

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

Name: Eilis Smith

SCR No: 1100695

NOTICE IS HEREBY GIVEN THAT the Conduct Committee of the Northern Ireland Social Care Council, at its meeting on **07 October 2015**, made the following decision about your registration with the Northern Ireland Social Care Council:

The Committee found the facts proved in Charges 1, 2 and 4.

The Committee found the facts in Charge 3 not 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 Social Worker by the South Eastern Health and Social Care Trust, within the Bangor Community Mental Health Team, you:

1. Following the death of Service User A on 22 February 2009, falsely recorded that you continued to visit Service User A on multiple occasions.
2. Following the death of Service User A on 22 February 2009, falsely reported during supervision that you continued to have contact with Service User A.
3. Falsely made a mileage claim on 12 November 2010 in relation to a visit to Service User A at Hollywood Private Nursing Home.
4. Falsely made a mileage claim on 28 September 2011 in relation to a visit to Service User A at Hollywood Private Nursing Home.

And your actions as set out above at 1, 2, 3 and 4 were dishonest.

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 03 September 2015, sent by Special Delivery and addressed to the Registrant at her address as it appears on the Register, the Council notified her of the day, time and venue for this hearing. The Committee is satisfied that the Notice has been effected in accordance with Rule 3 of Part 1 and Rule 4 of Schedule 2 of the NISCC (Conduct) Rules 2014.

Proceeding in the Absence of the Registrant

An application was made to proceed in the absence of the Registrant under Rule 14 of Schedule 2 of the 2014 Rules. The Committee was advised that the Notice of Hearing was signed for on the day following service and that there has been no application to adjourn the hearing. The Committee has considered the factors identified by the Courts in the case of *R v Jones* [2003] 1 AC 1 in relation to the exercise of its discretion and has accepted the advice given by the Legal Adviser. The Committee is aware that the discretion to proceed in the absence of a Registrant is one which should be exercised with the utmost care and caution, that the crucial question is whether the Registrant has voluntarily waived her right to be present or represented at these proceedings, and that it must strike a careful balance between fairness to the Registrant and the wider public interest. Mr Dixon advised the Committee that the Registrant had written to the Council on 27 September 2015. She confirmed that she was aware of the date of the hearing and advised that she would not be attending. Mr Dixon told the Committee that the Registrant had not sought in her letter to request an adjournment of the proceedings to appear before the Committee at a later date, either personally or by a representative.

The Committee considered the matter very carefully in light of the submission made by Mr Dixon, and was satisfied that, with knowledge or means of knowledge of the proceedings, the Registrant has voluntarily waived her right to be present, and notes that there is nothing to indicate that she would be more likely to attend at a future hearing if the matter was adjourned today. The Committee must strike a careful balance between fairness to the Registrant and the wider public interest. In the circumstances of this case, the Committee has decided that the balance of fairness is in favour of proceeding in the Registrant's absence.

Application to admit Hearing Bundle

The Committee acceded to an application under Paragraph 11 of Schedule 2 to admit a hearing bundle on the basis that the material contained therein was relevant to the Charge, and that no unfairness would accrue to the Registrant in the admission of the bundle.

Background

The Committee heard from Mr Dixon that the Registrant was employed as a Band 6 social worker in the Bangor Community Mental Health team. She was employed as a social worker from September 1998. The Registrant had a period of long term sick leave from work, from October 2013 to April 2014. During this period, her case load was allocated to a work colleague. He attempted to make contact in January 2014 with one of the

Registrant's clients, Service User A, at the last address recorded for her at Hollywood Private Nursing Home (the Home). The Registrant's work colleague was advised by the Home that no-one by that name had lived there for the last three years. Following checks made by the Registrant's team leader, it was confirmed that Service User A had died in February 2009. A review then took place of the relevant Community Mental Health file. It was noted that the Registrant had recorded visiting Service User A at the Home, and had confirmed her visits in supervision notes for a significant period after Service User A's death. The Committee was also told that, on two occasions, the Registrant had made false mileage claims in respect of alleged visits to Service User A at the Home after she had died. The Committee was told that Service User A would have been the Registrant's only client at the Home, and that she would have no other legitimate work related purpose in travelling to the Home.

