Tribunals Service
Care Standards

In the First-tier Tribunal

Between:

N D

Applicant

V

General Social Care Council

Respondent

[2010] 1739.SW-SUS

DECISION

Panel Tribunal Judge Nancy Hillier
Mr Jim Lim (Specialist member)
Mr Tim Greenacre (Specialist member)

Hearing held at Pocock Street, London on 1st July 2010.
ND did not attend the hearing. She was represented by Mr Allan Norman
Mr Andrew Coleman of Counsel represented the Respondent.

APPEAL

1. ND ("the Applicant") appeals under section 68 of the Care Standards Act 2000 against the decision of the Preliminary Proceedings Committee (PPC) of the General Social Care Council ("the Respondent") made on the 10th March 2010 to impose a further Interim Suspension Order (ISO) upon the Applicant for a period of six months. The initial ISO was imposed on 15th September 2009.

PRELIMINARY MATTERS

2. The legal representatives confirmed that the final formal allegations were completed on 30th June 2010. The conduct hearing was due to be heard on 9th August 2010, although there were certain matters which may throw some doubt on the likely effectiveness of that date. Both parties hope that the hearing will go ahead on that date.

THE LAW

3. By virtue of section 56 of the Care Standards Act 2000 the Respondent maintains a register of social workers and section 59 allows the Respondent to determine the circumstances by which an individual can be sanctioned and removed from the Register. The relevant rules for the purposes of this case are the General Social Care Council (Conduct) Rules 2008.
4. Rule 5 of the General Social Care Council (Conduct) Rules 2008 provides that it shall be the duty of the Preliminary Proceedings Committee (PPC) to consider an application by the Respondent for an ISO and decide whether the making of such an order is
    (a) necessary for the protection of members of the public;
    (b) otherwise in the public interest;
    (c) in the interests of the Registrant concerned.

   The power to impose an ISO comes from Rule 12(16) General Social Care Council (Conduct) Rules 2008.

5. Where the decision is made to impose an ISO, Rule 5(2) provides that the initial duration shall not exceed six months.

   Section 68 of the Care Standards Act 2000 provides that an appeal against a decision in respect of registration shall lie to the Tribunal.

6. On appeal, section 68(2) provides that the Tribunal may confirm the decision or direct that it shall not have effect and the Tribunal shall also have power under section 68(3) to vary any condition in force, direct that any such condition shall cease to have effect or to direct that any such condition as it thinks fit shall have effect in respect of that person.
7. When the original application is considered by the committee, the committee should bear in mind the effects of any sanction on the Registrant and whether it is proportionate. The need for public protection and the maintenance of the public's confidence in social care provision must be balanced against the consequences of an ISO upon the Registrant.

   The Committee must take into consideration the seriousness of the allegations and any evidence relating to the likelihood of any further incidents of harm, particularly to service users.
8. The powers of the Tribunal on appeal against an ISO are the same as the PPC in that it considers the gravity of the allegations and the nature of the evidence, the risk of harm to members of the public, the wider public interest and the prejudice to the Applicant if the order was continued. It can consider any additional information received by either party after the PPC. It does not make findings of fact.
9. It follows from section 68 that the Tribunal does not have power to hear a case de novo and apply to the Appellant whatever sanction it considers appropriate. Our power in this case is limited to simply confirming or setting aside the decision.
10. Although not directed to the case of ***Rawle McCarthy v GSCC [2008] 1391.SW*** by the legal representatives, we reminded ourselves of the effect of delay which should, in our view, always be considered when the committee is asked to renew an ISO. In that case, the tribunal stated:

> "*The word interim should be given its normal meaning and the onus is upon the Council in such cases to expedite their enquiries and hold a substantive hearing*

as quickly as possible. We can think of few cases that in reality would require more than 6 months to fully prepare and most should be dealt with quicker.

BACKGROUND

11. ND was an experienced senior social worker. On 22nd May 2009, she took cocaine on a night out with fellow professionals. On 28th May, she was arrested on suspicion of offering to supply and possession of cocaine and on 1st June, she was suspended on full pay. On15th July, ND admitted in an investigatory meeting with her employers that she had taken cocaine on the 22nd May and that she had taken it previously. This led to a disciplinary hearing on 6th October at which she was summarily dismissed. On 9th October 2009, she was charged with possession of cocaine and being concerned in the supply of cocaine and on10th January 2010, pleaded guilty to possession of a class A drug. On 22nd February 2010, she was given a two year conditional discharge by a Crown Court.

EVIDENCE

12.. The tribunal considered the written evidence contained in the bundle, the undated formal allegation document and the submissions of the advocates in reaching our conclusion.

SUBMISSIONS

13. On behalf of the Applicant, Mr Norman submitted that ISO's are emergency measures and should not be used as routine administrative measures. Such measures should be used where there is a real risk of ongoing harm. He urged the tribunal to consider the likely decision of the Committee and pointed out that if a final suspension is unlikely, then an interim suspension would be inappropriate. Further, he submitted that there is a presumption in favour of an ability to continue in practice.

Protection of the public.

