

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

GENERAL OPTICAL COUNCIL

F(24)09

AND

EDWARD ELLISON NÉ MATTHEW BICKERSTAFFE (01-19063)

**DETERMINATION OF A SUBSTANTIVE HEARING
15 JULY 2024**

Committee Members:	Sara Fenoughty (Chair/Lay) Mark Richards (Lay) Mark McLaren Lay Kamlesh Gohil (Optometrist) Alexander Howard (Optometrist)
Clinical adviser:	N/A
Legal adviser:	Clare Bunting
GOC Presenting Officer:	Lee Bridges
Registrant present/represented:	Not present and represented
Registrant representative:	Nicholas Hall (Counsel) Katharine Germishuys (AOP)
Hearings Officer:	Arjeta Shabani
Facts found proved:	Particulars 1, 2 and 3
Facts not found proved:	None
Misconduct:	Found
Impairment:	Impaired
Sanction:	Erasure
Immediate order:	Yes

Allegation

The Council alleges that you, Matthew Bickerstaffe, a registered Optometrist (01-19063):

- 1. On or around 26 October 2021, you sent messages via ChatIW, under the username “[redacted]”, as set out in Schedule A.*
- 2. On or around 26 October 2021, you sent messages via Snapchat, under the username “[redacted]”, as set out in Schedule B.*
- 3. One or more of the messages as referred to in Schedule A and/or B were:*
 - i. Inappropriate; and/or*
 - ii. Sexual.*

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

Schedule A

- Haha in looks or action??
- Got a pic of her?

Schedule B

- I wouldn't know where to look
- Nice, she started changing yet?
- [redacted]
- Nice. Get some pics for me
- You given her to anyone else?
- Can I see a pic?
- [redacted]
- Do you or would you play with her
- Can I see her?
- No vids of her playing I assume
- She a skinny mini?
- [redacted]
- Bendy
- [redacted]

AGREED PANEL DETERMINATION DISPOSAL

1. At the outset of the hearing Mr Bridges on behalf of the General Optical Council (GOC) informed the Committee that prior to the hearing a provisional agreement of an agreed panel determination had been reached with regard to this case between the GOC and the Registrant.
2. The agreement, which was put before the Committee within an Agreed Panel Disposal (APD) report finalised on 04 July 2024, sets out the Registrant's full admission to the facts alleged, that the Registrant's actions amounted to misconduct and that the Registrant'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 erasure with an immediate order.
3. The Committee considered the provisional agreement reached by the parties as set out in the APD Report, which is at Annex A of this determination.

DETERMINATION

4. The Committee considered the hearing bundle of 118 pages which included the APD Report and the APD Policy. The Registrant had admitted the facts of the allegation in their entirety. The parties had agreed within the APD report that misconduct and current impairment were established and that the case could appropriately be disposed of by erasure.
5. The Committee was mindful that the ultimate decision in respect of this matter rests with the Committee and there were a number of options open to the Committee, as set out at paragraph 8.3 of the GOC's APD policy and paragraph 5 of the Agreed Panel Disposal Report. These options included the Committee disagreeing with parts of the report and varying the sanction, after hearing further submissions.

Background to the allegation

6. The GOC received a referral on 30 November 2021 by a Local Authority Designated Officer ("LADO") from Bath and North East Somerset Local [redacted]. The referral followed concerns that the Registrant had been [redacted] on 27 November 2021 in relation to [redacted].
7. On 2 December 2021 the Council were also informed by the Association of Optometrists (AOP), on behalf of the Registrant, that there was an ongoing [redacted].
8. [redacted].
9. On 22 December 2021 a hearing took place to determine the Council's application for an Interim Suspension Order ("ISO"). The application was made on the grounds of being necessary for the protection of the public and otherwise in the public

interest. It was not opposed by the Registrant. The Committee ordered that the Registrant's registration be suspended in the interim whilst the investigation was ongoing for the maximum period of 18 months from the date of the order.

10. The ISO was first reviewed at a hearing on 24 May 2022 and the Committee concluded that it was appropriate and proportionate for the present order of suspension to continue for the duration of its term. A further review was scheduled to be carried out within 6 months.

11. The second review hearing of the ISO was carried out on 21 October 2022, the Committee concluded that there had been no material change of circumstances and the case was still under investigation by the [redacted]. The Committee further concluded that it was appropriate and proportionate for the order to continue for the duration of its term.

