SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2022] CSIH 47
XA45/22

Lord Justice Clerk
Lord Turnbull
Lord Tyre

OPINION OF THE COURT

delivered by LORD TYRE

in the Appeal

by

SW

Appellant

against

a decision of the Health and Care Professions Tribunal sitting as the Conduct and Competence Committee of the Health and Care Professions Council dated 20 July 2022

Appellant: P Reid; BTO LLP
Respondent (The Health and Care Professions Council): Dean of Faculty, Blair; Anderson Strathern

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18 October 2022

Introduction

[1] The appellant ("SW") is a chartered counselling psychologist. In terms of the Health Professions Order 2001, she is a "practitioner psychologist" whose professional regulatory body is the Health and Care Professions Council. In January 2021 an allegation of

misconduct by SW was made to the Council by a therapist providing services to a client referred to as Service User A ("SUA"). SUA was a former client of SW with whom she had formed a personal relationship. The Council referred the complaint to a panel of its Competence and Conduct Committee. After a hearing the panel made a finding that SW's fitness to practise was impaired and imposed a sanction of 12 months' suspension. In this appeal under article 38 of the 2001 Order, SW challenges the sanction imposed. In her grounds of appeal she also challenged the panel's finding that her fitness to practise was impaired, but that ground was not insisted upon.

The allegations against SW

[2] The allegations considered by the panel were as follows:

> "1. Did not maintain appropriate professional boundaries in relation to Service User A, in that:
>
> (a) on an unknown date in or around January 2013 you:
>
> i) provided Service User A with your personal mobile telephone number;
>
> ii) met with Service User A in a café;
>
> iii) you entered a sexual relationship with Service User A.
>
> (b) on an unknown date in August 2013 you moved in with Service User A.
>
> 2. Failed to promote and protect the interests of Service User A, in that you:
>
> (a) prematurely and/or abruptly ended therapy with them when it was not clinically indicated; and/or
>
> (b) exhibited coercive and controlling behaviour during the course of your relationship.
>
> 3. Your conduct in relation to Particular 1 was sexually motivated.
>
> 4. The matters set out in Particulars 1, 2 and 3 above constitute misconduct.

5. By reason of your misconduct, your fitness to practice is impaired."

[3] SW admitted allegations 1(a)(i)-(iii), 1(b), 2(a), 3 and 4.

The panel's factual findings

[4] During the night of 2-3 February 2013, SW engaged in a lengthy exchange of text messages on her work phone with SUA, to whom she had been providing therapeutic services since 2010. Both were intoxicated. The exchange, which had been initiated by SUA, was not of a sexual nature. On the following day SUA contacted SW threatening to report her to her manager and professional body, and insisting that she (SUA) be referred to another therapist. SW recognised that the texting had constituted a serious breach of professional boundaries and that the therapeutic relationship which had been expected to continue for a number of sessions could not do so. She arranged for SUA to be transferred to a psychological therapies team at another geographic location, but did not disclose the true reason for this, stating instead "I am unable to offer her any further appointments due to time scales".

[5] SUA's final therapy session with SW took place on Tuesday 5 February 2013. The panel found that as SUA drove home from the session, SW sent her a text with her personal telephone number. Within a week or two of that date SW and SUA met by arrangement at a café. By late February a kiss had been exchanged, and by early March a sexual relationship had commenced. From August 2013 to November 2014, SW and SUA cohabited in a jointly rented flat. Their relationship continued until January 2017, at which point it ended by mutual agreement.

The panel's decision

[6] In relation to allegation 1, it was not disputed by SW that she had failed to maintain appropriate professional boundaries. In relation to allegation 2(a), the panel concluded that when the professional relationship was terminated, there was no review and no proper conclusion to the therapy which was ended abruptly at a time when that was not clinically indicated. It was the fact that SW had allowed professional boundaries to be crossed which caused it to end. This failed to promote the best interests of SUA. As regards allegation 3, the panel found in relation to the provision of her personal number and the meeting in the café that it was more likely than not that the prospect of a sexual relationship was an element of SW's motivation. For these reasons the panel concluded that SW's admission of allegations 1(a)(i)-(iii), 1(b), 2(a), and 3 had been appropriately made. On the evidence, the panel did not consider that allegation 2(b) (exhibiting coercive and controlling behaviour during the course of the relationship) had been established.

