



SHERIFF APPEAL COURT

[2024] SAC (Civ) 23

Sheriff Principal D Pyle
Sheriff Principal N A Ross
Appeal Sheriff I Fleming

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL N A ROSS

In the appeal in the cause

MF

Pursuer and Appellant

against

SCOTTISH SOCIAL SERVICES COUNCIL

Defender and Respondent

Pursuer and Appellant: Khurana KC; Jones Whyte
Defender and Respondent: Lindsay KC; Scottish Social Services Council

27 May 2024

[1] The appellant was formerly employed by a nursery school. The appellant was a registered practitioner permitted to care for children. On 4 December 2020 the father of one of the nursery children, Child A, made an allegation against the appellant. The allegation founded upon a disclosure made by Child A. Child A had disclosed that he had been sexually assaulted by the appellant.

[2] The disclosure was spontaneous. Both parents had subsequently interviewed Child A and had video recorded the conversation. They both gave statements to the police. A joint investigative interview was conducted. No criminal proceedings subsequently

took place, but the allegation was referred to the respondent in its regulatory capacity under the Regulation of Care (Scotland) Act 2001 (the “2001 Act”). A Fitness to Practise Panel was convened to determine whether the allegations could, on the balance of probabilities, be proved. Following a hearing over 24 days, the Panel issued a notice of decision dated 11 August 2022, finding the allegations proved, and ordering the removal of the appellant’s name from the register. The evidence at the hearing included a report and oral evidence from Professor Macpherson. He is an experienced consultant forensic clinical psychologist who gave expert evidence on the interviewing and evidence of young children. His evidence considered Child A’s evidence, but also gave general information about the nature of children’s recollection and factors which may influence it. It noted, amongst other things, that a child’s recollection can be enigmatic, featuring only a few details, and that the vast majority of child disclosures are true, although false allegations do occur at a non-negligible rate. This expert evidence was not challenged or contradicted. Professor Macpherson’s evidence included that it is very common for a child of that age to recall a specific act, but not the timeframe or dates or other details, and that they are better at recalling actions.

[3] The appellant appealed in terms of section 51 of the 2001 Act. The appellant founded on a large number of grounds. The sheriff dealt with many of these following debate and allowed a substantive hearing on the remainder. At the substantive appeal hearing, three grounds of appeal were advanced, namely that the Panel’s determination was unfair, the decision was perverse, and the decision did not adequately specify the Panel’s reasoning. By undated interlocutor issued on 3 October 2023, the sheriff refused the appeal.

[4] The appellant appeals that decision on three grounds. The grounds found on the Panel’s findings in fact. In brief, the first ground relates to evidence about the date and place of the assault. The evidence showed that the assault could only have taken place on a

small number of dates. It narrowed down to a single date, 1 December 2022. The evidence showed that a film was being shown that day. Child A had said that two members of staff were not present during the assault. The evidence showed that those two staff were present at the screening. Further, Child A referred to another child being present, but it was proved (it is asserted) that the other child did not normally attend nursery on that day of the week. The Panel concluded that the assault took place on that date, but not during the screening. The appellant had made detailed submissions about how the logistics showed Child A's account not to be credible. The Panel had erred in finding that the incident could nonetheless have occurred. The second ground was that the Panel had gone beyond parties' submissions in finding that the incident could have occurred in circumstances not raised in cross-examination and not addressed by parties in submission. The third ground was that it was perverse to have found that the incident occurred when there was uncontradicted evidence that the other named child was not present on the day, contrary to Child A's disclosure.

[5] The present appeal is against a decision which is itself an appeal decision under statute. Parties agreed that the present statutory appeal fell to be regarded as a review rather than an appeal against the sheriff's decision.

