BEFORE THE FITNESS TO PRACTISE COMMITTEE
OF THE GENERAL OPTICAL COUNCIL

GENERAL OPTICAL COUNCIL

AND

NATHAN SMITH (01-32598)

DETERMINATION OF A SUBSTANTIVE HEARING
AGREED PANEL DISPOSAL (APD)
9 NOVEMBER 2020

Committee Members:	Ms A Johnstone (Chair/Lay) Ms N Barnett (Lay) Mr B Summerskill (Lay) Ms D Ellis (Optometrist) Ms S Nasrullah(Optometrist)
Legal adviser:	Ms H Helmi
GOC Presenting Officer:	Ms G Hansen
Registrant:	Present and represented
Registrant representative:	Mr S Thomas (Counsel) Ms M Rashid (AOP)
Hearings Officer:	Mr T Yates
Facts found proved:	All particulars
Facts not found proved:	N/A
Misconduct:	Found
Impairment:	Impaired
Sanction:	3 Months suspension – (Without Review)
Immediate order:	N/A

AGREED PANEL DISPOSAL

Prior to this hearing a provisional agreement in the form of an Agreed Panel Report (APR) had been reached with regard to this case between the GOC and the Registrant. The APR was signed by the Registrant and the GOC on 3 and 4 November 2020 respectively.

The agreement, which was put before the Committee, sets out the Registrant's full admission to the facts alleged in the Allegation, states that the Registrant accepts that his 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 a 3 month Order of Suspension (without review or immediate order).

The Committee has considered the provisional agreement reached by the parties. That provisional agreement reads as follows:

"AGREED PANEL REPORT

Introduction

1. This is a substantive hearing in respect of Mr Nathan Smith ("the Registrant"), a registered optometrist, first registered with the General Optical Council ("the Council") as an optometrist on 16 October 2007. The Fitness to Practise Committee ("FTPC") meet to consider whether to approve an agreed form of disposal under the Agreed Panel Disposal ("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 and from counsel before agreeing to dispose of this case by the APD process.

2. The Council's published policy on the APD process is appended to this report. As is made clear in that policy, 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 a full supervisory jurisdiction over the procedure and, save where it would be otherwise appropriate not to do so, the APD recommendation is considered at a public hearing. The options open to the FTPC are:

    i. To approve the recommendation and make the appropriate order(s);
    ii. To vary the sanction with the agreement of both parties;
    iii. To disagree with the recommendation. In this instance, an amended recommendation may be resubmitted at a reconvened APD hearing, or the case may proceed under the usual hearing process.

Background

3. On 15 March 2017, when completing his annual retention form, to maintain registration with the Council, the Registrant declared to the Council that, whilst working for [REDACTED] in January 2013, he had recorded in a patient's records that he performed an ophthalmoscopy, when he had not, and that he had resigned from his position at [REDACTED] prior to a disciplinary hearing.

4. The Council investigated the matter and, on 30 April 2019, prepared an investigation report for consideration by the Case Examiners. The Registrant submitted representations to the Case Examiners dated 30 May 2019, making admissions to the allegations in relation to Patient A and Patient B. The Case Examiners referred the matter to the FTPC on 24 June 2019.

5. In preparing for the hearing, the Council obtained a witness statement from the investigator at [REDACTED] ("Colleague C") and a supplementary report from the Council's expert witness.

6. The Council's case was served on the registrant on 15 May 2020.

7. The AOP provided the Council with a reflective piece from the Registrant, dated 21 September 2020, a bundle of testimonials, recent patient records, and CET records.

8. The Council and the AOP, on behalf of the Registrant, have agreed that the allegations constitute misconduct, that the Registrant's fitness to practise is impaired, that the appropriate and proportionate sanction is a three month suspension, and neither a review of the suspension order nor an immediate order are necessary.

