

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

GENERAL OPTICAL COUNCIL

F(23)33

AND

JOSHUA COLIN SMITH (D-17395)

**DETERMINATION OF A SUBSTANTIVE HEARING
06 – 07 NOVEMBER 2023**

Committee Members:	Ian Crookall (Chair/Lay) Asmita Naik (Lay) Alice Robertson-Rickard (Lay) Jessica Shrimplin (Dispensing Optician) Simon Pinnington (Dispensing Optician)
Legal adviser:	Charlotte Mitchell-Dunn
GOC Presenting Officer:	Harriet Dixon (QEBHW)
Registrant present/represented:	Yes and represented.
Registrant representative:	John Graham (WGL Ltd)
Hearings Officer:	Terence Yates (6 th) Abby Strong-Perrin (7 th)
Facts found proved:	Particulars 1 and 2
Facts not found proved:	None
Misconduct:	Found
Impairment:	Impaired
Sanction:	6-month Suspension Order (Without Review)
Immediate order:	Yes



ALLEGATION

The Council alleges that in relation to you, Mr Joshua Colin Smith (D-17395), a registered dispensing optician:

1. *On 22 December 2021, you created a contact lenses order for Person B and you:*
 - a. *Did not use a prescription to place the order for Person B;*
 - b. *Falsified the records to show that the contact lenses order was a legitimate transaction;*
 - c. *Did not collect payment for the contact lenses;*

2. *Your actions as set out above were dishonest in that;*
 - a. *You knew Person B was not a patient at the REDACTED;*
 - b. *You intended to obtain free contact lenses for Person A;*

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

CONSENSUAL PANEL DETERMINATION AGREEMENT

1. At the outset of this hearing, Ms Dixon, on behalf of the General Optical Council (GOC) informed the Committee that prior to this hearing a provisional agreement of a consensual panel determination had been reached with regard to this case between the GOC and the Registrant.
2. The agreement, which was put before the Committee within an Agreed Panel Disposal (APD) report finalised on 1 November 2023, sets out the Registrant's full admission to the facts alleged in the charges, that the Registrant's actions amounted to misconduct and that the Registrant's fitness to practise is currently impaired by reason of that misconduct. It is further stated in the agreement that an appropriate sanction in this case would be a suspension of six months, without a review hearing and with an immediate order.
3. The Committee has considered the provisional agreement reached by the parties as set out in the APD Report, which is at Annex A of this determination.

DETERMINATION

4. The Committee noted the APD Report and considered the APD Policy. The Registrant had admitted the facts of the allegation in their entirety. The parties had agreed within the APD report that misconduct and current impairment were established and that the case could appropriately be disposed of by a sanction of 6 months suspension, with no review.
5. The Committee noted that the ultimate decision in respect of this matter rests with the Committee and there were a number of options open to the Committee, as set out at paragraph 8.3 of the GOC's APD policy. These options included the Committee

disagreeing with parts of the report and varying the sanction, after hearing further submissions.

Background to the allegations

6. On 10 May 2022, the Council received a written complaint via the GOC website from the Principal Optometrist at REDACTED. The complaint was in relation to the Registrant ordering contact lenses for his REDACTED without paying for them. It was alleged that the Registrant achieved this by creating false records to show that the order was a legitimate transaction and ordered the lenses under a different person's name and to a different home address. REDACTED undertook an investigation which would have led to a disciplinary hearing. The Registrant resigned from REDACTED before the hearing took place.
7. On 18 August 2022 the Council notified the Registrant of the Fitness to Practise investigation. On 29 March 2023, the case examiners referred the matter to the GOC Fitness to Practise Committee.
8. On 27 June 2023, the Council's case was served on the Registrant.
9. On 25 July 2023, the Registrant's representative WGL Ltd returned the completed hearings questionnaire to the Council. The Registrant admitted to allegations 1,1c and 2a, the Registrant at this point did not however admit allegations 1a, 1b and 2b.
10. On 25 September 2023, WGL Ltd raised the possibility of seeking an APD hearing. On 26 October 2023 WGL Ltd provided a witness statement on behalf of the Registrant in which the Registrant admitted all of the allegations. The Council also received an e-mail which confirmed the Registrant accepted current impairment.
11. On 27 October 2023, WGL Ltd submitted the Registrant's signed witness statement and Bundle of Documents to the Council.

