BEFORE THE FITNESS TO PRACTISE COMMITTEE
OF THE GENERAL OPTICAL COUNCIL

GENERAL OPTICAL COUNCIL

AND

AMAR SHAH - (01-28580)

DETERMINATION OF A SUBSTANTIVE HEARING
1-3, 10-11 OCTOBER 2019

| Committee Members:          | Ms V Paterson (Chair/Lay)      |
|                            | Ms R O’Connell (Lay)          |
|                            | Ms A Robertson-Rickard (Lay)  |
|                            | Ms C Roberts (Optometrist)     |
|                            | Dr C Collin (Optometrist)      |
| Legal Adviser:             | Mr G Coll                      |
| GOC Presenting Officer:    | Mr B Rich (Counsel)            |
| Registrant present/represented: | Yes represented              |
| Registrant representative: | Ms L Barnfather (Counsel)      |
| Hearings Officer:          | Mr T Yates                     |
| Facts found proved:        | None                           |
| Facts not found proved:    | All facts found not proved     |
| Misconduct:                | N/A                            |
| Impairment:                | N/A                            |
| Sanction:                  | N/A                            |
| Immediate order:           | N/A                            |
ALLEGATION

The Council alleges that you, Mr Amar Shah, a registered optometrist:

1) On 4 February 2016 you conducted a sight test on Patient A and you abused your professional position, in that:
   a. On one or more occasions, in the course of a single examination, you touched Patient A in an inappropriate and sexual manner under the guise of conducting examinations;

2) On 4 February 2016 you carried out a sight test on Patient A and:
   a. You used an inappropriate examination technique, and/or
   b. You failed to obtain valid consent from Patient A before conducting the examination.

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

DETERMINATION

Admissions in relation to the particulars of the allegation
The Registrant did not admit any particulars of the allegation.

Preliminary and procedural matters
The parties did not raise any preliminary issues.

The Committee members made potential conflict declarations. Two Committee members had in the past worked for the same company as the Registrant but at different branches of that company. They had no knowledge of the Registrant or the Allegation and had no current connection with the company. The parties had no observations to make in regard to the declarations. The Committee heard and accepted the advice of the Legal Adviser that the reasonable and informed observer must be satisfied that there could be no objective perception of partiality or bias as much as no actual bias. The Committee considered that there was no reason not to continue to hear the case.

At the outset of the hearing, Mr Rich for the General Optical Council ("the Council") advised the Committee that it should treat Allegations 1 and 2 as alternatives. Allegation 1 was related to alleged sexualised misconduct by the Registrant. If
Allegation 1 were to be proved, then Allegation 2 would fall away. Only if Allegation 1 was not proved should the Committee then go on to consider Allegation 2. Allegation 2 was said to provide for the possibility that the Committee might be satisfied that the Registrant had deliberately touched Patient A’s breasts or chest during the examination, but that a sexual intention or purpose in doing so had not been made out.

Hearing partly in private

The Committee considered whether parts of the hearing should be conducted in private [redacted]. The parties were in agreement with this proposal. The Committee accepted the advice of the Legal Adviser and determined to hear those matters [redacted] in private in terms Rule 25(2)(b) of the General Optical Council (Fitness to Practise) Rules Order of Council 2013 (the Rules). Certain personal details in relation to more than one witness were discussed in the course of their evidence and in order to facilitate the relevant witnesses giving evidence without restriction, the public were excluded, and the hearing continued in private for those parts only.

Admission of evidence

During the hearing, Ms Barnfather, who was cross-examining Person Z for the Registrant, invited the Committee to receive an additional exhibit for the Registrant. It was said to be a telephone record made by a Council officer of a discussion with a senior person at [redacted] Branch, London (“the Branch”) on 12 September 2017 which had been made available to Ms Barnfather as unused material by the Council. Mr Rich objected to the document being admitted as evidence. He submitted that it was multiple hearsay and so of little value. In his submission, he stated it could have been produced much earlier and supported by direct testimony. He said that he was now seriously disadvantaged by it being introduced at this late stage. Ms Barnfather accepted that the record was hearsay and that she wished to rely on the document for the truth of its contents. She said that the Council had known about the contents of the document as the Council’s officer had created it.