9. There is no interim order in place.

10. The allegation is set out below.

Allegation

The Council alleges that in relation to you, Mr Nathan Smith (01-32598), a registered optometrist:

1. On or around 29 June 2012, you conducted a refractive consultation on Patient B to determine their suitability for a Refractive Laser Eye surgery, and you:

    a. Failed to ensure that all appropriate clinical examinations were recorded;
    b. Recommended that Patient B met the suitability criteria for Wavefront Intralase LASIK surgery on the basis of an inadequate record;

2. On or around 12 January 2013, you conducted a refractive consultation on Patient A to determine his suitability for a Refractive Lens Exchange surgery, and you:

    a. Failed to perform ophthalmoscopy;
    b. Incorrectly told Patient A that all necessary tests had been done;
    c. Incorrectly recorded in Patient A's records that you had conducted one of more of the following examinations and/or assessments on Patient A, when you had not done so:

   i. Ophthalmoscopy; and/or
   ii. Cycloplegic refraction;

d. Recommended that Patient A met the suitability criteria for Refractive Lens Exchange Multi-focal when you had not performed ophthalmoscopy;

3. Your conduct as set out at 2.b and/or 2.c.i and/ or 2.c.ii above was dishonest in that you knew that you had not performed ophthalmoscopy and/or cycloplegic refraction;

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

Nature of the Recommended Disposal

11. 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 a three month suspension, with no review and no immediate order.

Law

12. 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").

13. 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.

14. 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."

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

Stage 1: Factual Findings

16. The Registrant was employed as an optometrist by [REDACTED] from 5 November 2007. On 12 January 2013, the Registrant conducted a refractive consultation on Patient A to determine their suitability for a Refractive Lens Exchange surgery. Patient A raised concerns with the consultation by telephone on 24 January 2013.

17. As a result of the concerns raised by Patient A, [REDACTED] commenced an investigation and Colleague C interviewed the Registrant on 29 January 2013. During that interview, the Registrant accepted that he had told Patient A that all of the tests had been completed, when they had not been, and that he had recommended that Patient A was suitable for the procedure despite not completing all necessary tests.

The Registrant explained that this was the "wrong decision" but explained that he had "wanted to look competent" to the patient. The Registrant accepted that he told the counselling team that he had completed the examination, when he had not done so, and that he documented results for examinations which he had not completed, namely ophthalmoscopy and cycloplegic refraction.

18. During that interview on 29 January 2013, the Registrant and Colleague C also discussed the Registrant's refractive consultation with Patient B on 29 June 2012 to determine their suitability for a Refractive Laser Eye surgery. The Registrant acknowledged that the records of the consultation with Patient B were "unacceptable".

19. The records of Patient A and Patient B have been reviewed by the Council's expert witness. In relation to Patient B, it is her opinion that the records of Patient B are "woefully incomplete", noting that there is no evidence from the records that the overwhelming majority of tests which ought to have been completed before the Registrant could recommend that Patient B met the suitability criteria for Wavefront Intralase LASIK surgery had been completed. The expert evidence is that it is "simply not possible" to recommend a patient for this surgery without having completed multiple tests, taking the patient's medical history and conducting an eye examination, none of which were recorded as having been done. For the avoidance of doubt, the GOC does not allege that the tests were not carried out.

20. In relation to Patient A, the expert evidence is that an ophthalmoscopy was necessary to allow examination of the back of Patient A's eyes to ensure that there were no contra-indications to the surgery. The expert evidence is that whilst the risk of finding of a contra-indication was "slim", if such a contra-indication was present, there was a risk of post-operative complications and a risk to Patient A's sight. For those reasons, the Registrant accepts that it was necessary to perform an ophthalmoscopy prior to recommending surgery.

21. The expert evidence is there was no need to perform a cycloplegic refraction in order to recommend surgery.

22. The Registrant accepts that, when he told Patient A that all necessary tests had been done, he knew that that was incorrect. The Registrant also accepts that he knew that he had not performed an ophthalmoscopy or cycloplegic refraction at the time that he recorded that he had done so and that he therefore falsified the results of those tests. The Registrant therefore accepts that his conduct was dishonest.

23. The Registrant admits the facts alleged against him.

Stage 2: Misconduct and Impairment

Misconduct

24. With regard to the issue of misconduct, there is no definition but a review of some of the authorities provides some guidance, Lord Clyde 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".

25. 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."

26. As to seriousness, Collins J, in Nandi v General Medical Council [2004] EWHC (Admin), rightly emphasised, at paragraph 31 of his judgment,

    "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'."

