

Notice of Decision of the Northern Ireland Social Care Council's Conduct Committee

Name: Terence Edward Whittenham

SCR No: 6007704

NOTICE IS HEREBY GIVEN THAT the Conduct Committee of the Northern Ireland Social Care Council, at its meeting on **12 February 2016**, made the following decision about your registration with the Northern Ireland Social Care Council:

The Committee found the facts proved;

The Committee found that you have committed misconduct;

The Committee decided to make an Order for removal of your registration from the Register ('a Removal Order').

Charge:

That, being registered under the Health and Personal Social Services Act (Northern Ireland) 2001 (as amended), and whilst employed as a Care Assistant by Four Seasons Health Care at Dungannon Care Home, you committed the following offence whilst on duty:-

1. On 20/06/2015 in the County Court Division of Fermanagh and Tyrone you unlawfully assaulted [Service User A], contrary to section 42 of the Offences Against the Person Act 1861.

You pleaded guilty at the Magistrates' Court for the Petty Sessions District of East Tyrone on 21st August 2015, and were convicted of the said offence on 18th September 2015.

And your actions as set out above amount to Misconduct, such as to call into question your suitability to remain on the Social Care Register.

Preliminary Matters

Representation

The Registrant did not attend the hearing and was not represented. The Northern Ireland Social Care Council ("the Council") was represented by Mr John Johnston (Solicitor, Directorate of Legal Services) who attended with Mr Nigel Wilkinson (Council's Officer).

Service

The Council served the Registrant with a Notice of Hearing to his last registered address. It was sent on 14 January 2016. The Committee's Legal Adviser was shown proof of postage as well as a document demonstrating that the Notice had been received on 16 January 2016. He advised the Committee that the content of the Notice complied with the requirements set out at Rule 4 of Schedule 2 of the NISCC (Conduct) Rules 2014 ("the Rules"), and with the service requirements set out in the Rules.

Furthermore, a bundle of relevant documents was sent to the Registrant on 27 January 2016, and these were received on 29 January 2016. The Legal Adviser was shown evidence which proved that the documents had been posted and received, and he advised the Committee accordingly.

Proceeding in the Absence of the Registrant

The Council made an application pursuant to Rule 14 (2) of Schedule 2 of the Rules, that the Committee should hear and determine the case in the absence of the Registrant. In support of that application, Mr Johnston referred the Committee to the communication which had been entered into with the Registrant, and with a solicitor acting on his behalf, with a view to establishing whether he would be attending the hearing. Those engagements are helpfully set out in a document dated 12 February 2016 ("Re: Notice of Service") which was prepared for the Committee by the Committee Clerk, Jane Keenan.

As can be seen from this document, the Registrant advised in an attendance form received by the Council on 01 February 2016 that he did not intend to attend or be represented at the hearing. This was preceded by a letter from a solicitor acting on his behalf, dated 12 January 2016, which explained that their client would not be attending today's hearing because of ill health and the expense associated with attendance.

Miss Keenan determined that it was appropriate to carry out further enquiries to establish whether the Registrant wished to seek a postponement of the hearing, taking into account that he had cited ill health and financial considerations as the reasons why he could not attend. She made a number of unsuccessful attempts to contact the Registrant directly by telephone. On 08 February 2016, she spoke to the Registrant's solicitor and invited her to seek specific instructions from her client in relation to the question of his attendance. In a subsequent discussion on the same date, the solicitor provided the following information:

- She had spoken to the Registrant who had instructed her that he would not be attending the hearing;
- He did not wish to seek a postponement;
- He was content that the Committee could proceed in his absence.

The Committee was advised by the Legal Adviser that in determining whether to proceed in the Registrant's absence, they must analyse the issues with great care and the utmost caution. However, he advised that it was significant that the Registrant had not specified the nature of his medical condition or provided any medical

evidence, and had explicitly stated, through his solicitor, that he did not wish to seek a postponement and was content that the Committee should proceed in his absence.

The Committee accepted the Legal Adviser's advice. It recognised that there were clear disadvantages and a risk of unfairness in proceeding in the absence of a Registrant. However, in this case there was no good reason to refuse the Council's application. On the contrary, the Committee concluded that the Registrant had voluntarily absented himself from the process, and had communicated unequivocally that he did not wish to attend or to seek a postponement. If the Registrant had genuine medical reasons for being unable to attend, the Committee would have expected him to put this forward in clear terms, supported by medical evidence. He has made no such application, and has not even specified the nature of his ill health. Accordingly, taking all of these factors into account, the Committee concluded, unanimously, that it was appropriate to proceed in the Registrant's absence since no purpose would be served in postponing the case.

