APPEAL NO: 2009/3PC & 2009/3PVA

IN THE CARE TRIBUNAL

MJ

V

DEPARTMENT OF HEALTH, SOCIAL SERVICES AND PUBLIC SAFETY

BEFORE: HARRY BLACK (CHAIRMAN)
CHRISTINE McLAUGHLIN
FERGUS CULLEN

Hearing dates: 22nd, 23rd, and 24th February 2010.

1. The Appellant appeals under Art 11(1)(a) and Art 42(1)(a) of the Protection of Children and Vulnerable Adults (N.I.) Order 2003 against two decisions of the Department of Health, Social Services and Public Safety to include her on the Disqualification from Working with Children (DWC) List and the Disqualification from Working with Vulnerable Adults (DWVA) List. Both decisions are dated 24th.April 2009.

2. The Appellant was represented by Mr. O'Brien B.L. instructed by Patrick Fahy & Co. Solicitors and the Respondent was represented by Ms. McBride B.L. instructed by the Departmental Solicitor.

3. At the outset of the hearing the Tribunal made a Restricted Reporting Order under Reg. 19(1) of the Care Tribunal Regulations (N.I.) 2005 to protect the identities of the appellant, witnesses and the vulnerable adults referred to in the proceedings.

The Law

4. Appeals against inclusion in the DWC and DWVA Lists are governed by Arts. 11 and 42 of the Protection of Children and Vulnerable Adults (Northern Ireland) Order 2003.

5. Art. 42(3) provides that: if on an appeal ...... 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.

6. Art. 11(3) is similar in terms with regard to appeals against inclusion in the (DWC) list.

7. Thus in order to dismiss the appeal the tribunal must be satisfied that :
   (i) there was misconduct;
   (ii) the misconduct harmed or placed a vulnerable adult at the risk of harm; and
   (iii) the individual is unsuitable to work with vulnerable adults.

8. The burden of proof is on the Department and the standard of proof is the civil standard, that is, the balance of probabilities.

Background

9. The appellant MJ was employed as a carer by SCS, a Company which provided a caring service to individuals in their own home. Most of these individuals, referred to as clients or service users, are either elderly or generally incapable of attending to their own care due to various serious illnesses and disabilities. The appellant had a previous period of employment with the company until 1999 and rejoined in 2003 after a four year break. The Company has anything from 200 to 400 employees.

10.It was alleged that the appellant was guilty of misconduct in that generally she was rough with clients and intimidated them. It was claimed that she was abusive and rude and rushed her calls. Particular allegations included specific foul language to one client, attending alone for calls (double up calls) which required the attendance of two carers, attending a 'time critical call' at a time outside the specified period and other specific allegations relating to failings and omissions in the provision of care to particular clients.

11.Disciplinary proceedings had been brought against the appellant by her employer resulting in a final written warning in October 2007 and subsequent dismissal in March 2008.

12.Although there was no evidence of any of the clients having suffered actual physical harm it was submitted that some had suffered upset and distress amounting to emotional harm and by reason of the appellant's alleged misconduct she had also placed the clients at risk of harm.

Evidence

13.In addition to the written statements and material provided to the Tribunal in advance of the hearing, the Department called HF, LD, KC and MB to give oral evidence. These witnesses were also employed as carers by the Company and had on occasions worked alongside MJ, the appellant, in the course of their employment. The Tribunal also heard oral evidence from two Social Workers, KH and PMcG regarding complaints made by clients against MJ and which were conveyed to the appellant's employer. The final witness called by the Respondent to give oral evidence was AMcC the Managing Director of the Company (Employer). The appellant MJ gave oral evidence at the hearing. No other witnesses were called to give oral evidence.

14.In the context of a Tribunal hearing, observing the manner in which a witness gives his or her evidence and how he or she behaves or responds to questioning is an important part of the process. The Panel

had no difficulty in accepting the evidence given by the Social Workers in that they were merely conveying accounts and information which had been provided to them by others. These witnesses were not in a position to comment on the accuracy of the information given to them regarding the alleged misconduct as they were not present when it allegedly occurred. They gave their evidence in a forthright and confident manner.

15. The evidence given by some of the care workers however did present significant difficulties for the Panel. For example, HF, now 20years old, was hesitant in demeanour, she displayed a reluctance to tell the Tribunal about matters which she had previously described in a written statement and on cross examination she confirmed that some entries in the statement alleging fear of MJ and that she found her extremely intimidating were untrue. The nature of how her written statement was compiled, apparently over the telephone in part was also questionable. Her admission that she signed the statement but didn't read over it was both frank and alarming. Some allowance can be made due to the fact that she was only 17 years old at the time of the alleged incident relating to the client CD and giving evidence at the hearing was 'nerve wrecking' but the reliability of her overall evidence was significantly undermined.

