



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

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**Name:** Noel Jesus Alinea Foronda

**SCR No:** 2085489

**Date:** 10 July 2014

**NOTICE IS HEREBY GIVEN THAT** the Conduct Committee of the Northern Ireland Social Care Council, at its meeting on **07 July 2014**, 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):

1. On 22 May 2013 you were found guilty of:

"Defendant on the 27<sup>th</sup> day of July 2012 in the County Court Division of Ards, intentionally penetrated sexually the vagina of [an adult female] with a finger, the circumstances being that the penetration was sexual, that the said [adult female] did not consent to the penetration and you did not reasonably believe that she so consented, contrary to Article 6(1) of the Sexual Offences (Northern Ireland) Order 2008".

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**

#### **Service**

The Registrant was neither present nor represented at this hearing. In a Notice of Hearing dated 06 June 2014, sent by Special Delivery and addressed to the Registrant at his address as it appears on the Register, the

Council notified him of the day, time and venue for this hearing. In addition, the Council forwarded the Notice of Hearing on the same date to the Registrant at HMP Maghaberry, where it is understood that the Registrant was serving a custodial sentence in respect of his conviction at that time. The Committee was advised that the Notice of Hearing was signed for on 07 June 2014 at HMP Maghaberry. The Committee is satisfied that the Notice has been served in accordance with Rule 3 of Part 1 and Paragraph 4 of Schedule 2 of the NISCC (Conduct) Rules 2013 (the Rules).

### **Proceeding in the Absence of the Registrant**

The Committee heard an application on behalf of the Council by its solicitor, Mr Wilson. He submitted that it was appropriate to proceed in the absence of the Registrant. He confirmed that the Registrant had been released from his custodial sentence and had knowledge or means of knowledge of today's hearing, and that the public interest required the expeditious disposal of the case today.

The Committee heard and accepted the advice of the Legal Adviser on the proper approach to be adopted to the question of proceeding in the absence of the Registrant, and had regard to those factors identified by the Court of Appeal on the issue in the case of *R v Jones* [2003] 1 AC 1.

The Committee reminded itself that it should exercise its discretion judicially, and noted that it should only proceed in the absence of the Registrant having considered the question with the utmost care and caution. The Committee noted that the Notice of Hearing had been signed for at HMP Maghaberry where the Registrant was incarcerated at that time, and was satisfied that he would have knowledge or means of knowledge that the case was scheduled for today and that the matter could be considered in his absence. The Committee was also satisfied that the conviction of the Registrant was a serious matter and that the public interest in determining the case expeditiously outweighed the Registrant's interest. Accordingly, the Committee decided, weighing the interests of the Registrant together with the public interest, that it was appropriate to proceed to hear the case in the Registrant's absence.

### **Background**

The Registrant was employed as a support worker at Blair Lodge in Bangor and cared for elderly residents. The Committee was told that the Registrant is registered on Part 2 of the Register and is understood to no longer work in the social care field. The Registrant was convicted, at Downpatrick Crown Court, before a judge and jury, of sexual assault by penetration of a female. He was convicted of intentionally penetrating the vagina of the female on 27 July 2012. The Registrant was sentenced to a determinate custodial sentence of one year imprisonment to be followed by a licence period of one year. The Registrant was also made the subject of a number of consequential Orders following his conviction, namely a Sexual Offences Prevention Order (SOPO), and was placed on the Sex Offenders' Register for a period of ten years. The Registrant was also made the subject of the notification requirements of the Sexual Offences Act 2003. The Committee was provided with a document setting out the factual background giving rise to the Registrant's conviction which took the form of a

judgement from the Court of Appeal in Northern Ireland. The Registrant's conviction was upheld by the Court of Appeal on 25 February 2014.

## **Evidence**

The Committee received in evidence a bundle of documents (Exhibit A) which comprised the Certificate of Conviction from Downpatrick Crown Court and the judgement of the Court of Appeal in relation to the Registrant's appeal against the conviction which was handed down on 25 February 2014.

