

First-tier Tribunal Care Standards

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

[2022] 4738.ISO-W
Neutral Citation number: [2022] UKFTT 450 (HESC)

Heard by Video Link on 29 November 2022

BEFORE

Mr H Khan (Tribunal Judge)
Ms P McLoughlin (Specialist Member)
Ms D Rabbetts (Specialist Member)

BETWEEN:

Social Care Wales

Applicant

-v-

Kevin Franz

Respondent

DECISION

The Appeal

1. Social Care Wales (“the Applicant”) applies under section 148 of the Regulation and Inspection of Social Care (Wales) Act 2016 (“the Act”), to the Tribunal, for the interim suspension order made against Mr Kevin Franz (“the Respondent”), on 10 June 2021, for a period of 18 months until 9 December 2022, to be extended until 9 March 2023.

The Hearing

2. The hearing took place on 29 November 2022. The hearing took place by video. The documents that we were referred to are in the electronic hearing bundle (256 pages) prepared by the Applicant for the hearing.

Attendance

3. The Applicant was represented by Ms Gem Casey, Solicitor. The sole witness was Ms Clare Lane, Fitness to Practise Senior Officer (Social Care Wales).

4. The Respondent did not attend nor did any witnesses on his behalf.
5. Ms Clare Lane had some technical issues dialling into the hearing by video. Ms Lane dialled in by telephone and the Applicant was content to proceed on this basis.

Preliminary Issues

6. The Tribunal had received the Telephone note of the conversation between Ms Lane and the Respondent on 23 November 2022. We treated this as an application to admit it as late evidence.
7. We admitted the late evidence as it was relevant to the issues in dispute. In considering any late evidence, the Tribunal applied rule 15 and took into account the overriding objective as set out in rule 2 of the Tribunal Procedure (First Tier Tribunal) (Health Education and Social Care Chamber) Rules 2008. The Telephone note was relevant in that it explained the Respondent's intentions in relation to this appeal.
8. We heard submissions from Ms Gem Casey and considered whether or not we should proceed in the Respondent's absence.
9. Ms Casey submitted that the Tribunal should proceed in the Respondent's absence. Ms Casey confirmed that the email address on that email was the correct one for the Respondent.
10. We considered rule 27 of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 (as amended) ("the 2008 Rules"). We concluded that we would proceed in the Respondent's absence. Our reasons for doing so are set out below.
11. We were satisfied that the Respondent was aware of the hearing (notifications sent on 25 October 2022, 22 November 2002, and details to how to access the video hearing was sent on 23 November 2022) that it was in the interests of justice to proceed with the hearing.
- 23 The hearing was listed to start at 10AM. It did not start until 10:15am. This was to allow additional time for the Respondent to dial into the hearing in the event of any change of mind since 23 November 2022. There has been no prior explanation for the Respondent's absence to the Tribunal nor was there a request for a postponement of the hearing.
- 24 The Respondent has not engaged throughout these proceedings. No evidence has been served by the Respondent despite the Respondent being given an opportunity and being directed to do so pursuant to a Tribunal order dated 25 October 2022.

25 We considered the Telephone note of the conversation between Ms Lane and the Respondent on 23 November 2022. That note confirmed that that the Respondent had been receiving the emails from the Applicant and the Tribunal. The Respondent is recorded as saying the following;

“Well I’m getting them, but I don’t know why you’re all sending me all this stuff, when I already told the woman the last time that I don’t work in care anymore, I don’t work in social care and wouldn’t go back to care anyway so I don’t read anything any of you send me…”

“...Yeah, I’m definitely receiving them all an everything, but I’m not reading any of them because I’m just not interested in any of it and I’m not coming to any of it”.

26 In our judgement, whilst we were mindful of the impact of these proceedings on the Respondent’s professional and personal life, in our judgement, the Respondent had been given every opportunity to participate and had expressly elected not to do so. The Respondent made it clear in the telephone note dated 23 November 2022 that he was not interested and that he was *“not coming to any of it”*

27 The challenge in this case was also that the interim suspension order was due to expire on 9 December 2022 and the matter had to be heard and determined by that date.

28 We, therefore, concluded that it was in the interest of justice to proceed with the hearing.

The Applicant

29 The Applicant is the regulator for the social care profession in Wales. Under section 68(1) of the Act, the Applicant’s main objective in carrying out its functions is to protect, promote and maintain the safety and well-being of the public in Wales.

