

IN THE CARE TRIBUNAL

**APPEAL NO. 2007/5PC & 2007/5PVA
APPEAL NO 2007/6 & 2007/6PVA**

FC

V

DEPARTMENT OF HEALTH, SOCIAL SERVICES AND PUBLIC SAFETY

AMcG

V

DEPARTMENT OF HEALTH, SOCIAL SERVICES AND PUBLIC SAFETY

BEFORE:

**HARRY BLACK (CHAIRMAN)
MALACHY O'LOAN
ISOBEL ELLIOTT KNOX**

Hearing dates: 28th, 29th & 30th April 2008

1. The Appellants appeals against decisions of the Respondent dated 19th April 2007, namely to include them on the Disqualification from Working with Vulnerable Adults (DWVA) List and the Disqualification from Working with Children (DWC) List.
2. The Appellants were represented by Ms. J. Griffiths of the Citizen Advice Board and the Respondent was represented by Ms. D. McBride of Counsel, instructed by the Departmental Solicitor.
3. Prior to the commencement of the hearing the tribunal made a Restricted Reporting Order under Regulation 19(1) to protect the identities of the appellants, witnesses and vulnerable adults referred to in the proceedings.
4. THE LAW: Appeals against inclusion in the DWC and DWA lists are governed by Arts 11 and 42 of the Protection of Children and Vulnerable Adults (N.I.) Order 2003.
Art 42(3) provides that: If on appeal a Care 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 children, the Tribunal shall allow the appeal.

Art 11(3) is in similar terms and governs appeals against inclusion in the DWC List.

Thus, in order to dismiss the appeal, the Tribunal must be satisfied that:

- (i) there was misconduct;
 - (ii) the misconduct harmed a vulnerable adult, or placed a vulnerable adult at risk of harm; and
 - (iii) the individual is unsuitable to work with vulnerable adults.
5. The burden of proof is on the Department and the standard of proof is the civil standard, that is, the balance of probability.
6. The Order does not define misconduct. In Angela Mairs v Secretary of State (2004) 269 PC the Care Standards Tribunal in Great Britain concluded that in principle “a single act of negligence could constitute misconduct but in most cases the misconduct will be an incident forming part of a course of erroneous or incorrect behaviour undertaken by a person who knew or ought to have known that what he or she was doing was contrary either to the general law or to a written or unwritten code having particular application to his or her profession, trade or calling. In the context of a profession, for there to be a finding of misconduct there must be a falling short, whether by omission or commission, of the standards of conduct expected from members of that profession”. It further 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”.
7. Harm 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”.
8. The alleged misconduct which harmed or placed at risk of harm a vulnerable adult. At the material time both appellants were employed as Care Assistants in a residential Care Home. FC had commenced employment in the Home in 2002 and AMcG had been working there from 1991. The latter had experience as an Enrolled Nurse and was the senior carer on duty when the events occurred which gave rise to the current proceedings. The Care Home provided for about 20 residents and the tribunal heard that many were frail, elderly and some suffered from dementia. The Respondent called evidence in respect of two incidents concerning the appellant AMcG. Three witnesses gave evidence

about events on 31 Aug 06, hereinafter referred to as 'the commode incident'. Evidence was also called in respect of the second incident on the 10th and 11th September 06 concerning a resident JB. At the hearing of these appeals no evidence was called against FC regarding the commode incident. It was conceded that she had no culpability therein. The Respondent relied on evidence implicating her only in the second incident ie. concerning the resident JB.

As regards the commode incident it was a common case that the contents of a commode had been spilled in one of the resident's room. AMcG accepted that she had been responsible for the spillage and her evidence to the Tribunal was that she had cleaned it up as best she could but was unable to do the job effectively as she was not permitted to use the carpet shampoo machine during her night time shift. She informed the day staff about the situation when they arrived for the morning shift at 8.00a.m. AMcG left the premises at that time. Three witnesses who were on day duty on that morning, LQ, EL and NMCG gave evidence to the tribunal that the room was in a mess. Collectively they said that the smell was overpowering, faeces and urine could be seen splashed on the floor and furniture and in their opinion little or no effort had been made to clean the room. The case made against the appellant AMcG regarding this incident was that her failure to clean the room effectively, amounted to misconduct and that the elderly resident was placed at risk of harm due to the possibility of infection from the soiled state of the room.

The second incident concerning the elderly resident JB involved both appellants. The Tribunal heard evidence from EL, EM and LQ to the effect that when they came on duty on the morning of 11th September 06, the elderly resident JB was still in the sitting room and had not been to bed the previous evening. They described her as being partially undressed and soiled and as the faeces on her body and nearby were hardened they formed the view that she, JB, had been left in that state for a considerable period of time. AMcG had informed the day staff at changeover, approximately 08.00a.m. that JB had refused to go to bed but there had been no mention that her condition gave any cause for concern. It was a common case that JB could be unco-operative at times and aggressive to an extent but the evidence from the Respondents' witnesses suggested that she could be coaxed, cajoled and persuaded and generally any problems which she presented could be resolved without significant difficulty. Both appellants denied that JB was left in a soiled state. Their evidence was that JB had steadfastly refused to go to bed the previous evening, there was some evidence of soiling at that time as her trousers were in a bin and there was some slight bits of faeces on a pad nearby. Both appellants accepted that her lower body was covered with a blanket or cardigan. They stated that the appellant was safe and warm, she was given tea, regularly checked throughout the night and as she slept for most of the time, her condition gave no cause for concern. Their combined efforts to persuade her to get washed and cleaned and to go to bed failed. The appellants claimed that

when they last saw her shortly before 8.00a.m. there was no evidence of soiling either on her body or nearby on the carpet as claimed by the day staff.

