2007/4PC & 2007/4PA

LI

-v-

DEPARTMENT OF HEALTH, SOCIAL SERVICES AND PUBLIC SAFETY

BEFORE:

HARRY BLACK (CHAIRMAN), MARY McDONNELL, JAMES McCALL

Hearing date: 15th and 16th November 2007

1. The Appellant appeals against two decisions of the Respondent dated 5th April 2007, namely to include her on the Disqualification from Working with Children (DWC) List and the Disqualification from Working with Vulnerable Adults (DWVA) List.

2. The Appellant was represented by Mr Potter of Counsel, instructed by Savage and Co. Solicitors and the respondent was represented by Mr Brady of Counsel, instructed by the Departmental Solicitor.

3. Prior to the commencement of the hearing the Tribunal made a Restricted Reporting Order under Regulation 19(1) to protect the identities of the appellant, witnesses and children referred to in the proceedings.

4. THE LAW: Appeals against inclusion in the DWC and DWA lists are governed by Arts 11 and 42 of the Protection of Children and Vulnerable Adults (NI) Order 2003. Art 11(3) provides that:- If on appeal.. .a Care Tribunal is not satisfied of either of the following, namely :-

   a) that the individual was guilty of misconduct (whether or not in the course of his employment) which harmed a child or placed a child at risk of harm; and,

   b) that the individual is unsuitable to work with children,

   the Tribunal shall allow the appeal.

   Article 42 (3) is in similar terms vis a vis vulnerable adults.

   Thus, in order to dismiss the appeal, the tribunal must be satisfied that:

   (i) there was misconduct
   (ii) the misconduct harmed a child or placed a child at risk of harm and
   (iii) the individual is unsuitable to work with children.

5. The burden of proof is on the Department and the standard of proof is the civil standard, that is, the balance of probability.

6. The order does not define misconduct. In Angella Mairs v Secretary of State (2004) 269 PC the Care Standards Tribunal in Great Britain reached a conclusion that in principle "a single act of negligence could constitute misconduct but in most cases the misconduct will be an incident forming part of a course of erroneous or incorrect behaviour undertaken by a person who knew or ought to have known that what he or she was doing was contrary either to the general law or to a written or unwritten code having particular application to his or her profession, trade or calling. In the context of a profession, for there to be a finding of misconduct there must be a falling short, whether by omission or commission, of the standards of conduct expected from members of that profession." It further observed that "misconduct could range from serious sexual abuse through to physical abuse (including inappropriate physical restraint) and/or poor child care practices in contravention of organisational codes of conduct". Harm is defined in Art. 20 of the 2003 Order, as having the same meaning as in Art. 2 (2) of the Children (Northern Ireland) Order 1995, that is "ill treatment or the impairment of health or development".

7. <u>The alleged misconduct which harmed a child or placed a child at risk of harm.</u> The appellant LI was employed as a Child Care worker in the NT Nursery from May 2005. She held the position of Supervisor. On 8th August 2006 three Nursery Assistants reported to the Manager that they had witnessed the appellant act inappropriately towards child C. We heard oral evidence from 2 of the witnesses, namely SM and DK. There was evidence that it was customary for some of the children to have a sleep around mid-day. They went to sleep on sleep mats which were placed in rows on the floor. The mats were about a couple of inches thick. SM said that she was cleaning the floor when she heard a thud and looked up. She said that she saw the appellant sitting between 2 children and she had her right leg over child C's chest. The child was on her back, her hands were crossed over her chest, she was squealing hysterically, she was struggling. The child was trying to see what the other children were doing. SM said that she was shocked, she had not seen anything like this before, she reported the matter later that day. DK gave evidence that child C had been popping her head up and that she heard the appellant telling the child to lie down. She said that she saw the appellant lift the child and that she 'flung' her down onto the mat and that she heard the thud of the child striking the mat. She said that the appellant put her leg across the child's chest, it looked tight so that child C couldn't move, the child was crying, screaming and struggling to get back up. She said that she was shocked, she had never seen anything like this before and she also reported the matter.

