

IN THE CARE TRIBUNAL

SD

V

**THE DEPARTMENT OF HEALTH,
SOCIAL SERVICES & PUBLIC SAFETY**

**BEFORE: HARRY BLACK (CHAIRMAN)
ARTHUR RAINEY
ROBERTA BROWNLEE**

Hearing dates: 11th, 12th, 13th, 14th, 15th, and 19th October 2010.

The Appellant appeals under Art. 11(1)(a) and Art. 42(1)(a) of the Protection of Children and Vulnerable Adults(N.I.) Order 2003 against two decisions of the Department of Health, Social Services and Public Safety to include her on the Disqualification from Working with Vulnerable Adults(DWVA) List and the Disqualification from Working with Children(DWC) List. Both decisions are dated 26th August 2009.

The Appellant was represented by Ms. Griffiths, from Magherafelt District Advice Service and the Respondent was represented by Mr. McArdle B.L. instructed by the Departmental Solicitors Office.

At the outset of the hearing the tribunal made a Restricted reporting Order under Reg. 19(1) of the Care Tribunal Regulations (N.I.) 2005 to protect the identities of the appellant, witnesses and the vulnerable adults referred to in the proceedings.

The Law

Appeals against inclusion in the DWVA and DWC Lists are governed by Arts. 11 and 42 of the Protection of Children and Vulnerable Adults (N.I.) Order 2003.

Art. 42(3) provides that if on appeal.... the tribunal is not satisfied of either of the following, namely

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

that the individual is unsuitable to work with vulnerable adults, the tribunal shall allow the appeal.

Art. 11(3) is similar in terms with regard to appeals against inclusion on the DWC List.

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

there was misconduct;

(ii) the misconduct harmed or placed a vulnerable adult at risk of harm; and

(iii) the individual is unsuitable to work with vulnerable adults.

The burden of proof is on the Department/Respondent and the standard of proof is the civil standard, that is, the balance of probabilities.

Background:

The appellant SD was employed by the Northern Health and Social Care Trust (the Trust) as a Home Care Worker (HCW). She worked as part of a team of 6 workers. Generally they worked in pairs (double rota teams) providing care to patients, most of whom were elderly, in the patients' own homes. It was alleged that the appellant had been guilty of physical and verbal abuse against some of the elderly patients during the home visits. Three members of the team FK, LH, and KK who had worked with the appellant on various occasions made the allegations. The Trust carried out a disciplinary investigation following which the appellant was dismissed. She appealed against the dismissal but the complaints of abuse against the patients were upheld and her dismissal was confirmed. Her provisional listing on the DWVA and DWC lists was subsequently amended to a full listing by decisions dated 26th August 2009.

Evidence and Findings:

In advance of the hearing the Tribunal had been provided with a large quantity of written material including statements from witnesses who attended to give evidence. The principal witnesses on behalf of the Respondent were the three Home Care Workers, FK, KK, and LH. Collectively they said that the appellant was verbally abusive and rough in her handling of a number of elderly patients and each of the witnesses described particular incidents in which they stated that they had witnessed specific acts by the appellant which caused concern.

NMcN was an elderly patient who had suffered a stroke. She had very poor eyesight and had limited communication skills. The witnesses stated that it was common for the appellant to allow the patient to be dropped onto the commode to the extent that it was clear to them that the patient experienced distress and discomfort. They also stated that the appellant would place her foot on the patient's foot to steady her removal from the commode. Evidence was also given that the patient had been slapped on occasions when she had gripped the appellant's arm and that the manner of washing the appellant's face with soap on the flannel was also a source of distress and discomfort.

MB was an elderly patient who suffered from dementia. All three witnesses gave evidence that they were concerned about how she was treated by the appellant. FK referred to slaps being administered by the appellant on one or two occasions and both FK and KK stated that excessive soap was used when cleaning the patient's face which clearly caused distress and discomfort. All three stated that they had witnessed the appellant squeezing or tweaking the patient's toes causing the patient to squeal. They said that the appellant responded to their questioning of this conduct by stating that it was 'to get her going'.

X was a male client with a debilitating condition. Prior to his death his condition worsened significantly and he was virtually unable to do anything for himself. KK gave evidence that the appellant regularly made inappropriate remarks to him concerning sexual relations with his wife Y. She stated that sometime after his death she had a conversation with his wife during which, she, Y, referred to the inappropriate comments having been made by the appellant about their sex life.

Further evidence was given by the witnesses that the appellant on occasions would turn patients by gripping their clothes instead of using glide sheets and one patient MS was lifted by 'the scruff of the neck'. Another patient UD was said to have been given a slap. In general they stated that the appellant was rough in her handling of patients who clearly suffered distress and she was prone to being verbally abusive.

