BEFORE THE FITNESS TO PRACTISE COMMITTEE
OF THE GENERAL OPTICAL COUNCIL

GENERAL OPTICAL COUNCIL

F(22)25

AND

SCOTT BROWN (01-15700)

DETERMINATION OF A SUBSTANTIVE HEARING
Monday 6 February – Thursday 9 February 2023

Committee Members:	Ms Jayne Wheat (Chair/Lay) Mr John Vaughan (Lay) Mr Nigel Pilkington (Lay) Ms Agnes Ali (Optometrist) Ms Kalpana Theophilus (Optometrist)
Legal adviser:	Mr Graeme Dalgleish
GOC Presenting Officer:	Dr Francis Graydon
Registrant present/represented:	Yes and represented
Registrant representative:	Mr Kevin Saunders, of Counsel Ms Katie Holland – AOP
Hearings Officer:	Ms Abby Strong-Perrin
Facts found proved:	All
Facts not found proved:	None
Misconduct:	Found
Impairment:	Found
Sanction:	No further action
Immediate order:	N/A

ALLEGATION (As amended at the final hearing)

The Council alleges that you, Scott Brown 01-15700, a registered Optometrist whilst working as a Locum at REDACTED*:*

1. On or around 16th June 2018, you failed to conduct an adequate sight test On Patient A in that you:

a. Failed to detect retinal detachment in Patient A despite the condition being clinically indicated; and/or

b. Failed to refer Patient A to a hospital eye service for further investigation of this condition despite being clinically indicated

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

DETERMINATION

Preliminary matter – Proposed amendment of the Allegation

1. The Committee was advised by Dr Graydon for the GOC and Mr Saunders for the Registrant that agreement had been reached to amend 1 b) of the allegation by removing the words "*her symptoms*" and replacing them with "*this condition."* Mr Saunders indicated his agreement and submitted that the proposed amendment properly reflected the evidence that there were no symptoms.
2. The Committee accepted legal advice and was mindful of Rule 46(20). It was of the view that the agreed amendment could be made without injustice to either party and that, in the circumstances, it was fair and appropriate to allow the proposed amendment.

Background to the allegations

3. The allegation centres on the Registrant's failure to conduct an adequate sight examination on Patient A. Specifically that (i) he failed to detect a right eye retinal detachment in Patient A despite the condition being clinically indicated and/or (ii) he failed to refer Patient A to a hospital eye service for further investigation of that condition despite being clinically indicated.

4. The Registrant is a registered Optometrist who qualified in 1994 and has since that time been employed as an Optometrist, has run his own Optometry

practice and worked as a locum. The Council rely on Patient A's witness statement dated the 3rd March 2022. In June 2018, Patient A attended REDACTED Opticians in Perth, Scotland for a routine eye test. The eye test was carried out by the Registrant. At the time of the consultation, he was engaged as a locum optometrist in the practice.

5. Patient A states in her witness statement that the Registrant caried out several individual tests. He also took photographs of her eye. At the end of the eye test, the Registrant provided Patient A with a prescription. Patient A recalls the Registrant did not inform her of any concerns about her eyes. He provided no advice on (i) symptoms Patient A should "look out for", or (ii) guidance when to re-attend for a future eye test.

6. On 22nd June 2021, Patient A attended REDACTED and the Optician requested a second opinion and referred her to Ninewells Hospital, Dundee, the same day. Her right eye was examined by Dr Tarafdar, a Consultant Ophthalmologist. Patient A was informed that she had a right eye retinal detachment. Dr Tarafdar opined that Patient A required critical care including two surgical procedures.

7. On the 6th July 2021 REDACTED sent Patient A, following her request, the photographs of her eye captured by the Registrant during the eye test in June 2018. The retinal photographs of Patient A's right eye were exhibited.

8. On the 28th July 2021 Patient A again attended Ninewells Hospital to receive treatment for the right eye detached retina. The discharge letter from Ninewells Hospital is dated 28th July 2021 and includes details of the surgery performed on Patient A.

