SHERIFFDOM OF TAYSIDE, CENTRAL & FIFE AT DUNDEE
B142/13

Decision of

Sheriff M S Mactaggart

In causa

AD, [REDACTED]
APPELLANT

Against

SCOTTISH SOCIAL SERVICES COUNCIL, having their Head Office at Compass House, Riverside Drive, Dundee
RESPONDENTS

Dundee,

The Sheriff, having resumed consideration of the cause, repels pleas-in-law one, two and three for the Appellant; sustains pleas-in-law three, four, five and six for the Respondents; quoad ultra repels all remaining pleas-in-law; refuses the Appeal and confirms the decision of the Respondents' Registration Sub-committee contained in the Notice of Decision dated 5 February 2013; meantime reserves any question of expenses arising from this Appeal and appoints parties to be heard thereon on at within the Sheriff Court House, Dundee.

NOTE:

Background:

(1) This is an appeal in terms of section 51 of the Regulation of Care (Scotland) Act 2001 against a decision of the Respondents' Registration Sub-committee intimated on 5 February 2013 following a hearing on 29 and 30 January 2013. In terms of that decision the said Sub-committee refused an application by the Appellant for Registration as a Residential Child Care Worker on the grounds that they were not satisfied as to his good character, conduct and competence.

(2) Prior to the application for registration the Appellant had been employed as a residential care worker in [REDACTED]. On or about 1 December 2008 he was suspended from his duties by his employers following allegations of misconduct. In his application for registration, the Appellant disclosed to the Respondents that he was the subject of an internal investigation in relation to a young person who had made allegations of inappropriate behaviour towards her. In addition to an internal investigation, the appellant was charged with Breach of the Peace which proceeded to trial at [REDACTED] Sheriff Court in December 2010 and January 2011.

(3) In terms of the criminal proceedings, a submission of no case to answer was upheld by the presiding Sheriff on 24 January 2011 and the Appellant was acquitted. The internal investigation by his employers, was completed by 5 May 2009 when the Appellant was issued with a formal warning.

(4) The Appellant submitted an application to the Respondents for registration on 19 March 2009. Registration of social workers and social service workers is now a requirement in terms of the Regulation of Care (Scotland) Act 2001. The Respondents were not minded to grant the application for registration lodged by the Appellant and, accordingly, and in terms of their Rules, referred the matter to their

Registration Sub-committee. The said Sub-committee heard the application over a two day period, being 29 and 30 January 2013 at which the Appellant represented himself and gave evidence.

(5) The Respondents refused the Appellant's application for registration and gave notice of their decision in written form on 5 February 2013. Said notice sets out the allegations which formed the basis for the referral to the Sub-committee, their findings in fact, their decision, their reasons, the legal advice given to them by the legal adviser, the right of appeal and the date of effect of the decision. It is against that decision that this appeal is taken.

(6) The allegations which formed the basis of the referral to the sub-committee were of unacceptable behaviour towards a female service user AA including, among other things, sending text messages of an inappropriate nature. In terms of its findings, the Sub-committee found that the appellant inappropriately sent four texts, when off shift, to the service user for whom he was the key worker and that these texts were sent on 13, 16, 19 and 20 November 2008. The Appellant had admitted sending two of the texts but maintained that a further two were sent in error. The Appellant submitted that he was on medication at the time these text messages were sent, that this medication had altered his mood, thought processes and behaviour, and he gave evidence regarding this to the Sub-committee. In addition, certain medical records were lodged and before the Sub-committee for consideration.

(7) The proceedings before the Registration Sub-committee on 29 and 30 January 2013 were recorded by shorthand writer and transcripts were available to the court in hearing this appeal.

(8) The Appellant appeals against the decision of the Registration sub-committee on the basis that such decision was flawed. He cites delay in the proceedings, a failure to take proper account of medical records lodged and medical issues raised by him, a

misunderstanding and misinterpretation of the no case to answer submission upheld at the criminal trial, a lack of proportionality, and a lack of reasons regarding the refusal to grant the application subject to conditions. The Appellant's submissions are set out at length later in this note.

The Statutory Framework surrounding registration and registration rules:

(9) The Scottish Social Services Council (the Council) is a body corporate constituted in terms of the Regulation of Care (Scotland) Act 2001 section 43. In terms of its constitution, the Council are charged, *inter alia*, with promoting high standards of conduct and practice among social service workers – section 43(b)(i).

(10) Section 44 of the said Act directs that the Council shall maintain a register of social workers and social service workers and section 46 provides for the grant or refusal of an application for registration on the said register. In terms of section 46(2) the Council, in considering an application for registration, have to be satisfied that the applicant is of good character and that they meet such requirements as to competence or conduct as the Council may impose. Section 46(2B) provides that if the council is not so satisfied it shall either (a) grant the application subject to such conditions as it thinks fit, or (b) refuse the application.

