SHERIFFDOM OF TAYSIDE CENTRAL AND FIFE AT DUNDEE

[2021] SC DUN 58

DUN-B839-19

JUDGEMENT OF SHERIFF GREGOR MURRAY

in the cause

AT

Pursuer

against

THE SCOTTISH SOCIAL SERVICES COUNCIL

Defender

Act: Mr Sutherland; Lay Representative
Alt: Nelson; SSSC

Dundee, 15 September 2021

Background

[1] By this Summary Application, the Pursuer appeals against the finding of a Fitness to Practise Panel formed by the Defender that he assaulted a resident of a are home at which he was employed.

Admitted background and legal framework

[2] As the Joint Minute of Admissions, Joint Productions, Record and parties' written submissions in process disclose, a great deal of the case background and the applicability of the authorities referred to is admitted.

[3] As the Pursuer seeks to criticise a number of the actions of the Defender and the Fitness to Practise Panel ("a Panel"), the following narration includes a contextual

explanation of the legislative and procedural provisions which underpin the Defender's operations. Where necessary, foot notes are provided.

[4] On 21 February 2018, the Pursuer commenced employment as a Carer with HC-One Limited at a care home in East Lothian.

[5] The Defender was established under the Regulation of Care (Scotland) Act 2001 ("the Act"). The Act imposes a duty upon the Defender to promote high standards of conduct and practice among social service workers[1].

[6] The Act defines a social service worker, among others, as "a person employed in the provision of…a care service"[2]. The Pursuer became a social service worker by virtue of his employment as a Carer with HC-One Limited.

[7] The Defender is obliged to maintain a register ("the register") of those employed to provide a care service[3]. Those seeking inclusion on it must apply to the Defender in accordance with rules it is given power to promulgate[4].

[8] The Act obliges the Defender [5] to prepare and publish Codes laying down standards of conduct and practice expected of social service workers, to which such workers and their employers must have regard[6]. Employers must take any Code into account when making any decision about the conduct of a worker[7].

[9] In November 2016, the Defender published a Code of Practice for Social Service Workers ("the Code")[8].

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1 s.43(1)(b)
2 s.77
3 s.44(1)(b)
4 s.45
5 s.53
6 s.53(3A) and (3B)
7 s.53(4)
8 Joint Inventory, No. 2

[10] The Pursuer applied to the Defender to include his name on the register. On 19 April 2018, the Defender approved his application. Consequently, the Pursuer's conduct at work became subject to the 2016 Code.

[11] On 1 October 2018, an incident occurred between the Pursuer and a 76 year old resident in the dining room at the care home. The incident was witnessed by ER, an employee of HC-One, and BH, the husband of another resident.

[12] Immediately following the incident, HC-One suspended the Pursuer from employment. The Home Manager, NF, then carried out an internal investigation into the incident, during which she spoke to the Pursuer and took statements from ER and BH.

[13] On 11 October 2018, HC-One held a disciplinary hearing with the Pursuer. On 15 October 2018, it dismissed him from employment[9].

[14] On 25 October 2018, HC-One referred the details of the incident to the Defender. The documents it sent with the referral included copies of the statements NF obtained from ER and BH and of a Minute of the Disciplinary Meeting held with the Pursuer[10].

[15] With effect from 1 October 2001, under powers conferred by the Act[11], the Scottish Ministers promulgated the Scottish Social Services Council (Appointments, Procedure and Access to the Register) Regulations 2001[12] ("the Regulations"). The Regulations *inter alia* permit the Defender to appoint committees and such committees to appoint sub-committees[13].

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[9] Joint Inventory No. 14, pages 781 - 782
[10] Joint Inventory No. 14, pages 619 - 680
[11] s.56(1)(b)
[12] SSI2001/303
[13] Regulations 8(1) and (2)

[16] The Act also obliges the Defender to promulgate rules with the consent of the Scottish Ministers to determine the circumstances and the means by which a person's name may be removed from the register[14].

[17] In 2016, the Defender promulgated Fitness to Practise Rules 2016 which it later amended by Fitness to Practise (Amendment) Rules 2017. The 2016 Rules as amended are referred to by the Defender as The Combined Fitness to Practise Rules 2017 ("the Rules"[15]).

[18] The Rules permit the Defender to form a Panel[16] to decide *inter alia* whether a registered worker's fitness to practise is impaired and, if so, any sanction to be imposed[17]. The Panel is a sub-committee of the Defender's Fitness to Practise Committee[18].

[19] If the Defender receives an allegation about a registered worker which it considers, if proved, would be likely to result in a finding that the worker's fitness to practise would be impaired[19], it may enquire into the allegation[20] and/or investigate it. If it takes the latter course, it must inform the worker and any employer[21]. During an investigation, the Defender may, with the worker's consent, impose a Temporary Suspension Order.

[20] Following any investigation, if the Defender considers there is a real prospect of a finding of impairment and consequent sanction of the worker, it may refer determination of the allegation to a Panel[22].

[21] In that event, the Defender is obliged to inform the worker and any employer of the allegation and referral and give reasons why it considers the worker's fitness to practise has

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14 s.49
15 Joint Inventory, number 4
16 Rule 7.1
17 Rule 7.3(b) and Schedule 2
18 Rule 7.2
19 Rule 8.1
20 Rule 8.2
21 Rules 8.2 and 8.3
22 Rules 9.1(c), 9.3(a) and 9.5(a)

been impaired[23]. Within 21 days, the Defender must send the evidence on which it intends to rely to the worker[24].

