

1 HEARING AID COUNCIL PROCEEDINGS

2 **Meeting of the**
3 **DISCIPLINARY COMMITTEE**
4

5 Held at:

6 70 St Mary Axe

7 London EC3A 8BD

8 On

9 **Friday, 22nd January 2010**

10 -----

11 PRESENT:

12 MR CHRISTOPHER HUGHES OBE

13 **(THE CHAIR)**

14 **Panel Members:**

15 MR MICHAEL BISHOP

16 MR DAVID PYLE

17 MR TONY CORCORAN

18 MR MARK GEORGEVIC

19
20 **Legal Assessor:**

21 MR MICHAEL VERE HODGE QC

22 -----

23 MR CHRIS WHALLEY appeared on behalf of the **Hearing Aid Council.**

24 MS AMICIE KNOWLES Disciplinary Committee Clerk
25 -----
26

27 **In the matter of:**

28 MR NICHOLAS GOSTELOW.

29 Transcript produced by Sellers Legal Services
30 76 Chancery Lane, London WC2A 1AA ,Tel: +44 (0)20 7405 4512

31

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Friday, 22nd January, 2010.

MR WHALLEY: I can perhaps begin with reading the charges out which you will find at page 6 - 5 and 6. Charge 1 is a breach of 7C of the Hearing Aid Act 1968 and clause 3 of the Hearing Aid Council Code of Practice 2008. The particulars of the charge: on or around the 5th November 2008 whilst conducting audiometry on Client D, he failed to give best possible advice in that the hearing loss in Client D's right ear was outside the recommended fitting range of a hearing aid prescribed for him, namely Unitron E4 Moxi.

Charge number 2: breach of section 7C of the Hearing Aid Act 1968 and clause 9 of the Hearing Aid Council Code of Trade Practice 2008. Particulars of that breach are that on or around the 5th November 2008 whilst conducting audiometry on Client D you failed to comply with rule 3 of the British Society of Audiology recommended procedures 2004 in that you failed to undertake masking.

Sir, this is listed for fast-track hearing today. You'll find that Mr Gostelow has returned the fast-track letter and admitted the charges and that's found at pages 6 and 7.

Page 6 of the letter that was returned on 22nd October 2009 where he states:

"I fully and unequivocally admit the charges set out and would like my case to be dealt with by the Council's fast-track procedure."

And then in an email sent to Amicie Knowles of the Hearing Aid Council at page 7 he makes further admissions. He does then state that he would like this Committee to reconsider clause 3, which is something I will turn to in a short time. Before that I will briefly outline the facts of the case. Client D attended Hidden Hearing in Maidstone where Mr Gostelow works on 5th November 2008 and was fitted with a pair of hearing aids. Because he suffers from a large amount of ear wax he had to return the hearing aids to Hidden Hearing on a number of occasions. In January 2009 neither of the aids worked so he returned them to the manufacturer, Unitron.

1 Three months after this, Hidden Hearing advised him that the hearing aids were not
2 satisfactory, but he was told he was out of time to receive a refund. His letters of
3 complaint can be found at pages 17 and page 20 of the bundles.

4 The Hearing Aid Council instructed an audiological adviser and they prepared a report,
5 which is found at pages 57 and 59. In that report they state that the hearing levels at
6 2 kHz and above in the right ear are outside the recommended fitting range for the
7 product provided and that is a breach of clause 3.

8 You will note that Client D sent a letter at page 20 in the bundle. In that letter he also
9 states that he was never at ease with the aids because of the difficulty cleaning them,
10 and I submit that that is further evidence that best advice was not given. The advisor
11 also states in there report that masking was not undertaken in Client D's right ear and
12 that amounts to a breach of clause 9A.

13 As I indicated previously, Mr Gostelow did sign the letter at page 6 where he states that
14 he admits the charges. He further reiterates that admission at page 7 where, at the
15 fourth paragraph down he states:

16 "I have read and understand this notice. I fully and unequivocally admit the
17 charges set out in this notice and would like my case dealt with by the fast-
18 track procedure."

19 He then does go on to ask this Committee to review the charge of a breach of clause 3.

20 You will see that in the fifth paragraph he states that he does accept that the aid in
21 the right side did not provide enough power, but he then goes on to explain that he
22 does not think there was any instrument which could provide that without occluding
23 the ear. He then moves on to further state that he wants the Committee today to
24 review that charge.

25 Sir, on behalf of the Hearing Aid Council, I say that the evidence in the bundle prove
26 that charge, in particular his unequivocal admissions and it is very difficult with these
27 fast-track procedure where the dispenser is not in attendance because further
28 questions cannot be put to him, but clearly if he has, on two occasions, submitted

1 that he unequivocally admits the charges, I would ask you to consider that they are
2 proven, Sir.

3 CHAIR: Thank you. Any questions for Mr Whalley?

4 MR CORCORAN: Are we happy that he has actually admitted the charges?

5 CHAIR: Can we explore it a little further? The charge says on alleged breach 1, the hearing
6 loss in the patient's right ear was outside the recommended fitting range for the
7 hearing aid prescribed for him. In his email he says:

8 "I fully and unequivocally admit the charges set out in this notice. I do feel
9 that under the charge of best advice, clause 3, although the aid on the right
10 side did not provide enough power above 2 kHz, I don't think there is an
11 instrument anywhere that could provide the power required without occluding
12 the ear, which is simply not an option in this case."

13 So what he's - he then asks us to review the charge. This is, I think, somewhat
14 unsatisfactory. What evidence have you, or is there any evidence that there are in
15 fact aids which meet the clinical needs of this patient better?

