

SHERIFFDOM OF TAYSIDE, CENTRAL AND FIFE AT DUNDEE

JUDGMENT OF SHERIFF L SMITH

in the cause

AI, [Redacted]

Pursuer

against

SCOTTISH SOCIAL SERVICES COUNCIL, Compass House, 11 Riverside Drive, Dundee
DD1 4NY

Defender

Pursuer: Mr Simpson, Lay Person

Defender: Mr Weir, Solicitor

Dundee, 25 May 2018

The Sheriff having resumed consideration of the cause, SUSTAINS the defender's pleas-in-law 1, 2 and 3; UPHOLDS the decision of the defender made on 11 October 2016 whereby the defender's Registration Sub Committee (RSC) refused the pursuer's application for registration in the part of the register for support workers in a care home service for adults; FINDS no expenses to or by either party.



Sheriff

NOTE

[1] This is an appeal by a care home support worker against a decision dated [redacted] by the Registration Sub Committee (hereinafter referred to as the "RSC") of the Scottish

Social Services Council (hereinafter referred to as the “SSSC”) whereby the RSC decided to refuse the pursuer’s application for registration in the part of the register for support workers in a care home service for adults. The appeal was brought by virtue of section 51(2) of the Regulation of Care (Scotland) Act 2001 hereinafter referred to as “the Act”. Intimation of the pursuer’s wish to appeal against the RSC decision was intimated to the Sheriff Clerk at Dundee by a letter of 25 October 2016. There was no objection by the defender to the competency of the pursuer’s appeal. By interlocutor of 22 February 2018 the court granted Mr [redacted] Simpson’s unopposed motion for permission to act on behalf of the pursuer as a lay representative in terms of the Summary Application Rules, Statutory Instrument 1999 No 929, sections 1.8(2) and 1.8(2)(iii). Mr Simpson had represented the pursuer at the hearing of the RSC, on [redacted]. The parties had adjusted their pleadings and the defender’s agent had lodged an updated record in accordance with the court interlocutor of 22 February 2018. There were no pleas-in-law for the pursuer whose position was set out in paragraphs of condescendence numbered 1.1 to 4.3. The matter came before me for hearing on 29 March and 30 April 2018. The pursuer was represented by Mr Simpson and the defender was represented by Mr Weir, solicitor.

[2] The factual background to this appeal is that on 29 November 2014 the pursuer applied for registration with the defender on the part of the register for support workers in a care home service for adults. As the defender had been notified of allegations of misconduct towards a care home resident (AA) relating to the pursuer application, the defender was obliged in terms of the Act and the Scottish Social Services Council (Registration) Rules 2014 (hereinafter referred to as the “Rules”) to refer the pursuer’s application for registration and the allegations against her, to a hearing before an independent RSC. The hearing took place over three days, [redacted]. On [redacted] the RCS

intimated their decision to refuse the pursuer's application for registration in terms of Part 2, Rule 23(13)(b) of the Rules. The RSC's decision, findings in fact and reasons for their decision was set out in their notice of decision dated [redacted] and served on the pursuer on [redacted]. It is against that decision that the present appeal is brought to this court.

The pursuer's position

[3] The pursuer submitted that although it was accepted that the SSSC were mandated by legislation to act under their rules as provided for under the Regulation of Care (Scotland) Act 2001 in doing so the SSSC had denied a fair hearing to the pursuer as the application of the rules had not been compliant with the terms of Article 6 of the Human Rights Act. As a result the pursuer had been denied a fair hearing before the RSC. It was submitted that the Regulation of Care (Scotland) Act 2001 did not stipulate where venues for RSC hearing should be held. Their decision to assign such hearings in Dundee (some considerable distance from the pursuer's home and place of work) immediately disadvantaged the pursuer and any proposed witnesses to be called on her behalf, as a result of the resultant travel time and costs they would incur. In addition the decision to hold the hearing so far from the pursuer's home and place of work precluded her from instructing a solicitor under the legal aid scheme to represent her interests at the RSC hearing and any subsequent appeal.

