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(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (CROWN SIDE)

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SECTION 29 OF THE NATIONAL HEALTH SERVICE REFORM AND HEALTH CARE PROFESSIONALS ACT 2002

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BETWEEN:

THE COUNCIL FOR THE REGULATION OF HEALTH CARE PROFESSIONALS

Applicant;

-and-

THE NURSING AND MIDWIFERY COUNCIL

First Named Respondent;

-and-

CLAIRE McDONNELL

Second Named Respondent.

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WEATHERUP J

[1] The Council for the Regulation of Health Care Professionals (the Council), by its amended Notice of Appeal under Section 29 of the National Health Service Reform and Health Care Professions Act 2002, seeks an order that the decision of the Professional Conduct Committee (PCC) of the Nursing and Midwifery Council (NMC) dated 14 December 2004, made in relation to Claire McDonnell that no further action should be taken, be substituted by an order that Ms McDonnell be cautioned and a record of the caution retained by

the NMC or alternatively that the case of Ms McDonnell be remitted to the PCC of the NMC with directions as to disposal of the case of Ms McDonnell.

The statutory scheme.

[2] The Nurses, Midwifes and Health Visitors (Professional Conduct) Rules 1993 were made by the United Kingdom Central Council for Nursing, Midwifery and Health Visiting under the Nurses, Midwifes and Health Visitors Act 1979 and the Nurses, Midwifes and Health Visitors Act 1992. Section 10 the Nurses, Midwifes and Health Visitors Act 1997 provided for a Central Council of Health Care Professionals that would by rules determine circumstances in which, and the means by which, a person may for misconduct or otherwise be removed from the professional register. With the implementation of the Nursing and Midwifery Order 2001, transitional arrangements were set out in the Nursing and Midwifery Order 2001 (Transitional Provisions) Order of Council 2004 which came into force on 1 August 2004. Article 2 of the 2004 Order provided that where an allegation of misconduct had been received by the Council before 1 August 2004 the Council shall deal with that allegation in accordance with Section 10 of the 1997 Act and the 1993 Rules as if they remained in force.

[3] Rule 2 of the 1993 Rules deals with removal from the Register where a practitioner had been guilty of misconduct. Further Rule 4 provides that a practitioner may be cautioned as to her future conduct where she has been guilty of misconduct.

[4] The 2002 Act at Section 29 provides for the reference of disciplinary cases by the Council for the Regulation of Health Care Professionals to the High Court of Justice in Northern Ireland as follows –

> "(4) If the Council considers that –
>
> (a) a relevant decision falling within sub-section (1) has been unduly lenient, whether as to any finding of professional misconduct or fitness to practice on the part of the practitioner concerned (or lack of such a funding), or as to any penalty imposed, or both, or
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> (b) a relevant decision falling within sub-section (2) should not have been made and it would be desirable for the protection of members of the public for the Council to take action under this section, the Council may refer the case to the relevant court.

(7) If the Council does so refer a case -

(a) the case is to be treated by the court to which is has been referred as an appeal by the Council against the relevant decision (even though the Council was not a party to the proceedings resulting in the relevant decision), and
(b) the body which made the relevant decision is to be made a respondent.

(8) The court may -

(a) dismiss the appeal
(b) allow the appeal and quash the relevant decision
(c) substitute for the relevant decision any other decision which could have been made by the Committee or other person concerned, or
(d) remit the case to the Committee or other person concerned to dispose of the case in accordance with the directions of the court, and may make such order as to costs (or, in Scotland, expenses) as it thinks fit."

The disciplinary charges.

[5] Ms McDonnell was employed as a health visitor at Portadown Health and Social Services Centre. She was charged with a number of disciplinary offences and on 13 December 2004 the PCC found the facts proved against Ms McDonnell in respect of five of the charges and concluded that misconduct had been proved in respect of two of those charges. Those two charges were numbered 1a and 4a(i). The PCC decision of 13 December 2004 in respect of the charges was set out in a Minute.

[6] Charge 1a alleged that between January 1996 and 9 February 2001 Ms McDonnell failed to maintain proper and accurate health visiting records. The facts grounding the finding of misconduct in relation to charge 1a were stated in the Minute to be that –

> "An audit of the notes held in the caseload of Mrs McDonnell were found to have a significant paper record gap. This audit was confirmed by the

> evidence of Rosemary Hughes, which she compiled from the records removed from the Portadown clinic base. We are satisfied that she reported what she found and followed the instructions held within the terms of reference in 1.2 of the audit introduction. On several occasions under cross-examination the respondent accepts that her record keeping did not always reflect the actual work done."

