

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

Name: Wendy Sue Welsh

SCR No: 6019859

NOTICE IS HEREBY GIVEN THAT the Fitness to Practise Committee of the Northern Ireland Social Care Council, at its meeting on **11 December 2017**, 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 suspending your registration for a specified period of two years ('a Suspension Order').

Particulars of the Allegation (as amended):

That, being registered under the Health and Personal Social Services Act (Northern Ireland) 2001 (as amended):

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| 1. | On or about 22 April 2016 while employed as a Care Assistant by Nursing and Caring Direct Ltd, you slapped Service User "H" in his home. |
| 2. | On or about 22 April 2016 while employed as a Care Assistant by Nursing and Caring Direct Ltd, you used foul and inappropriate language towards Service User "H" in his home. |
| 3. | On or about 02 June 2016, you inaccurately completed a written declaration to a prospective employer, Rose Lodge Care Homes Ltd, indicating you had never been the subject of an adult or child abuse investigation which alleged you were the perpetrator of any adult or child abuse. |

And your actions as set out above show that your fitness to practise is impaired by reason of your misconduct.

Preliminary Matters

The Registrant was neither present nor represented. Mr Anthony Gilmore, Solicitor, Directorate of Legal Services, represented NISCC.

Service

The Notice of Hearing, together with requisite documentation, was sent to the Registrant at her registered address on 03 November 2017 by Special Delivery. The Notice of Hearing contained confirmation of the date, time and venue of the hearing, together with a warning that the matter could proceed in her absence. The

Committee was satisfied that the Registrant had been given in excess of 28 days' clear notice of the hearing and was, accordingly, satisfied that service of the proceedings had been effected in accordance with Rule 3 and Paragraph 5 of Schedule 2 of the NISCC Fitness to Practise Rules 2016 ('the Rules').

Proceeding in the Absence of the Registrant

The Committee heard that the Notice of Hearing was returned to NISCC on 23 November 2017. It was re-sent by first class post on the same date and not returned as undelivered. The Committee Clerk, in a telephone conversation on 30 November 2017, confirmed that the Registrant was aware of the hearing and was content for the matter to proceed in her absence. The Committee accepted the Legal Adviser's advice. The Committee noted that the Registrant had not asked for there to be an adjournment of the hearing so that she could attend or be represented at a later date. In any event, the Committee could see no good reason for adjourning the proceedings, and noted that NISCC had intended to call a number of witnesses in support of the allegation which the Registrant faced. The Committee noted that while some disadvantage to the Registrant might arise in proceeding in her absence, her interests were outweighed by the general public interest and the fact that the allegations faced by the Registrant were serious and were alleged to have occurred some 18 months prior to the hearing. The Committee considered that the Registrant had voluntarily absented herself from the proceedings, and that it was fair and appropriate to proceed in the Registrant's absence. In making its decision, the Committee reminded itself that it would draw no adverse inference against the Registrant for her decision not to appear, and that the burden of proving the facts rested on Mr Gilmore, who appeared on behalf of NISCC.

Application to Admit Hearing Bundle

The Committee acceded to an application by Mr Gilmore to admit a hearing bundle containing witness statements and other relevant evidence (Exhibit 1) in accordance with Paragraph 12 of Schedule 2 of the Rules.

Background

The NISCC received a referral in respect of the Registrant on 25 April 2016 from the Registered Home Manager of Nursing and Caring Direct (NCD). A second referral was made on 26 July 2016 by the Community Manager of Rose Lodge Care Homes (Rose Lodge). The first referral had resulted in the first two allegations against the Registrant, while the second referral had resulted in the third allegation.

The Registrant is registered on Part 2 of the Register.

NCD, in the first referral, reported that on 26 April 2016, a colleague with whom the Registrant worked had witnessed the Registrant react to Service User H in an inappropriate manner while providing personal care to him. It was alleged that Service User H hit out at the Registrant and that she had reacted by slapping him on the arm and shouting at him using foul and abusive language. An investigation was commenced with the Registrant being suspended. The Registrant denied any inappropriate contact or the use of force by her in relation to the incident as alleged.