The Committee heard and accepted the advice of the Legal Adviser. He reminded it that Rule 40(1) and (2) allowed evidence to be admitted in wider circumstances than in civil proceedings, but that if evidence would be disallowed in civil proceedings the Committee may only allow it in a Fitness to Practise hearing if it would be just to do so.

The Legal Adviser advised the Committee that it had power to decide the relative weight to be attached to hearsay in due course; but first the Committee had to be satisfied that it was fair to allow the document and also that it was relevant.

The Committee understood that the purpose of the document was to undermine the credibility of Patient A and/or Person Z. The Committee considered that the correct interpretation of the contents of the document for that purpose was critical. The Committee considered that the best source for that would have been the live testimony of the two people directly involved in the call. The Committee had been informed that the note was ambiguous and was concerned that it could not be
clarified or challenged. It's uncertainty of meaning could not purposefully assist the Committee in determining the credibility of a witness. It could only distract attention from the issues that could be resolved by reliable and authentic evidence. Having considered all of these matters, the Committee determined that it would not allow the document to be admitted for reasons of fairness.

Background to the allegations

This is a substantive hearing in respect of Mr Amar Shah (the Registrant) an Optometrist registered with the Council since 23 February 2015.

On 4 February 2016, the Registrant was employed as an Optometrist at the Branch. He had been qualified for a year. At this time, he expected to see about 15 patients a day for a range of reasons which could include conventional eye examinations following a pre-examination screening test. Generally, patients who were to have eye examinations were allocated a total of 30 minutes for the whole process and were then given further time to choose frames.

The Registrant conducted Patient A’s eye examination at about 6pm. Patient A recalled that part of the examination related to her vision when reading from a computer screen, which she referred to as ‘the computer test’.

Subsequent to this examination Patient A made a police complaint against the Registrant. She said he had positioned himself in front of her, holding a chart of letters against his chest. He had then stretched out and extended his left arm placing his hand under her right armpit and resting the palm of his hand on the outer aspect of her right breast. He withdrew his arm after a moment and repeated these actions with his right arm and hand, touching Patient A’s left breast in the same way.

As a result of the complaint, the Registrant was interviewed under caution a few days later. He denied touching Patient A in the manner complained of and could not remember her or the examination. Later, police discontinued the investigation and no further action was taken.

Findings in relation to the facts

The Committee heard evidence on behalf of the Council from Patient A and Person Z (Patient A’s friend), and from the Registrant on his own behalf.

Patient A’s evidence

In private

[Redacted]

In public

Patient A was close friends with Person Z, the second witness for the Council. Person Z had recommended her to attend the Branch for an eye examination. On 4 February 2016, Patient A was to be an overnight guest of Person Z and Person Z’s husband. Person Z drove Patient A to the Branch in time for a 6pm appointment,
which could have been with any Optometrist on duty but was with this Registrant who by chance next became available.

Patient A’s evidence was that the pre-screening process was uneventful, but the wait in the corridor to be seen in room 4 was an unexpectedly long ten minutes. She stated that the weather was cold at that time, and that she had travelled to the premises wearing a coat and scarf. Once taken into room 4 by the Registrant, she felt oppressed by the unreasonable heat blowing down onto her in the patients’ chair. In her view, the air conditioning temperature had been set far too high so she had to remove her coat and scarf. She began to perspire and that caused the examination equipment to slip down her nose during the examination. She pointed out her discomfort to the Registrant who was the only other person in the room, but she stated that he had responded that he was unable to turn the heat down, as the remote control was not working due to the batteries being run down. Patient A’s evidence was that the door was closed throughout the examination.

Patient A recalled in evidence that throughout the examination leading up to ‘the computer test’, the Registrant had repeatedly asked her if she was ‘alright’ and sought, on the face of it, to reassure her. She later wondered whether his attentiveness was linked to his later touching of her and may have been a way of customising her to accept an intrusion as being normal and unremarkable. Patient A stated that more than once, and with no clear reason, the Registrant had turned from his task and looked towards the door. She said in evidence that it was as though he knew that he was about to do something wrong and, she later concluded, had planned to do something wrong by making the room far too hot in advance. This had the effect of making her remove her coat and scarf.

