

IN THE CARE TRIBUNAL

Between Innocent Makhathini (Appellant)

and

Northern Ireland Social Care Council (Respondent)

Before Diane Drennan (Chairman)

Panel Members: Maureen Ferris & Paul Archer

Hearing held at the Tribunal Hearing Centre Bedford House, Belfast on the 31st July 2013

Appeal

1. Innocent Makhathini ('the appellant') appeals under section 15 of the Health and Personal Social Services Act (Northern Ireland) 2001 against the decision of the Registration Committee of the Northern Ireland Social Care Council ('the Council') dated 24th January 2013 to refuse to register him onto the Social Care register.

Representation

2. The appellant appeared in person and the respondent was represented by Mr Mark Scott of the Directorate of Legal Services (DLS), solicitor.

Preliminary hearing

3. At a preliminary hearing on 15th May 2013, directions were made by the Tribunal Chairman dealing with the exchange of documents, the preparation of a Tribunal bundle and the fixing of hearing dates. A third party disclosure order was made on the same date asking for relevant documents from the appellant's employer.

The Law

4. Section 3(1) of the Health & Personal Services Act (Northern Ireland) 2001 ('the 2001 Act') requires the respondent to maintain a register of social workers and social care workers. Section 4(1) of the Act states that an application for registration must be made to the Council in accordance with the relevant rules which are the NISCC (Registration) Rules 2012.
5. Rule 4(9)(b) of the 2012 Rules states that the Council shall not grant an application for Registration unless "It is satisfied as to the applicant's good character, conduct, competence and health (including physical and mental fitness to perform the work of persons registered in the part of the register in which registration is sought)".
6. Section 9 of the 2001 Act provides for the preparation by the Council of Codes of Practice laying down standards of conduct and practice expected of social care workers and a requirement for the code to be taken into account by the Council in making a decision and also in any proceedings on an appeal against such a decision. Such a code of practice was issued by the Council in September 2002.
7. Rule 15(1)(a) of the NISCC (Registration) Rules 2012 require the Council to refer to the Registration Committee "any application for registration, or renewal of registration, which it is not minded to grant".
8. Section 15(2) of the 2001 Act provides for an appeal against a decision of the Council in respect of registration to lie to the Care Tribunal. By section 15(3) of the 2001 Act: "On an appeal against a decision, the Care Tribunal may confirm the decision or direct that it shall not have effect".

Burden and standard of proof

9. The burden of proof is on the Appellant. It is for the appellant (or the applicant before the Registration Committee) to show that he or she is a person who meets the standards of good character, conduct etc. as set down in rule 4(9)(b) of the 2012 Rules. (Northern Ireland Care Tribunal case of **DS v NISCC: NISCC/1/2009** at paragraph 9).
The standard of proof is the civil standard, that is, the balance of probability, as defined in **Re H and others (Minors)** [1995] UKHL 16 at paragraph 73: "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".

Background

10. Innocent Makhathini (the appellant) was born on the 3rd November 1972. On 6th November 2006, he commenced employment with AM Care Centre (the name of the establishment has been anonymised by the Tribunal) (as per his contract of employment) as a care assistant, undertaking duties with elderly and vulnerable residents.
11. On the 8th April 2011, the Council received a PSNI notification (dated 5th April 2011) that the appellant had been convicted at Laganside Court on 29th March 2011 of 'aggravated assault on a female or boy under 14 years', following an incident which took place on the 16th January 2011. The appellant received 6 months imprisonment suspended for two years. On 11th April a letter was sent by the Council to the appellant to Flat 1C R Drive, Belfast (the address given in the PSNI notification, which the Tribunal has anonymised), giving details of the conviction and asking whether the appellant wished to make any comment to the Council.
12. The appellant was not registered on the Social Care register, therefore the Council did not investigate further, although the information supplied by the PSNI was retained by them to be used at a later stage if registration was applied for.
13. The appellant filled out an application form for NISCC registration as a social care worker. His form was verified and endorsed by Ms AD, the Nurse Manager at AM Care Centre on the 25th April 2012. The appellant signed the form on the same date. The appellant, as part of his application 'pack' received guidance notes for applications to the Social Care register and the NISCC Code of Practice for Social Care Workers. The application was received by the Council on the 3rd August 2012.
14. The application form filled in by the appellant stated, at section 7, the following:

