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Judgment: approved by the Court for handing down | *Delivered:* 01/02/11
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

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BETWEEN:

PATRICK JOSEPH ROGAN

Appellant;

-and-

THE NURSING AND MIDWIFERY COUNCIL

Respondent.

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GILLEN J

Application

[1] This is an appeal by Patrick Joseph Rogan, formerly a staff nurse in a male dementia ward at Downshire Hospital, against the finding of a Conduct and Competence Committee of the Nursing and Midwifery Council ("the CCC" or "the Panel") dated 13 September 2010. The appellant challenges the findings of fact made by the Panel in which it found allegations of misconduct against him proven and thereafter proceeded to make a striking off order.

Background

[2] The appellant was employed as a staff nurse in Ward 32, a male dementia ward, at Downshire Hospital. It is alleged by the respondent (NMC) that allegations of mistreatment of patients by the appellant came to light in August 2000 as a result of a complaint made by Isobel Tweedie a health care assistant. Subsequently another staff nurse Aby Mathew raised further allegations of mistreatment of patients and bullying and aggressive behaviour directed towards him between October 2004 and April 2006.

[3] The matter was investigated by the NMC and referred for a hearing before the Panel.

[4] The hearing before the Panel commenced on 11 January 2010. It was adjourned part-heard and resumed again on 27 April 2010 for a further five days. The Panel received evidence from four witnesses on behalf of the NMC namely William Walsh who had conducted the Trust investigation into the allegations, Michael O'Reilly the Ward Manager of Ward 32, Isobel Tweedie a health care assistant and Aby Mathew a staff nurse.

[5] The appellant pleaded guilty to one charge of the use of obscene language in front of a patient and health care assistant and the Panel found him guilty of the following allegations:

- Charge 3 – Striking a patient in the face
- Charge 4 – Striking a patient in the back
- Charge 5(a) - Gesticulating and shouting at Mr Mathew to go away
- Charge 5(b) – Shouting at Mr Mathew to "work away"
- Charge 5(c) – Repeatedly shouting at Mr Mathew and accusing him of having fed a patient who had spilt tea down his front.

[6] In short the Panel found proven the allegations made by Aby Mathew and dismissed the allegations made by Isobel Tweedie. The Panel spent a significant amount of time reaching its decision.

[7] The case adjourned to 6 September 2010 when the Panel's decision on misconduct and impairment (the second stage of hearing) was handed down. The Panel then further retired to consider the appropriate sanction, thereafter making a striking off order.

Statutory framework

[8] The NMC is the body responsible for regulation of the nursing and midwifery professions across the United Kingdom. It is a body corporate and a registered charity funded entirely on the annual subscriptions of the nurses and midwives on its register. It performs a number of important regulatory functions provided for under the Nursing and Midwifery Order 2001 ("the 2001 Order").

[9] In particular Article 3(4) provides:

> "The main objective of the Council in exercising its function shall be to safeguard the health and well-being of persons using or needing the services of registrants."

[10] Part V of the Order provides a framework for the adjudication of allegations against a nurse of impaired fitness to practise. Allegations of

misconduct are subject to an investigative process. Where it is considered there is a case to answer, these allegations are referred to the Panel which is empowered under Article 29 of the Order to impose a range of sanctions, the most serious of which is a striking off order.

[11] The Nursing and Midwifery (Fitness to Practise) Rules 2004 as amended by the Nursing and Midwifery (Fitness to Practise) (Amended) Rules 2007 ("the Rules") set out the procedure for CCC hearings. The statutory regime under Rule 24 as amended by the 2007 Rules provides for a three stage process as follows:

(a) The CCC considers the factual allegations and makes its findings based on oral and documentary evidence applying the civil standard of proof.

(b) Where findings of fact are made the CCC then goes on to consider whether –

(i) they amount to misconduct
(ii) if so, is the nurse's fitness to practise impaired?

Fitness to practise is defined as the suitability of the nurse to remain on the register without restriction. The determination of these issues involves an exercise of professional judgment by the CCC

(c) If the CCC concludes that fitness to practise is impaired it finally goes on to consider the appropriate sanction. Again this involves an exercise of the Panel's professional judgment. The power to make a striking off order arises under Article 29(5)(a) of the Order and is invoked in those cases where the Panel considers that the conduct is fundamentally incompatible with being a nurse.

