Neutral Citation Number: [2020] EWHC 731 (Admin)

Case No: CO/2544/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/03/2020

Before :

MR JUSTICE CHAMBERLAIN

- -

Between :

DINAH KAVAARUPO — **Appellant**

- and -

NURSING AND MIDWIFERY COUNCIL — **Respondent**

- -
- -

Briony Molyneux (instructed by **Royal College of Nursing**) for the **Appellant**
Leeann Mohamed (instructed by**Nursing and Midwifery Council**) for the **Respondent**

Hearing dates: 24 March 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 31.03.2020 at 10:00am.

Mr Justice Chamberlain:

Introduction

1 Ms Dinah Kavaarpuo appeals pursuant to article 38(1) of the Nursing and Midwifery Order 2001 ('the 2001 Order') against the decision of a panel of the Nursing and Midwifery Council's Fitness to Practice Committee ('the panel'). After a hearing lasting 15 days between 13 and 31 May 2019, the panel found 22 of the 42 charges proved. The panel found that all but three of these charges amounted to misconduct and that the Appellant's fitness to practice was impaired by reason of this misconduct. The panel decided that the appropriate sanction was a striking-off order. It also imposed an interim suspension order suspending 'the whole of [her] registration' so that she would not be able to practise if she appealed to this Court. Notice of the panel's decision was sent to the Appellant by letter of 3 June 2019.

2 This appeal was heard in open court. In the light of HM Government advice as a result of the Covid-19 pandemic, the Appellant and her counsel, Ms Briony Molyneux, attended by videolink using Skype for Business. The Respondent's counsel, Ms Leeann Mohamed, attended by telephone. Both counsel were able to make full oral submissions in the usual way.

The provisions governing registration and striking-off

3 Article 6 of the 2001 Order provides that the NMC register is to be divided into parts. Article 6(2) provides as follows:

> 'Each part shall have a designated title indicative of different qualifications and different kinds of educational training and a registrant is entitled to use the title corresponding to the part of the register in which he is registered.'

There are separate parts of the register for nurses and midwives.

4 Where a panel concludes that an allegation is well-founded, and does not undertake mediation or decide that it is not appropriate to take any further action, it is required to impose one of the sanctions set out in Article 29(5), that is:

> '(a) make an order directing the registrar to strike the person concerned off the register (a "striking-off order");
>
> (b) make an order directing the registrar to suspend the registration of the person concerned for a specified period which shall not exceed one year (a "suspension order");
>
> (c) make an order imposing conditions with which the person concerned must comply for a specified period which shall not exceed three years (a "conditions of practice order"); or
>
> (d) caution the person concerned and make an order directing the registrar to annotate the register accordingly for a specified period which shall be not less than one year and not more than five years (a "caution order").'

5 The NMC's Sanctions Guidance provides as follows under the heading 'Conditions of practice order':

> '**How conditions and sanctions applied to those registered as both nurse and midwife**
>
> Our register is made up of two parts.
>
> One part of the register is for nurses, and one part is for midwives. Someone entered on our register as a nurse and as a midwife will only have one single registration with us, but they will be entered on two parts of our register.
>
> Fitness to practice sanctions applied to all parts of someone's single registration.
>
> If someone who is a nurse and midwife has a conditions of practice order, all of the conditions will apply to all parts of their practice, unless the order states otherwise.
>
> For the same reason, a suspension order will apply to all of a nurse or midwife's single registration. We cannot suspend someone from only one part of the register.
>
> If a panel wants to prevent someone who is registered as both a nurse and a midwife from practising in only one of those professions, it must do so using a conditions of practice order, which would say (for example) "you must not practice as a nurse".
>
> This would be appropriate if someone had problems in **one** of the professions they practice that are so serious that the panel decides they need to be prevented from practising that profession, but the panel **also** decided that a complete restriction on all areas of practice would not be necessary to protect the public.
>
> This wouldn't be equivalent to a suspension order, because it would allow the person to continue to work in one area of their professional practice.
>
> Sometimes, there will be an overlap between the two areas of professional practice. When this happens, panels should consider whether they need to impose particular conditions on the nurse or midwife's work in the other profession.
>
> In a case with serious clinical problems about only one area of professional practice, like a repeated failure in midwifery care, but also separate feelings about a more general part of practice, like record keeping, it may be necessary to prevent the person from working as a midwife, and to impose conditions on their practice as a nurse, to address the record keeping concerns.

> This would be a proportionate response if the panel decided it needed to prevent someone practising in one profession, but is also decided they were able to practice safely with restrictions in the other profession.' (Emphasis added.)