Rose Lodge, in the second referral, reported that the Registrant completed her first shift with them on 18 June 2016 following receipt of a clear Access NI check and two satisfactory references. On 22 June 2016, a further reference was received from NCD which indicated that the Registrant was subject to a vulnerable adult investigation. This reference was filed in error by Rose Lodge without being seen by a member of management. On 14 July 2016, a member of RQIA indicated to Rose Lodge that the Registrant was the subject of an investigation in the course of her previous employment. As a result, an investigatory meeting was held on 18 July 2016. This meeting was held to consider whether in the course of her application with Rose Lodge, the applicant had failed to disclose that she was the subject of an adult investigation in relation to the incident involving Service User H.

Evidence

The Committee heard evidence from the following witnesses:

- Witness 1, the Registrant's co-worker on 22 April 2016;
- Witness 2, the Assistant Line Manager in April 2016 with NCD;
- Witness 3, the Registered Manager in April 2016 with Rose Lodge.

In addition, the Committee considered the hearing bundle as set out in Exhibit 1, which contained, amongst other things, the witnesses' statements made to NISCC in the course of its investigation into the Registrant's conduct.

The Committee found the witnesses to be credible and reliable in relation to their evidence. They were honest and gave evidence in a forthright manner.

Application to Amend the Particulars of the Allegation

The Committee heard an application by Mr Gilmore to amend the Particulars to substitute the word 'assaulted' with 'slapped' in Particular 1, and to remove the words 'dishonestly or' in Particular 3. The Committee accepted the Legal Adviser's advice. The Committee was satisfied that no injustice was caused to the Registrant and that the proposed amendments better reflected the available evidence. The Committee, therefore, granted the application to amend the Particulars of the Allegation.

Finding of Facts

The Committee considered the oral and documentary evidence very carefully. It accepted the Legal Adviser's advice.

The Committee considered Particulars 1 and 2 together. The Committee noted that the Registrant, at various stages, had given slightly different accounts of the incident involving Service User H on 22 April 2016. On 14 July 2016, the Registrant had denied to Rose Lodge that she had ever hit anyone under her care. In a statement written by the Registrant on 27 April 2016, the Registrant had stated that Service User H had scraped her left arm not causing an injury but startling her. In an earlier investigation meeting on 26 April 2016, the Registrant stated that Service User H had 'hit out' at her. Broadly speaking, the Registrant denied having any untoward

contact with Service User H but in the meeting of 26 April 2016, she did accept that she had used the words "frig sake...I don't get paid for this".

The Committee heard evidence from Witness 1. She described the incident involving Service User H and the Registrant on 22 April 2016 in detail. Witness 1 described Service User H getting agitated during the process of being given his personal care and that he had hit the Registrant 'quite a slap' to her forearm. Witness 1 stated that the Registrant hit Service User H's forearm with an open hand and stating "Don't fucking hit me. I don't get paid to get hit by you". Separately, while changing Service User H's pad, Witness 1 described the Registrant as saying "I know it's not fucking right, you won't let me fix it". During questioning by the Committee, Witness 1 stated that she 'vividly remembered' the words uttered by the Registrant and that she had a clear and unobstructed view of the Registrant slapping Service User H.

The Committee considered that Witness 1 gave a clear account of what she heard and saw, and was consistent in her account when pressed about the detail by the Committee. The Committee was satisfied that Witness 1's evidence was entirely honest and credible, and preferred her account over that given in the various documentary pieces provided by the Registrant. The Committee, therefore, found Particulars 1 and 2 proved.

In relation to Particular 3, the Committee had regard to the Declaration and Consent Form signed by the Registrant on 02 June 2016 in support of her application for employment with Rose Lodge. When asked whether she had ever been the subject of an adult or child abuse investigation of which she was alleged to be the perpetrator, the Registrant ticked the 'No' box to signify that she had not. The Committee heard evidence on this issue from Witness 3, who was clear that the Registrant as an experienced social care worker would have been aware that adult abuse in the context of the Form would have included any allegation made of slapping a service user in her care. The Committee accepted Witness 3's evidence in this regard, and noted that the Registrant had a combined total of at least ten years' previous experience in the social care field when she came to sign the document in question in June 2016. As an experienced social care worker, the Registrant would have been expected to know and to have been trained in the concept of adult abuse and that it encompassed all forms of non-consensual contact with a service user including hitting or slapping service users. The Committee was, therefore, satisfied that the Registrant had inaccurately completed the Form and found Particular 3 proved.