The Respondent

30 The Respondent registered with the Applicant as a Domiciliary Care Worker on 23 January 2020. He was employed by Terreen Solutions.

Events leading to the Interim Suspension Order

31 The events leading up to the suspension are set out in the Applicant’s skeleton argument and in the hearing bundle.

32 On 19 June 2020, the Applicant received a referral from Terreen Solutions Limited. The referral records that the Respondent was under investigation by the police for financial abuse of a vulnerable user of

care and support. The employer advised that the Respondent had created a PayPal account in the user's name when they did not have capacity to do so themselves.

- 33 The Applicant was informed that the Respondent was dismissed by Terreen Solutions Limited on 22 May 2020. The reason given for the Respondent's dismissal was that he had failed to follow company rules and procedures with regard to the administration and safekeeping of money belonging to a vulnerable service user and had committed an act of fraud which also amounted to a breach of trust. Among the actions alleged against the Respondent was that he set up a PayPal account in the name of a vulnerable individual receiving services (who lacked capacity), and that the individual's money was used by the Respondent to purchase items for the Respondent's own benefit.
- 34 On 10 June 2021, an Interim Orders Panel met to consider an application for an interim order. The Respondent did not attend the hearing and was not represented. The Panel determined that an interim suspension order should be imposed for a period of 18 months on the grounds that such an order was (1) necessary for the protection of the public, and (2) otherwise in the public interest.
- 35 On 8 December 2021 and 6 June 2022 an Interim Orders Panel met to review the interim suspension order. The Respondent did not attend and was not represented at either hearing. On each occasion the Panel determined that the interim suspension order should remain in place on the same grounds.
- 36 On 16 June 2022, North Wales Police informed that the Respondent was sentenced to 9 months imprisonment (suspended for 12 months), 300 hours unpaid work and required to pay compensation to the victim's estate in the sum of £6,270.59.
- 37 A certificate of conviction was received from Mold Crown Court by the Applicant on 16 August 2022.

The Applicant's position

- 38 The Applicant seeks a three month extension of the Interim Suspension Order until 9 March 2023. The Applicant's substantive investigation has now concluded and the matter has been referred to a Fitness to Practise Panel to consider all the evidence obtained. The final hearing has been listed for 10 January 2023
- 39 An extension is sought to enable this process to be completed.

The Respondent's position on the Application

- 40 The Respondent has not engaged with the application, has not exchanged any evidence pursuant to the Directions given on 25 October 2022 and has not participated in these proceedings.
- 41 The hearing bundle makes reference to a telephone call on 5 May 2021 between the Applicant and the Respondent. The Respondent confirmed at that stage that he had intended to respond to the allegations and confirmed that he was not working in the social care sector. The Respondent has not participated in the review hearings.
- 42 On the 23 November 2022, the Respondent confirmed to the Applicant via telephone conversation that he was receiving the documentation regarding the proceedings but that he would not be reading the documents nor attending the hearing.

The Issues to be determined

- 43 According to the list of issues, the Tribunal should consider whether the interim suspension order imposed on 10 June 2021 for a period of 18 months should be extended beyond 9 December 2022 to 9 March 2023.

The Legal Framework

- 44 The legal framework was helpfully set out in the skeleton argument prepared by the Applicant's legal representative.
- 45 The Applicant is the regulator for the social care profession in Wales. Under section 68(1) of the Regulation and Inspection of Social Care (Wales) Act 2016 ("the Act"). Its main objective in carrying out its functions is to protect, promote and maintain the safety and well-being of the public in Wales.
- 46 Under section 68(2) of the Act, in pursuing that objective, the Applicant 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.
- 47 Sections 143 to 149 of the Act deal with the imposition of an interim order by an Interim Orders Panel in relation to a registered person.
- 48 Under section 144(5) of the Act, an Interim Orders Panel may make an interim order only if it is satisfied that the order –
- (a) is necessary for the protection of the public,
 - (b) is otherwise in the public interest, or

