

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

GENERAL OPTICAL COUNCIL

F(20)08

AND

JOANNE DONNELLY (D-16951)

**DETERMINATION OF SECOND SUBSTANTIVE REVIEW
17 JUNE 2021**

Committee Members: Pamela Ormerod (Chair/Lay)
Ann McKechin (Lay)
Mark Richards (Lay)
Ian Taylor (Dispensing Optician)
Sarah Baylay (Dispensing Optician)

Legal adviser: L Whittle-Martin

GOC Presenting Officer: D Taylor

Registrant: Not present and unrepresented

Registrant representative: N/A

Hearings Officer: Ms A Riaz

Outcome: Erasure

Proof of service

The Committee noted that the Registrant was not in attendance at this virtual hearing.

The Council was therefore required to satisfy the Committee that the documents had been served in accordance with Section 23A of the Opticians Act 1989 (the Act) and Rule 61 of the Fitness to Practise Rules 2013 (the Rules).

The Committee heard that notice of this hearing, which contained the required information, dated 29 January 2021, had been served by email to the address provided by the Registrant. The Committee was satisfied that this accorded with the Council's policy on service of documents implemented in the light of the current Covid 19 emergency.

The Committee accepted the advice of the Legal Adviser.

The Committee was satisfied that service had been effected in accordance with the relevant Rules and requirements.

Proceeding in the absence of the Registrant

The Committee was invited by Mr Taylor on behalf of the Council to proceed with the hearing in the absence of the Registrant.

The Committee accepted the advice of the Legal Adviser, who referred to the cases of *R v Jones & Hayward* [2001] EWCA Crim 168 and *Adeogba v GMC* [2016] EWCA Civ 162.

The Committee considered whether it would be in the interests of justice to proceed in the Registrant's absence in accordance with Rule 22. The Committee kept in the forefront of its deliberations the need to exercise the discretion to proceed in a Registrant's absence with the utmost caution.

The Committee took into account the email dated 10 June 2021 from the Registrant stating:

"Good morning, I have no interest in the hearing. it has been going on far to[sic] long".

The Committee also took account of the email dated 3 December 2020, sent by the Registrant for the purpose of the Registrant first substantive review hearing, in which the Registrant informed the Council that the Registrant would not be attending that hearing. The Committee also took account of emails, dated 4 May 2020 and 19 May 2020, sent by the Registrant for the purpose of the substantive hearing, stating: *"I won't be attending the hearing"* and *"Again as I've said I just want this over"*.

The Committee concluded from the Registrant's continued absence, together with the representations made by the Registrant's most recent email, that they had decided to absent themselves from this hearing. The Registrant had not requested an adjournment and the Committee concluded that it was highly unlikely that the Registrant would attend if the matter were to be adjourned. The Committee took account of the nature of this hearing, which is a mandatory review. In all the circumstances the Committee concluded that it was in the public interest for the hearing to proceed.

Accordingly, the Committee decided to proceed in the absence of the Registrant.

Background

The allegation, which was found proved at the substantive hearing on 22 – 23 June 2020, was that the Registrant, on 5 October 2018, whilst working as a Dispensing Optician at [redacted], attended work when under the influence of alcohol.

A number of work colleagues gave evidence at the substantive hearing to the effect that the Registrant had attended work on that date in the morning smelling of alcohol and behaving in an uncharacteristic manner, consistent with being under the influence of alcohol. As a result, the store manager at [redacted] suspended the Registrant from work and directed the Registrant to return home by taxi. Despite this direction, the Registrant attempted to set off in their own car until prevented from doing so by the manager.

The allegation was denied by the Registrant who, in telephone calls with the Council shortly after the Registrant referral, claimed that the Registrant had not consumed alcohol, but had taken medication for a cold and chest infection, which might have affected the Registrant. In its findings of fact this explanation was rejected by the Committee.

The Committee further concluded that the Registrant's conduct in attending work under the influence of alcohol breached a number of provisions of the GOC Code and was sufficiently serious to amount to misconduct.

The Committee decided that the Registrant's fitness to practise was impaired, both on grounds of public protection and the need to uphold professional standards and public confidence in the profession.

The Registrant's registration was suspended for 6 months.

