

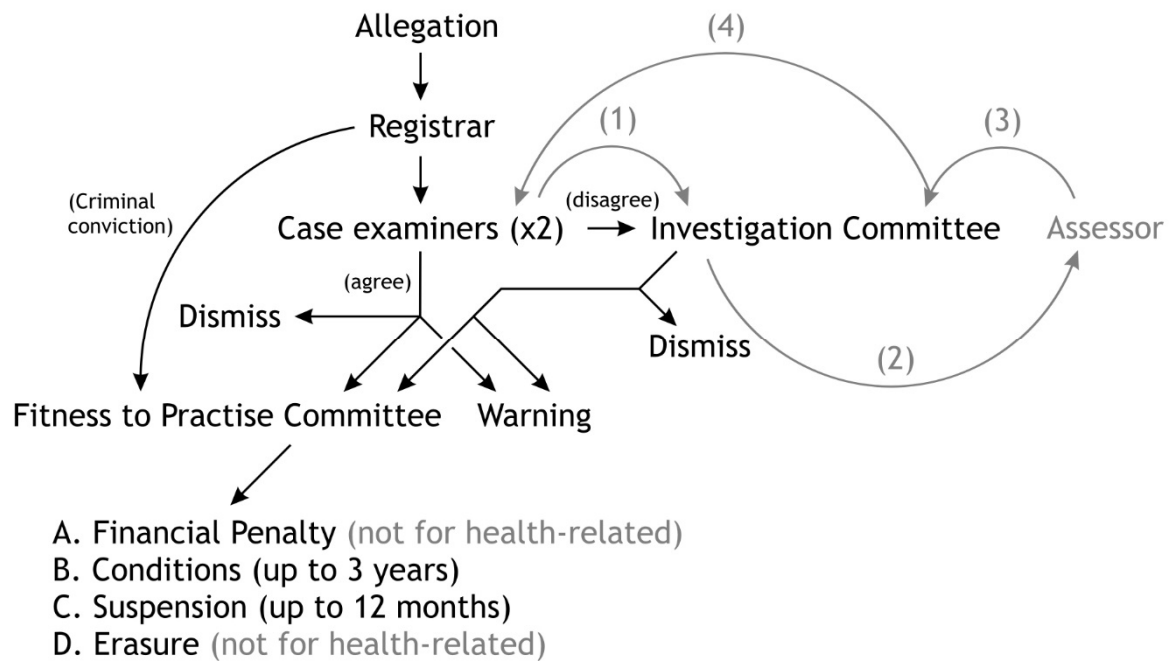
# 1 Introduction

## 1.1 General Optical Council

The regulation of optometrists and dispensing opticians in the UK falls under the remit of the General Optical Council (GOC). The GOC has a responsibility to ensure the continued fitness to practise (FtP) of its registrants as part of its function of promoting high standards of conduct and performance under s.1(2) of the Opticians Act 1989. A person's FtP may be impaired by reason of, for example, misconduct, deficient professional performance, a criminal conviction, or a police caution (Opticians Act 1989, s.13D(2)).

Under the new fitness to practise rules, if an allegation is made that potentially raises questions about an optician's fitness to practise, the Registrar must refer it to two case examiners for consideration (Fitness to Practise Rules 2013, rule 4), unless the allegation relates to a criminal conviction resulting in a custodial sentence, in which case it must be referred directly to the Fitness to Practise Committee (*ibid.*, rule 4(5)).

The case examiners must consider the allegation and may, if both agree, refer the case to the Fitness to Practise Committee, or dispose of the case by issuing a warning to the registrant regarding their future conduct or performance (*ibid.*, rule 12(1)(a)). Where the case examiners cannot agree, they must refer the allegation for consideration by the Investigation Committee (*ibid.*, rule 12(1)(b)). The Investigation Committee may refer the case to the Fitness to Practise Committee, or issue a warning (*ibid.*, rule 14). Consideration by both the case examiners and the Investigation Committees takes place in private (*ibid.*, rules 12(8) & 13(6)). An overview of this process is shown in **Figure 1**.



