SHERIFFDOM OF TAYSIDE CENTRAL AND FIFE AT DUNDEE

Court Reference B241/15

Judgment

Of

Sheriff Brian Michael Cameron

In causa

AE, [REDACTED]

Pursuer

Against

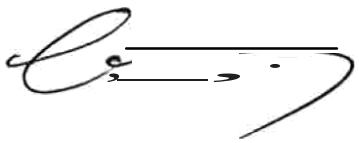
The Scottish Social Services Council, Compass House, 11Riverside Drive, Dundee, DDl 4NY

Defender

Dundee, August 2015

Act: Briggs
Alt: Campbell

The Sheriff, having resumed consideration of the cause; Refuses the appeal; Finds the pursuer liable to the defender in the expenses of the cause as taxed; allows an account of expenses to be given in and remits same to the auditor of court to tax and report



Sheriff Michael Cameron

NOTE

1. Introduction

1.1 This is an appeal by the pursuer in terms of section 51of The Regulation of Care

(Scotland) Act 2001 ("the Act") against a decision of the defender dated 25 March 2015 ("the

decision") imposing a Removal Order ordering that the pursuer's registration as a social worker be removed from the register of social workers maintained by the defender under section 44 of the Act ("the Register"). That decision was made by a conduct sub-committee ("the sub-committee") authorised to make such a decision on behalf of the defender.

1.2I heard parties at an evidential hearing on 7 July 2015. Whilst the pursuer gave evidence, that evidence was limited in its scope and was not of any significant relevance to the matters at issue before the court. Both parties provided written outline submissions. These are with the process. I made avizandum.

2. The legal framework

2.1 The Act established the defender as the independent regulator of social workers in Scotland and in that capacity it, inter alia, regulates entry to and removal from the Register. A person must be registered with the defender in order to practice as a social worker. The defender in exercising the functions conferred on it by the Act has a statutory duty to promote high standards of conduct and practice among social workers.

2.2 Section 59 of the Act requires the defender to exercise its functions in accordance with the principle that

"The safety and welfare of all persons who use, or are eligible to use, care services are to be protected and enhanced."

2.3 Section 49 of the Act requires the defender to make rules determining the circumstances in which and the means by which a person may be removed from the Register.

2.4 Section 53 of the Act requires the defender to prepare codes of conduct laying down the standards of conduct expected of social workers. The defender expects social workers to meet the standards set out in the codes and may take action if the social worker concerned fails to do so.

2.5 The rules relevant to the present appeal are The Scottish Social Services (Conduct) Rules 2012 ("the Rules").

2.6 In relation to allegations of misconduct (such as in the present appeal) the relevant parts of the Rules are;

- Part l, Rule 2 defines Misconduct as

"....*conduct, whether by act or omission, which falls short of the standard of conduct expected of a person registered with the Scottish Social Services Council, having particular regard to the Code of Practice for Social Service Workers issued by the Council under Section 53(1)(a) of the Act and the Scottish Social Services Council (Registration) Rules 2012, both as amended or substituted from time to time"*

- Schedule 3 and in particular ;

"(11) Procedure at hearing
(1) Subject to these Rules and the requirements of a fair hearing, the Sub-committee may decide its own procedures and may issue directions with regard to the just and expeditious determination of the proceedings.

(4) The hearing shall be conducted in two stages:
(a) findings of fact and Misconduct in terms of Paragraph 24 below; and
(b) mitigation and sanction in terms of paragraphs 25 and 26 *below.*

(14) Evidence

(1) After obtaining the advice of the Legal Adviser, the Conduct Subcommittee may admit any evidence that would be regarded as relevant and, in terms of the Civil Evidence (Scotland) Act 1988, ad missible in an ordinary civil court in Scotland provided that the Sub-committee can refuse to admit evidence where it does not consider it relevant to the material facts in dispute. Oral evidence may not be ad mitted where it relates only to facts which have been agreed between the Parties in a document lodged with the Clerk.

(2) The Sub-committee may receive other oral, documentary or other evidence submitted by the Registrant or the Council; which appears to the Sub-committee to be relevant to its consideration of the case.

(3) The Sub-committee may of its own volition, request the Parties to provide documentation or request any person to provide documentation or to give oral evidence, which it considers might assist it in determining the Charge against the Registrant and the Sub-committee may receive such evidence.

(4) The Sub-committee may admit documentary evidence put forward by a Party notwithstanding that such documentary evidence has not been disclosed in advance of the hearing

(a) if the other Party consents; or

(b) where after consultation with the Legal Adviser, it is satisfied that the admission of such evidence is necessary to ensure the fairness of the proceedings and outweighs any prejudice to the other Party, which has not previously seen that evidence.

(5) The findings of fact and certification of conviction of any UK Criminal Court shall be conclusive proof of the facts or conviction so found.

(6) The findings offact and determination by any of the regulatory bodies set out in SCHEDULE 6, shall be prima facie evidence of the facts so found. The Registrant shall be entitled to adduce evidence to the Sub-committee in rebuttal.

(18) Burden and Standard of Proof

(1) The burden of proof shall rest upon the Council.

(2) Where the facts are in dispute, the Sub-committee shall decide the facts on the civil standard of proof

(22) Admissions

(1) After the Charge has been read, the Convener shall ask the Registrant whether any facts alleged in the Charge are admitted and whether the Registrant admits Misconduct.

(2) Where the Registrant admits the facts alleged, or the facts alleged and Misconduct, and where a Statement of Facts has been agreed in advance the Presenter shall read out the agreed Statement of

Facts.
(3) Where the Registrant admits the facts alleged but denies Misconduct, the Sub-committee shall determine the issue of Misconduct and then announce a finding on the facts alleged and Misconduct.
(4) Miere the Registrant has admitted Misconduct, the Sub-committee, ifsatisfied, shall announce a finding of Misconduct. On a finding of Misconduct the Sub-committee shall proceed to determine the issue of sanction in accordance with paragraph 26 below.

(23) Procedure where facts disputed
(1) Miere no admissions are made, or some facts alleged remain disputed, the Presenter shall present the case against the Registrant to the Sub-committee and produce evidence and witnesses in support of those facts which are not admitted.
(2) At the end of the evidence presented by the Presenter the Subcommittee may ask the Presenter questions.
(3) The Registrant may produce evidence and witnesses in support.
(4) At the conclusion of the evidence presented by the Presenter, and at the conclusion of the evidence presented by the Registrant the Sub-committee may question either party.
(5) At the conclusion of all evidence and any questions by the Subcommittee the Parties may make a closing statement on both the facts and the issue of Misconduct and the Parties may lead evidence on the issue of Misconduct.
(6) The Sub-committee shall then ask whether the Registrant admits Misconduct. If the Registrant does admit Misconduct the Subcommittee shall proceed to determine the issue of mitigation and sanction.

(24) Findings of fact and Misconduct
(1) The Sub-committee shall then consider in private whether the facts alleged in the Charge which remained disputed by the Registrant have been proved on the civil standard of proof The Sub-committee shall make findings offact and shall consider whether the findings offact amount to Misconduct.
(2) In deciding upon the issue of Misconduct, the Sub-committee shall have regard to the Code of Practice for Social Service Workers issued by the Council under Section 53(1)(a) of the Act, as amended from time to time.
(3) If the Registrant is found not to have committed Misconduct, the case will be dismissed and the hearing concluded. The Clerk may be directed by the Sub-committee to remind the Registrant of the terms of the Code of Practice for Social Service Workers. In this case the direction and the reasons therefor shall be entered on the Registrant's Registration in the relevant part of the Register.
(4) Save in exceptional circumstances, the Sub-committee shall not be

required to give detailed reasons for its findings of fact. However the Sub-committee shall give reasons for its findings on the issue of Misconduct.

(5) The Convener will then announce in the presence of the Parties the Sub-committee's findings of fact and decision on Misconduct. If Misconduct has not been proved the case will be dismissed.