Evidence

The Committee considered the hearing bundle, Exhibit 1, together with the oral evidence of the Registrant's direct line manager, Witness 1.

Approach of the Committee

The Committee has considered all of the documentary evidence placed before it and the evidence of the Council's witnesses. The Committee has approached the matter in the following way:

- a. Firstly, to decide whether the facts in the Charge have been proved on the balance of probabilities;
- b. Secondly, to decide if the established facts amount, as particularised, to misconduct; and
- c. Finally, if misconduct is found, to decide, once the panel has considered any evidence provided in mitigation, what sanction should be applied.

In approaching the task of determining the facts, the Committee was mindful that the burden of proof rests with the NISCC. The Registrant herself is not required to prove anything. The Committee reminded itself that the absence of the Registrant added nothing to the Council's case and that the Council at all times was required to discharge the evidential burden at the fact finding stage. The standard of proof to which the NISCC is required to prove matters is the civil standard on the balance of probabilities.

The Committee heard and accepted the advice of the Legal Adviser at various stages in the hearing, and has accepted that advice as set out in this Notice. The Committee has exercised the principle of proportionality at all times.

Finding of Facts

The Committee first turned to Charges 1 and 2 together on the discrete issue of whether, as a fact, it could be proved that Service User A died on 22 February 2009. The Committee considered that it could be satisfied on the balance of probabilities of this for the following reasons. Firstly, the Committee considered the witness statement of Witness 1 at Paragraph 7, where she confirmed that she contacted the Mental Health Outpatients' Department, Service User A's GP and the Bangor Administrative Department, who confirmed that Service User A

died on 22 February 2009. Second, the Committee also had regard to an email contained within the hearing bundle, which confirmed a telephone call with Service User A's GP on 12 March 2014, in which the GP is recorded as confirming that Service User A died on 22 February 2009.

The Committee then addressed the question of whether the Registrant had falsely recorded that she continued to visit Service User A on multiple occasions after her death. The Committee, in this regard, considered handwritten and computer records from the Community Mental Health file and the statement of Witness 1 at Paragraph 5. These documents confirmed that the Registrant had recorded multiple visits on a face-to-face basis with Service User A on various dates subsequent to 22 February 2009.

The Committee then addressed the question of whether the Registrant falsely reported during supervision that she continued to have contact with Service User A on dates after Service User A had died. In this regard, the Committee considered the supervision records which were contained in the hearing bundle in relation to the Registrant's supervision by Witness 1. The Committee also had regard to the oral evidence of Witness 1 and her witness statement. The oral and documentary evidence confirmed that the Registrant, during supervision, had falsely reported continuing to have contact with Service User A on multiple dates after Service User A had died.

For the reasons given, the Committee was satisfied that Charges 1 and 2 were proved on the balance of probabilities.

The Committee then turned to address Charge 3, and had particular regard to a Claim for Travelling form, and an extract detailing the Registrant's work related journeys and claims therefor. The Committee noted that the visit to the Home took place on 12 November 2010 but that the claim for that visit was not signed by the Registrant until 25 November 2010. The Charge particularises the claim as having been made falsely on 12 November 2010. The evidence of the claim for the visit was not dated until 25 November 2010. For this reason, the Committee has found this Charge not proved.

The Committee then turned to address Charge 4, and had particular regard to a Claim for Travelling form, and an extract detailing the Registrant's work related journeys and claims therefore. The Committee noted on this occasion that the claim form was dated on 28 September 2011, as particularised in the Charge. The Committee also had regard to the oral and documentary evidence from Witness 1, who confirmed that the Registrant would have had only one client in the Home, namely Service User A, and would have had no other legitimate work related reason to visit the Home. The Committee therefore drew an inference from this evidence that the Registrant was seeking to claim mileage on 28 September 2011 falsely as Service User A had died and there was no other reason or basis for the claim to be advanced by the Registrant.