[4] At the RSC hearing papers had been lodged late by the SSSC. The pursuer was advised on the day of the hearing that witnesses who had been anticipated to be called by the SSSC were not available or in attendance at the hearing. The pursuer had objected to the fact that the witnesses were not present when it was anticipated that they would be there.

The pursuer's representation at the hearing had been inhibited as a result of the absence of these witnesses who could not be cross-examined. In addition it had been represented on her behalf that other witnesses whose evidence would have been more pertinent to the issues being considered should have been in attendance. For example the evidence of the charged nurse on duty at the time of the incident and the evidence of any doctor who may have examined the adult concerned could and should have been available to the RSC. It was submitted further that the legal advisor to the RSC had informed the RCS that there had been collusion between the two student witnesses (YY and ZZ) whose statements had been submitted in evidence to the RSC but despite this admission the hearing had continued regardless.

[5] The pursuer submitted that the RSC had proceeded in the absence of any consideration as to how the pursuer could defend her own position without the SSSC leading the evidence of the witnesses against her and without her having opportunity to lead evidence from witnesses to support her position. Furthermore the RSC had failed to place proper weight on the two letters or statements provided in personal support of the pursuer from a staff nurse who had worked with her for an excess of seven years and that of senior carer XX. It was submitted that the two statements of the students who had been in attendance during the incident and whose statements were before the RSC should be given less weight than the three statements that of the pursuer and two from senior staff within the care home in question. Such evidence should outweigh the statements of the two students relied on by the SSSC.

[6] Mr Simpson submitted that the RSC members had misdirected themselves by stating that it had been established that the pursuer had acted in an aggressive and threatening manner by shouting the words "I am only trying to help you" when it was accepted that the lady in

question was deaf. The RSC had failed to take into account that there was no evidence of any injury to the lady in question and the police had not been involved. It was submitted that given the iniquity of the RSC hearing this court should intervene and order fresh evidence to be heard and remit the case back to the RSC for this purpose. In so doing the pursuer would then be given the opportunity of cross-examining the witnesses in relation to their allegations of the pursuer's brutality towards AA, the time restraints the pursuer was working to that morning in preparing her for her outing and AA's propensity for violence towards her carers.

[7] In relation to the pursuer's failure to indicate that she had been dismissed from her employment with [redacted] by her then employer, [redacted], it was submitted that the pursuer had given a detailed explanation to the RSC as to why she had not included information about the circumstances of her leaving her former employment in her application form for registration. She had provided an explanation as to her confusion in relation to this but despite this the RSC appeared to have concluded that she had broken the application rules in her application to the SSSC.

[8] In summary the pursuer's position was: (i) that the RSC should not have admitted the written statements of witness YY and witness ZZ when they were not giving oral evidence; (ii) undue weight was placed on those statements against the oral evidence of the pursuer; (iii) the court should in these circumstances hear the merits of the case and allow fresh evidence to be introduced in respect of these factual disputes; (iv) that insufficient weight was placed on the pursuer's explanation as to why she failed to declare her dismissal to her employer and defenders as part of her application process with each organisation; and (v) that the decision of the RCS to refuse the pursuer's application for registration was unreasonable and is disproportionate.

The defenders' position

[9] Mr Weir submitted that the SSSC and the RSC as public bodies in terms of section 6 of the Human Rights Act 1998 and as such are fully compliant with Article 6(1) of the Human Rights Act. He also submitted that as a statutory body the defender also has a common law obligation to conduct itself according to the principles of natural justice and not abuse or exceed its powers. It was submitted that the defender had acted in compliance with these principles and the law in dealing with this case.

Mr Weir highlighted a number of authorities to underline the approach the court should adopt in relation to appeals to the court from decisions of regulatory bodies such as the defender. He submitted that it was clear from these cases that this was particularly so where a decision made by a professional conduct committee had imposed a sanction. It was not enough for the appellate court to come to the view that another disposal may in the circumstances have been preferable or that a different penalty should have been imposed. The appellate court would have to conclude that any penalty imposed could properly be described as excessive and disproportionate in all the circumstances of the case. Similarly the appellate court requires to acknowledge that the RSC had the advantage of observing and considering all the evidence at first hand.