“Applicants must disclose all details on their application form of any caution, binding-over, conviction or pending charges. The NISCC can refuse to register you if you give false information or have withheld relevant details on your application....”
15. Section 7.2 of section 7 opened with the question: “Have you ever been convicted of a criminal offence in the UK, or any other country”? Below this question were two boxes marked ‘Yes’ and ‘No’ and below the boxes was a table with four columns, headed ‘Details of conviction’, ‘Date of conviction (dd/mm/yy)’, ‘Court where you were convicted’ and ‘Sanction applied’. The

appellant clearly ticked the 'Yes' box, but there was also a definite mark in the 'No' box. Under 'Details of conviction,' the appellant wrote the word 'assault', Under 'Date of Conviction', he wrote '2011' and under 'Court where you were convicted' he wrote 'Belfast'. The appellant left the column 'Sanction applied' blank.

16. On the 5th November 2012, AD was telephoned by a Council representative who stated that the appellant had declared a criminal conviction on his application form but gave her no information about it.
17. Following the phone call from the Council, AD met with the appellant on the 5th November 2012, discussed the conviction and whether details of it were on the form when she signed it.
18. The appellant was sent a form from the Council entitled 'Further information on self-disclosure' to be completed by him. He attended the Council's offices on 8th November 2012 and completed the form with assistance from a Council employee. The form was signed by the appellant. On the form the appellant stated that there was an argument between himself and his wife, the police were called and he received a sentence suspended for two years. He also stated: "I didn't tell A my manager at the time. She knows now..."
19. On the 9th November 2012, AD was contacted by a Council employee who gave her details about the conviction received by the appellant.
20. On 12th November 2012, the appellant again met with AD and there were further discussions relating to the conviction and whether details of it were on the appellant's application form. At this meeting AD referred to "a tick in the 'No' box" and informed the appellant that the matter was going through the disciplinary process. The appellant continued to work at AM Care Centre.
21. On 27th November 2012, following an email dated 9th November 2012 from the Council, Detective /Chief Inspector Iain Hall wrote to the Director of Registration at the Council, giving details of the incident on 16th January 2011 which led to the appellant's conviction. The police attended Flat 1C R Drive , Belfast and spoke with GM, (the appellant's wife) who stated that her husband, the appellant, had punched her in the face. Police observed that G had slight swelling under her left eye and her left eye was bloodshot. Police arrested the appellant and conveyed him to Grosvenor Road for questioning.
22. AM Care Centre initiated a disciplinary investigation on the basis of, firstly, a breach of trust surrounding the appellant's NISCC application and, secondly, because the appellant did not inform his Nurse Manager Ms AD or indicate on the application form that he had a criminal conviction. On 5th December 2012,

a disciplinary hearing was held and on 6th December 2012 the appellant was sent a letter stating that he had caused a breach of trust between himself and the management of the home. He was issued with a final written warning under the company disciplinary procedure.

23. The appellant appealed against the final written warning. The appeal hearing was held on the 18th December 2012 and upheld the decision made on 5th December to issue the appellant with a final written warning.

24. The NISCC Registration Committee met on the 22nd January 2013. The appellant attended but was unrepresented. The Committee decided to refuse the appellant's application for registration onto the Social Care Register under paragraph 20(16)(b) of the NISCC (Registration) Rules 2012, which states that: "The Registration Committee may - ...refuse the application for registration....."