[22] On receipt of HC-One's referral, the Defender considered that the allegation against the Pursuer could result in a finding that his fitness to practise was impaired. It then carried out its own investigation.

[23] With the Pursuer's consent, the Defender temporarily suspended the Pursuer's registration for a period of nine months from 16 November 2018[25].

[24] During its investigation, the Defender took two further statements from ER[26], one from BH[27] and asked the Pursuer to complete and return a Personal Statement form. The Pursuer did so on 10 February 2019. He included a copy of a statement of his recollections of the incident[28].

[25] After concluding its investigation, the Defender advised the Pursuer that it intended to seek removal of his name from the register. On 3 August 2019, the Pursuer advised the Defender he was not prepared to agree to that course[29]. On 9 September 2019, the Defender e-mailed the Pursuer to advise that a final hearing in relation to the allegations would take place between 25 and 28 November 2019[30].

[26] The Defender then requested a Panel consider allegations that on 1 October 2018:

(a) the Pursuer slapped the resident's face and

(b) his actions caused reddening to the resident's face

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[23] Rules 11.1 - 11.3
[24] Rule 12.1
[25] Rule 9; Joint Inventory, number 14, pages 713 - 714
[26] Joint Inventory, numbers 8 and 9
[27] Joint Inventory, number 14, pages 713 – 714
[28] *ibid*, pages 721 - 727
[29] *ibid*, page 728
[30] *ibid*, pages 728 - 729

[27] In response, the Clerk to the Panel assigned 14 October 2019 as a Case Management Meeting ("CMM")[31] and appointed a solicitor, Alistair Murdoch, as its Chair[32].

[28] In advance of the CMM, the parties were obliged to lodge with the Panel and exchange details of any evidence, further evidence, witness lists, their availability for a final hearing and other relevant information[33]. A CMM Chair and Clerk are obliged to use such information to enable a hearing date to be assigned to determine the allegation made[34].

[29] Copies of the documentary evidence lodged in advance of the CMM, copied to the Pursuer and made available to the Panel at the final hearing have been lodged in process[35]. The evidence includes two copies of the statements taken from ER and BH by HC-One[36], of HC-One's interviews with the Pursuer[37], a Minute of the Pursuer's Disciplinary Hearing on 11 October 2018, copies of a statement he voluntarily provided at it[38], of the Personal Statement, of accompanying documentation provided to the Defender by the Pursuer and copies of the documents which HC One submitted to the Defender.

[30] The CMM on 14 October 2019 was held by teleconference and was continued to 30 October 2019. Both meetings were chaired by Mr Murdoch. The Pursuer represented himself and Rebecca Mudie, a solicitor employed by the Defender, appeared as its Presenter.

[31] At the first CMM, the Presenter intimated she wished to lead evidence from ER and BH. The Pursuer intimated he wished to lead the same witnesses and NF. He also advised that Steven Streets, a Lay Representative, would appear for him at the final hearing assigned

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31 Rules 13.1 - 13.2
32 Rule 13.1 and Paragraph 13 of Schedule 2
33 Rules 12.2, 12.4 and 14.1 - 14.3
34 Rules 14.4 and 14.7 - 14.8
35 Joint Inventory, no. 14
36 *ibid* (i) pages 639 - 640 and 641 (ii) pages 771 - 772
37 *ibid*, pages 645 - 647
38 *ibid*, pages 783 - 786

for 25 to 28 November 2019. The Presenter suggested the Pursuer lead NF on the first day. The CMM was continued to 30 October for the Defender to ascertain whether she would be available to give evidence.

[32] At the continued CMM, agreement was *inter alia* reached that NF would give evidence on the first day.

[33] Minutes of the two CMMs were prepared by the Clerk and circulated[39].

[34] The Rules provide that a final hearing must be conducted in three sequential stages - findings of fact[40], whether the findings of fact impair a worker's fitness to practise[41] then what, if any, sanction should be imposed[42]. If the Defender fails to prove its case at Stage 1, the allegation must be dismissed[43]. Either party may lead evidence at any stage[44].

[35] Evidence was led during Stage 1 of the Pursuer's hearing. On 25 November, ER's examination in chief was taken in the morning. As NF was only available on that day, her evidence was interposed that afternoon. On the morning of 26 November, the evidence of BH was also interposed before ER was cross and re-examined. The Panel also asked questions of each witness.

[36] Thereafter, Mr Streets intimated that the Pursuer was not to give evidence himself. The Panel then heard submissions on Stage 1 from the Presenter and Mr Streets and adjourned to consider its Stage 1 decision.

[37] On the morning of 27 November, the Chair intimated the Panel found allegation (a) proved and allegation (b) not proved.

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[39] Joint Inventory, no's 13 and 5
[40] Rules 15.1(a) and 18
[41] Rules 15.1(b) and 19
[42] Rules 15.1(c) and 20
[43] Rule 18.10
[44] Rules 18.3 - 4, 19.4 - 5 and 20.5 - 5A

[38] Before the Panel moved to Stage 2 of the hearing, Mr Streets read out a statement on behalf of the Pursuer[45] in which he stated the Pursuer felt "it did not make any sense to waste the Panel's time debating his impairment" as the Panel had "already indicated…that he must be impaired to some degree or other" and the Pursuer did not accept de-registration under any circumstances. He and the Pursuer then left the hearing and did not further participate in it.

