

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

**GENERAL OPTICAL COUNCIL**

**F(22)08**

**AND**

**NIRMAL KOASHA (01-21288)**

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**DETERMINATION OF A SUBSTANTIVE HEARING  
24 OCTOBER – 28 OCTOBER 2022**

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<b>Committee Members:</b>	Mr Ian Crookall (Chair/Lay) Mr Mark McLaren (Lay) Ms Ann McKechin (Lay) Ms Kalpana Theophilus (Optometrist) Ms Catherine Collin (Optometrist)
<b>Legal adviser:</b>	Mr Mike Bell
<b>GOC Presenting Officer:</b>	Mr Matthew Corrie
<b>Registrant present/represented:</b>	No and not represented
<b>Registrant representative:</b>	N/A
<b>Hearings Officer:</b>	Ms Abby Strong-Perrin
<b>Facts found proved:</b>	Allegations 1, 2, 3 4 (a) (b) on basis of misleading and 6 (a)
<b>Facts not found proved:</b>	5 and 6 (b) – (f)
<b>Misconduct:</b>	Found
<b>Impairment:</b>	Not impaired - warning given for 12 months
<b>Sanction:</b>	N/A

<b>Immediate order:</b>	N/A
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**Proof of service**

1. The Committee heard an application from Mr Corrie for the Council for the matter to proceed in the Registrant’s absence. First, the Council was required to satisfy the Committee that the documents had been served in accordance with Section 23A of the Act and Rule 61 of the Fitness to Practise Rules 2013.
2. Mr Corrie referred the Committee to the Council’s Service bundle and the Notice of Inquiry dated 24 June 2022. Mr Corrie submitted that Notice had been properly served in accordance with Section 23A of the Act and Rule 61.
3. Mr Corrie submitted that the Notice of Inquiry had not included a copy of the Allegations but referred to Rule 34 and submitted that this did not require the Notice of Inquiry to include the Allegations.
4. The Committee accepted the advice of the Legal Adviser. He referred the Committee to the Council’s service bundle and Rule 34. He further referred the Committee to Rule 28 and advised that this was the sole rule dealing with the intimation of the Allegations and that this merely required that the Allegations must be served as soon as ‘reasonably practicable, after ‘an Allegation has been referred to the Fitness to Practice Committee.
5. The Committee was therefore satisfied that all reasonable efforts have been made to notify the Registrant of the hearing in accordance with the Rules.

**Proceeding in the absence of the Registrant**

6. The Committee then went on to consider whether it would be in the public interest to proceed in the Registrant’s absence in accordance with Rule 22 or whether to grant the registrant’s application to adjourn.
7. Mr Corrie, on behalf of the Council, submitted that the Committee should proceed in the Registrant’s absence. He referred the Committee to Rule 22 and the cases of *R v Jones [2022] UKHL 5* and *GMC v Adeogba [2016] EWCA Civ 162*.
8. Mr Corrie referred the Committee to the various emails between the Registrant and the Council in the Council’s bundle. Mr Corrie submitted that the Allegations were serious and involved alleged dishonesty and that public protection interests existed. Mr Corrie further submitted that there were witnesses for the Council who had arranged to attend the hearing and would be inconvenienced if it did not

proceed. Mr Corrie submitted that it was in the public interest for the hearing to proceed in the Registrant's absence.

9. In relation to the Registrant's application to have the hearing adjourned, Mr Corrie referred to the case of *GMC v Hyat* [2018] EWCA Civ 2796. He submitted that each case was fact specific and whether to grant the application to adjourn was a matter for the Committee. Mr Corrie submitted that if an adjournment was sought on the grounds of REDACTED, the Registrant should produce independent evidence identifying the REDACTED, why it precludes engaging in the hearing and prognosis. Mr Corrie submitted the Registrant had not done this and that her application came late in the day without any reference to REDACTED having been made in any prior communication with the Council.
10. The Committee accepted the advice of the Legal Adviser. He referred it to the case of *Adeogba* in relation to proceeding in absence and to Rules 35 to 37 and the case of *Hyat* in relation to the Registrant's request that the hearing be 'adjourned'
11. The Committee carefully considered the submissions of Mr Corrie and the various emails from the Registrant and all relevant productions.
12. The Committee considered that the Registrant had not provided it with sufficient specific evidence as to why any REDACTED meant that she could not engage with this hearing nor provided any prognosis as to when she might be fit to attend another hearing should today's hearing be adjourned. Further, the Committee noted that there had been historic periods of non-engagement with the Council by the Registrant and that the issue of REDACTED had only being raised very recently. The Committee did not consider that the information provided by the Registrant sufficiently evidenced that she was unable to engage with this hearing for REDACTED reasons. Furthermore, at the start of the hearing the Committee adjourned to enable the Registrant to provide further evidence of the status of her REDACTED. This was not forthcoming.
13. The Committee considered, that in the circumstances, the Registrant had voluntarily absented herself from today's hearing and provided insufficient evidence to persuade it that, if the hearing did not proceed, that she would engage at a future date. The Committee considered that the Allegations were serious and raised issues of public protection. Several witnesses have been warned for this hearing. The matters go back to 2020, so as memories fade recall is likely to less reliable were these matters to be adjourned.
14. The Committee determined that it would be in the public interest for the hearing to proceed in the Registrant's absence.

