BEFORE THE FITNESS TO PRACTISE COMMITTEE
OF THE GENERAL OPTICAL COUNCIL

F(23)22

GENERAL OPTICAL COUNCIL

AND

PHILLIP SOWDEN (01-14181)

DETERMINATION OF A SUBSTANTIVE HEARING
AGREED PANEL DISPOSAL (APD)
23-24 OCTOBER 2023

Committee Members:	Ian Crookall (Chair/Lay) Asmita Naik (Lay) Vivienne Geary (Lay) Philippa Shaw (Optometrist) Caroline Clark (Optometrist)
Legal adviser:	Alecsandra Manning-Rees
GOC Presenting Officer:	Dr Francis Graydon
Registrant:	Not present but represented
Registrant representative:	Mr Nicholas Hall (instructed by AOP)
Hearings Officer:	Nazia Khanom
Facts found proved:	All
Facts not found proved:	None
Misconduct:	Found
Impairment:	Impaired
Sanction:	4-month suspension – (with review)
Immediate order:	Yes

ALLEGATION

The Council alleges that in relation to you, Mr Philip John Sowden (01-14181), a registered optometrist:

1. *On 15 May 2019, you conducted an eye examination on Patient A, and you:*

   a. *Failed to conduct an appropriate assessment of Patient A's eyes in that you:*
      i. *Failed to detect signs and/or symptoms of glaucoma.*

   b. *Failed to refer Patient A to the hospital eye service for further investigation and/or treatment of glaucoma.*

   c. *Failed to maintain adequate records in connection with your eye examination with Patient A, in that you did not fully record details of the:*

      i. External eye examinations conducted.
      ii. information on the optic disc appearance.
      iii. Method used to obtain measurements for intra-ocular pressures.
      iv. Near visual acuities in each eye;
      v. Tonometry instrument used and/or time of the test;
      vi. Field instrument used;
      vii. Optic nerve neural retinal rim appearance;
      viii. Anterior chamber angle assessment;
      ix. Symptoms of a cloud that Patient A was presenting, including the duration and/or commencement of the symptom and/or exacerbating factors;
      x. Name of the registrant conducting the examination

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

CONSENSUAL PANEL DETERMINATION AGREEMENT

1. At the outset of this hearing, Dr Graydon, on behalf of the GOC, informed the Committee that prior to this hearing a provisional agreement of a consensual panel determination had been reached with regard to this case between the GOC and Mr Sowden.

2. The agreement, which was put before the Committee within an APD report dated 25 September 2023, sets out Mr Sowden's full admission to the facts alleged in the charges, that Mr Sowden's actions amounted to misconduct and that Mr Sowden's fitness to practise is currently impaired by reason of that misconduct. It is further stated in the agreement that an appropriate sanction in this case would be a four-month suspension with a review hearing.

3. The Committee has considered the provisional agreement reached by the parties, as set out in the APD Report, which is at Annex A of this determination.

Background to the Allegation

4. On 18 November 2020, the GOC received a referral from "Patient A" raising concerns about the clinical care they received at the Redacted practice where Mr Sowden

worked. Patient A wrote: “For the past three years I have been telling the optician at my eye test that I have a vision blackspot. I was told that my pressures were fine, and he could see nothing wrong”. Patient A confirms that the Registrant was aware that her father had glaucoma.

5. In summary, the evidence indicates the following timeline of key events:
    - Between 1981 and 2019, Patient A attended the Redacted Practice which then changed ownership in 2019 and became Redacted Eyecare for sight tests.
    - On 15 May 2019, Patient A had a sight test with the Registrant.
    - On 10 October 2020, Patient A attended Redacted Ltd for a sight test and was referred to hospital as part of the Glaucoma Referral Refinement Scheme.
    - On 21 October 2020, Patient A attended Redacted Hospital for an assessment and investigation where she received a diagnosis of POAG (primary open angle glaucoma).
    - In November 2021, Patient A had selective laser trabeculoplasty on both eyes.
    - This series of events caused the GOC to investigate the complaint and obtain clinical advice from an expert witness. The expert stated that Mr Sowden had failed to identify Patient A’s glaucoma despite clear indications from the patient’s history, from the sight tests undertaken and from the patient's presenting symptoms. Furthermore, the expert commented adversely on the adequacy of the records maintained.

Submissions of the Parties

6. On behalf of the General Optical Council Dr Grayson and Mr Hall endorsed the approach set out in the APD.

7. Some points of clarification were raised by the Committee to ensure that the correct procedure had been followed in referring the case under the Agreed Panel Disposal procedure; to clarify the position in respect of misconduct arising out of an act on a single date; the relevance of the Registrant’s retirement in disposing of the case in this way and the purpose of a review in the proposed sanction.