(11) Section 51 of the said Act provides for appeal to the sheriff against a decision of the council and, in terms of sub-section (2) thereof, the sheriff, on appeal, may (a) confirm the decision, (b) direct that it shall not have effect or (c) direct that it shall not have effect and make such other order a the sheriff thinks fit.

(12) Section 59 sets out the general principles to be applied under the said Act. In particular section 59(2) provides that the welfare of all persons who use, or are eligible to use, care services are to be protected and enhanced.

(13) Section 57 of the said Act provides the council with the power to make rules regarding the registration of applicants and these are to be found in the Scottish Social Services Council (Registration) Rules 2009A.

(14) Part II of those rules deals with registration procedures and Rule 4 applies to applications for registration. Specifically Rule 4 (7) provides that the Council shall not grant an application for registration until it is satisfied as to the applicant's good character, conduct and competence. The interpretation Rule 2 defines "conduct" as "behaviour which meets the standards of conduct and practice expected of social service workers as laid down in the code of practice for social service workers."

(15) In terms of Rule 13, where an applicant has made an unsuccessful application for registration, the Council shall not consider any further application from that applicant until the expiry of two years from the date of refusal of the application unless, in the opinion of the council, acting reasonably, there has been a material change of circumstances.

(16) Part III of the Rules governs Registration Sub-committees. In terms of Rule 14, where the Council is not minded to grant an application for registration, it shall refer the matter to the Registration Sub-committee. When such a referral is made, a statement of referral is to be sent to the Clerk of the sub-committee, who in turn sends it to the applicant.

(17) Rule 16 provides for a pre-hearing review stage to take place before every registration sub-committee and parties are given the option of following written or oral procedure. In the event of either party requesting oral procedure, the clerk to the sub-committee arranges to hold a pre-hearing review meeting.

(18) Rule 21 governs the procedure to be followed at a Registration Sub-committee. *Inter alia* it provides that the committee will conduct its business according to the rules of natural justice and the requirement of a fair hearing and shall act in accordance with the principle of proportionality. It further provides that the Sub-committee shall sit in private. The Sub-committee may at any stage of the hearing, adjourn the proceedings for the purpose of seeking further information or for any other purpose.

(19) In terms of Rule 22 (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 if either (a) 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.

(20) In terms of Rule 23 the facts are to be decided on the civil standard of proof and the burden of proof rests on the applicant.

(21) Rule 27 provides for the postponement of the hearing at the request of either party.

<u>The Registration Sub-committee's reasons for decision:</u>

(22) The reasons given by the Registration Sub-committee in refusing the Appellants application for registration, contained in the Notice of 5 February 2013 are as follows:

"1. You had not satisfied the Sub-committee as to your good character, conduct and competence as required by Rule 4(7) and Rule 23(2) of the Rules.

2. The Sub-committee took careful account of the oral and documentary evidence available, as well as the submissions made on behalf by you and the Council. The Sub-committee considered the seriousness and nature of the allegation in relation to the text messages alone. Sending these texts to a service user was wholly inappropriate on a number of levels including the risk to the service user AA in advising that one of her "who cares?" workers had died; disclosing your mobile number contrary to the employer's policy and professional practice as well as the content and nature of some of the texts. These were sent when you were not in the workplace and inappropriately crossed professional boundaries. Whilst you sought to explain that the reasons for sending the texts were due to your medication there was no medical evidence to support your explanation. You also sought to suggest two of the texts were sent by mistake. On both points the Sub-committee did not consider the submissions credible. It considered the sending of these texts on their own displayed behaviour incompatible with the Code of Practice for Social Service Workers (parts 4.2, 5.4 and 5.8) and accordingly with Registration.

3. The Sub-committee considered carefully the other determinations available to it, including granting of the application, the imposition of conditions on Registration, or adjourning the hearing for the purpose of seeking further information or for any other purpose. The Sub-committee was satisfied that it had sufficient information before it to make its decision and did not consider that an adjournment was required.

4. The Sub-committee did consider whether Registration could be granted but with the imposition of conditions. As your conduct related to value based errors of judgement the Sub-committee was of the view that there were no relevant training conditions that could be imposed nor were there any other conditions that could be monitored and enforced effectively.

5. The Sub-committee was conscious that Registration was a badge of credibility for registrants. The importance of maintaining the reputation of the Register and the confidence of the public could not be understated. Even though you had shown insight, remorse and regret for two of the texts you admitted deliberately sending to AA the Sub-committee was not satisfied that it would be appropriate at this juncture to allow you to be registered as to do so would diminish the reputation and credibility of the Register.

6. The Sub-committee had regard to the availability of repeat application in two years time, or earlier in the event of a material change of circumstances.

7. Having regard to the principle of proportionality, the prejudice to you in refusing your application was outweighed by the overriding duty to promote high standards of conduct and practice amongst social service workers.

