

Notice of Decision of the Northern Ireland Social Care Council's Fitness to Practise Committee

REDACTED

Name: Helen Emma Anne Irwin

SCR No: 6002170

NOTICE IS HEREBY GIVEN THAT the Fitness to Practise Committee of the Northern Ireland Social Care Council, at its meeting on **21 and 22 November 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 your fitness to practise is impaired by reason of misconduct;

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

Particulars of the Allegation:

That, being registered as a social care worker under the Health and Personal Social Services Act (Northern Ireland) 2001 (as amended), and whilst employed as a senior care assistant with Chester Nursing Home, Whitehead:

1. On 22 March 2015, you left your work premises without permission and without reasonable excuse;
2. On 22 March 2015, you consumed alcohol whilst on duty rendering yourself unfit to fulfil your duties as a social care worker.

And that by reason of the matters set out above, your fitness to practise is impaired by reason of misconduct.

Preliminary Matters

Service

The Registrant was neither present nor represented. The Council was represented by Mr John Johnston, Solicitor, Directorate of Legal Services, Business Services Organisation.

In a Notice of Hearing, dated 20 October 2016, sent by Special Delivery and addressed to the Registrant at her address as it appears on the Register, the Council notified her of the date, time and venue for this hearing. The Registrant signed for this correspondence on 21 October 2016. The Committee was satisfied that the Notice of

Hearing was served in accordance with Rule 3 of the NISCC Fitness to Practise Rules 2016 ("the Rules") and the requirements of Paragraph 5 of Schedule 2 of the Rules.

Proceeding in the Absence of the Registrant

Mr Johnston made an application to proceed in the absence of the Registrant, under Paragraph 15 of Schedule 2 of the Rules, and that the Committee should hear and determine the case in the absence of the Registrant. Mr Johnston submitted that whilst the Registrant had been in contact with the Council at an earlier stage, she had not responded to the Notice of Hearing. Mr Johnston invited the Committee to conclude that the Registrant had voluntarily absented herself from these proceedings and that there would be no benefit from an adjournment.

The Committee was mindful that the discretion to proceed in the absence of the Registrant should only be exercised with the utmost care and caution. The Committee accepted the advice of the Legal Adviser. The Committee was satisfied that reasonable efforts had been made to notify the Registrant of the Hearing and accepted that there was no evidence that the Registrant would be more likely to attend if the matter was adjourned. The Committee balanced the Registrant's interests against the wider public interest and, in all the circumstances, resolved to hear the case in the Registrant's absence.

Application to Admit Hearing Bundle

The Committee heard an application from Mr Johnston, under Paragraph 12 of Schedule 2 of the Rules, to admit a bundle of papers into evidence. Mr Johnston advised the Committee that these papers had been served on the Registrant by Special Delivery on 03 November 2016. On receiving advice from the Legal Adviser, and as there was no objection from the Registrant, the Committee was satisfied that the bundle met with the requirements of fairness and relevance and should be admitted.

Background

Mr Johnston advised the Committee that the Registrant was registered on Part 2 of the Northern Ireland Social Care Register. At the time of the allegation, the Registrant was a senior care assistant at Chester Nursing Home. On 10 April 2015, the Council received an Employer Referral Form from the Wilson Group which sets out the background to the incident, namely, that the Registrant left the building and consumed alcohol at work, was intoxicated and placed service users at risk.

Finding of Facts

In reaching its decision on the facts, the Committee considered all of the evidence adduced in the case, together with the submissions made by Mr Johnston on behalf of the NISCC.

The Committee was aware that the burden of proof rests on the NISCC and that the standard of proof is the civil standard; namely, the balance of probabilities. This means that the facts will be proved if the Committee is satisfied that it is more likely than not that the incidents, as described in the Particulars of the Allegation, occurred as alleged.

The Committee heard and accepted the advice of the Legal Adviser.

The Committee heard oral evidence from three witnesses called on behalf of the Council:

- Witness 1, Care Assistant, Chester Nursing Home, Whitehead;
- Witness 2, Nurse Manager, Chester Nursing Home; and
- Witness 3, Area Manager, Wilson Group.

The Committee heard oral evidence from Witness 1 and considered her to be a credible and reliable witness. She was working on the same shift as the Registrant on 22 March 2015. The Committee noted that her oral evidence was broadly consistent with the statement which she provided to the Council in December 2015, the contemporaneous statement which she made on 22 March 2015, and the answers which she gave when interviewed by the Nurse Manager on 22 March 2015. The Committee considered her evidence to be straightforward and fair to the Registrant, and noted that she described the Registrant as a senior care assistant and that she considered her to be caring, genuine and kindly towards the residents.

