

IN THE CARE TRIBUNAL

BETWEEN:

NS

Appellant

-and-

NORTHERN IRELAND SOCIAL CARE COUNCIL

Respondent:

Tribunal Panel:

Stephen Quinn Q.C. (Chairman); Mary O'Boyle; Sally O'Kane (Lay Members)

Date: 6th April 2016

Venue: The Tribunals Hearing Centre, Royal Courts of Justice, Belfast

Decision: Unanimous decision of the Tribunal Panel: Appeal dismissed.

1. The Appellant was a Care Assistant who had applied to be registered on the Northern Ireland Social Care Council (NISCC) Register as a Social Care Worker Adult Residential Care Worker. Section 3(1) of the Health & Personal Social Services Act (NI) 2001 ("the Act") requires the Respondent to maintain a Register of Social Workers and Social Care Workers. Section 9 of the Act provides for the preparation by the Council of Codes of Practice laying down standards of code and practice expected of Social Care Workers and a requirement for the Code to be taken into account by the Council making a decision and also in any proceedings on appeal against such decision. Section 4(1) of the Act states that an application for registration must be made to the NISCC in accordance with the relevant Rules which, in this case, are the NISCC (Registration) Rules 2014 ("the Rules"). Rule 4(9)(b) of the 2014 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)*".
2. Rule 15(1)(a) of the Rules requires the Council to refer to the NISCC Registration Committee ("the Registration Committee") any application for registration which it is not minded to grant and the Council referred the

Appellant's application to the Registration Committee in accordance with the Rules.

3. The Tribunal Panel has been provided with a Trial Bundle and Addendum Trial Bundle (reference: NISCC6/2014) containing all relevant documents. The Notice of Referral to the Registration Committee was sent to the Appellant's registered address by special delivery on the 25th June 2014 and was acknowledged as received on the 26th June 2014. The Notice was signed as having been received on the 26th June 2014 and therefore the Registration Committee determined that the Notice of Referral had been served in accordance with the Rules. The Report to the Registration Committee is at Section 3.2 of the Bundle. This report sets out the facts of the referral and exhibits the evidence to be considered by the Registration Committee on the 24th July 2014. Briefly stated, the Report records that the Appellant was employed as a Care Assistant at Milesian Manor Nursing Home, Magherafelt and that on the 8th July 2013 an allegation was made by another Care Assistant (Erin Convery) that NS had been rough with a resident (OM) and had hit the resident on the hand. As a result of an internal investigation at Milesian Manor, NS was dismissed from her employment on the 9th July 2013 for gross misconduct. The Report referred to a letter from the Appellant's solicitor, Kevin McDonnell (MacElhatton & Co., Solicitors, Belfast) of 7th May 2014 and the letter from the Police Service of Northern Ireland (PSNI) of the 14th May 2014 confirming that NS was convicted of a "*common assault arising from her employment at Milesian Manor on a resident. The case was heard at Magherafelt Magistrate's Court on the 29th March 2014 NS appealed the decision to convict her to Derry County Court. The Appeal Hearing took place on the 28th April 2014 and she was convicted. The Court imposed a three month custodial sentence suspended for one year.*"
4. The main issue considered and investigated by the Registration Committee was the Appellant's conviction on a charge of common assault on a resident at the Nursing Home where she was employed. The Certificate of Conviction (in the addendum Trial Bundle, page 3) shows that on a plea of "not guilty" NS was convicted at the Magistrate's Court on the 26th March 2014 and on appeal to the County Court it was ordered that the conviction be affirmed but that the Order be varied in that the sentence of imprisonment for three months would now be suspended for one year. Having considered all of the issues the Registration Committee refused to register the Appellant. The Appellant appealed under Section 15 of the Health & Personal Social Services Act (NI) 2001 ("the 2001 Act") and in accordance with Regulation 4(6) of the Care Tribunal Regulations (NI) 2005 ("the 2005 Regulations") against the Registration Committee's refusal of registration in the relevant part of the Northern Ireland Social Care Register. Section 15(3) states that; "*On an appeal against the decision, the Care Tribunal may confirm the decision or direct that it shall not have effect*". Section 15(4) provides power to vary conditions and make directions regarding such conditions.
5. In coming to its decision, the Registration Committee considered a file of papers that we have considered at Section 3.2 of the Bundle and also produced a Notice of Decision dated the 30th July 2014 (Section 3.3 of the Bundle). The legal advice given to the Committee when considering the papers and arriving at their conclusion is set out in the Notice of Decision:

"The legal adviser reminded the Committee that the statutory test to satisfy registration in the particular circumstances of this case, namely that the Applicant was of good character and conduct was not defined by the applicable statutory framework. Rather, it was for the Committee in the exercise of its judgment, based on the available documentary evidence, to determine whether the test was met or not. The Committee was also reminded of the need to consider the public interest (which included the need to protect the public and vulnerable service users) when applying the statutory test."

