BEFORE THE FITNESS TO PRACTISE COMMITTEE
OF THE GENERAL OPTICAL COUNCIL

GENERAL OPTICAL COUNCIL

AND

SHABBIR KADERBHAI (01-19408)

______________________________

DETERMINATION OF A SUBSTANTIVE HEARING
13-15 JANUARY 2020

______________________________

Committee Members: Dr P Ormerod (Chair/Lay)
Mr J Kellock (Lay)
Dr E MacMillan (Optometrist)
Ms L Troy (Optometrist)
Ms S Gimson (Lay)

Legal adviser: Ms L Whittle-Martin

GOC Presenting Officer: Mr P Lownds

Registrant: Present and represented

Registrant representative: Mr C Saad (Counsel)
Ms N Wheater (AOP)

Hearings Officer: Mr T Yates

Facts found proved: None

Facts not found proved: 1,2, 3 (no case to answer).

Misconduct: N/A

Impairment: N/A
ALLEGATION

The Council alleges that you, Shabbir Kaderbhai, a registered Optometrist and director at the Practice [REDACTED]:

1) You failed to adequately advise Patient A by not informing her of the option to keep her existing spectacles and not purchase new lenses and/or frames on:
   a) 22 September 2010, and/or
   b) 21 September 2011, and/or
   c) 14 September 2012, and/or
   d) 2 October 2013, and/or
   e) 10 November 2014, and/or
   f) 5 December 2015

2) You failed to provide Patient A with a copy of her prescription following the sight test, contrary to section 26(2) of the Opticians Act 1989 on:
   a) 22 September 2010, and/or
   b) 21 September 2011, and/or
   c) 25 October 2011, and/or
   d) 14 September 2012, and/or
   e) 2 October 2013, and/or
   f) 10 November 2014, and/or
   g) 5 December 2015;

3) Between 22 September 2010 and 5 December 2015, you failed to implement an appropriate system for preparing prescriptions to issue to patients following sight tests.
And by virtue of the facts set out above, your fitness to practise is impaired by reason of

a) misconduct; and/or
b) deficient professional performance.

**DETERMINATION**

**Witnesses**

The Committee heard from the following witnesses called by the GOC:

- Patient A;
- Mr Stephen Abery, a Community Optometrist who was called as an expert witness

The GOC also provided the Committee with a 170 page bundle of documentation comprising: Patient A’s witness statement and exhibits; Mr Abery’s expert report and appendices; the Registrant’s written representations dated 25 January 2019; a letter from Patient A dated 24 February 2019; Patient A’s optical records retained by [REDACTED]; and an email from the Registrant’s legal representative dated 19 December 2019.

The Registrant gave evidence.

The Registrant also provided the Committee with a 153 page bundle of documentation comprising: an example of a Prescription Confirmation slip; Prescription Confirmation Audits completed at [REDACTED] between 19 December 2018 and 2 December 2019; Confirmation of Optical Assistant Staff Training Protocols at [REDACTED] completed between 10 January 2019 and 7 October 2019; the Registrant’s curriculum vitae; the Registrant’s CET Statements spanning 2010 to 2021; the Registrant’s CPD Action Plan, Training Action Plan and Record & Reflect document; the Registrant’s non-CET accredited Reading Log; and 20 testimonials written in support of the Registrant. In the course of the hearing the Committee was further provided with a photograph of [REDACTED] and a computerised print out of screening personnel for the relevant time period.

**Background to the allegations**

The Registrant first registered with the General Optical Council (GOC) as an Optometrist on 18 July 2002.

At all material times the Registrant practised as an Optometrist from [REDACTED] ("the Practice"), where he is a director.
In 2009 Patient A was diagnosed with [type 2 diabetes] and required annual screening. She attended regular eye examinations with the Registrant and [diabetic] screening appointments at the Practice on the following dates:

- 22 September 2010 (eye examination and [diabetic] screening)
- 21 September 2011 (eye examination and [diabetic] screening)
- 25 October 2011 (re-check examination only)
- 14 September 2012 (eye examination and [diabetic] screening)
- 02 October 2013 (eye examination and [diabetic] screening)
- 10 November 2014 (eye examination and [diabetic] screening)
- 5 December 2015 (eye examination and [diabetic] screening)

It was alleged that at each appointment, the Registrant failed to advise Patient A that she had the option of keeping her current glasses and not purchase new frames/lenses.

It was also alleged that he failed in his duty to provide Patient A with a copy of her prescription following the sight tests he carried out, and that he failed to implement an appropriate system for preparing prescriptions to issue to patients following sight tests.