#### **Application for Admission of Hearsay Evidence.**

15. Mr Corrie made an application for the witness statement of Mr B to be accepted as 'hearsay' evidence and read into the evidence. He referred the Committee to the case of *Thorneycroft v NMC* [2014] EWHC 1565 (Admin) and to the various documents before the Committee detailing the Council's attempts to have Mr B attend the hearing to give evidence. He submitted that Mr B's evidence was not

the sole and decisive evidence in relation to the Allegations, that the Registrant had not objected to Mr B's evidence and that no unfairness would arise by it being allowed in as evidence.

16. The Committee accepted the advice of the Legal Adviser who referred it to the case of *Thorneycroft*.
17. The Committee considered that the Council had made sufficient efforts to have Mr B attend the hearing. Further, the Committee considered that Mr B's evidence was not the sole and decisive evidence to the Allegations, had not been objected to and that no unfairness would arise if his witness statement was read in.
18. The Committee therefore granted Mr Corrie's application.

### ALLEGATIONS

The Council alleges that you, Miss Nirmal Koasha (01-21288), a registered optometrist:

1. Spoke to Ms A in or around late January 2020 about booking appointments with residents at the registered care home where she worked;
2. You recommended that Ms A cancel the existing appointments of Patient 1 and Patient 2 with Mr B on 6 February 2020 and rearrange them so that you saw both patients on 12 February 2020;
3. In respect of Allegation 2, there was no clinical reason or other justification for rearranging the appointments of Patient 1 and Patient 2;
4. Your conduct as set out in Allegation 2 was dishonest and/or misleading towards Ms A, in that:
  - a. you were no longer working with Mr B at Company X, but withheld that information from Ms A;
  - b. you had not spoken to Mr B or anyone at Company X about cancelling the appointments, but withheld that information from Ms A;
5. Your conduct as set out in Allegation 2 constituted a failure to work collaboratively with Mr B, in that you sought to cancel his appointments without his knowledge;
6. On or around 23 January 2020, you failed to maintain adequate patient records, in that you:
  - a. Failed to record Patient A's date of birth on Patient A's sight test record;
  - b. Recorded different date of births for Patient B on Patient B's sight test record and GOS form;
  - c. Recorded different date of births for Patient C on Patient C's sight test record and GOS form;

- d. Recorded different date of births for Patient D on Patient D's sight test record and GOS form;
- e. Recorded different year of birth and/or different patient name for Patient E on Patient E's sight test record and GOS form;
- f. Recorded different years of birth for Patient F on Patient F's sight test record and GOS form

AND that by reason of the matters alleged above your fitness to practise is impaired by reason of misconduct.

## DETERMINATION

### Background to the allegations

19. The Registrant was formally a director of REDACTED. The Committee were provided with a document which purported to be a copy of the Franchise Agreement between REDACTED and the Registrant. This document was not signed by the Registrant and the Committee took no account of its content. She resigned as a director at a date unknown prior to 2020.
20. Following her resignation as a director of REDACTED the Registrant set up a rival company REDACTED.
21. It is alleged that in or around late January 2020 the Registrant had a telephone conversation with Ms A, the Manager of REDACTED (the Home) during which the Registrant advised Ms A that service users in the Home were due a yearly eye tests. It is further alleged that the Registrant recommended to Ms A that the appointments for Patient 1 and Patient 2 that had already been made with the Home should be cancelled and eye tests should be arranged for five of the Home's service users for 12 February 2020. It is alleged that the Registrant did not advise Ms A that she was no longer a director of REDACTED and that in withholding this information and recommending to Ms A to cancel and rearrange appointments that the Registrant acted dishonestly.
22. It is further alleged that on or around 23 January 2020 the Registrant failed to maintain adequate patient records in relation to various service users.

### Findings in relation to the facts

23. Mr Corrie, on behalf of the Council, submitted that the burden of proof was on the Council and the standard of proof was the balance of probabilities.
24. Mr Corrie referred the Committee to his skeleton written argument. He invited the Committee to consider the evidence of Ms A as credible and reliable. He submitted that she had provided a written statement and attended to give evidence. Mr Corrie submitted that Ms A had done her best to provide an accurate account of what had occurred and that she had no reason to make anything up. Mr Corrie further submitted that Ms A's email of 7 February 2020, written shortly after the events she spoke of, was corroboration of her oral evidence to the Committee. Mr Corrie also submitted that the 'hearsay' witness statement evidence of Mr B further corroborated the evidence of Ms A.
25. In relation to Mr B, Mr Corrie submitted that there was no obvious reason for him to lie, there was no opposing account to contra what Mr B said and that he gave his account as a professional person and a director of REDACTED. Mr Corrie submitted that the Committee should accept the evidence of Mr B.
26. Mr Corrie addressed each Allegation in turn.
27. In relation to Allegation 1, Mr Corrie referred the Committee to the written and oral evidence of Ms A, her email of 7 February 2020 and the corroborating evidence of Mr B. Mr Corrie submitted that on the basis of this evidence the Committee should find Allegation 1 proved.
28. In relation to Allegation 2, Mr Corrie submitted that the Committee should again accept the evidence of Ms A and Mr B. Mr Corrie submitted that Ms A had told the Committee what was said in the telephone conversation between her and the Registrant and how following the conversation she had changed the service users' Home diary entries for the sight test visits. Mr Corrie submitted that the Committee should look at what took place to support the evidence of Ms A. Mr Corrie submitted that it was the evidence of both Ms A and Mr B that Mr B attended at the home on 6 February 2020 with a colleague to carry out the sight tests on Patient 1 and Patient 2, that Ms A was not expecting him and Mr B was surprised when told that the Registrant had cancelled the appointments during her call with Ms A. Mr Corrie further submitted that Ms A had stated in evidence that she had raised the existing appointments with the Registrant during the telephone conversation and the Registrant had said she would cancel them. Ms A said that she had specifically asked the Registrant if she would cancel the existing appointments and the Registrant had said she would do this. On the

