

First-tier Tribunal Care Standards

The Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care) Rules 2008

[2021] 4289.REM-W

Hearing held: Mold Justice Centre
On 16 and 17 November 2021 V Kinly Hybrid hearing
18 November 2021: Panel Deliberations V Kinly

BEFORE

**Ms Melanie Lewis (Tribunal Judge)
Dr David Cochran (Specialist Member)
Ms Bridget Graham (Specialist Member)**

BETWEEN:

Ryan Howells

Appellant

-v-

Social Care Wales

Respondent

AMENDED DECISION

The Appeal

1. The Appellant appeals under section 158 of the Regulation and Inspection of Social Care (Wales) Act 2016 ("the Act"), against the decision of the Fitness to Practise Panel ('the Panel') following a hearing on 19-21 April 2021 (as set out in the Notice of Decision dated 22 April 2021) which following a finding of impairment, made a removal order under section 138 (9) of the Act. The Respondent, Social Care Wales ("SCW"), is the regulator for the social care profession in Wales.

Attendance

2. Ms Jaimie Whitley Solicitor Advocate represented the Appellant Mr Ryan Howells. His witness was his partner Ms Hannah Brown.
3. ~~Ofsted~~ **Social Care Wales** were represented by Mr. Delme Griffiths Solicitor. SCW's witnesses were: –

1. Ms Becky Farmer, Former Operations Manager for Options Autism Limited.
2. Ms Melanie Ramm, Former Administrations Manager for Options Autism Limited.
3. Mr John Hanson, Fitness to Practise Senior Officer of Social Care Wales.

Preliminary Issues

4. In the usual way the Tribunal has made an order pursuant to Rule 14(1)(d) of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care) Rules 2008 preventing the disclosure of any matter likely to lead members of the public to identify the children referred to in this decision. As such, the Tribunal has not used the full names of immediate witnesses to the incidents in question.
5. This was a hybrid hearing with the option of attending in person which all the witnesses and representatives did, save for Ms Hannah Brown.
6. Ms Hannah Brown was unable to attend on 17 November 2021 as she had to write up incident reports at work. She works in the Care sector. The case was adjourned for lunch and by agreement she was able to attend by video. Again, there were no issues. Her evidence was short and subject to only a few questions.
7. Dr Cochran had been unable to drive to the hearing due to a physical issue. He confirmed that he was fully fit to sit on the panel at all times. The parties raised no objections to this, and he was able to fully participate in the hearing with no technical issues.
8. The Respondent had notified that Mr Mark Brown Practise Officer and Ms Fiona Usher Practise Officer would attend as observers for ongoing professional development. There was no objection to this, but we were informed that if they attended in person as they planned to, this would be in breach of Covid 19 restrictions on the maximum number that could be in the room. That was resolved when they, too, joined by video.
9. Also in attendance on 16 November 2021 by video was Ms Yallop as part of the Judicial Work shadowing scheme. She did not talk to the panel and took no part in our consideration of the case.
10. At the start of the proceedings the representatives sought guidance as to how the Tribunal would look at the hearsay evidence of Colleague 1. The Tribunal confirmed that we would look at it as a matter of weight. Both representatives had set out the relevant rules and authorities in their skeleton arguments but were agreed on the principles to be applied. We set them out under the section on the law below.