Fitness to Practise

The Committee heard a submission from Mr Gilmore and accepted the Legal Adviser's advice. The Committee exercised its independent judgement on the question of whether the Registrant's fitness to practise is impaired by reason of the facts proved.

The Committee was satisfied that the Registrant's actions had fallen far below the standards to be expected of a registered social care worker, and were serious. In relation to Particulars 1 and 2, Witness 2 explained to the Committee that the Registrant, in accordance with her training, should have stepped back upon seeing Service User H's agitation. Instead of following a procedure aimed at de-escalating the situation, the Registrant had used force against a vulnerable service user. The Committee did not have any evidence to suggest whether the

Registrant acted in a deliberate manner or whether she had simply reacted instinctively after Service User H slapped her. Nonetheless, the Committee considered that there could be no excuse for a professional social care worker to act in the way in which the Registrant had acted. In addition, the Registrant's failure to document what had happened and her failure to accept the clear evidence provided by her co-worker aggravated the seriousness of the Registrant's actions. In relation to Particular 3, the Committee considered that it was essential for the Registrant to have accurately completed a Form designed to ensure in the pre-appointment process that any vulnerable service users with whom the Registrant might have come into contact were safeguarded. The Registrant, to the Committee's mind, would or at least should have been well aware as an experienced social care worker that the allegation which she faced, even though denied, created a duty of disclosure on her part when she was asked in the relevant employer's form whether she had ever been the subject of an adult abuse investigation in which she was alleged to be the perpetrator.

In considering the seriousness of the Registrant's misconduct, the Committee was satisfied that she had breached the following provisions of the Standards of Conduct for Social Care Workers:

Standard 1: As a social care worker, you must protect the rights and promote the interests and wellbeing of service users and carers. This includes:

1.2 Treating people with consideration, respect and compassion.

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

5.1 Abuse, neglect or harm service users, carers or colleagues.

The Committee had not been provided with any documentary material by the Registrant touching upon her insight into her failings. The Committee had also not been provided with any remedial steps taken by the Registrant in order to demonstrate that there would be no repetition of the conduct which had resulted in the regulatory proceedings against her. As a result, while the Committee was satisfied that the conduct which led to the allegation was capable of remedy through appropriate training and the demonstration of insight, there was no evidence before the Committee that the Registrant had engaged in any activity in this regard. As a result, the Committee considered that the Registrant presented a real risk to the public and that there was a high likelihood of the conduct complained of being repeated by the Registrant in the future.

The Committee also had regard to the formulation provided by Dame Janet Smith in her Fifth Report to the Shipman Inquiry (as quoted with approval by Cox J in CHRE v NMC & Grant [2011] EWHC 927 (Admin)). The Committee considered that the Registrant's misconduct demonstrated that:

- (a) The Registrant had in the past and was liable in the future to act so as to put vulnerable service users at unwarranted risk of harm; and

- (b) The Registrant had in the past and was liable in the future to bring the social care profession into disrepute; and
- (c) The Registrant had in the past breached and was liable in the future to breach one of the fundamental tenets of the social care profession.

The Committee also considered that there was a strong public interest in the circumstances of this case in order to uphold and maintain proper standards of conduct and performance and to maintain the reputation of the social care profession.

For these reasons, the Committee finds that the Registrant's fitness to practise is impaired by reason of her misconduct.

