

# Section 29 Case Meeting

22 November 2021

157-197 Buckingham Palace Road, London SW1W 9SP



## *Members present*

Renata Drinkwater (in the Chair), Board Member, Professional Standards Authority  
Mark Stobbs, Director of Scrutiny & Quality, Professional Standards Authority  
Kisha PUNCHIHEWA, Head of Legal, Professional Standards Authority

## *In attendance*

Peter Mant, Counsel, 39 Essex Street Chambers

## *Observers*

Colette Higham, Senior Scrutiny Officer, Professional Standards Authority  
Bernice Johnson, HR & Governance Administrator, Professional Standards Authority  
Rachael Martin, Scrutiny team Coordinator, Professional Standards Authority

**This meeting was held virtually in light of the current health pandemic.**

## **1. Definitions**

- 1.1 In this meeting note, standard abbreviations have been used. Definitions of the standard abbreviations used by the Authority, together with any abbreviations used specifically for this case are set out in the table at Annex A.

## **2. Purpose of this note**

- 2.1 This meeting note records a summary of the Members' consideration of the relevant decision about the Registrant made by the regulator's panel, and the Authority's decision whether or not to refer the case to the court under Section 29 of the Act.

## **3. The Authority's powers of referral under Section 29 of the Act**

- 3.1 The Authority may refer a case to the relevant court if it considers that a relevant decision (a finding, a penalty or both) is not sufficient for the protection of the public.
- 3.2 Consideration of whether a decision is sufficient for the protection of the public involves consideration of whether it is sufficient:
- to protect the health, safety and well-being of the public
  - to maintain public confidence in the profession concerned, and

- to maintain proper professional standards and conduct for members of that profession.

3.3 This will also involve consideration of whether the panel's decision was one that a disciplinary tribunal, having regard to the relevant facts and to the object of the disciplinary proceedings, could not reasonably have reached; or was otherwise manifestly inappropriate having regard to the safety of the public and the reputation of the profession (applying *Ruscillo*<sup>1</sup>).

#### **4. Conflicts of interest**

4.1 The Members did not have any conflicts of interest.

#### **5. Jurisdiction**

5.1 The Legal Advisor confirmed that the Authority had jurisdiction to consider the case under Section 29 of the Act. Any referral in this case would be to the High Court of Justice of England and the statutory time limit for an appeal would expire on 25 November 2021.

#### **6. The relevant decision**

6.1 The relevant decision is the Determination of the Panel following a hearing which concluded on [REDACTED].

6.2 The Panel's Determination which includes the charges and findings is set out at Annex B.

#### **7. Documents before the meeting**

7.1 The following documents were available to the Members:

- Determination of the panel dated [REDACTED]
- The Authority's Detailed Case Review
- Transcripts of the hearing dated [REDACTED] and [REDACTED]
- Counsel's Note dated 19 November 2021
- Exhibits bundle
- CE masters bundle
- CE decision letter to registrant
- The HCPC's Sanctions Policy
- The Authority's Section 29 Case Meeting Manual

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<sup>1</sup> CRHP v Ruscillo [2004] EWCA Civ 1356

7.2 The Members and the Legal Advisor were provided with a copy of a response from the HCPC to the Authority's Notification of s.29 Meeting. The Members considered the response having received legal advice and after they reached a conclusion on the sufficiency on the outcome.

## 8. Background

8.1 At the material time the Registrant was employed as a [REDACTED] at the [REDACTED] ('the Trust'). The Registrant was first employed at the Trust in [REDACTED] and at the time at which the misconduct occurred, was a [REDACTED] in [REDACTED] and in charge of a [REDACTED]. He had line management responsibility for a team of around six [REDACTED], including Colleague A and Colleague B, both of whom were employed as theatre support workers.

8.2 The misconduct occurred between [REDACTED]. On [REDACTED], Colleague A, who had resigned from the Trust, reported his unhappiness about the Registrant's overfamiliar behaviour and sexualised comments towards him. The Registrant was informed and apologised to Colleague A and the following day Colleague A withdrew his notice of resignation.

8.3 On [REDACTED], the Registrant, whilst drunk sent several inappropriate text messages to Colleague A, which included a sexually explicit message offering to perform oral sex.

8.4 The following day Colleague A and his wife attended a meeting at the hospital with the Registrant's line manager NN, the matter was reported to the Trust's HR department and an internal investigation undertaken under the Trust's harassment and bullying policy. During the investigation, Colleague B was interviewed and also reported similar concerns regarding the Registrant's conduct.

8.5 On [REDACTED], Colleague A made a referral to the HCPC regarding the Registrant's conduct.

8.6 The proven allegations were that the Registrant had on one or more occasions between [REDACTED] made inappropriate remarks and/or gestures to Colleague A including telling him that he was in denial and was gay and asking when Colleague A was going to have an affair with him, asking Colleague A when he was going to leave his wife, telling Colleague A he was gay, and mimicking performing oral sex on a man.

8.7 The Panel found proved that the Registrant had sent several inappropriate text messages to both Colleague A and Colleague B while he was drunk.

8.8 The Panel further found proved that the Registrant had touched Colleague A and Colleague B's bottom.

8.9 The Panel found not proven the allegations that the on various occasions the Registrant had stroked Colleague A's neck and/or ears, touched Colleague A's genital area through his trousers and put his hand down Colleague A's scrub trousers and/or underwear and touched his buttocks. The Panel found not

proved the allegation that the Registrant had touched Colleague B's genital area through his trousers and had on one or more occasions, exposed his genitals to colleagues in the workplace.