8. The Parties addressed the Committee on the above points confirming that the appropriate procedure has been followed and the case had been referred by the case examiners on 1 March 2023. In respect of misconduct arising out of a single event it was submitted that missing a diagnosis of glaucoma in these circumstances was sufficiently serious given the patient had a family history of glaucoma and was presenting with symptoms which aligned with possible glaucoma. Furthermore, within the single appointment the failings were varied and included a failure to make appropriate records, and a failure to make an onward referral. It was therefore not one single clinical issue. It was agreed that the review was necessary as an additional safeguard given the Registrant’s position on retirement. Should the Registrant wish to return to practice following his suspension/retirement he would need to make a new application to the GOC and would have to satisfy the GOC as to his competencies in order to be registered. However, Mr Hall confirmed that the Registrant has no desire to return to practice.

9. The Committee heard and accepted the advice of the Legal Adviser who reminded the Committee that although there was an agreed disposal, as set out in the APD report, the Committee was not obliged to follow that outcome and it was for the Committee to form its own independent judgment in respect of each stage of the proceedings. If the Committee disagreed with and was minded to vary the APD report, there should be an opportunity for further submissions from the parties.

10. In relation to misconduct, the Legal Adviser endorsed the case law and principles set out in the APD report. In addition, the Committee's attention was drawn to the principles in the case of ***R(Calhaem) v GMC*** **[2007] EWHC 2606 (Admin)** Jackson J stated:

"*Mere negligence does not constitute 'misconduct'…Nevertheless, and depending upon the circumstances, negligent act or omissions which are particularly serious may amount to 'misconduct'… A single negligent act or omission is less likely to cross the threshold of 'misconduct' than multiple acts or omissions. Nevertheless, and depending on the circumstances, a single negligent act or omission, if particularly grave, could be characterised as 'misconduct'."*

11. Regarding impairment again the Legal Adviser endorsed the case law set out in the APD report and additionally highlighted the case of ***Clarke v GOC*** **[2018] EWCA Civ 1463** – in which Newey LJ at [31]

"…the fact that Mr Clarke was not intending to resume practise could be of little or no consequence. Where repetition is improbable merely because the optometrist will no longer be practising, that would not seem to be indicative of fitness to practise. If anything, cessation of practice may point in the opposite direction, since the optometrist's skills could deteriorate with lack of use."

12. In relation to sanction the Legal Adviser drew the Committees attention to the factors on sanction as set out in the Indicative Sanctions Guidance ("ISG") namely:

- 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.

13. Further, the Committee is required to act proportionately by weighing the interests of the registrant against the public interest.

DETERMINATION

14. The Committee decided to accept the consensual panel determination.

Findings in relation to Fact

15. The Registrant admitted the full particulars of the allegation by way of the consensual panel determination. The Committee accepted that admission by way of Rule 46(6) of the General Optical Council (Fitness to Practise) Rules 2013 ('the Rules'). The Committee found the factual allegation proved.

Findings in relation to misconduct

16. The Committee then went on to consider whether the Registrant's fitness to practise is currently impaired. Whilst acknowledging the agreement between the GOC and the Registrant, the Committee has exercised its own independent judgement in reaching its decision on impairment.

17. In respect of misconduct, the Committee considered that whilst the facts proven related to a single appointment on 15 May 2023, there were various failures by the Registrant within that appointment.

18. In relation to allegation 1a) i) the Registrant initially failed to conduct an appropriate assessment of Patient A's eyes as he failed to detect signs and/or symptoms of glaucoma. The Committee considered that this was particularly serious considering the Patient's family history of the condition and her presenting complaint. The Committee were concerned that the Registrant failed to act upon the presenting issues, namely the abnormality in the Patient's visual field found by the Amsler test which the Registrant performed. This should have been an indication to the Registrant this this was a concern that warranted further investigation and onward referral.

19. The Committee also considered the opinion of the Clinical Adviser's report in this case which stated that the "*Failure to detect and manage a patient with sight affecting glaucoma would fall far below the standard of a reasonably competent optometrist".*

20. In relation to allegation 1b) the Registrant failed to make an onward referral for further investigation and/or treatment of glaucoma. The Committee had the benefit of seeing Patient A's examination at her next practice (Redacted Ltd) and then later at Redacted Hospital. The Patient was initially diagnosed with non-pressure glaucoma in 2020 and then referred on for treatment, where she later had surgery for her presenting complaint. By failing to recognise the implications of the presenting symptoms which the patient was experiencing, Mr Sowden prevented the Patient from potentially obtaining treatment for her condition at an earlier stage. It is noted that within the limited records made by the Registrant, the issues and test results recorded clearly demonstrated a need for further investigation.

