

APPEAL NO. 2005/1PC & 2005/1PVA

IN THE CARE TRIBUNAL

PF

-v-

DEPARTMENT OF HEALTH, SOCIAL SERVICES AND PUBLIC SAFETY

Before:

J.A. Kenneth Irvine (Chairman)

Heather Leo

Eileen Thomson

Hearing date: 22nd June 2006

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 6th September 2004.

Representation

2. The applicant was represented by Thomas Fitzpatrick of Counsel (instructed by Paul McMullan, Solicitor) and the respondent was represented by David Scoffield of Counsel (instructed by the Departmental Solicitor).

Preliminary matters

3. Prior to the start of the hearing the Tribunal made the following direction: 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 we heard oral evidence from KS, formerly a catering assistant and now a care assistant, PR, a care assistant, and SL, manager of M Day Support Centre. We heard oral evidence from the Applicant, PF.

5. We read written statements from these witnesses and also from EMcD and IR, both officers in the Child and Community Care Directorate of the DHSSPS, BM, the Disability Services Manager of the area trust responsible for M, and SPL, mother of the vulnerable adult KL.

6. We were provided with a considerable number of associated documents including papers relating to Judicial Review proceedings in respect of the Applicant's Pre-employment Consultancy Service (PECS) listing (which proceedings had been adjourned by the High Court pending the present hearing).

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....

Three stage test

9. 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 placed a vulnerable adult at risk of harm and
- (iii) that the individual is unsuitable to work with vulnerable adult.

DWC list

10. Article 11 of the Protection of Children and Vulnerable Adults Order (Northern Ireland) 2003 provides for an individual to appeal against inclusion of his name on the list to this Tribunal and Art.11(3) provides that:

If on an appeal...under this Article 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 a child or placed a child at risk of harm; and
- (b) that the individual is unsuitable to work with children, the Tribunal shall allow the appeal....

Three stage test

11. Thus, in order to dismiss the appeal, the Tribunal must find:

- (i) that there was misconduct,
- (ii) that the misconduct harmed a child, or placed a child at risk of harm
and
- (iii) that the individual is unsuitable to work with children.

Definition of Misconduct and harm or risk of harm

12. 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".

13. "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".

Burden of proof

14. The burden of proof is upon the Department.

Standard of proof

15. 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. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability..."

16. In *W v Secretary of State* [2002] 115 PC the Care Standards Tribunal in Great Britain considered further the guidance on the balance of probability standard of proof set out above and said that:

"The Tribunal is composed of people who, because of their training and professional experience, are very familiar with the likelihood or otherwise of incidents occurring that form the basis of the claim of misconduct and of the reliability of the accounts given of that misconduct. We are therefore entitled to draw inferences from the facts

presented to us, but we must not speculate analyse the facts presented to us in the light of our particular expertise form a view about whether the Secretary of State's version of events is more likely than not. In some cases, the seriousness of the allegation will make the version of events as described more improbable and therefore more evidence will be required to discharge the burden. In other cases, although a serious incident is alleged, the Tribunal's expertise may lead it to conclude that the event described is not so unlikely and therefore the balance of probability will be satisfied without much in the way of supporting evidence."

The facts

a. PF was employed as a care worker at M Day Support Centre. The incident in question occurred on 6th April 2001. She had been in post since February 2000. Prior to that date she had worked in another care establishment and before that had previously been similarly employed at M on a fixed term contract.

b. Her primary duties at M involved looking after KL, who has a severe learning disability, no expressive language and complex needs. When he attended the Centre, KL was often kept in his own room because he liked his own 'space'. He could become agitated which would cause him to slap his face, bite his arms, shout or become noisy. KL was in the habit of rocking to and fro and banging his head against the back of the chair. Due to this behaviour, he was usually strapped in a chair at the Centre and wore plastic arm guards, but his behaviour also required him to be restrained from time to time. PF had been trained in restraint techniques.

c. In addition to her official duties caring for KL at M, PF had been privately employed by KL's parents to help at their home and to accompany KL on the bus to and from M, although this had ceased prior to the alleged incident.

d. On the day in question, 6th April 2001, PF was with KL in a room on their own. There was some evidence (supported by a written statement in the supplementary documentation) that he was having his nails cut by another member of staff but this seems to have been completed before the alleged incident. KS, who was at that time employed as a catering assistant came into the room to collect a tray. She told the Tribunal that she saw PF forcing back KL's head by pushing on his forehead, slapping his hands and shouting at him in a foul manner. According to KS the words used were, 'I'm sick of you this day, you're nothing but a wee bastard!' and 'I hate you'. There was some dispute as to the precise time of day when the incident happened. Tribunal did not consider the slight discrepancy in time to be material to the issues before it. KS collected the tray and left the room. In her written statement KS said that another member of staff (EH) came into the room at that time. There was no suggestion that KS questioned PF's actions at the time, either by speaking to PF (indeed, she accepted that she had not spoken to her) or by mentioning it to EH. EH did not provide any evidence to Tribunal; it did see a copy of a Statement made by her to PSNI on 19th September 2001 in which she said

that she had no recollection of the event, that she 'noticed nothing out of the ordinary on Friday 6 April 2001.'

e. It would appear that KS made a casual mention of the incident to some colleagues at lunch but no one seems to have regarded the matter as serious enough to take it further at that stage. KS gave the names of three colleagues who were present at that stage. Only one gave evidence to Tribunal and she admitted that she did not have a clear recollection of the day. On the evening of 6th April (a Friday) members of staff at M were on a social event at a public house. About 11 p.m. KS mentioned to SL that she had observed an incident earlier that day. She had taken drink and SL said that he would not discuss the matter then but that she should speak to him on the following Monday.

