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IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

[2020] EWHC 2571 (Admin)



No. CO/2622/2020

Royal Courts of Justice

Thursday, 20 August 2020

Before:

MRS JUSTICE EADY

B E T W E E N :

NURSING AND MIDWIFERY COUNCIL

Applicant

- and -

ANTHONY JOHN COOMBS

Respondent

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MR J. EDENBOROUGH (instructed by the Nursing and Midwifery Council) appeared on behalf of the Applicant.

THE RESPONDENT did not appear and was not represented.

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**J U D G M E N T**

MRS JUSTICE EADY:

**Introduction**

1 This is the hearing of the applicant’s application under Article 31(8) of the Nursing and Midwifery Order 2001 (“the Order”), for a nine month extension of an interim order imposed on the respondent to these proceedings, restricting his registration as a nurse.

2 Mr Edenborough appears for the applicant; The respondent, Mr Coombs, is neither present nor represented at this hearing. The respondent has otherwise been represented by the Royal College of Nursing (“the RCN”) but, by email sent to my clerk yesterday at 12.13, Mr Clements-Jackson of the RCN stated that:

“We are without instructions as of writing but I can confirm that we are not attending or otherwise contesting the application.”

3 I have also seen a certificate of service, dated 17 August 2020, confirming that service on the respondent was effected by email on 29 July 2020. Due to a concern that prior consent for electronic service had not been obtained, the applicant also emailed the respondent’s representative at the RCN yesterday and obtained confirmation that consent had, in fact, been given for that form of service. Again, the email exchange in this regard has been forwarded to me.

4 I am satisfied that the respondent has been served with the relevant documentation and notice of this hearing, and that he and his representatives have had the opportunity to attend and/or make representations on the application today. In the circumstances, I consider that it is appropriate to proceed with this hearing today, notwithstanding the respondent’s absence.

5 This application is supported by a statement from the applicant’s case manager, Mark Sturdy, dated 21 July 2020, and the documents exhibited thereto. I have read this material, together with the skeleton argument prepared by Mr Edenborough, in advance of this hearing.

**The factual background**

6 The respondent was referred to the applicant by his former employer, the London Bridge Hospital, on 27 March 2018, due to concerns raised about his ability to practice safely as a registered nurse. Those concerns initially dated from January 2018 and related to blood glucose monitoring, management of a patient with hypoxia and the preparation and management of critical care patients. Mr Sturdy explains that the applicant was also advised of three separate alleged errors, which predated those matters and related to the administration and recording of controlled drugs in November 2017. A disciplinary hearing had been held in relation to those concerns in November 2017, when the respondent had been given a final written warning, and recommendations had been made for supervision and training. The additional concerns in January 2018 occurred very shortly after the completion of the recommended supervision and training, and whilst the respondent was still subject to the final written warning.

7 The respondent resigned from London Bridge Hospital on 7 February 2018, prior to the completion of any disciplinary proceedings. He then commenced employment in the Acute

Medical Unit at Darent Valley Hospital (“the Hospital”), which is part of the Dartford & Gravesend NHS Trust, in April 2019. Since then the applicant has received information from the respondent’s current employer concerning two further drug administration errors, which are said to have taken place in July 2019: one related to the administration of intravenous drugs, when the respondent had not completed the hospital’s relevant competency training; the second to the administration of medication to a patient to whom they had not been prescribed. Those matters have been the subject of a second referral to the applicant.

- 8 Returning to the chronology, on 24 April 2018, a panel of the applicant’s Investigating Committee (“IC”) imposed an interim conditions of practice order (“ICoPO”) on the respondent for a period of eighteen months. The reasons for the making of the ICoPO were provided in a decision letter of 25 April 2018.
- 9 The ICoPO was varied on 30 May 2018 and has been reviewed and confirmed on 14 November 2018 and 16 May 2019. It was again varied on 8 October 2019 and, most recently, on 23 March 2020, the decision letter in relation to that latest review being dated 25 March 2020.
- 10 In addition, on 18 August 2020, I am told the respondent’s representative requested an early review of the interim order and I understand that that is in the process of being scheduled. That review was requested in the light of a document from the Hospital, setting out a positive review of the respondent’s performance, and a further document - a positive email about the respondent from a student nurse - was sent directly to the applicant. I make clear that I have read both of those documents.