6 Under the heading 'Striking-off order', the Sanctions Guidance provides as follows:

> A striking-off order is the most serious sanction. It results in removing the nurse or midwife's name from the register, which prevents them from working as a registered nurse or midwife.
>
> This sanction is likely to be appropriate when what the nurse or midwife has done is fundamentally incompatible with being a registered professional. Before imposing this sanction, key considerations the panel will take into account include:
>
> - Do the regulatory concerns about the nurse or midwife raise fundamental questions about their professionalism?
> - Can public confidence in nurses and midwives be maintained if the nurse or midwife is not removed from the register?
> - Is striking-off the only sanction which will be sufficient to protect patients, members of the public, or maintain professional standards?' (Emphasis added.)

The charges and the Committee's findings

7 The Appellant was registered in the NMC register both as a nurse and as a midwife. The 42 charges against her related to five separate episodes between 2 February and 22 September 2016 in which, in the course of her practise as a midwife, she gave care to five women in labour that was said to be deficient.

8 Given the limited scope of this appeal, it is not necessary to set out in full the findings made by the panel in respect of each charge. In its decision on misconduct, they said this:

> 'The panel determined that the overwhelming majority of matters found proved, which related to lack of informed consent, inadequate communication, patient safety, and dishonesty in a clinical setting, taken individually and collectively, are sufficiently serious to amount to misconduct. In the panel's view, the failings which were wide-ranging demonstrated a lack of support, care and compassion towards women in your care on five separate occasions, and each would be deemed deplorable by fellow professionals. The panel concluded that your actions in relation to the matters found proved fell significantly below the standard required of a registered midwife and therefore amounted to misconduct.'

9 In its decision on the impairment the panel said this:

> 'The panel noted that you failed to terminate intimate procedures when asked to do so, failed to support women in their birth choices and left Patient C covered in blood waiting to be taken down to theatre, leaving her at potential risk of infection. Furthermore, you failed to stop suturing when asked to do so by both patient D and Colleague A and placed that patient at risk when you left her unattended in a lithotomy position, with her legs in stirrups and with the end of the bed having been removed. The panel therefore determined that by the misconduct found you had acted so as to place patients at unwarranted risk of harm.
>
> The panel was satisfied that your actions, in particular with regard to your failure to communicate with patients, your actions conducted without obtaining consent, and your dishonesty had brought the midwifery profession into disrepute.
>
> The panel had regard to the fact that patients and the public place trust in the midwifery profession, and that midwives are expected to act in a way which justifies that trust. It is fundamental to maintaining that trust that midwives make it a priority to deliver safe and effective care to their patients. The panel considered that these were fundamental tenets of the profession. The panel therefore considered that your actions, in respect of the charges found proved breached fundamental tenets of the profession identified above.
>
> You also acted dishonestly.'

10 The finding of dishonesty related to charges 24 and 25, which alleged, respectively, that the Appellant had recorded in Patient C's notes that she was happy with the lithotomy position when she was not and that the Appellant's actions in this regard were dishonest.

11 As to sanction, the panel identified the following aggravating factors:

- Your lack of insight into your misconduct;
- Your misconduct placed all five patients at unwarranted risk of harm;
- Patient C was hearing impaired and therefore particularly vulnerable;
- The dishonesty found proved was in a clinical setting;
- Your misconduct was not isolated as it related to 5 patients during five different episodes of midwifery care and demonstrated a pattern of failings over a period of seven months;
- Your misconduct related to a failure to provide basic midwifery care and a breach of local policies and guidelines.

12 The mitigating factors were these:

- There was some evidence of remorse for your misconduct in your reflective accounts and you offered an apology to the patients at the local investigation;
- Evidence of keeping up to date with nursing practice;
- Evidence of an attempt to remediate some of the midwifery concerns through training;

- You have practised since the incidents without repetition of your misconduct, albeit, as a nurse and not a midwife;
- Positive professional testimonials.

13 The panel then turned to the question of which sanction, if any, to impose. It held that it would not be appropriate to take no action: there remained a high risk of repetition of the conduct found proved; any repetition would bring with it is a risk of harm to patients; to take no action would not provide protection to the public, nor mark the seriousness of the misconduct. A caution would also be inappropriate: the impairment was not 'at the lower end of the spectrum'. The panel then considered placing conditions on the Appellant's registration. It said this:

> 'The panel considered that it had found that your misconduct arose from wide-ranging concerns relating to basic midwifery practice, including poor communication and sustained in ability to appropriately communicate with women during labour. In the panel's view, your misconduct was indicative of general incompetence. The panel also considered that there was evidence of attitudinal problems in your failure to listen and respond to what the women in your care had clearly requested orally and in their birth plans. Whilst there was some evidence of a willingness to address concerns through training on your part, the panel concluded that it was not possible to formulate conditions which would address the matters emanating from the findings of dishonesty. In light of these considerations, the panel determine that the conditions of practice order would not be an appropriate or proportionate sanction. The panel further determine that the conditions of practice order would not adequately satisfy the public interest considerations arising from your misconduct.'