Having found Charges 1, 2 and 4 proved, the Committee then turned to whether, by her actions as proved, she had acted dishonestly. The Committee had no hesitation in being satisfied, on the balance of probabilities, that the Registrant's actions would have been regarded as dishonest by the standards of ordinary and reasonable people. In submitting a false mileage claim and recording and asserting at supervision that she had been having multiple contacts with Service User A when she did not, owing to the fact that Service User A had died, the

Committee was satisfied, on the balance of probabilities, that the Registrant must have known that what she was doing was dishonest by the standards of ordinary and reasonable people. In this regard, the Committee took notice of the fact that the Registrant was a very experienced social worker who had been in post since 1998. She was a senior practitioner and a practice teacher, who would have been well-acquainted with good practice in relation to record-keeping and making claims in accordance with the policies of her employer.

Accordingly, the Committee was satisfied, on the balance of probabilities that the Registrant had acted dishonestly in relation to Charges 1, 2 and 4.

Misconduct

The Committee accepted the advice of the Legal Adviser, who drew its attention to the definition of misconduct as provided for in the Rules, as 'conduct which calls into question the suitability of a Registrant to remain on the Register'. In addition, the Committee reminded itself of the definition of misconduct provided by Lord Clyde in *Roylance v GMC* as '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...it is not any professional misconduct which would qualify. The professional misconduct must be serious.'

The Committee further reminded itself that it must exercise its own independent judgement in deciding whether the Registrant has committed misconduct, and that it is not required to observe any burden or standard of proof.

The Committee heard a submission from Mr Dixon who invited it to find that the Registrant, by her actions as found proved, had acted in a manner which amounted to misconduct. The Committee found that the Registrant's actions were a serious departure from the standards to be expected of a social worker. The Registrant falsified records in relation to alleged visits to a service user which did not take place, and asserted falsely to her line manager during supervision that she was having continued contact with Service User A when in fact she was not. The Committee noted that when the Registrant was spoken to in May 2014 by her line manager, Witness 1, she attempted to mislead Witness 1 and suggest that she may have got the identity of Service User A mixed up with another service user in the same Home. Enquiries by Witness 1 established clearly that there was no truth or basis for the Registrant's claims in this regard. In addition, the Registrant's actions were premeditated, involving the completion of numerous records over several years. She acted in a calculated manner and recorded significant detail in relation to visits which in fact did not take place. The Committee also noted that by submitting one false mileage claim in September 2011, the Registrant had benefited financially as a result of her dishonest actions. The Committee was also satisfied that the Registrant's actions had the potential to put Service User A at risk if she had been alive.

Finally, the Committee was satisfied that the Registrant's actions amounted to a serious breach of trust, and had the potential to undermine the trust and confidence which the public place in social workers who are required to deal with vulnerable service users in their care.

The Committee had regard to the applicable Code of Practice for Social Care Workers, and considered that the Registrant's actions have breached the following provisions of the Code:

Code 2: As a social care worker, you must strive to establish and maintain the trust and confidence of service users and carers. This includes:

2.1 Being honest and trustworthy; and

2.4 Being reliable and dependable.

Code 6: As a social care worker, you must be accountable for the quality of your work and take responsibility for maintaining and improving your knowledge and skills. This includes:

6.1 Meeting relevant standards of practice and working in a lawful, safe and effective way; and

6.2 Maintaining clear and accurate records as required by procedures established for your work.

For the reasons given above, the Committee was satisfied that the Registrant's actions amounted to misconduct which was serious.

Sanction

The Committee heard a submission from Mr Dixon, on behalf of the Council, on the appropriate sanction to apply in this case. The Committee looked again at the available documentary material presented during the hearing and paid careful attention to Mr Dixon's submission. He drew the Committee's attention to those factors which he argued were aggravating, and which suggested that the appropriate sanction should be at the more severe end of the spectrum. He argued that the Registrant, by her actions, had abused the trust placed in her by her employer, and had undermined public confidence in the social work profession. Mr Dixon ended his submission by reminding the Committee that the Registrant had engaged in dishonest conduct over a prolonged period.

