APPEAL 2008/8 PC & 2008/8 PVA

IN THE CARE TRIBUNAL

ATG

-v-

DEPARTMENT OF HEALTH, SOCIAL SERVICES AND PUBLIC SAFETY

Before:
J.A. Kenneth Irvine (Chairman)
Roberta Brownlee
Christine McLaughlin

Hearing date: 6th July 2009

Application

1. The Appellant appeals under Art.11(1)(a) of the Protection of Children and Vulnerable Adults (Northern Ireland) Order 2003, against the decision of the Department of Health Social Services and Public Safety to include her on the Disqualification from Working with Children (DWC) List, and under Art.42(1)(a) of the said Order, against the decision of the Department of Health Social Services and Public Safety to include her on the Disqualification from Working with Vulnerable Adults (DWVA list). Both these decisions are dated 27th May 2008.

Representation

2. The Appellant was represented by Donal Flannigan of Counsel (instructed by J.J.Haughey, Solicitor) and the Respondent was represented by Eamonn McArdle of Counsel (instructed by the Departmental Solicitor).

Preliminary matters

3. At the Directions Hearing held on 19th November 2008 the Tribunal made the following direction which was continued indefinitely at the conclusion of the hearing: That there be Restricted Reporting Order under Regulation 19(1), prohibiting the publication (including by electronic means) in a written publication available to the public, or the inclusion in a relevant programme for reception in Northern Ireland, of any matter likely to lead members of the public to identify the applicant or any vulnerable adult. For this reason the names of all those referred to in this decision will be replaced by their initials.

4. At the said Directions Hearing a Schedule of Dates was agreed for the service and exchange of documents and the Tribunal so directed. This direction was not adhered to by Appellant. The Tribunal issued an Unless Order on 10th February 2009. Such Order was not complied with and an Order dismissing Appellant's appeal was made on 19th February 2009. Following representations by the Solicitor for the Appellant and the Departmental Solicitor on behalf of the Respondent a Set-aside Order was made on 12th March 2009.
At the commencement of the present hearing Tribunal made a statement for the assistance and guidance of future Appellants and their advisors. It indicated that the Set-aside had been granted only after very serious consideration and Tribunal was swayed not only by the seriousness of the matter to the Appellant but also by the fact that this is a comparatively new jurisdiction and Appellant may not have fully appreciated the seriousness of the failure to comply with time limits. Tribunal wished to make it clear that in any similar circumstances in the future it is less likely that an application for set-aside would find favour with the Tribunal.

The evidence

5. For the Respondent, Tribunal heard oral evidence from JR, Regional Manager of the care agency for which Appellant worked; EH, General Manager of the agency, and JH, Proprietor of the agency. For the Appellant, Tribunal heard oral evidence from NOH, manager of another agency for which the Appellant also worked; PL, who was involved with Appellant in a voluntary organization; and MK, a care assistant who worked with the Appellant.

6. Tribunal also had before it a substantial bundle of papers which included correspondence, minutes of meetings, care plans and other relevant material.

7. At the outset of the hearing Mr. Flannigan indicated that he would be conceding the issues of misconduct and the potential to cause harm. This concession considerably assisted the Tribunal and concentrated the issues upon which its Decision had to be made.

The law

DWVA list

8. Appeals against inclusion in the DWVA list are governed by Art.42 of the Protection of Children and Vulnerable Adults Order (Northern Ireland) 2003.

9. Art.42 (3) (a) provides that:

> If on an appeal...under this Article the Tribunal is not satisfied of either of the following, namely -
> (a) that the individual was guilty of misconduct (whether or not in the course of his employment) which harmed or placed at risk of harm a vulnerable adult; and

(b) that the individual is unsuitable to work with vulnerable adults
the Tribunal shall allow the appeal....

DWC list

10. Article 11(3) of the Protection of Children and Vulnerable Adults Order (Northern Ireland) 2003 is in similar terms and governs appeals against inclusion in the DWC list.