9. On the 7th September 2021 Patient A returned to Ninewells Hospital for a six week check-up. During this consultation Patient A showed Dr Tarafdar the relevant retinal photographs captured during her eye test with the Registrant back in June 2018. Patient A recalls that Dr Tarafdar reviewed the photographs taken in June 2018 and informed her that the retinal detachment had been visible in those photographs.

10. On the 20th September 2021, Patient A wrote to REDACTED and informed them of the advice she received from Dr Tarafdar. On 6th October 2021 Mr A

from REDACTED informed Patient A that he reviewed the paperwork the Registrant had documented from her sight test. He informed her that "*something did not look right*" and that "*I should have had drops during the test".*

11. On the 9th November 2021 Patient A attended a second check-up at Ninewells Hospital. On the 7th January 2022 the second surgery was performed on Patient A's right eye. Patient A recalls that following the surgery Dr Tarafdar informed her the retina was attached. However she opined that "*it would detach again due to the length of time it had previously been detached".*

12. On 22nd February 2022 Patient A returned to Ninewells Hospital for a six week check-up following the second surgery. She was advised that *"her eyesight was as good now as it is going to be*" and that her "*retina was currently still attached".*

13. The GOC has obtained an expert report from Dr Anna Kwartz, Optometrist, and rely on her expert evidence in the report dated 25th March 2022.

Findings in relation to the facts

14. The Registrant admitted particulars 1 a) and 1 b), as amended. Misconduct and impairment were not admitted and are a matter for the professional judgment of the Committee. In terms of Rules 40(6) and 46(6) the Committee found the facts proved by way of admission.

Submissions in relation to misconduct

15. The Committee heard submissions on behalf of the GOC and the Registrant.

16. Dr Graydon referred to his written skeleton argument and reminded the Committee that misconduct was a matter for its judgement. He submitted that the admitted failures by the Registrant amount to serious professional misconduct. He referred to the relevant case law, including *Remedy UK Ltd v General Medical Council* [2010] EWHC 1245 (Admin). He submitted that the conduct fell far below what was expected of an Optometrist. He submitted that the Registrant had failed to meet core competencies and breached GOC Standards of Practice for Optometrists and Dispensing Opticians.

17. Dr Graydon referred the Committee to the conclusions of the expert report by Dr Kwartz who states at section 6.1 as follows:-

    a. *I do not consider that Scott Brown performed an adequate eye examination*

b. Patient A's retina shows several high water lines, which are indicative of longstanding inferior retinal detachment

c. On finding the high water lines, I consider that Scott Brown should have related the clinical signs to an underlying retinal detachment and made a referral

d. Whilst Patient A's retinal detachment was likely to have been longstanding and not actually an emergency (as would be the case for an acute detachment), I do not expect a reasonably competent primary care optometrist to be familiar with such subtleties. I consider it would have been appropriate for the registrant to have either made an emergency or an urgent referral for Patient A to be examined at the hospital eye service

e. The consequences of Mr Brown's actions are that Patient A's retinal detachment went undiagnosed

18. Dr Kwartz concludes at section 7:-

"7.1. There is a fundamental issue in this case that Scott Brown incorrectly identified Patient A's high-water lines as retinoschisis rather than a sign of retinal detachment. Owing to his mis-diagnosis, he did not make an appropriate referral for his patient and her retinal detachment was therefore not identified for a further 3 years. By this time, the visual prognosis from surgery was poor due to the chronic and extensive nature of the condition.

7.2. When an optometrist investigates a patient for retinal detachment, there are two fundamental components to the examination that need to be performed: the first is fundus examination following pupil dilation and the second is a check for Shafer's sign, which is pigment cells in the anterior vitreous. In this report, I have not suggested that Mr Brown should have performed either of these tests. Whilst they were both indicated, I have not been critical of their omission as the evidence of retinal detachment was so frank, that he could have made a management decision without the further tests."

