

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

SUSPENSION ORDER REVIEW HEARING

Name: Colleen Isobel Leckey

SCR No: 6010078

NOTICE IS HEREBY GIVEN THAT the Fitness to Practise Committee of the Northern Ireland Social Care Council, at its meeting on **28 April 2017**, made the following decision about your registration with the Northern Ireland Social Care Council:

The Committee found that your fitness to practise remains impaired;

The Committee decided to revoke the Suspension Order and impose a Removal Order on your registration.

Preliminary Matters

Service

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

In a Notice of Review Hearing dated 27 March 2017, 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 Notice was received and signed for on 28 March 2017. A hearing bundle was also sent by Special Delivery to the Registrant on 11 April 2017, and signed for on 12 April 2017.

The Committee is satisfied that the Notice of Review Hearing has been served in accordance with Rule 3 of the NISCC Fitness to Practise Rules 2016 ('the Rules') and the requirements of Paragraph 33 (5) of Schedule 2 of the Rules.

Proceeding in the Absence of the Registrant

Mr Gilmore made an application to proceed in the absence of the Registrant under Paragraph 15 of Schedule 2 of the Rules. Mr Gilmore advised the Committee that there had been no communication from the Registrant, and that she had not responded to the Notice of Review Hearing or to the decision of a previous Fitness to Practise Committee dated 11 November 2016. Mr Gilmore submitted that the Registrant had waived her right to attend, she had not sought a postponement or an adjournment or provided any medical evidence that she was unable to attend.

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 heard and accepted the advice of the Legal Adviser. The Committee noted that the Registrant did not attend the hearing in November 2016. The Committee also took into account that there is no suggestion from the Registrant that she seeks an adjournment or that she would be more likely to attend if the hearing were adjourned to another date. The Committee is satisfied that the Registrant has voluntarily decided not to attend and that no useful purpose would be served by an adjournment. The Committee has also taken into account public protection and the public interest in ensuring that the current Suspension Order is reviewed before it expires. The Committee, in all the circumstances, is satisfied that it is appropriate to proceed with this hearing in the absence of the Registrant.

Application to Admit Review Hearing Bundle

The Committee heard an application from Mr Gilmore to admit a bundle of papers into evidence. On receiving advice from the Legal Adviser, and there being no objection from the Registrant, the Committee determined that the bundle should be admitted as it met with the requirements of fairness and relevance.

Background

The Fitness to Practise Committee of the Northern Ireland Social Care Council, at its meeting on 07 and 08 November 2016, found that 'On or about 06 – 07 April 2015, the Registrant was under the influence of alcohol and unfit to fulfil her duties as a social care worker whilst on night duty.' That Committee made an Order suspending the Registrant's registration for a period of six months.

It was suggested that at least one month prior to the end of the period of the Suspension Order, the Registrant could provide the following information as regards to whether her fitness to practise remains impaired:

- Evidence of the Registrant's engagement with the NISCC;
- Provision by the Registrant of a written reflective report dealing with her observations and insight into the potential risk of her behaviour, at the time of this incident, on service users and colleagues; how she would do things differently in the future; the effect of her behaviour on public confidence in the social care profession and details of any other remedial action she has taken;
- References or testimonials from any employer for paid or unpaid work.

The Notice of Decision was sent to the Registrant to her registered address on 11 November 2016 by Royal Mail via Special Delivery. The Notice was returned to the NISCC marked 'not called for'. The Notice was resent to the Registrant's registered address by 1st class post.

On 28 February 2017, the Council wrote to the Registrant and invited her to provide documents or information as to whether her fitness to practise remains impaired. The Registrant did not respond to this correspondence and no documents were provided.

Fitness to Practise

The Committee heard a submission from Mr Gilmore on the question of impairment. He submitted that the Registrant's fitness to practise remains impaired as she has not cooperated or engaged with the Council, provided testimonials or references and has not produced a reflective report. Mr Gilmore submitted that the failure of the Registrant to engage is indicative of a lack of insight. In his opinion, there was a finding in November 2016 that her fitness to practise was impaired and this situation is ongoing as a result of a lack of insight and engagement.

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

The Committee then considered whether the Registrant's fitness to practise can be considered no longer impaired.

The Committee is satisfied as to the reason for the alleged impairment of fitness to practise as set out in the previous decision. In particular, the Committee noted the finding that the misconduct was serious. The Registrant was caring for vulnerable elderly service users at night and, in carrying out her duties whilst under the influence of alcohol, had the potential to put them at risk of harm.