Witness 2 is the Nurse Manager at Chester Nursing home from April 2014. She gave evidence that Chester Nursing Home is a 40 bedded unit and that the residents all have dementia, at varying stages, with a range of needs. The Committee considered Witness 2 to be a clear and credible witness, and she was able to provide the Committee with some useful evidence about her investigation of the events on 22 March 2015 involving the Registrant. She described that she was off shift that day, but was notified in the evening by the Assistant Nurse Manager that an incident had occurred involving the Registrant. Witness 2 explained that she started to interview staff about what had happened, and the Committee was directed to the notes of those meetings within the bundle of evidence.

The Committee also heard evidence from Witness 3. The Committee considered Witness 3 to be a straightforward and credible witness who gave full and frank answers to questions raised. The Committee found her to be a very professional witness with a clear recollection of events. The Committee also noted the positive comments made by Witness 3 in respect of the Registrant. Witness 3 gave evidence that she was the Area Manager for the Wilson Group. She gave evidence that she is always on call in case of an emergency and that, on 22 March 2015, she was contacted by the Deputy Nurse Manager who explained that he had an issue with one of the carers. She also chaired the disciplinary meeting with the Registrant on 26 March 2015.

Particular 1: On 22 March 2015, you left your work premises without permission and without reasonable excuse

This allegation is found proved.

In reaching this decision, the Committee took into account all of the documentary evidence in the bundle and the evidence of Witness 2 and Witness 3.

The Committee noted that there was no evidence that another member of staff saw the Registrant leaving the premises on 22 March 2015.

However, the Committee heard evidence from Witness 2. Witness 2 gave evidence that, because of what had occurred on 22 March 2015, she made arrangements to cover the Registrant's shift on 23 March 2015. While she was working, the Registrant phoned to apologise for events the day before and said to Witness 2 that she was very sorry. Witness 2 invited her in to speak to her. During this meeting, the Registrant explained to her that she left the building at about 4 pm to go to the off-licence, and confirmed that she had not asked permission to leave. Witness 2 said that the Registrant explained to her that she had a 'good few glasses of wine' but assured her that she had no contact with any of the residents.

Witness 2 gave evidence that she next had contact with the Registrant on 26 March 2015 at a disciplinary meeting held in Chester Nursing Home. She was at the meeting as note taker, and the meeting was chaired by the Area Manager, Witness 3.

The Committee also noted the evidence of Witness 3. On 26 March 2015, Witness 3 chaired the disciplinary meeting with the Registrant. During this meeting, the Registrant openly admitted that she had left the premises without permission and that she had consumed alcohol on the premises. Witness 3 said that the Registrant told her that on 22 March 2015, she left work between 4 pm and 4.30 pm without permission, and that she left through the back of the building and went to the local off-licence. Witness 3 explained that the Registrant was very open and very remorseful, and could not apologise enough. The Registrant explained to Witness 3 that she had been for counselling and was getting help, and that her problems were to do with her home life and not work related.

The Committee accepted the evidence of Witness 2 and Witness 3 and considered that, on the balance of probabilities, it is more likely than not that on 22 March 2015, the Registrant left her work premises without permission and without reasonable excuse.

Particular 2: On 22 March 2015, you consumed alcohol whilst on duty rendering yourself unfit to fulfil your duties as a social care worker

This allegation is found proved.

In reaching this decision, the Committee took into account all of the documentary evidence in the bundle and the evidence of Witness 1, Witness 2 and Witness 3.

The Committee noted the contents of the letter from the Registrant to the Council, dated 13 May 2015. In this letter, the Registrant stated that she "did consume alcohol whilst on duty".

The Committee considered the detailed description provided by Witness 1 of what she saw when she was called to assist with the Registrant on 22 March 2015. Witness 1 said that she had started her break and was in the kitchen area when she heard a noise coming from a small room with lockers in it. She was with another care assistant who went into the room and then called for her to go in. Witness 1 said that when she went into the locker room she saw the Registrant who was staggering, and she could smell alcohol and see empty bottles of

wine on the floor. Witness 1 gave evidence that she escorted the Registrant into the kitchen area and assisted her to sit on a chair.

Witness 1 said that she notified the Staff Nurse, who agreed with Witness 1 that the Registrant needed to get off the premises as soon as possible, both in her own interests and to protect the residents. She went to get her car and the Registrant was assisted by two others down the stairs and into the car, and she drove her home.

