

SHERIFFDOM OF TAYSIDE CENTRAL AND FIFE AT DUNDEE

B619-17

JUDGMENT

by

SHERIFF LINDA SMITH

in causa

AG, residing at [REDACTED], and being registered as a Support Worker in the part of the Register for Support Workers in a Care Home Service for Adults under reference number [REDACTED]

Pursuer

against

THE SCOTTISH SOCIAL SERVICES COUNCIL, the independent Regulator for Support and Social Workers in Scotland, established by the Regulation of Care (Scotland) Act 2001, and having a place of business a Compass House, 11 Riverside Drive, Dundee, DD1 4NY

Defender

Dundee, 9 February 2018.

The sheriff having resumed consideration of the cause SUSTAINS the Pursuer's pleas in law 1, 2, 3, 4 and 5, and *quoad ultra* repels the parties pleas; REVERSES the decision of the Defender made on 17 November 2017 whereby the Defender's Fitness to Practice Panel imposed a Temporary Suspension Order for a period of six months on the Pursuer's Registration in the part of the Register for Support Workers in a Care Home Service for Adults; DIRECTS that the Defender's Temporary Suspension shall have no effect; FINDS the Defender liable to the Pursuer in expenses; ALLOWS an account thereof to be given in and

REMITTS same, when lodged, to the Sheriff Clerk to tax and to report; CERTIFIES the cause as being suitable for the employment of Senior Counsel.

SHERIFF

Finds in fact:

1. The Pursuer AG resides at [REDACTED]. On 31 October 2014 he was registered as a Support Worker in the part of the Register for Support Workers in a Care Home Service for Adults under reference number [REDACTED].
2. The Pursuer is and has been employed as a Support Worker by HC-One Limited. They have employed him as a Support Worker at [REDACTED] since May 2014 and from September 2013 and to May 2014 at [REDACTED].
3. On 31 October 2014 the Pursuer was registered as a Support Worker in the part of the Register for Support Workers in a Care Home Service for Adults under reference number [REDACTED].
4. The Defender is the Scottish Social Services Council (hereinafter referred to as ("SSSC") and is the Independent Regulator for Support and Social Workers in Scotland established by the Regulation of Care (Scotland) Act 2001 (hereinafter referred to as the "2001 Act") having a place of business at Compass House, 11 Riverside Drive, Dundee DD1 4NY.
5. The SSSC controls entry to and removal from the part of the register for Support Workers in Care Home Services for Adults and determines the principles, values and standards that underpin good Social Work and Support Worker practice.

6. The SSSC (Fitness to Practice) Rules 2016 (hereinafter referred to as “the Rules”) made by the SSSC in pursuance of its powers under sections 47, 48, 49, 50 and 57 of the 2001 Act, sets down a procedure for receiving complaints and, where appropriate investigating allegations of misconduct and deficient professional practice, which in the reasonable opinion of the SSSC, are likely to result in a finding that a support worker’s fitness to practice is impaired.
7. The SSSC provides Decisions Guidance for Fitness to Practice Panels (hereinafter referred to as FPP) and SSSC staff (Number 5/2/6 of Process). The introduction to this document states at Part A.1 that *“This guidance is an authoritative statement on our approach to decision making and the panel and SSSC staff must refer to it when making a decision.”*
8. On or about July 2015 the SSSC became aware (in the course of their investigations by their Fitness to Practice Panel team into another referral), of allegations about the Pursuer (a registered Support Worker) that raised serious concern about the Pursuer’s fitness to practice and impairment in terms of Part 1 of the Rules.
9. The SSSC made enquires in relation to the allegations against the Pursuer and decided to further investigate the allegations concerning him. They regarded the allegations against him as serious and informed the Pursuer of that decision on 20 September 2015. 5/1/1 of Process is a copy of the Personal Statement Form served on the Pursuer by the Defender on 20 September 2015. The SSSC informed the Pursuer in said notice that they had received information relating to allegations of misconduct and deficient professional practice against him. Notice of this was intimated at that time to the Pursuer’s employers HC-One Limited. These related to serious allegations during the period from 19 May 2014 to February 2015 during

which time the Pursuer continued to work with HC-One Limited as a Support Worker at [REDACTED].

