

First-tier Tribunal Care Standards

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

NCN: [2021] UKFTT 44 (HESC)
[2020] 4115.ISO-W (VKinly)

Heard by Video Link on 5 February 2021

BEFORE

Ms Faridah Eden (Tribunal Judge)
Ms Jennifer Cross (Specialist Member)
Ms Dorothy Horsford (Specialist Member)

BETWEEN:

Samantha Gould

Appellant

-v-

Social Care Wales

Respondent

DECISION

The Appeal

1. Ms Samantha Gould (“the Appellant”) appeals under section 145 of the Regulation and Inspection of Social Care (Wales) Act 2016 (“the Act”) to the Tribunal against the decision of Social Care Wales (“the Respondent”) issued on 14 August 2020, imposing an Interim Suspension Order on her registration as a domiciliary care worker from 13 August 2020 for a period of 18 months.

The hearing

2. The hearing took place on 5 February 2021. This was a remote hearing which was not objected to by the parties. The form of remote hearing was by video. A face to face hearing was not held because it was not practicable due to the public health situation, neither party requested a face to face hearing and we considered that all issues could be determined in a remote hearing. The documents that we were referred to are in the electronic hearing bundle provided for the hearing and the additional statement of the Appellant referred to below.
3. The Appellant does not own a computer and attended the hearing using the video function on her mobile phone. She was unable to access the electronic bundle whilst using her phone for the hearing. We ensured that all the documents in the bundle which were referred to during the course of the hearing were summarised or read out for the Appellant. The Appellant was distressed

throughout the hearing. We offered her the opportunity to take a break and asked if there was anything we could do to support her. We understood clearly the reasons why she objected to the interim suspension order. We also noted that the Respondent's legal representative had taken steps to support the Appellant in preparing for the hearing (page H1 of the bundle) and that the Appellant attended a telephone case management hearing on 15 January 2021 at which Judge Khan directed her to produce a further written statement. Therefore, we were satisfied that the Appellant was able to participate and to present her case.

4. At the conclusion of the hearing, both parties said that the video hearing was fair and they were able to participate.

Attendance

5. The Appellant attended and represented herself. The Respondent was represented by Mr Graham Miles, Solicitor from Blake Morgan. The Respondent's only witness was Ms Lisa Parry, Fitness to Practise Senior Officer, Social Care Wales.

Additional Evidence

6. Following a telephone case management hearing on 15 January 2021, Judge Khan ordered that the Appellant sent to the Tribunal a written statement. This statement was included in a supplementary bundle sent to the Tribunal on 29 January 2021.

Events leading to the interim suspension order

7. The Appellant is a domiciliary care worker. She was registered with the Respondent on 21 June 2019. She was previously employed by 1st Grade Care as an Area Planner. Following a disciplinary investigation, she was dismissed by 1st Grade Care on 29 June 2020. 1st Grade Care made a referral to the Respondent on 1 July 2020. The reason for the referral was that the disciplinary investigation had found that the Appellant had attended the calls of service users during a period of self-isolation whilst she was suspected of suffering from Covid-19 and without a negative test result, she had instructed an unauthorised member of staff to care for service users, and she had falsely attempted to claim payment for the work carried out by the unauthorised member of staff. The investigation also dealt with the question of whether the Appellant had worn appropriate PPE during the calls. However, the disciplinary investigation did not appear to reach a clear finding of fact on this point.
8. According to the investigation report and referral to the Respondent, the Appellant had felt unwell on 9 June 2020. She spoke to her GP and was advised to self-isolate and arrange a Covid-19 test. Her employer arranged for her and other colleagues to have a Covid-19 test. The Appellant was asked to work from home until she received a negative test result. Although the Appellant's colleagues received negative test results, her results were not returned.
9. On 15 June 2020, the Appellant submitted a 'shadowing form', which stated

that a new member of staff had shadowed a care run during the Appellant's self-isolation period. She was asked to clarify this by staff at 1st Grade Care. She told 1st Grade Care that she had completed a call on 12 June 2021 and a double handed run on 14 June 2020. She said that on 14 June she had completed three calls and then left the new member of staff to complete the run with another care worker. The referral from 1st Grade Care said that the Appellant manually logged herself as attending all calls on 14 June, including calls which she had not attended. The referral also states that 1st Grade Care had not yet received a DBS check or suitable references in respect of the new member of staff. In her statement for the disciplinary investigation, the Appellant said that she had kept her distance during calls and had an apron, gloves and mask. She did not wear a visor or goggles, but had her own glasses on.

