

## **Outcome of Fitness to Practise Panel impairment hearing held on 17, 18, 19 May, 2 and 5 July 2021**

<b>Name</b>	Karen Lenny
<b>Registration number</b>	3138543
<b>Part of Register</b>	Support Workers in a Care Home Service for Adults
<b>Current or most recent town of employment</b>	Kirkcaldy
<b>Sanction</b>	Warning to stay on your registration for a period of 12 months and condition imposed
<b>Date of effect</b>	27 July 2021

The decision of the Fitness to Practise Panel is below followed by the allegation.

The following allegation and decision may refer to the Scottish Social Services Council as 'the Council' or 'the SSSC'.

### **Decision**

This is a Notice of the decision made by the Fitness to Practise Panel (the Panel) of the Scottish Social Services Council (the SSSC) which met on Monday 17, Tuesday 18, Wednesday 19 May, Friday 2 and Monday 5 July 2021 by videoconference.

At the hearing, the Panel decided that the allegations against you were proved, that your fitness to practise is impaired and made the decision to impose a warning for a period of 12 months and conditions on your Registration in the part of the Register for Support Workers in a Care Home Service for Adults.

### **Matters taken into account**

In coming to its decision, the Panel had regard to these documents:

- the Act
- the Code of Practice for Social Services Workers Revised 2016 (the Code)
- the Scottish Social Services Council (Fitness to Practise) Rules 2016 as amended (the Rules)
- Decisions Guidance for Fitness to Practise Panels and Scottish Social Services Council staff dated December 2017 (the Decisions Guidance).

### **Allegations**

The allegations against you at the hearing were as follows:

On 16 January 2020, while employed as a care assistant, at Kingdom Homes Ltd in Kirkcaldy, and during the course of that employment, you did:

- a. hit service user AA by slapping her on the arm
- b. hit service user AA by slapping her on the leg
- c. call service user AA a “fucking bitch” and “a horrible woman” or words to that effect
- d. send a message to your colleague ZZ stating “What you doin telling management I abused AA. I didn’t lay a hand on her. I walked away after I was almost kicked in the face and clawed, thanks for that”, or words to that effect

and in light of the above, your fitness to practise is impaired because of your misconduct.

### **Findings of Fact**

The Panel heard from three witnesses for the SSSC, namely, ZZ, YY and XX. The Panel also heard from you and from your supporter, WW.

The Panel heard evidence of two different accounts of events that took place in AA’s room on the 16 January 2020 at Methven House. The Panel had to assess the credibility of the witnesses, including yourself, when deciding which account was more likely to have occurred than not. The Panel had to decide which account to accept on the civil standard of proof, namely, the balance of probabilities. You informed the Panel that the alleged incident had been referred to Police Scotland and the Crown Office and Procurator Fiscal Service (COPFS). The Panel noted that that a decision was taken by the COPFS to take no action/no further action on the basis that there was insufficient admissible evidence against you at that time. The Panel noted that the decision from the COPFS is taken on a different standard of proof namely ‘beyond reasonable doubt’. The Panel noted the COPFS’s position but it did not influence its decision making.

The Panel considered the evidence of ZZ. The Panel noted that ZZ had reported the incident to her Senior Carer, YY, after the breakfast rush in the morning of the alleged incident on 16 January 2020. ZZ was upset about having to report the matter as she considered you to be a friend and she did not know if she was doing the right thing by reporting the matter. YY reassured her that it was necessary to report her allegations and that she should report them to the manager on duty. The manager on duty that day was XX. The Panel accepted that ZZ was upset when reporting the alleged incident and was concerned about the effect of reporting on her friendship with you. ZZ wrote an account of what had happened earlier that morning. The statement was a contemporaneous

account in that the alleged incident occurred at 9am and the account was written at 10.21am the same day.