**Application pursuant to Rule 46 (8)**

At the close of the case for the GOC, Mr Saad submitted that there was no case to answer on the facts in relation to Particulars 1 and 3, and no case to answer on impairment in relation to Particulars 1, 2 and 3.

In relation to Particular 1, Mr Saad relied on an answer given by Mr Abery to a scenario which he had been asked to consider when giving evidence before the Committee. Mr Abery was asked to consider a situation in which a patient, who had reported a reduction in distance vision, was given a sight test, which had led to a prescription change. Mr Abery was asked whether it was appropriate, in those circumstances, for the practitioner to test the current prescription against a new, suggested prescription, and, if the patient then claimed to be able to see better with the suggested prescription, to ask whether the patient would like the prescription to be updated. Mr Abery said that this would be entirely appropriate. Mr Saad submitted that it was clear from the notes that Patient A had expressed an appreciation of the change in her prescriptions, and that Mr Abery’s evidence on this point meant that there had been no duty on the Registrant to inform Patient A explicitly of the option to keep her glasses in the circumstances.

In relation to Particular 3, Mr Saad relied on Mr Abery’s evidence that there was no duty to have such a system in place.

Mr Saad’s secondary submission was that in relation to all three Particulars, there was no case to answer on impairment because the date of the most recent incident
was over 4 years ago and significant steps to address the deficiencies referred to in Particular 2 had already been put in place.

Mr Lowndes submitted, in relation to Particular 1, that Patient A had provided evidence which, if accepted, was capable of proving Particular 1. Further, the expert evidence provided by Mr Abery was that the Registrant's failure to inform Patient A of the option to keep her glasses fell significantly below the standards expected of him.

In relation to Particular 3, Mr Lowndes submitted that a duty to implement an appropriate system for preparing spectacle prescription forms to be given to the patient following sight tests was to be implied within the meaning of Section 26.

In relation to impairment Mr Lowndes took the Committee to the relevant GOC Code of Conduct, Paragraphs 5, 7 and 19, and submitted that the alleged failures were serious.

The Committee accepted the advice of the Legal Adviser, who reminded the Committee of Rule 46 (8) which states:

“Before opening the Registrant’s case the Registrant may make submissions as to

a. Whether sufficient evidence has been adduced upon which the disputed facts could be found proved;

b. Whether the facts, whether they are disputed or proved, could support a finding of impairment.”

The Legal Adviser reminded the Committee of the leading case of Galbraith [1981] 1 WLR 1039, as adapted to a regulatory setting by the case of Sharaf v GMC [2013] EWHC 332, which clarified that the test in regulatory proceedings is whether, taking the evidence presented by the regulator at its highest, a tribunal could find the facts proved on the balance of probability.

In relation to Particular 1, the Committee concluded that the scenario relied on by Mr Saad when questioning Mr Abery had not been put to Patient A. Mr Saad submitted that the records proved that Patient A had appreciated the change in vision when provided with a new suggested prescription. However, the Committee did not consider that that part of the notes provided evidence that the scenario or conversation relied upon by Mr Saad had in fact occurred. Furthermore, the evidence provided by Mr Abery had been more wide-reaching than Mr Saad’s submission suggested. Mr Abery had accepted that there was no duty to ask a patient whether he or she wished to retain his or her existing glasses in every instance; however, he said that in some instances there is such a requirement. He had provided evidence that the requirement applied to the facts relating to Particular 1 and it will be for the Committee to consider that evidence in this case, along with Patient A’s evidence. The Committee therefore rejected the submission of no case to answer on the facts in relation to Particular 1.

In relation to Particular 3, the Committee accepted the submission put forward by Mr Saad. Mr Abery had said in evidence that there was no duty to implement a system,
and the Committee rejected Mr Lownds’ submission that such a duty was implied in Section 26. The Committee concluded, from the reading of the Act, that the duty set out in Section 26 is a duty on the optometrist to give the prescription to the patient immediately following the sight test, not to put a system in place to prepare a prescription. The Committee therefore accepted the submission of no case to answer on the facts in relation to Particular 3.

In relation to Mr Saad’s secondary submission on impairment, relating to Particulars 1, 2 and 3, the Committee concluded that the evidence presented by the GOC was capable of leading to a finding of impairment. The age of the Allegation did not, of itself, provide sufficient reason for allowing the submission and as yet any evidence of remediation had not been tested.