f. On the Monday SL spoke to KS. He did not get a statement from her at the time but asked her to prepare one which she later did. He kept notes of the interview but was not able to produce them to Tribunal. Following the meeting with KS he discussed the problem with the Human Resources Manager of the Trust and, following her advice, determined that PF be suspended pending investigation. On the following day he called PF in and told her of the allegations and handed her a letter of suspension. At that stage he said she said to him, 'We're talking about verbal, nothing else.'

g. On 10th April 2001 SL received from PF a letter of resignation. Again following advice from his Human Resources Manager, he telephoned PF to try to persuade her to reconsider that decision and to come in and talk to him. She declined. She told Tribunal that she resigned because she no longer wished to be working with people who could make such accusations about her, especially as her own twin sister (since deceased) had been mentally and physically disabled and PF had looked after her. She told Tribunal that she was unaware of the existence of the PECS list and of the fact that she might be placed on that list and her work prospects affected because of the allegations. She had thought that she could just put the matter behind her by resigning. SL acknowledged in his evidence that PF had worked very well with KL, both at M and at KL's home and that she had spent many hours with him.

h. PF was referred to the Department by her employer and on 3rd March 2004 was placed on the PECS register. This was following extensive correspondence with PF's Solicitor. Under the 2003 Order she was subsequently transferred to the statutory DWVA and DWC lists.

i. The incident was investigated by the Police Service for Northern Ireland which took statements from PF, KS, SL, EH, PR and the mother of KL. The Department of the Director of Public Prosecutions decided to take proceedings against PF but the proceedings were subsequently withdrawn. According to a letter from the Assistant Director of the Department of the DPP the police report indicated that, 'The witness [KS] had suffered health problems brought about by the prospect of having to give evidence. Police view was that requiring the witness to give evidence would only add to those health problems.'

Assessment of the evidence

In considering the evidence before it Tribunal bears in mind that the alleged incident took place five years ago and occupied at best a few minutes, at worst a matter of seconds. The recollection of witnesses as to precise words can be fallible after such lapse of time. None the less, the incident alleged was of sufficient seriousness as to have made some impact on all concerned.

Tribunal has no doubt that an incident did occur, something which did make an impression upon KS. PF accepted that she was involved in physical restraint of KL and did raise her voice to him. She also accepted that she did at times use bad language (although she said that she would not use it to a client) and that she was perceived as having a temper (but would not agree with this).

Tribunal must then consider whether the incident constituted misconduct (as defined above). Tribunal was not satisfied on the evidence before it that it could enter a finding that there had been misconduct. There may well have been, but the evidence was not sufficiently persuasive to enable it to find that the actions which occurred were misconduct rather than an appropriate way to restrain KL.

The main witness for the Department was KS. She had been reluctant to give evidence. Indeed, an earlier attempt to run criminal proceedings against PF had collapsed because KS refused to give evidence. She attended before the Tribunal on foot of a Witness Summons issued by the Tribunal. It was indicated at the outset that while she was present she was very reluctant to give evidence and that she had been advised by her Doctor that it might be injurious to her health. No medical evidence was adduced to verify this. Tribunal found her evidence to be marked by a poor degree of recall. It accepts that she saw something which caused her some shock but she was not able to convince it that the behaviour which she saw was inappropriate. There was no explanation as to why, if she considered the behaviour inappropriate she did not try to intervene or to seek help or to report earlier than 11 p.m. with drink taken. Even now, five years after being promoted from catering assistant to care assistant she is unable to say whether what had happened was inappropriate.

The only witness stated to have come into the room as KS left was not before Tribunal and her written statement (made shortly after the date) indicated no recollection of anything untoward happening. Of the work colleagues to whom KS is alleged to have mentioned the incident at lunchtime, only one appeared before the Tribunal and stated that she could not remember the events of that day.

SL's evidence was confident and comprehensive (apart from the missing interview notes). He was, of course, not able to give any evidence as to the actual incident, only as to its aftermath. It seemed clear to Tribunal that SL had been happy with PF's performance as a care assistant and was anxious to give her every opportunity to take part in the investigation and disciplinary

procedure. Unfortunately, she, for her own reasons, declined to do so. Had she engaged with the enquiry at that stage the whole issue might have been resolved at that point and it would never have reached the point of a Tribunal hearing.

Decision

Tribunal finds that the Department has not discharged the burden of proof and that evidence of misconduct, as alleged, does not reach the necessary standard of proof.

Although, under the 'three stage test' Tribunal is not required to go on to consider whether or not a vulnerable adult was harmed or put at risk of harm, Tribunal notes that no evidence of harm to a vulnerable adult, either physical or psychological, was presented to it. There are, of course, cases where the Tribunal, exercising its professional experience, may conclude from the facts before it that there was a reasonable risk of harm. However, in the present case it was never suggested to Tribunal that KL had suffered any harm, either physical or mental, nor was there any evidence put forward to suggest that he was put at risk of harm by the actions of PF. Had there been such evidence, it might strongly have supported the contention that misconduct had occurred.

Equally, under the same test, it was not necessary for Tribunal to consider whether or not the applicant was unsuitable to work with vulnerable adults or with children.

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

Appeal allowed.

J.A.Kenneth Irvine (Chairman)
Heather Leo
Eileen Thomson

23rd June 2006