25. The Council stated in its decision that:

1. "The applicant intentionally omitted to include reference to a conviction at 7.2 of his application for registration with NISCC (at the time of his manager's endorsement of that form) in an attempt to avoid his conviction coming to the attention of his employers at AM Care Centre. The applicant had been convicted at Laganside Court House on 29th March 2011 of aggravated assault on his wife. The offence occurred on 16th January 2011. The Council's view was that AFTER endorsement of his application, the applicant endeavoured to conceal the box 'no' at 6 and 7.2, and then ticked the 'yes' box together with a statement that he has a conviction for 'assault'. The Council maintain that these actions are evidence of dishonesty on the part of the applicant.

2. The applicant has minimised his conviction to his employer and to NISCC".

26. Following a formal meeting with his employers, AM Care Centre, the appellant's employment was terminated on 4th February 2013.

27. On 15th February 2013, the appellant in his appeal application set out his reasons for Appeal: these can be summarised as follows:

- i. The appellant denied that he intentionally omitted to include reference to a conviction.
- ii. He denied minimising the conviction.
- iii. He referred to his good employment record while employed at AM Care Centre.

- iv. The appellant stated that even after his manager became aware of his conviction he was never suspended.
- v. The appellant referred to no other incident of misconduct or change in his behaviour, stating that “everything was OK until I was officially discharged from work in February 2013”.
- vi. The appellant alleged that the Committee (the Registration Committee) were not concerned with the protection of the public because the matter referred to was not work related, but a misunderstanding between himself and his wife.

Evidence and Submissions

28. The Tribunal had the benefit of viewing the applicant’s original application form, of reading a full written transcript of the hearing before the Registration Committee, as well as a copy of the Appellant’s personnel file, the Notice of Decision (dated 24th January 2013) and other documents contained within the Tribunal bundle.

Summary of Respondent’s Evidence

29. The Tribunal heard oral evidence from Ms AD, now Clinical Compliance Manager with the W group of homes, who was Nurse Manager of AM Care Centre at the time the appellant worked there.

30. AD was referred to section 7.2 on the appellant’s form in relation to criminal convictions and was shown the word ‘assault’ under ‘Details of Conviction’ and ‘2011’ and ‘Belfast’ in relation to the date and court. She firmly stated that she did not see these details at the time she endorsed the form, adding that she would have spoken to the appellant if these had been on the form and that a reference to ‘assault’ would have ‘alerted alarm bells’. She stated in her evidence that she was 110% certain that there were no assault details on the form.

31. AD gave evidence that she dealt with about 40 forms over a period of several months; that she was careful with these and did not just flick through them. She was referred to section 8 on the appellant’s form where she made a note in relation to the fact that she had not counter-signed the proof of address as an example of the care she took in completing the forms.

32. She became aware of a ‘conviction’ on 5th November 2012 after a telephone call from a representative of the Council, but was given no details of same. A

minuted meeting was held with the appellant on 5th November 2012 where he maintained that details of the assault were on his form at the time of endorsement by AD and she maintained that they were not.

33. AD gave evidence that the appellant had referred to the offence as a 'minor thing' and had stated that he could not get residency if he had an offence and he therefore did not divulge it.
34. She stated that once details of the assault were known about, she contacted the Care Centre's HR (Human Resources) Manager, MC and proceeded with disciplinary proceedings for breach of trust and falsification of documents. AD would have preferred that the appellant did not work for her and that disciplinary proceedings were taken for gross misconduct, but was advised by HR and DAS (legal advisors) to wait for the decision of the NISCC Registration Committee.
35. AD stated, that from her experience as a staff trainer, that staff in the AM Care Centre would be aware that issues outside work were relevant and that any convictions should be disclosed, although she did admit under cross-examination by the appellant that at the time the appellant was employed by AM Care Centre there was no clear policy in place regarding the disclosure of convictions.
36. She was referred to sections 2.1 and 2.2 of the NISCC Code of Practice for Social Care Workers which stated that a social care worker should be 'honest and trustworthy' and should communicate in 'an appropriate, open, accurate and straight-forward way'. AD considered that the appellant would not fulfil these two requirements and stated that she worked on the assumption that employees fill out forms honestly and accurately.