- (c) is in the interests of the registered person.
- 49 Under section 144(4) there are two types of interim order, namely:
- (a) an interim suspension order, which is an order suspending the registered person's registration;
 - (b) an interim conditional registration order, which is an order imposing conditions on the registered person's registration.
- 50 Under section 144(5), when an interim order is imposed it takes effect immediately and will have effect for the period specified by the Interim Orders Panel, which may not be more than 18 months.
- 51 Under Section 146 of the Act, an interim order must be reviewed by an Interim Orders Panel within six months of the date on which the interim order was imposed. If, following a review under section 146, an interim order remains in place, it must be further reviewed within six months of the date of the review.
- 52 Under section 148 of the Act, Applicant may apply to the Tribunal for an interim order to be extended or further extended. On an application, the Tribunal may -
- (a) revoke the interim order,
 - (b) in the case of a conditional registration order, revoke or vary any condition,
 - (c) extend, or further extend, the order for up to 12 months,
 - (d) make no change to the order or to the period for which the order is to have effect.
- 53 In making a determination, the Tribunal should have regard to the principles outlined by the Court of Appeal in GMC v Hiew [2007] EWCA Civ.369.
- 54 The onus of satisfying the Tribunal that the criteria was met falls on the Applicant and the relevant standard is the civil standard, namely on a balance of probabilities.

Evidence

- 55 We took into account all the evidence that was presented in the bundle and at the hearing. We have summarised the evidence insofar as it relates to the relevant issues before the Tribunal. We wish to make it clear that what is set out below is not a reflection of everything that was said or presented at the hearing.
- 56 We heard from Ms Lane. Ms Lane had taken over the case midway through. She confirmed that the police had informed her on 17 May 2022 that the Respondent had pleaded guilty to charges of fraud and theft and would be sentenced on 16 June 2022.

- 57 On 16 June 2022, the police informed her that the respondent had been sentenced to 9 months imprisonment (suspended for 12 months), 300 hours unpaid work and required to pay compensation to the victim's estate in the sum of £6270.59.
- 58 Ms Lane confirmed that she had requested a certificate of conviction and received this on 16 August. She had also requested a copy of the transcript of the sentencing remarks from the trial judge so that this could be taken into account. The sentencing remarks had only been received in the last few weeks.
- 59 The Applicant's investigation had now concluded, and the matter had been referred to a Fitness to Practise Panel. It was listed for a hearing on 10 January 2023. It was to be dealt with under the faster process given the conviction. The proposed extension period of three months would allow the Fitness to Practise proceedings to be resolved. The Applicant had also referred the Respondent to the Disclosure and Barring Service.
- 60 Ms Lane explained that given the lack of engagement from the Respondent, there was limited information available about him. It was believed that he was currently working as a delivery driver.

The Tribunal's conclusion with reasons

- 61 We took into account all the evidence that was included in the hearing bundle and presented at the hearing.
- 62 We wish to place on record our thanks to Ms Ramsey and Ms Lane for their assistance at the hearing.
- 63 The question for the Tribunal (as the primary decision maker) is whether at the date of its decision, it reasonably believes that the interim order should be extended. This means that it has to consider the criteria as that considered for the original interim order, namely, whether it is necessary for the protection of the public, is otherwise in the public interest, or is in the interests of the registered person.
- 64 We reminded ourselves that the Tribunal is considering the appeal at the date of the hearing and makes its decision on the basis of all of the evidence available to it, including any oral evidence at the hearing and is not restricted to matters available to the Interim Orders Panel.
- 65 Furthermore, the Tribunal's role in the appeal is not to make any findings of fact but to consider whether there is sufficiently strong evidence to support the decision to extend the Interim Suspension Order.
- 66 We concluded that taking in account all the circumstances, it was

necessary and proportionate for the interim suspension order made 10 June 2021 to be extended until 9 March 2023.