Three stage test

11. Thus, in order to dismiss the appeal, the Tribunal must find:

(i) that there was misconduct,
(ii) that the misconduct harmed a vulnerable adult or child as the case may be, or placed a vulnerable adult or child at risk of harm and
(iii) that the individual is unsuitable to work with vulnerable adults or children.

Definition of Misconduct and harm or risk of harm

12. The Order does not define misconduct. However, in *Angella Mairs v Secretary of State* [2004] 269.PC the Care Standards Tribunal in Great Britain observed that 'misconduct could range from serious sexual abuse through to physical abuse (including inappropriate physical restraint) and/or poor child care practices in contravention of organisational codes of conduct'. They referred to the case of *Doughty v. General Dental Council* [1987] where misconduct was said to be 'a falling short, whether by omission or commission of the standards of conduct expected from members of [a] profession'.

13. 'Harm' in relation to children is defined in Art.20 of the 2003 Order as having the same meaning as in Art.2(2) of the Children (Northern Ireland) Order 1995, that is 'ill treatment or the impairment of health or development'. In relation to adults it is defined in Art. 48 (3) of the 2003 Order: (a) in relation to an adult who is not mentally handicapped it means ill-treatment or the impairment of health; (b) in relation to an adult who is mentally handicapped it means ill-treatment or impairment of health or development.

Burden of proof

14. The burden of proof is upon the Department.

Standard of proof

15. The standard of proof is the civil standard, that is, the balance of probability, as defined in *Re H* [1996] AC 563: 'The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not.'

The facts and the evidence

16. The basic facts were:

i. The Appellant was a Domiciliary Care Worker employed by C agency and had worked for it since 1994.

ii. C is a domiciliary care agency which provides a range of services including personal care, practical support, sitting services and night duties for frail elderly, mentally and physically disabled.

iii. Concerns were raised about the treatment of one of their clients T. T is a 90-year old lady who is categorized as elderly and mentally infirm. Under the care package negotiated with the local Social Services Trust C was to provide T with three visits per day, each to last 45 minutes. The Appellant was allocated to the care of T. On or about 16th February 2007 C received through Social Services an anonymous complaint expressing concern about the treatment of T.

iv. JR, the Regional Manager of C, telephoned the Appellant to seek confirmation of the times of her calls with T. She was told that she called at different times of the day, splitting the allocated time over the various visits. She was told that this was not permitted or acceptable, that the tasks must be carried out during the allocated time slots and not split. The client was suffering from mental health problems, and completing the slot in full at the correct time was important for the client's sense of routine and continuity. JR also reminded the Appellant that she was required always to sign the care plan in the client's home as evidence that the slot was being carried out in accordance with the care plan which is stipulated by the Health Trust as the commissioning body.

v. Over the following weekend, 17th-19th February 2007 spot checks were carried out. Appellant was observed to enter the house and to leave in five, seven and four minutes respectively.

vi. On the following Thursday, 22nd February 2007, JR spoke to T who complained that the Appellant rushed her and told her what to do, treating her as if she, the Appellant, were her boss.

vii. On 26th February an investigatory meeting was held with the General Manager, EH, who asked the Appellant for an account of her activities at T's house on the previous weekend. Appellant then gave an account which was inconsistent with the evidence of the spot checks and the plan of care that was to be delivered to T. It was also noted that she had failed on each of the three days to sign the care Plan as required to do.

viii. On 2nd March 2007 a Disciplinary Hearing took place conducted by EH and which as attended by the Appellant who was accompanied by MK. The allegations were that the Appellant was guilty of excessive work time abuse, had failed to complete contracted duties and had made a fraudulent claim for wages. She was found guilty of all charges. In the notice of the decision of the disciplinary hearing it was stated that EH had taken into account an earlier incident referred to as 'the W incident'. This involved two separate complaints in June and July 2006 regarding another client W whose

daughter was dissatisfied with the Appellants care for her mother. In consequence of the first complaint the Appellant received an informal verbal warning followed by a formal verbal warning for the second complaint. The other carer involved with W was MK who received a written warning as a result of her conduct.

ix. The matter was referred to the Respondent Department and the Appellant's name was placed on the DWVA(NI) and DWC(NI) lists.