[39] After considering the circumstances, the Panel resolved to conduct the remainder of the hearing in the Pursuer's absence[46]. After hearing submissions on impairment from the Presenter that afternoon and considering them the following morning, it then determined that the Pursuer's fitness to practise was impaired.

[40] The Panel moved to consider Stage 3. After hearing and considering further submissions from the Presenter, the Panel ordered that the Pursuer's name be removed from the register[47].

[41] A transcript of proceedings at the Panel hearing recording the foregoing has been prepared and lodged in process[48].

[42] The Panel subsequently issued formal Notice of its Decision[49].

[43] On 19 December, the Pursuer lodged the present Summary Application under s.51 of the Act, by which he seeks to appeal against the Panel's decision.

[44] s.51 provides:

> "Appeal against decision of Council
> (1) A person given notice under section 50(2) of this Act of a decision to implement a proposal may, within fourteen days after that notice is given, appeal to the sheriff against the decision.

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45 Transcript 27 November, pages 9 - 11
46 Rule 35
47 Transcript, 28 November, page 19
48 Joint Inventory, number 17
49 Rule 22.3, Joint Inventory, No 3

(2) On such an appeal the sheriff may—
  (a) confirm the decision; or
  (b) direct that it shall not have effect.
(3) The sheriff shall also have power, on such an appeal—
  (a) to vary any condition which, by virtue of section 46 of this Act, is in force in respect of the person;
  (b) to direct that any such condition shall cease to have effect; or
  (c) to direct that a condition which the sheriff thinks fit to impose shall have effect in respect of the person."

Procedural history

[45] The case called before me for a final hearing by WebEx on 9 July 2021. In advance, written submissions for each party, a Joint Minute of Admissions and Joint Productions were lodged. It was agreed no evidence needed led and that parties agreed the relevant principles in the cases cited.

[46] Richard Sutherland appeared for the Pursuer as his Lay Representative, having also been present at the Panel hearing as the Pursuer's supporter. Mr Nelson, solicitor, appeared for the Defender. Each adopted their written submissions and expanded upon them. At what I thought was the conclusion of the hearing, Mr Sutherland indicated he had many other points to raise. Consequently, by agreement, I allowed time limited periods for Mr Sutherland to lodge supplementary written submissions, for Mr Nelson to respond and continued the hearing to 6 August.

[47] Mr Sutherland subsequently lodged a further 50 pages of submissions and Mr Nelson a brief response. After considering these and further verbal submissions on 6 August, I made *avizandum*.

Pursuer's submissions

[48] The Pursuer's crave asks the Court to overturn the Panel's Findings in relation to fact and impairment and to have all records of them amended as the Defender's and the Panel's reasoning and the processes they adopted during the investigation of the allegation against the Pursuer and during the Panel hearing were plainly wrong and manifestly inappropriate.

[49] Supporting submissions were advanced on Record, during the hearing and in writing. As there was a degree of overlap, I have consolidated them where necessary. Though not all are foreshadowed in the pleadings, I have afforded the Pursuer a degree of latitude as neither he nor his representative are legally qualified, a course to which I did not understand Mr Nelson to object. Though Mr Sutherland did not ultimately rely on all his submissions, I have recorded each for fullness.

[50] The Panel was obliged to, but failed, to ask the Pursuer whether he admitted impairment of his fitness to practise[50]. Consequently, its decision was flawed.

[51] The Defender's decision to impose a Temporary Suspension Order on the Pursuer in November 2018 was unreasonable, unfair and disproportionate. This submission was not insisted upon.

[52] During its investigation of the allegation, the Defender did not act reasonably, as it unfairly obtained and relied upon witness statements which did not independently record the witnesses' evidence.

[53] The Defender's investigation did not follow ACAS model procedures, nor did the Defender timeously disclose to the Pursuer evidence from it which it intended to rely on at the final hearing.

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[50] Rule 19(1)(a)

[54] On the evidence available to it, the Panel's decision was unfair and unreasonable. Almost all of ER's evidence which it relied on was confused and contradictory. The Panel ignored contradictions about the distance between the incident and her and on the time gap between the resident striking the Pursuer and the Pursuer making contact with him.

[55] The Presenter and the Panel both erroneously concluded that BH was predisposed to support the Pursuer and wrongly disregarded his evidence. Again, this point was not insisted on.

[56] BH became confused in his evidence as the Presenter and Panel both badgered him. Reference was made to the Hearing transcript and/or recording.

[57] The Panel ought to have attached more weight to the evidence of the Pursuer and BH, especially as the latter corroborated the former's evidence that he was crouching down when the incident occurred and contradicted ER, who maintained the Pursuer had been standing.

[58] Even on the balance of probability, there was no evidence of weight or value against the Pursuer. The Panel came to plainly wrong decisions on the evidence presented (*Southall* v *GMC* 2010 EWCA Civ 407 at para 47) as it was so unreliable. The Panel did not examine all the facts in a balanced and thorough manner.

[59] The Defender's investigation and presentation of the allegation and the Panel's decision were not fair, reasonable or proportionate in the context of the Pursuer having been admittedly assaulted by a resident who had acted similarly in the past. This was not a case in which clinical or specialised evidence was crucial. It was open to the court to overturn the Panel's decision (*B* v *SSSC* 2012 SLT (Sh Ct) 199).