21. Finally turning to allegation 1c) it is plain that the Registrants records in this case are unsatisfactory. The Committee considered that the failure to properly record the consultation with Patient A meant that they could not be sure what tests were undertaken. The Committee also considered the opinion of the Clinical Advisers report in respect of record keeping which stated that it was *"…difficult to tell whether the registrant conducted an adequate sight test as the patient records are so poor. I would consider that the registrant has failed to meet the GOC Standard 8 Maintain Adequate Patient Records."*

22. Whilst accepting that not every breach of the standards of practice for optometrists and dispensing opticians will automatically lead to a finding of misconduct the Committee did find that the following standards had been breached:

7 Conduct appropriate assessments, examinations, treatments and referrals

7.2 Provide or arrange any further examinations, advice, investigations or treatment if required for your patient. This should be done in a timescale that does not compromise patient safety and care

8 Maintain adequate patient records

8.1 Maintain clear, legible and contemporaneous patient records which are accessible for all those involved in the patient's care
8.2 As a minimum, record the following information:
8.2.4 The details and findings of any assessment or examination conducted

23. The Committee therefore found that the conduct of the Registrant on this occasion fell below the standard of practice expected of a competent optometrist. The Committee then went on to consider how serious the errors made by the Registrant on this occasion were. The Committee were satisfied that in the context of the Patient's known family history, her long attendance record with this practice and the individual errors made by the Registrant on 15 May 2019, that this behaviour fell far below the standard expected and amounts to misconduct within the meaning of section 13D(2)(a) of the Act.

Findings in relation to current impairment

24. The Committee then considered whether Mr Sowden's fitness to practise is currently impaired. The Committee were mindful that impairment is expressed in terms of the present, namely whether the Registrant's fitness to practice is currently impaired. As set out in the case of ***Meadow v GMC*** **[2006] EWCA 1390:**

> "*In short, the purpose of fitness to practise proceedings is not to punish the practitioner for past misdoings but to protect the public against the acts and omissions of those who are not fit to practise. The FPP thus looks forward not back. However, in order to form a view as to the fitness of a person to practice today, it is evidence that it will have to take account of the way in which the person concerns has acted or failed to act in the past"*.

25. The Committee also considered that there were two aspects of fitness to practice. Firstly, the Registrant's own current competencies and behaviour and secondly the public component, that being the need to uphold proper standards of behaviour within the profession and public confidence in the profession.

26. Dealing first with the Registrant's fitness to practice in respect of the personal components, the Committee noted that there was a general lack of evidence in terms of insight, remorse, and remediation. Whilst the Registrant has made admissions to his behaviour and indicated his desire to retire, there was no evidence of extra training regarding the identification and management of glaucoma, or record keeping. In addition, there was no statement addressing any reflections on his practice. Finally, the Registrant's CET record submitted did not demonstrate much in the way of addressing the issues in this case and that CET was not recent within the current CPD cycle.

27. Considering that the Registrant had not practised since 16 February 2022 and had for all purposes retired, the Committee considered that there was insufficient evidence of remediation or training and as such the Committee was satisfied that there was a material risk of future repetition should the Registrant return to practice.

28. Turning then to the important public policy considerations, the Committee were similarly of a view that the need to uphold professional standards and public confidence in the profession would be undermined if a finding were not made in this

particular case. The Registrant's behaviour undermines public confidence in the optical profession and brings the profession into disrepute by virtue of his failings.

29. Therefore, the Committee finds that Mr Sowden's fitness to practise is currently impaired on both public protection and public interest grounds.

Finding in relation to sanction

30. The Committee considered the sanctions available to it from the least necessary to the most severe (no sanction, financial penalty, conditional registration, suspension, erasure).

31. The Committee had regard to the Indicative Sanctions Guidance and the purpose of sanction, namely the protection of the public, the declaration and upholding of high standards within the profession and the maintenance of public confidence in the profession. They considered that sanction was not intended to punish a practitioner but that it may have a punitive effect. They were also mindful that sanction must be proportionate in meeting the overarching objectives.

32. In relation to taking no action, the Committee was of the view that this was not proportionate nor sufficient given the seriousness of the misconduct and the public interest concerns. Further, there were no exceptional circumstances to justify taking no action in any event.

33. The Committee considered the issue of a financial penalty order; however, it was of the view that such an order was not appropriate nor proportionate in the circumstances.