The appellant gave evidence on her own behalf. In short she denied all of the allegations. She said that they were untrue and the conduct attributed to her did not happen. At the close of proceedings it was submitted on her behalf that there had been 'an enormous fabrication, a fiction'.

The other two HCW's who made up the team of six; GMcG and KMcG gave evidence on behalf of the appellant, as did MH a former HCW. Collectively they stated that they did not see any abuse perpetrated by the appellant and they did not believe that it had occurred. They were supportive of the appellant although GMcG in cross examination did concede that privately she had made comments about her reluctance to work again with the appellant.

Members of the families of some of the elderly patients gave evidence to the effect that they had not seen any abuse and collectively they stated their surprise and shock at the allegations. They were supportive of the appellant.

The Tribunal received additional oral and written testimony from a number of sources including evidence from management involved in the investigation of the allegations and from personnel who had roles in the conduct of the disciplinary and appeal hearings which the appellant had attended with her representatives. Documentation concerning the appellant's claim for unfair dismissal to the Industrial Tribunal and the terms of the settlement in the appellant's favour were also available.

Although the evidence in the case was both voluminous and extensive it was agreed by the parties, and endorsed by the Tribunal, that the central issue in the case was the credibility of the 3 HCW's, FK, KK and LH.

In the context of oral hearings before Tribunals, observing the manner in which a witness gives his or her evidence and how he or she behaves or responds to questioning is an important part of the process. The three witnesses in question gave their evidence in a forthright manner in what were clearly distressing and challenging circumstances. They were closely and carefully questioned at length by the appellant's representative and nothing in their demeanour, in the observations by the Panel, gave any grounds for concern regarding the Panel's assessment of their credibility.

It was suggested to the witnesses that their failure to report and document the allegations at an early stage seriously undermined the truthfulness of their accounts. Their explanations that they were both apprehensive and reluctant to inform on a co worker, and that they had perceived a lack of support from management in the process was accepted by the Panel.

The witnesses were consistent with each other in that their accounts generally described similar observations relating to the appellant's conduct. Their evidence in chief and their questioning did not reveal any internal inconsistency or inherent implausibility which cast doubt on the Panel's overall assessment of their credibility.

The absence of any objective physical injury on the elderly patients was a factor which required consideration but it was noted that the Respondent did not suggest that objective physical harm had been caused and only a track mark of a shoe on a patient's foot had been advanced in evidence. It had not been suggested that bruising or other visible injury was evident. In the assessment of the Panel the absence of such physical evidence did not cast doubt on the credibility of the evidence of the witnesses.

The Panel also considered the evidence by the family members. The Panel accepted their evidence that they were unaware of and shocked by the allegations. However they did accept that generally they were not present in the room when intimate personal care was being provided by the care workers and accordingly had limited observation of events. There was an issue between witnesses about the level of communication enjoyed by NMcN and whether she was capable of saying certain words attributed to her. The Panel found that while her communication skills were limited in that she was able to speak a few words, she was capable of conveying her feelings and emotions to those around her. Her limitations in communication did not dilute or detract from the nature of her physical treatment by the appellant described by the 3 witnesses. The Panel attached appropriate weight to the evidence of the family members but did not consider that it cast doubt on the credibility of the 3 witnesses. Similarly the care workers called to give evidence on behalf of the appellant, while they were supportive of the appellant and collectively stated that there was no evidence of abuse while they worked with the appellant, were not present when it was claimed that the appellant had been guilty of the misconduct.

The appellant in evidence denied the allegations in full. It had never been alleged that the witnesses were mistaken in their observations or had misread or misinterpreted her actions when caring for patients. She maintained throughout that the allegations were untrue and the incidents did not happen. She also was closely and carefully questioned and maintained that she had not done anything improper as suggested by the witnesses. The Panel had equal opportunity to observe her giving evidence and in fairness to her she did not waver under cross examination. The difficulty for the appellant however was she was at a loss to offer any realistic reason as to why 3 of her co workers, if she was credible, had effectively conspired together to give false evidence against her. She stated that she did have a dispute with FK who made the initial complaint against her and suggested that the evidence of LH and KK could have been motivated by their close friendship with FK. The Panel rejected this evidence. It is implausible in the view of the Panel that serious and untruthful allegations would be made merely to back up or maintain a friendship given that the appellant agreed that she had no previous difficulties or problems with her co workers and with whom she had socialized on occasions.