14 Next, the panel considered the possibility of a suspension order. Having referred to the Sanctions Guidance, it said this:

> 'The panel took into account that in your reflective statements and all evidence, you demonstrated some remorse for your conduct. However, the panel considered that your misconduct which included dishonesty in a clinical setting, had placed patients at unwarranted risk of harm, breached fundamental tenets of the profession and brought the profession into disrepute. It considered this had found that acting without consent and dishonestly in a clinical setting, was particularly serious and that your other feelings were not isolated, involving five patients during five different episodes of midwifery care over seven months. The panel also bore in mind its findings that there is a high risk of your misconduct and dishonesty being repeated, due to your very limited insight in failing to take full responsibility and professional accountability for your feelings and the impact your misconduct had on the women in your care. The panel determined that there was a lack of acknowledgement of the patients' distress on your part.
>
> The panel carefully considered the dishonest conduct in your case. It noted that it occurred in September 2016, thus it was after an investigation meeting with Ms 1 in February 2016 in relation to the concerns around patient A's care. In the panel's view, you deliberately documented that patient C was

> 'happy' with the lithotomy position when that was not the case, to protect yourself from a further complaint or a fresh investigation. In the panel's judgement your dishonesty, which involved the falsification of patient records, which are legal documents, was very serious.
>
> In the circumstances, the panel determined that the seriousness of your misconduct, as highlighted by the fact found proved was a significant departure from the standards expected of a registered midwife. The panel concluded that the behaviour demonstrated a serious breach of the fundamental tenets of the profession.
>
> Balancing all of these factors, the panel determine that a suspension order would not be an appropriate or proportionate sanction to protect the public and address the public interest considerations.' (Emphasis added.)

15 The panel then referred to the excerpt from the Sanctions Guidance on striking-off orders set out at [6] above. It observed that the misconduct in this case was 'very serious and to allow you to continue practising would undermine public confidence in the profession and in the NMC as a regulatory body'. It noted the mitigating factors but concluded that they were outweighed by the aggravating ones. It decided that 'nothing short of a striking off order would be sufficient in this case'. Such an order was 'necessary to protect the public, mark the importance of maintaining public confidence in the profession, and to send to the public and the profession a clear message about the standard of behaviour required of a registered midwife'.

16 Following the decision on sanction, the NMC applied for an interim suspension order. Such an order was necessary to prevent the appellant from practising if she decided to appeal. The panel said this:

> 'The panel had particular regard to its earlier finding that there remains a high risk of repetition of the significant failings identified in your practice. It also bore in mind the seriousness of the matters which it has found proved and concluded that in light of its earlier decisions on impairment and sanction, that an interim order was necessary for the protection of the public and otherwise in the public interest. For the reasons already set out in detail on sanction, the panel considered that conditions of practice would not be appropriate. The panel therefore concluded that it is necessary for the whole of your registration to be subject to an interim suspension order on the grounds of public protection and in the public interest. To do otherwise would be inconsistent with its earlier findings.' (Emphasis added.)

The grounds of appeal

17 In the appellant's notice and skeleton argument, Ms Briony Molyneux advanced two grounds of appeal. First, she argued that it cannot be said with any certainty that the panel understood that the effect of the striking-off order was to prevent her from practising either as a midwife or as a nurse. They were never given specific legal advice to this effect. The interim orders in place prior to the hearing before the panel had permitted her to continue working as a nurse, though not as a midwife. There was no reference in the panel's decision to any intention to stop the Appellant from working as a nurse. This

submission is bolstered, the Appellant says, by the facts that each of the five episodes to which the charges relate arose in the context of midwifery practice and that the panel's decision contains repeated reference to 'the midwifery profession'. Insofar as reliance is placed on the Sanctions Guidance, the Appellant notes that the parts dealing with practitioners registered in more than one part of the register appears under the heading 'Conditions of practice orders', rather than under the heading 'Striking-off orders' and that the text does not even mention that striking-off orders prevent a registrant from practising under any of the designations registered.

