

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

GENERAL OPTICAL COUNCIL

F(22)15

AND

GARY MARSHALL (D-6494)

**DETERMINATION OF A SECOND SUBSTANTIVE REVIEW
16 NOVEMBER 2023**

Committee Members: Pamela Ormerod (Chair/Lay)
Miriam Karp (Lay)
Sarah Hamilton (Lay)
Sarah Baylay (Dispensing Optician)
Adrian Street (Dispensing Optician)

Legal adviser: Charlotte Mitchell-Dunn

GOC Presenting Officer: Tom Stevens

Registrant: Not present and unrepresented

Registrant representative: N/A

Hearings Officer: Abigail Strong-Perrin

Outcome: The Committee directed that the name of the registrant be erased from the appropriate register(s).

Proof of service

1. The Committee heard an application from Mr Stevens for the Council, for this 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. The Committee accepted the advice of the Legal Adviser.
2. Mr Gary Marshall (hereafter "the Registrant") had been served the notice of hearing on 13 July 2023 via post and email, both methods of service permitted by Section 23A of the Act and Rule 61 of the Fitness to Practise Rules 2013. The Committee had regard to the contents of the notice, which included the date of this review, together with the requirements set out in Rules 56 and Rule 28(1)(b) to (e), namely the right to attend and be represented, the power of the Committee to proceed in absence, the right of the Registrant to adduce evidence, and the Committee's powers of disposal. The Committee noted that the links for the hearing had been provided to the Registrant on 10 November 2023 and 15 November 2023.
3. The Committee was satisfied that notice was served in accordance with the Rules and that reasonable efforts have been made to notify the Registrant of the hearing.

Proceeding in the absence of the Registrant

4. 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. The Committee heard submissions from Mr Stevens on behalf of the Council and accepted the advice of the Legal Adviser.
5. The Committee was satisfied that the Registrant was aware of the date of this review and had decided not to attend. The Committee noted that the Registrant had not engaged since April 2021, had not attended the substantive hearing in November 2022 or the subsequent review in May 2023. The Committee considered that the Registrant had voluntarily absented himself in the full knowledge of the nature of the hearing and the powers of the Committee.
6. The Committee was not satisfied that an adjournment would secure the Registrant's attendance on a future occasion. The Registrant had not requested such an adjournment. The Committee was also satisfied that the Registrant had been given the opportunity to attend but had decided not to do so. The Committee was mindful that this was a mandatory review of a suspension order currently in place which is due to expire on 27 December 2023 and so there was a public interest in proceeding, especially as matters of public protection were engaged.
7. In all the circumstances, the Committee determined that it would be in the public interest for the hearing to proceed in the Registrant's absence.

Background

8. The Registrant was employed by Costco Wholesale UK Limited (“Costco”) at the company’s **Redacted** branch from 13th March 2000 to 28th December 2020.
9. An investigation was conducted by Regional Operations Supervisor, Optical and Hearing, Mr F on 24 November 2020, due to the number of concerns which had arisen as a result of the number of spectacle remakes being required at the company’s **Redacted** branch. Mr F reviewed a number of patient records. It was during this review that concerns became apparent with the working practices of the Registrant.
10. It was identified that the Registrant had made changes to patients’ prescriptions, had advised some patients to revert to using previous prescriptions and in other cases had advised a new prescription. The Registrant’s employers could find no evidence contained within the records that either a registered Optometrist or person authorised to carry out a sight test had issued a new prescription. Neither could they find any evidence that any such person had provided the requisite authorisation to enable the Registrant to form the conclusions he had reached with respect to new prescriptions or the actions he undertook.
11. The Registrant is not an Optometrist or a person training to be an Optometrist. The Registrant does not fall within the category of Registrants who are permitted to carry out eye tests. There were a number of records identified by Mr F that indicated that patients did not appear to have been issued with a written statement which set out their updated prescription.
12. On 28 November 2020 Mr B, the General Manager **Redacted** and Mr F met with the Registrant, during which the Registrant conceded that he had carried out refractions and that he should not have done so. The Registrant was suspended with immediate effect.
13. An investigatory meeting was conducted on 7 December 2020 by Assistant Warehouse Manager, Mr C, with the Registrant. At this meeting the Registrant again appeared to accept that he had carried out the refractions but asserted that all changes were approved and checked by the resident Optometrist and that the resident Optometrist had failed to record these changes.
14. An investigatory meeting was conducted on 9 December 2020 with the resident Optometrist, Mr D , during which Mr D contradicted the account provided by the Registrant. The Registrant attended a disciplinary hearing on 12 December 2020 and was subsequently invited to attend a meeting so that the outcome of the disciplinary meeting could be communicated to him in person. Mr Marshall did not attend the subsequent meeting.
15. On 18 December 2020 a letter was sent to the Registrant by Mr B to inform him of the decision reached following the disciplinary hearing, namely Mr B:

