DUN-B339-24

SHERIFFDOM OF TAYSIDE, CENTRAL AND FIFE

AT DUNDEE

NOTE BY SHERIFF TIMOTHY NIVEN-SMITH

In the causa

BG

Appellant

Against

SCOTTISH SOCIAL SERVICES COUNCIL

Respondent

Act: Party litigant

Alt: G Heeps, SSSC

Dundee, 20th September 2024

NOTE

Introduction

[1] This is an appeal under section 51 of the Regulation of Care (Scotland) Act 2001 against the decision of the Respondent to impose a Temporary Suspension Order ("TSO") on the Appellant's registration.

Procedural History

[2] The Appellant is employed by [redacted] as a social care worker providing at home care in the community to elderly clients. The Appellant has been registered as such with the Respondents since 2017.

[3] On the 13th of March 2023 the Appellant appeared at [redacted] Sheriff Court on a petition at the instance of the Procurator Fiscal at [redacted] The petition at the instance of the Procurator Fiscal contained two charges: firstly, a contravention of Section 1 of the Sexual offences (Scotland) Act 2009, rape and secondly, a contravention of section 3 of the Sexual offences (Scotland) Act 2009, sexual assault.

The Appellant made no plea. The case was continued for further examination and the Appellant was liberated on bail.

[4] On the 30th of May 2024 the Respondents convened an independent fitness to practice panel ("FPP"). In advance of the FPP the Respondents fitness to practice department ("FPD") lodged an extensive bundle of documentation circa two hundred and forty-five (245) pages. The Appellant attended the FPP at which time he was unrepresented. As a preliminary matter the Appellant challenged the admissibility of papers provided by the Respondents FPD to the FPP on the basis that they related to matters prior to his appearance on petition at [redacted] Sheriff Court and as such were irrelevant to the proper consideration of a TSO. As the FPP hearing proceeded it became apparent that the Respondents presenter was not relying on any documentation included in the bundle lodged prior to page 68 in support of their contention that a *Prima facie* case existed necessitating the FPP considering a TSO but submitted that the material was relevant for the FPP to consider the proportionality of a TSO.

[5] The FPP having heard parties made a ruling partly in the Appellants favour on the admissibility of the challenged papers. The Appellant conceded that considering his appearance on petition, a matter of public record and reported in the local press, the imposition of a TSO was appropriate. The FPP imposed a TSO of fifteen (15) months duration, effective from the 6th of June 2024.

[6] The Appellant lodged an appeal against the decision of the FPP timeously. The Respondents in opposing the appeal and lodging answers submitted as their first plea-in-law that the Appellants averments were irrelevant *et separatim* lacking in specification and after sundry procedur, I head argument of the parties on the 16th of September 2024 on all aspects of the appeal.

Submissions for the Appellant

[7] The Appellant conceded from the outset that considering his appearance on petition charged with serious sexual offences the imposition of a TSO was appropriate. The Appellant did not seek to contend that the length of TSO was excessive in the circumstances. In these circumstances, the appeal was novel the Appellant not challenging the decision of the FPP regarding the imposition of a TSO or the length of TSO.

[8] The contention of the Appellant appeared to be that the notice of decision issued by the FPP did not accurately reflect the FPP hearing, had been prepared by the Respondents FPD rather than the Independent FPP. The Appellant submitted in the circumstances there had been procedural irregularity. In addition, the Appellant contended that he had been given an undertaking or a legitimate expectation from

the discussions at the hearing that the notice of decision would not refer to the criminal charges he faces. In all the circumstances, the Appellant sought an order recalling the decision of the FPP and that the Court should direct the FPP to issue a new notice of decision which is written by the FPP and secondly which accurately, reflects the events of the FPP hearing on the 30th of May 2024.

[9] In developing his submissions the Appellant took me to a document he had lodged for the appeal numbered 5.1.2 "the draft decision", which he contended was prepared by the Respondents FPD. The Appellant submitted that it was clear on considering this document when the court compared it with the Respondents document (contained within Respondents document 6.2.1 lodged for the appeal) I could conclude that the Respondents FPD had prepared the notice of decision and not the FPP. The Appellant submitted that he was entitled to a decision from the FPP not the Respondents FPD and a decision which accurately reflected the hearing.

