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Case No: CO/160/2023

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/08/2023

Before :

MR JUSTICE CHAMBERLAIN

- -

Between :

NASEEM SULEMAN	**Appellant**
- and –	
GENERAL OPTICAL COUNCIL	**Respondent**

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- -

Mr Marc Beaumont (instructed by **Beaumont Legal Services**) for the **Appellant**
Mr Paul Parker (instructed by **Clyde & Co LLP**) for the **Respondent**

Hearing dates: 7th June 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 16th August 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE CHAMBERLAIN

Mr Justice Chamberlain :

Introduction

1. The appellant, Naseem Suleman, is a registered student dispensing optician. In September 2019, she worked at the Huntingdon and St Ives branches of Specsavers, in Cambridgeshire. Those responsible for the management of the stores made a series of allegations to the General Optical Council ("GOC"), the regulator for opticians. The allegations were that she had carried out restricted activities as a dispensing optician whilst unregistered. They included the charge that she had dishonestly given her employers a false registration number in order to conceal that she was not yet fully qualified.

2. After a remote hearing lasting for some ten days between 21 September and 16 December 2022, at which Ms Suleman was not represented and for the most part not present, a Fitness to Practise Committee of the GOC ("the Committee") found eight allegations against her proved and determined that she was guilty of misconduct. It decided that her fitness to practise was impaired and that her name should be erased from the register.

3. Ms Suleman appeals pursuant to s. 23G(1)(a) of the Opticians Act 1989. Her grounds of appeal contain 20 numbered paragraphs. Paragraphs 1-19 challenge the Committee's decision to reject Ms Suleman's application to adjourn the hearing and hear the appeal in her absence. They are in essence particulars of what I shall call the first ground of appeal. Paragraph 20 advances a separate, second ground of appeal, which asserts that the Committee's decision was vitiated by bias because one of its five panel members, Simon Pinnington, had a connection to Specsavers which gave rise to apparent bias.

4. At the hearing, Marc Beaumont for the appellant focused almost exclusively on the second ground.

The material facts

The adjournment application

5. The chronology leading up to the appellant's application to adjourn the hearing is somewhat complicated. In the light of my decision on ground 2, it is not necessary to go into it in detail. It suffices to say that the appellant said that she had been going through a divorce, was suffering from anxiety and was not in a fit mental or physical state to attend the hearing. The GOC did not accept that any medical difficulties were properly evidenced and invited the panel to reject some of the things she had said in writing in support of the application. The Committee gave reasons for dismissing the application to adjourn and the hearing started on 21 September 2022 in the appellant's absence.

The Committee

6. The members of the Committee were Pamela Ormerod (the lay Chair), Diane Roskilly (a lay member), Amanda Webster (a lay member), Philip Cross (a Dispensing Optician) and Simon Pinnington (a Dispensing Optician). The Legal Adviser was Mike Bell. Georgia Luscombe represented the GOC.

The allegations and findings

7. It is not necessary to say much about the allegations against the appellant, save that the facts and circumstances were in dispute in certain key respects. The evidence against the appellant included evidence from employees of the two Specsavers branches at which the appellant had worked: Alex Stewart (the Branch Manager at Huntingdon), Aisha Bari (the Branch Manager at St Ives) and Susanna da Silva. The panel made findings rejecting the appellant's case (denied by Ms da Silva and Mr Stewart) that she had told Ms da Silva that she was registered as a student dispensing optician and that Ms da Silva had assured her that she did not need to be supervised (see paragraphs 101, 108 and 129 of the decision). On any view, this was a significant building block in the case that the appellant had been dishonest. At paragraph 178, the panel found as follows:

> "The Committee considered that acting in the manner found proved in particulars 1-5 the Registrant had put patients at risk of harm, breached the trust put in her by colleagues and Specsavers and undermined public confidence in Specsavers and the Profession." (Emphasis added)

Mr Pinnington's involvement with Specsavers

8. Very shortly after the start of day 3 (28 September 2022), in the absence of the appellant or any representative, there was the following exchange:

> THE CHAIR: Okay. Well, let's make a start. Mr Pinnington, did you have a comment?
>
> MR PINNINGTON: I would just like, at the beginning of the proceedings, to read into the record that I was formally [sc. formerly] a director of a Specsavers practice, a position I held for 25 years, but I resigned from that three years ago when I retired. I have no contact with any of the people involved in this case.
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> THE CHAIR: Thank you. I assume that you would take no objection to that and the Panel was previously aware and did not believe that there was any conflict of interest that it needed to address.
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> MS LUSCOMBE: That's fine.
>
> THE CHAIR: There was no further legal advice you need to give us, Mr Bell, was there?

> THE LEGAL ADVISER: No, ma'am. Again, it is a situation where there is a tenuous connection and I cannot see in any way, shape or form it would give rise to any potential conflict of interest."