10. On 13 August 2020, an Interim Orders Panel of the Respondent met. The Appellant was not present and had asked for an adjournment, which the Panel declined. The Panel imposed an interim suspension order of 18 months, on the basis that this was necessary for the protection of the public and in the public interest. The Panel considered that there was "a real risk of significant harm to someone's health, safety or well-being" if no order was made and that an interim was also necessary "to promote and maintain public confidence in the social care profession."

Subsequent events

11. Ms Parry's witness statement said that in advance of the Interim Orders Panel hearing, it became clear that the Appellant had obtained new employment with another employer, Care Cymru. On 14 August 2021, the Respondent's hearing clerk emailed the Appellant with the outcome of the decision. On 4 September 2020, Ms Parry telephoned Care Cymru to discuss the Appellant's employment status. The Appellant answered the telephone and said that she had not received any correspondence and did not know she was suspended. The Appellant told Ms Parry that she had been open with her employer about the Respondent's investigation. Ms Parry re-sent the notification of the suspension to the Appellant and emailed Care Cymru. On 7 September 2020, Ms Gemma Tyrer of Care Cymru emailed Ms Parry and stated that Care Cymru was unaware of the investigation. Ms Tyrer told Ms Parry that the Appellant had been suspended and was to be dismissed.

Legal Framework

12. There was no dispute as to the legal framework and we have adopted the legal framework as set out in the Respondent's skeleton argument.
13. The Respondent is the regulator for the social care profession in Wales. Under section 80 of the Act, the Respondent's functions include keeping a register of social workers and social care workers of any other descriptions specified by the Welsh Ministers in regulations.
14. The Social Care Wales (Specification of Social Care Workers) (Registration) (Regulations 2016 specifies the descriptions of social care workers for whom a register must be kept. The Social Care Wales (Specification of Social Care

Workers) (Registration)(Amendment) Regulations 2018 with effect from 2 April 2018, specify an additional description of social care workers in respect of which the Respondent must keep a register, namely those who are employed or engaged under a contract of services by a service provider of a domiciliary support service to provide care and support to a person. From 1 April 2020, registration by domiciliary care workers has been mandatory.

15. Under section 68(1) of the Act, the Respondent's main objective in carrying out its functions is to protect, promote and maintain the safety and well-being of the public in Wales.
16. Under section 68(2) of the Act, in pursuing that objective, the Respondent 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.
17. Under section 112(1) of the Act, the Respondent is required to prepare and publish a code of practice setting standards of conduct and practice expected of social care workers.
18. Under section 112(5) of the Act, where a registered person is alleged to have failed to comply with any standard contained in a code of practice that failure:
 - (a) is not, of itself, to be taken to constitute deficient performance as a social care worker or serious misconduct; but
 - (b) may be taken into account in proceedings under the Act which relate to the person's fitness to practise.
19. The Respondent has prepared and published a Code of Professional Practice for Social Care ("the Code") under section 112(1) of the Act, the relevant version of which applied with effect from 1 July 2015.
20. 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.
21. 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.
22. 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; and
 - (b) an interim conditional registration order, which is an order imposing conditions on the registered person's registration.

