SHERIFF APPEAL COURT

[2022] SAC (Civ) 7
EDI-B482-19

Sheriff Principal C D Turnbull
Appeal Sheriff S F Murphy QC
Appeal Sheriff R D M Fife

STATEMENT OF REASONS

delivered by APPEAL SHERIFF S F MURPHY QC

in the cause

FIONA SIMPSON

Pursuer and Appellant

against

NURSING AND MIDWIFERY COUNCIL

Defender and Respondent

Pursuer and Appellant: Bain QC; Beltrami & Co Solicitors
Defender and Respondent: Reid, advocate; Nursing & Midwifery Council

29 April 2021

Introduction

[1] The appellant, Fiona Simpson, has been a registered nurse since 1993 and a registered specialist in community public health since 2006. The respondent is the Nursing and Midwifery Council (hereinafter "NMC"), the statutory regulator of the professions of nursing and midwifery in Scotland, which maintains a register of qualified professional nurses and midwives. In order to remain on the register, nurses and midwives are required to undertake a revalidation and registration process every 3 years. Revalidation was

introduced in 2016 as an electronic process. The appellant required to revalidate and renew her registration by 31 March 2018.

[2] On 13 March 2018 the appellant applied online to do so. She was required to meet the following requirements:

(i) 450 practice hours within the previous 3 years;

(ii) 35 hours of continuing professional development (CPD) which included 20 hours of participatory learning;

(iii) five pieces of practice-related feedback;

(iv) five written reflective accounts;

(v) a reflective discussion with a colleague, another registered nurse;

(vi) a declaration regarding her health and character;

(vii) professional indemnity arrangements; and

(viii) confirmation.

[3] It was the first time the appellant had used the electronic online procedure. She completed the application at around 10.00am on that day and revalidation took place. We were informed that revalidation occurs automatically and that quality assurance takes place by the selection at random of a number of electronic applications which are checked over by an official of the NMC.

[4] At the time when this electronic revalidation was made the appellant had not in fact completed steps (v) and (viii) above. A meeting with a suitably-qualified colleague, Julie Semple, had been arranged to take place later that day, 13 March 2018, at 1.30pm. In the event the meeting had to be cancelled unexpectedly. It was re-arranged for the following day, 14 March 2018. On that day a colleague questioned whether it was proper for

Ms Semple to take part in the process. The matter was clarified with the NMC but by then Ms Semple had become too upset to continue.

[5] On the afternoon of 14 March 2018 the appellant telephoned the NMC to advise them of the circumstances and to indicate that her application could not be confirmed until the following day, 15 March 2018. The appellant requested advice from the NMC as to what she should do and asked if she could retract the application of 13 March and complete the online process again. She was told that if anything further was to be done she would be contacted by the NMC.

[6] A member of the NMC's staff prepared an internal email in which she noted that the appellant had called on 14 March 2018 to explain that she had completed her online revalidation before completion of all requirements and that it would be confirmed on 15 March 2018. It was noted that her registration had been renewed. In error the email was never sent and the appellant heard nothing further from the NMC with regard to her call. The person who took the call could not recall later if the appellant had asked if she could retract her online application.

[7] The appellant met with Ms Semple on 15 March 2018 and her outstanding revalidation requirements were successfully completed.

[8] The NMC informed the appellant on 19 March 2018 of an allegation that her application for revalidation and renewal of 13 March 2018 had been fraudulently procured or incorrectly made in terms of article 22(1)(b) of the Nursing and Midwifery Order 2001 (hereinafter the "2001 Order") on the basis that she had "revalidated [her] NMC registration via NMC online before the reflective discussion and confirmer meetings had taken place". She had stated in her application dated 13 March 2018 that a reflective discussion with a colleague had taken place on that day when no such discussion had taken place and that she

had stated that she had received confirmation from the same colleague on the same date when she had not received it at that time. The appellant responded by accepting that her entry on the register had been incorrectly made but she denied that it had been fraudulently procured.