{10} Turning to the points submitted by the pursuer Mr Weir dealt firstly with the point that the RSC should not have admitted the written statements of the witnesses YY and ZZ when the witnesses were not available to give oral evidence or be cross-examined on their written statements. In this particular case the anticipation at the pre-hearing conference was that these witnesses would be available for cross-examination however they were not compellable witnesses and on the day they were not in attendance. It was submitted that

paragraph 24(1) of the Rules allows the RSC to admit any evidence regarded as relevant and admissible in an ordinary civil court in terms of the Civil Evidence (Scotland) Act 1988.

Section 2(1) of that Act provides that such evidence shall not be excluded solely on the grounds that it is hearsay. Mr Weir drew to the court's attention the case of *The Queen (on the application of Bonhoeffer) v General Medical Council* [2011] EWHC 1585 (Admin) where at paragraph 39 of the judgment Lord Justice Stadlen stated:

"There is in my judgment no absolute rule whether under article 6 or common law entitling a person facing disciplinary proceedings to cross-examine witnesses on whose evidence the allegations against him are based. Nor does such an entitlement arise automatically by reason of the fact that the evidence of the witness in question is the sole or decisive basis for the evidence against him."

However it was submitted in this case that the statements submitted were adminicles of evidence from two students who had been there and had witnessed the events and as such this evidence was properly before the hearing. Mr Simpson had made various submissions to the RSC in relation to this and in relation to the amendments that had been made to each of the statements by the witnesses themselves. The pursuer had herself given evidence that was significant and pertinent to the RSC's consideration of the evidence as a whole. In these circumstances Mr Weir submitted that the admission of the two statements from the witnesses YY and ZZ could not be said to have deprived the pursuer of a fair hearing, a fact that was remarked upon by the RSC in their notice of decision. It was also pertinent that although Mr Simpson had intimated to the RSC that he was disappointed that these witnesses were not present he had also raised his concern at the lack of any witnesses from the care home in question. Although it was accepted that Mr Simpson had not acted on the pursuer's behalf at the pre-conference hearing there had been no attempt by him on the pursuer's behalf to bring any witnesses on the pursuer's behalf or to ask the RSC to

adjourn the hearing to facilitate the attendance of such witnesses, as they would have been obliged to consider. No application in terms of Rule 21(4), which allows either party to make representations on, *inter alia* "any legal matter" had been made in this case and could have been made by the pursuer up to seven days before the hearing. In short the decision of the RSC to admit the evidence of the witnesses who are not in attendance was an approach that they were entitled to take.

[11] In response to the pursuer's criticism that undue weight had been placed on the statements of the witnesses YY and ZZ it was evident from the transcript, particularly that of the convenor XX, that the committee recognised they should treat this evidence with caution especially where it conflicted with the oral evidence they had before them from the pursuer. It is submitted that the pursuer's position in relation to each of the allegations against her was explored in depth at the hearing in the course of examination-in-chief, cross-examination and by questioning from the RSC itself. It is clear from the RSC's assessment of her evidence that they did not get this wrong or misread the situation. The pursuer had accepted in her evidence that the confrontation with the complainer was over a short and tense period of time, that she had had to raise her voice as the complainer was deaf and although she maintains that she had not acted aggressively towards the complainer, the pursuer had accepted that she could have worded things differently. The RSC had also considered the pursuer's evidence and that of Mr Simpson in submissions that the pursuer had taken hold of the lady by the hands not the wrists, not in restraint but to let the complainer know that the pursuer was present. However the pursuer had also accepted in her evidence that she could have walked away from the situation that had developed. The RSC were also aware from the pursuer's evidence and from Mr

Simpson's submissions that there was no injury or bruising to the wrists or hands of the complainer.

