



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

GENERAL OPTICAL COUNCIL

F(24)18

AND

DAVID MCINTOSH (D-35775)

**DETERMINATION OF A SUBSTANTIVE HEARING
2-4 SEPTEMBER 2024**

Committee Members:	Pamela Ormerod (Chair/Lay) Amanda Webster (Lay) John Vaughan (Lay) Philip Cross (Dispensing Optician) Sarah Castree (Dispensing Optician)
Legal adviser:	Aaminah Khan
GOC Presenting Officer:	Charles Drinnan
Registrant present/represented:	No and not represented
Registrant representative:	Not represented
Hearings Officer:	Latanya Gordon
Facts found proved:	Particulars 1 (apart from 1(g)), 2 and 3
Facts not found proved:	Particular 1(g)
Misconduct:	Found
Impairment:	Impaired
Sanction:	Erasure
Immediate order:	Yes

PRELIMINARY ISSUES

Proof of service

1. As the Registrant did not attend the hearing, nor was he represented, a phone call was made by a hearings officer, to the Registrant, in order to ascertain his current position. The Registrant indicated in that discussion that he would be sending further material, which he would like to be placed before the Committee. This was received shortly thereafter in an email and was further information relevant to the impairment stage of the proceedings.
2. The Committee then heard an application from Mr Drinnan, on behalf of 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 Opticians Act 1989 and Rule 61 of the General Optical Council (Fitness to Practise) Rules 2013 ('the Rules').
3. Mr Drinnan referred the Committee to the service bundle, which included the Notice of Hearing, dated 11 July 2024 and a response from the Registrant, sent the same day, confirming that he could access the case documents. Mr Drinnan highlighted that the Notice of Hearing had been emailed to the Registrant's registered email address and checks had been made to confirm that the Registrant had given his prior consent to receive correspondence from the Council by email (which he had in an email from September 2023). Mr Drinnan took the Committee through more recent correspondence from the Council to the Registrant, dealing with preparations for the hearing, to show that the Registrant was aware of the hearing today.
4. Mr Drinnan invited the Committee to find that the documents before the Committee were sufficient to satisfy the requirements of Section 23A of the Opticians Act 1989 and Rule 61. Further, Mr Drinnan submitted that the Council had made all reasonable efforts to notify the Registrant of the hearing in accordance with Rule 22(a).
5. The Committee accepted the advice of the Legal Adviser, who referred the Committee to the Rules on service of the Notice of Hearing and acceptable methods of service, including by email where a Registrant has provided consent to receive correspondence by email, which was the case here.
6. The Committee had regard to the documentation before it regarding service contained within a service bundle. The Committee noted that the Registrant had been served with the Notice of Hearing on 11 July 2024, via email, to an email address which the Registrant had registered with the Council. The Registrant had previously consented to receiving correspondence by email. Furthermore, the Registrant had confirmed receipt of the notice of hearing and had corresponded with the Council regarding the hearing, as recently as today.
7. The Committee was satisfied, in the circumstances, that there had been effective service of the Notice of Hearing and that all reasonable efforts had been made to notify the Registrant of the hearing in accordance with the Rules.

Proceeding in the absence of the Registrant

8. The Committee then went on to consider whether, having regard to the reasons for the absence provided by the Registrant, it would be in the public interest to proceed in the Registrant's absence in accordance with Rule 22(b).

9. Mr Drinnan, on behalf of the Council, submitted that it was in the public interest to proceed in the absence of the Registrant, having regard to the reason for his absence, which was that he could not get the time off work. Mr Drinnan invited the Committee to consider that the Registrant would have been given the opportunity to provide his available dates for the listing of this hearing. The Registrant could have sought time off or asked for adjustments to be made. Mr Drinnan submitted that having to work was not a good enough reason to be absent from these proceedings and invited the Committee to find that the Registrant had voluntarily waived his right to attend.
10. Mr Drinnan submitted that this case concerned a particularly serious allegation of dishonesty consisting of theft from his employer, on twelve separate occasions, which started over two years ago. Whilst the Registrant had said in recent correspondence that he would have preferred to attend, no formal adjournment application had been made by the Registrant, despite being invited in correspondence to put any such application in writing. What had been received from the Registrant this morning could be described as a statement of mitigation; it was not seeking an adjournment. Mr Drinnan submitted that there was nothing to suggest that if the case was adjourned, the Registrant would attend a future hearing.
11. Mr Drinnan submitted that there was a public interest in cases being heard within a reasonable time and without undue delay. There were also two witnesses for the Council available to give evidence today. Mr Drinnan highlighted the admissions that the Registrant had made in his disciplinary interview, from which the Committee could conclude that the risk of reaching the wrong conclusions in the absence of the Registrant, in light of those admissions, was limited. Mr Drinnan submitted that it would run counter to the public interest, and public confidence in the regulator and the profession could be damaged, if serious cases such as this were not dealt with expeditiously. Mr Drinnan invited the Committee to determine that it was in the public interest to proceed.
12. The Committee accepted the advice of the Legal Adviser, who referred the Committee to the guidance on proceeding in a Registrant's absence in the Council's 'Hearings and Indicative Sanctions Guidance' (updated November 2021). The Legal Adviser reminded the Committee of the guidance on proceeding in absence arising from the case of *GMC v Adeogba* [2016] EWCA Civ 162.
13. In summary, it was advised that the Committee had a discretion as to whether to proceed in the Registrant's absence. The Committee should have regard to any reasons for absence which have been provided by the Registrant, and consider, whether in the circumstances, it is in the public interest to proceed. The Legal Adviser advised the Committee that in deciding whether to proceed in the absence of the Registrant it should proceed with great care and caution. She advised that the Committee should consider whether the Registrant had waived his right to attend and whether adjourning would likely secure his attendance. The Legal Adviser advised the Committee that it should take into account the public interest in the hearing of cases in an expeditious manner.