Witness 2 said that on 23 March 2015, the Registrant phoned her and apologised for her actions. Witness 2 said that when she met with the Registrant on the same date, the Registrant told her that she had started drinking in the Home, that she had a 'good few glasses of wine' and that she did not have any contact with residents after she took the alcohol.

Witness 3 said that when she met with the Registrant on 26 March 2015, the Registrant told her that she had been washing dishes until about 5.30 pm when she flipped and drank two bottles of wine in about 15 minutes.

The Committee accepted the admission made by the Registrant in her letter to the Council, and the evidence of Witness 1, Witness 2 and Witness 3 and considered that, on the balance of probabilities, it is more likely than not that on 22 March 2015 the Registrant consumed two bottles of wine whilst on duty, rendering herself unfit to fulfil her duties as a social care worker.

Fitness to Practise

The Committee then moved on to consider firstly, whether the facts found proved amount to misconduct and, if so, whether the Registrant's fitness to practise is currently impaired.

The Committee heard submissions from Mr Johnston on the question of impairment. He submitted that the NISCC has defined impaired fitness to practise as calling into question the Registrant's suitability to remain on the Register without restriction or at all. Mr Johnston submitted that the Registrant's fitness to practise is impaired because of her misconduct. He submitted that the evidence heard by the Committee, and the facts found proved, have established that the Registrant's actions fell well short of the standard to be expected. He further submitted that the Registrant's actions, in leaving work without permission and consuming alcohol whilst on duty, were totally unacceptable and put vulnerable service users at risk of harm, both when the Registrant was not on the premises and when she consumed alcohol on the premises. Whilst the evidence was that the Registrant, whilst under the influence of alcohol, did not come into contact with residents, Mr Johnston submitted that the evidence was that she was highly intoxicated and unfit to care for residents, and that her colleagues were so concerned for her that one of them took her home. This resulted in removing more of her colleagues from their duties.

Mr Johnston invited the Committee to conclude that the Registrant's actions amount to misconduct and outlined the relevant parts that, in his submission, breached the Code of Practice for Social Care Workers in force at the time. He invited the Committee to consider Code 2: 2.4; Code 3: 3.6; Code 5: 5.7 and 5.8; Code 6: 6.1 and 6.3.

He then referred the Committee to the Standards of Conduct and Practice for Social Care Workers 2015 and submitted that the Registrant's behaviour breached the Standards of Conduct at Standard 2: 2.6; Standard 3: 3.6; Standard 5: 5.8; Standard 6: 6.1 and 6.5.

When considering the issue of remediation, Mr Johnston submitted that the Registrant's misconduct could be remediated. However, he suggested that the Committee had nothing before it to evidence that it had been remediated. He invited the Committee to consider the letter from the Registrant dated 13 May 2015, in which she admitted that she had consumed alcohol at work and that [REDACTED]. However, he submitted that there was no documentary evidence that [REDACTED]. In his submission, there is a real risk that she would repeat her behaviour.

Mr Johnston submitted that, in light of the facts found proved, public confidence in the NISCC to maintain proper standards, and in the NISCC as a regulatory body, would be undermined if a finding of impaired fitness to practice was not made.

The Committee had careful regard to all of the evidence in the case and the submissions of Mr Johnston. The Committee accepted the advice of the Legal Adviser. The Committee then went on to consider whether the facts found proved amounted to misconduct. The Committee took into account that this is a matter for the Committee to determine, exercising its own independent judgement with no burden or standard of proof.

The Committee had regard to the Code of Practice for Social Care Workers (September 2002) in force at the time. The Committee determined that the Registrant's actions on 22 March 2015 fell substantially short of the standards expected of a social care worker as follows:

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:

2.4 Being reliable and dependable.

Code 3: As a social care worker, you must promote the independence of service users whilst protecting them as far as possible from danger or harm

3:6 Complying with employer's health and safety policies, including those relating to substance abuse.

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

5.7 Put yourself or other people at unnecessary risk; or

5.8 Behave in a way, in work or outside work, which would call into question your suitability to work in social care services.

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;

6.3 Informing your employer or the appropriate authority about any personal difficulties that might affect your ability to do your job competently and safely.