[7] The PCC reasons for the finding of misconduct in respect of charge 1a were as follows -

> "In relation to charge 1a the Committee finds that you were guilty of misconduct and the reasons are that record keeping is an integral part of health visiting practice. It is not an optional extra and such record keeping is the mark of a safe practitioner in that it assists the care process enabling other practitioners as well as yourself to provide appropriate levels and continuity of care."

[8] Charge 4a(i) alleged that Ms McDonnell failed to identify families in need in that she failed to prioritise correctly the cases of families that included families described as E, J, K and L. The facts grounding the finding of misconduct in relation to charge 4a(i) were stated to be that –

> "In respect of family E the respondent categorised the family as low priority. This is evidenced not only by the statement of Mrs Maguire, but also by the respondent's own evidence. Having carefully analysised the records, the Committee is satisfied that on or before 22 June 2000 the family should have been categorised as a family in need. Mrs McDonnell observes but does not heed the warning signals.
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> In respect of family J the respondent categorised them as low priority. However after analysis of the records the Committee are satisfied that the family should have been categorised as a family in need following a series of accidents to the children of this family. Mrs McDonnell records in her own records that child protection is an issue on 11 February 2000.
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> In respect of family K the respondent does not categorise this family as in need. Following a careful analysis of the records, we determine that Mrs

> McDonnell fails to be alerted by the previous entry of a student health visitor who clearly states that the mother has self expressed concerns about the child on 10 September 1999. The results were a significant height centile decrease visible in the records. Mrs McDonnell appears not to instigate home visits, despite frequent failures to attend for further development assessment. These '*Did not attend*' contacts were recorded, but not actioned.
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> In respect of family L Mrs McDonnell fails to correctly categorise the family as in need. Following analysis of the records, the Committee is satisfied that the respondent missed warning signs that this was a family with potential to become dysfunctional. Between 1997 and January 2000 there are entries in the records in Mrs McDonnell's own hand which in the professional judgment of the Committee should have changed Mrs McDonnell's priority categorisation."

[9] The PCC's reasons for finding misconduct in respect of charge 4a(i) were as follows -

> "In charge 4a(i), that you failed to promote correctly the cases of families E, J, K, L and the Committee has noted the contents of the records of these families and in spite of the evidence having completed the appropriate training, it is not reflected in the copious notes that an assessment of need has taken place. That collaborative plans had been devised and there is little evidence of evaluation or review of the health visiting or other interventions made. Had you taken a more systematic approach to the assessment of need this might have assisted you to prioritise correctly. We note, however, that the failure to visit the homes on a monthly basis did not itself justify a finding of misconduct.

[10] Having made the findings of misconduct in respect of charges 1a and 4a(i) the PCC decided that no further action be taken. The reasons for that conclusion were stated to be that –

> "The Committee is mindful hitherto of your exemplary character as set out in many of the

> professional testimonials that have been submitted. We particularly note the testimonials from your working colleagues and peers and senior members of the primary care team who work with you at Portadown Health Centre during the period in question, and were able to speak, at first hand, about the calibre of your work and their knowledge of your relationships with your clients.
>
> We have also taken into account and given due weight to the Colgan report in respect of mitigation. We have been mindful of the difficulties faced by yourself and others in the discharge of your responsibilities as confirmed by the Council's witness who indicated that staffing shortages had resulted in changes to the developmental assessment schedules.
>
> The Code of Professional Conduct was drawn to the respondent's attention."

To the text of the Minute should be added the additional words that appear in the transcript in relation to the issue of penalty –

> "You should appreciate that to be found guilty of misconduct is an extremely serious matter. You must understand that the Committee does not condone your actions and omissions in any way. However the Committee also recognises the circumstances particular to your case and for this reason feels it appropriate to take no further action."

The Council's grounds of appeal.