[12] The evidence in relation to the pursuer's attempts to tuck in the complainer's vest also focused on the evidence of the pursuer and that of the witnesses YY and ZZ in relation to this aspect of the allegations. It was submitted that again there was little difference between the pursuer's evidence in relation to this and to that of the witnesses YY and ZZ. In her evidence to the RSC the pursuer had indicated that on more than one occasion, she had attempted to tuck-in the lady's vest and was anxious to do so as she did not think the complainer would be allowed to go on the outing if she was not respectably dressed. The RSC also heard evidence from the pursuer that she should have walked away and that in due course the lady in question went on the outing, the students (witnesses YY and ZZ) having put on a longer cardigan to hide the lady's "untucked- in" vest.

[13] For these reasons Mr Weir submitted that it was unnecessary for the court to hear fresh evidence in relation to these factual areas of dispute. This was not a case where exceptional circumstances should apply and in any event should evidence be heard it would now be five years since the incident concerned and 20 months had elapsed since the RSC had heard original evidence in the case. These time differences would undoubtedly have had a negative impact on the recollections of any witnesses who could be called for the pursuer or the SSSC.

[14] Finally it was pointed out by Mr Weir that a refusal to allow the pursuer to register did not mean that she would be unable to reapply for registration. The finding of the RSC was not denied by the pursuer namely that an explanation for her failure to declare her dismissal was due to her confusion as to the significance of the compromised agreement she

had signed with her previous employer. In her evidence the pursuer had accepted that she had not indicated in her application for registration that she had been dismissed by [redacted] but had decided to put on the application that she had been made redundant. Mr Weir pointed out again that the pursuer had admitted that she now understood the point, which had been made to her by the SSSC, namely that she should have indicated in her application form that she had in fact been dismissed.

[15] In conclusion Mr Weir submitted that there was nothing in the RSC decision to suggest that they had misdirected themselves in law by making a disproportionate decision accordingly the court should reject the pursuer's grounds of appeal and uphold the defenders' pleas-in-law by dismissing the appeal.

The Law

Human Rights Act 1998

Article 6

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

The Regulation of Care (Scotland) Act 2001 provides at:

Section 43. 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.

- (2) The Council shall, in the exercise of its functions, act –
- (a) in accordance with any directions in writing given to it by the Scottish Ministers;
 - (b) under the general guidance of the Scottish Ministers; and
 - (c) in a manner which encourages equal opportunities and in particular the observance of the equal opportunity requirements.

The Scottish Social Services Council (Registration) Rules 2014 - (First Inventory of Productions for the Defender) provides:

Part 11 – Registration Procedures

4 Application for Registration...

4(2) The Approved Application shall:

- (a) contain a warning to the Applicant ...
 - (iii) that the Applicant must comply with the Code of Practice for Social Service Workers issued by the Council and may be subject to disciplinary action under the Council's Conduct Rules for any breach of the Code;
- (b) be completed and signed by the Applicant

Part 111 – Registration Sub-Committees

23. Procedure at Registration Sub-Committee...

23(3) Subject to the requirements of a fair hearing and after hearing representations from the parties, the registration Sub-Committee may at any stage of the hearing, adjourn the proceedings for the purpose of seeking further information or for any other purpose.

Codes of Practice for Social Service Workers and Employers – (First Inventory of Productions for the Defender) provides:

Introduction

This document contains agreed codes of practice for social service workers and employers of social service workers describing the standards of conduct and practice within which they should work. This introduction, which is also reproduced in the Code of Practice for Social Service Workers, is intended to help you understand what the Codes are for and what they will mean to you as a social service worker, employer, service user or member of the public.

.....

The two Codes for workers and employers are presented together in this document because they are complimentary and mirror the joint responsibilities of employers and workers in ensuring high standards.

3. As a social service worker, you must promote the independence of service users while protecting them as far as possible from danger or harm.

This includes:

3.3 Following practice and procedures designed to keep you and other people safe from violent and abusive behaviour at work

3.4 Bringing to the attention of your employer or the appropriate authority resource or operational difficulties that might get in the way of the delivery of safe care.

