

16 MAY 2018

RW/RW redacted

AH v Scottish Social Services Council

Dundee 15 May 2018 Sheriff

The Sheriff, *ex proprio motu* Assigns [redacted] 8 at 10.00am within the Sheriff Court at Dundee, 6 West Bell Street, Dundee as a hearing on expenses.

Sheriff Carmichael

This document has been electronically authenticated and requires no wet signature.

SCANNED

15/05/2018

Sheriffdom of Tayside Central and Fife at Dundee

Decision of

Sheriff Alastair Carmichael

Sheriff of Tayside central and Fife

in causa

AH, [redacted]

Appellant

against

Scottish Social Services Council, Compass House, 11 Riverside Drive, Dundee, DD1 4NY

Respondent

BRIGGS, solicitor, for the Petitioner

GALLACHER, solicitor, for the Respondent

14 May 2018, the Sheriff having resumed consideration of the case;

Confirms the decision of the Fitness to Practice Panel of the Scottish Social Services Council dated [redacted], refuses all of the Appellant's pleas-in-law, refuses the Respondent's first and second pleas-in-law and sustains the Respondent's other pleas-in-law, and orders that the case be put out for a hearing on expenses on a day to be fixed by the Sheriff Clerk.

NOTE

[1] This case is an appeal brought by way of summary application under the Regulation of Care (Scotland) Act 2001 section 51 ("the Act"). The Appellant appeals the decision of the Fitness to Practice Panel ("the FPPP") of the Scottish Social Services Council of [redacted]. In that decision the FPPP decided that the Appellant's fitness to practice as a social worker was impaired and that her registration as a social worker be removed.

[2] Section 51 of the Act provides no guidance as to the grounds for an appeal. It allows the sheriff to confirm the original decision or to direct that the decision should not have effect. The section also allows the sheriff to remove or vary any conditions of practice that are already in force and to impose conditions of practice.

[3] The case called before me on [redacted]. A record had been produced for the hearing. There were also written notes of arguments for the Appellant and the Respondent. There was no transcript available for the evidence led before the FPPP over 10 days. I heard submissions from the agents for the Appellant and the Respondent. Their submissions, both written and oral, were well constructed and presented and I commend them for this.

BACKGROUND

[4] There was little of the background to this case that was in dispute.

[5] The Respondent is the SSSC which is the independent regulator for social services in Scotland, having been established by the Act. The SSSC controls entry to, and removal from, the social workers' register and therefore controls who can practice as a social worker and who cannot. The Act requires the Respondent to establish and maintain a register of social workers. The Respondent can grant applications for registration in whole, conditionally or subject to such conditions as the Respondent sees fit. Section 59 of the Act requires the Respondent to exercise its functions in accordance with the principle that 'the safety and welfare of all persons who use, or are eligible to use, care services are to be protected and enhanced.'

[6] The Respondent is required by section 49 of the Act to make rules by which it can carry out its functions. The current rules are the Scottish Social Services Council (fitness to practice) rules 2016 ('the 2016 Rules'). Under the 2016 Rules allegations that a worker's fitness to practice is impaired are heard by the FTTP.

[7] Rule 2 states that, 'a worker is fit to practise if they meet the standards of character, conduct and competence necessary for them to do their job safely and effectively with particular regard to the Codes.' Relevant to the current case, Rule 2 goes on to state that, '*a worker's fitness to practise may be impaired by one or more of the following grounds: misconduct, deficient professional practice, health...*'

[8] The Respondent produced guidance for FTTPs in the form of the Decisions Guidance for Fitness to Practice Panels and Scottish Social Services Council Staff ("the Guidance"). Rule 36 of the 2016 Rules states that FTTPs are not bound by this guidance when reaching a decision, but that a FTTP would have to set out reasons for failing to do so.

[9] Rule 20 of the 2016 Rules sets out the sanctions available to the FTTP where it has decided that a worker's fitness to practice is impaired. These are set out as:

- to impose no sanction
- to warn the worker
- to impose a condition on the worker's registration
- to impose a warning and a condition
- to make a suspension order for a period not exceeding 2 years
- to make a suspension order and impose a condition
- to make a removal order
- to revoke any temporary order.

