

# Section 29 Case Meeting

18 September 2023

16-18, New Bridge St, Blackfriars, London, EC4V 6AG



## *Members present*

Alan Clamp (in the Chair), Chief Executive, Professional Standards Authority  
David Martin, Concerns & Appointments Officer, Professional Standards Authority  
Simon Wiklund, Head of Legal, Professional Standards Authority

## *In attendance*

Michael Standing, Counsel, 39 Essex Street Chambers

## *Observers*

Rachael Martin, Scrutiny Team Coordinator, Professional Standards Authority

## **1. Definitions**

1.1 In this meeting note, standard abbreviations have been used. Definitions of the standard abbreviations used by the Authority, together with any abbreviations used specifically for this case are set out in the table at Annex A.

## **2. Purpose of this note**

2.1 This meeting note records a summary of the Members' consideration of the relevant decision about the Registrant made by the regulator's Panel, and the Authority's decision whether or not to refer the case to the court under Section 29 of the Act.

## **3. The Authority's powers of referral under Section 29 of the Act**

3.1 The Authority may refer a case to the relevant court if it considers that a relevant decision (a finding, a penalty or both) is not sufficient for the protection of the public.

3.2 Consideration of whether a decision is sufficient for the protection of the public involves consideration of whether it is sufficient:

- to protect the health, safety and well-being of the public
- to maintain public confidence in the profession concerned, and
- to maintain proper professional standards and conduct for members of that profession.

3.3 This will also involve consideration of whether the Panel's decision was one that a disciplinary tribunal, having regard to the relevant facts and to the object of the disciplinary proceedings, could not reasonably have reached; or was otherwise manifestly inappropriate having regard to the safety of the public and the reputation of the profession (applying *Ruscillo*<sup>1</sup>).

#### **4. Conflicts of interest**

4.1 The Members did not have any conflicts of interest.

#### **5. Jurisdiction**

5.1 The Legal Advisor confirmed that the Authority had jurisdiction to consider the case under Section 29 of the Act. Any referral in this case would be to the High Court of Justice of England and Wales and the statutory time limit for an appeal would expire on 22 September 2023.

#### **6. The relevant decision**

6.1 The relevant decision is the Determination of the Panel following a hearing which concluded on 19 July 2023.

#### **7. Documents before the meeting**

7.1 The following documents were available to the Members:

- Determination of the Panel dated [REDACTED]
- The Authority's Detailed Case Review
- Transcripts of the hearing dated [REDACTED]
- Counsel's Note dated 18 September 2023
- IC Bundle
- Exhibits
- The GOC's Sanctions Guidance
- The Authority's Section 29 Case Meeting Manual

7.2 The Members and the Legal Advisor were provided with a copy of a response from the GOC to the Authority's Notification of s.29 Meeting.

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<sup>1</sup> CRHP v Ruscillo [2004] EWCA Civ 1356

## 8. Background

- 8.1 In November 2021 Mr A, the Registrant's [REDACTED], made a referral to the GOC that the Registrant a registered Optometrist had made racist comments to him and that she had failed to disclose criminal offences to the GOC.
- 8.2 The Registrant had first registered with the GOC as a student optometrist on [REDACTED]. On 10 August 2007, the Registrant had been convicted of Driving with Excess Alcohol at Huddersfield Magistrates Court. She had been disqualified for 16 months and required to pay a fine of £100.00.
- 8.3 On [REDACTED], the Registrant applied to join the register of optometrists, declaring the truth of the content of her application form in which she had answered 'No' to the following question: Have you ever been convicted of, or cautioned in relation to a criminal offence (or been the subject of an Agreed Offer, Penalty Payment Agreement, or Absolute Discharge Order in Scotland) or are you currently being investigated in relation to a criminal offence?
- 8.4 On 8 subsequent occasions between [REDACTED] the Registrant failed to declare her conviction, having submitted applications for retention in which similar declarations were required to which she again responded 'No'. After Mr A's referral, the Registrant disclosed the offence to the GOC in March 2022, 14 years after the conviction.
- 8.5 During the proceedings and in response to an application that Mr A be required to give live evidence in person, the GOC withdrew Mr A's witness statement. A no case to answer application was upheld in relation to the allegation that the Registrant had referred to Mr A as a 'Nigger' and 'Dirty Nigger'. The Registrant admitted that she had referred to Mr A as a 'Paki' in a text message and that her failure to disclose her conviction to the GOC had been dishonest and/or misleading.
- 8.6 The Panel found that the Registrant's use of the term 'Paki' in a text message did not amount to misconduct.
- 8.7 The Panel determined that her fitness to practise was impaired in relation to the non-disclosure of her conviction on public confidence grounds and imposed a suspension order for 3 months.

## 9. Applying Section 29 of the 2002 Act

- 9.1 The Members considered all the documents before them and received legal advice.
- 9.2 The Members discussed the following concerns about the decision:

### *Undercharging*

- 9.3 The Members considered whether the GOC failed to bring additional charges which captured the Registrant's more generalised negative attitudes towards people of Asian heritage. There was evidence arising from Mr A's witness statement which could have been fully articulated in the charges rather than being limited to three occasions of racist abuse which was alleged.