14. The Committee was satisfied that the Registrant was aware of today's hearing and that he had the option to attend, however he had chosen not to do so. The Committee had regard to the Registrant's reason for not attending, which was only advised on 27 August 2024, despite being aware since the 11 July 2024 that the hearing was scheduled to commence 2 September 2024. Whilst the Registrant had indicated that he would have preferred to be involved in the hearing, he stated that he could not get the time off work, without any supporting evidence. The Committee did not consider in all the circumstances that this was a sufficiently good reason to not attend these proceedings. Further, there had been no explicit application to adjourn made by the Registrant. He had been invited on 27 August 2024 to put any adjournment application in writing and had not done so. The Committee considered whether the recent correspondence from the Registrant could be interpreted as a request for an adjournment, but in the circumstances was not satisfied that it could. The Committee was of the view that in light of the admissions made by the Registrant in his disciplinary interview and correspondence, the risk of coming to a wrong conclusion was minimal.
15. In the circumstances, the Committee could not see any basis for not proceeding today and there would be nothing gained by adjourning the hearing, as there was nothing to reassure the Committee that the Registrant would attend a future hearing. These were serious allegations of dishonesty, which had commenced over two years ago and it was in the public interest to determine them without undue delay. Furthermore, the Council's witnesses were available today and they would also be inconvenienced if the hearing did not proceed and was to be adjourned.
16. Accordingly, the Committee determined that it would be in the public interest for the hearing to proceed in the Registrant's absence.

ALLEGATION (AS AMENDED)

The Council alleges that you, Mr David McIntosh (D-35775), a registered Dispensing Optician:

1) Whilst working at the Specsavers Store A ("the Store"), you obtained funds totalling around £1,417,147 from your employer by conducting unauthorised and/or false refund transaction(s) on around 12 separate occasions, as below:

- a) On 18 June 2022 you carried out a refund amounting to £35 to your personal [redacted] card ending [redacted];*
- b) On 24 September 2022 you carried out a refund amounting to £39 to your personal [redacted] debit card ending [redacted];*
- c) On 1 October 2022 you carried out a refund of £129 to your personal*

[redacted] debit card ending [redacted];

d) On 25 October 2022 you carried out a refund of £35 to your personal

[redacted] debit card ending [redacted];

e) On 11 December 2022 you carried out a refund of £199 to your personal

[redacted] debit card ending [redacted];

f) On 30 December 2022 you carried out a refund of £248 to your personal

[redacted] debit card ending [redacted];

g) On 9 February 2023 you carried out a refund of £1 to your personal

[redacted] debit card ending [redacted];

h) On 16 February 2023 you carried out a refund of £59 to your personal

[redacted] debit card ending [redacted];

i) On 5 March 2023 you carried out a refund of ~~£239~~ £293 to your personal

[redacted] debit card ending [redacted];

j) On 17 March 2023 you carried out a refund of £120 to your personal

[redacted] debit card ending [redacted];

k) On 15 April 2023 you carried out a refund of £194 to your personal [redacted]

debit card ending [redacted];

l) On 14 May 2023 you carried out a refund of £119 to your personal

[redacted] debit card ending [redacted].

2) On 14 May 2023 whilst working at Specsavers Store A (“the Store”), you created a false product refund for £119 on the till against no customer details;

3) Your actions at 1) and/or 2) above were dishonest and/or inappropriate, in that you:

a) knew the refunds did not arise from legitimate transactions; and/or

b) knew you were not entitled to the refund money

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

17. Mr Drinnan made an application to amend the allegation, in order to correct what he submitted was likely to be a typographical error in particular 1(i), where the amount refunded ought to read £293, which would match the evidence in the case, rather than £239. Mr Drinnan confirmed that this amendment, if granted, would also affect the total figure in the stem of paragraph 1, which would then require amendment to read £1,471, rather than £1,417.

18. Mr Drinnan referred the Committee to the several parts of the evidence which showed that the correct amount of the refund made on 5 March 2023 was £293, not £239. Mr Drinnan submitted that there would be no injustice to the Registrant in making these amendments, as he accepts the wrongdoing. The amendment would reflect what was put to the Registrant during the investigation stage, which was accepted by him in full in the disciplinary interview.
19. The Committee accepted the advice from the Legal Adviser regarding the discretion it had to make amendments to the Allegation, at any stage of the hearing, under Rule 46(20), if the amendment can be made without injustice.
20. The Committee determined to make these two amendments to the figures in the stem of particular 1 and 1(i) (as shown by underlining in the Allegation above), as it was satisfied that they could be made without injustice and would better reflect the evidence in the case.

DETERMINATION

Admissions in relation to the particulars of the allegation

21. As the Registrant was not present there were no formal admissions to the allegation. The amended Allegation was read into the hearing record by the Hearings Officer.

Background to the allegations

22. The Registrant is a Dispensing Optician (D-35775), who qualified on 17 January 2022. At the time of the events alleged, he was working as a registered Dispensing Optician at Specsavers Store A ('the Store'). He had been working for Specsavers at this store for 8 years and had progressed to the level of store manager.
23. The Store was initially unaware of what was happening until Specsavers Head Office ('Head Office') informed them on 2 May 2023 of suspicious activity which had been detected relating to product refunds. It transpired that regular refunds were going through on the store system and the refunds were being made to various bank cards linked to the Registrant. All of these refunds were made using the Registrant's operator code for the system.
24. Head Office arranged for covert CCTV cameras to be installed in the store. This was completed out of store opening hours on 3 May 2023. Very few people knew of the installation. The two cameras cost £1,200 each and were installed in two areas, one over the counter and the other over the dispensing area, as initially it was not clear where the refunds were taking place.