Background

11. In November 2017, the Appellant was registered with SCW as a Residential Childcare Worker. It was his first job in this sector. Until March 2019, the Appellant was employed by Options Kinsale School ("Options") as a childcare practitioner. It is his case that he was fully trained. This included one month induction and regular appraisals. No other disciplinary proceedings had been taken against him.
12. The Appellant was referred to SCW by Options following an incident on 19 September 2018.
13. The background facts are not in dispute. There was a change of plan on the day. At short notice Mr Howells and a female colleague referred to as "Colleague 1" took two young people to an off-site biking activity. He worked in the care part of the school and she worked in the education part but they had occasionally worked together before and neither suggests this had caused any problems. They were escorting two young people: YPA who had a diagnosis of autism and learning difficulties and YPB who also had complex needs.
14. The activity was about a 45-minute drive from Options. Colleague 1 drove. The first contentious issue is what Mr Howells showed YPA on his personal phone and whether Mr Howells made sexual comments to him.
15. When they arrived at the venue, they were informed that due to adverse weather the activity had to be cancelled. It is agreed that YPA reacted in a negative way to this. Mr Howells' case is that he got YPA in a 'side hug' to get him back into the car. The SCW Appeal panel found otherwise and that it was an inappropriate neck hold. It is not contentious that this was a difficult situation to deal with and that Colleague 1 did not assist in the restraint as she wrongly thought that her PRICE (Protecting Rights in a Caring Environment) training had run out.
16. It is agreed that Colleague 1 was the only direct witness to the incident. They both agreed to call for back up and sat and waited with the two young people until 3 members of staff from Options came, which took at least an hour due to the distance.
17. Following events on this day, YPA and staff members made disclosures about the Appellant, which led to the Appellant being suspended.
18. Options subsequently conducted an investigation. At the conclusion of that investigation, a disciplinary hearing took place on 1 March 2019. The Appellant unsuccessfully appealed the decision made at that hearing.
19. A new concern arose, namely that Mr Howells submitted a statement from Colleague 1 retracting what she had previously said. The veracity of that document was doubted and investigated by Mr Hanson, the SCW case officer. Colleague 1 had been summarily dismissed by Options 3 days after

the event for failing to raise safeguarding issues around the trip at the first opportunity. This led to her wanting no further involvement in the investigation. She met Mr Hanson twice in her home and was clear on both occasions she had not prepared this statement. She was prepared to assist to the extent that she made a signed statement confirming this. She was clear she had had not been in contact with Mr Howells since October 2018. She agreed some WhatsApp messages had passed between them, but not after that date .

20. Following receipt of the referral, SCW proceeded to conduct its own investigation. It was determined that there was a case to answer in relation to the Appellant's conduct and he was referred to a Fitness to Practise Panel.
21. A Pre-Hearing Review was subsequently arranged for 1 February 2021, which the Appellant attended ("the PHR"). Ahead of the PHR, a bundle of evidence and draft charges were sent to the Appellant. At the PHR, those charges were considered and approved and hearing arrangements were addressed.
22. The case was listed for a substantive hearing on 19-21 April 2021, to be conducted remotely via Zoom. The Appellant did not attend the Hearing. The FTP Panel proceeded and noted that no application for an adjournment had been made.
23. We set out the detailed charges below and neither party invites us to re-open the charges found not proved, although they might be seen as more serious.
24. The Panel went on to conclude that the Appellant's fitness to practise was impaired by reason of his Serious Misconduct. Having done so, it decided to impose a Removal Order, the most serious sanction.

The charges found proved by the Fitness to Practise Panel:

25. We set these out in full and highlight in bold those found proved.

1. On 19 September 2018, when attending and/or travelling to an off-site activity at a country park, you:

(a) failed to follow your employer's Mobile Phone Policy in using your personal mobile phone and/or in showing Young Person A an image or images from that phone;

(b) spoke inappropriately to Young Person A in that you said to him, or words to the effect:

(i) 'do you know what a willy is?';

(ii) 'do you know what sex is?';

(c) spoke inappropriately to Colleague 1, in that you called her a 'f..... idiot';

(d) used an inappropriate technique and/or disproportionate force in restraining Young Person A.

2. In support of an appeal against your dismissal, you provided your employer with a written statement dated 13 March 2019, which you falsely claimed had been made and/or signed by Colleague 1.

3. On or about 13 April 2019, you provided Social Care Wales with a written statement dated 13 March 2019, which you falsely claimed had been made and/or signed by Colleague 1.

4. Your conduct in 2 and 3 above was dishonest.

Summary of Appellant's case:

26. The Appellant now seeks to appeal the Decision but does not seek to go behind the findings made in his favour by the FTP Panel. He seeks the withdrawal of the Removal Order and requests the Tribunal substitute this for another, less severe disposal that the Panel could have made. It is alleged that the Decision to impose a Removal Order was disproportionate to the misconduct found proved. The Appellant also seeks to appeal the Panel's decision to proceed in his absence but that was not pursued before us as he said that he knew about the hearing, the sanctions that might be imposed and that he was working so not unfit to attend. His key point was that the hearsay evidence from Colleague 1, if admitted, should not be given weight as she had changed her story and was said by the police to be unreliable. The Appellant also seeks to challenge the Panel's findings of fact in relation to the proven charges.

