

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

GENERAL OPTICAL COUNCIL

F(19)20 and F(19)21

AND

MR BARRY CHURCH (D-4248)

**DETERMINATION OF A SUBSTANTIVE HEARING
10-11 DECEMBER 2019**

| | |
|--|--|
| Committee Members: | Mr G White (Chair/Lay) Mr P Curtis (Lay) Ms S Hamilton (Lay) Mr I Taylor (Dispensing Optician) Ms J Ames (Dispensing Optician) |
| Clinical adviser: | n/a |
| Legal adviser: | Ms M Ashworth |
| GOC Presenting Officer: | Mr G Micklewright |
| Registrant present/represented: | Not present and not represented |
| Registrant representative: | n/a |
| Hearings Officer: | Ms A Riaz |
| Facts found proved: | F(19)21 – 1(a)(i) to (iii), 1(b)(i) to (iii) F(19)20 – 1, 2(a)(i) and (ii), 2(b)(i) to (iii) |
| Facts not found proved: | None |
| Misconduct: | F(19)21 – yes |
| Conviction: | F(19)20 – yes |

| | |
|-------------------------|------------------------------|
| Impairment: | Yes |
| Sanction: | Erasure |
| Immediate order: | Suspension ordered forthwith |

Proof of service

The Committee heard an application from Mr Micklewright, on behalf of the General Optical Council (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 Opticians Act and Rules 34 and 61 of the Fitness to Practise Rules 2013 (the Rules). The Committee accepted the advice of the Legal Adviser.

The documentation before the Committee showed that the Hearings Manager had sent the Registrant, by special delivery, a letter, dated 23 July 2019, attaching the two sets of allegations [F(19)20 and F(19)21], providing the information as required under Rule 28.

Two notifications of hearing were sent to the Registrant on 17 September 2019, one relating to the conviction allegation [F(19)20], and the other relating to the misconduct allegation [F(19)21]. Both notifications were sent in the same envelope by special delivery, and both informed him that the date of the hearing would be 10 to 12 December 2019, as required under Rule 34.

On 30 September 2019, a procedural hearing was held, at which a differently constituted fitness to practise committee directed that the two allegations be joined and heard together.

On 21 November 2019, a further letter, containing an updated Notice of Inquiry with the joined allegations was sent to the Registrant by special delivery. This notice confirmed the date, time and venue of the hearing.

The Committee is satisfied that all reasonable efforts have been made to notify the Registrant of the hearing.

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. The Committee accepted the advice of the Legal Adviser. The Committee was mindful that the discretion to proceed in the absence of a Registrant must be exercised with the utmost care and caution.

The Committee had regard to the correspondence between the Registrant and the Council. The Committee noted that there had been no response from the Registrant to any of the notices regarding the hearing or the reminders about the hearing. He had not responded to the notification sent to him on 23 July 2019; the Notices sent to him on 17 September 2019; nor to the updated notice of 21 November 2019. Further, he had not responded to an email from the Council, dated 17 November 2019, inviting him to indicate whether he would be attending the hearing; nor had he responded to an email from the Council, dated 2 December 2019, noting the date of the hearing and inquiring whether he had any material he wished to put before the Committee.

The Committee noted that the Registrant had sent an email, dated 10 April 2018 asking the Council to cease sending him communications, and stating:

"I shall not be attending any further hearings and if you continue sending recorded delivery correspondence I shall refuse to accept them".

The Committee also noted that the last communication from the Registrant appeared to be an email, dated 28 August 2018, when he informed the Council that he had no intention of responding to what he described as the Council's 'pointless requests'.

The Committee was satisfied that the Registrant was aware of the hearing scheduled to take place and its nature and purpose. It concluded that he had decided not to attend, thereby voluntarily waiving his right to do so. The Committee determined that it would be in the public interest for the hearing to proceed in the Registrant's absence.

Application to amend

The GOC applied to amend the stem of the allegation of F(19)20 as the Registrant had incorrectly been described as a registered optometrist, whereas he was on the register as a Dispensing Optician. Having heard and accepted the advice of the Legal Adviser, the Committee decided to allow the application. It was satisfied that there would be no prejudice to the Registrant in allowing the application. The amendment would accurately describe the Registrant's registered status, and it did not materially change the nature of the allegations against him.