[12] In the instant case the appellant's challenge is to the findings of fact. No challenge has been made to the subsequent determination on misconduct, impairment and sanction. It follows that unless and until the findings of fact are displaced, the striking off order remains in place.

[13] Article 29(9) of the Order provides that the person concerned may appeal to the appropriate court against an order made under paragraph (5).

Article 38(4)(b) defines the appropriate court as, in Northern Ireland, the High Court of Justice.

[14] Article 38(3) provides that on appeal the High Court may:

(a) Dismiss the appeal.

(b) Allow the appeal and quash the decision appealed against.

(c) Substitute for the decision appealed against any other decision that the Practise Committee concerned could have made.

(d) Remit the case to the Practise Committee concerned .. to be disposed of in accordance with the directions of the court.

Relevant authorities

[15] In the course of the hearing I have considered a number of authorities touching upon the principles in this matter including Ghosh v General Medical Council [2002] 1WLR 1915, GMC v Meadow [2006] EWCA Civ 1390, Raschid & Fatnani v MGC [2007] EWCA Civ 46, Gupta v GMC [2002] 1 WLR 169, Priess v General Dental Council [2001] WLR 1926, Azzam v GMC [2008] EWHC 2711 and Twibill v Pharmaceutical Society of Northern Ireland 2010 NIQB 137.

[16] From these authorities I have distilled the following principles relevant to this case. First, it is necessary for me to be satisfied before allowing this appeal that the decision of the panel has been shown to be wrong (see Priess v General Dental Council supra).

[17] Secondly appeals such as in the instant case are almost invariably conducted on the basis of transcripts. Allowance must be made for the advantage that the first instance body enjoyed having had the opportunity to observe at first hand and weigh up the credibility and reliability of the evidence given by the witnesses especially where credibility and reliability are crucial matters in issue. In many cases the advantage is very significant and an appellate court should be slow to interfere with the decisions on matters of fact taken into account and determined by the first instance body. (See Gupta v GMC).

[18] Thirdly the specific experience and expertise of the Panel has to be borne in mind. (see Azzam's case at paragraph 25 and Ghosh's case at page 1923 paragraph 34.)

Conclusions

[19] I have come to the conclusion that I find no error in the Panel's reasoning in this matter and consequently I have determined to dismiss the appellant's case. My reasons for so concluding are as follows.

[20] First, the judgment of the Panel deserves respect as the body best qualified to judge what the professional expects of its members. Essentially this case was determined on the basis of the competing credibility of Mr Mathew on the one hand and the appellant Mr Rogan on the other. On a number of occasions the Panel referred to their conclusions on the question of credibility of the two parties e.g. page 4 of the decision:

> "The Panel was therefore presented with an account by Mr Mathew and a denial by Mr Rogan. The Panel is of the view that Mr Mathew is a credible and reliable witness and gave consistent evidence in relation to this incident. The Panel notes that Mr Rogan denies this allegation. However the Panel preferred Mr Mathew's evidence and is satisfied, based on the evidence that it has heard that it is more likely than not that this incident occurred as described by Mr Mathew (*in relation to charge 3*). The Panel finds this charge proved."

[21] This was a lay panel of three people chaired by a non-legally qualified person but with a legal advisor present throughout. They had the advantage of seeing both Mr Mathew and Mr Rogan being examined and cross-examined by experienced legal counsel over a number of days in order to assess their credibility and reliability. I find no error in the course of the written decision that I have received and I fully recognise that their ability to assess the credibility of these witnesses is much greater than mine given that I am confined to the transcript.

[22] Mr McCann, who appeared on behalf of the appellant, sought to impugn the Panel's assessment in a number of respects. It was his contention that there was a clear objective basis on which it could be plausibly argued that the Panel's reliance on Mr Mathew amounted to a "credulous and unreasonable approach".