27. In the case of Calhaem v General Medical Council [2007] EWHC 2606 (Admin) , at paragraph 39 at paragraph (1), Jackson J (as he then was) said:

    "(1) Mere negligence does not constitute "misconduct" within the meaning of section 35C(2)(a) of the Medical Act 1983. Nevertheless, and depending upon the circumstances, negligent acts or omissions which are particularly serious may amount to "misconduct".
    (2) A single negligent act or omission is less likely to cross the threshold of "misconduct" than multiple acts or omissions. Nevertheless, and depending upon the circumstances, a single act or omission, if particularly grave, could be characterised as "misconduct".
    (3) "Deficient professional performance" within the meaning of section 35C(2)(b) is conceptually separate from negligence and from misconduct. It connotes a standard of professional performance which is unacceptably low and which (save in exceptional circumstances) has been demonstrated by reference to a fair sample of the doctor's work.
    (4) A single instance of negligent treatment, unless very serious indeed, would be unlikely to constitute "deficient professional performance".
    (5) It is neither necessary nor appropriate to extend the interpretation of "deficient professional performance" in order to encompass matters which constitute "misconduct"."

28. The Registrant accepts that his record keeping for both Patient A and Patient B fell far below the standard expected of a registered optometrist.

29. It is agreed by both the Council and the Registrant that the Registrant's conduct breached the following paragraphs of the 'GOC Code of Conduct for Individual Registrants' (April 2010):

1. Make the care of the patient your first and continuing concern;
6. Maintain adequate patients' records;
7. Respect the rights of patients to be fully involved in decisions about their care;
10. Be honest and trustworthy;
16. Work with colleagues in the ways that best serve patients' interests;
19. Ensure your conduct, whether or not connected to your professional practice does not damage public confidence in you or your profession.

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

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

Impairment

32. There are a number of 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. These authorities discussed the way in which regulatory committees should approach impairment in this case at the second stage.

33. They are:
    - Cohen v GMC [2008] EWHC 581 (Admin);
    - Zygmunt v GMC [2008] EWHC 2643 (Admin);
    - Cheatle v GMC [2009] EWHC 645 (Admin);
    - Yeong v MC [2009] EWHC 1923 (Admin);
    - CHRE v NMC and Grant [2011] EWHC 927 (Admin)

34. As to the meaning of fitness to practise, in the case of Zygmunt v GMC [2008] EWHC 2643 (Admin), Mr Justice Mitting (at para 29) adopted the summary of potential causes of impairment offered by Dame Janet Smith in the Fifth Shipman Inquiry Report (2004, Paragraph 25.50). Dame Janet Smith considered that impairment would arise where a doctor has in the past, or is liable in the future to:

    a) present a risk to patients;
    b) bring the profession into disrepute;
    c) breach one of the fundamental tenets of the profession;
    d) act in such a way that his/her integrity can no longer be relied upon.

35. Factors (a), (b) (c) and (d) are engaged in this case.

36. 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 judgment 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".

37. 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 matters 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 types 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".

38. 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."

39. The parties agree, in the light of the evidence provided by the Registrant of insight and the absence of repetition since these events, that the risk of repetition in this case is low.

40. The Registrant accepts that his fitness to practise is currently impaired, in that it is necessary and in the public interest to make a finding of impairment of fitness to practise in order to uphold professional standards and maintain public confidence in the profession.

<u>Stage 3: Sanction</u>

41. 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).

42. 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

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

44. 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.

45. 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 optometrist being permitted to return to practice. The FTPC should consider the sanctions available, starting with the least restrictive sanction available, judging whether that sanction will be sufficient to achieve the over-arching objective, and, if it will not, moving on to consider the next least restrictive sanction.

46. In terms of aggravating features, the parties have identified the following: 1) dishonesty in relation to clinical tests, to the patient, and in the patient's records; 2) dishonesty in order to conceal a clinical mistake; 3) the risk of serious harm to Patient A in recommending elective surgery without having carried out all necessary tests; and 4) aggravating the risk of serious harm to Patient A by making false entries in Patient A's records.

47. In terms of mitigating circumstances, the parties have identified the following: 1) the Registrant's prompt admissions when challenged by his employer; 2) the level of insight demonstrated by those admissions and the Registrant's admissions to the Council; 3) the evidence of subsequent good practice; 4) remediation of record keeping failures and 5) there are no previous findings against the Registrant.