**Findings of fact in relation to Particulars 1 and 2**

Patient A provided a witness statement and gave evidence before the Committee. She asserted that at the end of each eye examination, the Registrant advised her that her eyesight had changed. She maintained that the Registrant did not advise her that she had the option of keeping her current glasses, and that had he done this she would have taken that option rather than purchasing new glasses/lenses on each occasion.

Patient A said that in February 2017 she decided to attend a different opticians, (Practice B) [REDACTED], for her regular eye examination and screening check. She said that she had been advised by them that although there had been a slight change in her eyesight this did not require new lenses and she made no purchase. She said she was also handed a copy of her prescription. Patient A said that this had prompted her to recall that she had never received a copy of her prescription following any eye examination conducted by the Registrant at the Practice.

Patient A said that following her Practice B appointment she became concerned about whether she had in fact needed to purchase the new frames/lenses issued by the Registrant. She submitted a written complaint to the Optical Consumer Complaints Service (OCCS) dated 10 April 2018, which she later sent to the Council.

It was put to Patient A in cross-examination that in the course of her sight tests with the Registrant, she had appreciated a difference between the new lenses suggested by him and the old, as documented in the Registrant’s contemporaneous handwritten patient notes, which were exhibited in evidence. She said that she could not remember whether she had told the Registrant that she had appreciated the difference. It was put to her that the Registrant told her that she had three options: to buy new spectacles, to keep the same frames but get the lenses re-glazed, or to keep her old spectacles. She said that she had never been provided with the last of those options.

Patient A stated in cross-examination that she went on holiday in August 2017 and damaged the glasses which had been issued to her by the Registrant in December 2015. Thereafter she wore her glasses issued in November 2014. She stated that
she detected no difference between the 2014 and 2015 glasses. This contrasted with her earlier statement in cross-examination that she had earlier said in cross-examination that she had noticed a difference between the 2014 and 2015 glasses and had commented favourably on this to her daughter at the time.

She accepted that the first time she made a formal complaint of not being provided with her prescriptions was in her letter to the OCCS dated 10 April 2018. She said that it was not until she visited Practice B that this point occurred to her.

The GOC’s second witness was Mr Abery, a Community Optometrist, who was called to give expert evidence. He had provided a written report, dated 16 July 2019.

In his report, Mr Abery expressed the following opinion relating to Particular 1:

"If Patient A was not at each Sight Test given the option of either keeping her current glasses or updating her refractive correction, then in not giving Patient A this option Mr Kaderbhai fell seriously below the standard of a reasonably competent optometrist. However, if he did give Patient A this option at each Sight Test then I make no criticism".

In his oral evidence Mr Abery confirmed that a reasonably competent optometrist would not always have to give a patient the explicit option of keeping their own spectacles in every case and that this would depend on the circumstances. Mr Abery further confirmed that he would not expect a practitioner to note on the patient record that he had given the patient the option to keep his existing spectacles.

In relation to Particular 2, Mr Abery said in his report that the provision of a copy of the patient's prescription to the patient following a Sight Test is a requirement under Section 26 of the Opticians Act 1989 which states that

"... when a registered medical practitioner or registered optometrist tests the sight of another person ... it shall also be his duty to give the person whose sight he has tested, immediately following the test, either a signed, written prescription for an optical appliance or a signed, written statement that he does not need to wear or use an optical appliance."

Prior to writing his report, Mr Abery was provided with a copy of the Registrant’s written representations, dated 25 January 2019 (prepared before the allegations against the Registrant had been finalised).

In that written response, the Registrant denied that he had failed to notify Patient A of her options and stated that he specifically asked her whether she wished to purchase new glasses and/or new lenses after each Sight Test.

In relation to the giving of prescriptions, the Registrant said in his written response:

"My normal practice is to give out a copy of the prescription at the end of the eye test before the patient leaves. However, previously, during busy periods, I would have signed the prescription form following the sight test, and another member of staff would have completed the details and given this to the patient. For this reason and due to the passage of time, I cannot be certain whether myself or a member of staff"
gave Patient A a copy of her prescription on this date, although this would have been my intention."

In his report Mr Abery expressed the following opinion regarding the delegation of preparing prescriptions to staff:

"My assessment is that the issuing of the prescription is one of the "protected functions of sight testing" and therefore should not be delegated. I consider that signing a prescription form before another member of staff completes the details and gives the prescription to the patient, falls below the standard expected of a reasonably competent optometrist".

Mr Abery confirmed, when giving evidence before the Committee, that in relation to each of the appointments with the Registrant, the evidence revealed a change in visual acuity or reported symptoms of reduced vision. He said that on each occasion it would have been reasonable to consider that the glasses should be updated. He added that any improvement had to be justified as worth having.