[23] Mr McCann outlined a number of such instances. First, in relation to charge 3 which referred to an incident in which the appellant allegedly slapped a patient on the face, Mr Mathew had allegedly given some differing accounts as to *when* the incident occurred. When he first reported the matter to the clinical services manager William Walsh on 16 August 2006 he claimed the incident occurred "6-8 months ago". He then made a witness statement to

the NMC on 1 June 2008 where he stated "I cannot recall exactly when the incident occurred but I believe it was towards the end of 2005". He made a further witness statement on 11 January 2010 at which he stated at paragraph 5 that the incident had occurred "between October 2005 and February 2006". In his direct evidence to the Panel he said that he was not sure when it took place.

[24] It was Mr McCann's contention that the Panel not only failed to consider the extent to which the vagueness of the evidence in itself constituted unreliability, but also the extent to which it deprived Joseph Rogan of an opportunity to challenge it e.g. it rendered him unable to inspect contemporaneous records of nursing notes, worksheets etc.

[25] I find nothing inherently implausible about a witness, after a period of some years, being somewhat imprecise about a time sequence. Albeit the parameters have been somewhat loose, the time frame itself has been consistent on the part of Mr Mathew. Mr McCann was able to exploit this in cross-examination of Mr Mathew and the Panel had ample opportunity to form an opinion as to whether it smacked of fabrication or whether it was the perfectly understandable imprecision of a truthful witness. In short I find nothing inherently implausible about the evidence as recorded on the transcript of Mr Mathew and I do not find any error on the part of the Panel in accepting this aspect of Mr Mathew's evidence.

[26] Secondly, Mr McCann took issue with Mr Mathew's failure to report the allegations at the time they had occurred. He had not mentioned them for example to a Ms Rae who was an adaptation coordinator whose job was to help him adapt to Northern Ireland and the work with which he was engaged. He complained to her about Rogan's aggressiveness towards him shortly after starting his work but did not mention the allegations that Rogan had attacked other patients. Mr Mathew had given an explanation grounded on his fear of the appellant who had allegedly acted in an aggressive manner towards him. He was concerned that any such action would attract Rogan's attention and he feared the consequent reaction towards him. The appellant had accepted in admitting charge 2(b) that his conduct was inappropriate at least on that occasion and he had admitted apologising to Mr Mathew in respect of charge 5(c). Once again, the Panel have had the opportunity of viewing and assessing Mr Mathew as to the credibility of this assertion in a way that I have not. I have no reason to find it in error in concluding that this was a plausible explanation for failing to report at the time.

[27] Thirdly counsel relied on the fact that not only did Mr Mathew fail to report the incidents alleged against Mr Rogan, but he did not make any record of it. He revealed in the course of his evidence before the Panel that he kept two diaries and on the second day of the hearing disclosed these diaries. These contain no record of the incidents contained in charges 3, 4 or 5 but did

specifically refer to exchanges between himself and Mr Rogan in November 2005 and April 2006 together with a reference to an unhappy exchange between Mathew and another woman called Patricia.

[28] In themselves I found nothing objectionable about him making entries about some matters and not others. Those that he had recorded directly involved himself whereas the charges dealt with issues involving another person namely Rogan. It was his case that he had commenced to make the entries which he did because colleagues had suggested to him that he ought to record instances of harassment.

[29] However Mr McCann took the matter somewhat further in light of the explanation given by the witness to the Panel as to why he had not recorded the incidents which were the subject of the charges. Mathew's explanation was that the November entry related to an incident of aggressive behaviour by the appellant which he had made on the advice of a colleague and that of 18 April 2006 was a prelude to him reporting that matter the following day. At the hearing he went on to say that he had intended to record the issues concerning the present charges in his diary but had initially simply omitted to do so and when he reconsidered thereafter entering them, he was uncertain as to the precise dates as to when they had occurred and who was present.

[30] Once again, basing my approach on the transcript, I find nothing inherently implausible about the entries that were made in the diary being confined to instances of personal harassment. It is an understandable explanation. In other words he was keeping a note of his specific problems with Rogan. Thus the entries in April and November and indeed the entry with the woman called Patricia in March 2006 recording difficulties with her all form a pattern. This puts them in a different genre from the incidents arising out of the charges involving Rogan. Again the Panel had the priceless advantage, denied to me, of watching the demeanour of the witness when giving this evidence. It is not without significance that the chairman (as recorded at page 455 in the transcript) specifically asked him about the lack of notes and was therefore in a good position to form an assessment of the credibility of his answers.