The Committee had regard to the Standards of Conduct and Practice for Social Care Workers and found that the Registrant is currently in breach of:

Standards of Conduct:

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

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

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:

6.11 Being open and honest with people if things go wrong, including providing a full and prompt explanation to your employer of what has happened; and

6.12 Co-operating with any investigation or formal inquiry into your conduct, the conduct of others, or the care or services provided to a service user where appropriate.

Standards of Practice:

Standard 6: As a social care worker, you must develop yourself as a social care worker. This includes:

6.3 Reflecting on your practice to continuously improve the quality of service provided;

6.4 Using sources of support for your personal development, including supervision, appraisal and training; and

6.6 Recording progress in relation to your personal development.

The Committee then considered whether the impairment is capable of remediation and concluded that it was. However, there is no evidence before the Committee that the Registrant has taken any steps to remediate the impairment since the original Order was made. The Registrant has not demonstrated any insight into her failings. The Committee noted that the original Committee had put forward very well considered suggestions to assist the Registrant in demonstrating insight and remediation. The first suggestion was that the Registrant engages with the NISCC. She has failed to do so. The second was that she provide a written reflective report which she has failed to do. The third suggestion took into account that the Registrant was suspended and referred to references or testimonials from any employer for paid or unpaid work. The Registrant has failed to provide any references or testimonials.

In view of the Registrant's lack of insight, lack of remediation and lack of engagement, the Committee could not be satisfied that there is no risk of repetition of similar behaviour in the future. The Committee considered the formulation adopted by Dame Janet Smith in her fifth Shipman report and determined that:

1. The Registrant acted in the past so as to put service users at an unwarranted risk of harm and is liable to do so in the future; and
2. The Registrant, in the past, brought the profession into disrepute and is liable to do so in the future; and
3. The Registrant, in the past, breached one of the fundamental tenets of the social care profession and is liable to do so again in the future.

The Committee took into account the public interest when deciding that the Registrant's fitness to practise is impaired. The Committee accepted the need for the NISCC to uphold proper professional standards and public confidence in the social care profession. The Committee determined that public confidence would be undermined if a finding of impairment was not made in the circumstances where a registrant had been suspended but failed to engage with the NISCC, demonstrate insight or take any steps to remediate during the course of their suspension.

The Committee finds that the Registrant's fitness to practise remains impaired as a result of her lack of engagement, remediation and insight. In the absence of these factors, the Committee cannot be satisfied that the Registrant does not pose a risk to service users.

Sanction

In reaching its decision on sanction, the Committee considered the submissions of Mr Gilmore and heard and accepted the advice of the Legal Adviser. The Committee took into consideration the NISCC Indicative Sanctions Guidance (January 2017), bearing in mind that the decision on sanction is one for the Committee's own independent judgement.

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

- It is now two years since the incident in question and the Committee accepts the possibility that the Registrant's conduct has improved in the interim;
- There was some initial cooperation with the NISCC investigation;
- This was a single incident;
- There are no previous regulatory findings in respect of the Registrant; and
- There is no evidence that any actual harm was caused to service users or colleagues.

The Committee determined that the aggravating factors are:

- The Registrant has demonstrated a prolonged and complete lack of insight;
- She has displayed a lack of regret;
- Her actions were premeditated, she attended work having consumed alcohol and brought alcohol to work with her;
- Her actions posed a serious risk to elderly vulnerable service users;
- She did not cooperate fully with the NISCC investigation and provided no information for the Review Hearing today;
- The misconduct was related to her work; and
- The Registrant has shown a serious disregard for the NISCC's Standards of Conduct and Practice.

The Committee went on to consider the appropriate sanction as set out at Paragraph 33 (8) of Schedule 2 of the Rules.

Conditions of Practice Order – the Committee determined that it would not be appropriate to impose a Conditions of Practice Order at the expiry of the current Suspension Order. There is no evidence to suggest that the Registrant would cooperate with conditions of practice or would respond positively to remediation or retraining. The Registrant did not attend her initial hearing and was not present today, so the Committee is unable to confirm that conditions could be achievable and accepted. The Committee determined that no practicable or workable conditions could be formulated which would address the Registrant's failings, in particular, her lack of insight. The Committee determined that a Conditions of Practice Order would not be sufficient to protect the public from the risk of repetition and would not meet the public interest in upholding proper professional standards and maintaining public confidence in the NISCC.

