

IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Carr v. Nova Scotia Board of Dispensing Opticians,
2006 NSSC 13

Date: 20060112
Docket: S.H. No. 234931A
Registry: Halifax

Between:

John Carr

Plaintiff

v.

The Nova Scotia Board of Dispensing Opticians

Defendant

DECISION

Judge: The Honourable Justice Douglas L. MacLellan.

Heard: November 17 and 18, 2005, in Halifax, Nova Scotia

Counsel: June Rudderham, for the plaintiff
Marjorie A. Hickey, Q.C., and Patricia M. Elliott, for the
Defendant

By the Court:

[1] This is an appeal filed by John Carr from the decision of the Nova Scotia Board of Dispensing Opticians [hereinafter referred to as ‘the Board’] dated the 29 of October 2005 which found him guilty of two counts of unprofessional conduct and imposed a penalty of suspension of his license to practice for a period of seven weeks.

[2] The appeal is taken pursuant to Section 15 of the *Dispensing Opticians Act* which provides:

Section 15(1) Any person affected by an order made under Section 14 may appeal therefrom to a judge of the county court for the district in which he resides.

Section 15(5) The hearing of the appeal shall be a trial *de novo* and the judge may hear all such evidence as he deems to be relevant, and may affirm the order of the Board, or amend it and affirm it as amended, or set it aside and make such decision as to costs as the judge may determine.

[3] Section 14(1) provides:

Section 14(1) The Board may by order suspend or revoke the certificate of registration of a dispensing optician whom it finds has been guilty of unprofessional conduct or of incompetency, fraud or misrepresentation in connection with his practice of optical dispensing.

[4] Counsel for both parties agreed that the Court would receive into evidence a transcript of some of the evidence heard by the Board at the hearing which resulted in the penalty imposed on Mr. Carr.

[5] Evidence heard by the Board in relation to allegations not found to be unprofessional conduct were excluded from the transcript.

[6] The two allegations against Mr. Carr were as follows:

It is alleged that you are guilty of unprofessional conduct in connection with your practice of optical dispensing in that:

Allegation 1

Between January, 2003 and September, 2004, you used inappropriate language and demonstrated an inappropriate attitude towards Stephen Hayden, Hazel Geddes, Allan Romans, Adam Romans and Virginia Hebb.

Allegation 2

Between February and March, 2004 you inappropriately attempted to influence the complaints process of the Board of Dispensing Opticians by being a party to the withholding of a monetary refund ordered by the Small Claims Court to be

paid to Stephen Hayden, on the condition that Mr. Hayden withdraw his complaint before the Board of Dispensing Opticians

[7] At the hearing before the Board, the allegations in relation to Allan Romans, Adam Romans and Virginia Hebb were dismissed, therefore, this appeal involves only the complaints of Stephen Hayden and Hazel Geddes.

Complaint of Stephen Hayden

[8] Mr. Hayden testified that he came to Wizard Optical Centre where Mr. Carr worked in August 2003 to purchase glasses based on a prescription he had received from Dr. I. Mendleson. He indicated to Mr. Carr that he wanted progressive lenses and they had some discussions about what types of frames would be suitable for that type of lense.

[9] He said that they agreed on an appropriate frame and Mr. Carr arranged to have the progressive lenses fitted in the frame. He said he came back a week later to pick up the glasses and at that time he said he found his sight blurry, but was told that he should only wear the glasses for periods of two hours each day to get used to the progressive lenses.

[10] He said he tried using the glasses, but that he could not see very well. He said he reverted to using his old glasses and then went on vacation for a number of days before he went back to see Mr. Carr.

[11] He said that when he went back to see Mr. Carr, he was told that Dr. Mendleson must have made a mistake in the prescription and that he should go back to him because he could not see out of the top portion of the progressive lenses.

[12] He said he went back to see Dr. Mendleson and the prescription was checked. He was told that the prescription was correct and that the problem was how the progressive lenses were made up in that the reading portion of the lense was too high and this was what was causing his problem in that he was basically always looking out of the reading portion of the lense.

[13] Mr. Hayden said he then went back to see Mr. Carr and told him what he had been told by Dr. Mendleson's office. He said at that time Mr. Carr became irrate and told him that there was no problem with the make-up of the progressive lenses.

