

NCN: [2021] UKFTT 312 (HESC)

First-tier Tribunal Care Standards

The Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care) Rules 2008

[2021] 4326.ISO-W VKINLY

Heard by Video Link on 2 September 2021

BEFORE

**Mr H Khan (Tribunal Judge)
Ms H Reid (Specialist Member)
Ms L Owen (Specialist Member)**

BETWEEN:

Social Care Wales

Applicant

-v-

Jade Dominique Davies

Respondent

DECISION

The Appeal

1. Social Care Wales (“the Applicant”) applies under section 148 of the Regulation and Inspection of Social Care (Wales) Act 2016 (“the Act”), to the Tribunal, for an interim suspension order made against Ms Jade Dominique Davies (“the Respondent”), on 17 March 2020 for a period of 18 months until 16 September 2021, to be extended until 16 June 2022.

The Hearing

2. The hearing took place on 2 September 2021. This was a remote hearing which has not been objected to by the parties. The form of remote hearing was by video. A face to face hearing was not held because it was not practicable, and no-one requested the same and we considered that all issues could be determined in a remote hearing. The documents that we were referred to are in the electronic hearing bundle (318 pages) provided for the hearing.
3. The only difficulty with the video hearing was during closing submissions. Ms Piffaretti in the latter part of her closing submissions

dropped out of the hearing due to issues with her own Wi-Fi. However, Ms Piffaretti managed to dial in by telephone and complete her closing submissions.

Attendance

4. The Applicant was represented by Ms Eve Piffaretti Solicitor. Its sole witness was Ms Sophie Bennett, Fitness to Practise Lead (Social Care Wales).
5. The Respondent did not attend nor did any witnesses on her behalf.

Preliminary Issue

6. We heard submissions from Ms Piffaretti and considered whether or not we should proceed in the Respondent's absence. Ms Piffaretti submitted that the Tribunal should proceed in the Respondent's absence. Ms Piffaretti's submissions included that the Respondent had been notified of the hearing by email at an email address that the Respondent had confirmed belonged to her. Furthermore, the Respondent had not engaged with any of the Interim Orders Panels and the current interim suspension order was due to expire on 16 September 2021.
7. We considered rule 27 of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 (as amended) ("the 2008 Rules"). We concluded that we would proceed in the Respondent's absence. Our reasons for doing so are set out below.
8. We were satisfied that the Respondent was aware of the hearing (notifications sent on 2 August 2021, 23 August and 31 August 2021) and that it was in the interests of justice to proceed with the hearing. The Applicant confirmed that the email address provided on the application form was an email address provided by the Respondent herself during a telephone call with Ms Bennet.
9. The hearing was listed to start at 10:00am. It did not start until around 10:15am. This was to allow the Respondent a further to dial into the hearing. There had been no explanation for the Respondent's absence nor was there a request for a postponement of the hearing.
10. The Respondent had not engaged throughout these proceedings. No evidence has been served by the Respondent despite the Respondent being given an opportunity and being directed to do so pursuant to a Tribunal order.
11. The additional challenge in this case was that the interim suspension order was due to expire on 16 September 2021 and therefore the timescales for hearing and determining the case were considerably short. The case had to be heard and concluded by 16 September 2020.

We concluded that it was in the interests of justice to proceed with the hearing.

The Applicant

12. The Applicant is the regulator for the social care profession in Wales. Under section 68(1) of the Act, the Applicant's main objective in carrying out its functions is to protect, promote and maintain the safety and well-being of the public in Wales.

The Respondent

13. The Respondent was registered by the Applicant as a Residential Child Care Worker on 2 September 2015. She was employed by Keys Group between 24 December 2016 and 12 April 2018.