[9] A hearing before the NMC's Investigating Committee (hereinafter "the Committee") took place on 5 April 2019. On 8 April 2019 the appellant was advised that the Committee had determined that her entry on the register was fraudulently procured and incorrectly made. She was informed that she was to be removed from the register with effect from 7 May 2019 and that an interim suspension order would be put in place for a period of 18 months to cover the period for any appeal to be determined.

[10] Following a hearing before the Outer House of the Court of Session Lord Bannatyne terminated the interim suspension order and ordered that the appellant's name be restored to the register on 24 May 2019.

The appeal to the sheriff

[11] Thereafter the appellant appealed to the sheriff of Lothian and Borders at Edinburgh seeking to have the Committee's decision quashed, failing which to have the matter remitted back with a direction to substitute an alternative to removal from the register, all in terms of article 38 to the 2001 Order, on the bases that the Committee had erred by (i) holding that the entry had been both fraudulently and incorrectly made; (ii) failing to follow the reasoning set down by the Supreme Court in the case of *Ivey* v *Genting Casinos (UK) Ltd* [2017] UKSC 67 with regard to its consideration of the question of dishonesty; (iii) holding that the entry had been fraudulently procured where it had failed to consider the whole evidence; and (iv) holding that the entry had been fraudulently procured where

there was insufficient evidence to support such a finding. It was said that the sanction imposed was disproportionate and unjustified.

[12] The sheriff held that the entry in the register had at the very least been incorrectly made so that it would not be appropriate to quash the finding of the Committee. There was considerable debate as to whether it was competent for the Committee to hold that the entry had been both incorrectly and fraudulently made. Having considered the competing submissions carefully the sheriff decided that the terms as used within article 22 of the 2001 Order were cumulative and not exclusive. She concluded that the Committee had properly had regard to the whole evidence and that there had been an evidential basis for its decision that the entry had been fraudulently made. The NMC conceded that with regard to making a finding of dishonesty the Committee had not received an appropriate direction in terms of *Ivey* and the sheriff proposed to remit the matter back for the Committee to hold a fresh hearing at which the appropriate directions were to be given. In those circumstances she found it unnecessary to make any determination in respect of the penalty which had been imposed.

The appeal to the Sheriff Appeal Court

[13] An appeal has been taken to this court on the following grounds:

(i) that the sheriff erred in holding that under article 22(i)(b) of the 2001 Order an entry in the register might be both fraudulently procured and incorrectly made in the circumstances of this case;

(ii) that the sheriff erred in law by holding that the Committee had had regard to the whole evidence;

(iii) that the sheriff erred in law by holding that there had been sufficient evidence to find that the entry in the register had been fraudulently procured; and

(iv) that the sheriff had erred in law by remitting the matter back for a fresh hearing in the light of the absence of a direction in terms of *Ivey* combined with the other flaws in the process and reasoning of the Committee.

The Nursing and Midwifery Order 2001

[14] Article 22 of the 2001 Order states:

> "22.- (1) This article applies where any allegation is made against a registrant to the effect that –
> …
> (b) an entry in the register relating to him has been fraudulently procured or incorrectly made."

Article 22(5) requires that an allegation under 22(1)(b) be referred to an Investigating Committee, the powers of which are set out in article 26 and include the following:

> "(7) In the case of an allegation of a kind mentioned in article 22(1)(b), if the Investigating Committee is satisfied that an entry in the register has been fraudulently procured or incorrectly made, it may make an order that the Registrar remove or amend the entry and shall notify the person concerned of his right of appeal under article 38."

Article 38 provides for appeal to the sheriff in Scotland whose powers are contained within article 38(3):

> "(3) The Court or sheriff may-
>
> (a) dismiss the appeal;
>
> (b) allow the appeal and quash the decision appealed against;
>
> (c) substitute for the decision appealed against any other decision the Practice Committee concerned or the Council, as the case may be, could have made; or

(d) remit the case to the Practice Committee concerned or Council, as the case may be, to be disposed of in accordance with the directions of the court or sheriff,

and may make such order as to costs (or, in Scotland, expenses) as it, or he, as the case may be, thinks fit."