Application to Admit Hearing Bundle

In the course of the proceedings, the Committee acceded to an application on behalf of the Council that this bundle of documents would be received into evidence. On receiving advice from the Legal Adviser that the documents were relevant and there being no objection from the Registrant, it was relevant to admit the Bundle into evidence in accordance with Rule 11 of the Rules.

Background

The Committee was told that the Registrant was registered on Part 2 of the Register. On 20 June 2015, he was employed as a Care Assistant at the Four Seasons Health Care at Dungannon Care Home, when it was reported that he had assaulted a service user by grabbing her hair and pulling her head back and shaking her head from side to side. The incident was witnessed by the Registrant's colleague, who advised her employer that the Registrant said to her, "you never saw me pull her hair."

The Registrant was suspended from his employment while the matter was investigated by the PSNI. Ultimately, a decision was made to prosecute the Registrant for the offence of Common Assault (contrary to section 42 of the Offences Against the Person Act 1861). He pleaded guilty at his first appearance at Court on 21 August 2015, and on 18 September 2015, he was sentenced to a period of 4 months' imprisonment which was suspended for 2 years.

Evidence

The Committee was referred to a Certificate of Conviction from the Petty Sessions District of East Tyrone, dated 07 October 2015, containing the above information. The Committee was also referred to the Employer's Referral Form, received by the Council on 24 June 2015, setting out the circumstances in which the assault took place.

Finding of Facts

The Committee found, on the balance of probabilities, that the facts contained within the Charge had been established. Taking into account Rule 11 (5) of Schedule 2 of the Rules, the Committee was satisfied that the Certificate of Conviction proved that the Registrant, by virtue of his guilty plea and the conviction of the Court, had assaulted a service user on 20 June 2015.

The Committee noted that the Certificate of Conviction was in the name of "Terence Whittenham McCann", whereas the Registrant's name as contained on the Register is "Terence Whittenham."

Mr Johnston explained to the Committee that the Council had received communication from the Registrant's former employer to say that he had married in 2014. The Committee was also told that the address and date of birth contained on the Certificate of Conviction was the same as that contained on the Register, held by the Council, for Mr Whittenham. The Committee was satisfied that the Registrant is the person named on the Certificate of Conviction, and that the name change, in all probability, was consequent upon the recent marriage.

Misconduct

Mr Johnston submitted that an assault on a service user who suffered from learning difficulties was behaviour which fell far below the standards to be expected from a responsible member of the social care profession. He asserted that such behaviour damaged the reputation of the profession. He referred the Committee to the NISCC Codes of Practice for Social Care Workers and, in particular, section 5. He indicated that it was the Council's view that provisions 5.1 and 5.8 of that Code had been breached.

Code 5: As a social care worker, you must uphold public trust and confidence in social care services. In particular you must not:

- 5.1 Abuse, neglect or harm service users, carers or colleagues;
- 5.8 Behave in a way, in work or outside work, which would call into question your suitability to work in social care services.

The Committee received advice from the Legal Adviser with regard to the meaning of 'misconduct', and the factors which they could take into account when determining this issue. The Committee accepted that advice.

The Committee concluded that the Registrant's behaviour was a clear act of misconduct. The act of assaulting a service user in the aggressive and unjustified fashion as described above, was entirely inconsistent with the high standards of care and attention which are to be expected from a social care professional charged with the responsibility of working with vulnerable people.

The Committee considered that Mr Johnston was correct to contend that there had been a breach of sections 5.1 and 5.8 of the Code. Having regard to section 3.8 of the Code, the Committee was also satisfied that the Registrant's conduct was an abuse of power, which undoubtedly had the effect of undermining the service user's proper feelings of dignity and respect.

Sanction

On behalf of the Council, Mr Johnston argued that the Registrant's misconduct merited a suitably severe sanction. He helpfully rehearsed, for the Committee, what he viewed as the aggravating features of the case:

- This was an assault on a vulnerable service user;
- The Registrant had not attended the proceedings, and had not provided the Committee with an account of his personal circumstances or testimonials;
- He had not provided any evidence to show that he had gained any insight into his failings, or to show that he was apologetic;
- The Registrant had not provided any evidence to show that he had taken steps to learn from the incident, for example, by undertaking a course of study;
- When first interviewed by his employer about the incident, while he had admitted shouting at the service user, he did not admit to assaulting her.

In the circumstances, Mr Johnston concluded that the Council had serious concerns about the risk posed to service users by the Registrant, and since those concerns could not be resolved, a Removal Order was appropriate in order to protect the public.