9. The legal adviser's use of the word "again" refers to Mr Pinnington's disclosure on the previous day that, many years ago, he had met one of the GOC's expert witnesses. The legal adviser advised that this did not give rise to a ground for recusal. No one has suggested that this was wrong.

10. The connection with Specsavers is, however, relied upon as vitiating the Committee's decision. There was no attempt to draw this connection to the attention of the appellant, who was not present or represented. The connection first came to the attention of the appellant when it was discovered "purely adventitiously" by Mr Beaumont on or about 11 January 2023, when preparing the grounds of appeal. An application for disclosure of further information about the nature and extent of Mr Pinnington's interest was refused on the papers by Constable J on 30 May 2023, essentially because the key facts relevant to the allegation of apparent bias were, by that time, already known from disclosure made in response to requests by the appellant.

11. Constable J's reasons for dismissing the application included a summary of the material known about Mr Pinnington's connection with Specsavers and some high level conclusions about that material:

> "5. As correctly pointed out by Mr Beaumont, for the Claimant, the test which will be applied to the apparent bias ground of appeal is that set out in *Porter v Magill* [2002] 2 AC 357, in which the House of Lords approved the test formulated by Lord Phillips of Worth Matravers MR in *In re Medicaments and Related Classes of Goods (No 2)* [2001] 1WLR 700, para 85: 'The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased.'
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> 6. The information provided by Mr Pinnington, and as at least in part available at Companies House, is that he was a director and co-owner of the Hounslow Branch of Specsavers from 1994 until May 2019. He had owned 50% of the shares. In answer to questions of him, Mr Pinnington has also stated that from 2019 onwards he was a locum dispensing optician at a number of Specsavers practices: Hounslow, Abingdon, Farnborough, St Albans, Prestatyn, Marlow, Chiswick, Camberley and Wilmslow. In the 2019-2020 tax year, he worked 110 days, in 2020-2021 he worked 46 days and in the tax year 2021-2022 he worked for 73 days, all as a locum dispensing optician for the various Specsavers branches.
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> 7. On the basis of Mr Pinnington's share-holding and directorship for 25 years, together with his work thereafter as a locum, solely for Specavers, the fair-minded and informed observer would conclude that Mr Pinnington had a business relationship with a Specsavers branch and with the brand more

> widely which can safely be described as a substantial, long-lasting and (at the time of the panel hearing) ongoing one. It is against this information that the test of apparent bias should be considered."

Ground 2 – Apparent bias

Submissions for the appellant

12. Mr Beaumont for the appellant submitted that this was a strong case for automatic disqualification: see *Dimes v Proprietors of Grand Junction Canal* (1852) 3 HL Cas 79, 10 ER 315 and *In Re Medicaments,* at [40] ("It has long been held that, where a judge has a pecuniary interest in the outcome of a case, he is automatically disqualified, whether or not that interest gives rise to a reasonable apprehension of bias"). The facts here are *a fortiori*, since here the business relationship was ongoing at the time of the hearing. Furthermore, the reputation of the Specsavers brand was in issue. He had a personal interest in vindicating that reputation. A concern for the reputation of a party has been held to be disqualifying: *R (Kaur) v Institute of Legal Executives Appeal Tribunal* [2011] EWCA Civ 1168. The fact that Specsavers branches are franchises does not affect this: see by analogy *R v Bow Street Metropolitan Stipendiary Magistrate ex p. Pinochet Ugarte (No. 2)* [2000] 1 AC 119.

13. The fair minded and informed observer would also note that the locum work was not disclosed by the GOC at first and that Mr Pinnington had failed to answer the appellant's reasonable question whether he was hoping for or anticipating more work as a locum. The failure to answer would itself trouble the observer.

14. If there was apparent bias on the part of Mr Pinnington, that taints the decision as a whole: see *In re Medicaments,* [99].

Submissions for the respondent

15. Paul Parker for the respondent pointed out that Specsavers branches operate on a quasi-franchise system in which the franchisee holds the class A shares in the branch and operates the business and Specsavers UK Holdings Ltd holds the B shares. So, while the Specsavers holding company has a financial interest in every branch, the franchisee only has a financial interest in their own branch. Mr Pinnington was a director of Hounslow Specsavers Ltd until 6 May 2019 and had a financial interest in that branch until 18 July 2019. After that, this financial interest in these companies came to an end. Although he had continued to work as a locum for other Specsavers branches, he had never participated in their management and had never worked at the Huntingdon or St Ives branches. He had made a proper GOC member appointment declaration about his links to Specsavers. A slimmed down version of this declaration was posted on the GOC website.