[7] As to the allegation of misconduct, the panel noted that the fact that SUA was a client of SW demonstrated her vulnerability; that SUA had formed an attachment to SW from the therapeutic relationship; that SW was aware of specific respects in which SUA was vulnerable; and that SW knew that what she was doing was wrong. The panel was satisfied that SW knew at the time they occurred that her actions were likely to result in harm to SUA. As SW acknowledged on hearing SUA give evidence, SUA had been profoundly adversely affected by the events under consideration. Although the initial breach of appropriate professional boundaries did not arise from a sexual motivation on the part of SW, such a motivation arose immediately thereafter and compounded what was already a serious breach. The sexual relationship that quickly followed a long therapeutic relationship

constituted a breach of proper professional standards despite the ending of the therapeutic relationship. These circumstances were sufficiently serious to constitute misconduct.

[8] The panel noted that it was required to consider the issue of current impairment of fitness to practise both from the point of view of the personal component and in relation to the wider considerations relevant to the public component. It was required in particular to consider whether breaches of this type were remediable. The panel concluded that the breaches represented an attitudinal disregard of standards of which SW was aware and which she understood. These were more difficult to remedy than failures based on a lack of knowledge or skill. It was also more difficult to assess whether meaningful steps had been taken to address them. There had been a failure by SW to take responsibility for what occurred. Her reflections had been focused on her own development, rather than on the harm the relationship had caused to SUA. Her submissions in respect of the likely or actual effect on SUA had been less well developed. She had not undertaken boundaries training until September 2021, and had only done so because of the pending proceedings.

[9] The panel accordingly concluded that SW's insight into her actions was incomplete, and that there was a more than negligible risk that she would fail to maintain proper professional boundaries in the future. Where such a risk, however small, existed, and where the consequences for a service user would be grave, a finding of misconduct in respect of the personal component was justified. Further, the public component required a finding of current impairment of fitness to practise to be made. If such a finding was not made, the importance of observing proper professional standards, and public confidence in the integrity and regulation of practitioner psychologists, would be diminished.

The Council's Sanctions Policy

[10] The Council has published a Sanctions Policy setting out the principles its panels should consider when deciding what sanction, if any, should be imposed in a fitness to practise case. The primary function of any sanction is to protect the public. The considerations in this regard include any risks the registrant might pose to those who use or need their services, the deterrent effect on other registrants, public confidence in the profession concerned, and public confidence in the regulatory process. It is not the role of the panel to punish for past misdoings, but the panel will take account of past acts or omissions in determining whether a registrant's fitness to practise is currently impaired. A sanction may be punitive in effect, but should not be imposed for that purpose. Panels should take the minimum action necessary to ensure the public is protected. This means considering the least restrictive sanction available to them first, and only moving on to a more restrictive sanction if it is necessary to protect the public.

[11] Paragraph 106 of the policy states that a conditions of practice order is likely to be appropriate where the registrant has insight; the failure or deficiency is capable of being remedied and there are no persistent or general failures which would prevent the registrant from remediating; appropriate, proportionate, realistic and verifiable conditions can be formulated; the panel is confident the registrant will comply with the conditions; and the registrant does not pose a risk of harm by being in restricted practice. Conditions are less likely to be appropriate in more serious cases involving, *inter alia*, dishonesty or abuse of professional position, including vulnerability. "Abuse of professional position" includes inappropriate relationships with service users. In such cases, paragraph 109 states that a conditions of practice order should only be imposed where the panel is satisfied that the

registrant's conduct was minor, out of character, capable of remediation and unlikely to be repeated.

[12] Paragraph 121 states that a suspension order is likely to be appropriate where there are serious concerns which cannot be reasonably addressed by a conditions of practice order, but which do not require the registrant to be struck off the register. These types of cases will typically exhibit the following factors: the concerns represent a serious breach of the standards of conduct, performance and ethics; the registrant has insight; the issues are unlikely to be repeated; and there is evidence to suggest the registrant is likely to be able to resolve or remedy their failings. A suspension order may be imposed for a specified period up to one year. When determining the length of a suspension order, panels must ensure that their primary consideration is what is necessary and proportionate for public protection.