19. Dr Kwartz expresses the opinion that the Registrant breached core competencies and concludes that the Registrant breached 1.2.4, 2.2.6 and 6.1.12 of the General Optical Council's Stage 2 Core Competencies for Optometry (2011); and breached 5.1, 6.1, 6.2, 7 and 7.5 of the General Optical Council's Standards of Practice for Optometrists and Dispensing Opticians (2016).

20. Dr Graydon invited the Committee to make a finding of misconduct in this case.

21. Mr Saunders for the Registrant referred to his written submissions. He submitted that the Committee had been referred to the core competencies by the GOC but that had conflated deficient professional performance with misconduct. He referred to the case of *R. (on the application of Vali) v General Optical Council* [2011] EWHC 310 (Admin). He submitted that there was a clear distinction between those issues. He also referred the Committee to the case of *Ashton v General Medical Council* [2013] EWHC 943 and submitted that mere negligence was not misconduct and that conduct must be deplorable to amount to misconduct. He said that only a particularly grave single act or omission of negligence was likely to amount to misconduct. He further submitted that consequences were not the appropriate way to assess misconduct and he referred to *Hindmarch v Nursing and Midwifery Council* [2016] EWHC 2233 (Admin).

22. Mr Saunders submitted that the expert states that the retinal detachment was likely to be long standing by June 2018 and so the Registrant's conduct had not caused the condition. The chronology was all part of the context to be considered by the Committee in assessing misconduct. He reminded the Committee that the patient had a limited sight test history and stated that she had no symptoms.

23. Mr Saunders submitted that the Dr Kwartz's findings were that there was an inadequate eye examination, but that falls short of what would be considered "*deplorable."* He pointed out that the Registrant was not bound to take fundus photographs, and having done so he should not be criticised. He submitted that the Registrant may have been negligent, but that was not misconduct. He submitted that Dr Kwartz states that it would have been "*appropriate*" to make a referral, but that was not "*deplorable*" or an elementary or grievous failure.

24. Mr Saunders referred to the Guidance produced by the College of Optometrists and pointed the Committee to Dr Kwartz's opinion which states that, apart from the retinal pathology, the remainder of the eye test met the required standards. The examination was comprehensive and that was supported by Dr Kwartz. He submitted that the Registrant may have made a misdiagnosis, but that was far short of misconduct.

25. Mr Saunders submitted that it would be unjust to describe the Registrant's conduct as deplorable or a grievous failure and this was not a case of misconduct. This was a single incident of misdiagnosis.

Findings in relation to misconduct

26. The Legal Adviser referred the Committee to the guidance in *Roylance v GMC* (no 2) [2000] 1 AC 311 where misconduct was defined as: *"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 medical practitioner in the particular circumstances…. The expression "serious professional misconduct" is not defined in the legislation and it is inappropriate to attempt any exhaustive definition."

27. The Legal Adviser also referred the Committee to the guidance in Mallon v GMC 2007 CSIH 426 which stated:- "*Descriptions of serious professional misconduct such as "conduct which would be regarded as deplorable by fellow practitioners" (Nandi v GMC[2004] All ER (D) 25, Collins J, quoted in Meadow v GMC [2007] 1 All ER 1, Auld LJ at paras [200]-[201]) tend, we think, to obscure rather than assist our understanding… In view of the infinite varieties of professional misconduct, and the infinite range of circumstances in which it can occur, it is better, in our opinion, not to pursue a definitional chimera. The decision in every case as to whether the misconduct is serious has to be made by the Panel in the exercise of its own skilled judgment on the facts and circumstances and in the light of the evidence"*

28. The Legal Adviser reminded the Committee that in considering misconduct there was no onus or burden of proof, and that it was a matter for its own professional judgment. The Committee was mindful that in *Nandi v GMC* [2004] EWHC 2317 (Admin) it is reminded that the adjective "*serious*" in relation to misconduct must be given its proper weight. It was also mindful that a single negligent act or omission is less likely to cross the threshold of '*misconduct*' than multiple acts or omissions.