[31] I found Mr McCann's characterisation of the delayed emergence of the diaries as smacking of fabrication to be pure speculation and no more plausible than the explanation proffered by Ms McDonald on behalf of the respondent that he had simply brought them along on the off chance that they might conceivably have some relevance albeit they did not record the incidents which were the subject of the charges. Once again it was classically a matter for a Panel seeing and hearing the witness to make their own judgment and determination on his credibility in this regard.

[32] Mr McCann sought to introduce an element of fraud on the part of Mr Mathew by drawing attention to the entry in April 2006 which contained an additional piece of paper appended to the date in question upon which his account was written. He contrasted this with the November entry where he had simply extended his account from one day to the subsequent date in the diary. Mr McCann contrasted the two approaches by suggesting that he had added the additional piece of paper in April because it was impossible for him to make an entry on the subsequent date by virtue of the fact it was already the subject of a different entry and thus he fraudulently added an additional piece of paper. He drew attention to the fact that Mr Mathew had admitted in the course of his evidence about nursing notes for the period 3-4/8/06 that he had made a subsequent entry. I see nothing untoward about a nurse adding a rather inconsequential note to a previous entry in his notes.

[33] In short I consider Mr McCann's assertion to be to be entirely speculative without any foundation of fact to sustain it. It seemed to me a perfectly reasonable approach to have added an additional page of notes when the diary provided insufficient space for a record of one particular day. The fact that he had not done this on a previous occasion is no indication whatsoever that it was fraudulent on a later occasion. Similarly going back to correct an omission in a nursing note on one occasion is neither evidence of fraud nor improper conduct and certainly not indicative of a pattern of behaviour.

[34] The Panel had all these matters before them and watched Mr Mathew give his evidence and therefore had a far better opportunity than I have to determine by virtue of his demeanour and gait whether or not there was substance to these allegations when he was confronted with them. I have no reason to believe that the Panel was in error in coming to the conclusion that he was a credible witness.

[35] Mr McCann produced a carefully constructed argument to the effect that the Panel, whilst not guilty of bias, had allowed itself to be improperly influenced or prejudiced in a number of respects. First, whilst dismissing charges 1 and 2 based on the evidence of Isobel Tweedie, it had nonetheless somehow allowed these allegations to influence its thinking. Counsel argued that this was partly evidenced by the fact that an interim suspension order was put in place after the committee had heard Isobel Tweedie's evidence when the case had been adjourned for a number of months despite the fact that no such order was originally in place. Mr McCann asserted that the conclusion reached by the committee that Nurse Mathew had grounds to be afraid of Mr Rogan must have been influenced by Isobel Tweedie's evidence.

[36] Counsel further submitted that an adjournment application at the outset of the proceedings by counsel on behalf of the NMC in order to raise another allegation of assault – which application was refused by the Panel –

again had served to influence the Panel's decision-making. Mr McCann contended before me that a lay panel was in a wholly different position from judges or magistrates insofar as the latter can exclude such matters from their consideration when making a final determination whereas the instant Panel could not.

[37] If there had been any real substance to these complaints, I cannot understand why they were never raised at the hearing so that the Panel could have addressed them if necessary. Secondly, this Panel had the advantage of a legal advisor who would clearly have been conscious of any reference by any of the lay panel members to prejudicial material. Thirdly, I believe this Panel had demonstrated its independence of mind and commitment to a fair process by virtue of its dismissal of Mrs Tweedie's allegations and the refusal to permit an adjournment to allow a further charge. Far from demonstrating prejudice against the appellant, I consider it underlines the commitment of the Panel to fairness and transparency.

[38] Ms McDonald, who appeared on behalf of the respondent with Ms Brownlee, properly brought to my attention the provisions of r24(7) of the 2007 Rules which is one of the rules governing the order of proceedings at the hearing of such cases before this Panel. It makes express provision for the Panel to come to a conclusion after hearing submissions as to whether sufficient evidence has been presented to find the facts proved and make a determination as to whether the registrant has a case to answer. Parliament has thus clearly envisaged that this Panel will hear evidence which it will dismiss and yet continue to hear other material on different charges.