10. The SSSC could access all employer documentation from HC-One Limited, in relation to their employment of the Pursuer and in relation to any allegations against him prior to, or after service of the Personal Statement Form on the Pursuer in September 2015.
11. The initial notice served on the Pursuer and intimated to his employer did not, at that time, include allegations of misconduct and deficient professional practice against him for the period around September 2013 when the Pursuer was employed by HC-One Limited as a Support Worker at [REDACTED].
12. Pending further investigations by the SSSC, the SSSC could have made a referral to a Fitness to Practice Panel (hereinafter referred to as "FPP") for a Temporary Order. The purposes of such a referral enables the FPP to consider at an early stage of investigation by the SCCC, the making of a Temporary Order *inter alia*, to provide protection to vulnerable adults who may come into contact with the service worker, to provide reassurance to the general public that vulnerable adults are protected from possible risk of harm and to enable the service worker to be suspended or remain in supervised employment if this is thought to be necessary. Such a referral to the FPP enables the SCCC to continue its investigations and to decide in due course what further action should be taken, if any, against the service worker.
13. The SSSC chose not to refer the allegations concerning the Pursuer to a FPP until on or about 7 September 2017, approximately two years after he was notified by the SSSC of the allegations against him.

14. By letter of 7 September 2017 the SSSC provided the Pursuer with an Initial Notice of Referral to FPP Hearing on 9 October 2017. Copies of the bundle of papers lodged for the FPP hearing included signed and dated statements in support of the detailed allegations brought against the Pursuer. The allegations included allegations relating to incidents on 13 September 2013 when the Pursuer was employed by HC-One Limited as a Support Worker at [REDACTED].
15. At the FPP hearing on 9 October 2017 the hearing was aware that all the allegations related to incidents in 2013 and the periods from May 2014 to February 2015 had been fully investigated at the time by the Pursuer's employer HC-One Limited. The FPP had copies of the full investigations carried out by HC-One; statements obtained from relevant witnesses at that time and minutes of meetings held in the course of said investigations.
16. Recent statements from witnesses revealed that the Investigating Officer for HC-One Limited in February 2015 was [REDACTED] who was also the Disciplining Officer in relation to the allegations against the Pursuer during the period around September 2013 when HC-One Limited employed the Pursuer as a Support Worker at [REDACTED]. During the period of his employer's investigations the Pursuer was suspended by his employer but after the investigation concluded he was reinstated.
17. [REDACTED] was employed by HC-One Limited in a managerial role in July 2015 when the SSSC decided to further investigate the allegations and informed the Pursuer of their decision to do so on 20 September 2015.
18. HC-One Limited fully cooperated with the SSSC and the FPP throughout their investigations.

19. No documentation was lodged by the SSSC to the FPP in explanation for the delay, or any difficulties encountered, by the SSSC in obtaining the evidence contained in the documentation provided in the bundle of papers (6/1/2 of Process) lodged and intimated in advance of the hearing on 9 October 2017. No documentation or evidence was provided by the SSSC to the FPP as to why allegations dated 13 September 2013 was not included in the Personal Statement served on the Pursuer on 20 September 2015.
20. No information or detailed explanation was provided to the FPP by the SSSC as to what work was done or when enquiries were first made to obtain information when their investigations first raised concerns about the Pursuer's conduct. No information was provided chronologically of any difficulties encountered by the FPP in obtaining information during the period from July 2015 to the date the listed statement of documentation was produced in August 2017.
21. Since February 2015 there have been no allegations of misconduct or complaints against the Pursuer to any aspect of his employment as a Care Worker. In the intervening period the Pursuer has successfully obtained a number of certificates and qualifications in various aspects of caring for and understanding the needs of vulnerable persons in his care.
22. On Monday 9 October 2017 the FPP adjourned the hearing to obtain material from 1 February 2015 to date on;
 - (a) the details at each establishment at which the Pursuer had worked,
 - (b) details from any formal or informal complaints of any nature made against him,
 - (c) details of any formal or informal disciplinary action taken against him including, matters investigated in the period from 18 February to 11 March 2015,

- (d) details of any concerns (however minor) in relation to the workers practice,
 - (e) details of any training undertaken by him,
 - (f) details of any improvement plans or other measures implemented in relation to him, and
 - (g) copies of each establishment's procedures and policies in relation to complaints, whistle blowing support and supervision and training.
21. No relevant concerns, complaints or any disciplinary action were brought to the attention of the FPP in response to the requested information for the period from 1 February 2015 until 9 October 2017 or since.
22. The manager of HC-One Limited [REDACTED] and the Pursuer's line manager [REDACTED] provided statements to the FPP hearing that they had no concerns in relation to the Pursuer behaviour or conduct.
23. There was no admission of wrong doing on the part of the Pursuer and no evidence of any assessment of risk revealed in the period from July 2015 to 30 November 2017 (the date of the adjourned hearing) by care home staff or managers or from independent Care Inspectorate Reports. In these circumstances the FPP hearing had no relevant evidential basis to consider it necessary for the protection of the public or otherwise in the public interests or that of the Pursuer to make a Temporary Suspension Order.