8. Accordingly having decided that you had failed to satisfy the Sub-committee that you had met the required standards of good character, conduct and competence, refusal of the application was appropriate."

Appellant's submissions:

(23) In terms of the facts, it was submitted there was little in dispute. The Appellant applied for registration on 19 March 2009. His application was refused and referred to the Respondents' Registration Sub-committee. That committee's decision is dated 5 February 2013. The Appellant had been employed in residential care work since 2003. He was suspended in 2008 over allegations of misconduct. He applied for registration to the SSSC (the Respondents) and they waited until the outcome of the criminal charges before dealing with his application.

(24) The appeal proceeds on five grounds: (a) delay; (b) the finding and interpretation of the no case to answer submission in the criminal trial; (c) medical reasons, in that the committee failed to take into account evidence of the Appellant's depression and the Appellant's beliefs and lack of information regarding the procedure for an adjournment at the time; (d) proportionality; and (e) lack of reasons regarding any conditions that could have been imposed on registration.

(25) Dealing firstly with the issue of delay it was submitted that the decision of the Sub-committee was taken four years after the events. The delay in making this decision made it much easier for the committee to come to its decision. At the time of the hearing the Appellant was employed with [REDACTED] and this may have influenced the Sub-committee's decision, given that the Appellant was in employment. However, his employers had conducted their complaint investigations within a short timescale and there was no reason why the Respondents' sub-committee could not have done likewise. In their answers, the

Respondents say that the delay arose because they had an agreement with the Crown Office Procurator Fiscal Service (COPFS) not to investigate matters or interview witnesses whilst the criminal investigations were ongoing. However, it was submitted, they had no such agreement with the Appellant who was entitled to have his application heard within a reasonable time frame. Such a delay in hearing the application was unnecessary and prejudicial to the Appellant.

(26) The interpretation of the no case to answer submission by the Registration Sub-committee was wrong and prejudicial to the Appellant. The Sub-committee did not proceed on the basis that the result of this submission being upheld was that the appellant was found not guilty. Productions numbered C133 and C135 before the committee are referred to. The first is a letter from COPFS to SSSC dated 1 March 2011, the second a letter from COPFS to SSSC dated 8 June 2011. The first letter contains the following two paragraphs:-

> *"The Sheriff declined to state any reason for this decision, but under section 160(2) of the Criminal Procedure (Scotland) Act 1995, if, after hearing parties, the judge is satisfied that the evidence led by the prosecution is insufficient in law to justify the accused being convicted of the offence charged, the judge is obliged to acquit him of the offence.*
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> *Accordingly, I can only conclude that the Sheriff formed the view that he was satisfied that the evidence before him was insufficient in law to convict [REDACTED] of the breach of the peace libelled."*

The second letter contains the following:-

> *"No report was made by the Sheriff. However, the Procurator Fiscal Depute who was present at the trial has indicated that a no case to answer submission was upheld by the Sheriff because he considered that the actions libelled did not constitute the crime of Breach of the Peace as it was defined in case law. He did not consider that the actions of [REDACTED] were sufficiently "public", given that they had been conducted in private."*

Thereafter, if one then looks at the transcript of the first day of evidence before the sub-committee, page 11 paras B – D this records the cross-examination of the Appellant by the case presenter. One sees the following questions and answers:-

"Q: *Is it not the case though at Court that the Court case was dropped because there was no case to answer, it didn't reach the end of the proceedings?*

A: *I got acquitted.*

Q: *We will hear evidence over the next couple of days that the Court case was dropped after the Crown case because there was no case to answer, you were charged with a breach of the peace, because the defence made a submission that there was no case to answer because they actually were happening in private, not sufficiently in the public domain, so they could not carry on with the breach of the peace conviction, is that not the case?*

A: *Yes, all I know is I got acquitted, not guilty, that's what I got told.*

Q: *So the case never actually reached the end, this happened after the Crown case, because it wasn't sufficiently in the public domain?*

A: *Yes*

On day two of the hearing, the transcript at pages 53C to 54B records the case presenter's submissions to the committee on this issue as follows:-

"133 is the letter from the Crown Office and Procurator Fiscal Service in relation to the breach of the peace charge and the fact a 'no case to answer' submission was made by the defence and upheld by the Sheriff. So this in effect as I explained yesterday means that at the end of the Crown case, as [REDACTED] was charged with a breach of the peace, the defence raised a submission that there was not case to answer in relation to the fact that the actions weren't sufficiently in the public domain and to uphold such a breach of the peace charge.

There is a further letter 135 which confirms what I have just said. At the bottom it is stated, "A no case to answer submission was upheld by the Sheriff because he considered that the actions libelled do not constitute the crime of breach of the peace as it was defined in Case Law. He did not consider that the actions of [REDACTED] were sufficiently public, given they had been conducted in private".