6. The Appellant was not legally represented at any of the Care Tribunal Directions Hearings or at this Appeal Hearing but did have the assistance of an interpreter at all hearings before this Tribunal. The Respondent was represented by Mr Mark Scott, Solicitor, of the Directorate of Legal Services. The appropriate test in relation to whether or not this Tribunal should allow the Appellant's registration is the same test applied by the NISCC Registration Committee (see Rule 4(9)(b) of the 2014 Rules).
7. The Trial Bundle and Addendum Trial Bundle contain all the relevant documents relating to the incident that occurred on the 8th July 2013 at Milesian Manor Nursing Home involving NS and OM (the resident). They also include, inter alia, the Appellant's application for registration and all documents relevant to the Registration Committee and its findings. The Bundles also include relevant letters written by the Appellant regarding her case and the issues between the parties, the response from this Tribunal and Preliminary Directions arising out of Preliminary Hearings regarding relevant documentation, evidence and witnesses that should be made available for this Hearing. The Appellant has been served with all of this material and confirmed that she had received the Trial Bundle and the Addendum Bundle before the Hearing commenced. Included within this bundle are Police statements from Erin Convery (EC), a co-worker and witness to the incident, Martha O'Kane (MOK), the Nurse Manager of Milesian Manor Nursing Home and Hazel Thompson, who is the Advocate for the injured party, OM, in relation to the assault. There is also a typed "Summary of Audio Recorded Interview" recording a Police interview with NS that occurred on the 2nd August 2013 at 13.25 hours conducted by interviewing Police Officers, Constable Brett and Constable McEldrew of the PSNI. We note that there was no legal representative, nor an interpreter present at this Police interview, but we acknowledge that the Summary records that NS was cautioned under the Police and Criminal Evidence Act (PACE).
8. The Tribunal note that in the document, "Report to the Registration Committee" (Section 3.2 of the Bundle) that the Committee reflect upon the conviction for assault and at paragraph 8.1 state;

"Rule 4(9)(b) of the Registration Rules state 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" the Council considers that by virtue of her conviction for the assault of a frail, vulnerable, elderly service user, the Applicant has not demonstrated that

she fulfils these criteria and therefore submits that the Applicant should not be included in the Northern Ireland Social Care Register."

We acknowledge and note the Appellant's letter of the 16th April 2015 to the Care Tribunal headed *"To clarify the matters at issue between the parties"* wherein, inter alia, she makes the following points:

- (i) That she never accepted her guilt or pleaded guilty. She never smacked, hit or slapped resident OM.
- (ii) That she was interviewed by PSNI without a lawyer or an interpreter and was not informed that there were criminal charges to be made against her or that she may be imprisoned or lose her right to work as a carer.
- (iii) That the Magistrate and the County Court Judge ignored the facts that the resident, OM was aggressive and during the incident the Appellant was injured by OM (refer to the General Practitioner's report from Dr McAreevy dated the 11th March 2014) who grabbed and would not release her hand.
- (iv) That Erin Convery (EC) was an untruthful witness and caught lying by her solicitor, Kevin McDonnell, at the Magistrate's Court in that Erin Convery did not see a slap administered to the resident.
- (v) That she is of good character, conduct, competence and health and the allegations were only made against her after she criticised the Home Manager (at Miliesian Manor) about poor and criminal working conditions putting residents and staff at risk.

On our analysis of the papers, the issues raised at the Directions Hearings by the Appellant and the points highlighted in the Appellant's correspondence the above points appear to be the main issues of importance to the Appellant.

9. At the request of the parties, in Preliminary Directions Hearings, a number of Witness Summons were issued. At the request of the Appellant a Witness Summons was issued to secure the attendance of Mr Kevin McDonnell, the Solicitor who represented her at Magherafelt Magistrate's Court and who instructed Counsel to represent the Appellant in her appeal to Londonderry County Court.
10. Mr Kevin McDonnell was called as a witness and the Chairman, with the consent of all parties present at the hearing, took Mr McDonnell through some preliminary points of evidence, mindful that at the Directions Hearings the Appellant had made it clear that Mr McDonnell should be called as he would prove that EC, who allegedly witnessed the assault, was an unreliable witness. Mr McDonnell confirmed that he could recollect the case and stated that he had access to prosecution papers and the PSNI statements together with documents from Miliesian Manor including EC's handwritten statement. He agreed that there was an issue raised about whether EC actually saw any contact between NS and OM or, alternatively, heard the contact without