Finds in fact and Law

1. In terms of Rule 45.4 (a) it is accepted that there was *prima facie* evidence of allegations against the Pursuer namely that:-

while employed as a Care Assistant by HC-One Limited, and during the course of that employment, you did:

1. in or around September 2013, at [REDACTED], you did:
 - a. manually lift resident AA without the use of a hoist contrary to AA's moving and handling plan
 - b. complete resident's hourly turning charts in advance of the care being delivered to residents
 - c. provide personal care to a resident while the resident's bedroom door was open

2. at [REDACTED], and during the course of that employment, you did:
 - a. between December 2014 and February 2015, on exact dates unknown to the SSSC.
 - i. on two occasions, fail to announce your presence or turn the light on when entering resident BB's room at night
 - ii. on two occasions, manually lift resident BB off her bed without waking BB first
 - iii. on two occasions, manually lift resident BB off her bed without the use of a hoist contrary to BB's moving and handling plan
 - iv. instruct your colleague ZZ to change resident BB's bed sheets while you were holding BB in a cradle lift
 - v. grab and turn resident BB while BB was still sleeping
 - vi. change BB's continence pad without waking BB first
 - vii. your actions at 2a.i-2a.vi above caused distress to resident BB
 - viii. when your colleague ZZ confronted you about your actions at 2a.i – 2a.vi above, place your face close to ZZ's face and state "what are you going to do about it" or words to that effect

- ix. your actions at 2a.viii above caused distress to your colleague ZZ
 - x. fail to announce your presence or turn the light on when entering resident CC's room at night
 - xi. grab resident CC's feet
 - xii. swing resident CC around by her feet to get her into a sitting position
 - xiii. you did the above at allegations 2a.xi – 2a.xii without waking resident CC first
 - xiv. manually lift resident DD without the use of a hoist contrary to DD's moving and handling plan
 - xv. repeatedly sleep on waking nightshift
 - xvi. fail to announce your presence when entering resident EE's room at night
 - xvii. change resident EE's underwear without waking EE up first
 - xviii. your actions at allegations 2a.xvi – 2a.xvii above caused distress to EE
 - xix. your actions at allegations 2a.xv – 2a.xvii above caused distress to your colleague YY
 - xx. pull resident FF out of bed
 - xxi. handle resident FF in a rough manner
 - xxii. your actions at allegations 2a.xx – 2a.xxi above caused distress to FF
- b. in around December 2014, enter resident's bedrooms at night while the residents were sleeping and:

- i. fail to announce your presence
 - ii. turn the lights on without warning the residents
 - iii. pull back resident's bed covers to check their continence pads without waking the residents up first
 - iv. change resident's continence pads without waking them up first
 - v. fail to communicate with residents while delivering personal care
- c. on or around 14 December 2014 and another date unknown to the SSSC:
- i. hold resident GG's hands and refuse to let go
 - ii. your actions at above caused distress to GG
- d. on dates unknown to the SSSC in 2014, communicate with your colleagues in an intimidating and demeaning manner, in particular:
- i. state to your colleague XX "you are racist and I will get you" or words to that effect
 - ii. call your female colleague ZZ "a little girl" or words to that effect.

2. In terms of Part 3, Rule 8.1 such specific allegations in relation to the Pursuer's conduct at either care home, if proved, would in the reasonable opinion of the SSSC be likely to result in a finding that the worker's fitness to practice is impaired and also be likely to result in a finding that the worker's fitness to practice is impaired.

3. The SSSC In terms of Part 3, Rule 9.2(b) the SSSC decided to refer the Pursuer's case to the Fitness to Practice Panel (hereinafter referred to as "the FPP") for consideration of a Temporary Order Referral under Part 7 of the Rules. In so doing the SSSC considered that the Pursuer's case there was *prima facie* information that should be

considered as an impairment case under Part 4 of the Rules. The SSSC applied the test in Rule 9.4(a) which provides that a Temporary Order may be made where the SSSC considers it necessary for the protection of members of the public, or otherwise in the public interest, or is in the interests of the worker concerned.