(25) Mitigation

(1) Where the Sub-committee finds that the Registrant has committed Misconduct, including where the Registrant admits Misconduct, the Convener shall require the Presenter to provide the Sub-committee with details of the Registrant's previous record with the Council.

(2) The Convener will then announce the sanctions available to the Sub-committee and shall invite representations from both Parties in respect of the sanction to be imposed.

(3) The Registrant may address the Sub-committee in mitigation and may produce references and testimonials and may call character witnesses in support.

(4) Where character witnesses are called, they may be questioned by the Presenter and the Sub-committee.

(5) Where the Registrant has chosen not to attend the hearing, the Registrant may provide details of mitigation in writing, in advance, to the Clerk. The Clerk shall provide such mitigation documentation to the Sub-committee at this stage.

(6) After hearing the Registrant, if the Registrant is present, the Subcommittee shall decide, in private, what sanction it should impose.

If it is minded to impose a condition or conditions, the terms of such will be formulated. If the Sub-committee is minded to impose a condition or conditions the Council may call a witness to give evidence before the Sub-committee and the Parties as to the suitability or workability of any potential condition or conditions. The Registrant shall be entitled to cross-examine the witness.

(7) The Sub-committee shall announce its decision on sanctions in public, and shall give reasons for its decision.

(8) A decision by the Sub-committee on the question of sanction shall be treated as that of the Council.

(26) Sanctions

(1) At any time during the proceedings, on the application of the Council, having considered representations from the Registrant or the Registrant's representative, if present, the Sub-committee may impose, extend or vary an Interim Suspension Order.

(2) Upon a finding of Misconduct, the Sub-committee may:

(a) warn the Registrant and direct that a record of the warning be placed on the Registrant's Entry in the Register for a period of up to 5 years, details of the warning will remain in the Council's records and will be taken into account in future

Council proceedings; or
(b) warn the Registrant and direct that a record of the warning be placed on the Registrant' s Entry in the Register for a period of up to 5 years, details of the warning will remain in the Council's records and shall be taken into account infuture Council proceedings; and inform the Registrant that it intends to impose a condition or conditions on the Registration in a part or parts of the Register and indicate the terms of such, in accordance with Paragraph 26(4) below; or
(c) make a Suspension Order for a period not exceeding two years; and inform the Registrant that it intends imposing a condition or conditions on the Registration in a part or parts of the Register and indicate the terms of such, in accordance with Paragraph 26(4) below; or
(d) inform the Registrant that it intends impose a condition or conditions on the Registration in a part or parts of the Register and indicate the terms of such, in accordance with Paragraph 26(4) below; or
(e) make a Suspension Order for a period not exceeding two years; or
(f) make a Removal Order;
(g) and /or revoke any Interim Suspension Order
(3) In deciding what sanction is to be imposed, the Sub-committee shall take into account:
(a) the seriousness of the Registrant's Misconduct;
(b) the protection of the public;
(c) the public interest in maintaining confidence in social services;
(d) the issue of proportionalit y; and
(e) may take into account Indicative Sanctions Guidance (as issued by the Council).
(4) Where the Sub-committee decides to impose one of the sanctions referred to at paragraph 26(2)(a)(b) or (d) above, or revoke any Interim Suspension Order imposed in accordance with paragraph 26(2)(c) above, it shall issue a Notice of Decision in terms of paragraph 27.
(5) Where the Sub-committee is minded to impose a condition or conditions on the Registrant's Registration in a part or parts of the Register:
(a) the Sub-committee will issue to the Parties a note of the condition or conditions it is minded to impose.
(b) where the Registrant is present at the hearing and the Subcommittee is minded to impose a condition or conditions on the Registrant's Registration in a part or parts of the Register, the hearing will be adjourned by the Sub-committee for a reasonable period of time to allow the Registrant an opportunity to consider the note of the condition or conditions

that the Sub-committee is minded to impose.
(c) Where the Registrant is not present at the hearing and the Sub-committee is minded to impose a condition or conditions on the Registrant's Registration in a part or parts of the Register, the hearing will be adjourned by the Sub-committee and the Clerk will send to the Parties a note of the Subcommittees' proposed condition or conditions within 7 days of the hearing being adjourned.
(6) The note of the condition or conditions referred to at Paragraph 26 (S)(a) above shall:
(a) set out the condition or conditions which the Sub-committee is minded to impose and the reasons for the condition or conditions; and
(b) inform the Parties of the right to make written representations to the Sub-committee concerning any matter that the Parties wish to dispute, within 14 days of service of the note of the condition or conditions.
(7) The Sub-committee shall reconvene to consider the matter as soon as practicable in the case of Paragraph 26(5)(b) above or after the expiry of the 14 day period set out in the note of the condition or conditions in Paragraph 26(6) above. At least 7 days prior to the meeting the Clerk shall send:
(a) to the Sub-committee and the Council a copy of any written representations submitted by the Parties and
(b) to the Sub-committee and to the Parties a Notice of Reconvened Hearing.
(8) At the reconvened hearing, the Sub-committee shall take into account any written representations made by the Parties in relation to the issue of conditions, and may consider oral evidence and/or submissions on the issue before determining what sanction to impose on the Registrant.

(27) Notice of Decision
(1) Within 7 days, after the conclusion of the hearing, the Clerk shall send a Notice of Decision to the Parties and to those named in paragraph 8 above.
(2) The Notice of Decision shall:
(a) record any advice given by the Legal Adviser;
(b) set out the Charge upon which the decision of Misconduct was found;
(c) set out the Sub-committee's findings of fact and its decisions on Misconduct and sanction;
(d) give reasons for the Sub-committee's decisions;
(e) where a Suspension Order has been imposed, set out the period of suspension;
(f) set out any rights to make written representations in terms of section 48 of the Act.

(g) inform the Registrant of the right of appeal to the Sheriff set out in Section 51 of the Act;
(h) inform the Registrant that the Notice of Decision will take effect in accordance with Section 51 of the Act."

2.7 The defender is a public authority for the purposes of the Human Rights Act 1998 (the "1998 Act") and the European Convention on Human Rights ("ECHR").

3. The background

3.1 On 11 November 2014 the defender issued a Notice of Hearing to the pursuer. That notice contained the following charges against the pursuer;

1. The Charge against you is that between February 2010 and 2 September 2012 while employed as a Social Worker by [REDACTED] and during the course of that employment, you did:

   a. between February and March 2010, whilst working with service user AA in relation to PPP parenting, behave inappropriately towards service user AA by:

      i. flirting with AA and touching her on the arm
      ii. discussing AA's boyfriends with her
      iii. smoking cigarettes in AA's home
      iv. discussing your personal circumstances with AA, including disclosing that you are an alcoholic and have Myalgic Encephalomyelitis
      v. advising that you and AA could have a personal relationship if you were no longer allocated to work with her
      vi. advising AA you had had sex with clients previously
      vii. providing AA with your personal mobile telephone number
      viii. arranging to meet AA at a hotel
      ix. threatening to use your power to remove AA's son from her if she told anyone of your relationship with her

b. on 17 August 2010 send 47 text messages from your work mobile phone to service user AA which was inappropriate as:
i. you were not AA's allocated Social Worker and had no legitimate reason to communicate with her

c. on or around 17 August 2010 fail to ensure that you had set a security code on your work mobile telephone to secure your telephone against use by others
i. and in doing so you did breach your employer's Mobile and Landline Communications Policy

d. between on or around 11 March 2010 and around 17 August 2010 you did send text messages, some of which had sexually explicit content, to service user AA
i. and you did send some of these using his work mobile telephone

e. on various dates between 19 July 2012 and 2 September 2012 send approximately 59 text messages of a sexually explicit nature to CC using your work mobile phone, in breach of your employer's Mobile and Landline Communications Policy, including, but not restricted to, the following messages:

(i) [Sexually explicit content redacted]
(ii) [Sexually explicit content redacted]
(iii) [Sexually explicit content redacted]
(iv) [Sexually explicit content redacted]
(v) [Sexually explicit content redacted]
(vi) [Sexually explicit content redacted]
(vii) [Sexually explicit content redacted]
(viii) [Sexually explicit content redacted]

(a) and in doing so you did breach your employer's Mobile and Landline Communications Policy

f. on various dates between 12 April 2012 and 1 September 2012, using your work mobile telephone, engage in text message conversations with ZZ discussing your use of controlled drugs

g. on various dates between 21 May 2011 and 29 May 2012, using your work mobile telephone, engage in text message conversations with former service user DD, relating to you arranging to purchase controlled drugs from DD on a number of occasions.

