

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

GENERAL OPTICAL COUNCIL

F(21)11

AND

EMMANUEL MEGAFU (01-20634)

**DETERMINATION OF A SUBSTANTIVE HEARING
25-26 OCTOBER 2021**

Committee Members:	Ms Eileen Carr (Chair/Lay) Ms Amanda Webster (Lay) Mr Mark McLaren (Lay) Ms Philippa Shaw (Optometrist) Ms Ann Barrett(Optometrist)
Legal adviser:	Ms Helen Gower
GOC Presenting Officer:	Ms Zahra Ahmed
Registrant present/represented:	Yes and represented
Registrant representative:	Mr Chris Saad Ms Cassandra Dighton (AOP)
Hearings Officer:	Mr Terence Yates
No case to answer in relation to facts:	1 and 4
No case to answer in relation to misconduct:	2 and 3

ALLEGATION

That being a registered optometrist, the fitness to practise of Mr Emanuel Megafu is impaired by reason of misconduct, in that:

1. On 09 October 2018, you touched Patient A on her back and/or her stomach underneath her clothing with your hands and:
 - a. The touching was intentional;
 - b. Patient A did not consent to being touched in this way; and
 - c. There was no clinical justification for touching Patient A in this way;
2. On or around 11 October 2018 or 05 November 2018, a member of your staff informed you that Patient A had complained about you having touched her on her back and/or stomach;
3. You failed to respond to the complaint made by Patient A as set out at Allegation 2;
4. Your actions as set out at Allegation 1 were:
 - a. inappropriate; and/or
 - b. sexual;

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

Application for measures in relation to Patient A

The Council made an application under Rule 41 of the General Optical Council (Fitness to Practise) Rules Order of Council 2013 (the "Rules") that screens should be used to assist Patient A in giving her evidence. Ms Ahmed submitted that Patient A fell within one of the prescribed categories of witness who may be considered to be vulnerable because the allegation is of a sexual nature. Ms Ahmed explained that Patient A has requested the use of screens. The screens would enable Mr Saad to see Patient A, but that Patient A would not be able to see the Registrant.

Mr Saad did not oppose the Council's application.

The Committee accepted the advice of the Legal Adviser. She confirmed that the Committee had the discretion to take measures, including the use of screens, if Patient A fell within one of the prescribed groups of witness. She advised that the Committee should consider whether the proposed measures were appropriate and proportionate.

The Committee decided that the use of screens was desirable because it may assist Patient A to give her best evidence and that this measure did not create any unfairness for the Registrant. The Committee therefore agreed to the Council's application for measures in relation to Patient A.

DETERMINATION

Admissions in relation to the particulars of the allegation

On behalf of the Registrant, Mr Saad admitted particular 2 of the Allegation. This admission relates to Patient A's complaint to a member of staff on 5 November 2018.

The remainder of the allegation was not admitted.

Background to the allegations

On 9 October 2018, Patient A attended Mr Megafu's Eye Clinic (the Practice) and she was seen by the Registrant.

On 18 October 2018, Patient A attended the Practice to have her glasses reglazed. She waited approximately twenty minutes without raising any issues about the appointment on 9 October 2018.

On 5 November 2018 the practice manager ("**Person C**"), made a written note that Patient A and her partner, Person B, had made a complaint about Patient A's appointment with the Registrant on 9 October 2018. Patient A and Person B also recollect a visit to the Practice to make a complaint. They state that this visit took place on 11 October 2018.

Person C's written note of this meeting recorded the complaint as follows:

"Said that when Mr Megafu had treated her eyes on 9-10-18 he asked her to take her jumper off and started feeling down her back and then asked if he could feel her lower stomach to see if there was any pain".

On 7 December 2018, the Council received a complaint from Patient A. In this complaint she stated that she visited the Practice on 9 October and that the Registrant "*put his hand up my back and down to my stomach. This was the day of my visit. ...told the [redacted] in the shop but she said leave it with me and I will speak to him and I will give you a ring.*"

The Council obtained two statements from Patient A dated 18 January 2020 and 9 June 2020 and a statement from Person B dated 22 March 2021.