basis of this evidence, Mr Corrie submitted the Committee should find Allegation 2 proved.

29. In relation to Allegation 3, Mr Corrie submitted that it was a matter of 'interpretation' why the date had been changed. He submitted that it was the Council's position that the reason for the Registrant recommending that the dates be changed was to allow her, not REDACTED, to carry out the sight tests. Mr Corrie further submitted that if the Committee accepted this conclusion then the dates had been changed for commercial purposes and there was no clinical or other justifiable reason for this occurring.
30. In relation to Allegations 4, Mr Corrie submitted that the Committee should apply the everyday definition to the word 'misleading'. He referred the Committee to the case of *Ivey v Gentings Casinos (UK) Ltd [2017]* in respect of the test for dishonesty to be applied by the Committee. He submitted that both limbs (a) and (b) of Allegation 4 were limbs of omission. Mr Corrie submitted that the Committee should consider the contents of the telephone conversation between Ms A and the Registrant and, considering its context, asking what was its purpose. Mr Corrie submitted that the Registrant's relationship with the Home derived from her being a partner in REDACTED. At the time of her alleged actions, she had left REDACTED and set up a rival practice. Mr Corrie submitted that it was clear from Ms A's evidence that the Registrant had not stated that she was acting on behalf of REDACTED. Ms A had said she assumed that the Registrant still worked for REDACTED.
31. He further submitted that Ms A had clearly stated that if she had been aware that the Registrant was acting for a rival company she would have said 'no thanks'. Mr Corrie further submitted that Ms A stated that she had specifically raised the issue of the pre-existing appointments with the Registrant during the telephone conversation and that the Registrant had not stated that she was no longer involved with REDACTED. Mr Corrie submitted that in all the circumstances it was reasonable to expect that the Registrant would have told Ms A of this change. Mr Corrie submitted that the following conclusions should be drawn from this background – that Ms A was clear the Registrant had not told her that the Registrant was now with REDACTED; Ms A thought the Registrant continued to be involved with REDACTED; that when Ms A raised the question of the pre-existing appointments, the Registrant said nothing.
32. Mr Corrie submitted that, in relation to the Registrant's 'state of 'knowledge'', having spent time at REDACTED she was likely to know that REDACTED would be diarising eye tests for service users at the Home and was seeking to win this business for REDACTED. He referred the Committee to the draft Franchise Agreement provided by REDACTED but accepted this was not signed by any party

and might have limited weight. Mr Corrie submitted that non solicitation agreements were common in commerce and the possible existence of such an agreement was relevant to the Registrant's state of mind. He submitted that the Registrant might consider that examining service users at the Home might raise issues. Mr Corrie submitted that it was obvious that it was material to Ms A which company was carrying out the tests. Mr Corrie submitted that if the Registrant acted in the manner described for her commercial benefit and had not withheld information, she would not have got the business and therefore she had acted dishonestly and also been misleading.

33. In relation to Allegation 5 Mr Corrie referred the Committee to Paragraph 10 of the Standards of Practice for Optometrists and Dispensing Opticians and submitted that this showed that the Registrant had a duty to act collaboratively with Mr B. He submitted that the Committee should apply the ordinary every day usage of the word collaboratively. Mr Corrie submitted that it was clear that the Registrant had not acted collaboratively with Mr B. he submitted that the Registrant acted in her own interest not in the interests of the patients.
34. In relation to Allegation 6, Mr Corrie referred the Committee to the expert evidence and opinion of Mr Abery. He referred the Committee to Standard 8.2 of the Standards of Practice for Opticians and dispensing Opticians. Mr Corrie submitted that the failure to record dates of birth and record different names and dates of birth on the sight test records and the GOS forms suggested a failure to maintain patient records.
35. The Committee considered the reply to the Allegations from the Registrant and other relevant information from her contained in the documents before it.
36. The Committee accepted the advice of the Legal Adviser. He referred the Committee to the cases including the cases of *Suddock v NMC* [2015] EWHC 3612 (Admin), *Dutta v GMC* [2021] EWHC (Admin) 1974 and *Khan v GMC* [2021] 374. He provided the Committee with various everyday dictionary definitions of words contained in the Allegations.

### **Committee's Decision**

37. The Committee considered each Allegation in turn. It heard the live Evidence of Ms A and Mr Abery and took into account the written witness statement of Mr B. The Committee also considered the written representations of the Registrant. In reaching its decision the Committee considered how the relevant witnesses oral evidence fitted with non-contentious or agreed facts, contemporaneous documents, the inherent probability or improbability of any account of events and

any consistencies and inconsistencies. The Committee accepted the advice of the Legal Adviser.

