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

CO/2270/2017

[2017] EWHC 3573 (Admin)

Royal Courts of Justice
Wednesday, 29th November 2017

Before:

MRS JUSTICE O'FARRELL

B E T W E E N :

PROFESSIONAL STANDARDS AUTHORITY
FOR HEALTH & SOCIAL CARE — Applicant

- and -

NURSING & MIDWIFERY COUNCIL — First Respondent

- and -

JOE APEANING — Second Respondent

J U D G M E N T

A P P E A R A N C E S

MR D BRADLEY (instructed by Weightmans LLP) appeared on behalf of the Applicant.

MR C SCOTT appeared on behalf of the First Respondent.

MISS N MAQBOUL (instructed by the Royal College of Nursing) appeared on behalf of the Second Respondent.

This transcript has been prepared without access to all documentation

MRS JUSTICE O'FARRELL:

1 In this matter the Professional Standards Authority for Health and Social Care ("PSA") appeals under s.29 of the National Health Service Reform & Healthcare Professions Act 2002 against the decision by the Conduct & Competence Committee of the Nursing & Midwifery Council (the "Committee") dated 21st March 2017 that the Second Respondent, Mr Apeaning, a registered nurse, was guilty of misconduct but that his fitness to practise as a nurse was not thereby impaired on the ground that the Committee's decision is not sufficient to maintain proper professional standards and conduct for members of the profession.

2 The First Respondent, the NMC, has conceded the appeal. Mr Apeaning opposes the appeal on the ground that the Committee was correct to find that his fitness to practise is not currently impaired and that a finding of impairment was not necessary to protect the public interest, maintain public confidence in the profession and to maintain and uphold proper standards of behaviour from members of the profession.

3 The relevant background facts are as follows. Mr Apeaning has been a registered nurse since 2011. In 2015 he was Acting Charge Nurse on Hulton Ward at The Spinney Hospital, a psychiatric intensive care unit for patients detained under the Mental Health Act with acute psychosis or for those in an acutely disturbed phase of a mental disorder.

4 On 29th April 2015, Mr Apeaning secluded a patient, Patient D, without the criteria for doing so having been met. On 22nd May 2015, Mr Apeaning terminated Patient A's seclusion without conducting a risk assessment or documenting sufficient reasons for so doing.

5 As a result of these incidents on 10th June 2015 Mr Apeaning was subject to a disciplinary procedure Stage One informal discussion. The subject was failure to comply with hospital policy in relation to care of patients in seclusion and longer term segregation. The improvements sought were for Mr Apeaning to refresh himself again on the hospital policy in relation to care of patients in seclusion and longer term segregation and any further omissions regarding failure to comply with this policy will result in disciplinary proceedings.

6 On 20th June 2015 Mr Apeaning failed to notify the doctor on call that Patient E, who was in seclusion and whose care plan required two such reviews in 24 hours, required a medical review.

7 On 26th June 2015 Patient A and Patient B were suspected of being in possession of cannabis. Patient A was admitted to The Spinney from another facility having set fire to his bedroom on two occasions. He had a diagnosis of psychotic illness and substance misuse. He presented as aggressive and intimidating to the other patients. He smoked on the ward and had threatened to burn the hospital down. Patient B had been admitted from an acute ward in another facility due to the risk of absconding and was diagnosed with paranoid schizophrenia.

8 Mr Apeaning subjected Patients A and B to removal of clothing searches. The searches were not authorised; were not conducted in accordance with the unit's policy for searches; they were not proportionate; they were not conducted in a manner which was consistent with the patient's dignity and privacy. Mr Apeaning required a junior colleague to watch whilst each patient provided a urine sample. Both patients were required to remove all of their clothing at the same time and were instructed to squat whilst naked. Mr Apeaning interrogated Patient B whilst Patient B was naked and required his junior colleague to touch Patient A's testicles.

9 Following this incident Mr Apeaning was subject to an investigation hearing three days later on 29th June 2015. What followed from that was an internal disciplinary hearing which took place on 7th July 2015.

10 On 8th July 2015, as a result of that disciplinary hearing, Mr Apeaning was given notice of dismissal from employment. He appealed against that dismissal. However, on 24th August 2015 a letter notifying him that his dismissal had been upheld was sent.

11 The following allegations were made in respect of Mr Apeaning's conduct for the purpose of the Committee's substantive hearing, which took place between 23rd and 27th January 2017. Charge 1 was as follows:

> "On 26th June 2015 Mr Apeaning's actions in relation to Patient A were inappropriate in that he:
>
> (1) did not obtain the necessary authorisation from the senior manager to perform a removal of clothing search;

(2) instructed Colleague A to watch Patient A whilst he provided a urine sample;

(3) performed a removal of clothing search when it was not proportionate to do so;

(4) instructed Patient A to squat whilst naked;

(5) allowed Patient A to be completely naked;

(6) instructed Colleague A to touch Patient A's testicles".