**Figure 1:** Process for dealing with allegation that potentially call an optician's fitness to practise into question. In cases relating to adverse physical or mental health, an additional 4-step assessment (shown in grey) must also be carried out. Neither a financial penalty nor removal from the Register are appropriate sanctions where any impairment of fitness to practise is as a result of poor health.

Membership of a Fitness to Practise Committee is drawn from a panel made up of 40 members: 18 lay people, of whom 8 are lay chairs; 12 optometrists, and 10 dispensing opticians. Panels considering individual cases normally comprise five panellists including one chair, with a lay majority. Additionally, a legal adviser sits with each Committee and advises on points of any matters of law, evidence or procedure (ibid., rule 43). One or more clinical or specialist advisers may also be present. Their role is to provide advice to the Committee in relation to issues regarding an indicted individual's health or to any other matter of relevance, as appropriate to the case (ibid., rules 44 & 45).

The Fitness to Practise Committee meet in public, except where they are considering confidential information concerning the optician's health, or if it is otherwise considered appropriate by the Committee (Fitness to Practise Rules 2013, rule 25). Both the GOC (which brings the case) and the registrant are invited to

attend the hearing. The GOC is normally represented by counsel, and the optician is usually present and legally represented. The parties call witnesses, who may be cross-examined by the other party, and have questions put to them by the Fitness to Practise Committee. There are three stages to a hearing, namely:

1. Findings of fact;
2. Decision of impairment;
3. Sanction.

At stage 1, the panel will decide if specific facts or accusations are proven based on the civil burden of proof (i.e. “on the balance of probabilities”) (ibid., rule 38).

At stage 2, the Fitness to Practise Committee decide whether the optician’s fitness to practise is impaired as a result of the fact(s) proven at stage 1. Both the GOC and the optician may address the panel with respect to impairment of FtP and, in relevant cases, both parties can present additional evidence relating specifically to impairment. It is important to emphasise at this point that the Fitness to Practise Committee are required to decide on whether or not a optician’s fitness to practise *is* (currently) impaired; not whether it *was* impaired at the time at which the proven facts occurred.

If the panel concludes that the registrant’s fitness to practise is impaired, the hearing moves to stage 3, at which the following sanctions are available to the Fitness to Practise Committee: to impose a financial penalty; to place conditions on the optician’s registration for up to 3 years; to suspend the optician’s registration; or to remove the optician’s name from the relevant register. Where the adverse mental or physical health of the registrant leads to a finding of impairment, neither a financial penalty nor erasure may be considered as an appropriate sanction. In deciding on the appropriate sanction the panel must have regard to the GOC’s document *Fitness to Practise Panels: Hearings Guidance and Indicative Sanctions* (HGIS) (General Optical Council, 2013a).

The HGIS outlines the decision-making process and factors to be considered by the Fitness to Practise Committee in cases that have been referred to it. It is an authoritative statement of the GOC’s approach to sanctions issues, and states that in

determining the appropriate sanction, the Committee “must consider both mitigating and aggravating features as set out in the evidence they have heard” (ibid., p.12).

The HGIS also provides guidance on which sanctions are most appropriate to the nature of the impairment: for example, in cases involving serious harm to patients, either deliberately or through incompetence, removal from the register is signposted as being an appropriate sanction (ibid., p.27).

Any decision that restricts an optician’s registration or removes the optician from the register can be appealed in the High Court (or in the Court of Session in Scotland) under s.23G of the Opticians Act 1989. The GOC, in common with all statutory bodies overseen by the Professional Standards Authority for Health and Social Care (PSA), is bound by rulings of the Administrative Court of the Queen’s Bench Division of the High Court (and its equivalent in Scotland), and may have to change its guidance for deciding whether a optician’s fitness to practise is impaired based out the outcome of such appeals (Dyer, 2008, 2009).

## **1.2 Cases**

Among the relevant appeals to the High Court was *Cohen v GMC*, which clarified that Fitness to Practise Committees must focus on opticians’ current and future fitness to practise, and not on disciplining them for past misconduct.

At stage 2 of Cohen’s hearing, his fitness to practise was deemed to be impaired by virtue of an act of misconduct. This was dealt with at stage 3 by the imposition of a relatively mild sanction, namely: to place conditions on his registration. He appealed the decision to the High Court, reasoning that due consideration of certain mitigating factors was not taken at stage 2 and, had these factors been taken into account, his fitness to practise would not have been found impaired, and his hearing would not have progressed to stage 3.