Summary of Respondent's case

27. The Respondent did not invite us to go behind the findings made by the FTP Panel. It was submitted that they were entitled to proceed in the Appellant's absence and to accept hearsay evidence albeit with caution, which they did looking for other corroborative evidence. They invited us to uphold their decision on impairment and sanction.

Legal Framework

28. Under section 68(1) of the Regulation and Inspection of Social Care (Wales) Act 2016, SCW's main objective in carrying out its functions is to protect, promote and maintain the safety and well-being of the public in Wales.

29. Under section 68(2) of the Act, in pursuing that objective, SCW is required to exercise its functions with a view to promoting and maintaining:

- (a) high standards in the provision of care and support services;
- (b) high standards of conduct and practice among social care workers;
- (c) high standards in the training of social care workers; and
- (d) public confidence in social care workers.

30. Under section 112(1) of the Act, SCW is required to prepare and publish a code of practice setting standards of conduct and practice expected of social care workers. SCW has prepared and published a Code of Professional Practice for Social Care.
31. The provisions of the Act dealing with the disposal of fitness to practise cases are contained within Chapter 3, Sections 134 to 142 of the Act.
32. SCW has also issued guidance entitled '*Guidance on Indicative Disposals for the Fitness to Practise Panel and Interim Orders imposed by the Interim Orders Panel*'. The first part of this guidance relates to the imposition of sanctions by a Fitness to Practise Panel and the general principles to be taken into account.
33. The right of the Appellant to appeal to the Care Standards Tribunal against the decision of the Fitness to Practise Panel in his case) is set out in section 158(1)(e) of the Act. The FTT is not limited to reviewing the decision and looks at the evidence at the date of the hearing. The burden of proof is on the Respondent to a balance of probabilities.
34. Under section 158(5), the Tribunal may:
 - (a) confirm the decision;
 - (b) substitute for the decision appealed against another decision that the Panel could have made; or
 - (c) remit the case to SCW to dispose of in accordance with directions of the Tribunal.

Hearsay evidence

35. The FTP Panel admitted hearsay evidence but did not think it appropriate to hear from YPA as he is 13 years of age, autistic and has a learning disability. His care plan records that his talk can be sexualised and he did say he had been shown a naked girl on the Appellant's phone but this was not the subject of any charge, as Colleague 1 did not see that or hear any talk of the sort he suggested, other than a reference by Mr Howells to a 'willy'.
36. The Appellant submits in the Grounds of Appeal that they should not have accepted hearsay evidence from Colleague 1 who was available to give evidence but did not want to have any further involvement with her previous employer. His key point was that he had been deprived of the opportunity of questioning her and that she was unreliable.
37. The representatives agreed that the regulations and law did not prohibit admitting hearsay evidence. They agreed that the relevant principles were as set out in the case law referred to in their skeleton arguments.
38. Rule 17(1) of the *Social Care Wales (Proceedings before Panels) Regulations 2016* Rules provides that *a panel may receive oral,*

documentary or other evidence. This is subject to Regulation 20(2) which in turn provides:

*"In fitness to practise proceedings ... evidence is not admissible unless-
(a) it would be admissible in civil proceedings in England and Wales' or
(b) the fitness to practise panel considers that the evidence is relevant, and that it is fair to admit it."*

39. Rules on admissibility stem from Section 1 Civil Evidence Act 1995 which indicates at Section 1. Relevant considerations are set out in Section 4.
40. We were also referred to relevant case law that admission would not cause unfairness to the Registrant (*Shaikh v General Pharmaceutical Council* [2013] EWHC 1844 (Admin)). What is fair is fact-sensitive and will depend on the circumstances of an individual case, particularly the nature and subject matter of the proceedings (*R (on the application of Bonhoeffer) v General Medical Council* [2011] EWHC 1585 (Admin) It was held in *Thorneycroft v NMC* [2014] EWHC 1565 (Admin) that where hearsay evidence is the sole or decisive evidence, a panel must consider the issues in the case, the other evidence which is to be called and the potential consequences of admitting the evidence.