The Committee reminded itself that it was not required to adhere to any standard of proof. At the sanction stage, the Committee exercised its own independent judgement on the appropriate sanction to impose and applied a sanction which adequately protected the public. In so doing, the Committee recognised that it was not the function of these proceedings to punish the Registrant but to protect the public and vulnerable service users, to maintain proper standards of conduct and behaviour, and to uphold the reputation of the social care workforce in general.

The Legal Adviser referred the Committee to Paragraph 25 (1) of Schedule 2 of the Conduct Rules which sets out the statutory disposals available. He reminded the Committee that, upon a finding of misconduct, it may: (a) admonish the Registrant and direct that a record of the admonishment should be placed upon her entry in the Register for a period of up to five years; or, (b) make an Order suspending the Registrant's registration for a period not exceeding two years (a Suspension Order); or, (c) make an Order for removal of the Registrant's registration from the Register (a Removal Order).

The Legal Adviser informed the Committee that, by virtue of Paragraph 25 (2), it was obliged to take into account

the following factors in its determination on sanction, namely: (a) the seriousness of the Registrant's misconduct; (b) the protection of the public; (c) the public interest in maintaining confidence in social care services; and (d) the issue of proportionality.

The Legal Adviser referred the Committee to the NISCC Indicative Sanctions: Guidance for Conduct Committees document, and in particular to the following provisions:

Paragraph 2.5: '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'.

Paragraph 2.6: 'A Committee must ensure that measures taken to limit the fundamental right to practise one's profession are no more than is necessary in all the circumstances'.

Paragraph 2.4: 'There is a duty on Conduct Committees to act fairly. What constitutes the standard of fairness in any proceedings is not fixed and may change over time and depends on the circumstances of each case'.

Paragraph 2.2: 'The public should have confidence that the NISCC, 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 work force in general is maintained. It is part of the NISCC's role to maintain the standards and to protect the public from social care workers who, for any reason, whether competence, character or conduct, are not fit to practise. Any social care worker registered with the NISCC agrees to abide by the Code of Practice for Social Care Workers'.

Paragraph 2.3: 'In serving the public interest, the primary purpose of sanctions is to ensure, firstly, that the social care worker does not have the opportunity to repeat the misconduct and secondly, to maintain the reputation of the profession'.

The Committee accepted the advice of the Legal Adviser.

Admonishment – the Committee first considered whether it was appropriate to impose an admonishment for a period of up to five years in relation to this case. The Committee has already determined elsewhere that the Registrant's actions were serious, and represented a significant departure from the standards to be expected of a social care worker. The Registrant has been found to have acted dishonestly in relation to recording that she visited Service User A on multiple occasions and asserting to her employer during supervision that she continued to have contact with Service User A when she did not. Furthermore, the Registrant had been found by the Committee to have falsely submitted a claim for mileage in relation to a visit which the Committee was satisfied did not take place. The Committee was not of the view that the Registrant's behaviour was at the lower end of

the spectrum of misconduct. For this reason, the Committee was not satisfied that an admonishment was an appropriate response to the misconduct made out against the Registrant.

Suspension – The Committee next turned to the question of whether it was appropriate to make a Suspension Order of up to two years in relation to this case. The Committee had no evidence that the Registrant had any insight into the gravity of her actions. The Committee considered that in the absence of insight, a real risk was posed of the Registrant repeating the behaviour which had resulted in the current proceedings against her. In addition, there was no evidence before the Committee that the Registrant was remorseful for the behaviour which resulted in the regulatory proceedings brought against her by the NISCC. Furthermore, having regard to the serious nature of a finding of dishonesty, and the absence of any evidence that the Registrant would be able to resolve the cause of the misconduct during the period of suspension, the Committee considered that it would be inappropriate to permit the Registrant to return to unrestricted practice once the period of suspension had been served. For this reason, the Committee was not satisfied that a period of suspension would adequately protect the public.