Summary of Appellant's evidence

37. Mr GMcK of the Council gave evidence on behalf of the appellant. His role was to examine the cover sheet, to check if each section was covered and to refer to the registration section if necessary. Although he remembered the appellant, he could not remember specific details about his form.
38. The appellant gave evidence in person and referred to each of his grounds of appeal in turn. He stated that he did put details of the conviction on his application form before he gave it to Ms AD. He maintained this position under cross examination, but admitted that he did not fill in details of the sanction because he did not understand and thought that the Council could obtain this

information from the police; he obtained no information from his solicitor. He stated that he had put the offence down on his Home Office forms.

39. In relation to the mark at 7.2 of the form in the 'No' box, the appellant said he could not remember anything about the mark.
40. The appellant maintained in his evidence and under cross-examination that he did not minimise the conviction. He said the incident was a minor thing because he maintained that it did not happen, although he accepted under cross-examination that a conviction for aggravated assault is a serious matter.
41. In relation to ground 3 of the appellant's grounds of appeal, the respondent accepted that there was no other disciplinary action noted against the appellant, apart from the disciplinary action which resulted in the final written warning noted in the letter to the appellant dated 6th December 2012.
42. The appellant referred to grounds 4 and 5 of the appeal and added that after Ms AD knew of his conviction he was not suspended and continued to work. He described how he liked working with elderly people and stated that relatives and residents were happy with his work.
43. In answer to questioning from the Tribunal Panel in relation to the letter of 11th April 2011 sent to the Appellant by the Council, the appellant stated that he did not live at Flat 1C R Drive, Belfast in April 2011 and he never received the letter.
44. Under cross-examination, the appellant, although maintaining that details of the conviction were on his application form at the time of endorsement, accepted that Ms AD only became aware of the conviction in November 2012. When being questioned about the 'Further information on self-disclosure' form filled in by him at the Council offices on 8th November 2012, which stated in relation to the offence, "I didn't tell my manager at the time, she knows now", the appellant maintained that he did not give Ms AD details about the conviction because it was a family matter.

Respondent's submissions

45. Mr Scott referred to the oral evidence received from AD, GMcK and the appellant and stated that the Council had had the benefit of considering the appeal in the light of that evidence. He stated the Council's position as follows:

46. Regarding the first ground, the Council maintained that the appellant did alter the form after it had been endorsed by AD and that he did not divulge details of his conviction on the form or by any other means of communication.
47. Second ground: the conviction had been described on numerous occasions as 'minor' by the appellant. However, the incident in January 2011 was considered before a criminal court where the facts were established beyond a reasonable doubt.
48. Third ground: the Council did not dispute the appellant's third ground of appeal.
49. Fourth ground: the Council would say that the suspension was a matter for his employers.
50. Fifth ground: the Council referred to the evidence given by Ms AD and disputed the appellant's contention that 'everything was OK'.
51. Referring to the final ground of appeal, the Council did not accept the appellant's statement that the Council was not concerned with the protection of the public. Despite the fact that the 2011 incident occurred away from the work-place, it was the Council's view that the conviction itself and the failure to disclose it can be considered work related matters.
52. The Council maintained the view that the appellant had failed to satisfy the criteria set out in Rules 4(3)(a)(i) and 4(3)(a)(ii) of the NISCC Rules. The Council based its view both on the appellant's conviction and his falsification of documents.

Appellant's submissions

53. The appellant denied falsification of documents, stating everything was on the application form. He also referred to the fact that the Council did not inform his employer after the police had informed them, the fact he was not suspended by his employers and to the note of 5th November 2012 where Ms AD stated he was a good care assistant.

Conclusions

54. The Tribunal has carefully examined all the evidence, the documentation placed before it and the submissions made by the parties, even if we have not specifically referred to all of them.