At the first substantive review, held on 18 December 2020, the Committee noted that there had been no engagement by the Registrant since the substantive hearing. The Committee concluded that there was nothing before it to suggest that the Registrant had made any efforts to demonstrate remorse for their misconduct, or insight into its likely damaging impact on the public and on the Registrants profession, or recognition or remediation of its underlying causes. The Committee concluded that the Registrant's fitness to practise as a dispensing optician remained impaired on the grounds of public protection and the wider public interest.

The first review Committee imposed a further period of suspension, for 6 months in duration, on the basis that this would provide patients with adequate protection from the risk of repetition identified, and would be sufficient in the circumstances to uphold the public interest. The Committee made the following recommendations in line with the recommendations previously made at the initial substantive hearing:

- The Registrant's engagement and attendance;
- Evidence that the Registrant has fully appreciated the gravity of the Registrant misconduct, and that the Registrant understands the seriousness of their actions in terms of public safety and the impact that they had on the reputation of the profession;
- Evidence of remediation;
- Evidence that the Registrant has maintained their skills and knowledge; and
- Character references and testimonials in relation to any paid or unpaid work undertaken since the time of the misconduct, written with full knowledge of the findings of the Committee at the substantive hearing and of this Committee at this review hearing.

The first review Committee stated that it gave serious consideration to the sanction of erasure of the Registrant's name from the register, but concluded, not without hesitation, that the Registrant should be given a further opportunity to engage with the proceedings and provide evidence of insight, remorse and remediation.

Submissions and Legal Advice on Impairment

Mr Taylor submitted that there had been no engagement from the Registrant and in all the circumstances the Registrants fitness to practise remains impaired.

The Legal Adviser took the Committee to the first three criteria in the case of *Council for Healthcare Regulatory Excellence v (1) Nursing and Midwifery Council (2) Paula Grant [2011] EWHC 927*, and advised the Committee to consider whether the Registrant:

- 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
- Has in the past and/or is liable in the future to bring the profession into disrepute; and/or
- Has in the past breached and/or is liable in the future to breach one of the fundamental tenets of the profession.

The Legal Adviser referenced the case of *Cohen v General Medical Council [2008] EWHC 581*, and encouraged the Committee to ask whether the Registrant's conduct is remediable, whether it has been remedied and whether it is highly unlikely to be repeated. The Legal Adviser advised the Committee to question whether the Registrant's misconduct could be regarded as an isolated incident in the Registrant's career as a Dispensing Optician, and whether the Registrant has demonstrated insight into the Registrant's misconduct. Further, the Legal Adviser advised the Committee to consider whether the need to uphold proper professional standards and public confidence in the Registrant and in the profession, would be undermined if a finding of impairment of fitness to practise were not made in the circumstances of the case.

Decision on Impairment

The Committee accepted the advice of the Legal Adviser. The Committee concluded that the first three criteria in the case of *Council for Healthcare Regulatory Excellence v (1) Nursing and Midwifery Council (2) Paula Grant [2011] EWHC 927* applied. It determined that in attending work whilst under the influence of alcohol the Registrant had acted in a manner that had the potential to put patients at unwarranted risk of harm, had brought the profession into disrepute and had breached a fundamental tenet of the profession. The Committee accepted that the Registrant's actions in attending work under the influence of alcohol as a dispensing optician had been an isolated incident. However, it considered that the Registrants misconduct had been serious. The Committee noted that throughout the entirety of these regulatory proceedings there had been no engagement from the Registrant, save for a number of emails indicating the Registrants lack of interest in the proceedings. The Committee concluded that there was nothing before it to suggest that the Registrant had made any efforts to demonstrate remorse for the Registrant's misconduct, or insight into its likely damaging impact on the

public and on the Registrant's profession, or recognition or remediation of its underlying causes.

The Committee decided that the Registrant's misconduct was capable of remediation, but that there was nothing to suggest that it had in fact been remediated and therefore, the likelihood that the Registrant would repeat their conduct in the future remained high.

The Committee also noted that the Registrant had failed to take any of the steps recommended to the Registrant by the previous Committee as actions which were likely to assist a reviewing Committee.

The Committee therefore found that the Registrant's fitness to practise as a dispensing optician remains impaired on the grounds of public protection.