34. The Committee considered the Indicative Sanctions Guidance in relation to the imposition of conditions. It was of the view that conditional registration would not be practicable or workable due to the Registrant's retirement from the profession. In addition, the Registrant has not demonstrated sufficient insight, remorse, or remediation such that conditions would be the appropriate outcome in this case. As set out at paragraph 21.18 of the ISG in relation to conditions:

> "*Where the FtPC has identified that there are significant shortcomings in the registrant's practice or evidence of incompetence exists, the Committee should satisfy itself that the registrant would respond positively to retraining and remedy any deficiencies in practice whilst protecting patients. When assessing the potential using of conditions, the Committee need to consider objective evidence submitted on behalf of the registrant, or such evidence that is available to them, about the registrant's practice."*

35. In this case the Committee noted that there was no objective evidence in respect of the Registrant's potential for extra training and development. They further noted that the Registrant has not practised as an optometrist since February 2022 and voluntarily came off the register in March 2023. In order to impose conditions, given the serious nature of the misconduct found, the Committee felt that they needed to understand much more about the Registrant's practice and current risk by way of insight, remorse, remediation and re-training. The Committee therefore considered that conditions were neither workable nor proportionate in this case.

36. The Committee therefore considered whether a suspension order was the appropriate sanction in this case. The Committee considered that within the Indicative Sanctions Guidance the reasons for imposing a suspension order applicable to this case were:

- A serious instance of misconduct where a lesser sanction is not sufficient.

- No evidence of harmful deep-seated personality or attitudinal problems
- No evidence of repetition of behaviour since incident

37. The Committee considered that the Registrant has some insight by virtue of his admissions and the risk of repetition of the behaviour was low although this was by virtue of his retirement rather than further training or development. Notwithstanding this, the Committee felt that even though the suspension proposed is relatively short, a review was necessary to monitor the decision of the Registrant to retire and to ensure that should he change his mind and seek to return to the Register while the fitness to practise proceedings are ongoing, a review would assist the Committee in addressing any ongoing public risk factors. The Committee was further satisfied that once the suspension had concluded, should the Registrant wish to return to practice, that the GOC's re-registration process would provide the necessary checks as to his competent and safe practice.

38. In order to ensure their decision was accurate, fair and proportionate the Committee considered whether an order of erasure was appropriate. In the circumstances of this case, namely misconduct arising out of a single patient assessment, the Registrant's long and unblemished career history, the Registrant's admissions and co-operation with his regulator an order of erasure would be disproportionate.

39. The Committee therefore concluded that the appropriate sanction was a four-month suspension with a review.

40. A review hearing will be held between four and six weeks prior to the expiration of this order. It would be normal practice for any suspension order to be reviewed. A review will give an FTP committee the opportunity to assess whether the Registrant's stated intention to retire has been maintained. Whilst in no way binding any future committee, it may be assisted by either:-

    a) Clear confirmation in writing from the Registrant that he has ceased to be registered and no longer intends to practice or

    b) If the Registrant wishes to continue in practice how he has addressed the clinical concerns outlined in this determination and maintained his ability to meet GOC professional standards

Immediate order

41. The Committee has heard submissions by way of the APD in respect of an immediate order. It has accepted the advice of the Legal Adviser which was if the Committee has made a direction for suspension, it should consider whether there are reasons for ordering immediate suspension. Before doing so the Committee must be satisfied that to do so is necessary for the protection of members of the public, otherwise in the public interest or in the best interests of the Registrant.

42. The Committee considered whether it was necessary to impose an immediate order. The Committee considered that should an appeal be lodged then the Registrant would be able to practise unrestricted until such a time as the appeal can be heard which may be a significant period of time and they were concerned that failing to impose an immediate order would in those circumstances fail to protect the public. They also considered that an immediate order was otherwise in the public interest given their substantive findings.

Signature :  **Date: 24 October 2023**

Registrant: Philip Sowden

Signature : Registrant was represented by AOP **Date: 24 October 2023**

ANNEX A

BEFORE THE FITNESS TO PRACTISE COMMITTEE OF THE GENERAL OPTICAL COUNCIL

THE GENERAL OPTICAL COUNCIL

and

PHILIP SOWDEN (Registration

Number: 01-14181)

AGREED PANEL DISPOSAL REPORT

Introduction

1. *This is an Agreed Panel Disposal ("APD") hearing in respect of Philip Sowden (01-14181), a registered optometrist first registered with the General Optical Council ("the Council") as an optician on 27 September 1991.*

2. *The Fitness to Practise Committee ("FTPC") meet to consider whether to approve an agreed form of disposal under the APD process. Both parties agree to the proposed form of disposal set out in this report. The Registrant has had the benefit of legal advice from the Association of Optometrists ("AOP") before agreeing to dispose of this case by the APD process.*

3. *The Council's published policy on the APD process is appended to this report. It is a hearing management tool, designed to assist in avoiding full hearings with the calling of evidence where the public protection and public interest objectives of the fitness to practise process would still be met by an agreed outcome. It is not a separate statutory tool or path to a finding of impaired fitness to practise. The FTPC retains full jurisdiction over the procedure and, save where it would be otherwise appropriate not to do so, the proposed APD is considered at a public hearing.*