48. Having regard to the GOC's Indicative Sanctions Guidance, the parties agree that the appropriate and proportionate sanction is a suspension order for a period of three months. The parties agree that neither a review nor an immediate order are required.

49. The parties consider that it is neither proportionate nor sufficient to take no further action or to impose a financial penalty given the gravity of dishonesty in relation to clinical conduct.

50. The parties consider that conditional registration was not appropriate given the gravity of the conduct and the absence of identifiable areas of practice in need of assessment or retraining in light of the Registrant's subsequent good practice.

51. The parties agree that all of the relevant factors of paragraph 34.1 of the Indicative Sanctions Guidance are present and indicate that a period of suspension is appropriate:

    a. A serious instance of misconduct but where a lesser sanction is not sufficient;
    b. No evidence of harmful deep-seated personality or attitudinal issues;
    c. No evidence of repetition of behaviour since incident;
    d. The [parties are] satisfied the registrant has insight and does not pose a significant risk of repeating behaviour.

52. Whilst dishonesty can be an indicator of an attitudinal issue, the parties do not consider that it is an indicator in this case, where the dishonesty was admitted promptly and has not been repeated over a significant period of time.

53. The parties therefore consider that a period of suspension will be sufficient to declare and uphold proper standards of conduct and behaviour and maintain public trust and confidence in the profession, which is dependent upon the honesty of individual optometrists. In the absence of a significant risk of repetition, a suspension order is sufficient to protect the public.

54. In considering the length of the suspension, although this remains a matter for the Committee, it is submitted by the parties that three months is appropriate to reflect the nature of the concerns raised by the case, the registrant's acceptance of the allegations against him, and his previous and subsequent good practice.

55. The parties agree that the Registrant's conduct is not fundamentally incompatible with registered practice and that a sanction of erasure would be disproportionate. The Registrant has demonstrated insight into his misconduct and the risk of repetition is low. There is a public interest in allowing a good optometrist to return to practice.

56. The parties consider that a review hearing is not required given the low risk of repetition.

57. The parties do not consider that it is necessary to impose an immediate order given the low risk of repetition and resulting low resulting of patient harm. The parties consider that the public interest is sufficiently addressed by the imposition of the substantive suspension order.

Signed Date 03-11-2020

On Behalf of Nathan Smith

Signed

Date 4 November 2020

On Behalf of the General Optical Council"

DETERMINATION ON AGREED PANEL DISPOSAL (APD)

The Committee decided to accept the APR (Agreed Panel Report).

In addition to the APR, the Committee read the hearing bundle, and took into account the GOC'S APD Policy.

The Committee heard and accepted the advice of the Legal Adviser who gave advice as to the matters to be considered as to each stage, as well as the Committee's powers in respect of an APD.

Decision on Facts

The Registrant admitted all particulars of the Allegation by way of the APD. The Committee therefore found all factual particulars proved by way of these admissions.

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

Decision on Misconduct

In respect of misconduct, the Committee was aware that misconduct is a matter for its own independent judgment. The Registrant fell far below Standards 1, 6, 7, 10 and 16 of the GOC Code of Conduct. The Committee was aware that such breaches, in themselves, did not necessarily mean that misconduct should be found.

The Registrant was dishonest to Patient A, as well as dishonest in his record-keeping for Patient A. He breached his duty to carry out ophthalmoscopy in respect of Patient A, and, having failed to do so, recommended that Patient A met the suitability criteria for elective surgery, despite the fact that ophthalmoscopy was required in order to make such a recommendation. The Council's expert witness opinion is that ophthalmoscopy was necessary to ensure that there were no contra-indications to surgery, and that while the risk of finding such contra-indications was "slim", if they did exist there was a risk of post-operative complications and a risk to Patient A's sight.

In respect of Patient B, the Registrant breached his duty to ensure that all appropriate clinical examinations were recorded and recommended that Patient B met the suitability criteria for the elective surgery in question on the basis of an inadequate record. The Council's expert witness opinion is that the records of Patient B are "woefully incomplete", and that it is "simply not possible" to recommend a patient for the surgery without multiple tests and examinations, which were not recorded as having been done.