Submissions for the appellant

[15] The written submissions lodged for the appellant contended that charges brought against a professional person required to be specified with precision, and that unfairness would result where someone was found guilty of offences which were different from those with which he had been charged, under reference to *De Smith's Judicial Review* at paragraphs 7-049 and 7-050. Failure to allege dishonesty expressly would constitute a procedural flaw, see *Singleton* v *The Law Society* [2005] EWHC 2915, at paras [12] - [13]. However, in her oral presentation before us, senior counsel for the appellant focused primarily on the fact that the notice of proceedings sent to the appellant clearly indicated that the two types of offence contained within article 22(1)(b) were to be considered as alternatives in the present case. It had never been the appellant's position that the two were mutually exclusive but that it was procedurally unfair to bring in findings of guilt under both heads in a case in which they had been specifically libelled as alternatives. The appellant accepted that the entry had been incorrectly made and it was open to the Committee to proceed to consider whether it had been fraudulently procured. The finding that the appellant's entry had been both fraudulently and incorrectly made was not one available to the Committee because it had chosen to consider the two as alternatives in this case. The sheriff had erred by holding that the two could be considered cumulatively as a matter of law while omitting to relate that to the particular form of the accusation made against the appellant in the present case.

[16] Senior counsel repeated the submission that the Committee had not received a legal direction in accordance with the guidance given by the Supreme Court in the case of *Ivey* and therefore had not applied the correct test in relation to the question of dishonesty on the appellant's part. This point was conceded by the respondent, as it had been before the sheriff.

[17] To determine if the entry had been fraudulently obtained, the Committee was further required to address why the appellant might have been dishonest and to find cogent evidence of dishonesty*: McLennan* v *General Medical Council* 2020 CSIH 12 at paras [74] and [75]. They had been required to be able safely to exclude other possible explanations for the appellant's conduct, including the possibility of carelessness: *Soni* v *General Medical Council* [2015] EWHC 364, at paragraph 61. This had not been done. The Committee had focused on the appellant's conduct at the time of the completion of the original submission but had failed to take into account the evidence which had been presented by the appellant, in particular the fact that all necessary steps to complete her revalidation were in place two days after the entry of 13 March 2018; that they had been commenced beforehand; that almost all were in place at the time of her purported registration on 13 March 2018; and that she had self-reported her error to the respondent on 14 March 2018. The sheriff had erred in holding that the Committee had taken proper regard to the whole evidence.

[18] The appeal should be upheld and the decision quashed. Thereafter the matter should not be remitted back for the process to recommence because the errors of law and reasoning had not been the appellant's fault; rather the court should substitute a decision that the entry had been incorrectly made and should remit it back for the register to be amended to reflect the date of reflective discussion and confirmation as 15 March 2018 in terms of article 38(3)(d). The sanction imposed had been excessive and disproportionate in

view of the appellant's personal circumstances and past record with the NMC and because it had been imposed in relation to a finding that the entry had been fraudulently made. Correction of the entry would be appropriate and proportionate.

Submissions for the respondent

[19] There was no dispute the appellant had completed her online registration before all the necessary elements were in place. She had been well aware of that which was a sign of fraudulent actings. The sheriff's reasoning had been correct and the proper construction of article 22(1)(b) was that the two elements were cumulative. Reference was made to *Bennion on Statutory Interpretation* (7th edition) at paragraphs 9.7, 12.4, 12.1 and 12.2; and to *R* v *Federal Steam Navigation Co Ltd* [1973] 1 WLR 1373, per Lawton LJ at p 1377. The appellant's interpretation of the matter would only assist a fraudster and should be rejected, as the sheriff had correctly decided.

[20] The court should only intervene over the Committee's assessment of the evidence if it could be shown that it had plainly gone wrong: *Professional Standards Authority* v *Nursing and Midwifery Council* 2017 SC 542, at paragraph 25. The appellant did not come near to meeting that test and the sheriff had been correct to reject the challenge.