23. 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.
24. Under section 145 of the Act, a registered person may appeal against the imposition of an interim order to the Tribunal. Under section 145(4), the Tribunal may:
 - (a) revoke the interim order;
 - (b) ...
 - (c) replace the interim suspension order with an interim conditional registration order;
 - (d) ...
 - (e) vary the period for which the interim order is to have effect;
 - (f) remit the case to the Respondent for it to dispose of in accordance with directions of the Tribunal;
 - (g) make no change to the interim order.
25. Under Section 146 of the Act, regardless of whether there is an appeal under Section 145, an interim order must be reviewed by an Interim Orders Panel within six months of the date on which the interim order was imposed.
26. 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.
27. Proceedings before an Interim Orders Panel are governed by Part 4 of The Social Care Wales (Proceedings before Panels) Regulations 2016 ("the Regulations").
28. Under regulation 28 of the Regulations, the general objectives of an Interim Orders Panel in carrying out its functions are:
 - (a) to protect, promote and maintain the health, safety and wellbeing of the public;
 - (b) to promote and maintain:
 - (i) public confidence in social care workers, and
 - (ii) a high standard of conduct and practise among social care workers; and
 - (c) to deal fairly and justly with the case.
29. The Social Care Wales (Interim Orders) Rules 2018 make provision for the convening of Interim Orders Panel hearings and for the procedure at the hearing.
30. The Respondent has issued guidance entitled 'Guidance on Indicative Disposals for the Fitness to Practise Panel and Interim Orders imposed by the Interim Orders Panel' ("Interim Orders Guidance").
31. Part II of the Guidance relates to applications for interim orders and includes general principles to be taken into account by an Interim Orders Panel.
32. Paragraph 1.8 of the Interim Orders Guidance states that a panel should

consider, on the evidence before it, the risk of harm to the public, in particular to individuals who use services and/or to the registered person if an interim order is not imposed.

Evidence

Lisa Parry

33. At the hearing, we heard oral evidence from Ms Parry. She adopted her witness statement as her evidence in chief.
34. On further questioning from Mr Miles, Ms Parry said that the Interim Orders Panel had decided to proceed in the Appellant's absence because it was understood that she might be working for a new employer and the Panel wanted to consider the risk that she might pose. Ms Parry said that the first review of the Interim Suspension Order was scheduled for Thursday 11 February 2021. She said, provided the Tribunal did not lift the Suspension Order, she would be asking for it to remain in place. The Respondent's case is that this is necessary for the protection of the public. She emphasised that domiciliary care workers work alone in other people's homes and that it is important that they are trustworthy and honest.
35. Ms Parry said that the Respondent was in the process of bringing Fitness to Practise proceedings against the Appellant. The scope of the investigation has broadened since the findings of the Interim Orders Panel because the Respondent is now considering whether the Appellant was truthful and honest with Care Cymru. Ms Parry is expecting a witness statement from Ms Tyrer at Care Cymru within the next few weeks. Ms Parry has already processed three witness statements from 1st Grade Care. Once the investigation is complete, Ms Parry will need to give the Appellant a period of 28 days to respond. There will then be an internal case conference at which Ms Parry will present the case, including the Appellant's response. When asked by the Tribunal Panel, Ms Parry said that she could not have carried out the investigation any quicker than she had done. She said that she had acted promptly. Ms Parry said that after the internal case conference, the case will be referred to the hearing team. This team will draft charges and hold a pre-hearing review, after which the hearing will be scheduled. There is currently a wait of around three months for pre-hearing reviews to be scheduled. However, for lengthy hearings it can take longer. The prescribed notice period of 42 days is included within those time scales.
36. Ms Parry's view was that a Fitness to Practise hearing could be held within the next 12 months but could not be held within the next six or nine months. This is because there might be delays in the process and it might be difficult to ensure all of the witnesses could attend a hearing. When pressed by the Tribunal Panel on whether it would be possible to shorten the remaining period of the Interim Suspension Order to 10 months, Ms Parry said that it might be possible but she was concerned about the possible impact of the Coronavirus pandemic on scheduling the hearing and the fact that four witnesses would need to attend from both 1st Grade Care and Care Cymru. She said that if a Fitness to Practise hearing was delayed, the Respondent would need to apply to the Tribunal for an extension to the Interim Suspension Order and that this application would need to be made three months prior to the end of the Interim Suspension Order.