Sanction

The Committee heard a submission from Mr Gilmore and accepted the Legal Adviser's advice. The Committee reminded itself that it should exercise its independent judgement on the question of sanction and act proportionately. The Committee first addressed the mitigating factors and identified the following:

- The Registrant had a previous good history and the Committee was advised that there had been no further issues of concern in relation to the Registrant's practice following the referrals which had resulted in the current proceedings;
- In relation to Particulars 1 and 2, while the motivation for the Registrant's actions remained unclear, there was no evidence that she had acted in a wilful, deliberate or premeditated way. The Registrant slapped Service User H on one occasion, however there was evidence that the matter quickly de-escalated with the assistance of Witness 1;
- The Committee considered that the current regulatory proceedings represented an isolated episode in an otherwise long and unblemished period of working in the social care sphere in which the Registrant would often have to work in difficult and challenging circumstances;
- There was no evidence that the Registrant had engaged in a pattern of abuse;
- In relation to Particular 3, there was no evidence that the Registrant had acted dishonestly, as reflected in the application of NISCC to withdraw such an allegation from this Particular. At best, it could be said that the Registrant had acted in a casual and inadvertent manner in her response to the relevant question on the Form;
- There was no evidence that the Registrant acted wilfully in order to cover up her failings.

The Committee next addressed the aggravating factors and identified the following:

- The Registrant had slapped and used foul and abusive language towards a vulnerable service user in her care;

- The Registrant was unapologetic in her responses to Witness 1 in the aftermath of the incident in April 2016, and refused to accept that she had slapped Service User H and otherwise acted inappropriately;
- The Registrant had inaccurately filled in a Form, which would have been used in order to protect and safeguard vulnerable service users with whom the Registrant might come into contact in the course of her employment;
- There was an absence of evidence of insight and remedial action following the regulatory referral of the Registrant's case to NISCC.

The Committee then turned to address the question of the appropriate sanction to apply in ascending order of severity.

Warning – the Committee considered that this was an inappropriate sanction as it had identified that the Registrant, through her lack of insight and remedial action, presented a risk in the future to vulnerable service users who might require her services, and the public in general.

Conditions of Practice Order – the Committee considered that this was an inappropriate sanction to apply. The Registrant, for her own reasons, had decided not to engage in the regulatory process. The Committee had no information as to the Registrant's employment status. In those circumstances, the Committee was unable to formulate any workable, enforceable or verifiable conditions which would adequately protect the public.

Suspension – the Committee next considered whether suspension was an appropriate and proportionate sanction to apply. The Committee noted that it had identified the Registrant as posing a risk of repeating the behaviour complained of in the future and, that by her failure to engage in the regulatory process, had failed to demonstrate insight or remedial action. This weighed heavily with the Committee. Set against those issues, however, the Committee was satisfied that while the Registrant's actions were serious, they represented an isolated episode in an otherwise unblemished career. The Registrant had worked for a significant period in the social care field and there was evidence that she had no previous issues of concern raised in respect of her practice. The Registrant had worked in an often challenging and difficult working environment delivering care to vulnerable service users. There was no evidence that there had been a repeat of the behaviour since the incidents which had resulted in the current referrals. The Committee, for this reason, was prepared to accept that the conduct engaged in by the Registrant was isolated and was not fundamentally incompatible with continuing to be registered as a social care worker. The Committee was further satisfied that unless the Registrant was able in the future to satisfy a reviewing Committee that she had insight into her failings and had taken steps to address them, the public would be sufficiently protected in the meantime by a period of suspension.

The Committee wished to make it clear that it considered this case to be on the borderline between suspension and removal and decided, in order to reflect this fact, to impose a Suspension Order for the maximum available period, namely two years. A reviewing Committee would be assisted at the end of the suspension period by the Registrant completing a reflective piece documenting what occurred in relation to Service User H and the

inaccurate completion of the Form, together with any evidence of keeping up to date with relevant training in the social care profession.

Removal – the Committee looked at those factors in the Indicative Sanctions Guidance document which would justify the imposition of a Removal Order. While acknowledging that some of the factors were engaged in this case, which had resulted in the Committee giving very serious consideration to a Removal Order, it was persuaded, on balance, that a Removal Order would not be appropriate. The Registrant had not acted in a dishonest fashion nor had she sought to cover up her failings. She had not caused serious harm through a deliberate act or through her gross neglect, nor had she demonstrated a blatant disregard for the system of registration. The Committee was, accordingly, persuaded, on balance, that a Removal Order, at this stage, would be disproportionate.