[11] The Council decided under its emergency procedures to issue a Notice instigating an appeal under section 29 in relation to Ms McDonnell, the Notice being issued on 31 December 2004 within 21 days of the decision of the PAC of 13 December 2004. On 6 January 2005 the Council gave full consideration to the issues and concluded that having considered legal advice it had jurisdiction under Section 29(4) of the 2002 Act to consider whether or not to refer Ms McDonnell's case to the High Court and secondly that the PCC's decision not to impose a sanction was unduly lenient and it would be desirable for the protection of members of the public for the Council to take action under Section 29 of the 2002 Act and thirdly that the Section 29 criteria had been fulfilled and the PCC should exercise its discretion to confirm the decision taken under the emergency procedures to refer the case to the High Court. An amended Notice was issued on 11 February 2005.

[12] The Council sets out its grounds of appeal in the amended Notice as follows –

> (1) The hearing before the PCC arose out of six separate charges relating to the period between January 1996 and 9 February 2001. The PCC hearing took place over a period of nearly ten months ie between 25 February 2004 and 14 December 2004. The evidence was heard on 25 to 27 February 2004, 25 to 27 May 2004 through to November 2004 with findings as to misconduct and sanction being given (following submissions on evidence as to mitigation) on 14 December 2004.
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> (2) The PCC gave little by way of reasons for their decision to impose no sanction, save that they observed that they had taken into account -
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> 2.1 the second respondent's exemplary character;
> 2.2 testimonials as to the calibre of the second respondent's work and her relationships with clients;
> 2.3 the Colgan Report (a report of an audit carried out in three NHS Trusts including the Craigavon and Banbridge NHS Trust for whom the second respondent worked prepared by E. Colgan in January 2002);
> 2.4 difficulties faced by the second respondent in the discharge of her responsibilities.
>
> (3) None of these matters could excuse the persistent and widespread failure of the second respondent in relation to record keeping. None of these matters properly addressed the issues of future risk, maintenance of public confidence in the nursing and health visiting profession and/or maintenance of standards in the nursing and health visiting professions.
>
> (4) These are impermissible omissions given that, in reaching its conclusion as to the facts and as to misconduct in relation to charge 1a (relating to record keeping) the PCC held that there was significant gaps in the second respondent's records between 1996 and 9 February 2001, that record keeping is an integral part of health visiting practice, and that it assists the care process enabling other practitioners as well as the

health visitor to provide appropriate levels and continuity of care.

(5) Moreover, the PCC did not in their reasons explain in any way the significance which it attributed to the Colgan report, if any, save to note that it was a matter to which they had given due weight.

(6) In the circumstances -

6.1 the sanction imposed by the PCC was unduly lenient, having regard (a) to the professional misconduct found proved against the second respondent and (b) given all proper weight to the protection of members of the public and the need to maintain public confidence in the health visiting profession and the need to declare and uphold proper standards of conduct within the profession (the three interests which must be balanced by a PCC);

6.2 the decision fails to give any or adequate proper weight to the guidance from the UKCC and/or the MNC as to the critical importance of record keeping for health visitors, and the need for each health visitor to take responsibility for record keeping. To find serious breaches of these obligations, and that this amounts to misconduct, but not to impose any sanction whatsoever is manifestly inappropriate. This is particularly so where, as here, the identified failures could have compromised the care and attention provided to families who needed it;

6.3 the decision itself sends out a message that failures in relation to record keeping do not of themselves merit any disciplinary sanction;

6.4 the matters relied upon by the PCC as to mitigation were manifestly inappropriate in the circumstances and/or the reasons as to mitigation were inadequate;

6.5 given the features of this case as it was put before the PCC, the minimum sanction necessary for the protection of the public, maintenance of public confidence in the profession and maintenance of standards in the profession was to issue a caution against the second respondent. To direct that no action be taken was manifestly inappropriate in the circumstances;

6.6 there was a failure of process before the PCC in that the PCC gave inadequate reasons for their decision.

[13] In summary the Council relies on inadequate reasons for the PCC decision and undue leniency of penalty. Prior to the hearing of this appeal the NMC gave notice that it acceded to the position of the Council that the PCC's decision was unduly lenient and that the appropriate sanction for the PCC to have imposed was a caution. At the hearing the Council proceeded on the basis that the absence on any penalty in respect of the finding of misconduct under charge 1a was unduly lenient and that the appropriate sanction for the PCC to have imposed would have been a caution.

The approach to section 29 appeals.