So the reality is the evidence was not tested to the end. We cannot comment on whether the Sheriff found, what he found about the evidence, this is a no case to answer submission based on the fact that his actions alleged happened in private rather than public."

It was submitted on behalf of the Appellant that these remarks were misleading, wrong and prejudicial to the Appellant. Had the Sub-committee been correctly advised of the proper meaning of a no case to answer submission, this may have led to a different outcome.

(27) Turning now to medical issues, certain medical records were lodged by the Respondents' agent at the start of the hearing. They had obtained a mandate from the Appellant to obtain these. The Appellant gave evidence on the first day of the hearing and told the Sub-committee that he was on medication which had altered his behaviour – transcript pages 4 para F to page 5 para A. He specifically raised the issue of medication at this stage, stating:-

> *"I have suffered this situation for the past four years, regret everything that happened and looking back at it I wouldn't be sitting in front of you if I hadn't taken prescribed medication, namely Citalopram, which altered my behaviour and I didn't get any warning from my doctor of the possible side effects of the medication and the chances - I had adverse reactions to it."*

The Appellant realised during the course of that day that certain papers were missing from the medical records and produced these for the second day of the hearing. These were lodged without objection. By the time the appellant lodged his documents (nos A1 – A4) he had already given his evidence. The four text messages were sent between October 2008 and November 2008. His records reveal that on 8 December 2008 the doctor suggested stopping his medication. On page 4 of the records produced by him it discloses the prescription of this medication on 29 October and 19 November 2008. This covers the period when the text messages were sent. The Appellant suggested this in his evidence and it could be material to the points in issue. On page 85 of the second day's transcript the committee state:-

> *"Whilst the Applicant sought to explain that the reasons for sending the texts were due to his medication, there was no medical evidence to support the Applicant's explanation. He also sought to suggest that two of the texts were sent by mistake."*

However, the medical records show that the medication was changed and that supports the Appellant's position. The committee could have adjourned the hearing for further information in the light of these subsequent records. Any reasonable committee could have called another witness to speak to the records or explain matters. They ought to have adjourned for further information. The Appellant sought and obtained a letter from his GP dated 7 February 2013 which forms production 2 for the Appellant. This letter, it was submitted, goes some way to supporting the Appellant's position and was something that the committee could have obtained if they had considered this issue properly.

(28) The Appellant accepted that there is a difference between a conduct issue and a registration issue. However this was an issue of alleged conduct being considered at registration stage. According to the Appellant, the only information leaflet available is in relation to Conduct Sub-committee hearings and the Appellant produced this as production 4 "Information for Registrants about the Sub-committee Hearings Process." This was the only information the Appellant had regarding the procedures to be adopted. At paragraph 10(b) it states that the case may be heard in private under the Health Procedure if it appears that the alleged misconduct may be been caused, or substantially contributed to by the physical or mental ill-health of the Registrant. In terms of paragraph 6 the medical adviser, defined as an independent doctor from outside the SSSC who advises the Sub-committee, should also be present if the proceedings are under the health procedure. The proceedings before the Registration Sub-committee were in private. The Appellant was entitled to assume that the same procedures would be adopted if medical issues became apparent as a reason for conduct before the Registration Sub-committee.

(29) On the issue of proportionality, there was no indication that the committee took into account the Appellant's previous good character or his record since the allegations were made. He had continued to work but not in the child care sphere.

This is something that should have been taken into account by the Sub-committee. The Appellant accepts that the messages he admits to sending were inappropriate, however, the committee's decision was not proportionate given the background and his own good character.

(30) The committee have the power to issue registration with conditions. In their decision they say that conditions are not appropriate. Point 5 of the decision suggests insight and remorse. At point 4 of the decision they describe it as a value based error of judgement. The Appellant produced Child Protection Basic Awareness Training programmes which are available (production 6 for the Appellant). Such training specifically addresses issues of values and attitudes. These training courses could have been considered by the Sub-committee. The Appellant's agent referred the court to a decision of the Respondents' Conduct Sub- committee relating to Russell Conn. In that case the issue was, *inter alia,* having telephone contact with a service user on his personal mobile phone. The Sub- committee imposed conditions of training on the Registrant's registration, looking specifically at the issues of setting and maintaining appropriate boundaries and open and transparent communication. It was submitted that similar training as a condition of registration could have been applied in this case. The Sub-committee did not properly address this issue in reaching their decision.

(31) For the foregoing reasons the appeal should be allowed.

The Respondents' Submissions:

(32) On behalf of the Respondents it was accepted that they did delay proceedings until after the criminal proceedings were concluded. This was due to an understanding that exists between the Council and COPFS. The Council were only given permission to interview witnesses in June 2011.