12 Charge 2 was as follows:

"On 26th June 2015 Mr Apeaning's actions in relation to Patient B were inappropriate in that he:

(1) did not obtain the necessary authorisation from the senior manager to perform a removal of clothing search;

(2) instructed Colleague A to watch Patient B whilst he provided a urine sample;

(3) performed a removal of clothing search when it was not proportionate to do so; (4) instructed Patient B to squat whilst naked;

(5) allowed Patient B to be completely naked; and

(6) interrogated Patient B whilst he was naked."

13 Charge 3 was that:

"On 10th April 2015 Mr Apeaning's actions in relation to Patient C were inappropriate in that he:

(1) secluded Patient C when it was not necessary to do so;

(2) failed to record the seclusion in Patient C's clinical notes; failed to record the start time of the seclusion;

(3) failed to open a seclusion recording form;

(4) failed to complete the seclusion register;

(5) failed to conduct any reviews; and

(6) failed to complete the seclusion pack."

14 Charge 4 was that:

"On 29th April 2015 Mr Apeaning's actions in relation to Patient D were inappropriate in that he:

(1) secluded Patient D when seclusion was not clinically indicated; and

(2) failed to adequately record in Patient these clinical notes the reasons for seclusion."

15 Charge 5 was that:

"On 22nd May 2015, Mr Apeaning's actions in relation to Patient A were inadequate in that he:

(1) failed to record sufficient reasons for terminating Patient A's seclusion; and

(2) did not carry out a risk assessment on Patient A prior to terminating his solution."

16 Charge 6 was that:

"On 20th June 2015 Mr Apeaning failed to notify the doctor on call that Patient E required a medical review whilst Patient E was in seclusion."

17 There was a seventh charge but at the outset of the hearing the Committee determined that it should be dismissed.

18 Mr Apeaning admitted Charges 4, 5 and 6 and disputed Charges 1 and 2. Following a hearing of the evidence the Committee found that the allegation at Charge 3 was not proved. The Committee found that the allegations in relation to Charges 1 and 2 were proved and that the allegations in relation to Charges 4, 5 and 6 were proved by admission.

19 Following those findings of fact the Committee adjourned the hearing and resumed on 20th March 2017 and 21st March 2017 where it considered whether misconduct had been established by reason of the facts proved and whether or not that misconduct gave rise to an impairment of fitness to practise.

20 The Committee found that the facts proved amounted to misconduct, in large part by reference to the findings themselves against the fact that it meant that provisions of the relevant Codes of

Practice were breached. The Committee concluded that Mr Apeaning's conduct fell short of what was proper in the circumstances and was sufficiently serious so that it amounted to misconduct.

21 The Tribunal then went on to consider whether, as a result of that misconduct, Mr Apeaning's fitness to practise was currently impaired. The Committee took into account additional evidence produced by Mr Apeaning, including oral testimony from him and from a line manager, a range of testimonials as to his competence, and his written statement reflecting on his conduct. As a result of those matters the Committee stated as follows:

> "The panel is of the view that you have demonstrated a sufficient level of insight in that you have fully accepted your failings and acknowledge the implications of your failings.
> The panel considered that you have sufficiently reflected upon your actions and the impact these may have had on residents and colleagues, the reputation of the profession and the NMC as its regulator.
> The panel acknowledge that you have practised without incident since the events and that no other concerns have been raised regarding your clinical or professional conduct.
> You have the support of your current employer who, following your work there as an agency nurse, employed you on a permanent basis, knowing of the allegations against you.
> There is no evidence of a pattern of the conduct found proven, nor of any attitudinal issues.
> The panel is confident that this misconduct is highly unlikely to be repeated.
> The panel determined that you have taken full responsibility for your failings and have fully demonstrated the steps which you have taken to remediate your misconduct.
> The panel considered that you have demonstrated a genuine passion and commitment to the nursing profession and note that there is no evidence before it to suggest that you were anything other than an otherwise competent and dedicated nurse.
> The panel concluded that there was sufficient evidence that, you have fully remediated your misconduct.

Given the large amount of persuasive evidence supplied by you to the panel, it is satisfied that you have fully remediated the failings in your practice.
The panel has therefore concluded that you are not liable in the future to act so as to put patients at unwarranted risk of harm.
The panel finds that prior to working at the hospital and the home your practice had been exemplary and the references indicate that you have returned to that high standard.
The panel therefore concluded that your practice is not currently impaired on the grounds of public protection".

22 The Committee then went on to consider the public interest issue.

"Having considered public protection, the panel next went on to consider whether it was necessary to mark your conduct by a finding of impairment on the grounds that it was necessary to maintain confidence in the profession and the upholding and maintenance of proper conduct and behaviour.
The panel has carefully considered the public interest in this case, given the consequences of your misconduct. It concluded that it would not be appropriate to find impairment solely on a public interest basis. Public confidence in the profession would not be undermined by a finding of no impairment, given the particular circumstances of this case which reflects your insight, the remediation of your failings and the fact that you do not pose an ongoing risk to the public.
The panel has therefore found that your fitness to practise is not currently impaired on wider public interest grounds".