Preliminary Application

12. At the outset of the hearing, Mr Graham on behalf of the Registrant argued that the comments in relation to the APD from the complainant, ought not to be admitted into evidence on the basis that it was unfair to admit this evidence. He noted that the GOC had previously made a statement to the effect that they would not place reliance upon these comments. Accordingly, he stated that in line with Rule 40 it would be unfair to admit such evidence. In the alternative, he argued that if the comments were to be admitted into evidence, limited weight ought to be attached to them.
13. Ms Dixon on behalf of the GOC submitted that it was fair in the circumstances to admit the comments from the complainant. She relied on the fact that the APD policy itself outlined that if such evidence was available it would be provided to the Committee. Ms Dixon argued that the material was relevant and as such it ought to be admitted. She argued that if admitted, it was a matter for the Committee to consider what weight, if any, to attach to the evidence.

14. The Committee were provided with legal advice in respect of Rule 40 of the Fitness to Practice Rules.
15. The Committee determined in all the circumstances it was fair to admit the comments from the complainant. The Committee considered that the APD policy made specific reference to the admission of such evidence. The Committee therefore determined that it would not be unfair to admit such evidence. The Committee considered that following the admission of the evidence it was able to determine the weight, if any, to be attached to the comments. The Committee noted that the comments were counterbalanced by a number of positive references provided on behalf of the Registrant, and in this context the Committee determined that what weight would be afforded to the comments.

Findings in relation to the facts

16. The Registrant admitted the facts of the Allegation in their entirety. The Committee therefore found the facts proved by reason of the Registrant's admissions pursuant to Rule 40(6) of the General Optical Council (Fitness to Practise) Rules 2013 ('the Rules').

Findings in relation to misconduct

17. The Committee considered the written submissions provided on behalf of the Council and the Registrant. It has accepted the advice of the Legal Adviser.
18. The Committee proceeded to consider whether the admitted facts, which were found proved, amounted to misconduct, which was serious.
19. The Committee had regard to the documentary evidence before it, including the APD Report, the bundle of agreed evidence, the witness statement and material provided by the Registrant and the comments from the complainant.
20. The Committee agreed with the parties' submission, set out within the APD report, that the Registrant's conduct breached the following paragraphs of the Standards of Practice for Optometrists and Dispensing Opticians (the Standards) effective from April 2016:
 - Standard 16: Be honest and trustworthy.
 - Standard 17: Do not damage the reputation of your profession through your conduct.
21. The Committee was of the view that the conduct of the Registrant, by dishonestly obtaining free contact lenses for Person A (REDACTED) and by creating a falsified contact lenses order for Person B, fell far below the standards that were expected of the Registrant and what was proper in the circumstances. The Committee considered that the Registrant's actions were motivated by financial gain and resulted in a loss being suffered by the NHS.

22. The Committee noted that while the Registrant committed an isolated act of dishonesty, it amounted to a serious departure from the standards of practice expected of a competent dispensing optician. The Committee concluded that the dishonest conduct was damaging to the reputation of the profession and has brought it into disrepute. Further, fellow professionals would consider the actions of the Registrant to be deplorable.
23. In the circumstances, the Committee was satisfied that the conduct of the Registrant amounted to professional misconduct, which was serious. Therefore, the Committee determined that the facts found proved amounted to misconduct.