- 8.10 The Panel did not find any of the proven comments/actions to be sexually motivated.
- 8.11 The Panel found that the proven actions amounted to misconduct but did not conclude that a finding of impairment was required on either personal or public components.

***Failure to find that the Registrant's conduct was sexually motivated***

- 8.12 The Members considered the approach taken by the panel and their reasoning provided in the determination on sexual motivation. In considering this issue, the Members noted that the extent that it would be appropriate to afford deference to the decision of the panel will depend on the particular facts and circumstances of the findings made; whether the panel had made any error of principle or the decision fell outside the bounds of what the panel could properly decide; whether the judgment is based in significant part on the assessment of credibility of a witness and the particular behaviour in question.
- 8.13 The Members considered the registrant's conduct in making sexualised comments and inappropriately touching junior staff to be unacceptable behaviour. The Members considered that it would not be unreasonable to conclude that the registrant and Colleague A and Colleague B worked in a dysfunctional team in which staff were generally engaging in behaviour which was inappropriate and possibly not taken seriously by senior staff members.
- 8.14 The Members did not identify any error of principle.
- 8.15 The Members noted that the panel had preferred the evidence of the registrant in relation to this conduct. Given that the panel had heard first-hand from each witness and was best placed to assess credibility, the Members considered that in this case it would defer to the panel's assessment. It noted that the registrant had accepted some of the actions that had taken place but disputed that the motivation behind this was sexual. The Members also concluded that the explanations for the motivation or intention behind the behaviour was not unbelievable. This was not a case where there was no other plausible explanation.
- 8.16 The Members concluded that the panel's findings in relation to whether the registrant's conduct was sexually motivated was a decision available to them.
- 8.17 The Members did, however, consider that the charges should have been broader or worded differently to include harassment or bullying. These aspects of the registrant's conduct do not appear to have been explored by the HCPC and the inappropriate nature of his conduct was not pursued in the charging.

***Failure to find impairment on public interest grounds***

- 8.18 The Members considered whether the panel should have made a finding of impairment on public interest grounds and whether the panel were correct in their approach on this ground.

- 8.19 In considering this issue, the Members noted that deference is usually afforded to a disciplinary body on such matters. The Members considered whether the panel had erred in its approach to the question of impairment.
- 8.20 The panel appeared to base its assessment of whether a finding of impairment was required on its assessment of the effect the registrant's conduct had on Colleague A and Colleague B. It did not appear to have given any consideration to the objective seriousness of the registrant's conduct and how this might impact on public confidence in the profession or the maintenance of standards in the profession.
- 8.21 The Members noted that the registrant was a senior member of a Team who repeatedly spoke to his junior staff members in an inappropriate manner which breached boundaries. He also had little regard to the overall impact of his actions on his colleagues as well as any impact on team moral.
- 8.22 The Members were concerned by the registrant's conduct given his position of seniority and felt that the panel had not fully engaged with the seriousness of the registrant's behaviour.
- 8.23 The Members considered whether their concerns regarding the seriousness of the misconduct were enough to warrant a public interest finding. It was clear to the Members that the panel considered the registrant's conduct to be unacceptable behaviour. It was also clear that the registrant appeared to realise this and that he has since addressed this misconduct. There was evidence to support this. What was not clear was whether the only reasonable outcome was that the seriousness mandated an impairment finding. The Members concluded that it was possible for the panel to reach the view that despite the objective seriousness of the behaviour a finding of impairment was not mandated.
- 8.24 The Members then considered whether the panel had fallen into error in terms of the weight it had placed on the finding of misconduct. The Members noted the tension in the case law in relation to the relevance of a misconduct finding within the HCPC scheme. Overall, the Members concluded that as this was not a case where there was a finding of sexual motivation and the registrant had addressed the issues found proven, it was difficult to argue that this was a case where a finding of impairment was mandated.

### **Conclusion on insufficiency for public protection**

- 8.25 The Members were concerned with the seriousness of the registrant's conduct towards junior members of staff when in a position of seniority, however, the Members were satisfied that this was noted by the panel and the registrant had since addressed his conduct. Taking this into account the Members concluded that the decision was not one which no reasonable Panel could have made. In all the circumstances, therefore, it was not insufficient for public protection.

## **9. Referral to court**

- 9.1 Having concluded that the panel's Determination was not insufficient for public protection, the Members were not required to consider whether they should

exercise the Authority's power under Section 29 to refer the case to the relevant court.

**10. Learning points**

- 10.1 The Members agreed that the learning points set out at Appendix C should be communicated to the Regulator.
- 10.2 We consider that the panel decision on impairment could be much improved. First, the Panel fell into error in not considering the objective seriousness of the registrant's behaviour and how this would be regarded by members of the public and by the profession for the purpose of maintaining standards. Rather the panel limited its consideration to the impact of Colleague A and B.
- 10.3 Second, where a panel reaches a conclusion that it will not make a finding of impairment, then given the HCPC regime (where the relevant misconduct cannot be marked formally on the register or in a published determination) such a decision must be made following careful scrutiny of the case. We would recommend that the panel asks itself this very question and reflects on the outcome.

*Renata Drinkwater.*

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**Renata Drinkwater (Chair)**

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**Dated**