4. The SSSC could have applied the test in Rule 9.4(a) and decided to refer the Pursuer's case to the FPP for consideration of a Temporary Order Referral under Part 7 of the Rules in September 2015 when they served the Personal Statement Form on him but chose not to do so. Had they done so they could still have continued their investigations and in terms of Part 3 Rule 8.5 requested information from any person or source at that time.

5. On 9 October 2017 the FPP adjourned their consideration of the Hearing to obtain additional information as to whether a Temporary Order Referral was necessary given the historic nature of the allegations against the Pursuer.

6. In terms of Rule 45.4(b) (i) the FPP required this additional information to assess whether a Temporary Order was necessary. The additional information sought was positive and in support of the Pursuer. It demonstrated that there had been no additional complaints or criticisms of the Pursuer's work arising from his interaction with colleagues or adults in his care. He had obtained additional and relevant qualifications and training in the intervening years. Independent Care Inspectorate Reports were also positive.

7. In the absence of any negative up-to-date information or evidence against the Pursuer the FPP hearing misdirected itself by then going on to consider that a Temporary Suspension Order was necessary for the protection of members of the public or in the

interests of the Pursuer. In so doing the FPP failed to demonstrate the purpose of a Temporary Suspension Order, in particular the proportionality of such an order, as set out in the Guidelines at Parts B, 12, 12.1, 12.2 and 12.3.

8. By accepting the allegations “if proved” against the Pursuer to be a “breach of trust” the FPP then went on to find that the Pursuer’s failure to admit the allegations or show any “insight or regret” for his alleged actions. In so doing the FPP demonstrated their lack of understanding of the temporary nature of any order to be considered by them at this stage and did not give sufficient consideration to the guidance given to them in the Guidelines at Part D, 15.4:

*“ the focus is not on fitness to practise but on **risk**”*

9. *Esto* the FPP required to make a Temporary Order they did not consider the nature of any Temporary Order that may be made or give explanation as to why any such order was inappropriate. Their decision to impose a Temporary Suspension Order on the Pursuer for six months was disproportionate, unnecessary and harsh given the SSSC had made no referral to the FPP for any Temporary Order in September 2015 when the more recent allegations had been made against him.

10. By imposing a Temporary Suspension Order suspending the Pursuer from practice for a period of six months the FPP misdirected itself and failed to follow the SSSC Guidelines to staff in relation to Temporary Orders as set out in Part B, 12.2 ((6/1/4 of Process). In so doing the FPP placed undue regard on the historic nature of the allegations, the number and nature of the professional qualifications that the Pursuer had obtained in the meantime, the lack of any recent criticism or allegations against the Pursuer and his ongoing employment with the same employee and any other relevant factors in the

Pursuer's favour. As a result their decision failed to act in a fair and proportionate manner towards the Pursuer.

11. The FPP placed insufficient weight on the number and nature of the allegations brought to the attention of the SSSC in July 2015 and the SSSC decision at that time to make no application to the FPP for a Temporary Order. In so doing the FPP failed to place sufficient weight on the considerable delay by the SSSC in requesting the Temporary Order now sought, which Order, by its nature is a protective measure to be taken *inter alia* when the SSSC require to continue investigations in relation to allegations against a care worker.

12. The FPP's decision that the Pursuer had shown no insight or regret in relation to the allegations against him and therefore that his behaviour was a breach of trust demonstrates the FPP's misdirection. In so doing their decision demonstrated they had formed a concluded view on the merits of the complaints still under investigation by the SSSC.

13. By imposing a Temporary Suspension Order the FPP misdirected itself by failing to follow 12.3 of the Guidelines in relation to Temporary Orders whereby the FPP are advised to first consider the least restrictive Temporary Order. In particular the FPP did not consider the Guidelines at 15.4A whereby their focus was to consider "risk" to service users and to protect the public and not the Pursuer's "fitness to practice" while there was an on-going investigation by the SSSC. Their failure to consider and enquire into any restrictions which could be implemented in the Pursuer's working environment, demonstrated that the FPP had misdirected themselves on how to consider whether a Temporary Order was required at all or, if one was required, the least restrictive Temporary Order to be imposed.