The Registrant's actions and omissions were serious and put both patients at risk of serious harm. The Committee was satisfied that the matters found proved were so serious as to fall sufficiently below the standards of conduct expected of the Registrant to constitute misconduct.

Decision on Impairment

The Committee then considered whether the Registrant's fitness to practise is currently impaired. The Committee was aware that impairment is a matter for its own independent judgment and that both public protection and the wider public interest should be considered.

The Committee considered the APR in which it is stated that the following limbs, taken from the test of impairment in the case of *CHRE v NMC and Grant* [2011] EWHC 927*,* are said to be "engaged":

i. that the Registrant presented a risk to patients;
ii. that the Registrant brought the profession into disrepute;
iii. that the Registrant breached a fundamental tenet of the profession;
iv. that the Registrant acted in the past in such a way that "his…integrity can no longer be relied upon".

The Committee did take into account the early admissions of the Registrant to his employer when interviewed at a local level, and the self-referral of the Registrant to the GOC. The Committee also took into account the lapse of time since the second incident (nearly 8 years), and the evidence of his reflection, insight and remediation.

The Committee was of the view that the Registrant's reflective statement was not particularly detailed. However, in the Committee's view, the more significant evidence of reflection, insight and remediation was the form of the evidence of the Registrant's good practice since January 2013. Such evidence was in the form of the Registrant's recent patient records, the positive references and testimonials about his practice, and the extensive CET which he has undertaken. The Committee read the testimonials including those from within the optometry profession who are aware of this regulatory process, who value him as a professional and who have employed him since the incidents. The testimonials speak highly of him as a professional and refer to his honesty. The Committee was of the view that, by way of his good practice since the incidents, the Registrant has demonstrated sufficient insight and remediation.

Nevertheless, the Committee was of the view that the misconduct was serious. It involved serious departures from expected standards which put patients at an unwarranted risk of harm. However, the Committee also agreed with the parties that, in light of the absence of repetition of the misconduct since, and the insight and remediation shown, the risk of repetition is low. Therefore, the Committee agreed that there is no ground for finding impairment on the basis of the need to protect the public. However, the Committee was of the view that there is a need to uphold the public interest in light of the serious nature of the dishonesty which occurred, and the past risk to patients. The Committee therefore decided that a finding of impairment is required to maintain confidence in the profession and to declare and uphold proper standards.

Decision on Sanction

The Committee was aware that the purpose of sanction in this case is to uphold the public interest, and that any sanction must be proportionate, and is not meant to be punitive. The Committee took into account the Indicative Sanctions Guidance (ISG) published by the Council.

The Committee considered the sanctions available to it from the least to the most severe. It was aware that it must consider the sanctions in ascending order of severity, and only move upwards if the lesser sanction is insufficient to address the concerns which it has identified.

The Committee considered the APR including the aggravating and mitigating features set out in that document. The Committee decided that to impose no sanction would be inappropriate because this matter is too serious, and the public interest would be undermined. The Committee was of the view that a financial penalty is not appropriate in this case and, in any event, would not address the public interest. The Committee was of the view that conditional registration would be inappropriate because there is no current issue with regard to the Registrant's clinical competency, and that no conditions could be formulated to address the public interest concerns arising out of the dishonesty.

The Committee then considered Suspension and noted that the ISG states that

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

1. *A serious instance of misconduct but where a lesser sanction is not sufficient;*
2. *No evidence of harmful deep-seated personality or attitudinal problems;*
3. *No evidence of repetition of behaviour since incident;*
4. *The panel is satisfied the registrant has insight and does not pose a significant risk of repeating behaviour…"*

In this case, the Committee agreed with the parties there is no evidence of any harmful deep-seated personality or attitudinal problems, in light of the Registrant's early admissions, self-referral and engagement with the regulatory process. There is no evidence of repetition since, and the Registrant has demonstrated considerable insight and the risk of repetition is low. It is for these reasons that the Committee decided that Suspension would be appropriate. In considering the length, the Committee carefully considered the aggravating and mitigating factors, and decided that in light of the strong mitigating factors, the successful record of practice since the incidents and the insight, remorse and remediation which the Registrant has demonstrated, 3 months would be proportionate and sufficient to give a clear message that the misconduct was unacceptable and would be sufficient to uphold the public interest.