Committee's decision on scope of Patient A's evidence

In her evidence Patient A briefly mentioned that she had a learning disability. In re-examination of Patient A, Ms Ahmed invited Patient A to give evidence about the nature of this disability. Mr Saad objected to this line of questioning. Ms Ahmed submitted that further details were relevant and may assist the Committee in assessing Patient A's evidence and any inconsistencies within that evidence. Mr Saad submitted that it was entirely inappropriate for this matter to be raised for the first time during the re-examination of Patient A without any prior notice to the defence. He submitted that it would be entirely unfair to permit this question, given that the Registrant would have no opportunity of properly testing the evidence or obtaining expert opinion. Further, the defence had no opportunity to assess whether or not the evidence had any relevance to Patient A's evidence and it was not agreed that the evidence was relevant.

The Committee accepted the advice of the Legal Adviser. She advised that the Committee should consider whether it would permit Ms Ahmed to raise this matter, bearing in mind the requirements for admissibility of evidence. Those requirements are that the evidence must be relevant and that it is fair to admit the evidence. When it considered these requirements, the Committee should address the objections raised by Mr Saad.

The Committee decided not to permit Ms Ahmed to pursue the new line of questioning. The Committee considered that the proposed area of questioning might be relevant, but that it would not assist the Committee to hear from Patient A on this topic. The Committee considered that it would not be fair or appropriate for the Committee to form any view about this complex matter without the benefit of expert evidence. Furthermore, the Committee agreed with Mr Saad's submission that the exploration of this area of evidence would create unfairness for the Registrant. The Registrant has had no prior notice and would not have a proper opportunity to test the evidence.

In reaching its decision, the Committee acknowledged that Patient A is in the category of vulnerable witnesses because she is the alleged victim of an allegation of a sexual nature. The Committee also had in mind the purpose of the regulatory proceedings and the Council's overriding objective. Having carefully reviewed the options open to it, the Committee was not of the view that it was in the public interest, Patient A's best interests, or the Registrant's interests for the Committee to adjourn the case to allow the Council to carry out further investigations.

Decision under Rule 46 of the Rules

Mr Saad submitted that there was no case to answer in relation to the entirety of the Allegation. His submissions were contained in a written skeleton argument.

On particular 1 and 4, the Allegation of inappropriate and/or sexual touching of Patient A, Mr Saad submitted that the Council has not adduced sufficient evidence upon which the disputed facts could be found proved. He submitted that the Council's case is entirely dependent on Patient A's reliability and that there was no

view of her evidence that allowed for a positive finding in relation to her reliability. Mr Saad highlighted examples of inconsistencies in Patient A's evidence and inconsistencies between the evidence of Patient A and other evidence called by the Council. Mr Saad submitted that Person B's evidence should be rejected entirely.

On particular 3, the allegation that the Registrant failed to respond to Patient A's complaint, Mr Saad submitted that the Council has not submitted any evidence that establishes that the Registrant was under a duty to respond to the complaint. Mr Saad added that there was evidence that the Registrant responded to the complaint by asking Person C to inform Patient A that she should contact the police if she wished to do so.

In her submissions, Ms Ahmed acknowledged that the Council's case in relation to the inappropriate and sexual touching of Patient A depended upon the reliability of the evidence of Patient A. Person B's evidence was always limited to what he was told by Patient A. She submitted that Patient A may have been confused at times during her oral evidence to the Committee and that she may be a witness who is suggestible. She submitted that Patient A and Person B were open with the Committee in describing conversations in which they had discussed the case. Ms Ahmed submitted that Patient A and Person B had not understood that it was inappropriate for them to discuss the case and there was no intent to deceive others.

In relation to particular 3, Ms Ahmed referred the Committee to the Council's Standards for optometrists and dispensing opticians Standard 18. She submitted that the responsibility for responding to complaints remained with the Registrant and could not be transferred to Person C. Ms Ahmed submitted that if the Committee concluded that there was a case to answer in relation to the facts of particular 3, it could consider whether those facts, by themselves were sufficient to support a statutory ground of impairment and/or a finding of current impairment.

The Committee accepted the advice of the Legal Adviser. She confirmed that under Rule 46 of the Rules, on the conclusion of the Council's case, the Registrant may make a submission on whether sufficient evidence has been adduced by the Council on which the disputed facts could be found proved. The application of *R v Galbraith [1981] 73 Cr.App.R 124* in the context of regulatory law involves the Committee considering:

Has the Council presented evidence that is sufficient for the Committee to find the facts proved, the statutory ground of impairment, and current impairment.