- a. Had considered the Registrant's conduct to have substantially failed to meet the standards expected by Costco in his position as a registered professional.
- b. Had a reasonable belief that the Registrant had acted outside of his scope of practice as a Dispensing Optician and in such a manner jeopardised patient safety.
- c. Was satisfied that the Registrant's actions amounted to gross misconduct and fundamentally damaged the company's trust and confidence in him.

16. Mr B outlined within the letter that there were sufficient grounds to justify the termination of the Registrant's employment contract without notice. However, Costco advised that the Registrant would be removed with immediate effect from the Optical Department, but would be permitted to work as a Cashier at another location due to his length of service within the organisation; with the view to his returning to his position subject to the determination of any GOC investigation. Costco considered that the concerns identified in respect of the Registrant's practice were sufficiently serious to justify an escalation to the GOC, pursuant to "Standards for Optical Businesses".

17. Costco instructed registered Optometrist, Ms E, to provide a clinical opinion in respect of the relevant records. Ms E agreed with the concerns identified by Mr F and recommended that the affected patients be recalled for a further eye examination.

18. The Allegations against the Registrant were as follows:

*The Council alleges that in relation to you, Mr Gary Marshall (D-6494), whilst employed as a Contact Lens and Dispensing Optician at **Redacted**:*

1. On one or more occasions between September 2018 and December 2020, you:

a. failed to obtain the necessary authorisation from an Optometrist when altering the prescription of a patient;

b. inappropriately modified the previous spectacle prescriptions of patients;

c. failed to arrange for appropriate checks to be made by an Optometrist when dispensing new prescriptions;

d. failed to undertake a dispensing triage;

e. failed to keep an adequate record of your consultation with a patient, including but not limited to failing to record the patient's:

i. visual acuity;

- ii. *ocular history;*
- iii. *medical history;*

f. failed to refer a patient to an optometrist for further examination and/or checks where clinically indicated;

g. failed to refer a patient for a new sight test where clinically indicated.

2. On one or more occasions between November 2020 and April 2021, you stated, when asked, that you had obtained the required approval from the resident Optometrist, Mr A, on each occasion that you had altered the prescription of patients between September 2018 and December 2020.

3 a. you had not obtained the required approval from Mr A to alter the prescriptions of patients on one or more occasion between September 2018 and December 2020;

b. you knew that you had not obtained the required approval from Mr A to alter the prescriptions of patients on one or more occasion between September 2018 and December 2020;

c. you knew that you should not have altered the prescription of any patient without obtaining the required approval from an Optometrist.

4. Your actions as set out at paragraphs 2 and 3 above were dishonest

19. Between 15 and 22 November 2022, at the Substantive Hearing, the Fitness to Practise Substantive Committee (“the 2022 Committee”) found the facts proved in their entirety, including dishonesty, except in relation to paragraph 3c. The 2022 Committee also found misconduct and that the Registrant’s fitness to practise was impaired.
20. The 2022 Committee concluded that the appropriate sanction was a 6-month period of suspension with a review to take place before the expiry of the substantive order.
21. To assist in making the decision of the issue of impairment at any review hearing, the Registrant was advised by the 2022 Committee that any subsequent Committee would be assisted by the following:
- The Registrant’s engagement in any future hearing;
 - The Registrant’s demonstration of insight into the regulatory concerns arising from the allegations found proved;
 - Records of any training undertaken;
 - Up-to-date references where available.
22. This matter was reviewed at a substantive review hearing on 17 May 2023, the Registrant did not attend that hearing and did not submit any of the evidence suggested by the substantive hearing Committee. The reviewing Committee found

that the fitness to practise of the Registrant was currently impaired on patient safety and public interest grounds, in order to maintain public confidence in the profession and to uphold professional standards. The reviewing Committee determined that the Registrant should be suspended for a further 6 months. At that stage, the reviewing Committee determined that the sanction of erasure was disproportionate and therefore not appropriate.