29. The Committee considered the submissions from both parties, the expert report from Dr Kwartz and it accepted the legal advice. It was mindful of its earlier factual findings and the unchallenged expert evidence. The Committee has found that the Registrant failed as alleged, in that he failed to detect a retinal detachment in Patient A despite the condition being clinically indicated, and then failed to refer Patient A to a hospital eye service for further investigation of this condition, despite it being clinically indicated. albeit asymptomatic.

30. This is a serious eye condition. In Dr Kwartz's unchallenged expert opinion the eye test conducted by the Registrant as regards retinal pathology was inadequate. That led in turn to an admitted failure to refer the patient on for further hospital treatment. The Committee did not consider that the rest of the eye test being adequate had any proper bearing on its consideration of this issue. The Committee noted that deficient professional performance is not alleged in this case.

31. The Committee was mindful that these findings relate to a single eye examination and that mere negligence does not, of itself, mean that the act or omission amounts to misconduct. The Committee considered all of the surrounding circumstances and carefully considered the seriousness of the failures found proved.

32. The Committee found that this was not a momentary lapse of judgement or inattention. There was a failure by the Registrant, an experienced Optometrist to adequately investigate a clinically indicated retinal lesion and a consequential failure to refer the patient for further hospital investigation in respect of a serious eye condition. Whilst this can, perhaps, be described as isolated, the Committee concluded that the facts proved were not simply a single or minor negligent act or omission by the Registrant.

33. The Committee concluded that these are serious failures, that placed the patient at risk and undermined public confidence in the profession. The Committee concluded that these failures can properly be described as elementary failures by an experienced Optometrist which fell far below what would have been proper in the circumstances. The Committee concluded that the conduct is serious and amounts to misconduct.

34. Further, the Committee found that the failures amount to a breach of standards 5.1, 6.1, 7.1 and 7.5 of the General Optical Council's Standards of Practice for Optometrists and Dispensing Opticians (2016):-

    5.1 Be competent in all aspects of your work, including clinical practice, supervision, teaching, research and management roles, and do not perform any roles in which you are not competent.

    6.1 Recognise and work within the limits of your scope of practice, taking into account your knowledge, skills and experience.

    7 Conduct appropriate assessments, examinations, treatments and referrals

    7.5 Provide effective patient care and treatments based on current good practice.

35. The Committee has considered all the case law before it, including references in some cases to "*deplorable*" conduct, but concluded that such a finding was not required to find misconduct in this case.

36. The Committee concluded that the facts proved are serious and amount to misconduct.

Impairment

37. The Registrant gave evidence and he adopted his witness statement as his evidence in chief. In his witness statement he states that since this matter was raised he has undertaken relevant CPD and sought to undertake training to improve his practice. He is undertaking an independent prescribing (IP) course and he has identified areas where his clinical practice could improve. In answer to questions by Mr Saunders, the Registrant told the Committee that he has changed his history and symptoms recording to include a question on flashes, and floaters where he previously relied on the patient to tell him and amended his record keeping to include an "advice to patient" section. He said that where there are signs but no symptoms, or symptoms but no signs, he now treats that as a potential referral until otherwise indicated. He said that he can now send photographs to the hospital for the opinion of a Consultant without a formal patient referral, and he can now discuss his findings with the hospital if he is considering a referral.

38. The Registrant said that he qualified 28 years ago and has worked as an Optometrist since then. He said that he has always taken steps to deal with any shortcomings. The Registrant stated in his witness statement that the IP course has underlined the need to dilate even when a potential issue is central. He also now dilates both eyes even if the issue is apparently specific to one eye. He states that this allows a comparison between the two eyes and also to confirm no similar pathology is present in the fellow eye, even if the patient is asymptomatic.

39. In his witness statement he states that has completed 24 sessions at REDACTED ophthalmology teach and treat clinic, and at each of these sessions he saw at least three patients referred by community optometrists. At these sessions he states that he took history and symptoms, assessed and managed the patients under supervision of an ophthalmologist. He stated that he has worked under supervision in his practice due to an interim order for conditions imposed by a Committee of the GOC. He has completed a number of CPD courses. His supervisor, for whom the Registrant conducts locum work has provided positive reports and a positive testimonial. The Registrant said that he had reflected on his practice and regrets the events that led to the allegation and the detriment suffered by Patient A. He apologises to Patient A in his witness statement.