The Council considers that the Charge, if proved, constitutes Misconduct as defined in Rule 2 (1) of the Scottish Social Services Council (Conduct) Rules l.4,2.1,2.2,2.3,2.4,3.8,5.1,5.2,5.3,5.4,5.7,5.8, and 6.1 of the Scottish Social Services Council Code of Practice for Social Service Workers."

3.2 A hearing before the sub-committee took place on 10 December 2014 and 16, 17 and 18 March 2015. The pursuer raised a preliminary motion at the hearing seeking the exclusion of (first) hearsay evidence of allegations made by witness AA and (second) the transcript of text messages sent by the pursuer to witness CC.

3.3 Mr Briggs informed me that the motion to exclude hearsay evidence was made in light of the fact that witness AA was not to be called as a witness at the hearing. The hearsay evidence that the sub-committee intended to consider in the absence of AA was (i) e mails from a [REDACTED], a social worker within Children's Services to a [REDACTED] in which she rehearses information disclosed to her by AA relating to the pursuer; and (ii) a note of an interview between [REDACTED], investigating officer for Education and Children's Services and AA.

3.4 The pursuer lodged a written submission in support of his preliminary motion. That written submission set out that the motion to exclude the hearsay evidence related to charge l.a (i) to l.a (xi) and further that the motion to exclude the transcript of text messages related to charge l.e. In summary the pursuer's position was (i) that it was not fair to admit the hearsay evidence of AA in relation to charge 1.a (i) to 1.a (xi) in the absence of exceptional circumstances, which did not exist in this case and (ii) that the detail contained in charge l.e was a breach of the pursuer's right to respect for his private and family life, which included the right to a private sex life. The defenders lodged written submissions in response.

3.5 It is significant and important to record at this stage that at the hearing the pursuer admitted the following;

- That on 17 August 2010 47 text messages were sent from his work mobile telephone to AA
- That on various dates between 19 July 2012 and 2 September 2012 he sent 59 sexually explicit texts to CC using his work mobile phone

- That on various dates between 12 April 2012 and 1September 2012 using his work mobile phone he engaged in text messages with ZZ discussing his (the pursuer's) use of controlled drugs; and
- That on various dates between 21 May 2011 and 29 May 2012 using his work mobile phone he engaged in text messages with DD relating to him (the pursuer) arranging to purchase controlled drugs from DD on a number of occasions.

4. The decision of the sub-committee

4.1 The sub-committee issued a detailed note of its decision on 25 March 2015. The decision of the sub-committee was that there had been Misconduct on the part of the pursuer (as defined by Rule 2(1) of the Rules) and as a result it was determined that the pursuer should be removed from the Register.

4.2 In relation to the specific charges the sub-committee found as follows:

- Charges l.a(i) – 1.a(ix) were found not to have been proven
- Charge 1.d(i) was found not to have been proven
- Charges 1.b., l.c., 1.e., 1.f. and 1.g were found to have been proven.

4.3. In relation to the preliminary motion raised by the pursuer the sub-committee determined, firstly, to admit the hearsay evidence of AA "...in the interests of justice ..." and, secondly, that in relation to the text messages with CC, Article 8 of ECHR was engaged but that having used his work mobile phone to send the messages the pursuer had "... reduced his right to seek respect for his private life as he had effectively brought his private life into contact with public life by the use of his work mobile phone ....".

4.4 In relation to sanction the sub-committee considered that the pursuer's behaviour was "...fundamentally incompatible with being a social worker .....was at the upper end of the spectrum of Misconduct and constituted a serious departure from the relevant professional standards set out in the Code of Practice ...". The sub-committee considered that a Removal Order required to be made.

5. The grounds of appeal

5.1 The pursuer in the present action seeks to have the decision of the sub-committee set aside. The grounds upon which he seeks to do so are set out in the record and can be summarised by reference to the pleas in law for the pursuer;

- The defender, in admitting hearsay evidence pertaining to the allegations made by AA, erred in law;
- The defender, in admitting the transcript of text messages sent by the pursuer to CC, erred in law and acted in breach of the pursuer's article 8 right to respect for his private life;
- The defender, in admitting the hearsay evidence pertaining to the allegations made by witness AA and the transcript of text messages sent by the pursuer to witness CC, failed to give the pursuer a fair hearing ;and
- The defender in arriving at their decision to order the removal of the pursuer from the Register acted unreasonably

5.2 In relation to the decision of the sub-committee to allow the hearsay evidence of AA, the pursuer's submission was to the effect that he was deprived of a fair hearing as he had been denied the opportunity to cross-examine AA. The ability to cross-examine was fundamental to the overall fairness of proceedings. The decision was a breach of Article 6 of ECHR as it denied the pursuer the right to a fair hearing. Whilst the pursuer recognised that the Rules allowed for the admission of hearsay evidence (Rule 14 – hearsay evidence being admissible in terms of the Civil Evidence (Scotland) Act 1988), the test that the defenders ought to have applied in deciding to admit the hearsay evidence of AA was, not whether it was in the interests of justice, rather whether it was a proportionate means of achieving a legitimate aim. It was submitted by the pursuer that the sub-committee had failed to consider what the legitimate aim of allowing the hearsay was and furthermore failed to consider whether to allow that evidence, in light of the pursuer's right to a fair hearing, was a proportionate means of achieving that aim. That failure according to the pursuer was an error in law.

5.3 In support of his position the Pursuer referred me to the case of *The Queen (on the application of Johannes Philip Bonhoeffer v General Medical Council [2011] EWHC 1585.* I was in particular referred to the dicta of Mr Justice Stadlen at paragraphs 39-47 where it is said;

> *"39. The question before this Court is whether the decision by the FTPP to admit Witness A 's hearsay evidence was irrational. In my judgment the answer to that question is not dictated by any absolute rule whether of common law or under Article 6. Various formulations of such a putative rule were canvassed in argument. There is, in my judgment, no absolute rule whether under Article 6 or in common law entitling a person facing disciplinary proceedings to cross examine witnesses on whose evidence the allegations against him are based. Nor does such an entitlement arise automatically by reason of the fact that the evidence of the witness in question is the sole or decisive basis of the evidence against him. Nor, so far as Rule 34 is concerned, does it follow automatically from a conclusion that hearsay evidence would be inadmissible under the gateways of section 114 and/or 116 of the 2003 Act that it would be unfair for the FTPP to admit it under the Rule.*

40. However, in my judgment the Claimant's challenge to the decision of the FTPP in this case is not dependent on the assertion of the existence of any such absolute rules. Rather, it is dependent on the application to the particular and very unusual facts of this case of the general obligation of fairness imposed on the FTPP having regard to general common law principles, the Claimant's Article 6 rights and the terms of Rule 34.

41. In my judgment the application of those principles to the peculiar facts of this case required the FTPP to conclude that it would be unfair to admit Witness A's hearsay evidence.