In relation to the delegation of prescriptions Mr Abery said in evidence that if the Registrant had asked a colleague to fill in the substantive details on the prescription form, as opposed to merely asking a colleague to fill in the patient's name and address, that behaviour would fall "a long way below expected standards" which he also described as "about as bad as it gets". Mr Abery went on to say that if an optometrist filled in the prescription form apart from the address that would not be so bad.

He agreed in cross-examination that whilst there is a duty on the practitioner to give the prescription to the patient immediately following the test, there is no separate duty to have a system in place to ensure that the prescription is given. Mr Abery in his oral evidence said that the Registrant’s records were of a good standard.

The Registrant gave evidence before the Committee. He confirmed that he had an unblemished career having qualified in 2002.

The Registrant told the Committee that due to the passage of time he did not have any recollection of any of the sight tests that he had carried out on Patient A independent of his records. He said, however, that he had a routine when conducting sight tests and there was no reason to suppose that he would have departed from this routine when seeing Patient A. He took the Committee through this routine, with the assistance of the patient notes written by him at the time. He said that at the end of the eye examination he would run through his findings with the patient. If he had discovered a change in prescription, he would normally seek to demonstrate this change to the patient by testing the patient's vision first with the patient's current spectacles and then with the new prescription. If the change in prescription was appreciated by the patient he would discuss the options. He would inform the patient that they could "continue as they are", or they could have the prescription updated. If the patient wished to update the prescription, he would discuss the next option, which was to have new glasses or to "re-glaze", meaning that new lenses would be put into the current frames. He was asked what he meant when saying that the
change in prescription was “appreciated” and he said that it meant that the patient stated that the new prescription was better. He took the Committee to the part of his notes in relation to each of the relevant appointments held with Patient A which, he said, demonstrated that Patient A had appreciated a change in prescription found by him on each occasion. He also pointed to occasions when new spectacles had been ordered and other occasions when re-glazing was preferred.

The Registrant said that he would always give the patient a copy of the prescription and give them the option of asking any further questions. He would then say when he would like to see them again and would inform them that if they had any problems they could come back earlier.

He said that it was only during busy periods and in exceptionally rare circumstances that he would delegate the completion of the prescription form, by which he meant that he would sign the form having filled in all the relevant details save for the patient’s address, which would then be completed by another member of staff.

In closing submissions, Mr Lownds submitted that the issues in the case were discreet, and that there was a clear factual dispute between the two witnesses, Patient A on the one hand, and the Registrant on the other.

Mr Lownds submitted that the Committee should prefer the evidence of Patient A who had given clear evidence on the essential issues in dispute. In arguing that Patient A was a reliable witness he relied on two particular points: the importance of the issue to Patient A, and the significance to her of the trigger event, namely her experience at Practice B.

In closing submissions, Mr Saad submitted that the Registrant was an Optometrist who had qualified in 2002 and had an unblemished career. He had produced good character references. It was accepted by the GOC that the sight tests conducted by the Registrant had been carried out appropriately and that there had in fact been changes in Patient A’s eyesight on each occasion. It was accepted that he had acted properly and honestly and that his records were of a good standard. Mr Saad therefore asked the Committee to question why this practitioner should have fallen foul of routine parts of the test [in failing to discuss the options or provide the prescription].

Mr Saad submitted that Patient A could not remember some of the detail of the case and she accepted that she could be forgetful. She had been attending optometrists since the age of 11. She was clearly not shy of raising an issue at the time if there had been one to raise. Mr Saad submitted that she was an unreliable witness. There were discrepancies between her evidence before the Committee and the evidence she provided in her witness statement. For example she had said that the Registrant had used a computer to make notes during the sight test, whereas she now accepted in light of the documentation placed before her that he had made handwritten notes; she made no mention in her statement of demanding copies of her prescription from other members of staff at the Practice whereas she now
complained of this; she said in her statement that she rarely changed glasses for cosmetic reasons, whereas in evidence she referred to choosing new glasses because her old pair was out of fashion.

The Committee accepted the advice of the Legal Adviser who advised on the burden and standard of proof, the use that could be made of expert evidence, the impact of the passage of time since the events, and the relevance of the Registrant’s good character and character references.

The Committee began by considering the witnesses in the case.

The Committee accepted that both Patient A and the Registrant had been doing their best to recall the details of what had occurred; however it was inevitable that their recollection would be imperfect due to the passage of time.

The Committee found the evidence of the expert in the case, Mr Abery, to be measured and helpful.