## **Finding of Facts**

The Committee heard a submission from Mr Wilson in relation to Paragraph 11 (5) of Schedule 2 of the Rules. He submitted that the Certificate of Conviction which was adduced in evidence was conclusive proof of the conviction and facts underlying the conviction.

The Committee received and accepted the advice of the Legal Adviser as to the proper approach to be adopted on the basis of the conviction.

The facts giving rise to the conviction related to an incident which occurred on 27 July 2012, when the Registrant consumed alcohol in the company of a female and two other male friends. The female and another adult agreed that the Registrant was too drunk to make his own way home safely, and they helped the Registrant to a bed in the spare room of the house where they were drinking. The Registrant, in the course of this incident, approached the female and subjected her to a serious sexual assault, of which he was convicted, and which forms the basis of the Charge set out above. The conduct ceased when some moments later, another adult entered the room.

Having regard to Paragraph 11 (5), the Committee, upon consideration of the proper Certificate of Conviction issued by Downpatrick Crown Court on 22 July 2013 (ICOS:12/125622), finds the facts proved by reason of the conviction.

## **Misconduct**

The Committee heard a submission from Mr Wilson on the question of whether the conviction and facts so proved by the Committee are such as to amount to misconduct. Mr Wilson submitted that the Registrant had been convicted of a serious sexual offence, which society had marked as inappropriate, and which had been met with the imposition of an immediate custodial sentence. Mr Wilson continued that, by his conviction for this offence, the Registrant in his actions fell below the standard that would be expected of a registered social care worker. He further argued that his actions would be such as to bring the profession of social care into disrepute. Mr Wilson concluded by suggesting to the Committee that Paragraph 5.8 of the NISCC Codes of Practice for Social Care Workers had been breached by the Registrant's actions.

The Committee reminded itself that misconduct is defined in the Rules as conduct which calls into question the suitability of the Registrant to remain on the Register. The Committee accepted the advice of the Legal Adviser in this regard. The Legal Adviser referred the Committee to the case of Roylance v the GMC, in which it was

emphasised 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 Committee at this misconduct stage of the proceedings is therefore required to carefully analyse the conduct of the Registrant which gave rise to the conviction, and to determine whether his conduct is serious and falls below the standard to be expected of a registered social care worker.

The Committee was satisfied that the Registrant’s actions were serious and resulted in his conviction in respect of a sexual offence. He has been placed on the Sex Offenders Register for ten years, is the subject of a SOPO for five years and is also the subject of notification requirements. The Registrant, in his actions, clearly took advantage of the female complainant and subjected her to a frightening and degrading ordeal. The Committee had no evidence before it to suggest that the Registrant had shown any degree of remorse or insight into his actions. The Committee, for these reasons, is entirely satisfied, that in relation to the facts found proved, the Registrant has fallen short of the standards to be expected from a member of the social care workforce, and that his actions are serious and amount to misconduct.

The Committee, in approaching its task as to whether the conduct alleged against the Registrant amounted to misconduct, considered that he had breached the following provisions of the Codes:

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

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 finds misconduct proved.

### **Sanction**

The Committee was advised that the Council held no disciplinary history regarding the Registrant, nor had he submitted any references or testimonials for the consideration of the Committee.

The Committee heard an oral submission from Mr Wilson in which he referred to the NISCC Indicative Sanctions Guidance. He emphasised that, while the particular sanction to be applied is strictly a matter for the Committee to decide upon, he was of the view (on behalf of the Council) that this was a serious case which required the imposition of a Removal Order.

The Committee accepted the advice of the Legal Adviser in relation to the proper approach to be adopted on the question of sanction. The Legal Adviser emphasised that the Committee must approach its task in a proportionate fashion and start its deliberations with the least severe sanction. Only in circumstances where the Committee was satisfied that a sanction would not adequately protect the public should it move to consider a more severe and restrictive sanction. The Committee further accepted the advice of the Legal Adviser that, while the sanction was not designed to be a punitive measure it could have a punitive effect upon the Registrant.