37. Ms Parry said that the Respondent had considered whether to impose an Interim Conditional Order on the Appellant but had concluded that this was not appropriate. She said that an Interim Conditional Order would normally work by an employer managing conditions. The Appellant is not currently employed. Ms Parry is also concerned about the Appellant's honesty and integrity, such that she does not consider an Interim Conditional Order would be appropriate.
38. On questioning by the Tribunal Panel, Ms Parry said that she did not accept the Appellant's account that she had received a verbal notification of a negative test because the Appellant's colleagues from 1st Grade Care had said that she did not tell them that she received a negative Covid test.
39. As regards the Appellant's honesty with Care Cymru, on questioning by the Tribunal Panel, Ms Parry said that she had contacted the Appellant before the Interim Orders Panel hearing and the Appellant was fully aware of the potential consequences of the hearing. Ms Parry could not recall whether she had told the Appellant that she would not be able to work if suspended but said that the Appellant had been sent all of the relevant information. She referred us to the email she had sent to the Appellant at page 160 to 161 of the bundle. She said that the notification of the suspension had been sent by her colleague to an email address which had been previously successfully used for the Appellant. She said that she had explained to the Appellant on the telephone that she could work in an unregistered position and had given her the opportunity to go home at that point. She said that she would expect the Appellant to know which roles require registration as she had previously worked in a senior position.

The Appellant

40. The Appellant confirmed that the statement which she sent to the Tribunal on 29 January 2021 was true and that she wanted to use it as her evidence in the appeal.
41. On questioning by the Tribunal Panel, she said that she had received a verbal negative Covid test result and could still not trace a written outcome of her test result. She said that she received the telephone call giving the negative result on the morning of Friday 12 June 2020 before going out for the first call. Her colleagues had received text messages but she never received a text message. She said that she could not follow up the call because it was on a private number. She called 112 but was told there was no record kept of Covid test results. On cross examination by Mr Miles, she said that she had not referred to the verbal negative result at the disciplinary investigation because of a genuine oversight. She said that her mother was in the next room and overheard the telephone conversation. She agreed that the verbal negative result was central to the disciplinary issue but said that 1st Grade Care had wanted a hard copy or a text and she did not have that. When asked why she had not referred to the telephone call in her email to Ms Parry at page 160, she said that she did not have an answer to that, if she was being honest. She said that she had not referred to the verbal test result in the WhatsApp messages at pages 139 to 145 of the bundle because she needed a hard copy result.
42. As regards asking the new member of staff to work without the relevant checks,

on questioning by the Tribunal Panel, she said that she was a bit naïve but in her previous role carers would never be sent out unless the checks were complete.

43. On questioning by the Tribunal Panel, the Appellant said that she had applied for unregistered positions but the interviews had been terminated when she told employers about the Respondent's investigation.
44. As regards PPE, on questioning by the Tribunal Panel, she said that she did not wear goggles because they were uncomfortable over her glasses. She never had a visor. There was one in her car but she gave it to other carers.
45. On cross-examination, the Appellant was asked about the WhatsApp message sent by Toni Sartin, her supervisor on Sunday 14 June 2020 saying that the Appellant needed to work from home again the next day. The Appellant said that she had not told Toni Sartin that she had already been carrying out calls because Toni knew that she was working over the weekend. She said that she had the on call telephone and that if she was not supposed to be working she should not have been given the telephone. She said that when she had been unwell on a previous occasion Toni had driven to pick up the telephone. She denied that she was concealing that she had worked over the weekend and said that she felt she was being set up.
46. On questioning by the Tribunal Panel, she said that she did not tell Care Cymru about the Respondent's investigation because she did not think "it would go this far." She clarified that by this she meant that she did not think she would be suspended and not able to practise. She said that she did not attend the Interim Orders Panel hearing and was waiting for the result before telling Care Cymru. She said that she would never put anyone at risk and took many precautions to avoid infecting her own family. On cross-examination, she said that she knew the investigation was serious but did not think it would come to the point where she would be suspended. She was hoping that the hearing would be postponed and she had been intending to speak to Care Cymru. She agreed that she had told Ms Parry on the telephone that she had already informed Care Cymru about the investigation and agreed that she was "in the wrong there." She agreed that she had been dismissed for dishonesty and that an important of the role of a domiciliary care worker is to have honesty and integrity.