In the opinion of Justice Silber, the Fitness to Practise Panel (of the General Medical Council) considered that it followed automatically that Dr Cohen’s fitness to practise was impaired from the factual findings of misconduct. He stressed that “it was not intended that every case of misconduct found at stage 1 must automatically

mean that the practitioner's fitness to practise is impaired [at stage 2]". He disagreed with the decision that it was not relevant to take mitigating circumstances into account at stage 2. He specifically concluded that "they did not consider it relevant at [this] stage because they did not mention it in their findings at stage 2, but they did mention it at stage 3". Accordingly, he ruled that Dr Cohen's fitness to practise should not have been regarded as impaired and the sanctions imposed by the panel should be substituted for a warning.

In the ruling in the case of *Zygmunt v GMC*, Justice Mitting further asserted that a practitioner's current fitness to practise must be gauged not only on past conduct, but also by reference to how he or she is likely to behave or perform in the future.

Justice Mitting agreed with the assertion of Justice Silber in *Cohen* that when fitness to practise is being considered (at stage 2), the task of the Fitness to Practise Committee is to consider the misconduct in the light of all relevant factors in determining whether fitness to practise is (rather than was) impaired. He quashed the decision of the panel on the question of fitness to practise being impaired and remitted it to the panel to re-determine in the light of the guidance given in the judgment.

In *Azzam v GMC*, it was established that the Committee must give appropriate weighting to mitigating circumstances at stage 2, especially where they may affect the current FtP.

Justice McCombe ruled that the Fitness to Practise Committee erred in deciding to give little weight to evidence attesting to Azzam's training and performance in the period following the incident because such evidence was relevant to the issue of whether his fitness to practise was impaired *at the date of the hearing*. He stated that it must behove a Fitness to Practise Committee to consider facts material to the practitioner's fitness to practise looking forward. For that purpose, they should take into account evidence as to his present skill set, and to any steps taken since the misconduct occurred, to remedy any deficiencies.

## 2 Aims & Objectives

The aim of this research is to examine determinations of impairment of fitness to practise, and sanctions imposed, by the GOC during the three-year period between 1 October 2012 and 30 September 2015. Among the objectives are:

1. to assess whether the Fitness to Practise Committee is adhering to the judgments in *Cohen*, *Zygmunt*, and *Azzam* when determining fitness to practise; and
2. to assess whether those circumstances described by the GOC in their *Hearings Guidance and Indicative Sanctions* as warranting the suspension or termination of an optician's registration do actually lead to these outcomes.

These objectives will be tested using the following hypotheses:

1. specific aggravating/mitigating circumstances considered when determining the appropriate sanction at stage 3 will first have been considered when determining fitness to practise at stage 2; and
2. cases citing specific aggravating circumstances are more likely to lead to suspension or removal from the relevant registers.

## 3 Materials & Methods

The GOC are responsible for ensuring the determinations of their public hearings are published in a timely manner. A list of all Fitness to Practise Committee decisions made in the previous 12 months, together with the reason for each decision, is published on the GOC website. Transcripts may additionally be requested in accordance with s.8 of the Freedom of Information Act 2000. A request for data covering the three year period between 1 October 2012 and 30 September 2015 was made. The GOC complied with this request on 29 October 2015.

Cases were selected on the basis of specific inclusion criteria. Only those cases which involved an optician who was appearing before the Fitness to Practise Committee at first instance, were included. Review cases and cases appealing for restoration after a previous determination were excluded, as were interim order

cases, and cases where none of the allegations were found proven at stage 1. All allegations that required progression to stage 2, including those involving criminal convictions and cautions, misconduct, and deficient professional performance, were included. Cases relating to an optician's health were excluded, as such cases are often heard in private, and not subsequently reported, or reported in a truncated form, under rule 25 of the Fitness to Practise Rules 2013.