He said he asked for his money back and was told by Mr. Carr that he would not give him the money back and that the warranty on the glasses provided for a one-time adjustment to the progressive lenses. Mr. Hayden said that he was told by Mr. Carr that he could not guarantee that the adjustment would resolve the problem he was having with the glasses.

[14] He said that he then asked that he be given two sets of glasses, one for reading and one for normal vision. He said that Mr. Carr told him that he could do that for an additional \$60.00 on top of the \$239.00 he had already paid for the progressive lenses. He said he would not agree to spend that additional money and that Mr. Carr told him that he was a 'small person' for not agreeing to that kind of arrangement. He said that Mr. Carr told him that he could not seem to get through to him and that he told him to get out of the store. He said that at that point Mr. Carr was speaking very loud and that there was a lady present in the store whom he later found out was the owner of Wizard Optical Tracey MacLeod.

[15] Mr. Hayden said that after leaving the store, he went to the Small Claims Court and started a Small Claims action against Wizard Optical claiming the return of his purchase price of the progressive lense glasses.

[16] That claim, [Exhibit 4, Tab 18] asked for a refund of \$239.00, court costs of \$75.00 and \$100.00 for the inconvenience of having to deal with the matter.

[17] Mr. Hayden said that he served Wizard Optical with the claim and on the day set for the court hearing, he went to court but no one appeared for Wizard Optical. As a result, he got default judgment in the amount of his claim. That was on January 5, 2004.

[18] Once he got the default judgment, he also filed a complaint against Mr. Carr with the Board. [Exhibit 1, Tab 6A]. That complaint is dated December 17, 2003, but was received by the Board on January 5, 2004.

[19] Mr. Hayden said after he got the judgment, he went back to Wizard Optical and spoke with Tracey MacLeod. She told him that her solicitor June Rudderham had the money and that he should contact her to pick it up. He said he did that and was told that he would be paid the amount of his judgment if he dropped the complaint against Mr. Carr. At that time he received a letter dated March 4, 2005 from June Rudderham in which she indicated as follows: [Exhibit 1, Tab 6B].

Please be advised that I represent John Carr and Tracey MacLeod, carrying on business as Wizard Optical, with regard to the above-noted matter.

My clients' position is that the allegations in your complaint to the Nova Scotia Board of Opticians and your comments to Wizard Optical's clientele are malicious and defamatory. Please be advised that if Wizard Optical's business is in any way interrupted or inconvenienced as a result of your defamatory comments, both written and verbal, my clients intend to take legal action against you to recover any financial loss that they may suffer.

...

This aside, during our telephone conversation on February 17, 2004, I told you that in an effort to settle this matter, my clients were willing to pay you \$414.00, which represents the amount of your Court Order. This offer, however, was on the condition that you withdraw your complaint with the Nova Scotia Board of Dispensing Opticians. You stated during this telephone conversation that you did not wish to withdraw your complaint.

...

I enclose a letter stating that you withdraw your complaint along with a postage paid envelope addressed to my office. If you chose to accept my clients' offer, I ask that you please sign this letter and return it by mail to my office no later than **Friday, March 26, 2004**. I shall then forward the letter to the Nova Scotia Board of Dispensing Opticians. Upon receipt of this signed letter from you, I will forward the full amount owing to the Sheriff's office on behalf of my clients.

[20] The letter referred to in this correspondence was as follows:

March 3, 2004

Nova Scotia Board of Dispensing Opticians
5580 Spring Garden Road, Suite 16
Halifax, NS B3H 141

Dear Sir/Ms:

Re: Withdrawal of complaint by Stephen J. Haden against Wizard Optical Centre

I acknowledge payment of June L. Rudderham, solicitor for Wizard Optical, to the Sheriff's office in the amount of \$617.79. This amount constitutes complete settlement of Claim # SCCH 208882 filed October 16, 2003 in Halifax, Nova Scotia and granted January 20, 2005, and includes all costs associated with this claim, including, but not limited to Sheriff's costs, HST and interest.

I hereby withdraw my complaint to the Nova Scotia Board of Dispensing Opticians against Wizard Centre and all its employees, and assigns.