18 The second ground was that the sanction of the striking-off order was disproportionate in all the circumstances. The Appellant accepts, however that this ground of appeal 'stems from those advanced above and cannot stand alone'. Nonetheless, she submits that it was 'wholly unfair that in a case that centres around midwifery concerns and contact, the outcome results in preventing [her] from working as a safe and effective nurse as she has been for several months before the hearing'. The appropriate way forward, the Appellant submits, is for the striking-off order to be replaced with a conditions of practice order lasting for three years, with a single condition not to work as a midwife. This course of action, the Appellant admits, 'delivers the intended outcome the panel were looking to achieve and is proportionate with the circumstances, recognising the wide-ranging failures in midwifery, whilst also acknowledging the unblemished long practice of [the Appellant] as a nurse'. (It is noted that the Appellant has worked for more than 20 years as a nurse and midwife without any concerns being raised.) Alternatively, the Appellant submits that the question of sanction should be remitted to a panel of the committee to consider the most appropriate way forward.

19 During the course of the hearing, Ms Molyneux sought to characterise the finding of dishonesty on charge 25 as a 'one-off' instance which was not done for gain. I drew attention to the finding contained in the underlined passage I have quoted in [14] above (that the Appellant had dishonestly made the false record in Patient C's notes in order to protect herself from a further complaint or fresh investigation). Ms Molyneux replied that there was no evidence for that finding. When it was pointed out that this was not among her pleaded grounds of appeal, she indicated that she wished to apply to amend these. Ms Mohamed, for the Respondent, invites me to refuse permission to amend. She submitted that the Appellant had been legally represented throughout and had had ample time to consider and draft grounds of appeal. She submitted that it would be unfair to permit an unpleaded challenge to a finding of fact at this late stage because, to respond to it, it would be necessary to go through the hearing transcripts to establish whether the inference drawn by the panel was open to them. If the amendment were allowed, Ms Mohamed submits that the inference as to the reason for the dishonesty was the kind of inference a fact-finding tribunal could properly draw.

Discussion

The application to amend the grounds of appeal

20 The need for procedural rigour in public law cases has been emphasised in a number of recent cases: see e.g. *R (Talpada) v Secretary of State for the Home Department* [2018] EWCA Civ 841, [67] *et seq*. As Singh LJ made clear at [69]:

> 'Courts should be prepared to take robust decisions and not permit grounds to be advanced if they have not been properly pleaded or where permission has not been granted to raise them. Otherwise there is a risk that there will be unfairness, not only to the other party to the case, but potentially to the wider public interest, which is an important facet of public law litigation.'

21 This guidance is no less applicable to appeals of this kind from disciplinary findings by professional regulators than it is to judicial review proceedings.

22 In this case, it was obvious from the panel's reasons that the finding of dishonesty, and the inference drawn by the panel as to the motivation for it, formed an important part of the justification for the sanction imposed. Yet neither Ms Molyneux's original grounds of appeal, nor her addendum grounds dated 11 February 2020, indicated any intention to challenge the finding or the inference.

23 It is particularly important to give proper notice of challenges to factual findings because responding to such challenges requires a careful analysis of the evidence before the tribunal. It is no answer to say that the full transcripts of evidence are before the court. Those transcripts are voluminous. Ms Mohamed was right to say that she is prejudiced because she had no reason to scour those transcripts for evidence relevant to findings which were not challenged until the hearing today. In the circumstances, if I were to grant permission for the Appellant to amend to raise this new point at this very late stage, I would have to adjourn the hearing or permit written submissions from the Respondent on the point.

24 I refuse permission to amend for three reasons. First, Ms Molyneux was unable to identify any reason, let alone a good reason, for not having included her challenge to the findings of dishonesty among her original grounds of appeal. Secondly, to allow the amendment at this stage would prejudice the Respondent, as I have said. Thirdly, and in any event, the new point appears to lack substance. Findings of fact based on the assessment of the credibility of witnesses who have given oral evidence are not to be lightly set aside: see e.g. *Biogen Inc. v Medeva plc* [1997] RPC 1, 45 (Lord Hoffmann). Nor are inferences drawn from findings of primary fact: *Beacon Insurance Co. Ltd v Maharaj* [2014] UKPC 21, [17] (Lord Hodge). These principles have been consistently applied in the context of appeals from professional regulators: see e.g. *Sait v General Medical Council* [2019] EWHC 3279 (Admin) (Mostyn J). In this case, the panel's finding that the Appellant had acted dishonestly was reached after hearing oral evidence from both Patient C and the Appellant. They were cross-examined. The panel had the opportunity to form their own impression of the credibility of each of them. As to the inference about the reasons for the dishonesty, the panel was entitled to conclude, having found that the entry in Patient C's records was dishonest, that there must have been a reason for the dishonesty. It used the fact that the entry had been made after the initial investigation of Patient A's complaint to infer that the reason was a desire to avoid a further complaint or investigation. On the face of it, this was an inference properly open to them having heard the Appellant give oral evidence.