The Committee next considered the issue of impairment, and noted that a finding of misconduct does not necessarily lead to a finding of current impairment. When considering current impairment, the Committee had regard to the Standards of Conduct and Practice for Social Care Workers 2015, and found the Registrant to be in breach of the following Standards of Conduct:

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

2.2 Communicating in an appropriate, open, accurate and straightforward way.

Standard 3: As a social care worker, you must promote the autonomy of service users while safeguarding them as far as possible from danger or harm. This includes:

3.6 Complying with employers' health and safety policies, including those relating to substance misuse.

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

5.7 Put yourself or other people at unnecessary risk;

5.8 Behave in a way, in work or outside work, which would call into question your suitability to work in social care services.

Standard 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;

6.5 Informing your employer or the appropriate authority in a timely manner about any personal difficulties that might affect your ability to do your job competently and safely.

The Committee bore in mind that the Particulars of the Allegation relate to two individual events in a long career and, in particular, that this was a single isolated occasion when the Registrant consumed alcohol whilst on duty. However, the Committee considered that it was a serious incident. The evidence was that she was highly intoxicated and incapable of looking after herself, never mind care for the vulnerable residents. The Committee also concluded that the incident was serious because the Registrant had left the premises and taken action to buy the alcohol that she later consumed. This decision to leave her duties to buy alcohol was further evidence that the Registrant's actions fell far short of what was expected and was serious enough to amount to misconduct.

The Committee next went on to consider the issue of past impairment. The Committee had no hesitation in concluding that the Registrant's actions on 22 March 2015 had breached one or more fundamental tenets of the social care profession to an extent that would bring the profession into disrepute. The Registrant's core duties

were to provide care to the vulnerable residents in the Home, and her actions rendered her incapable of providing this care. The Committee concluded that the Registrant's misconduct in the past had:

- Put vulnerable residents at unwarranted risk of harm;
- Brought the profession into disrepute; and
- Breached a fundamental tenet of the social care profession.

For these reasons, the Committee had no doubt that at the time that these events occurred, the Registrant's fitness to practise had been impaired by reason of her misconduct.

The Committee moved on to consider whether the Registrant's fitness to practise is currently impaired and whether she is liable to repeat her misconduct. The Committee had careful regard to the issues of insight, remediation and the evidence about her past history. The Committee noted that the Registrant had admitted the allegations and had been apologetic during her meetings with Witness 2 and Witness 3. The Committee noted the letter to the Council on 13 May 2105, and the admission that the Registrant had consumed alcohol whilst on duty. The Committee concluded that the Registrant had some insight and recognised the unacceptability of her failings. The oral evidence before the Committee was that the Registrant was a valued member of staff and that her actions were out of character.

With regard to remediation, the Committee concluded that the Registrant's misconduct could be remediated. However, the Committee had no evidence of the support referred to in the Registrant's letter of 13 May 2015. The Committee noted that the Registrant declined a request from the Council [REDACTED]. As a direct result, there is no [REDACTED]. There is no evidence of the support mechanisms put in place or any action taken by the Registrant to remediate her misconduct.

The Committee, therefore, considered that it had insufficient information currently before it to allow the Committee to safely reach a conclusion that the Registrant's actions had been remediated and were highly unlikely to be repeated. The Committee concluded that there remains some risk of repetition of similar misconduct in the future.

Throughout its deliberations, the Committee considered the public interest which includes protection of the public, the declaring and upholding of proper standards of conduct and behaviour and the maintenance of public confidence in the profession. The Committee is satisfied that this is a case where public confidence in the profession would be undermined if no finding of impairment were made in light of the serious nature of the misconduct found proved.

Accordingly, and for the reasons above, the Committee has determined that the Registrant's fitness to practise is impaired by reason of her misconduct.

Sanction

In reaching the decision on sanction, the Committee had regard to all of the evidence adduced in the case, together with the detailed submissions of Mr Johnston on behalf of the NISCC. The Committee heard and accepted the advice of the Legal Adviser.

The Committee has borne in mind that any sanction imposed must be appropriate and proportionate and, although not intended to be punitive in its effect, may have such consequences. The Committee has taken into account the Council's Indicative Sanction Guidance, bearing in mind that the decision on sanction is one for its own independent judgement.

The Committee first considered the aggravating and mitigating factors in the case. The Committee determined that the aggravating factors are:

- The Registrant was intoxicated and unfit to perform her duties;
- The residents in the Home were elderly and vulnerable and she placed them at a risk of potential harm;
- The Registrant demonstrated no insight into the effects of her behaviour on the residents in the Home and her colleagues who ended up looking after her;
- This incident occurred in work;
- Her actions were premeditated as she left work to purchase alcohol;
- The Registrant provided no evidence to the Committee that [REDACTED], and that her behaviour would not be repeated; and
- The Registrant has demonstrated a serious disregard for the Codes of Practice for Social Care Workers (in force at the time).