25. CCTV footage, which was obtained from the covert cameras, shows the Registrant on 14 May 2023 processing a refund using his smart watch. No customer details were entered. The Registrant is seen in the footage to hold his smart watch over the credit/debit card (PDQ) machine and the refund is processed onto his Android/Apple Pay account, which was a [redacted] account. The Registrant then removes the receipts, placing one in the till and the second he puts in the bin.
26. Head Office came to the store to begin the investigation of the Registrant on 30 May 2023. It was discovered the Registrant's bank details matched against the refunds. The Registrant was suspended from the store pending a disciplinary interview. The disciplinary interview took place on 2 June 2023, during which the Registrant admitted that he had taken the money by processing false refunds onto his debit cards. The Registrant has subsequently paid back the money in full following the internal investigation by Specsavers. The Registrant cited personal finance difficulties when asked why he was stealing from the business.
27. Mr Drinnan explained when opening the case, that particular 2 of the Allegation related to the refund captured on CCTV on 14 May 2023. It was alleged in respect of particular 2, that the Registrant's dishonesty went further than just making a false refund, as he also created a false product refund in order to cover up the theft and make it more difficult to discover. Mr Drinnan stated that one could assume that the same method was used for the other refunds, however only one false product refund had been particularised, as that had been captured on the CCTV footage. Mr Drinnan confirmed that it was the Council's case that on at least one occasion the Registrant's actions went further, in that he took steps to hide the dishonesty.

The hearing

28. Witness A ([redacted]) and Witness B ([redacted]) both gave live evidence and confirmed the content of their witness statements, which stood as their evidence in chief.
29. The Committee asked questions for Witness A regarding the employment of the Registrant. Witness A confirmed that he had been a good employee prior to the events in question. The Registrant had been new to optics when he started at the store and they had nurtured him into the role of Dispensing Optician and store manager. Witness A confirmed that the Registrant had repaid the money taken from the store shortly after the final disciplinary meeting. He understood that the Registrant had sought another role as a Dispensing Optician at another Specsavers store after being dismissed, as he had asked for a reference, which had been provided. Witness A confirmed that the store did not make a complaint to the police, as it was decided against doing so, as there would need to be a referral to the Council and the Registrant had agreed to pay back the money.

30. Witness B gave evidence and explained the mechanism of the refunds and what was shown by the CCTV footage. Witness B stated that when the Registrant processed a false refund it would have created a financial variance, and that would have been investigated. To get round that and hide the variance, the Registrant processed an erroneous refund against no customer details. Witness B explained that a product refund existed on the system for when a customer purchased something like an accessory, which did not need to be put on a customer's record. This feature was used by the Registrant, which Witness B stated had been done on every occasion where there was an unauthorised refund by the Registrant, not just on the 14 May 2023. Witness B gave evidence that the variance could still be discovered if a false product refund was done, however this required the store to be checking the product refunds, which was not picked up by the store in this case.
31. Witness B was asked regarding his total of the false refunds, which was £1 less than the total that the Council had come to. Witness B explained that on one occasion, on 9 February 2023 (particular 1(g)), the Registrant completed a refund of £1 then processed a sale of £1, which could have been the Registrant checking that the PDQ machine was working. Witness B stated that it was quite common for staff members to do this to check the machine and as it was also put through as a sale, the net balance was £0.
32. Witness B gave evidence that the Registrant appeared remorseful in the disciplinary interview and was very candid. He showed insight, admitting what he had done immediately, without challenge, and became upset. He also wanted to repay the money as soon as possible.
33. Prior to making closing submissions, Mr Drinnan raised two points with the Committee. Firstly, he observed that based upon the evidence of Witness B, further incidences of false product refunds could have been included in the Allegation, in addition to the one shown on CCTV (particular 2), as Witness B's evidence was that this method had been used by the Registrant on each occasion. Mr Drinnan stated that the Council were not seeking to make further amendments to the Allegation at this stage. However, he reminded the Committee that if it felt that the Allegation did not cover the scope of the alleged misconduct adequately it could make amendments to the Allegation of its own accord.
34. The second issue raised by Mr Drinnan related to particular 1(g), which was the refund of £1 on 9 February 2023. Given the evidence heard in relation to this, Mr Drinnan submitted that the Committee may consider this was not a false refund if it was then repaid. Alternatively, Mr Drinnan submitted that the Committee could take the view that it was still a false refund as even though repaid, the store was not getting the same £1 back. Mr Drinnan suggested that it was a matter for the Committee how it wished to approach this issue.

35. Mr Drinnan proceeded to make closing submissions on behalf of the Council. He submitted that the facts in this case were incredibly straightforward. He invited the Committee to consider the CCTV footage, which showed the 'MO' (modus operandi) of the Registrant. Mr Drinnan referred the Committee to the investigation report of Witness B and the detail of the spreadsheets, which when cross-referenced with the Allegation, lead to the irresistible conclusion that the Registrant stole the money from the store on the 11 occasions set out in particular 1 (not including particular 1(g)). Mr Drinnan submitted that it was obviously unauthorised to steal from an employer and it was clear that the refunds were false.
36. In relation to particular 2, Mr Drinnan submitted that it can be seen on the CCTV footage that the Registrant took the money via an Android/ApplePay refund onto his smartwatch. He then binned the customer copy of the receipt.
37. Mr Drinnan invited the Committee to have regard to what the Registrant said in his disciplinary interview, in which he outlined the method he used to effect the thefts. Mr Drinnan submitted that any evidence of insight or of his intentions was not relevant at this stage. When focusing on the facts alleged, they were made out and Mr Drinnan invited the Committee to find particulars 1 and 2 proved.
38. In relation to particular 3, which alleges dishonesty, Mr Drinnan referred the Committee to the test for dishonesty set out in *Ivey v Genting Casinos* [2017] UKSC 67. Mr Drinnan submitted that when applying that test to the facts of this case, the only conclusion the Committee could come to is that the Registrant's conduct was dishonest. Mr Drinnan submitted that the Registrant was fully aware that he was not entitled to the refunds obtained, that was why he created a false product refund in order to cover his tracks. This supports the submissions that this was dishonest conduct.
39. In relation to particular 3 referring to '*dishonest and/or inappropriate*', Mr Drinnan submitted that it was axiomatic that if the Registrant was dishonest, this would also be inappropriate. The Registrant was employed in a position of trust as store manager and had been given trusted access to the system to process genuine refunds. Mr Drinnan submitted that his actions in creating false refunds would be extremely inappropriate conduct.
40. The Committee accepted the advice of the Legal Adviser that the burden of proving a disputed allegation was on the Council, to the civil standard of the balance of probabilities. In particular, the Legal Adviser gave advice regarding considering the particulars of the Allegation separately, that intention can be inferred from the surrounding circumstances. She also referred the Committee to the case of *Ivey v Genting Casinos* [2017] UKSC 67 in relation to the test for dishonesty.