Removal – The Committee has therefore decided to impose a Removal Order in this case. The Committee was satisfied that the Registrant's actions amounted to a serious departure from the relevant professional standards set out in the Code of Practice for Social Care Workers. The Committee paid particular regard to Paragraph 5.10 in the Indicative Sanctions Guidance document, which states that 'dishonesty is particularly serious because it may undermine trust in social services. Examples could include cases of theft...lying to a manager about whether a work task has been undertaken...falsifying evidence. The public must be able to place complete reliance on the integrity of Registrants'. The Registrant has provided no evidence of insight or a realisation that what she did was wrong. The Registrant has failed to give an undertaking that her dishonest conduct will not be repeated in the future. The Committee is satisfied that these factors, taken together with a finding of dishonesty, which occurred over a prolonged period of time and which was premeditated, is behaviour which is fundamentally incompatible with being a social care worker. The Committee also determined that the Registrant had abused the position of trust which she was in by benefitting financially from her dishonest conduct and falsifying records which had the potential, if she were alive, to place a vulnerable service user in her care at risk of harm. The Committee was satisfied that the public interest, which includes the protection of vulnerable service users and the declaring and upholding of proper standards and behaviour, could only be properly upheld by making a Removal Order in this case, and to send out a clear message to the public and the social care workforce that actions such as those undertaken by the Registrant are incompatible with remaining on the Social Care Register.

Legal Advice Given

Service

This is the first stage of the process which you must look at and, as Mr Dixon has rightly indicated, it is governed

by the 2014 NISCC Conduct Rules and, for present purposes, by virtue of paragraph 4 of Schedule 2 of the Rules, it makes certain requirements of the Council in relation to advising a Registrant who is the subject of a Conduct proceedings of certain matters which must be contained in the Notice of Hearing. One of those matters which is contained in this Notice of Hearing is the power of the Committee to proceed in the absence of a Registrant but the first stage is whether the Notice has been properly served. By virtue of paragraph 4(2), it 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, and there is on the face of it no agreement in that regard here. The Notice of Hearing in this case is dated 3rd of September and, then, the next provisions that of Rule 3 of the Rules, in which it indicates that any reference to the sending of a Notice to any person is a reference to it being sent in the case of a Registrant to the Registrant's home address as it appears on the Register, or if the last known address differs from that in the Register, then the Registrant's last known address.

The next paragraph is also relevant that all communications to be sent for the purposes of these Rules, they 'may be sent by registered post or by a postal service in which delivery is recorded to an address notified by a Registrant to the Council and any such communication shall be treated as having been served on the day after it was posted.'

In this case, it is clear that the Council do not have to prove receipt of the Notice of Hearing, the Rules will be perfected the day following the service of the Notice of Hearing on 4th of September and therefore, it is clear that the Registrant in this case has been given more than 28 days' clear notice of this Hearing advising her of the date, time and venue of it. It is therefore my advice to you, that service of the Notice of Hearing in this case has been effected in accordance with the Rules.

Proceeding in the Absence of the Registrant

I would be happy now to give you advice on the separate and discrete issue of having been satisfied that service has been effected in accordance with the Rules that you now consider, separately, the discretion of whether you should proceed in the absence of this Registrant. After which, I would invite you to retire to consider this issue. But it is simply to outline to you, that if you are satisfied that the Registrant is not present and represented, but that the service of the Notice of Hearing has been effected in accordance with the Rules, that you may proceed to hear the case in her absence.