(33) The time-line of events is as follows:-

1st December 2008	the Appellant was suspended;
19March 2009	the Appellant made his application in which he disclosed the ongoing issues and the pending criminal proceedings;
5th May 2009 -	the Appellant was given his final written warning;
Dec 2010 -	criminal trial;
24 January 2011 -	no case to answer submission upheld;
March 2011 -	confirmation given by PF to Council;
June 2011 -	permission given to interview witnesses;
March 2012 -	statements received from COPFS;
3rd July 2012 -	statement of referral signed by Clerk;
9th August 2012	pre-hearing meeting;
11 Sept 2012	notice of referral sent to the Appellant;
29/30 Jan 2013	hearing

(34) The Appellant argues that the delay was unnecessary and prejudicial. The delay was however, necessary, due to the understanding with COPFS and if the Council were not to adhere to this understanding, it could result in serious prejudice to the criminal proceedings. Further and in any event the court cannot infer that a different decision would have been made if the hearing had taken place earlier.

(35) In relation to the issue of the interpretation of the no case to answer submission, the Appellant has misdirected himself as to how this was viewed by the Sub-committee. It is clear from the transcript that the Appellant told the Sub-committee that he was acquitted. In terms of their findings in fact, the Sub-committee found that the Appellant was charged and went to trial on a charge of breach of the peace. At trial a no case to answer submission was accepted by the court in relation to the acts being private and not public (finding in fact 5). This was a correct interpretation of was happened both in fact and in law. There is no

question of the Sub-committee being misdirected or misdirecting itself on the correct interpretation to be placed on the events and outcome of the criminal trial.

(36) The transcript shows that the Appellant was given the opportunity to lodge late medical records and these form productions A1 to A4. The medical issues raised by the Appellant were not ignored by the Sub-committee. The Appellant had already given his evidence by the time he lodged his late documents but he was given an opportunity to sum up at the end and all of this can be seen from the transcript of the second day of evidence from pages 62 to 72. The Appellant addressed the committee at length on the issue of his medication. In terms of the procedure to be adopted when medical issues are present, the Appellant has confused "conduct" proceedings with "registration" proceedings. The agent referred to the Notice of Referral sent to the Appellant which forms papers F1 to F7 of those before the committee. This Notice gives clear instructions as to the procedure to be followed and the time-scales in terms of lodging any documents upon which the Appellant seeks to found. It is not the case that there is only information available in relation to conduct proceedings. There is in fact information available in relation to registration proceedings albeit in a different format.

(37) The Appellant was present at the pre-hearing review meeting on 19 August 2012. He had every opportunity to put forward any medical evidence he considered important to his case and he even had an adjournment granted. If he erred in not putting sufficient information forward then the consequences of that error must rest with him. The letter that he has subsequently produced from Dr [REDACTED] and dated 7th February 2013 does not in fact state that his behaviour was caused by his medication. The letter post-dates the hearing and was never seen by the Sub-committee. The terms of this letter are not subject to agreement and the court therefore has to approach it with caution. However the Appellant needs to demonstrate that, had this letter been before the committee, they would have reached a different outcome.

(38) The burden of proof rests with the Appellant in terms of Registration Rule 23. The onus rests with him to advance any argument that he considers important. He has provided no explanation as to why the letter from Dr [REDACTED] was not produced in sufficient time to be considered by the Sub-committee. It is not for the legal adviser or the convenor to assist the Appellant, it is a matter for him to prepare and conduct his case. The onus is on him to prove that he is of good character and competent. He cannot look back now and say he would have done things differently. If he considered the medical issue to be important and needed further time then he should have addressed that issue either at the pre-hearing review or before the committee.

(39) The Appellant failed to satisfy the sub-committee that he was a suitable person to be registered and the refusal to register him was appropriate and proportionate in the circumstances. In the Notice of Decision (production 1 for the Respondents), they set out their reasons for their decision with clarity. The Sub-committee did go on to consider granting the application subject to the imposition of conditions however they reasoned that as the conduct related to value based errors of judgment there was no relevant training conditions that could be imposed. In any event the Appellant did not advance any conditions that he thought were appropriate in the circumstances.

(40) The decision of the Sub-committee was reasonable, justified and proportionate in all the circumstances. They were well-placed to make the decision. Public interest and public confidence cannot be understated. It is for the committee to hear the evidence and decide each case on its own merits. The decision of the sub-committee was reasonable and supported by the facts. There was no procedural irregularity in the manner in which the case was dealt with, the committee applied the correct legal tests, and they were proportionate in their decision given that they have to balance public interest, including those of the service user, against the

interests of the applicant. Those people working in the social work field work with some of the most vulnerable people in society and that is why the test is good character and competence. This is essential to instil public confidence in the service. After hearing evidence the committee found that the Appellant failed to meet the appropriate level of good character. The notice of decision left the Appellant in no doubt as to why they had reached the decision they did.

(41) The Appellant has not advanced any reasoned argument as to why these proceedings were not fair to him. He knew the case against him and he was given adequate time to prepare and present his case. The onus was on the Appellant to prove that he was a suitable person for registration and he failed to discharge that burden. Accordingly the appeal should be refused.