Yours very truly,

Stephen J. Hayden

[21] Mr. Hayden said that while he was discussing the offer to settle made by Ms. Rudderham, he asked her if that kind of thing was legal and she said told him that it was done all the time. He said he refused to sign the letter and therefore did not get his money.

[22] He said that in discussion with Ms. Rudderham he told her that since they were putting conditions on the offer that he would agree to drop the complaint with the Board if he was paid \$10,000.00. He said that he had no intention of pursuing that and it was just in response to their position.

[23] Mr. Hayden said that he met with the Complaint's Committee of the Board of Opticians and that around the same time he received his money based on the Small Claims Action from the Sheriff's office where he had previously registered the judgment.

[24] In March 2004, Mr. Hayden complained to the Board about the fact that he was being asked to drop the original complaint before he would be paid the Small Claims judgment.

[25] Mr. Hayden was asked on cross-examination about his conversation with Mr. Carr after he had been back to see Dr. Mendleson, and he said that Mr. Carr leaned against the wall of the store, put his glasses frame in his mouth, and said that "I don't seem to get through to you." He was shown a photo of the interior of the store [Exhibit 5] and it was suggested that Mr. Carr could not lean against the

wall based on where they were both standing. He denied that suggestion and maintained his position that Mr. Carr did lean against the wall and said what he did.

Complaint of Hazel Geddes

[26] Ms. Geddes testified that she had contact with Mr. Carr in October, 2002. She had a prescription and went to Wizard Optical where she met Mr. Carr. She said she wanted two pairs of glasses, one with progressive lenses and one with single vision lenses. She said she was fitted for both and purchased them for \$319.00.

[27] She said that she was having problems with the progressive lenses and three months later went back to see Mr. Carr. She said he looked at the glasses and asked her to stand up with the glasses on her face. He suggested that she was wearing the glasses in a different position than would normally be the case. She said that he then asked a person who appeared to be another customer in the store to come over and look at her to see if the glasses looked okay. She said she was

upset with this procedure and that the other person said that there was nothing wrong with the glasses.

[28] She said Mr. Carr told her that she would not be getting her money back. She said she had not asked for her money back at that point.

[29] She said Mr. Carr was loud and that she was upset. She said that he offered to give her a set of single lense glasses to replace the progressive lense glasses. He said she agreed despite the fact that she did not need an extra set and that she really wanted the progressive lense glasses. She said that when she went back to pick up the new pair of glasses that she got her son to go into the office to do so because she did not want to deal with Mr. Carr again.

[30] She said that some time later she noted that the second pair which she had received from Wizard Optical, and which she hadn't really used, had cracks where the frame meets the glass lenses, so she decided to take them back to Wizard Optical. She said that she first called the store and got information about the warranty being offered to the public by Wizard Optical. She felt she should be covered based on that information.

[31] She went back into the store and talked with both Mr. Carr and Tracey MacLeod. She explained to them about the cracks and that she really wanted progressive lenses as originally intended. She said that Mr. Carr accused her of breaking the glasses. She said that at that point someone in the store came up to her and touched her on the shoulder. She said she looked toward that person at which point Mr. Carr told her to shut up and leave the premises.

[32] She said he called her rude. She said she stood her ground and asked for a refund. She said at that point Tracey MacLeod came over and also told her to leave the store. She said she asked Tracey for the receipt which she had earlier given to Mr. Carr and that Tracey MacLeod refused to give it to her. She said at that point she took the receipt out of her hand. She said that as they continued to discuss the situation Mr. Carr told Tracey to give her the refund and get her out of here. She said she started to leave and Mr. Carr said ‘if you want a refund, I want your glasses.’ She said she was dumbfounded by that and that she needed her glasses for driving. She said that Mr. Carr finally said that he would give her \$200.00 back and she asked for a cheque. She was told that the accountant had to sign the cheque and that she should come back later to pick it up.

[33] She said she came back a week later to pick up her cheque but instead was given an envelope which contained her glasses which had been repaired, but no refund. She said that Mr. Carr told her to take it or leave it and that if she wanted anything else to put it in writing.

[34] In the envelope she received a letter dated February 12, 2004 [Exhibit 6] explaining their position and indicating:

Further to your visit to our store on Feb 10, 2004 my optician has passed along your request for a partial refund on your purchase, since, as my employee, he is not authorised to make that decision.