[60] In addition, the Panel attached no or insufficient weight to HC-One's failures to implement its policies designed to protect employees and prevent incidents occurring. The

availability of that evidence was considered at the continued CMM. The Panel Chair refused an intended line of cross examination to NF that HC-One Limited had previously acknowledged a need for further training and the Pursuer had raised concerns about prior to the incident[51]. Other evidence in support of that conclusion was ignored by the Panel, in particular the appointment by HC-One of a Turnaround Manager to the home soon after the incident and changes it made to the care plans and policies, as was also confirmed during the continued CMM.

[61] The Panel's decision was also insufficiently balanced. On the one hand, it concluded it was unable to judge the severity of the assault on the Pursuer. On the other, it came to different conclusions, notably it was "unable to be sure, on the balance of probabilities, whether or not AA had actually struck your face" "there was no suggestion of duress" and the resident was simply "throwing his arm out"[52].

[62] The Panel was not impartially constituted, its members having been appointed and paid for by the Defender. This demonstrated that it did not fairly and reasonably examine the evidence.

[63] The Pursuer had been disadvantaged and prejudiced by the evidence of NF being interposed with that led for the Defender.

[64] The Pursuer's departure at the conclusion of Stage 1 was entirely reasonable. He could not have further pled his case had he remained for a further two days. It was pointless for him to remain and make submissions at Stages 2 and 3 as case law restricted any appeal to Stage 1.

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[51] Hearing transcript, page 124
[52] Notice of Decision

Defender's submissions

[65] The written submissions for the Defender, while relevant, were also unnecessarily lengthy and repetitive. In part, I am sure that was necessitated by the manner in which the Pursuer's written case was presented. However, the degree of repetition, the various fonts and type sizes used within them all suggest they were drafted by committee and were insufficiently revised, an issue I leave the Defender to reflect on. The outcome, again, was that I have had to consolidate them.

[66] I was invited to sustain the Defender's pleas-in-law, to repel the Pursuer's pleas-in-law, to confirm the Panel's decision of 28 November 2019 in terms of s.51(2)(a) of the Act and to refuse the appeal.

[67] An appeal under s.51 complied with Article 6 of the ECHR (*Tehrani* v *United Kingdom Central Council for Nursing, Midwifery and Health Visiting* 2001 SC 581 as approved in *Smith* v *SSSC* 2015 SLT (Sh Ct) 103). There could be no violation of the convention if the proceedings were subject to subsequent control by a judicial body with full jurisdiction (*Bryan* v *United Kingdom* ECHR 1995 (Application 19178/91 at paras 46 and 47). The hearing before the Sheriff, whilst a full appeal, was a review not a re-hearing (*Michalak* v *GMC* 2017 HKSC 71 (at para 20). The phrase "full appeal" meant unrestricted control by a court with full Article 6(1) compliant jurisdiction.

[68] If the Pursuer's Article 6 rights had not been satisfied at the hearing, the court could take any necessary steps to ensure that they had been satisfied by the conclusion of the appeal. s.51 afforded the Sheriff wide powers to achieve those ends. Any unfairness in the Defender's proceedings could be corrected by review in the appeal, including examination of the evidence and productions. In that way the appeal prevented any breach of article from occurring in the first place.

[69] For this court to interfere with the decision at first instance there required to be a clear error, one which indicated that the Panel plainly went wrong in its determination (*LM* v *General Teaching Council for Scotland* [2020] CSIH 42; *X* v *GDC* 2020 CSIH 71 at paragraph 31). That had not occurred.

[70] There could be no question of the Panel's independence. It was constituted under the relevant legislative provisions and was comprised of competent Panel members. Such members were publicly recruited after interview for fixed terms and paid a daily rate for attendance to ensure no question or issue of advancement arose. They were not employed by the Defender, did not share its office, had no liaison with its Fitness to Practise Department nor could they access to its IT network. A clerk from the former selected each panel. The Chair was a solicitor in private practice. The Defender's Hearings and Fitness to Practise Departments were separate departments. In any event, as submitted, the Panel's independence and impartiality was preserved by the right of full appeal in s.51.

[71] The Panel's conduct of the hearing did not give rise to any appearance of bias. No fair minded and informed observer, having considered the facts, would have concluded there was a real possibility of bias against the Pursuer (*Helow* v *Advocate General for Scotland* 2009 SC (HL) 1 at para [14]). The Panel did not intervene excessively. The proceedings were procedurally fair, in accordance with the Rules.

[72] *Esto* there was procedural unfairness, there were no adverse consequences as the same result would have been reached.

[73] There was no failure to disclose evidence before the Hearing. All witness statements, whether given to HC-One or the Defender, and the former's investigative notes were disclosed before the CMM within relevant timescales.

[74] The Panel's findings in fact were not erroneous and were not sufficiently out of line with the evidence to indicate with reasonable certainty that the evidence has been misread (*Southall*, para 47). There was no basis for criticism of the order in which witness evidence was led. The Defender arranged for NF to attend as a courtesy at the Pursuer's request, had no power to compel her to do so and had always intended to call Ms Reynolds as its first witness. The order of witnesses who gave evidence and the interposing of NF to accommodate her availability were agreed. Had he wished NF to be led at a later date, Mr Streets could have sought an adjournment but did not do so.

[75] While NF's evidence was available to the panel before ER's cross-examination, the result was the same as her having been led later. Though there were inconsistencies between ER's statements and her evidence, she consistently maintained she saw the Pursuer strike the resident and that there was a pause before he did so.

