CO/4354/2016

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Tuesday, 7 March 2017

B e f o r e:

MR JUSTICE GARNHAM

Between:

PROFESSIONAL STANDARDS AUTHORITY FOR HEALTH AND SOCIAL CARE
Appellant

v

NURSING AND MIDWIFERY COUNCIL
First Respondent

PHILOMENA JUDGE
Second Respondent

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(Official Shorthand Writers to the Court)

Mr P Mant (instructed by Capsticks) appeared on behalf of the **Appellant**
Ms H Fleck (instructed by the Nursing and Midwifery Council) appeared on behalf of the **First Respondent**
Ms C Binding (instructed by the Royal College of Nursing) appeared on behalf of the **Second Respondent**

J U D G M E N T
(Approved)

MR JUSTICE GARNHAM:

Introduction

1. The Professional Standards Authority for Health and Social Care (hereafter "the PSA") is a body corporate created by section 25 of the National Health Service Reform and Health Care Professions Act 2002, as amended. Its statutory functions include promoting the interests of patients in relation to the performance, by the Nursing and Midwifery Council ("NMC"), of its functions. The NMC is a body corporate recognised in The Nursing and Midwifery Order 2001 (2002/253). The functions of the NMC include the establishment and maintenance of standards of conduct and performance for nurses and midwives. Ms Philomena Judge (hereafter "the Registrant") is a nurse registered by the NMC.

2. On 20 April 2016, a conduct and competence committee of the NMC commenced a hearing into allegations of misconduct against the Registrant. Those proceedings were concluded on 23 June 2016 when the committee suspended her from the register for a period of twelve months.

3. By this appeal, which is brought under section 29 of the 2002 Act, the PSA appeal against that decision to suspend the Registrant, contending that that sanction was insufficient for the protection of the public. That appeal is opposed by the Registrant who asserts that the sanction was within the range of reasonable sanctions open to the committee. The NMC appeared before me to indicate that they did not seek to uphold the decision of their committee.

The Statutory Scheme

4. There is a considerable measure of agreement as to the relevant statutory provisions.

5. Thus it is agreed that the decision to impose a suspension order against the Registrant was a "relevant decision" under section 29.1(i) of the 2002 Act. Pursuant to section 29(4) the PSA may refer a relevant decision to the High Court where it considers that "the decision is not sufficient (whether as to a finding or a penalty or both) for the protection of the public". Section 29(4A) provides that:

> "(4A) Consideration of whether a decision is sufficient for the protection of the public involves consideration of whether it is sufficient-
>
> (a) to protect the health, safety and well-being of the public;
>
> (b) to maintain public confidence in the profession concerned; and
>
> (c) to maintain proper professional standards and conduct for members of that profession."

6. Pursuant to section 29(7), where a case is referred to the High Court under section 29(4) it is to be treated as an appeal and accordingly CPR 52 applies. It follows that the court should allow an appeal where the decision was "wrong" or unjust because of a serious procedural irregularity.

7. Section 29(8) makes provision for the court's powers on hearing the appeal. The court may dismiss the appeal, allow it and quash the relevant decision, substitute any other decisions for the relevant decision or remit the case to the committee to dispose of in accordance with the directions of the court.

8. The Court of Appeal considered what criteria were to be applied by the court when deciding whether a relevant decision was "wrong" in the case of Ruscillo v Council for Regulation of Health Care Professionals [2004] EWCA Civ 1356. The court held that the statutory test to be applied by the Authority in deciding whether to refer a case to the court, namely, whether the relevant decision was unduly lenient, should also be the criteria adopted by the court in determining the appeal. The statutory test is no longer "undue leniency" but is "insufficiency", but I accept the submission advanced by both principal parties that the approach of this court should be the same as that indicated in Ruscillo. At paragraph 73 in that case the court said this:

> "The task of the disciplinary tribunal is to consider whether the relevant facts demonstrate that the practitioner has been guilty of the defined professional misconduct that gives rise to the right or duty to impose a penalty and, where they do, to impose the penalty that is appropriate, having regard to the safety of the public and the reputation of the profession. The role of the court when a case is referred is to consider whether the disciplinary tribunal has properly performed that task so as to reach a correct decision as to the imposition of a penalty. Is that any different from the role of the council in considering whether a relevant decision has been 'unduly lenient'? We do not consider that it is. The test of undue leniency in this context must, we think, involve considering whether, having regard to the material facts, the decision reached has due regard for the safety of the public and the reputation of the profession."