8. A number of other witnesses were called by the respondent, however none were eye witnesses to the incident described by SM and DK. JL, a Nursery Assistant was present on the day. She didn't hear a thud but said that she had heard a child crying. The proprietor of the premises BC gave evidence about being informed of the allegations, the carrying out of investigations, interviews of the witnesses and the appellant, and the suspension of the appellant. Various statements were taken which were available to the Tribunal and while we can accept that the management of the premises had a desire to act promptly with welfare of children being of paramount importance, the practice of compiling statements from closed questions and where limited answers are given is to be discouraged. It would have been preferable if the witnesses had been asked to write, in their own hand, an account of the events as they had seen them unfold. For this reason we did not place a great deal of weight on these one page documents and placed much more emphasis on the oral evidence which was available to the tribunal. KG, the mother of the child gave evidence about being informed of the allegations and her perception of how the child subsequently reacted. She said that the child had been upset when she came home and became clingy and wanted cuddled. She accepted that she couldn't directly make a link between the child's behaviour and the incident in question. There was no medical evidence available to the Tribunal. CM, the manager, who had the day to day running of the premises, gave evidence about being informed of the allegations, her conversations with BC and the interviews and investigations which were carried out.

9. The appellant accepted throughout that she had placed her leg over the child. In evidence she said that the 'leg over procedure" was not unusual in the Nursery. She said that she had been taught this procedure in that she had seen CO do it previously, that it seemed to work and that she had never been questioned about it before. She described how she would arch her leg over the child, her foot being near the child's thigh and her own thigh may have been near to the child's waist. She said that she used this procedure with child C because it worked in that it helped her settle to sleep. She said that on the day in question the child started "messing about" on the bed mat and she asked the child if L, the appellant, needed to put her leg over her. The appellant said that the child continued to mess about and she then put her leg over her. Her evidence was that the child was crying but this was not unusual and although the child was wriggling about she was not struggling and there was no physical pressure on her. The appellant stated that she did not lift the child or thump her down, she did not place the child's hands across her chest, she spoke to her in a firm but not threatening voice and during the procedure she would have placed her own hand on the child's chest in a rocking motion. The appellant believed that nothing irregular or unusual took place and there had been no indication during the day that anything was wrong until she had been brought to the office some time later.

10. One witness was called on behalf of the appellant. CO, a Nursery Assistant was working on the premises on the day in question but was not

present at the material time. She heard about an incident concerning child C. Her evidence was that the leg over procedure was commonly used on the premises, she had used it herself, having seen other girls using it. Her description of the procedure was that the leg was arched over the lower part of the child's body, near its feet and the child would be patted until it went over to sleep. She stated that it would be wrong to put one's leg over a child's face, chest or arms and in her use of the technique there was no physical contact and it did not stop the child getting up. She never queried the technique and had never been told that the procedure was inappropriate. She had no concerns about the appellant's behaviour and stated that she was a person who conducted herself appropriately.

11. We had the benefit of hearing and observing the witnesses give their evidence in what must have been uncomfortable circumstances for all involved. They were cross examined closely and extensively and in particular the two principal witnesses SM and DK exhibited some distress under detailed questioning. It is correct to say that SM in a previous written statement had described another alleged incident concerning the appellant in which she felt that a child's arm was pulled with such excessive force that it could have been pulled out of its socket, whereas, in oral evidence, she accepted that it was best described as a "tugging incident". Also, it was difficult to unravel the precise sequence of events as to when DK saw or heard the thud which she described. In cross examination she described looking round when she heard the thud and also said that she saw the child being "flung" down and that was the source of the thud. It was therefore difficult for us to make a specific finding with regard to what precisely DK saw before the appellant's leg went over the child. We do not find that these apparent inconsistencies have a significant impact on the overall impression which we form of these witnesses. The reference to the arm out of the socket is either the use of an unfortunate figure of speech in the earlier statement or an exaggeration of what the witness perceived. It is important to remember that any incident which is alleged to have occurred prior to the subject incident in August 2006 did not result in the appellant being listed. The tugging incident and other alleged incidents, including a reference to a child becoming sick at feeding time were never reported or documented, nor were they ever brought to the appellant's attention. Accordingly, we place no weight on any evidence which tends to suggest unacceptable conduct by the appellant prior to 8th August 2006. The central issue in the case concerns the incident on 8th August 2006 and in particular the use of the leg over procedure and the manner in which it was used. While it was submitted that the evidence of the witnesses was unreliable because of the inconsistencies referred to, we reminded ourselves that there was common ground between the witnesses and the appellant in that it was accepted by the appellant that she had used the leg over procedure on the day in question. She did of course take issue with the account given by the witnesses about the manner in which it was used. Given this common ground the Panel carefully considered the evidence in an effort to resolve the conflict.