Legal Advice Given

Service

The service of the proceedings was governed by Rule 3 and Paragraph 5 of the second Schedule of the relevant rules, the NISCC Fitness to Practise Rules 2016, and Mr Gilmore has already touched upon this. The position basically is that which is set out at Paragraph 5, which requires a Notice of Hearing, together with requisite documentation and containing certain prescribed information, to be sent to a Registrant no less than 28 days after the posting of the Notice of the Hearing and for the date to be fixed thereafter. So in other words, there should, unless with the express agreement of the Registrant, be a date fixed no less than 28 days after the posting of the Notice of Hearing.

In this particular case, you have heard that the Notice of Hearing was in fact sent on 03 November and that, therefore, required applying the day after rule as it were, 29 days to elapse before the date fixed for hearing, which in my recollection, or in my estimation, the next working day would be Monday 04 December, this is now 11 December and, therefore, the period is in excess of that as prescribed in the Rules.

The other efforts made by the Council and particularly the Committee Clerk, have gone over and above really that which is required to be addressed by the relevant Rules. No criticism at all of that. No doubt the Council is acting in the best interest of the Registrant to bring the particulars of the hearing to her attention. But critically, what is required for the Rules is for the Notice of Hearing to be sent in accordance with Rule 3 and Paragraph 5 of Schedule 2 and it is therefore my advice to you and your colleagues that applying those provisions, it is safe to proceed on this process with service as being effected in accordance with the Rules at this stage.

Proceeding in the Absence of the Registrant

Mr Gilmore again has rightly alerted you and your colleagues to the fact that the decision as to whether to proceed in the absence of a Registrant is a discrete exercise and separate from the issue of service and one

which you and your colleagues must exercise your discretion judicially having regard to the factors set out in recognised case law in this area. You no doubt will be well aware of the authority of the Crown v Jones & ORS, in which the House of Lords in that case affirmed the proposition that the decision to proceed in the absence of an effected person is one which only should be entertained after the Tribunal of Fact exercising the utmost care and caution.

Other case law has made clear that the discretion to proceed in the absence of a Registrant is a severely constrained discretion. The House of Lords in the case of Jones & ORS affirmed a number of factors identified by the Court of Appeal in that case in relation to Tribunals which are faced with circumstances in which an effected person has failed to appear before a criminal court or a regulatory tribunal. In the case of Hayward, in the regulatory context, has crystalized those factors and insofar as they are relevant to your deliberations, they are as follows. You must look at the following matters: first 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 is likely to result in the Registrant attending the proceedings at a later and the likely length of any such adjournment; next, whether the Registrant, despite being absent, wished to be represented at the hearing or whether she has waived that right; 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 effect of delay in the memories of any witnesses who may be called to a regulatory hearing; and finally, the general public interest and, in particular, the interest of any victims or any witnesses that a hearing should take place within a reasonable time of the events to which it relates.

Undoubtedly the absence of the Registrant will cause her a disadvantage in the sense that she will not be able to question witnesses or indeed give evidence to this Committee if you decide to proceed in her absence, but you must balance that against the requirement for an expeditious disposal of the case from the regulator's perspective and also the general public interest which I have alluded to a moment or two ago and in that regard, you should recall the case the of Adegoba & ORS application for Judicial Review in which the Court of Appeal in England and Wales affirmed the distinction to be drawn between criminal cases where a Defendant fails to appear in a criminal trial, where a criminal court has the power to compel that Defendant to appear at a later stage, a power not open to you and your colleagues, and also the Court of Appeal in Adegoba made it plain that you should not lose sight of the principle purpose of these proceedings not to punish any Defendant in the sense that a criminal court would be required to do rather, the primary focus of your proceedings is to have in mind at all times the public interest, which of course includes the protection of the public and the maintenance of proper standards of conduct and performance. You must of course with your colleagues shortly rise to address those issues and accord what proper balance is to be struck between the interests of the Registrant who is absent, the regulatory body which has brought these proceedings and of course the public interest, and you must bear in mind, and very carefully, the submissions that you have heard from Mr Gilmore in relation to the interactions at least between the Council and the Registrant in that deliberation.

