SHERIFFDOM OF TAYSIDE, CENTRAL & FIFE AT DUNDEE

[2020] SC DUN25

DUN-B759-19

NOTE BY SHERIFF JILLIAN MARTIN~BROWN

in the case of

WENDY McLAGGAN

Pursuer

against

SCOTTISH SOCIAL SERVICES COUNCIL

Defender

Act: Flanigan, Thompsons Solicitors
Alt: Blair, Anderson Strathern LLP

Dundee, 3 April 2020

NOTE

Introduction

[1] This is an appeal under section 51 of the Regulation of Care (Scotland) Act 2001 against the decision of the defender to impose a Temporary Suspension Order ("TSO") on the pursuer's registration. The dispute concerned whether the defender ought to have taken into account the willingness of the pursuer's current employer to comply with proposed conditions on the pursuer's registration and whether the defender's decision to impose a TSO rather than a Temporary Conditions Order ("TCO") was reasonable in all the circumstances.

Procedural history

[2] The pursuer is employed by Perth & Kinross Council ("the employer") as an early childhood practitioner at a primary school. She faced allegations in relation to her fitness to practise and breaches of the Codes of Practice for Social Service Workers and Employers. The defender convened a Temporary Order Hearing on 3 September 2019.

[3] On 3 September 2019, the defender's Fitness to Practise Panel ("the FTPP") found that a temporary order was necessary for the protection of members of the general public and was otherwise in the public interest, and considered that a TCO might be a proportionate response. The FTPP proposed a number of temporary conditions on the pursuer's registration, including additional support and supervision when working with pre-school children, and adjourned the hearing to allow for consideration of the proposed conditions and to investigate whether the employer would co-operate with additional support and supervision when working with pre-school children.

[4] The FTPP reconvened on 22 October 2019 and considered, inter alia, an email from the employer dated 9 October 2019. The FTPP concluded that a TCO would not adequately address the issues and that a TSO was a necessary and proportionate response to the behaviour alleged and to the public protection risks and other public interest risks associated with the alleged behaviour.

[5] The decision to impose a TSO came into effect on 30 October 2019 and the pursuer lodged an appeal at Dundee Sheriff Court on 13 November 2019, within the 14 day period for lodging an appeal. At a hearing on 6 March 2020, having considered the written and oral submissions for both parties, I refused the appeal. I have been asked to provide a note outlining my reasoning to assist with future appeals on similar issues.

Submissions for the pursuer

[6] The pursuer submitted that although the defender's Decisions Guidance for Fitness to Practise Panels and Scottish Social Services Staff ("the Decisions Guidance") recommended that conditions should be achievable and that decision makers should take steps to satisfy themselves that if a condition needs cooperation from an employer or other party that they are willing and able to do so, TCOs require the compliance of the worker not the employer. Conditions can, and are imposed, in professional regulation even where there is no current employer (Perry *v* Nursing and Midwifery Council [2012] EWHC 2275 (Admin) at paras. 46 and 47).

[7] Any indication from the employer that they were not able to comply with the proposed condition in relation to additional support and supervision when working with pre-school children was an irrelevant and inappropriate consideration. The FTPP should have only been concerned with the enforceability of the condition, whether it was workable and whether it protected the public and the wider public interest. If dissatisfied with the employer's assurance, it remained open to the FTPP to formulate other conditions which would manage the risk or to seek further clarification from the employer. The allegations being investigated did not include dishonesty and the FTPP had no reason to assert that the pursuer would work in a manner not compliant with the conditions they were minded to impose.

[8] Suspension, even temporarily, impacted on the pursuer's right to earn a living, caused her detriment in terms of reputation and deprived her of the opportunity to demonstrate that she was working to the standard expected. Such orders were only proportionate, reasonable, necessary and fair where a FTPP acted in accordance with the

Decisions Guidance. The Decisions Guidance was clear that the least restrictive order should be considered and only if it was not enforceable or workable or if did not protect the public should a FTPP consider a TSO. The FTPP's decision to impose a TSO rather than a TCO in all the circumstances was disproportionate, unreasonable, unnecessary and manifestly unfair. The FTPP therefore acted unreasonably.