The Committee determined that the mitigating factors are:

- The Registrant made an admission to her employer the next day and co-operated with the employer's investigation;
- The Registrant made a genuine apology to Witness 2 and Witness 3 during the employer's investigation;
- The Registrant admitted, in correspondence to the Council, that she had consumed alcohol at work;
- The Registrant had a previous good history, and the evidence was that she was liked and respected at work; and
- There was no actual harm caused to the residents of the home.

The Committee went on to consider the appropriate sanction. The Committee took the view that the Registrant's actions had fallen well below the standard of a registered social care worker. As such, it was the Committee's duty to protect the public from the risk of harm and to uphold proper standards of conduct, so as to maintain public confidence in the profession. The Committee had already determined that it could not be satisfied that there is no risk of repetition of the failings found proved.

Warning - the Committee considered the issue of a Warning in the case. The Committee determined that a Warning would not protect the public from the risks identified. Given the serious nature of the misconduct, the

risk of repetition and the need to protect service users, the Committee considered that a Warning would not be appropriate.

Conditions of Practice Order - the Committee next considered a Conditions of Practice Order. The Registrant has not presented any evidence in relation to remediation of her misconduct. The Committee was not satisfied that the Registrant would respond positively to conditions, as she had declined to consent to a request from the Council that she [REDACTED]. The Committee determined that, given the lack of engagement from the Registrant, Conditions of Practice could not be determined which were relevant, proportionate and workable. The Committee also concluded that a Conditions of Practice Order would not be sufficient to deal with the risks identified or meet the public interest, given the significant departure by the Registrant from the standards expected of a registered social care worker.

Suspension - the Committee did not consider that a Suspension Order would be an appropriate or proportionate sanction in this case. The Committee determined that this was a serious incident of misconduct. The Committee determined that a Suspension Order would not address the risk of repetition. In the view of the Committee, the interests of service users and the public would not be sufficiently protected by suspension. The Registrant has not presented any evidence to the Committee that she would be able to resolve or remedy the cause of her misconduct during a period of suspension.

Removal - the Committee concluded that given the seriousness of the Registrant's misconduct, the lack of evidence of remediation or the risk of her repeating her misconduct, a Removal Order is the only sanction sufficient to protect the public and maintain public confidence in the social care profession and the NISCC as its regulator. The Committee considered that the Registrant's actions constitute a serious departure from the expected standards. Her actions in leaving work to buy alcohol, then consuming it whilst she was responsible for the care of vulnerable elderly residents, were serious. The Committee has concluded that, in the absence of evidence of remediation, there is a continuing risk to service users. The Registrant has a long history of being a social care worker and the evidence was that she was a valued and respected member of staff. The Committee considered the potential devastating impact of a Removal Order on the Registrant, but concluded that the safety of service users was more important than the impact on the Registrant.

The Committee also considered that public confidence in the social care profession would be undermined if a social care worker who behaved in such an inappropriate way in work, and failed to show any remediation, was allowed to remain on the Register.

The Committee concluded that a Removal Order was a suitable, appropriate and proportionate sanction which will be imposed on the Registrant's registration with immediate effect.

Legal Advice Given

Service

My advice to you at this stage is simply you have heard submissions from Mr Johnston that, in accordance with the Fitness to Practise Rules, the Notice should be served by first class or registered delivery post. It was served on 20th October and signed for on 21st October, and I have been shown the electronic signature to confirm that it was received. Although not a service requirement under the Rules, the Registrant also was sent, by Special Delivery post, a bundle on 3rd November 2016, which I have again seen the electronic proof of signature received on 4th November.

It also does fall to me to advise you at this stage that the hearing should not, in accordance with the NISCC Fitness to Practise Rules 2016, there is a requirement that the hearing should not be fixed earlier than 28 days after the posting of the Notice, and that being done on 20th October it is more than 28 days before today's hearing. So, it is my advice to you as a Committee, at this stage it is safe to proceed and to take service as having been effected.

Proceeding in the Absence of the Registrant

You have now received an application from the Council's solicitor to proceed with today's hearing in the absence of the Registrant. The Council, through submissions from Mr Johnston, makes the case that the Registrant has been duly notified of today's hearing in accordance with the Rules. The Registrant has not engaged with that process and has not responded since service of the Notice of Hearing. She has not made any application for a postponement nor an adjournment, nor has she attended today. You have heard submissions from the Council's solicitor that it is unlikely that she would attend in the future if you were to adjourn today's proceedings.