- 67 We concluded that we were satisfied that an interim order was necessary for the protection of THE public and otherwise in the public interest. Our reasons for doing so are set out below
- 68 We found the evidence of Ms Lane to be particularly persuasive. Ms Lane's evidence was clear and well reasoned. We acknowledge that she had taken over the case after it had started but nevertheless in our view, she had taken a proactive approach. In particular, we found it very helpful that Ms Lane had contacted the Respondent to ascertain his intentions in relation to the appeal prior to the hearing itself and had produced a Telephone note of the conversation. We had no reason to doubt the contents of the Telephone note.
- 69 As the Respondent has elected not to participate in these proceedings, the only information we had regarding the Respondent circumstances was provided by the Applicant orally at the hearing and that which was included in the hearing bundle. This included his intentions in relation to this application and the fact that he would not participate.
- 70 We took into account the information that it was believed he was working as a delivery driver at this time.
- 71 The power to make an interim suspension order is not uncommon for regulated professions and there is case law arising from other regulatory schemes which has considered the threshold and the relevant considerations in deciding whether such an order is appropriate.
- 72 We considered the case of the *General Medical Council v Dr Stephen Chee Cheung Hiew [2007] EWCA Civ 369* which was referred to by the Applicant and the principles set down in that decision.
- 73 We remind ourselves that the function of the Tribunal is to ascertain whether the allegations against the Respondent, rather than their truth or falsity, justify the prolongation of the extension.
- 74 We took into account matters such as the gravity of the allegation, the nature of the evidence, the seriousness of the risk of harm to vulnerable users of services, the reasons why the case has not been concluded by the Applicant and the prejudice to the Respondent if an interim order is continued.
- 75 We took into account that the Respondent was according to the Certificate of conviction (dated 16 August 2022) contained within the hearing bundle, convicted on 17 May 2022 of fraud by abuse of position-Fraud Act 2006. We acknowledge that the Respondent pleaded guilty to the offence. He was sentenced to a total custodial

period of nine months suspended for 12 months. He was also required to pay compensation to the victim's estate in the sum of £6270.59.

- 76 The allegation/conviction involves a vulnerable individual who was using care and support services and whose money was used by the Respondent to purchase items for his own benefit. The allegations/conviction also involve a fundamental breach of trust. Furthermore, the allegations arose only six months after he had registered with the Applicant.
- 77 We concluded that the interim order remains necessary for the protection of members of the public (including vulnerable service users) in view of the risk of serious harm that would arise if the alleged conduct were to be repeated with other individuals. We concluded that there was a real risk of significant harm to the health, safety and well-being of vulnerable individuals using care and support services if the Respondent was allowed to continue to practise unrestricted.
- 78 Further, we consider that an average member of the public would be shocked and troubled if the Respondent was able to practice without restrictions in place before the final determination of his case. We are therefore satisfied that the extension of the interim order is in the public interest.
- 79 We considered that the interim suspension order shall be extended until 9 March 2023. In reaching our decision, we acknowledge that the Applicant has now completed its investigation and has listed the matter for a hearing before the Fitness to Practise panel on 10 January 2023. We acknowledge that the Applicant has had to make further enquiries such as obtaining the certificate of conviction and the transcript of the sentencing remarks. We also considered it sensible to allow some additional time in order to complete that process, for example, to deal with any adjournments or delays.
- 80 As Ms Lane made clear in her evidence, as the Respondent has been convicted, it will be possible for him to be referred for A hearing before a Fitness to Practise Panel under the streamlined procedure, without the need for further investigation by the Applicant. This is because a person's fitness to practise may be regarded as impaired on the basis of a conviction for a criminal offence.
- 81 We consider that the proposed extension of three months is both necessary and proportionate.
- 82 We reminded ourselves that if the Tribunal were to grant an extension of the interim suspension order in this case, the Applicant will be required by section 146(4)(b) of the Act to convene an Interim Orders Panel to conduct a review of the interim order within three months of the Tribunal's decision. In addition, under section 146(8) an Interim Orders Panel may review an interim order at any time if new evidence

becomes available. This

- 83 In reaching our decision, we took into account any prejudice/hardship to the Respondent of any interim suspension order continuing. There is limited information before us regarding the Respondent's current circumstances due to his non engagement with these proceedings. The Applicant understands that the Respondent is currently working as a delivery driver.
- 84 In our view, having taken into account all the circumstances of the case, on balance, we concluded that it was necessary and proportionate to extend the interim suspension order in this case.
- 85 We, therefore, taking in account all the circumstances, concluded that it was necessary and proportionate for the interim suspension order made on 10 June 2021 to be extended until 9 March 2023

DECISION

- 86 The application to extend the order dated 10 June 2021 and which is due to expire on 9 December 2022 shall be granted and the interim suspension order shall be extended until 9 March 2023

**Judge H Khan
Lead Judge**

First-tier Tribunal (Health Education and Social Care)

Date Issued: 06 December 2022