...

Therefore, I am unable to meet your request for a refund on this occasion.

[35] Following that, Ms. Geddes filed a complaint dated February 20, 2004 with the Board. On March 24, 2004, she received a letter from Wizard Optical with a cheque for \$200.00 and was told she could keep her two pairs of glasses.

The evidence of John Carr

[36] Mr. Carr testified that he has been a practicing optician for 15 years. He is married to Tracey MacLeod, the owner of Wizard Optical. He said that he fitted Hazel Geddes with one pair of progressive lense glasses and one pair of normal glasses. He said that when she came back complaining about having problems with the progressive lense glasses he told her there were three options she could chose from. They were: 1) she could get different progressive lenses; 2) she could get bi-focal glasses; and, 3) she could get single-vision lenses.

[37] He said he explained these options to her and that the change in progressive lense glasses was a one time change only. He denied having Ms. Geddes stand in front of another customer to view the glasses, but said that he got Tracey MacLeod to do that. He said that Ms. Geddes would know Tracey from the office and that she often helped him with determining if glasses fit a customer.

[38] He said that he did not accuse her of breaking the glasses when she came back later on and that he never told her to shut up and leave the premises.

[39] He denied that he or Tracey MacLeod held back her receipt from Ms. Geddes. He said that he did mention a possible refund but that Tracey had made that decision that there would be no refund. He said that Tracey MacLeod decided later to make a refund after Ms. Geddes filed a complaint with the Board.

[40] In regard to Stephen Hayden, Mr. Carr said that when he came back after being fitted with the progressive lenses that he did a test and found his vision to be very bad. He therefore suggested that he go back to see Dr. Mendleson.

[41] He said that when Mr. Hayden came back to the store some time later that he was obviously frustrated and angry. He said that Mr. Hayden told him that the prescription was correct and that he had been told by an optician in Dr. Mendleson's office that the reading portion of the lenses was extending too high on the lense itself. He said he disagreed with that opinion, but that he was prepared to change the lenses, but he felt that it would be of no use to him. He suggested a larger frame or standard bifocals. He said Mr. Hayden wanted a guarantee that the new glasses would work and that he could not give that kind of guarantee. He suggested that he could provide two sets of glasses for an additional \$60.00 but that Mr. Hayden would not agree to that. He said he got very loud and at one point

told him ‘you’re going to pay, little man’. He said he felt threatened by Mr. Hayden and that there was another customer in the store while this argument was going on between himself and Mr. Hayden.

[42] Mr. Carr said that he was aware that his lawyer June Rudderham had sent a letter to Mr. Hayden suggesting that Wizard Optical would pay the Small Claims judgment if he dropped the complaint filed with the Board. He said that he felt that was not appropriate and he did not want to be involved with it.

[43] Mr. Carr was asked why he had not testified at the original Board hearing into the complaints against him. He said he felt that the Board was prejudiced against him and that he would not get a fair hearing. He said he also felt that he should use his financial resources on the appeal procedure which would not involve fellow opticians

Evidence of Tracey MacLeod

[44] She testified that she is the wife of John Carr and the owner of Wizard Optical. She said that she remembers Hazel Geddes being in the store. She

purchased two sets of glasses and later came back complaining about problems with the progressive lense glasses. She said it was her who looked at the glasses on Ms. Geddes and not a customer. She said that Ms. Geddes was offered either progressive lense glasses on different frames or standard bi-focal glasses or a single vision lense.

[45] She said Ms. Geddes chose single lenses glasses to replace the progressive lense glasses. She said that about a year later she came back and wanted progressive lense glasses. She said that she refused that request and accused her of breaking the glasses she brought into the store. She said the glasses looked like they had been crushed against something. She said that she never ordered her to leave the store, but that she told her that she was being rude.

[46] She said that it was her decision to tell Mr. Hayden that Wizard Optical would pay the Small Claims judgment if he dropped the complaint. She said that she missed the hearing in Small Claims Court because she was confused about the Court date.

[47] It is agreed here that the burden is on the Board to prove on a balance of probabilities the allegations against Mr. Carr.