Findings in relation to the facts

41. In relation to the issue raised by Mr Drinnan, regarding the false product refunds being more fully particularised than they had been in the Allegation, the Committee noted that it had the power to make amendments to the Allegation of its own accord if it felt that the scope of what was alleged did not adequately cover the alleged misconduct. However, whilst the Allegation could have been particularised differently, the Committee was not minded to make further amendments to it at this late stage. The Committee considered that the essence of the alleged misconduct, in that the false refunds totalling around £1471, over a period of just under a year, was adequately captured. Further, the method used by the Registrant, of creating false product refunds, had been reflected for at least one occasion in particular 2.
42. In relation to the issue raised regarding the refund of £1 (particular 1(g)), this was considered by the Committee in terms of whether it had been proved by the Council, as set out further below.

Particular 1

43. The Committee first considered the evidence in relation to particular 1, which alleged that (as amended) on the 12 occasions listed between 18 June 2022 and 14 May 2023, the Registrant conducted unauthorised and/or false refunds to the total value of around £1,471. The Committee went through the 12 occasions where unauthorised and/or false refunds had been alleged and considered them separately and in turn.
44. The Committee noted that in relation to most of the occasions alleged, these were not covered by the CCTV footage, although that was available for the last occasion on 14 May 2023. The Committee had regard to the evidence and investigation report of Witness B, including the detailed spreadsheets of the transactions provided, which supported what was alleged. Witness B gave clear evidence, which was supported by the detailed investigation and subsequent report that he had prepared. For all of the refund transactions, the evidence of Witness B was that a false product refund had been created, which was not linked to a customer.
45. The Committee also had regard to the interview conducted with the Registrant on 2 June 2023, in which he admitted carrying out false refunds, due to having financial difficulties at the time. When asked directly whether he had stolen money from the store, the Registrant accepted that he had. He did not seek to minimise or challenge any of the false refunds that were alleged and accepted the total that was put to him. The Committee noted that the Registrant described his method as follows:

“I select random products from the Specsavers price list to process refunds for the amounts discussed. I keep it to the smallest amount to cover the costs that I have going out of my account in that month.”

46. Furthermore, in a letter sent by the Registrant to the Case Examiners, undated, he stated that *“I do not dispute the allegations brought against me, and I am fully aware of the severity of my actions.”*
47. Although the Committee had not heard directly from the Registrant in these proceedings, it was of the view that the admissions that he had made in his interview and in his correspondence could be relied upon as being his honest account and an acceptance of his actions.
48. In relation to the last occasion set out in particular 1(l), on 14 May 2023, this was supported by the covert CCTV footage, which showed the Registrant using his smartwatch at the till. The Committee noted that the timing of this footage approximately fitted with the times set out in Witness B’s investigation report for the time of the unauthorised refund.
49. The Committee considered that the unchallenged evidence of Witness B, the CCTV footage and the admissions of the Registrant during the investigation stage, were all supportive of each other. The Committee was satisfied on the evidence before it, that there was no genuine reason for these refund transactions and noted that none had been put forward by the Registrant.
50. The Committee was satisfied in respect of each occasion in particular 1 (apart from particular 1(g)) that the refunds were carried out by the Registrant and that they were unauthorised and false. Accordingly, the Committee found all of particular 1 (with the exception of (g)) proved.
51. In relation to 1(g), the evidence that this was an unauthorised and/or false refund was inconclusive, in respect of the £1, which had been shown to have been a refund to the Registrant, but within a short timescale was repaid to the store, therefore the net balance in relation to this transaction was £0. The Committee was not satisfied in light of this that the Council had proved that it was an unauthorised and/or false refund.

Particular 2

52. This particular alleges that on 14 May 2023 the Registrant created a false product refund for £119 on the till against no customer details. The Committee noted the distinction that had been made by Witness B in his evidence that this related to going further than creating the false refund itself for £119 on 14 May 2023 (in particular 1(l)), by creating the false product refund to cover up the variance. The Committee accepted the evidence of Witness B that this is what had occurred on 14 May 2023 and his interpretation of the system data and CCTV evidence. The Committee noted that this also accorded with the Registrant’s description of his method, which he had explained in interview.
53. Accordingly, the Committee determined that this particular was found proved.



Particular 3

54. This particular alleges that the Registrant's actions set out in particulars 1 and/or 2 were dishonest and/or inappropriate, in that he a) knew the refunds did not arise from legitimate transactions; and/or b) knew he was not entitled to the refund money.
55. The Committee considered the test in the case of *Ivey* and started with consideration of what the Registrant's state of mind was. The Committee was satisfied on the evidence before it, particularly from his full admissions in his disciplinary interview and letter to the Case Examiners, that the Registrant knew both that the refunds did not arise from legitimate transactions and also that he was not entitled to the refund money.
56. The Committee was satisfied that the Registrant had a dishonest state of mind at the time of conducting the false refunds, and he appreciated what he was doing was not permitted, which is why he sought to cover up his tracks with the false product refund. The Committee was satisfied that this conduct was both inappropriate and dishonest, both by the knowledge of the Registrant and by the objective standards of ordinary decent people.
57. Accordingly, the Committee found particular 3 of the allegation proved.