40. Dr Graydon asked the Registrant about REDACTED.

Submissions on Impairment

41. The Committee has heard submissions from Dr Graydon on behalf of the Council and from Mr Saunders for the Registrant.

42. Dr Graydon referred to his skeleton argument and submitted that the issue of impairment was a matter for the Committee's professional judgement. He referred to the relevant case law and the need to look both forward and back to assess current fitness to practice. REDACTED

43. Dr Graydon referred the Committee to the case of *CHRE v NMC and Grant* [2011] EWHC 927 (admin). He submitted that Patient A had been placed at unwarranted risk of harm by the Registrant's conduct and that was clear from her witness statement. He submitted that it was appropriate to make a finding of impairment of fitness to practice.

44. The Committee heard from Mr Saunders for the Registrant who referred to his written submissions. He submitted that insight was a crucial element and that the Registrant had shown clear insight into his conduct and submitted that his evidence was cogent and clear. He had explained the changes he had made to his professional practice and had acknowledged and accepted his failings.

45. As regards remediation of his practice, Mr Saunders submitted that the Registrant has acted swiftly and effectively to improve his practice and had undertaken changes to his practice. He referred to the CPD undertaken by the Registrant and the fact that the Registrant has been under supervised practice since March 2022. He referred to the reports from the Supervisor before the Committee which he submitted reflected that the Registrant is diligent and conscientious. He submitted that the Registrant has a glowing reference from his Supervisor and current employer, REDACTED.

46. Mr Saunders submitted that it was not appropriate to place too much weight on the REDACTED. He submitted that there was no evidence of a pattern behaviour, or of a real risk of significant harm. He submitted there was no evidence to support that contention by the GOC. The Registrant has otherwise had no issues in a long career and the Committee should not accumulate the REDACTED with this current matter.

47. Mr Saunders submitted that remediation was clear from the evidence and that the Registrant was not currently impaired. He had clear insight, commitment to improving his practice, no further issues had arisen since June 2018 and he had, otherwise, an unblemished career. He submitted that the Registrant was committed to his community and that he was a credit to his profession.

Findings on impairment

48. The Legal Adviser reminded the Committee of the GOC guidance on impairment and the authoritative guidance on assessing impairment of fitness to practice in *CHRE v NMC and Grant* [2011]. He reminded the Committee to consider the crucial issues of insight, remediation and the risk of repetition. He

also reminded it of the central importance of considering the public interest and he referred it to the guidance in *Cohen v GMC* [2008] EWHC 581 where the court stressed:- "*the critically important public policy issues which are: the need to protect the individual and the collective need to maintain confidence in the profession as well as declaring and upholding proper standards of conduct and behaviour which the public expect…and that the public interest includes amongst other things the protection of service users and the maintenance of public confidence in the profession."* Impairment was a matter for its own professional judgment.

49. The Committee accepted the legal advice and considered the Registrant's evidence and the submissions from both parties. The Committee found that the Registrant was open and honest and had sought to assist the Committee. It found the Registrant's evidence was credible and reliable. The Committee was mindful of the importance of the public interest and that it is assessing current impairment.

50. The Committee found that the conduct is remediable and considered next whether it has been remedied. The Committee considered the eight Supervision reports, as well the testimonial from his Supervisor and employer. These relate to his current practice and all are reassuring and positive.

51. The Supervisor's testimonial states:- "*Mr Brown's presence in my practice enhances, not diminishes, its clinical reputation….. following his period of supervision I have the highest possible regard for Mr Brown's clinical knowledge, attitude and decision making. Upon being advised of the nature of the complaint by the GOC he immediately took steps to address any shortfall in knowledge via CPD and has continued to seek out appropriate CPD and recorded lectures… He continues to be an excellent clinician and I believe is a vital component of his 2 practices' communities"*

52. The Committee found that the Registrant has undertaken meaningful and sufficient remediation, including relevant CPD courses as well as the IP course, which involves assessing patients who have been referred to hospital. He explained to the Committee about the real and significant changes he has made to his practise and procedures in order to deal with the deficiencies in his practise. The Committee concluded that the Registrant has demonstrated that he has successfully remediated his practise.