[10] The Appellant took the court at some length through the transcript of the FPP hearing in support of his contention that he understood that the charges would not be referred to in the decision of the FPP.

Submissions for the Respondent

[11] The Respondents representative invited me to sustain the Respondents first plea in law and confirm the decision of the FPP. The Respondents representative empathised with the fact the Appellant did not have legal representation but submitted that did not entitle the court to provide a remedy to the Appellant which was not provided for under statute. The Respondents representative took the court through the framework of Section 51 of the 2001 Act and maintained that the remedy sought by the Appellant in his summary application (his appeal) was not a competent disposal.

[12] The Respondents representative took the court to a tract of cases which provided the bold proposition that this court exercising its supervisory or appellate function in relation to Professional bodies disciplinary proceedings should only interfere with such a decision where that body either got it plainly wrong or acted in a manner that was manifestly inappropriate.

Cases cited were: Cheatle -v- General Medical Council [2009] EWHC 645 (Admin). Professional Standards Authority for Health and Social care -v- Nursing and Midwifery council [2017] CSIH 29. MF -v- Scottish Social Services Council [2024] SAC (Civ) 23. McLaggan -v- Scottish Social Services Council [2020].

[13] The Respondent submitted that there was no serious flaw in the procedure adopted by the FPP such as would vitiate the proceedings or render them manifestly

inappropriate. A consideration of the transcript of the FPP hearing would demonstrate no irregular conduct.

[14] The Respondents agents maintained a consideration of the transcript of the FPP would demonstrate that the Appellant was simply in error when he submitted that he had a legitimate expectation that the criminal charges giving rise to the FPP hearing and in turn the TSO would not be referred to in the note of decision. The Respondents maintained that the notice of decision required to give reasons for the decision reached to be fair and in support of that proposition referred the Court to several authorities: Marie Needham -v- The Nursing and Midwifery Council [2003] EWHC 1141 (Admin), Abdullah -v- General Medical Council [2012] EWHC 2506 (Admin).

[14] The Respondent submitted that the note of decision referred to by the Appellant "the Draft" was prepared by the Respondents FPD under explanation, that only becomes the notice of decision where the registered party accepts the draft and no hearing is assigned. Whereas here the Appellant did not accept the draft and a FPP hearing was assigned the draft notice of decision does not become the notice of decision. The Respondent submitted that the Appellant simply failed to demonstrate that the notice of decision was prepared by anyone other than the FPP.

[15] The Respondents agent submitted by reference to each article of condescendence in the summary application that the Appellants pleadings were lacking in any proper specification and reiterated that it craved the Court to do something which was incompetent in terms of the statutory framework accordingly, I was invited to sustain the Respondents first plea in law.

Decision

[15] In the Scottish case of the Professional Standards Authority for Health and Social Care v the Nursing and Midwifery Council 2017 SC 542 Lord Malcolm in delivering the opinion of the court at paragraph [25] observed that: "The Court was favoured with the citation of a large number of previous decisions in cases of this kind. There is a well-established body of jurisprudence relating to the proper approach to appeals from regulatory and disciplinary bodies. The general principles can be summarised as follows. In respect of a decision of the present kind, the determination of a specialist tribunal is entitled to respect. The Court can interfere if it is clear that there is a serious flaw in the process or the reasoning, for example where a material factor has not been considered. Failing such a flaw, a decision should stand unless the court can say that it is plainly wrong, or, as it is sometimes put, "manifestly inappropriate". This is because the tribunal is experienced in the particular area and has had the benefit of seeing and hearing the witnesses."

[16] I require to pay respect to the Respondents independent FPP. I can only interfere with the decision of the FPP in limited circumstances: -(1) if I can hold there was a serious flaw in the process or the reasoning or (2) the decision reached was manifestly inappropriate. I turn to look at these in the circumstances of this case.

[17] Rule 45 of the Scottish Social Services combined Fitness to Practice Rules 2017 deals with the procedure and hearing in relation to Temporary orders. In terms of Rule 45 (4) in deciding a temporary order 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)."