Application to Amend the Particulars of the Allegation

Just so as I fully understand Mr Gilmore, this Registrant, Ms Welsh, has never, as I understand it, been referred to the police for any form of investigation and it would also appear to be the case, she has never been in any way questioned or cautioned in respect of an allegation of assaulting a third party Service User H in this case, and of course certainly from my mind, one would see that type of allegation pleaded whenever you are dealing with a case involving a conviction when in court, a criminal court, applying a higher standard of proof has made a determination which has resulted in a conviction.

There would also seem to be, even on the basis of the evidence from particularly the first witness, Witness 1, some evidence that certainly this Registrant slapped, although it is denied, that she slapped or in some other way hit Service User H. It just troubles me slightly and obviously the Committee may seek some submission from you on how you will be able to prove this particular action constitutes something which really can only be determined in strict legal terms, at least in my mind, by a criminal court which obviously hasn't adjudicated on this incident at all. And obviously it is open to you as the Case Presenter on behalf of the Council under the Rules to make an application at any stage up until and including the findings of fact if you so desire to make the allegation more reflective of the evidence to amend any Particular or any part of it before the Committee decides to retire to look at these allegations and no doubt will pay particular care to each and every word that's used in respect of that.

Finding of Facts

The Committee must now retire at this stage, the first of the proceedings against Ms Wendy Sue Welsh to consider the Particulars set out in the Notice of Hearing, and you must, in that regard, bear in mind Paragraphs 12 and 13 of the second Schedule of the 2016 Rules. Most particularly, you must recall that the burden of proof to prove the facts alleged shall rest upon the Council. The Council has brought these proceedings against Ms Welsh. She has decided for her own reasons no doubt, not to attend these proceedings but her non-attendance at this stage should not be held against her. She is not required, as it were, to prove her innocence. The burden proving the facts whether they are denied rests upon Mr Gilmore on behalf of the Council to prove them. You will note in the available documentary material at least, there is some indication provided from this Registrant that she does deny some of the Particulars at least directed towards her.

You must look very carefully and attach such weight as you consider appropriate to her denials and also to the other available documentary material while looking at the Particulars.

You must, in that regard, apply the civil standard of proof to the Particulars and that has also been described as the balance of probabilities, and guidance as to the balance of probabilities has been provided in case law and it states that an event is proved on the balance of probabilities if a finder of fact is satisfied that on the evidence the occurrence of the event is more likely than not. It does not require the finder of fact to be certain that the event did occur.

The case law has also made clear that there is only one civil standard of proof and neither the serious of the

allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied. Although in some cases, it might be necessary to look at the facts more critically or more anxiously than others before you can be satisfied to the requisite standard, however, it is clear that there is only one single and unvarying standard. There is no general rule regarding the weighting or the testing of the strength of evidence presented to the relevant finder of fact. It is a matter of common sense and logic based upon the particular circumstances of each case.

As you have already heard and you have already, as I understand it, conceded to the application, dishonesty plays no part in this case and I'm not going to address you on that now at this stage.

So, you must, therefore, apply at this particular point in time the civil standard to determine what, if any, of the Particulars as amended have been proved in this case before moving further.

Fitness to Practise

This is now the second stage of the proceedings against this Registrant, Ms Wendy Sue Welsh, and you are required to follow, as Mr Gilmore has indicated to you, that as set out for you at Stage 2 in Paragraph 24 of the second schedule of the Rules.

The Council has made it clear in those Rules that in deciding upon the issue of impairment to fitness to practise you must have regard to a number of factors: the first, whether you are satisfied as to the reason for the alleged impairment for fitness to practise; next, the Standards of Conduct and Practice issued by the Council; next, whether the impairment is capable of remedy; next, whether the impairment has been remedied; next, the risk of repetition; and finally, the public interest.