The Law

The parties were agreed that the Defender (SSSC) is established under the Regulation of Care (Scotland) Act 2001 (the Act) S43 as the professional regulator for Social Service Workers in Scotland. It was agreed that the SSSC is required to keep a register of social service workers (S 44) and that S49 of the Act empowers the SSSC to determine rules for the circumstances and means whereby a person may be removed from the register of social service workers. S50ss (2)(b), (3)(a), (4)(a) and (b) provides for the SSSC to give notice of any decision made under the Rules created by S49 of the Act. S51 provides a right of appeal to the Sheriff Court against any such decision. The relevant sections of the Act are: -

S43 Constitution of Scottish Social Services Council

(1) There shall be a body corporate, to be known as the Scottish Social Services Council (in the following provisions of this Act referred to as “the Council”), which—

- (a) shall exercise the functions conferred on it by this Act or any other enactment; and*
- (b) shall have the general duty of promoting high standards—*
 - (i) of conduct and practice among social service workers; and*
 - (ii) in their education and training.*

S44 Register of social workers and of other social service workers

(1) The Council shall maintain a register of—

- (a) social workers;*
- (b) social service workers of any other description prescribed; and*
- (c) persons—*
 - (i) participating in a course, approved by it under section 54(1) of this Act, for those wishing to become; or*
 - (ii) employed in positions probationary to their becoming, social workers or social service workers of such other description.*

S49 Removal etc. from the Council's register

(1) *The Council shall, by rules made with the consent of the Scottish Ministers, determine circumstances in which, and the means by which —*

(a) an entry relating to a person in the register maintained by the Council may be removed from a part in which it appears;

(b) an entry removed by virtue of paragraph (a) above may be restored to the part in question;

(c) a person's registration in a part of that register may be suspended (and that person treated as not being registered in that part notwithstanding that the relevant entry still appears in it) for such period as the Council may specify in the case in question;

(d) a suspension by virtue of paragraph (c) above may be terminated; and

(e) an entry in a part of that register may be altered (other than in implementation of a proposal of which notice is given under section 47(1) of this Act).

(2) *Rules under subsection (1) above shall —*

(a) make provision as to —

(i) the procedure to be followed;

(ii) the standard of proof; and

(iii) the rules of evidence to be observed,

in proceedings brought (whether before the Council or before any committee of the Council) for the purposes of the rules; and

(b) provide for such proceedings to be in public except in such cases (if any) as the rules may specify.

(3) *The Council shall maintain a register of persons who have been registered in the register maintained under section 44(1) of this Act but who, by virtue of paragraph (a) of subsection (1) above, are for the time being not so registered; and where an entry relating to a person is, by virtue of paragraph (b) of that subsection, restored, the entry relating to that person in the register maintained under this subsection shall be removed.*

S50 Notice of Council's decision

(1) *If the Council decides to grant unconditionally an application for registration under this Part, it shall give the applicant notice of its decision.*

(2) *If the Council decides —*

(b) in accordance with rules made under subsection (1) of section 49 of this Act, to do any of the things mentioned in paragraphs (a) to (e) of that subsection, it shall give the person affected notice of the decision.

(3) A notice under subsection (2) above shall—

(a) explain the right of appeal conferred by section 51 of this Act;

(4) A decision such as is mentioned in subsection (2) above, other than a decision under section 46(2) to refuse the application, shall not take effect—

(a) if no appeal is brought, until the period of fourteen days referred to in section 51(1) of this Act has elapsed; and

(b) if an appeal is brought, until that appeal is finally determined or is abandoned.

51 Appeal against decision of Council

(1) A person given notice under section 50(2) of this Act of a decision to implement a proposal may, within fourteen days after that notice is given, appeal to the sheriff against the decision.

(2) On such an appeal the sheriff may—

(a) confirm the decision; or

(b) direct that it shall not have effect.

(3) The sheriff shall also have power, on such an appeal—

(a) to vary any condition which, by virtue of section 46 of this Act, is in force in respect of the person;

(b) to direct that any such condition shall cease to have effect; or

(c) to direct that a condition which the sheriff thinks fit to impose shall have effect in respect of the person.

S53 Codes of practice

(1) The Council shall prepare, and from time to time publish, codes of practice laying down standards of conduct and practice expected—

(a) of social service workers; or

(b) in relation to social service workers, of persons employing or seeking to employ such workers.