23. The reviewing Committee considered that any future Review Committee might be assisted by the following:

- The Registrant's engagement in any future hearing;
- The Registrant's demonstration of insight and remediation into the regulatory concerns arising from the allegations found proved;
- Evidence that the Registrant has kept his knowledge and skills up to date;
- Up-to-date references where available.

24. This Committee took account of all the findings of the 2022 Committee and the reviewing Committee convened on 17 May 2023.

25. The period of suspension imposed upon the Registrant is due to expire on 27 December 2023.

Submissions

26. The Committee heard submissions from Mr Stevens on behalf of the Council.

27. Mr Stevens set out the history and background of the case in detail.

28. Mr Stevens submitted that the Registrant has continued not to engage, and as such the Council has seen no evidence of insight or remediation from him. Mr Stevens noted that the Registrant has not complied with the suggestions of either the substantive hearing Committee or the previous reviewing Committee set out above, which would have been of assistance to the Committee determining the matter today.

29. Mr Stevens submitted that the Committee was unable to determine whether the Registrant had addressed his insight into the misconduct. He submitted that the conclusions made by the 2022 Committee at the substantive hearing, remain unchanged. He referred to the determination of the 2022 Committee at paragraph 150, namely *"The Committee determined that the Registrant's conduct was serious and fell far below the standards to be expected of a Contact Lens Optician. It considered that the conduct would be viewed as deplorable by fellow members of the profession. As such the Committee determined that the facts found proved amounted to misconduct."*

30. Mr Stevens further referred the Committee to Paragraph 160 namely *"The Committee considered that it had no evidence before it that the Registrant had demonstrated insight into the nature and extent of his misconduct, or its consequences for colleagues, other members of the profession, or public*

confidence in the profession and the Council as regulator. Further, the Committee considered that the Registrant had not demonstrated any regret or remorse.”

31. Mr Steven highlighted that the Registrant had provided no reflection and had not demonstrated that he had engaged in CPD. Mr Stevens submitted as a result there was a real risk of repetition in this case. Mr Stevens suggested on the evidence before the Committee that it could not be satisfied that the level of risk identified by previous Committees did not remain. He further submitted that the nature and gravity of the dishonesty was serious and together with the Registrant's non-engagement and absence of remediation, the public interest required a finding of current impairment.
32. Mr Stevens therefore invited the Committee to make a finding of impairment as there was a real risk of repetition in the circumstances.
33. Mr Stevens relied upon the skeleton argument drafted on behalf of the Council. This sets out that there has been no material change in circumstances since the last review and that there is no evidence before the Committee of insight or remediation. It submits that the Registrant has been provided with a reasonable opportunity to engage in the process and it appears that it is highly unlikely that he will engage in the future.
34. In respect of sanction, Mr Stevens submitted that the case was too serious for the Committee to take no action and that conditional registration was not workable. He noted that this was a case of dishonesty and submitted that conditions would be difficult to formulate, and they were not appropriate because the Registrant was not engaging.
35. Mr Stevens submitted that he was instructed to submit that a further period of suspension was a suitable outcome in this case, but he acknowledged that given the lack of engagement, or change in circumstances, it would be open to the Committee that to direct that the name of the Registrant is erased from the appropriate register. He submitted that the continuing lack of engagement on the Registrant's part may well be considered an additional aggravating feature when determining sanction.

Findings regarding impairment

36. The Committee had no written submissions or information from the Registrant for the purpose of this review.
37. The Committee accepted the advice of the Legal Adviser. In reaching its decision, the Committee was mindful of the wider public interest elements of declaring and upholding proper standards of conduct and behaviour and maintaining public confidence in the profession. The Committee exercised its own judgement in relation to the question of whether there was current impaired fitness to practise.