- (i) If the Council has presented no evidence; the Committee will conclude that there is no case to answer;
- (ii) If there is some evidence, but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence, the Committee must consider two things:

- (a) Where the Committee concludes that the Council's evidence, taken at its highest, is such that no finding of impairment could properly be made, by a committee properly directed, it should stop the case.
- (b) Where, however, the Council's evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability or other matters which are within the competence of the Committee and where on one possible view of the facts there is evidence upon which a committee could properly come to the conclusion that the Registrant is impaired, then the Committee should allow the case to continue.

The witness evidence presented by the Council relevant to the allegation of sexual touching was the statements and oral evidence of Patient A, Person B and Person C. The documentary evidence included Patient A's complaint form dated 7 December 2018, contemporaneous notes made by Person C of a meeting with Patient A and Person B on 5 November 2018, the Registrant's clinical records of his consultation with Patient A on various dates including 9 October 2018, and documentary records of Patient A's visits to the Practice. Having reviewed the witness and documentary evidence, the Committee agreed with Mr Saad that the proof of the facts in particular 1 was entirely dependent on Patient A's reliability.

Having reviewed Patient A's witness statements and her oral evidence, the Committee decided that reliance could not be placed on her evidence. There were multiple inconsistencies within Patient A's evidence both written and oral, along with inconsistencies between her evidence and the contemporary records, and the evidence of Person C. Person C was described by both Mr Saad and Ms Ahmed as a reliable witness. The Committee recognised that it is not unusual for there to be inconsistencies as to detail within the accounts of a witness. It also recognised that a patient may be confused or have a poor recollection of dates, but it considered that the inconsistencies in Patient A's evidence along with other evidence, were so numerous and substantial that the Committee could not rely on the evidence of Patient A to find the facts proved on the balance of probabilities.

The Committee noted the chronology of events that Patient A made no complaint about the appointment on 9 October 2018, collected her reglazed glasses on 18 October 2018, making no complaint on that occasion, and that her first complaint was made on 5 November 2018, almost a month after the appointment in question. Given the seriousness of the allegation, this chronology raises a doubt as to the reliability of Patient A's description of events.

The Committee highlighted some of the inconsistencies in Patient A's evidence. Patient A's oral evidence was that when she arrived at the Practice on 9 October 2018 she had woken up with a "*bad feeling in my stomach*", that "*something bad was going to happen*", and had asked Person C to accompany her to the examination, but that PERSON C refused her request. When challenged on this account Patient A was robust in confirming that her recollection was correct and that it related to the appointment on 9 October 2018. She told the Committee that Person C told her that the Registrant does not permit the reception staff to enter the treatment room. The evidence of Person C, a Council witness, was that this was untrue. Person C told the

Committee that no request for a chaperone was made on 9 October 2018 and it is also incorrect that the Registrant does not permit reception staff to enter the treatment room. Patient A's evidence was also inconsistent with her two written signed statements.

In Patient A's oral evidence she was unable to clarify for the Committee whether the Registrant in touching her used one hand, one hand interchangeably, or used both his hands at the same time. As Ms Ahmed pointed out there has always been an inconsistency in Patient A's account. In her written complaint to the Council Patient A referred to the Registrant's "hand", but in her supplementary witness statement she described the Registrant using both his hands when she explained how the Registrant reached over to her from his wheelchair. In her oral evidence, Patient A's evidence on this matter was confused and contradictory. The clarification of this detail was of some importance in the context of other facts in the case, particularly the Registrant's disability. Person C's evidence was that she did not believe it was possible for the Registrant to use both his hands at the same time because his disability meant that he would become unstable in his wheelchair. This evidence was consistent with the expert reports of Mr Tudor L Thomas, Consultant Orthopaedic Surgeon, dated 13 February 2021 and 14 June 2021. At the conclusion of Patient A's evidence, the Committee did not have a sufficiently clear picture, from Patient A's various descriptions, of how the Registrant's touching had taken place.

Patient A was also inconsistent in her oral evidence in her account of the length of time the alleged touching took place. At one point she said that it lasted twenty minutes, but when it was pointed out to her that this was inconsistent with earlier statements, she said that it lasted ten minutes.