The Committee did consider Erasure but in light of its reasoning in respect of an Order of Suspension, it decided that Erasure would be disproportionate.

The Registrant has already demonstrated sufficient insight, undertaken remediation, and presents a low risk of repetition. The purpose of the sanction is to mark the public interest alone and the Committee therefore decided that a review hearing would not be required. The Committee decided that the public interest would be sufficiently protected by the substantive sanction of Suspension for 3 months.

Immediate order

The Committee considered this matter and agreed with the reasons in the APR that an immediate order is not required in this case. This is due to the considerable insight which the Registrant has demonstrated, the low risk of repetition, and the Registrant's successful practice since the incidents, attested to by his testimonials. The Committee decided that the public interest would not be undermined if no immediate order were made.

Chair of the Committee: Anne Johnstone

Signature ……………………………………….. **Date: 9 November 2020**

Registrant: Nathan Smith

Signature **present via videoconference** **Date: 9 November 2020**

FURTHER INFORMATION
Transcript
A full transcript of the hearing will be made available for purchase in due course.
Appeal
Any appeal against an order of the Committee must be lodged with the relevant court within 28 days of the service of this notification. If no appeal is lodged, the order will take effect at the end of that period. The relevant court is shown at section 23G(4)(a)-(c) of the Opticians Act 1989 (as amended).
Professional Standards Authority
This decision will be reported to the Professional Standards Authority (PSA) under the provisions of section 29 of the NHS Reform and Healthcare Professions Act 2002. PSA may refer this case to the High Court of Justice in England and Wales, the Court of Session in Scotland or the High Court of Justice in Northern Ireland as appropriate if they decide that a decision has been insufficient to protect the public and/or should not have been made, and if they consider that referral is desirable for the protection of the public. PSA is required to make its decision within 40 days of the hearing (or 40 days from the last day on which a registrant can appeal against the decision, if applicable) and will send written confirmation of a decision to refer to registrants on the first working day following a hearing. PSA will notify you promptly of a decision to refer. A letter will be sent by recorded delivery to your registered address (unless PSA has been notified by the GOC of a change of address). Further information about the PSA can be obtained from its website at www.professionalstandards.org.uk or by telephone on 020 7389 8030.
Effect of orders for suspension or erasure
To practise or carry on business as an optometrist or dispensing optician, to take or use a description which implies registration or entitlement to undertake any activity which the law restricts to a registered person, may amount to a criminal offence once an entry in the register has been suspended or erased.
European Alert

The General Optical Council is required by Regulation 67 of the European Union (Recognition of Professional Qualifications) Regulations 2015 to inform all European competent authorities of any restrictions or prohibitions on a dispensing optician or an optometrist's practice. 'Competent authority' effectively means the relevant regulator for each EU member state.

The GOC is the competent authority for all opticians registered in the United Kingdom (UK).

If you have been made subject to either a suspension or conditions of practice order (whether interim or substantive), or to an erasure order, we hereby notify you of the following:

- Within 3 days of the Fitness to Practise Committee decision taking effect you will be the subject of an alert sent under article 56a(1) of the Directive;
- You have the right to appeal the decision to issue the alert or to apply for rectification of the decision; and
- You have the right to access remedies in respect of any damage caused by false alerts sent to other competent authorities.

The alert is sent securely via the Internal Market Information (IMI) system. The alert will include the following details:

- Your identity (full name and date of birth);
- Your profession;
- Your GOC registration number;
- The fact that the GOC is the national authority which adopted the decision on the restriction or prohibition of your professional activities;
- The scope of the restriction or prohibition;
- The period during which the restriction or the prohibition applies.

If you wish to appeal the decision to issue this alert then please see the information sheet below. Please note that this relates to your right of appeal against the issuing of the alert – see above regarding your right of appeal against a substantive decision.

A copy of the alert may be obtained via the contact details at the end of this document.

Please see the attached information sheet for further information.

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.

European Alert – Information Sheet

Please see the below Frequently Asked Questions (FAQs) which have been developed to assist you with this process and explain your options.