42. Informing that judgment I would reject the GMC 's contention that the question which arises on this claim for Judicial review is whether the FTPP should be precluded from conducting any inquiry at all into the majority of the serious allegations advanced against the Claimant. It does not follow from the conclusion that it would be unfair to admit Witness A's hearsay evidence that the FTPP should be precluded from conducting any inquiry into the majority of the allegations against the Claimant. The remarkable feature of this case is that Witness A has repeatedly expressed his willingness and ability to attend to give live oral testimony and expressed himself as willing and able to do so right up to the date of the hearing in front of the FTPP to consider the GMC 's application to adduce his hearsay evidence. Any decision not to proceed with those allegations which are wholly dependent on the evidence of Witness A by relying on his oral testimony whether in person or by video link was and remains a matter or the GMC. There is nothing as it seems to me in the decision of this Court, which would preclude the GMC from calling Witness A to give oral testimony. To the contrary, the FTPP made no findings of fact to the effect that there would be a significantly greater threat to the safety of Witness A by virtue of his giving oral

testimony than would be the case if his hearsay evidence were adduced

43. Prima facie, the arguments for affording the Claimant the opportunity to cross examine Witness A are in my view formidable. The Claimant is an extremely eminent consultant paediatric cardiologist of international repute. The allegations against him could hardly be more serious. They involve allegations of sexual misconduct, the abuse of young boys and young men and the abuse of a position of trust. If proved, they would have a potentially devastating effect on his career, reputation and financial position. Not only is the evidence of Witness A the sole evidence against the Claimant in support of most of the allegations against him, but insofar as those allegations involve alleged misconduct towards other victims, those victims were interviewed by the MPS and denied that the allegations were true. Indeed it was for that reason that the FTPP was told by Mr Donne that the MPS decided that there could be no sensible prosecution in this country against the Claimant in respect of Witness A's allegations that the Claimant abused the other alleged victims, notwithstanding that, since some of that alleged conduct, as distinct from the alleged conduct directed to Witness A, took place after 2003, the English court would have jurisdiction under the Sexual Offences Act 2003. Thus, not only is this a classic case of one person 's word against another but because the other alleged victims live in Kenya, neither the Claimant nor the FTPP nor the GMC has any legal power to compel their attendance at the FTPP hearing to give evidence in support of the Claimant. It is hard to imagine circumstances in which the ability to cross-examine the uncorroborated allegations of a single witness would assume a greater importance to a professional man faced with such serious allegations.

44. It is axiomatic that the ability to cross-examine in such circumstances is capable of being a very significant advantage. It enables the accuser to be probed on

matters going to credit and his motives to be explored. It is no less axiomatic that in resolving direct conflicts of evidence as to whether misconduct occurred the impression made on the tribunal of fact by the protagonists on either side and by their demeanour when giving oral testimony is often capable of assuming great and sometimes critical importance.
45. In this case the disadvantage to the Claimant of being deprived of the ability to cross-examine his accuser is incapable of being in any way mitigated by the FTPP being able to study the demeanour of Witness A when he was being interviewed by the MPS The audio and video tapes of the interviews which constitute the centrepiece of the hearsay evidence sought to be adduced by the GMC have been lost as a result of admitted incompetence by the MPS
46. In relation to those charges that relate to what the Claimant is alleged to have done to Witness A, as distinct from what is alleged to have been done to the other alleged victims. there are no other witnesses to the alleged conduct whom the Claimant could either call or cross-examine as a means of challenging Witness A 's account. These difficulties in challenging Witness A 's allegations against him are likely to be compounded by the facts that the conduct complained of is alleged to have commenced as long ago as 1995 whereas the allegations were first put to the Claimant as recently as 2009 and that the conduct is all alleged to have occurred in Kenya.
47. . Nor in my judgment is the unfairness to the Claimant mitigated by thefact that the GMC 's reliance on Witness A 's hearsay evidence weakens the case against him orthat the case against him may fail. The nature of the unfairness complained of is that the admission of evidence in the form of hearsay statements which could have been but will not be tested in cross-examination may lead to the charges against the Claimant being found by the FTPP to the correct, whereas if it were adduced in the form of oral testimony, and tested in cross-examination it might be found to be incorrect or at least not accepted as probably correct. Such a result either is or is not unfair. If it is, it does not cease to be unfair merely because the admission of the hearsay evidence may lead to a different result. The FTPP recorded that it had heard from Witness Z ''about the circumstances in ·which the evidence was made and the apparent reliability of Witness A. The Panel found Witness Z to be an honest and credible witness. " It is important to note that the FTPP 's reference to apparent reliability in that passage was limited in that it took a decision to declinethe invitation by the GMC al the hearing to read the transcripts of Witness A 's interviews with the MPS. It thus was not in a position to reach any even provisional view as to the reliability of the content or substance of the hearsay evidence sought to he adduced. It is thus not clear what was the evidential basis for the finding of the FTPP that Witness A 's *hearsay evidence "has clear probative value* ".

5.4 Mr Briggs specifically drew my attention to paragraph 44. He submitted that the admission of the hearsay evidence of AA materially affected the outcome of the hearing before the sub-committee. It was submitted that in the absence of the hearsay evidence of AA, the extent of the evidence against the pursuer was that text messages had been sent to AA from the pursuer's work mobile phone. It was unreasonable for the defender to reach a

finding of misconduct that they did and in particular that the pursuer had failed to respect and maintain the dignity of AA. The content of the text messages were never recovered. The only evidence of the messages was contained within the phone bill. The content of the text messages could have been anything. It does not follow that he exploited and abused AA.

5.5 In relation to the decision of the sub-committee to allow evidence of the transcript of the text messages sent to CC, Mr Briggs submitted that the admission of that evidence was a breach of the pursuer's right to respect for his private life, a right he enjoyed by virtue of section 8 of ECHR. The texts were of a highly private and personal nature exchanged between consenting adults. If the defender sought to derogate that right it required to show that the extent of the derogation was a proportionate and necessary step to achieving a legitimate aim.

5.6 Mr Briggs submitted that whilst the defender had identified the "legitimate aim", namely to uphold the public's confidence in preserving the pursuer's employers mobile phone policy, what the defender failed to do was to consider whether in the context of the proceedings before the sub-committee it was proportionate to allow such an intrusion into the pursuer's private life. It was submitted that the defender had not considered proportionately and in any event the aim identified by the defender was not proportionate to the intrusion into the pursuer's right to privacy. The basis upon which the sub-committee reached its decision, that the pursuer had "...reduced his right to seek respect for his private life as he had effectively brought his private life into contact with the public life by use of his work mobile phone" was an error in law. There was, it was said, no basis upon which to conclude that an individual can waive their right to respect for their private live.

5.7 In conclusion Mr Briggs submitted that had the sub-committee not erred in law it was likely that it would not have found the pursuer guilty of misconduct.

5.8 In reply Mr Campbell reminded me of the approach that the court should take when considering the appeal, and in particular an appeal in cases where the issue of credibility and reliability of witnesses is to be considered, by reference to the decision of the Inner House in *Gray v Nursing and Midwifery Council 2009 SLT 779 {[2009] CSIH 68}* and in particular at paragraph 12 where the court referred to the decision of the Privy Council in *Gupta v General Medical Council [2001] 1 WLR* 1915:

> *"In all such cases the appeal court readily acknowledges that the first instance body enjoys an advantage which the appeal court does not have, precisely because that body is in a better position to judge the credibility and reliability of the evidence given by the witnesses. In some appeals that advantage may not be significant since the witnesses' credibility and reliability are not in issue. But in many cases the advantage is very significant and the appeal court recognises that it should accordingly be slow to interfere with the decisions on matters of fact taken by the first instance body. This reluctance to interfere is not due to any lack of jurisdiction to do so. Rather, in exercising its full jurisdiction, the appeal court acknowledges that, if the first instance body has observed the witnesses and weighed their evidence, its decision on such matters is more likely to be correct than any decision of a court which cannot deploy those factors when assessing the position."*

5.9 In relation to sanction, Mr Campbell drew my attention to what was said by the Inner House in *Gray* at paragraph 14 and in particular where the court considered the opinion of an Extra Division in *Graham v Nursing and Midwifery Council 2008* SC *659 :*

> *"The starting point, in considering an appeal of this kind, is to recognise that the appellate court will generally be reluctant to interfere with a decision made by a professional conduct committee. That reluctance will be particularly marked when the subject of the appeal is restricted to the question of the sanction imposed. It has long been accepted that a professional conduct committee will possess particular qualities of relevant experience and expertise and will normally be in a position to determine what is the appropriate disposal. To such experience proper regard should be*

paid, and also to the professional conduct committee's view as to what is required in the way of the protection of the public and the reputation of the profession. Accordingly, the appeal court should not interfere with the decision of a professional conduct committee if it comes to the view that another disposal might in the circumstances have been preferable, or that, given a free hand, it would have imposed a different penalty. It is well settled that the appropriate test which must be applied in an appeal of this kind if the disposal is to be set aside is that the penalty imposed can properly be described as excessive and disproportionate in all the circumstances of the case."