[39] I have read the judgment of Carnwath LJ in R (On the Application of Mahfouz) v Professional Conduct Committee of the General Medical Council [2004] EWCA Civ 233. This case involved prejudicial newspaper coverage having been read by members of the Professional Committee of the GMC. At paragraphs 23/24 the Judge said:

> "The jury is at one end of the spectrum of tribunals, in that the members would generally have no previous experience of court procedures and practices. Further along the line are magistrates' courts where the justices although not legally qualified should, by virtue of the training and experience, be better able to `put out of their minds matters that are irrelevant'. (See Johnson v Leicestershire Constabulary Times 7.10.98 per Simon Brown LJ).
>
> [24] The committee members in this case included two professionals and three lay members,

> selected from a panel of persons chosen as having experience in public life. We were told that the panel includes retired judges, justices of the peace, barristers, solicitors and academics. They can be assumed to understand the proper approach to issues of law and to be aware of the need to disregard irrelevant materials".(See also Arlidge Eady & Smith on Contempt 3rd Edition at paragraph 4-117).

[40] I have no doubt that the panel in this case, assisted by a legally qualified advisor, would also be able to understand the proper approach to issues of law and be aware of the need to disregard irrelevant material. I find no substance in the course of the decision, either expressly or impliedly, that leads me to the conclusion that they allowed prejudice of any kind to enter their minds or that they were tainted by the matters relied on by Mr McCann. The assertion to the contrary is an example of pure speculation which has no basis in fact or law. I consider that the evident care with which the decision has been drafted is indicative of the proper approach which this Panel has adopted.

[41] I make it clear that the decision to suspend the applicant during the lengthy adjournment after the evidence of Ms Tweedie seems to me to have been a perfectly logical step to take pending a final outcome of the case in order to ensure that the public was protected in the interim. It predicates no final determination on the matter and is an occurrence that is regularly reflected in court proceedings elsewhere when interim measures are often adopted pending a final determination.

[42] On a different tack, Mr McCann asserted that having rejected the Tweedie allegations, the Panel ought to have invoked that matter in aid of Rogan's credibility when assessing the allegations made by Mathew. I do not agree that this is necessary. The fact that Ms Tweedie's allegations were not proved to the satisfaction of the Panel was no indication that the allegations of Mr Mathew were similarly ill-founded or that Rogan was thus more credible than otherwise would have been the case when considering his denials .

[43] Counsel further attacked the credibility of Mr Mathew by reference to the fact that he had referred to a third incident when Rogan had been physically aggressive towards patients when making his statement to the NMC in June 2008. He did refer to the third incident in the course of his evidence and distinguished this from the other two incidents on the basis that he had only heard of the third incident rather than actually witnessing the first two. It was within the ambit of the Panel's margin of discretion, having heard the plaintiff, to have accepted this as a plausible explanation. I have

again no reason to believe that the panel paid any attention to an allegation that was not part of the charges put before them at the actual hearing. The legal advisor would have undoubtedly intervened had such an occurrence manifested itself.

[44] Finally, it was perfectly proper for the Panel in my view to take into account the conclusion that the appellant was unreliable and lacking in credibility when he raised allegations against Mr Mathew at the hearing of a serious nature which he had never raised before to any member of staff during the course of the Trust's disciplinary proceedings, during the course of proceedings in the employment tribunal which he conducted, at any stage in the NMC proceedings prior to the hearing itself or even in the formal complaint he had lodged with the NMC about Mr Mathew. At the Panel hearing he was subject to cross-examination about this matter and his excuse was at that he had been advised against so doing by his legal adviser. Whilst legal privilege between solicitor and client cannot be breached nonetheless the panel is entitled to consider whether this was a likely scenario or not in the context of judging credibility. The Panel had a clear opportunity to assess and judge his credibility on this issue in a manner denied to me .

[45] In all the circumstances I have come to the conclusion that there is no basis in fact or in law for this appeal to succeed and accordingly I dismiss the appellant's case. I shall invite the parties to address me as to the issue of costs.