

F(06)18

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

GENERAL OPTICAL COUNCIL

AND

DAVID AGYEMAN (D-8945)

SUBSTANTIVE HEARING: Tuesday, 18 September 2007

SUBSTANTIVE HEARING: DAVID AGYEMAN (D-8945)
Tuesday, 18 September 2007

Fitness to Practise Committee: Mr P North (Lay Member) (Chair)
Miss A Grute (Dispensing Optician)
Mrs G Huka (Lay Member)
Miss R Plahay (Dispensing Optician)
Lady M Wall (Lay Member)

Legal Adviser: Mr D Etherington QC

Hearings Manager: Mr D Henley BEM

For the GOC: Mr B Albuery

The Registrant was unrepresented and appeared in person.

[Proceedings commenced at 10.30]

Mr North: Good morning. I am Mr Peter North, a lay member of the Hearings Panel, and I have been elected by the Committee to chair today's hearing. The Committee is made up of two dispensing opticians and three lay members, and I will ask the members of the Committee to introduce themselves and the capacity in which they sit. *[Introductions]* To my right is Mr Etherington QC, the Committee's Legal Adviser, who will provide legal advice and assistance to the Committee and ensure that the proceedings are conducted in accordance with the Rules of Procedure so as to arrive at a result which is fair and just. The Legal Adviser may accompany the Committee should it sit in private to deliberate. In the event that any matter arises during the course of the Committee's deliberations upon which the Committee seeks advice, the parties will be invited to return to hear the matter which the Committee has raised and the advice given to the Committee. Where advice on any issue is not accepted by the Committee, this will be indicated in the course of its decision on that issue.

At the desk in front of the Committee, to my left, is the transcriber who will be keeping an official record of all that is said today during the sessions of the hearing at which the parties are present. Next to the transcriber is Mr Henley, the Hearings Manager, who will provide administrative assistance to the Committee. The remaining persons sitting in the hearing room, other than the public and press areas, are members of the respective legal teams. All parties are reminded that where details of any patients are to be discussed, those patients have been allocated the letters A to N in the allegation, and those patients should only be referred to by that letter.

Do I have any applications at this point?

Mr Albuery: Sir, there is an application from me for a short adjournment, which I think is supported by Mr Agyeman. May I make an application?

Mr North: Yes.

Mr Albuery: Firstly, may I thank you and your colleagues for allowing us to start slightly later than we should have done. There are two reasons for that delayed start, and those are the same reasons why I have to seek your further indulgence. This case is listed as a substantive hearing for two days. Before now there have been two procedural hearings. Mr Agyeman did not attend either of those hearings and has not engaged with the process until this morning. The conversations that I have

begun to have with him have proved fruitful, and already it is clear to me, from what he has told me, that we have saved a number of hours of hearing time, and indeed I am unlikely to have to call all of the witnesses I had intended to call.

Those discussions are ongoing. The case raises a number of issues and I am assisting Mr Agyeman - though I cannot advise him and I have made that clear - in understanding the process so that he can make informed decisions which you will be content to receive from him. Clearly, and I mean no disrespect to Mr Agyeman when I say this, the fact that he is not legally represented may mean that that takes longer than it might otherwise have done. I know that it is irritating for committees who get here on time not to be able to start on time. I was here shortly after nine o'clock; I wish we could start at ten. You could insist we proceed, but the fact is that if you do you will do a disservice to this case and to yourselves, and the case will go on longer than it need to.

There is another point that I mention, which also causes me to have to make this application, and it is about disclosure of documents. I understand that you have been sent by the Council a hearing bundle which includes full statements and some patient records. Is that correct?

Mr North: That is correct, Mr Albuery.

Mr Albuery: Have you and your colleagues read them?

Mr North: We have.

Mr Albuery: That bundle was sent to you in error and it should not have been sent to you by the Council, and it should not have been sent to you because it was not an agreed bundle. The effect of you having read evidence, part of which the Council does not rely upon and some of which you may not have heard from the witness box, is something which I am currently considering with Mr Agyeman and with your Legal Adviser and upon which I am taking instructions. That is a matter which needs to be considered very carefully and decisions about the effect of that should not be rushed.

For those two reasons I have to ask for an adjournment. The Committee will be keen, I am sure, if they grant such an application, to put a time on it, but it is terribly difficult, for the reasons I hope I have made clear, for me to give you a time by which I can be sure to be ready, particularly bearing in mind that time must allow Mr Agyeman, who is unrepresented, to make decisions about the matters I have raised with you, and I am sure you would be keen not to impose some time bar which might cause those decisions to be rushed.

Mr North: Thank you, Mr Albuery. I understand Mr Agyeman supports this application. Is that correct?

Mr Agyeman: That is correct, Sir.

Mr North: Thank you. Would colleagues like a moment or two to consider the application?
[Yes] Could the parties withdraw?

Mr Etherington: Just before we withdraw I wonder if you would wish me to give any legal advice in public on the two matters - in brief?

Mr North: I think that would be good.