16 MR WHALLEY: The evidence for that charge is from the audiological adviser. The difficulty
17 with the fast-track decision is that if there was any dispute, if he was not admitting the
18 charges, evidence would be called to further explore that charge. The adviser would
19 be called to give evidence and explain in their opinion why best advice was not given
20 for those reasons. Clearly the dispenser would then be open to cross-examine and
21 put to that adviser in evidence that perhaps there were no other suitable aids and
22 best advice therefore was given. Based on that experts report, that is what the
23 charges drafted and that is obviously the basis on which initially Mr Gostelow has
24 then admitted the charges. It was really a matter for the dispenser, if he disputes the
25 charge, to say so, to attend to put forward any evidence.

26 LEGAL ASSESSOR: I think it might be helpful if I just give some advice about charge 1
27 being the breach of section 7C and clause 3. Of course it is a matter for you and
28 your colleagues factually to consider whether the email that we have at page 7 in the

1 bundle is the registrar maintaining his guilty plea, or whether what he is saying is
2 sufficiently equivocal to mean that it is not safe to assume that he is standing by his
3 admission of that particular breach. It is an inherent problem, perhaps, of a fast-track
4 process when somebody in addressing what starts out as being mitigation ends up
5 being a withdrawal of a whole-hearted admission. And so you and your colleagues
6 may feel where he states at the middle of that large, last paragraph; "I still feel that I
7 did give the best advice and I prescribed the most powerful open fit aid available" is
8 that that does not lie very happily or consistently with an admission of clause 3 which
9 is a failure to give the best possible advice, in broad terms. It is a matter of course
10 for you and your colleagues who are more attuned to the technical side of it, as I as a
11 legal adviser can be, but there is a risk. I have to advise this is a withdrawal of a
12 whole-hearted plea of guilty to that particular allegation.

13 CHAIR: Thank you Mr Vere Hodge, the Committee will now withdraw and consider its
14 advice in this case.

15 (Committee retire)

16 CHAIR: In November 2008, Mr Gostelow, a registered hearing aid dispenser conducted
17 audiometry on a patient and prescribed a hearing aid. In the course of that
18 assessment of Patient D's hearing, of the patients hearing, he carried out various
19 audiological assessments but did not undertake audiometry with masking. He has
20 been charged with two breaches of the Hearing Aid Council Code of Practice 2008,
21 the first that he prescribed a hearing aid which was outside the fitting range - the
22 hearing loss for the patient was outside the fitting range for the aid. On the 22nd
23 October Mr Gostelow signed an acceptance of the charges which is expressed; "I
24 fully and unequivocally admit the charges set out in this notice." Accordingly he has
25 pleaded to both a charge of providing poor advice in dispensing an aid which was not
26 suitable for hearing loss and a charge of failing to carry out audiology properly.
27 However, in August 2009 he wrote a detailed letter to the solicitors acting for the
28 Council giving a considerable amount of information about the relationship with and

1 clinical investigation of the patient; discussing how he came to choose the aid and
2 the treatment he provided subsequently. He also said in that letter; "I am aware of
3 the discrepancies in the audiogram carried out on 15th November. I do not know
4 why I did not carry out masking as a rule 3 at 1,000, 2,000 and 4,000 kHz. I am fully
5 aware of the British Society audiology recommendations and always follow these
6 procedures."

7 At the same time as he returned the statement fully and unequivocally admitting the
8 charges on 22nd October, he sent a email to the Hearing Aid Council accepting fully
9 and unequivocally the charges, and then in what purports to be mitigation, going on
10 to provide arguments as to why he had provided best advice, and saying in terms; "I
11 still feel that I did give the best advice."

12 In the circumstances, it does not seem proper to this Disciplinary Committee to accept
13 the plea to charge 1, the failure to provide the best advice and accordingly we
14 adjourn that charge to a later date, either for a full contested hearing on the charge or
15 alternatively in the light of any further communication from Mr Gostelow should he
16 review his position and decide that he is accepting the charge - a clear and
17 unequivocal acceptance of charge.

18 With respect to the second charge, failure to follow the correct procedures for
19 audiometry, we have no such difficulty. The evidence is clear, the admission is
20 repeated and unequivocal and accordingly we find the charge of failure to comply
21 with the British Society of Audiology recommended procedures in accordance with
22 clause 9 of the Hearing Aid Council Code of Practice, we find that charge proven.

23 Now Mr Whalley, where do you want to go with respect to sanction? Have you
24 anything to say on that matter?

25 MR WHALLEY: Very briefly, again the Investigating Committee recommended a financial
26 penalty £1,000 per charge; clearly there is only one charge that you will have to
27 consider today. You again are not bound to follow this recommendation.

28

1 *(Committee retire)*

2 CHAIR: The Committee has now had an opportunity to consider the mitigation put forward
3 by Mr Gostelow and the circumstances of the dispensing. The Committee is satisfied
4 that a financial penalty is appropriate in this matter and we impose a penalty of
5 £1,000. Is there an application for costs?

6 MR WHALLEY: There is, Sir. An application under 10(3) of the Hearing Aid Council Act.
7 Again you have the power to award costs against any party in the proceedings.
8 There should have been handed up now an application for schedule of costs and
9 also a statement of means which has been provided by Mr Gostelow. The cost
10 application is in the sum of £1,919 which you will be aware that fast-track indicated
11 costs should not exceed £2,000.

12
13 *(The committee consider the issue of costs)*

14
15 CHAIR: The Disciplinary Committee awards costs in favour of the Hearing Aid Council in the
16 sum of £959.50. With respect to that and the financial penalty we have considered
17 the income and expenditure schedule provided by Mr Gostelow and we direct that
18 the sums should be paid within three months of the date of today. Thank you.