The Panel considered your belief that ZZ was lying because her account contained inconsistencies in your view. You said that ZZ had said that AA was on her side when the alleged slap or block occurred, whereas your view was that AA was on her back. The Panel looked at ZZ's statement and at her evidence to the Panel and found that ZZ did not say that AA was on her side when the alleged slap took place. Her evidence to the Panel was that AA was on her back and in her statement, she says it was when she was putting on AA's clean underwear. The Panel did not accept that ZZ was inconsistent in her account in this regard.

The Panel also considered your belief that ZZ was not credible because she believed the bed bars were up when the incident took place. The Panel accepted that ZZ thought that the bed bars were up at the time of the incident but did not think that meant that the arms and legs could not have been flailing or lashing out. The Panel did not think that the issue of the bars, even if ZZ was wrong and the bars were not in place, made a material difference to whether the events took place in the way ZZ said they did as the bars were not that high and AA could still have lashed out and you could have retaliated in the way recounted by ZZ.

You also said that ZZ was not consistent about whether she held AA's hand or not. The Panel considered that whether ZZ held AA's hand was not relevant to whether she saw you hitting back at AA and swearing at her.

The Panel went on to consider whether ZZ would have a motive for lying about your actions. The Panel noted that you were in general friends, despite a temporary falling out before Christmas 2019. You had made up as ZZ had given you a present and you had worked together and were at the time friends on Facebook. Further, ZZ was upset about having to tell management about your actions which indicated to the Panel that she liked you and felt guilty about reporting your actions. The Panel did not think that ZZ had any motive to lie to her employer and to the SSSC about such serious allegations.

The Panel considered ZZ to be straightforward when she gave her evidence and to be a balanced and reliable witness.

The Panel went on to consider the evidence of YY. She confirmed that ZZ was upset when having to report what she believed to have occurred. The Panel found YY to be a straightforward witness.

The Panel also found XX to be straightforward although she could not speak to much as she had only been at Methven House for a short period of time prior to the incident. The Panel accepted XX's evidence as far as it went.

The Panel then considered your evidence. The Panel accepted that you found yourself in a challenging situation when having to provide personal care to AA. The Panel, however, found it telling that when you were suspended you told XX that you knew what the allegations related to. That was confirmed because you messaged ZZ later that day saying you had not abused AA despite the fact that you had not been informed at that time of who the resident was and who had made the allegation.

The Panel also noted that when you were asked questions by the Presenter about the incident in question, you did not reply in a straightforward way, instead you answered the question by posing a question of your own relating to the motives of ZZ. The Panel was also concerned that when you gave your account of what happened to your employer in the interview in January 2020, you told them that you took a breather and then on your return the arm incident took place followed by the leg incident. However, when giving evidence to the Panel, you insisted that the leg incident had happened prior to taking a breather. The two accounts were difficult to reconcile.

When asked whether you could have muttered something under your breath that ZZ could have misunderstood, you denied having said anything at all to AA and suggested that ZZ was lying.

The Panel found that you knew when you were suspended that you had done something wrong when you were providing personal care to AA on the morning of 16 January 2020. The Panel did not think you were wholly straightforward when answering questions about the incident and that if you had done nothing wrong, you would have been more forthcoming about explaining exactly what happened from your point of view, rather than answering the questions by asking questions of ZZ's motives.

The Panel also heard evidence from WW who attended the hearing as your supporter. She also attended the investigation meetings with you but was not present on the day of the alleged incident. The Panel accepted WW evidence as truthful, but it did not assist the Panel in determining what happened on the day of the 16 January 2020 in relation to AA.

The Panel found the following findings of fact:

- You had worked for Kingdom House since 2018 and at Methven House from around July 2018.
- You and ZZ were working at Methven house, on the middle corridor, on 16 January 2020. You were both care assistants.
- You were paired with ZZ and asked by YY to attend to AA in [redacted]. You were told by YY that AA was distressed that morning. You knew that AA was frequently distressed and that when she was distressed, she had a tendency to lash out with her arms and legs. You had been hurt a few days

before by AA when she clawed at your face and scratched your face. You did not fill out either an Antecedent Behaviour Consequence (ABC) form or incident report to management.