ALLEGATIONS (as amended)

ALLEGATION F(19)21

The Council alleges that you, Barry Vincent Church (D-4248), a registered Dispensing Optician:

- 1) *Failed to engage with the Council's investigation into concerns about your [REDACTED], in particular you:*
 - a) *Did not provide to the Council your consent in order for the Council to obtain your [REDACTED] records, despite emails to you on:*
 - i) 13 October 2017
 - ii) 27 November 2017
 - iii) 16 January 2018
 - b) *Refused to participate in the [REDACTED] process as directed by the Investigation Committee on 4 July 2018 and communicated to you by letter from the Council dated 26 July 2018 in that you:*
 - i) *did not consent to the release of your [REDACTED] or any other information from your [REDACTED] and any other doctors who may have examined you;*
 - ii) *did not agree to be examined by two [REDACTED] appointed by the GOC; and*
 - iii) *did not agree to submit to [REDACTED].*

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

ALLEGATION F(19)20

The Council alleges that you, Barry Vincent Church (D-4248), a registered Dispensing Optician:

1. *On 22 November 2016 were convicted before the Cambridgeshire Magistrates' Court of theft by employee, contrary to sections 1(1) and 7 of the Theft Act 1968.*
2. *On 06 January 2017, as a result of paragraph 1 above, before the same Court:*
 - a. *Were sentenced to 26 weeks' imprisonment, suspended for 24 months, with:*

- i. Supervision for 24 months; and*
 - ii. A rehabilitation activity requirement for 30 days.*
- b. Were ordered to pay:*
- i. £3,311.50 compensation*
 - ii. £115.00 victim surcharge*
 - iii. £85.00 prosecution costs.*

AND, by virtue of the above, your fitness to practise is impaired as a result of your conviction.

DETERMINATION

Background to the allegations

The Registrant is registered with the Council as a Dispensing Optician. The Registrant was employed as the Store Manager of the [REDACTED] in [REDACTED]. He had been working at the store for approximately three years and had held the position of manager since January 2015. In that role, the Registrant was authorised to issue refunds.

In September 2016, concerns came to light concerning an abnormally high number of refunds being processed through the store system without a customer code and carried out by a single store member. An investigation was conducted by [REDACTED], which identified that between 20 July 2015 and 29 October 2016, the Registrant had authorised 85 refunds, of which 57 were believed to be fraudulent.

Consequently, covert CCTV was set up on 13 October 2016. On 14 October 2016, the Registrant was recorded as removing £80 in cash from the takings and putting it into his pocket.

On 1 November 2016, the Registrant was interviewed under caution by a [REDACTED] Financial Risk Consultant. The Registrant made full admissions of theft in that interview. He admitted that between 20 July 2015 and 29 October 2016, he had stolen a total of £3311.50.

On 5 November 2016, the Registrant referred himself to the Council, stating that he had been dismissed from his employment on a charge of serious misconduct, and that he had been charged by the police for theft by employee and was bailed to attend [REDACTED] on 22 November 2016.

On 22 November 2016, the Registrant appeared at Cambridgeshire Magistrates' Court and pleaded guilty to an offence of theft, in that between 20 July 2015 and 29 October 2016 he stole cash to the value of £3311.50 belonging to [REDACTED]. On 6 January 2017, the Registrant was sentenced to a term of imprisonment of 26 weeks, suspended for 24 months.

The first allegation against the Registrant is that his current fitness to practise is impaired by reason of that conviction.

On 21 June 2017, in response to correspondence from the Council, the Registrant sent an email to the Council. Within that email, he indicated that his conduct in relation to the theft matters had arisen out of [REDACTED]. Consequently, the Council started an investigation into the [REDACTED] and wrote to him on a number of occasions seeking his engagement with that investigation.

On 13 October 2017, correspondence was sent to the Registrant seeking his signed consent to obtain a [REDACTED]. This request was chased up on 27 November 2017 and 16 January 2018. No response was received.

On 10 April 2018, the Registrant sent an email to the Council asking it to cease sending him correspondence. In the email, the Registrant stated that he had no intention of returning to the optical profession and that he would not be attending any further hearings.

On 26 July 2018, the Council sent, by recorded delivery a copy of the Investigation Committee decision directing the Registrant to participate in the [REDACTED] process.

On 28 August 2018, the Registrant sent an email to the Council, stating that he considered that any assessments were irrelevant, and that he would not be responding to the requests.

The second allegation against the Registrant is that he allegedly failed to engage with the Council's investigation into concerns about his [REDACTED], which amounts to misconduct, and that his current fitness to practise is impaired by reason of that misconduct.