However, you should remember that the discretion to proceed has been described by the courts as a severely constrained discretion, and the House of Lords has also held in the leading of case of R v Jones, that the discretion to commence and conduct proceedings in the absence of a Registrant should be exercised with the utmost care and caution. In exercising that discretion, you must strike a careful balance between fairness to the Registrant, and to the wider public interest. You must take account of all the circumstances of the case, including whether the Registrant's actions amount to a waiver of the right to be present or represented. In reaching that decision, you should take account of the factors identified by the Court of Appeal in the case of R v Jones and, whilst that case concerned the absence of a defendant in a criminal trial, nonetheless, with appropriate

modification of the terminology, it has been universally held that the case is of application to the regulatory process. The factors identified by the Court in the case of R v Jones are as follows:

Firstly, 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.

Next, whether an adjournment might result in the Registrant attending the proceedings at a later date. Next, the likely length of any such adjournment.

Next, whether the Registrant, despite being absent, wished to be represented at the Hearing or has waived that right.

Next, the extent to which any representative would be able to receive instructions from and present the case on behalf of the absent Registrant.

Next, the extent of the disadvantage to the Registrant in not being able to give evidence having regard to the nature of the case.

Next, the general public interest and, in particular, the interests of any victims or witnesses that a Hearing should take place within a reasonable time of the events to which it relates; and finally, the effect of delay on the memories of witnesses.

You have heard from Mr Dixon in that regard in relation to the serious nature of the allegations which have been preferred against the Registrant in this case, and you have also heard from Mr Dixon that there has been no request for an adjournment from the Registrant herself, nor has she indicated that she wished to be represented either by a professional body or by a legal representative. Those are all matters which you and your colleagues must take into account in the exercise of your discretion, which should be done in a judicial fashion, and you should attach such weight as you consider appropriate to the submissions which you have heard.

So, unless you have any questions for me or unless there are any representations upon my advice from Mr Dixon, that would conclude my advice to you on this issue at this stage.

Application to admit the hearing bundle

I will be very brief in this; obviously you haven't seen the bundle, but it is clear from Mr Dixon's submission that this evidence is admissible and relevant, and you will have a very wide latitude to admit evidence which would otherwise be inadmissible in other proceedings, and it is certainly my advice to you at this stage that it is entirely appropriate for you to admit this bundle under Paragraph 11 of Schedule 2.

Finding of the Facts

At this stage then, before you shortly retire at this, the fact finding stage of the proceedings, in relation to Eilis Smith, I am required to give you some advice in relation to those matters which you can properly take account of at this stage.

You must remember that you should draw no adverse inference from the failure or refusal of the Registrant to attend these proceedings. She does not have to prove her innocence; these proceedings have been brought by the Northern Ireland Social Care Council, and it is the Council which bears the burden of proving any facts in dispute on the balance of probability. That is confirmed for you, in relation to this matter, at page 43 of the Conduct Rules at paragraph 12. You will also see, following that the confirmation is that the standard of proof shall be the balance of probabilities. So, Mr Dixon, in this case, has the burden of proving any fact in dispute and the standard applicable is the civil standard, which is to say the balance of probabilities.

You must then have regard to what is meant by the balance of probabilities, and the case law has made it clear that an event is proved on the balance of probabilities if a tribunal is satisfied that, on the evidence, the occurrence of the event is more likely than not, it does not require a tribunal to be certain that an event did occur. Case law also makes it clear that there is only one civil standard of proof, and neither the seriousness of the allegation, nor the seriousness of the consequences for the Registrant, should make any difference to the application of the standard of proof to be applied. It is clear that there may be some particular circumstances in which a tribunal has to look more critically or more anxiously than others before it can be satisfied to the requisite standard. However, the standard of proof is, however, finite and unvarying.

You also must remember that there are no general rules regarding the weighing of the strength of evidence to be presented to you. It is a matter of common sense and logic, based again on the particular circumstances of the case and the evidence which you have both read and heard.

I would also draw your attention to the Charge; the Charge is one of misconduct, and it is particularised in four different ways, those factual matters are set out at 1 through 4 and, when you retire, you must look critically at each and every element of the particulars as set out, and you of course can be satisfied in relation to some elements of the Head of Charge to the requisite standard, and not be satisfied to the same degree in relation to any other aspect of a particular.

So, you will be required to look at that with some anxious scrutiny.