[76] In context, it appeared the Pursuer made an informed choice not to give evidence because he considered that the panel would not believe ER. Though Mr Streets suggested the Pursuer did not do so as his English was inadequate, no prior indication of any such issue had been given at either CMM. Had it been, an interpreter could have been provided. However, evidence of the Pursuer's position was available to the Panel. It disclosed, by his own admission, that the Pursuer accepted he struck the resident and there was some form of delay before he did so.

[77] In combination, his comments and Ms Reynolds' evidence enabled the Panel to come to a reasoned decision. That and the legal advice given by the Chair were reasoned, legally correct and proportionate. All relevant issues were taken account of. No weight was attached to irrelevant issues. The decision showed ER evidence had become exaggerated over time and that some of her allegations were incorrect.

[78] The Pursuer's decision to absent himself after Stage 1 was irrelevant. At Stages 2 and 3, when determining whether the Findings in Fact amounted to misconduct then sanction, the Panel acted in terms of Rule 36 by taking account of relevant issues, notably misconduct, public protection and public interest, insight, regret, remediation (*Roylance* v *GMC* 1 AC 311; *Cohen* v *GMC* 2008 EWHC 581; *CHRE* v *NMC and Grant* 2011 EWCA 927) and Decisions Guidance in relation to impairment of practice. In considering mitigation and sanction, it took account of submissions, references and the Decisions Guidance and relevant case law (*Bolton* v *the Law Society* EWCA Civ 32 38).

[79] As such, the Panel did not err in law or otherwise act unreasonably. Its decisions were neither plainly wrong nor manifestly inappropriate. There was no basis for a court, in the exercise of appellate jurisdiction, to interfere with them.

[80] The Pursuer's averment that the SSSC presenter failed to carry out "reasonable procedures" was neither specific nor supported by the evidence.

[81] The breach of Rule 8 (when the Chair failed to ask the Pursuer whether he admitted any part of the allegations) was an administrative oversight with no adverse consequences which was irrelevant to the operation and outcome of the hearing (*Zia* v *GMC* 2011 EWCA Civ 743 at para 46). Had the Pursuer been asked, he would not have admitted any part. Before and during the hearing, he could have chosen to do so had he wished. The consequence of the failure was that the Defender had been obliged to lead all available evidence to prove the allegations.

[82] The Pursuer's claim about the Temporary Suspension Order imposed in November 2018 was irrelevant, as the time for appealing it had expired 28 days after it was made and the Pursuer in fact consented to it.

[83] The Defender's investigation was carried out fairly and proportionately under the Rules. These required the Defender to independently investigate allegations, not to rely on an employer's investigation and papers and refer a case to a Panel based on them. As the Defender was required to obtain all available evidence for a Panel to be able to assess the facts of an allegation, then to decide whether it was sufficiently serious, nothing unfair or untoward had occurred.

[84] In any event, the issue was irrelevant, as the Panel concluded ER exaggerated the degrees of force and premeditation involved in the assault. Even if there had been enhancing and strengthening of the Defender's case, the Panel rejected those elements of her evidence. Nothing in the statements or evidence suggested professional unfairness or collusion on the part of the SSSC representative.

[85] The Pursuer's claims that the witness statement variations should stand alone and cast the Panel's decision into serious doubt was ill founded. Submissions by Mr Streets to that effect had correctly been rejected by the Panel.

[86] The claim that the Defender did not follow ACAS investigation procedures was irrelevant. There was no duty on the Defender to do so.

[87] The claim that the findings of the Panel were unfair, unreasonable and disproportionate was also baseless. That the Panel did not find parts of the allegations proved illustrated its careful consideration of the evidence. It was entitled to conclude that ER consistently maintained the Pursuer struck the service user and that there was a delay before he did so. That was also the information the Pursuer gave HC-One Limited.

[88] There was no unreasonable, unfair or disproportionate treatment of BH, as the transcript showed. He was examined in a professional and courteous manner. The Presenter's submissions on his evidence were justified, as were the Panel's conclusions. At

no time did BH deny the Pursuer struck the service user. The submission that there was no evidence of weight or value against the Pursuer was absurd when the evidence of ER, BH and the written information was considered.

Discussion

[89] I need say no more about the Pursuer's submissions which he did not insist upon.

[90] The Pursuer's submission that the Panel's decision was flawed by reason of its failure to ask him whether he admitted impairment to practise is misconceived. Put shortly, as the Defenders submitted, it was an administrative oversight of the type which is commonly excused by a court. As the Defender also submitted, the failure actually benefitted the Pursuer as it required the Defender to prove more, not less, of its case. In any event, it is manifestly plain that in advance of the hearing the Pursuer neither admitted any assault, impairment of his fitness to practise nor the imposition of any sanction.

[91] It is convenient to globally address the Pursuer's submissions that the Panel was not impartially constituted, its members having been appointed and paid for by the Defender, did not fairly and reasonably examine the evidence and that the Defender did not act reasonably by unfairly obtaining and relying upon statements which did not independently record the witness's evidence.

[92] In brief, those submissions all misapprehend the Defender's role generally, its discretion to investigate any allegation which it receives, its discretion to obtain statements when doing so, the status of a Panel and its role.

[93] The Act and the Rules *inter alia* require the Defender to fulfil two classes of function. First, it must maintain the register, promote appropriate standards of practice by registered workers and provide procedures to admit, remove and if necessary restore the names of

workers from it. In the exercise of that function, the Defender published the Code, a document which the Pursuer admits he knew about and required to work under it.