12. The third review hearing of the ISO was carried out on 30 March 2023; the order was maintained. It was noted that the ISO was due to expire on 21 June 2023.

13. The ISO was extended by the High Court on 21 June 2023, for a further period of 12 months.

14. On 30 August 2023, the fourth review hearing of the ISO was carried out and although the [redacted] had concluded, the Council's investigation was ongoing. The Committee concluded that the interim order was necessary, given that in the Registrant's professional role, he may come into contact with and engage with [redacted]. It considered whether interim conditions would be sufficient to address public protection and public interest concerns but was of the view that the nature of the allegations did not render this workable or practicable. Furthermore, it was not satisfied such conditions would address the high public interest element in the case.

15. On 29 November 2023, the Case Examiners determined that the matter should be referred to the Fitness to Practise Committee (FTPC).

16. The fifth review hearing of the ISO was carried out on 01 February 2024 and the Committee concluded that there remained a need for an interim order, as the serious risk to public protection as identified previously remained present. The Committee noted the ISO was due to expire on 20 June 2024 and made no order for further review.

17. The ISO was further extended by the High Court on 06 June 2024 for a period of 9 months and is due to expire on 20 March 2025.

18. On 21 February 2024, the Council's case was served on the Registrant.

19. On 20 March 2024, the Registrant's representative, AOP, returned the completed Hearings Questionnaire. The Registrant made admissions to the allegation and indicated that he considered the case suitable for APD. The AOP confirmed in correspondence that the Registrant admits to the facts, misconduct and current impairment.

20. On 25 March 2024, the AOP confirmed that the Registrant agreed to the Council's proposed sanction of erasure.

Findings in relation to the facts

21. The Registrant admitted the facts of the Allegation in their entirety. The Committee accepted the advice of the Legal Adviser and found the facts proved by reason of the Registrant's admissions pursuant to Rule 40(6) of the General Optical Council (Fitness to Practise) Rules 2013 ('the Rules').

22. The Committee noted the additional detail provided within the APD at paragraphs 26 – 31 in relation to the factual allegations which raise concerns relating to an inappropriate and / or [redacted]. During the course of the online chat with an [redacted].

Findings in relation to misconduct

23. The Committee considered the written submissions provided on behalf of the Council and the Registrant including the APD Report, and the bundle of agreed evidence. It accepted the advice of the Legal Adviser.

24. The Committee proceeded to consider whether the admitted facts, which were found proved, amounted to misconduct.

25. The Committee was mindful of the overarching objective to protect the public including the public interest, and was of the view that the facts found proved were serious, and that the conduct of the Registrant amounted to serious misconduct within the meaning of section 13D(2)(a) of the Act.

26. The Committee agreed with the parties' submission, set out within the APD report, that the Registrant's conduct breached the following paragraphs of the Standards of Practice for Optometrists and Dispensing Opticians (the Standards) effective from April 2016:

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;

27. The Committee noted that the misconduct amounted to a serious departure from the standards of practice expected of a competent Optometrist. The Committee concluded that the conduct was damaging to the reputation of the profession and has brought it into disrepute. Further, fellow professionals would consider the actions of the Registrant to be deplorable.

28. In the circumstances, the Committee was satisfied that the conduct of the Registrant amounted to professional misconduct, which was serious. Therefore, the Committee determined that the facts found proved amounted to misconduct.

Findings in relation to current impairment

29. The Committee then went on to consider whether the Registrant's fitness to practise is currently impaired by virtue of his misconduct. Whilst acknowledging the agreement between the GOC and the Registrant, the Committee has exercised its own independent judgement in reaching its decision on impairment and accepted advice from the Legal Adviser.

30. The Committee considered whether the Registrant's conduct was capable of being remediated, whether it had been remediated and whether there is a risk of repetition of the conduct in the future. The Committee went on to consider the level of insight and remediation that had been demonstrated in this case by the Registrant.

31. The Committee noted that the Registrant had made admissions and had co-operated with the regulator in these proceedings. The Committee considered that conduct of this nature was extremely difficult to remediate. Furthermore, there was no information before it from the Registrant relating to remediation, insight or reflection.