53. The Committee found that the Registrant has demonstrated in his written and live evidence that he has properly reflected on his practise and has developed good insight into his misconduct. His written statement expresses remorse and regret, and in it he has apologised to Patient A, the profession and to his

community. The Committee concluded that the Registrant has demonstrated good insight.

54. The Committee considered the REDACTED.

55. The Committee considered the questions relevant to this Registrant as set out in *Grant* for assessing impairment which are expressed as follows:-

"Do our findings of fact in respect of the doctor's misconduct, deficient professional performance, adverse health, conviction, caution or determination show that his/her fitness to practise is impaired in the sense that s/he:

a. has in the past acted and/or is liable in the future to act so as to put a patient or patients at unwarranted risk of harm; and/or

b. has in the past brought and/or is liable in the future to bring the medical profession into disrepute; and/or

c. has in the past breached and/or is liable in the future to breach one of the fundamental tenets of the medical profession;"

56. The Committee found that the Registrant has in the past placed Patient A at unwarranted risk of harm. However, given the good level of insight, the remediation, including the current quality of his practise as demonstrated by the Supervision Reports, the Committee concluded that there was a low risk of repetition of the misconduct.

57. The Panel found that limbs b). or c). above were not engaged in the circumstances of this case. The Registrant has not in the past and is not liable in the future to bring the profession in to disrepute or to breach fundamental tenets.

58. However, the Committee remained concerned that this matter arose during the currency of the REDACTED. The Committee considered the wider public interest and was mindful of the guidance in the case of *Cohen* about the importance of maintaining public confidence in the profession, as well as declaring and upholding proper standards.

59. The Committee concluded that a well informed and reasonable member of the public would be concerned that these allegations arose whilst the Registrant was subject to REDACTED. Mindful of the importance of maintaining public confidence in the profession, the Committee concluded that it was necessary on wider public interest grounds only to make a finding of current impairment.

It concluded that not to do so would fail to maintain public confidence in the profession and would fail to uphold and declare proper professional standards.

60. The Committee accordingly finds, on public interest grounds only, that the Registrant's current fitness to practice is impaired.

Submissions on Sanction

61. Dr Graydon referred to the overarching objectives of the GOC and referred to the need to promote and maintain public confidence in the profession and the need to maintain proper professional standards. He also referred to the powers of the Committee in respect of sanction. He submitted that a sanction must be proportionate. He referred to paragraph 21.2 of the Hearings and Indicative Sanctions Guidance (HISG) and submitted that to take no further action would not be appropriate or proportionate given the concerns expressed by the Committee about the REDACTED. He submitted that there were no exceptional circumstances in this case and that taking no action and imposing a financial penalty were not appropriate in this case. He submitted that conditional registration would not be sufficient to protect the public and that a period of suspension was the appropriate sanction in this case.

62. Dr Graydon submitted that an aggravating feature of this case was the REDACTED. Further, the impact on Patient A and the Registrant's considerable professional experience were also aggravating features. He stated that there were no patient testimonials and the Registrant had not shown a full appreciation of his conduct on public confidence. He submitted that the public interest outweighed the interests of the Registrant and Dr Graydon referred to the guidance in *Bolton v Law* Society (1994) 1 WLR 512.

63. Mr Saunders stated that it was not fair to hold the unblemished history of the Registrant as an aggravating feature and that the GOC seeking suspension was surprising given that impairment has been found on a narrow basis, and there are positive findings in respect of insight and remediation. He referred the Committee to 21.7 in respect of taking no action and submitted that this case was exceptional and the Committee should take no further action.