4. *The options open to the FTPC are as follows:*

   (i) To approve the report in its entirety and make the appropriate order(s);
   (ii) To vary the sanction with the agreement of both parties after inviting submissions. If one or both parties disagree with the variation suggested by the FTPC, the APD hearing will be vacated and the matter will be scheduled for a substantive hearing before a new committee without an agreed report;
   (iii) To disagree with all or part of the report. In this instance, the Council and the registrant may agree to amend the report in light of the FTPC's findings and resubmit this to the same committee at a reconvened hearing, otherwise the APD hearing will be vacated, and the matter will be listed for a substantive hearing before a new committee without an agreed report;
   (iv) If either party decides that they no longer want the case to proceed by APD. The current hearing must be immediately concluded by the FTPC with no orders being made (unless there is a request for procedural directions from both parties).

The matter will then be scheduled for a substantive hearing before a new committee without an agreed report.

Background

5. *On the 18th November 2020, the GOC received a referral from "Patient A" raising concerns about the clinical care they received at the [redacted] practice.*

6. *Patient A wrote: "For the past three years I have been telling the optician at my eye test that I have a vision blackspot. I was told that my pressures were fine, and he could see nothing wrong". Patient A confirms that the Registrant was aware that her father had glaucoma.*

7. *In summary, the evidence indicates the following timeline of key events:*

    - *Between 1981 and 2019, Patient A attended [redacted] Practice which then changed ownership in 2019 and became [redacted] Eyecare for sight tests.*
    - *On 15 May 2019, Patient A had a sight test with the Registrant.*
    - *On 10 October 2020, Patient A attended [redacted] Ltd for a sight test and was referred to hospital as part of the Glaucoma Referral Refinement Scheme.*
    - *On 21 October 2020, Patient A attended [redacted] Hospital for an assessment and investigation where she received a diagnosis of POAG (primary open angle glaucoma).*
    - *In November 2021, Patient A had selective laser trabeculoplasty on both eyes.*

Allegations

8. *The allegation against the Registrant is set out below.*

The Council alleges that in relation to you, Mr Philip John Sowden (01-14181), a registered optometrist:

1. *On 15 May 2019, you conducted an eye examination on Patient A, and you:*

    a. *Failed to conduct an appropriate assessment of Patient A's eyes in that you:*
        i. *Failed to detect signs and/or symptoms of glaucoma.*
    b. *Failed to refer Patient A to the hospital eye service for further investigation and/or treatment of glaucoma.*
    c. *Failed to maintain adequate records in connection with your eye examination with Patient A, in that you did not fully record details of the:*
        i. *External eye examinations conducted.*
        ii. *information on the optic disc appearance.*
        iii. *Method used to obtain measurements for intra-ocular pressures. iv. Near visual acuities in each eye;*
        iv. *Tonometry instrument used and/or time of the test;*
        v. *Field instrument used;*
        vi. *Optic nerve neural retinal rim appearance;*
        vii. *Anterior chamber angle assessment;*
        viii. *Symptoms of a cloud that Patient A was presenting, including the duration and/or commencement of the symptom and/or exacerbating factors;*
        ix. *Name of the registrant conducting the examination*

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

Nature of the Recommended Disposal

9. *Upon the Registrant's admissions and upon the Council and Registrant agreeing to this recommendation, the parties jointly seek and recommend to the FTPC that this matter is disposed of by a determination on the following basis:*

    i. All of the particulars of the allegations are admitted and found proved;
    ii. That the particulars of the allegations amount to misconduct;
    iii. That the Registrant's fitness to practise is impaired by reason of misconduct; And
    iv. The appropriate and proportionate sanction is 4-month suspension with a review.

Relevant law

10. *The matter is governed by the Opticians Act 1989 ("the Act") and the General Optical Council (Fitness to Practise) Rules Order of Council 2013 ("the Rules").*

11. *In accordance with Rule 46 a hearing is required to be conducted in three stages as follows:*

    i. *Stage 1 - Findings of fact;*
    ii. *Stage 2 - Findings on whether, as a result of the facts found proved, the Registrant's fitness to practise is impaired by reason of misconduct;*
    iii. *Stage 3 - Consideration of the appropriate sanction, if any.*

12. *Rule 40(6) provides: "the registrant may admit a fact or description of a fact, and a fact of description of a fact so admitted may be treated as proved."*

13. *More detailed submissions are set out below in respect of each stage.*

Stage 1: Factual Findings

14. *On 18 November 2020, the GOC received a referral from "Patient A" raising concerns about the clinical care they received at the [redacted] practice.*

15. *As part of the GOC's investigation, clinical records were obtained from the Registrant's workplace, [redacted] Eyecare.*

16. *The clinical records provided by the practice include an index card summarising the visit history with initials after each date. The record indicates that Patient was seen very regularly over a long period of time.*

17. *The entries comprise a date followed by a single or double letter in parentheses after each entry.*

18. *Entries include the following;*

    - *26 August 2016 (PS);*
    - *18 March 2017 (PS);*
    - *14 April 2018 (AB).*

    The annotation PS can reasonably be accepted are the initials of the Registrant Philip Sowden(PS).