The sanction imposed on SW

[13] The panel acknowledged that a sanction should not be punitive but should be imposed where it was required to protect the public, to maintain confidence in the profession, and to uphold professional standards. In accordance with the Sanctions Policy, the panel considered the available options in ascending order of gravity until reaching one that, in its view, sufficiently addressed these aims.

[14] The panel regarded the following factors as serious:

- There was a breach of professional boundaries that constituted a breach of trust. SW not only knew that SUA was a vulnerable person, but also the respects in which she was vulnerable.
- The breach of trust arose from SW abusing her professional position to have an inappropriate relationship. There had been a long therapeutic relationship, at first

fortnightly and then weekly. The sexual relationship began within a few weeks of the ending of the therapeutic relationship.

- SW was fully aware that her behaviour was inappropriate.
- Not only did SUA suffer harm as a result of SW's activities, SW knew at the time that harm was very likely to be suffered.
- SW's insight into her behaviour, and particularly the consequences of it, was incomplete. There accordingly remained a risk of repetition. Although that risk was not great, it was not negligible, and if it did occur the degree of harm would be likely to be considerable.

[15] The panel identified the following factors favourable to SW:

- Once the matter came to light, she had fully engaged with the Council and had admitted both factual particulars and that misconduct had been demonstrated.
- Again after the matter was disclosed, she had been open with her employer.
- She had expressed remorse and had apologised for her behaviour.
- She had demonstrated some insight, although for the reasons expressed above, her insight was far from complete.
- At a very late stage, she had undertaken a training course on professional boundaries, but that of itself was not sufficient to show that her remediation was complete.
- There was no history of regulatory findings against her.

The panel did not consider it a mitigating factor that the events had taken place nine years previously. The reason for the delay in the matter being considered by the Council was SW's lack of candour in failing to disclose to her employer why her therapeutic relationship with SUA had terminated.

[16] The panel decided that its finding of misconduct required the imposition of a sanction. It first considered whether a caution order would be appropriate. It could be argued that the issue was isolated in the sense that it concerned one relationship with one service user but, that apart, the present case did not fit the criteria suggested in paragraph 101 of the Sanctions Policy. The issue was neither limited nor relatively minor. There was a risk of repetition, and the breaches had not been fully remediated. The panel concluded that a caution order was not appropriate.

[17] The panel next addressed the question whether a conditions of practice order should be made, and had regard to paragraphs 106 to 109 of the Sanctions Policy. Its conclusion at paragraph 64 of its decision was as follows:

> "As has already been stated, this was a case of a very serious abuse of a professional position that resulted in a grossly inappropriate relationship that constituted a serious failure to maintain appropriate professional boundaries. The conclusion of the Panel was that this is a case that is, quite simply, too serious to result in the imposition of a conditions of practice order. The imposition of such an order would not mark the seriousness of the Registrant's behaviour, would not sufficiently reassure the public of the seriousness that behaviour of that sort will have serious consequences and would not serve to declare proper professional standards so as to deter other registrants from behaving in a similar manner."

[18] The panel then proceeded to consider making a suspension order, and had regard to paragraph 121 of the Sanctions Policy. In the view of the panel:

- the concerns in the present case represented a serious breach of the standards of conduct, performance and ethics;
- SW had some, albeit not fully developed, insight;
- there was a risk of repetition, although the risk was not high;
- there were no grounds on which it could be said that SW would not wish to resolve and remedy her failings, although she had not to date succeeded in resolving or remedying them.

The panel accordingly regarded the conditions for imposition of a suspension order as having been met.

[19] Finally, the panel considered whether a striking off order was required, and concluded that it was not.

[20] As regards the length of the suspension, the panel decided that it should be for the maximum period of 12 months. This was necessary to allow SW time to consider what remedial work she needed and intended to do, and then to undertake the identified steps. In any event, the panel concluded that no lesser sanction would satisfy the wider public interest and sufficiently underline the gravity of the misconduct. The panel accordingly made an order directing the Registrar to suspend SW's registration for a period of 12 months from the date when the order took effect. In terms of article 29(11) of the 2001 Order, a suspension order does not take effect until the expiry of the period within which an appeal may be made or, where an appeal has been made, until the appeal is withdrawn or otherwise finally disposed of. However, the Council applied for and were granted an *interim* suspension order suspending SW's registration pending the final determination of this appeal, subject to a maximum period of 18 months.

