Boots Opticians Professional Services Ltd

Members present
Antony Townsend (in the Chair), Board Member, Professional Standards Authority
Mark Stobbs, Director of Scrutiny and Policy, Professional Standards Authority
Kisha Punchihewa, Head of Legal/Senior Solicitor, Professional Standards Authority
(attendance by telephone)

In attendance
Peter Mant, Legal Advisor, 39 Essex Chambers (attendance by telephone)

Observers
Rachael Martin, Team Coordinator, Professional Standards Authority
Michael Humphreys, Policy Manager, Professional Standards Authority
Lesley Loughran, Publications Officer, Professional Standards Authority
Christopher Pawluczyk, Senior Scrutiny Officer, 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\(^1\)).

4. **Conflicts of interest**

4.1 The Members did not have any conflicts of interest but wanted it recorded that Member Kisha Punzihewa worked at the GOC 7 years ago. The Member was satisfied that she was not familiar with this case.

5. **Jurisdiction**

5.1 The Legal Advisor confirmed that Corporate registration falls under Section 29 of the Act and that the Authority had jurisdiction to consider the case. 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 3 May 2019.

6. **The relevant decision**

6.1 The relevant decision is the Determination of the panel following a hearing which concluded on 27 February 2019.

6.2 The Panel's Determination which includes the charges and findings is set out at Annex B.

7. **Documents before the meeting**

7.1 The following documents were available to the Members:

- Determination of the panel dated 27 February 2019
- Counsel's Detailed Case Review
- Transcripts of the hearing dated 17-21 December 2018 and 27 February 2019
- Registrant's exhibits bundle
- The GOC's Indicative Sanctions Guidance
- The Authority's Section 29 Case Meeting Manual

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\(^1\) CRHP v Ruscillo [2004] EWCA Civ 1356
8. **Background**

8.1 The proceedings concerned Boots Opticians Professional Service Limited, a business Registrant of the GOC.

8.2 The charge against the Registrant concerned a failure, between October 2014 and February 2016, to appropriately manage protected disclosures made by an employee ("Mr A") about clinical concerns within the business, in that it: (i) did not identify that the disclosures were protected disclosures pursuant to the Public Interest Disclosure Act 1988; disclosed to the subject of the protected disclosures ("KE") that they had been made by Mr A; and retained KE as Clinical Governance Optometrist with responsibility for the clinical supervision of Mr A.

8.3 The Registrant denied the charge against it on the basis that the disclosures made by Mr A were not protected disclosures. The Panel rejected this argument and found all the allegations proved. It determined that the Registrant’s fitness to practise was impaired on public protection and wider public interest grounds. It imposed the maximum financial penalty of £50,000 but declined to impose any other sanction holding that “any conditions would merely replicate existing legal obligations”.

8.4 Mr A was called to give evidence by the GOC as the Registrant denied the charge against it. At the fact-finding stage, the Registrant called all three of its employees/officers to whom Mr A had made his disclosures. At the misconduct and impairment stage, the Registrant called its current Professional Services Officer (PSO) who gave evidence about the development of a new whistleblowing policy. The PSO accepted that the disclosures should have been treated as whistleblowing and apologised for the previous policy; but notably the PSO did not explain how this approach sat alongside the way the case had been defended. She also accepted the further criticisms made by the Panel of the policy she had presented to it as the updated policy. These included the delay in preparing the policy and in ensuring that its staff were appropriately trained to understand it.

8.5 There was then a two-month delay before the sanction stage. No further witnesses were called but an additional bundle of documents was submitted (this included a further amended policy) and counsel for the Registrant asserted further facts in submission.

9. **Applying Section 29 of the 2002 Act**

9.1 The Members considered all the documents before them and received legal advice. The Members noted that the financial penalty imposed was likely to address concerns as to the seriousness of the misconduct as this was the maximum penalty that could be imposed. The focus of the Members’ discussion was whether the outcome addressed the lack of insight and remediation and the risk of repetition that the Panel had identified.

9.2 The Members discussed the following concerns about the decision:
 Were the Panel’s reasons for not imposing conditions reasonable?

9.3 The Members considered whether the Panel’s decision not to impose conditions either in addition to the financial penalty or as the sole sanction was reasonable given the Panel’s findings at the impairment stage.

9.4 At the misconduct and impairment stage the Panel heard evidence from the Registrant’s PSO. She gave evidence that in November 2018 a new policy on whistleblowing was published on a staff intranet page and staff were required to read the policy and answer questions on-line. At the time 30 out of 55 senior staff had completed the relevant on-line module. Other staff were required to read the policy and complete the online questions and at that time 3,700 out of 6,000 staff had done so. The Panel were also informed that in the first quarter of 2019 a more interactive on-line learning module was being developed that all staff would be required to complete.

9.5 The PSO also agreed, when questioned by the Panel, that there was a requirement for the grievance policy to cross-refer to whistleblowing. The Members noted that the Registrant’s employees had wrongly treated the protected disclosures made by Mr A as a grievance.

9.6 The Members noted the Panel’s acceptance that the misconduct in this case should be capable of remediation through the introduction of a suitable and effective policy; implementing suitable staff training and ensuring the policy is brought to the attention of all employees and its effectiveness monitored. However, it was clear that the Panel had reached the view that the steps taken by the Registrant and presented to the Panel at the misconduct and impairment stage were considered to be inadequate.

9.7 At the sanction stage the further evidence submitted by the Registrant included: a revised whistleblowing policy; statistics on completion of on-line learning and an email from the Federation of Dispensing Opticians stating that they were considering issuing guidance to their members. But the Members noted that no oral evidence was called to explain the new policy that was placed before the Panel.