- 9.4 The Members were mindful that there was no evidence other than Mr A's witness statement in respect of more general racist attitudes. Mr A suggested in his witness statement that the Registrant was verbally racist regarding Asians in general, often on returning home from work. The Members considered whether these attitudinal issues should have been investigated and potentially alleged.
- 9.5 The Members considered that any evidence of racist attitudes beyond the text message would engage the public interest and further inquiry should have been made by the GOC and the Panel to ensure that the allegations reflected the full extent of the misconduct as outlined in Mr A's witness statement. As the Panel did not inquire into this matter further, it was unable to make a judgment on the possibility of the Registrant harbouring more generalised racist attitudes. As to whether further allegations would have impacted on the sanction imposed the Members were less certain since ultimately Mr A was not present at the hearing to give evidence and any chance of additional allegations progressing were reliant on the Panel believing Mr A's evidence.
- 9.6 The Members did consider however, that had further allegations been put and found proved indicating racist attitudes the remediation and insight presented would have carried less weight. The Members concluded that the GOC failed to inquire and properly present the case to the Panel and the Panel had failed to satisfy itself that the allegations reflected the full extent of the GOC case as initially presented to it.

#### *Evidence of Mr A*

- 9.7 The Members first considered whether the Panel was wrong to require Mr A to attend the hearing in person to give evidence. The Panel did not consider the issue of whether 'special measures' were required for Mr A to give evidence but was first invited to consider whether Mr A would be required to attend to give evidence in person.
- 9.8 The Members considered that in terms of the Panel sufficiently weighing the evidence it was suboptimal for Mr A not to be present in person.
- 9.9 The GOC's representative considered whether to make an application for special measures to be put in place to allow Mr A to give evidence but concluded that there was no evidence of intimidation but acknowledged that there was a history of – an allegation of domestic abuse and coercive and controlling behaviour. It was unclear whether this related to behaviour by the Registrant or Mr A, but clearly Mr A was reluctant to be present in the same room as the Registrant. The Members considered the GOC representative's view that special measures could only be sought where there had been intimidation was much too narrow and not supported by relevant case law.
- 9.10 The Members had some concerns regarding the GOC's management of Mr A as a witness. The Members concluded that the GOC's failure to seek special measures for the giving of evidence by Mr A and decision that these were not applicable in this case amounted to a procedural irregularity.

#### *Misconduct finding*

- 9.11 The Members considered whether the Panel correctly addressed the factors relevant to the assessment of the seriousness of the conduct when considering

the one-off use of the word “Paki” in the context of a dispute amidst the breakdown of a marriage. The Panel had concluded that this did not amount to serious professional misconduct.

- 9.12 The Members were uncertain whether a finding of misconduct on this charge would have been material to the sanction ultimately imposed of suspension for three months. The allegation was found proved as an isolated incident and there was evidence of insight and remediation.
- 9.13 The Members’ uncertainty was largely due to the procedural irregularity in not allowing Mr A to give evidence using special measures and questions about whether this had an impact on the outcome.
- 9.14 The Panel had referred to the Registrant’s use of the word ‘Paki’ as isolated, yet Mr A’s witness statement suggested otherwise, and the Panel did not have the opportunity to explore this because of the procedural irregularity in not allowing Mr A to give evidence remotely or with special measures. However, even had the Panel found the allegation to amount to misconduct, the Members were unable to conclude that this would necessarily have had any material impact on the final sanction.

#### **Conclusion on insufficiency for public protection**

- 9.15 The Members were concerned with the Panel and GOC’s failure to inquire into the evidence and properly present the case ensuring that the allegations reflected the full extent of the evidence before them. Furthermore, the GOC’s failure to seek or Panel’s failure to consider the issue of whether ‘special measures’ were required for Mr A to give evidence amounted to a procedural irregularity.
- 9.16 The Members acknowledged that the GOC had exercised prosecutorial discretion, and this could be difficult to challenge. Further, the finding of impairment did go some way to addressing the public interest engaged in this case and the Members concluded that there were too many uncertainties in terms of the impact failings in this case could have on the final sanction. In all the circumstances, therefore, the Members concluded that the decision was not insufficient for public protection.

### **10. Referral to court**

- 10.1 Having concluded that the Panel’s Determination was not insufficient for public protection, the Members were not required to consider whether they should exercise the Authority’s power under Section 29 to refer the case to the relevant court.

### **11. Learning points**

- 11.1 The Members agreed that the learning points set out at Appendix B should be communicated to the Regulator.

Handwritten signature of Alan Clamp in cursive script.

**Alan Clamp (Chair)**

**03/10/23**

**Dated**

**12. Annex A – Definitions**

12.1 In this note the following definitions and abbreviations will apply:

<b>The Authority</b>	The Professional Standards Authority for Health and Social Care
<b>The Panel</b>	A Fitness to Practise Panel of the GOC
<b>The Registrant</b>	[REDACTED]
<b>The Regulator</b>	General Optical Council
<b>GOC</b>	General Optical Council
<b>The Act</b>	The National Health Service Reform and Health Care Professions Act 2002 as amended
<b>The Members</b>	The Authority as constituted for this Section 29 case meeting
<b>The Determination</b>	The Determination of the Panel sitting on 1 [REDACTED]
<b>The Court</b>	The High Court of Justice of England and Wales
<b>The SG</b>	Regulator’s Sanctions Guidance