64. Mr Saunders submitted that a restrictive sanction is not appropriate in this case given the findings as to level of remediation, good insight, and a low risk of repetition as well as the finding that the Registrant is not likely to bring the profession into disrepute or to breach fundamental tenets of the profession. He submitted that higher sanctions would be disproportionate as there was no need for such sanctions which would be punitive. Such sanctions would deprive the public of the benefit of the Registrant's practice. He submitted that no further

action was not a lenient approach in this case as it "*marks his card*" and it would be made public.

Finding on Sanction

65. The Legal Adviser referred the Committee to the GOC's HISG and stressed the need for the Committee to act proportionately and to impose the least restrictive sanction that is appropriate in all the circumstances of the case. The Committee must balance the interests of the Registrant with the need to protect the public and the wider public interest and must be mindful of its earlier findings.

66. The Committee accepted the legal advice and was mindful of the guidance in the HISG and the need for proportionality. The Committee considered all the circumstances of this case, including, importantly, the level of insight and remediation shown by the Registrant.

67. The Committee first considered the aggravating and mitigating factors in this case. It found that the aggravating factors were:-

- The significant delay in the treatment of Patient A's undiagnosed retinal detachment and the impact that had on Patient A
- REDACTED

68. The Committee found the following mitigating factors:-

- The Registrant has demonstrated good insight into his failings
- The Registrant has remediated his failings and produced persuasive and cogent evidence of his remediation
- The positive testimonial from the Registrant's supervisor, who is fully aware of the facts of the misconduct
- The Registrant has shown remorse and made an apology in his statement to Patient A, the GOC and his professional community
- The Registrant has been in practice for 28 years without any previous fitness to practice history REDACTED
- There is no evidence of any repetition since the event
- The misconduct related to a single eye examination in 2018
- The asymptomatic nature of Patient A's presentation

69. The Committee considered the HISG and the approach to sanction and proportionality at paragraph 8 which states :-

"*8.1 The [Committee] should take a proportionate approach in deciding what sanction to impose, if any. This means weighing the interests of the public against the interests of the registrant when deciding whether a sanction is necessary to protect the public.*

8.2 The Committee should have regard to all the circumstances of the particular case, any aggravating and/or mitigating features that may be present, and any personal mitigation submitted by the registrant.

8.3 In deciding what sanction is appropriate, the Committee should start with the least severe and only move on to consider the next sanction if the one under consideration does not sufficiently protect the public, promote, and maintain public confidence in the profession and promote and maintain proper professional standards and conduct, having regard to the circumstances of the case and the over-arching objective."

70. The Committee also considered the guidance on mitigation at paragraph 14:-

"14.4 The [Committee] should consider testimonials in the light of the factual findings that have been made. Testimonials prepared in advance of a hearing need to be evaluated in the light of the factual findings made at the hearing. The Committee should consider whether the authors of the testimonials were aware of the events leading to the hearing and what weight, if any, to give to them. The Committee should also consider how long the author has known the registrant, how recently the author has had experience of the registrant's behaviour at work and whether there is any evidence that the author has a conflict of interest in providing the testimonial...

14.6 Persuasive evidence of rehabilitation and a credible commitment to high standards in the future will be directly relevant to the question of fitness to practise. Such evidence may be considered as mitigation, subject to the circumstances of the case, notwithstanding that there may have been a concern about the registrant's conduct in the past."

<u>No further action</u>

71. The Committee next considered the guidance at paragraphs 21.3 – 21.8. on taking no further action. It considered the guidance from Lord Bingham in *R v Kelly (Edward)* [2000] QB 198 and was mindful of the need to protect the wider public interest. The Committee considered that guidance which states:-

"*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."

72. In this case current impairment was specifically made on public interest grounds in order to mark the misconduct as unacceptable. Impairment was not found on the basis of a need to protect the public given that the Registrant has fully remediated his practise.