38. In relation to all the Allegations, the Committee took into account the evidence relevant to that Allegation, the submissions of Mr Corrie in relation to the Allegations and any reply to the Allegation provided by the Registrant.

*1. Spoke to Ms A in or around late January 2020 about booking appointments with residents at the registered care home where she worked*

39. The Committee considered all the relevant evidence before it in relation to this Allegation, the submissions of Mr Corrie and any reply to the Allegation by the Registrant.

40. The Committee took into account the written witness statement from Ms A and her oral evidence to the Committee.

41. Ms A was at the time of the Allegation the Registered Manager of the Home. There were six service users in the Home all of whom had moderate to severe learning difficulties.

42. Ms A stated that she had known the Registrant in her professional capacity through REDACTED for around 3 years. Ms A told the Committee that during this period the Registrant would ring up on an annual basis to arrange 'home eye test' appointments for the service users at the Home.

43. Ms A also told the Committee that around the end of January 2020 she received a telephone call from the Registrant. Ms A stated that the Registrant said that five of the homes service users were due to have a sight test and asked if she could come to carry out the tests.

44. The Committee also took into account the email from Ms A dated 7 February 2020 to Mr B, in which Ms B states that she had received a phone call from the Registrant. Following the visit of Mr B, he requested Ms A to send an email to REDACTED setting out the history of her contact with the Registrant.

45. The Committee also took into account the witness statement of Mr B in which he stated that when he and a colleague went to the Home on 6 February 2020 to carry out eye tests Ms A had told them that she had received a call from the Registrant who had advised her to cancel the appointments for 6 February 2020 and rebook five service users to 12 February 2020.

46. The Committee also noted that in her unsigned reply to the Allegations headed 'case 2020/47', the Registrant had stated that she 'called the home and asked if they would like me to perform their eye examinations'.
47. The Committee considered that there was nothing to undermine the evidence of Ms A in relation to the phone call from the Registrant. Ms A's evidence was corroborated by her email to Mr B and the hearsay evidence of Mr B, which was not contested by the Registrant. Further, the Committee considered accepted that the Registrant had called the Home.
48. Considering all the relevant evidence the Committee was satisfied that, on the balance of probabilities, the Registrant spoke to Ms A in or around late January 2020 about booking appointments with residents at the registered care home where Ms A worked.
49. The Committee therefore finds Allegation 1 proved.
  2. *You recommended that Ms A cancel the existing appointments of Patient 1 and Patient 2 with Mr B on 6 February 2020 and rearrange them so that you saw both patients on 12 February 2020.*
50. The Committee considered all the relevant evidence before it in relation to this Allegation, the submissions of Mr Corrie and any reply to the Allegation by the Registrant.
51. The Committee took into account the written witness statement from Ms A and her oral evidence to the Committee.
52. Ms A said that she told the Registrant that she had already received a call from 'a colleague' of the Registrant approximately one month previously booking eye tests for two of the service users identified by the Registrant. Ms A identified these services users as Patient 1 and Patient 2.
53. Ms A told the Committee that the Registrant said that this was 'very strange' and recommended these appointments were cancelled and re-arranged for the following weeks when she could test five of the service users. Ms A said that she did not think anything of this and re-arranged the appointment. Ms A said she had assumed that the Registrant was calling from REDACTED. Ms A said that she thought that Mr B and the Registrant must have got 'their wires crossed'.
54. The Committee also took into account the email from Ms A dated 7 February 2020 to Mr B, in which Ms A states that the Registrant had said that 'all 5 service users were due [an eye test] therefore it made sense to cancel the appointment on the

6 Feb and we rearranged a further date for 12 Feb for [the Registrant] to test all 5'.

55. The Committee also took into account the witness statement of Mr B in which he stated that when he and a colleague went to the Home on 6 February 2020 to carry out eye tests Ms A had told them that she had received a call from the Registrant who had recommended her to cancel the appointments for 6 February 2020 and rebook five service users at a later date.
56. The Committee also noted that in her reply to the Allegations headed 'case 2020/47', the Registrant had stated that she 'called the home and asked if they would like me to perform their eye examinations', that she 'cannot recall the conversation', but did not deny or contest that she recommended that the eye tests arranged for Patients 1 and 2 on 6 February 2020 should be cancelled and rearranged for 12 February 2020.
57. The Committee considered that there was nothing to undermine the evidence of Ms A in relation to the contents of her conversation with the Registrant during the phone call. Ms A's evidence was corroborated by her email to Mr B and the hearsay evidence of Mr B, which was not contested by the Registrant. Further, the Committee considered that the Registrant herself stated that she had called the Home and did not deny or contest that she had recommended cancelling and rearranging the appointments.
58. Considering all the relevant evidence the Committee was satisfied that, on the balance of probabilities, the Registrant recommended that Ms A cancel the existing appointments of Patient 1 and Patient 2 with Mr B on 6 February 2020 and rearrange them so that you saw both patients on 12 February 2020.
59. The Committee therefore finds Allegation 2 proved.
  3. *In respect of Allegation 2, there was no clinical reason or other justification for rearranging the appointments of Patient 1 and Patient 2*
60. The Committee considered all the relevant evidence before it in relation to this Allegation, the submissions of Mr Corrie and any reply to the Allegation by the Registrant.
61. The Committee considered the terms of the Allegation and in particular the words 'no clinical reason or other justification for rearranging the appointments of Patient 1 and 2'. The Committee considered that applying the everyday interpretation of this phrase that any justification for rearranging the appointments must arise from the interests of Patient 1 and 2. It therefore approached this Allegation on that

basis.