[14] The approach to appeals under Section 29 was reviewed by the Court of Appeal in England and Wales in Ruscillo v The Council for the Regulation of Health Care Professionals and the General Medical Council and Another [2004] EWCA Civ. 1356. The PCC of the General Medical Council acquitted Dr Ruscillo of a disciplinary charge and the Council appealed to the High Court against that decision. The issue arose as to whether Section 29 of the 2002 Act gives a right of appeal to the Council to appeal against an acquittal. The Court of Appeal held that section 29 confers on the Council power to refer to the High Court a decision of a disciplinary tribunal that a health care professional has not been guilty of alleged professional misconduct provided always that the criteria in Section 28(4) are satisfied. Accordingly Dr Ruscillo's appeal was dismissed.

[15] The Court of Appeal considered the nature of the statutory appeal to the High Court. Section 29(7)(a) of the Act requires any case referred by the Council to be treated by the High Court as an appeal by the Council against the relevant decision. The Court of Appeal referred to the English Civil Procedure Rules Part 52 which provides that every appeal will be limited to a review of the decision of the lower court unless a practice direction makes a different provision for a particular category of appeal or the court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing.

[16] In Northern Ireland Part 2 of Order 55 of the Rules of the Supreme Court apply to appeals, references and applications under statutory provisions but does not contain particular provisions in relation to the nature of a statutory appeal. The issue was considered by Carswell J in Re Baird and Others [1989] NI 56. Sixteen members of Craigavon Borough Council appealed to the High Court against the decision of a local government auditor under Section 82 of the Local Government Act (Northern Ireland) 1972. Equivalent statutory appeals in England were conducted without a complete

oral rehearing. Carswell J stated that where the statutory provisions for appeal are identical in the two jurisdictions it would appear that the method of appeal should be the same in each, for it was not easy to suppose that the legislature intended that Council members appeals against surcharges under similar legislation should be conducted in a different fashion (page 60 b to c). Carswell J stated that under the 1980 Northern Ireland Rules it was easier to accept without reservation the applicability to statutory appeals in this jurisdiction of the views expressed by Lord Goddard CJ and Hillbury J in Allender v Council of the Royal College of Veterinary Surgeons [1951] 2 All ER 859 that a statutory appeal required the Court to hear the case and treat it as a re-hearing in the same way as an appeal from a decision of a Judge of the High Court sitting at first instance is treated by the Court of Appeal. In the present case the appeal was not conducted by way of a re-hearing but by evidence on affidavit and argument by Counsel on the affidavits and exhibits.

[17] The Court of Appeal in Ruscillo proceeded to set out a general approach to an appeal under section 29.

(1) Disciplinary matters that are imposed under the various regulatory schemes do not have the primary object of penalising for misconduct. The primary object is to protect the public and the reputation of the profession in question. The primary object of the creation of the Council was also the protection of the public and Section 29 is only one of a number of provisions under which the Council is empowered to achieve this object. (Para. 60).

(2) Section 29 (4)(a) permits the Council to refer a case to the Court where it would be desirable for the protection of members of the public to take action and "a relevant decision falling within sub-section 1 has been unduly lenient, whether because the findings of professional misconduct are inadequate, or because the penalty does not adequately reflect the findings of professional misconduct that had been made, or both." (Para. 67).

(3) If the court considers that the decision as to penalty was correct it must dismiss the appeal, even if it concludes that some of the findings that led to the imposition of the penalty were inadequate. (Para. 70).

(4) If the court decides that the decision as to penalty was "wrong" it must allow the appeal and quash the relevant decision. It can then substitute its own decision under Section 29(8)(c) or remit the case under Section 29(8)(d). (Para. 70).

(5) It may be that the court will find that there has been a serious procedural or other irregularly in the proceedings before the disciplinary tribunal. In those circumstances the court may be unable to decide whether or not the decision as to penalty was appropriate. In such circumstances the

court may allow the appeal or remit the case to the disciplinary tribunal with directions as to how to proceed (para. 72).

(6) What are the criteria to be applied by the court when deciding whether a relevant decision was wrong? The task of the disciplinary tribunal is to consider whether the relevant facts demonstrate that the practitioner has been guilty of the defined professional misconduct and where they do to impose the penalty that is appropriate having regard to the safety of the public and the reputation of the professions. The role of the court is to consider whether the disciplinary tribunal has properly performed that task so as to reach a correct decision as to the imposition of a penalty. That role is no different to the role of the Council in considering whether a relevant decision has been unduly lenient. The test of undue leniency involves considering whether, having regard to the material facts, the decision reached has due regard for the safety of the public and the reputation of the profession (para. 73).