Suspension – the Committee determined that it would not be appropriate to impose a further period of suspension. The Committee noted that whilst the incident occurred two years ago, the Registrant continues to show no insight. There is no evidence before the Committee that she would be prepared to gain such insight in the future. The Committee considered that the Registrant's misconduct and impairment is serious. The Committee took into account that this incident was an isolated incident and that no harm was caused to any service user. However, the failure on the part of the Registrant to reflect on the nature of her misconduct and the risks to those in her care caused the Committee to conclude that the interests of service users would not be

sufficiently protected by suspension. The Registrant was provided with an opportunity to remedy her misconduct during the initial period of suspension. She has failed to provide the Committee with evidence that the misconduct has been remedied and that lessons have been learned. There is nothing which allows the Committee to conclude that the Registrant will take positive action to resolve or remedy the cause of her misconduct during a further period of suspension.

Removal – after careful deliberation, the Committee determined to revoke the Suspension Order and impose a Removal Order. The Committee concluded that removal from the Register is the only appropriate and proportionate sanction. The Committee concluded that the Registrant's misconduct, compounded by her persistent lack of insight, is fundamentally incompatible with being a registered social care worker. There is no evidence of remorse and no evidence that the Registrant is likely to remediate her misconduct. Since the imposition of her Suspension Order, the Registrant has not engaged with the NISCC in any way. As a result, the Committee is of the view that confidence in the social care profession would be undermined by allowing the Registrant to remain on the Register.

The Committee considered the potential devastating impact of a Removal Order on the Registrant, but concluded that the public safety and the public interest outweighed the impact on the Registrant.

The Committee determined 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

Paragraph 33 (5) of Schedule 2 of the Rules specifies that no later than 28 days before a review hearing the Notice of Review must be sent to the Registrant. The first question you have to consider is whether the Notice has been properly served and the Registrant has received fair notice of this hearing today. I have been shown a copy of the Notice of Review Hearing, which was sent on 27 March 2017 by Special Delivery post. That was to the Registrant's address as it appears on the Register. I can confirm that is more than 28 days before today's hearing so the requirements of Paragraph 33 (5) have been met.

Rule 3 of the Fitness to Practise Rules deals with service of documents and, in those Rules, if a document is sent by Special Delivery post or by registered post in which there is a signature to prove service, then it is deemed to be served. I have been shown the Notice of Review sent by Special Delivery post on 27 March 2017 and the signature showing that it was delivered and received on 28 March 2017. I can confirm that it is my view that it would be safe for you to consider the Notice has been properly served in accordance with the requirements of the Rules.

In addition to the Notice itself, I have also been shown that a hearing bundle was sent by Special Delivery post on 11 April 2017 and signed for on 12 April 2017. Again, it would be safe for you to accept that those documents

have been properly sent to the Registrant in this case.

Proceeding in the Absence of the Registrant

Mr Gilmore has directed you to Paragraph 15 of Schedule 2. Paragraph 15 (2) of Schedule 2 specifies that where a Committee is satisfied that the Notice of Hearing has been duly served on the Registrant, it may: hear and determine the case in the absence of the Registrant; or adjourn the case and give directions.

You have received the application from Mr Gilmore that you should choose the course of proceeding with today's hearing in the absence of the Registrant. He makes the point that it is unlikely that the Registrant would attend at any future hearing.

When deciding whether to proceed in the absence of the Registrant you must have at the forefront of your thinking that the discretion to proceed should only be exercised with the utmost care and caution. I would refer you to the case of GMC v Adeogba, which the Court of Appeal heard in March 2016. The Court of Appeal set out the basis upon which a panel, such as this Committee sitting today, should exercise its discretion in deciding whether or not to go ahead in the absence of a registrant. Lord Bingham said that the principles set out in R v Hayward and R v Jones provide a useful starting point for the approach of the Committee. He did point out, however, that it is important to bear in mind that there is a difference between a criminal trial proceeding in the absence of a defendant and the decision of a regulator to continue with a disciplinary hearing in the absence of a registrant. The principles from R v Hayward and R v Jones read as follows:

"The trial judge has a discretion as to whether a trial should take place or continue in the absence of a defendant and / or his legal representatives. That discretion must be exercised with great care and it is only in rare and exceptional circumstances that it should be exercised in favour of a trial taking place or continuing, particularly if the defendant is unrepresented. In exercising that discretion, fairness to the defence is of prime importance but fairness to the prosecution must also be taken into account. The judgments have regard to all the circumstances of the case, including the nature and circumstances of the defendant's behaviour in absencing himself from the trial, whether his behaviour was deliberate, voluntary and, as such, plainly waived his right to appear, whether an adjournment might result in a defendant attending voluntarily, the length of such an adjournment, whether there is any indication the defendant wishes to be legally represented at the trial even though absent, the extent of the disadvantage of the defendant not being able to give his account of events having regard to the nature of the evidence against him, and the risk of a jury reaching an improper conclusion about the absence of the defendant, then the general public interest and the particular interest of any victim and witnesses that the trial should take place in a reasonable period of time and the effect of any delay on the memory of witnesses", which of course doesn't apply in today's hearing.