9. The tribunal was faced with a conflict in the evidence. However, having observed and heard the witnesses give their evidence we reached a conclusion that it was more likely than not that JB was in the state described by the respondent's witnesses on the morning of 11th September 06. The three witnesses who gave the relevant evidence were credible in our view and they were consistent in their testimony and in cross examination. It was a common case that JB was partially clothed and the fact that it was admitted that there was some evidence of soiling on the previous evening around 10.00p.m. tends to support the case against the appellants. The witnesses were consistent about the faeces on JB's body and while it is impossible to be precise as to how long it was present we favour the view that it was not the result of something which happened almost immediately before the arrival of the day staff at around 8.00a.m. The witnesses were also so concerned about the state of JB to the extent that the matter was reported to management later that morning. We do not believe that this course of action would have been taken lightly had they not had serious concerns about the state of JB. It is also relevant in our view that immediate action was taken by the day staff to tend to JB, have her showered and cleaned and put to bed in due course. The tribunal heard evidence that some tension did exist between day staff and night staff concerning various job duties but it was not suggested that this had any bearing on this particular incident. It was not alleged that the day staff witnesses were motivated to report the appellants because of any spite, malice or ill feeling towards the appellants.

For the above reasons we prefer the evidence of the Respondent's witnesses and we find that JB was found in a totally unacceptable state on the morning in question. We accept that both appellants were faced with a difficult task in trying to attend to JB while at the same time provide care for up to twenty other residents but it is inexcusable that she was allowed to remain in a questionable state from the previous evening when it was apparent that there had been some evidence of soiling. We are satisfied that there was a falling short of the standards of conduct expected from members of the appellants' profession. The day staff were able to perform their duties when tasked to attend to JB on the morning in question. Proper performance of the appellants duties may have been difficult in the hours beforehand but we are not satisfied on the evidence available to us that proper performance was impossible. Accordingly we find that both appellants were guilty of misconduct.

10. As regards the commode incident we noted that it was not brought to the attention of management at the relevant time. We find that any documentation obtained in respect of this incident was more than likely prepared after the incident concerning JB. We have already referred to the tension which existed between day staff and night staff on some issues and we were also made aware

that sometimes a difference of opinion existed as to whether certain duties were the responsibility of care staff or domestic staff. We have no doubt that the witnesses had some concerns about the state of the room but it is difficult for us to be precise about its actual condition and whether or not its condition, at the material time, was the result of an omission by the appellant AMcG or a falling short of the standard expected of her. While we had some reason to believe that the appellant may have been able to do more about the situation than she was prepared to accept we cannot be satisfied on the evidence that her actions amounted to misconduct.

11. It was accepted by the parties that JB had suffered no physical harm but we cannot escape the conclusion that she was placed at the risk of harm. She was left for a considerable period of time overnight when it was apparent that she required cleaning and washing. The presence of faeces on her body, given the delicate nature of her skin due to her advanced years, was likely to have a detrimental effect on her health and well being. One must also consider the potential distress caused by the lack of dignity throughout the incident. We are therefore satisfied that the misconduct with regard to this incident, at the very least placed a vulnerable adult at risk of harm although we do accept that the potential for harm was somewhat reduced by the intervention of the day staff.
12. The appellant AMcG was the senior carer on duty on the night in question. She had significant responsibility towards the elderly residents. She had previous experience as a trained nurse and had worked in various hospitals. She had worked in this Care Home for 19 years. She clearly had training and a great deal of experience of working in residential care. Her evidence that the manager or owner were not very approachable to discuss problems was not compelling and she was aware that the needs of residents had priority over any domestic duties which may have required attention. We have considerable sympathy for her but the very fact that she had this experience and was the senior carer and allowed the situation with JB to develop raises questions about her suitability to work with vulnerable adults. We cannot be satisfied that given a similar situation arising in the future the appellant would act differently. The public at large and those who find themselves in situations where care is required have a right to expect that such people who are placed in such important positions of trust working with vulnerable adults are beyond reproach. We conclude that the appellant AMcG is unsuitable to work with vulnerable adults. We further conclude that public confidence in the provision of services to children would be undermined if the appellant was permitted to work with children, given the fact that she was deemed unsuitable to work with vulnerable adults. We conclude that she is also unsuitable to work with children. It is our unanimous decision that both appeals of AMcG be dismissed.
13. We place FC in a different category. She had lesser experience, she was the junior carer on duty on the night in question and while she also had responsibilities for the welfare of the residents she was subordinate to AMcG.

If it had been necessary to contact the manager or owner of the home to deal with the situation concerning JB we would expect that authority to lie with AMcG and not FC. We would expect FC to have looked to AMcG for guidance, instruction or supervision to deal with the situation. In our view it would have been the responsibility of AMcG to take a more proactive role to effectively deal with the situation. We also noted that it was FC who informed AMcG of the need to enter the incident with JB in the Report Book. We formed the impression that FC did accept that her performance fell below acceptable standards on the day in question and that she has learned from her mistakes. The fact that her conduct fell below par during one particular incident and given the facts of this case, this Tribunal takes the view that she is not unsuitable to work with vulnerable adults or children. We allow both appeals of FC.

Harry Black (CHAIRMAN)

16th May 2008