Submissions for the defender

[9] The defender submitted that Scottish courts had repeatedly emphasised that caution should be exercised when considering an appeal from a specialist tribunal which regularly considers fitness to practise concerns. The general approach adopted by the Inner House when hearing appeals from specialist regulatory tribunals was summarised in PSA *v* NMC 2017 SC 542 at para. 25 :

> "… 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. It is in a better position than the court to determine whether, for example, a nurse's fitness to practise is impaired by reason of past misconduct, including whether the public interest requires such a finding. The same would apply in the context of a review of a penalty."

[10] The FTPP had no power to compel any party other than the pursuer to comply with conditions it imposed. There was no point in imposing conditions which the employer would not be willing or able to comply with. An adjournment was necessary to consider the employer's position. It could not be said that in considering the possibility of conditions and granting the adjournment, the panel had committed itself to the imposition of a TCO.

[11] The email from the employer of 9 October 2019 was neither an inappropriate nor irrelevant consideration. In the email, the employer had commented directly on whether the proposed condition would be workable. It was obviously relevant to the FTPP's decision as to whether the employer could accommodate any further support which might be required by the proposed conditions.

[12] The FTPP had produced an eleven page written decision, recording the arguments which were made before it, the documents which it considered and the reasons for the conclusions it reached. Its conclusions were logically linked to the submissions and evidence considered and it could not be said that its decision was irrational. The FTPP followed the procedure set out in rule 45 of the Scottish Social Services Council Combined Fitness to Practise Rules 2017 ("the 2017 Rules"), which combined the existing Fitness to Practice Rules 2016 with the Fitness to Practice (Amendment) Rules 2017. There was no procedural impropriety. They considered that conditions might be possible but, following receipt of further information, concluded that they could not mitigate the risk to the public and public interest as the conditions were not workable. This was a decision that the expert tribunal was entitled to make. It was not manifestly inappropriate or plainly wrong and it should therefore be upheld.

Decision

[13] Rule 21 of the 2017 Rules provides that in an impairment case, if the FTPP proposes to impose a condition on the worker's registration, the FTPP must advise the parties of the proposed condition and must adjourn the hearing for a reasonable time to allow the parties an opportunity to consider the proposed condition.

[14] The Decisions Guidance provides at pages 28-30 that TCOs must be enforceable and workable. To achieve this, decision makers should consider whether a particular condition is achievable and decision makers should take steps to satisfy themselves that if a condition needs cooperation from an employer or other party that they are willing and able to do so.

[15] In this case, the FTPP advised the parties of proposed conditions, including additional support and supervision when working with pre-school children. The FTPP then adjourned to allow consideration of the proposed conditions and to investigate whether the employer would co-operate with such a condition.

[16] I am of the view that the information provided by the employer was directly relevant to the proposed conditions and whether they were workable and enforceable. Had the employer been more supportive, then that would have assisted the pursuer in submitting that a TCO was an appropriate response and that a TSO was disproportionate. Unfortunately for the pursuer, the employer was not particularly supportive. The terms of the email of 9 October do not provide assurance that the pursuer would not return to practise in a nursery setting, nor that she would be subject to additional support. I consider that these are appropriate considerations for the FTPP to have taken into account.

[17] It is not my role to make the decision of the FTPP again. Instead, it is for me to consider whether the decision of the FTPP was plainly wrong or manifestly inappropriate. Looking at the reasons for the FTPP's decision, set out at pages 9 – 10 of the Notice of Decision, it is clear to me that the FTPP took into account the pursuer's submissions that she was already adhering to the proposed conditions; that she was not

working in a nursery situation; and that any risk the pursuer posed could be adequately managed by imposing a TCO.

[18] The FTPP also took into account the email from the employer of 9 October 2019; the risk to the public and public interest; and recognised that imposing a TSO might cause financial, emotional and reputational hardship for the pursuer. Having considered all those factors, the FTPP determined that a TSO was a necessary and proportionate response to the behaviour alleged and that there were no other steps that could reasonably be taken to protect against the risks of harm arising. They therefore decided to impose a TSO of ten months' duration.

[19] I do not consider that the decision of the FTPP was disproportionate, unreasonable, unnecessary or manifestly unfair. The FTPP acted in a way which took into account the enforceability of the condition, whether it was workable and whether it protected the public and the wider public interest.

[20] Having found no flaw in the process or reasoning of the FTPP, nor that their decision was plainly wrong or manifestly inappropriate, I refused the appeal. The defender did not seek expenses so I found no expenses due to or by either party.