- On the morning of 16 January 2020, AA was positioned diagonally across her bed and you and ZZ needed to pull her up the bed and reposition her. You both realised that AA was wet and that both her nightwear and her bedding needed to be changed.
- You were both aware of AA's challenging behaviour and ZZ was anxious about her behaviour. Neither you nor ZZ knew that AA had a Distressed Needs Protocol in her care plan. The care plan was accessible to all staff in the duty room. You explained that there was little time in the day to read the care plans as you were kept so busy.
- In order to remove the wet sheet and nightwear, AA was moved onto her right side. She was flailing her arms and legs.
- You took a breather away from the bed in response to having had a near miss from AA's flailing limbs. You removed yourself to the bathroom area which was out of sight of ZZ and the bed.
- ZZ continued to provide care to AA when you stepped away. When you returned after a few minutes, you continued to provide personal care to AA.
- When you returned, the Panel found that AA was by this point on her back as you and ZZ were putting on clean underwear, pad and nightie. AA continued to lash out at you and ZZ, although she lashed out more towards you than ZZ.
- When AA lashed out with her right arm, you took your left arm behind your shoulder and brought it down on AA's right arm. The Panel did not think that the action, as described by ZZ, could be said to be a blocking action as there was some force to it and there was a slapping sound when you connected with her skin. The Panel found that the action constituted a slap rather than a block.
- AA then lashed out with her foot, and you used your left hand in a back hand motion to swipe her leg. You made contact and again there was slapping sound. The Panel found that your action constituted a slap rather than a block.
- You then turned to AA and called her a 'fucking bitch' and a 'horrible woman'. The Panel had to decide if ZZ could have been mistaken but you denied having made any comment at all and so the Panel accepted ZZ's account as being credible and more likely to have happened than not.

- The Panel found that your actions amounted to a loss of control in what was a challenging situation. The Panel found that you were aware that you had acted inappropriately because you knew that the allegations related to potential abuse of AA before you were told of the nature of the allegations.
- ZZ was upset but did not report the matter straight away. She continued with the breakfast duties and once the busy period was over, she went to find her senior, YY. She recounted what had happened. She was upset and felt guilty about reporting your actions as she viewed you as a friend.
- ZZ then went with YY to report the matter to XX. She was asked to write an account, which she did, and that statement is in the bundle. It was written at 10.21am on 16 January 2020, about one and a half hours after the incident with AA.
- You continued with your duties that morning until you were called into the manager's office. UU and XX were present, and they explained there had been an allegation made and that they needed to suspend you on full pay. They did not say who the allegation related to nor who had made it.
- On your way out of the building, you said to XX that you were 'fuming' and that you knew what this (the allegation) was about.
- On your way home on the train that morning, you sent a Facebook message to ZZ in the following terms: "What you doin telling management I abused AA. I didn't lay a hand on her. I walked away after I was almost kicked in the face....and clawed....thanks for that."
- ZZ did not reply to your message and reported the matter to management.

## **Impairment**

The Panel, having found the findings of fact, went on to consider whether your fitness to practise was impaired. The Panel heard from the Presenter and then from you and WW, your supporter.

### Presenter's submissions

The Presenter referred the Panel to Rule 2. and the ground of impairment that the SSSC is relying on, namely, misconduct. The Presenter submitted that the Rules do not provide any definition for the grounds of impairment, however, the Presenter referred the Panel to *Roylance v General Medical Council* (No.2) [2000] 1AC 311-1999 Privy Council case and the lead judgment of Lord Clyde:

At paragraph 19: "*Misconduct is a word of general effect, involving some act or omission which falls short of what would be proper in the circumstances. The standard of propriety may often be found by reference to the relevant rules and standards ordinarily required to be followed by a medical practitioner in the*

*particular circumstances.”*

The Presenter also referred the Panel to the case of *Mallon v General Medical Council* [2007] CSIH 17 (Court of Session Inner House Decision), which stated that the seriousness of the conduct is a decision which must be made by the Panel who are considering the case by exercising their own skilled judgement on the facts and circumstances.

