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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
[2020] EWHC 2575 (Admin)



No. CO/2678/2020

Royal Courts of Justice
Thursday, 20 August 2020

Before:

MRS JUSTICE EADY

B E T W E E N :

NURSING AND MIDWIFERY COUNCIL

Applicant

- and -

CLODUALDO CABIA

Respondent

MR C. SCOTT appeared on behalf of the Applicant.

THE RESPONDENT was not present 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 an extension of an interim conditions of practice order imposed on the respondent in these proceedings on 21 February 2019. The interim order is due to expire later today and the applicant seeks an extension of seven months.
- 2 Mr Scott appears for the applicant at this hearing; the respondent, Mr Cabia, is neither present nor represented. I have seen a certificate of service which attaches confirmation of delivery from the applicant to Mr Cabia, by Royal Mail, on 5 August 2020. Papers were also sent by email on 31 July 2020. It seems, however, that there has been no response from Mr Cabia, and he has not been in touch with the court, nor sought to confirm his attendance at this hearing. I am, however, satisfied that Mr Cabia will have been aware of this application and of the arrangements for the hearing and, in the circumstances, I consider it is appropriate to proceed in his absence.
- 3 The applicant's application in this matter is supported by a statement from its case manager, Alexander Young, dated 30 July 2020, together with documents exhibited thereto. I have read that material, and the skeleton argument prepared by Mr Scott, in advance of this morning's hearing.

The Background

- 4 The respondent was employed as a Registered Nurse at Watford General Hospital. On 24 January 2019, he notified the applicant about clinical concerns in his practice and this was subsequently followed by a referral from the Head of Nursing at the hospital. The concerns are said to include poor record keeping, poor patient care, failure to make observations and to monitor patients, a failure to preserve patient safety, a failure to recognise and/or escalate deteriorating patients, and poor communication and attitude. In particular, it is alleged that the respondent made a series of clinical errors in January 2019, which could have placed patients at risk of harm and his employment was terminated as a result.
- 5 This was the third referral investigated by the applicant into the respondent's nursing practice. The first, in July 2013, resulted in findings that the respondent had failed to provide appropriate care to a deteriorating patient, and had been dishonest in representing his knowledge of the patient to a colleague. A substantive order was imposed in respect of those findings, in September 2014. That order persisted, either as a suspension order or as a conditions of practice order, until it was found, on 11 May 2018, that the respondent had remediated his clinical misconduct and directed that it should lapse on its expiry, which it did on 20 June 2018.
- 6 The second referral arose from concerns about the respondent's knowledge of English. On 17 May 2018, it was found that the respondent lacked the necessary knowledge of English to practise safely as a nurse and his practice was restricted through a substantive conditions of practice order. On 29 October 2019, that order was replaced with a 12 month suspension order, which will remain in force until 15 December 2020.
- 7 The present referral has been investigated by the applicant and a decision from the applicant's case examiners is awaited as to whether the respondent has a case to answer.

The respondent's case first came before a Panel of the Investigating Committee on 21 February 2019, when an interim conditions of practice order was made for 18 months; reasons for that decision being confirmed in a letter to the respondent on 22 February 2019.

- 8 The interim order has since been reviewed on three occasions, the last being 21 July 2020, and the interim conditions have been confirmed and continued. The order is due to expire later today.

The Present Application

- 9 This is the applicant's first application to the court to extend the interim order in this case. The applicant seeks this extension on the grounds that it is necessary for the protection of the public and is otherwise in the public interest.

The Test I am to Apply

- 10 In considering this application, and in accordance with the guidance provided in *GMC v Dr Stephen Chee Cheung Hiew* [2007] EWCA Civ 369, I have had regard to the following matters: the gravity of the allegations made against the respondent, the seriousness of the risk of harm to patients, the reasons why the case has not been concluded, and the prejudice to the practitioner if an interim order is continued.
- 11 I bear in mind that the applicant bears the burden of satisfying me that an extension should be granted, and that it should be of the length sought. In making the assessment required of me, I further keep in mind that it is not the function of the court to make findings of primary fact about the events that led to the interim order, or to consider the merits of the case more generally. The question for me is whether the allegations - rather than their truth or falsity - justify the prolongation of the interim order.

The Application of these Principles to the Present Case

- 12 The allegations in this case relate to failures in areas of basic nursing care, including record keeping and the monitoring and escalation of care of deteriorating patients. I am satisfied that these are serious allegations and that there is a real risk that patients would be exposed to unwarranted harm, should the respondent be able to practise unrestricted. That risk is heightened by the respondent's history of making similar errors, which resulted in a substantive order being made against him between September 2014 and June 2018. I further accept that to expose patients to such risk would undermine public confidence in the profession.
- 13 I have had careful regard to the history of the investigation as explained by Mr Young. It is apparent that there are two periods of significant delay for which there is no satisfactory explanation, beyond the transfer of the case between investigators. The applicant has apologised for this failing but points out that its investigation has now been completed and a decision is awaited as to whether the case examiners find a case to answer. Should they do so, the case will progress to a final hearing or meeting.
- 14 In terms of the extension sought, there must be two statutory response and notice periods of 28 days given to the respondent. In addition, the applicant observes that there will be a need to accommodate the availability of witnesses, who are clinical workers; given these factors, along with the impact of delays caused by COVID-19, a longer than usual extension will therefore be needed. It is in those circumstances that an extension of seven months is sought.

- 15 Against this background, I have considered the prejudice that will be caused to the respondent by such an investigation. I note that he is already prevented from working as a nurse until December 2020 by reason of the existing suspension order. As the applicant points out, however, as that relates to language skills not clinical concerns, that could be revoked should evidence of relevant remediation be shown; it cannot, therefore, provide a satisfactory substitute for the continuation of the present interim order. I further note, from the investigation report, that the respondent has apparently indicated that he may wish to voluntarily remove himself from the NMC register, although I do not understand that he has taken any steps to do this as yet.
- 16 Having due regard to the potential prejudice to the respondent from granting the extension sought, I am, nevertheless, satisfied that the public interest in maintaining the order outweighs the respondent's interests in this respect, and that the order remains necessary to protect the public and is otherwise in the public interest.
- 17 I therefore grant the application and the extension sought.
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CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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This transcript has been approved by the Judge.