5.10 Mr Campbell then turned to consider the grounds of appeal in the present case;

The decision of the defender to admit the evidence of AA was an error in law

Mr Campbell's submission in response to this ground was in seven parts:

i. Specification

A number of charges were presented to the sub-committee that related to witness AA. There was a lack of averments by the pursuer to support in what way or why the sub-committee has erred in law. The defender's primary position was that the averments as they stand are lacking in specification and should be dismissed. The defender only required to meet the case set out against it. The case as set out denies the defender fair notice of the why the pursuer considers the defender *to* have erred in law.

ii. Admissibility of Evidence

Paragraph 14(1) of the Rules *(1.41)* provides that the sub-committee may admit any evidence regarded as relevant and admissible in an ordinary civil court in terms of the Civil Evidence (Scotland) Act 1988.

Section 2(1) of the Civil Evidence (Scotland) Act 1988 provides that in any civil proceedings evidence shall not be excluded solely on the grounds it is hearsay.

The evidence that the pursuer sought the sub-committee to exclude was both relevant, as it went directly *to* the charges, and admissible in terms of the Civil Evidence (Scotland) Act 1988 and the Rules.

iii. Common law on admission of hearsay evidence

The pursuer's position within his written submission to the sub-committee was that hearsay evidence should only be admitted in exceptional circumstances *(paragra ph 19 et seq).* Reference was made to *The Queen (on the ap plication of Johannes Philip Bonhoeffer) v General Medical Council [2011] EWHC 1585 (Admin).*

Mr Campbell referred me to the case of *Nursing and Midwifery Council v Eunice Ogbonna [2010] EWHC 272 (Admin)* which dealt with the admission of hearsay evidence. The case was heard in the Court of Appeal (Civil Division) on appeal from the High Court and in front of three Justices. In *Ogbonna* a witness had moved abroad and the NMC had made no attempts to secure her attendance. The key passage is *at* paragraph 24:

"If, of course, despite reasonable efforts the NMC could not have arranged for Ms Pilgrim to be available for cross-examination, then the case for admitting her hearsay statement might well have been strong. But the NM C made no efforts at all."

Following *Ogbonna, Bonhoeffer* was heard in the High Court by two Justices. In *Bonhoeffer* the GMC took a decision not to call a witness from Kenya to speak to sexual allegations against a Doctor. This was despite the witness repeatedly advising he would attend. This was described as a *"remarkable feature"* (paragraph 42) of thecase.

In paragraph 39 of the judgment, Justice Stadlen stated:

"There is, in my judgment, no absolute rule whether under Article 6 or common law entitling a person facing disciplinary proceedings to cross-examine witnesses on whose evidence the allegations against him are based. Nor does such an entitlement arise automatically by reason of the fact that the evidence of the witness in question is the sole or decisive basis of the evidence against him."

The court in *Bonhoffer* was reluctant to interpret *Ogbonna* as laying down any general rule and only went as far as to say that if *Ogbonna* had laid a general rule down to the lower Courts it was that what was required for an admission of hearsay evidence to be fair was fact sensitive (paragraph 78).

It was submitted that on a close reading of *Bonhoeffer*, it does not support the position that hearsay evidence may only be permitted in exceptional circumstances. The paragraph that refers to exceptional circumstances is paragraph 84. To place it in its full context:

"The former observation in my judgment supports the proposition that, in the absence of a problem in the witness giving evidence in person or by video link, or some other exceptional circumstance, fairness requires that in disciplinary proceedings a person facing serious charges, especially y if they amount to criminal offences which if proved are likely to have grave adverse effects on his or her reputation and career, should in principle be entitled by cross- examination to test the evidence of his accuser(s) where that evidence is the sole or decisive evidence relied on against him."

The passage refers to "an absence of a problem" in a witness giving evidence or some other "exceptional circumstances". Even in the "absence of a problem" or "exceptional circumstances" the person should only "in principle" be entitled to cross-examine where that evidence is the sole or decisive evidence.

Mr Campbell's position was that the court in *Bonhoeffer* derived eight propositions from the authorities. Amongst these is the proposition that:

"....if reliance is sought to be placed on the evidence of an accuser between whom and the accused party there is an important conflict of evidence as to whether the misconduct alleged took place, there would, if that evidence constituted a critical part of the evidence against the accused party and if there were no problems associated with securing the attendance of the accuser , need to be compelling reasons why the requirement of fairness and the right to a fair hearing did not entitle the accused party to cross-examine the accuser."

iv. The submissions and information before the sub-committee

Mr Campbell reminded the court that the issue was first raised on behalf of pursuer at the sub-committee on 10 December 2014. A transcript of that day's evidence is produced at number 9 of the defender's productions. On that day, the pursuer's solicitor stated it was a key part of our legal system that an opportunity is given to test the evidence *(page 9.3).*

The defender made a submission on that day to the effect that attempts had been made to contact witness AA, including letters and telephone calls *(page 9.5).*

The sub-committee required to adjourn to future dates due to the unavailability of the pursuer and asked parties to prepare written submissions on the point.

The pursuer's and defender's submissions are contained at numbers 4.1 and 5.1 of the defender's productions, respectively. The Defender's submission outlined in greater detail the attempts l:o contact the witness *(page 2)* and provided an overview of the case law.

At the reconvened sub-committee on 16 March 2015 (the transcript is number 10 of the defender's inventory) the defender summarised its position to the sub-

committee, making further reference to the cases contained within the written submission and applying the facts of the present case to the law *(page 10.6).*

The pursuer responded to the defender's submission by conceding there was no absolute right to cross-examine and highlighting the importance of the panel seeing a witness first hand in their assessment of credibility and reliability. It was stated on his behalf, that it was unfair for the pursuer to be "forced" to answer questions, "pulled and pushed in different direction" but the evidence of his accuser can be admitted in paper form *(page 10.9).*

In deciding how to apply the facts of the case to the law the information the sub-committee had before them was:

- The defender had requested AA to attend as a witness.
- The defender obtained up-to-date address information for AA upon realising the address was not current and wrote to AA at this address on 2 occasions without receiving a response.
- The defender attempted to contact AA by telephone. This contact detail was no longer in use and the defender obtained a further telephone number however this would not accept incoming calls.
- The defender had no powers to compel witnesses.
- AA had previously advised the defender she would give evidence by video link but when efforts were made to arrange this the Defender received no response.

5,:-

v. The decision of the sub-committee

I was reminded that before reaching its decision, the sub-committee had received detailed legal advice from the legal advisor. That legal advice is recorded in the transcript produced at number 10 of the defender's productions and specifically from page 10.12. The legal adviser highlighted:

- The sub-committee and the pursuer would have no opportunity to assess the demeanour of AA and that may impact on their assessment of credibility and reliability.
- Witness statements and hearsay are admissible.
- The need to consider the admission of the evidence in terms of Article 6 of the ECHR.
- *Bonhoeffer* and paragraph 109 which relates to video link evidence.
- The need to consider the attempts made by the defender *to* contact the witnesses, the circumstances of the witness and the reasons for her non-attendance.
- The seriousness of the charge
- That there is no absolute right to cross-examine in the proceedings

The decision of the sub-committee indicated that the decision to admit AA' s evidence was arrived at after "careful consideration". The sub-committee considered the evidence *to* be relevant and admissible. It considered that admission of the evidence was fair at common law and under Article 6.