Findings in relation to current impairment

24. The Committee then went on to consider whether the Registrant's fitness to practise is currently impaired by virtue of his misconduct. Whilst acknowledging the agreement between the GOC and the Registrant, the Committee has exercised its own independent judgement in reaching its decision on impairment.
25. The Committee considered whether the Registrant's conduct was capable of being remediated, whether it had been remediated and whether there is a risk of repetition of the conduct in the future. The Committee considered that whilst dishonesty can be difficult to remediate, this was not impossible. The Committee went on to consider the level of insight and remediation that had been demonstrated in this case by the Registrant.
26. The Committee noted that the Registrant had made admissions and had co-operated with his regulator in these proceedings. The Committee considered the Registrant's witness statement, the CPD courses that he had undertaken, and the references that he had provided. The Committee considered that the Registrant had developed insight and undertaken appropriate remediation, by making admissions to the allegation and attending relevant CPD courses. The Committee further noted the references provided by former Colleagues at REDACTED and other Colleagues. These stated in summary that the Registrant was a hardworking and motivated employee, with higher qualifications to support low vision patients. His work in this area had also resulted in him receiving a Trust award for excellent performance. The Committee took into consideration that there were no clinical concerns in this case.
27. In the circumstances, the Committee formed the view that the Registrant had made a serious error of judgment in committing the isolated act of dishonesty, but he had since adequately reflected, developed insight and remediated by completing appropriate CPD courses.
28. The Committee therefore agreed with the submissions of the parties that the risk of repetition of similar conduct in the future was low, and further, that a finding of current impairment was not required on public protection grounds.
29. The Committee next considered the public interest and the guidance in the case of *CHRE v (1) NMC and (2) Grant* [2011] EWHC 927 (admin). In particular, the Committee had regard to the test that was formulated by Dame Janet Smith in the report to the Fifth Shipman Inquiry, as approved in the case of *Grant*, which is as follows:

“Do our findings of fact in respect of misconduct... show that his fitness to practise is impaired in the sense that he:

- a. *Has in the past acted and/or is liable in the future to so act so as to put a patient or patients at unwarranted risk of harm and/or;*
- b. *Has in the past brought and/or is liable in future to bring the medical profession into disrepute and/or;*
- c. *Has in the past breached and/or is liable in the future to breach one of the fundamental tenants of the medical profession and/or;*
- d. *Has in the past acted dishonestly and/or is liable to act dishonestly in future.”*

30. The Committee was satisfied that limbs (b)-(d) of this test are engaged in this case, namely that the Registrant’s conduct brought the profession into disrepute, breached one of the fundamental tenets of the profession and was dishonest.

31. The Committee had regard to the public interest and considered that the requirement to uphold professional standards and maintain public confidence in the profession would be undermined if no finding of impairment was made.

32. Therefore, the Committee found that the fitness of the Registrant is currently impaired.

Sanction

33. The Committee considered the aggravating and mitigating factors present in this case. In the Committee’s view, the aggravating factors are as follows:

- 1) It was carried out for financial gain at a loss to the NHS;
- 2) the conduct was an abuse of his employer’s trust;
- 3) the Registrant did not immediately make admissions to his conduct.

34. The Committee identified the following mitigating factors:

- 1) The Registrant was of previous good character with no fitness to practise history;
- 2) The Registrant had co-operated with the GOC;
- 3) While the comments of the complainant contained some concerns, these were counterbalanced by the substantially positive references provided on the Registrant’s behalf;
- 4) The Registrant had demonstrated a good level of insight, reflection, remorse and had apologised.

35. The Committee considered the sanctions available to it from the least necessary to the most severe (no sanction, financial penalty, conditional registration, suspension, erasure).

36. In relation to taking no action, the Committee was of the view that this was not proportionate nor sufficient given the seriousness of the misconduct and the public interest concerns. Further, there were no exceptional circumstances to justify taking no action in any event.
37. The Committee considered the issue of a financial penalty order; however, it was of the view that such an order was not appropriate nor proportionate in the circumstances.
38. The Committee considered the Indicative Sanctions Guidance (ISG) in relation to the imposition of conditions. It was of the view that conditional registration would not be practicable due to the nature of the misconduct, which did not involve identifiable clinical areas of practice in need of assessment or retraining, which conditions often seek to address.
39. The Committee was of the view that it would be difficult to formulate appropriate conditions in a dishonesty case. Further, conditions would not sufficiently mark the seriousness of the misconduct in this case and would not meet the public interest.
40. The Committee concluded that conditions could not be devised which would be appropriate, proportionate, workable or measurable.
41. Next, the Committee considered suspension and had regard to paragraphs 21.29 onwards of the ISG. In particular, the Committee considered the list of factors contained within paragraph 21.29, that indicate that a suspension may be appropriate, which are as follows:

Suspension (maximum 12 months)

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

- a. serious instance of misconduct where a lesser sanction is not sufficient.*
- b. No evidence of harmful deep-seated personality or attitudinal problems.*
- c. No evidence of repetition of behaviour since incident.*
- d. The Committee is satisfied the registrant has insight and does not pose a significant risk of repeating behaviour.*
- e. In cases where the only issue relates to the registrant's health, there is a risk to patient safety if the registrant continued to practise, even under conditions.*