(7) References to the court having regard to double jeopardy when considering whether a sentence is unduly lenient upon an Attorney General's reference as not really apposite where the primary concern is for the protection of the public (para. 75).

(8) The test of whether a penalty is unduly lenient in the context of Section 29 is whether it is one which a disciplinary tribunal having regard to the relevant facts and the object of the disciplinary proceedings could reasonably have imposed (para. 76).

(9) In any particular case under Section 29 the issue is likely to be whether the disciplinary tribunal has reached a decision as to penalty that is manifestly inappropriate having regard to the practitioner's conduct and the interests of the public (para. 77).

(10) Where all material evidence has been placed before the disciplinary tribunal and it has given due consideration to the relevant factors, the Council and the court should place weight on the expertise brought to bear in evaluating how best the needs of the public and the profession should be protected. Where however there has been a failure of process or evidence is taken into account on appeal that was not placed before the disciplinary tribunal a decision reached by the tribunal will inevitably need to be reassessed (para. 78).

<u>The issue concerning records and record keeping.</u>

[18] In 1998 the United Kingdom Central Council for Nursing, Midwifery and Heath Visiting issued "Guidelines for Records and Record Keeping."

- The introduction states that -

  "Record keeping is an integral part of nursing, midwifery and health visiting practice. It is a tool of professional practice and one that should help the care process. It is not separate from this process and is not an optional extra to be fitted in if circumstances allow.

  The quality of your record keeping is also a reflection of the standard of your professional practice. Good record keeping is a mark of the skilled and safe practitioner, whilst careless or incomplete record keeping often highlights wider problems with the individuals' practice.

  Good housekeeping is, therefore, both the product of good teamwork and an important tool in promoting high quality health care."

- Under the heading "Content and Style" it is stated that there are a number of factors which contribute to effective record keeping. Patient and client records should be factual, consistent and accurate; be written as soon as possible after an event has occurred providing current information on the care and condition of the patient or client; be consecutive; identify problems that have arisen and the action taken to rectify them.

- Under the heading "Audit" it is provided that audit is one component of the risk management process and the ultimate aim of risk management is the promotion of quality. If improvements are identified and made in the processes and outcomes of health care, risks to the patient or client are minimised and costs to the employer are reduced. By auditing records one can assess the standard of the record and identify areas for improvement and staff development.

- Under the heading "Legal matters and complaints" it is stated that -

  "As a registered nurse, midwife or health visitor you have both a professional and a legal duty of care.

> Your record keeping should therefore be able to demonstrate -
>
> a full account of your assessment and the care you have planned and provided;
>
> relevant information about the condition of the patient or client at any given time and the measures you have taken to respond to their needs;
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> evidence that you have understood and honoured your duty of care that you have taken all reasonable steps to care for the patient or client and that any actions or omissions on your part have not compromised their safety in any way and a record of any arrangement you have made for the continuing care of a patient or client.

[19] The evidence against Ms McDonnell included an audit of all health visiting records held by her, conducted by Ms Hughes, a senior nurse advisor in family support and child protection from the Armagh and Dungannon Health and Social Services Trust, and Ms Clarke, a child protection nurse specialist from the Newry and Mourne Health and Social Services Trust. Ms Hughes gave oral evidence to the PCC.

[20] The terms of reference of the Hughes audit were "to examine all family and child health records held by Mrs Claire McDonnell and ascertain adherence to Trust, Southern Health and Social Services Board (SHSSB), Regional and National policies, procedures, protocols and guidance." The policies, procedures, protocols and guidance relied on by the Hughes audit were listed in Appendix 1 to the report. Ms Hughes gave evidence based on her audit report which provided support for charge 1a that between January 1996 and 9 February 2001 Ms McDonnell had failed to maintain proper and accurate health visiting records. Further supporting evidence was given by Ms Maguire the Assistant Director of Primary Care.

[21] Ms McDonnell, while acknowledging some omissions in her records, defended her overall performance and referred to a heavy caseload, limited clerical support and problems with resources. Ms McDonnell's case involved a direct attack on Ms Hughes qualifications and competence, methodology and conclusions. Her case also involved a robust attack on Ms Maguire who was said to have settled the terms of reference for the Hughes audit so as to attach blame to Ms McDonnell and divert attention from management failures. The essence of Ms McDonnell's case is stated in the skeleton argument as a summary of matters appearing in the transcript as follows; she was being used as scapegoat in the high profile aftermath of the death and

serious injury of two children; the system failed to provide adequate resources to perform the increased workload post the Children's Northern Ireland Order 1995; the managers failed to manage and indeed suppressed evidence of such failure from the PCC; the managers failed to listen to or heed the constant cries for help by the health visitors and their HVTLs; evidence of increased managerial intervention and change in the systems from early to mid-2001 onwards apparent from Ms Gorman's evidence and the Colgan Report; Ms McDonnell being a sacrificial lamb who was offered to protect management from the fall-out resulting from the death and serious injury of the two children.