Discussion and decision:

(42) Before discussing the issues which arose in this appeal in detail, it would, at this point be pertinent to set out the terms of the text messages that the Registration Sub-committee were satisfied had been sent by the Appellant to the service user.

13 November 2008:	"hi, how r u, I'm missing u, what u up 2 tmrw x"
16 November 2008:	"hi, got some bad news tonight, [REDACTED] dies this morning"
19 November 2008:	"make it Friday afternoon if that's ok with you, I'll fone L8r"
20 November 2008:	text me and let me know if u can make it"

The Appellant admits sending the first two messages. These messages were sent from the Appellant's mobile telephone to the service user's mobile telephone and

whilst the Appellant was off duty. The service user was a seventeen year old female and the Appellant was her key worker.

(43) The Registration Sub-committee heard evidence regarding these messages, among other things, over a two day period. The Appellant gave evidence on day one of the hearing. He produced further medical records on the morning of day two and these were allowed to be lodged late, of consent. The Appellant made oral submissions to the Sub-committee on day two of the hearing.

(44) Agents referred the court to a large number of authorities relating to the approach to be taken by the court to appeals of this nature. I do not intend to make reference to each of the authorities as many were simply a duplication, although I am grateful to agents for drawing these to my attention.

(45) In terms of the general approach to be taken by the court the most useful analysis I think is to be found in *Gray v Nurisng and Midwifery Council* [2009] CSIH 68. This case related to issues of professional misconduct by a nurse. The most useful passages are to be found in paragraphs [12] to [14]:

> "[12] In *Gupta* v *General Medical Council* [2002] 1WLR 1691, a privy council decision of Lord Rodger of Earlsferry, in delivering the judgment of the Board, referred at paragraph 8 to the cases of *Ghosh* v *General Medical Council* [2001] 1WLR 1915 and *Preiss* v *General Dental Council* [2001] 1WLR 1926 in support of the proposition that the Board's jurisdiction was appellate rather than merely supervisory. He continued, at paragraph 10, to discuss the approach to findings of fact:
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> > "The decisions in *Ghosh* and *Preiss* are a reminder of the scope of the jurisdiction of this Board in appeals from professional conduct committees. They do indeed emphasise that the Board's role is truly appellate, but they also draw attention to the obvious fact that the appeals are conducted on the basis of the transcript of the hearing and that, unless exceptionally, witnesses are not recalled. In this respect these appeals are similar to many other appeals in both civil and criminal cases form a judge, jury or other body who has seen and heard the witnesses. 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 that any decision of a court which cannot deploy those factors when assessing the position. In considering appeals on matters of fact from the various professional conduct committees, the Board must inevitably follow the same general approach. Which means that, where acute issues arise as to the credibility or reliability of the evidence given before such a committee, the Board, duly exercising its appellate function, will tend to be unable properly to differ from the decisions as to fact reached by the committee except in the kinds of situation described by Lord Thankerton in the well known passage in *Watt or Thomas* v *Thomas* [1947] AC 484, 487-488…

[13] In *Mallon* v *General Medical Council* 2007 SC 426 the Second division of this court had to consider *inter alia* the question of the entitlement of the Fitness to Practice Panel of the General Medical Council to make a finding that the appellant was guilty of serious professional misconduct. In delivering the opinion of the court, Lord Justice-Clerk Gill said:

…..

> **Powers of the Appellate Court**
>
> [19] Counsel agree that we have to apply the test set out in *McMahon* v *Council of the Law Society of Scotland* 2002 SC 475, (paras [13]-[16]; that is to say, we should look at the decision of the panel in the light of the whole circumstances of the case, always having due respect to the expertise of the panel and giving its decision such weight as we should think appropriate. However, as the court observed in that case (para[16]), in following this approach it is good sense to keep in view the obvious reasons that have been repeated over the years for according respect to the views of specialist tribunals in appeals of this kind. When invited to disturb a finding of serious professional misconduct, we have to defer to the judgment of the panel to whatever extent is appropriate in the circumstances (*Meadow* v *General Medical Council* [2006] EWCA Civ 1390, Auld LJ, para [197]) In applying this agreed test we are entitled to substitute our own

judgment on the facts for that of the panel; but whether such interference on our part is justified will often depend, in our view, on the nature of the misconduct. We have to take a similar approach to the question of penalty. As was conceded by the respondents in *Ghosh* v *General Medical Council*, it is open to the court on that question to consider all the matters raised by the appellant, to decide whether the sanction imposes was appropriate and necessary in the public interest or was excessive and disproportionate, and in the latter case either to substitute some other penalty or to remit the case to the panel for reconsideration (para 34).