Patient A observed that the Registrant’s hands were shaking during the examination. She considered that this too was revealing of the Registrant’s true intent during the examination. To her, he appeared in retrospect to have been behaving nervously.

Patient A stated that towards the end of the examination the Registrant carried out a test of her ability to read print on a computer screen during work. She said that he called this a ‘…computer test’. She had acknowledged that part of her work required reading from a VDU. She stated that the Registrant placed himself in front of her position in the chair. He placed a chart of letters on his chest to simulate a computer screen view and asked Patient A to read the chart. Patient A remembered that the Registrant first extended his left arm towards her, placed his fingers in contact with her right armpit and caused the palm of his hand to rest on the side of her right breast. The contact was momentary but startling for Patient A and caused her immediately to sit more upright. The Registrant withdrew his hand and arm but then repeated the process again with his right arm and hand, this time his right hand coming to rest on the outside of her left breast. Patient A’s evidence was that she believed that her surprise must have been obvious, and the Registrant sought to reassure her, saying that the process was an ‘…old fashioned way of doing it.’ She was upset by the incident. It seemed so out of place with the Registrant’s young age and the incongruousness of the procedure. However, the Registrant continued with the examination, recording results and behaving as though everything was normal.
Patient A said that the Registrant had placed the palm of his hand flat against each of her breasts in turn. He did not however stroke her or cup his hands.

Finally, Patient A remembered that the Registrant repeated direct ophthalmoscopy but did not explain why. This time, his physical contact extended to placing some part of his anatomy against her chest so that she stated that she felt weight upon her chest. She was unable to identify what part of his anatomy was involved.

Patient A’s evidence was that she felt ‘…violated’ by the Registrant’s actions.

Patient A said that she was upset after the examination. She accepted that she spent some time choosing and then paying for spectacles and made no immediate complaint or report to her close friend Person Z or the staff member attending to her.

Patient A said that in the car journey to Person Z’s house, she asked Person Z if she had ever had a ‘computer test’ explaining what had happened. Person Z told her that she had not. After discussing matters with Person Z’s husband and then a colleague who was a police officer, she made a complaint to the police the following day.

Patient A gave evidence that she had initially doubted herself and asked Person Z ‘…is this something that happens’. She said in evidence that she ‘…just knew it wasn’t right. He was just a young boy, I am old enough to be his mother. Am I imagining it or am I feeling uncomfortable for the right reasons? She said that she had asked herself could someone be so deceitful or mischievous? She recalled that she was looking to Person Z and others for affirmation that she ‘…wasn’t going crazy’.

In cross-examination, Patient A did not accept that if there was contact during the ‘computer test’ that it was accidentally on her shoulder in consequence of the Registrant using his extended arm to gauge the distance of her body from the chart for the purposes of the test.

Patient A gave evidence that having reflected that upon a number of seemingly incongruous actions by the Registrant in the examination, she concluded that he must have intended to do something wrong. She did not accept that it should have taken the Registrant ten minutes to prepare room 4. She wondered whether the Registrant had deliberately boosted the heat control of the air-conditioning unit to make the position beneath it very hot for Patient A, causing her to remove her outer garments.

**Person Z’s evidence**

Person Z gave evidence that she accompanied her friend Patient A to the Branch. She remembered that Patient A returned from the pre-screening uneventfully but was quiet after the examination in room 4 which was uncharacteristic. Nothing was said about the examination until the pair were in Person Z’s car making the short return journey to Person Z’s home.

She recalled that Patient A was upset and asked her whether Person Z had ever had a ‘computer test’. Patient A explained that during the computer test the Registrant
had placed his fingers under Patient’s A’s armpit and touched her breasts with the palm of his hand, first with his outstretched left hand on the outside of her right breast and then his right hand on her left breast. She said that the Registrant had tried to reassure Patient A that this was an ‘old fashioned’ way of doing things. Person Z stated that Patient A had raised no other concerns about the examination.