Mr Etherington: There are two applications made here, Sir. The first one is, if I may put it that way, a standard application for some more time, eloquently argued by Mr Albuery, and you have heard the reasons for that. That is a matter entirely within your discretion. Put simply, a little time may save a lot, is what I think Mr Albuery is saying to you.

The second matter is in a different category altogether because here Mr Albuery is saying there has been potentially a procedural irregularity which may affect the fairness of the proceedings. It is right in those circumstances, you may think, for the Registrant to have an opportunity, first of all to consider if there are any submissions that he would wish to make to you about that matter, and secondly for you to have an opportunity then to consider the fairness of the proceedings generally thereafter. Often in these cases, when the detail has been explored it becomes clear whether there is a problem or there is not a problem; sometimes there may be and sometimes there may be not. Why this is in a different category, however – and this cannot be said to be the fault in any way of the Registrant himself. On the first matter, that I will leave alone, but on the second matter it cannot be said to be the fault of the Registrant in any way, and therefore you may think, in all fairness, you would wish to give him a degree of latitude in at least understanding whether there is any application he needs to make to you in due course.

Mr North: Thank you, Mr Etherington. Would the parties withdraw?

[Hearing adjourned at 10.38]

[Hearing resumed at 10.44]

Mr North: The Panel has received no legal advice since it moved into private session and we are minded to grant the application, and in due course we will provide both parties with a copy of our decision. We would like to make a further hour available for both parties to consider both arms of the application.

Mr Albuery: Thank you very much. That is very helpful.

Mr North: Thank you, Mr Albuery.

[Hearing adjourned at 10.45]

[Hearing resumed at 11.43]

Mr North: Thank you, Mr Albuery. I hope that time was of use.

Mr Albuery: Thank you, Sir. It was very helpful. Mr Agyeman has an application, Sir, to make to you.

Mr North: Mr Agyeman?

Mr Agyeman: I have been advised to have an adjournment if possible so I may have a new Panel, have a listen to the QC and also the AOP this morning.

Mr North: Mr Albuery, any comment?

Mr Albuery: My instructions are not to oppose the application. The position is that you have read evidence which was not evidence which I relied upon, and you have also read some other evidence which witnesses could not in fairness have given from the

witness box and which I would not have sought to adduce because I believe it to be inadmissible. Bearing those things in mind, and bearing in mind Mr Agyeman's wish, having consulted representatives to have an adjournment, the Council thinks it would be wrong to oppose that application.

Mr North: Mr Agyeman, do you have any final comment?

Mr Agyeman: No, Sir.

Mr North: Members of the Committee, do you have any questions?

Mrs Huka: Yes, I would like to be clear that it is Mr Agyeman's intention, if we are minded to adjourn this case, to actually come back with legal representation?

Mr Agyeman: Yes.

Mr North: Any further questions? [*No*] Once again, we will hear from the Legal Adviser.

Mr Etherington: The application for the adjournment here is made on the grounds that the Panel has seen material that should not have been given to them and includes both evidence that may not have been relied upon in the event, and also part of the evidence that is conceded by the presenting officer to have been inadmissible in any event.

As a result of that, the Registrant makes the application. Although he has not stated the grounds, no doubt it would appear to a reasonable person properly informed that a fair hearing may not now be possible. It is a matter entirely for your discretion, but you will bear in mind that considering whether or not to oppose this application, the presenting officer has probably a much better idea, with respect, Sir, than the Panel as to what the likely issues in this case are to be, and whether there is a potential for prejudice to have been caused. You will want to give that matter considerable weight. In the end, it is a matter for your discretion.

Mr North: Thank you. That has been very helpful. Any further questions from the Committee at this point? If you will withdraw, we shall consider the matter.

[Hearing adjourned at 11.47]

[Hearing resumed at 12.42]

DETERMINATION

Mr North: The Committee has reached a decision on the application in respect of the determination of the inquiry on 18 September 2007. On 18 September 2007 the Fitness to Practise Committee of the General Optical Council met to consider the following allegation:

That the fitness to practise of David Agyeman (a registered dispensing optician) is impaired in that:

Between 8 July 2005 and 31 August 2005 on the various dates and to the various patients set out in Schedule A Mr Agyeman fitted contact lenses to 14 patients when he was not qualified to do so, contrary to Rule 3 The Contact Lens (Qualifications) Rules 1988, which were

made pursuant to Section 25(3) of the Opticians Act 1989 (as amended).

AND by reason of the facts set out above Mr Agyeman is guilty of misconduct.

The Committee received an application. An application has been made by the Registrant to adjourn these proceedings because of a procedural irregularity which has occurred. This Committee received a bundle of witness statements and exhibits from the Council. These statements in particular included evidence which was not to be called at all, and evidence which was inadmissible and which the Committee would not be entitled to hear. This is very regrettable and should not have happened and could affect the appearance of whether the Registrant would receive a fair hearing today. We know little about the issues which will be in dispute since the Registrant is not represented, nor has he engaged in this process until today. However, Mr Albuery, on behalf of the Council, is better informed and, significantly, does not oppose the application.