42. The Committee were satisfied that the factors of a-d were engaged in this case, with e. not being relevant.
43. The Committee concluded that when considering insight, remediation and the mitigating factors, a suspension order was appropriate to address the public interest concerns that it had identified. It considered that a suspension order would adequately mark the seriousness of the Registrant's conduct, maintain confidence in the profession and declare and uphold proper standards of professional conduct and behaviour.
44. The Committee considered the relevant part of the ISG in relation to erasure, namely paragraph 21.35. The Committee was mindful that whilst dishonesty was serious and

could lead to erasure, that was not necessarily the appropriate sanction in every dishonesty case. The Committee concluded that given this was a one-off incident, the Registrant's good level of insight, the remediation that had taken place, and the mitigation that was present, the conduct was not fundamentally incompatible with being a registered professional. Therefore, erasure, in the particular circumstances of this case, would be a disproportionate sanction. This confirmed the view of the Committee that an order of suspension was the appropriate and proportionate sanction to order in this case.

45. The Committee considered the proposed length of the suspension order in the APD report, which was six months. The Committee was satisfied that the proposed length of six months appropriately balanced the seriousness of the misconduct, in that it resulted in financial loss to the NHS and involved a breach of employer's trust but took into account the mitigating factors in the case. The Committee was satisfied on balance that the period proposed of six months was sufficiently long enough to meet the public interest.
46. Accordingly, the Committee approved the APD report and made an order in the terms agreed by the parties, namely a six-month suspension order.

Review hearing

47. The Committee next considered whether a review hearing ought to be held prior to the expiration of this order. The Committee was mindful of paragraph 21.32 of the ISG, which states that a review hearing should normally be directed. However, the ISG goes on to state that one of the reasons for this, is the need to the Committee to be satisfied that the Registrant's patients will not be placed at risk by resumption of unrestricted practice.
48. The Committee is minded, in this instance, not to order a review hearing, as it had no concerns regarding the Registrant returning to unrestricted practice and given the Committee's views on the good level of insight and remediation that the Registrant had already demonstrated, a Review hearing was not considered necessary.

Immediate order

49. The Committee considered whether to make an immediate order in this case. It has considered the APD Report in which both parties agreed that an immediate order was warranted in this case.
50. The Committee has accepted the advice of the Legal Adviser, which was to consider the statutory test in whether the making of an order is necessary for the protection of members of the public, otherwise in the public interest or in the best interests of the Registrant.
51. The Committee decided to impose an immediate order, as it was in the public interest given the findings in this particular case.

Conclusion

52. For the reasons set out above, the Committee determined to accept the Agreed Panel Disposal as put forward by the parties, without variation.



Revocation of interim order

53. The Committee was informed that there was no interim order made in this case, therefore there is no such order to revoke.

Chair of the Committee: Ian Crookall

Signature 

Date: 7 November 2023

ANNEX A

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

GENERAL OPTICAL COUNCIL

and

MR JOSHUA COLIN SMITH (D-17395)

AGREED PANEL DISPOSAL REPORT

Introduction

- 1. This is an Agreed Panel Disposal ("APD") hearing in respect of Mr Joshua Colin Smith ("the Registrant") (D-17395). The Registrant first registered with the General Optical Council ("the Council") as a student dispensing optician on 28 October 2016 and subsequently registered as a dispensing optician on 20 August 2019.*
- 2. The Fitness to Practise Committee ("FTPC") meet to consider whether to approve an agreed form of disposal under the Agreed Panel Disposal ("APD") process. Both parties agree to the proposed form of disposal set out in this report. The Registrant has had the benefit of legal advice from William Graham Law Ltd ("WGL Ltd") before agreeing to dispose of this case by the APD process.*
- 3. The Council's published policy on the APD process is addended to this report. It is a hearing management tool, designed to assist in avoiding full hearings with the calling of evidence where the public protection and public interest objectives of the fitness to practise process would still be met by an agreed outcome. It is not a separate statutory tool or path to a finding of impaired fitness to practise. The FTPC retains full jurisdiction over the procedure and, save where it would be otherwise appropriate not to do so, the proposed APD is considered at a public hearing.*
- 4. The options open to the FTPC are:*