[48] In considering these allegations a question was raised whether the Court should consider the evidence presented at the hearing before the Board and the findings made by the Board along with the evidence presented at the appeal hearing. That is the position of the respondent and is based on a number of cases outlined in her pre-trial brief.

[49] In *Fung v. Nova Scotia* (Provincial Dental Board) [1990] N.S.J. No. 359, Richard J. of this Court in dealing with a trial *de novo* heard under the Dental Act R.S.N.S. 1989, Ch. 125 said at page 5:

“Counsel are in agreement that this court, hearing this appeal as a trial *de novo*, it in no way fettered by the previous rulings of either the committee or the board. I am free to arrive at my own determination provided I do so without violence to either the law or precedent. Does this mean I can ignore the unanimous recommendations of twelve registered dental practitioners (six on the Peer Review Committee and six on the Board)? In my view, it would not be prudent to do so.

[50] In *Tuplin v. Canada (Indian and Northern Affairs)* [2001] P.E.I.J. No. 113, Jenkins, J. of the Prince Edward Island Supreme Court dealt with a trial *de novo*

appeal from the decision of the Regulator of Indian Affairs not to register the appellant under the Indian Register. The appeal from that decision was, according to the statute by trial *de novo*. Justice Jenkins said at paragraph 15:

On a hearing *de novo*, the role of this Court is to freshly consider and decide the issues previously decided by the Registrar; and also to consider whether the Registrar had legal authority to do what she did. The scope of the appeal and latitude for a different decision is broader than on an appeal on the record, where the question would be limited to whether the Registrar made a reviewable error. In a hearing *de novo*, the appellate court can receive new evidence, and is not confined to reviewing the record of the Registrar's decision. An appellate court can choose to refer to the record, and can treat the Registrar's factual findings and decision as having evidential value, or substantial evidential value, and/or can treat the Registrar's findings with some respect and deference in view of the Registrar's expertise, or substitute its view for the Registrar's on the facts without deference to the Registrar.

See Jones and de Villars, *Principles of Administrative Law* (3rd ed.) Ch. 14; Blake, *Administrative Law in Canada* (2nd ed) Ch. 6; *Dickason v. University of Alberta*, [1992] 2 S.C.R. 1103; *Lamb v. Canadian Reserve Oil & Gas Ltd.*, [1971] 1 S.C.R. 517; *Dudley v. Chiropractic Assn. (Alberta)* (1977), 2 Alta. L.R. 384 (Alta. Dist. Ct.)

[51] I accept this as the proper approach to this matter.

[52] The Notice of Appeal filed by Mr. Carr alleges the following three grounds of appeal:

i. The tribunal of the Nova Scotia Board of Dispensing Opticians erred in failing to find that the Nova Scotia Board of Dispensing Opticians failed to provide the Appellant with proper notice of the complaint of Stephen Hayden, dated March 15, 2004, as required by the policies and procedures of the Nova Scotia Board of Dispensing Opticians.

ii. The tribunal of the Nova Scotia Board of Dispensing Opticians erred in failing to find that the complaints against the Appellant do not constitute unprofessional conduct as defined by Section 14(2) of the *Dispensing Opticians Act* or as defined under any other policies of the Nova Scotia Board of Dispensing Opticians.

iii. The decision of the tribunal of the Nova Scotia Board of Dispensing Opticians to impose the sanction of a seven-week suspension against the Appellant is unreasonable and unduly harsh.

[53] I ruled at the start of this hearing that the first ground was moot because since the hearing was to proceed by way of trial *de novo* any objection to lack of notice of allegation number two would only apply to the hearing committee decision and could not be raised in light of the fact that Mr. Carr has been aware of that allegation since prior to the hearing before the Board on October 29, 2004.

[54] Ground No. 2 alleges that the Board erred in finding that the facts supported a finding of unprofessional conduct.

[55] Because this ground of appeal deals with a finding made by the Hearing Committee without having heard from Mr. Carr and his witnesses, I conclude that

there are two issues before me, namely, number one, what are the facts, and number two, after finding the facts do they establish unprofessional conduct.

[56] The third ground of appeal alleges that the penalty imposed was unreasonable and unduly harsh.