It was suggested on behalf of the appellant that the evidence of the 3 witnesses lacked corroboration. There is no formal requirement that evidence of a witness must be corroborated. However the Panel did take into account the evidence of RW a Home Care Officer who was tasked to investigate the issues relating to X set out at Para 12 above. The Panel accepted her evidence that X's wife Y conveyed to her concerns regarding inappropriate remarks of a sexual nature attributable to the appellant. This evidence, from another source, was supportive of the evidence given by KK on the issue. Also it was not in dispute that the appellant was made aware that she was no longer welcome in the XY household indicating that some form of incident had occurred which had given rise for concern.

Having heard and observed the witnesses giving their evidence the Panel concluded that FK, KK and LH were credible witnesses. The Panel was in no doubt that the witnesses had observed the incidents which had been described by them in written and oral testimony. The Panel was careful to separate direct evidence from hearsay evidence. While the latter is admissible one must tread with caution before attaching any weight. For example there was hearsay evidence of a report by a witness CH to the effect that her mother's skirt had been torn by the appellant but a document subsequently emerged pursuant to a meeting which took place in the interval between the disciplinary hearing and the appeal hearing which recorded that CH denied all allegations attributing misconduct to the appellant. This conflict of evidence was resolved in the appellant's favour and the Panel made no adverse finding regarding the appellant's conduct in this regard. There was considerable debate by the parties over the importance of this document and how and when it came into existence. Suffice to say the Panel attached little or no weight to it and it had no impact on the decision made by this Tribunal. Similarly some questions were raised regarding the appellant's treatment of a double amputee DH, mainly with regard to verbal abuse and an unsigned document was produced purporting to have been written by DH in which he claimed to have no problems with the appellant. The Panel attached little weight to this part of the evidence

and made no specific findings. Again this part of the case had no impact on the decision made by the Tribunal.

Misconduct is not defined in the Order but in *Angella Mairs v Sec of State for Education* (2004) 269 PC the Care Standards Tribunal in England held that misconduct could range from serious sexual abuse through to physical abuse and in *Doughty v General Dental Council* (1987) misconduct was said to be a falling short, whether by omission or commission of the standards of conduct expected from members of a profession.

Harm is defined in the Order and means ill treatment or the impairment of health (or development).

Having found as facts that the appellant had acted in the manner described by the 3 HCW's as set out in particular at Paras 10, 11 and 12, the Panel were in no doubt that it had been established to the required standard that the appellant was guilty of misconduct. Her actions clearly fell short of standards of conduct expected from her profession. In the cases of NMcN and MB her actions amounted to poor working practices at best and at worst physical abuse.

The absence of medical evidence confirming physical injury was noted but it was not difficult for the Panel to reach a conclusion on the evidence and to infer from the facts that the appellant's misconduct was likely to cause distress, discomfort, emotional and psychological harm to the patients involved. Accordingly the Panel found that there was misconduct and the misconduct harmed a vulnerable adult or placed a vulnerable adult at risk of harm.

This Tribunal takes a very serious view of the appellant's misconduct. The gravity of the misconduct in relation to MB alone is alarming while not seeking to minimize the nature and seriousness of other incidents. The appellant has denied that the incidents ever took place, as she is entitled to do, and accordingly there is no recognition by her that her conduct had the potential to harm vulnerable adults. There is no evidence therefore of any steps taken by her to minimize the possibility of a recurrence. We are driven to the conclusion that the appellant simply does not comprehend the nature of the risk to vulnerable adults her actions have caused or would be likely to cause. Her conduct was unacceptable, unprofessional and fell entirely outside the bounds of normal practice in her profession. We take account of her 14 years of service and the absence of any formal disciplinary record in addition to the letters of support and character references but the nature and the gravity alone of the misconduct makes her unsuitable to work with vulnerable adults.

We cannot be confident that she would act differently if she was given a position of trust in relation to children and we believe that public confidence in the provision of services would be undermined if the appellant was permitted to work with children, given the fact that she was deemed unsuitable to work with vulnerable adults. We also find her to be unsuitable to work with children.

We conclude this case by making reference to the management structure in place throughout the periods in question. It left a lot to be desired. The available evidence raised a number of question marks over the availability of support afforded to care workers who found themselves in a situation where reporting of work colleagues became an issue. The competency of management to effectively investigate the complaints was also questionable given the mistake made by a manager in the course of the investigation in attending and documenting a visit to an elderly patient, believing that patient to be another person. While all concerned may have worked in difficult conditions and in a stressful environment it is incumbent on management to ensure the safety and welfare of vulnerable adults entrusted to their care and to ensure that an effective and efficient system is in place to deal with and properly investigate any complaints or matters for concern which may arise. Protection of the vulnerable adults is very important but protection of employees is no less important.

It is the unanimous decision of the Tribunal that both appeals are dismissed.

Harry Black (Chairman)

Dated: 4 November 2010.

Date amended decision recorded in register and re-issued to parties: 1.12.10