[21] The Committee had not accepted the appellant's explanation and had found aspects of her evidence to be unreliable. Other witnesses had been preferred and the assessment of the evidence was quintessentially a matter for the tribunal of first instance: *C* v *Gordonstoun Schools Ltd* 2016 SC 758**.** In the event no practical result had been achieved by the appeal as the appellant had remained registered throughout. This was similar to the situation in *McLennan* and in that case the finding of fraud had been upheld. The closing submission made on the appellant's behalf had been substantially no more than a plea in mitigation.

The appellant's call on the following day was illustrative of a fraudster having a crisis of conscience and was of no consequence in relation to her previous actions. Registration was a "red line" issue for the NMC and the appellant had admitted that she had incorrectly made the entries on 13 March 2018. A finding of an error which amounted to the first alternative could not vitiate a finding that that the registration had been fraudulently obtained in terms of the second alternative.

[22] The concession, made before the sheriff, that the Committee had not received appropriate legal guidance in accordance with *Ivey* was maintained. The appellate court should therefore remit the matter for reconsideration by an Investigatory Committee of the NMC with the correct guidance in relation to the dishonesty test and, if the appellant were to be successful in her first ground of appeal, in relation to the alternative forms of the charge.

Discussion and decision

[23] Having considered the matter carefully and reviewed the authorities cited by counsel, the sheriff concluded that the terms "fraudulently procured *or* incorrectly made" (our emphasis) within article 22(1)(b) were to be read conjunctively. She accepted the respondent's arguments on the point. We agree with her interpretation of the law and with her conclusion that to read the phrase disjunctively would produce an absurd result.

[24] Unfortunately that is not the end of the matter in the circumstances of this case. The charge sent to the appellant was in these terms:

> "That you, Fiona Simpson, a registered nurse,
> 1. On 13 March 2018 revalidated your NMC registration via NMC Online before the reflective discussion and confirmer meetings had taken place

> AND thereby, an entry made on the register of the Nursing and Midwifery Council, in the name of Fiona Simpson PIN 86Y0366S was fraudulently procured or in the alternative incorrectly made"

The NMC chose specifically to libel the two elements within article 22(1)(b) "in the alternative" in this case and that is the form in which notice was given to the appellant. In our view the NMC's Committee was not entitled to find both elements established, having given notice to the appellant that they were not seeking to do so, notwithstanding the proper interpretation of the provision. It is a simple question of fair notice. For this reason alone the decision of the Committee cannot stand.

[25] The sheriff interpreted the appellant's position to be that her admission that the entry had been incorrectly made precluded enquiry into whether it had been fraudulently procured. Before us Ms Bain submitted that there had been a misunderstanding and that the appellant was seeking only to make the point that the charge in this case precluded a finding under both heads. In our view the Committee was entitled to consider whether the entry had been incorrectly made and to consider whether it had been fraudulently procured. What it could not do was what in fact it did: to hold that both had been established where the two aspects had been charged as alternatives in this particular case.

[26] It was accepted on behalf of the NMC that the Committee had not been properly directed on the legal test for dishonesty set out by the Supreme Court in the case of *Ivey*. The judgment contains the following guidance from Lord Hughes within paragraph 74:

> "When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary

> decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest."

The Committee was not directed to this legal test by its legal advisor and therefore did not apply it. The decision of the Committee essentially founded on conclusions that the appellant had acted dishonestly in making its finding that the entry had been fraudulently procured so that this error went to the heart of the decision and the sheriff was correct to decide that it could not stand as a result.

[27] Turning to the Committee's assessment of the evidence, we accept that the assessment of evidence of witnesses is essentially a matter for the court or tribunal of first instance: *C* v *Gordonstoun Schools*, at para [56]; and that an appellate court should only intervene if that tribunal had plainly gone wrong*: C* v *Gordonstoun Schools,* para [56]; *Professional Standards Authority* v *Nursing and Midwifery Council,* para [25]. However, we note that in *Mallon* v *General Medical Council* 2007 SC 426 the Lord Justice Clerk (Gill) drew a distinction (at paras [19] and [20]) between decisions relating to medical malpractice and those relating to non-clinical matters. With regard to the former, a court was at a serious disadvantage compared to a professional standards committee but there was little to inhibit a court from substituting its own judgment in relation to non-clinical matters, such as in the present case, where the tribunal was thought to have gone wrong. One example of a ground for such intervention was given in *Professional Standards Authority* v *Nursing and Midwifery Council,* once more at para [25]: "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." We consider that there was such a serious flaw in the present case.