[94] Second, the Defender must act as a gatekeeper if an allegation is made about a registered worker. In the exercise of that function, the Act, the Regulations and the Rules require the Defender to follow a defined procedural path.

[95] When it receives an allegation, the Defender must form an opinion on it. It must decide if the allegation is specific and relates to a named worker. If it does, the Defender must assess the allegation and come to a reasoned opinion - it must determine whether, if the allegation was proved, it would be likely to lead to a finding that the worker's fitness to practise was impaired[53].

[96] Implicitly, if the allegation does not pass initial assessment, the Defender need take no further action. If it does pass that stage, the Defender must then decide whether to investigate it[54].

[97] If an investigation commences, the Rules create a rebuttable presumption that the worker and any employer should be advised of the allegation[55]. During it, unfettered discretion is conferred on the Defender to seek information from any person or source[56] and to seek an order temporarily suspending the worker's registration, either consensually or from a Panel[57].

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[53] Rule 8.1
[54] Rule 8.3
[55] Rule 8.3
[56] Rule 8.5
[57] Rules 9.2 and 9.5

[98] After the investigation concludes, the Rules confer discretion on the Defender to follow one of three paths:

- it may decide to take no further action[58]
- if the worker consents, the Defender may itself impose one of six specified sanctions[59]
- if the allegation is not accepted, the Defender may refer the case to a Panel for consideration[60]

[99] The nature of the three options confirms that the underlying purpose of investigation is to enable the Defender to decide whether the worker has a case to answer. As every allegation will be fact specific, the nature and extent of every investigation will vary, hence the need for unfettered discretion to request information from any person or source.

[100] In his case, the evidence shows that the Defender received an allegation from HC-One and decided to investigate it. The statements which it obtained from ER and BH (and the Personal Statement it requested the Pursuer complete) were all taken for the purposes of that investigative process, in the exercise of unfettered discretion conferred by the Rules. As such, they cannot have been obtained unfairly and the Pursuer's submission to that effect falls to be rejected. I address how the information within them is used by a Panel below.

[101] The Pursuer's submission that the Panel was not impartially constituted, it members having been appointed and paid for by the Defender falls to be considered in the contextual understanding of the Defender's functions described above.

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[58] Rule 9.1(a)
[59] Rule 9.1(b)
[60] Rule 9.1(c)

[102] At first blush, once a tangle of primary and secondary legislation has been unravelled, the Pursuer's submission has a degree of attraction.

[103] A Panel, as a matter of law, is part of the Defender. The Regulations confer power on the Defender to create a framework to implement and administer its obligations and, *inter alia*, permit it to form committees, and committees to form sub-committees[61]. A Panel is a sub-committee formed by the Defender's Fitness to Practise Committee[62]. The manner in which a Panel must operate is also controlled by the Defender through Rules it directly promulgated[63] Rules which also provide that Panel members are appointed by the Defender[64]

[104] However, that attraction is dispelled by the context and certain of the Defender's submissions. In essence, these show that a Panel is a necessary consequence of the Defender's gatekeeping and investigatory functions, one which is contingent on a dispute arising on either temporary suspension or a sufficiently serious allegation which could cause impairment and merit sanction.

[105] A Panel's link to the Defender is also an inevitable consequence of the Act, which was passed by a Scottish Parliament after due process and the consent of whose Ministers is a prerequisite of any Rules the Defender proposes to promulgate.

[106] Seen in that way, if the Defender had no power to create a Panel and/or make Rules to allow one to make decisions, another Act would have been necessary to create another body to fulfil its function or to confer power on an existing body to do so. In these

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[61] Regulations 8(1) and 8(2)
[62] Rule 7.2
[63] Preamble to the 2017 Rules
[64] 2017 Rules, Schedule 2, para 1

circumstances, it can be presumed that the Scottish Parliament deemed such measures unduly expensive, unnecessary and/or absurd.

[107] Separately, Mr Sutherland did not dispute the Defender's response, which was that a Panel is independent as its members are publicly recruited, interviewed, sit for fixed terms and are not employed by it. Instead, they are paid a daily rate for attendance, which prevents any accusation of advancement. The Panel operates from separate accommodation and does not liaise with the Defender's Fitness to Practise Department. It has no access to its IT network. The Defender's Hearings and Fitness to Practise Departments are entirely separate. There was no question of the Panel being incompetently constituted as its members fulfilled the criteria provided for by the Rules. In any event, the Panel's independence and impartiality was preserved by the right of full appeal in s.51.

[108] As that information was not disputed, I accept it. I also agree that s.51 is an appropriate right of review. For these various reasons, I reject the Pursuer's submission that the Panel in the Pursuer's case was not impartially constituted.

[109] The Pursuer's misapprehension of the Defender's investigative role also undermines his submission that the Defender unfairly obtained and relied upon statements by ER which did not independently record her evidence. Legally, that is not what occurred. Put simply, the statements record information sought by the Defender to assist it making a decision on whether to take the allegation forward and, if so, in which way.

[110] Any bias toward the Defender which arises as a result of information it obtained during an investigation is not unfair - if unfairness arises, it is balanced out by other factors which were not referred to in the Pursuer's submissions.

[111] In the exercise of its duty to disclose, a copy of any statement obtained during an investigation is disclosed by the Defender to the worker. If, as here, its content is disputed,

it becomes an adminicle (piece) of evidence which the Panel assesses at the final hearing - its content is not treated as the truth unless the worker admits what was said. In this way, disclosure provides fair notice to the worker to prevent ambush at the hearing; the worker is afforded time to investigate what was said, to clarify points directly with the witness and decide whether or not to accept the statement. If it is not accepted, there is time to prepare relevant cross examination to test the veracity of the statement.