17. In the light of Counsel's acceptance that Appellant's actions did constitute misconduct and that it gave rise to a risk of harm to a vulnerable adult Tribunal had to consider only whether by her actions Appellant was rendered unsuitable to work with vulnerable adults or with children. It was thus necessary for it to consider the context in which the actions occurred including, among other things, Appellant's past conduct, the number of incidents, the nature and seriousness of the incidents, the training and support provided for her, and the risk of her repeating such conduct (which would include evidence of her recognition of the misconduct and its potentially harmful consequences).

18. Tribunal found JR a credible witness. It noted her evidence that the warning about time-splitting was given before the spot checks were carried out and that she took swift action to carry out the checks a few days after the conversation. It also emerged from her evidence that Appellant did not drive and had to carry out her visits on foot or obtain lifts. She had uncertainty about previous complaints stated to have been made about Appellant's work.

19. EH was also found to be credible and reliable and dealt with issues as raised. There was an indication that procedures were not in place at the time of the incidents but this had now been remedied.

20. Tribunal had no problem with JH's evidence although he had no direct relevant knowledge going to the substance of the appeal.

21. NOH struck Tribunal as professional in her management. Her evidence was clear so far as it went and was limited to her knowledge of Appellant as an employee of the agency which she managed.

22. PL impressed Tribunal as a gracious lady, totally committed to the voluntary caring organization with which Appellant also worked and to which she was said to show 'total dependability'. Her knowledge of Appellant was confined to her work as a volunteer with that body.

23. MK was able to speak of Appellant as a fellow-employee. However, she was not very familiar with T, having only attended to her twice, on one of which occasions T had asked her to leave, and she had not been present when the three incidents occurred. She herself had been disciplined for the 'W incident'.

24. The Appellant did not herself give evidence nor did she file a Witness Statement. Mr. McArdle invited Tribunal to draw its own inferences from this

failure and cited to it the dictum of Lord Diplock in the case of *British Railways Board v. Herrington* 1972 AC 877: 'The Appellants ... elected to call no witnesses, ... This is a legitimate tactical move under our adversarial system of litigation. But a defendant who adopts it cannot complain if the court draws from the facts which have been disclosed all reasonable inferences as to what are the facts which the defendant has chosen to withhold.'
Tribunal also noted the approach of the Care Standards Tribunal in the case of *JS v. Secretary of State* [2005] 487 PC where the Appellant in that case not only did not give evidence but also declined to attend his own hearing: 'We therefore consider that there are adverse inferences to be drawn against the Appellant for his failure to attend the Tribunal hearing, particularly when it comes to disputed facts and evidence regarding his suitability to work with children and young adults.'
Tribunal noted Mr. Flannigan's statement that Appellant did not wish to give evidence because of her age and the fact that she would find it upsetting to do so. Tribunal accepts that giving evidence could have been upsetting for her. It is reasonable for Tribunal to draw the inference that under cross-examination she might have to deal with the allegations (mentioned but not substantiated in evidence) of previous complaints and/or concerns about her work. However, she could have filed a written statement if there were any explanations for her actions which she wished to give. The only statement by her at any stage was that contained in the original Notice of Appeal, viz., 'I have never prior to my dismissal by C received any disciplinary action or criticism by any employer. My honesty has not been questioned during this time. I have never compromised my position as carer. I pose no threat or risk to any of the children or adults I care for.' The evidence before Tribunal was that she had indeed been subject to previous disciplinary action. Furthermore, Appellant had not been frank with the Disciplinary Hearing; she had denied failings until confronted with the spot-check evidence and she had also made a claim for payment for the full time expected of her. She had failed to accept the direction given to her a few days previously that time-splitting was not acceptable and that the slot must be completed in full and the plan of care signed. This warning was not disputed. She could also have brought someone else to the Tribunal to speak on her behalf with regard to the events themselves; she did not do so.