19. *A single clinical hand-written clinical record is provided in the GOC bundle. The single record had the following omissions:*

    - *No details of Patient A's symptoms (cloud) including duration, commencement, which eye, viewing distance or exacerbating factors;*
    - *Near visual acuities in each eye;*
    - *Tonometry instrument or time of test;*
    - *Field test instrument used;*
    - *Optic nerve neural retinal rim appearance;*
    - *No external eye examination is recorded;*
    - *Anterior chamber angle assessment;*
    - *The name of the registrant conducting the examination.*

20. *In respect of the records the Registrant made, the cup to disc ratio of the optic nerve was recorded as 'flat' and on fields testing as 'kept seeing 3 on last presentation R'.*

21. *The records provided by [redacted] Ltd who saw Patient A on the 10th October 2020 indicate the CDR (cup to disc ratio) in Patient A to be R0.7 L0.4 with a 'notch' in the inferior portion of the neuro retinal rim. For the avoidance of doubt, a 'notch' is a sign that a focal area of loss occurred within the rim tissue of the optic nerve.*

22. *The hospital records indicate that there was significant cupping in the optic nerve of the right eye with notching and bayonetting of an inferior blood vessel in the left optic nerve.*

23. *Bayonetting describes the appearance of the course of retinal blood vessels seen at the edge of the optic nerve cup. Vessels can appear to disappear as they make a sharp turn into the cup and emerge on the neuro retinal rim making them look discontinuous.*

24. *The ophthalmologist seeing Patient A made a diagnosis of bilateral open angle glaucoma.*

Registrant's Response

25. *In the Hearings Questionnaire dated 16 June 2023, and by email dated 18 July 2023, the Registrant:*
    (a) Admits to the listed allegations;
    (b) Accepts current impairment;
    (c) Agrees that the case is suitable for APD.

Stage 2: Misconduct and Impairment

Misconduct

26. *There is statutory definition of misconduct. Relevant authorities provide some guidance for the Panel to consider.*

27. *In Roylance v GMC (no.2) [2000] 1 A.C. 311 Clyde LJ stated at page 331 in his judgment*

    "Misconduct is 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 misconduct is qualified in two respects.

First, it is qualified by the word "professional" which links the misconduct to the profession of medicine. Secondly, the misconduct is qualified by the word "serious". It is not any professional misconduct which will qualify. The professional misconduct must be serious".

28. *In R (on the application of) Remedy UK v General Medical Council [2010] EWHC 1245 Elias LJ stated at paragraph 37 of his judgment:*

    "First, it may involve sufficiently serious misconduct in the exercise of professional practice such that it can properly be described as misconduct going to fitness to practise. Second, it can involve conduct of a morally culpable or otherwise disgraceful kind which may, and often will, occur outwith the course of professional practice itself, but which brings disgrace upon the doctor and thereby prejudices the reputation of the profession."

29. *In Nandi v General Medical Council [2004] EWHC (Admin), Collins J addressed the issue of seriousness at paragraph 31 emphasising;*

    "the need to give it proper weight, observing that in other contexts it has been referred to as 'conduct which would be regarded as deplorable by fellow practitioners'."

30. *The Council and the Registrant agree that the Registrant's conduct breached the following paragraphs of the Standards of practice for optometrists and dispensing opticians:*

    7 Conduct appropriate assessments, examinations, treatments and referrals.
    7.2 Provide or arrange any further examinations, advice, investigations or treatment if required for your patient. This should be done in a timescale that does not compromise patient safety and care.

    8. Maintain adequate patient records.
    8.1 Maintain clear, legible and contemporaneous patient records which are accessible for all those involved in the patient's care.
    8.2 As a minimum, record the following information:
    8.2.4 The details and findings of any assessment or examination conducted.

31. *The Council and the Registrant further agree that the said allegations amount to a serious departure from the standard of practice expected of a competent optometrist.*

32. *The Council and the Registrant agree that the Registrant's conduct amounts to misconduct within the meaning of section 13D(2)(a) of the Act.*

Impairment

33. *There are several relevant authorities from the High Court in appeals against decisions of the General Medical Council's Fitness to Practise Panels, where the Panel has found a doctor's fitness to practise to be impaired.*

34. *These authorities discussed the way in which regulatory committees should approach the issue of impairment the second stage.*

35. *The Panel is referred to the following authorities:*

    Cohen v GMC [2008] EWHC 581 (Admin);
    Zygmunt v GMC [2008] EWHC 2643 (Admin);
    Cheatle v GMC [2009] EWHC 645 (Admin);
    Yeong v GMC [2009] EWHC 1923 (Admin);