[10] Part A of the Guidance gives advice about the decision-making process for a FTTP. Paragraph 6 is entitled, *'What are the key purposes of our decisions?'* It then states that decisions should be made;

- *to protect the public*
- *to uphold the public interest*
- *in the interests of the worker*

Paragraph 6 states that the purpose of a decision is not punishment but accepts that some decisions may have the punitive effect. It states that, *'our decisions send a message to the profession and the wider public about the standards expected and they also discourage other workers from behaving in a similar way.'*

Paragraph 6.1 is entitled *'Protecting the public'* and reads as follows, *'we aim to protect and enhance the safety and welfare of people who use, or may use, services. When making a decision we must make sure, insofar as is possible, that the worker does not have an opportunity to repeat the behaviour. A decision made on the grounds of public protection should take into account the risk of harm and any actual harm caused. When considering the risk of harm, many factors will influence the decision maker, including the risk of repetition, the values a worker displays or how they have reflected on their behaviour.'*

Paragraph 6.2 is entitled *'upholding the public interest.'* It states that the public interest includes maintaining public confidence in the profession and the SSSC as the regulator, and also promoting and maintaining standards.

Under, *"Maintaining public confidence in the profession'* it includes, *'People who use services and their families trust social service workers with their health, safety and welfare, often at vulnerable times in their lives. The care that workers deliver and the behaviour they display must uphold the trust placed in them by people who use services and the wider public. The profession's most valuable asset is its reputation and the confidence that inspires. Decisions must take into account that the reputation of the profession is more important than the interests of any individual worker.'*

Under *'Promoting and maintaining standards'* it includes, *"the codes set out the standards workers should maintain. Failure to follow the codes may present a risk to public protection and damage the reputation of the profession. Repeated or serious failures are more likely to do this."*

[11] The Appellant was employed as a social worker in the Child Care Team by [redacted]. Allegations were made that the Appellant's performance was impaired in respect of a number of cases that she had handled between March 2013 and January 2015. A performance improvement plan was put in place for the Appellant between August 2013 and January 2015. The Appellant had been dismissed from employment as a social worker on [redacted] and was re-employed by [redacted] in a non-registerable (i.e. not as a social worker) role.

[12] The FTTP heard evidence about these allegations on 10 days between [redacted] and issued its decision on [redacted]. It heard evidence from 2 witnesses led on behalf of the

SSSC. These first of these was YY who was a senior social worker and who was the Appellant's manager and supervisor during the period covered by the allegations. The second was ZZ who was a social work manager with 16 years of experience. The Appellant was represented at the hearing and gave evidence to the FTPP.

THE FTPP DECISION

[13] The FTPP issued its judgement dated [redacted]. The FTPP decision was that some of the allegations against the Appellant were proved and that her fitness to practice had been impaired. The FTPP made the decision to impose a removal order on the Appellant's registration in the Register for Social Workers. The removal order was to come into effect on [redacted] or, as has happened, once any appeal is determined.

[14] The FTPP decision outlined the cases in which it held that the Appellant's practices had amounted to deficient professional practice. The decision then addressed the issue of impairment. The FTPP held that the Appellant had shown very limited insight or reflection into the seriousness of her conduct or the possible consequences for vulnerable service users. The FTPP held that the Appellant had sought to blame others for her deficient professional practice and had accepted only limited personal responsibility. The FTPP held that the Appellant had taken no steps to address these deficiencies in her professional practice and had made no apology for her failures. The FTPP was not satisfied that the Appellant had taken any steps since the conduct complained of to remedy her past deficient professional practice. The FTPP decided that the Appellant had failed to provide an acceptable level of care to the service users named in the allegations, and the level of care which she had provided was well below the professional standards expected. The FTPP concluded that the Appellant's behaviour was very serious and that her actions constituted a serious breach of trust to vulnerable service users and their families and, that while there was no evidence of direct harm caused any service user, harm was probably caused to some of them. The FTPP concluded that the Appellant's conduct amounted to a sustained failure to act in accordance with the fundamental requirements of the role of a social worker, stretching over a period of about 18 months. The FTPP concluded that there was a high risk of repetition of similar behaviour. The FTPP concluded that the Appellant had deep-seated attitudinal issues in relation to the role of a social worker and it was a matter of concern that the Appellant did not appear to appreciate the significance of these issues. The FTPP noted that the Appellant had been closely monitored during the personal improvement plan but had failed to achieve any sustained improvement in her professional practice. The FTPP concluded that a suspension or a continuation of practice with conditions was not sufficient in the circumstances. The FTPP therefore imposed the sanction of removal.