Submissions for the appellant

[6] Senior counsel for the appellant submitted that the crux of the appeal was that the Panel had founded on the opinion of Professor Macpherson but had not explained why they had founded on some evidence but not on other evidence. They had ignored Child A's evidence that another named child had been present, which was inconsistent with that other child not attending nursery on that day of the week. Inconsistently, it had accepted another

disclosure from Child A, via the mother's hearsay evidence, that two staff members were present. Counsel accepted that the Panel did not require to explain their reasoning, but submitted that once they had started to make the analysis, it required to be rational and not perverse. The Panel also applied expert evidence although the expert had not had sight of some evidence, namely the parent's police statements, which were subsequently recovered. It was a serious matter when expert opinion was given on an incomplete factual basis. It was not possible to identify what parts of the evidence the Panel had applied. The matter should be referred to the Panel for a rehearing.

Submissions for the respondent

[7] Senior counsel for the respondent submitted that the three grounds of appeal had been blended into a single ground, which turned on the effect of the alleged unreliability of Child A's mistaken evidence that another named child had been present. The evidence relating to the other child had not, however, been developed or clarified at the time. It had not been the subject of cross-examination, or further evidence. No significance had been attached to this evidence in submissions, and it had not been established as factually correct. Nobody had raised the point before the Panel.

[8] Subsidiary pieces of evidence, such as the presence of the two staff members, were not determinative. The expert evidence did not bear to opine on the truth of Child A's disclosure, and specifically refused to do so. The evidence was given for the purposes only of general guidance. The Panel had regarded it as such, which could be seen particularly at page 28 of the determination. It did not matter whether the expert had seen all of the child's evidence, as he was not giving an opinion on it.

Decision

[9] There was no dispute about the law to be applied, and parties accepted that the test on appeal is whether the decision of the Panel can be said to be wrong (*Cheatle v General Medical Council* [2009] EWHC 645 (Admin)). As to the content of the Panel's decision, we agree with the observations of the sheriff in *B v Scottish Social Services Council* 2012 SLT (Sh Ct) 199 at para [31] that:

“Thus, it appears that a professional disciplinary body has no duty to give reasons as to its findings on matters of fact except in exceptional cases. That is equally true where the essential issue is one involving assessment of the credibility and reliability of the evidence...nothing more by way of reasons was required in law than a decision on the heads of the charge...”

[10] For the appellant the principal argument was that the Panel, having referred to part of Child A's evidence, required to explain why it did not have regard to another, potentially exculpatory, part of that same evidence. In our view that proposition is not vouched by authority. The standard of reasoning required of a disciplinary board does not require to meet the same standard as a court decision. In considering whether the Panel reached the wrong conclusion, the whole decision must be considered.

[11] The Panel's Notice of Decision is a lengthy and comprehensive document which set out the regulatory basis on which the Panel proceeded, and the submissions and evidence on which it founded. It dealt with a number of matters, mainly of an interim or procedural nature which are not the subject of appeal. It recognised the onus on the respondent to prove the case.

[12] The central evidence came from Child A's parents, which described disclosures by Child A. The initial disclosure was unprompted and involved a comment about his father's genitals, and how they compared to the appellant's genitals. The parents made a subsequent recording of the child, and both parents gave evidence about the content. The

evidence was supported by an expert, Professor Macpherson, who gave general evidence about the truthfulness of disclosure evidence. His evidence was that an unprompted disclosure was likely to be true and accurate. A child of that age might recall a specific act but might not give accurate information about the timeframe or dates. That evidence was not contradicted or challenged.

[13] The Panel's decision summarised the appellant's evidence and set out how it was, in parts, unsupported or contradicted by the evidence of other witnesses. It rejected the appellant's submission that Child A's parents had an unspecified agenda against the nursery. It noted the similarity between the initial disclosure and subsequent video recordings of Child A's evidence, and the police statements. It accepted Professor Macpherson's evidence, and considered in detail what it should or should not accept about Child A's disclosure. It accepted the view that Child A's account had been consistent during the disclosures and had not been adversely influenced by questioning. It noted Professor Macpherson's evidence that a child of that age, if making up a story, would normally base such a story on personal experience. It was unlikely here to be attention-seeking behaviour, as Child A had subsequently lost interest in the disclosure.