Finding of Facts

[57] I have heard from Stephen Hayden and Hazel Geddes. They both testified about their interaction with Mr. Carr at Wizard Optical. I have also heard from Mr. Carr and Tracey MacLeod. Their evidence is clearly in conflict with the versions given by Mr. Hayden and Ms. Geddes.

[58] The issue is which version of the facts is more likely to have occurred. In deciding that I must consider how each witness presented their evidence and also whether their evidence is consistent with other facts not in dispute.

[59] Stephen Hayden said he became upset when after being told by Mr. Carr that he should go back to Dr. Mendleson to check his prescription, he confirmed that

prescription and Mr. Carr was not prepared to take responsibility for the make-up of the glass lenses. He testified that he was not offered the options which Mr. Carr said he offered him namely that he could have the lenses reground or have bifocals or have single lens glasses.

[60] Mr. Hayden's evidence is that he was told the warranty only covered a one-time adjustment to the glasses and that he would be stuck with this if they did not work. He said that he suggested that he be given two sets of glasses one for reading and one for normal use. He said that he was refused that and that it would cost him \$60.00 to have a pair of glasses for normal vision made.

[61] I accept Mr. Hayden's version of what happened when he went back to see Mr. Carr after consulting with Dr. Mendleson about this prescription. I believe Mr. Carr became upset because he did not agree with what Mr. Hayden had been told by Dr. Mendleson's office. I believe he felt it was a reflection on his ability to properly design the progressive lenses in Mr. Hayden's glasses and therefore he was not prepared to guarantee that the new lenses would work.

[62] I find it was his responsibility to ensure that if a person is fitted with progressive lenses that under normal circumstances they would work and that he should not fill the prescription if it is not possible for the person to adapt to the progressive lenses. I do not believe Mr. Hayden was ever offered normal bi-focal lenses in place of the progressive lenses as alleged by Mr. Carr. I believe that he would have accepted that proposal if offered.

[63] Mr. Carr's credibility is in doubt with me because of his response to the initial complaint by Mr. Hayden. In that response dated January 21, 2004 [Exhibit 4, Tab 2] and later on February 5, 2004 [Exhibit 4, Tab 3] he indicated that Mr. Hayden had been offered a complete refund, but had decided to return the glasses with the progressive lenses. The first reference I am able to note in the evidence before me was that on March 4, 2004, Ms. Rudderham, on behalf of Mr. Carr, made an offer to pay the judgment that had been obtained by Mr. Hayden against Wizard, but only if he withdrew his complaint. That letter [Exhibit 1, Tab 6B] refers to a conversation between Ms. Rudderham and Mr. Hayden which took place on February 17, 2004.

[64] There appears to be no evidence that prior to January 21, 2004 or February 5, 2004, Mr. Carr ever offered Mr. Hayden a refund as he stated in the letters to the Board. I also find it hard to compare an offer of a refund with the payment of a judgment obtained in Small Claims Court.

[65] In his first response dated January 21, 2004, [Exhibit 4, Tab 2] to Mr. Hayden's complaint, Mr. Carr stated:

At no time in my discussions with Mr. Hayden did he request a refund of his money, and I am advised by the management of Wizard Optical that this will be gladly done if he wishes to return the eyeglasses. This, in fact, has always been their standard policy.

[66] In his evidence before me, Mr. Carr testified that he did not make an offer of refund to Mr. Hayden because he was not finished with the dispensing of the prescription. He also indicated that he could not make that decision in any event and that it was up to Tracey MacLeod to decide if a refund was given in any particular case.

[67] I conclude that Mr. Carr was attempting to mislead the Board when he wrote that Mr. Hayden was offered a refund. I also find that the main thrust of Mr.

Hayden's problem with Mr. Carr was the fact that he wanted a refund and that it was not forthcoming. That was at the heart of his complaint against Mr. Carr and yet Mr. Carr responds by telling the Board that Mr. Hayden had never requested a refund.

[68] Because his evidence is inconsistent with the other evidence in this case, I reject Mr. Carr's version of what happened between himself and Mr. Hayden.