You are also required to look, at the fact finding stage, at the issue of dishonesty, and that is also a matter which, again, requires to be either proved or not proved, applying the standard of proof and, in relation to that, what I would say to you is this:

If you are satisfied on the balance of probabilities that the Registrant has acted in a manner in which the Social Care Council alleges, the final issue is whether the Registrant was acting dishonestly. In order to resolve that issue, you need to consider two questions: First, are you satisfied to the balance of probabilities that the Registrant's actions would be regarded as dishonest according to ordinary standards of reasonable and honest people?

If so, and only if so; secondly, are you satisfied on the balance of probabilities that the Registrant herself must have realised that her actions would be regarded as dishonest by those standards. It is only if the answers to

both these questions is 'yes', that you must find the allegation of dishonesty proved by the Social Care Council in this case. If the answer to each of the questions is 'no', or the answer to the first question is 'yes' and the second question is 'no', or the answer to the first question is 'no', then the Social Care Council has not proved its case on the balance of probabilities. In pausing there, case law also makes it clear that in a large number of cases where dishonesty is alleged on the particular facts of the case, there may be very little difficulty with addressing the first question, that is to say whether on the balance of probabilities, the Registrant's actions would be regarded as dishonest according to the ordinary standards of reasonable and honest people. Perhaps the more difficult issue which you will have to wrestle with is the second, what is known as the subjective limb of the test, that is to say whether you are satisfied on the balance of probabilities that the Registrant, herself, must have realised that her actions would be regarded as dishonest by those standards.

You have also not heard any evidence to the contrary in relation to the Registrant and you are, therefore, also entitled to assume on that basis that the Registrant is otherwise a person of good character. In that regard, you may consider that a person of good character may be less likely than otherwise to act in the manner complained of against this Registrant. That is not a defence to any charge which she faces, but it certainly speaks to propensity; someone of good character may be less likely than otherwise to act in the way complained of in relation to this Registrant. I would say, however, that that is but one factor to be taken into account in your overall assessment of the evidence, and by applying the relevant standard of proof whether each and every one of the particulars alleged against the Registrant is proved to the civil standard, that is to say, the balance of probabilities.

So unless, you have any questions for me or, or unless there are any representations on my advice from Mr Dixon, that would be my advice to you concluded at this stage.

Misconduct

At this stage then of the proceedings, at the second stage of the proceedings, you are now required to address the issue of misconduct. As I indicated to you earlier, this Charge against the Registrant is one of misconduct and, obviously if you do not find misconduct in this case, then the case will go no further and if you find misconduct, then the matter will inevitably proceed to the final stage, the mitigation and sanction stage of the proceedings.

Misconduct is rarely enough to find in the applicable statutory framework of other healthcare regulatory bodies, but the Social Care Council does seek to define it in the 2014 Conduct Rules and, at page 2 of the Rules misconduct is defined as 'conduct which calls into question the suitability of a Registrant to remain on the Register'.

The case law is also of some assistance in relation to seeking to define misconduct as a separate and discrete concept, and the leading case in this area is that of Roylance v General Medical Council, although dealing with alleged misconduct on the part of a medical practitioner, the case of Roylance has been universally approved in relation to what it says about misconduct in other healthcare regulatory bodies.

In the case of Roylance the leading speech, delivered by Lord Clyde in that case, he said this:

"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."

I would, in that regard, refer you to paragraph 23 sub paragraph 3 of Schedule 2 of the 2014 Rules at page 50 and it says that, 'in deciding upon the issue of misconduct, the Committee shall have regard to the Code of Practice issued by the Council', and that will be a useful basis for you to look at in establishing whether or not it can properly be said that misconduct is made out in this case.

You have heard Mr Dixon recite for you what in his estimation represents the breaches of the Code in light of your findings at the fact finding stage but, of course, it is for you to look afresh at the Code of Conduct and make your own decision, at the appropriate time, in relation to that.

