

**Outcome of Fitness to Practise Panel impairment hearing held on
Tuesday 13, Wednesday 14 and Thursday 15 August 2019**

Name	Graham MacDonald
Registration number	1079742
Part of Register	Social Workers
Current or most recent town of employment	Wishaw
Sanction	Case dismissed
Date of effect	20 August 2019

The decision of the Fitness to Practise Panel is below followed by the allegation.

The following allegation and decision may refer to the Scottish Social Services Council as 'the Council' or 'the SSSC'.

Decision

This is a Notice of the decision made by the Fitness to Practise Panel (the Panel) of the Scottish Social Services Council (the SSSC) which met on Tuesday 13, Wednesday 14 and Thursday 15 August 2019 at Compass House, 11 Riverside Drive, Dundee, DD1 4NY.

At the hearing, the Panel decided to dismiss the case against you for the reasons outlined below.

Matters taken into account

In coming to its decision, the Panel had regard to these documents:

- the Regulation of Care (Scotland) Act 2001 (the Act)
- the Code of Practice for Social Services Workers Revised 2016 (the Code)
- the Scottish Social Services Council (Fitness to Practise) Rules 2016 as amended (the Rules)
- Decisions Guidance for Fitness to Practise Panels and Scottish Social Services Council staff dated December 2017 (the Decisions Guidance).

Allegations that your fitness to practise is impaired

The allegations against you are that whilst employed as a Social Worker by North Lanarkshire Council, and during the course of that employment, you did:

1. between 26 November 2014 and 5 December 2014, fail to fully investigate concerns which arose from an Adult Protection Referral made regarding service user AA, in particular:
 - a. fail to seek information from relevant organisations, including but not limited to, Police Scotland
 - b. fail to follow an instruction of ZZ, your line manager, that you explore AA's role as possible carer for AA's uncle, BB
 - c. fail to adequately consider whether immediate protective measures were required for AA by not adequately exploring:
 - i. emotional abuse against AA
 - ii. AA feeling suicidal
 - iii. AA stating that her life was not worth living
 - iv. AA feeling she had no way out her of situation
 - v. AA being thrown out of her home by her mother
 - vi. AA having to wander the streets
 - vii. AA having to stay in an elderly neighbour's house
 - viii. AA feeling she had no control over her life
 - ix. AA feeling extremely anxious
 - x. AA worrying about getting up in the morning
2. between 25 November 2014 and 5 December 2014, fail to complete Part 2 of the AP1 form indicating that "No Further Action" would be taken following the adult protection interview with AA
3. on an unknown date prior to 18 February 2015, fail to input recordings on MySWIS relating to contact as part of AA's Adult Support and Protection investigation

and in light of the above your fitness to practise is impaired because of your misconduct as set out in allegations 1-3.

Preliminary matters

Late papers

You and the Presenter had late papers, namely statement of witness information sheet for ZZ, statement of ZZ, statement of facts for the parties, amended initial notice of referral (INOR), two timelines of case, a letter from XX and a letter from WW. Neither party objected to the lodging of the late papers.

The Panel decided that admission of the late papers was necessary to ensure the fairness of the proceedings and that this outweighed any prejudice to you. The papers were admitted in terms of Rule 32.7 and numbered 195 to 208 and 24 to 27.

Amending the allegations

The allegations were amended by agreement between you and the Presenter. The amended allegations were admitted as a late paper as described above.

As this was agreed, the Panel determined that these should be amended in the terms agreed between you and the Presenter.

Representation

You were represented by [solicitor].

Redaction

The Presenter and your representative agreed that page 72 of the bundle should be redacted in total. Your representative confirmed that she was content that the Panel could put this page out of its mind in terms of consideration of the application before it. The Panel decided to redact page 72 as it was potentially prejudicial to you and redaction was the fair and just way to proceed.

Delay

The Panel raised the issue of the delay in the SSSC bringing the present application to a hearing. The allegations contained within the INOR (as amended) are almost five years' old. The Panel directed the Presenter to provide a timeline detailing the step by step process which commenced in March 2015 when this matter had first been referred to the SSSC by your employer, North Lanarkshire Council (NLC). The Presenter provided an initial document but then provided a second more detailed document in respect of the timeline which covered the period of time from March 2015 to date in an attempt to explain why matters had taken so long to reach the Panel.

Your representative submitted that she wished to make a motion to dismiss the present application due to the inordinate delay on the part of the SSSC in this

matter. She sought, and the Panel granted, an adjournment to allow both your representative and the Presenter to prepare legal submissions in respect of this motion.