The Facts of the Case

9. In October 2013, the Registrant was employed on the Campion Unit at Prospect Park Hospital in Berkshire. She had worked there since 2003. That unit is a short-term assessment and treatment service for adults with learning difficulties who also have mental illness or present serious behavioural challenges. Patient A was a patient at the unit. He had been diagnosed with autistic spectrum disorder, severe mental impairment and challenging behaviour.

10. It was alleged before the committee that the Registrant had been seen "poking" Patient A four or five times in the chest and hitting him on the side of the head with a broom or mop handle. It was also alleged that the Registrant had "cuffed" Patient A around the head with her hand. It was said that she had been seen brandishing a mop handle close to Patient A's head. When another person entered the room, it was said, the Registrant stopped brandishing the mop handle and put it down. But after the man left the room, it was said, she picked up the mop and continued to brandish it, striking Patient A two or three times on the head. It was said that Patient A became increasing distressed.

11. The charge brought by the NMC against the Registrant asserted that she had inappropriately used a mop or broom or brush handle in the course of providing care to Patient A, on one or more occasions had struck Patient A with the handle and had, in addition, struck him with her hand. As regards the first of those charges the NMC clarified to the committee that its case was that the Registrant's conduct was "deliberate and malicious".

12. The Registrant disputed all heads of charge, claiming at one stage that she used a broom to place a pillow behind Patient A's head because she did not want to get too close to him, on another occasion that she was sweeping up toys as a distraction and that the broom may have made contact with Patient A accidentally, and on a third occasion that she touched Patient A's head to calm him or to straighten his protective hat.

13. The hearing before the committee lasted from 20 to 22 April 2016 when findings of fact were made. The case was then adjourned. On 22 June, the committee addressed the questions of misconduct and impairment. The following day the panel reached its decision on sanction.

14. The committee found all heads of charge proved. It expressly accepted the NMC's case, noting in particular that it found that the actions of the Registrant were deliberate and emotionally abusive. The panel held that the Registrant's actions amounted to misconduct noting that they involved emotional distress to an extremely vulnerable patient. Although the committee accepted that there was no intent to cause physical harm, it concluded that the Registrant's actions were deliberate and known by her to be the type of abusive actions that would cause distress and emotional harm.

15. On the question of impairment the committee noted that some weeks had passed since the fact finding hearing but there had been no meaningful reflection by the Registrant either as regards the consequence of her actions or what she might do differently in the future. The panel concluded there was no real insight, remorse or remediation and there was a risk of repetition.

16. In reaching its conclusion on sanction the panel identified the following aggravating factors: first, Patient A was very vulnerable and unable to raise concerns about the abuse he suffered; second, the Registrant struck Patient A despite there being clear signs of distress; third, they referred to her use of the broom handle to strike Patient A as being repeated; fourth, they said she had shown no meaningful element of insight, remorse or remediation; fifth, they said that as an experienced nurse she ought to have known that her actions would have caused distress and emotional harm to Patient A and thereby constituted abuse; and, finally, they said she had demonstrated a lack of insight.

17. By way of what they called mitigation, the panel noted that the Registrant had no previous referrals to the NMC, the committee had no information about any other issues raised in respect of her practice; the events in question occurred on a single occasion involving a single patient; there was no physical harm to Patient A; the Registrant had thirty years of previously unblemished service; and she had engaged with the NMC process and given oral evidence before the committee.

18. The committee rejected both a caution and conditions as appropriate sanctions. The panel then turned to consider whether suspension would be appropriate. It referred to paragraph 67 of the NMC's indicative sanctions guidance and said this:

> "The panel was troubled by the manner in which you gave oral evidence, not least because it could not ascertain from your limited responses whether you had any real understanding as to the consequences of your actions. Since the panel had no evidence which might explain your apparent detached manner when giving oral evidence, it decided to resolve this issue in your favour i.e. that it could not conclude that there was evidence of a harmful deep-seated attitudinal problem."

19. The panel went on to say that a nurse with the Registrant's extensive experience "should have" the potential to develop insight and take practical steps to re-establish professional integrity. The committee indicated that a suspension would provide public protection and would mark the seriousness of the misconduct such that the public interest would also be satisfied.

20. The committee indicated that it had deliberated at length as to whether a striking-off order would be proportionate. In that regard the panel said this:

> "The panel has shown that it considers your conduct to have been fundamentally unacceptable and of such a gravity that barring considerations such as we have identified, the sanction of striking-off was properly available to it. Indeed, you should know that the panel gave very serious consideration to imposing such an order in your case. However the panel recognised that you have had thirty years of unblemished service; that you have provided supportive testimonials of your nursing practice at the time, and you have shown commitment to wishing to continue working with patients with learning difficulties and challenging behaviour. Taking these considerations in account, together with those already expressed in connection with the suspension order, the panel concluded that a striking-off order would be marginally disproportionate in your case."