1. **Why has the General Optical Council (GOC) sent this alert?**

With effect from 18 January 2016 the GOC is legally required to issue alerts concerning all registrants whose practice has been prohibited or restricted – this includes all determinations of suspension, conditions or erasure issued by a Fitness to Practice Committee (FTPC), whether interim or substantive, and any extensions ordered by the High Court.

This legal requirement is placed on us by article 56a of Directive 2005/36/EC on the recognition of professional qualifications ('the Directive'). This article was adopted into UK legislation via Regulation 67 of the European Union (Recognition of Professional Qualifications) Regulations 2015. All other Member States must also comply with the provisions of the Directive and participate in the alert mechanism.

2. **What is the purpose of these alerts?**

The purpose of these alerts is to ensure public protection across all Member States. The intention is that each member state will be notified of any restrictions or prohibitions placed on UK registrants so that they are able to check this against their own registers and applicants. We will also be notified of any restrictions or prohibitions handed down to European optical professionals. This will assist us with safeguarding the public and maintaining the integrity of our registers.

3. **Why was I not consulted before the alert was sent?**

The terms of the Regulations are very strict; the alert must be issued within three days of the panel's decision coming into effect. The notification must be issued at the same time the alert itself is sent.

4. **Who will see the alert?**

The alert is sent securely via the Internal Market Information (IMI) system to the competent authority in each Member State.

In the UK, statutorily regulated health and social care professionals have to be registered with, and show that they meet the standards of, the relevant regulatory body, in order to practise their profession. The regulators control access to regulated professions, professional and vocational titles and professional activities which require specific qualifications, and are subject to national law. The European Commission term these organisations the 'competent authorities' although the exact duties of the competent authorities vary across member states, they are effectively the regulator (in the same way the GOC is) for each member state.

A competent authority has been defined by the European Commission as: *any authority or body empowered by a Member State specifically to issue or receive training diplomas and other documents or information and to receive the application and take the decision, referred to in Directive 2005/36/EC.*

5. **If there is a mistake in the alert can I apply for it to be corrected?**

If you notice a mistake in the alert (such as a typing error or incorrect information) then please contact the GOC and we will consider your request to amend the alert. Please note the GOC is not able to remove an alert at your request, see next question for further information.

6. What if I disagree with the alert being sent?

If you disagree with the sending of an alert then you have the right of appeal to the County Court. If you merely consider there to be a mistake within the alert then please refer to the above question.

Please note that the GOC is required to send the alert under European Law. With this in mind, and if you still wish to appeal to the County Court, then you may find the following government website useful: https://www.judiciary.gov.uk/you-and-the-judiciary/going-to-court/county-court/

If you attended the hearing and were given the FTPC decision document by hand then the period for submitting an appeal with the County Court is 28 days from the date you were handed the document. If the FTPC decision document has been sent to you by post, the appeal period is 30 days from the date the decision document was posted to you (there is an additional 2 days allowed to cover postage time).

7. Can the GOC assist me with my appeal against the issuing of an alert?

The GOC is unable to help you with your appeal – we strongly advise that you seek independent legal advice.

8. If I appeal an alert being sent, what effect will that have on the substantive decision made in relation to my registration?

There will be no effect on the decision made by the GOC affecting your registration. This would be an appeal against the issuing of the alert and not the substantive decision – they are two separate things and each have different appeal routes. If you require details on how to appeal the substantive decision (i.e. the erasure, conditions or suspension) then please refer to the separate guidance sheet enclosed with the decision letter regarding your substantive GOC case.

9. If I successfully appeal the issuing of an alert, what will happen to the alert itself?

While your appeal is ongoing the alert will remain on the IMI system but with a qualification to say that an appeal has been lodged.

On appeal the County Court may:

- Dismiss your appeal;
- Allow your appeal and direct the alert be withdrawn or amended accordingly.

If the County Court decide to allow the appeal then the GOC has a duty to delete the alert (or amend as appropriate) within three days of this decision.

10. What happens if the order made by the FTPC is revoked?

When an order is revoked by the FTPC (or the High Court) and that order was the subject of a European alert, we will close the alert within 3 days of the decision to revoke the order. When an alert is closed, all personal data is removed from the