**Admonishment** – the Committee first considered the imposition of an admonishment for five years. The Committee had no references or testimonials from the Registrant, and had no evidence upon which to be satisfied that the Registrant had insight into his serious wrongdoing or was remorseful for his actions and their effect upon the female complainant in this case. The Committee's findings in relation to the facts and misconduct are too serious to justify the imposition of an admonishment. For these reasons, the Committee decided that imposing an admonishment would be entirely inappropriate.

**Suspension** – the Committee next turned to the question of whether it would be appropriate to impose a Suspension Order in this case. The Committee had no evidence that the Registrant had any insight into his behaviour or was remorseful for his actions. The Committee could not be satisfied that the public and vulnerable service users would not be at risk of the Registrant repeating his behaviour if he was given a suitable opportunity to exploit. The Committee also noted that the Registrant was the subject of a specific condition in his SOPO which prevents him from “being employed/working with vulnerable people...whether paid or unpaid” without the express approval of his Designated Risk Manager (DRM). This provision remains in place for a period of five years from the date of his conviction. Quite apart from this prohibition, the Committee has no evidence to suggest that the Registrant could undergo any period of training or assessment, or undertake suitable remedial behaviour, which would allow him to safely practise in the future and to resume his entry on the Register at the conclusion of the suspension period. The Committee was of the view that the Registrant's conviction arose out of a very serious episode of misconduct, and that no amount of training or remedial behaviour would justify the Committee in imposing a Suspension Order.

**Removal** – the Committee has decided in the exercise of its judgement to make a Removal Order in this case. The Committee is satisfied that the actions of the Registrant, which resulted in his conviction, are a very serious departure from the standards to be expected from a member of the social care workforce, and that his conduct is fundamentally incompatible with remaining on the Register. The Registrant has failed to attend this conduct hearing and his engagement with the regulatory process has been limited. He has not sought to attend the hearing to show remorse or demonstrate insight. To allow a Registrant to remain on the Register in these circumstances would fundamentally undermine the confidence which the public requires to have in NISCC as the regulator in the social care sphere. It would also fail to declare and uphold proper standards of conduct and behaviour. The Committee has also identified that the Registrant would be at risk of repeating his misconduct. In these circumstances, there is a real risk to the public and vulnerable service users that the Registrant would repeat his misconduct in the absence of being removed from the Register.

The Committee has therefore decided that the public interest and the need to protect the public can only be satisfied in this case with the making of a Removal Order.

The Interim Suspension Order, which has been in place in this case, will now be revoked with immediate effect, in accordance with Paragraph 25 (1) (d) of Schedule 2 of the Rules.

## Legal Advice Given

### Service

You must consider whether notice of the Hearing has been served in accordance with the Rules, and as Mr Wilson has rightly alluded to, the first provision to which you should have regard is Rule 3 of the 2013 Conduct Rules and at Paragraph A it states that:

'In these rules any reference to the sending of a notice to a Registrant is a reference to the sending of a notice by registered post or by a postal service in which delivery or receipt is recorded to the Registrant's address on the Register, or if the last known address differs from the address on the Register, then the Registrant's last known address'.

By virtue of paragraph B it states that:

'Where any notice is to be sent to a Registrant it shall be treated as having been served on the day after it was posted'.

You should also have regard to Schedule 2 of the Rules and also in that regard specifically you should have regard to Paragraph 4 which makes it clear that: 'The Hearing shall not be fixed for any date earlier than 28 days after the posting of the Notice of Hearing, except with the agreement of the Registrant'.

In relation to this case the Council has seen fit to serve the Notice of Hearing, not only on the Registrant's address on the Register, but also for reasons which may become apparent at a later stage, at Maghaberry prison. It would therefore appear that with regard to Rule 3 an effort has been made to comply with that Rule in relation to the registered address and indeed the last known address.

It is also clear from my consideration of the Notice of Hearing that having been signed for the day after it was sent out, that the Registrant has been afforded with at least 28 days clear notice of this Hearing. It is therefore my advice to you with regard to Rule 3 and Paragraph 4 of the Second Schedule, that service has been effected in accordance with the Rules in relation to this case.