Submissions in relation to misconduct and impairment

58. The Committee heard submissions in respect of misconduct and impairment together. However, it considered and determined the two issues separately and in turn.
59. First, the Committee proceeded to consider whether the facts, as found proved, amount to misconduct. No further material was put before the Committee at this stage.
60. The Committee heard submissions from Mr Drinnan on behalf of the Council who invited the Committee to find that the Registrant's actions, in dishonestly and inappropriately, taking money from the store on 11 occasions over a period of almost a year, and on at least one occasion having been observed covering his tracks, amounted to misconduct.
61. Mr Drinnan outlined the caselaw on misconduct, with reference to the cases of *Cheatle v General Medical Council* [2009] EWHC 645 (Admin), *Roylance v General Medical Council (No.2)* [2000] 1 A.C. 311 and *Remedy UK Ltd v General Medical Council* [2010] EWHC 1245 (Admin).
62. Mr Drinnan submitted, in summary, that the Registrant's thefts from his employer, amounted to disgraceful and morally culpable behaviour, which attracted opprobrium and brought the profession into disrepute. He submitted that the

Registrant's actions had fallen far below the standards expected of Optometrists and Dispensing Opticians.

63. Mr Drinnan invited the Committee to have regard to the "*Council's Standards of Practice for Optometrists and Dispensing Opticians*," effective from April 2016 ('the Standards'). He submitted that the Registrant has departed from the following standards by virtue of his conduct:

- Standard 16: Be honest and trustworthy.
- Standard 16.1: Act with honesty and integrity to maintain public trust and confidence in your profession.
- Standard 17: Do not damage the reputation of your profession through your conduct.
- Standard 17.1: Ensure your conduct, whether or not connected to your professional practice, does not damage public confidence in you or your profession.

64. Mr Drinnan submitted that the Registrant's conduct fell far short of these standards in the circumstances. He submitted that it was also conduct that was criminal offences of theft and it was only through the generosity of his employer, that the criminal case did not go further.

65. Mr Drinnan stated that if a member of the public were to be asked what they thought of a manager stealing from the till and covering it up, the Committee may think they would be appalled. In addition, if the regulator did not take robust action in such a case, the damage to the regulator and the profession would be severe. Mr Drinnan invited the Committee to find that the conduct amounted to misconduct of the most serious kind.

66. Turning to the separate issue of current impairment, Mr Drinnan highlighted to the Committee the information before it from the Registrant, which was relevant to the issue of current impairment. This was the Registrant's letter to the Case Examiners and his email of yesterday (2 September 2024), sent to the hearings officer, which referred to him being in a significantly better place now than at the time of events. Mr Drinnan submitted that this was the only piece of information, received from the Registrant, which really assists when looking at the issue of current impairment.

67. Mr Drinnan referred the Committee to the guidance in the case of *CHRE v (1) NMC and (2) Grant* [2011] EWHC 927 (admin) and the test that was formulated by Dame Janet Smith in the report to the Fifth Shipman Inquiry. Mr Drinnan submitted that limbs (b)-(d) of this test are engaged in this case, namely that the conduct in question brought the profession into disrepute, breached one of the fundamental tenets of the profession and was dishonest. Mr Drinnan submitted that the fourth limb of dishonesty had already been found by the Committee at the facts stage.

68. Mr Drinnan referred to the public interest and stated that the need to uphold professional standards and maintain public confidence in the profession would be undermined if no finding of impairment was made. He submitted that this was

one of those cases referred to in the case of *Yeong v General Medical Council* [2009] EWHC 1923 (Admin), where a finding of impairment of fitness to practise may be justified on the grounds that it is necessary to reaffirm clear standards of professional conduct so as to maintain public confidence in the practitioner and in the profession.

69. Mr Drinnan invited the Committee to make a finding of current impairment by reason of misconduct. He submitted that as his role was a manager, the Registrant's actions would undermine confidence in the profession, not withstanding that no patients were harmed. Mr Drinnan stated that whilst in some cases risks can be ameliorated through remediation, that carries much less weight where not concerned with clinical errors.
70. Mr Drinnan acknowledged that the Registrant had accepted that there were no excuses for his conduct, which was right. However, his explanation was that he was taking the money to cover his bills, which Mr Drinnan submitted was a situation that could easily happen again. Mr Drinnan submitted that one may have some sympathy for the Registrant. However, notwithstanding the increases in the cost of living, if someone had a secure job it could be expected that other steps would be taken, such as cutting back on expenses, rather than stealing from an employer. Mr Drinnan suggested that the situation of potential financial difficulties was not one that could readily be remediated by the Registrant and there was no real evidence that the Registrant had taken steps to reduce the risk of repetition.
71. Mr Drinnan submitted that although the Registrant had stated in his email yesterday (2 September 2024) that he was in a much better position than previously, there was no real evidence of that. He submitted that the Registrant's statement that he was not currently impaired should not move the Committee from the irresistible conclusion that the misconduct is so serious that the Registrant's fitness to practise is currently impaired.
72. The Committee accepted the advice of the Legal Adviser who referred to the case of *Roylance v General Medical Council (no2)* [2000] 1 AC 311 regarding the two principal kinds of misconduct, either conduct linked to professional practice or conduct that otherwise brings the profession into disrepute. The Committee was reminded that misconduct was a matter for its own independent judgement and no burden or standard of proof applied. Further, that the Committee needed to consider whether the conduct was sufficiently serious to amount to professional misconduct.
73. In relation to the issue of current impairment, the Legal Adviser advised the Committee that the question of impairment was a matter for its independent judgement taking into account all of the evidence 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 *The General Medical Council v Armstrong* [2021] EWHC 1658 (Admin), *CHRE v (1) NMC and (2) Grant* [2011] EWHC 927 (admin) and *Cohen v GMC* [2008] EWHC 581 (Admin).