16. There were other examples of difficulties with the oral evidence. KC's oral evidence concerning the use of a hoist with client MG in the presence of MJ conflicted sharply with the account given in her written statement and there were inconsistencies in her evidence regarding whether or not she reported the allegations of misconduct to her employers. On some occasions she claimed that reports were made and on other occasions she adhered to claims that she did not report MJ as she did not feel that it was her place to do so. She was prepared to accept that she had difficulty remembering some things and also suggested that there was some confusion in the way her evidence appeared in her written statement. In fairness to KC she did accept that client LG's account, regarding the allegation that MJ had left her in darkness temporarily by switching off a light, was difficult for her(KC) to understand.

17. Other care workers admitted a reluctance to report matters to employers. This was confirmed by AMcC, the Managing Director of the Company. However the absence of a contemporaneous report followed up by immediate investigation with matters being formally documented at the relevant time does nothing to support the accuracy or the veracity of accounts given many months after the alleged incident. For example, LD claimed that MJ had threatened to hit her. This was a serious allegation which was not documented until 5 months later. LD could not offer any reason as to why this was the case nor could she remember the type of words used in the threat. Given the robust denial by MJ that the incident had occurred the Panel was conscious of authority that the more serious the allegation the stronger must be the evidence before a finding is made that the allegation is proved on the balance of probabilities. We did not find the evidence to be strong in this regard.

18. Sadly some of the clients who allegedly were the victims of the alleged misconduct have since passed away and the Panel did not have the benefit of hearing direct oral evidence from these sources. Nor did the Panel have witness statements from the clients which is understandable in the circumstances. Whilst this Tribunal, by virtue of Reg. 23(1) of the Care Tribunal Regulations(N.I.) 2005, may consider any evidence, whether or not such evidence would be admissible in a court of law it cannot be overlooked that direct oral evidence given in person by a witness at the hearing is generally preferable to that contained in a written statement. As stated earlier this is an important part of the process and provides an opportunity for a Panel to assess what weight to attribute to any particular piece of evidence. In cases where there is a robust denial of wrongdoing, as in this case, apart from an admission of foul language relating to the client CD, the importance of oral testimony is of far greater importance. We did not, for example, attach any degree of weight to evidence of anonymous complaints or allegations made by persons who were not prepared to follow them up. The evidence of a list of clients refusing to have MJ back in their house was also called into question given the existence of a letter purporting to come from a daughter of one of those clients, DC, praising the professional manner in which MJ cared for her father.

19. The oral evidence which the Panel heard in this case clearly contained inconsistencies and inaccuracies to the extent that it was impossible for the Panel to accept it as broadly reliable. It would have been wrong and unfair to the appellant for the Panel to select and accept some evidence which was adverse to her case while rejecting other parts which were clearly inaccurate and in some details untrue. Similarly, although some written statements and evidence had been obtained from witnesses who did not give oral testimony we were reluctant to attach much weight to the allegations contained therein. In the absence of these witnesses attending the hearing we regarded their written evidence as being of fairly limited evidential value. The finding which we made was that the appellant, on her own admission, was guilty of misconduct in using foul language to CD and in her reference to CD following investigations of a complaint about his care. It was noted that this misconduct was investigated by management and a final written warning was administered. It did not result in the appellant's dismissal. We also found that although CD was likely to have been upset when he was sworn at we were not persuaded, on the available evidence that he had been harmed or placed at risk of harm, harm meaning ill treatment or the impairment of health and development.

20. MJ gave oral evidence to the Tribunal. Apart from her admission regarding foul language regarding CD, she robustly denied the allegations that she had been guilty of misconduct with regard to her daily care of clients. She stated that she attended double up calls alone because another carer had failed to attend on occasions. There was some evidence to support this claim and more importantly there was no evidence before the Tribunal that in providing care on her own she had put the client at risk of harm. Similarly she stated that the time critical calls were changed with consent and sometimes at the request of members of client's families. While she should have reported these matters to management we regard these lapses as indicative of incidences of poor working practices as opposed to misconduct. It was noted that no complaints were forthcoming from clients regarding the quality of care provided in the double up or time critical calls.

21. While it is not in doubt that the care workers who did give evidence are professional in the level and quality of care which they provide to the clients there is no doubt that there was a general reluctance to bring matters of concern to the attention of their superiors. This has no place in the care profession. Matters of concern should be reported promptly, documented and immediately investigated and appropriate action taken. This provides protection not only for the client but also affords protection for the employee and employer should any further enquiries or hearings arise. Delay in dealing promptly and efficiently with matters of concern will ultimately lead to confusion, inaccuracies and inconsistencies giving rise to questions about reliability of evidence as is apparent in this case.

22. On the available evidence we find that although the appellant was guilty of misconduct as set out in relation to verbal abuse of CD we are not satisfied to the required standard that CD was harmed or placed at risk of harm. On the available evidence we are not satisfied that it has been proved to the required standard that the appellant was guilty of misconduct in any other regard which harmed or placed at risk of harm a vulnerable adult.

23. It is the unanimous decision of the Tribunal that both appeals are allowed.

HARRY BLACK (Chairman)

23 March 2010.