In considering Particular 1, the Committee first considered the evidence of Mr Abery and proceeded on the basis of the evidence given by him that whilst there was a requirement for an optometrist to advise the patient of the option to keep existing spectacles rather than purchasing new lenses and/or frames, there was no express formula or wording that the optometrist was obliged to use.

It was accepted by Patient A in her evidence that she was given the option of purchasing new lenses and/or frames and this was consistent with the Registrant's evidence and the evidence in the contemporanoe records. The key issue for the Committee to determine was therefore whether Patient A had been given the option to keep her existing spectacles.

In considering the evidence of Patient A, the Committee took into account the fact that the records established that she had appreciated the difference in prescriptions; it followed that she had reason to conclude that the purchase of new spectacles or lenses may be beneficial. Furthermore, Patient A had accepted that she sometimes chose glasses when they were not clinically indicated, for example because new frames would be more in tune with the current fashion. The Committee took into account the passage of time and the fact that these were routine appointments, together with Patient A's acceptance that her memory was not always good. The Committee concluded that while the outcome and its cost implications may have been memorable for her, it was not persuaded that her recall of the detail of the appointment was accurate. The Committee concluded that it would be understandable if Patient A did not remember with accuracy the small part of the conversation that was in issue, particularly as she was concerned about her health at all times. Whilst the advice regarding the option of retaining old spectacles may have been understood by Patient A when given explicitly by Practice B when new glasses or lenses were not clinically indicated, this option may not have been understood by
Patient A when given by the Registrant in different circumstances (i.e. where a change of prescription was clinically indicated), and she may have failed to recollect the totality of his advice.

In considering the Registrant's evidence, the Committee took into account his good character and his unblemished, lengthy career. The Committee gave limited weight to, but nevertheless took into account, the letters from customers, all of whom had attended the Registrant's practice during the relevant period, who said that in their experience the Registrant had advised them of the option of retaining their old glasses on every occasion.

The Registrant had been consistent in his oral evidence that it was his practice to give the option of continuing as they were or updating their frames/lenses. He said that if they chose to continue with their current glasses he would write "happy at present". The Committee found him to be a credible witness.

In those circumstances the Committee concluded that the GOC had not overcome the burden of proof to the requisite standard. The Committee was not satisfied on the balance of probabilities that the Registrant had failed to adequately advise Patient A by not informing her of the option to keep her existing spectacles and not purchase new lenses and/or frames on any of the dates set out in Particulars 1(a) to (f).

Accordingly, the Committee found Particular 1 not proved.

In relation to Particular 2, the Committee applied the same reasoning.

Patient A had accepted that on occasion her memory could be poor. Patient A said in evidence that it was not until she went to Practice B that she realised that she had not been receiving copy prescriptions. However, this contradicted her oral evidence and her letter of 24 February 2019, when she said that she had asked at least one member of staff at the Practice for a copy of her prescription but her request had been ignored. Furthermore, the Committee took account of the fact that, prior to attending the Practice, she had been attending a set of opticians for a period of some 20 years when the requirement to provide prescriptions had been in place, and Patient A had given evidence that she had received and retained copy prescriptions during that period. It therefore seemed improbable that any failure on the Registrant's part to provide her with prescriptions would go unnoticed on her part. The Committee concluded that it could not therefore place weight on Patient A's recollection in respect of this particular.

The Committee acknowledged the Registrant’s evidence that on rare occasions he delegated the giving of prescriptions, and concluded that the likelihood that this had occurred on any of the seven occasions complained of was minimal, given the Registrant’s evidence on the point. Moreover, if he had delegated parts of the process of preparing prescriptions it was still unlikely that the prescription had not been given to the patient.
In considering the Registrant’s evidence that it was his routine practice to provide patients with a prescription, the Committee again took into account his good character and unblemished career. The Committee again gave limited weight to, but nevertheless took into account, the letters from customers who said that in their experience the Registrant had provided prescriptions throughout the period in question.

The Registrant had been consistent in his evidence that it was his routine practice to give his patients a copy of their prescription, and the Committee found him to be a credible witness.

In those circumstances the Committee concluded that the GOC had not overcome the burden of proof to the requisite standard. The Committee was not satisfied on the balance of probabilities that the Registrant had failed to provide Patient A with a copy of her prescription following her sight test on any of the dates set out in Particulars 1(a) to (g).

Accordingly, the Committee found Particular 2 not proved.

Chair of the Committee: Pamela Ormerod

Signature .......................... Date: 15 January 2019

Registrant: Shabbir Kaderbhai

Signature .......................... Date: 15 January 2019
## 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.