[14] The Panel also considered inconsistencies in the parents' evidence, and explained why they nonetheless accepted their accounts. The Panel explained the process of reasoning at page 28 of the decision. It reminded itself of the expert's views, and in particular that it was very common for a child of that age to recall a specific act but not time frames, dates or phrases. Children are better at recalling specific acts. It referred to the video evidence and transcript, and the process of taking that evidence. It formed its own view as to the significance of the presence of the two staff members. It noted it had considered the evidence "holistically" with particular reference to the evidence of Professor Macpherson.

Having considered the evidence, and explained the reasoning process in some detail, the Panel accepted Child A's disclosure as true.

[15] The analysis showed, in our view, that the Panel reached a rational and considered view on what evidence it accepted or rejected. In doing so it was performing its function as factfinder. The Panel reached a discerning opinion, on the evidence, that the incident occurred on the day when a movie was being shown and when other children were present. The Panel did not make a specific determination as to the presence of the other named child, but they did not require to do so.

[16] The Panel tested its view by considering the protocols of the nursery, and whether these showed the incident could not have occurred. It noted the evidence of the staff witnesses, and concluded that their evidence did not show Child A's evidence to be inherently implausible. It determined that there "was no basis for it concluding that [the child's] disclosure must be a story because it simply could never have happened." That phrase is quite clear. The Panel did not consider that any other evidence in the case, including the suggestion that another named child could not have been present, rendered Child A's disclosure unreliable.

[17] The appellant founds this appeal on the proposition that there might have been significant evidential weight in the inconsistency between Child A's evidence that another named child was present during the incident, and the fact that the other named child was not rostered to be present on that day of the week. In our view, there are two obstacles to that proposition.

[18] First, the presence of the other child was unproven. The presence or otherwise of the other child rested on general evidence as to nursery attendance days. The matter was not focused as a significant issue. If this were of central importance it was for the appellant to

place the evidence, and the appellant's inference from the evidence, before the Panel. In fact, this piece of evidence was not given material weight, and was not proved to be factually correct.

[19] Second, there is no reason to anticipate that the point was of evidential significance, far less showing the Panel's decision to be wrong. The Panel made clear that they followed the expert evidence, which included that a child of A's age was likely to remember a specific act, but less so the surrounding factual context. This determination was consistent with that evidence. The presence, or otherwise, of another child is no more than factual context. Further, this submission overlooks that the truth of Child A's disclosure was supported by other evidence. Child A, unprompted, pulled his penis above the waistband of his pyjamas as part of the disclosure. Child A's actions were found to be internally consistent. Potential corruption of his evidence during the video recording was considered and rejected. All of these features support the Panel's decision, which was to give considerable weight to the content of Child A's disclosure. On the evidence, they were justified in doing so. The Panel considered whether evidence of surrounding context, including the presence of other children, rendered the disclosure unreliable. They did not accept that it did.

[20] The appeal does not demonstrate illogicality, perversity or unfairness. The Panel's decision was reasoned, logical and based on the facts and expert evidence. It did not require to deal with every point made in submissions. The point principally founded upon was not a material part of the appellant's position at the hearing. The appeal attempts to elevate selected factual evidence to a significance that it was not given at the hearing. It disregards the wider evidence before the Panel. This evidence was not in any event accepted as proven. Even had it been proved, it was still open to the Panel to decide what weight they gave to the evidence. The Panel's decision to accept Child A's disclosure as true is supported by

both the factual evidence and the unchallenged expert evidence. For all these reasons, the appellant has not demonstrated that the decision was wrong, or that this court has any grounds on which to interfere with the decision of the Panel.

Disposal

[21] The appeal is refused. Parties requested a hearing on expenses. The hearing will be by written submission.