The Presenter submitted that your behaviour found to be established breached parts 1.4, 2.2, 2.4, 3.10, 5.1, 5.3, 5.7, 5.8, 6.1 and 6.5 of the Code. The Presenter submitted that your behaviour amount to misconduct.

In relation to impairment of fitness to practise, the Presenter referred the Panel to *Council for Healthcare Regulatory Excellence v the Nursing and Midwifery Council and Paula Grant* [2011] EWHC 927 (Admin) and *Cohen v General Medical Council* [2008] EWHC 581. The Panel was referred to Mrs Justice Cox in the *Grant* case where she states at paragraph 69: “the question is always whether it [fitness to practise] is impaired as at the date of the hearing, looking forward.” Further, at paragraph 70, Mrs Justice Cox goes on to state that a proper determination of “fitness to practise” will involve consideration of past and current performance as well as past misconduct and of any steps subsequently taken by the practitioner to remedy it.

It was submitted that there are a number of factors, which should be taken into account, when reaching a decision, however, the protection of the public and maintaining public confidence in the profession are paramount.

It was submitted that the factors in the Decisions Guidance should be considered, in particular:

The Presenter submitted that the behaviour was at the serious end of the scale. In terms of risk of repetition, the SSSC accepted this was a one-off incident, but it was submitted that you had failed to display sufficient insight into the behaviour which would enable the Panel to be satisfied that the behaviour would not be repeated.

The Presenter submitted that your behaviour could be remedied in some respects by training, but it was the view of the SSSC that the physical and verbal abuse towards AA cannot be remedied.

The Presenter submitted that there are significant public protection concerns associated with your behaviour and, should your actions be repeated, there would be a high risk of physical or emotional harm to vulnerable users of services. It was submitted that there was a risk of ongoing harm, and that the public would be very concerned about your conduct and that a reasonable member of the public in possession of all the facts of the case would consider their trust and confidence in the profession, and in the SSSC as regulator, to be undermined should there be no finding of impairment.



The Presenter addressed the Panel on the aggravating and mitigating factors in the Decisions Guidance. The Presenter submitted that, in weighing up all the factors, the Panel should make a finding that your fitness to practise is impaired.

### Your submissions

You gave evidence to the Panel by answering questions put to you by the Panel. You explained that you had been working in the care sector for two years prior to the incident. You explained your understanding of how dementia affects people differently and how the condition can vary day to day. You explained how you empathised with dementia sufferers, in particular, one who had lost her partner and you explained how you supported her. You described how with AA, on the day in question, you got a shock when she kicked out physically. You also explained that your colleague, ZZ, was nervous of AA and that she had less experience than some of your other colleagues. You said that you would deal with the situation differently today. You would have recognised that you needed to give AA some space to calm down and you would have walked away. You also recognised that you needed help from more experienced colleagues and that you should have requested that help rather than continue with offering personal care. You did not accept that you had hit AA, but explained that there was confusion, legs and arms flailing and that you had administered a block with your hand. You accepted again that you should not have done that and instead you should have put the bars up on the bed and left AA for a while to give her space to calm down. You explained that you love working in care and that you still wish to work in the sector with the elderly. You explained that the message you sent to ZZ sounded abrupt but that you could come across as aggressive due to your accent and way of speaking but that you did not mean to sound like that. You had not meant to sound sarcastic.

WW, a member of Fife Council, spoke on your behalf and provided a testimonial for you. She said that she had known you for over eight years and that you had carried out courses together and she had supported you to get your job in care. WW did not think you were aggressive at all and that you had not breached the Code in that you were reliable and dependable, you treated people with dignity and respect. She accepted that your communication skills might not be as good as they could be, but you had had a difficult childhood and had not had the education that you should have received due to your difficult circumstances. She explained that you had had a positive report from the Care Inspectorate who had observed you whilst at work at Finavon, Kingdom House. You then gave an example of a positive relationship you had had with one of the service users who recognised your accent from her youth.