Parties' arguments

47. In its skeleton argument and in oral submissions by Mr Miles, the Respondent argued that these were serious allegations and that the Appellant's conduct showed a reckless disregard for the health and well-being of those in her care. The Respondent argued that the Appellant had put at risk 6 staff members and 22 vulnerable people. It was these allegations which founded the public safety concerns on which the Interim Suspension Order was based. Mr Miles argued that some of the public interest concerns were based on the Appellant's conduct subsequent to her dismissal from 1st Grade Care, in addition to her conduct when waiting for her Covid test. He said that she had not told her employer about the investigation or the Interim Orders Panel hearing. When questioned about this by Ms Parry she had been untruthful. Mr Miles argued that the public would be shocked if the Appellant were allowed to continue to work as a

domiciliary care worker. He stressed the importance of honesty and integrity for domiciliary care workers who enter the homes of vulnerable people without supervision.

48. Mr Miles argued that an Interim Conditional Order was not a viable alternative because there was no employer who could monitor the Appellant's compliance with conditions and that, in practice, it would be difficult to impose conditions on a domiciliary care worker. As domiciliary care workers work alone, it is difficult to monitor them. He argued that an Interim Conditional Order would not be adequate to protect the public.
49. As regards the length of the order, Mr Miles argued that the Tribunal should allow time for unforeseen difficulties and take into account the obligation of the Interim Orders Panel to review the Interim Suspension Order every six months.
50. The Appellant did not make any oral arguments to the Tribunal. She said at the beginning of the hearing that she wanted the Interim Suspension Order to be revoked and that she would also accept an Interim Conditional Order in place of the Interim Suspension Order. We took into account her appeal application, her email to the Respondent's legal representative at page H1 of the bundle, her statement made as part of the disciplinary investigation at page I24, her statement for the Respondent's investigation at page I60 and her statement prepared for the Tribunal proceedings.
51. The Appellant's case can be summarised as follows. She had received a verbal negative test when she attended calls. She took care when attending calls and wore all of the PPE apart from the goggles and visor. She understands the risks associated with Covid-19 and takes great care not to put her partner and mother at risk, both of whom are vulnerable. She was not told that the new member of staff had not been fully checked and had judged that she was experienced and capable of doing the work unsupervised. She did not intentionally falsify the records of who had attended calls. She feels that 1st Grade Care did not support her or offer sufficient training and that her supervisor behaved inconsistently in her expectations of the Appellant and as between different members of staff. In terms of the proportionality of the Interim Suspension Order, she explained that it was having an impact on her mental health and that she is taking medication for depression and anxiety. She stated that she has worked hard to get to her current position in her career and loves her job. She is unable to find alternative employment because of the Interim Suspension Order.

The Tribunal's conclusions with reasons

52. We took into account all the evidence that was included in the hearing bundle and presented at the hearing.
53. When considering an Interim Suspension Order, the Tribunal stands in the shoes of the regulator and the question for the Tribunal is whether at the date of its decision, it is satisfied that the order is necessary for the protection of the public; is otherwise in the public interest or is in the interests of the registered person.