The sub-committee acknowledged the defender's efforts to contact the witness, albeit reserving some criticism of the defender for not making further efforts whilst acknowledging the outcome may not have altered. Mr Campbell submitted that this did not suggest that the sub-·committee considered the attempts at contact by the defender ‘‘unreasonable".

The sub-committee acknowledged there was no absolute rule to cross-examine and noted it would require to consider the weight it applied to AA's evidence "extremely carefully". The sub-committee concluded that the prejudice to the defender and the wider public interest outweighed the prejudice to the pursuer and the interests of justice required the evidence to be admitted.

By the time the sub-committee reached their decision they had taken all relevant information into account as presented by the parties and heard legal advice on the matter. In the defender's submission the sub-committee gave a full, rational and detailed reason for their conclusion.

vi. <u>The sub-committee’s application of the facts of the case to the law</u>

In *Ogbonna* the issue was that the NMC had made no effort to contact the witness to secure her attendance. In *Bonhoeffer* the issue was that the regulator rejected the opportunity to call the witness despite the witness insisting he would attend. This was described as a "remarkable feature".

It was submitted that this was in contrast to the present case where the defender made reasonable efforts to secure the attendance of the witness.

Mr Campbell submitted that there is no absolute right to cross-examine and the admission of evidence when there is not a witness to speak to it must turn on its own facts.

The pursuer contended in the written submission on his behalf that hearsay evidence should only be admitted in exceptional circumstances. He went on to identify exceptional circumstances as the witness being in a coma or unable to fly due to a hurricane *(paragraph 21)*.

Mr Campbell's submission was that that was not the position that should be taken from Bonhoeffer. The case refers to "in the absence of a problem with the witness" as well as some other "exceptional circumstance". It goes no further to define a "problem" with a witness but it is clear it is envisaging something far more mundane than extreme weather .

The defender in the present case had a "problem" in that its witness would not co-operate. It was submitted that the sub-committee correctly applied the facts and circumstances of the present case to the law on admitting hearsay evidence and reached a conclusion which it was entitled to reach, in the circumstances. It was not misdirected. It did not reach a perverse or irrational decision as there were factors that distinguished the case from *Ogbonna* and *Bonhoeffer*. The sub-committee's

decision showed that it clearly understood the issue at hand and reached a rational decision after balancing the competing interests.

vii. The impact of the admission in the context of the proceedings as a whole

Mr Campbell submitted that the court should look at whether any deviation from ECHR operated unfairly to the defender.

In admitting AA's evidence the sub-committee noted it would require to consider extremely carefully the weight it should give AA's evidence. Ultimately the sub-committee decided the non-attendance of AA was material and it could only give limited weight to the evidence.

Mr Campbell pointed out that the sub-committee did not find allegations l(a) or (d) relating to AA proven. Furthermore the sub-committee only found part l(b) proven in relation to AA. That part of the allegation was supported by mobile telephone records (produced as number 7 of the defender's productions and specifically at page 181) and the pursuer's admission that the texts were sent from his phone. The pursuer's position was that [a person know to him] sent the texts from his phone. The sub- committee did not find the pursuer's evidence on that point reliable or credible (page 6 of the decision).

Referring to the authority cited above, Mr Campbell submitted that I should be slow to interfere with the sub-committee's findings on credibility and reliability as it had

the benefit of hearing the pursuer's oral evidence and to assess his demeanour while giving this evidence.

Mr Campbell went on to submit that even if I was to hold that the decision to admit AA's evidence was an error the pursuer's first plea in law should still be repelled on the basis that the evidence had little impact of the hearing as a whole and it was the lack of credibility and reliability of the pursuer that led to the only part of the charge in relation to AA being proven.

The decision if the defender to admit the transcripts of text messages was an error in law and breached Article 8 of the ECHR

The submission in relation to this ground was in six parts:

1. specification

Mr Campbell submitted that there were insufficient averments for the defender to have fair notice of what the error on the part of the defender was. Was it that the evidence was admitted in the first place? Was the error complained of that the person the pursuer sent the texts to never had any "professional dealings" with the pursuer, as he contends? Or was the error restricted to a perceived breach of Article 8 rights? It was submitted that the pursuer's averments lacked specification and the ground should be dismissed.

ii. Article 8 at common law

The pursuer pleads that the decision to admit the transcript of text messages breaches his Article 8 rights. The starting point is for the court to determine whether

the behaviour falls under the scope of "private life". I was referred to the decision of the House of Lords in *Campbell v MGN Limited [2004] 2 AC 457* and in particular the opinion of Lord Nicholls of Birkenhead at page 462:

"Essentially the touchstone of private life is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy. "

I was also referred to the opinion of Lord Justice Mummery (paragraph 55 (4)) in X *v Y [2004] EWCA Civ 662:*

"What is "private life" depends on all the circumstances of the particular case, such as whether the conduct is in private premises and, if not, whether it happens in circumstances in which there is a reasonable expectation of privacy for conduct of that kind."

iii. Interference with Article 8 right at common law

Mr Campbell submitted that should I hold that the pursuer did have a reasonable expectation of privacy in the circumstances and that right has been interfered with it should go on to consider whether that interference was justified in accordance with the qualifications in Article 8(2) of ECHR.

I was referred to *Copland v UK (2007) 45 E.H.R.R.* 37 which I was told dealt with matters similar to the present case (in *Copeland* the issue included emails sent from work). At page 866 of the report produced it is stated by the court;

"41:...telephone calls from business premises are prima facie covered by the notions of "private life" and "correspondence" for the purpose of Art. 8(1). It follows logically that emails sent from work should be similarly protected under Art.8, as should information derived from the monitoring of personal internet usage.

42. The Applicant in the present case had been given no warning that her calls would be liable to monitoring, therefore she had a reasonable expectation as to the privacy of the calls made from her work telephone. The same expectation should apply in relation to the applicant's email and internet usage."

The court went on at paragraph 48 to say that the Court could not "exclude" that the monitoring of an employee's use of a telephone, email or internet may be considered to pursue a legitimate aim.

Copland was closely followed a few months later in *Halford v UK (1997) IRLR 471.* Recognising that *Copland* and *Halford* focused more on provisions in domestic law to justify an interference, Mr Campbell then referred me to *Atkinson v Community Gateway Associations 2014 WL4250057* a decision of the Employment Appeal Tribunal which considered an interference in the context of an employer's disciplinary process and against the employer's policy. At paragraph 57 on page 22 of the report produced the EAT said: .

"It was necessary to look at the Respondents' email policy and consider whether its terms were such that such an expectation was or might be excluded in this case…"

The EAT then went on to consider the terms of the employer's policy in detail. It was said that the terms of the employer's email policy has a similar clarity to it as the defender's policy on mobile phone usage in the present case.

The EAT also touched upon the issue of whether the emails could be used in the disciplinary process and concluded, at paragraph 66:

"...we can see no basis on which it could be said that those emails, which were blatantly in breach of the Respondents' policy, could not be used in disciplinary proceedings."

iv. <u>The submissions and information before the sub-committee</u>

Mr Campbell reminded me that the sub-committee had the benefit of hearing the pursuer and defender's oral and written submissions.

I was referred to the submission made on behalf of the pursuer *(page 9.4 of the transcript).* The Pursuer submitted to the sub-committee that it was not proportionate as sexual text messages sent from a work phone is so insignificant compared to "poring over" a private conversation.