[22] The PCC concluded that Ms McDonnell's notes had "significant paper record gaps" and that Ms Hughes had reported what she had found and followed her terms of reference. The PCC concluded that the presence of significant paper record gaps amounted to misconduct and that proper record keeping was "the mark of a safe practitioner".

Undue leniency.

[23] In the light of those findings by the PCC the Council challenges the PCC decision to impose no penalty and to take no further action. The PCC directs its challenge to the adequacy of the reasons for the decision on penalty and ultimately to the contention that the decision was unduly lenient. As stated in Ruscillo at paragraphs 76 and 77 the test of whether a penalty is unduly lenient is whether it is one which a Disciplinary Tribunal, having regard to the relevant facts and the object of the disciplinary proceedings, could reasonably have imposed, and in any particular case the issue is likely to be whether the Disciplinary Tribunal has reached a decision as to a penalty that is manifestly inappropriate having regard to the practitioner's conduct and the interests of the public.

[24] The interests of the public lie in public protection, public confidence in the health visitors' profession and the maintenance of professional standards. The UKCC guidelines refer to the safety aspect of record keeping and state that good record keeping is a mark of the skilled and safe practitioner. Record keeping of such a low standard as to warrant a finding of misconduct must give rise to serious concern for the risk of harm to patients and impact on public confidence in health visitors. The absence of action by the PCC in light of a finding of such misconduct may serve to erode public confidence and may fail to demonstrate that professional standards are being maintained, unless the PCC offers satisfactory justification for that lack of action. Having regard to Ms McDonnell's conduct as found by the PCC under charge 1a and having regard to the interests of the public and the object of the disciplinary proceedings, a decision to impose no penalty appears to be manifestly inappropriate and unduly lenient. So why was no action taken?

[25] The PCC have given reasons for their decision on penalty which the Council consider are not adequate to explain the basis of their decision. In relation to reasons generally the Privy Council in Selvanathan v General Medical Council (2000) 59 BMLR 95 considered an appeal against a finding of serious professional misconduct against a registered medical practitioner with the penalty being that for 12 months the appellant's registration was to be conditional on not engaging in sole practice, having his clinical knowledge objectively assessed and demonstrating through assessment that he was fit to resume unrestricted practice. Lord Hope stated that in practice reasons should now be given by the PCC for their determination whether or not they found the practitioner to have been guilty of serious professional misconduct and their decision on the question of penalty. However reasons had been given in that case and the question concerned the adequacy of those reasons Lord Hope stated:

> "In regard to this question, it is necessary to bear in mind the composition and nature of the Professional Conduct Committee which is constituted by the Council under the Rules made under (the legislation). It is composed of medical practitioners and lay members. The only legal assistance they have is that of the legal assessor appointed under (the legislation) whose function (under the Rules) is to advise them on questions of law. (The Rules) require the Committee to reach a view as a Committee on the matters which they have before them for determination. No provision is made for expressions of dissent either as to the result or on matter of detail. In these circumstances it is not to be expected of the Committee that they should give detailed reasons for their findings of fact. General explanation of the basis for their determination on the question of serious professional misconduct and of penalty will be sufficient in most cases."

[26] Further, in Threlfall v General Optical Council (2004) EWHC 2683 (Admin) a registered ophthalmic optician appealed from a decision of the disciplinary committee of the General Optical Council which had found her guilty of serious professional misconduct. On review of the extent of the duty to give reasons Stanley Burnton J concluded that the effectiveness of any right of appeal to be exercised may depend on the giving of reasons by the disciplinary committee and that in any case in which a decision was made to impose a disciplinary order adequate reasons should be given in good time for the right of appeal to be exercised. Further he added at paragraph 37:

> "Lastly, I mention that there is a further practical reason why disciplinary committees should give adequate reasons for their decisions, and that is to enable the Council for the Regulation of Health Care Professionals to consider whether to exercise its powers under Section 29 of the 2002 Act."