[18] The first step in terms of Rule 45 is for the FPP to consider whether there is *prima facie* evidence of an allegation. The Appellant appeared on petition at [redacted] Sheriff Court on the 13th of March 2023. The allegations were of Rape and Sexual assault, contrary to sections 1 and 3 of the Sexual offences (Scotland) Act 2009. By virtue of section 3(6) of the Criminal Procedure (Scotland) Act 1995 the High Court has exclusive jurisdiction in relation to allegations of rape accordingly, any allegation of rape is serious as if the Crown proceed to indict an accused can only be indicted to the High Court. In terms of Fallon v Horseracing Regulatory Authority [2006] EWHC 2030 (QB) a regulatory tribunal are entitled to assume that where a prosecutor has brought a charge against a person, there are substantial grounds for doing so. In addition, it is within judicial knowledge that before an individual is placed on petition charged with rape the local Procurator Fiscal or one of his or her Deputes must report the case to Crown counsel within the National Sexual Crimes Unit (NSCU) at Crown office to confirm the instruction to place the accused on petition. Taking all these matters together there cannot be (and in fact there is not) any challenge to the FPP concluding that there was here a *prima facie* case against the Appellant given his appearance on petition.

[19] The second step in terms of Rule 45 if there is *prima facie* evidence of an allegation is for the FPP to then consider whether a temporary order is necessary for the protection of members of the public or is otherwise in the public interest or is in the interests of the worker. The FPP held that if the allegation was proved it would constitute a breach of parts 2.4, 5.7 and 5.8 of the code of practice for social services workers revised 2016. These are respectively that: the worker 2.4 "will be reliable and dependable, 5.7 I will not put myself or other people at unnecessary risk, 5.8 I

will not behave, while in or outside work, in a way which would bring my suitability to work in social services into question."

[20] An allegation of rape contrary to section 1 of the Sexual Offences (Scotland) Act 2009 involves, intended or reckless penetration of another's vagina or anus or mouth without consent and without any reasonable belief of consent. Consent means "free agreement". A conviction for rape will almost always save for exceptional circumstances result in the imposition of a custodial sentence to meet the aims of punishment, retribution and deterrence. If the accused has committed rape, then he will have behaved in a manner -irrespective of whether the allegation arises from his private life as opposed to his work life- bringing into question his suitability to work with the elderly.

[21] Given the appearance on petition it is difficult to conclude that the FPP reached a decision which was either "plainly wrong" or "manifestly inappropriate". Quite the contrary it appears to be the only logical decision which could have been reached in the circumstances.

[22] The appeal here of course was far more nuanced and in part suggested serious flaw in the issuing of the decision and having been given a legitimate expectation that the FPP decision would not refer to the allegations the decision breaches that expectation. I shall deal with these aspects in reverse.

[23] The Appellant's submissions are without foundation factually having considered *ad longum* the transcript of the hearing of the FPP. I cannot detect any undertaking that the panel gave the Appellant that the allegations would not be referred to *in gremio* of their decision. In my view any such undertaking would -if given- have been perverse as it would transgress rule 46 of the Scottish Social Services (Fitness to Practice) Rules 2016 as amended by the 2017 rules and would transgress the jurisprudence on tribunals providing reasoned decisions.

[24] Rule 46 entitled Temporary order referral: notice of decision provides as follows: "1. Within 7 days of the conclusion of the hearing the Clerk must send a notice of decision to: a. the parties; b. the worker's employers (if any); and c. if the worker is registered in the part of the Register for students, the worker's University. 2. The Notice of decision must: a. record any legal advice given by the chair; b. give reasons for the Panel's decisions; c. where a temporary suspension order has been made, set out the period of suspension." In my view, a decision in this case which failed to stipulate that the accused had appeared on petition charged with contraventions of section 1 and 3 of the Sexual offences (Scotland) Act 2009 and the date and place of that occurrence would fail to explain how the FPP satisfied themselves of the first leg of the test (*supra)* in terms of Rule 45 and would fail to

demonstrate how they were satisfied that there was a *prima facie* allegation let alone how they decided upon the second leg of the test.