Each case that met the inclusion criteria was analysed. Descriptive data, including the commencement and completion dates of each hearing, the range of dates over which the alleged misconduct occurred, the registrant's particulars, and any sanction imposed were recorded. Additionally, each case report was subjected to a thematic analysis: at each of stages 2 and 3, it was determined whether the Fitness to Practise Committee made reference to certain aggravating circumstances or points of mitigation in reaching their determinations of impairment and sanction, respectively. Specifically, each report was parsed for the panel's deliberation of certain circumstances highlighted in the HGIS as being of significance, namely:

1. evidence of the optician's insight into the problem;
2. whether there was a risk of harm to patients or the public;
3. whether dishonesty was involved; and
4. the optician's behaviour since the date on which the misconduct.

To assess whether aggravating and mitigating circumstances considered when imposing sanctions are first considered when determining impairment, we applied the same standard as Justice Silber in *Cohen*: we did not consider a mitigating or aggravating factor was considered at stage 2 if it was not reported at stage 2, but was subsequently mentioned at stage 3. In each instance, the circumstances were labelled as either present or absent. In cases where a mitigating or aggravating factor was not mentioned at either stage 2 or 3, it was considered not to be relevant in that case. These data were tabulated in a form amenable to quantitative analysis using IBM® SPSS® Statistics, version 23.0.

Pearson's chi-squared test was used to detect a variation from the distribution of data that should be expected: so, for example, if consideration of risk of harm at

stage 2 is not consistent with consideration at stage 3, the distribution is unequal and would form part of a correlation that the test would detect.

Aggravating circumstances deemed by the GOC as serious enough to warrant a sanction removing the optician from the register, specifically dishonesty and risk of harm to patients or the public, were sought out in the stage 3 deliberations. For each case in which either of the aggravating circumstances of risk of harm or dishonesty was considered, the  $X^2$  test was carried out to determine if their inclusion in the deliberations was more likely to lead to the sanction of erasure.

## 4 Results

In total, 42 cases met with the inclusion criteria. Insight was considered at stage 2 in 41 of 42 hearings (98%). For the 41 cases in which it was considered at stage 2, it was subsequently examined again at stage 3 in 37 cases (90%). Insight was not considered at stage 3 in the first instance in any cases. In a single case, it was not included in the committee's deliberation at either stage (**Table 1**).

**Table 1:** Correlation between consideration of insight as a mitigating factor at each of stages 2 and 3 of 42 GOC fitness to practise hearings.

FtP Stage?	Determination Stage?	
	Yes	No
Yes	37	4
No	0	1

Pearson's chi-squared test was conducted to determine any correlation between insight as a factor at each of stages 2 and 3 of the FtP hearing. There was a statistically significant correlation between the stages at which this specific circumstance was first given consideration ( $X^2(1) = 7.580, p = 0.006$ ). There was a moderately strong positive association between the stage of first consideration and insight determined using Cramér's phi ( $\phi_c = 0.425, p = 0.006$ ). The optician's insight into their misconduct was more likely to be heard at stage 3 if it was first considered at stage 2, indicating that the FtP Committee were considering this factor at stage 2 in the first instance.



Similar results were observed for the other three factors, namely: risk of harm to patients or the public ( $X^2(1) = 11.351$ ,  $\phi_c = 0.520$ ,  $p < 0.001$ ); behaviour of the optician since the misconduct occurred ( $X^2(1) = 13.530$ ,  $\phi_c = 0.568$ ,  $p < 0.001$ ); and dishonesty ( $X^2(1) = 42.000$ ,  $\phi_c = 1.000$ ,  $p < 0.001$ ), with the latter perfectly correlated between the two stages.

Risk of harm to patients was examined at stage 2 in 37 of 42 hearings. It was considered as a mitigating factor (i.e. there was no risk of harm) in 27 of those cases (73%), and as an aggravating feature in 10 cases (27%). In 66.7% of cases (28) this factor was considered at stage 2 prior to stage 3 (**Table 2**).

**Table 2:** Correlation between risk of harm as a considered factor at each of stages 2 and 3 of 42 GOC fitness to practise hearings.