- i. To approve the report in its entirety and make the appropriate order(s);*
- ii. To vary the sanction with the agreement of both parties after inviting submissions. If one or both parties disagree with the variation suggested by the FTPC, the APD hearing will be vacated and the matter will be scheduled for a substantive hearing before a new committee without an agreed report;*
- iii. To disagree with all or part of the report. In this instance, the GOC and the registrant may agree to amend the report in light of the FTPC's findings and resubmit this to the same committee at a reconvened hearing, otherwise the APD hearing will be vacated, and the matter will be listed for a substantive hearing before a new committee without an agreed report;*
- iv. If either party decides that they no longer want the case to proceed by APD, the current hearing must be immediately concluded by the FTPC with no orders being made (unless there is a request for procedural directions from both parties). The matter will then be scheduled for a substantive hearing before a new committee without an agreed report.*

Background

- 5. On 10 May 2022, the Council received a written complaint via the GOC website from the Principal Optometrist at REDACTED. The complaint was in relation to the Registrant ordering contact lens for his REDACTED without paying for them. It was alleged that the Registrant achieved this by creating false records to show that the order was a legitimate transaction and ordering the lens to a different home address.*
- 6. On 18 August 2022, the Council notified the Registrant of the Fitness to Practise investigation.*
- 7. On 29 March 2023, the Case Examiners referred the matter to the GOC Fitness to Practise Committee.*
- 8. On 27 June 2023, the Council's case was served on the Registrant.*

9. *On 25 July 2023, the Registrant's representative, WGL Ltd, returned the completed Hearings Questionnaire to the Council. The Registrant at this point admitted to allegation 1, 1c and 2a. The Registrant did not admit to allegation 1a, 1b, 2 and 2b.*
10. *On 25 September 2023, WGL Ltd raised the possibility of seeking an APD hearing.*
11. *On 26 October 2023, WGL Ltd provided a witness statement on behalf of the Registrant in which the Registrant admitted the allegations. The Council also received an email which confirmed that the Registrant accepts current impairment.*
12. *On 27 October 2023, WGL Ltd submitted the Registrant's signed witness statement and Bundle of Documents to the Council.*
13. *The allegation against the Registrant is set out below:*

Allegation

The Council alleges that in relation to you, Mr Joshua Colin Smith (D-17395), a registered dispensing optician:

1. *On 22 December 2021, you created a contact lenses order for Person B and you:*
 - a. *Did not use a prescription to place the order for Person B;*
 - b. *Falsified the records to show that the contact lenses order was a legitimate transaction;*
 - c. *Did not collect payment for the contact lenses;*
2. *Your actions as set out above were dishonest in that;*
 - a. *You knew Person B was not a patient at the REDACTED*
 - b. *You intended to obtain free contact lenses for Person A;*

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

Nature of the Recommended Disposal

14. Upon the Registrant's admissions and upon the Council and Registrant agreeing to this recommendation, the parties jointly seek and recommend to the FTPC that this matter is disposed of by a determination on the following basis:

- i. All of the particulars of the allegations are admitted and found proved;
- ii. That the particulars of the allegations amount to misconduct;
- iii. That the Registrant's fitness to practise is impaired by reason of misconduct; and
- iv. The appropriate and proportionate sanction is a suspension order for 6 months without review.

Relevant law

15. The matter is governed by The Opticians Act 1989 ("the Act") and The General Optical Council (Fitness to Practise) Rules Order of Council 2013 ("the Rules").

16. In accordance with Rule 46 a hearing is required to be conducted in three stages:

- i. Stage 1 - Findings of fact;
- ii. Stage 2 - Findings on whether, as a result of the facts found proved, the Registrant's fitness to practise is impaired by reason of misconduct;
- iii. Stage 3 - Consideration of the appropriate sanction, if any.

17. Rule 40(6) provides: "the registrant may admit a fact or description of a fact, and a fact or description of a fact so admitted may be treated as proved."

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

Stage 1: Factual Findings

19. On 10 May 2022, the Council received a written complaint via the GOC website from the Principal Optometrist at REDACTED. The complaint was in relation to the Registrant ordering contact lens for his REDACTED without paying for them. It was alleged that the Registrant achieved this by creating false records to show that the order was a legitimate transaction and ordering the lens to a different home address.