Events leading to the Interim Suspension Order

14. The events leading up to the suspension are set out in the Applicant's skeleton argument. These have not been challenged and we have broadly adopted the background as set out in that document.
15. On 10 July 2018, the Applicant received a referral from Keys Group setting out concerns regarding the professional boundary between the Respondent and the Young Person A. The referral indicated that these concerns had been disclosed as a result of the Respondent making an allegation of rape against Young Person A.
16. On 1 March 2020, the Applicant was informed by North Wales Police that the Respondent was being investigated for the offences of 'Abuse of Position of Trust (sexual activity with a child) and Perverting the Course of Justice'.
17. North Wales Police ("Police") subsequently confirmed to the Applicant that no further action was being taken by the Police in relation to the rape allegation, but that the Respondent was being investigated for allegations of abuse of a position of trust (involving sexual activity with a child) and perverting the course of justice
18. On 17 March 2020, an Interim Orders Panel (IOP) imposed an Interim Suspension Order in relation to the Respondent for a period of 18 months. This was imposed on the grounds that (1) the order was necessary for the protection of the public (including service users) and (2) was otherwise in the public interest.
19. On 16 September 2020, an Interim Orders Panel met to review the Interim Suspension Order. The Panel determined that the Interim Suspension Order should remain in place on the same grounds that the order was made.

20. On 6 January 2021, the Police informed the Applicant that the Crown Prosecution Service (CPS) had made a decision to take no further action against the Respondent. This decision was said to be, 'mainly due to the fact that the victim did not make a formal complaint'.
21. On 12 March 2021 an Interim Orders Panel met to review the Interim Suspension Order. The Respondent did not attend the hearing. The Panel determined that the Interim Suspension Order should remain in place on the same grounds that the order was made. This was notwithstanding the fact that, by that date, it was known that there was no ongoing criminal investigation.
22. In February 2021, the Applicant received disclosure of evidence gathered by the Police during their investigation. The evidence disclosed includes records of interviews of the Respondent under caution and screenshots of intimate text messages between the Respondent and Young Person A.
23. The Applicant asserts that records of her police interviews show that the Respondent made the following admissions which indicate a failure to maintain an appropriate professional boundary with Young Person A:
 - a) She had collected Young Person A in her car from the railway station in Birmingham on numerous occasions when he had requested that she do so;
 - b) Young Person A was a frequent visitor to her home to the extent that he went there four or five times each week;
 - c) Sexual intercourse with Young Person A took place on numerous occasions;
 - d) Although the Respondent said that she felt threatened by Young Person A, she did not report this to police or to her employer;
 - e) She had told Young Person A to delete text messages from his phone when he said he had been arrested and that the purpose of doing so was to conceal these messages from the police.
24. According to the Applicant, the mobile phone analysis conducted by the Police identified text messages exchanged between the Respondent and Young Person A on numerous dates between April 2017 and May 2018, examples of which include:
 - a) Messages of an intimate and/or sexual nature;
 - b) Conversations about the Respondent being pregnant and Young Person A being the putative father;
 - c) Young Person A asking the Respondent to buy him a new pair of trainers
 - d) the Respondent asking Young Person A to delete messages on his phone when he had been arrested by the police.

The Applicant's position

25. The Applicant's position is that an extension is sought until 16 June 2022 to enable the investigation to be completed and a hearing before the Fitness to Practise Panel to be concluded.
26. The Applicant states that it has not been able to complete its investigation, including the gathering of relevant evidence previously due to the Police investigation, high number of such cases and staff issues arising from the pandemic.
27. The Applicant has now received from the Police disclosure of evidence gathered during the police investigation. The evidence disclosed includes records of interviews of the Respondent under caution and screenshots of intimate text messages between the Respondent and Young Person A. Arrangements are being made to interview relevant witnesses to conclude the Applicant's investigation.

The Respondent's position on the Application

28. The Respondent has not exchanged any evidence pursuant to the Directions given on 2 August 2021 and has not participated in the proceedings.

The Issues to be determined

29. According to the list of issues, the Tribunal should consider whether the interim suspension order imposed on 17 March 2020 for a period of 18 months should be extended beyond 16 September 2021.

The Legal Framework

30. The legal framework was helpfully set out in the skeleton argument prepared by the Applicant's legal representatives. This was not in dispute and we have therefore broadly adopted the legal framework as set out in the skeleton argument.
31. The Applicant is the regulator for the social care profession in Wales. Under section 68(1) of the Regulation and Inspection of Social Care (Wales) Act 2016 ("the Act"). Its main objective in carrying out its functions is to protect, promote and maintain the safety and well-being of the public in Wales.
32. Under section 68(2) of the Act, in pursuing that objective, the Applicant is required to exercise its functions with a view to promoting and maintaining –
 - (a) high standards in the provision of care and support services,
 - (b) high standards of conduct and practice among social care workers,
 - (c) high standards in the training of social care workers, and
 - (d) public confidence in social care workers.
33. Sections 143 to 149 of the Act deal with the imposition of an interim

order by an Interim Orders Panel in relation to a registered person.

