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IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

[2020] EWHC 2569 (Admin)



No. CO/2786/2020

Royal Courts of Justice

Tuesday, 25 August 2020

Before:

MRS JUSTICE EADY

B E T W E E N :

NURSING AND MIDWIFERY COUNCIL

Applicant

- and -

WILDING

Respondent

MR M. CASSELLS (instructed by Nursing and Midwifery Council) appeared on behalf of the Applicant.

THE RESPONDENT did not appear and was not represented.

J U D G M E N T

MRS JUSTICE EADY:

Introduction

- 1 This is the hearing of the applicant’s application, under Article 31(8) of the Nursing and Midwifery Order 2001 (“the Order”), for a seven-month extension of an interim order imposed on the respondent.
- 2 The applicant’s application is supported by a statement from Suzanna Drury, a Case Manager, dated 7 August 2020, which I have read in advance of this hearing together with the documents exhibited thereto. I have also seen the certificate of service, signed on 21 August 2020, confirming service of the application and supporting witness statement and exhibits on the respondent by means of recorded delivery and first-class post on 17 August 2020, delivery being signed for at 11.35 on 19 August 2020. I understand that the claim form and associated documents were also sent to the respondent by email prior to this date. No formal response has been received from the respondent in relation to the application, but I am satisfied that she has been served and that it is appropriate to proceed with this hearing today, notwithstanding her absence.

Factual background

- 3 At the material time, the respondent was employed as a registered midwife by the Liverpool Women’s Hospital (“the Hospital”), which is part of the Liverpool Women’s NHS Foundation Trust (“the Trust”). On 29 January 2019 the applicant received a referral letter from the Head of Midwifery at the Hospital stating that the respondent had been dismissed by the Trust on grounds of capability. It was identified that, in seven specific cases, the respondent’s performance fell well below the standards expected of a midwife.
- 4 The applicant commenced an investigation which identified regulatory concerns relating to lack of competence; specifically, in relation to the following areas: (i) interpretation of cardiocotographs; (ii) record-keeping; (iii) the ability to escalate and deal with emergencies; and (iv) the ability to prioritise patients. An additional concern relating to dishonesty – namely, knowingly falsifying a patient’s records - was also identified.
- 5 Following the conclusion of the applicant’s investigation, the case was considered by the applicant’s Case Examiners (or “CEs”) on 12 June 2020, who determined that the respondent had a case to answer in respect of all of the regulatory concerns and referred the matter to the Fitness to Practice Committee (the “FtPC”) for adjudication. That determination is explained in the CE’s decision letter of 25 June 2020.
- 6 The respondent was previously represented by Thompsons, Solicitors, but - as Ms Drury explains in her statement - on 18 April 2019, the applicant received correspondence from Thompsons stating they would no longer be acting on behalf of the respondent, who no longer wished to engage with the regulatory proceedings. Ms Drury further says that, on 23 June 2020, the respondent informed the applicant that she wished to apply for voluntary removal from the applicant’s register.

The interim order proceedings

- 7 Under Article 31(2) of the Order, a FtPC can make an interim order where it is satisfied that such an order is necessary for the protection of members of the public, or otherwise in the public interest, or is in the interests of the person concerned.

- 8 The respondent's case first came before a panel of the Investigating Committee on 1 March 2019. An interim suspension order (or "ISO") was made on that date for eighteen months, for reasons set out in a letter to the respondent dated 4 March 2019. Specifically, it was considered that there was a real risk of repetition of the practice concerns, and that those concerns were serious, wide-ranging and had been repeated over a period of two years, notwithstanding both informal and formal capability programmes. In the circumstances, the panel concluded there was a real risk of significant harm should the respondent be allowed to practice without restriction and that some form of interim order was necessary on the ground of public protection and was otherwise in the public interest in order to maintain confidence in the profession and in the NMC as regulator. Given the history of this case - where, despite extended periods of supernumerary status, the respondent had still allegedly not met the standards required of a registered midwife to practise safely and autonomously - the panel was not satisfied that workable and practical conditions of practice could be devised which would be sufficient to protect the public given the wide-ranging and serious allegations made; it concluded, therefore, that an ISO was appropriate, necessary and proportionate.
- 9 The ISO has since been reviewed on three occasions, the last being on 21 July 2020, when the FtPC noted that there had been no material change of circumstances since the order was imposed and last reviewed.
- 10 That order is now due to expire on 31 August 2020. Meanwhile, the substantive case is now at the stage at which it is ready to be scheduled for substantive determination at hearing or meeting.