23 There is a large measure of agreement between the parties as to the relevant legal framework and the legal principles to be applied in this case. I am very grateful to counsel for their very clear and concise skeleton arguments and arguments before the court today.

24 The starting point is s.29 of the National Health Service Reform Healthcare Professions Act 2002.

“Section 29(1) provides that the section applies to
... (j) any corresponding measure taken in relation to a nurse or midwife …

(2) This section also applies to:

(a) a final decision of the relevant committee not to take any disciplinary measure under the provision referred to in whichever of paragraphs (a) to (h) of sub-section (1) applies;

(b) any corresponding decision taken in relation to a nurse, midwife or health visitor under the Nursing & Midwifery Order 2001, or to any such person as is mentioned in sub-section (1)(j)

…

(4) Where a relevant decision is made the authority may refer the case to the relevant court if it considers that the decision is not sufficient whether as to a finding or a penalty or both for the protection of the public.

(a) 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 the members of that profession.

…

(7) If the Authority does so refer a case

(a) the case is to be treated by the court to which it has been referred as an appeal by the Authority against the relevant decision ….

(8) The court may:

(a) dismiss the appeal;

(b) allow the appeal and quash the relevant decision;

(c) substitute for the relevant decision any other decision which could have been made by the committee; and

(d) remit the case to the committee or other person concerned to dispose of the case in accordance with the directions of the court, and may make such order as to costs as it thinks fit for it".

25 Part V of the Fitness to Practise part of the relevant order provides at Article 22 that,

"(1) This article applies where any allegation is made against a registrant to the effect that:

(a) his fitness to practise is impaired by reason of:

(i) misconduct ..."

26 Article 29 provides that,

"If, having considered an allegation, the Health Committee … concludes that it is not well founded:

(a) where requested to do so by the person concerned, it shall make a declaration to that effect giving its reasons; and

(b) in any other case and with the consent of the person concerned may make such a declaration."

27 Article 29(3) provides that,

"If, having considered an allegation, the Health Committee … concludes that it is well founded, it shall proceed in accordance with the remaining provisions of this article".

28 Article 29(4) provides,

"The Committee may:

(a) refer the matter to Screeners for mediation or itself undertake mediation; or

(b) decide that it is not appropriate to take any further action".

29 Article 29(5) provides,

"Where a case does not fall within para. 4, the Committee shall:

(a) make an order directing the Registrar to strike the person concerned off the register;

(b) make an order directing the Registrar to suspend the registration of the person concerned for a specified period which shall not exceed one year;

(c) make an order imposing conditions with which the person concerned must comply for a specified period which shall not exceed three years; and

(d) caution the person concerned …"

30 The approach to the court in respect of appeals of this nature has been authoritatively set out in the case of Dr Giuseppe Ruscillo v The Council for the Regulation of Healthcare Professionals [2004] EWCA Civ 1356 in which Lord Phillips, MR set out the following guidance at para.52 through to para.78 including at para.71,

> "If the court decides that the decision as to a penalty was 'wrong', it must allow the appeal and quash the relevant decision in accordance with CPR 52.11(3)(a) and s.28(8)(b) of the Act. It can then substitute its own decision under s.29(8)(c) or remit the case under s.29(8)(d).
>
> 73. What are the criteria to be applied by the Court when deciding whether a relevant decision was 'wrong'? 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 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...
>
> 78 The question was raised in argument as to the extent to which the Council and the Court should defer to the expertise of the disciplinary tribunal. The expertise is one of the most cogent arguments for self-regulation. At the same time Part 2 of the Act has been introduced because of the concern as to the reliability of self-regulation. Where all material evidence has been placed before the 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. Where, however, there has been a failure of process, or evidence is taken into taken into account on appeal that was not placed before the disciplinary tribunal, the decision reached by that tribunal will inevitably need to be reassessed".

31 More recently, that approach has been re-affirmed by the Court of Appeal in the case of General Medical Council v Dr Nilesh Pravin Jagjivan [2017] EWHC 1247 in which Lady Justice Sharp summed up the approach in cases such as these at para.40 where she stated,

"In summary:

(i) Proceedings under section 40A of the 1983 Act are appeals and are governed by CPR Part 52. A court will allow an appeal under CPR Part 52.21(3) if it is 'wrong' or 'unjust because of a serious procedural or other irregularity in the proceedings in the lower court';

(ii) It is not appropriate to add any qualification to the test in CPR Part 52 that decisions are 'clearly wrong';

(iii) The court will correct material errors of fact and of law. Any appeal court must however be extremely cautious about upsetting a conclusion of primary fact, particularly where the findings depend upon the assessment of the credibility of the witnesses, who the Tribunal, unlike the appellate court, has had the advantage of seeing and hearing;

(iv) When the question is what inferences are to be drawn from specific facts, an appellate court is under less of a disadvantage. The court may draw any inferences of fact which it considers are justified on the evidence;

(v) In regulatory proceedings the appellate court will not have the professional expertise of the Tribunal of fact. As a consequence, the appellate court will approach tribunal determinations about whether conduct is serious misconduct or impairs a person's fitness to practise and what is necessary to maintain public confidence and proper standards in the profession and sanctions with diffidence;

(vi) However there may be matters, such as dishonesty or sexual misconduct, where the court 'is likely to feel that it can assess what is needed to protect the public or maintain the reputation of the profession more easily for itself, and thus attach less weight to the expertise of the Tribunal …';

(vii) Matters of mitigation are likely to be of considerably less significance in regulatory proceedings than to a court imposing retributive justice, because the overarching concern of the professional regulator is the protection of the public; and (viii) a failure to provide adequate reasons may constitute a serious procedural irregularity which renders the Tribunal's decision unjust".