FtP Stage?	Determination Stage?	
	Yes	No
Yes	28	9
No	0	5

Dishonesty was considered at stage 2 in 36 of 42 (86%) of cases examined. It was deemed to be an aggravating factor in 32 cases (89%) and, by virtue of its absence, a mitigating factor in 4 others (11%). It was not examined at either stage in just 6 cases. It was not factored at stage 3 in the first instance in any of the cases examined, and was not considered at all in 6 cases (14%). In all cases where dishonesty was considered at stage 3, it had first been considered at stage 2 (**Table 3**).

**Table 3:** Correlation between dishonesty as a considered factor at each of stages 2 and 3 of 42 GOC fitness to practise hearings.

FtP Stage?	Determination Stage?	
	Yes	No
Yes	36	0
No	0	6

The behaviour of the optician since the misconduct occurred was considered at stage 2 of 23 hearings (55%). For the 23 cases in which it was considered at stage 2, it was subsequently examined again at stage 3 in 20 cases (87%). Subsequent behaviour was first considered at stage 3 in 6 cases (14%). In a further 13 cases (31%), it was not included in the panel’s deliberation at either stage (**Table 4**).

**Table 4:** Correlation between subsequent behaviour as a considered factor at each of stages 2 and 3 of 42 GOC fitness to practise hearings.

FtP Stage?	Determination Stage?	
	Yes	No
Yes	20	3
No	6	13

Where harm or risk or harm to the patient was an aggravating factor stage 3 (9 of 42 cases), 78% of cases resulted in suspension or removal from the register. Where no such risk was found (33/42), 91% of practitioners were sanctioned by erasure. This difference is not statistically significant ( $X^2(1) = 1.163, p = 0.281$ ) (**Table 5**).

**Table 5:** Correlation between risk of harm as an aggravating factor and the sanction of removal (in the form of either suspension or striking off) from the relevant register.

Risk of harm found?	Sanction	
	Removal	Other
Yes	9	0
No	28	5

Conversely, where dishonesty was involved (33/42), either suspension or removal was deemed the appropriate sanction in 94% of cases, compared to the 67% of opticians receive one of these sanctions where dishonesty was not an aggravating factor (6/9). There is a statistically significant, moderate correlation between dishonesty and erasure ( $X^2(1) = 5.015, \phi_c = 0.346, p = 0.025$ ) (**Table 6**).

**Table 6:** Correlation between dishonesty as an aggravating factor and the sanction of removal from the relevant register.

Dishonesty found?	Sanction	
	Removal	Other
Yes	31	2
No	6	3

## 5 Discussion

### 5.1 Fitness to Practise

Four factors were chosen to assess whether aggravating and mitigating circumstance were given due consideration when determining fitness to practise. Insight into the misconduct and behaviour since it occurred were selected, as their presence reflects that the Fitness to Practise Committee are complying with the ruling in the *Zygmunt* case, in which it was emphasised that an optician's current fitness to practise must include consideration of how the optician is likely to act in the future, in addition to their past conduct. The optician's behaviour in the interim period, during which they are free to continue unimpeded in their practise (unless an interim order is in place), must be considered if the Fitness to Practise Committee can claim to be looking forward when deciding the current status of fitness to practise, especially in cases where the optician has made an effort to remedy any shortcomings that contributed to the misconduct. Additionally, before seeking to overhaul their performance or behaviour, an optician must first gain insight into their misconduct. Such insight must be in evidence before reparations can be made.

Risk of harm and dishonesty are considered to be amongst the most severe aggravating circumstances described in the HGIS (General Optical Council, 2013a (pp.27-28)). These were included here as they are deemed to potentially warrant a more severe sanction, and, as such, failure to consider them at stage 2 can lead to harsher consequences, as was the case for Dr Zygmunt.

Risk of harm was factored into 37 of 42 of hearings. In each cash, it was considered first at stage. Dishonesty was considered relevant to 36 cases, and –

again – was first considered in determining fitness to practise in every case. Insight was a factor in the greatest number of hearings (41), and was first factored into the Committee’s deliberations at stage 2. The optician’s behaviour since the misconduct occurred was a factor in just 29 cases. It first entered the panel’s deliberations at stage 2 in 23 (79%) of these cases. It first appeared at stage 3 in 6 (21%) cases. Each of these factors was more likely to be considered at stage 3 following initial consideration at stage 2. When considered together, these figures indicate that the GOC are, in general, guided by the rulings in *Cohen, Zygmunt, and Azzam*.