[20] The spectrum of serious professional misconduct can range from conduct that is entirely non-clinical, such as defrauding the National Health Service or sexually harassing an employee or colleague, to conduct in the course of the clinical practice, such as the carrying out of a reckless surgical procedure. In a case of the former kind, a court might conclude that there was little to inhibit it from substituting its own judgment from that of the panel if is should have cause to differ from it. In a case of the latter kind, which involves a technical question of medical malpractice, the court is, we think, at a serious disadvantage to the panel whose decision is impugned."

[14] Finally, on the question of sanction, reference may be made to a recent decision of an Extra Division of this court, *Graham* v *Nursing and Midwifery Council* 2008 SC 659, in which the same statutory provisions were applicable as they are in the present case. At paragraphs 11 to 14 Lord Wheatley, in delivering the opinion of the court, said:

"[11] …[I]n particular it is clear from the terms of sec 12 [of the 1997 Act] that the appellant's right of appeal is unrestricted, and it is not confined to supposed errors of law on the part of the committee, but in effect can amount to a rehearing before the appellate court. In practice, the options on disposal available to the committee in the present case were to made no order, to issue the appellant with a caution, or to remove the appellant's name from the Nursing Register, with or without specification of time.

[12] 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 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 imposes 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 (see *Ghosh* v *General Medical Council*, para 34).
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> [13] Against that background it is necessary to consider the purposes of disposal, following a determination of professional misconduct by a professional conduct committee, particularly in the case of health care professionals. These purposes will in broad terms include consideration of matters such as the punishment of the practitioner, the protection of the public, and the protection of the reputation of the profession (see *Gupta* v *General Medical Council*, per Lord Rodger of Earlsferry, para 21). It is clear from that passage, following the opinion of Sir Thomas Bingham M.R (as he then was) in *Bolton* v *Law Society* [1994] 1 WLR 512 pp 517-519), that the principal purposes of the disposal in a case before a professional conduct committee are concerned with the protection of the public, and the protection of the reputation of the profession. The need to impose punishment on the individual practitioner is, comparatively, of lesser importance. One consequence of this is that matters personal to the practitioner which would normally be prayed in aid in mitigation of sanction have less significance that in other forms of disposal.
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> [14] The question which arises before us in this appeal therefore is whether, having regard to the overarching need to protect the public and the reputation of the nursing profession, and to a much lesser extent the need to impose some appropriate measure of punishment on the offender, the disposal selected by the committee in the present case can in all the circumstances by described as excessive and disproportionate…."

(46) The foregoing is in my view a correct analysis of how a court should approach an appeal from a professional conduct committee. However, I consider that the same legal principles apply, and the same approach ought to be adopted, to appeals from a professional registration committee where issues of competence, professional standards and compliance with a code of conduct are concerned.

(47) The first point put forward in support of the appeal is that of delay on the part of the Respondents in dealing with the Appellant's application for registration. The Appellant was charged with a breach of the peace arising from the same circumstances with which the Respondents had to deal when considering his application. The Respondents have an agreement with the Crown Office Procurator Fiscal Service that they will not interview witnesses nor seek to take any statements until the criminal proceedings are concluded. One can easily see why that would be the case. It is essential, and in the interests of justice, that nothing is done, or seen to be done, that may prove prejudicial to the criminal proceedings, which are, after all, taken by the Crown in the public interest. That a delay of this length occurred in this case as a result of that is regrettable but I can find nothing to suggest that this delay was prejudicial to the Appellant. There is no suggestion, for example, that the delay hampered the preparation of his case before the Registration Sub-committee, that it had any bearing on the evidence put before the Sub-committee nor indeed that it had any bearing on the outcome. The Appellant submits that that the fact he was in employment and had been in employment since the outcome of the internal investigation made the decision an easier one for the Sub-committee to reach. Whilst the Sub-committee made reference in their notice of decision to the issue of employment, there is nothing to indicate that this was in any way a determinative factor in their decision. For all of these reasons I reject the Appellant's arguments in this regard.

(48) The second issue raised by the Appellant relates to the interpretation of, and findings in connection with, the no case to answer submission. As I understand his position, the Appellant believes that the line of cross-examination taken at the Sub-committee hearing and the submissions made by the case presenter allowed the Sub-committee to form an erroneous view as to the meaning and effect of the no case to answer submission in the criminal trial.

(49) The Sub-committee had the benefit of two letters from COPFS dealing with the issue of the no case to answer submission. The first, dated 1 March 2011 correctly sets out the position in law in relation to such a submission namely that *"if after hearing parties, the judge is satisfied that the evidence led by the prosecution is insufficient in law to justify the accused being convicted of the offence charged, the judge is obliged to* ***acquit*** *him of the offence"* (emphasis mine). The second letter provides a bit more detail in relation to the Sheriff's findings but does not detract from the position set out in the first letter.