That obligation extends to the giving of adequate reasons for the decision as to any penalty imposed as well as any finding of professional misconduct or fitness to practice.

[27] The PCC gave four reasons for the decision to take no further action. First, Ms McDonnell's exemplary character with particular reference to the testimonials submitted. Secondly, the Colgan Report which was "taken into account and given due weight". Thirdly, the difficulties arising from staffing shortages which resulted in changes to the developmental assessment schedules. Fourthly, as stated in the transcript of the hearing, "the circumstances particular to your case".

[28] Before considering the reasons for the decision to take no further action it is necessary to restate the object of the disciplinary exercise and the approach of the Court to the issue of penalty. Disciplinary matters that are imposed under the various regulatory schemes do not have the primary object of penalising for misconduct, but rather the primary object is to protect the public and the reputation of the profession in question. The test of undue leniency involves considering whether, having regard to the material facts, the decision reached has due regard for the safety of the public and the reputation of the profession. In any particular case the issue is likely to be whether the disciplinary tribunal has reached a decision as to penalty that is manifestly inappropriate having regard to the practitioner's conduct and the interests of the public. The Court should place weight on the expertise of the tribunal that has been brought to bear in evaluating how best the needs of the public and the profession should be protected.

[29] The PCC's first reason concerned Ms McDonnell's exemplary character. The place of previous good character in the assessment of the appropriate penalty in professional disciplinary proceedings was considered by the Court of Appeal in Bolton v Law Society (1994) 1 WLR 512. A Solicitors' Disciplinary Tribunal found that a solicitor has misapplied funds and decided that he should not be struck off but should be suspended from practice for two years. Sir Thomas Bingham MR stated:

> "Because orders made by the tribunal are not primarily punitive, it follows that considerations which would ordinarily weigh in mitigation of punishment have less effect on the exercise of this

> jurisdiction than on the ordinary run of sentences imposed in criminal cases. It often happens that a solicitor appearing before the tribunal can adduce a wealth of glowing tributes from his professional brethren. He can often show that for him and his family the consequences of striking off or suspension would be little short of tragic. Often he will say, convincingly, that he has learned his lesson and will not offend again. On applying for restoration after striking off, all these points may be made, and the former solicitor may also be able to point to real efforts made to re-establish himself and redeem his reputation. All these matters are relevant and should be considered. But none of them touches the essential issue, which is the need to maintain among members of the public a well founded confidence that any solicitor whom they instruct will be a person of unquestionable integrity, probity and trustworthiness. Thus it can never be an objection to an order of suspension in an appropriate case that the solicitor may be unable to re-establish his practice when the period of suspension is past. If that proves, or appears, unlikely to be so the consequence for the individual and his family may be deeply unfortunate and unintended. But it does not make suspension the wrong order if it is otherwise right. The reputation of the profession is more important than the fortunes of any individual members. Membership of a profession brings many benefits, but that is a part of the price."

[30] This approach was followed in Gupta v General Medical Council (2002) 1 WLR 1691 where the Privy Council dealt with a finding by the Professional Conduct Committee of the General Medical Council that the registered medical practitioner had been guilty of serious professional misconduct and directed that his name be erased from the register. The Privy Council dismissed the appeal and held that the sanction of erasure was wholly appropriate for the protection of the public and the standing of the profession. Lord Rodger referred to the general approach of Sir Thomas Bingham MR in Bolton v Law Society and stated that the same approach falls to be applied in considering the sanction of erasure imposed by the Professional Conduct Committee of the General Medical Council.

[31] Exemplary conduct is relevant and should be taken into account in considering penalty. However it is not a reason for failing to impose a penalty in relation to a finding of misconduct if it is otherwise appropriate to do so.

[32] The PCC's second reason concerned the Colgan Report. The report was taken into account by the PCC when it came to consider penalty. No evidence was adduced as to the contents of the report but submissions were made in relation to its contents. The Colgan Report concerned an audit of health visiting in three Trusts namely Armagh and Dungannon, Craigavon and Banbridge and Newry and Mourne prepared in January 2002 by E Colgan, a Nurse Education Consultant. The audit involved a four strand approach comprising an audit of health visiting records, a health visitor survey, a service user survey and focus group meetings. The audit of health visiting records set out findings as to the level of record keeping in Craigavon and Banbridge. The health visitor survey found the monitoring of records as part of supervision in Craigavon and Banbridge as seen by some as very useful and by others as intimidating or even threatening and that some health visitors did not feel that supervision was supportive or allowed them to raise issues they would have liked to discuss. The Council describes the PCC's reliance on the report as a critical error and sets out what it has described as the report's general complimentary result. Ms McDonnell relies on the report as background information about practice in the three Trusts concerned and in furtherance of her plea that her performance was comparable to others and that the preferring of disciplinary charges was unfair.