THE SHERIFF COURT'S POWERS

[15] Section 51 of the Act allows the sheriff to confirm the original decision or to direct that the decision should not have effect. The section also allows the sheriff to remove or vary any conditions of practice that are already in force and to impose conditions of practice. The Act does not, however, define or give guidance about what grounds of appeal may be taken nor does it specify what factors the relevant court may take into consideration when coming to its decision.

THE APPELLANT'S SUBMISSIONS

[16] The Appellant had 4 attacks on the FTTP's decision as listed in her pleas-in-law. The first was subdivided into parts (a) to (m) and in essence was that the FTTP should not have selected the sanction of removal, that it should not have allowed opinion evidence from witnesses YY and ZZ and had allowed their own personal views of the Appellant to affect their judgement. The second was that the FTTP had breached the Appellant's Article 8 rights because the selection of the sanction of removal was disproportionate. The third was that there was an excessive delay of 31 months before this matter proceeded to hearing, and the last was that the Appellant had not been given a fair hearing under Article 6 because the hearing had lasted 10 days over and above the delay in hearing it.

[17] The Appellant submitted that the only ground for impairment that was established was that of 'deficient professional practice'. This is far less than any kind of misconduct that involves culpability. The FTTP should taken into account the protection of the public, the public interest in maintaining confidence in the social services and also proportionality when considering a sanction. It should also have selected a sanction that was no more than necessary to protect the public in terms of rule 36.1 of the Guidance.

[18] The Appellant suggested that because the FTTP's decision was based only on deficient professional practice, the FTTP should have imposed a sanction of suspension, and not one of removal from the register. The sanction of removal was not proportionate in the circumstances. It is unfair to remove somebody from the register just for being bad at their job.

[19] The Appellant pointed out that the similar rules governing social workers in England and Wales provide that fitness to practice may be impaired on the basis of, *inter-alia*, a worker's misconduct or lack of competence. However, unlike the 2016 (Scottish) Rules, the rules south of the border do not allow removal of workers who are impaired by lack of competence from the register until they have been either suspended or subject to practising conditions for a period of no less than 2 years immediately preceding the decision. The Appellant suggested that it cannot have been the intention of Parliament to set up rules that allow practice committees on different sides of the border to impose different sanctions for cases where the facts are similar. The appropriate sanction for the Appellant was therefore one of suspension.

[20] There is scant evidence of any actual harm was caused by the Appellant's actions. The Appellant said in her written submissions, 'there were no grieving widows, no crying orphans, no petitions delivered to the Houses of Parliament...', and that there was nothing from which the decision panel

could possibly have concluded that there was a public interest which was sufficiently serious that the sanction of removal had to be imposed.

[21] The FTPP had held that the Appellant had been suspended for a period of 2 years, when this was clearly incorrect.

[22] There was no evidence from which the FTPP could have reached the conclusion that deep attitudinal issues had impacted on the Appellant's work.

[23] The FTPP had confused itself by stating on the one hand that there had been a performance improvement plan put in place, but on the other hand had noted that the employer's supervision of the Appellant had not been wholly adequate.

[24] The FTPP had misdirected itself in law by allowing opinion evidence from witnesses YY and ZZ as to the Appellant's fitness to practice. This had the effect of fettering the discretion of the FTPP.

[25] The members of the FTPP had allowed their judgement to be affected by their own personal views of the Appellant for which there was no evidential basis.

THE RESPONDENTS' SUBMISSIONS

[26] The Respondent accepted that it is a public authority in terms of section 6 of the Human Rights Act and must therefore not act in a way which is incompatible with a Convention right.