The present application and my approach

- 11 It is against that background that the applicant makes this application. Under Article 31(9) of the order, on such an application, the court may extend, vary, or further extend (for up to twelve months) the period for which the order has effect. In *General Medical Council v Dr Stephen Chee Cheung Hiew* [2007] EWCA Civ 369, the Court of Appeal gave guidance on the principles to be applied in applications of this kind. Specifically, the criteria to be applied by the court when considering an application to extend an interim order are the same as those for the making of the order by the regulatory body and relevant factors will include (i) the gravity of the allegations; (ii) the seriousness of risk of harm to patients; (iii) the reasons why the case has not been concluded; and (iv) prejudice to the practitioner if the interim order is continued.
- 12 The onus of satisfying the court that the criteria are met is on the regulatory body. It is, however, not the function of the court to make findings of primary fact about the events that have led to the suspension or to consider the merits of the case for suspension. The court is required to ascertain whether the allegations, rather than their truth or falsity, justify the prolongation of the interim order; in general, it need not look beyond those allegations.

Application of those principles to this case

- 13 I accept that the allegations in this case are serious and wide-ranging in nature, relating directly to the respondent's midwifery and clinical practice. I further accept that the fact that the allegations relate to basic but fundamental midwifery practice is of particular concern when assessing risk, and that all the concerns demonstrate a potential for serious unwarranted patient harm. There is, moreover, particular concern given the similarity of the issues raised and the fact that these have apparently persisted, notwithstanding supervision being put in place and the respondent being the subject of both informal and formal

capability programmes. The further allegations of misconduct, in the form of dishonest record-keeping, add to the gravity of the allegations and could be said to be indicative of an underlying attitudinal concern which is more difficult to correct. I am satisfied that the applicant has demonstrated the requisite gravity of the allegations in this case and I further accept that all the matters referred to in the allegations have the potential for serious unwarranted harm to patients.

- 14 As the applicant acknowledges, there has been a delay in concluding the substantive case and it is of concern that this case has yet to be completed. The chronology exhibited to Ms Drury's statement details the various investigative and procedural steps undertaken and it is apparent that little progress was made with the investigation between 19 February 2019 and 17 June 2019. There is no explanation for that. Subsequently, delays were also experienced between 22 August 2019 and 6 March 2020, when the applicant was seeking to obtain witness statements from seven witnesses. The further delay that occurred at this stage can be explained as being due to the need to seek additional information, to slow responses from the witnesses and due to additional witnesses then being identified as part of the process.
- 15 Thereafter, delays arose due to measures taken by the applicant to deal with the immediate effects of the COVID-19 pandemic; this has inevitably impacted upon various of the applicant's functions and is a factor that is likely to lead to further delays in the future, as the applicant seeks to catch up with the work that has built up over these months. Given this background, and taking into account the statutory notice periods required and the need to schedule the hearing to allow for the attendance of witnesses, the applicant has sought an extension of seven months.
- 16 Turning to the question of prejudice to the respondent, as the applicant accepts, any extension to the interim order has the potential to cause prejudice to the respondent, albeit in this case she has indicated that she does not wish to engage with the regulatory proceedings and it has been stated that she intends to apply for voluntary removal from the applicant's register.
- 17 Taking all these matters into consideration, I am satisfied that, given the seriousness of the concerns, any prejudice to the respondent in extending the interim order is outweighed by the public interest in ensuring public and patient safety and maintaining confidence in the profession. I also accept that the ongoing necessity of the order is demonstrated by the fact that it has been reviewed on a number of occasions and, on each occasion, the specialist panel has confirmed that the order remains necessary for public protection and is otherwise in the public interest. In the circumstances, I am prepared to allow the application to extend the interim order for seven months on the grounds that it remains necessary to protect the public and is otherwise in the public interest.

CERTIFICATE

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This transcript has been approved by the Judge.