Lord Bingham went on to say that there is a burden on all professionals subject to a regulatory regime to engage with the regulator, both in relation to any investigation and ultimate resolution of the allegations made against them. He stated this is part of the responsibility to which they sign up upon being admitted to the profession. The Court of Appeal held there could be no premium for non-engagement.

I would remind you that the Registrant is entitled to a fair hearing and to attend and to be represented and to test the case against herself and to bring evidence on her own behalf. You should consider whether an adjournment of this case would result in her attending at a later date and you should also consider the sort of time frame that would be involved in such an adjournment. It is proper in this review hearing situation for you to take into account the responsibilities on you as a Committee to public protection and to the public interest in carrying out a timely review of the Suspension Order on or before the current Order expires. I would advise you should retire to make your decision.

Application to Admit Review Hearing Bundle

The position is obviously you can accept the bundle if you are satisfied the requirements of fairness and relevance are met. Given that the bundle has been served on the Registrant and she has not objected to the content of the bundle I would advise it would be safe for you to accept the bundle. I have looked at it myself and can confirm that it is relevant and there nothing in it which I deem to be unfair.

Impairment

I think the best position would be to start with the Rules and consider why you are here today.

You have been referred by Mr Gilmore to Paragraph 33 of Schedule 2 of the Fitness to Practise Rules. Paragraph 33 (1) requires that towards the end of a period of suspension the Council should invite the Registrant to provide documents or information as to whether the fitness to practise of the Registrant remains impaired. Paragraph 33 (3) (b) states that where the Registrant fails to comply with a reasonable request for this type of information, the Council should refer the matter to a Fitness to Practise Committee. It is on that basis that this case is being referred to you today.

Paragraph 33 (4) states that where a case is referred to a Committee, the Committee should be constituted by members who did not deal with the original hearing. I am satisfied, having spoken both to the Clerk and to yourselves, that none of you were involved in a previous hearing in respect of this Registrant.

You were then asked to determine whether the Registrant's fitness to practise can be considered no longer impaired. That is the test that you have to consider today, whether you consider that her fitness to practise is no longer impaired. It might be helpful if I referred you back, and Mr Gilmore has already referred to it, to the definition of Fitness to Practise and impairment within the Rules. That can be found at Paragraph 24 of Schedule 2 at sub-paragraph (3).

"In deciding upon the issue of impairment of fitness to practise, a Committee shall have regard to:

- (a) whether it is satisfied as to the reason for the alleged impairment;
- (b) the Standards of Conduct and Practice issued by the Council;
- (c) whether the impairment is capable of remediation;

- (d) whether the impairment has been remediated;
- (e) the risk of repetition, and
- (f) the public interest".

Those are all the factors that you should take into account in reaching your decision today.

There are a number of cases on the issue of impairment and I am not going to go through all of those with you today, but there are things that I think might be helpful as you reach your decision. I remind you of the case of Meadows v GMC when it was highlighted that purpose of any fitness to practise procedure is not to punish the practitioner for past misdoings but to protect the public against acts and omissions of those who are not fit to practise now. As a Committee, you should therefore look forward and not backwards.

You have received submissions from Mr Gilmore in respect of public confidence and professional standards of conduct, and I have directed you to the reference in the Rules to the public interest. It is proper for you to take into consideration the public interest as you reach your deliberation. In the case of CHRE v NMC and Grant, which has already been referred to by Mr Gilmore, Mrs Justice Cox at paragraph 74 stated that in determining whether a practitioner's fitness to practice 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 whether there is a 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. It is proper for you to take into account those factors as you reach your decision.