12. It was not difficult to find as a fact that the leg over procedure was used on the day in question and on the appellant's own admission she had used it on quite a number of occasions previously. We also find as a fact that this procedure was used by the appellant as a form of physical restraint. Having carefully considered the evidence we conclude that no other conclusion is plausible. The appellant described the child both messing about and wriggling about on the mat before she put her leg over the child. In cross examination she conceded that it was sleep time and if she, (child C), had got up she could have disrupted the other children. In answer to a question from the Panel about the purpose of the leg over technique she conceded that it was to let the child know that there was to be no more messing about because it was sleep time and she 'supposed' that it, the technique, was to stop them getting up and disrupting other children. We do not accept the appellant's evidence that there was no physical pressure on the child. We find that the appellant was prepared to exert sufficient pressure on the child to limit its movement and to ensure that it was restrained by use of the appellant's leg and we prefer the evidence of the eye witnesses in this regard. The appellant accepts that although she may have had some difficulties at work with some of the staff there were no issues with DK or SM and she agreed that there was no tension between them nor were there any problems and generally she got on well with them. She could think of no reason why they had made the allegations and statements. There was no suggestion made that the witnesses were acting out of malice or mischief or had conspired to fabricate false allegations against the appellant. We also take into account that the appellant held the position of supervisor over the two witnesses and we can understand their evidence regarding their reluctance to act in the manner in which they did in bringing the matter to the attention of more senior staff. We accept their evidence that the incident made a significant impact on them. We reject the appellant's evidence that the leg over procedure was a common occurrence in the Nursery. The appellant claimed that she was taught the procedure in the Nursery but on questioning she accepted that it had not been taught formally, rather that she had picked it up from CO who gave evidence on her behalf. However, the description of the procedure given by CO differed from that given by the appellant and CO said that her own use of the procedure did not prevent the child getting up. When asked what purpose was achieved in the circumstances she conceded "I suppose nothing if you think about it". We were not impressed by this evidence. The appellant alleged that other girls used the procedure but apart from the evidence of CO we did not hear oral evidence from those girls who were alleged to have used the procedure. It was not suggested to any of the three Childcare workers who did give evidence, DK, JL

or SM that any of them had used it on any occasion and CM, the manager, was emphatic that she was unaware of its use on the premises. The weight of the evidence is against the appellant that the procedure was commonly used. Further, it does not enhance the appellant's case, in our view, that the Nursery's Policy Booklet was silent on when 'physical intervention' would be appropriate. Circumstances could arise when it would be appropriate to intervene physically e.g. to extricate a child from an immediate danger and in other circumstances verbal instruction, persuasion or other non physical action may suffice. It would be impossible to define the circumstances precisely. Various situations could arise and one would expect an individual to act appropriately and make their own judgement if physical intervention was appropriate without having to ensure that it was provided for in a booklet.

13. Having found that the leg over procedure was a form of physical restraint we find that it was a totally inappropriate form of restraint. It is totally unacceptable for a child to be restrained by an adult in the manner described. The child was two years old at the material time, it was crying on the appellant's evidence, distressed on the evidence of the witnesses, and in either situation the appellant's claim that she did not think that she was doing anything inappropriate does not commend itself to the Tribunal. This leg over procedure used by the appellant has no place in normal child care practices, and we have no doubt in finding that she ought to have known that what she was doing was wrong taking into account the fact that she has 19 years experience of working in Childcare. Her conduct fell far short of the standards of conduct expected from members of her profession. The appellant was guilty of misconduct.

14. There was no direct evidence that the child suffered any actual physical harm and there was no evidence that it required any medical attention subsequently. Nevertheless we have no doubt that the appellant's actions in restraining the child in the manner described could have put it at risk of physical harm and at the very least there would be a risk of emotional or psychological harm given the circumstances that it was on its back and an adult's leg was across its body during a procedure which the appellant admitted to having regularly used on this particular child previously. In the circumstances we find that the appellant was guilty of misconduct which placed a child at risk of harm.

15. We do take account of the appellant's many years of previous unblemished Childcare service. However we have to have regard for the degree of risk posed by the appellant. We are concerned that she continues to assert that she feels that she did nothing wrong and

that there was nothing inappropriate in her actions. We could not be satisfied that she would act differently in a similar situation. The public at large and those who entrust their children into the hands of professionals have a right to expect, indeed to demand, that such people who are placed in such important positions of trust working with children are beyond reproach. We cannot be satisfied that the appellant can be given the trust that is so essential when working with children. We conclude that she is unsuitable to work with children. It is of course essential that those who are considered unsuitable to work with children are not given positions of trust in relation to vulnerable adults. We follow the view of the Care Standards Tribunal in Great Britain that public confidence in the provision of services to vulnerable adults would be undermined if it became known that the appellant was employed to work with vulnerable adults, given the fact that she was prohibited from working with children. We conclude that she is unsuitable to work with vulnerable adults.

16. Accordingly, it is our unanimous decision that both appeals be dismissed.

Harry Black (Chairman)
Mary McDonnell
James McCall

19 December 2007