The Rules provide that where you are satisfied that the Notice of Hearing has been duly served, you may hear and determine the case in the absence of the Registrant. Mr Johnston has correctly referred you to Paragraph 15 of Schedule 2 which creates the ability for you to proceed in her absence. It is, however, a matter of discretion for you as a Committee to decide whether to hear and determine the case or to adjourn and give directions.

You will be familiar with the criminal case of R v Jones, and that is 2003 case, which establishes that the discretion to proceed in the absence of a defendant, in this situation a Registrant, must only be exercised with the utmost care and caution.

I further direct you to case of R, an Application of Raheem v NMC, and that is a 2010 case, and the ruling of Holman J in that case that reference by committees or tribunals such as this, or indeed judges, to exercise a discretion to proceed in the absence of the person with the utmost caution is more than mere lip service; a phrase used by Lord Bingham and that is the Jones case. So, you must give it more than lip service and I would, therefore, suggest that you do retire to consider your deliberations.

I would remind you that the Registrant is entitled to a fair hearing, to attend the hearing, to be represented and to test the case against her. You should consider whether an adjournment in this case would result in her attending at a later date. You should consider the sort of timeframe that would be involved in such an adjournment. If you are satisfied that the Registrant had knowledge or the means of knowledge of today's proceedings, you may

choose to conclude that she has voluntarily absented herself from these proceedings. In considering this, you should take into account the information provided to her in the Notice of Hearing and consider whether it was sufficient to advise her of the importance of attending today.

I would also advise you that the principle of fairness does apply to the Council's case as well as to the Registrant. We have heard submissions from the Council's solicitor that there is a public interest in proceeding and going ahead today. When exercising your discretion, you should balance the rights of the Registrant against the wider interests in this case proceeding, and you should take all these factors into account when you retire to deliberate on how you wish to proceed.

Application to Admit Hearing Bundle

So the application you have received is to admit the hearing bundle, and Mr Johnston has correctly referred you to Paragraph 12 (1) (a) and 12 (1) (b) of Schedule 2 of the Rules, and that permits you to admit documents into evidence. These papers have been served on the Registrant and the Rules make it clear that, subject to the requirements of a fair hearing and of relevance, you as a Committee may admit documents whether or not it would be admissible in a Court of Law. You have not yet seen the bundle so it is difficult for you to deliberate on that. I have had the opportunity to review it and it is my view that the documents would appear to be relevant to the issues before you and that there is no unfairness to the Registrant in those documents being submitted before you.

Mr Johnston has advised you that there are three witnesses whose witness statements are contained within the bundle who are going to attend to give evidence, so they are going to speak to their witness statements and you will have the opportunity to test those statements and to test the veracity of them and to question the witnesses as you see fit.

There are two witness statements within the bundle of witnesses who are not attending. It is open to you to admit those into evidence and it is a matter for you as a Committee then what weight you choose to apply to those statements given that they are not attending before you. There is case law on the point that makes it clear where someone is a sole witness of the allegation to be raised and an application is made to admit their statement into evidence without that witness attending to give evidence; that would be unfair. But the situation, as I understand it at this point, is very different in that there are three witnesses who will give live evidence to the central allegations upon which the Council's case is based and there is, therefore, no unfairness. It is, however, a matter for you what weight you choose to give to the evidence which is not given live before you today.

Conflict of Interest

My advice to you as a Committee is that that would not be sufficient to constitute a conflict of interest. If you were to know a witness then it could impact on your impartiality of your decision making, or even be perceived as impacting on your decision making, then that would be sufficient and you would have to recuse yourself. But my advice would be that that is not sufficient to constitute a conflict of interest.

Admissibility of Evidence

My advice would be the same advice that essentially I gave you earlier. The statements are admissible. They are relevant and there is no unfairness to either the Registrant or to the Council in admitting those statements. It is, however, a matter for you as a Committee what weight you apply to them. There is an unfairness, I repeat that point, in admitting a statement where it is the sole evidence upon which an allegation is based and that is not the position that you find yourselves in today.

Finding of Facts

At this stage, you have reached the first stage of these proceedings and that is the fact finding stage. Mr Johnston has correctly referred you to Paragraph 13 of Schedule 2 of the Rules and 13 (1) makes it clear that the burden of proof to prove the facts alleged shall rest upon the Council. 13 (2) specifies that the standard of proof shall be the balance of probabilities.