4. As a social service worker, you must respect the rights of service users while seeking to ensure that their behaviour does not harm themselves or other people. This includes:

4.2 Following risk assessment policies and procedures to assess whether the behaviour of service users presents a risk of harm to themselves or others.

4.3 Taking necessary steps to minimise the risks of service users from doing actual or potential harm to themselves or other people.

Decision

[16] The Article 6 rights to which the pursuer refers is that set out in the Convention for the Protection of Human Rights and Fundamental Freedoms. This is incorporated into domestic law by the Human Rights Act 1998. As this appeal relates to civil proceedings, it is only Article 6(1) that is of relevance. That provides that in the determination of their civil rights and obligations everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. As the defender is a public authority in terms of S6 of the Human Rights Act 1998 it is unlawful for it to act in a way that is incompatible with Article 6 rights. It is clear from Parts 111 and 1V of the Rules regulating the SSSC registration procedures that the RSC is an independent body, separate from the SSSC and designed to consider or review any application for registration in terms of Rule 16. Rule 23 specifically provides procedure in relation to the conduct of the RSC allowing *inter alia* the sub-committee to decide its own procedure subject to the rules and requirements of natural justice. In reviewing the procedures followed by the RSC in this case I am satisfied that the RSC conducted the hearing before them in relation to this case in a proportionate and equitable manner.

[17] The crux of the pursuer's argument is that the RSC proceeded in the absence of witnesses, in particular in the absence of the witnesses ZZ and YY. It was stated that

other witnesses such as qualified staff within the care home could have been called by the SSSC to give evidence to the RSC about the care plan for the complainer, how difficult a person she was to cope with and the pursuer's competence in all aspects of her work and in particular in dealing with the complainer on that particular morning. It is very clear from the Rules that the burden of proof shall rest with the Applicant or Registrant (Rule 25(2)). Therefore any evidence to be elicited to support the pursuer's case should have been raised in advance of the RSC hearing or at the very least should have been raised on her behalf at the hearing itself. Had this been so the RSC could have considered whether it was then appropriate or not to adjourn the hearing for such evidence to be led on behalf of the pursuer. The SSSC have no power to compel any witness but if they are asked by a social service worker to invite witnesses to attend or to assist her in facilitating evidence from such witnesses to enable such evidence to be placed before the RSC, the SSSC regard themselves as under an obligation to assist where they can. In this case there was a pre-hearing discussion at which the pursuer was legally represented and at which no such representations were made on her behalf. At that pre-hearing discussion there was an expectation by both sides that the SSSC witnesses ZZ and YY would be in attendance at the RSC hearing but the solicitor for the pursuer was as yet undecided as to what evidence he would seek to bring to the RSC hearing. It was significant that at no time did the pursuer or anyone acting on her behalf make any request or application to the SSSC or to the RSC on the day of the hearing or before, either to bring witnesses or to facilitate the hearing of evidence from any witnesses that she wished to call. Such evidence could have been given by affidavit or by tendering full statements from any such witnesses. Instead letters or testimonials by two witnesses were produced which did not address the incident in question that had occurred in relation to the complainer AA on the morning of 6 February

2013. These testimonials simply spoke in general but in positive terms about the pursuer's abilities.

[18] It was very clear from the statement of facts and the detailed reasons for the RSC decision that the differences in the statements from the witnesses ZZ and YY were not significantly at odds with the pursuer's own evidence to the RSC. [19] From what I have considered regarding the circumstances in which the pursuer found herself on the morning of 6 February 2013 whilst [redacted] employed her as a care assistant, it is clear that she was working at a very busy time of the day. A number of residents of the care home were expecting to go on an outing and buses had been laid on to take them. They were to leave shortly after breakfast and no doubt staff would be busily employed getting residents out of bed, dressed, ensuring that they had breakfast and that they were properly attired for the trip. In the bundle of evidence there is evidence that the complainer AA could be a difficult lady; she was deaf and it was not uncommon for her to become cross, bad-tempered and to lash out with her hands and feet at members of staff. The pursuer was helping to get the complainer AA ready for the outing and staff were keen for her to go, as she had not participated in many such outings in the past. Two students, the witnesses ZZ and YY, were to assist the complainer on this particular morning but this had not been made clear to the pursuer. It is clear from their evidence and also from the pursuer's evidence that these students did not have much of an idea as to what they should be doing to assist and certainly the pursuer's own evidence was that she did not know how capable either of them would be in assisting her with the many chores that she had to do that morning. It is clear from my reading of the transcript of evidence before the RSC, those tensions after breakfast were "running high". The pursuer was anxious to have the complainer AA dressed appropriately so that she would be allowed to go on the bus and to