The Panel directed both the Presenter and your representative to provide each other and the Panel with a copy of their submissions together with a copy of all of the authorities upon which they sought to rely. The hearing was adjourned to the morning of 14 August 2019.

On reconvening, the Panel was provided with a copy of the written submissions by both the Presenter and your representative, the terms of which are referred to. The Panel was also provided with a copy of the cases upon which both the Presenter and your representative wished to rely.

Your representative made her submission first. Her initial motion was to invite the SSSC to withdraw the present referral in terms of Rule 9(7).

The Presenter confirmed that the SSSC was not prepared to withdraw the referral.

Your representative proceeded to submit that the present hearing should be discharged and the application dismissed due to the unreasonable delay by the SSSC in the present proceedings and bringing this matter to a hearing. She invited the Panel to deal with this in terms of Rule 30.

The Presenter accepted that there had been delays but submitted that these were not unreasonable.

You confirmed that you had been made aware of the referral of the allegations to the SSSC in March 2015.

The Panel noted that there was a large amount of crossover in the submissions by the Presenter and your representative and in terms of the cases upon which they relied.

It was a matter of agreement between the Presenter and your representative that the present proceedings attracted the protection afforded by Article 6 of the ECHR. The Panel did not disagree with this proposition and noted that this followed the determination of the courts within *Le Compte and others v Belgium* (1982) 4 EHRR and within *Gosh v GMC* 2001 WLR 1915.

Given that Article 6 applies to the present proceedings, the Panel required to consider whether there was a fair and public hearing within a reasonable time. The starting point for this was to decide from what point the "reasonable time" runs. The Panel was referred to *Attorney General (No 2 of 2001)* 2004 2AC 72 HL and to *Okeke v NMC* 2013 WL 617251. The Panel saw no reason to disagree with Mr Justice Leggatt at Paragraph 28 of *Okeke* whereby the relevant period of time is considered to start when the appellant (in the present case, you) was

given notice that an allegation had been made against her to the NMC. For present purposes, you confirmed that you had been made aware that allegations had been made to the SSSC in March 2015.

The starting point for the Panel in terms of considering “reasonable time” is March 2015. In terms of *Zimmerman and Steiner v Switzerland 1984 6 EHRR 17*, this requires to be assessed in each case according to the particular circumstances of that case. The Presenter addressed the Panel in detail in relation to each entry in the second timeline document. The Panel noted that there was an initial delay of eight months by the SSSC after receiving notification of the allegations from NLC. The Presenter explained that it was not unusual for the SSSC to await the outcome of the employer’s investigations. However, he accepted that the SSSC also conducts its own investigations contemporaneously with employers’. On this occasion, the decision had been made to await the outcome of the NLC investigation. The outcome of the NLC investigation was received by the SSSC in January 2016. The Panel considered that this was an acceptable delay in the circumstances of the case.

Thereafter, in February 2016 the SSSC determined that an Interim Conditions Order (ICO) should be sought in relation to your Registration. However, this was not considered by a Panel until August 2016, some seven months later. This appeared to the Panel to be an unjustified delay. The decision had been taken in February to seek an ICO but this was not referred to a Panel until June 2016, five months after the decision was made. An ICO was granted in August 2016 and remained in place until January 2017 when it expired. The SSSC chose not to seek a further temporary order in respect of your Registration. As at the date of the present hearing, you remain registered without conditions.

The Panel noted that the first statement from the witness, VV, was obtained in August 2016 and finalised in October 2016, some three months later. This statement was obtained 17 months after receipt of the allegations by the SSSC and eight months after the receipt of the outcome of the employer’s investigation. No other witness statements were obtained by the SSSC until 9 August 2019, one week prior to the present hearing.

The SSSC sought an update about your practice from your employer in March 2017, a response to which was not received until July 2017, five months later. No reminders were sent to NLC.

The SSSC sought clarity from NLC in July 2017 and received no reply. A reminder was not sent to NLC until November 2017, five months later.

In December 2017, the SSSC, on reviewing your case, decided to continue to investigate this matter, 11 months after expiry of the ICO. At this time, NLC confirmed that you were subject to a review. NLC finally confirmed the outcome of that review in March 2018.

In March 2018, the SSSC passed the case for sector advice which took three months to obtain. The SSSC sought further information from NLC in May 2018 which was obtained two months later. Further information was obtained in July 2018. Five months later, the SSSC made the decision to proceed. However, a hearing was not requested until April 2019, six months later.