34. Under section 144(5) of the Act, an Interim Orders Panel may make an interim order only if it is satisfied that the order –
 - (a) is necessary for the protection of the public,
 - (b) is otherwise in the public interest, or
 - (c) is in the interests of the registered person.
35. Under section 144(4) there are two types of interim order, namely:
 - (a) an interim suspension order, which is an order suspending the registered person's registration;
 - (b) an interim conditional registration order, which is an order imposing conditions on the registered person's registration.
36. Under section 144(5), when an interim order is imposed it takes effect immediately and will have effect for the period specified by the Interim Orders Panel, which may not be more than 18 months.
37. Under Section 146 of the Act, an interim order must be reviewed by an Interim Orders Panel within six months of the date on which the interim order was imposed. If, following a review under section 146, an interim order remains in place, it must be further reviewed within six months of the date of the review.
38. The Applicant has issued guidance entitled the Selecting an appropriate disposal in a hearing "Disposals Guidance' (April 2021). Section 6 of the Disposals Guidance relates to applications for Interim Orders and includes general principles to be taken into account by an Interim Orders Panel.
39. Under section 112(1) of the Act, the Applicant is required to prepare and publish a code of practice setting standards of conduct and practice expected of social care workers. The Applicant has prepared and published a Code of Professional Practice for Social Care ('the Code').
40. The Applicant has also issued practice guidance for different categories of social care workers. This is intended to support practitioners to meet the standards in the Code. The relevant practice guidance for the Respondent is entitled, 'The Residential Child Care Worker'
41. Under section 148 of the Act, Applicant may apply to the Tribunal for an interim order to be extended or further extended. On an application, the Tribunal may -
 - (a) revoke the interim order,
 - (b) in the case of a conditional registration order, revoke or vary any condition,
 - (c) extend, or further extend, the order for up to 12 months,

- (d) make no change to the order or to the period for which the order is to have effect.
42. In making a determination, the Tribunal should have regard to the principles outlined by the Court of Appeal in GMC v Hiew [2007] EWCA Civ.369.
43. The onus of satisfying the Tribunal that the criteria was met falls on the Applicant and the relevant standard is the civil standard, namely on a balance of probabilities.

Evidence

44. We took into account all the evidence that was presented in the bundle and at the hearing. We have summarised the evidence insofar as it relates to the relevant issues before the Tribunal. We wish to make it clear that what is set out below is not a reflection of everything that was said or presented at the hearing.
45. We heard from Ms Bennett. Ms Bennett explained that the allegations against the Respondent were serious. The Respondent was registered as a Residential Child Care Worker. The Respondent had first met the Young Person A in her role as a Residential Child Care Worker. There were significant professional boundary issues. The disclosure provided by the police included evidence of an inappropriate sexual relationship and text messages which made reference to the Respondent asking Young Person A to delete messages in order to conceal the relationship.
46. Ms Bennett acknowledged that the Police investigation had been completed and that the CPS had not recommended any further criminal action. However, she explained that there was a different burden of proof in Fitness to Practice proceedings.
47. Ms Bennett also acknowledged that there had been a delay in progressing the matter since the Police disclosure in February 2021. This was due at least in part to a high number of cases and staff shortages.
48. The next step was to interview the Police Sergeant who had investigated the matter and to obtain a witness statement from the Respondent's manager. There had been some issues experienced in obtaining permission to interview the Police Sergeant but approval had now been given and a meeting was scheduled for 17th September 2021.
49. The Applicant was still experiencing delays in getting the relevant Director to grant approval the Respondent's previous manager to be interviewed. Ms Bennett explained that if this approval was not forthcoming, they would be proceeding with the matter on the basis of the Police evidence alone.

