

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

GENERAL OPTICAL COUNCIL

F(19)31

AND

NIALL McGIBNEY (SO-13138)

**DETERMINATION OF A SUBSTANTIVE HEARING
5 FEBRUARY 2020**

Committee Members:	Ms Sharon Gimson (Chair/Lay) Mr Kevin Connolly (Lay) Ms Carolyn Tetlow (Lay) Ms Philippa Shaw (Optometrist) Ms Judy Lea (Optometrist)
Clinical adviser:	N/A
Legal adviser:	Dr H Helmi
GOC Presenting Officer:	Ms Anna Ling
Registrant present/represented:	No and not represented
Registrant representative:	N/A
Hearings Officer:	Ms A Shabani
Facts found proved:	Particular 1
Facts not found proved:	None
Misconduct:	N/A
Impairment:	Impaired
Sanction:	Order of Suspension for 9 months (no review) No Immediate Order

Proof of service

The Committee heard an application from Ms Ling for the Council for the matter to proceed in the Registrant's absence. First, the Council was required to satisfy the Committee that the documents had been served in accordance with Section 23A of the Act and Rule 61 of the Fitness to Practise Rules 2013 (the Rules). The Committee accepted the advice of the Legal Adviser.

The Committee is satisfied that all reasonable efforts have been made to notify the Registrant of the hearing in accordance with the statutory provisions.

Proceeding in the absence of the Registrant

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.

Ms Ling applied for the hearing to proceed today. Ms Ling informed the Committee that the Registrant's last contact with the Fitness to Practise department of the Council was in October 2018. Ms Ling referred the Committee to recent emails from a Hearings Administrator dated 28 and 31 January 2020, asking the Registrant if he has any material to submit for today's hearing. A more recent email dated 3 February 2020 asks the Registrant whether he will be attending and represented at the hearing. Ms Ling informed the Committee that the Registrant did not reply to any of the emails.

The Committee accepted the advice of the Legal Adviser who referred to the principles which the Committee should consider, as well as the case of *GMC v Adeogba* [2016] WLR 3867.

The Committee noted that the Registrant had himself referred his conviction to the Council in October 2017, and also sent some further communications by email about the sentence on 29 June and 25 September 2018. He was therefore aware that his declaration of his conviction was a matter which the Council was likely to consider further and may lead to regulatory proceedings. However, in light of the more recent lack of engagement with the Council, the Committee was satisfied that he had voluntarily waived his right to attend. There is nothing before the Committee to indicate that the Registrant would be likely to attend on a future date if today's hearing were adjourned. The Committee did take into account the potential disadvantage to the Registrant in proceeding in his absence, but was satisfied that in the particular circumstances of his absence, the public interest in proceeding expeditiously outweighed that potential disadvantage. The Committee was satisfied that in the circumstances, it was fair, in the interests of justice and in the public interest to proceed.

ALLEGATION

The Council alleges that in relation to you, Niall McGibney (SO-13138), a registered student optometrist:

1. On 21 April 2017 at Maidstone Crown Court you were convicted of entering into or becoming concerned in an arrangement contrary to section 328(1) of the Proceeds of Crime Act 2002.

And by virtue of the facts set out above, your fitness to undertake training is impaired by reason of a conviction.

DETERMINATION

Admissions in relation to the particulars of the allegation

The Registrant admitted Particular 1 of the Allegation in a personal statement which was sent by email to the Council on 18 October 2017.

Background to the allegations

The Registrant is registered as a student optometrist with the Council. On 18 October 2017, the Registrant declared a criminal conviction to the Council, which was that on 21 April 2017 at Maidstone Crown Court he had pleaded guilty to a money laundering offence, namely that he entered into or became concerned in an arrangement which he knew or suspected facilitated the acquisition, retention, use or control of criminal property by or on behalf of another person. On 29 June 2018 he was sentenced to a 2 year Community Order with an unpaid work requirement to complete 160 hours within the first 18 months of the order, and a victim surcharge. The conviction relates to a money laundering enterprise involving approximately 11 defendants and 15 elderly victims. The Registrant's involvement was between 1 January 2014 and 1 July 2015.

The Registrant was arrested on 8 September 2015 and during a police interview he admitted his involvement including opening 3 bank accounts for the purpose of having money transferred. The Registrant identified the person who involved him to the police. The Registrant also admitted that he realised the money was not legitimate but continued because he was receiving a percentage of the money for himself. The Registrant told the police that he had informed the person who involved him that he wanted to stop but at the suggestion of that other person he agreed to find others to whom the money would be transferred in return for which the Registrant would receive a smaller percentage. The Registrant recruited 6 others and although he knew it was not right, he continued receiving a percentage of the money transferred.

Findings in relation to the facts

The Committee took into account the submissions of Ms Ling as well as the skeleton argument on behalf of the Council dated 22 January 2020. The Committee also took into account the Registrant's personal statement which was sent to the Council by email dated 18 October 2017.