20. During the course of the Council's investigation, the following information and evidence were obtained from the REDACTED:

- Initial complaint from the Principal Optometrist at the REDACTED;
- Witness statement and exhibits of REDACTED
- Witness statement and exhibits of REDACTED
- Correspondence between the Registrant and REDACTED
- Representations of the Registrant
- Comments of the Complainant

21. The disciplinary investigation report states that the circumstances resulting in the investigation were that the Registrant placed an order for disposable contact lenses under the name of Person B. The prescription was provided by Person A (REDACTED). The address provided for the delivery of the contact lenses was not the address of Person B. There was no prescription to verify that the lenses are appropriate for Person B. The payment for the lenses has not been received into REDACTED. The invoice for the lenses identifies REDACTED (Dispensing Optician) as a contact for the order when she had not been involved in the dispensing. The invoice was authorised for payment by the Registrant and has been paid by the REDACTED.

22. The registrant admits the facts alleged against them.

Stage 2: Misconduct and Impairment

Misconduct

23. With regard to the issue of misconduct, there is no definition but a review of some of the authorities provides some guidance. In Roylance v GMC (no.2) [2000] 1 A.C. 311 Lord Clyde, in his judgment at page 331, stated:

“Misconduct is a word of general effect, involving some act or omission which falls short of what would be proper in the circumstances. The standard of propriety may often be found by reference to the rules and standards ordinarily required to be followed by a medical practitioner in the particular circumstances. The misconduct is qualified in two respects. First, it is qualified by the word “professional” which links the misconduct to the profession of medicine. Secondly, the misconduct is qualified by the word “serious”. It is

not any professional misconduct which will qualify. The professional misconduct must be serious”.

24. *In the case of R (on the application of) Remedy UK v General Medical Council [2010] EWHC 1245 at paragraph 37, it was stated:*

“First, it may involve sufficiently serious misconduct in the exercise of professional practice such that it can properly be described as misconduct going to fitness to practise. Second, it can involve conduct of a morally culpable or otherwise disgraceful kind which may, and often will, occur outwith the course of professional practice itself, but which brings disgrace upon the doctor and thereby prejudices the reputation of the profession.”

25. *In Nandi v General Medical Council [2004] EWHC (Admin), Collins J addressed the issues of seriousness at paragraph 31 emphasising;*

“the need to give it proper weight, observing that in other contexts it has been referred to as ‘conduct which would be regarded as deplorable by fellow practitioners’.”

26. *It is agreed by both the Council and the Registrant that the Registrant’s conduct breached the following paragraphs of the Standards of practice for optometrists and dispensing opticians:*

16. Be honest and trustworthy;

16.1 Act with honesty and integrity to maintain public trust and confidence in your profession;

17. Do not damage the reputation of your profession through your conduct;

17.1 Ensure your conduct, whether or not connected to your professional practice, does not damage public confidence in you or your profession;

27. *The Council and Registrant agree that the allegations amount to a serious departure from the standard of practice expected of a competent dispensing optician.*

28. *The Council and Registrant further agree that the Registrant’s conduct therefore amounts to misconduct within the meaning of section 13D(2)(a) of the Act.*

Impairment

29. There are several relevant authorities from the High Court in appeals against decisions of the General Medical Council's Fitness to Practise Panels, where the Panel has found a doctor's fitness to practise to be impaired.

30. These authorities discussed the way in which regulatory committees should approach impairment in this case at the second stage.

31. The panel is referred to the following authorities:

- *Cohen v GMC [2008] EWHC 581 (Admin)*;
- *Zygmunt v GMC [2008] EWHC 2643 (Admin)*;
- *Cheatle v GMC [2009] EWHC 645 (Admin)*;
- *Yeong v GMC [2009] EWHC 1923 (Admin)*;
- *CHRE v NMC and Grant [2011] EWHC 927 (Admin)*

32. As to the meaning of fitness to practise, in the case of *Zygmunt v GMC [2008] EWHC 2643 (Admin)* Mr Justice Mitting, at paragraph 29 adopted the summary of potential causes of impairment offered by Dame Janet Smith in the Fifth Shipman Inquiry Report (2004, Paragraph 25.50).

