

IN THE CARE TRIBUNAL

RM

-v-

DEPARTMENT OF HEALTH, SOCIAL SERVICES AND PUBLIC SAFETY

Before:

J.A. Kenneth Irvine (Chairman)

Roberta Brownlee

Paul Archer

Hearing dates: 31st March – 1st April 2008

Application

1. The applicant 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 20th April 2007.

Representation

2. The Applicant was represented by Nick Jones of Counsel (instructed by McCann & McCann, Solicitors) and the Respondent was represented by Denise McBride of Counsel (instructed by the Departmental Solicitor).

Preliminary matters

3. At the Directions Hearing held on 31st March 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.

The evidence

4. For the Respondent Tribunal heard oral evidence from CS, Managing Director of the owner of the K Nursing Home; PK, nurse manager at the home during RM's employment there; JD who succeeded her as manager; KF, NA, EL and AP who were employed at the home. Tribunal heard oral evidence from the Applicant, RM.

5. Tribunal read written statements from JS the deputy manager of K and from three residents. For RM, it had before it a number of statements and references from other employers, from residents and from family of residents.

6. At the outset of the hearing Miss McBride handed in a written submission and Mr. Jones indicated that he would be conceding the issue of misconduct in respect of certain of the incidents alleged. He accepted that there had been a number of incidents of minor misconduct, that they fell below the standard required but only to a minor extent and that RM has subsequently addressed the issues. Both of these steps considerably assisted the Tribunal and concentrated the issues upon which its Decision had to be made.

The law

DWVA list

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

8. 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

9. 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

10. 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

11. 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".

12. "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

13. The burden of proof is upon the Department.

Standard of proof

14. 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

15. The basic facts were:

- i. The Appellant RM was a Care Worker employed at K and had worked there from 26th December 2002 to 6th October 2006.
- ii. K is a nursing home for the frail elderly.
- iii. In or about August 2006 another Care Assistant raised concerns about RM's treatment of some residents. An enquiry was instigated by management and statements taken from staff and residents, copies of which were before Tribunal.
- iv. RM denied the allegations and raised allegations against other members of staff and management. These other allegations were not pursued before Tribunal.

- v. On 6th October 2006 RM tendered her resignation.
- vi. On 6th November a Disciplinary Hearing took place, the panel consisting of CS and JD. RM attended with her Trade Union representative but left before the completion of the hearing. The panel found RM guilty of gross misconduct and stated that had she not previously resigned she would have been dismissed.
- vii. The matter was referred to the Respondent Department and RM's name was placed on the DWVA(NI) and DWC(NI) lists.

16. In the light of Counsel's acceptance that some of RM's actions did constitute misconduct and that it caused some harm to vulnerable adults Tribunal therefore had to consider only whether by her actions RM 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, RM's past conduct, the number of incidents, the nature and seriousness of the incidents, the training and support provided for RM, and the risk of RM repeating such conduct (which would include evidence of her recognition of the misconduct and its potentially harmful consequences).

17. CS and JD gave evidence regarding the disciplinary hearing. Apart from this hearing they had no direct knowledge of RM's conduct. CS described her as being 'extremely agitated' at the hearing, shouting and calling him a liar and eventually leaving before the proceedings were completed. CS said that in reaching their decision the panel did not take account of the hearsay element of some of the statements before them.

18. JD became manager of K after RM left. His evidence therefore related to the disciplinary hearing and to general matters of appropriate conduct. He felt on the basis of the statements before them that RM's actions constituted gross misconduct. He had no doubt that harm had been caused to residents, mainly emotional and psychological harm. He felt that RM having a long history of work and care would have undergone a lot of training. There appeared to be a lack of insight into the gravity of what had happened. While accepting that all people can have a 'bad day', this should not impinge upon a duty of care.

19. KF's evidence related to a number of residents. She thought that RM did not take account of the emotional problems of some residents, that her moods fluctuated and this impinged upon her care of residents, that while she could be very nice and caring she could also be short tempered with residents.

20. NA described further incidents with residents. She said that these happened in May or June 2006 and that she had reported them a few weeks later. She told Tribunal that she had reported them because one of the residents, RF, was upset and she was terminally ill. There had been an allegation that NA had reported RM because RM had gone out with NA's son and had ceased doing so but NA denied that this was the case, saying that they had only gone for a drink. She told Tribunal that she did not report the incidents at the time because the deputy manager, JS, (her immediate

superior) was off at the time.

21. EL described an incident with a resident PB, alleging that RM had shouted at her. She said that she had reported the incident to management and that it had occurred in 2006, shortly before the investigation. She referred in her witness statement to other alleged incidents but told Tribunal that she had not considered them serious enough to report. She told Tribunal that it was only in the last year that RM was sharp with residents; prior to that there was no cause for concern.

22. AP described an incident involving resident EL at whom RM was alleged to have shouted. From AP's evidence it would appear that this incident took place in summer 2006. She had not reported it. It was unclear to Tribunal why not. She agreed that she did not see RM harm EL in any way.