The Panel considered that a delay of four years and six months in the present matter reaching a hearing gives real cause for concern.

The Panel was referred to the three-point test by Lord Bingham in *Dyer v Watson 2004 1 AC* in considering whether a reasonable time requirement has been violated.

The first point relates to the complexity of the case. The Panel did not consider that the present case was complex in any way. There were only two witnesses called by the SSSC. There were around 200 pages of documentation, a large proportion of which was a procedural document from NLC relating to adult protection procedures which ran to 69 pages. The Panel was not persuaded by the Presenter's submission in this regard. There were only two witness statements in the bundle of documents, one dating from 2016 and the other from a week before the hearing. The Panel notes that there is no statement in the bundle from one of the two witnesses due to attend the hearing. While the Panel accepts that there is no requirement for the SSSC to produce such statements, it perhaps raised further questions as to the state of preparation of the case by the SSSC.

Point two of the test refers to the conduct of the worker. The Presenter submitted that you had delayed in replying to the SSSC in December 2018 which delayed the referral of this case to a Panel. However, it would appear that the correspondence sent to you did not contain a "reply by" date. In terms of the timeline document, a reply by you does not seem to have been pursued by the SSSC. Given this, the Panel did not consider that your conduct in any way contributed to the delays in this case.

The manner in which this case has been dealt with by the SSSC is the third point for consideration by the Panel. It took four months to arrange a suitable hearing date. The Panel did not consider that time frame to be inappropriate in any way. However, the Panel considered that the cumulative delays in this case since it was first referred to the SSSC are wholly unacceptable. The Panel would refer to the delays outlined above. There are periods of three, five, six and seven months where the SSSC appears to have taken no action of any kind to progress the investigation or the hearing.

In conclusion, the Panel considers that an overall delay of four years and six months requires to be addressed by the SSSC. However, an explanation for a large number of the delays was not forthcoming as noted above.

The Panel then considered the issue of potential prejudice to you caused by the delay. One of the issues mentioned in *Speirs v Ruddy (2007) UKPC D22* is the quality of the evidence due to the effect of the delay upon the memories of the witnesses. The Panel was provided with the statement of YY on the first day of the hearing. She repeatedly stated that she could not remember various matters or had a vague recollection. The Panel considered that it was likely that the witnesses would also be similarly affected by the passage of time if required to speak to the allegations.

The Panel considered *Okeke*, and noted that the circumstances of that case were broadly similar to the present case with the overall delay in reaching a hearing amounting to around four and half to five years. In that case, the NMC could not explain the delay. In the present case, there are a number of extended periods of time throughout that four and a half year period for which the SSSC could not provide a reasonable excuse for the delay.

The Panel accepts that distress to the worker in this situation is par for the course. It is an unfortunate, but unavoidable, part of this process. This strengthens the argument that any delay should be kept to a necessary minimum. That cannot be said to be the case here.

The Panel considered the issue of proportionality in light of the application of Article 6. The Panel noted that both parties agreed that there was no causal link between the allegations and the unfortunate outcome for the service user. This is a balancing exercise. The Panel required to balance the public interest and protection role of the SSSC as regulator against the prejudice to you caused by the repeated delays. The Panel considered that the allegations were at the lower end of the scale, albeit acknowledging that any such failings could have potentially serious consequences. They were for the most part procedural failings. Having carefully considered all of the facts and circumstances of the present case, the Panel decided that on this occasion the prejudice to you as a result of the repeated delays outweighed the public interest in progressing this matter.

In conclusion, the Panel considered that the time lapse here gave grave cause for concern. The case was not complex or out of the ordinary in any way. There was no delay apportionable to you. It was clear from the statement obtained from YY that the delay has had an effect on the quality of some of the evidence before the Panel. This caused prejudice to you as a result. When balancing all of these considerations, the Panel decided that the public interest had been outweighed by the prejudice to you. The SSSC could not provide a justifiable reason for the repeated delays in this case. The Panel decided that the high test referred to in the various case authorities had been met on this occasion. Accordingly, the Panel decided to exercise its power in terms of Rule 30 and dismissed the case.

Legal Advice

There was only one matter upon which the Panel sought legal advice. The Panel requested clarification as to when the “reasonable period” began. The Chair referred the Panel to *Attorney General (No 2 of 2001) 2004 2AC 72 HL* and to *Okeke v NMC 2013 WL 617251* as outlined above and confirmed that the relevant period began when you were given notice that the allegations had been referred to the SSSC, namely, in March 2015.

The Panel accepted the legal advice given by the Chair.