The gateway, as it were, on which impairment of fitness to practise is founded in this case is misconduct, and Mr Gilmore again has given you helpful guidance in that regard. I would also seek to assist you by reminding you of the very well and very often quoted passage from the speech of Lord Clyde in the case of Roylance v GMC (No. 2), in which Lord Clyde made clear that *'misconduct is a word of general effect involving some act or omission which falls short of what would be proper in the circumstances. The standard of propriety may often be found by reference to the rules and standards ordinarily required to be followed by practitioner'* and in that case a medical practitioner in this case a social care practitioner *'...in the particular circumstances'*.

I would also remind you that in seeking to establish whether misconduct can properly be made out in this case, you should have regard to the Standards of Conduct and Practice and it is important to remember that while a breach of those Standards is not in itself determinative of misconduct, nonetheless it provides a very useful yardstick by which to measure whether or not misconduct has been made out.

At this particular stage, you are looking at whether the facts which you have found proved and amount to the statutory ground as set out in the allegation in this case. If, and only if, you are satisfied that that statutory ground is made out you must determine in consequence whether Ms Welsh's fitness to practise is impaired. It is important to remember, in the guidance of the GMC that fitness to practise is expressed in the present tense. As

the court noted in Meadow, the purpose of fitness to practise procedures is not to punish a practitioner for past misdoings but to protect the public against the acts of omissions of those who are not fit to practise. The panel thus looks forward not back. However, in order to form a view as to the fitness of a person to practise today, it is evident that it will have to take account of the way in which the person concerned has acted or failed to act in the past.

Thus, although your task is not to punish for past misdoings, you do need to take account of past acts or omissions in determining whether a Registrant's present fitness to practise is impaired.

Further helpful guidance was provided by Dame Janet Smith in her fifth report to the Shipman Inquiry, a formulation of cited approval by Mrs Justice Cox in the case of Grant in which the formulation was expressed in this way. Do our findings of fact in respect of Ms Welsh's misconduct show that her fitness to practise is impaired in the sense that she a) has in the past acted and / or is liable in the future to act so as to put a patient or patients or vulnerable service users, in this case, at unwarranted risk of harm and / or b) has in the past brought matters liable in the future to bring the medical profession into disrepute and / or c) has in the past breached and / or is liable in the future to breach one of the fundamental tenets of the social care profession and for present purposes d) is not applicable in the context of these proceedings.

In terms of the factors to be taken into account, the case of Cohen v GMC makes it clear that it is critically important to appreciate the different tasks which you and your colleagues are currently engaged in. At this stage you are concerned with the issue of whether in the light of any misconduct proof the fitness of the Registrant to practise has been impaired taking account of the critically important public policy issues. Those critically important public policy issues identified in Cohen which must be taken into account by a panel such as yours, were described by the Court as, the need to protect the individual service user and the collective need to maintain confidence in the profession as well as declaring and upholding proper standards of conduct and behaviour which the public expect and that public interest includes amongst other things the protection of service users and maintenance of public confidence in the profession.

Thus, in determining whether fitness to practise is impaired, you must take account of a range of issues which in essence comprise two components. First the personal component that is to say, anything known about the current covenants, behaviour etcetera of the individual Registrant and secondly public component, that is to say the need to protect service users, declare and uphold proper standards of behaviour and maintain public confidence in the profession. As the Court noted in Cohen, the sequential approach to considering allegations means that not every finding of misconduct will automatically result in a panel concluding that fitness to practise is impaired as the Court observed there must always be situations in which a panel can properly conclude that the act was an isolated error on the part of the practitioner and the chance of it being repeated in the future is so remote that her fitness to practise has not been impaired. It must be highly relevant in determining if fitness to practise is impaired that first the conduct which led to the charge is easily remediable. Second that it has been remedied and third that it is highly unlikely to be repeated.

It is important for panels to recognise that the need to address the critically important public policy issues identified in Cohen means that you cannot adopt a simplistic view and conclude that fitness to practise is not impaired simply on the basis that since the allegation arose the Registrant has corrected matters or learnt his or her lesson.