### Panel's decision

The Panel considered first the question of misconduct. In relation to the allegations found proven at a. b. and c. above, the Panel found that your behaviour fell short of the Code and amounted to misconduct. In relation to



allegation d., the Panel accepted your evidence that you had sent the text when upset, that your mode of communication is blunt and that you had not intended it to be sarcastic or hurtful to ZZ. In those circumstances, the Panel did not think that your behaviour in sending the text at allegation d. amounted to misconduct.

The Panel went on to consider whether your fitness to practise is impaired as of today's date. The Panel took into account the conduct that occurred with AA, your insight since that event and the aggravating and mitigating factors as set out in the decisions Guidance.

The Panel considered that your conduct toward AA was serious but acknowledged that it was a one-off incident. The Panel took the view that the risk of you repeating such conduct was low.

In terms of the aggravating and mitigating factors detailed at section 8 of the Decisions Guidance, the Panel formed the following conclusions:

1. Insight - whilst it is accepted that you have shown some insight, the Panel did not think you had shown full insight as you continue to deny that the incident happened in the way found by the Panel, and this is an aggravating factor.
2. Previous history - you have had no previous findings of misconduct and so the Panel viewed this as a mitigating factor.
3. Circumstances leading up to behaviour - the Panel acknowledged that AA was displaying a high level of distress which included kicking out at you. You had not encountered this intensity of behaviour before. The Panel did not think, however, that this was mitigating and therefore this was a neutral factor.
4. Length of time and subsequent practice - the Panel accepted that you have not been able to work in social services due to the Temporary Suspension Order (TSO) imposed on you and so this is a neutral factor.
5. Conduct inside or outside work - the conduct was inside of work and involved a vulnerable service user. The Panel considered this to be aggravating factor.
6. References or testimonials - WW spoke highly of you and the Panel therefore took her testimonial as a mitigating factor.
7. Cooperation - You have engaged well with the Panel and the SSSC and have been keen to explain your perspective. The Panel took this as a mitigating factor.

8. Isolated incident/pattern of behaviour - this incident is an isolated one albeit serious. The Panel accepted that there was a level of confusion as to what happened and that ZZ's perception, which was accepted by the Panel, and your perception varied. The Panel considered the fact of it being isolated as mitigating.
9. Consequences of behaviour - the Panel considered that your behaviour contributed to AA's distress on the day. There was no evidence, however, of lasting harm. This is a neutral factor.
10. Abuse of trust - the Panel considered that your behaviour that day was a misguided loss of control rather than a deliberate action. The Panel did not think you had abused your position of trust.

The Panel went on to consider the public interest and public protection. Whilst the Panel could not say there was no risk of you repeating your behaviour in a similar situation, the Panel was reassured by your evidence that you had learned from the experience and would deal with matters differently. The Panel noted, however, that you still only had limited insight into the incident and therefore could not say that there was no risk. The risk to the public was therefore low in the Panel's view.

The Panel went on to consider the public and whether a member of the public knowing all the facts would consider your fitness to practise to be impaired. The Panel considered that the public would be surprised if no finding of impairment was made given the serious breaches of the Code that the Panel has found.

The Panel considered all of the above factors and thought that on balance your fitness to practise is impaired as at today's date.

### **Sanction**

The Panel decided to impose a warning on your Registration for 12 months and conditions.

The Panel took into account the Presenter's submissions and your submissions in reaching its decision. The Presenter submitted that the only appropriate sanction was removal. The Presenter referred the Panel to the Decisions Guidance and submitted that you had engaged in a serious departure from the Code, that you had shown limited insight, that you had shown no evidence of remediation and that in terms of section 10.6, you were unfit to be a member of the caring profession. The Presenter submitted that if the Panel was not minded to accept that a Removal Order was the appropriate sanction, then conditions and a warning, as amended by the SSSC, were acceptable.

You submitted that you had shown insight and that you were prepared to accept that a warning and conditions would be appropriate in the circumstances. You accepted that you would profit from training and that you would undertake a

reflective account. You had concerns that you were being asked to accept that your behaviour had been abusive when you did not recognise that behaviour and believed that your behaviour had been defensive.