50. Ms Bennett confirmed that once the evidence had been gathered and evaluated, a decision would be made as to whether or not to progress this to a Fitness to Practice panel.
51. Ms Bennet explained that the Interim Suspension Order was granted for a period of 18 months on 17 March 2020 and it was anticipated that the investigation and any subsequent regulatory outcome would have been finalised during the duration of this order.
52. However, the criminal investigation took longer than anticipated and the Applicant has been provided with copies of the evidence gathered during the police investigation which was lengthy.
53. The Respondent has not engaged with the Applicant's process and if the lack of engagement continues additional time will be required to comply with regulatory timescales in order to arrange a hearing if required.
54. The Interim Suspension Order was sought until 16 June 2022 so that the investigation could be completed, any timescales for notice of hearings given to the Respondent and to allow for a Fitness to Practice hearing to take place.
55. The Applicant had worked on an "ideal" time estimate but had also built in a contingency of around six weeks in order to deal with any unexpected issues and to communicate the decision to the Respondent. The added complication in this matter was that due to the non-engagement of the Respondent, it would not be possible to shorten the timescales between the investigation and the Fitness to Practice hearing.
56. Ms Bennett explained that if an Interim Suspension Order was not made, the Respondent would be free to work in such a role in another area.
57. There was limited information about the Respondent due to a non-engagement. The Applicant was informed by the Police that the Respondent may be working in an Alcohol and Drugs Rehabilitation Team but could not confirm this.

The Tribunal's conclusion with reasons

58. We took into account all the evidence that was included in the hearing bundle and presented at the hearing.
59. We wish to place on record our thanks to Ms E Piffaretti and Ms S Bennett for their assistance at the hearing.
60. The question for the Tribunal (as the primary decision maker) is whether at the date of its decision, it reasonably believes that the

interim order should be extended. This means that it has to consider the criteria as that considered for the original interim order, namely, whether it is necessary for the protection of the public, is otherwise in the public interest, or is in the interests of the registered person.

61. We reminded ourselves that the Tribunal is considering the appeal at the date of the hearing and makes its decision on the basis of all of the evidence available to it, including any oral evidence at the hearing and is not restricted to matters available to the Interim Orders Panel.
62. Furthermore, the Tribunal's role in the appeal is not to make any findings of fact but to consider whether there is sufficiently strong evidence to support the decision to extend the Interim Suspension Order.
63. We concluded that taking in account all the circumstances, it was necessary and proportionate for the interim suspension order made on 17 March 2020 to be extended until 16 June 2022.
64. We concluded that we were satisfied that an interim order was necessary for the protection of public and otherwise in the public interest. Our reasons for doing so are set out below
65. We found the evidence of Ms Bennett to be clear and credible. We found her detailed knowledge of the case to be particularly impressive. Ms Bennett was candid in acknowledging that there had been delays, since the Police disclosure (in February 2021) in progressing the investigation due to staff shortages and the number of cases that the Applicant was dealing with. Ms Bennett also provided a clear explanation of the proposed timescales for the investigation to be completed and, if considered appropriate, for the matter to proceed to a Fitness to Practice hearing.
66. As the Respondent has failed to engage with these proceedings, the only information we had regarding the Respondent's circumstances was provided by the Applicant orally at the hearing and included in the hearing bundle.
67. The power to make an interim suspension order is not uncommon for regulated professions and there is case law arising from other regulatory schemes which has considered the threshold and the relevant considerations in deciding whether such an order is appropriate.
68. We considered the case of the *General Medical Council v Dr Stephen Chee Cheung Hiew* [2007] EWCA Civ 369 which was referred to by the Applicant and the principles set down in that decision.
69. We remind ourselves that the function of the Tribunal is to ascertain whether the allegations against the Respondent, rather than their truth or falsity, justify the prolongation of the extension.

