

**Paul Kelly, Chairman**  
**Derek Styles, Professional Member**  
**Colin Barnes, Member**

**DAVID STEVEN t/as J.OLDHAM Opticians**

**Appellant**

**And**

**MANCHESTER PRIMARY CARE TRUST**

**Respondent**

**DECISION WITH REASONS**

1. By a letter dated 13<sup>th</sup> March 2009 the Respondent PCT informed the Appellant of a decision not to grant a General Ophthalmic Services Mandatory Contract relying on provisions found in General Ophthalmic Services Contract Regulations 2008 Part2 Reg.3. (“the Regulations”).
2. Appeals from such decisions are to The Family Health Services Appeal Authority for England & Wales (Reg.6.).
3. The appeal came before the Panel on 26th June 2009 in Leeds where David Steven appeared in person and the PCT was represented by Mr. J. Fitzgerald, Messrs. Hempsons, Solicitors.
4. It is fair to say there is a lengthy history to the Appellant’s application some of which we will refer to in due course, but as a preliminary issue it was necessary to confirm the application/appeal was by David Steven trading under the style or title of J.Oldham Opticians. Helpfully the Appellant readily confirmed that was the position and the matter proceeded accordingly.
5. In summary the Regulations prevent a PCT contracting for provision of General Ophthalmic Services with those who fall within prescribed conditions found in Part 2 Reg. 4 (3). In particular a PCT cannot enter into a contract if

*“(k) the PCT is not satisfied that the person-*

*(i) has the premises, equipment and record keeping arrangements, or*

(ii) *will employ or engage, by the date the contract is to commence, appropriate staff, to provide services under the contract;*

(l) *the PCT is not satisfied that it is a person suitable to provide general ophthalmic services;.....”*

6. The refusal to enter into a contract with the Appellant is based upon unsatisfactory premises, inappropriate staff and unsuitability of the applicant/Appellant.

7. The premises issue:-

7.1 Following an earlier application in respect of the Appellant's premises at 924 Ashton New Road the PCT caused an inspection to be undertaken by Harvey Bussin, the then Ophthalmic Adviser. He reported on the 13<sup>th</sup> October 2008 by a letter (page 41 of the bundle) setting out 24 main failings with a number of sub-provisions. The consequence of his findings led the PCT to refuse to grant a contract in respect of that application. The significance of the report dated 13<sup>th</sup> October 2008 becomes apparent when placed alongside an inspection undertaken by Dr. Sarah Slade the new Ophthalmic Adviser on 11<sup>th</sup> February 2009 following receipt by the PCT of a revised application by the Appellant in December 2008 and to which this appeal refers.

7.2 The format of the two inspections are not the same but the substance of the later report indicates that little if anything had been done to address concerns expressed by Mr. Bussin's report in October 2008. Nothing is to be gained by a scrupulous comparison between the two reports but significant ongoing failings identified in the second report include ineffective infection control contributed to in part by dirty carpets full of dog hairs and unpleasant smell; no Health & Safety policy for staff or patients; inadequate hand washing facilities; no complaints procedure; size of consulting room prevented proper use of some equipment notably Visual Field tester. By contrast the Appellant had improved soundproofing.

7.3 The second inspection noted 24 'red-light' areas which required attention before Dr. Slade could recommend the PCT to contract with the Appellant. In addition there were a further range of recommendations which could be worked through either by the Appellant or with the PCT and were not regarded as quite as serious as the 'red light' provisions.

7.4 Mr. Steven explained that the premises had been in the family for a great many years. The name of J.Oldham Opticians has been used for 150 years and is well known amongst the community it has served faithfully for several generations. The property is on the side of a busy road and is difficult to keep clean. He generally disagreed with the contents of both reports but would ensure the premises would be brought up to standard if a contract was granted.

7.5 In general terms Dr. Slade was concerned that, even after discussing matters at length with Mr. Steven he did not seem to grasp the significance of

some of the points she raised i.e. a complaints policy and the possible improper use of the term 'Opticians' in the business title. Mr. Steven himself is not an optometrist. She concluded her report with an action plan setting out how the shortcomings she had identified could be addressed and by whom, for consideration by the PCT in its decision making. Taking together the inspection report and all other matters known concerning the Appellant the PCT decided it would simply refuse the application.

7.6 The Appellant has asked for a further independent inspection. There have been two inspections reporting broadly similar findings. He was unable to get to grips with the contents of the first report. There is no reason to believe he will do any better between now and a third report and there must be a limit on use of public resources.

7.7 The results of the inspection carried out by Dr. Slade are contained in the bundle (pages 14 to 23), it is self contained and succinct and concludes by expressing concerns over the applicant himself, intended staff and the premises. Taken as a whole and added to the unsatisfied findings of the previous inspector we are satisfied the premises are unsuitable.