9.8 The Members considered the content of the new policy document. The Members shared the Panel’s concerns regarding the new policy and whether it was "fit for purpose". In particular, they noted the Panel’s concerns regarding: the absence of a definition of whistleblowing; absence of guidance to distinguish whistleblowing and grievances and an absence of clarity in stating that public interest concerns need not be the sole motive for disclosure.

9.9 With regard to implementation of the policy it was noted that whilst the figures for completion of the e-learning programme were now close to 100%, these figures related to the November 2018 policy. The Members noted a decision had been taken to roll-out the amended policy at the same time as launching the new interactive e-learning module.

9.10 The Members also noted a decision had been taken not to cross-reference the grievance and whistleblowing policy. This was concerning given the genesis of the case before the Panel.
9.11 The Members noted that at the sanction stage the GOC invited the Panel to impose a financial penalty. No submissions were made as to the risk of repetition or the significance of the Registrant’s new evidence. In terms of conditions, Counsel for the GOC stated that the Panel should “seriously consider” a conditional registration order but that “probably” this was a case that could adequately and proportionately be disposed of by imposing a financial penalty. The Members were concerned by the approach taken by the GOC at sanction. The Members also noted that the Registrant’s Counsel submitted that the new evidence provided should provide reassurances that the Registrant had developed full insight and remediation. They further submitted that conditions were not appropriate on the basis that it was “not immediately obvious what conditions could be imposed”.

9.12 The Members noted that in its decision on sanction the Panel did not set out any clear conclusions about the quality or relevance of the additional evidence it had received from the Registrant or whether this additional evidence had any impact on their findings at the impairment stage. The Members were particularly concerned about whether the decision on sanction addressed the findings at the impairment stage, in particular that there was a risk of repetition. It was noted that in the list of aggravating features, the Panel stated that “there seemed to have been little recognition even now on the part of the Business Registrant that “whistleblowing” was an important mechanism to ensure patient safety” and that any satisfactory measures to produce an appropriate policy “were only now in progress.”

9.13 The Members were also concerned with the reasons provided by the Panel for rejecting a conditions of practice order. It stated that any conditions would do no more than replicate existing legal obligations. The Members concluded that the approach taken by the Panel here was wrong. The Members discussed the purpose of conditions and the various possible conditions that could have been imposed to ensure that (i) a suitable whistleblowing policy was put in place and (ii) suitable training and compliance was achieved. Conditions of Practice would have allowed a reviewing panel to be satisfied that the Registrant had completed and remediated the concerns that had been identified and that no outstanding concerns remained. The Members noted the benefits of this approach given the long-standing lack of insight and the absence of further oral evidence after the impairment decision.

9.14 The Members considered the Panel’s reasons for rejecting a conditions of practice order were flawed. It was not correct to reject conditions of practice on the basis that it would merely replicate the law as it stands – the issue here was the failure to understand when a protected disclosure was made and create a system that would prevent repetition. The Members noted that conditions would have provided a further opportunity for a panel to revisit the matter of training of staff on the new policy as well as assess progress and on-going compliance with the policy.
Conclusion on insufficiency for public protection

9.15 The Members were concerned with the Panel’s approach to determining the appropriate sanction. Specifically, their failure to address the concerns raised at the impairment stage as to risk of repetition and remediation and the flawed reasons set out for rejecting a conditions of practice order. Nevertheless, the Members noted that the new policy presented at the sanction stage did in some way address the Panel’s previous concerns but considered the decision to train employees on the old policy appeared pointless.

9.16 The Members noted the Registrant’s intentions to roll out further training and whilst there was no reason to doubt this, had conditions been imposed this would have provided further opportunity to reassess that the revised policy was effective and adhered to.

9.17 Despite their concerns the Members considered that the Panel had clearly identified the areas of concern in this case and imposed the maximum financial penalty which was sufficient in addressing the seriousness of the misconduct and the public interest. Whilst the Members felt that conditions were their preferred approach, they concluded that the decision not to impose conditions was not one which no reasonable Panel could have made.

9.18 In all the circumstances, the Members were satisfied that although the Panel made an error in ruling out conditions there was enough evidence presented by the Registrant at the sanction stage to conclude that conditions were not required. The Members concluded the decision was therefore, 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 C should be communicated to the Regulator.

Antony Townsend (Chair) Dated 10th June 2019
12. **Annex A – Definitions**

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

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<thead>
<tr>
<th><strong>The Authority</strong></th>
<th>The Professional Standards Authority for Health and Social Care</th>
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<tbody>
<tr>
<td><strong>The Panel</strong></td>
<td>A Fitness to Practise Committee of the GOC</td>
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<tr>
<td><strong>The Registrant</strong></td>
<td>Boots Opticians Professional Services Ltd</td>
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<tr>
<td><strong>The Regulator</strong></td>
<td>General Optical Council</td>
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<td><strong>GOC</strong></td>
<td>General Optical Council</td>
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<td><strong>The Act</strong></td>
<td>The National Health Service Reform and Health Care Professions Act 2002 as amended</td>
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<td><strong>The Members</strong></td>
<td>The Authority as constituted for this Section 29 case meeting</td>
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<td><strong>The Determination</strong></td>
<td>The Determination of the panel sitting on 27 February 2019</td>
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<td><strong>The Court</strong></td>
<td>The High Court of Justice of England and Wales</td>
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<td><strong>The ISG</strong></td>
<td>Regulator’s Indicative Sanctions Guidance in force at sanction stage</td>
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