Submissions for the appellant

[21] SW did not challenge the panel's finding of misconduct nor, ultimately, its finding that her fitness to practise was currently impaired. As regards the sanction imposed, it was submitted on her behalf that:

(i) a suspension order was excessive and disproportionate;

(ii) if a period of suspension was appropriate, 12 months was excessive and disproportionate; and

(iii) in any event the period should be reduced to take account of the period of *interim* suspension served pending determination of her appeal.

[22] The imposition of a period of suspension was entirely punitive. SW had practised for almost a decade, including during the period of investigation, without any restriction upon her registration. She had had regular reviews with her supervisor, focused on maintenance of appropriate professional boundaries. The panel had erred in discounting the passage of time as a mitigating factor; it was plainly relevant to the risk to the public and the public interest in regulation of the profession. Although it was admitted that the relationship was inappropriate, there had been no sexual aspect prior to termination of the therapeutic relationship, and no finding that SUA's care had been compromised by the transfer to an alternative therapist. The test for imposition of a sanction was necessity. A period of suspension was not necessary to protect the public or the reputation of the profession; any continuing risk could be managed by conditions of practice. Moreover, no consideration had been given to the interests of SW's clients with whom she had built relationships of trust and confidence that had been summarily terminated.

[23] In selecting a period of 12 months' suspension, the panel had imposed the most severe sanction short of striking off. No explanation had been given for discounting a shorter period. The panel's conclusion that no lesser sanction would satisfy the wider public interest represented an over-reaction to the allegations found to be established, and failed to recognise the passage of time without further concerns being raised. If suspension were held to be necessary, a more appropriate period would be about two months (which SW had already served by virtue of the *interim* order).

[24] Finally, the sanction was rendered excessive and disproportionate by the fact that the period of suspension will not commence until disposal of the appeal. That represented a

substantial penalty imposed on SW for exercising her statutory right to appeal and was manifestly unfair. Reference was made to the observations of the court in *Burton* v *Nursing and Midwifery Council* [2018] CSIH 77. On any view the period should be reduced to reflect the time SW had been suspended pending determination of the appeal.

Submissions for the Council

[25] On behalf of the Council it was submitted that the appeal should be refused. It could not be said that the panel's decision on sanction, including the duration of the suspension, was outwith the range reasonably open to a reasonable panel properly directing itself. The panel had correctly applied the Council's Sanctions Policy. The policy was clear that in circumstances involving abuse of professional position, a conditions of practice order was not likely to be appropriate. The factors in paragraph 109 were not pertinent to SW's case. The panel had correctly identified that each of the factors identified in paragraph 121 for imposition of a suspension order was engaged, and gave reasons for its decision. Considerations of the public interest informed both the type of sanction selected and the duration of any sanction. The public interest was likely to require significant action to be taken to mark its disapproval of conduct which fell well short of the standards to be expected of a registered professional. As regards the passage of time, the panel was entitled to regard the delay in consideration of SW's conduct as the result of her lack of candour. Disruption of the registrant's relationship with his or her clients would occur in any case where suspension was found to be necessary.

[26] The overriding concern was the maintenance of public confidence in the profession. This was a serious abuse of professional position and the panel had been entitled to regard public confidence as carrying greater importance than remediation and risk of repetition. It

would not be possible to frame conditions of practice that would address the public component of SW's misconduct.

[27] No deduction should be made from the period of suspension in respect of time spent pursuing this appeal. The statutory structure did not envisage any such deduction and it was not for the court to innovate on the terms of the 2001 Order. An *interim* order and a final sanction had different purposes and the distinction between the two should not be blurred by deducting from the final suspension any period arising from an *interim* order. The invitation of the court in *Burton* to consider whether there was a need for amendment of the equivalent disciplinary scheme for nurses and midwives had not been taken up. In any event it could not be said that the panel's decision was plainly wrong when it could not have known, when imposing the sanction, whether its decision would be appealed or, if so, how long it would take for the appeal to be determined.