At page 4.6 of the written submissions the pursuer, further information is provided including that the texts were between two consenting adults with capacity. Mr Campbell pointed out that no authority was advanced in support of the pursuer's contention the exercise was a "medieval stocks exercise" designed by the state to "humiliate" one of its citizens.

The defender's written submission to the sub-committee are at produced at 5.1 of the defender's productions and closely mirror the summary of the relevant case law and highlight particular aspects of the employer's policy that is considered to be relevant:

The employer's Mobile and Landline Communication Policy (at 7.173 of the Defender's productions) provides at paragraph 9.1under the headlining 'Monitoring of Use':

"Users have no expectation of privacy in anything they create, store, send or received on Comhairlie's phone systems."

When the sub-committee reconvened on 16 March 2015, the pursuer acknowledged that the defender had referred to a lot of case law to do with privacy and his agent expressed the view that the issue is a "matter of common sense", of the "commonness in the layman's language" *(page 10.4).*

It was highlighted that the messages were sent from a phone owned by the Pursuer's former employer. Paragraph 6.5 of the policy (produced as 7.176) was also highlighted to the sub-committee:

"Do not take or store pictures, or send or store text messages containing sexual or illegal material or material that is offensive in any way whatsoever."

The defender goes on to highlight a further three paragraphs from the employer's policy to the sub-committee, namely 1.2, 8.2 and 9.1.

v. <u>The decision of the sub-committee</u>

Mr Campbell reminded me that the sub-committee received legal advice on this issue starting at 10.13 of the defender's productions. The advice set out:

- Article 8 is not an absolute right
- Respect to the private life can be reduced
- The sub-committee has to perform a balancing exercise

The sub-committee held that the charge engaged Article 8. The sub-committee noted that article 8 was not an absolute entitlement but was subject to whether interference was necessary. The sub-committee decided the interference was necessary as the texts were sent from a work mobile phone. The use of the work phone was governed by a policy that the pursuer ought to have known about and that it provided him no expectation of privacy.

In conclusion, the sub-committee decided the action in using the work phone, in the circumstances reduced his right to a private life as the pursuer had brought his private life into contact with his public life.

vi. The sub-committee' s application of the facts to the law

In Mr Campbell's submission the defender had advanced the argument that the texts did not fall into the private sphere of life, with reference to case law and the clear terms of the employer's policy indicating the pursuer had no reasonable right to privacy.

The sub-committee rejected this part of the defender's argument and held that Article 8 was engaged, however the interference was necessary.

The sub-committee was referred to *Copland* and *Halford* which supported the position that reviewing communications could be a legitimate aim.

They were then referred to *Atkinson* which looked at the employer's policy.

It was Mr Campbell's position that in applying the facts of this case to the law the sub-committee had the benefit of an employer's policy which couldn't be in any

clearer terms as to the fact no reasonable expectation to privacy could be derived. The policy went further to prohibit the sending of sexual messages from the work phone.

Mr Campbell submitted that the sub-committee was entitled to take into account the terms of the relevant employer's policy from the case law. In deciding the pursuer reduced his right to a private life by using his work telephone it did not approach the issue with an erroneous principle or application of the law on the facts. The conclusion was one that the sub-committee was entitled to reach after a careful consideration of the submissions advanced and the authorities referred to.

The decision of the defender to admit the evidence of AA and of the text messages to CC failed to give the pursuer a fair hearing

i. Specification

Mr Campbell submitted that the pursuer has no averments supporting the plea in law advanced. The only reference to a "fair hearing" in the pursuer's pleadings iswhen quoting the terms of the Rules. There are no averments to explain in what way the pursuer contends he was denied a fair hearing. Accordingly, the plea in law should be repelled.

ii. Fair hearing

In the event that I consi9-ered there to be sufficient averments to support the pursuer's plea in law, then the defender submitted that the requirements for a fair hearing were met.

The hearing followed the procedure outlined in the Rules, parties were heard on their submissions, the sub-committee received legal advice and deliberated matters in private before announcing their decision and the reasons for it.

Mr Campbell had earlier addressed the issue about whether evidence being admitted when a witness did not attend prevents a fair hearing has been discussed in response to the pursuer's first plea in law. A brief summary was that there is no absolute right to cross examine, each case turns on its own circumstances and the decision the sub-committee reached was one they were entitled to reach.

I was referred to paragraph 120 of *Bonhoeffer* and the speech of Lord Bingham in Grant v The Queen [2007] 1AC 1, paragraph 17:

"*...The Strasbourg court has been astute to avoid treating the specific rights set out in Article 6 as laying down rules from which no derogation or deviation is possible in any circumstances. What matters is the fairness of the proceedings as a whole...the Strasbourg court has recognised the need for a fair balance between the general interest of the community and the personal rights of the individual and has described the search for that balance as inherent in the whole Convention...Thus the rights of the individual must be safeguarded, but the interests of the community and the victim of crime must also be respected ...While, therefore, the Strasbourg juris prudence very strongly favours the calling of live witnesses, available for cross-examination by the defence, the focus of its inquiry in any given case is not on whether there has been a deviation from the strict letter of Article 6(3) but on whether any deviation there may have been has operated unfairly to the defendant in the context of the proceedings as a whole. This calls for consideration of the extent to which the legitimate interests of the defendant have been safeguarded.*"

Mr Campbell submitted that the evidence admitted in relation to AA had limited bearing on the outcome. In addition, the decision made by the sub-committee involved findings beyond the Charges relating to CC which the sub-committee treated seriously. Accordingly, there was little evidence upon which the pursuer

could advance a case that a) a deviation occurred and b) any deviation operated unfairly in the context of the proceedings as a whole.

The defender acted unreasonably in ordering the removal of the pursuer from the Register

i. The defender adopted the submissions outlined above as forming part of the submission as to why the decision was reasonable in the circumstances.

11. The decision of the sub-committee was that on the facts found the pursuer's conduct fell short of the standard expected of a social worker. The sub-committee gave reasons why they felt each part of the facts found constituted Misconduct with reference to the Codes. The sub-committee found that the pursuer breached twelve different parts of the Codes.

m. The sub-committee also considered and took account of the Indicative Sanctions Guidance document which provides guidance to the sub-committee on how to determine the issue of sanction and relevant factors. The sub-committee started with the least restrictive sanction and worked their way up, giving detailed reasons why they considered each sanction unsuitable until they reached a removal order.

iv. The sub-committee found that the 47 text messages sent to AA was a fundamental breach of trust, was premeditated and an abuse of the power that came with the pursuer's position.

v. The sub-committee found that the text messages to CC and in relation to the parts of the Charges relating to discussion of controlled drugs on his work phoned constituted a "profound lack of judgment". The actions of the Pursuer were said to have placed himself, service users and members of the public at unnecessary risk of potentially serious harm.

vi. Mr Campbell stressed that the case law discussed at the part of his submission dealing with the approach the court should adopt underlines that the court should recognise the specialised nature of the sub-committee, which includes a "due regard" member on the sub-committee from the same part of the register as the pursuer, and be slow to interfere with the decision made by it. Proper regard ought to be had tothe experience of the sub-committee in dealing with matters as they relate to a person's suitability to work in social services. The test from *Graham* is notsimply whether the sheriff hearing this application considers another disposal is preferable. The test that must be applied is whether the penalty imposed can be properly described as excessive and disproportionate in the circumstances of the case.

vii. The decision on the facts found is not a "harsh" one to use the language of Sheriff O'Carroll inthiscourtin *AB vScottishSocialServicesCouncil(unreported),Dundee, 19 July 2012* (paragraph 53). It was a decision that was within the reasonable range of options to the sub-committee having considered the appropriate documentation and having come to a detailed and reasoned decision. Mr Campbell submitted that the decision was not unreasonable nor irrational, disproportionate or excessive or erroneous.

viii. Mr Campbell's fall-back position was that even if the pursuer succeeds in establishing that the evidence admitted in relation to AA and the transcripts of the texts with CC was an error, the Pursuer still made admissions in relation to Charges l(f) and (g) relating to text messages on his work phone discussing his use of controlled drugs and the purchase of controlled drugs. The sub-committee decision makes clear that they found this to be a "profound lack of judgment", put the Pursuer and others at unnecessary risk and is behaviour, outside work, which calls into question his suitability to be a social worker. It is not an unreasonable requirement to except a social worker not to indulge in the use of illegal controlled substances. The sub-committee would have been entitled to make a removal order on these parts of the Charge alone and such a decision would not have been excessive and disproportionate.

a. In conclusion Mr Campbell moved me to repel the pursuer's pleas in law, refuse the appeal and find the defender liable in expenses as taxed.