actually having a view of it. He had a very clear recall that he explained in detail to NS that the District Judge at Magherafelt Magistrate's Court summed up that, in her opinion, NS was reckless in her behaviour in performing her duties in undressing the resident (OM) and that it was from the Appellant's own evidence and her Police interview that she was convicted. The Panel were impressed by Mr McDonnell's evidence and competence, he did not have notes but confirmed that he had a good recall of case and confirmed that he did not attend the appeal hearing but appointed Counsel to attend. He also confirmed that NS did not have an interpreter at the Magistrate's Court but that he had no difficulty in taking instructions from the Appellant when she attended at his Belfast office and during the hearing when he defended her at the Magistrate's Court.

11. The Appellant questioned Mr McDonnell through her interpreter though it was apparent to the Panel that she had a good understanding of English and did not need the majority of the answers translated. Her questions dealt mostly with what EC said she actually saw of the assault. Mr McDonnell could not precisely recall what evidence EC had given on oath at the Magistrate's Court about her view of the alleged assault, but agreed that this was an important issue in the case. In reply to direct cross-examination he stated that he could not precisely recall EC's answers. The Appellant then produced two copy statements from EC (the first to her employer in handwritten form dated the 8th July 2013 and the second to the Police dated 14th July 2013). Those copy statements contained some handwritten notes and Mr McDonnell confirmed that those notes were the notes that he made at the time of the Magistrate's Court hearing. There was a short adjournment while the two statements were copied and distributed to all the parties.
12. The Appellant, once again, put it to Mr McDonnell that EC admitted she did not see the assault. Mr McDonnell answered that he could not recall the precise answer but again agreed that it was an important issue in the Trial. His recall was that the Court never found that EC was telling lies about this point but he did recall that an issue was raised about whether she saw or heard the slap and agreed that there was considerable debate as to whether EC saw the slap as opposed to hearing it. The Appellant put to him that there were differences in the two statements from EC, namely the statement she gave to the Police dated the 14th July 2013 and the statement she made during the investigation carried out by Milesian Manor dated the 8th July 2013 (Section 3.2 of the Bundle). He agreed that there were discrepancies between the two statements from EC but firmly stated that EC was questioned about this and the issue was put before the Court. His handwritten notes address what he considered to be the main points in the defence: that EC didn't see the slap but heard a noise that she interpreted as a slap.
13. Mr Scott cross-examined Mr McDonnell. Mr McDonnell confirmed:
 - (i) That the District Court (Magistrate's Court) found that NS had taken no precautions when undressing the patient. She was assessed as being reckless, she saw the risk but continued.

- (ii) The Court convicted mainly on the evidence provided by NS in her Police interview. The District Judge took account of the admission of contact between NS and the resident, OM.
 - (iii) In her evidence NS confirmed that she had made contact with the patient.
 - (iv) That the handwritten notes on the documents produced by NS today are his notes and that they outline the discrepancies between the statements. He confirmed that those issues were put to EC and were opened to the Court.
 - (v) That there were differences in the evidence as to what EC actually saw. He had underlined in red ink the word "hear" in the Police statement referring to the fact that EC stated "I could hear the smack from where I was standing beside the bed". He confirmed that he put those points to EC when he cross-examined.
14. In concluding his evidence and on further questions posed by the Panel, Mr McDonnell told the Tribunal that he took time to explain to the Appellant, after conviction at the Magistrate's Court, that in his opinion District Judge Kelly convicted her on the contents of her Police interview wherein she admitted that she slapped the resident on the hand although stated that it was not deliberate. He added that to the best of his recollection, the Magistrate also took into account the Appellant's reckless behaviour relating to how she was performing the undressing duties with the resident.
15. Mr Scott then called Erin Convery as a witness. She confirmed that she was a Care Worker at Milesian Manor and that she witnessed the incident that occurred on the 8th July 2013 at Milesian Manor, that she made statements about the incident and appeared as a witness at Magherafelt Magistrate's Court and the Appeal at Londonderry County Court. We will not rehearse all of the evidence but will break it down into the main points raised by NS throughout her defence of the assault allegation, her application for registration and the appeal process:
- (a) EC was asked to draw a plan of the room to indicate where she was standing and to demonstrate to the Tribunal her line of sight. She described the bedroom and her plan assisted in understanding the layout. She confirmed she could see what was happening when NS was removing OM's clothes.
 - (b) She confirmed that OM was agitated and was shouting, that she was at the bed, heard raised voices and saw NS taking off OM's cardigan and jumper.
 - (c) She heard a noise like a slap. She then confirmed that she saw NS from the side, that she lifted her hand in the air and slapped OM on the right hand. Under further questioning she confirmed that she might not have seen it clearly but definitely heard the sound of a slap. She confirmed that she was standing at the bed, that she saw it out of the corner of her eye and demonstrated to the Tribunal what occurred.