The Panel considered the submissions made and was of the view that a Removal Order was not appropriate in your case. A Removal Order is the most serious sanction and prevents you from working in the social services sector. According to the Decisions Guidance, a Removal Order should only be used where there is no other way to protect the public or where confidence in the social service profession would be undermined by allowing you to remain on the Register. The Panel was of the view that you had shown reasonable insight and reflection, that your behaviour was a one off, that you had previously been given positive feedback by the Care Inspectorate and that you had been provided with a testimonial from WW regarding your good character. The Panel did not agree with the SSSC that because you had not engaged in any remediation that that should be a negative factor toward removal. The Panel accepted that you have been suspended and so have had no opportunity to remedy your behaviour. The Panel did not think that a Removal Order was proportionate given your insight, the one-off nature of your actions and the low risk of potential harm in the future.

The Panel considered that:

- A warning would be appropriate as the Panel is of the view that you have shown reasonable insight and reflection and the Panel thought the risk of you repeating your behavior was very low. The Panel considered the Presenter's submission that a warning was only appropriate when there was no risk of repetition. The Panel has assessed the risk as low and in combination with the conditions imposed below is of the view that you pose a very low risk to service users in the future.
- The Panel went on to consider conditions. The Panel consider the following conditions to be appropriate, in particular, the Panel is of the view that the training that is required and the reflective account would address why your fitness to practise has been impaired. You have indicated that you would comply with the conditions and that you will engage in training even before you have found an employer to monitor the conditions. The Panel imposes the following conditions:
  1. Prior to securing employment in the social service sector, you will inform your employer of the conditions imposed on your Registration and the reasons that they were imposed. Written evidence of this should be signed by your prospective employer and submitted to the SSSC within seven days of you commencing employment.
  2. Within four months of commencing a registerable role, you will provide the SSSC with evidence that you have undertaken training and learning which must cover:

- a. Dementia awareness training including understanding stress and distress.
- b. Effective communication.
- c. Dignity, Privacy and Respect.
- d. Adult Support and Protection.

You should discuss with your employer the most effective way to complete this learning. It can be in the form of face-to-face study or online training, mentoring, supervision and/or independent study.

- 3. Within two months of completing condition 2., you must submit a reflective account which may be a personal written account, or in the form of a recorded professional discussion with your employer or on the telephone with the SSSC. Your reflective account must be to the satisfaction of the SSSC. In writing your account, you are required to reflect on your behaviour when you demonstrated abusive behaviour towards an individual in your care. Your reflective account must address:
  - a. The impact of your behaviour and communication on the service user in your care.
  - b. The potential impact of your behaviour on your colleague.
  - c. The importance of delivering care, free from abuse and harm.
  - d. How to challenge your own attitudes and behaviour so that they are not harmful.
  - e. How your behaviour breaches the Code.
  - f. How your behaviour undermines the trust and confidence in you as a social service worker.
  - g. How the SSSC can be assured that you will not repeat your behaviours.
  - h. What you have learned since the incidents and what you would now do differently.
  - i. Your responsibility as a social service worker to model professional practice including values.
- 4. For a period of 12 months after you have commenced a role which requires SSSC Registration, you must engage in formal supervision with your employer at least every four weeks. During the course of each supervision session you must discuss:
  - a. The requirements stipulated in conditions 2. and 3. and how you are progressing with completing the conditions.
  - b. How you are demonstrating appropriate and responsive care free from abuse and harm.
  - c. How you are demonstrating effective, appropriate and respectful communication with service users in your day-to-day work.

- d. How you are delivering responsive and respectful care that demonstrates your ability to treat individuals with dignity and respect.

You must submit a formal record of each supervision session, countersigned by your employer, to the Fitness to Practise Department within two weeks of each supervision taking place.

The Panel is of the view that a warning plus conditions would be appropriate due to the reasons outlined above.