### **The approach I am to adopt**

- 11 This application is made under Article 31(8) of the Order; on such an application, the court may extend, or vary, or further extend (for up to twelve months) the period for which the order has effect. In *GMC v Dr Stephen Chee Cheung Hiew* [2007] EWCA Civ 369, the Court of Appeal gave guidance on the principles to be applied in applications of this kind; specifically, the criteria to be applied are the same as those for the making of the interim order by the regulatory body. Relevant factors in considering whether or not to grant the extension sought include the gravity of the allegations, the seriousness of the risk of harm to patients, the reasons why the case has not been concluded and the prejudice to the practitioner if an interim order is continued.
- 12 I bear in mind that the onus of satisfying the court that the criteria are met is on the regulatory body, but it is not my function to make findings of primary fact about the events that led to the restriction to practice order, or to otherwise consider the merits of the case. I am required not to seek to determine the truth or falsity of the allegations but to consider whether they are such as to justify the prolongation of the interim order.

### **Application of those principles to this case**

- 13 The applicant asks that the interim order be extended for a further period of nine months. It is said that the ongoing necessity of the order is demonstrated by the fact that it has been reviewed on a number of occasions and on each occasion a specialist Fitness to Practice Panel, having conducted a risk assessment, has determined that an interim order is required and that it is proportionate and appropriate. Moreover, the applicant reminds me that, at the respondent’s request, there is to be an early review and it is submitted that that would be the most appropriate forum for a nuanced discussion as to whether an order remains necessary and, if so, what form it should take - the panel is a specialist tribunal and is likely to have

more time to consider this matter than the High Court. At this stage the applicant asks that the court grant the extension it seeks, pending the further review, and, in any event, to allow it the time required to substantively conclude this matter.

- 14 Turning then to the first of the criteria I am bound to apply, I accept the applicant's submission that the allegations made against the respondent are serious and relate directly to his nursing practice. The matters alleged, if repeated, would carry a serious risk of harm to patients with a related risk of harm to the public interest in maintaining confidence in the profession.
- 15 The more difficult question for the applicant is explaining why this case has not yet been concluded. Mr Sturdy seeks to address this issue in some detail in his statement. In respect of delays occurring prior to the current public health crisis, Mr Sturdy explains the chronology of difficulties during the earlier stages of the investigation relating to the obtaining of relevant documents from the first referrer and then from two particular witnesses. Delays in this respect had a ripple effect in progressing the investigation and final disclosure was only received from the second of those witnesses in early November 2018. At the same time, Mr Sturdy explains that there were difficulties in arranging interviews, and statements were only sent to those two witnesses for signing on 19 March 2019.
- 16 It seems that shortly before that there was a case review by one of the applicant's lawyers, who advised in early February 2019 that further statements were required from the referrer's organisation and that also has lengthened the investigation. Mr Sturdy has also explained that staff reassignments caused further difficulties and, in August 2019, a case lawyer advised the new investigator to make contact with seven witnesses directly. That was done on 2 August 2019 and a further three witnesses were interviewed but initial emails to two others bounced back. Another witness is yet to reply and further attempts have been made to locate others, with further interviews being conducted in August, September, October and December 2019. From the information supplied, I understand that most interviews and statements relating to the first referral were finalised by 30 April 2020, but the applicant is currently awaiting two outstanding statements before that referral would be ready to report to the case examiners.
- 17 As for the second referral, however, the investigation remains in its infancy. Mr Sturdy explains that documentation was received from the Hospital in November 2019 but that, after December 2019, no further progress was made until March 2020, when further information was requested. The explanation for that is apparently due to the investigator having a high case-load and then leaving the applicant. I make clear that is not an adequate explanation.
- 18 Further delays have then arisen in respect of both referrals as a result of the ongoing public health crisis, although I am told that this case is one of those which has now been taken off hold, as the relevant NHS Trust can now be contacted.
- 19 The applicant has acknowledged that any extension to the interim order has the potential to cause prejudice to the respondent but contends that the allegations in this case are serious and represent real and significant patient safety concerns. As such, it is submitted that any prejudice to the respondent in extending the interim order is outweighed by the public interest in ensuring public safety and maintaining confidence in the profession. The applicant has further sought to reassure the court that it will take steps to ensure this matter is now brought to a substantive conclusion.