8. The staffing issue:-

8.1 We have mentioned that Mr. Steven is not an optometrist. Since the death of his late wife some 8 years ago he has relied on a succession of locum optometrists to undertake sight tests and discharge his duty as a contractor. This suggests that his wife was an Optometrist and that, since her demise others have been used in her place. Mr Steven actually said that his wife had been a Dispensing Optician who also did the books. At the time of the application under appeal he had secured the services of a Mrs. Jones to whom Dr. Slade spoke on the date of the inspection. Dr. Slade was concerned that Mrs. Jones had not practised except on an occasional day for the previous four years and that the day they met was the first day Mrs. Jones had attended the premises. The view was that Mrs. Jones would require some additional support from the PCT if the contract was to be granted .

8.2 At the hearing Mr. Steven gave evidence to the effect that Mrs. Jones was now in hospital and was non specific as to when and if she could resume her locum role. He added that sight testing would continue to be undertaken by a Mr. Eastwood his former locum.

8.3 The Panel is doubtful about the accuracy/truthfulness of Mr. Steven's explanation given the fact the PCT received a letter from Mr. Eastwood in December 2008 indicating he no longer had any connection with the practice and wished to withdraw his name from any ongoing application. If it were true we would have expected Mr. Eastwood to confirm such a significant change in his position.

8.4 In terms of being satisfied the Appellant would employ or engage appropriate staff by the date of a contract, the Panel is left with no positive evidence as to the continued availability of Mrs. Jones and an unconvincing

statement by Mr. Steven as to the availability of Mr. Eastwood. We cannot be satisfied to any standard the Appellant would have appropriate staff in place by the contract date.

## 9 Suitability

9.1 The PCT case on suitability is in part on the perceived inability of the Appellant to grasp the extent of the regulatory responsibilities on a contractor identified at the time of the inspection by Dr. Slade and further evidenced by his chaotic dealings with the PCT during his various applications; in part on previous admissions of falsifying claim forms which came to light during a NHS Counter Fraud investigation in 2006 and in remaining part by an unsatisfied agreement to repay upwards of £2,000 to the PCT arising from the fraud investigation.

9.2 We have commented on the contents of the inspection report and although Mr. Steven wishes to impress upon us that he recognises all that is required of him we are not convinced he understands the considerable burdens which attach to the granting of a contract. Regulatory matters such as Health & Safety, Freedom of Information, security of patient records and associated issues attendant upon the management of a modern business seem to be an inconvenience, illustrated by the way he submitted successive applications and merely asked the PCT to refer to previous application forms without realising each application was a self contained document. We recognise repeating information can be a chore but it is part of modern commercial life. The impression is that Mr. Stevens is increasingly unable to cope with management responsibilities and it may not be without significance that he tells us practice management was dealt with by his wife prior to her death. By way of further example he does not grasp the fact that use of the word 'Opticians' is protected and may be exposing him to liability, neither does he seem to grasp the significance of his limited company soon being removed from the Company Register. Finally he was unable to address in any meaningful sense the contents of the first inspection report.

9.3 We take a less charitable view on matters concerning the fraud investigation. There is clear evidence that when interviewed under caution in December 2006 he admitted altering GOS claim forms to enable him to recover payments to which he was not entitled because he did not hold a GOS contract at the material time. Those admissions led to him agreeing repayment. He now denies any wrongdoing and blames an unidentified person in the PCT reception for telling him to alter the forms. We are not about to embark upon an inquiry as to the issues surrounding the allegation, it is enough for our purposes that the Appellant, without explanation, now adopts a wholly inconsistent position despite the plain contents of the statement and his unsatisfied agreement to repay monies wrongly claimed.

9.4 In addition to the fraud allegation and the failure to repay money we are concerned about the ease with which the Appellant changes his position – the reference to Mr. Eastwood now being available for example. He may genuinely believe what he tells us, he may be confused or he may be

deliberately attempting to mislead. Being as generous as we can the Appellant is unreliable and inconsistent - shortcomings we would not expect in a GOS contractor.

- 10 The PCT was right not to be satisfied the Appellant has the premises or would employ or engage appropriate staff to provide services under the intended contract and it was also right not to be satisfied the person is suitable to provide general ophthalmic services. It follows we dismiss the appeal.
11. Any application for a contract disqualification order should be made in writing within 21 days from receipt of this decision.
12. Either party has the right to appeal this decision under Sec.11 of the Tribunal and Inquiries Act 1992 by lodging notice of appeal in the Royal Courts of Justice, The Strand, London WC2A 2LL within 28 days from the date of this decision, further, a party may apply to the FHSAA for review or variation of this decision no later than 14 days after the date on which this decision is sent.

Dated 17th July 2009

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Paul Kelly, Chairman.