Mr Johnston took steps to fairly outline, for the Committee, the factors that provided some mitigation for the Registrant. In particular, he referred the Committee to the fact that the Registrant had co-operated with the police and probation services, and had offered up a plea of guilty at the earliest opportunity, thereby avoiding a contested hearing in the Magistrates' Court. He also pointed to a measure of co-operation with the Council, through the Registrant's solicitor. Mr Johnston also drew attention to the fact that the Council had no record of any disciplinary findings against the Registrant, and his former employer had indicated that there were no previous allegations against him.

The Committee received advice from the Legal Adviser with regard to the proper approach to its consideration of sanction. He drew the Committee's attention to the factors set out at Rule 25 (2) of Schedule 2 of the Rules, which it was obliged to apply when addressing the issue of sanction. He emphasised to the Committee that the key principle was proportionality.

He advised the Committee that one of the ways to ensure a proportionate and reasoned approach would be to endeavour to follow the advice contained at paragraph 2.8 of the Indicative Sanctions Guidance, to the effect that a Committee should start its considerations by examining the least restrictive sanction first, and only move to consider the next most serious sanction if the lesser sanction was insufficient to reflect the seriousness of the misconduct.

The Committee accepted the advice of the Legal Adviser which it applied to its considerations.

Admonishment – The Committee considered whether an admonishment was appropriate. It concluded that the Registrant's misconduct was so serious that an admonishment would fail to protect the public, and would risk undermining confidence in social care services. The Registrant had been found guilty of an unjustified assault on a vulnerable service user. His behaviour was aggressive and lacked control. He had not provided the Committee with any evidence that he had insight into his failings, and had not tendered any apology. The Committee was concerned that if he was merely admonished, there would be a risk that he could repeat his behaviour. While the Committee acknowledged that there was evidence of the Registrant's previous good history and character, and the fact that he had co-operated with the prosecution process, this was an insufficient basis to impose an admonishment.

Suspension – The Committee gave careful consideration to impose a Suspension Order. It noted, in particular, the guidance offered by paragraph 4.12 of the Indicative Sanctions Guidance. The Committee concluded that the gravity of the Registrant's misconduct was such that a Suspension Order would not be a sufficient sanction. The Committee considered that, in general, an assault of the nature described above, directed at a vulnerable service user, must be regarded in principle as behaviour which is fundamentally incompatible with continuing to be a registered social care worker. In this case, the Registrant had not made any effort to assure the Committee that his behaviour would not be repeated, and nor had he taken any steps to demonstrate that he had reduced the risk which he clearly posed to service users. In the Committee's view, to impose a Suspension Order in these circumstances would not serve the public interest in maintaining confidence in social care services.

Removal – The Committee agreed with Mr Johnston's submission that a Removal Order was the appropriate sanction in this case. This was a most serious act of misconduct, and quite incompatible with being a social care worker. The Registrant had betrayed the trust which had been placed in him to care for a vulnerable person, and he had abused his position in a most flagrant and unjustified manner. Rather than confronting the situation he found himself in by engaging with the Council's processes, he failed to attend the hearing. He has not provided any evidence of insight or remorse, and has not provided any evidence that he has taken steps to reduce the risk which he poses. The social care profession and the public cannot have any confidence that the Registrant is a suitable person to remain on the Register. Accordingly, it is the Committee's unanimous view that a Removal Order is the only appropriate sanction to reflect the seriousness of the misconduct, the need to protect the public and the obligation to promote confidence in social care services.

Legal Advice Given

Proof of Service

The Rules provide that service should be to the last registered address of the Registrant and Rule 4, Paragraph 4 of Schedule 2 sets out what the Notice of Hearing should contain. It should state the date, time and venue of the Hearing, specify the Charge against the Registrant, state whether the case is going to proceed under the Conduct or the Health Procedure, etc. Importantly, the Hearing shall not be fixed for any date earlier than 28

days after the posting of the Notice of Hearing.

So that is the background Rules, and what Miss Keenan has shown me and established to my satisfaction is that the requisite Notice has been served in accordance with the Rules. First of all, she has shown me the Notice of Hearing which was sent to the Registrant's last registered address dated 14th of January 2016, and she has shown me the signed receipt for that correspondence dated 16th of January 2016. I was going to go on to say that as Mr Johnston has indicated that the disclosure bundle was sent on 27th of January, I have seen proof of postage of that, and I have seen signature for receipt of that correspondence dated 29th of January, so in accordance with the Rules, I can advise you that service has been properly effected.