The evidence

41. In accordance with its usual practice the Tribunal fully read the bundle in advance. What follows is intended to be a brief summary of the evidence by each witness which we set out in more detail where it is relevant to our conclusions.
42. Ms Becky Farmer adopted her statement and exhibits. She was the in-house investigating officer.
43. When YPA got back he gave an account of what happened to Ms Farmer and Ms EH. He said that he had been shown a picture on the Appellant's phone, that he was cross he could not go biking and that Ryan had hurt him trying to get him back in the car. He said he had his hand around his neck which hurt and he could not breath. YPA's key worker took a photo of a mark on the back of his neck which was visible, to show his social worker who came in to see him the next day. The Tribunal clarified that it faded by that next day and it was not thought necessary to seek any medical attention or confirmation. There was also a basic body map showing where the mark was.
44. Colleague 1 provided various accounts of the incident but when asked with reference to her 2 interviews and her own handwritten statement, Mr Howells accepted that they were not substantially different on the sequence of events. YPA was angry he couldn't go bike riding, kicked an ice cream stand, was put back in the car by Mr Howells but then got out again and got a golf club out of the back of the car and refused to get back in. The Tribunal queried why she was questioned at this point if there were safeguarding concerns,

but Ms Farmer said that Options had been advised in other investigations that they should try to gather the basic facts.

45. A further conversation with Colleague 1 is recorded on 20 September 2018 which was more formal and at her request. She had said she had more to disclose and was told that it was very important that she protect young people and say what she knew. The Tribunal raised that she had not been told that when she was first spoken to. She said she had gone home the night before, when there was nobody there and the incident played on her mind and “*What had happened was not right*”. The interview was conducted by Ms NG with Ms Farmer present as note taker.
46. In this second account Colleague 1 said for the first time that Mr Howells told YPA that no one liked him and Colleague 1 said she did. He asked YPA if he knew what a willy was. Mr Howells threatened YPA that he would make sure that he would not be allowed to play on his X Box when he got home. YPA had said Mr Howells called Colleague 1 a “ bloody idiot” and she said without prompting was that he called her a “F.....idiot”. She was warned not to discuss the case. She did not sign the statement which Mr Howells strongly raised, but Ms Farmer said it had been sent to her and she had not corrected it, but she had been dismissed shortly after.
47. In cross examination, Ms Whitley emphasised that the demonstrated hold had not been recorded which Ms Farmer said would be very difficult to accurately describe in words. She also referred to points where both NG and BF were asking questions one after another, without giving Colleague 1 a chance to respond. They were also asking leading questions but Ms Farmer said this was necessary to put the specific words alleged to Colleague 1.
48. Colleague 1 subsequently provided a written statement of events signed on 21 September but headed 19 September 2021. She said that Mr Howells had been intimidating when they walked back to the gate after their colleagues arrived. She said she had removed him from her phone contacts and social media. This did not fit with what she said later the following year when she told Mr Hanson that she had exchanged some WhatsApp messages after the event but had no contact since October 2018.
49. Mr Howells was also formally interviewed by Ms Farmer during the course of her in-house investigation on 21 January 2019. Ms Melanie Ramm was also present as note taker but when she was cross examined by Ms Whitley it was pointed out that she asked questions too. Mr Howells had a Union Representative with him. He denied any sexualised talk but said that YPA may have seen his screen saver of his daughter but that he did not show him a photograph. He said, as he has consistently, that he put YPA in an appropriate side hug to get him back in the car. His case is that he was in a very challenging and threatening situation. At the conclusion, Mr Mark Williams Head of Service acknowledged that training could not prepare you for every situation and asked him if he thought something went wrong. He said no. He said that he had done everything ‘*100% right*’. That has been his consistent case.