The Committee also concluded that a finding of impairment remained necessary on public interest grounds. The seriousness of the misconduct and the lack of any remediation meant that a finding of current impairment was required to uphold professional standards and maintain public confidence in the profession.

Submissions and Legal Advice on Sanction

Mr Taylor submitted that erasure was the appropriate sanction in the light of the Registrant's email of 10 June 2021, declaring that they had no interest in the proceedings, and in the absence of any other engagement.

The Committee accepted the advice of the Legal Adviser who advised the Committee to consider the range of available sanctions in ascending order of seriousness; to consider any aggravating and mitigating factors in the case; to act proportionately; and to remember that the purpose of sanction is not to be punitive, but is to protect the public, maintain public confidence in the profession, and declare and uphold proper standards of conduct and behaviour. The Legal Adviser advised the Committee to take into account the factors set out in the GOC's "Hearings and Indicative Sanctions Guidance".

Decision on Sanction

The Committee accepted the advice of the Legal Adviser.

The Committee considered the sanctions available to it from the least restrictive to the most severe. The Committee took into account the Indicative Sanctions Guidance (ISG). It recognised that the purpose of sanctions is not to be punitive, although it may have this effect.

The Committee approached the Registrant's misconduct as an isolated incident of attending work whilst under the influence of alcohol. The Committee agreed with the stance taken by the substantive Committee that the Registrant was precluded from being treated as a person of good character due to the existence of a warning issued by the Investigating Committee of the GOC in relation to the Registrant's [redacted]. The Committee was mindful of the fact that, in issuing the warning, the Case Examiners did not make a finding that the Registrant's fitness to practise was impaired at that point. However, the Committee regarded the existence of the warning as an aggravating factor, in that it related to [redacted] and the warning was still in force at the time of the current misconduct.

The Committee regarded the following as mitigating factors:

- the misconduct amounted to an isolated incident of attending work under the influence of alcohol;
- the misconduct dated back to October 2018 and there had been no evidence of repetition of the behaviour.

The Committee regarded the following as aggravating factors:

- the Registrant's misconduct had placed patients, including vulnerable patients under the age of 16, at unwarranted risk of harm;
- the Registrant had been a manager, in a position of leadership;
- the misconduct had occurred when the 4 year warning imposed on 4 September 2015 for alcohol related activity had been active;
- there was no evidence of remorse, remediation or insight.

The Committee concluded that, given the Registrant's lack of engagement and the Registrant's failure to take up any of the previous Committee's recommendations, conditions were not workable, as there was no reason to believe that the Registrant would be willing to cooperate.

The Committee considered a further period of suspension. The ISG indicated that if the Committee was satisfied that the Registrant has insight and does not pose a significant risk of repeating the behaviour, suspension may be appropriate. However, in the current instance, the Committee was not satisfied in that regard. The Committee appreciated that there was no evidence that the Registrant had repeated the misconduct since the incident, but the Committee had no information about the Registrant's current occupation other than that the Registrant had chosen to work in the healthcare sector and had decided that the Registrant no longer wished to work in the profession.

The Committee regarded the Registrant's misconduct as serious, for the reasons set out in this determination. The Committee concluded that in the light of the complete lack of remorse, remediation and insight, erasure was now the only sanction which would be sufficient to protect patients and the public interest. Public confidence in the profession could not be sustained unless the Registrant is now removed from the register. The Committee understood that the purpose of sanctions is not to be punitive, and that erasure is the most serious of all sanctions. However, in complying with its duty to act proportionately, the Committee took account of the Registrant's most recent email indicating that the Registrant had no interest in the proceedings, and that the proceedings had been going on for too long in the Registrant's view. The Committee balanced the Registrant's interests against the need to protect the public and the wider public interest, which includes the maintenance of public confidence in the profession and the declaring and upholding of proper standards of conduct and behaviour.

In all the circumstances, the Committee concluded that the only appropriate and proportionate sanction in the circumstances is erasure.

That concludes this determination.

Chair of the Committee: Dr Pamela Ormerod

Signature

Date: 17 June 2021

Registrant: Joanne Donnelly

Signature not present or represented

Date: 17 June 202

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. PSA is required to make its decision within 40 days of the hearing (or 40 days from the last day on which a registrant can appeal against the decision, if applicable) and will send written confirmation of a decision to refer to registrants on the first working day following a hearing. 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.