The Committee's findings regarding misconduct

74. The Committee considered the Council's Standards (referred to above), which it had been referred to by the Council, in particular standards 16, 16.1, 17 and 17.1. The Committee was satisfied that these Standards were applicable and that the Registrant's actions, which amounted to multiple acts of dishonesty, fell far short of the Standards to be expected.
75. The Committee noted in particular that the Registrant had stolen a significant amount of money from his employer, totalling approximately £1,471, over 11 separate occasions, spread over a prolonged period of almost a year. The Registrant used a sophisticated method to manipulate his employer's refund system and on at least one occasion was observed to take steps to cover up his actions, which would make detection more difficult. He breached the trust placed in him by his employer, as he was working at the time of the thefts as the store manager, in a position of responsibility. The thefts were not impulsive, nor isolated but were pre-meditated and persistent. The thefts only came to light when the Head Office noticed suspicious activity and commenced an investigation. The conduct also amounted to criminal offences and the Registrant was fortunate that a criminal complaint to the police was not made by his employer.
76. Whilst it was to the Registrant's credit that he repaid the sums taken in full, the Committee was mindful that there were other costs involved. The store had to incur costs as part of the investigation, including the installation of the covert cameras, at not insignificant sums. Furthermore, at the early stages of the investigation, before the Registrant had been identified, other colleagues of the Registrant may have been under suspicion for the thefts.
77. Having regard to the above features of the case, the Committee was satisfied that the Registrant's conduct was serious, morally culpable, and would be considered deplorable by fellow professionals. It fell far below the standards expected of a Dispensing Optician, contravening both of the Standards 16 and 17. The Committee also concluded that this conduct is damaging to the reputation of the profession and has brought it into disrepute.
78. Accordingly, the Committee determined that the facts found proved amount to misconduct.

The Committee's findings regarding impairment

79. The Committee next went on to consider whether the Registrant's fitness to practise is currently impaired by virtue of his misconduct.
80. The Committee had regard to the submissions of Mr Drinnan and the legal advice received regarding the issue of current impairment, as summarised above. The Committee also had regard to the material it had before it from the Registrant, including his email on the first day of the hearing, in which he stated that,
- "I can say that I do accept that my judgement was impaired during the time in question but that there is no impairment now."*
81. The Committee considered whether the Registrant's conduct was capable of being remediated, whether it had been remediated and whether there is a risk of repetition of the conduct in future.

82. The Committee was of the view that the persistent dishonesty in this case would be difficult to remediate, but did not consider that it was impossible to do so. However, the Committee considered that the level of insight and remediation demonstrated by the Registrant in this case was limited. It was concerned, particularly as he had not engaged consistently in these proceedings, that there was little evidence of him undertaking detailed reflection, nor taking any meaningful steps to remediate his behaviour.
83. The Committee had regard to the Registrant's explanation in his disciplinary interview, letter to the Case Examiners and more recent correspondence, that he committed the misconduct due to the cost of living increasing and how he was struggling to pay his bills. Whilst this general explanation had been provided by the Registrant, it did not adequately explain, in the view of the Committee, why the misconduct occurred, as many others in similar financial hardship do not resort to stealing. The Registrant had referred to discussing his financial issues with family members, seeking counselling and [redacted] and [redacted] and had secured his finances. However, the Committee had no supporting evidence about any remediation or steps the Registrant had undertaken more recently to address these issues, and it knew nothing about his current financial position and how well he was currently managing his financial affairs.
84. The Committee noted that the Registrant had apologised and appeared to be remorseful for his conduct. The Committee also noted that the Registrant had made full admissions in interview and accepted that the conduct being described as gross misconduct was a fair assessment. However, the Committee concluded that the Registrant's insight into his conduct was limited, and he still has significant work to do in this respect in order for the Committee to be reassured that he has remediated his misconduct and there is no prospect of repetition. For example, the Committee was of the view that the Registrant appeared to understand the misconduct affected his employer, but had not demonstrated sufficient reflection into the broader impact of his misconduct upon his colleagues, the public interest, and public confidence in the profession and the Regulator.
85. Given the lack of evidence of insight and remediation by the Registrant and lack of information regarding the Registrant's current financial position, the Committee was concerned that there remained a risk of repetition, should the Registrant find himself in similar circumstances again.
86. The Committee next turned to consider the public interest and had regard to the case of *CHRE v (1) NMC and (2) Grant* [2011] EWHC 927 (admin) and the test that was formulated by Dame Janet Smith in the report to the Fifth Shipman Inquiry. The Committee agreed with the submission of Mr Drinnan that limbs (b)-(d) of this test are engaged in this case, namely conduct which brings the profession into disrepute, breaches a fundamental tenet of the profession and which is dishonest. The Committee was of the view that these limbs were engaged based upon past conduct of the Registrant and given the risk of repetition, the Committee could not be confident that they were not liable to reoccur in future.
87. Given the serious nature of the conduct and the length of time that it persisted for, the Committee concluded that the public would be extremely concerned if no finding of impairment was made, and this would undermine the public interest.

The Committee determined that it was also necessary to make a finding of impairment in this case in order to maintain confidence in the profession, and the Regulator and in order to uphold proper professional standards.

88. Therefore, the Committee found that the fitness of Mr David McIntosh to practise as a Dispensing Optician is currently impaired.