32. In General Medical Council v Meadow [2007] QB 462 the court identified three principles that must be borne in mind and to which weight should be attached, namely:

(i) the body from whom the appeal lies is a specialist tribunal whose understanding of what medical professions expect of its members in matters of medical practice deserve respect;
(ii) the tribunal had the benefit, which the Court normally does not, of hearing and seeing the witnesses on both sides; and
(iii) the questions of primary and secondary fact and the over-all value judgment to be made by a tribunal, especially the last, are akin to jury questions to which there may reasonably be different answers".

33. In Council for Healthcare Regulatory Excellence v Nursing & Midwifery Council & Paula Grant [2011] EWHC 927 Mrs Justice Cox considered the relevant regulatory framework and the test to be applied and stated the following at para.73,

> ""Sales. J also referred to the importance of the wider public interest in assessing fitness to practise in Yeong v GMC [2009] EWHC 1923, a case involving a doctor's sexual relationship with a patient. Pointing out that Cohen was concerned with misconduct by a doctor in the form of clinical errors and incompetence, where the question of remedial action taken by the doctor to address his areas of weakness may be highly relevant to the question whether his fitness to practise is currently impaired, Sales, J considered that the facts of Yeong merited a different approach. He upheld the submission of counsel for the GMC that:
>
> > "… Where a Fitness To Practise Panel considers that the case is one where the misconduct consists of violating such a fundamental role of the professional relationship between medical practitioner and patient and thereby undermining public confidence in the medical profession, a finding of impairment to fitness to practise may be justified on the grounds that it is necessary to reaffirm clear standards of professional conduct so as to maintain public confidence in the practitioner and in the profession. In such a case, the efforts made by the medical practitioner in question to address his behaviour for the future may carry very much less weight than in a case where the misconduct consists of clinical errors or incompetence.
>
> 74. I agree with that analysis and I would add this. In determining whether a practitioner's fitness to practise is impaired by reason of misconduct the

relevant panel should generally consider not only whether the practitioner continues to present a risk to members of the public in his or her current role, but also whether the need to uphold proper professional standards and public confidence in the profession would be undermined if a finding of impairment were not made in the particular circumstances.

75. I regard that as an important consideration in cases involving fitness to practise proceedings before the NMC where, unlike such proceedings before the General Medical Council, there is no power under the rules to issue a warning if the committee finds that fitness to practise is not impaired. Such a finding amounts to a complete acquittal, because there is no mechanism to mark cases were findings of misconduct have been made, even where that misconduct is serious and has persisted over a substantial period of time. In such circumstances the relevant panel should scrutinise the case with particular care before determining the issue of impairment.""

34. It was made clear before me by both counsel that it is not suggested that there should be anything other than a discrete exercise to determine impairment separate from that to determine misconduct. Mr Bradley, on behalf of the PSA, made it clear that he was not suggesting that a finding of impairment should be made simply so as to impose a penalty on the registrant. Each case is fact-specific but the wider public interest was one of the factors that should be taken into account.

35. Turning now to the grounds. The first ground is that the finding of the Committee regarding fitness to practise in this case was wrong because the Committee failed to identify and/or have adequate regard to the seriousness of Mr Apeaning's misconduct.

36. Mr Bradley, for the PSA, relies in particular on the following factors:

(a) Patients A, B, D and E were vulnerable patients in relation to whom the Second Respondent occupied a senior position of trust in which he was responsible for ensuring not just that those in his care were properly looked after, but for setting an example to junior colleagues on the ward.
(b) The misconduct in question extended beyond the searches of Patients A and B and to a series of failures in respect of the seclusion of three patients.

(c) In relation to Patients A and B the searches were not proportionate to the issue that was being addressed; they were performed in a manner which was not professional and that no professional could ever have considered to be acceptable.

(d) Despite the fact that he was Acting Charge Nurse, Mr Apeaning failed to comply with the code of practice for nurses and midwives, the employer's protocol manual for searching patients, and the code of practice under the Mental Health Act.

(f) The Committee heard, but in its determination as to misconduct impairment made no reference to, evidence of the way in which Mr Apeaning behaved during the searches, in particular by reference to his very abrupt and quite aggressive behaviour.

(g) The protocol and codes are designed to protect vulnerable patients, including as to their human rights and mental health and the conduct referred to in relation to the two searches of Patients A and B put those interests of risk.