[25] There is clear authority for the proposition that regulatory bodies/disciplinary bodies must provide reasons for their decisions: in the case of Phipps v GMC [2006] EWCA Civ 397 a case concerned with a decision of the professional conduct committee of the GMC, the predecessor of the FPP, the Court of Appeal saw no reason to think that Doctors sitting in judgement on their peers should be exempt from the general rules as to the giving of reasons that apply to all other tribunals. Sir Mark Potter said that the requirement for judicial and quasi-judicial tribunals to state their decisions in a form sufficient to make clear to the losing party why it lost- in accordance with the principles recognised by the Court of Appeal in English v Emery Reinhold and Strick ltd [2002] 1 WLR- will be satisfied: "if, having regard to the issues as stated and decided and to the nature and content of the evidence in support, the reasons for the decision are plain, whether because they are set out in terms, or because they are implied i.e readily to be inferred from the overall form and content of the decision……." Again, in my view, a decision in this case which failed to stipulate that the accused had appeared on petition charged with contraventions of section 1 and 3 of the Sexual offences (Scotland) Act 2009 and the date and place of that occurrence would fail to explain how the FPP satisfied themselves that there was a *prima facie* allegation and would fail to provide a basis for their conclusion that the Appellant may present a risk to members of the public.

[26] In my view it would be inadequate for a FPP to simply state that a registered practitioner had either been placed on petition or a summary complaint charged with a criminal offence as a reason for their decision. The insertion of the word "serious" before "criminal offence" would not illuminate the matter for an informed reader of the decision particularly, where an informed reader would appreciate that an individual could be charged on summary complaint with anything from driving without insurance contrary to section 143 of the Road Traffic Act 1988, as amended at one polar extreme to crimes such as assault to injury or fraud or embezzlement at the other extreme. To allow an informed reader to understand why a particular decision was reached the decision must refer to the alleged crime or crimes. As stated, I can find no trace that such a legitimate expectation could have been derived from what was said and any such undertaking would -had it been given which it was not- have been perverse accordingly, I am entirely satisfied that no such undertaking was given.

[27] The Appellant maintains that the decision issued by the FPP was prepared by the Respondents FPD and not by the FPP. I can find no support for that contention. The issued decision is considerably different form the "draft decision" issued by the

Respondents FPD prior to a hearing being assigned. The decision gives significant detail to the reader of what occurred at the FPP hearing on the 30th of May 2024 logically, it could not have been prepared prior to the hearing.

[28] This was an appeal in terms of Section 51 of the Regulation of Care (Scotland) Act 2001. On such an appeal the sheriff is empowered to do the following in terms of section 51(2): "51 (2) On such an appeal the sheriff may- (a) Confirm the decision; or (b) Direct that it shall not have effect". Having regard to my decision set out *supra* I confirm the decision of the FPP made on the 30th of May 2024. I confirm the decision as I am not satisfied that there has been any serious flaw in the process or the reasoning of the FPP. I have considered absence a flaw whether the decision reached was plainly wrong or manifestly inappropriate and conclude it was not and accordingly, I refuse the appeal of the Appellant. I pause to observe that in his summary application the Appellant craved this court to do the following: "order the Notice of decision issued by the Defender to the Pursuer on June 6th 2024 be recalled, and that a new notice of Decision be issued which is written by the hearings panel and that accurately reflects the events of the hearing which took place on May 30th 2024." Like the Respondents agent I have sympathy with the Appellant who has represented himself in a highly technical matter without the assistance of a solicitor. I further empathise with the Appellant as to why he could not afford or did not want to spend his savings on legal representation however, what the Appellant has sought by way of remedy from this court is not competent having regard to the provisions of section 51(2) of the 2001 Act. In my view had I been with the Appellant all I could have done in this case would have been to order that the decision of the FPP not have effect.

[29] Recognising that the Appellant was not legally represented and had no experience of written pleadings I accept he did his best to set out his case within his pleadings, but the case set out is wholly lacking in specification and as pled is irrelevant. I have however, considered his oral submissions advanced at the hearing in the interests of justice to consider whether the decision of the FPP should be set aside, I am satisfied for the reasons given that it should not be set aside.

Sheriff T. Niven-Smith

11th October 2024