Further as indicated in the case of Brennan v HPC in cases where a panel makes a finding of impairment solely on the basis of a public component of an allegation, it must explain the reasons for that decision. It is insufficient simply to recite that, for example, it is necessary in order to maintain public confidence in the social care profession.

In terms of the degree of harm and culpability for that, in assessing the likelihood of the Registrant causing similar harm in the future, you should take into account the degree of harm caused by the Registrant and the Registrant's culpability for that harm. In considering the degree of harm you must consider the harm caused by the Registrant but you should also recognise that it may have been greater or less than the harm which was intended or reasonably foreseeable.

Finally, to remind you that the question of current impairment applying the case of Biswas is not a matter of proof, it is a matter for your judgment and that of your colleagues in relation to whether the test can be said to be made out and also in terms of your judgment in respect of the weight that you give to the personal and public components which I have described to you.

Sanction

Mr Gilmore has dealt with this very comprehensively, but in terms of advice now at this stage, the third stage of the proceeding against Ms Welsh, I would refer you to Paragraph 25 and following in relation to the second schedule of the Rules.

You have already identified those powers which you may invoke in relation to this matter, and Mr Gilmore has also taken you to Paragraph 26 (2) in relation to those matters which you must take into account when you and your colleagues shortly retire to deliberate on what sanction to impose in this case.

The first thing you must do and it was touched upon by virtue of sub paragraph 2 (a), is that you must assess the seriousness of the misconduct identified in this case. Paragraphs 3.2 and 3.3 of the Indicative Sanctions Guidance document sets out an unexhausted list of mitigating and aggravating factors respectively, which I would commend to you and your colleagues in terms of determining the seriousness of the misconduct. Once you have done that, should you then look at the list of available sanctions in ascending order of severity, commencing with whether it be appropriate and in the public interest to include the case with a Warning. If you are not satisfied that the public would be adequately protected, should you then consider to move up through the sanctions in ascending order of severity. The matter set out at sub paragraph 2 (e) of Paragraph 26 also makes plain that you should consider the issue of proportionality. Simply put, that means that when you and your colleagues identify a sanction which you in your judgement consider adequately protects the public, you should

not move any further. You should not consider a more restrictive sanction as to do so would be to punish and the purpose of a sanction is not to punish although it may have a punitive effect. The purpose of a sanction rather is to protect the public and to maintain public confidence in the social care profession. That is also set out for you through sub paragraphs 2 (b), (c) and (d).

The Indicative Sanctions Guidance document which has been presented to you obviously sets out those factors which may be said to be present in the particular circumstances of the case which would entitle you to apply such a sanction. Unless of course you wish me to do so, I don't intend to rehearse them now but simply to remind you that this is a matter for the exercise of your judgement in collaboration with your colleagues and taking into account those matters set out for you in Paragraph 26 (2).

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 suspended for a specified period of two years and you may not practise as a social care worker during the period 11 December 2017 to 10 December 2019 inclusive.

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.

Early Review

The Fitness to Practise Committee may, at your request, review the Order before the end of the period for which the suspension has been imposed if there has been a material change of circumstances since the Order was imposed. The Committee may, after reviewing a Suspension Order, revoke that Order or replace that Order with a Conditions of Practice Order.

Review at Conclusion of Sanction

A review of your fitness to practise will be undertaken towards the end of the period for which the Suspension Order has been imposed. The Council will write to you no later than 12 weeks before the expiry of the Order to invite you to submit any information or documentation which you would like to have considered as part of the

review process. The review will consider the particular concerns which have been outlined above by the Fitness to Practise Committee, and will seek to ascertain what remedial steps you have taken during the period of your suspension.

Following the Council's review, the matter may be referred for review by the Fitness to Practise Committee. If the Committee reviews the Order and it is satisfied that your fitness to practise remains impaired, it may impose a further Order to commence upon expiry of the existing Order, or it may impose a Conditions of Practice Order to commence upon expiry of the existing Order, or it may vary the terms of the existing Order, or it may revoke the existing Order and impose a Removal Order.

M. Stewart

Clerk to the Fitness to Practise Committee

15 December 2017

Date