

18 October 2018

Seventh floor
St James's Buildings
79 Oxford Street
Manchester M1 6FQ

Email: enquiries@mpts-uk.org
Website: www.mpts-uk.org
Telephone: 0161 923 6263
Fax: 0161 240 7199

To: MPTS Associates

Cc: Tribunal Clerks
Medical Defence Organisations
Employer Liaison Advisers

Re: General Optical Council v Clarke [2018] EWCA Civ 1463

Learning Points

When considering whether or not a practitioner's *fitness* to practise is impaired, the following considerations may be relevant.

- Where the practitioner intends to continue work, the likelihood of repetition of the behaviour which led to the regulatory proceedings may be very relevant to their fitness to practise.
- Where repetition of the behaviour is unlikely simply because the practitioner will no longer be practising, that is not indicative of fitness to practise and may instead point to impaired fitness to practise as the practitioner's skills could deteriorate with lack of use.
- Whether a practitioner has retired or intends to retire from practise is of little or no relevance to the issue of impairment.

Background

This was an appeal by the General Optical Council ('GOC') against the decision of Mr Justice Fraser in March 2017 to quash the decisions of the GOC's Fitness to Practise Committee (FTPC) that Mr Clarke's ('C's') fitness to practise was impaired and that his name should be erased from the register.

GOC hearings

- 2004-2009 – C worked as an optometrist and performed four eye examinations on a patient. It was later alleged that C failed to note the

patient's deteriorating visual field and failed to refer them for treatment for this. The patient lost sight in their right eye.

- July 2014 – the GOC applied for (and obtained) an interim order of suspension against C. In his witness statement, C noted that he ought to have referred the patient for treatment and set out the remedial action he had undertaken.
- April 2015 – After being informed that the GOC would be conducting an investigation, C's representatives wrote to the GOC repeating his admissions and stating that C had sold his practice and retired. C offered to provide undertakings in order to avoid a full hearing.
- June 2015 – A GOC FTPC convened to consider C's case. C did not attend and was not represented. The FTPC found that the allegation against C amounted to misconduct, that C's fitness to practise was impaired and that his registration ought to be suspended for a period of 12 months. The FTPC took into account C had said that he had sold his practice and retired, did not intend to practise again nor renew his GOC registration.
- June 2016 – A FTPC hearing convened to review C's case. C submitted a witness statement restating that he had sold his business and that he did not intend to work as an optometrist again. C asked to be allowed to be removed from the register with an agreed undertaking that he would not practise again. The FTPC determined to erase C from the register as it appeared *'to be the only means of protecting patients and/or maintaining public confidence in the profession'*. The FTPC noted that the acceptance of undertakings was not provided for within the GOC's statutory framework.

High Court appeal

March 2017 – C appealed against the FTPC's finding of impairment and decision to erase him from the register in June 2016. Mr Justice Fraser heard the appeal in the High Court and in allowing the appeal, he:

- quashed the FTPC's decisions on impairment and sanction;
- substituted a decision of no impairment;
- said that the FTPC had not taken into consideration:
 - the likelihood of repetition of the conduct, about which he said there *"was simply no likelihood of repetition as he had sold his practice, had retired and wished to remove himself from the Register;*
 - the fact that it could be said C's conduct had been remedied by his decision to cease practising.

Grounds of Appeal

The GOC appealed against the High Court's decision. Shortly before the Court of Appeal hearing, agreement was reached between the parties for C to withdraw from the register and that the Court of Appeal would not be asked to make any further order as to sanction. The only issue left to be considered was whether the High Court was correct to substitute a finding of no impairment.

The GOC submitted that:

1. the High Court had not adequately distinguished between impairment and sanction. The GOC said that a judgment on impairment must be made by reference to whether, if permitted to practise, the practitioner would be fit to do so without restriction and not on the basis of whether they intended to continue practising;
2. it would be a concern if an optometrist could voice an intention to retire (to avoid a finding of impairment) but then change their mind and resume or continue practising or seek to work abroad.

Judgment of the Court of Appeal

The appeal was heard by Lady Justice Arden and Lord Justice Newey, with judgement given by the latter. The Court of Appeal said that:

1. the statutory language was crucial and it was clear from it that "the focus must be on impairment *of fitness to practise*" [para 27];
2. "it is hard to see how the fact that an optometrist no longer intends to practise....can have any bearing on whether his "fitness to practise" is impaired" [para 28].
3. where an optometrist is intending to continue work, the likelihood of repetition of the behaviour which led to the regulatory proceedings may be very relevant to his fitness to practise.
 - a. where misconduct is "highly unlikely to be repeated" in the course of continuing practice, that points towards fitness to practise;
 - b. however, where repetition is unlikely merely because the optometrist will no longer be practising, "that would not seem to be indicative of *fitness* to practise. If anything, cessation of practice may point in the opposite direction, since the optometrist's skills could deteriorate with lack of use" [para 29].
4. the FTPC had been entitled to make a finding of impairment at the 2016 review hearing and "it was open to the FTPC at the *impairment* stage to take

the view that [C's] retirement did not count in his favour" and the fact that he had not undertaken any continuing education and training work was of relevance. The absence of these activities and C's cessation of practice "could each be thought to suggest that [C's] skills as an optometrist would have reduced since the 2015 hearing" [para 30];

5. the High Court's approach to impairment was erroneous and when considering impairment (as opposed to sanction) "the judge needed to focus on whether [C's] *fitness to practise* was impaired" and , in that context, the fact C was not intending to resume practice "could be of little or no consequence" [para 31].

The Court of Appeal allowed the appeal to the extent of reinstating the FTPC's finding of impairment. However, as referred to above, C was allowed to withdraw his name from the GOC's register and no further action was taken with regard to sanction (and the order of erasure made by the FTPC was not restored).

Kind regards

Tribunal Development Section

0161 240 7292

Tribunaldevelopmentsection@mpts-uk.org