62. The Committee considered the reply from the Registrant and concluded that she did not seek to provide any such justification in it.
63. The Committee also noted that none of the other witnesses that gave evidence before it, either in person or by witness statement stated that there was any such justification.
64. The Committee considered all the documentation before it and concluded that there was nothing within any documentation showing any such justification.
65. Considering all the relevant evidence the Committee was satisfied that, on the balance of probabilities, in respect of Allegation 2, there was no clinical reason or other justification for rearranging the appointments of Patient 1 and Patient 2.

The Committee therefore finds Allegation 3 proved.

4. Your conduct as set out in Allegation 2 was dishonest and/or misleading towards Ms A, in that:
  - a. you were no longer working with Mr B at Company X, but withheld that information from Ms A;
  - b. you had not spoken to Mr B or anyone at Company X about cancelling the appointments, but withheld that information from Ms A;
66. In considering both limbs of Allegations 4, the Committee applied the test for dishonesty as set out in *Ivey v Gentings Casinos (UK) Ltd [2017]* and applied the ordinary dictionary everyday meaning to the word 'misleading'.
67. Paragraph 74 of *Ivey* states:

*“When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual’s knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not additional requirement that his belief may be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest.”*
68. The Committee noted that the ordinary everyday definition of misleading is 'causing someone to believe something that is not true.'

69. The Committee also considered that it is possible to be both dishonest and to mislead either by positive acts or by acts of omissions.
70. The Committee further noted that it was open to it to find Allegation 4 proved in relation either to limb (a) and (b) and in respect of dishonesty or misleading actions or both.
71. The Committee considered each limb of Allegation 4 in turn.
72. In relation to both limbs (a) and (b), the Committee reminded itself of its findings in respect of Allegations 2.
73. In relation to limb (a), the Committee again took into account the written and oral evidence of Ms A. Ms A stated to the Committee that she was clear that the Registrant had not told her that she was calling on behalf of REDACTED. Ms A stated that she assumed that the Registrant was still acting on behalf of REDACTED, although she accepted that she couldn't specifically say that the Registrant had said this was the case. However, Ms A stated that if she had become aware that the Registrant was calling on behalf of REDACTED that Ms A would simply have said 'no thanks' to the suggestion that the Registrant undertake the eye tests. Ms A also told the Committee that she had specifically raised the question of cancelling the pre-existing appointments again with the Registrant, who had confirmed she would do this but did not take that opportunity to tell Ms A that she was no longer connected with REDACTED. The Committee considered that there was nothing to undermine the evidence of Ms A.
74. The Committee took into account that in her reply the Registrant has stated that 'I would have introduced myself under REDACTED and NOT [sic] REDACTED.' However, the Registrant's position on this issue has not been tested as she had not attended and engaged with this hearing. The Committee therefore attached little weight to the Registrant's general statement.
75. Taking into account all the relevant evidence, the Committee was satisfied, on the balance of probabilities, that when making the recommendations found proved in Allegation 2, the Registrant withheld from Ms A that she was no longer working with Mr B at Company X. The Committee further concluded that in doing so the Registrant was seeking to gain business for REDACTED. In the Committee's opinion the Registrant's approach in her conversation with Ms A was to offer her services as an Optometrist, recognising that the Home was free to choose the company who might provide ophthalmic services to their service users. The Committee considered that such commercial actions were known by ordinary decent people to occur regularly between different commercial organisations. Whilst the Committee would expect a greater degree of openness from the Registrant, her omission to provide information about her status was insufficient

to be considered dishonest; however the omission was misleading. The Committee also took into account that Ms A regarded the Registrant as a professional and she had no reason to think that she was not truthful. The Committee determined that in these circumstances, by the standards of ordinary decent people, the Registrant's withholding of this information would not be seen to be dishonest. The Committee did consider that by withholding this information the Registrant kept back information from Ms A and therefore concluded that the Registrants conduct as set out in limb (a) was misleading.

76. In relation to limb (b), for similar reasons as set out in relation to limb (a) the Committee considered that, on the balance of probabilities, the Registrant had withheld from Ms A that the Registrant had not spoken to Mr B or anyone at Company X about cancelling the appointments. Again, for the same reasons as set out in relation to limb (a), the Committee determined that in these circumstances, by the standards of ordinary decent people, the Registrants withholding of this information would not be seen to be dishonest; however it was misleading. The Committee did consider that by withholding this information the Registrant kept back information from Ms A and therefore concluded that the Registrants conduct as set out in limb (b) was misleading.

77. The Committee therefore determined that, on the balance of probabilities the Registrant's conduct as found proved in Allegation 2 was misleading in respect of both limb (a) and (b) of Allegation 4, but was not dishonest.