- (d) She went on to say that she was shocked, that she had never see anything like this before and, when questioned, said that she did not say anything to NS and confirmed that the resident was totally silent after the slap occurred.
- (e) EC finished her shift at 8.30pm and went to see the Manager to report the incident. She went home that night and wrote out her statement at home.
- (f) She gave evidence about attending the investigation process at Milesian Manor and was then asked about her involvement in the Criminal Prosecution. She told the Tribunal that she didn't admit to lying and added that the Judge didn't ask questions about her honesty. She admitted to the Tribunal that it was difficult to see the slap because of the angle that she was viewing from but she saw it out of the corner of her eye and definitely heard a slapping noise.
16. EC was cross-examined by the Appellant. The cross-examination concentrated on whether EC observed the alleged assault or alternatively heard a noise like a slap. EC said she saw the slap and heard it. She was also asked to describe the working practices when faced with an aggressive patient and said that she was trained to give space, to reassure the patient, tell them what was happening and get them ready for bed. Upon further questioning, she said that the Appellant was being rough with the patient and that she didn't know what to do. She was challenged as to why she didn't help or go for help. She answered that the Appellant was handling the patient in a rough manner and she didn't want to get involved.
17. EC was questioned by the Chairman and Panel Members. The important parts of this section of her evidence can be summarised as follows:
- (i) She got induction training and there was also training in:
- Manual handling - 1 ½ hours;
 - Fire training - 2 hours;
 - Privacy and dignity - 1 ½ hours;
 - She added that she also got first aid and dementia handling training.
- (ii) She confirmed that she got no training in relation to handling aggressive patients or dealing with aggression or anger. There was no training for "aggression management".
- (iii) She told the Tribunal that she never saw any sign of aggression from the Appellant and had never witnessed her handling patients in a rough manner before this incident.
18. Roisin Robinson (RR) was called to give evidence. She confirmed that she was a Care Assistant employed at Milesian Manor for ten years commencing her employment approximately 2007. She had worked on numerous

occasions with NS, confirmed that she was a hard worker and that there had been no previous complaints about her work. She told the Tribunal that the patient, OM, could be difficult. She was known to be verbally abusive and violent. She had reports from staff that they had been attacked by OM and confirmed, on occasions, when she walked past OM, she had been given a light slap by the resident. It was known that OM was a difficult resident and that she was troublesome at bedtime. She added that staff should never be alone with OM and if in difficulty should sound the buzzer. There was a Care Plan for OM but RR agreed the carers were not informed in any great detail about this Care Plan. She told the Tribunal that there was training in how to deal with "vulnerable adults" and that in her experience the staff were trained and had experience of dealing with difficult patients. After direct questioning by the Panel, she confirmed that she did have "vulnerable adult" training and when questioned by the Appellant, Ms Robinson confirmed that she had been a victim of OM's violence in the past. Mr Scott asked some questions and the witness confirmed that there were approximately 34 residents in the home, 50% of whom suffered some effects of dementia. She told Mr Scott that the staff were definitely not permitted to react or "raise a hand" in response to how a resident behaved.

19. Given RR's evidence regarding the behaviour pattern of OM and with the consent of the parties, the Panel decided to recall EC on issues of whether or not she knew OM to be a difficult and aggressive resident. EC told the Panel that she didn't personally know that she was aggressive but had been told by other people that OM had been aggressive towards them and was known for such aggressive and difficult behaviour. When asked why she didn't give that evidence when first questioned, she could not provide a convincing answer.
20. The Chairman advised NS of her right to give evidence to this Tribunal, explaining the importance of such evidence but advising that Mr Scott, representing the Respondent, had a right of cross-examination and that the Tribunal Panel may have some questions to direct to her. This was explained carefully to the Appellant who was asked if she fully understood what was being put to her, she agreed that she fully understood but elected not to give evidence to the Tribunal.
21. Given that the Appellant was not represented and required the services of an interpreter, this Tribunal decided to offer the parties the opportunity to make written submissions to the Tribunal on the understanding that no new evidence was to be included in those submissions. Both parties delivered submissions within the time allowed. We have read the submissions and carefully noted the contents. This Tribunal takes into account all of the above submissions by both parties and gives appropriate weight to them in arriving at a decision in this appeal.
22. We take account of Mr McDonnell's evidence, the written submissions from both parties and the correspondence, statements, reports and papers in the Bundle. We take account of the fact that she did not have legal representation before the Tribunal. We accept that NS did make an effort to get legal representation and note that there was no lawyer or interpreter at the Police interview.

