conditions to address this. In any event, given the ongoing lack of engagement, or steps to develop insight or achieve remediation, the Committee did not consider that conditional registration would meet either the protection of the public concerns or the public interest elements of maintaining public confidence and upholding the reputation of the profession.
46. The Committee was of the view that suspension was the proportionate sanction at this point. It would give the Registrant a further opportunity to engage with the GOC and demonstrate any remediation, insight and that he has kept his skills and knowledge up to date. The Committee was mindful of the Registrant's long service and previous unblemished career.
47. It was the Committee's view that a suspension order would protect against the risk of repetition for the period for which it was in place.
48. The Committee next considered the length of the suspension. It was of the opinion that a further six months would be appropriate and proportionate in the

circumstances of this case. An additional six month period would allow the Registrant another opportunity to demonstrate his commitment to showing insight and remediation.

49. The Committee did consider the sanction of erasure but came to the conclusion that at this stage, that sanction was disproportionate and therefore not appropriate.
50. The substantive 2022 Committee had signposted the types of information which the Registrant might want to provide to assist him in demonstrating insight and remediation, but the Registrant had not provided any information for this Committee to consider. This suspension order would give the Registrant another opportunity to assist a further reviewing Committee with information which this Committee considered was important.
51. The Committee further determined that a review hearing should be held prior to the expiry of the Registrant's period of suspension.
52. The Committee considers that any Review Committee might well be assisted by the following:
 - The Registrant's engagement in any future hearing;
 - The Registrant's demonstration of insight and remediation into the regulatory concerns arising from the allegations found proved;
 - Evidence that the Registrant has kept his knowledge and skills up to date;
 - Up-to-date references where available.
53. Accordingly, the Committee determined to suspend the Registrant for a further 6 months.

Chair of the hearing: Ms Jayne Wheat

Signed



date: 17 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.