Findings in relation to the facts

The Committee heard and accepted the advice of the Legal Adviser. The Committee understood that the burden of proving each individual fact rests on the Council and that the Council will only be able to prove a fact if it satisfies the required standard of proof, namely the civil standard, whereby it is more likely than not that the alleged incident occurred.

Allegation F(19)20 (conviction matters)

Particular 1

The Committee finds particular 1 proved.

Rule 40(3) of the Fitness to Practice Rules 2013, provides that production of a certificate of conviction shall be conclusive evidence of the offence committed. The Committee had regard to the signed memorandum of conviction provided by the Cambridgeshire Magistrates' Court for the court register of 6 January 2017. The Committee was satisfied from the recorded information within the memorandum, that the Registrant had been convicted before the Cambridgeshire Magistrates' Court of theft by employee, contrary to sections 1(1) and 7 of the Theft Act 1968.

Particular 2

The Committee finds particular 2 proved in its entirety.

The Committee was satisfied from the recorded information within the memorandum that the Registrant had been sentenced on 6 January 2017 to 26 weeks' imprisonment, suspended for 24 months, [particular 2(a)], with supervision for 24 months [particular 2(a)(i)], and a rehabilitation activity requirement for 30 days [particular 2(a)(ii)]. It was also satisfied from the recorded information that the Registrant was ordered to pay £3,311.50 compensation [particular 2(b)(i)], £115.00 victim surcharge [particular 2(b)(ii)]; and £85 prosecution costs [particular 2(b)(iii)].

Allegation F(19)21 (Failure to engage matters)

Particular 1(a)

The Committee finds particulars 1(a)(i), 1(a)(ii), and 1(a)(iii) proved.

The Committee first considered whether the Registrant was under a duty to engage with the Council's investigation into concerns about his [REDACTED]. It was satisfied that the Registrant had raised the issue [REDACTED], in his email to the Council dated 21 June 2017. Following such disclosures, the Committee considered that the Council was required to investigate [REDACTED], and it was satisfied that the Registrant had a corresponding duty to engage in the investigation.

The Committee had regard to the email, dated 13 October 2017, sent to the Registrant by the Council. In that email, it was explained to the Registrant that the Council was required to make inquiries on issues which may affect a Registrant's fitness to practise, and his consent was sought for the Council to obtain his [REDACTED]. The Registrant did not respond to that request [particular 1(a)(i)].

The Committee had regard to the email, dated 27 November 2017, sent to the Registrant by the Council. In that email it was expressed that no response had been received to the earlier email, and a further request for the Registrant's consent was made, asking for him to provide his consent by 5 December 2017. The Registrant did not respond to that request [particular 1(a)(ii)].

The Committee had regard to the email, dated 16 January 2018, sent to the Registrant by the Council. In that email it was expressed that no response had been received to the earlier requests, and a further request for the Registrant's consent was made, and the consent forms for him to complete were again attached. The Registrant did not provide his consent to the request [particular 1(a)(iii)].

In all the circumstances, the Committee was satisfied that the Registrant did not provide his consent following any of the requests made by the Council, and accordingly he had failed to engage with the Council's investigation in this regard.

Particular 1(b)

The Committee finds particular 1(b)(i), 1(b)(ii), and 1(b)(iii) proved.

The Committee had regard to the directions made by the Investigation Committee on 4 July 2018, and set out in the letter of 26 July 2018, which was sent to the Registrant by recorded delivery. The directions required the Registrant to give consent for his [REDACTED] to be provided by his [REDACTED] [particular 1(b)(i)]; agree to be examined by [REDACTED] appointed by the GOC [particular (b)(ii)]; and agree to submit to a [REDACTED] [particular 1(b)(iii)].

The Committee had regard to the email, dated 28 August 2018, sent by the Registrant to the Council, in which he stated:

“Any requests for [REDACTED] are now totally irrelevant...I stated on previous occasions that you are wasting time and resources constantly pursuing me. Therefore I have no intention of responding to your pointless requests.”

The Committee considered that the Registrant was under the ongoing duty to engage with the Council's investigation, as well as the additional obligation to comply with the directions which had been made by the Investigation Committee. The Committee was satisfied that the nature and content of the Registrant's email of 28 August 2018 amounted to a refusal to participate in the [REDACTED] as directed. Accordingly, the Committee was satisfied that the Registrant had failed to engage with the Council's investigation in this regard.

Findings in relation to proof of conviction and misconduct

The Committee heard submissions from Mr Micklewright on behalf of the Council. It has accepted the advice of the Legal Adviser.