(50) The Appellant drew the court's attention to a passage of evidence, day one, page 11, where he was cross examined by the case presenter. Whatever the purpose and nature of the questioning, the Appellant's answers are, in my view, the relevant issue here. He states on two occasions that he was acquitted. It was never suggested to or by the Sub-committee that this was not the case. When one looks at the Sub-committees findings in fact in relation to this (finding 5), they state that the Appellant was charged and went to trial on a charge of breach of the peace. At trial a no case to answer submission was accepted by the court in relation to the acts being private and not public. That is correct both factually and in law. There is nothing to suggest that the Sub-committee did not understand that the Appellant was acquitted. There is nothing in their decision to indicate that they erroneously proceeded on the basis that he was guilty of a criminal offence nor to suggest that they did not understand the implications of the no case to answer submission. Accordingly I reject this ground of appeal.

(51) The Appellants' ground of appeal in relation to medical issues appears to proceed on the basis that the Sub-committee, having seen his medical records, ought to have adjourned the hearing in order to obtain further information, eg the letter produced form the Appellant's GP dated 7 February 2013. However the Appellant also submits that there was confusion on his part in relation to the procedures being adopted by the Sub-committee and this confusion was caused by a lack of available

information in relation to the proceedings. As I further understand it, he also submits that the proceedings before the Sub-committee, once a medical issue was identified, ought properly to have followed the same procedure as that adopted by the Conduct Sub-committee, namely to have a medical adviser present.

(52) The Appellant was present at the pre-hearing review. He was provided with the Notice of Referral which provided clear information in relation to the procedure to be adopted by the Sub-committee and the timescales for lodging documents. In any event, he was allowed to produce further medical information late. In addition, he addressed the committee regarding his medication and the effect that he alleged this had on him at the time. It is clear from his evidence to the Committee that he blamed his medication for his actions. The medical records produced by him, although they indicate a change in his medication around the time events were occurring, do not state that this medication led to his acting in a particular way. There does not appear to me to have been anything within the medical records which would necessarily have led the committee to seek further information. The Sub-committee, in their decision, (para 2) make it clear that they understood the point being made by the Appellant, namely that he blamed his medication for his actions. They refer to their being no medical evidence to support that, and that, in my view must be correct. What they had before them were records indicating the Appellant was on medication and that this was changed around the relevant time but nothing to indicate that this affected his behaviour and in particular nothing to suggest that this was the reason he had sent the text messages. Further, the letter the Appellant produced from his GP, and which was not before the committee, does not state that the medication was responsible for his actions. Even if the Committee had had the letter of 7 February 2013 before it, the Appellant is unable to show that this would have led to a different outcome.

(53) The Rules relating to Conduct Sub-committee hearings are quite distinct from those relating to Registration Sub-committee hearings. In so far as procedures are

concerned, the onus was on the Appellant to familiarise himself with the correct procedure to be adopted before a Registration Sub-committee particularly if the point being taken by him related to medical issues. In any event, the Registration Sub-committee gave him leeway in allowing him to produce further medical records albeit late and, had he considered other information was pertinent to his case, the onus was on him to produce that. I therefore reject the Appellant's arguments on these points.

(54) In relation to proportionality, the Sub-committee made it clear in their decision the basis that they had considered the effect of the refusal on the Appellant but that the prejudice to him was outweighed by the overriding duty to promote high standards of conduct and practice amongst social service workers. The Sub-committee had to consider the issue of public confidence in social service workers. They make it clear that high standards have to be maintained. The Sub-committee heard all the evidence and did not find the Appellant credible in his assertions regarding two of the text messages. They make it clear in their decision that the sending of the messages was wholly inappropriate and incompatible with the code of conduct. They state in para 5 of their decision that the Appellant had shown insight, remorse and regret, however they go on to say that to register the Appellant would diminish the reputation and credibility of the Register. I consider their reasons for non-registration are quite clear and demonstrate that they had due regard to the issue of proportionality (para 7) and that there decision was, in all the circumstances both fair and proportionate.

(55) It is further clear that the Sub-committee did consider the imposition of conditions (para 4 of the Notice of Decision). They did not consider there were any relevant training conditions that could be imposes nor were there any other conditions that could be monitored and enforced effectively. The Appellant referred to a not dissimilar case before the Conduct committee, however, each case must be decided by the relevant committees on their own merits. It has to be borne in mind

that the Sub-committee had the benefit of hearing the evidence here and of assessing the witnesses. They had the benefit of assessing the Appellant. They are the body best placed to make the decision regarding conditions. On the face of it, they gave that issue due consideration and rejected it.

(56) In all the circumstances I have come to the view that this appeal should fail. The Registration Sub-committee reached a view that objectively was reasonable in the circumstances, supported by the facts and proportionate. They considered registration subject to conditions but rejected that. They need do not more in my view.

(57) Agents both indicated they wished a hearing on expenses regardless of the outcome and accordingly I am setting the matter out for such a hearing.