(2) Before publishing a code, the Council shall—

(a) obtain the consent of the Scottish Ministers to the provisions of that code; and

(b) consult the Commission, any person, or group of persons, prescribed by the Scottish Ministers and any other person, or group of persons, the Council considers it appropriate to consult.

(3) The Council shall keep the codes under review and shall vary the provisions of a code whenever, after such consultation, it considers it appropriate to do so.

(4) The employer of a social service worker shall, in making any decision which relates to the conduct of that worker, take into account any code published under subsection (1) above by the Council.

(5) The Council shall give a copy of a code so published to any person who requests such copy.

The Parties are agreed that the current rules in force under S57 of the Act are set out in the Scottish Social Services Council Fitness to Practice Rules 2016 (referred to herein as “the Rules”) (6/1/1 of Process). Parties are also agreed that the current guidance document produced by the SSSC is The Decisions Guidance for Fitness to Practice Panels and Social Service Council Staff (6/1/4 of Process)

Decision

This Appeal hearing was initially scheduled for two Court dates but due to pressure of business on day one, the hearing was adjourned until the following day in the hope that court business would allow it to proceed. In the intervening period Senior Counsel Ms Bain for the Pursuer and Mr Gilt prepared their submissions in writing, which I had opportunity of reading the following day prior to the commencement of the Appeal hearing. The facts of the case and the circumstances leading up to the FPP decision on 30 November were not in dispute.

The Pursuer's Position

The Pursuer's position was in short that the decision of the FPP on 17 November 2017 to impose a Temporary Suspension Order on him for a period of six months should be given no effect. It was submitted that:-

- (a) the FPP had misdirected themselves on the question of delay
- (b) that the FPP were confused over issues that should have influenced their decision, as a result they had pre-judged the guilt of the Pursuer and had failed to have regard to the paragraph 12 of the Decisions Guidance thereby misdirecting themselves by taking an irrelevant consideration in to account (
- c) that the FPP had ignored evidence of the absence of misconduct on the part of the Pursuer for a period of over two years and instead had made their decision to impose a Temporary Suspension Order on the basis of the original allegations when they were required to enquire and take into account whether there was evidence of repetition in terms of paragraph 12.2 of the Decision Guidelines, and
- (d) in so doing the FPP having failed to have regard to paragraph 12 they took account of factors in paragraph 8. Had they not done so no Temporary Suspension Order would have been granted or at the most a Temporary Conditions Order would have been imposed.

The Defender's Position

The Defender in answer submitted:-

- (a) that the FPP decision demonstrated that they did exercise their decision appropriately, that they had made a fair and proportionate decision for the

protection of the public and they had not placed undue weight on the nature of the allegations against the Pursuer. The FPP had also taken into account the financial impact that their decision may have on the Pursuer. It was submitted that case law recognises that the Court will be particularly reluctant to interfere with a decision made by a professional misconduct committee. In *Graham v Nursing and Midwifery Council* 2008 SC 659 Lord Wheatley stated:

“ It is well settled that the appropriate test which must be applied in an appeal of this kind if the disposal is to be set aside is that the penalty imposed can properly be described as excessive and disproportionate in all the circumstances of the case”

(b) that the FPP had exercised their discretion appropriately and that the delay was not about the commencement of the Defender’s proceedings but concerns about the Pursuer’s behaviour. The case of *Haikel v General Medical Council* [2002] UKPC 37 was cited to demonstrate a delay in that case from notifying the appellant in September 1999 that investigations against him had begun until May 2001 when he was served with the evidence to be placed before the Professional Conduct Committee. It was held that in the absence of an explanation it was still open to the Committee to determine whether or not the delay was such as to amount to an abuse of process. It was submitted that in this case the Personal Statement Form sent to the Pursuer had made no mention of a Temporary Order being sought (6/1//2 of Process page F87) and the SCCC could apply for a Temporary Order when it had sufficient evidence to do so. An explanation for the delay had been provided and it was conceded that the proceedings had commenced in 2015 when the Pursuer was notified of allegations in the Personal Statement sent to him.