73. The Committee took account of the HISG at paragraph 21.4 which makes clear that an impairment finding with no further action is a way to mark the seriousness of the misconduct in the public interest. The Committee was satisfied that it has sufficiently marked the misconduct as unacceptable by making a finding of current impairment, and it is satisfied that such a finding sufficiently maintains public confidence and upholds proper professional standards.

74. In relation to the REDACTED which was central to the Committee's finding on impairment, the Committee does not seek to minimise the significance of this or the other aggravating factor, being the impact on Patient A. However, the Committee must balance those factors with the numerous mitigating factors. The Committee reminded itself that it is not purpose of sanctions to punish.

75. The Committee was mindful of paragraphs 14.4 and 14.6 of the HISG. It has found that the Registrant demonstrated good insight and it has accepted good and cogent evidence that the Registrant has fully remediated his practice. There is cogent evidence that the Registrant has performed well whilst subject

to supervised practice and under interim conditions of practice pending this hearing.

76. The Committee has considered eight positive supervision reports from the Registrant's Supervisor. That Supervisor has also provided, in the full knowledge of these proceedings and having supervised the Registrant, a positive testimonial which speaks highly of the Registrant, his diligence and his commitment to good practice, including his commitment to his community. He is considered an excellent clinician by his Supervisor who states:- *"following his period of supervision I have the highest possible regard for Mr Brown's clinical knowledge, attitude and decision making… Mr Brown's presence in my practice enhances, not diminishes, its clinical reputation."*

77. The Committee considered paragraph 14.6 of the HISG. It heard from the Registrant in his live evidence about his commitment to seeing patients out side of normal working hours. The Committee considered that this demonstrated a strong and credible commitment to high standards in the future.

78. The Committee found that these were powerful mitigating factors and it attached considerable weight to the high-quality evidence of remediation, professional commitment and good current practice. The Committee was satisfied that the Registrant has already remediated his practise.

79. The strength and weight of the mitigating factors identified, including remediation and the evidence about his current clinical practice, are uncommon and the Committee regarded them as unusual. The Committee concluded that in all the circumstances, this case can be properly considered exceptional.

80. The Committee concluded that a restriction on the Registrant's practise is not required in the wider public interest. The issue of public protection does not arise in this case. The Committee was satisfied that the guidance at paragraph 21.7 applies in this case and it has seen ample, cogent evidence of remediation as well as significant mitigation.

81. The Committee considered the HISG further and found that to impose a financial penalty would be inappropriate and would serve no proper purpose.

82. Before reaching a final conclusion, the Committee, mindful of proportionality and the HISG at paragraph 8.3, considered the next available sanction on the scale. It considered whether conditional registration would be proportionate or appropriate in this case. The Committee has no concerns regarding the Registrant's current or future practice, and there is no need to restrict his practice in order to protect the public. There are no risks or concerns identified by the Committee that would properly inform or give rise to the need for conditions. Conditions would be disproportionate and punitive.

83. Although not required to, in light of the GOC's submissions on the sanction of suspension, the Committee unusually went on to consider this sanction. The Committee considered that as the misconduct related solely to clinical failings in relation to Patient A, it was entitled to place considerable weight upon the mitigating factors it has identified. Having regard to the HISG guidance upon proportionality and the overarching objectives of the GOC, the Committee was satisfied that suspension would be disproportionate and purely punitive.

84. The Committee concluded that to take no further action is the appropriate and proportionate order in this case. To impose restrictions on the Registrant's practise in the particular circumstances of this case would be disproportionate. The informed and reasonable member of the public would be satisfied that public confidence in the profession was maintained and standards upheld by the regulatory process and the findings of misconduct and impairment, which in themselves denote the seriousness of the Registrant's past failings. This finding will be published on the GOC website.

85. The Committee therefore determined that it would take no further action.

Revocation of interim order

86. The Committee hereby revokes the interim order for conditional registration that was imposed on 25 March 2022**.**

Chair of the Committee: Ms Jayne Wheat

Signature ……  **Date: 9 February 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
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. 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). Further information about the PSA can be obtained from its website at www.professionalstandards.org.uk or by telephone on 020 7389 8030.
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.