[112] That analysis is supported by other provisions in the Rules. The statement is an adminicle of evidence which a civil court can consider under the Civil Evidence (Scotland) Act 1988, a statute to which the Panel is directed to have regard[65]. A statement is a potentially admissible adminicle of evidence before the Panel[66]. In this way, a Panel which later hears oral evidence from the witness who provided the statement to the Defender has authority to assess what, if any, weight it should attach to it.

[113] Consequently, the Pursuer's submission is without foundation. He was given fair notice before the CMM of ER's statements to both HC-One and the Defender. There is no doubt that their content was in dispute. The Pursuer and Mr Streets were given time to prepare to obtain their own statements if they wished and/or to cross examine ER as appropriate. As the transcript discloses, that is exactly what happened at the hearing. ER was led and extensively cross-examined on the statements. From that exercise, the Panel was able to compare and assess how much weight, if any needed attached to what she said at any time.

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[65] Rule 32.1

[66] Rules 32.4 and 32.6

[114] Finally, this process again assisted, not prejudiced, the Pursuer - as ER gave varying versions of the incident in her statements and in oral evidence, the Panel was unable to accept she said.

[115] The Pursuer's submission that the Defender failed to follow ACAS model procedures during the investigation can also be disposed of briefly. In brief, as the Defender submitted, the Rules make no provision for any such procedures to be considered during an investigation. For the reasons explained, the Rules on the investigative process deliberately afford the Defender very wide discretion to take such steps as required on a case by case basis. I was provided with no reason why the Rules bound the Defender to follow ACAS procedures. The submission falls to be rejected.

[116] The submission that the Pursuer was prejudiced by the interposing of NF's evidence with evidence led for the Defender also has an instinctive attraction. The burden of proof at the hearing lay with the Defender[67]. The Rules do not oblige a worker to lead any evidence at all. Consequently, as a witness for the Pursuer, NF ought not to have been led before the Defender closed its case.

[117] The timing of her evidence also caused a separate difficulty. As the Pursuer at the CMMs and Mr Streets at the hearing each agreed to NF's evidence being interposed, it is arguable that they implicitly waived any prejudice which arose. However, neither was legally qualified. That possibility could have been canvassed at the CMM and the hearing, to ascertain whether they were aware of the point. As the Minutes and transcript show, that did not occur.

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[67] Rule 32.11

[118] However, as the Defender submitted, no actual prejudice arose. Most importantly, as NF did not see the actual incident, her evidence could not form part of the Defender's case. Moreover, in the Pursuer's eyes her evidence was necessary to potentially cast doubt on the veracity of the statement she took from ER and to corroborate his belief that his reaction to the resident hitting him was borne of or conditioned by HC One's failure to provide him with adequate training, a point he had previously raised at staff meetings.

[119] In that context, NF's evidence only became relevant if the Panel accepted ER's witness statements or the relevance of the Pursuer's belief. As it accepted neither, no actual prejudice occurred.

[120] For similar reasons, Mr Streets' objection during the hearing that the timing of NF's evidence inconvenienced his ability to deal with other witnesses was without foundation. It is common ground that NF was only available to give evidence on the first day. As a Party Litigant, the Pursuer had no power to compel her to attend and was forced to rely on the courtesy extended by the Defender to have her appear on the only day she was available. He did not need to call her. Mr Streets knew she did not see the incident. He knew, or at least is deemed to have known, from the CMM Minutes that she would be called on the first day, most likely before the Defender closed its case. Finally, as the Defender submitted, there was no suggestion that NF's evidence would have been any different if she had been led later. In the round, had that taken place, the outcome would have been the same.

[121] For these reasons, though more care should arguably have been taken about when NF was to be led, I reject the Pursuer's submissions about the timing of her evidence.

[122] The Pursuer's submission that his departure at the conclusion of Stage 1 of the hearing was reasonable was simply an explanation of his actions. For what it is worth, I interpret his actions as implicit acceptance that after the Panel found in fact that he assaulted

the resident, he saw no purpose in remaining as the decision certainly meant that at Stage 2 the Panel would conclude his fitness to practise was impaired and at Stage 3 would probably result in his name being removed from the register.

[123] It is convenient to address the Pursuer's remaining submissions globally. They argue that the Panel's decision was unfair, unreasonable and plainly wrong for the following reasons:

- almost all of ER's evidence was confused and contradictory
- in arriving at its decision, the Panel ignored important contradictions in the evidence
- the Presenter and the Panel badgered BH during his evidence, causing him to become confused
- the Panel ought to have preferred the Pursuer and BH's evidence that the former was crouching down when the incident occurred to that of ER
- there was no evidence of weight or value against the Pursuer; the evidence presented was so unreliable that the Panel's decision was plainly wrong
- the Panel's decision ignored the context in which the Pursuer's actions were judged, in particular that he had first been assaulted by the resident first
- the Panel refused to allow a line of cross examination relating to HC-One's failures to implement policies designed to protect employees and to prevent incidents occurring and attached no or insufficient weight to such evidence on the point as was allowed
- the Panel's assessment of the incident was unbalanced and not supported by the evidence

[124] Those submissions can all be addressed by rehearsing the evidence available to the Panel.