(h) Mr Apeaning required junior staff to be involved in the misconduct.

(i) The searches of Patients A and B took place only sixteen days after Mr Apeaning had been subject to his employer's disciplinary procedure, the outcome of which included a requirement that he familiarise himself with the Code of Practice.

37. In summary, it is submitted by Mr Bradley that the conduct of Mr Apeaning was wholly inconsistent with a membership of the caring profession of nursing and that it demonstrated a problem of attitude by reason of the nature of his conduct toward Patients A and B and his disregard of important protocols and policies as to both searches and seclusion.

38. As against that, it is submitted by Miss Maqboul, on behalf of Mr Apeaning, that the Committee paid extensive regard to all of the evidence in the case and in so doing it was able to assess the seriousness of the issues before it and accordingly determined that Charges 1 and 2 were found proven and amounted to misconduct. In reaching its decision the Committee heard detailed information over six days and was able to perform a forensic analysis of both documentary and oral evidence. Examples that show the Committee actively carrying out its task appropriately were that it rejected a submission by Mr Apeaning's counsel at the close of the NMC's case that there was no case to answer. The Committee found that the witnesses called on behalf of the NMC were credible but that Colleague A's accounts in some respects were exaggerated, i.e. it did not fully accept all of his evidence.

39. The Committee found that Mr Apeaning had reasonable grounds to believe that a patient was in possession of a substance that could adversely affect the safety and security of themselves and

others, i.e. that there were reasonable grounds that gave rise to the circumstances in which the search was carried out. The Committee accepted Mr Apeaning's account of the events in respect of Patient C, the subject of Charge 3 that was found not proved.

40. It is submitted that the Committee gave clear and detailed reasons for its findings and demonstrated how it had assessed the level of seriousness of the Second Respondent's actions. The Committee paid due regard to the relevant Code for practice and behaviour for nurses and midwives, the Operational Policy for care of patients in seclusion, the Code of Practice for the Mental Health Act, The Spinney protocol manual for the searching of patients. The Committee was entitled, having considered all of those factors, to find that there was no impairment of Mr Apeaning's fitness to practise. The finding of misconduct adequately demonstrated the seriousness with which the Committee viewed Mr Apeaning's actions. It did not follow from that that his fitness to practise was automatically impaired or that any sanction was needed. It was not necessary for the Committee, having made detailed findings in relation to each charge, to repeat, with their reasons in relation to their findings of misconduct and their finding in respect of impairment, each and every aspect of the conduct of Mr Apeaning found to have fallen below expected standards, particularly when that was documented in detail at the facts stage. Finally, careful consideration was given to the tests laid out in Grant at the impairment stage. Clear and cogent reasons were given as to why the current impairment was not found.

41. In my judgment the Committee was wrong to find that Mr Apeaning's fitness to practise was not impaired by reason of the seriousness of his misconduct for the following reasons. Firstly, the patients concerned were very vulnerable individuals. Mr Apeaning occupied a senior position of trust. The patients suffered from serious mental health issues, such that they had been detained under the Mental Health Act or were otherwise considered suitable to be detained in a secure facility. They suffered from a disability at the time and the circumstances of their presence in the specialist unit required a very high standard of care and protection. The findings against Mr Apeaning constituted very significant failures on his part to protect and care for very vulnerable individuals.

42. Secondly, the breaches of protocol and the Codes of Practice were serious breaches. There were a number of incidents over a relatively short period of time in 2015. It is of note that the matters referred to in Charge 6 in relation to seclusion occurred after the disciplinary procedure in relation to Charges 4 and 5 took place and after Mr Apeaning had specifically been tasked with reconsidering and re-acquainting himself with the relevant protocols and Codes of Practice.

These were not isolated incidents. They demonstrate, in my judgment, that Mr Apeaning had a complete disregard for the applicable protocols and Codes of Practice that were applicable in this case.

43. Thirdly, Mr Apeaning's behaviour in relation to Patients A and B during the searches was a matter of great concern. He behaved in an abrupt and aggressive manner. He directed junior members of his staff to participate in inappropriate and intrusive searches. He showed a complete lack of compassion and care in relation to those affected patients. He acted in a manner that was wholly inconsistent with the nursing profession.

44. For those reasons, in my judgment, the Committee was wrong to find that there was no impairment in respect of his fitness to practise.

45. I now turn to Ground 2. Ground 2 is that the finding of the Committee in relation to the finding of impairment was wrong because the Committee failed to consider the impact on the public interest so as to maintain public confidence in the nursing profession in relation to Mr Apeaning's actions.

46. Mr Bradley's submissions in relation to this ground are, first of all, that:

(a) the Committee was wrong to find that the Second Respondent had been open and honest during the Committee's proceedings;
(b) the Committee failed to consider the impact upon the public interest of Mr Apeaning's denials, in particular of Charges 1 and 2, and his inconsistent evidence;
(c) the Committee failed to have regard to the relevant guidance of the NMC in relation to remediation and insight guidance; and
(d) the Committee was not in a position to find that Mr Apeaning demonstrated a sufficient level of insight into his conduct and had fully accepted and acknowledged the implications of his failings, fully remediated his conduct and was not liable to put patients at unwarranted risk of harm in the future.