32. The Committee next considered the public interest and had regard to the test that was formulated by Dame Janet Smith in the report to the Fifth Shipman Inquiry, as approved in the case of Grant, which is as follows:

“Do our findings of fact in respect of misconduct... show that his fitness to practise is impaired in the sense that he:

- a. Has in the past acted and/or is liable in the future to so act so as to put a patient or patients at unwarranted risk of harm and/or;*
- b. Has in the past brought and/or is liable in future to bring the medical profession into disrepute and/or;*
- c. Has in the past breached and/or is liable in the future to breach one of the fundamental tenants of the medical profession and/or;*
- d. Has acted in such a way that his/her integrity can no longer be relied upon..”*

33. The Committee was satisfied that limbs (a)-(d) of this test are engaged in this case, namely that the Registrant's conduct is likely to put patients at risk of harm, brought the profession into disrepute, breached one of the fundamental tenets of the profession, and his integrity can no longer be relied upon.

34. The Committee had regard to the public interest and considered that the requirement to uphold professional standards and maintain public confidence in the profession would be undermined if no finding of impairment was made.

35. Therefore, the Committee found that the fitness of the Registrant to practise as an Optometrist is currently impaired.

Sanction

36. The Committee accepted the advice of the Legal Adviser and was aware that 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.

37. The Committee was mindful that it should start with the least severe and only move on to consider the next sanction if the one under consideration does not sufficiently protect the public, promote, and maintain public confidence in the profession and promote and maintain proper professional standards and conduct

38. The Committee considered the aggravating and mitigating features present in this case. In the Committee's view, the aggravating factors are as follows:

- a. The inappropriate and / or [redacted];
- b. Serious departure from the relevant professional standards as set out in the Standards of Practice for registrants;

The Committee considered these matters to be of considerable weight in its assessment of the seriousness of the misconduct.

39. The Committee identified the following mitigating factors:

- a. The Registrant has no fitness to practise history;
- b. The Registrant has co-operated with the GOC;

The Committee gave little weight to these mitigating factors.

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

41. In relation to taking no action, the Committee was of the view that this was neither 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.

42. The Committee considered the issue of a financial penalty order; however, it was of the view that such an order was neither appropriate nor proportionate in the circumstances.

43. The Committee considered the Indicative Sanctions Guidance (ISG) in relation to the imposition of conditions. It was of the view that conditional registration would not be practicable.

44. The Committee was of the view that it would be difficult to formulate appropriate conditions in this case. Further, conditions would not sufficiently mark the seriousness of the misconduct and would not meet the public interest.

45. The Committee concluded that conditions could not be devised which would be appropriate, proportionate, workable or measurable.

46. Next, the Committee considered suspension and had regard to paragraphs 21.29 onwards of the ISG. Given the nature and seriousness of the allegations, the Committee concluded that a suspension would not be appropriate or sufficient to protect the public and public confidence in the profession.

47. The Committee considered erasure and concluded that the Registrant's conduct is fundamentally incompatible with registered practice and that this sanction is the appropriate course of action and the most proportionate sanction.

48. Accordingly, the Committee approved the APD report and made an order in the terms agreed by the parties, namely an order for erasure.

Immediate order

49. The Committee considered whether to make an immediate order in this case and had regard to the APD Report in which both parties agreed that an immediate order was warranted in this case.

50. The Committee accepted the advice of the Legal Adviser, which was to consider the statutory test in whether the making of an order is necessary for the protection of members of the public, otherwise in the public interest or in the best interests of the Registrant.

51. The Committee decided to impose an immediate order, as it was in the public interest given the findings in this particular case.

Conclusion

52. For the reasons set out above, the Committee determined to accept the Agreed Panel Disposal as put forward by the parties, without variation.

Revocation of interim order

53. The Committee hereby revokes the interim order for suspension of registration that was imposed on 22 December 2021 and which was subsequently extended.

Chair of the Committee: Sara Fenoughty



Signature

Date: 15 July 2024

Registrant: Matthew Bickerstaffe

Signature ...not present.....