78. Allegation 4 is therefore found proved only in relation to the Registrants conduct being misleading.

*5. Your conduct as set out in Allegation 2 constituted a failure to work collaboratively with Mr B, in that you sought to cancel his appointments without his knowledge;*

79. In considering Allegation 5 the Committee considered that it should apply the ordinary everyday dictionary definition to the use of the word 'collaboratively'. The Committee considered this to be 'working on a joint project'...'involving two or more people working together for a special purpose.'

80. The Committee also considered that as Allegation 5 alleges a failure, at the point at which such a failure is alleged the Registrant required to be under an obligation to collaborate with Mr B.

81. The Committee also took into account Paragraph 10 of the Standards of Practice for Optometrists and Dispensing Opticians which states that optometrists and dispensing opticians must:

*'Work collaboratively with colleagues in the interests of patients.'*

82. In its prior findings, the Committee has determined that by late January 2020, the Registrant was no longer working for REDACTED. The Committee considered that at this time the Registrant was no longer a colleague of Mr B, nor working on a joint project or together for a special purpose.

83. The Committee therefore determined that in or around late January 2020, the Registrant was under no obligation to work collaboratively with Mr B and therefore could not have failed to do so.

84. Allegation 5 is therefore found not proved.

85. The Committee next considered Allegation 6.

*6. On or around 23 January 2020, you failed to maintain adequate patient records, in that you:*

- a) Failed to record Patient A's date of birth on Patient A's sight test record;*
- b) Recorded different date of births for Patient B on Patient B's sight test record and GOS form;*
- c) Recorded different date of births for Patient C on Patient C's sight test record and GOS form;*
- d) Recorded different date of births for Patient D on Patient D's sight test record and GOS form;*
- e) Recorded different year of birth and/or different patient name for Patient E on Patient E's sight test record and GOS form;*
- f) Recorded different years of birth for Patient F on Patient F's sight test record and GOS form*

86. The Committee considered all the relevant evidence before it in relation to this Allegation, the submissions of Mr Corrie and any reply to the Allegation by the Registrant. The Committee in particular took into account the report and conclusions of the expert witness Mr Stephen Aberly, Optometrist and his further oral evidence before the Committee.

87. The Committee concluded that the alleged obligation on the Registrant was to 'maintain adequate patient records'. The Committee also considered that the ordinary everyday dictionary meaning had to be given to the word 'adequate'. The Committee determined that the ordinary everyday dictionary meaning of 'adequate' was 'enough or satisfactory for a particular purpose'

88. The Committee first considered the Allegation in 6 (a) which alleged a failure to record Patient A's date of birth on Patient A's sight test record.
89. In relation to limb (a), the Committee considered that on the basis of Mr Abery's expert evidence, there was an obligation on the Registrant to record Patient A's date of birth on Patient A's sight test record. However, Mr Abery highlighted the difficulty of obtaining this information within the location of a care home for people with learning difficulties where there is a reliance on the staff to obtain this data.
90. Having reviewed the copies of Patient A's sight test records provided to it, the Committee was satisfied that Patient A's date of birth had not been recorded on Patient A's sight test record and that this failure was attributable to a failure on the part of the Registrant. The Committee further determined that the omission of Patient A's date of birth from the sight test record resulted in Patient A's patient records not being adequate. The Committee therefore finds limb 6 (a) proved.
91. The Committee next considered the Allegation 6 limbs (b) - (f).
92. The Committee considered that the specific use of the words 'patient records', in the Allegation required the Committee to determine what such records comprised. The Committee considered that the ordinary definition of a patient record is 'a record of a patient's medical information'.
93. The Committee noted that in his evidence to the Committee, the Council's expert witness, Mr Abery was asked in oral evidence if he considered the GOS forms to be part of the patient record, to which he replied he did not and that these forms would not be kept with the patient record. The GOS-6 form was submitted to the NHS for payment and the GOS-3 was given to the patient as a copy of the prescription.
94. In paragraph 3.2.12 of his report, Mr Abery stated:
- 'In my experience domiciliary visits to people with learning disabilities may be challenging and sometimes chaotic'. I would expect Miss Koasha to have checked the names on the GOS forms when she filled in the optical prescriptions to ensure she was filling in the correct form for each patient, but not necessarily to have checked the other details, that is dates of birth, last examination date and reason for domiciliary visit'.*
95. There was no contra evidence before the Committee to suggest Mr Abery's expert opinion on this matter was incorrect and he was before the Committee as the Council's expert. The Committee therefore determined that 'patient records' did

not include the GOS forms and that the obligation on the Registrant when completing 'patient records' was as defined by Mr Abery. Furthermore, the evidence of Mr Abery as quoted above, suggested the Registrant would not necessarily be expected to check the dates of birth on the GOS forms. Her responsibility was to check that the information she inserted in the GOS forms related to the patient in question.

96. The Committee therefore found that there was no failure as narrated in the stem of Allegation 6 in relation to limbs (b) to (f) of Allegation 6.
97. The Committee therefore finds limb (a) of Allegation 6 proved, but limbs (b) to (f) not proved.