[69] Mr. Carr's position before me is not that his actions as described by Mr. Hayden were unprofessional, but that he did not act as described by Mr. Hayden. I conclude that Mr. Hayden's description of the events in Mr. Carr's store is the correct one. I note that I heard from Nadine Parsons who was present in the store when the argument between Mr. Carr and Mr. Hayden took place. Her evidence was that it was only Mr. Hayden who was upset. However, I note she did not support Mr. Carr in his evidence that he was told by Mr. Hayden "that you are going to pay little man". I conclude that her evidence does not assist either party here and can be explained by the fact that she had no interest in what was going on while she looked for glasses for herself.

[70] The essence of the complaint of unprofessional conduct against Mr. Carr is not so much about what he said to Mr. Hayden, but how he treated him. The allegation is that he used inappropriate language and demonstrated inappropriate attitude toward Stephen Hayden. Mr. Hayden himself did not complain about inappropriate language. His complaint was about how he was treated when he complained that he could not use his progressive lense glasses.

[71] I conclude and find that the manner in which Mr. Carr treated Mr. Hayden was inappropriate in the circumstances and therefore he is guilty of unprofessional conduct.

Complaint of Hazel Geddes

[72] This complaint filed by Ms. Geddes is based on her view that Mr. Carr and Wizard Optical treated her badly because after purchasing progressive lenses for her glasses and finding that she was having problems, gave her only the option of getting single lense glasses. She accepted that proposal, however, about a year later she found that the glasses had cracked through no abuse by her. She went back to Wizard and was accused of breaking the glasses. She was then promised a

refund of the purchase price. She was told to come back for the refund and was then advised that there would be no refund but instead the single lense glasses would be replaced. After she filed a complaint with the Board, she was given a refund.

[73] Once again, the parties differ on the various conversations which took place between the parties. Mr. Carr denies many of the accusations about the language used by him. He denies that he asked a customer to look at the glasses that Ms. Geddes was wearing. He denies that he told her to shut up and leave the premises or that he accused her of breaking the glasses.

[74] Based on the evidence I have heard from Hazel Geddes and the response that I heard from John Carr and Tracey MacLeod, I find based on a balance of probabilities that I accept Ms. Geddes version of what happened between them. I reject Mr. Carr's evidence that he offered to have the progressive lense reground or adjusted. I cannot understand why Ms. Geddes would not have accepted that especially since she had just purchased a pair of single lense glasses. Instead I am asked to believe that given the option of having an adjustment made or normal bi-focal lenses, she chose, instead, to have a second pair of single lense glasses.

[75] I conclude that she was never offered anything other than single lense glasses to replace the progressive lense glasses.

[76] When Mr. Carr was asked why her version of what transpired between himself and Ms. Geddes was so different he answered that she must have had another agenda, meaning, that she was still trying to get a pair of progressive lense glasses. That suggestion seems absurd in the circumstances she has described to me and the obvious impact the transaction had on her. I interpret her complaint to be a sincere complaint based on what she perceived as bad treatment by Mr. Carr and Wizard Optical.

[77] I conclude and find that Ms. Geddes version of what happened is what happened and that it was inappropriate for Mr. Carr to use the language that he did towards Ms. Geddes and treat her the way he did.

[78] I find that the Board has proven allegation No. 1 in relation to both Stephen Hayden and Hazel Geddes.

Allegation No. 2

[79] Both parties agree that this allegation is the most serious of the two.

[80] It is alleged that Mr. Carr in dealing with the complaint of Stephen Hayden attempted to influence the complaint process by withholding a refund until Mr. Hayden withdrew his complaint to the Board.

[81] The facts here are not really in dispute. Mr. Hayden obtained a Small Claims Judgment against Wizard Optical based on his purchase of progressive lense glasses. He presented the judgment to Tracey MacLeod at Wizard Optical who advised him to obtain the money to satisfy the judgment from her lawyer June Rudderham. June Rudderham agreed, on behalf of both John Carr and Tracey MacLeod, to pay the judgment, if, and only if, Mr. Hayden withdrew the complaint he had filed with the Board.