Ground 1

25 I reject the submission that the panel misunderstood the effect of a striking-off order in this case, for three reasons.

26 First, as Ms Mohamed for the Respondent submits, the panel made numerous references to the Sanctions Guidance. The absence from the Sanctions Guidance of reference to the fact that a striking-off order prevents a registrant from practising under any of the designations registered does not assist the Appellant. The passage in the Guidance I have underlined at [5] above makes very clear that the only way to prevent a registrant from practising under one of her designations but not the other is to impose a conditions of practice order. Although the panel did not refer specifically to the part of the Sanctions Guidance dealing with conditions of practice, that is no doubt because Ms Molyneux, who represented the Appellant before the NMC as she did before me, did not invite the panel to make a conditions of practice order which would have permitted only practice as a nurse. Before the panel, she suggested something very different, namely conditions requiring reflective work and monitoring, which would have permitted her to continue working even as a midwife. The panel cannot be criticised for failing specifically to address conditions of practice never suggested to them.

27 Second, and in any event, the panel considered in terms whether to impose a conditions of practice order. They decided that it would not be appropriate to do so. That was because, in addition to showing [the Appellant's] incompetence as a midwife, the charges found proved demonstrated 'attitudinal problems in [her] failure to listen and respond to what the women in your care had clearly requested orally and in their birth plans' and because 'it was not possible to formulate conditions which would address the matters emanating from the findings of dishonesty'. These were matters which were obviously relevant to practice as a nurse as much as to practice as a midwife. In the light of these findings, it is obvious that the panel would have declined to impose a conditions of practice order limiting the Appellant to practice as a nurse, even if (contrary to the fact) that had been suggested to them.

28 Third, the reasons given by the panel for making the interim suspension order make clear that they considered it necessary to prevent the Appellant from practising either as a midwife or as nurse. The panel plainly understood that the interim order had prevented practice as a midwife only. That fact was made clear in the Appellant's submissions and the Appellant's practice as a nurse following the imposition of that order was referred to by the panel itself as a mitigating factor in her favour. Nonetheless, the panel considered it necessary 'for the whole of [the Appellant's] registration' to be subject to an interim suspension order. The purpose of that was, plainly, to prevent her practising either as a midwife or as a nurse, while any appeal was pending. The panel's conclusion that '[t]o do otherwise would be inconsistent with its earlier findings' indicates that it intended its striking-off order to have the same effect. I am unimpressed with Ms Molyneux's suggestion that I should place little weight on what the panel chair said about interim suspension because that part of the reasons was or might have been drafted from a template with the assistance of the panel secretary. It must be assumed that panel members understand the reasons they give; and that those reasons reflect their understanding of the facts and law. There is nothing to displace that assumption here. Nor is there any significance in the fact that this passage came after the panel gave its decision on sanction. It is no less revelatory of the panel's understanding of the effect of their order for that.

Ground 2

29 As Ms Molyneux accepts, ground 2 'cannot stand alone'. In any event, the decision of the panel as to sanction was a 'multi-factorial' one. As the Court of Appeal noted in *General Medical Council v Bawa-Garba* [2018] EWCA Civ 1879, [2019] 1 WLR 1929, [67]:

> 'An appeal court should only interfere with such an evaluative decision if (1) there was an error of principle in carrying out the evaluation, or (2) for any other reason, the evaluation was wrong, that is to say it was an evaluative decision which fell outside the bounds of what the adjudicative body could properly and reasonably decide.'

30 In this case, the decision appealed was a carefully reasoned evaluation by an expert tribunal. It has not been suggested that the panel failed to take into account any considerations that were relevant or took into account any that were irrelevant. Apart from the suggestion that it misunderstood the effect of its striking-off order on the Appellant's ability to practise as a nurse – a suggestion that I have rejected – the Appellant has not identified any error of principle or approach. Insofar as the panel considered that the charges found proved demonstrated attitudinal failings and dishonesty in a clinical setting, and that these could not be adequately addressed by any lesser sanction than striking-off, that decision was squarely within the range of decisions properly and reasonably open to them.

Conclusion

31 For these reasons, the appeal is dismissed.