[125] The Pursuer admitted he was subject to the Code. Paragraph 3.3 provides that he would "follow practices…designed to keep…other people safe from violent and abusive behaviour at work". Paragraph 5.1 provides that he would not "abuse…or harm people who use services (or) carers". Any worker hitting a resident obviously breaches those provisions.

[126] On 1 October 2018, immediately after the incident, the Pursuer told NF that the resident struck him across the face, knocking his glasses off. He picked them up then struck the resident on the left cheek, without thinking, as a reaction. He apologised for his actions[68]. Mr Streets did not dispute that analysis during his cross examination of NF.

[127] At the Disciplinary Hearing on 11 October 2018, the Pursuer gave a similar account. He again acknowledged he knew the Code[69]. He read out a prepared statement in which he described assisting the resident to have porridge for breakfast. As he became aware that the resident was in a potentially unsafe position in his wheelchair, he crouched down to put his feet back on the footrest. As he did so, the resident suddenly struck him in the face, knocking his glasses off. In a reflex motion, he caught his glasses and started to jump up then, as he did so "swung out in the direction of the assault with my right hand, contacting (the resident's) face." He described this as "a spontaneous defensive reaction…certainly without any malicious intent". He also stated "The moment this happened I was surprised and shocked by my own reaction and aware of the inappropriateness of what had

[68] Joint Inventory, number 14, page 646
[69] *ibid*, page 783

happened" and agreed with ER soon after that "it was unacceptable under any circumstances to slap a resident".

[128] Mr Streets advised the Panel that the Pursuer regarded those statements as accurate and was prepared for Panel to take them into account[70]. The Presenter relied on them in her Stage 1 submissions to the Panel[71], as did Mr Streets when he submitted to the Panel that "a perfectly natural reaction to being hit is fight or flight", the Pursuer's conduct involved him "standing up rapidly and raising his arms to protect himself" and his action was a "defensive reflex reaction" to being hit[72].

[129] The Panel found in fact that[73] "6. In reaction to your glasses being knocked off, you slapped (the resident) on his face…"

[130] As the preceding paragraphs show, there was ample unchallenged evidence for the Panel to make that finding. By the Pursuer's own admission, he hit the resident, was shocked by what he had done, accepted it was inappropriate and agreed that slapping a resident was unacceptable in any circumstances. Thereby, breached the Code. The Panel relied on that evidence when making that finding in fact[74]. There was no evidential foundation for the alternative scenario which Mr Streets put to the Panel. In light of the Pursuer's own evidence, his submission that the Panel ought to have taken into account that HC-One appointed a Turnaround Manager to the home soon after the incident and/or made changes to its care plans and policies is irrelevant.

[131] That analysis is sufficient to deal with almost all of the Pursuer's submissions listed in paragraph 123 above. As the Panel relied on the Pursuer's own admissions, admissions

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[70] Transcript, page 141
[71] Transcript, page 145
[72] Transcript, pages 153 - 154
[73] Joint Inventory, part 2, page 2
[74] *ibid*, page 7

which demonstrated he had breached the Code, the Panel's decision could not have been unfair, unreasonable or plainly wrong.

[132] As regards the remaining points, contrary to the Pursuer's submission, the Panel accepted he was crouched before being hit by the resident[75]. On that analysis, that the Pursuer was admittedly hit first was an irrelevant factor. As the Panel accepted the Pursuer's version of what happened before that occurred, it correctly took context into account. The transcript does not disclose any line of Mr Streets' cross examination of NF being refused. The line in question was in fact fully put to her[76].

[133] In summary, the admitted evidence shows that the Panel's Findings in Fact 1 - 5 and 10 are uncontroversial. For the reasons narrated, the Panel was perfectly entitled to make Finding in Fact 6. As they proved that the Pursuer assaulted a resident while at work, those Findings alone were sufficient to allow the Panel to move on to Stage 2.

[134] However, perhaps because it found the evidence of ER, BH and NF unsatisfactory for differing reasons, the Panel also made findings 7, 8 and 9. As it did so and those findings are also challenged, it is necessary to review them. However, when analysed, their only real significance relates to the Findings that the Pursuer's slap was much less forceful than ER estimated and that sufficient time elapsed between the resident's slap and the Pursuer's reaction for him to have refrained from reacting and to have removed himself from the situation.

[135] Those Findings cannot have been plainly wrong. The Finding on the degree of force was in line with the Pursuer's own evidence and with that of BH in his statement to

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[75] Finding in Fact 5

[76] Transcript pages 119 - 125

HC-One. For the reasons it gave[77], the Panel was perfectly entitled to reach it. On the Finding in relation to lapse of time, the Panel relied on ER's evidence before it, on which it said she had been consistent. Review of her statements and evidence confirms that. In addition, having heard her personally in oral evidence, the Panel's judgment was one it was best placed to make and should not be lightly interfered with. Even if it was wrong, the Pursuer himself admitted in both interviews that he picked up his glasses before reacting. BH, a witness from whose evidence the Pursuer sought corroboration, described the glasses flying across the floor before the Pursuer retrieved them. As such, whether or not the Panel relied on ER's evidence, on the Pursuer's own account there was time for him to have composed himself, especially as he accepted he knew the resident well, knew how to read his reactions and knew he was prone to reacting violently. Had I been required to hold that the Panel erred on the matter, I would have reached the same conclusion.

[136] For the reasons given, the Pursuer's Application must be refused. As no motion for expenses was made, I have found none due to or by either party.

[77] Decision, page 7, 2nd paragraph