6. Discussion

6.1 The approach to be taken by the court when dealing with appeals from professional disciplinary bodies such as the defender in the present case is well established in law by decisions such as *Gray v Nursing and Midwifery Council and Gupta v General Medical council (supra).* In summary the court will be reluctant to interfere with the decision of the professional tribunal and that the court should give due and proper regard to the experience

of the tribunal and in particular its view on what is required for the protection of the public and the reputation of the profession. The court should not interfere with the decision if it comes to the view that a different disposal might have been preferable. In regards to sanction the test to be applied by the court is whether the penalty can be described as excessive and disproportionate in all the circumstances.

6.2 Before expressing my views on the grounds of appeal, I should say at the outset that I do not accept the defender's submission made in respect of the first and second grounds of appeal to the effect that there was a lack of specification in the pursuer's pleadings. This is a summary application. Whilst that of itself does not remove the requirement for parties to give fair notice to each other and the court in the pleadings of the case to be advanced, the context of this case is such that the defender could hardly be said to have been taken by surprise by the case advanced by the pursuer. That case is to all intents a rehearsal of the case advanced at the hearing before the sub-committee. It is significant to note that the defender was able to present detailed and comprehensive submissions in answer to the pursuer's case in the event that I was not prepared to hold that there was a lack ofspecification. I do, however, consider that there is force in the defender's submission that there is a lack of specification in relation to the third ground of appeal to the effect that the pursuer was denied a fair hearing.

6.3 The first ground of appeal to be considered is whether the defender erred in law in admitting the hearsay evidence relating to the allegations made by AA. In my view that ground of appeal is fundamentally flawed, irrelevant and should not be upheld starting point when considering that ground of appeal is to have regard to the "preliminary written

submission" made by the pursuer at the hearing before the sub-committee. It is self-evident from that submission that the pursuer's objection to that hearsay evidence related to charges l.a(i) to (xi). What the pursuer seems to have ignored in the present appeal is that, whilst the sub-committee decided to admit the hearsay evidence, ultimately that decision was of no moment as the sub-committee found charges l.a(i) to (xi) not to have been proven. The hearsay evidence was also relevant to charge l.d but that charge was also found to be not proven.

6.4 In any event I agree with the submissions made by Mr Campbell on behalf of the defender that the decision of the sub-committee to admit the hearsay evidence of AA did not amount to an error in law nor did the admission of that evidence lead the defender to not affording the pursuer a fair hearing. It is quite clear from the decision of the sub-committee that it gave very careful consideration as to whether hearsay evidence should be allowed. In my view the sub-committee, having taken legal advice, correctly identified the approach to be taken and carefully weighed and balanced the interests of all concerned in reaching the decision that it did. There was no misdirection and the decision was one which the sub-committee was entitled to reach.

6.5 I should say for completeness that when the issue of the relevancy of the pursuer's ground of appeal relating to the admission of the hearsay evidence was discussed at the hearing before me, Mr Briggs sought to persuade me that the same argument applied to the defender's approach to charge l.b and that I could deal with the appeal on that basis. I was not prepared to allow the pursuer to advance that argument in relation to charge l.b. Apart from anything else there was no submission made to the sub-committee to that effect.

Furthermore no notice has been given in the pleadings relating to the present appeal of such an argument. That is hardly surprising. The decision of the sub-committee in relation to charge l.b was based on an admission by the pursuer that the 47 text messages were sent from his phone and a rejection by the sub-committee of the pursuer's evidence that the text messages were sent by [a person known to him] as not credible or reliable. It seems to me that, in any event, the admission of the hearsay evidence pertaining to AA played little, if any, part in the decision of the sub-committee in relation to charge l.b.

6.6 The second ground of appeal is whether the defender in admitting the transcript of text messages sent by the pursuer to CC erred in law and in particular acted in breach of the pursuer's article 8 right to respect for his private life. The sub-committee having taken legal advice held that charge l.e did engage Article 8 but that interference was necessary "as the mobile phone from which the texts were sent was a work mobile phone".

6.7 The starting point for consideration of the second ground of appeal must be the pursuer's employers "Mobile and Landline Communication Policy" (produced at 7.173 of the defender's inventory of productions). That is what the sub-committee did. That policy makes it clear (at paragraph 9.1) that the pursuer "....must have no expectation of privacy in anything that they create, store, send or receive on the Employer's phone systems." Furthermore (at paragraph 6.5) it is stated "(d)o not take or store pictures, or send or store text messages containing sexual or illegal material or material that is offensive in any way whatsoever ."

6.8 I agree with the submission made on behalf of the defender that the sub-committee cannot be said to have erred in law in the approach that it took in determining that the evidence of the text messages ought *to* be admitted. It is clear that the sub-committee had regard for the fact that the pursuer had acted in breach of his employer's phone policy. It is also clear that the sub-committee had the benefit of legal advice and that the decision taken was in accordance with that advice. The pursuer criticises the use of the phrase "reduced his right to seek respect for his private life" by the sub-committee as being an error in law. I do not accept that. Whilst that part of the sub-committee's decision could perhaps have been better expressed it ought to be looked *at* in context and in particular the context of the decision as a whole (page 10.16. of the transcript and page 4 of the Notice of Decision). The sub-committee has clearly concluded that whilst Article 8 was engaged, the right that followed was not absolute and in circumstances where the pursuer's employer's mobile phone policy was in place, the interference with the pursuer's Article 8 right was necessary.

In my view that was a decision that the sub-committee was entitled to reach in the circumstances of the case before it. The second ground of appeal is not upheld.

6.9 The third ground of appeal is whether the decision to admit the evidence of the text messages to CC meant that the pursuer was denied a fair hearing. As I discussed at paragraph 6.2 above I accept the submissions made on behalf of the defender that there is a lack of specification in the pursuer's pleadings as to how it was that the pursuer was denied a fair hearing. In any event Mr Briggs, on behalf of the pursuer, did not make any submissions to me on the question of the fairness of the hearing. His submissions were restricted *to* the first and second grounds of appeal. The third ground of appeal is not upheld.

6.10 As regards sanction the pursuer's submission was that the decision to order the removal of his name from the Register was unreasonable. I do not uphold that ground of appeal. In so doing I respectfully adopt the reasoning of Sheriff O'Carroll in *AB v Scottish Social Services Council,* a decision at this court dated 19July 2012 where he says;

"I cannot see any fault in the reasoning on the face of it. Furthermore, as the case law makes clear ...this Court is required to give appropriate deference to the decisions of such professional disciplinary bodies. It is true that the penalty decided upon by the committee is severe: there is no more severe penalty. However, I cannot say it is harsh in the circumstances and neither am I entitled to interfere with the decision on penalty y without quite sound reason."

In the present case whilst the sanction imposed was severe I cannot say that it is harsh in the circumstances and furthermore there is no "quite sound reason" that would entitle me to interfere with the defender's decision.

6.11 For the reasons set out above I refuse the appeal.

7. Expenses

7.1 Parties were agreed that expenses should follow success. The defender has been entirely successful. I have accordingly found the defender entitled to expenses.

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