In relation, finally, to the position from the legal perspective, at this stage in the proceedings, you are not required to adhere to the burden and standard of proof; you must bring to bear your judgment in relation to the issue of whether misconduct has been made out in this case.

So unless you have any questions for me, or unless there are any representations upon my advice, that would conclude it at this stage. Thank you.

Sanction

Before you shortly retire to consider this, the third and final stage of the proceedings against this Registrant, Ellis Smith, I am required to provide you with some advice in relation to those matters which you can properly take account of. In that regard, I would commend to you the Indicative Sanctions Guidance document published by the Social Care Council in April 2014. It expands upon the factors and issues which must be taken into account when the Conduct Committee, which has found misconduct, must have regard to, and it is also clear that as you have already rightly outlined, once you have found misconduct against a Registrant under the Conduct Rules, that there is no right of acquittal, you must apply a sanction which you have outlined in the Hearing, which I do not seek to repeat here.

However, you should remember that the Guidance document, as its title suggests, is a guide and no more, it is for you to exercise your own independent judgment in relation to the appropriate sanction to apply, and one which will adequately protect the public. The Guidance document sets out a number of fundamental principles which I would, with your permission, seek to remind you of. First of all, that the issue of the application of a sanction is not a punitive measure, it is not imposed to punish a practitioner for past wrongdoings, rather it is to be applied in the public interest.

As paragraph 2.2 makes clear, 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 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 practise. In serving the public interest, the primary purpose of sanctions is to ensure that the social care worker does not have the opportunity to repeat the misconduct, and to maintain the reputation of the profession.

You must also have regard to the issue of proportionality and that is explained for you at paragraphs 2.5 and 2.6 which state:

"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 ..."

Paragraph 2.6 continues:

"A Committee must ensure that measures taken to limit the fundamental right to practise one's profession are no more than is necessary in all the circumstances."

You should also seek to identify the extent to which misconduct is serious in this case. You have already, of course, said in your misconduct decision that the misconduct is serious, but you must look at trying to, as it were, calibrate that with regard to those factors set out at paragraphs 3.2 and 3.3 of the Indicative Sanctions Guidance document. I would commend those factors to you at the outset of your deliberations that you look at each of those bullet points trying to balance mitigating factors and aggravating factors to establish what factors are in play and what are not in play in this particular case.

When you have completed that task, you must then look at the available sanctions, and you must look at this in a manner which commences with considering the least restrictive sanction first, that is to say an admonishment of up to five years, you have discretion in relation to the length of time that an admonishment may be applied. Only if you are satisfied that an admonishment would not adequately protect the public, must you then consider more restrictive sanctions of suspension and, if you are not satisfied that the public would be offered the necessary degree of protection should you then, and only then, consider the most restrictive sanction which is obviously the removal of the Registrant from the Register.

You have already heard a submission from Mr Dixon who has referred you to the Indicative Sanctions Guidance document, and I would also commend to you those portions of the Guidance document at paragraphs 5.10 to 5.13 in relation to the issue of dishonesty. He has also referred you to the leading authority, in relation to the case of Parkinson v NMC and the quotation from Mitting J in that case which you have also heard, which I will not repeat unless of course you wish me to do so.

You must also bear in mind the fact that the Registrant has not attended here, you obviously have been advised

by me not to draw an adverse inference against her for that but, of course, you have limited information based on her failure to attend in order to try to properly weigh her interests with the public interests but, nonetheless, you should do that, and whatever material may be available to you seeking to identify the possible impact, which the imposition of a sanction will have upon the Registrant provided by her, should be looked at anxiously by you in your deliberations.

I should also finally say to you that, of course, at this stage of the proceedings again you are not required to adhere to any burden or standard of proof, the matter really is for your judgment to determine the appropriate and proportionate sanction to apply in this case.

So unless you have any questions for me, or unless there are any representations upon my advice, that would conclude it 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 on the Register has been removed with immediate effect and it would be an offence for you to work as a social worker.

C Kimberley

Clerk to the Conduct Committee

13.10.15

Date