**Findings in relation to misconduct**  
**Submissions on Misconduct**

98. Mr Corrie referred to his written skeletal submissions. He referred the Committee to the cases of *Roylance v GMC* [2000] 1 A.C. 311, *Calheam v GMC* [2007] EWHC 2606 and *Remedy v GMC* [2010] EWHC 1245. Mr Corrie submitted that there is no statutory test for misconduct, but that it must be serious misconduct.
99. Mr Corrie submitted that even although the Committee had not found that the Registrant had acted dishonestly, her conduct found proved was unsatisfactory and below what was to be expected in the circumstances. Mr Corrie submitted that the Registrant acted to gain commercial advantage and her own gain. He submitted that the gravity was that the impression given by the Registrant was misleading giving rise to Ms A thinking that the Registrant was from REDACTED. Mr Corrie submitted that this was significant given that MS A had told the Committee would not have allowed the service users appointments to be changed if she had known that the Registrant was not calling from REDACTED. Mr Corrie submitted that the Registrant's conduct caused inconvenience to Ms A and she acted for own commercial interests and not that of the service users. Mr Corrie submitted that the conduct was sufficiently serious to amount to misconduct.
100. In relation specifically to Allegation 6 (a), Mr Corrie referred to paragraph 87 of the Committee's decision on facts and the criticisms of Mr Abery, the Council's expert witness. He left the matter to the Committee to decide.
101. Mr Corrie referred the Committee to paragraph 16.3 and 17.1 of the Standards which he submitted were breached.

102. The Committee accepted the advice of the Legal Adviser. He referred the Committee to the cases of the cases of *Roylance v GMC* [2000] 1 A.C. 311, *Calheam v GMC* [2007] EWHC 2606 and *Remedy v GMC* [2010] EWHC 1245.

### **Decision on Misconduct**

103. The Committee first considered whether the Allegations found proved amounted to misconduct.
104. The Committee considered the submissions of Mr Corrie, the written representations of the Registrant, its prior determination and all relevant evidence before it.
105. The Committee has found that the Registrant's behaviour was misleading. In particular, the Committee would expect a greater degree of openness to be demonstrated by the Registrant in her dealings with Ms A, with whom she had worked for a number of years. The Registrant was trusted by Ms A who was entitled to expect that the Registrant would respect the relationship which existed and be frank and open in her dealings. Although the Registrant was seeking to establish a business opportunity, the Committee would expect that she would disclose material information about the new business of which she was the proprietor. In the absence of that information, Ms A was led into making assumptions on the basis of her past experience of working with the Registrant. The Registrant, by her silent omission, chose not to correct those assumptions which Ms A reasonably made.
106. The Committee considered that this was a serious, albeit isolated, failure on her part. Her conduct in not disclosing material information damaged the reputation of the Registrant as an optometrist in the eyes of both Ms A and Mr B, and by implication, damaged the profession as a whole by her conduct. The Committee determined the following Standards were engaged namely 16.1 and 17 which state:

*'16. Be honest and trustworthy*

*16.1 Act with honesty and integrity to maintain public trust and confidence in your profession.*

*17. Do not damage the reputation of your profession through your conduct*

*17.1 Ensure your conduct, whether or not connected to your professional practice, does not damage public confidence in you or your profession.'*

106. Furthermore, although the Committee found that the action was not dishonest, nevertheless the degree of trust which members of the public should have in members of the profession was affected. The misleading omission to explain the true position might be explained in the context of the Registrant seeking to exploit

a business opportunity but it was nevertheless “sharp practice” which in the opinion of the Committee fell seriously below what was acceptable.

**The Committee found that the Registrant’s action in relation to allegations 1 to 4 constituted misconduct.**

107. In relation to allegation 6(a), this related to a single record where a date of birth was missing. This was not a fair sample on which to assess the Registrant’s record keeping and, in any event, Mr Abery had given evidence that he considered that the clinical records did not fall well below expected standards.

**The Committee found that the Registrant’s action in relation to allegation 6 (a) did not constitute misconduct.**

**Findings regarding impairment**

**Submissions on impairment**

108. Mr Corrie again referred the Committee to his written skeleton submissions. He submitted that the question for the Committee was the Registrant’s current impairment.
109. He referred the Committee to the cases of *CHRE v NMC and Grant* [2011] EWHC 927 and *Cohen v GMC* [2008] EWHC 581.
110. Mr Corrie submitted that limbs (b) and (c) in the test formulated by Dame Janet Smith and adopted in *Grant* were engaged. Mr Corrie submitted that the Registrant’s ‘sharp practice’ and failure to act openly had brought the profession into disrepute and breached one of the fundamental tenets of the profession. He submitted that the Registrant had shown no insight or remediation and there therefore remained a risk of repetition. Mr Corrie submitted that given the Registrant’s lack of insight, the lack of remediation and the risk of repetition a finding of current impairment was required.
111. The Committee accepted the advice of the Legal Adviser. He referred the Committee to the cases of *CHRE v NMC and Grant* [2011] EWHC 927 and *Cohen v GMC* [2008] EWHC.

**Decision**

112. The Committee has already stated that this was a single incident and related to a matter which was not in any way concerned with the safety of patients. The only issue was the public interest element, namely the need to uphold proper

professional standards and public confidence in the Registrant and in the profession. The misleading approach of the Registrant in seeking new business for her firm contrasted with the evidence indicating that the Registrant was trusted by Ms A and had worked successfully with the care home service users over the past 3 years. She appeared to be a committed professional who undertook challenging work for some vulnerable patients. Although her engagement with the GOC in relation to these allegations had been limited, nevertheless she had instructed her former representative to state that she did not contest the allegations. This demonstrated a modest degree of insight on her part. The impact of these proceedings had a serious impact on the health and well-being of the Registrant, as the correspondence demonstrated. The Committee considered that it was unlikely that the behaviour would be repeated.