[27] The Respondent argued that the court should be slow to interfere with decisions on matters of fact taken by a first instance body. The court should also be slow to interfere with the sanction imposed by a professional conduct committee, because a professional conduct committee will possess particular qualities of relevant experience and expertise to determine what is the appropriate disposal.

[28] The Respondent asserted that there was a lack of averments on behalf of the Appellant to establish why the sanction imposed was disproportionate.

[29] The Respondent argued that the 2016 Rules and the Guidance gave clear procedures and guidance for the FTPP to make valid decisions. The FTPP's written decision makes it plain that it followed these properly.

[30] The Respondent stated that punishment was not the intention behind the sanction chosen, but accepted that there was an element of that in practical effect. Given the requirement of the FTPP to maintain the integrity of the profession and to maintain public confidence, the choice of removal as section was not excessive or disproportionate in all the circumstances.

[31] The Respondent asserted that the written decision of the FTPP showed that it had acknowledged the mitigating factors as well as listing the aggravating factors in this case. It had considered the matters of public protection and public interest and had considered what the public

would expect to be done. It had considered a warning but had decided that that was insufficient and it is also considered the imposition of conditions or a suspension but had decided that those were also inadequate.

[32] The Respondent argued that the FTTP had carried out the necessary balancing exercise when deciding whether to impose a sanction of removal.

[33] The Respondent stated that it was clear from the full written decision that there were findings in fact from which the FTTP could have reasonably inferred that harm had been caused to some of the individuals concerned.

[34] The Respondent argued that it was significant that the Appellant had been provided with a personal improvement plan but had, over that period, shown no signs of improvement and the FTTP had found that her work had continued to fall below the required standard.

[35] The Respondent explained that the referral was received on the [redacted] which made the total delay one of 22 months, and not 31 months. A case management meeting was held on [redacted] in which the Appellant's solicitor participated and had agreed that 10 days was a suitable length for the FTTP hearing.

DECISION

[36] There was no argument that the FTTP's decision was an intelligible one.

[37] The critical question for the court was whether the FTTP was entitled to impose the sanction of removal from the register.

[38] The 2016 Rules were legitimately made with a view to regulating social work and its practitioners in Scotland. It is clear that there is a difference between the Scottish rules and those that apply in England and Wales. This court has not been provided with any information to suggest what was or was not the intention of Parliament when these rules were made. Powers have been devolved to Scotland in a manner which allows authorities in Scotland to regulate their fields in ways which may or may not be similar or different to England and Wales.

[39] The 2016 Rules provide a selection of sanctions that are available to the FTTP should it decide that an impairment to practice has been established. The Guidance provides a list of scenarios at Paragraph 10 as examples of cases where more serious action may be required. This list includes, at paragraph 10.4, 'Failing to provide an acceptable level of care.' Information in the Guidance is that this is made out where a worker has not acted in the best interest of a person who uses social services and has provided care that falls well below the professional standards expected. It goes on to state that, *"a particularly important consideration is whether or not the worker has shown insight into these failures or has been able to improve their practice by taking remedial steps. Where insight is present and/or remedial steps have been taken, it is likely that the sanction other than removal may be appropriate."* The Guidance continues, *'There are some cases where a worker's failings cannot be remedied. This is because they are so serious or persistent that, despite steps subsequently*

taken, action is needed to maintain public confidence. This might include when a worker knew or should have known they were causing harm to someone who uses services and should have taken steps earlier to prevent this.'

[40] It is for this court to decide whether the FTPP's decision was one that a reasonable authority would have taken in all the circumstances, and not to decide whether it would have come to the same decision. The decision of the FTPP is lengthy and cogent. It is clear that it has taken many factors into consideration including factors of mitigation such as the Appellant's admission of certain shortcomings.