Person Z was concerned as was her husband who later discussed the matter with them both. On his advice, Patient A spoke on the phone to a colleague who was also a police officer, and that led to a formal police complaint being made by Patient A.

**Expert evidence**

The Committee was provided with expert reports from Dr Anna Kwartz and Mr Ian Cameron. The expert evidence was agreed by the parties and was to the effect that the method described by the Registrant to assess intermediate vision was appropriate, but that a deliberate touching of a patient’s breast could never be appropriate.

**The Registrant’s evidence**

The Registrant gave evidence that he did not recall either the examination or Patient A. He said that he first knew something was wrong several days later, when he responded to a police enquiry asking him to make contact. He stated that later that day, he attended a police station where he was interviewed and denied the allegation.

The Registrant had no memory of the consultation and did not have the benefit of the patient record to jog his memory at the time of the police interview. He was able to give evidence to the Committee of his normal practice and explained his normal examination procedures. He also drew a plan of the examination room and the Branch. In relation to his use of the ophthalmoscope, he explained that at that early stage of his career he was not confident in his use of the Volk indirect ophthalmoscopy technique and used the handheld ophthalmoscope to confirm his findings. He accepted that some patients find the close proximity of the clinician during direct ophthalmoscopy uncomfortable. He said that there would never be a reason to touch a patient on the breast. In his understanding, the use of an extended arm towards the patient’s body is a guide to assess the distance between the patient and the chart, and as a student his extended arm reach was measured at approximately 66cm. Knowing this, he said that he had used his arm reach to estimate the intermediate working distance associated with a Vision Display Unit. He did not call this a ‘computer test’ but he said that he would have used the terms ‘working distance’ and ‘computer’. In his statement the Registrant said “I dispute Patient A’s description of how I measured the distance between us so that I can check her intermediate addition. I would not have placed my hand under or near to her armpit and would not have made any contact with her breast. If any inadvertent physical contact was made (I have no recollection of this happening), this would have been my fingertips momentarily and unintentionally making contact with the front of her shoulder.”
The Registrant stated that he generally carried out his practice in examination room 4 which was the most remote room from the open and public reception area. He stated that the examination room door had a wired glass panel about six inches wide and two feet in height. This allowed observation from the corridor. The Registrant maintained that other staff members could see inside and that on occasions staff members would enter unannounced, even during examinations. The Registrant said that his usual practice was to have the door ajar.

In relation to Patient A’s assertion that the door was closed in room 4, the Registrant could not say that this was untrue, only that it was not his usual practice.

The Registrant stated that he did not recall the examination at all, but he accepted that from time to time he might well have looked at the door. He said that ordinarily it might take him ten minutes to prepare room 4. His room was the one used also as a store for deliveries received from the back door. He may have had to tidy and sanitise the room prior to commencing Patient A’s appointment.

In response to questioning, the Registrant stated that the shop was not normally quiet at that time of the day but was normally moderately busy. The Registrant denied having increased the room temperature. He explained that the adjacent contact lens teaching area relied on the same heating unit and a colleague would regularly increase the temperature when working in that adjacent area. The Registrant continued that the heater’s remote control was often not working so he could not modify the temperature to assist a patient, or for reasons of his own. He stated that he thought that he naturally had an apologetic manner which others had commented on. [Redacted]. He was clear that he would not have touched Patient A’s breasts.

The Registrant said that he had now modified his practice. He no longer relied so much on using direct ophthalmoscopy as he was now much more confident in using Volk indirect ophthalmoscopy. He no longer used his arms as a means of measuring distance so as to reduce the possibility of misunderstanding.