The Committee is required to consider the facts found proved in relation to two statutory grounds, namely conviction [F 19)20] and misconduct [F(19)21].

In relation to F(19)20, having found the facts proved, the Committee was satisfied that, by their nature, they amounted to the statutory ground of a conviction.

In relation to F(19)21, having found the facts proved, the Committee considered, in accordance with Rule 46(12) of the Rules, whether the statutory ground of misconduct was established.

The Committee had regard to paragraph 19.2 of the 'GOC Standards of Practice for Optometrists and Dispensing Opticians', which requires a Registrant to:

“Be open and honest with...relevant organisations, and take part in reviews and investigations when requested, and with the General Optical Council...”

The Committee considered that cooperation by Registrants was an important aspect of effective regulation of the profession, as it allows Regulators to investigate and assess a Registrant's fitness to practise. Failure to cooperate, therefore had the potential to put members of the public at risk and damage the reputation of the profession.

In this case, the Registrant had raised the prospect that his behaviour which led to the conviction may have been attributable to [REDACTED]. As a consequence, the Council had sought to undertake an investigation, in order to ascertain whether or not the Registrant had any [REDACTED] which may have had an impact on his ability to practise safely and effectively. This was in accordance with its statutory functions.

In the Committee's judgement, the Registrant had persistently and deliberately failed to engage with the Council's investigation, between 13 October 2017 and 28 August 2018. When the Investigation Committee directed him to cooperate with the [REDACTED], the decision of which was communicated to him on 26 July 2018, the Registrant refused to do so. He sent an email to that effect, describing the [REDACTED] as 'irrelevant' and the requests as 'pointless'.

The Committee concluded that the Registrant's actions fell far below the standards to be expected of a registered professional and found that the facts found proved in allegation F(19)21 amount to misconduct.

Findings regarding impairment

The Committee has heard submissions from Mr Micklewright on behalf of the Council. It has been provided with no submissions or evidence by or behalf of the Registrant. It has accepted the advice of the Legal Adviser.

The Committee had regard to the current GOC Fitness to Practise Guidance in relation to 'Determining Impairment'.

The Committee was mindful that there has been no communication from the Registrant, since his email of 28 August 2018, where he refused to cooperate with the Council investigation.

The consequences of this were that there was little or no evidence before the Committee of any insight, remorse or remediation in respect of either the Registrant's conviction for dishonesty or for his failure to cooperate with the Council investigation.

In relation to the conviction, the Committee considered that this was a serious offence of dishonesty. It was premeditated, sustained over a lengthy period of time, and was a significant abuse of a position of trust by a senior employee for financial gain.

The Committee acknowledged that the Registrant had admitted the theft during the employer's investigation and had pleaded guilty to it at the Magistrates' Court, which indicated some limited insight into his wrongdoing. However, he had subsequently completely disengaged with the Council, and as such, the Committee had no basis for assessing that there was no longer a risk of repetition. Accordingly, the Committee concluded that there remained a risk of repetition that the Registrant may act dishonestly.

In relation to the failure to cooperate with the Council's investigation, the Committee considered that this was a serious failure, which had the potential to compromise the Council's statutory function to protect the public. As the Registrant had not cooperated, the Council was not in a position to ascertain whether or not the Registrant had any **[REDACTED]** which may have adversely affected his ability to practise safely or effectively.

The information before the Committee demonstrated that the Registrant had a dismissive attitude to the importance of the investigation into his **[REDACTED]**. The absence of any information in respect of reflection, remorse or remediation, led the Committee to conclude that the Registrant had no insight into his misconduct in this regard.

In relation to the public interest, the Committee concluded that the Registrant's conviction for dishonesty, together with his persistent refusal to cooperate with the Council, brought the profession into disrepute. Further, they breached fundamental tenets of the profession, namely to act honestly and with integrity and to adhere to the standards required of registered professionals. In light of this, the Committee is of the

view that the public would expect the Regulator to take action to declare and uphold standards of conduct and behaviour. It therefore concluded that public confidence in the reputation of the profession would be undermined if a finding of impairment were not made in this case.

Accordingly, the Committee found that the fitness of Barry Vincent Church to practise as a Dispensing Optician is currently impaired on both public protection and public interest grounds.