Sanction

89. The Committee next went on to consider what would be the appropriate and proportionate sanction, if any, to impose in this case. It heard submissions from Mr Drinnan on behalf of the Council. No further material was placed before the Committee at this stage.
90. Mr Drinnan reminded the Committee that in imposing a sanction it was primarily concerned with protecting the public and with meeting the Council's overarching objective with regard to the wider public interest. He referred to the Council's 'Hearings and Indicative Sanctions Guidance' ('the Guidance') and outlined the range of sanctions that were available to the Committee in this case, including a financial penalty order. Mr Drinnan stated that the Committee may want to consider a financial penalty order, bearing in mind the costs incurred by the store in installing the covert cameras, but it ought to be borne in mind that the Registrant's means and ability to pay would need to be taken into account.
91. Mr Drinnan reminded the Committee that it ought to start with consideration of the least restrictive sanction first. However, he submitted that taking no further action and a conditions of practice order would both be wholly inappropriate, and in reality, given the seriousness of the misconduct, the Committee's focus would likely be on suspension and erasure. Furthermore, in relation to conditions, Mr Drinnan submitted that the Committee may consider that the Registrant has a deep-seated personality or attitudinal problem, which would make conditions inappropriate.
92. Mr Drinnan referred the Committee to the list of factors in paragraph 21.29 of the Guidance, which indicate when a suspension may be appropriate. He invited the Committee to consider whether a suspension would be a sufficient sanction to protect patients and the public interest. If so, he submitted that the Committee ought to stop there.
93. Mr Drinnan reminded the Committee of what it had found at the misconduct and impairment stages regarding the aggravating features of the dishonesty, including the length of time that the dishonesty persisted for, its repetition, that it was premeditated, covered up on at least one occasion and the breach of trust. Furthermore, the Committee had found that the insight and remediation of the Registrant had been limited and there remained a risk of repetition.
94. Mr Drinnan referred the Committee to paragraph 21.35 of the Guidance, and the list of factors therein which indicate that erasure may be appropriate, several of which he submitted applied to this case, particularly '*f. Dishonesty (especially where persistent and covered up)*'.
95. Mr Drinnan submitted that erasure was appropriate if it was the only means of protecting patients and/or maintaining public confidence in the profession. He referred the Committee to the case of *Bijl v GMC* (Privy Council Appeal No.78 of

2000)[2001] UKPC 41, which emphasised that a Committee should not feel it necessary to remove an otherwise competent and useful Registrant who presents no danger to the public, in order to satisfy the demand for blame and punishment. However, despite there being no risk to patient safety from the Registrant's conduct, Mr Drinnan submitted that it was necessary to maintain the reputation of the profession and referred to the comments of Lord Bingham in *Bolton v Law Society* [1994] WLR 512,

“The reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is part of the price.”

96. Mr Drinnan made reference to the paragraphs in the Guidance on indicative sanctions for dishonesty, at paragraphs 22.4 -22.6, highlighting that in cases of dishonesty a Registrant was at risk of being removed from the Register, although there was no blanket rule that erasure would be appropriate in all cases.
97. The Committee accepted the advice of the Legal Adviser, which was in summary, for the Committee to take into account the factors on sanction as set out in the Guidance; to assess the seriousness of the misconduct; consider any aggravating and mitigating factors; and to consider the range of available sanctions in ascending order of seriousness. Further, the Committee is required to act proportionately by weighing the interests of the registrant against the public interest.
98. The Committee firstly considered the aggravating and mitigating factors. In the Committee's view, the aggravating factors in this case are as follows:
- 1) the persistent and prolonged nature of the dishonesty, carried out on 11 separate occasions over a period of almost a year, which did not stop until discovered by the investigation;
 - 2) the Registrant's actions were pre-meditated and on at least one occasion steps were taken by him to cover up the theft;
 - 3) the abuse of trust, which was of particular significance given that the Registrant had a position of responsibility as a store manager;
 - 4) the misconduct had an impact upon the store, in respect of the cost of the installation of the covert cameras and the time and disruption involved in the investigation;
 - 5) there was only limited evidence of insight and remediation (as detailed in the impairment determination).
99. The Committee considered that the following mitigating factors were present:
- 1) the Registrant had apologised and shown remorse for his actions;
 - 2) the Registrant made full admissions at the investigation stage;
 - 3) the Registrant has paid back the money stolen in full;
 - 4) the Registrant had previous good character and work record, having progressed up to the position of store manager;
 - 5) there was no evidence of direct harm to the safety of patients;
 - 6) the Registrant had indicated that he had personal problems, of a financial and mental health nature, at the time of the incidents of misconduct which he is

addressing with the support of his family and health professionals, but provided no further details.

100. The Committee next considered the sanctions available to it from the least restrictive to the most severe, starting with no further action.

101. The Committee considered taking no further action as set out in paragraphs 21.3 to 21.8 of the Guidance. It concluded that taking no action would not be an appropriate outcome in this case. The Committee considered that taking no further action was not proportionate nor sufficient given the seriousness of the case and the public interest concerns. Furthermore, there were no exceptional circumstances to justify taking no action in this case.

102. The Committee considered the issue of a financial penalty order. However, it was of the view that such an order was not appropriate, given that it had no information relating to the financial position of the Registrant and his ability to pay a financial order. It also would not be a sufficient sanction to meet the public interest.

103. The Committee considered the Guidance in relation to the imposition of conditions. It was of the view that conditional registration would not be practicable due to the nature of the misconduct, which did not involve identifiable clinical areas of practice in need of assessment or retraining, which conditions often seek to address. In addition, conditions would not sufficiently mark the serious nature of the Registrant's misconduct or address the public interest concerns identified. The Committee concluded that conditions could not be devised which would be appropriate, proportionate, workable or measurable in this case.

104. The Committee next considered suspension and had regard to paragraphs 21.29 to 21.31 of the Guidance. In particular, the Committee considered the list of factors contained within paragraph 21.29, that indicate that a suspension may be appropriate, which are as follows:

Suspension (maximum 12 months)

21.29 This sanction may be appropriate when some, or all, of the following factors are apparent (this list is not exhaustive):

- a. A serious instance of misconduct where a lesser sanction is not sufficient.*
- b. No evidence of harmful deep-seated personality or attitudinal problems.*
- c. No evidence of repetition of behaviour since incident.*
- d. The Committee is satisfied the registrant has insight and does not pose a significant risk of repeating behaviour.*
- e. In cases where the only issue relates to the registrant's health, there is a risk to patient safety if the registrant continued to practise, even under conditions.*

105. The Committee was of the view that the majority of the factors listed in paragraph 21.29 were not applicable. The most clearly relevant was factor a), namely this was serious misconduct, where a lesser sanction was not sufficient.

