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IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

[2020] EWHC 2573 (Admin)



No. CO/2647/2020

Royal Courts of Justice

Tuesday, 25 August 2020

Before:

MRS JUSTICE EADY

B E T W E E N :

NURSING AND MIDWIFERY COUNCIL

Applicant

- and -

JACQUELINE CLARE FLEMING

Respondent

MR M. CASSELLS (instructed by the Nursing and Midwifery Council) appeared on behalf of the Applicant.

THE RESPONDENT did not appear and was not represented.

J U D G M E N T

MRS JUSTICE EADY:

Introduction

- 1 This is the hearing of the applicant’s application under Article 31(8) of the Nursing and Midwifery Order 2001 (“the Order”). The application is for a seven-month extension of an interim order imposed on the respondent suspending her registration as a nurse.
- 2 In support of its application, the applicant relies on the witness statement of Mark Sturdy, dated 28 July 2020, which I have read in advance of this hearing together with the documents exhibited thereto.
- 3 The respondent has not attended this hearing but I have seen the certificate of service dated 20 August 2020, which explains how the applicant served the application and supporting witness statement and exhibits on the respondent by means of recorded delivery and first-class post on 3 August 2020, delivery being signed for at 9.21am on 5 August 2020. Also, although not attending the hearing, the respondent wrote to the applicant on 17 August 2020 making reference to these proceedings and explaining that she will not be attending the hearing due to her health condition and for family reasons. The respondent also stated that she denies some of the underlying concerns and she believes that her managers conspired to get rid of her. I have taken the matters set out in the respondent’s letter of 17 August as her representations for this hearing and I have fully taken these into account. I am, however, satisfied that it is appropriate to proceed today in the respondent’s absence.

The factual background

- 4 At the relevant time, the respondent was employed as a health visitor with Wirral Community NHS Foundation Trust (“the Trust”). On 29 January 2019, the Trust made a referral to the applicant concerning the respondent; the Trust considered the respondent might be suffering with a health condition, namely alcohol addiction. The respondent’s employment had been managed by the Trust’s occupational health department, under their Substance Misuse policy, between November 2017 and January 2018; on 3 April 2018, however, further concerns arose that the respondent was working under the influence of alcohol and she was suspended. Subsequent investigation suggested that the respondent had conducted a home visit with a new mother whilst inebriated and had failed to complete a full assessment or provide a breastfeeding package.
- 5 The respondent resigned from the Trust in December 2018, prior to the conclusion of the internal investigation.

The interim order proceedings

- 6 The respondent’s case first came before a panel of the applicant’s Investigating Committee on 26 February 2019. An interim suspension order was made on that date for eighteen months, the panel being satisfied that such an order was necessary for the protection of members of the public and was otherwise in the public interest. The panel also considered that such an order was in the respondent’s own interests, given her ongoing health issues. The reasons for the panel’s decision were set out in a letter to the respondent of 27 February 2019.
- 7 The interim order has since been reviewed on three occasions, the last being on 21 July 2020. It is due to expire at the end of today.

The approach I am to adopt

- 8 This application is made under Article 31(8) of the Order. Pursuant to Article 31(9), on such an application the court may extend or vary or further extend, for up to twelve months, the period for which the Order has effect. In *GMC v Hiew* [2007] EWCA Civ 369, the Court of Appeal gave guidance on the principles to be applied in applications of this kind, making clear that the criteria to be applied by the court when considering an application to extend an interim order are the same as those for the making of such an order by the regulatory body. The relevant factors in considering whether to grant an extension include (i) the gravity of the allegations; (ii) the seriousness of the risk of harm to patients; (iii) the reasons why the case has not been concluded, and (iv) the prejudice to the practitioner if an interim order is continued.
- 9 The onus of satisfying the court that the criteria are met is on the regulatory body. It is not, however, the function of the court to make findings of primary fact about the events that have led to the suspension or to consider the merits of the case for suspension. The court is required to ascertain whether the allegations - rather than their truth or falsity - justify the prolongation of the interim order; in general, it need not look beyond those allegations.

Application of those principles to this case

- 10 I accept that the allegations in this case are plainly serious and the requisite risk of harm to patients has been demonstrated. The applicant is concerned that the respondent has a health condition, the manifestation of which has previously directly impacted upon her practice. It is further concerned that there is no material to suggest that the respondent now has that condition under control such that it would be unlikely that she would behave as alleged in the future if allowed to return to unrestricted practise. Moreover, in the absence of a clear diagnosis and prognosis, the applicant is unable to ascertain to what extent, if at all, the respondent has recovered and/or how significant her risk of relapse is.
- 11 The applicant has sought the respondent's consent for medical testing and reports but the respondent has declined to engage with the applicant in this regard. Without any criticism of the respondent's decisions, it was not unreasonable for the applicant to explore this line of investigation, albeit that it led to some delay; that is a relevant factor when also considering the time taken by the applicant to investigate this case. It is further apparent from Mr Sturdy's statement, that the applicant encountered difficulties engaging with witnesses which also lengthened the time of the investigation and, as this was drawing to a close, the applicant then had to deal with the challenges presented by the COVID-19 pandemic.
- 12 I am told that the investigation into this matter is now concluded and the applicant will shortly have a decision from its case examiners as to whether there is a case for the respondent to answer. If there is such a case, arrangements will then need to be made to substantively dispose of this case, either at a substantive hearing or meeting. It is to allow for those further steps, and for the necessary statutory notice periods that would need to be provided to the respondent, that the applicant seeks a seven-month extension in this case.
- 13 As for the potential prejudice to the respondent, although the applicant says there is no specific information about what, if any, difficulties the interim order might cause, I am prepared to accept that further delay would inevitably be prejudicial to her. That said, I also note that, at the outset of this matter, the respondent indicated that she accepted she had a problem with alcohol, stating that she was then focusing on her recovery. As I have already

observed, the interim order was imposed in part in the respondent's own interests to allow her to focus on that recovery.

- 14 Taking all these matters into consideration, I am satisfied that, given the seriousness of the concerns, any prejudice to the respondent in extending the interim order is outweighed by the public interest in ensuring public patient safety and maintaining confidence in the profession. I also accept that the ongoing necessity of the order is demonstrated by the fact that it has been reviewed on a number of occasions and on each occasion the specialist panel has confirmed that the order remains necessary for public protection and it is otherwise in the public interest and also in the respondent's own interests. In the circumstances, I am prepared to allow the application to extend the interim order for seven months on the grounds that it remains necessary to protect the public and is otherwise in the public interest.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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This transcript has been approved by the Judge.