[28] The starting point of the Committee's Decision on Facts is a general statement that it had considered all the oral and documentary evidence in the case together with the

submissions made before it on behalf of the NMC and the appellant. Thereafter its statement of reasons for its decision considers the credibility of the witnesses and reviews the basic facts surrounding the online registration submitted by the appellant on 13 March 2018. It is noted that the appellant accepted that her entry had been incorrectly made. Thereafter the Committee reached its decision of the question of fraudulent procurement essentially on the basis of the content and timing of the application of 13 March 2018. It specifically rejected the appellant's position that she had made mistakes by rushing through the process. However, at no point in the Committee's statements regarding the evidence is there any indication that consideration was given to the fact that the appellant had contacted the NMC on 14 March 2018 to report the errors of the previous day or to her claim that she had sought advice on the situation. There is no dispute that she did make contact; that an internal email regarding her call was never passed on to any senior figure by a member of the NMC's administrative staff; and that the Committee was told of that. It appears to us that self-reporting the situation by the appellant must be regarded as potentially incompatible with an intention to deceive or to act dishonestly and fraudulently, yet there is no consideration at all given to that aspect of the matter in the Committee's statement of reasons. The decision that the appellant provided information to the NMC which was inaccurate and false is based solely on its assessment of the contents of the application of 13 March 2018. The evidence of contact between the appellant and the NMC on 14 March 2018 was obviously important in relation to the question of any dishonest intention on her part but we can see no indication that the Committee considered it at all. In our view that is a fatal error in its reasoning.

[29] This is compounded by the absence of guidance in terms of *Ivey*. The sheriff decided that there was a basis in evidence which would allow the Committee to reach the conclusion

that the entry had been fraudulently procured, if properly directed in terms of *Ivey*, but this was based on its assessment of the evidence which we have found to be flawed. The sheriff notes that the Committee set out its assessment of the evidence of the various witnesses and set out the evidence which it accepted and that which it rejected. However, as we have noted, that assessment makes no reference to an important element of the appellant's case which has a bearing on the central issue of her honesty or dishonesty.

[30] In our view the cumulative effect of the absence of an appropriate direction in terms of *Ivey* and the failure to consider important aspects of the appellant's case mean that this appeal must be allowed. Accordingly we will quash the decision of the Committee.

[31] Notwithstanding that she had accepted that the entry had been incorrectly made, the appellant had attempted to correct the error by contacting the NMC on the following day. Her actions on 14 March 2018 at the very least can have had no other result than to bring the matter to the attention of the NMC. It was not acted upon at that stage because the email from the administrative officer who took her call was never sent. We were advised that the online registration procedure was fully automated so that no decision to accept or reject an application which appeared to contain all the required elements was made by any human intervention, and that some applications were selected at random for checking to provide quality assurance.

[32] In all these circumstances we have decided to make no further order. We do so because the appellant was not responsible for any of the errors which we have identified in the decision-making process and in our view reconsideration by a freshly-constituted Committee would be impractical and potentially unfair because Ms Semple has died in the intervening period. She would have been an essential witness in relation to the events of 13 - 15 March 2018 and in particular to any proper assessment of the appellant's position

that she had not acted dishonestly. We agree with the appellant's submission that the sanction imposed was disproportionate to any error on the part of the appellant and therefore was excessive. Notwithstanding the appellant's acceptance that the registration had been incorrectly made, no action was taken when she contacted the NMC on 14 March 2018 and we consider that any referral for reconsideration of that aspect of the matter would have no practical effect because the appellant was restored to the register in May 2019 by order of court. In addition we were advised that subsequent renewal has taken place without difficulty in March 2021.

[33] We sanction the appeal as suitable for the employment of senior counsel and find the NMC liable to the appellant for the expenses of this appeal.