The Arguments

21. I had the benefit of detailed skeleton arguments from Mr Peter Mant, Counsel for the Appellants and from Ms Chloe Binding, Counsel for The Registrant. I also heard oral submissions from both those counsel. I also heard very brief submissions from Ms Helen Fleck, Counsel for the NMC. I record here my gratitude to all three counsel.

22. Mr Mant advanced seven grounds of appeal on the PSA's behalf. First, he said that the Registrant's conduct had been fundamentally incompatible with continued registration. Second, he said that the committee failed to have due regard to the public interest in declaring and upholding standards and maintaining public confidence in the profession. Third, he argued that the committee had failed to consider and have adequate regard to all relevant parts of the indicative sanctions guidance. Fourth, he said that the committee's finding that it could not conclude that there was evidence of a harmful deep-seated

attitudinal problem was perverse. Fifth, he maintained that the conclusion that the Registrant should have the potential to develop insight was illogical and had no grounding in the evidence. Sixth, he said that the panel erred in its approach to the aggravating and mitigating factors. Finally, he argued that the panel failed to give adequate reasons for its decision in relation to the matters set out in the other grounds.

23. In response Ms Binding argued that, although the conduct established by the committee represented a very serious departure from professional standards and could properly be seen as offending against the core values of the profession, striking-off was not the only sanction that could reasonably have been imposed. Second, Ms Binding argued that although the aggravating factors identified by the committee did increase the seriousness of the Registrant's conduct the committee was entitled to find that her behaviour had not been consciously designed to cause physical harm. She pointed out that the force of the blows had been described by witnesses as appearing to be "moderate" or "quite minimal".

24. Third, she argued in her skeleton that the committee was entitled to say that they could not conclude that there was evidence of deep-seated attitudinal problems. The Registrant's intention had not been to cause physical harm and the conduct had been entirely out of character in the context of a thirty year unblemished career. Ms Binding relied on R (Onwuelo) v GMC [2006] EWHC 2739 (Admin) for the proposition that the fact that the Registrant's account on the facts was rejected by the committee was not to be regarded as an aggravating factor as regards sanction. Nor, she said, is it of itself an indicator as to a profound lack of insight. She argued in her skeleton that the panel's conclusion that the Registrant should have the potential to develop insight in the future was entirely reasonable given her career and in the light of her oral evidence.

25. Next Ms Binding argued that that long career and the evidence attesting to the Registrant's positive qualities as a nurse were highly relevant to the choice of sanction. She points to the decision in Giele v GMC [2005] 4 All ER 1242 as support for the proposition that there was a significant public interest in enabling competent practitioners to continue in practice.

26. Next Ms Binding argued that the panel had a discretion as to how it applied indicative sanctions guidance and was entitled to approach each case on a fact specific basis. Although it was accepted that various factors listed in the guidance relating to striking-off were present in this case that did not make striking-off the only sanction a reasonable panel could impose. In Ms Binding's submission it could not be said that a suspension order was plainly wrong. Finally, Ms Binding says that the reasons that the panel gave were adequate given that it is clear why the committee reached the decision it did on the question of sanction.

Discussion

27. The test imposed by CPR52.l1 is a rigorous one. Establishing that a decision of a professional regulator, like the NMC, is "wrong" necessitates establishing that the decision was outside the range of sanctions that such a committee could reasonably consider appropriate. As Leveson J (as he then was) said in Council for the Regulation of Health Care Professionals v GMC and Solanke [2004] 1 WLR 2432 at paragraph 15

"different people might, perfectly legitimately, take a different view about the same conduct; provided that it is not outside the range of appropriate sanctions, it cannot be said to be "wrong"".

28. In Shaw and Turnbull v Logue [2014] EWHC 5 Jay J said that the court's function was:

> "to apply to it a strict yardstick; it is not to second-guess the [panel's] findings, or to substitute [its own] views for theirs even if, for example, [it was] of the opinion that the conclusions are probably wrong....'Plainly wrong' imports a high onus of persuasion, and for good reason: the reviewing Court does not see or hear the witnesses" (paragraph 213)

29. The court will, as a result, accord a significant margin of appreciation to a professional body, especially where that body has seen and heard witnesses. In Ruscillo, the Court of Appeal noted that "where all material evidence has been placed before a disciplinary tribunal and it has given due consideration to the relevant factors, the Council and the Court should place weight on the expertise brought to bear in evaluating how best the needs of the public and the profession should be protected."