Decision

[28] The proper approach of the court to appeals from regulatory and disciplinary bodies was summarised by Lord Malcolm, delivering the opinion of the court, in *Professional Standards Authority for Health and Social Care* v *Nursing and Midwifery Council* 2017 SC 542, at paragraph 25:

> "…(T)he determination of a specialist tribunal is entitled to respect. The court can interfere if it is clear that there is a serious flaw in the process or the reasoning, for example where a material factor has not been considered. Failing such a flaw, a decision should stand unless the court can say that it is plainly wrong, or, as it is sometimes put, 'manifestly inappropriate'. This is because the tribunal is experienced in the particular area, and has had the benefit of seeing and hearing the witnesses. It is in a better position than the court to determine whether, for example, a nurse's fitness to practise is impaired by reason of past misconduct, including whether the public interest requires such a finding. The same would apply in the context of a review of a penalty…"

[29] The Sanctions Policy makes clear that the purpose of imposition of a sanction is the protection of the public. That purpose has both private and public components. The private component is concerned with protection of current and future service users, and focuses upon the registrant's insight, the likelihood of remediation of impairment of fitness to practise, risk of repetition, and the degree of harm likely to be suffered by a service user in the event of repetition. The public component is concerned with protection of public confidence in the relevant profession and in the ability of its regulatory process to deal appropriately with misconduct and impairment of fitness to practise, and focuses on declaring and upholding public standards and on deterrence of misconduct by others.

[30] Where a panel of the Council's Competence and Conduct Committee is considering what sanction to impose on a registrant, it must follow the Sanctions Policy unless there are sound reasons for departing from it (cf *Professional Standards Authority for Health and Social Care* v *General Medical Council* [2022] CSIH 37). It must therefore have regard to both the private and public components of the protection of the public. The latter component may in some cases predominate. For example, in *Yeong* v *General Medical Council* [2010] 1 WLR 548, where the misconduct consisted of a prolonged and inappropriate sexual relationship between a doctor and a patient, Sales J held (at paragraph 58) that the GMC's disciplinary panel had been entitled to conclude that in such a case the question of remedial steps and compliance with improved practising standards for the future was of less importance than the imposition of a sanction which conveyed a clear public statement of the importance which attaches to the fundamental standard of professional conduct in relation to relationships between medical practitioners and patients.

[31] In the present case the panel acknowledged that the purpose of a sanction is public protection and not punishment. It complied with the requirement of the Sanctions Policy to

consider the available sanctions in ascending order of gravity. When it came to consider whether to make a conditions of practice order, the panel correctly had regard to paragraphs 106 to 109 of the policy. As can be seen from paragraph 64 of its decision, set out above, the panel's decision not to make a conditions of practice order was founded largely upon the public component of the public protection requirement. The panel placed greater emphasis on the seriousness of the misconduct and the need to maintain public confidence in the profession than upon remediation and the existence of future risk. In our opinion the panel was entitled to take this approach, and, putting the matter at its lowest, its decision to reject a conditions of practice order for these reasons cannot be said to be plainly wrong or manifestly inappropriate.

[32] The panel's decision is also in accordance with paragraph 108 of the Sanctions Policy which explains that a conditions of practice order is less likely to be appropriate in more serious cases, including those involving dishonesty and abuse of professional position, including vulnerability. We observe that there was an element of dishonesty in the circumstances of the present case in that SW gave the transferee therapist a false reason for termination of her therapeutic relationship with SUA, although this was not one of the matters founded upon by the Council. More significantly, the potential exception to paragraph 108 contained in paragraph 109 allows the panel to impose a conditions of practice order in a case of abuse of professional position only if satisfied that the registrant's conduct was minor, out of character, capable of remediation and unlikely to be repeated, and even then the panel is enjoined to take care to "provide robust reasoning". The panel took the view that W's conduct amounted to a very serious abuse of professional position and far from minor. It was entitled to do so and was therefore entitled to disregard the exception in paragraph 109 as having no application to the circumstances of SW's case.