50. In addition, SCW relies upon the accounts of Mr CH and Ms MD who went to assist as to what they were told by Mr Howells on the drive back to Options. We consider the exact words in our conclusions.
51. Ms Melanie Ramm was the administration manager at the material time. She also confirmed that Colleague 1 was dismissed for failing in her reporting duties which upset her. She recalled email correspondence and three phone calls including with her father which she said, were *'not pleasant'*, which we clarified as meaning they were aggrieved by her treatment. The family also involved a solicitor regarding a previous eye injury sustained during Colleague 1's employment.
52. Mr Hanson was the Investigating Officer employed by SCW and instructed to investigate the received complaint. Two things in particular concerned him. One was a statement from Colleague 1 submitted by Mr Howells at his appeal hearing, retracting her accounts and saying that staff whom she named, had told her she had to say this. He was also concerned about some WhatsApp messages that Mr Howells produced. He visited Colleague 1 in her home in June and August 2019. The visits lasted for 20 to 30 minutes and on each occasion one of her parents were present. He was again told that they were aggrieved by the way she had been treated by Options given that she felt she was the innocent party. He explained the importance of her evidence given that she was the only witness to the event.
53. After the second visit she went as far as to sign a statement saying that she had not written or provided the statement produced by Mr Howells. It was not her signature. She had had no contact with Mr Howells since October 2018. Mr Hanson was curious as to how that statement had come into Mr Howells' possession. Mr Howells said that they had met at a pub. We record his answers and cross examination in our conclusion.
54. She was shown some screenshots of undated WhatsApp messages between her and Mr Howells which she said could be a reflection of some messages that passed between her and Mr Howells in October 2018. On this point she was adamant that she had had no contact with him since October 2018. He could not provide data from his phone which Mr Hansen said *"raised his curiosity"*. Mr Howells said he got a new phone with the same number but could not say why the data wouldn't have been backed up.
55. Mr Howells submitted a statement which his representative said would stand as his evidence in chief. He first worked in the care sector in 2017 and Options was his first job in the care sector. It has always been his case that he was fully trained that he felt the training was adequate.
56. It is common ground between him and Colleague I that the radio in the car was not working well. For the first time, he said he went on his music app on his phone and YPA may have seen album covers. He had first said he showed YPA a screensaver of his daughter but later said he had seen it over his shoulder.

57. When cross examined he agreed that he knew about the FTP hearing and the possible outcomes. He agreed he had been upset when an account appeared in the press but knew that was a possibility. He said he had "*buried his head in the sand*".
58. It was not true that he had "gripped" YPA as suggested by Colleague 1 who told him to stop. In response to 4 different questions, one from Mr Griffiths and three from the Tribunal he said there is no possibility that whilst the child was in a side hug, his hand could have slipped from his shoulders onto the back of his neck. He said for the first time in his statement that YPA was well-known for getting people sacked.
59. For the first time, backed up by a statement from his partner, Miss Hannah Brown he said that on the evening of the incident Colleague 1 had called him together with her mother to thank him for her support. Ms Brown corroborated that account, but the call log produced is for 19 October 2018 not September.
60. He was cross examined in close detail how he had got the statement from Colleague 1. He agreed they had had no contact since October 2018. He had received a call from her on a withheld number, '*out of the blue*' offering to write a statement for him.
61. He said they had met in the car park then went into the Lorne pub in Rhyll and sat by the machine, and his partner Ms Brown, who had travelled with him to Rhyll, sat in a different part of the pub. When she came to give evidence, Ms Brown said she knew Colleague 1 because she had also worked in Options. They had occasionally worked together and had no issues. In response to specific questions from the Tribunal she said that they had not had social contact when they worked together and she had not seen her since. She was very clear that she had never been to the Lorne pub or any other pub and met up.
62. When asked to reflect what might have been different, Mr Howells said he wished that he had had someone else with him and had called for assistance earlier. He never should have been in the position he was in.

Conclusion and Reasons

63. In reaching our conclusions we have taken account of all the evidence, the skeleton arguments filed by the representatives and their closing submissions.
64. We are not invited to go behind the findings of the FTP Panel and we have concluded that we should not do so. We are not limited to simply reviewing their decision. However, we consider it. We give weight to the decision which applied the relevant law regulations and reached a reasoned decision based upon all the evidence. On the evidence before them they did not find

that the very serious allegation of submitting a false statement made out on a balance of probabilities.

65. What different evidence was presented to the Tribunal? We had the written statement and oral evidence of Mr Howells. That does not cause us to make different findings but does, as we set out below, cause us to doubt that Mr Howell is consistent and truthful in his accounts.
66. The grounds of appeal assert that the FTP Panel should not have proceeded with the appeal given Mr Howells did not attend. Ms Whitley did not pursue that as he said that he knew about the hearing and that it could have serious and long-lasting consequences for him. He produced some medical evidence confirming that he has been suffering from depression but that was after the hearing. He was setting up a new business at the time of the hearing so, we conclude, was well enough to attend.