I think we will come on at the next stage perhaps to talk about the correspondence and the conversations that have been engaged in between Eimear Fahy, solicitor, and Miss Keenan, but I am confident in advising you that service has been effected in accordance with the Rules.

Proceeding in Absence

The application made on behalf of the Council is that we can proceed this morning, you can proceed this morning in his absence because he has indicated that he is content that you would do so. Now, the background Rule to this is set out, as Mr Johnston has indicated, at Rule 14 of Schedule 2. Essentially, where the Committee is satisfied that the Notice of Hearing has been duly served on the Registrant, it may hear and determine the case in the absence of the Registrant, or alternatively adjourn the Hearing and give directions.

You have a discretion whether to proceed in the absence of the Registrant, the case law tells us that you must proceed to exercise that discretion cautiously.

In the background to the developments that you have heard, was a suggestion made on behalf of the Registrant that he was sick and for that reason, added to some reference to expense, would not be in a position to attend the Hearing. Quite properly the Committee Clerk, Miss Keenan, has sought to explore what lay behind those assertions, and it is a relevant factor for you to consider that no medical evidence has been put forward to explain what this sickness is. More particularly perhaps, and more importantly perhaps, Miss Keenan has been efficient and careful to speak to the legal representative of the Registrant, the representative who I think represented the Registrant in the course of criminal proceedings and on 08th of February that solicitor sought specific instructions from her client, the Registrant, in terms of, essentially, what he wanted to do with regard to these proceedings. Did he want to seek a postponement for any reason, or was he content that the proceedings could take place in his absence, and the specific information that came back to Miss Keenan, importantly after Ms Fahy had spoken to her client, was that he wouldn't be attending, he did not wish to seek a postponement and he was content for the Committee to proceed in his absence, and Miss Keenan recorded a file note of that conversation which I understand you have been provided with.

Now, the case law in this area and specifically in the area where there is perhaps an assertion of ill health affecting the Registrant indicates, as I have said already, that you do have to proceed carefully. In the case of

Brabazon v UKCC reported at 2000 All England Reports it says that:

"Save in very exceptional circumstances where the public interest pointed strongly to the contrary, it was wrong for a committee which had the livelihood and reputation of an individual in the palm of its hand to go on with a hearing when it had unchallenged medical evidence before it that an individual was simply not fit to withstand the rigours of the disciplinary process."

But of course the facts of Brabazon are not in the case before you, you have merely received a hint or a suggestion that there is a medical problem affecting the Registrant, importantly, you have not received medical evidence or any indication of what that medical problem is. Moreover, and again by way of distinction with the Brabazon case, you have a very clear indication from somebody acting on the Registrant's behalf, a solicitor, and I can tell you a well-respected and experienced firm of solicitors operating in the Tyrone area, that their client essentially voluntarily waives his right to attend, to be represented, and is expressly indicating a wish that you would proceed in his absence.

So, taking all of those factors into account and ultimately it is a matter for you, in the exercise of your discretion, I can see, as a matter of law, no clear reason why you couldn't proceed in his absence given all of those factors but ultimately, as I say, that is a matter for you.

Findings of Facts

We are at stage 1 of the proceedings, that is the fact finding stage. The onus is on the Council to establish, on the balance of probabilities, the facts as contained within the Charge. You have the Charge in front of you, you can see the facts set out within the Charge. Essentially, the facts are that while employed as a care assistant at a Dungannon care home he assaulted a service user, that he pleaded guilty to that offence in the Magistrates' Court and was convicted of that offence. So, they are the essential factual elements and Mr Johnston says, correctly, that in this case where you have a Certificate of Conviction, as set out at page 1 of your bundle, that engages Rule 11 (5) of Schedule 2 of the Conduct Rules and in straightforward terms 11 (5) provides a device whereby a Certificate of Conviction, such as that you have before you, shall be conclusive proof of the facts or convictions so found. So it is your task, and it seems to me a relatively straightforward task which you, nevertheless, must conduct in private, it seems to me a relatively straightforward task for you to consider whether the facts contained within the Charge are in essence proved by reference to that Certificate of Conviction. As I say, notwithstanding the apparent straightforwardness of this task, the findings of fact provision in the Rules say you shall consider in private whether the facts in the Charge have been proved on the balance of probabilities.