[33] In his submissions counsel for SW placed emphasis on the passage of time since the occurrence of the misconduct, and on the fact that SW had been in unrestricted practice for more than a decade without any further issues arising. We note that the Sanctions Policy makes no express provision for allowance of passage of time as a mitigating factor. The panel's reason for declining to treat it as a mitigating factor was that the delay was due to SW's lack of candour in failing timeously to disclose why her therapeutic relationship with SUA had come to an end. It may be that in cases which turn primarily on remediation and future risk a significant passage of time since the occurrence of the misconduct will constitute an important mitigating factor for a panel to take into account when considering whether to impose a conditions of practice order. Where however, as here, the emphasis is on the public component of the sanction and the seriousness of the misconduct, passage of time is likely to be of lesser significance, and we do not consider the panel's decision not to treat it as a mitigating factor to have been plainly wrong. We also disagree with the suggestion that the panel erred in failing to attach weight to the consequences for SW's existing clients of her suspension. As the Council submitted, that will be an inevitable consequence of any decision to impose a suspension order and cannot be a material factor if, on a proper application of the policy, a suspension order has been found to be necessary.

[34] When the panel proceeded to consider whether to impose a suspension order, it had regard *inter alia* to the extent of development of insight, the degree of risk of repetition and SW's desire to resolve and remedy the failings that led to the finding of impairment of fitness to practise. It is to be noted that the context of this consideration was whether the panel regarded a suspension order as a *sufficient* sanction, not whether it was a necessary one. It was however submitted on SW's behalf that if proper regard was had to these factors and to the passage of time, the length of the suspension was manifestly excessive.

[35] The decision of a specialist panel on the duration of suspension of a practitioner whose fitness to practise has been found to be impaired is not something with which a court will readily interfere, and we see no reason to do so in this case. The panel made clear that its choice of a period of 12 months was based primarily on the public component of the sanction decision, albeit that some additional justification could be derived from the time that it perceived to be required for SW to identify and undertake the work necessary to develop further insight. The selection of the maximum period of 12 months fell clearly within the range open to the panel in these circumstances.

[36] Finally, we are not persuaded that it is open to us to reduce the length of the suspension to take account of the time taken for the appeal to be determined. Article 29(11)(b) of the 2001 Order is clear that where an appeal has been taken, no order by the panel takes effect until the appeal has been disposed of. Taken on its own, that provision affords a protection to a practitioner who decides to challenge the sanction that a panel has imposed. Where, however, the imposition of a suspension order under article 29 is accompanied by the making of an *interim* suspension order under article 31, the prospect arises of an aggregate period of suspension significantly in excess of 12 months.

[37] In a postscript to its opinion in *Burton* v *Nursing and Midwifery Council* (above), the court at paragraphs 32-35 observed that there might be an appearance of unfairness where a period of *interim* suspension did not count towards the period of suspension ultimately imposed as a sanction, and that a practitioner with a valid appeal point might be discouraged from pursuing an appeal because this would prolong her absence from work. The court suggested that consideration be given to the question whether time spent on *interim* suspension should count towards any period of suspension imposed as a sanction. So far as we are aware that suggestion has not been taken up, and it is apparent that the

court in *Burton* did not regard it as open to it, as a matter of interpretation of an Order similar to the Order at issue in the present case, to find that all or part of the period of *interim* suspension ought to be deducted from the period of suspension imposed as a sanction.

[38] It is difficult to see any basis upon which the court could hold that the panel was plainly wrong to impose a 12 month period of suspension without a deduction for time taken to determine this appeal. The panel could not know at the time of imposition whether an appeal would be made or, if so, how long it would take for the appeal to be determined. It would have been impossible for the panel to fix a period which took account of the possibility of an appeal. We accept that the factors to be addressed by a panel in deciding whether to make an *interim* suspension order are not on all fours with those applicable to the ultimate decision on sanction. The Order could nevertheless have made provision for the former to be taken into account when the panel is deciding the latter. It does not do so and it is not for the court to innovate on the statutory scheme in this regard. In the course of the hearing it was suggested that the point could be raised by a suspended practitioner in an application for review under article 30(2) of the Order. However we did not hear full argument on this suggestion and we express no view upon it.

Disposal

[39] For these reasons the appeal is refused.