23. PK had been nurse manager during RM's time at K and had therefore worked with her for about four years. She said in her witness statement that she 'quickly identified that R was not a team player'. However, she told Tribunal that she did not really have any concerns about RM's attitude to residents until the present investigation and there were no concerns that her moods affected treatment of residents up to that point. She confirmed that no serious issues arose in the early years of employment, that there were no problems which would have led to the possibility of harm in the first three years. She did, however, describe RM as 'hard work'. Following a report from the deputy manager a verbal warning was issued on 25th August 2006 in respect of incidents of rudeness to staff and residents. Copy of this had been produced to Tribunal on the morning of the hearing. PK had caused to be interviewed ten or fifteen members of staff and residents and noted their responses.

24. Tribunal heard extensive evidence from RM. She described how she had worked for twelve years as a Care Assistant and had never had any complaints prior to those presently before the Tribunal. She gave her version of the various events previously described. She accepted that, upon reflexion, she could have handled the matters 'a whole lot better'. She denied being 'sharp and short' with residents, rather that she was 'firm'. She accepted that there was room for improvement. She told Tribunal that she had not had any vulnerable adult training until a late stage in her employment and had never had any training in how to deal with complaints from patients. (Tribunal found nothing in the personnel records to contradict this.) She had stated in a letter to the disciplinary panel (copy of which was before Tribunal) that PK had used her to run messages and to help with care of her dogs. On her personnel file there was a memo following palliative care training in May 2006 which was in RM's handwriting. She stated that this training was prior to the incidents in question.

Suitability

25. The Care Standards Tribunal in Great Britain has in a number of cases given guidance with regard to the issue of suitability.

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.'

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.'

26. a. RM admitted that certain of the incidents happened and that harm (emotional) was caused thereby. Tribunal had no reason not to believe that other incidents also happened.

b. Accepting that there was misconduct, Tribunal considered the gravity of the misconduct. Notwithstanding the finding of the disciplinary panel that some of the matters constituted gross misconduct for their purposes Tribunal does not consider that any of the incidents individually would justify a finding of unsuitability. It then had to consider whether even taken together they would do so.

c. It was accepted by RM that 'harm' had been caused. Apart from one minor incident which would appear to have been accidental, there had not been any case of physical harm; all had been emotional or psychological. Just as there can be degrees of misconduct there must be degrees of harm and Tribunal finds that in all of the cases before it any harm caused was of a minor nature (not, of course, that that makes it acceptable). There was no evidence adduced to show any lasting effect on the residents.

d. Tribunal's main concern was as to the possibility of repetition. In considering this element it looked at RM's past history (both with K and elsewhere), the nature of the working environment (management and support), the gravity of the incidents, her willingness to acknowledge any shortcomings and to accept the need for improvement.

e. She had a clear work history for the best part of twelve years. This was evidenced by references from the previous employer and indeed by the management of K which seemed to be satisfied with her work up until the summer 2006 sequence. The employer for whom she worked after leaving K also gave a positive reference. The incidents themselves all occurred within a short period of time.

f. Her previous employer had provided a reference in which it was stated that, 'Throughout her employment there were never any complaints or problems raised about [R]'s work or conduct as an employee.' The file at K contained an appraisal report dated 18th January 2003 which described her as being, 'very patient with residents' and 'demonstrates genuine interest in her work'. The only other appraisal on her file was undated but appears to have been at a later date and says that, '[R] has a particular insight into challenging behaviour and deals with this very effectively.' Both of these appraisals were signed by PK.

g. Tribunal has already dealt with the gravity of the misconduct at b & c above.

h. At the end of the day, Tribunal felt that having considered all of these factors, in particular the length of RM's clear record and the degree of the misconduct involved and harm caused, the correct approach was to ask itself

what was the likelihood of a repetition of any misconduct and also to ask whether public confidence would be adversely affected if the Applicant were to be permitted to continue in health and social care work. The probability of repetition must be a matter of judgment in each case and, taking a broad view of all of the evidence before it, Tribunal concluded that it was less likely than not that there was a risk that RM would repeat the behaviour. The question of suitability must be decided not as at the date of the incident but at the date of the hearing. Tribunal accepted that, whether or not late in the day, RM is now aware of her shortcomings and willing to remedy them. It did not feel that public confidence would be adversely affected if she were to be permitted to continue in health and social care work.

Decision

27. It is the unanimous decision of the Tribunal that Applicant's appeal be allowed.

28. While Tribunal does not have any power to impose any condition upon RM it would suggest that it would be prudent (for her own benefit as much as for public protection) that she should work under supervision for a period of at least six months following her removal from the lists. It also recommends that she should undergo suitable training to assist her to cope. She needs to learn very serious lessons about her attitude and her inter-personal skills (and appears willing to do so) and needs to put in place a training course to address these problems.

29. 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. PK was RM's manager for three years prior to the subject incidents and had not identified any training needs for her.
- b. Management structure did not seem to have been adequately geared to deal with a situation such as that which arose.
- c. Management training records and staff appraisals as evidenced by RM's personnel file would appear to be lacking in detail.
- d. It would appear that care of residents may have been jeopardized if RM, when counted in care hours, was being used to run personal messages for another member of staff. Tribunal felt that, despite the denials, it was more likely than not that there was some truth in RM's allegations in this respect.

Appeal allowed.

J.A.Kenneth Irvine (Chairman)
Roberta Brownlee
Paul Archer

2nd April 2008