### Proceeding in the Absence of the Registrant

I would simply set out for you a number of factors which you should consider in the proper exercise of your discretion. I would remind you, of course first of all, that the leading case in this area which governs an absent defendant in a criminal process is the case of R v Jones in which the House of Lords made it plain that the discretion to proceed in the absence of a defendant in a criminal process should only be exercised after utilising the utmost care and caution. Whilst the case of Jones has been referred to in the criminal context, through the cases of Tate and Hayward it has a general application in the regulatory sphere as well. Modifying the terminology accordingly, the courts have identified the following factors which should be at the forefront of your minds in relation to whether or not to exercise your discretion and proceed in the absence of the absent Registrant:

1. The nature and circumstances of the Registrant's absence and, in particular, whether the behaviour may

be deliberate and voluntary and thus a waiver of the right to appear;

2. Whether an adjournment might result in the Registrant attending the proceedings at a later date;
3. The likely length of any such adjournment;
4. Whether the Registrant, despite being absent, wished to be represented at the Hearing or has waived that right;
5. The extent to which any representative would be able to receive instructions from and present the case on behalf of the absent Registrant;
6. The extent of a disadvantage to the Registrant not being able to give evidence having regard to the nature of the case;
7. The seriousness of the allegation;
8. The general public interest and, in particular, the interest of any victims or witnesses that a Hearing should take place within a reasonable time of the events to which it relates.

Finally,

9. The effect of delay on the memories of witnesses.

So whilst the Registrant has the right to attend before you, and to test the Council's case and to call witnesses, the Council have also the right to expect the fair and expeditious disposal of cases. There is also a corresponding public interest in ensuring that cases of this nature are also fairly and expeditiously disposed of. The courts in this jurisdiction have approved of the description of those competing interests as a 'triangulation of interests' and you must strike the appropriate balance between the Registrant's interest, the Council's interests, and the public interest in arriving at the proper decision.

### **Finding of Facts**

Just perhaps by way of a preliminary observation, that is to say that with regard to the Certificate of Conviction you should discount any reference to any other material other than the wording of the charge which the Registrant faces. So in other words my advice to you is that you should not have any regard to the second count upon which of course the defendant in that Crown Court trial was found to be not guilty.

You are confining yourselves as a Committee to the conviction of the Registrant on the 22nd of May 2013 in relation to sexual assault by penetration.

In the ordinary course of events and in fact obviously the Registrant not being present, that adds nothing to the Council's case, the Council is of course required to prove the case and the necessary requirements remain in place in that regard. But because this is a conviction case the Council are entitled to rely upon Paragraph 11, sub paragraph 5 which indicates that 'the findings of fact and certification of conviction of any UK criminal court shall be conclusive proof of the facts or convictions so found'. It is my advice to you that you are perfectly entitled, together with your colleagues, to accept the document set out at pages 1 to 3 inclusive of your bundle as a Certificate of Conviction of the Crown Court sitting at Downpatrick of the Registrant in relation to sexual assault by penetration. That document cannot be gainsaid. The Registrant does not seek

to suggest that it is, for example, someone else, that document is conclusive proof of the conviction and the facts underlying the conviction.

Your bundle also includes the judgment of the Court of Appeal in Northern Ireland in which the factual background is set out and in which the appeal of the Registrant on the procedural issue was dismissed unanimously by that Court. So there therefore can be no argument to be advanced by the Registrant that his conviction was quashed and that effectively he is entitled to the presumption that he did not commit any offence. This is confirmation for you and your colleague that his appeal, having been heard, was unsuccessful and he therefore remains convicted of the count which forms the basis of the charge before you and your colleagues.

My advice to you therefore, in light of all of those matters is straightforward and that is to say that you can now indicate that the facts underlying the conviction and the conviction itself have been found proved and that having adopted that course you can then move to the misconduct, the second stage of the proceedings. So my advice to you therefore is very clear and that is to say that you can announce to the satisfaction of the Committee that the Registrant has been convicted and that the conviction is conclusive proof of that and that you may then move, as I said, to the second stage of these proceedings.