Weight to be given to hearsay evidence:

67. There is no issue that hearsay evidence can be admitted. We first consider the issue of whether it was appropriate or in YPA's interests or in the public interest, to call him to give evidence. He is a 13-year-old learning disabled young person who has a diagnosis of autism.
68. His detailed care plan sets out that he can make sexualised comments. The charges were put on the basis that there was other evidence that corroborated him.
69. It is part of the Appellant's case that YPA makes things up. That is a recorded risk in his Care Plan, but we accept the evidence that since he had been at Options there were no recorded incidents of him making allegations against staff or threatening to have them sacked as the Appellant alleged. We accept the evidence of the witnesses that after the incident he was concerned that Mr. Howells would return to work at Options and had bad memories of him. He said he had been held round the neck and there was a mark on his neck to support that. He said he had been gripped by the neck twice, on the day of the incident and also repeated it to his social worker the next day. We accept that it would not have been appropriate to call him as a witness.
70. Colleague 1 is the key witness to the index events. She was in the car and close to the scene save for when she moved the car. We have concluded that we should attach cautious weight to her evidence, as it is undoubtedly relevant. She repeatedly made it abundantly clear to Mr Hanson that she would not be prepared to attend in person and have her evidence challenged. That is not to her credit. However, having considered the evidence both written and oral, we consider that we have a fuller understanding of why Colleague 1 wished to have no further involvement. The oral evidence amplified that she was dismissed within days of the incident for failing to raise safeguarding issues at the first opportunity. The evidence records that she did come in the following day and give a fuller account. All the witnesses called by the Respondent were consistent that she felt aggrieved and upset

by that treatment. She or her father on her behalf had 3 phone calls with Ms Farmer to raise this issue and an injury she had previously received to her eye. A solicitor was also involved regarding her injury and dismissal. This was soon dropped and Colleague 1's moved out of the care sector into other employment. She is young and described as a nervous and anxious person who wanted to move on and put this period behind her. She was not merely being irresponsible and difficult.

71. We also had in mind the points well raised by Ms Whitley. Colleague 1 was not reminded when she was first spoken to say what she knew and in her second interview was asked multiple questions, without giving her a chance to reflect and answer.
72. She could have been compelled to appear before the FTP Panel and before, us by issue of a Witness Summons but she would have been a reluctant witness. We look at what other evidence supports her account.
73. We find that her accounts are broadly consistent. Colleague 1's account is broadly consistent with the account of YPA although they were spoken to separately when they got back to Options after the incident. Both said that the activity was cancelled, and YPA was unhappy. Both said Mr Howells got him back in the car with a neck hold. Mr Howells agreed with her account that he said she was being too soft with YPA and that is why we accept in a heightened state he swore at her and called her a XXX idiot. The exact word changed from YPA to her description, but there is a consistency on the disagreement with her approach and getting cross with her.
74. We do not accept the Appellant's assertion that Colleague 1 changed her story. Mr Griffiths took the Appellant through this in cross-examination and he accepted that was the case on the sequence of events. Her first account was recorded shortly after the event on 19 September 2018. This was a basic fact-finding exercise, but it was not a full and frank report. That came voluntarily from Colleague 1 the following day when she had reflected overnight and put in further detail.
75. She was asked specifically about what images had been shown to YPA on the phone. She said that she had not seen them but knew Mr Howell's had his personal phone out. This does not suggest she was embellishing the account. She agrees with YPA that there was reference to male genitalia which in her second account she had tried to stop and then deflect from.
76. In her hand written notes dated 19 September 2019 but handed in on 21 September 2021, she gave the same comments and description.
77. There is a clear doubt about the veracity of the statement produced by Mr Howells in March 2019 where Colleague 1 suggests what she said was due to pressure being placed under pressure by named Options staff. She was spoken to twice by Mr Hanson in her own home with a parent present. She was clear she hadn't written it. She was clear it wasn't her signature. She said she'd had no further dealings with Mr Howells after October 2018. His

account of how she had agreed to meet him in a pub was not supported by his own partner, who he said was there. He had no answer as to why she could not have just sent it to him. He had no answer as to why she would change her story months later, which reflected badly on her confirming her as an unreliable historian, the very thing that she felt so upset about. The original of that statement was not produced. Mr Howells then said it was at home.