54. The Tribunal is considering the appeal as at the date of its decision and makes its decision on the basis of all of the evidence available to it, including the oral evidence at the hearing and is not restricted to matters available to the Interim Orders Panel.
55. 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 make an Interim Suspension Order. The Tribunal has assessed the strength of the evidence and the prospects of a Fitness to Practise Panel making a finding that the Appellant has been dishonest or poses a risk to the public.
56. We decided to keep the interim suspension order in place for the remainder of the 18 month period.
57. In terms of the risk to the public, we agree with the Respondent that these are serious allegations. The Appellant was working with highly vulnerable people who would be at great risk were they to become infected with Covid-19.
58. There is strong evidence that the Appellant put the public at risk. The Appellant agrees that she went on calls at a time when she was supposed to be self-isolating. All of her statements show that she understands the risks associated with Covid-19 because she states she would not put people at risk in a pandemic. In her statement prepared for the investigation at page I24 of the bundle, she states that "my understanding of self-isolation is that you don't go out and not having contact with anybody." She also states that "thinking about it all now, it was a really stupid thing to do." Therefore, there is strong evidence that the Appellant knowingly broke rules which were intended to protect the vulnerable people she was working with.
59. The only evidence to the contrary is the Appellant's evidence that she had received verbal notification of a negative test result. We have concerns about the credibility of this evidence because the Appellant did not mention any verbal notification in her statements to the disciplinary investigation carried out by 1st Grade Care or in her email to Ms Parry at page I60 of the bundle. The points that the Appellant raises about the care she takes around her mother and partner are irrelevant. The issue for consideration is whether she poses a risk to the service users she is caring for.
60. We are also concerned that, apart from her statement that it was a stupid thing to do when she was initially being investigated by 1st Grade Care, the Appellant has not acknowledged that she may have put anyone at risk. She has instead focussed on whether her supervisor behaved inconsistently or whether she is being singled out. She has said that she did not believe she would be suspended for her actions. We consider that this failure to acknowledge the risk associated with her actions adds to the weight of the allegations. The Respondent has cause to be concerned that the Appellant has not understood the gravity of the situation and would act in a similar way again.
61. In terms of the public interest concerns, we agree that, given the seriousness of the allegations, the public would be concerned about the Appellant continuing to work without restriction. We also agree that there are serious concerns about the Appellant's honesty and that these are important in light of her role as a

domiciliary care worker who goes into the homes of vulnerable individuals.

62. There is strong evidence to support the allegation that the Appellant has acted dishonestly. The Appellant agreed in oral evidence that she had not told the truth to Ms Parry about whether she had informed Care Cymru about the ongoing investigation. Even if the Fitness to Practise Panel were to accept the Appellant's evidence that she did not think she had to inform Care Cymru, she continued to keep the investigation from Care Cymru after Ms Parry had told her on the telephone that she needed to inform her employer.
63. In addition to the allegations that the Appellant had not been honest with Care Cymru, we did not consider the Appellant to be a credible witness before the Tribunal. Her evidence that she had received a verbal notification of a negative test was inconsistent with her previous statements to 1st Grade Care and to the Respondent. It was inconsistent with the WhatsApp messages included in the bundle and she gave no credible reason why she had mentioned the negative test so late.
64. We carefully considered the proportionality of the Interim Suspension Order and took into account the Appellant's evidence about the importance of her work to her, the time she has invested in her career, the difficulty she is having in obtaining alternative employment and her ongoing mental health difficulties. We understand that the ongoing investigation has been highly stressful for the Appellant. However, we must also take into account the vulnerability of the service users which the Appellant would be supporting and the seriousness of the allegations. Balanced against these considerations, we consider it proportionate for the Appellant to be suspended from working in registered positions.
65. As regards whether an Interim Conditional Registration Order would be more appropriate than the Interim Suspension Order, we accept the argument of the Respondent that an Interim Conditional Registration Order would not be workable whilst the Appellant is not employed. We are also concerned about the seriousness of the allegations and consider that an Interim Conditional Registration Order may not be sufficient for public protection and confidence, given the Appellant's role as a domiciliary care worker.
66. Finally, we considered the length of the Interim Suspension Order. We found Ms Parry to be a credible witness. Her evidence was clear and consistent. When she could not recall an event, she was honest about this. We accept her evidence that she has investigated the allegations as quickly as possible. We also accept her evidence that the investigation has broadened and now also concerns whether the Appellant was dishonest with Care Cymru, as well as her actions when waiting for the result of her Covid test.
67. Although there is a possibility that a Fitness to Practise hearing could take place in 9 or 10 months, we accept that it may be difficult to arrange a hearing. There are four witnesses working for two different care providers. We also accept that the ongoing Coronavirus pandemic will make it more difficult to schedule a hearing, both because it may be difficult for the Respondent to make practical arrangements for the hearing and because the witnesses are working in a sector in which they need to quickly cover staff shortages due to self-isolation.

68. Therefore, we conclude that the Interim Suspension Order is necessary and proportionate for the protection of the public and in the public interest.

Decision:

The appeal is dismissed and we make no change to the Interim Suspension Order.

Judge Faridah Eden

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

Dated: 22 February 2021