The Committee accepted the advice of the Legal Adviser who reminded it that the burden of proof rests entirely on the Council. The Committee was mindful that burden of proof is to the civil standard. The Legal Adviser referred to Rule 40(3) of the Rules which states:

“Production of a certificate purporting to be under the hand of a competent officer of a Court in the United Kingdom...that a person has been convicted of a criminal offence...shall be conclusive evidence of the facts found proved in relation to that determination”.

The Committee read the Certificate of Conviction from Maidstone Crown Court produced on 18 January 2018 which has been electronically signed by an officer of the court. The Committee also took account of the Registrant's admission to the conviction in his personal statement.

The Committee therefore found Particular 1 of the allegation proved.

Findings in relation to proof of conviction

The Committee heard the submissions of Ms Ling. It has accepted the advice of the Legal Adviser.

As a result of its finding at the facts stage, the Committee is required to consider whether the Registrant's fitness to undertake training is impaired by virtue of the criminal conviction.

Findings regarding impairment

The Committee took into account the submissions of Ms Ling, as well as those contained in her skeleton argument. Ms Ling submitted that this was not a matter related to protection of the public, and that question (a) of the questions set out in the case of *CHRE v (1) NMC and (2) Grant* [2011] EWHC 927 relating to risk to patients is not applicable in this case. Ms Ling relied on the questions contained in paragraphs (b), (c) and (d) of that case. Ms Ling submitted that the Committee may consider that the Registrant's personal statement demonstrates sufficient insight and that there is no longer a risk of repetition. However, Ms Ling submitted that a finding of impairment of the Registrant's fitness to undertake training is required on wider public interest grounds.

The Committee took into account the Registrant's personal statement as well as the Judge's sentencing remarks.

The Committee accepted the advice of the Legal Adviser who referred to *CHRE v (1) NMC and (2) Grant* [2011] EWHC 927. 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 took into account the Registrant's youth at the time of the criminal behaviour (17 – 18 years of age), that the offences occurred some years ago, in 2014 – 2015, that the Registrant was [redacted] at the time, as well as the fact that the Registrant was of good character prior to the conviction. However, the Registrant's offending was serious, occurred over a prolonged period, and involved organisation and the recruitment of others.

The Committee also carefully considered the Registrant's personal statement. While it does express remorse and insight, the Committee was concerned that this document was sent to the Council on 18 October 2017. It is therefore more than 2 years old. In the Registrant's absence, the Committee was unable to test his insight and to ask him questions about his reflections as they exist as of today's date. Nor is there any information before the Committee about the degree of the Registrant's compliance with his sentence or any report from a probation officer.

In the Committee's view, the Registrant breached the following provisions of the Council's Standards for Optical Students (effective from April 2016):

“15.1 Act with honesty and integrity to maintain public trust and confidence in your profession.

16 Do not damage the reputation of your profession through your conduct

16.1 Ensure that your conduct, whether or not connected to your professional study does not damage public confidence in you or your profession.

16.3 Be aware of and comply with the law and all the requirements of the General Optical Council.”

The Committee considered the case of *Grant* which set out questions from the Fifth Shipman Report to be asked by it when considering impairment. In considering these questions the Committee agreed with the Council that there is no evidence that the Registrant put patients at risk of harm nor that he is liable to do so. The Committee concluded, when considering the remaining questions from the Fifth Shipman Report, that the Registrant had, in the past, by virtue of his conviction for serious criminal offending involving dishonesty, brought the profession into disrepute, breached fundamental tenets, and acted dishonestly.

In the absence of such information which the Committee has identified above, the Committee could not be satisfied that the Registrant currently has sufficient insight into his criminal offending and conviction. In the absence of evidence of current insight and meaningful reflection, as well as a lack of engagement with today's hearing, the Committee could not be satisfied that the Registrant is not liable in the future to repeat his criminal offending.

The Committee considered the wider public interest, namely the need to maintain public confidence in the profession and to uphold proper standards of conduct and behaviour. On the basis of the matters set out above, the Committee was of the view that a reasonable and well-informed member of the public, aware of all the evidence before the Committee, would be concerned to discover that the Registrant's current fitness to undertake training was not found to be impaired in light of the serious conviction involving dishonesty. After careful consideration, taking into account all the reasons set out above, the Committee was of the view that the need to maintain public confidence in the profession and to uphold proper standards would be undermined if a finding of impairment were not made in the particular circumstances of this case.

The Committee therefore finds that the fitness of Niall McGibney to undertake training as an optometrist is impaired on public interest grounds.