The Council has brought these proceedings and it is up to the Council to prove its case. The Registrant, at this point, has to do nothing to prove that she is innocent of the allegations. To assist you, it may help if I refer to the case of Re H, and that is a 1990 case. In that case, the court made it clear that the balance of probability standard is met if you can be satisfied that it is more likely than not that the events described in the Particulars of the Allegation can be established.

It may also be helpful if I referred you to the decision of Gillen J in the case of Thornton v NIHE, which is a 2010 civil case, where he gave guidance on how best to assess oral evidence given. In that case, he stated that credibility of a witness embraces not only the concept of truthfulness, i.e. whether the evidence of the witness is to be believed, but also the objective reliability of a witness, i.e. his ability to observe or to remember facts and events about which the witness is giving evidence.

So you have had three witnesses before you today and you may wish to apply that test whenever you assess the evidence given to you. It is, however, ultimately a matter for you as a Committee to consider all the evidence, both the written documentation in the bundle and the oral evidence that you have heard, and to assess the evidence with common sense and use your judgment to form a decision as to whether or not the facts as set out within the Particulars of the Allegation have been established this morning, whether it is more likely than not that those have been proved.

Fitness to Practise

My advice, to you as a Committee at this stage, is that this is a matter in which you found the facts as set out within the Particulars of the Allegation proved that is that the Registrant left work without permission and consumed alcohol rendering her unfit to perform her duties. You are now tasked with deciding whether her fitness to practise is impaired, and you are invited to conclude that her fitness to practise is impaired as a result of her misconduct.

Mr Johnston has correctly referred you to the definition within the Rules of impairment of fitness to practise and

that is whether a registrant's suitability to remain on the Register unrestricted or at all has been affected by the facts as you found proved.

My advice to you is that this is a two stage process. So the first stage you have got to approach is to consider whether you are satisfied the Registrant's conduct amounts to misconduct. You will be familiar, but I will remind you again, that the word misconduct is not usually defined within the legislation and you are often referred to the case of *Roylance v GMC* where Lord Clyde, giving the judgment in that case, said that 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.

Mr Johnston, in his submissions on behalf of the Council, has directed you to the Code as it was in force at that time. So that is relevant to the issue of misconduct. You have to deliberate on whether the Registrant's actions fell below and fell short of what was proper in the circumstances, and the references to the Code as applicable at the time will assist you in performing that task.

In the case of *Remedy UK Ltd v GMC*, which is a 2010 case, the High Court of England and Wales reviewed the authorities in relation to the meaning of misconduct and concluded that misconduct is of two principle kinds; serious professional misconduct and, secondly, misconduct of a morally culpable or disgraceful kind. The court went on to confirm that the definition is qualified when looking at professional misconduct, professional links it to the professional practice as we have in this case and, secondly, the word serious. It is not any professional misconduct which would qualify, the professional misconduct must be serious.

It may be useful to take into account in your deliberations, that the case law is clear that misconduct can be found in relation to a single act, however a single act is less likely to cross the threshold of misconduct. That depends on the gravity of the act. In case of *Calhaem v GMC*, Jackson J considered the principles of misconduct at paragraph 26, and in his consideration stated that:

"A single negligent act or omission is less likely to cross the threshold of misconduct when compared to multiple acts or omissions. A single incident of negligent treatment, unless very serious indeed, would be unlikely to constitute deficient professional performance".

So in assessing this single incident, you need to consider whether it is of sufficient seriousness or gravity to cross the threshold. If you are satisfied that the actions of the Registrant, in this case, did constitute misconduct, then you move on to the second issue which is whether her fitness to practise is impaired. The principle of impairment was initially considered in the case of *Cohen v GMC*, when Silber J stated:

"There must be always situations in which a panel can properly conclude that the act of misconduct was an isolated error on the part of the medical practitioner and that the chance of it being repeated in the future is so remote that his or her fitness to practise has not been impaired".

It must be highly relevant in determining if a practitioner's fitness to practice is impaired, that first his or her conduct which led to the charge is easily remediable and, second, that it has been remedied; thirdly, that it is

highly unlikely to be repeated. Mr Johnston in his submissions, whilst not directly quoting from that case, has invited you to consider those three points: firstly whether it is remediable; secondly, whether it has been remediated; and thirdly whether it is highly unlikely to be repeated.

In the case of *Meadows v GMC* it was highlighted that the purpose of the fitness to practise procedure is not to punish a practitioner for past misdoings, but to protect the public against acts and omissions of those who are not now fit to practise. So, as a Committee, I would advise you that you should look forwards not backwards.