Misconduct

As has been indicated, you are now at stage 2, the misconduct stage of the process. Mr Johnston has submitted that the facts that you have found to be proved amount to misconduct. He refers your specific attention to Section 5 of the NISCC Code of Practice for Social Care Workers and he says that provisions 5.1 and 5.8 are engaged. The Rule in the Conduct Rules that is applicable at this stage is Rule 23 of Schedule 2, and Rule 23

sub-paragraph 3 tells you explicitly that in deciding upon the issue of misconduct you, the Committee, shall have regard to the Code of Practice issued by the Council under section 9 of the Act, and that is plainly why Mr Johnston refers you to it, you are obliged to have regard to the Code and to consider, as he says, whether 5.1 and 5.8 are breached. You need not stop there if you think it appropriate, he says that it is those two provisions of the Code that have been breached, you can of course take a different view.

The Conduct Rules, very briefly, define what misconduct is, there is an interpretation section in the first part of the Conduct Rules in Section 2. Misconduct means conduct which calls into question the suitability of a Registrant to remain on the Register. So, if you like, misconduct is established if the conduct alleged calls into question the suitability, so it is the calling into question the suitability, that is the thing that you should focus on.

As is common at this stage of the proceedings, the Legal Advisers tend to refer you to the decision of the Privy Council in Roylance v General Medical Council and I won't break with tradition by going anywhere else, I will refer briefly to page 54 of the text by Harris, Disciplinary and Regulatory Proceedings, 7th Edition. In a section entitled "The meaning of misconduct", the editors of that book refer to Roylance, and I will read from that at paragraph 4.10.

"It has been said that misconduct is a word of general effect, involving some act or omission which falls short of what would be proper in the circumstances. The standard of propriety may often be found by reference to the rules and standards ordinarily required to be followed by ...", in that case a medical practitioner, obviously in the case today by a member of the social care profession in the particular circumstances, and that is per Lord Clyde in the Roylance decision. So, to summarise, what he is saying there, your focus should be on whether the standard of propriety as set out in the Code of Practice, again, which defines the standards ordinarily required to be followed by a member of this profession, does the conduct that you have found set out in the facts, does that conduct depart from those standards. I think I can't put it any better than that. That would be my advice.

Sanction

As you know we have reached the third and final stage of the process where you are required to apply a sanction. The sanctions available to you have already been set out and they are contained with Rule 25 of Schedule 2. The key information that I need to convey to you is that set out within Rule 25 (2). In deciding what sanction you are to impose, you must take into account the following factors:

- The seriousness of the Registrant's misconduct;
- The protection of the public;
- The public interest in maintaining confidence in social care services; and
- The issue of proportionality.

I propose to dwell for a moment or two on the issue of proportionality. What that means, in essence, is that you shouldn't impose a sanction which is any more than necessary to comply with those factors set out in Rule 25 (2). In order to ensure that you take a proportionate approach, you are encouraged by the Indicative Sanctions Guidance to consider each of the available sanctions in ascending order of severity. If I read from page 5 of the

Indicative Sanctions booklet it sets out the approach. At paragraph 2.8 it says:

"A Committee should approach the task of deciding which sanction to impose in all of the circumstances of the particular case by starting with the least restrictive sanction and working upwards from there."

If I could just interpose the advice that within the Indicative Sanctions booklet, you will see for each of the particular sanctions that are available to you a checklist, if you like, setting out the mitigating and aggravating factors that might be taken into account. Of course, you are not to follow those slavishly but to look at the thing in the round.

'At each stage ...', the advice goes on to say '... the Committee should state why a particular sanction was not sufficient to protect the public ...' and then move on to the next sanction.

'The Committee should continue in this way until it reaches the sanction it considers to be sufficient to meet the objects set out in Rule 25 (2)'.

There is specific guidance within the Indicative Sanctions at page 6 in relation to your consideration of a conviction case. This is obviously a conviction case, as you know it sets out some relevant advice for you to consider.

That is all the advice I would propose to give you at this stage.

Right of Appeal

You have the right to appeal this decision to the Care Tribunal. Any appeal must be lodged in writing within 28 days from the date of this Notice of Decision.

You should note that the Conduct Committee's decision takes effect from the date upon which it was made. The effect of this decision is that your entry in the Register has been removed with immediate effect.

You are prohibited from working as a social care worker in any of the following positions:

- Care staff in a children's home, residential care home or nursing home.
- Manager of a residential care home, day care setting or domiciliary care agency.

It is **compulsory** for the above social care workers to be registered with the Northern Ireland Social Care Council in order to work. This is pursuant to the Northern Ireland Social Care Register (Social Care Workers Prohibition) and Fitness of Workers Regulations (Northern Ireland) 2013.

In accordance with Schedule 3, Paragraph 9 of the NISCC (Conduct) Rules, you may not apply to be restored to the Register within three years from the date of removal. This does not affect your right to appeal the Committee's decision to the Care Tribunal.



Committee Manager



Date