Sanction

The Committee heard submissions from Mr Micklewright on behalf of the Council. He submitted that this was an appropriate case for erasure. The Committee has accepted the advice of the Legal Adviser and has exercised its independent judgement. It has had regard to the Indicative Sanctions Guidance (the Guidance) and considered the sanctions in ascending order of severity. The Committee was aware that the purpose of a sanction is not to be punitive but to protect members of the public and to safeguard the wider public interest, which includes upholding standards within the profession, together with maintaining public confidence in the profession and its regulatory process.

The Committee considered that the mitigating factors in this case were:

- the Registrant had no fitness to practise history prior to these proceedings; and
- the Registrant made early full and frank admissions of guilt on being confronted by his employer.

The Committee considered the following to be the main aggravating factors in this case:

- the dishonesty was premeditated, repeated and committed in breach of his position of trust;
- there has been no active attempt to remediate in respect of either the dishonesty or the non-cooperation; and
- the Registrant lacks insight in respect of his failure to cooperate with the Council's investigation.

The Committee was of the view that the seriousness of the case meant that some form of sanction was required, and so the option of taking no action was inappropriate. The

Committee therefore considered the alternative sanctions available, beginning with the least restrictive.

The Committee did not consider that this was a case in which a financial penalty was appropriate. Such an order would not address the seriousness of the case.

In relation to conditional registration the Committee was of the view that the case was too serious to warrant conditions, even if the Registrant had engaged with the proceedings. In any event, the dishonesty which led to the conviction, and the nature of the misconduct in failing to cooperate was such that the Committee considered that there were no workable conditions which could be formulated to satisfactorily protect the public and safeguard the wider public interest. The Committee concluded that conditional registration would neither reflect the seriousness of the case nor satisfy the public interest in maintaining public confidence in the profession and declaring and upholding standards.

The Committee next considered suspension. It took account of its earlier findings and concluded that it could not be satisfied that the Registrant had insight and did not pose a significant risk of repeating his behaviour. Further, given the serious nature of the Registrant's sustained and premeditated dishonesty when in a position of trust and compounded by his failure to cooperate with the Council, the Committee concluded that a suspension was insufficient to mark the nature and gravity of the offending.

The Committee considered erasure and concluded that this was the only appropriate and proportionate sanction in this case. It was of the view that there was no other way to maintain the reputation of the profession and public confidence in the regulatory process.

In reaching this view, the Committee had regard to paragraph 36.5 of the Guidance and the factors which would indicate that the behaviour was fundamentally incompatible with ongoing professional registration. The Committee considered that the Registrant's dishonesty and failure to cooperate were serious departures from the relevant standards; the dishonesty was committed in abuse of his position of trust; and the dishonesty itself was premeditated and repeated. In all the circumstances it was the Committee's judgement that the Registrant's behaviour was fundamentally incompatible with ongoing professional registration.

In terms of the principle of proportionality, the Committee noted that the Registrant would be prevented from working in the profession by the sanction of erasure.

However, it was of the view that the public interest in maintaining public confidence in the profession and declaring and upholding standards outweighs his own interests.

Accordingly, the Committee directs that the name of Barry Vincent Church be erased from the appropriate register.

Immediate order

The Committee has heard submissions from Mr Micklewright on behalf of the Council. It has accepted the advice of the Legal Adviser.

The Committee has decided to order immediate suspension for the following reasons. Given the Registrant's non-cooperation into the investigation into his [REDACTED], the current position in relation to his [REDACTED] is unknown, and consequently, the issue of whether he would pose a risk to the public if he were practising is also unknown. In such circumstances, the Committee considered that an immediate order of suspension was necessary to protect the public.

Further, in light of its conclusions that the Registrant's behaviour is fundamentally incompatible with ongoing professional registration, the Committee decided to order immediate suspension, being satisfied that it was required in the public interest. To act otherwise would undermine public confidence in the profession and the regulatory process.

Revocation of interim order

The Committee hereby revokes the interim order for suspension of registration that has previously been imposed.

Chair of the Committee: Mr Graham White

Signature **Date: 11 December 2019**

Registrant: Mr Barry Vincent Church

Signature **Date: 11 December 2019**

| FURTHER INFORMATION |
|---|
| <p>Transcript</p> |
| <p>A full transcript of the hearing will be made available for purchase in due course.</p> |
| <p>Appeal</p> |
| <p>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 intention intention intention intention intention intention 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).</p> |
| <p>Professional Standards Authority</p> |
| <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> |
| <p>Effect of orders for suspension or erasure</p> |
| <p>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.</p> |
| <p>European Alert</p> |
| <p>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.</p> |

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.