(c) that the FPP concluded that the Pursuer had acted in the manner alleged and had referred to the Pursuer’s lack of insight to his actions. It was submitted that the Pursuer

accepted that there was a *prima facie* case against him and it was on that basis, not as a result of the FPP finding the allegations against him to be proved that the FPP had decided that the public required to be protected. The Defender accepted that the FPP, in deciding an application for a Temporary Order, must not and cannot decide on disputed matters of fact in relation to the substantive allegation. However the Defender submitted that, with reference to the FPP's comments on insight, they were entitled to consider this as a concept inextricably linked with the likelihood of repetition. Reference was made to the English case of *Bevan v The General Medical Council [2005] EWHC 174* where a doctor was found guilty of professional misconduct in that he had engaged in an adulterous relationship with a vulnerable patient. He had appealed on the basis that a decision to sanction him with erasing his name from the medical register was excessive and that a suspension would have been sufficient. Although the appeal had been upheld it was stated that the committee had correctly applied insight as a factor when considering the risk of repetition. It was submitted that in considering whether the Pursuer had evidenced any insight to the admitted *prima facie* evidence before them, the FPP are directed at paragraph 12.2 of the Decisions Guidance, to consider the risk of repetition when considering whether to grant a Temporary Order. At paragraph 12.3 of the Guidance they are directed to consider the factors in paragraph 15.1 which lists various factors which might be not be appropriate if present when deciding whether or not to impose a condition allowing a worker to remain on the Register one of which is "No insight or lack of reflection". It was submitted that in considering the risk of repetition the presence of insight is inextricably linked to this. If insight is demonstrated in relation to the alleged behaviour (if proven), it would provide reassurance that the likelihood of repetition is reduced.

The parties were agreed that the notice of the FPP decision was not sent timeously to the Pursuer but neither party relied on this administrative error and fact as a ground to overturn the FPP decision.

In the event of the Court upholding the Pursuer 's appeal against the imposition of a Temporary Suspension Order on the Pursuer parties were agreed that the Court was not required to consider any other form of Temporary Order

In conclusion I decided that the decision of the FPP to impose a Temporary Suspension Order on the Pursuer for a period of six months was inappropriate and harsh in the particular circumstances of this case. I was not required to consider the imposition of a Temporary Condition Order.

I accepted that both parties agreed that there was *prima facie* case against the Pursuer if proved, that he had been involved in a course of conduct of a serious nature. Such conduct if established may result in the Pursuer being removed from the Register of Social Service Workers. A party's lack of contrition or insight into his or her behaviour would be significant considerations at such a hearing. However this was not such a hearing. This was not a hearing to consider a Temporary Suspension or Conditions Order following an Impairment Hearing. This was a hearing requested by the SSSC for a Temporary Order in terms of Section 45.4 of the 2016 Rules. Rule 45.4 provides:

"In deciding a temporary order referral the Panel must:

- a. decide whether there is prima facie evidence of the allegation;*
- b. if there is, decide whether a temporary order is necessary:
i, for the protection of members of the public or is otherwise in the public interest or is in the interests of the worker; or*

- ii, *where the worker's fitness to plead has been called into question;*
- c. *if a temporary order is necessary on those grounds, decide whether to make a temporary conditions order, a temporary suspension order or both; and*
- d. *make the order (or orders)."*

As accepted there is agreement in this case that a *prima facie* case exists and that if an Impairment Hearing is convened the seriousness of the allegations if proved may result in the Pursuer being removed from the Register of Support Workers in a Care Home Service. The question of "insight" will be a consideration at such a hearing and, in my opinion would also have been a consideration in this case had the decision of the SSSC to take the facts to a FPP been made earlier. If for example the FPP hearing had been convened within a year of the SSSC's decision in September 2015 that the allegations were serious and merited investigation, the FPP could have decided that a Temporary Order requiring the Pursuer to be supervised on shifts or be confined to general duties, his insight into the seriousness of the allegations may have been more pertinent. However that is not what happened in this case. Whilst delay in referring a case to the FPP is not in itself a barrier to considerations of any temporary order, it does, in my opinion becomes so when no more recent allegations or additional factors come to light to compound the original allegations. In this case the allegations added to the original Personal Statement served on the Pursuer were not only older than those served on him but also alleged to have taken place when he was in the continuous employment of the same employer. Although the older allegations allegedly took place at a different care home they were investigated at the time by the same personnel, who were also involved in the investigations which took place at [REDACTED] some months later. In my view the SSSC decision not to refer these serious allegations to a FPP for

a Temporary Order in the later part of 2015 when the employee remained with the same employer and was served with an Initial Notice, was mistaken.