78. Ms Whitley in her five-point closing submission emphasised that the police at an early point did not proceed but it was not clear what charges they could have made or further enquiries, over and above those being made by Options. They said Colleague 1 was unreliable, but they were of course looking at the higher criminal standard of proof when the key witness is unwilling to help further or attend court.
79. Colleague 1's account of what happened and what was said on the journey back is consistent with two other colleagues who had come over to provide back up. She agreed with them that Mr Howells said "*I could have been sacked for what I did today*". No motive is suggested as to why three people would separately report those words if it was not said. Mr Howells previously denied throughout the original investigation and disciplinary process he had said that. For the first time in his statement for this Tribunal he acknowledged something close: "*I don't know how I have kept my job after today*". That makes no sense grammatically or otherwise." As far as he was concerned he had had to deal with the situation that arose and had done nothing wrong. On that version, he should have had nothing to fear.
80. It has not been established that she would have had any opportunity to liaise with the two colleagues. It is we find more likely that he knew he had gone too far and that those words were spoken and that he knew that he would have to face consequences.
81. Regrettably, we do not find the same consistency or lack of motive in the various accounts given by the Appellant. We now set out those concerns.
82. There is no issues that the Appellant was using his personal mobile phone. He should not have done so unless he had it signed off by a manager which he did not. There is no issue that he had been warned about this before. We have read the Mobile Phone Policy and there is not a total prohibition on personal phone use but he agreed that there were good reasons why personal phone use should be very limited when on duty. Initially he said Colleague 1 told him no work phone was available but for the first time this appeal said he said went to look for one. That is a clear inconsistency. At the very least this shows a very casual approach to a work policy that he was well aware of.
83. Thereafter he failed to accept responsibility for this and showed a disregard for safeguarding and professional boundaries, as he had the phone visible and was using it. He moved his account from saying YPA had seen the screen saver of his daughter over his shoulder to he showed a photograph. For the first time in this appeal, so three years after the incident, he suggested

that YPA might have seen an album cover as he scrolled through his music selection. We find it more likely than not that he did show a photograph. We make no new findings as to the exact content of the photograph as the evidence is not clear.

84. There is clear agreement between Colleague 1 and the Appellant that she did not agree with her approach of trying to calm YPA down by buying him crisps and a drink. This happened after he had 'kicked off'. He was clear that he didn't think he should be rewarded. He repeated at a number of points in his evidence that he saw YPA as being "*naughty*" which concerned us as not showing a sufficient understanding of his complex needs. In the heightened circumstances, including being threatened with a golf club, we find it likely on balance that he did call Colleague 1 a 'bloody' or a 'f.....idiot'. Had he recognised that was wholly inappropriate and apologised, we would be far less concerned.
85. Did Mr Howells use force and grip YP A around the neck to get him back into the car or did he as he states, use a permitted 'side hug'? On balance we find the evidence supports it was a neck hold. The one photograph supports that. It was not a major injury and we clarified required no medical attention. YP A made an immediate complaint that he had been held by the neck when he got back to the home which he repeated twice more.
86. The following day Colleague 1 said that she had seen a neck hold but was not close enough to elaborate on where his hands were other than she heard YPA complain he was hurting him. Mr Howells fell back on saying the investigation was incomplete as no CCTV had been examined but this had been checked and was not available after 4 days.
87. At the time of the event Mr Howells accepts he was well trained including in PRICE restraint. Essentially that is a graduated diffusion technique with physical handling only where there is a real risk of harm to the young person or a colleague.

Serious Misconduct:

88. We find that on the proven charges this was serious misconduct.
89. The appeal was based upon that this was a traumatic incident and that Mr Howells did the best he could in the circumstances. His case is that he didn't have the backup he should have had from Colleague1.
90. We can accept that it was a challenging situation and that the fact that YPA had a golf club in his hand was very threatening. Both Colleague 1 and Mr Howells agree that a member of the public adversely commented on YPA's behaviour. Colleague 1 says that account Mr Howells was able to calmly explain to her that the young person was subject to a care order and he was dealing with the situation.

91. He is a relatively inexperienced care worker but he had been trained in how to approach and communicate with children with autism and other needs. This is not being trained to a higher or specialist level. What can be expected from him though was to apply his training and defuse the challenging situations that he would inevitably have to deal with, given the cohort of children.
92. There was also the misunderstanding about whether Colleague 1 was PRICE trained. She thought she was not, but she was. That is clearly unsatisfactory. However, she did try to defuse things once YPA got out of the car again when she inadvertently released the lock. She had also told Mr Howells to calm down, so to that extent she was trying to do what all care workers should be doing, namely de-escalate and calm a situation.
93. The Code sets out the standards Mr Howells is expected to adhere to. He must act at all times with truthfulness and integrity. In this case, we place great emphasis on that. He must keep young people safe and promote their well being and sense of security. The public must be able to have confidence that he is doing that and protecting this very vulnerable cohort of children.