[33] The PCC have not explained the nature of their reliance on the Colgan Report nor is it obvious from a consideration of the report. The Council and Ms McDonnell advanced different views on the significance of the report and it may be assumed that the PCC inclined to Ms McDonnell's view, but to what extent is unknown. If the objectives of disciplinary proceedings as stated above are to be achieved then a satisfactory explanation is required for the imposition of no penalty on the finding of misconduct on charge 1a in the present case. The reference to the Colgan Report does not provide any such explanation. In any event Ms McDonnell's view was that her record keeping was at least equal to that of others and it was unfair that she should be disciplined and penalised when others were not. A comparison with the treatment of others is relevant and should be taken into account. However it is not a reason for failing to take action on misconduct if it is otherwise appropriate to do so.

[34] The PCC's third reason concerned staffing shortages. Ms Maguire gave evidence that in the years 1996/1997 routine assessments were suspended due to pressure arising from maternity leave and sick leave. However there was no suspension of the obligation to complete the record keeping in respect of work undertaken. While this suspension was indicative of temporary staff shortages during a part of the period to which charge 1a related, that does not bear on the obligation to complete the records of work actually undertaken.

[35] The PCC's fourth reason was referred to in the transcript and concerned the circumstances particular to Ms McDonnell's case. Those circumstances were not identified and this would appear to be a reference to the first three reasons set out above.

[36] The Council complains that the PCC consideration of penalty does not refer to the primary object of protecting the public and reputation of the profession. Although there is no express reference to these matters I proceed on the basis that the PCC was indeed mindful of the proper significance of the public interest aspect of its deliberations.

[37] Counsel for Ms McDonnell objected to the contention that the absence of penalty was unduly lenient and emphasised among other matters that no harm had been shown to arise from the paperwork defects; that there were no complaints about Ms McDonnell; that many others had the same standard of record keeping; that the Hughes audit was a 100% audit and the Colgan Report was a selective audit; that Ms McDonnell had an excessive caseload; that there would be no value in a caution being imposed on Ms McDonnell and that deference ought to be accorded to the expert tribunal comprising the PCC.

[38] The absence of harm and of complaints are relevant matters but the public interest in public protection also concerns the risk of future harm. Ms McDonnell's caseload was found to be below average. While Ms McDonnell may have retired the value of a penalty being imposed for misconduct, where appropriate, relates to public confidence and the reputation of the profession. While the capacity of the tribunal to apply its expertise must be respected the Court must be prepared to intervene where a penalty is manifestly inappropriate.

[39] As set out above the four reasons advanced by the PCC for its decision on penalty are not adequate to explain what appears to be a penalty that is manifestly inappropriate. While it is accepted that the PCC was mindful of the public interest aspect of its deliberations the reasons advanced do not warrant the conclusion reached. The decision to apply no sanction is unduly lenient.

[40] The Council's guidelines provide for the power to request further information from the PCC, which power would have enabled the Council to seek further reasons for the PCC decision of 13 December 2004. As the Council failed to seek amplification of the PCC reasons Ms McDonnell contends that the Council should not be permitted to advance the claim to the Court that the PCC reasons were inadequate. The issue in the appeal is whether the absence of penalty was unduly lenient in the circumstances. The issue as to the adequacy of the reasons for the decision is an important but ancillary matter. The reasons offered by the PCC for the absence of penalty

are not adequate to explain the absence of penalty. The reasons offered do not provide any basis for concluding that the absence of penalty is a decision which a Disciplinary Tribunal having regard to the relevant facts and the object of the disciplinary proceedings could reasonably have imposed.

[41] The decision on penalty is manifestly inappropriate and unduly lenient and the decision will be quashed. It is ordered that the case of Ms McDonnell be remitted to the PCC to reconsider the decision as to the penalty to be imposed on Ms McDonnell in respect of the finding of misconduct under charge 1a of failing to maintain proper and accurate health visiting records, taking into account the terms of this judgment.