47. In response. Miss Maqboul submits, first of all, that the Committee was entitled to find that Mr Apeaning was open and honest. They did not accept the entirety of the evidence against him as demonstrated by their comments in relation to Colleague A's evidence and also by reference to the fact that Ground 3 was not considered to be proved.

48. Secondly, the Committee had sufficient evidence before it to justify its finding that Mr Apeaning did have insight into his behaviour and that he had fully remediated his failings by reference to testimonial letters, training records, the evidence of his line manager, which demonstrated that he did not have any attitude issues, and to the reflective pieces of writing produced by Mr Apeaning for the purposes of the misconduct and impairment parts of the hearing.

49. The relevant guidance is that of the Remediation and Insight Guidance of the NMC. The following paragraphs are of particular relevance.

> " 7. At a substantial hearing or meeting the relevant panel must consider, in light of any of the facts found proven, whether the nurse's or midwife's fitness to practise is impaired…
> …
> 11. In considering impairment of fitness to practise it is fundamental that the decision-maker considers whether the nurse's fitness to practise is currently impaired. This must be a forward-looking exercise, although decision-makers should consider past events and behaviour, including the way in which the nurse concerned has acted or failed to act.
>
> 12. There are two key considerations for NMC decision-makers:
>
> (1) the NMC must protect the public. Appropriate action should be taken to restrict the registration of a nurse or midwife who presents a risk to the health, safety and/or welfare of the public; and
> (2) the NMC must act in the public interest, maintaining confidence in the professions and declaring and upholding proper standards of professional conduct.
>
> 13. It is urged that the NMC must adopt a fair and proportionate approach in assessing impairment of fitness to practise. ...
> …
> 15. The courts have been clear that when considering current impairment of fitness to practise decision-makers should remember that a finding of impairment serves an important purpose in marking the inappropriate nature of the nurse's behaviour,

declaring and upholding proper standards of professional conduct and maintaining confidence in the professions. ...

…

17. A finding of no impairment prevents the NMC from taking any further action to mark the nurse's behaviour, or otherwise act, to maintain confidence in the professions".

50. At 20.29, in terms of demonstrating insight, it is stated,

"Insight can include:

(1) the ability to step back from the situation and consider it objectively;

(2) recognising what went wrong;

(3) accepting their role and responsibilities at the material time;

(4) appreciating what could, and should, have been done differently; and

(5) understanding how to act differently in the future to avoid re-occurrence of similar problems. ...

…

31. Where a nurse denies the allegations made against them, including where they continued to do so after the findings of a panel, decision-makers should not automatically conclude that this prevents any insight being demonstrated. Whilst a nurse may fail to have insight into the particular incidents which occurred, they may be able to demonstrate some insight by showing an understanding of the need to take steps to minimise the risk of similar events occurring in the future and the steps that might be taken to achieve this….

…

33. All registered nurses must comply with the Duty of Candour which arises from the requirements set out in the Code of Ethics....

34. Compliance with this professional duty includes that nurses and midwives must

(1) be honest, open, and truthful in all their dealings with patients and the public...

36. Although decision-makers must always consider each case on its own facts and circumstances, the following non-exhaustive criteria can be taken into account when considering sufficiency of insight...

(2) Did the nurse accept the allegations against them when first raised by their employer? ...

(4) Did the nurse self-report to the NMC? ...

(5) Does the nurse admit the allegations against them and have they done so since an early stage in the proceedings?

(6) Has the nurse demonstrated insight from an early stage in the proceedings, including acceptance of responsibility for any failings or inappropriate behaviour; and

(7) Does the nurse acknowledge:

(i) the harm or risk of harm to patients;

(ii) the harm or risk of harm to the public confidence in the profession;

(iii) the extent to which their actions deviated from proper standards; and

(iv) their own responsibility for the incident problem without seeking to blame others or excuse their actions?

37. Decision-makers should be cautious before attaching weight to assertions of insight in cases where the nurse has, until recently, denied the allegations or failed to accept responsibility for their actions....

…

42. In connection with remedial steps, sufficient and appropriate remedial steps may include...

(3) successfully completing a period of supervised practice targeted at the concerns arising from the alleged behaviour…

…

46. A reflective piece of evidence provided by a nurse can be considered evidence although the decision-maker should consider at what stage in the proceedings it was produced."

51. In my judgment the Committee was wrong to find that Mr Apeaning's fitness to practise was not impaired based on consideration of issues of insight and remediation for the following reasons. First, it was simply not open to the Committee to find, as they did, that Mr Apeaning had been open and honest with them. Not only did he deny flatly the allegations set out in Charges 1 and 2 in relation to the inappropriate searches of Patients A and B, but he provided inconsistent and

evasive answers when first questioned about it, in later hearings and in the hearing before the Committee. More importantly, he blamed others. He blamed one of his colleagues in relation to the abuse of Patient A in touching his testicles. He also attempted to blame another colleague in relation to whether or not there was authority obtained for the relevant search. These were not just denials or putting the NMC to proof of the allegations; this was conduct that was simply dishonest.