Current Impairment:

94. A temporary over reaction to an extreme situation and failing to adhere to PRICE techniques might be technically unacceptable but in rare situations understandable. The Appellant has been consistent that he acted “100% right”. He could not accept the possibility at any point that his hold went wrong and he gripped the child’s neck. There is clear evidence that his hands were around the child’s neck and the rough words spoken support that he was going to bring him under his control, saying no one liked him. His words in the car afterwards show that he knew what he had done was wrong.
95. In early 2018 he had been spoken to about the very complex needs of the young people in his care, and how banter could be misconstrued by a young person with autism. In March 2018 it was suggested he complete PRICE refresher training which he did. He was reminded to think about his approach before he acted. He failed to apply this advice.
96. Further, Mr Howells has not shown any remorse for his actions or displayed any empathy for the potential impact upon YPA and YPB or indeed Colleague 1, who lost her job.
97. In the absence of any remedial steps, insight, remorse or engagement by Mr Howells we consider there is a significant risk of repetition in relation to his conduct. We cannot say with confidence that similar conduct would not happen again.

Sanction:

98. Removal is the ultimate sanction and lesser sanctions must be looked at first.
99. We had in mind mitigating factors namely Mr Howells' relative inexperience and the fact that the trip was last minute. In hindsight, he and Colleague 1 should have been clearer that they were taking steps to adhere to the phone policy, how they would handle any risks and identified the issue on her on PRICE training. He had not previously been subject to any disciplinary proceedings. Initially he did co-operate with investigations and believed it would amount to nothing.
100. Against that he has never accepted he did anything wrong or that there were things in his practise he needed to reflect on and work on. He stopped co - operating with the process and failed to produce key evidence when reasonably asked to do so.
101. We clarified with Ms Whitley that she was suggesting that conditions for 12 months would be most appropriate, if we upheld the findings. Mr Griffiths pointed out that Mr Howells has no current or potential employer prepared to supervise any conditions.
102. Unlike the FTP Panel we had the opportunity of hearing from Mr Howells directly. Under a fair but full cross examination, his case collapsed. It raised real concerns about his truthfulness. We formed a clear view that reliance could not be placed on what he said. Accurate record keeping, reporting and co-operation with enquiries are clearly key to care work and we have no confidence that he could do this.
103. The phone records he produced supported that an incoming call was made to him by Colleague 1 on 19 October 2018 which he later returned, not 19 September 2018 as he and his partner said. We were more concerned about his account that Colleague 1 would deliver a statement to him a pub. He had perhaps not anticipated being questioned in detail about this this and his answers were not credible. He introduced new explanations, namely that the meeting had been set up when she called him from a withheld number. He could not explain why she would suddenly contact him or why he had not produced the original statement. His account of his partner being there was not supported by her.
104. His answers about the WhatsApp messages were also not credible and needed much more explanation. This would have required him to produce data from his phone, which he claimed had been lost when he had to buy a new phone after his original phone got damaged. He could not explain why the data had not been backed up.
105. A Conditional Registration Order would not be appropriate because we conclude that this would not remedy the level of impairment found proved and provide the necessary level of public protection reflect the seriousness of Mr Howells conduct or what we see as a very serious breach of the expected standards.

106. For the same reasons the Tribunal also concluded that a Suspension Order would not be appropriate. The Appellant has not proposed any remedial action to address the impairment of his fitness to practise.
107. A Removal Order is necessary to protect the public and the wider public interest and we conclude that no lesser disposal is appropriate. It is both proportionate and necessary given the factors of the seriousness of inappropriate handling of an incident on 19 September 2018, not just in using an inappropriate restraint, but in a punitive approach to a vulnerable young person. We also take into account his lack of insight, reflection and remorse and have serious concerns about his lack of truthfulness and integrity.

Order

The decision of the FTP Panel dated following a hearing on 19-21 April 2021 (as set out in the Notice of Decision dated 22 April 2021) **is confirmed.**

Accordingly the appeal is DISMISSED.

Tribunal Judge Melanie Lewis

First-tier Tribunal (Health, Education and Social Care)

Date Issued: 03 December 2021

Date Amended: 16 December 2021