ANNEX A

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

GENERAL OPTICAL COUNCIL

AND

EDWARD ELLISON (NÉE MATTHEW BICKERSTAFFE) (01-19063)

AGREED PANEL DISPOSAL REPORT

Introduction

1. This is an Agreed Panel Disposal ("APD") hearing in respect of Mr Edward Ellison (née Matthew Bickerstaffe) ("the Registrant") (01-19063). The Registrant first registered with the General Optical Council ("the Council") as an Optometrist on 3 October 2021.
2. He has no relevant fitness to practise history.
3. 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.
4. 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.
5. The options open to the FTPC are:
 - 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 GOC 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

6. This matter was initially referred to the Council on 30 November 2021 by a Local Authority Designated Officer ("LADO") from Bath and North East Somerset Local [redacted]. The referral followed concerns that the Registrant had been [redacted].
7. On 2 December 2021 the Council were also informed by the AOP, on behalf of the Registrant, that there was an ongoing [redaction].
8. [redacted]
9. On 22 December 2021 a hearing took place to determine the Council's application for an Interim Suspension Order ("ISO"). The application was made on the grounds of being necessary for the protection of the public and otherwise in the public interest. It was not opposed by the Registrant. The Committee ordered that the Registrant's registration be

suspended in the interim whilst the investigation was ongoing for the maximum period of 18 months from the date of the order.

10. The ISO was first reviewed at a hearing on 24 May 2022 and the Committee concluded that it was appropriate and proportionate for the present order of suspension to continue for the duration of its term. A further review was scheduled to be carried out within 6 months.
11. The second review hearing of the ISO was carried out on 21 October 2022, the Committee concluded that there had been no material change of circumstances and the case was still under investigation by the [redacted]. The Committee further concluded that it was appropriate and proportionate for the order to continue for the duration of its term.
12. The third review hearing of the ISO was carried out on 30 March 2023; the order was maintained. It was noted that the ISO was due to expire on 21 June 2023.
13. The ISO was extended by the High Court on 21 June 2023, for a further period of 12 months.
14. On 30 August 2023, the fourth review hearing of the ISO was carried out and although the [redacted], the Council's investigation was ongoing. The Committee concluded that the interim order was necessary, given that in the Registrant's professional role, he may come into contact with and engage with [redacted]. It considered whether interim conditions would be sufficient to address public protection and public interest concerns, but was of the view that the nature of the allegations did not render this workable or practicable. Furthermore, it was not satisfied such conditions would address the high public interest element in the case.
15. On 29 November 2023, the Case Examiners determined that the matter should be referred to the FTPC.
16. The fifth review hearing of the ISO was carried out on 1 February 2024 and the Committee concluded that there remained a need for an interim order, as the serious risk to public protection as identified previously remained present. The Committee noted the ISO was due to expire on 20 June 2024 and made no order for further review.

17. On 21 February 2024, the Council's case in the form of a Rule 29 letter and accompanying bundle was served on the Registrant.

18. On 20 March 2024, the Registrant's representative, AOP, returned the completed Hearings Questionnaire. The Registrant made admissions to the allegation and indicated that he considered the case suitable for APD. The AOP confirmed in correspondence that the Registrant admits to the facts, misconduct and current impairment.

19. On 25 March 2024, the AOP confirmed that the Registrant agreed to the Council's proposed sanction of erasure.

20. The allegation against the Registrant is set out below:

Allegation

The Council alleges that you, Matthew Bickerstaffe, a registered Optometrist (01-19063):

- 1. On or around 26 October 2021, you sent messages via ChatIW, under the username "[redacted]", as set out in Schedule A.*
- 2. On or around 26 October 2021, you sent messages via Snapchat, under the username "[redacted]", as set out in Schedule B.*
- 3. One or more of the messages as referred to in Schedule A and/or B were:*
 - i. Inappropriate; and/or*
 - ii. Sexual.*

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

Schedule A

- Haha in looks or action??*
- Got a pic of her?*

Schedule B

- *I wouldn't know where to look*
- *Nice, she started changing yet?*
- *[redacted]*
- *Nice. Get some pics for me*
- *You given her to anyone else?*
- *Can I see a pic?*
- *[redacted]*
- *Do you or would you play with her*
- *Can I see her?*
- *No vids of her playing I assume*
- *She a skinny mini?*
- *[redacted]*
- *Bendy*
- *[redacted]*

Nature of the Recommended Disposal

21. 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 erasure.

Relevant law

22. 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").

23. In accordance with Rule 46 a hearing is required to be conducted in three stages:

- 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.

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

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

Stage 1: Factual Findings

26. The referral to the Council was made by the Bath and North East Somerset LADO, following the Registrant's [redacted]

27. On 26 October 2021, the Registrant had unknowingly engaged in an online chat with an [redacted], via a chat messaging service (ChatIW). He identified as a [redacted] male and the conversation showed him taking an interest [redacted]. The online chat moved to Snapchat, where the Registrant said that [redacted].