### **Specific Advice Given Regarding Registrant's Appeal**

This was a submission made by the Registrant's legal representatives that the trial judge in this case should have discharged the jury on the basis of a procedural issue with regard to a court appointed interpreter, and the trial judge in the exercise of his discretion ruled that it was not appropriate, having heard the parties' arguments, to discharge the jury. The appeal was lodged on the basis that the trial judge erred in law by refusing a defence application to discharge the jury. The Court of Appeal in paragraph 13 analysed it in this way:

"In this case the learned trial judge permitted both interpreters to be questioned in detail after arranging for the parties to have access to the relevant portion of the taped record of the evidence. Those enquiries proved inconclusive. The learned trial judge also took into account the headway that Mr Farrell, counsel on behalf of the defendant (or Registrant), had made in cross-examination of the complainant with regard to the amount of alcohol which he had consumed upon the evening of the alleged offences."

"We note ..." the Court of Appeal continued, "... that during the course of the cross-examination the complainant conceded that she had misled a doctor as to the amount of alcohol that she had consumed and agreed that she had been tipsy. The investigation of this matter that was carried out by the learned trial judge was both careful and conscientious and, having given the matter very careful consideration, and taking into account all the circumstances of the case, we are not persuaded that he failed to properly exercise his discretion in relation to his decision not to discharge the jury."

It was suggested that the Court appointed interpreter was there to interpret the official language of the



Philippines and it was alleged by the interpreter, who was instructed on behalf of the defence, that in point of fact the Court appointed interpreter was speaking to the complainant in a dialect which the interpreter did not understand and was in some way coaching or preparing the complainant to give evidence in such a way as to help the complainant's case. It was suggested at that stage that that was a material irregularity in the course of the trial and that the trial should have been aborted at that stage.

The trial judge heard submissions on behalf of both interpreters and listened to a 'For The Record' recording of the proceedings and, as the Court of Appeal has indicated, it became clear that there was no persuasive evidence to support the suggestion that had been made that the Public Prosecution Service interpreter had acted in an improper way. So that was the net issue as to whether the trial judge should have taken the view that there was a procedural irregularity and should have aborted the trial having heard submissions from the parties.

### **Misconduct**

In relation to that, as Mr Wilson has helpfully pointed out, and unlike some other regulators, the term misconduct has been defined by the applicable Rules in relation to the Social Care Council and those are to be found at page 2 of the 2013 Rules which defines misconduct as 'conduct which calls into question the suitability of a Registrant to remain on the Register'. In relation to that, you have also again helpfully heard the leading authority quoted to you on the question of misconduct and in that regard if you would indulge me that is to be found in the analysis of Lord Clyde in the case of Roylance v the GMC in which he said:

"Analysis of what is essentially a single concept requires to be undertaken with caution.

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 a medical practitioner in the particular circumstances." Of course, while dealing with the doctor who was alleged to have committed serious professional misconduct, the case of Roylance and, in particular, its analysis of misconduct has been used and is seen as having general application in the regulatory sphere. You will also find assistance in relation to the Second Schedule of the 2013 Rules which reminds the Conduct Committee that at the misconduct stage by virtue of paragraph 23, sub paragraph 4, in deciding upon the issue of misconduct the Committee shall have regard to the Code of Practice issued by the Council under section 9 of the Act. So therefore you and your colleagues must look carefully at the applicable Code and determine whether in his behaviour, which has led to his conviction, the Registrant has breached any applicable provision of the Code of Conduct.

You must also remember that for the purposes of the 2013 Rules that there is a burden which rests upon the Council in relation to misconduct. That is that the Council must prove misconduct to the civil standard, that is to say the balance of probabilities. That is a single and unvarying standard. If you are satisfied that misconduct is made out, that it is more likely than not to have occurred, then the civil standard has been satisfied and you will accordingly find misconduct to be proved.

So you must look at the applicable Code and that would provide a useful reference point for you and your colleagues when determining whether the practitioner in this case has fallen short of the standards ordinarily to be expected from the social care workforce and thereafter to determine applying the civil standards whether misconduct has been made out in this case or not. If you find that it has not been made out then you are obliged to dismiss the case and no further action will be taken. If you are satisfied that misconduct has been proved, then you will then, with your colleagues move to the third and final stage of the proceedings which is the mitigation and sanction stage.