113. A further material consideration for the Committee was that the allegations related to the manner in which business should be sought in a competitive environment. It did not relate to a primary concern of the GOC to ensure the safety of patients. As the Committee has stated in its determination, the Registrant's economy with the truth might well be seen by others as being in the nature of competitive business practice. The Committee considered that the concerns had been addressed by the bringing of these allegations. In particular, the Committee, by its determination, has put on record that this type of misleading approach to the obtaining of business is a departure from the accepted standards for a professional Optometrist.
114. **The Committee has decided that the behaviour did not meet the threshold for making a finding of current impairment both in relation to public protection and public interest.**

## Warning

### Submissions on a Warning

115. Mr Corrie submitted that, the Committee having found that the Registrant was not currently impaired, the Council asked for the Registrant to be given a formal warning for a period of 12 months. Mr Corrie referred to section 13F (5) of the Opticians Act 1989 and the Council's Hearings and Indicative Sanctions Guidance (the Guidance). Mr Corrie further referred the Committee to paragraphs 20.2 to 20.7 of the Guidance and commended the approach set out therein to the Committee.
116. Mr Corrie submitted that when considering whether to give a warning the Committee required to act proportionally and consider whether the Committee's finding of misconduct was sufficient to mark the gravity of the misconduct identified by the Committee.

117. Mr Corrie referred the Committee to its prior determinations and the Standards of Practice the Committee identified as having been engaged.
118. Mr Corrie, with reference to paragraph 20.6 of the Guidance submitted that there had been clear and specific breaches of the Standards of Practice and that the Registrant's conduct approached the threshold for current impairment. He submitted that if analogous allegations were to come before a future Committee who were aware of this Committee's findings it was likely a future Committee would find the Registrant currently impaired and that there was a need to formally record the Committee's concerns.
119. Mr Corrie, with reference to paragraph 20.7 of the Guidance, further submitted that there had been no expression of regret from the Registrant, she had not acted under duress, there were no previous public adverse regulatory findings and that no corrective steps had been taken by the Registrant nor references and testimonials provided.
120. Mr Corrie submitted that, given the Committee's findings, a warning was necessary to uphold the standards of the profession and public confidence in the profession. He submitted that a warning for a period of 12 months was proportionate.
121. The Committee accepted the advice of the Legal Adviser. He referred the Committee to Section 13F (5), the Guidance and advised that the Committee required to act proportionally.
122. Section 13F (5) of the Opticians Act 1989 that states:
- '(5) If the Fitness to Practise Committee find that—
- (a) the registered optometrist's or the registered dispensing optician's fitness to practise is not impaired;
  - (b) the business registrant's fitness to carry on the business of an optometrist or a dispensing optician or both is not impaired; or
  - (c) the student registrant's fitness to undertake training is not impaired, they may nevertheless give the registrant a warning regarding his or its future conduct or performance.'

123. The Committee decided that a warning should be given to the Registrant and that the public interest element did come into play. There was a clear breach of standards and it was necessary to warn the Registrant about her future conduct. The Registrant departed from the standards expected of her and it was important that this behaviour should not be repeated. The Committee decided that it was important to record formally the requirement for the Registrant to be open,

transparent and frank in her business dealings. If there were to be a repetition, it would be likely that a finding of impairment would be made.

- 124. The Committee determined that it was necessary for a warning to be given to uphold standards of the profession and public confidence in the profession. The Committee further determined that a warning for a period of 12 months would be proportionate.
- 125. The Committee issues the following warning to the Registrant for a period of 12 months from today's date namely:-
- 126. The Registrant must be open and frank in supplying information about her services. In any action to promote her optometric business, she must not mislead either by the statements she makes or by omitting to disclose material information.

**Chair of the Committee: Mr Ian Crookall**



**Signature ..... Date: 28 October 2022**

<b>FURTHER INFORMATION</b>
<b>Transcript</b>
A full transcript of the hearing will be made available for purchase in due course.
<b>Appeal</b>
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).
<b>Professional Standards Authority</b>
<p>This decision will be reported to the Professional Standards Authority (PSA) under the provisions of section 29 of the NHS Reform and Healthcare Professions Act 2002. PSA may refer this case to the High Court of Justice in England and Wales, the Court of Session in Scotland or the High Court of Justice in Northern Ireland as appropriate if they decide that a decision has been insufficient to protect the public and/or should not have been made, and if they consider that referral is desirable for the protection of the public.</p> <p>Where a registrant can appeal against a decision, the Authority has 40 days beginning with the day which is the last day in which you can appeal. Where a registrant cannot appeal against the outcome of a hearing, the Authority's appeal period is 56 days beginning with the day in which notification of the decision was served on you. PSA will notify you promptly of a decision to refer. A letter will be sent by recorded delivery to your registered address (unless PSA has been notified by the GOC of a change of address).</p> <p>Further information about the PSA can be obtained from its website at <a href="http://www.professionalstandards.org.uk">www.professionalstandards.org.uk</a> or by telephone on 020 7389 8030.</p>
<b>Contact</b>
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.