16. Mr Parker took issue with Constable J's characterisation of the business relationship between Mr Pinnington and Specsavers as "substantial, long-lasting and ongoing". He accepted that Mr Pinnington had a financial interest in the Hounslow branch until 2019, but has had none since. He is not now in a business relationship with the Hounslow branch, though he has worked as a locum there occasionally. He has no business relationship (let alone a substantial one) with the Specsavers brand (whatever

that means) and in particular no business relationship or financial interest in the Huntingdon and St Ives branches. He had nothing to gain personally from accepting the evidence of Specsavers' witnesses. The fair-minded and informed observer would not discern a real possibility or real danger of bias.

17. In any event, Mr Parker submitted that there was no real dispute about the facts. The appellant had attended briefly on the sixth day and had sought an adjournment to enable her to file evidence from the family proceedings in which she had been involved to explain her actions. This showed that she was focused more on mitigation than on disputing the facts.

Discussion

18. I begin by considering whether, as Mr Parker submitted, there was no real dispute about the facts. Having considered the transcript of day 6 of the hearing, I do not accept that characterisation. The transcript shows the appellant seeking an adjournment to obtain further evidence to show that she is "not a dishonest person at all". By that time, however, the GOC's evidence had been heard. There was an exchange between the Chair and the appellant in which the former asked if the appellant accepted that what had happened in September 2019 had been dishonest, but that line of questioning was curtailed on the advice of the legal adviser. The Committee decided that they would not adjourn, but would give the appellant an opportunity to give evidence. Ultimately, she did not feel able to do so. This does not show that the appellant had admitted that what happened was dishonest. Having regard to the entirety of what was said, it seems to me that she was maintaining that she had *not* acted dishonestly. That meant that there *was* a dispute about the facts.

19. The determination of an allegation of apparent bias involves two stages. First, the relevant circumstances must be found. Then, at the second stage, the court asks, "Would those circumstances lead a fair-minded and informed observer to conclude that there is a real possibility that the tribunal was biased?": see *Porter v Magill,* [102]-[103] (Lord Hope). The fair-minded observer is "neither complacent nor unduly suspicious": *Belize Bank Ltd v Attorney General of Belize* [2011] UKPC 36, [36] (Lord Kerr) .

20. I summarised the position on automatic disqualification in my judgment in *R (CPRE Somerset) v South Somerset District Council* [2022] EWHC 2817 (Admin):

> "21. There is an earlier line of authorities which identifies situations in which a judge or other decision-maker whose activities are governed by public law is automatically disqualified on the ground of apparent bias. This is so where the decision-maker is himself a party to the proceeding, the paradigm instance of a breach of the *nemo iudex in causa sua* principle. Similarly, the decision-maker will be automatically disqualified where he has a personal or pecuniary interest in the outcome, however small: *Dimes v Proprietors of Grand Junction Canal* (1852) 3 HL Cas 759.
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> 22. In *R v Bow Street Metropolitan Stipendiary Magistrate ex p. Pinochet Ugarte (No. 2)* [2000] 1 AC 119, automatic disqualification

> was extended to cover the case where a judge was director of a charitable company controlled by an intervenor in the proceedings. There was, it was said, 'no room for fine distinctions' if the principle was to be observed that justice should not only be done but seen to be done: 135E-F (Lord Browne-Wilkinson)."

21. In *Meerabux v Attorney General of Belize* [2005] UKPC 12, [2005] 2 AC 513, at [22] and [25], Lord Hope doubted whether the House of Lords in *Pinochet (No. 2)* would have had to reach for the concept of automatic disqualification if the *Porter v Magill* test had been available and said that in future that test should be applied in all cases where the decision-maker had no personal or pecuniary interest.

22. *In re Medicaments* was a case where the tribunal member had no pecuniary interest in the result (see at [40]), but apparent bias was made out for two reasons. The first was that the tribunal had to resolve a fundamental conflict of economic analysis between rival economic consultancy firms and one of its members had during the proceedings applied for employment with one of these firms. This meant that "the fair-minded observer would be concerned that, if [the tribunal member] esteemed [the firm] sufficiently to wish to be employed by them, she might consciously or unconsciously be inclined to consider them a more reliable source of expert opinion than their rivals": see at [95].

23. The second reason was that the tribunal member "might still harbour hopes that, sooner or later, she might find employment with [this firm]" and that "this might induce in her, consciously or unconsciously, a reluctance to reject as unsound evidence advanced by [the firm's] experts": see at [96]-[97].

24. In this case, there was no real dispute about the relevant circumstances. The starting point is the position set out at [6] of Constable J's reasons. Although Mr Beaumont submitted (correctly) that there was no formal evidence to this effect, I am prepared to accept additionally that Specsavers branches are operated on a franchise basis, with the directors who run the branch owning the A shares and the Specsavers holding company owning the B shares; and that the former have no financial interest in any other Specsavers store.