go on the outing that the complainer and the pursuer were keen for her to do. The pursuer thought the complainer was being difficult. She would not allow the carer to tuck-in her vest or to assist her in getting dressed properly. The complainer started to lash out with her hands and feet. It is clear from the pursuer's own admissions that she took hold of the complainer's hands and shouted at her (because she was deaf) that she was "only trying to help her". I think it is of little relevance as to whether the pursuer took the lady in question by the hands or by the wrists, as it is significant and indeed recorded by the RSC that there were no marks or injuries to the woman in question. It is also, in my opinion, of little relevance as to whether the taking of her hands or wrists was to restrain the woman or, as the pursuer insists, to simply let her feel that she (the pursuer) was present. Of far more significance is the pursuer's own admission in her evidence that in hindsight she could have worded things differently and more importantly that she could have walked away. It is apparent from the evidence before the RSC that the pursuer's motives may well have been well-intentioned, she wanted the complainer to go on the trip, she wanted her to look presentable and felt that she was doing all she could in the complainer's best interests. In my respectful consideration of the evidence I have read, it is apparent that the pursuer did shout at the complainer and did grab her hands. The pursuer does not appear to have appreciated that her actions could have been misconstrued by the complainer causing her fear and alarm or that the complainer had the right to do things in her own time and in her own way even if the consequences of this may mean that she would miss out on an outing which she had wanted to go on. It is of some significance that the evidence of the witnesses ZZ and YY was not challenged by the pursuer in relation to her raising her voice and taking hold of the complainer or in relation to her attempts to tuck-in the woman's vest. I felt it was also of significance that the evidence demonstrated that after the pursuer left the

complainer's room the two students were able to find clothing to cover the complainer's vest and to assist her onto the bus for her outing.

[20] In short I felt there was ample evidence before the RSC to reach the decision contained in paragraphs 1(a), (b) and (c).

[21] So far as the RSC decisions 2 and 3 are concerned Mr Simpson sought to inform the court in response to the submissions by the defender that in fact

[redacted] had not dismissed the pursuer from [redacted]. The factual position in relation to the details of the compromise agreement was before the RSC in the bundle of papers they had before them (reference by the convenor at page 11 of the transcript). There was no evidence that the pursuer had made any enquiries of the SSSC or of her legal advisors when the compromise agreement was entered into as to how this should be dealt with when applying for work with her new employers [redacted] or in her application form for registration with the Council dated 29 November 2014. The pursuer's own evidence in relation to this was that she did not know how to approach and deal with this matter with her new employers or with the application form she was required to complete. Her decision despite her uncertainty was to say that she had been made redundant. By her own admission this was factually incorrect.

[22] Having reviewed the transcript of proceedings in relation to the RSC hearing and the detailed notice of decision prepared by the RSC in support of their decision, I have no hesitation in concluding that the RSC decision was a carefully considered, balanced and appropriate decision in light of the evidence presented to them and in particular in relation to the admissions and account provided by the pursuer on her own behalf.

[23] Mr Simpson's criticisms of the SSSC approach to this matter particularly in light of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms

whilst highlighting the difficulties that members of the public may encounter in travelling to hearings such as this and the difficulties in securing co-operation from witnesses are not issues which were relevant in the assessment of the RSC's decision in this case. This is particularly so when the pursuer and those representing her made no requests to produce any evidence that she now claims would have been of assistance at the hearing.

[24] The parties sought no expenses from the other party in event of the appeal hearing finding in their favour.