[41] The Appellant's pleas-in-law 1(a), (b) and (c); the sanction of removal is one that was available to the FTPP. The decision that the Appellant's fitness to practice was impaired through deficient professional practice is one that could legitimately have the sanction of removal from the register. The FTPP had concluded that the Appellant's deficient practice had extended over an 18 month period, that the Appellant had failed to show any remedial or improving behaviour in a period of a performance improvement plan and had concluded there was a high chance of a repetition of similar behaviour if the Appellant was allowed to continue in practice. In the circumstances the imposition of the sanction of removal was reasonable. The FTPP was aware that it required to protect the public and uphold the public interest and has imposed the sanction of removal in that context. Paragraph 10.4 of the Guidance makes it clear that the FTPP was entitled to view the Appellant's case as one where the sanction of removal, amongst others, was appropriate.

[42] The Appellant's plea-in-law 1(d); there was no transcript of the proceedings available to the court. Looking at the findings in fact contained within the decision of the FTPP there was sufficient material available to it to infer that the Appellant had such attitudinal issues given that her conduct had continued over an 18 month period. In any event, there is no obvious conflict between any attitudinal issues held and defective professional practice. Attitudes held by a social worker do not necessarily produce an element of culpability in his or her work.

[43] The Appellant's pleas-in-law 1(e) and (f); I did not fully understand the Appellant's arguments about the significance of the FTPP's findings that the Appellant could not reflect on her behaviour or development during a period of suspension or that personal reflection is a form of insight. The FTPP was stating in its decision that the main reason for a period of suspension was not simply that of giving the suspended worker a chance to reflect on previous impaired working practices. In any event, I heard no argument to suggest what practical impact any of these findings might have had on the decision or selection of sanction.

[44] The Appellant's plea-in-law 1(g); looking at the decision of the FTPP there does not appear to be any direct evidence of harm. However, given the number and nature of the instances of impaired practice behaviour complained of over an 18 month period, there was sufficient evidence available to the FTPP to infer that some form of harm was probably caused to some service users. The FTPP also had to consider whether the Appellant's conduct created the risk of harm.

[45] The Appellant's plea-in-law 1(h); I do not agree with the Appellant's assertion that the FTPP decided that the Appellant had been suspended for a period of 2 years. The relevant part of the decision is at page 23 at paragraph 8 in the section headed 'Sanction'. The decision reads, '...you

have had 2 years to reflect and it is not the purpose of a period of suspension to allow time for reflection. You have been effectively suspended from the role of social work since [redacted] on which date he were dismissed.' It is clear from this that the FTPP was not saying that the Appellant had been suspended, what it was saying was that she had *in effect* been suspended because she had been dismissed from her role as a social worker who had been taken on in a non-registerable role.

[46] The Appellant's plea-in-law 1(i); there was no transcript of the proceedings available to the court. Looking at the findings in fact contained within the decision of the FTPP there was sufficient material available to it to infer that the Appellant had such attitudinal issues given that her conduct had continued over an 18 month period.

[47] The Appellant's plea-in-law 1(j); there is a possible contradiction between the finding that the Appellant had been closely monitored by the employer during the period of the allegations and the finding that the employer's supervision of the Appellant had not been wholly adequate. However, in the absence of a transcript of the proceedings before the FTPP it is not possible to conclude that one or other of these findings is perverse. It is possible that there was close monitoring and that, at the same time, it was defective in some way. There was no argument put forward by the Appellant to suggest what practical impact this contradiction, if there was one, had upon the decision or selection of sanction.