55. This is not a case concerning incidents of misconduct at the appellant's place of work. It revolves around an incident which took place on 16th January 2011 outside work and which resulted in the appellant being arrested and convicted on 29th March 2011 of 'aggravated assault on a female or boy under 14 years'. This was a serious offence, where the police evidence documented that the appellant had punched his wife in the face, as a result of which she had some swelling under her left eye and the eye was blood shot and for which the appellant received a custodial sentence of six months suspended for two years.
56. Section 5.8 of the Code of Practice for Social Care Workers clearly states that such a worker must not "Behave in a way, in work *or outside work* (italics added) which would call into question your suitability to work in social care services".
57. The English case of **Stephen Kilduff v GSCC [2010] UKFTT 602 (HESC)** concerned the appeal of a social worker against the decision of the Registration Committee of the GSCC not to register him, as they were not satisfied he was of sufficiently good conduct and character. The incidents of misconduct in that case occurred outside work. The Tribunal, in dismissing the appellant's appeal in that case, stated that "The GSCC and the public have to be able to have trust and confidence in registered social workers and the behaviour of a social worker outside of work is relevant" (paragraph 63).
58. The appellant in the present case was a mature man and an experienced social care worker at the time of the incident leading to his conviction. The Tribunal cannot look behind a conviction for aggravated assault heard before a criminal court where the evidential burden was beyond a reasonable doubt. The Tribunal noted from the transcript of proceedings before the registration committee (pages 79 - 80: Tribunal bundle) that the appellant was legally represented during the assault case and appealed the conviction but subsequently withdrew his appeal. The appellant did accept in cross examination and in answer to questions by the Tribunal that the conviction was a serious matter.
59. The Tribunal has a duty to consider the needs of very vulnerable service users and concludes that, having examined the letter from D/Chief Inspector Iain Hall of the PSNI dated 27TH November 2012, that the appellant lost his temper during the incident on the 16th January 2011 and assaulted his wife. It agrees with the conclusion of the Registration Committee that it cannot be satisfied that there would not be a repetition of such behaviour.
60. The Tribunal was impressed by the evidence of Ms AD which was given in a clear and straight forward manner. It accepts that at the time she endorsed

the appellant's application form for registration there were no details relating to the appellant's conviction on the form. It further accepts that AD dealt with application forms in a careful and conscientious manner and that if any details of the assault had been on the form, AD would have spoken to the appellant about it. The Tribunal finds that Ms AD, as a staff trainer, would have made staff aware that behaviour outside work was relevant and that any staff member working at AM Care Centre should have realised that they must disclose convictions. It further finds that AD would have suspended the appellant when she discovered the details of his conviction, but was advised by HR (Human Resources) and DAS (legal advisors) to wait for the Council's decision. For the above reasons, the Tribunal accepts Ms AD's evidence in its entirety.

61. The Tribunal heard the appellant's oral evidence and found it lacked credibility, in contrast with the evidence of Ms AD. The appellant's statement to AD, that he did not divulge the offence as he would not have got residency, lends support to the Tribunal's conclusion that details of the offence were not on the form at the relevant time. He maintained that he put details of the conviction on the form before he gave it to AD, but under cross-examination, when asked why there were no details of the sanction, he said he did not understand and gave no satisfactory explanation as to why he had not contacted his solicitor for this information.
62. The Tribunal finds that at the time AD endorsed the form, the appellant had not filled in section 7.2 in relation to convictions. It further finds that the appellant ticked the 'No' box on the form, and, following endorsement of the form by AD, attempted to erase it, ticked the 'Yes' box, noted 'assault' under 'Details of Conviction', '2011' under date and 'Belfast' under 'Court', while leaving the 'Sanction applied' column blank. The Tribunal finds that the appellant did minimise his offence in that he described the incident leading to the conviction as a 'minor thing'. However, the Tribunal notes that under cross-examination in this hearing, the appellant now accepts that a conviction for aggravated assault is a serious matter. He also accepts that a social care worker should be an example to the public.
63. The Tribunal accepts that, apart from the disciplinary action leading to the final written warning given to the appellant in December 2012, there was no other disciplinary action taken against him by his employers. It has heard from the appellant that he enjoyed his work with elderly people and accepts that, in his interaction with the residents, he was a good care worker.
64. However, this case is not about the appellant's work or his conduct in relation to residents of AM Care Centre. It concerns the applicant's conviction for aggravated assault, his attitude to this and his failure to have included details