Closing submissions

Mr Rich invited the Committee to find that Patient A and Person Z were truthful and reliable witnesses, who were accurately recalling an upsetting event. He submitted that there was no reason to invent such an incident and there was no reason to believe that it had been misinterpreted or misunderstood. He invited the Committee to find that a sexual motive for the Registrant’s actions was inherent in the evidence given and that the Committee should find Allegation 1(a) proved. If the Committee was unpersuaded that a sexual purpose lay behind the Registrant’s deliberate actions in touching Patient A’s breasts and then later pressing his body against hers in the ophthalmic examination, the Committee should find Allegation 2(a) proved. He left it to the Committee to decide how best to approach Allegation 2(b) having explained that it could be found proved since a deliberate but non-sexual touch would still require to be consented to.
Ms Barnfather invited the Committee to find that neither of the allegations was proved. She said that the Committee should prefer the credible and consistent evidence of the Registrant, who had no other complaints against him. He had a large number of testimonials in support of his good character.

The Committee heard and accepted the advice of the Legal Adviser who reminded the Committee that the Council carried the burden of proof to the civil standard. The Committee could accept some parts of a witness’ testimony and disregard other parts that it found unsatisfactory. The Registrant’s good character entitled him to say that it should be no simple matter to find that on this one occasion and uncharacteristically, he had behaved as alleged.

**Decision**

The Committee considered carefully all of the evidence. It accepted the expert evidence. It accepted that both Patient A and Person Z were credible, and both had sought to assist the Committee to the best of their abilities. Patient A was the only person who gave evidence in direct support of the allegations, which on its own was enough to find the allegations proved if her testimony was accepted. The Committee found her to be an honest person who responded well to searching and at times probing cross-examination. However, whilst the Committee did not question Patient A’s honest belief in what occurred, it did question whether she had reliably recalled or accurately interpreted what had happened. It noted inconsistencies in her account, for example, stating in her evidence to the Committee that the direct ophthalmoscopy was conducted with the light on but in her police statement, stating that the light was off.

The Committee noted that Patient A appeared initially uncertain about the appropriateness of what had happened in room 4. Patient A acknowledged that the touches to her breasts that she said she had experienced were “fleeting” and “momentary”. Patient A’s initial uncertainty, which appeared to have been resolved by discussion with her friends gave the Committee cause to look closely at the reliability of her evidence related to the touching of her breasts. It also noted that Patient A made no complaint to Person Z in relation to the alleged inappropriate contact made during direct ophthalmoscopy. The Committee noted that Patient A accepted during cross examination that it could have been the Registrant’s arm that touched her during direct ophthalmoscopy rather than his chest. The Committee was not persuaded that it could draw the same inferences from the surrounding circumstances of the examination as Patient A had done. The Committee accepted the Registrant’s explanations as to the usual heating of the room, his hands shaking and his usual manner. The Committee considered that overall, it was not satisfied by Patient A’s reliability, without in any way suggesting a personal failing on her part.

The Committee found that the Registrant had given credible evidence. The Committee accepted the Registrant’s evidence that he had seen around 45 more patients between seeing Patient A and being contacted by the police to make a statement several days later and that he therefore had no specific recollection of the examination.
The Committee also considered an extensive number of positive testimonials submitted by the Registrant including those from professional colleagues. It was able to take these into account at this stage to the limited extent of considering how far they supported the proposition that a person of good character would be unlikely to behave uncharacteristically. The Registrant had no adverse professional history. The Committee accepted the Legal Adviser’s advice that in law, although the standard of proof is always the balance of probabilities, cogent evidence was required to prove such an allegation against a person of good character.

Having taken account of all the evidence, the Committee was not satisfied the Council had proved its case on the balance of probability in relation to Allegation 1. It concluded that it was inherently more likely that any touching that may have occurred during Patient A’s eye examination was accidental rather than intentional. Allegation 1 is therefore not proved.

The Committee did not interpret Allegation 2 to encompass accidental touching. Having concluded that no intentional touching occurred for the reasons stated above, Allegation 2 is not proved.

Accordingly, the Committee did not find Allegations 1(a), 2(a) or 2(b) proved.

**Revocation of interim order**

In accordance with Rule 46(19) the Fitness to Practise Committee revoke the interim order of conditions previously imposed on Mr Shah on 20 September 2017. The interim order is revoked from Friday 11 October 2019. This direction has been added to the determination, with the agreement of all parties and the committee, on 17 October 2019.
## 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](http://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.

### 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.