## **Sanction**

I would remark initially that of course at this stage in the proceedings you are not required or obliged to follow any burden or standard of proof. You must exercise your judgment, together with your colleagues, and arrive at the sanction which you believe adequately protects the public and which is in the public interest. You are not required to follow any evidential considerations in that regard, it is an exercise in your judgment.

I would commend to you and your colleagues the approach advocated by the Council which requires the analysis of the facts and misconduct found proved in relation to both mitigating and aggravating factors and they are set out for you at pages 7 and 8 of the Indicative Sanctions Guidance document. You must obviously remember that the list is not exhaustive and it certainly is not a 'one size fits all' document, but nonetheless it does remind you that in order to properly arrive at a sanction you must, as it were, calibrate your deliberations to identify what factors aggravate and what factors might mitigate the imposition of the sanction.

The public interest issue is dealt with at paragraph 2.2 of the document which states:

"The public should have confidence that the Social Care Council as the Regulator of social care workers will uphold proper standards of behaviour and conduct. The public interest requires that the public and social care users are protected from unsafe practice and that confidence in the profession of social work and the social care workforce in general is maintained.

It is part of the Social Care Council's role to maintain standards and to protect the public from social care workers who, for any reason, whether competence, character or conduct, are not fit to practice. Any social care worker registered with the Social Care Council agrees to abide by the Code of Practice for social care workers."

At 2.3 of the document it states:

"In serving the public interest the primary purpose of sanctions is to ensure first that the social care worker does not have the opportunity to repeat the misconduct and, second, to maintain the reputation of the profession."

It is also right to observe that you must act in a proportionate manner, and that is dealt with at paragraph 2.5 of the document which states:

"The principle of proportionality requires that the consequences of the sanction which a Committee imposes

must not be disproportionate to the harm from which the sanction is intended to protect the public and social service users. The interests of the public and social service users have to be weighed against those of the Registrant. There is a wider public interest to be served in the approach to sanctions. A Committee ought not to have only a particular client or client group in mind."

It is also important to recall that the imposition of the sanction is not a punitive measure and the Registrant in this case has already been punished by a criminal court, the imposition of a sanction in the regulatory sphere is to, first of all, ensure that the public are adequately protected and to act in the public interest. It is of course important, however, to remember that while not being punitive, the imposition of a sanction may have a punitive effect. You should also approach your task in relation to proportionality commencing at the least restrictive sanction, that is to say the application of an admonishment for 5 years. If you feel that that sanction would not adequately protect the public, then you may approach your task in looking at the next severe sanction and upwards from suspension up to and including a Removal Order if you, in the exercise of your judgment, consider that to be an appropriate response to the facts and misconduct found proved in this case.

I would also commend to you paragraphs 5.4 and 5.5 of the Indicative Sanctions Guidance document where it sets out that there are some examples of misconduct where the courts have upheld the decisions to remove individuals from other statutory Registers despite strong mitigation. This is because it would not have been in the public interest to do otherwise given the circumstances concerned, and identify sexual misconduct as one of those more serious cases where removal has been considered justified. At 5.4 of the document it states that:

"Sexual misconduct encompasses a wide range of conduct and can include what is not limited to criminal convictions for sexual assault and sexual abuse."

It says that:

"The misconduct is particularly serious, however, where there is an abuse of the special position of trust that a Registrant occupies or where a Registrant has been subject to notification requirements as a sex offender."

At 5.5 it indicates:

"The risk to people who use services is an important consideration. In such cases removal from the Register has been judged the appropriate sanction to uphold public confidence in social care services. In these cases removal from the Register was not found to be unreasonable, excessive or disproportionate, but necessary in the public interest."

I would conclude by reminding myself and reminding the other persons in this Hearing room that it is of course for you and your colleagues to exercise your judgment in arriving at the appropriate sanction, and that is no doubt what will occur in the retiring room in a few moments time.

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**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 on the Register has been removed with immediate effect and should not work as a social care worker.**

L. Chamberlain

Committee Manager

10.07.14.

Date