of it on his application form for registration at the time when it was endorsed by his Nurse Manager Ms AD.

65. In the England and Wales Care Standards Tribunal case of **CR v General Social Care Council [2006] 0626.SW**, which involved failure to disclose criminal convictions, the Tribunal stated :

“The conduct of an applicant in relation to the application process is clearly a matter that can be taken into account when determining whether the applicant has demonstrated that she is of good character” (at paragraph 24).

66. Sections 2.1 and 2.2 of the NISCC Code of Practice for Social Workers state that a social care worker should be ‘honest and trustworthy’ and should communicate in ‘an appropriate, open, accurate and straight-forward way’. The Tribunal finds that the appellant, by the way he dealt with his application form, did not fulfil these two requirements.

67. Rule 4(3)(a)(i) and 4(3)(a)(ii) of the NISCC (Registration) Rules 2012 state that it is for the applicant applying for registration as a social care worker to provide on the application form “evidence as to the applicant’s – (i) good character; (ii) good conduct...”

Under Rule 4 (9)(b) of the Rules, the Council shall not grant an application for registration unless: “it is satisfied as to the applicant’s good character, conduct, competence and health (including physical and mental fitness to perform the work of persons registered in the part of the register in which registration is sought)”.

The Tribunal finds that the appellant has failed to meet the relevant requirements regarding good character and conduct, in relation to Rules 4(3)(a)(i) &(ii) and Rule 4(9)(b) of the NISCC (Registration) Rules 2012. This failure relates to his conviction for aggravated assault against his wife (for which he was given a custodial sentence of 6 months suspended for 2 years), to minimising the incident (as noted in paragraph 62 above), in respect of failing to have disclosed details of that conviction at the time his application form was endorsed by his Nurse Manager Ms AD and by trying, after endorsement, to conceal the original tick in the ‘No’ box at 7.2 of the application form, ticking the ‘Yes’ box and then stating that he had a conviction for assault.

68. Even if the Tribunal had not accepted Ms AD’s evidence in relation to the application form, because of the appellant’s conviction for aggravated assault and his attitude to it, it would still have affirmed the decision of the Council in this case, not to register the appellant as a social care worker.

Decision

69. It is the unanimous decision of the Tribunal that the appeal be dismissed and the decision of the Council be affirmed.
70. The Tribunal states that it is a matter of concern that the appellant's employer was not informed of the conviction dated 29th March 2011 until 5th November 2012. This was a serious offence involving violence and the appellant was working with vulnerable adults. It notes that a letter (which the appellant states he did not receive) was sent to the appellant on 11th April 2011. It pointed out that the Council did not have authority to investigate complaints about workers who were not on the Social Care register. This letter did not advise the appellant to inform his employer of the conviction. The Tribunal considers that if such letters are sent following PSNI notification of serious offences, then recipients should be advised to inform their employers who have the care of some of the most vulnerable members of society. The Tribunal consider that the appropriate Rule-making authority should address this matter as soon as possible.
71. The Tribunal also expresses concern that the appellant had no criminal record check carried out since 2nd September 2006. It considers that more frequent criminal record checks on staff working with vulnerable adults should be sought, as necessary, by the management of Care Homes, for the ongoing protection of the vulnerable adults in their care.

Diane Drennan
Chairman Care Tribunal

Date Decision recorded in Register and Issued to Parties: ***September 2013***