33. Dame Janet Smith considered that impairment would arise where a doctor:

- a) presents a risk to patients;
- b) has brought the profession into disrepute;
- c) has breached one of the fundamental tenets of the profession;
- d) has acted in such a way that his/her integrity can no longer be relied upon.

34. Factors (b) (c) and (d) are engaged in this case.

35. In *Cheatle v GMC*, Mr Justice Cranston said this (at paragraphs 21 - 22):

21. There is clear authority that in determining impairment of fitness to practise at the time of the hearing regard must be had to the way the person has acted or failed to act in the past As Sir Anthony Clarke MR put it in Meadow v General Medical Council [2006] EWCA Civ 1390 [2007] 1 QB 462:

"In short, the purpose of fitness to practise proceedings is not to punish the practitioner for past misdoings but to protect the public against the acts and omissions of those who are not fit to practise. The FPP thus looks forward not back. However, in order to form a view as to the fitness of a person to practice today, it is evident that it will have to take account of the way in which the person concerned has acted or failed to act in the past".

22. In my judgement this means that the context of the doctor's behaviour must be examined. In circumstances where there is misconduct at a particular time, the issue becomes whether that misconduct, in the context of the doctor's behaviour both before the misconduct and to the present time, is such as to mean that his or her fitness to practise is impaired. The doctor's misconduct at a particular time may be so egregious that, looking forward, a panel is persuaded that the doctor is simply not fit to practise medicine without restrictions, or maybe not at all. On the other hand, the doctor's misconduct may be such that, seen within the context of an otherwise unblemished record, a Fitness to Practice Panel could conclude that, looking forward, his or her fitness to practise is not impaired, despite the misconduct".

36. In Yeong v GMC [2009] Mr Justice Sales said (at Para 21):

"It is a corollary of the test to be applied and of the principle that a FTTP is required to look forward rather than backward that a finding of misconduct in the past does not necessarily mean that there is impairment of fitness to practise - a point emphasised in Cohen and Zygmunt...in looking forward the FTTP is required to take account of such matters as the insight of the practitioner into the source of his misconduct, and any remedial steps which have been taken and the risk of recurrence of such misconduct. It is required to have regard to evidence about matter that have arisen since the alleged misconduct occurred".

(At Para 48): "Miss Grey submitted that each of Cohen, Meadow and Azzam was concerned with misconduct by a doctor in the form of clinical errors and incompetence. In relation to such type of misconduct, the question of remedial action taken by the doctor to address his areas of weakness may be highly relevant to the question whether his fitness to practise is currently (i.e. at the time of consideration by a FTTP) impaired; but Miss Grey submitted that the position in relation to the principal misconduct by Dr Yeong in the present case (i.e. improperly crossing the patient/doctor boundary by entering into a sexual relationship with a patient) is very different. Where a FTTP considers that the case is one where the misconduct consists of violating such a fundamental rule of the professional relationship between medical practitioner and patient and thereby undermining public confidence to the medical profession, a finding of impairment of fitness to practise may be justified on the grounds that it is necessary to reaffirm clear standards of professional conduct so as to maintain public confidence in the practitioner and in the profession, in such a case, the efforts made by the medical practitioner in question to address his behaviour for the future may carry very much less weight than in the case where the misconduct consists of clinical errors or incompetence. I accept Miss Grey's submissions that the types of cases which were considered in Cohen, Meadow and Azzam fall to be distinguished from the present case on the basis she puts forward".

37. The High Court revisited the issue of impairment in the recent case of CHRE v NMC and Grant where Mrs Justice Cox noted (at paragraph 74):

"In determining whether a practitioner's fitness to practise is impaired by reason of misconduct, the relevant panel should generally consider not **only** whether the practitioner continues to present a risk to members of the public in his or her current role, but also whether the need to uphold professional standards and public confidence in the profession would be undermined if a finding of impairment were not made in the particular circumstances."

38. The Registrant accepts that his fitness to practise is currently impaired, in that;

- i. It is necessary in the public interest to make a finding of impairment of fitness to practise in order to uphold professional standards and public confidence in the profession.