[82] The only factual issue in dispute on this allegation is that Mr. Carr did not authorize Ms. Rudderham to write the letter of March 4, 2004 in which she set out

the basis of the proposed settlement. In that letter Ms. Rudderham indicated that she was representing both John Carr and Tracey MacLeod. [Exhibit 1, Tab 6B]

[83] In evidence before me, Ms. MacLeod said she asked that the letter be sent out and that her husband, Mr. Carr, did not know that Ms. Rudderham was acting for him on that aspect of the case. He said that after the letter was sent, he advised Ms. Rudderham to not name him in subsequent correspondence. He also agreed that he felt the approach advanced in that letter was not appropriate, that is, tying the settlement of the judgment to the withdrawal of the complaint.

[84] I reject completely the suggestion advanced by John Carr and Tracey MacLeod that Mr. Carr was not aware of what was being proposed as a settlement. I believe he was aware of the approach being used and is responsible for the actions of his lawyer who was speaking on his behalf.

[85] Counsel for the Board correctly pointed out that the Court has not heard from Ms. Rudderham about her instructions in making the proposal set out in her letter of March 4, 2004. The only evidence on that point except the letter itself is from Ms. MacLeod.

[86] I conclude and find that Mr. Carr did attempt to have Mr. Hayden withdraw his complaint in order to have his judgment satisfied and that this attempt constitutes unprofessional conduct on his part.

Penalty

[87] Mr. Carr appeals the penalty of seven weeks suspension imposed by the Board. His counsel suggests that if the Court finds him guilty of the allegations that it should consider a lesser period of suspension or a reprimand along with community service work.

[88] Counsel for the Board points out that the *Act* provides only for a revocation of license or suspension. Section 14(1) of the *Act* provides:

14(1) The Board may by order suspend or revoke the certificate of registration of a dispensing optician whom it finds has been guilty of unprofessional conduct or of incompetency, fraud or misrepresentation in connection with his practice or optical dispensing.

[89] She also asks that the Court show deference to the penalty imposed on Mr. Carr by the Hearing committee of the Board made up mainly of Opticians. I have been referred to the case of *Przysuski v. College of Opticians of Ontario* [1996] O.J. No. 611 where the Ontario Court of Justice (General Division) dealt with an appeal from a penalty of a five weeks suspension and a reprimand imposed on the appellant for using vulgar language towards a client. The Ontario Act has a penalty section similar to the Nova Scotia Act. MacFarland, J. speaking for the Appeal Court said:

We are of the view that suspension of registration should be reserved for the most serious of cases and that this case is not one of those. We would set aside that part of the penalty. In our view, a public reprimand is penalty enough in the circumstances of this case.

[90] I would note that the Court in *Przysuski (supra)* did not directly deal with the issue of whether the Court or the Board can impose any other kind of penalty except revocation or suspension.

[91] A new *Dispensing Opticians Act* introduced in the Nova Scotia Legislature as Bill 235, but not yet passed, does provide by Section 36 that where there is a finding of unprofessional conduct or conduct unbecoming the profession the

complaint's committee shall dispose of the matter in accordance with the Regulations. I have not been given the proposed Regulations, however, I assume it will provide for a broader range of penalties options than are presently set out in Section 14(1) of the current *Act*.

[92] I find that I do not have to decide the issue of whether it is in fact possible for me to impose a penalty other than revocation or suspension since I conclude that the penalty imposed by the complaint committee of the Board is appropriate here. I believe Mr. Carr's attempt to interfere with the complaint process is harmful to the process itself and is not in the best interests of the profession. It was done here not as ill-advised attempt to settle a complaint as you might expect from an unrepresented party but after consultation with legal counsel and after the complainant had in fact obtained a Court judgment against Mr. Carr's employer.

[93] The complaint's committee of the Board here felt the suspension imposed was appropriate based on the evidence which they heard. That evidence was also heard by me and in addition I heard from Mr. Carr and Ms. MacLeod. However, I have generally not accepted their evidence of what transpired, and therefore I

conclude that I should show deference to the Board on this aspect of the case and I would impose the same penalty of seven weeks suspension of license.

[94] I understand both parties agree that any suspension should only start three months from the date of my decision to permit Wizard Optical to engage a licenced dispensing optician to replace Mr. Carr during the period of his suspension.

[95] I will hear the parties on costs if there is no agreement.

[96] I would add that I am prepared to allow as part of the costs award an appropriate amount to compensate both Ms. Geddes and Mr. Hayden for their costs of attending at both the committee hearing and at this appeal.

J.