- 20 As for the future steps that are still to be taken, at paragraph 36 of his statement, Mr Sturdy explains that, for the first referral, outstanding witness statements need to be obtained from two witnesses and then the matter reviewed by a lawyer before a report can be made to the case examiners. For the second referral, which will be reported with the first, outstanding documentation and possibly witness statements must still be obtained. Notwithstanding this, Mr Sturdy says that it is nevertheless anticipated that both investigations will be completed in the next three months. Once investigations have been completed, a report will be sent to the respondent, who will then have twenty-eight days to submit a response. Thereafter, the investigation, and any response from the respondent, will be submitted to the case examiners to decide if there is sufficient evidence to support the allegations and determine if the case is appropriate and ready to be referred to the Fitness to Practice Committee. A further statutory twenty-eight day notice period upon referral to that Committee must also be provided to allow a further response. Then, if referred, this matter will be legally reviewed and will need to be listed for a further substantive hearing or meeting before a panel. If the case is referred for a hearing, witnesses have to be called and their availability to give evidence will need to be canvassed and a further final statutory twenty-eight day notice period prior to any substantive hearing or meeting must also be provided to the respondent. It is, therefore, to allow for all these further stages that the applicant requests the court grant an extended application of nine months on the grounds that, pending determination of these matters, it remains necessary to protect the public and is otherwise in the public interest.
- 21 I have to confess to being troubled by the time that it has taken to reach this stage and by the work that is still to be undertaken. There is, moreover, evidence to suggest that the respondent has been working satisfactorily more recently and I am concerned by the prejudice that he suffers as a result of the applicant's delays. That said, I accept that the most appropriate forum for a nuanced assessment as to whether an order remains necessary - and, if so, what form it should take - is by way of the review that the respondent has requested, which would be carried out by a specialist panel better placed to consider this matter and with more time to do so. The prospect of such a review mitigates the prejudice that the respondent otherwise would suffer and, given the assurances made as to the future progression of this matter, I am persuaded that it is appropriate for the matter to take that course rather than for me to seek to interfere at this stage. Moreover, given the seriousness of the underlying allegations and the need to protect the public, I am satisfied that the public interest in maintaining the order outweighs the respondent's interests at this stage and that the order remains necessary for the public protection and is otherwise in the public interest.
- 22 I, therefore, grant the extension sought and consider that, given the work still to be undertaken and the steps that have to be built in, the period sought is appropriate. The applicant should not assume, however, that any further extensions will be allowed by the court in this case. The commitments given in terms of the future investigations to be undertaken must be honoured. Should any further application be made, the applicant should ensure that my observations in this regard are drawn to the court's attention.

MRS JUSTICE EADY: Mr Edenborough, you said that you would make sure my observations are passed back to the NMC and those involved in the investigation, and obviously I would be grateful if a note could be kept that should any further application be made that my comments and concerns will be drawn to the court's attention so that whoever then has to deal with this matter knows what has been said.

MR EDENBOROUGH: My Lady, yes. I am drafting a note, your Ladyship, in email format now and that goes out to – if it provides a degree of reassurance – to a dedicated list of people who look at the outcomes and I will also copy in those individually dealing with this case.

MRS JUSTICE EADY: Thank you very much. Is there anything else, anything that I have missed?

MR EDENBOROUGH: Thank you. No, my Lady.

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**CERTIFICATE**

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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This transcript has been approved by the Judge.