Stage 3: Sanction

39. *Where the FTPC find that a registrant's fitness to practise is impaired, the powers of the FTPC are listed under section 13F (2) (3) and (4) of the Act. Section (2) states that the FTPC may, if they think fit, give a direction specified in subsection (3).*
40. *The purpose of sanctions in fitness practise proceedings are as follows:*
- a) the protection of the public;*
 - b) the declaring and upholding of high standards in the profession; and*
 - c) the maintenance of public confidence in the profession*
41. *Sanctions are not intended to be punitive. Accordingly, matters of personal mitigation carry very much secondary weight.*
42. *In Bolton v The Law Society [1994] 1 WLR 512 Bingham LJ said:*
- "...the reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits but that is part of the price."*
43. *The FTPC should have proper regard to the Indicative Sanctions Guidance unless the FTPC have sound reasons to depart from it – per Lindblom LJ in PSA v (1) HCPC (2) Doree [2017] EWCA Civ 319 at paragraph 29.*
44. *The FTPC must have regard to the principle of proportionality. The principle requires that when considering what sanction to impose in order to fulfil the statutory over-arching objective, the FTPC must take into consideration the interests of the Registrant, which may include the wider public interest in a competent dispensing optician being permitted to return to practice.*

45. *The FTPC should consider the sanctions available, starting with the least restrictive sanction available. The Panel should determine whether that sanction would be sufficient to achieve the over-arching objective.*
46. *Should the Panel conclude that the sanction would not be sufficient it should then move on to consider the next the next least restrictive sanction.*
47. *In terms of aggravating features, the matter involves dishonesty. The Registrant has admitted to the allegations and the negative impact his conduct will have on the reputation of the profession.*
48. *In terms of mitigating circumstances, the Registrant has no previous adverse fitness to practice history and is remorseful for his conduct. The Registrant has demonstrated insight and remediation by undertaking several courses. The Registrant fully acknowledges that his conduct was unacceptable and has stated that he has learned an invaluable lesson as a result of his failings.*
49. *Having regard to the GOC's Indicative Sanctions Guidance, the parties agree that the appropriate and proportionate sanction is a suspension order for 6 months without review.*
50. *This sanction is appropriate and proportionate in that a lesser sanction would not mark the seriousness of the misconduct or allow the Registrant to reflect sufficiently on his misconduct.*
51. *The period of suspension is sufficient considering the serious misconduct involved, balanced against the Registrant demonstrating insight and remediation, and there being no evidence of misconduct since the incident occurred.*

No Further Action

52. *The Indicative Sanctions Guidance states that no further action may be justified in "exceptional circumstances". The Council considers that there are no exceptional circumstances to justify taking no action in this instance.*
53. *The Council considers that taking no further action in light of the seriousness of the misconduct involved would not uphold standards or maintain confidence in the profession and the regulatory process.*

Financial Penalty Order

54. *The Indicative Sanctions Guidance suggests a financial penalty order may be appropriate where the conduct was financially motivated and/or resulted in financial gain.*

55. *The Council do not consider this penalty to be applicable to the circumstances of this case.*

Conditional Registration

56. *For conditions to be appropriate where the FTPC has identified significant shortcomings in the Registrant's practice, the Indicative Sanctions Guidance states, "the Committee should satisfy itself that the registrant would respond positively to retraining which would thus allow the registrant to remedy any deficiencies in practice whilst protecting patients."*

57. *The Council do not consider that conditions would be appropriate considering the nature of misconduct.*

Suspension

58. *The Council and Registrant agree that this is the appropriate sanction.*

59. *In considering the length of the suspension, although this remains a matter for the Committee, it is submitted by the parties that 6 months, with no review, is appropriate to reflect the nature of the concerns raised by the case, the Registrant's lack of previous history and his acceptance of the allegations against him.*

Erasure

60. *The parties agree that the Registrant's conduct is not fundamentally incompatible with registered practise and that, at this stage, this sanction would be disproportionate.*

Immediate Order

61. *The parties agree that, should the FTPC accept the parties' recommendation for disposal, it is appropriate to impose an immediate order for suspension as it is necessary to do so in the public interest.*

On behalf of the Council: Shahina Begum, Investigations Officer

Date: 31 October 2023

On behalf of the Registrant: signed by registrant

Date: 1 November 2023

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.</p> <p>Where a registrant can appeal against a decision, the Authority has 40 days beginning with the day which is the last day in which you can appeal. Where a registrant cannot appeal against the outcome of a hearing, the Authority's appeal period is 56 days beginning with the day in which notification of the decision was served on you. 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.
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.