## **5.2 Sanction**

The purpose of sanctions is not to be punitive, but rather to protect patients and the wider public interest (*ibid.*, p.21). In protecting the public interest, the Committee is required to consider “not only whether the registrant continue[s] to present a risk to members of the public, but whether the need to uphold proper professional standards and public confidence in the registrant and in the profession would be undermined if a finding of impairment of fitness to practise were not made in the circumstances of this case”, as outlined in *NMC v Grant*. Page 27 of the HGIS states that removal from the relevant register may be appropriate when the optician’s behaviour involves any of a list of aggravating factors, which include: a reckless disregard of the principles set out in the *Code of Conduct for Optometrists, Dispensing Opticians and Optical Students* (General Optical Council, 2013b); doing or risking serious harm to others; persistent lack of insight; and dishonesty.

The HGIS underscores cases where a registrant has “failed to provide an adequate level of care, falling well below the professional standards expected of a registered optometrist or dispensing optician” as being candidates for the sanction of erasure (General Optical Council, 2013a (p.29)). The fundamental duty of opticians to “[m]ake the care of the patient [their] first and continuing concern” is of paramount importance (General Optical Council, 2013b (para.1)). As well as working within the limits of their own competence, opticians are required to promote and encourage a culture that allows all staff to raise concerns openly and safely, and are required to raise safety concerns (*ibid.*, para.14). Reference to insight in the HGIS emphasises the requirement for evidence of the optician’s understanding of the problem: where

insight is not evident, it is likely that conditions on registration or suspension may not be appropriate or sufficient.

Requirements for honesty implicit in the *Code of Conduct* are highlighted by the HGIS (General Optical Council, 2013a (p.27)). The Code of Conduct states that registered opticians must be honest and trustworthy, and must act to maintain the public's trust in the profession (General Optical Council, 2013b (paras.6 & 19)). Even where it relates to matters outside the optician's responsibility, dishonesty is deemed as particularly serious, must be treated as a serious aggravating circumstance by the Fitness to Practise Committee, as it can undermine the trust the public place in the profession.

Where risk of harm was identified as an aspect of an optician's misconduct, it was no more likely that suspension or removal from the register would result compared to cases where no such risk was present. In previous research involving doctors, erasure from the register (i.e. striking off, not including suspension) was three times more likely to be the eventual outcome in cases involving risk of harm to patients or the public (Gallagher & Foster, 2015). For dentists, it was one-and-a-half times as likely (Gallagher & De Souza, 2015), and for pharmacists, twice as likely (Gallagher, Greenland & Hickman, 2015).

Where dishonesty was involved, suspension or removal was one-and-a-half times as likely to result. This is consistent with the pattern observed for both doctors and dentists: however, for the profession of pharmacy, the presence of dishonesty as an aggravating factor was associated with an eight-fold increase in the likelihood of the imposition of the ultimate sanction of erasure from the *Register of Pharmacists*.

This does not claim to constitute a complete qualitative analysis of how specific factors influence the decision of the GOC's Fitness to Practise Committee: rather it seeks to make way for such an analysis by first demonstrating that the committee is adhering to the published guidance. This research does not consider the extent to which such factors are considered, nor does it seek to address how they are affected by the facts of each individual case.

There has been a call for formal evidence on the factors to be considered in judging fitness to practise, which is currently limited (Baker, 2006). Some evidence can be found in research commissioned by the General Medical Council (Policy Studies Institute, 2000), but this is dated and specific to the medical profession. It has been recognised that this should be supplemented by independent research.

## Conclusions

All of the mitigating and aggravating circumstances chosen for this study were more likely to be considered in determining the appropriate sanction having first been taken in account when determining impairment of fitness to practise. We conclude, therefore, that the GOC do, in general, factor the rulings of High Court appeal cases into their deliberations on the impairment of fitness to practise and, where dishonesty is involved, consider the guidance within the HSI in determining which sanction to apply. We were unable to show that placing the safety of patients at risk was more likely to result in erasure – whether temporary or permanent – from the register.

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