In these circumstances the Committee feels that it has no option other than to grant this adjournment. Mr Agyeman has undertaken that he will use this adjournment to obtain legal advice and representation. The Committee is obliged to fix a date for the next substantive hearing, and the date will be 11 January 2008, commencing at 9.30 am. A notice of inquiry will be issued in accordance with the Rules.

Mr Agyeman, to avoid any further delay, I am sure you will agree that it is vital the Committee has your current address. Could you confirm that for me?

Mr Agyeman: Yes, Sir. It is Littleseas, 33 Newark Nok, London E6 6WH.

Mr North: And you do understand the importance of notifying the Council of any changes to your address?

Mr Agyeman: Yes, Sir.

Mr North: Finally, for my record, are you currently registered as a dispensing optician with the General Optical Council?

Mr Agyeman: I think, due to the inquiry, everything was on hold until the investigation had finished. That's my understanding.

Mr Albuery: Sir, can I assist you with that, having spoken to the Registrar this morning?

Mr North: Yes.

Mr Albuery: The position is that Mr Agyeman has not paid his fees, nor did he seek to be retained on the Register this year but, to ensure that he remains within the jurisdiction of the Council, the Council has kept him on the Register. So he is, and will remain until the determination of this case, on the Register of Dispensing Opticians.

Mr North: Do you appear on any of the other registers of the General Optical Council, Mr Agyeman?

Mr Albuery: Can I assist you with that as well, lest he is unsure about it?

Mr North: Indeed, Mr Albuery.

Mr Albuery: He appears, for the same reasons, and notwithstanding his same lack of engagement with the Council, on the Student Optometrists' Register, and will remain on that register also until the determination of these proceedings.

Mr North: Are you undertaking any work as a dispensing optometrist at the moment?

Mr Agyeman: Currently I am sitting for audiology entry exams.

Mr North: Are you carrying out any locum appointments?

Mr Agyeman: No, Sir.

Mr North: Are you planning to undertake work as an optometrist between this date and the date of the new hearing on 11 January?

Mr Agyeman: No, Sir.

Mr Albuery: Sir, bearing in mind your questions, I ought to tell you, and I do so on instructions, that certainly the Council has very recent email evidence to suggest that Mr Agyeman was working as a dispensing optician certainly a few weeks ago, at Specsavers in Great Yarmouth. I don't know, as we speak today, whether that is the case or whether that employment has now ended. There is no interim order currently in place. I am trying to get behind the questions. If this is a matter which concerns the Committee, then I would need a little more time, because I did not anticipate these questions – perhaps I should have done but I didn't, and I apologise – to give you some more information as to dates of this, because it came to light only in respect of trying to trace Mr Agyeman.

Although the Council has, I hope you will think very openly, admitted its error in the service of documents, the fact is, of course, that would not have occurred had Mr Agyeman engaged in these proceedings, or indeed complied with the directions given by your colleagues at the procedural hearing, which required him to do certain things, which he has not done, by 30 June. Whatever else you may say today, I will invite you, if I may, to remind Mr Agyeman that the Committee expects him to comply with all the outstanding directions, none of which have been complied with by him.

Mr Agyeman: Sir, if I could clarify what the gentleman –

Mr North: We are not here to hear the substantive matter, Mr Agyeman, and to address the merits of the allegations made against you. However, there have been directions from the Council in the past with which you have failed to comply. I would like to stop at that point and take some advice from my Legal Adviser.

Mr Etherington: I think the Committee is entitled to remind you, and perhaps it will be sufficient if I say it, that there is very unlikely to be any adjournment in the future. The procedural matter was not your fault today and that is understood, but if there were any other matters that arose that were your fault, or orders that you have not complied with, I am afraid you can expect the hearing on the next occasion to take place in any event. In particular, if you are relying on anything such as American qualifications and so on as part of your case, you will need to have that evidence in good time, and served on the Council certainly not less than 14 days before the hearing, to give them an opportunity to deal with it. In other words, what everyone is

anxious to avoid is you turning up on the next occasion and, for a reason that is your fault, not being ready to proceed. I am sure you understand that.

Mr Agyeman: Yes, Sir.

Mr North: Mr Albuery, any further comment?

Mr Albuery: No, but if you do want more information concerning that employment matter I mentioned, I will need time to look at some email correspondence.

Mr Etherington: Mr Albuery, can I help to this extent? I think what the Committee are concerned about is not so much what power they have at the moment to do anything, because they are limited by the inquiry they have conducted and also the procedural irregularities, and they are not the investigative committee. They are anxious that somebody should be looking at it.

Mr Albuery: Thank you. The Head of Legal at the GOC is sitting next to me and he has heard what you have said. Thank you.

Mr North: Are both parties content at that point?

Mr Albuery: Yes, Sir.

Mr North: Mr Agyeman?

Mr Agyeman: Yes, Sir.

Mr North: The Committee is now closed.

[Hearing concluded at 12.52]