CHRE v NMC and Grant [2011] EWHC 927 (Admin)

36. *As to the meaning of fitness to practise, in the case of Zvamunt v GMC [2008] EWHC 2643 (Admin) Mr Justice Mitting, at paragraph 29 adopted the summary of potential causes of impairment offered by Dame Janet Smith in the Fifth Shipman Inquiry Report (2004, Paragraph 25.50).*

37. *Dame Janet Smith considered that impairment would arise where a doctor:*

    a) *presents a risk to patients;*
    b) *has brought the profession into disrepute;*
    c) *has breached one of the fundamental tenets of the profession;*
    d) *has acted in such a way that his/her integrity can no longer be relied upon.*

38. *Factors (a) and (b) are engaged in the case before this Panel.*

39. *In Cheatle v GMC, Mr Justice Cranston states at paragraphs 21 - 22:*

    a. *There is clear authority that in determining impairment of fitness to practise at the time of the hearing regard must be had to the way the person has acted or failed to act in the past As Sir Anthony Clarke MR put it in Meadow v General Medical Council [2006] EWCA Civ 1390 [2007] 1 QB 462:*

       "In short, the purpose of fitness to practise proceedings is not to punish the practitioner for past misdoings but to protect the public against the acts and omissions of those who are not fit to practise. The FPP thus looks forward not back. However, in order to form a view as to the fitness of a person to practice today, it is evident that it will have to take account of the way in which the person concerned has acted or failed to act in the past".

    b. *In my judgement this means that the context of the doctor's behaviour must be examined. In circumstances where there is misconduct at a particular time, the issue becomes whether that misconduct, in the context of the doctor's behaviour both before the misconduct and to the present time, is such as to mean that his or her fitness to practise is impaired. The doctor's misconduct at a particular time may be so egregious that, looking forward, a panel is persuaded that the doctor is simply not fit to practise medicine without restrictions, or maybe not at all. On the other hand, the doctor's misconduct may be such that, seen within the context of an otherwise unblemished record, a Fitness to Practice Panel could conclude that, looking forward, his or her fitness to practise is not impaired, despite the misconduct".*

40. *In Yeong v GMC [2009] Mr Justice Sales said at paragraph 21:*

    "It is a corollary of the test to be applied and of the principle that a FTPP is required to look forward rather than backward that a finding of misconduct in the past does not necessarily mean that there is impairment of fitness to practise - a point emphasised in Cohen and Zygmunt...in looking forward the FTPP is required to take account of such matters as the insight of the practitioner into the source of his misconduct, and any remedial steps which have been taken and the risk of recurrence of such misconduct. It is required to have regard to evidence about matter that have arisen since the alleged misconduct occurred".

    (At Para 48): "Miss Grey submitted that each of Cohen, Meadow and Azzam was concerned with misconduct by a doctor in the form of clinical errors and incompetence. In relation to such type of misconduct, the question of remedial action taken by the doctor to address his areas of weakness may be highly relevant to the question

whether his fitness to practise is currently (i.e. at the time of consideration by a FTPP) impaired; but Miss Grey submitted that the position in relation to the principal misconduct by Dr Yeong in the present case (i.e. improperly crossing the patient/doctor boundary by entering into a sexual relationship with a patient) is very different. Where a FTPP considers that the case is one where the misconduct consists of violating such a fundamental rule of the professional relationship between medical practitioner and patient and thereby undermining public confidence to the medical profession, 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, in such a case, the efforts made by the medical practitioner in question to address his behaviour for the future may carry very much less weight than in the case where the misconduct consists of clinical errors or incompetence. I accept Miss Grey's submissions that the types of cases which were considered in Cohen, Meadow and Azzam fall to be distinguished from the present case on the basis she puts forward".

41. *The High Court revisited the issue of impairment in the recent case of CHRE v NMC and Grant where Mrs Justice Cox noted at paragraph 74:*

    "In determining whether a practitioner's fitness to practise is impaired by reason of misconduct, the relevant panel should generally consider not only whether the practitioner continues to present a risk to members of the public in his or her current role, but also whether the need to uphold professional standards and public confidence in the profession would be undermined if a finding of impairment were not made in the particular circumstances."

42. *The Registrant accepts that his fitness to practise is currently impaired based on both public protection and public interest grounds.*

Stage 3: Sanction

43. *Where the FTPC find that a registrant's fitness to practise is impaired, the power of the FTPC are listed under section 13F (2) (3) and (4) of the Act. Section (2) states that the FTPC may, if they think fit, give a direction specified in subsection (3).*

44. *The purpose of sanctions in fitness practise proceedings are as follows:*

    (a) the protection of the public;
    (b) the declaring and upholding of high standards in the profession; and
    (c) the maintenance of public confidence in the profession.