Mrs Justice Cox went on to refer to it -- and you will see it, and Mr Gilmore has directed you specifically to it -- the reference within the original decision to the formulation adopted by Dame Janet Smith in her Fifth Report from the Shipman case and the test which formulated as an appropriate test for panels considering impairment. You should give consideration to this test in your deliberations. Namely, has the registrant acted in the past and / or is she liable in the future to act so as to put a patient or service user at unwarranted risk of harm? Has the Registrant in the past and / or is she liable in the future to bring the profession into disrepute? Has the Registrant in the past and / or is she liable in the future to behave in a way that would breach one of the fundamental tenets of the social care profession? The final limb of that test is has she acted in the past dishonestly and is she liable to do so in the future? Which is not applicable to the current case.

It might be helpful if I refer you to the case of Ogbonna-Jacob v NMC. That is a 2013 case, which can be found at EWHC 1595. That was a case which dealt with a review that was conducted in the absence of a registrant who had earlier withdrawn from a previous hearing because she was unhappy about a ruling of the panel not to exclude the press. The nurse in that case made it clear that she did not intend to engage with the review process. She failed to take up the clear and specific suggestions of the previous panel that she provide the review panel with a written document reflecting on the particular matters which had occurred. So as in this case, the original panel dealing with the case had made a recommendation that before her suspension was reviewed she should take several steps, and she failed to do that. It was held that the review panel was entitled to reach

a conclusion that her fitness to practise was impaired because she had failed to engage with the review process.

The facts of that case were different to the current case as the registrant actually wrote to the review panel and presented herself as a victim showing no concern about the consequences of her action. You have nothing from this Registrant at all, but the case is helpful, I believe, in the judge dealing with the review, Sales J, at paragraph 14, stated that he could find no good grounds for criticising the panel's assessment that the appellant's (as she was in the appeal case) fitness to practise continued to be impaired. He noted the appellant had failed to engage with the review process and, in particular, she had failed to take up the clear and specific suggestions of the previous panel that she should provide the review panel with a written document reflecting on the particular matters which were referred to in her case. Sales J stated that even allowing for the fact the registrant in that case wished to continue to protest her innocence, it would have been possible for her to have engaged with the suggestion made by the panel, and she made no attempt to do so. He therefore considered that the panel was fully entitled to reach the conclusion that it did in relation to continuing impairment of her fitness to practice.

You may wish to take that into account as you reach your decision.

You should also take into account the matters which you have been fairly directed to by Mr Gilmore in terms of insight and remediation and the lack of engagement on the part of the Registrant.

Sanction

You have received detailed submissions from Mr Gilmore on sanction and you should properly take those into account, but I would remind you that your decision as a Committee on sanction is one for you to make, exercising your own common sense and judgment as you consider all the factors in this case.

You have already outlined the options which are available for you at this stage, and those are set out at Paragraph 33 (8) of Schedule 2 to the Rules, and that is to impose a further Suspension Order upon the expiry of the existing Suspension Order for a specified period of no longer than two years, to impose a Conditions of Practice Order to commence on the expiry of the Suspension Order for a specified period of no longer than three years, or to revoke the Order and impose a Removal Order. Those are the only three options before you at this stage.

You have been referred to the Indicative Sanctions Guidance and I would commend that document to you. I recommend that you take it into account as you deliberate on this matter. It has been highlighted that the purpose of sanction, which is set out at Paragraph 2.2 of the Indicative Sanctions Guidance, the primary purpose of sanction is not to be punitive but to protect the public, although the sanction may have a punitive effect.

Paragraph 2.5 reminds you of your obligation to act fairly in everything that you do and there is a duty on you as a Committee to act fairly. 2.6 deals with proportionality, and I would commend that to you and ask you to have that at the fore of your minds as you reach your deliberations. The principle of proportionality requires that the consequences of the sanction must not be disproportionate to the harm from the sanction is intended to protect the public and service users. The interests of the public and 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 and you should bear that in mind in your deliberations.

Mr Gilmore has suggested and I can confirm to you that it is appropriate that you should take an approach dealing with the least punitive sanction first and working up, only stopping when you reach the Order that you think is proportionate to the situation within which you find yourself.

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.

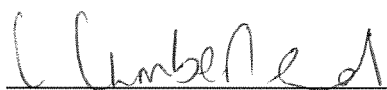
The effect of this decision is that your entry in the Register has been removed.

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

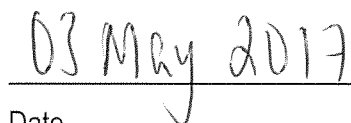
- Care staff in a children's home, residential care home or nursing home.
- Manager of a residential care home, day care setting or domiciliary care agency.

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.



Committee Manager



Date