23. The Tribunal confirms that it has read and considered the documents recording the investigation of the incident carried out by Milesian Manor Nursing Home. We have read the note of the interview of 9th July 2013 when NS was interviewed by her manager, Martha O'Kane and the note records; "[NS] then said she did not slap her but admitted to skitting her." At the investigation carried out by Dr Glancy in the presence of Breige O'Boyle at 2pm on the 1st August 2013 it is recorded, "[NS] explained that the resident had grabbed and pinched her hand and she was in severe pain and maybe I caught her hand and gave her a light smack – but this happened by accident". The Tribunal take into account the difficult circumstances faced by NS but note that NS did not deny, when put to her by Dr Glancy, that she was trained in "vulnerable adult abuse" but stated that she was "not trained in what to do when assaulted and she did not deliberately do it."
24. The Tribunal has been provided with references from the Appellant's previous and subsequent employers and those appear at pages 1 and 2 of the addendum Trial Bundle. It is clear that the Appellant has a good work history and is highly regarded by those employers. Roisin Robinson confirmed that the Appellant was a diligent worker and an excellent timekeeper.
25. Weight must also be given to the fact that there was nothing before the Tribunal to indicate that the Appellant has any history of behaviour of a similar nature or that there have been any subsequent events that would make her unsuitable as a Care Worker.
26. The evidence was clear in relation to the effect of the result on the resident. There were no marks on the resident whatsoever. Martha O'Kane, the Home Manager, examined the resident immediately after the allegation was brought to her notice and nothing was found.
27. This Tribunal has addressed the main issues raised by the Appellant through the hearings and in respect of those issues finds as follows:
- (i) That she contested the assault charges at the Magistrate's Court and appealed her conviction to the County Court never admitting her guilt nor did she show any remorse after conviction.
 - (ii) We accept that she didn't have a lawyer or interpreter when interviewed by the Police but find from our observations and the evidence of Mr McDonnell, that NS has reasonable understanding of the English language.
 - (iii) We now find as a fact that the resident was aggressive and had a history of aggressive and challenging behaviour. We also note the letter of the 10th July 2013, from the Appellant's General Practitioner, confirming that there was bruising on the Appellant's hand when she attended the General Practitioner's surgery for examination after the incident occurred.

(iv) We have decided that in our Judgment Erin Convery was not a reliable witness in some areas of her evidence. For example, she told the Tribunal that she had no knowledge of OM being aggressive, violent or in any way disruptive in her behaviour. When recalled to the witness box by the Chairman to address that specific point, she then told the Tribunal that she did have knowledge, from other employees, that the resident had been aggressive. This was not truthful evidence, in that she changed her evidence when challenged by the Chairman on the point.

(v) We accept that NS was of previous good character and has a good employment history.

28. Arising out of the Panel's examination of the papers and, in particular, references, records and the evidence of Roisin Robinson, it seems to us that this incident and assault conviction is a single blot on the Appellant's excellent working record.

29. Whilst we accept and recognise that the resident did not suffer any evident harm, we nevertheless see this as a technical assault on a vulnerable resident in a nursing home. We also note that the assault charge was contested on two occasions and on appeal the Learned County Court Judge, having heard all of the evidence again, confirmed the conviction but varied the sentence from one of immediate imprisonment for three months to three months imprisonment suspended for one year. Whilst recognising all of those points, the issues addressed in paragraph 27 and taking into account the evidence offered by the Appellant's solicitor, Mr McDonnell, and the weight that we give to the evidence from Ms Convery, we acknowledge that we still have to apply the test as set out in Rule 4(9) of the 2014 Registration Rules. Therefore, having considered all the evidence available to us and having taken into account the seriousness of the misconduct, the protection of the public and the public interest in maintaining confidence in the services, together with the issue of proportionality, we have come to the unanimous conclusion that the Appellant should not be registered at this time on the Care Register. We therefore affirm the decision as set out in the "Notice of Decision of the Northern Ireland Social Care Council Registration Committee" dated 30th July 2014 in confirming that "*the Committee has decided to refuse the Applicant's application for registration in accordance with Rule 20 (16) (a) of the NISCC (Registration) Rules 2014*". This decision of the Care Tribunal does not in any way prevent or hinder the Applicant from making a future application for registration within the appropriate Rules.

Stephen G Quinn Q.C.
Chairman of the Care Tribunal
2nd August 2016