38. The Committee considered that nothing had changed since the last review. There was no information from the Registrant since before the substantive hearing and the Registrant had not engaged with the Council since 2021.
39. The Committee acknowledged that both the substantive hearing Committee and the first review Committee had given recommendations which may assist a future reviewing Committee, and which signposted for the Registrant the types of information he might wish to provide to a reviewing Committee to demonstrate remediation and so discharge the persuasive burden on him. Whilst the Committee understood that these were recommendations and not requirements for the Registrant, the position was that the Committee had no information before it at all to demonstrate that the Registrant had developed any insight or that he had remedied his misconduct.
40. The Registrant has not engaged with the GOC. He has therefore not demonstrated that he has taken any steps to address any specific failings identified in the previous decision. The Committee has no information to assist with the Registrant's degree of insight and there is no information before the Committee to suggest that the Registrant has taken any steps to maintain or improve his professional knowledge and skills. The Committee is also not in possession of any testimonials or references on behalf of the Registrant. Given the length of time that has passed since the substantive hearing the Committee considered that absence of information concerning.
41. In the absence of any information to demonstrate insight and/or remediation, the Committee could not be satisfied that the Registrant had remedied his misconduct. Therefore, it concluded that a real risk of repetition remained. Given the nature and gravity of the allegation found proved together with the non-engagement, lack of evidence of remediation, and consequent risk of repetition, the Committee concluded that both patient safety and the wider public interest required a finding of current impairment.
42. Accordingly, the Committee found that the fitness of the Registrant to practise is currently impaired on patient safety and public interest grounds in order to maintain public confidence in the profession and to uphold professional standards.

Decision on Sanction

43. The Committee accepted the advice of the Legal Adviser. It had regard to the Indicative Sanctions Guidance.
44. The Committee considered the sanctions available to it from the least restrictive to the most severe, as set out in section 13(7) of the Opticians Act 1989, namely no sanction, conditional registration, suspension, and erasure. The Committee applied the principle of proportionality by weighing the Registrant's interests with the public interest.
45. The Committee concluded that in the absence of any insight and remediation, it would be inappropriate to take no action, as that would not be sufficient to address

either public protection or the public interest elements of maintaining public confidence and upholding the reputation of the profession.

46. The Committee did not consider that conditional registration was appropriate in this case. The Finding against the Registrant included findings of dishonesty. The Committee did not consider in the circumstances of the case that it was possible to formulate conditions to address this. In any event, given the ongoing lack of engagement, or steps to develop insight or achieve remediation, the Committee did not consider that conditional registration would meet either the protection of the public concerns or the public interest elements of maintaining public confidence and upholding the reputation of the profession.

47. The Committee considered imposing a further period of suspension but was not of the view that this was an appropriate sanction in this case. The Committee noted paragraph 21.29 of the Hearings and Indicative Sanctions Guidance which states as follows;

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

- a. A serious instance of misconduct where a lesser sanction is not sufficient.*
- b. No evidence of harmful deep-seated personality or attitudinal problems.*
- c. No evidence of repetition of behaviour since incident.*
- d. The Committee is satisfied the Registrant has insight and does not pose a significant risk of repeating behaviour.”*

48. The Committee considered that it was not satisfied that the Registrant had demonstrated any insight. Further, in the absence of any insight or remediations the Committee considered there was a significant risk of the Registrant repeating the behaviour.

49. The Committee noted that there was no evidence before it to demonstrate that the Registrant had kept his skills and knowledge up to date. The Committee considered this in light of the significant passage of time since the substantive hearing decision.

50. The Committee considered that the Registrant had been given ample opportunities to engage and demonstrate insight and/or remediation but had chosen not to. The Committee considered that it was highly unlikely given the history of this matter that the Registrant would engage with the GOC in the future.

51. The Committee considered paragraph 21.35 of the Hearings and Indicative Sanctions Guidance and noted the relevant subparagraphs as follows;

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

.....

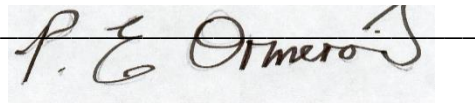
- f. Dishonesty (especially where persistent and covered up);*

h. Persistent lack of insight into seriousness of actions or consequences.”

52. The Committee noted that this was a case involving dishonesty and considered that through an ongoing lack of engagement the Registrant had demonstrated a persistent lack of insight into the seriousness of his actions or their consequences.
53. The Committee considered the need for proportionality and the impact upon the Registrant of imposing a sanction, however the Committee considered that in all the circumstances of the case erasure from the register was appropriate and proportionate. The Committee considered that such a sanction was the only means of protecting patients and/or maintaining public confidence in the optical profession given the Registrant’s persistent lack of engagement and insight, notwithstanding the potential impact and the mitigation which the original hearing had identified.
54. Accordingly, the Committee directed that the name of the registrant be erased from the appropriate register.

Chair of the Committee: Pamela Ormerod

Signed

A handwritten signature in black ink, appearing to read 'P. E. Ormerod', is written over a horizontal line.

Date 16/11/23

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.