52. Secondly, there was no adequate evidence of any real insight into the culpability of the behaviour on the part of Mr Apeaning, the impact of his behaviour on the patients, and on his need to demonstrate real change. There was evidence that no problems had arisen since these events in 2015. However, that in itself was not sufficient. What Mr Apeaning should have done was to demonstrate that serious steps had been taken to change his behaviour and that meant recognition that his attitude towards patients was something that needed remediation. There was no such evidence before the Committee. Therefore, they were not entitled to find that there had been complete remediation in respect of his failings in his practice. Despite the fact that there were testimonials indicating that he was dedicated to his profession and that his conduct was adequate between 2015 and 2017, there was no acceptance on his behalf of his responsibility for his conduct so as to reassure the Committee that there was no risk of repetition.

53. For those reasons I am satisfied that Ground 2 is made out, namely that the Committee did not have sufficient grounds on which to find that impairment was not necessary to be found so as to protect the public and maintain public confidence in the nursing profession.

54. I then turn to Ground 3. Ground 3 is that the Committee failed to give adequate reasons for deciding that Mr Apeaning's fitness to practise as a nurse was not impaired would satisfy the public interest. The finding amounts to a complete acquittal under the statutory scheme.

55. Mr Bradley's submissions were that the Committee failed to consider and give adequate reasons for its decision that there was no other impairment and as a result it is not automatic that the finding of misconduct will be published. The Committee had simply failed to consider the consequence for the public interest of the lack of publication and the fact that there would effectively not be even a caution in respect of Mr Apeaning's behaviour.

56. Miss Maqboul, in response, submitted that there was no positive obligation on the Committee to make explicit reference to each and every aspect of Mr Apeaning's conduct at every stage in the

proceedings. Sufficient regard was given to the public interest and the Committee concluded, on the last page of its decision, that public interest in the profession would not be undermined by a finding of no impairment, given the particular circumstances of this case which reflects insight, remediation of Mr Apeaning's and the fact that he did not pose an ongoing risk to the public. The Committee was in the best position to consider what was necessary to protect the public and the reputation of the profession, to assess the risk of repetition, the extent of insight and the expressions of remorse.

57. Given my findings in relation to Grounds 1 and 2 it is not necessary for this court to go on and consider Grounds 3. However, I should say at that if Ground 3 had been the only ground then I would not have been satisfied that that alone would have rendered the Committee's decision on fitness to practise wrong. The fact that the statutory scheme does not include the possibility of a caution or other sanction in circumstances where misconduct is found, but it is not considered that that misconduct gives rise to an impairment to fitness to practise, is best dealt with by changing the statutory regime. That alone would not justify a finding of impairment, i.e. solely so that the misconduct could be published and a caution or other sanction imposed.

58. However, because of my findings on Grounds 1 and 2 the outcome of that is that I am satisfied that the Committee's decision that Mr Apeaning's fitness to practise as a nurse is not impaired by reason of his misconduct is wrong. Therefore, I will allow the appeal and quash the decision of the Committee that the Second Respondent's fitness to practise is not impaired. I will substitute for that decision a finding that the Second Respondent's fitness to practise is impaired and remit the matter to a differently constituted panel of the Committee with a direction that it proceed pursuant to Articles 29(4) and (5) of the Nursing and Midwifery Order 2001.

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MR BRADLEY: My Lady, given your Ladyship's decision, I ask the court to provide that the Respondents pay the Appellant's costs of the appeal.

MRS JUSTICE O'FARRELL: Yes.

MR BRADLEY: My Lady, there are, of course, two Respondents and different approaches have been taken. The First Respondent conceded this appeal as early as 1st June 2017. That will impact upon quantum. I will return to quantum in a moment or after your Ladyship has

heard from my learned friends as to the principle. So far as the principle is concerned, the Appellant seeks its costs, but leaves it to your Ladyship to determine apportionment as between the two, having heard their submissions.

I said I would leave it until your your Ladyship comes to quantum. The costs as at 1st June 2017 were in fact only £4,627.92. So the remainder of the costs have been incurred after that concession. I just thought I would add that so that your Ladyship can see. The overall figure on the statement is £21,000. Before your Ladyship has to consider even the principle, your Ladyship might wish to be aware that that is the division.

Your Ladyship, as I say, will hear from my learned friends. However, may I just put this into your Ladyship's consideration of this: the appeal may become necessary because one party insists on having a hearing. Section 29 is the only way in which the Appellant, this Authority, can put decisions right. So, although there may be differences between them, the Authority is stuck with the whole costs bill. In those circumstances it needs to be met in a realistic fashion. So, if, for example, you were to hear that the Second Respondent cannot meet any order for costs, then the onus may need to fall on the First Respondent. I give your Ladyship that £4,000-odd figure because there is a very real desire to recognise that early concession from the regulator.