70. We took into account matters such as the gravity of the allegation, the nature of the evidence, the seriousness of the risk of harm to vulnerable users of services, the reasons why the case has not been concluded and the prejudice to the Respondent if an interim order is continued.
71. We acknowledge that these are allegations at this stage. Nevertheless, these allegations are serious allegations involving a vulnerable young person whom, the Applicant asserts, the Respondent met through her role as a Residential Child Care Worker. We acknowledge that whilst the allegations were serious enough to warrant a criminal investigation the Crown Prosecution Service has recommended no further action in relation to the criminal proceedings.
72. The allegations relate to professional boundaries. They include allegations of an inappropriate sexual relationship with a Young Person, messages of an intimate and/or sexual nature as well as allegations that the Respondent asked a vulnerable young person to delete messages on his phone when he had been arrested by the Police.
73. The alleged conduct includes alleged breaches of various parts of the Code of Professional Practice for Social Care. By way of example, Section 5 of the code requires registered persons to act with integrity and to uphold public confidence in the social care profession. In particular, registered persons must not “*form inappropriate personal relationships with individuals*”. It is alleged that the conduct also breached the practice guidance for Residential Child Care Workers. In particular, paragraph 4.6 gives practical guidance in relation to the maintenance of professional boundaries with children and young people. The Applicant alleges that the Respondent failed to adhere to this guidance over a prolonged period.
74. Although factual findings are not appropriate in the context of an interim order application, the Tribunal had regard to the strength of the evidence of an inappropriate sexual relationship between the Respondent and Young Person A and of her attempt to conceal that relationship
75. The Applicant asserts that the records of her police interviews show that the Respondent made the following admissions which indicate a failure to maintain an appropriate professional boundary with Young Person A;
- Young Person A was a frequent visitor to her home to the extent that he went there four or five times each week;
 - Sexual intercourse with Young Person A took place on numerous occasions;

- Although the Respondent said that she felt threatened by Young Person A, she did not report this to police or to her employer;
76. We concluded that the interim order remains necessary for the protection of members of the public (including vulnerable service users) in view of the risk of serious harm that would arise if the alleged conduct were to be repeated with other individuals. In our view there remained a risk of repetition and a real risk of significant harm to the health, safety and wellbeing of vulnerable individuals if an interim order was not in place and if the Respondent was allowed to continue to practise without restriction.
77. Further, an interim order in this case is otherwise in the public interest in order to preserve public confidence in social care services in view of the serious nature of the allegations against the Respondent. The public would be shocked if an interim order was not imposed in this case pending a final determination of the allegations.
78. We considered the reasons as to why the case has not been concluded to date. We acknowledge that it is appropriate for the Applicant to conduct its own investigation into the matters that are the subject of the referral and specifically, it is necessary for Applicant to gather and evaluate the relevant evidence to determine whether there should still be a referral concerning the Respondent to a Fitness to Practise Panel. The next steps have clearly been considered and arrangements made to interview witnesses. This is in recognition of the different standard of proof that applies in criminal proceedings, as compared with the Applicant's proceedings. Furthermore, as Ms Piffaretti submits allegations of serious misconduct may be founded upon proven facts that do not amount to the commission of a criminal offence.
79. We considered whether the interim suspension order should be extended until 16 June 2022. In reaching our decision, we noted that after completion of its investigation, the Applicant will be required to provide the Respondent with copies of the evidence gathered and invite her to respond with written representations within 28 days and then consider any such representations before determining whether to refer the case to a Fitness to Practise Panel for a hearing. If a decision is made to refer the case to a Fitness to Practise Panel for a hearing, a pre-hearing review meeting would need to be held to fix a date for the hearing and then the Respondent would need to be given at least 42 days' notice of the hearing date. The additional complication in this case is that as a consequence of the Respondent's non-engagement to date, according to Ms Bennett, it means that any timescales cannot be shortened.
80. We reminded ourselves that if the Tribunal were to grant an extension of the interim suspension order in this case, the Applicant will be required by section 146(4)(b) of the Act to convene an Interim Orders

Panel to conduct a review of the interim order within three months of the Tribunal's decision. In addition, under section 146(8) an Interim Orders Panel may review an interim order at any time if new evidence becomes available.

81. In reaching our decision, we took into account any prejudice/hardship to the Respondent of any interim suspension order continuing. There is limited information before us regarding the Respondent's current circumstances due to her non engagement. The Applicant understand that she may be working in an Alcohol and Drugs Rehabilitation Team but cannot confirm if this is actually the case.
82. We, therefore, taking in account all the circumstances, concluded that it was necessary and proportionate for the interim suspension order made on 17 March 2020 to be extended until 16 June 2022.
83. For the avoidance of any doubt, we wish to make it clear that whilst we have considered whether there should be an extension of the interim order, we do not express any views on the merits or otherwise of the case against the Respondent.

DECISION

84. The application to extend the order dated 17 March 2020 and which is due to expire on 16 September 2021 shall be granted and the interim suspension order shall be extended until 16 June 2022.

Judge H Khan

Lead Judge

First-tier Tribunal (Health Education and Social Care)

Date Issued: 07 September 2021