I would encourage you to take into account the case of *Grant v NMC*, in fact *CHRE v NMC* and *Grant* is the highest appeal form of that case, in which Cox J at Paragraph 74 stated that:

"In determining whether a practitioner's fitness to practise is impaired by reason of misconduct, the relevant panel should generally consider not only whether the practitioner continues to present a risk to members of the public in his or her current role, but also whether the need to uphold proper professional standards and public confidence in the profession would be undermined if a finding of impairment were not made in the particular circumstances".

Cox J went on to refer to the formulation adopted by Dame Janet Smith in her Fifth Shipman report where she formulated an appropriate test for panels considering the issue of current impairment. You should give consideration to this test in your deliberations namely:

1. Has the Registrant acted in the past or is she liable in the future to act in such a way so as to put a service user or resident at unwarranted risk of harm?
2. Has the Registrant in the past, or is she liable in the future, to bring the profession into disrepute?
3. Has the Registrant in the past or is she liable in the future to behave in such a way as to breach one of the fundamental tenets of the social care profession?

The fourth limb of the test is not relevant to today's proceedings and relates to when someone has acted dishonestly. You do not need to take it into account in your deliberations.

You have been referred to the current standards in force today and that is to assist you with those deliberations in deciding whether there is any current impairment at this moment in time. The Code of Practice, which was in force at the time, allows you to deliberate on misconduct and the current standards to assess whether there is any current impairment and that third limb of Dame Janet Smith's test, whether there has been any breach of the fundamental tenets of the social care profession.

I would remind you that your deliberations on impairment are not required to adhere to any standard of proof and it is a matter for you as a Committee exercising your own skill and judgment as you assess this task.

Sanction

Before you retire at this stage to consider the final stage in these proceedings, I am required to give you some brief advice in relation to those matters which you can properly take into account when considering sanction.

You have outlined the sanctions available to you upon a finding of impairment and those are clearly to issue a

Warning, to make a Conditions of Practice Order not to exceed 3 years, to make a Suspension Order, or to make a Removal Order to remove the Registrant from the Register. In deciding which sanction to apply, you should have regard to all the evidence and consider the submissions made by the Council's solicitor, Mr Johnston, but you must make your own decision in determining which is the appropriate sanction and take into account the seriousness of the Registrant's impaired fitness to practise, the degree to which in your opinion she has fallen short of the expected standards, and you must take into account the protection of the public and the role of the NISCC in declaring and upholding professional standards, and the maintenance of public confidence in the profession and the Regulator.

You have quite correctly been referred to the NISCC Indicative Sanctions Guidance and you should have careful regard to the Indicative Sanctions Guidance when making your decision. However, I would remind you that the decision of sanction is a matter for you as a Committee exercising your own independent judgment.

As Blake J said in *GMC v Atkinson*, and that is a 2009 case:

'The Indicative Sanctions Guidance is just that, guidance, it is something which every Panel must take into consideration and to depart from it may need some explanation but it is not a source of legal obligation'.

It is important that you act in a proportionate fashion and the Indicative Sanctions Guidance deals with proportionality and requires that the consequences of the sanction must not be disproportionate to the harm from which this sanction is intended to protect the public and service users. The interests of the public and service users have to be weighed against the interests of the Registrant. The need to act proportionately requires you to consider all of the available sanctions but to consider them in ascending order of seriousness, that is starting with the least restrictive sanction first until finding the Order that is sufficient to deal with the factors in this case which mean to ensure that, as you decided, fitness to practise is currently impaired.

The Guidance encourages you to take into account the mitigating and aggravating factors and to list those so that you can come to a view, and Mr Johnston has made submissions to you and has, as you have said, fairly outlined the mitigating factors that he has identified in this case. You can take into account the expressions of remorse and insight demonstrated by the Registrant during her employer's interviews, that this was a single incident and the evidence that you heard yesterday morning in relation to her as a professional, the standard of her work and how she was valued and viewed within the Home. You can also take into account the potentially devastating effect of sanction, both financially and professionally, in relation to this particular Registrant.

You will of course appreciate that case law has made it clear that the purpose of sanction is not to punish the practitioner for past wrongdoings, but rather to promote and uphold the public interest.

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 Fitness to Practise 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.

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 Fitness to Practise Rules, you may not apply to be restored to the Register within five years from the date of removal. This does not affect your right to appeal the Committee's decision to the Care Tribunal.

M. Stewart

Committee Clerk

25 November 2016

Date