30. I seek to approach the evidence in the present case on that basis.

31. The PSA argue that the high hurdle identified in Solanke and Roscillo is surmounted in the present case and that the conduct of the Registrant toward Patient A was fundamentally incompatible with being a nurse.

32. The NMC's indicative sanction guidance is, as Ms Bindings rightly submits, guidance rather than a direction. The conduct and competence committee retains a discretion as to the sanction it imposes in a particular case. But it must always have careful regard to the guidance and should follow it unless there are good reasons for not doing so. In my judgment, on the facts of this case, the guidance pointed very clearly towards the conclusion that suspension would be an inadequate sanction.

33. The panel concluded that the Registrant had used the mop/broom/brush handle inappropriately and went on to conclude that her actions had been deliberate and emotionally abusive. They found that on one or more occasions (and implicit in the panel's determination was that it had been on more than one occasion) the Registrant had struck Patient A with the handle. And they found that, in addition, the Registrant had struck the patient on the head with her hand.

34. Particularly disturbing, in my judgment, were two findings of the committee. First, that the Registrant's actions as recorded in the first charge had been carried out "in the knowledge that it was likely to significantly increase Patient A's level of distress and agitation" and, second, (and this was implicit rather than explicit in the panel's reasoning) that the Registrant had stopped her behaviour when another member of staff entered the room but recommenced it when he left.

35. In my judgment, for a nurse repeatedly to strike a vulnerable patient, especially in the knowledge that her conduct was likely to increase the patient's distress, constituted a serious departure from the relevant professional standards. Paragraph 71.1 of the

guidance therefore applies. That conduct involved the Registrant doing harm to the patient, harm to his mental state; accordingly paragraph 71.2 applied. Her conduct amounted to an abuse of trust and an abuse of position, so 71.3 applied. And it constituted violent conduct, so 71.5 applied.

36. The panel also concluded that despite the delay between the fact-finding hearing and the impairment and sanctions hearing the Registrant had shown no insight into her behaviour. Accordingly, in my judgment, paragraph 71.7, which deals with persistent lack of insight into the seriousness of the consequences of a nurse's actions, also applied.

37. In the light of those conclusions it seems to me impossible sensibly to conclude that any reasonable panel could decide other than that the Registrant's conduct was fundamentally incompatible with continued registration.

38. There was, on the committee's own findings, a significant risk of the Registrant repeating this behaviour. The panel concluded in its decision on impairment that it "could not therefore be satisfied that your behaviour would not be repeated." Given that finding and the other matters mentioned above, in my judgment suspension was plainly inadequate.

39. Furthermore, I accept Mr Mant's argument that the finding that there was no evidence of a harmful deep-seated attitudinal problem was perverse. The mere fact of this deliberate abuse of a patient, without any adequate explanation, points plainly to such a conclusion. The absence of evidence to explain the Registrant's detached manner in giving evidence is nothing to the point. There was a wealth of evidence about her misconduct, on repeated occasion on 24 0ctober 2013; she had demonstrated no insight, no remorse and no remediation. There was a risk of repetition. That was more than sufficient, in my judgment, to lead to a conclusion that she had a deep-seated problem.

40. Furthermore, there was, in truth, no evidence, as opposed to unsupported wishful thinking, that given more time the Registrant might develop insight. The fact that she was a nurse of considerable unblemished experience does not assist the committee in that regard, in my view. There was in the Registrant's case no hard evidence at all that she would or might do so; by contrast there was evidence, in her response over the preceding two months, to support a conclusion that there was no sign of any such insight emerging.

41. I would also accept the submission of Mr Mant as to the committee's approach to mitigating factors. The committee referred to the absence of physical harm suffered by the patient and to the Registrant's co-operation with the Regulators as mitigating factors. But that is to mischaracterise those considerations. On proper analysis, they are simply the absence of what would otherwise be aggravating factors.

42. Furthermore, there was, as Mr Mant submitted, no mitigation which went to explain the actions of the Registrant; no factors were identified that went to her culpability for the conduct itself or that diminished the seriousness of her behaviour. There was personal mitigation, notably her long service without previous complaint, but that did not reduce the seriousness of her conduct on the day in question.

43. In his final ground of appeal Mr Mant points to the absence of reasons for the panel's decision. In my judgment - and I apprehend Mr Mant recognised this - on the facts of this case, that ground adds nothing to the case. The panel has set out its reasoning and for the reasons set out above I have concluded that those reasons do not justify its conclusions.