28. The messages outlined in Schedule A and Schedule B of the allegation, were sent by usernames "[redacted]" and "[redacted]" and the Registrant admits to these being his accounts. The Registrant's admissions are documented within the [redacted].

29. [redacted].

30. [redacted]:

a. [redacted]

b. [redacted].

31. During the course of the Council's investigation, the following information and evidence was obtained:

- [redacted] exhibit of ChatIW messages

- [redacted] exhibit of Snapchat messages
- [redacted]
- LADO Review and Strategy Discussion Minutes dated 15 November 2022
- [redacted]
- [redacted]

32. The Registrant admits the facts alleged against them.

Stage 2: Misconduct and Impairment

Misconduct

33. With regard to the issue of misconduct, there is no definition but a review of some of the authorities provides some guidance. In Roylance v GMC (no.2) [2000] 1 A.C. 311 Lord Clyde, in his judgment at page 331, stated:

“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” (emphasis added).

34. In the case of R (on the application of) Remedy UK v General Medical Council [2010] EWHC 1245 at paragraph 37, it was stated:

“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.”

35. In *Nandi v General Medical Council [2004] EWHC (Admin)*, Collins J addressed the issues 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'."

36. It is the Council's case that the Registrant's conduct breached the following paragraphs of the Standards of Practice for Optometrists and Dispensing Opticians:

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;

37. It is agreed by both parties that the allegations amount to a serious departure from the standard of practice expected of an optometrist.

38. Both parties further agree that the Registrant's conduct therefore amounts to misconduct within the meaning of section 13D(2)(a) of the Act.

Impairment

39. 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, which are relevant to the current matters.

40. These authorities discussed the way in which regulatory committees should approach impairment in this case at the second stage.

41. 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)*

42. 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).

43. 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.

44. All of the aforementioned factors are potentially engaged in this case.

45. In *Cheatle v GMC*, Mr Justice Cranston said this (at paragraphs 21 - 22):

*21. 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".

22. 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".

46. In Yeong v GMC [2009] Mr Justice Sales said (at Para 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".

47. 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."*

48. The Registrant accepts that his fitness to practise is currently impaired, in that;

- i. It is necessary in the public interest to make a finding of impairment of fitness to practise in order to uphold professional standards and public confidence in the profession.*

Stage 3: Sanction

49. Where the FTPC find that a registrant's fitness to practise is impaired, the powers 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).

50. 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

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

52. 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."

53. The FTPC should have proper 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.

54. The FTPC must have regard to the principle of proportionality. The principle requires that when considering what sanction to impose in order 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 optician being permitted to return to practice.

55. 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.

56. 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.

57. The Registrant has admitted to the allegations, allegations which the Council firmly submit will have a negative impact on the reputation of the profession.

58. In terms of mitigating circumstances, the Registrant has no previous adverse fitness to practice history.

59. Having regard to the Council's Indicative Sanctions Guidance, the parties agree that the appropriate and proportionate sanction is erasure.

60. This sanction is appropriate and proportionate considering the serious level of misconduct involved and in that a lesser sanction would not mark the seriousness of the misconduct.

No Further Action

61. 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.

62. 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.

Financial Penalty Order

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

64. The Council do not consider this penalty to be applicable to the circumstances of this case.

Conditional Registration

65. 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."*

66. The Council do not consider that conditions would be appropriate considering the nature of misconduct.

Suspension

67. The Council do not consider, given the nature and seriousness of the allegations, that a suspension would be appropriate or would be sufficient to protect the public and public confidence in the profession.

Erasure

68. The parties agree that the Registrant's conduct is fundamentally incompatible with registered practice and that, at this stage, this sanction would be the appropriate course of action.

Immediate Order

69. The parties agree that, should the FTPC accept the parties' recommendation for disposal, it is appropriate to impose an immediate order as it is necessary to do so in the public interest.

On behalf of the Council: Shannett Thompson

Date: 4 July 2024

On behalf of the Registrant: Katharine Germishuys (Association of Optometrists)

Date: 04 July 2024

FURTHER INFORMATION
Transcript
A full transcript of the hearing will be made available for purchase in due course.
Appeal
Any appeal against an order of the Committee must be lodged with the relevant court within 28 days of the service of this notification. If no appeal is lodged, the order will take effect at the end of that period. The relevant court is shown at section 23G(4)(a)-(c) of the Opticians Act 1989 (as amended).
Professional Standards Authority
<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>
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.