[48] The Appellant's pleas-in-law 1(k) and (l); there is no transcript of the FTPP hearing and no note of precisely what questions were asked of these witnesses was produced. In general terms this evidence from witnesses YY and ZZ was admissible evidence and the FTPP was right to allow it. This was an enquiry into the Appellant's fitness to practice. Two witnesses were called on behalf of the SSSC and both were senior social workers. As far as I can tell, they were instrumental in starting the process that led to the Appellant's suspension. They must have made decisions because they had concerns about the Appellant's fitness to practice as a social worker. It is hard to imagine how the hearing could have been conducted without their opinions about the Appellant's fitness to practice being aired. The point in issue was whether or not the Appellant's fitness to practice as a social worker was impaired. The FTPP was entitled to hear evidence of opinion from these senior social workers about this matter because those opinions governed the actions and decisions that they took. They were both experienced and were in a position to state whether or not they thought that her fitness to practice was impaired. The witnesses had a skill and experience in this area. The witnesses were being asked to give an opinion about a matter that was within their own knowledge and experience. It was not made clear precisely what questions they had been asked, the context in which the questions were asked, nor in what capacity the witnesses had been asked the questions – as skilled witnesses or as eye-witnesses? The FTPP is a specialist body in which cases of professional conduct are heard. The FTPP is used to dealing with such matters and has its own knowledge as to what amounts to impairment. It is not in the same position as a jury who may need to have skilled witness evidence to assist them in an area in which they have only limited knowledge. No argument was put forward on behalf of the Appellant to expand upon the assertion that the FTPP had 'fettered' its decision as a result of allowing this evidence. The full decision of the FTPP makes it clear that it considered a whole range of matters and contains no suggestion that the FTPP had simply accepted this evidence of those witnesses and made its decision as a result of that.

[49] The Appellant's plea-in-law 1(m); no argument was put forward by the Appellant to substantiate this assertion that the FTTP allowed its judgement to be affected by the own personal views of the Appellant, nor how that may have impacted on its decision.

[50] The Appellant's plea-in-law 2; A person's Article 8 rights are not absolute. They are limited in that they can be interfered with if such interference is justified as being necessary for, amongst other things, public safety and to protect the rights and freedoms of others. Any such interference must be proportionate and do no more than is required to meet these aims. It is clear that the FTTP carefully considered the various sanctions open to it and decided that removal was the appropriate one. Given that the Appellant was tasked with looking after vulnerable individuals, it cannot be said that the decision to remove the Appellant was disproportionate or unnecessary.

[51] The Appellant's pleas-in-law 3 and 4; there was a delay in the case reaching a hearing in front of the FTTP. However the length of the delay cannot be said to be unreasonable in all the circumstances. The period of delay was 22 months from the employer's referral to the date of the decision and this falls well within what is required in terms of European case law to constitute an unreasonable delay, albeit that best practice would have been to have had it heard much earlier. The Appellant's Article 6 rights to a fair trial were not breached. She had a hearing in front of a properly constituted panel, she was legally represented and had an opportunity to cross-examine witnesses brought by the SSSC. She had the opportunity to give evidence, which she took. The hearing took place over 10 days and that suggests that the facts and circumstances were examined in great detail. I was not informed whether the hearing was held in public, but the decision was a written one and was fully reasoned. The Appellant was given a right of appeal which she has taken up. In all of the circumstances it cannot be said that she has not had a fair trial/hearing.

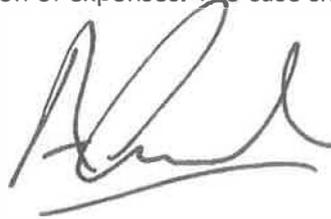
[52] It is well-established that where the original decision-making body is an expert body, then it is better placed than an appellate court to decide what standards and behaviours should be expected of its own professional practitioners. The membership of a FTTP is an expert body and will have a better understanding of the standards and behaviours that the SSSC requires of the Respondent than this court.

[53] In the absence of a transcript of the proceedings before the FTTP, it is difficult to interfere with the decisions on matters of fact taken by the FTTP, and even had there been a transcript it is accepted that courts of appeal will be slow to intervene with the court of first instance as regards findings-in-fact.

[54] The parties accepted that the FTTP was a properly constituted panel. It is a professional conduct committee, and as such it possessed the relevant experience and expertise to determine what is the appropriate disposal.

[55] The FTTP's decision shows that it considered all of the relevant evidence and the submissions made on behalf of the Appellant and the Respondent. It has not given any particular element insufficient or excessive attention. The decision is a reasonable one. It cannot be said that the FTTP's decision is one that no reasonable authority, in all the circumstances, would have taken.

[56] I was not addressed in detail on the question of expenses. The case should therefore be put out for a hearing on expenses.

A handwritten signature in black ink, appearing to read 'Alastair Carmichael', with a long horizontal stroke underneath.

Alastair Carmichael

Sheriff of Tayside, Central and Fife

14 May 2018