Sanction

The Committee heard submissions from Ms Ling who outlined the aggravating and mitigating factors in this case. Ms Ling informed the Committee that there had previously been another investigation by the Council into the Registrant in respect of matters unrelated to the matter found proved in this case. That case was closed by the case examiners, with no referral to a substantive hearing, although a warning had been issued to the Registrant on 7 February 2019. Ms Ling's position was that this warning was not relevant to the Committee's decision on sanction. Ms Ling suggested that the appropriate sanction would be a period of suspension, suggesting a period towards the longer end of the period of 12 months, which is the maximum period available.

The Committee accepted the advice of the Legal Adviser who referred to *CHRE v GDC (Fleischmann)* [2005] EWHC 87 and reminded the Committee that the choice of sanction is a matter for the Committee's independent judgment, that the purpose of sanction is to protect the public (if applicable) and uphold the public interest, and that any sanction must be proportionate. The Legal Adviser advised that the Registrant's warning should be disregarded by the Committee in coming to a decision on sanction as it involved no findings of fact and was unrelated in subject matter to the conviction in question.

The Committee took into account the Indicative Sanctions Guidance (ISG) published by the Council and reminded itself that its decision, that the Registrant's current fitness to undertake training is impaired, is based on the need to uphold the wider public interest only, with no public protection concerns.

The Committee identified the following aggravating factors:

- i. the conviction was in respect of an offence of dishonesty;
- ii. the offending occurred over a prolonged period;

- iii. the offending involved organisation and the recruitment of others by the Registrant in order to reduce his own exposure as well as to gain financially;
- iv. lack of engagement with the hearing process.

The Committee identified the following mitigating factors:

- i. no previous fitness to practise findings;
- ii. early admissions and remorse expressed during the police investigation, at court, and to the Council;
- iii. the Registrant's youth at the time of the offence;
- iv. the Registrant's [redaction] at the time of the offence;
- v. the offending occurred many years ago from January 2014 to July 2015
- vi. the offending occurred prior to the Registrant's registration as a student optometrist.

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 took into account that in principle the Registrant remains subject to a 2 year Community Order until 28 June 2020.

The Committee first considered, and discounted, taking no further action, because this would not be sufficient to address the public interest concerns in this case. This was not an exceptional case in which such an outcome may be appropriate.

The Committee next considered a financial penalty order but decided that this would not be appropriate in light of the nature of the conviction.

The Committee next considered conditional registration but decided that this would not be appropriate because there are no clinical concerns in respect of the Registrant, the Committee has no evidence that the Registrant would abide by conditions and conditions are not proportionate in view of the seriousness of the facts found proved.

The Committee next considered Suspension and para. 34 of the ISG. The Committee noted that the conviction was in respect of a serious offence involving dishonesty, where a lesser sanction is not sufficient. There is no evidence of harmful deep-seated personality or attitudinal problems, no evidence of repetition of the behaviour since the incident and the Committee considered that the Registrant has some insight. The Committee balanced these positive matters as well as the mitigating factors in this case, with the seriousness of the behaviour in question, as well as the ongoing Community Order, and the need to uphold the public interest. In these circumstances, the Committee was satisfied that a period of Suspension is the proportionate sanction. It determined that a period of 9 months was proportionate to reflect the gravity of the offending as well as the mitigating factors. In all the circumstances, a 9 month Suspension Order is sufficient to address the public

interest in order to maintain public confidence in the profession and uphold proper standards.

In coming to this decision, the Committee took into account the impact that this sanction will have on the Registrant, in that he will be unable to undertake training, and the financial and reputational impact. However, the Committee was satisfied that in weighing up the balance, the need to uphold the public interest outweighed the Registrant's interests.

The Committee did consider Erasure, but was of the view that this would be disproportionate and punitive, in light of the mitigating factors.

The Committee is minded, in this instance, not to order a review hearing. This is on the basis that the Registrant has not renewed his student registration, and that if he wished to return to the register in the future, he would have to apply again, and the Registrar would take this Committee's determination into account.

The Committee therefore imposes an Order of Suspension for a period of 9 months without a review.

Immediate order

The Committee heard submissions from Ms Ling who stated that she made no application for an immediate order on the basis that the Committee has found that there is no risk to patients in this case.

The Committee accepted the advice of the Legal Adviser.

The Committee took into account that the Registrant has withdrawn from his studies and that he did not pay his student retention fee last year. For him to re-enter the registry he would have to re-apply to the Registrar.

The Committee has decided not to impose an immediate order. In line with the Committee's previous decisions on impairment and sanction, an immediate order is not necessary to protect the public. The public interest will be served by the imposition of the substantive sanction in due course. In light of the need for the Registrant to re-apply to gain entry to the register, the Committee did not consider that it was in the public interest, or in his own interests to impose an immediate order.

Revocation of interim order

There was no interim order in place.

Chair of the Committee: Sharon Gimson

Signature **Date: 5 February 2020**

Registrant: Niall McGibney

Signature **Date: 5 February 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
<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. 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).</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.
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 alert system.