44. It follows that this appeal must succeed. In my judgment, (although I will hear counsel on this, but certainly my preliminary judgment is that) the appropriate order for me to make is to quash the relevant decision and substitute for it an order that the Registrant's name be struck-off the register.

45. Mr Mant?

46. MR MANT: I am grateful, my Lord. Certainly that is the order that the PSA would seek. In light of your findings, it seems inevitable that that is the order that should be made.

47. MS FLECK: My Lord, I agree, and that was what Ms Hennessy would have signed as a consent order.

48. MS BINDING: No submissions, thank you.

49. MR JUSTICE GARNHAM: Then I make that order.

50. MR MANT: Thank you, my Lord. The Authority also seeks its costs. Do you have a copy of our schedule?

51. MR JUSTICE GARNHAM: Conceivably. I cannot say I have focused any attention on it. Yes, I have it, thank you.

52. MR MANT: We submit that costs should follow the event. It is a matter for you as to how they should be apportioned between the two respondents.

53. MR JUSTICE GARNHAM: Is the figure that I see on the fourth page, the £16,000 figure, the total?

54. MR MANT: Yes, that is the total. We have provided a breakdown at the back of the costs up to 14 October, that is when the NMC conceded, and the costs after that date. My Lord, it is a matter for you but one approach would be to award costs against the NMC up to that date and then against the Registrant from that date.

55. MS FLECK: My Lord, that certainly is what the NMC would invite your Lordship to do. Of course, there are problems with the panel's decision, as your Lordship has found, the NMC took prompt steps to recognise that, and on 30 September, following advice, communicated that by letter in an email both to the PSA and to the second respondent putting them on notice that this would be our position and that we would submit that any further costs thereafter were effectively caused by their position and in the circumstances I would invite you to conclude that that is a reasonable apportionment.

56. MR JUSTICE GARNHAM: What do you say about the quantum of the costs?

57. MS FLECK: My Lord, I have nothing to say about the quantum of the costs.

58. MR JUSTICE GARNHAM: Ms Binding?

59. MS BINDING: My Lord, only to address you on quantum and the different between the costs of the PSA and the costs incurred by the Royal College of Nursing, the first figure being £16,337 and the second figure being £3,882, there is obviously quite a large difference even taking into account that fact that the PSA had to read the papers and anew and to prepare the bundles. That is all that I wish to say on apportionment.

60. MR JUSTICE GARNHAM: What about the breakdown between you and the NMC?

61. MS BINDING: As to the breakdown, the submissions of my learned friend seem entirely reasonable.

62. MR JUSTICE GARNHAM: I am going to try, Mr Mant, to avoid any jokes about how much more enthusiastic I would be about your costs if I had been provided with a paginated bundle with dividers in it. I suspect from the way that your instructing solicitor shakes her head that the failure was not entirely hers and that it happened somewhere between her and me.

63. MR MANT: She has actually asked me specifically to apologise on behalf of Capsticks. I think it was actually some sort of IT glitch because you will see that there should have been a page number in the corner but there is no excuse.

64. MR JUSTICE GARNHAM: Also the dividers, I shall not tell you the views I expressed about Capsticks at about 5.00 pm yesterday evening but there we are, as I said I will not allow that to influence me at all. The costs are quite high. They are notably higher than those that the NMC incurred, even allowing for the fact that you had rather more work to do than they did.

65. MR MANT: My Lord, it is certainly the case that what you --

66. MR JUSTICE GARNHAM: I actually interrupt myself and say that you are inviting me to assess these summarily, are you not?

67. MR MANT: Yes, I am, my Lord.

68. MR JUSTICE GARNHAM: And there is no objection from anybody that I do that?

69. MS FLECK: No, my Lord.

70. MR MANT: What you see in the bundle is very much a pared down version of what we had to go through, all the transcripts and the other documents. In addition to that, the PSA's procedures, which are necessary to fulfil their statutory functions, include a case meeting before a decision is made to refer, then there is the drafting of the grounds and then you have the skeleton argument and of course the hearing. My Lord, unless I can assist by addressing you on any specific matters, those are the broad submissions that I make.

71. MR JUSTICE GARNHAM: I am just glancing through this to see if there is anything else I want to ask you.

(A short pause)

72. I will make an order for costs to be paid by the NMC, the first respondent, to the appellant in the sum of £6,000 and from the second respondent to the appellant in the sum of £8,000.

73. MR MANT: Thank you, my Lord.

74. MR JUSTICE GARNHAM: Thank you all very much for your help and thank you in particular for the economy of your submissions.