MRS JUSTICE O'FARRELL: Yes. Thank you. Mr Scott?

MR SCOTT: My Lady, it follows from that - again, no doubt you will be unsurprised to hear - the Council, as the First Respondent, certainly recognises the principle that the Appellant has succeeded and the costs follow the event. But, my Lady, the First Respondent has conceded from an early stage - I drew your Ladyship's attention to the letter of 1st June - and in my submission it appears from the figure that you have been given that a large part of the preparation and the costs that were incurred took place after that, as a result of the Second Respondent seeking to contest the appeal. The Council has taken a realistic approach on receipt of the Grounds which were provided in May and, at the first opportunity, in my submission, took the inevitable decision that this appeal must succeed. So, the costs, which I appreciate that the Authority has had to incur - because we have reached this position - should not fall on the Council which has done its utmost to minimise the work that was required.

MRS JUSTICE O'FARRELL: Yes.

MISS MAQBOUL: Your Ladyship, the Second Respondent takes no issue with the fact that costs follow the event. I suggest that the First Respondent ought to have at some liability as to

costs up until 1st June - that point at which the appeal was conceded on behalf of the First Respondent. I realistically must acknowledge, on behalf of the Second Respondent that costs will follow after 1st June, I suggest. I do wish to make some observations in terms of the quantum of costs, but in terms of the principle I make no further submissions.

MRS JUSTICE O'FARRELL: Yes. Is there anything that you want to say in response to that on the issue of principle first?

MR BRADLEY: No. No. I am very grateful. I do not need to say anything to that.

MRS JUSTICE O'FARRELL: In terms of the issue of principle what I am going to do is order the First Respondent to pay the Appellant's costs up to the date of concession. Remind me, what was the precise date? 1st June, 2017. Thereafter, the Second Respondent to pay the Appellant's costs of the appeal. I will summarily assess those now.

MR BRADLEY: Before your Ladyship hears any points in relation to that may I seek to assist with a breakdown of the costs now to be paid by the First Respondent?

MRS JUSTICE O'FARRELL: Yes. That would be helpful.

MR BRADLEY: It is not clear from the statement. It would be very difficult to know-- Solicitors costs. Of that £4,627.92 solicitors' costs are £1,481.60. Counsels' fees, which includes advising and the Grounds of Appeal - £2,175. The court fee - £240. The rest is made up by VAT in the sum of £731. When I explain counsels' fees to your Ladyship, advice and Grounds did not include the skeleton argument because in this case that was delayed pending the Respondents informing the Appellant as to what their position in the appeal would be.

MRS JUSTICE O'FARRELL: Yes. Mr Scott, do you have anything to say about the detail of the summary assessment?

MR SCOTT: My Lady, not a great deal. I had sought a further breakdown before today from the Appellant's solicitors so that I could take instructions on precise figures. I got the figure shortly before we returned after the lunchtime adjournment. There is not a great deal I can add, save to say that it appears on the figures to be reasonable. I do not have instructions to go further than that just at the moment.

MRS JUSTICE O'FARRELL: Yes. Miss Maqboul, in relation to the remaining costs?

MISS MAQBOUL: The only matter I would raise, your Ladyship, is the disparity between the Appellant's schedule of costs and those incurred on behalf of the Second Respondent.

MRS JUSTICE O'FARRELL: I do not actually have those. They may well have been filed. They just did not reach me.

MISS MAQBOUL: If it assists, the total figure for the Second Respondent is £5,283.12. Your Ladyship will see the total costs figure advanced on behalf of the Appellant. In my submission, there is quite some disparity even if you take into account the fact that the Appellant has had to read and prepare bundles and provide the court and all parties with those.

MRS JUSTICE O'FARRELL: Do you want to say anything in response?

MR BRADLEY: Yes, please. My Lady, disparity is not really an argument in this assessment, in my respectful submission. The Second Respondent has been able to do much of this work in-house and so is not in a position where external solicitors are being instructed. In my respectful submission, the disparity shows the savings to be achieved from that obviously very sensible arrangement. It is not anything other than a reflection of the different approaches in my submission, these costs are entirely as would be expected from an Appellant in an appeal such as this.

MRS JUSTICE O'FARRELL: Yes. Thank you. I am going to order that the First Respondent shall pay the Appellant's costs, summarily assessed in the sum of £4,627.92. The Second Respondent shall pay the Appellant's costs summarily assessed in the sum of £16,000.

MR BRADLEY: Those figures are obviously inclusive of VAT.

MRS JUSTICE O'FARRELL: Yes.

MR BRADLEY: Does your Ladyship require us to draft and submit an order?

MRS JUSTICE O'FARRELL: Yes. Would you mind doing that? Yes. That would be helpful.

MR BRADLEY: I do not need to trouble your Ladyship with the mechanics.

MRS JUSTICE O'FARRELL: Thank you very much.

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