45. *Sanctions are not intended to be punitive. Accordingly, matters of personal mitigation carry very much secondary weight.*

46. *In* ***Bolton v The Law Society [1994] 1 WLR 512*** *Bingham LJ said:*

    "…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."

47. *The FTPC should have regard to the Indicative Sanctions Guidance unless the FTPC have sound reasons to depart from it – per Lindblom LJ in* ***PSA v (1) HCPC (2) Doree [2017] EWCA Civ 319*** *at paragraph 29.*

48. *The FTPC must have regard to the principle of proportionality. The principle requires that when considering what sanction to impose to fulfil the statutory over-arching objective, the FTPC must take into consideration the interests of the Registrant, which may include the wider public interest in a competent optometrist being permitted to return to practice.*

49. *The FTPC should consider the sanctions available, starting with the least restrictive sanction available. The Panel should determine whether that sanction would be sufficient to achieve the over-arching objective.*

50. *Should the Panel conclude that the sanction would not be sufficient it should then move on to consider the next the next least restrictive sanction.*

Aggravating Factors

51. *In terms of aggravating factors, it is important to highlight firstly, that the Registrant failed to recognise optic nerve changes after he assessed Patient A on more than one occasion. Secondly, there were failures to take or record an adequate history and take appropriate notice of previous records to assess Patient A in the context of previous findings. Thirdly there was a failure to recognise important clinical risk factors and act upon them appropriately to maintain the patient's ocular health and wellbeing.*

Mitigating Factors

52. *In terms of mitigating circumstances, it should be highlighted that the Registrant has no previous fitness to practise history and he has shown insight to admitting the allegations. Secondly, the Registrant agrees to the facts of misconduct and impairment for the purposes of the fitness to practise hearing. Thirdly, the risk of repetition risk is significantly reduced because the Registrant has confirmed he has retired and has no intention to return to practise.*

53. *Having regard to the Council's Indicative Sanctions Guidance, the Council and Registrant agree that the appropriate and proportionate sanction is a **4 month suspension with a review**.*

54. *This sanction is appropriate and proportionate in that a lesser sanction would no mark the seriousness of the misconduct or allow the Registrant to reflect sufficiently on his misconduct.*

55. *The period of suspension is sufficient considering the misconduct involved, balanced against there being no evidence of misconduct since the incident occurred.*

No Further Action

56. *The Indicative Sanctions Guidance states that no further action may be justified in "exceptional circumstances". The Council considers that there are no exceptional circumstances to justify taking no action in this instance.*

57. *The Council considers that taking no further action in light of the seriousness of the misconduct involved would not uphold standards or maintain confidence in the profession and the regulatory process. The insight undertaken by the Registrant does not fully remediate the Registrant's misconduct.*

Financial Penalty Order

58. *The Indicative Sanctions Guidance suggests a financial penalty order may be appropriate where the conduct was financially motivated and/or resulted in financial gain.*

59. *The Council do not consider this penalty to be applicable to the circumstances of this case. There is no evidence of financially motivated behaviour.*

Conditional Registration

60. *For conditions to be appropriate where the FTPC has identified significant shortcomings in the Registrant's practice, the Indicative Sanctions Guidance states, "the Committee should satisfy itself that the registrant would respond positively to retraining which would thus allow the registrant to remedy any deficiencies in practice whilst protecting patients."*

61. *The Council do not consider that conditions would be appropriate considering the nature of misconduct which has prevented the Council from being able to assess the level of risk posed to the public by the Registrant.*

62. *Further the Registrant has stated that he has retired and his last domiciliary was carried out on 16 February 2022. Conditional registration is not therefore practicable given the Registrant's intention to not return to the Council's Register.*

63. *Any conditions that might be imposed would be unworkable without the engagement of the Registrant and would be tantamount to a suspension*

Suspension

64. *The Council and Registrant agree that this is the appropriate sanction.*

65. *In considering the length of the suspension, although this remains a matter for the Committee, it is submitted by the parties that 4 months (with a review) is appropriate to reflect the nature of the concerns raised by the case, the Registrant's lack of previous history and his acceptance of the allegations against him.*

Erasure

66. *The parties agree that the Registrant's conduct is not fundamentally incompatible with registered practise and that, at this stage, this sanction would be disproportionate.*

Immediate Order

67. *The parties agree that, should the FTPC accept the parties' recommendation for disposal, it is appropriate to impose an immediate order for suspension to cover any appeal period as it is necessary to do so to protect the public and it is otherwise in the public interest.*

On behalf of the Council: J. Nguyen

Date: 4 September 2023

On behalf of the Registrant: Philip Sowden

Date: 25 September 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.