Suitability

25. The Care Standards Tribunal in Great Britain has in a number of cases given guidance with regard to the issue of suitability:
a. In *CN v Secretary of State* [2004] 399 PVA it stated: 'When the Tribunal considers the question of unsuitability, it must look at the factual situation in the widest possible context. ... Each case will be decided on its own facts and context will be all important.'
b. In *Selina Matswairo v Secretary of State for Health* [2007] 0937 PVA it said: 'no career is without its low points and few are wholly without any instances at all of human error. The gravity of the misconduct, the circumstances and, in particular, the probability of repetition are crucial factors.'
c. In *Gavin Rathbone v Secretary of State* [2007] 975 PVA it stated: 'In the

Tribunal's view Mr. Rathbone's failure to take proper care despite the strong warnings, his inability to realise that he has gone wrong, to own up to it, to accept the responsibility and to do his best to put things right and to do better in future is a serious failing and one which, regrettably, casts very real doubt on his suitability to work with vulnerable adults or children. The Tribunal found much in [the Secretary of State's] submissions concerning a lack of insight and understanding and a cavalier and reckless indifference.'

d. In *Kathleen Jackson v Secretary of State* [2005] 623 PVA the Tribunal concluded its consideration: 'This leads us to consider the issue of suitability. We have considerable sympathy with the Appellant because she is a woman who has spent most of her working life in the care sector; she has gone to the trouble to get qualifications and she has achieved senior care status. However the very fact that she has had this training and was a senior carer and went on to behave the way she did raises questions about her suitability to work with vulnerable adults. In addition we note that originally when she was confronted with the allegations she did acknowledge that there might be some substance to them but when she came to the Tribunal she denied that anything at all had happened.'

26. In the course of the investigatory meeting on 26th February Appellant told EH, 'I do it my way'. This statement leads Tribunal to have doubts as to Appellant's ability to change and to learn. Good practice has changed since she entered the caring profession but she needs to remember that the service must be client-driven. She clearly did not understand that her actions were placing T at risk. Tribunal echoes the view of the Care Tribunal in *GC v. DHSSPS* 2006/4PVA: 'We take the view that the appellant simply does not comprehend the nature of the risk to vulnerable adults his actions have caused or would be likely to cause.'

Appellant missed opportunities to accept responsibility, to explain any reasons for the faults and to promise to do better.

It is tragic that after a lifetime of service in the caring profession the Appellant finds herself in this situation but it is of her own making. Indeed, it might have been expected that being of mature years and experience herself she would have understood the needs of an elderly client but clearly she did not. The purpose of the legislation is to provide protection for children and vulnerable adults and Tribunal must always bear in mind that its primary duty is the provision of such protection.

Decision

27. It is the unanimous decision of the Tribunal that Appellant's appeals in respect of both lists be dismissed.

28. Tribunal feels compelled to express its concern about a number of issues which arose in the course of the hearing before it and which form part of the context for its Decision:

a. It was noted that Appellant was working for two agencies and it is concerned at the aggregate weekly hours required from her. The Regulation & Quality Improvement Authority (RQIA) and Domiciliary Care Agencies should have a system in place to check this and prevent re-occurrence.

b. There does seem to be a need for improvement in the monitoring of quality in all cases of domiciliary care by the RQIA and the Management of the Domiciliary Agencies.
c. The commissioning body (the Health & Social Care Trust) in each case needs to be more involved in quality control issues at the point of delivery of services to each and every client.

Appeals dismissed.

J.A.Kenneth Irvine (Chairman)
Roberta Brownlee
Christine McLaughlin
10th July 2009