25. There was a disagreement between the parties about whether I should regard myself as bound by Constable J's description of the connection between Mr Pinnington and Specsavers at [7] of his reasons. Mr Beaumont said that this description was binding upon me. Mr Parker said it was not and took issue with it. I do not regard myself as bound by what Constable J said. He was giving written reasons for refusing an application for disclosure on the papers. Even if the application had been determined more than a week before the substantive hearing, there would have been no opportunity for the respondent to contest those reasons at a hearing, because it was the successful party. I have heard full argument at the hearing and can reach my own conclusions about the nature and extent of the connection between Mr Pinnington and Specsavers.

26. That said, I find very little to disagree with in Constable J's description. The historic relationship between Mr Pinnington and Hounslow Specsavers was, on any view, both "substantial" and "long-lasting". A historic relationship confined to that single

branch, which ended in 2019, might not have given rise in the mind of the fair-minded and informed observer to a real possibility of bias, though it might have aroused some concerns of the kind referred to at [95] of *In re Medicaments*. But the relationship arising from Mr Pinnington's work as a locum was, in my judgment, more significant. Although Mr Pinnington had not said whether at the date of the hearing he hoped to obtain further such work, the only proper inference from what he had said, and what he had not said, was that he did entertain that hope. In this sense the relationship with Specsavers was "ongoing".

27. There are two features of that relationship which are material here. First, it was not with a single Specsavers branch, but with many such branches, not confined to a single geographical location. There was no evidence about how work as a locum was allocated, but it can reasonably be inferred that the Specsavers holding company, or some related overarching entity distinct from the individual companies which owned the branches, must have been involved. Second, the number of days worked shows that Mr Pinnington must have been deriving (and, it is to be inferred, expecting to continue to derive) significant income from this locum work. Indeed, this appears to have been Mr Pinnington's only source of work-derived income (other than sitting as a Committee member of the GOC's Fitness to Practise Committee).

28. I have borne carefully in mind the asserted corporate structure and, in particular, the fact that Mr Pinnington had no financial interest in the Huntingdon or St Ives branches and had not worked there. Nonetheless, it is important to consider how the case against the appellant was put. The allegation against her – which the Committee found proved – was that she had "breached the trust put in her by colleagues <u>and Specsavers</u> and undermined public confidence <u>in Specsavers</u> and the Profession": see the excerpt from paragraph 178 of the Committee's decision, set out at paragraph 7 above. This suggests that neither those making the complaint nor those formulating the charges saw the branches as wholly separate businesses.

29. Put shortly, there was something called "Specsavers" which had placed its trust in the appellant and in which she had allegedly undermined public confidence. Constable J referred to this as "the brand". I think this was a perfectly sensible description, though reference could also have been made to the holding company which, it is agreed, owned shares in every Specsavers branch. At all events, as the *Pinochet* case makes clear, in this area of the law, it is important not to draw "fine distinctions". What matters is the impression that would be left on the fair-minded and informed observer.

30. In my judgment, the fact that Mr Pinnington entertained the hope to obtain more centrally allocated locum work from Specsavers would lead the fair-minded and informed observer to conclude that there was a real possibility that, consciously or unconsciously, he would be disposed (i) to find substantiated complaints advanced to the GOC by those managing Specsavers branches that the appellant had engaged in conduct likely to injure the reputation of "Specsavers" and/or (ii) to resolve evidential disputes in favour of those individuals and against the appellant.

31. The position in this respect is akin to that in [96]-[97] of *In re Medicaments*. It is true that the dispute in this case was one of fact, rather than of expert evidence. But this distinction does not assist the respondent. If anything, a dispute of fact (particularly one turning on an assessment of the credibility of witnesses) is *more* likely than a

dispute between experts to engage concerns about apparent bias, because the rejection of a witness's factual evidence as untrue is more likely to be seen as a personal criticism of that witness.

32. This means that Mr Pinnington should, in my view, have recused himself. I do not consider that the Committee's decision is saved because he was only one its members. A similar point was made and rejected in *In re Medicaments* (see at [99]). In that case, the panel consisted of three members, not five, but the same reasoning applies. A panel which has sat for ten days (as the Committee has here) will be bound to have discussed the case in detail. It is impossible to know how influential the views of the individual panel members have been. If one member is tainted by apparent bias, the Committee's decision will be vitiated. I would therefore allow the appeal and remit the matter to a differently constituted committee.

Ground 1 – the refusal to adjourn

33. My conclusions on what I have called ground 2 mean that it is not necessary to consider whether the Committee erred in refusing to adjourn the case at the outset.

Conclusion

34. For these reasons, the appeal is allowed and the matter remitted to the GOC for hearing before a differently constituted Fitness to Practise Committee.