In oral evidence to the Committee Patient A added significant details that were not within her witness statement. She told the Committee that she had asked the Registrant why she should remove her jumper and that he did not respond to her question. In her witness statements, she did not mention this and this is not recorded in her written complaint.

Patient A told the Committee, that the Registrant's touching lasted as long as ten minutes and that she felt uncomfortable and frustrated. This evidence is very difficult to reconcile with other credible evidence of Patient A's behaviour immediately after the appointment. After the appointment Patient A remained in the Practice and she chose to book a follow up appointment with the Registrant. Person C explained that she gave Patient A the option of booking an appointment or waiting until closer to the time. Person C did not notice anything unusual about Patient A's demeanour. In conversation with Person C, Patient A told Person C about a doctor who examined her breasts and "got a hard on". In her evidence, Patient A agreed that this conversation took place. The Committee considered that the evidence relating to events immediately after the 9 October 2018 appointment undermined Patient A's credibility and reliability.

Patient A's evidence about the date she reported her complaint to Person C was incorrect. Her evidence in her statement and in oral evidence was that she reported the complaint on 11 October 2018. The Committee recognised that patients may be

confused about dates, but this was an inconsistency that further reduced any confidence in the reliability of Patient A.

The Committee placed no reliance on the evidence of Person B in relation to the disputed events on 9 October 2018. Person B supported Patient A as his partner and his witness statement and oral evidence was based on discussions which had taken place between himself and Patient A.

The Committee decided that there is no case to answer in relation to particular 1. Particular 4 is dependent on particular 1 and it falls away.

The Committee next considered the evidence relating to particular 3. The documentary evidence includes notes of the complaint meeting made by Person C on 5 November 2018 and the Practice complaints procedure. The witness evidence includes the unchallenged evidence of Person A that she received no response to the complaint she made at the Practice and Person C's evidence that the Registrant's response to the complaint was that he asked her to inform Patient A that she should contact the police. In her evidence, Person C said that she did not telephone Patient A and that she took responsibility for what she described as a misunderstanding between herself and the Registrant.

The Committee's interpretation of particular 3 was that the natural meaning of "response" was a response to Patient A. The Committee did not agree with Mr Saad's description that there was no evidence in support of the particular. The Committee considered that there was a case to answer in relation to the facts of particular 3 based on the evidence presented by the Council together with Standard 18 of the Council's Standards for Optometrists and Dispensing Opticians.

The Committee next considered whether there was a case to answer in relation to the statutory ground of misconduct and/or current impairment considered on the basis of particular 3 when looked at as a single particular. The Committee noted that any falling short of the required Standards related to a single incident of a failing to respond to a complaint over the short period of time between 5 November 2018 and 4 December 2018. On the evidence presented by the Council the failure to respond to Patient A resulted from an unfortunate misunderstanding between the Registrant and Person C. Given this context, the Committee decided that no reasonable committee could decide that the statutory ground of the allegation is met and that there is therefore no case to answer on particular 3.

Having concluded that there is no case to answer on any of the particulars the Committee decided that the case should not proceed.

Chair of the Committee: Ms Eileen Carr

Signature**Date: 26 October 2021**

Registrant: Mr Emmanuel Megafu

Signature present in person

Date: 26 October 2021

FURTHER INFORMATION
Transcript
A full transcript of the hearing will be made available for purchase in due course.
Appeal
Any appeal against an order of the Committee must be lodged with the relevant court within 28 days of the service of this notification. If no appeal is lodged, the order will take effect at the end of that period. The relevant court is shown at section 23G(4)(a)-(c) of the Opticians Act 1989 (as amended).
Professional Standards Authority
<p>This decision will be reported to the Professional Standards Authority (PSA) under the provisions of section 29 of the NHS Reform and Healthcare Professions Act 2002. PSA may refer this case to the High Court of Justice in England and Wales, the Court of Session in Scotland or the High Court of Justice in Northern Ireland as appropriate if they decide that a decision has been insufficient to protect the public and/or should not have been made, and if they consider that referral is desirable for the protection of the public.</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 www.professionalstandards.org.uk or by telephone on 020 7389 8030.</p>
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.