106. In relation to b), the Committee was of the view that this does not apply as the conduct, given that it was repeated instances of dishonesty, was likely attitudinal in nature.

107. In relation to c), whilst there was no evidence of repetition of the behaviour since the incidents, the dishonesty itself had persisted over a prolonged period.
108. In relation to d), the Committee had earlier found that the Registrant has developed only limited insight, very limited engagement with his Regulator and there remained a risk of repeating his conduct. Factor e) was not applicable to the facts of this case.
109. The Committee was of the view that a suspension order was insufficient to address the public interest concerns that it had identified. It considered that a suspension order would not adequately mark the seriousness of the Registrant's conduct, which was at the upper end of the scale, maintain confidence in the profession and declare and uphold proper standards of professional conduct and behaviour.
110. The Committee went on to consider erasure. The Committee was of the view that several of the factors listed in the Guidance at paragraph 21.35 (a)-(h), which lead towards the sanction of erasure being appropriate, applied in this case. Paragraph 21.35 states as follows:

Erasure

21.35 Erasure is likely to be appropriate when the behaviour is fundamentally incompatible with being a registered professional and involves any of the following (this list is not exhaustive):

- a. Serious departure from the relevant professional standards as set out in the Standards of Practice for registrants and the Code of Conduct for business registrants;*
 - b. Creating or contributing to a risk of harm to individuals (patients or otherwise) either deliberately, recklessly or through incompetence, and particularly where there is a continuing risk of harm to patients;*
 - c. Abuse of position/trust (particularly involving vulnerable patients) or violation of the rights of patients;*
 - d. Offences of a sexual nature, including involvement in child pornography;*
 - e. Offences involving violence;*
 - f. Dishonesty (especially where persistent and covered up);*
 - g. Repeated breach of the professional duty of candour, including preventing others from being candid, that present a serious risk to patient safety; or*
 - h. Persistent lack of insight into seriousness of actions or consequences.*
111. The Committee was of the view that factors a), c), f), and h) were engaged in this case. In relation to factor f), the Committee considered that this especially applied given that the Registrant's dishonesty was persistent and covered up. The Committee concluded that under the Guidance there were more factors indicating that erasure was the appropriate sanction rather than in relation to suspension.
112. The Committee had regard to the section on dishonesty at paragraph 22.4 of the Guidance. It noted that there was no blanket rule or presumption that erasure

is the appropriate sanction in all cases of dishonesty and that it was required to balance the circumstances of the case against the effect a finding of dishonesty has on public confidence in the profession. The Committee also had regard to the representations it had received from the Registrant on the first day of the hearing, where he had stated that he did not want the work that he put into his training as a Dispensing Optician to be in vain and asked for leniency.

113. The Committee determined that given that the seriousness of the Registrant's misconduct, the degree of dishonesty involved, and the aggravating factors detailed above, which outweighed the mitigating factors that were present, the Registrant's behaviour was fundamentally incompatible with being on the Register. The Committee was of the view that a reasonable and well-informed member of the public would be extremely concerned if a Dispensing Optician, who was also a store manager, had been stealing from the till for almost a year and was allowed to return to the profession. The Committee had no information as to how this decision will impact the Registrant's livelihood beyond the knowledge that he is employed but no longer working in the field of optics. In all the circumstances, the interests of the public in this case outweigh those of the Registrant. The Committee concluded that the proportionate and appropriate sanction in this case was one of erasure and any lesser sanction would not uphold standards and would undermine confidence in the profession and the Regulator.

114. The Committee therefore ordered that the Registrant be erased from the Register.

Immediate Order

115. The Committee invited representations on whether an immediate order should be imposed. Mr Drinnan, on behalf of the Council, invited the Committee to exercise its discretion to impose an immediate suspension order under Section 13I of the Opticians Act 1989. He reminded the Committee that if the Registrant appealed, the order for erasure would not come into effect for several months whilst the appeal was pending. Mr Drinnan submitted that an immediate order was necessary as there was nothing prohibiting the Registrant from returning to practise during the appeal period and any subsequent appeal. He stated that the Committee may consider that there are grounds to do so based upon the risks it had already identified in its earlier findings.

116. The Committee accepted the advice of the Legal Adviser, which was that to make an immediate order, the Committee must be satisfied that the statutory test in section 13I of the Opticians Act 1989 is met, i.e., that the making of an order is necessary for the protection of members of the public, otherwise in the public interest or in the best interests of the Registrant.

117. The Committee had regard to the statutory test, which required that an immediate order had to be necessary to protect members of the public, be otherwise in the public interest or in the best interests of the Registrant.

118. The Committee bore in mind that it had found that the misconduct was particularly serious, the Registrant lacked insight and there remained a risk of repetition. The Committee was therefore concerned that if no immediate order was made, the

Registrant could return to practise during the appeal process. The Committee therefore concluded that an immediate order was necessary in order to protect members of the public in this case.

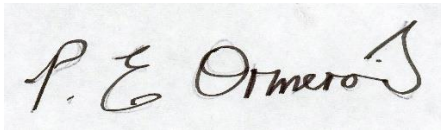
119. The Committee also bore in mind that it had concluded that erasure was the only appropriate and proportionate sanction in this case. In the circumstances, the Committee decided that it was also in the public interest that an immediate order be imposed, given the serious nature of the misconduct and the Committee's findings, in order to protect the wider public interest and maintain confidence in the profession and the Regulator. Accordingly, the Committee imposed an Immediate Order of suspension.

Revocation of Interim Order

120. The Committee was informed that there was no Interim Order to revoke.

Chair of the Committee: Ms Pamela Ormerod

Signature



Date: 4 September 2024

Registrant: Mr David McIntosh

Signature: Registrant not present

Date: 4 September 2024



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.