14. Mr Norman submitted that if there is no risk to the public then the ISO is inappropriate. Further, if there is a risk established, then that risk should be of significance. He identified three possible risks:

(I) ND's drug use.

(II) ND's capacity or competency ;

(III) ND's integrity.

He stressed that the committee had fresh evidence which showed ND had remained drug free since the admitted use of cocaine some months before, and that she had only used cocaine for a short period of time.

Further, it was clear to the PPC that the criminal proceedings had not proceeded on the basis of ND being involved in the supply of drugs.

15. Mr Norman referred to the response to the appeal filed by the Respondent on 25th April 2010. At paragraph [43] the Respondent alleged that the evidence of abstinence since May 2009 "does not preclude her representing a risk to members of the public were she to remain on the register in the interim." Further, at 47, the Respondent alleges that there is "plainly a risk" that ND may not be able to deal safely with cases where service users may have drug misuse issues and at [48] the fact that the behaviour took place at a bar outside the workplace does not preclude the fact that such behaviour could undermine her ability to operate safely at work. Mr Norman submitted that at the renewal hearing, the fact of abstinence was proved, the immediate admissions and cooperation with the police were well documented and the result of the criminal proceedings were known. These factors provided real evidence that the risk was ameliorated and the PPC gave no or insufficient weight to this against broad assertions of (unquantified) risk.

16. Mr Norman submitted that the case is not presented on the basis of impaired capacity, and that ND's integrity cannot really be called into question because of her obvious frankness throughout.

17. Mr Coleman submitted on behalf of the Respondent that probity and judgment are component parts of integrity and that ND's conduct was very serious and of necessity involved contact with criminals, namely, drug dealers. Whilst he accepted that by the time of the renewal hearing there was evidence of abstinence, and that there had never been any question of ND being intoxicated or under the influence of drugs at work, he said that there was little evidence for the PPC to balance in her favour at that stage.

Public interest.

18. Mr Norman cited the case of ***Sheikh*** in respect of the core question: Does the public interest require continued suspension? He distinguished the case of ***Sadler*** on the basis that there were multiple incidents over a period of years during official duties. ND's misconduct occurred in a social context and was therefore more akin to Sheikh. However, even in ***Sheikh*** there were many incidents and, whilst ND had taken cocaine for a short time, the incident complained of was more of a one off.

19. Mr Coleman submitted that whilst the incident occurred in a social context, ND was with colleagues and she told police officers that she had taken cocaine. The incident hit the front page of the local press and was reported in the specialist press. This was evidence of the public perception that such behaviour brought the profession into disrepute. Such interest had not evaporated, and the private nature of the PPC hearings would mean that if the ISO had not been renewed

the public would not know why and would lose faith in the professional body.

20. It is right to point out that ND accepted through her lawyer that the incident for which she was arrested showed a very serious lapse of judgment and she did not try to minimise that seriousness in any way.

21. Mr Norman drew the panel's attention to a series of GMC cases which indicated some likely outcomes for Doctors in similar circumstances and submitted that the 'Indicative sanctions guide' was of limited value because there were no drugs cases to assist. Mr Coleman drew the panel's attention to the limitations of such a table and pointed out that the standards for doctors may be very different.
22. Mr Coleman acknowledged that the PPC did not have information about the final formal allegation.

Delay

23. Mr Norman made it plain that ND did not allege that there was any initial delay. The delay arose, he said, once the plea of guilty had been accepted and a two year conditional discharge was imposed on ND with an order to pay £85 costs. From that time to the final formation of the formal allegation little had been done.

24. Mr Coleman accepted that the extent of ND's admissions was known from the outset and he acknowledged that the GSCC was frequently exhorted to avoid awaiting the outcome of criminal proceedings. He submitted that there was a decision to proceed on the basis of any criminal conviction at an early stage, and that the delay from conviction and sentence to setting the Pre Hearing Review and the conduct hearing was caused by the court failing to send out the memorandum of conviction until June 3rd2010.

Further, since the hearing took place on 10th March 2010, when the outcome of the criminal proceedings were known, the PPC must have thought that there would be little delay before the conduct committee disposed of the matter.

TRIBUNAL'S CONCLUSIONS WITH REASONS

25. Mr Norman made a submission that there is a presumption in favour of continuing to work in these cases. He had no evidence of this and it is not something which was relied on or accepted by the tribunal.
26. Mr Coleman referred us to the case of **Sandler v GMC 2010 EWHC 1029 (Admin) Nicol J**

In that case the panel were advised as follows:

"…..*to consider first whether an interim order was necessary for the protection of the public. If that was not the case, it should then proceed to decide whether an interim order should otherwise be made in the public interest. He reminded them of what Davis J. had said in Sheikh about the need to be clear as to whether the reputation of the profession could be upheld by a final order as opposed to an interim measure. He stressed that '"proportionality" is the watchword' – the panel had to balance the interests of the public against Dr Sandler 's interests in continuing his profession without restriction. If the panel considered that an interim measure at all was necessary in the public interest it should first ask itself whether conditions would be sufficient and only then ask whether this was a rare case where suspension was justified."*

We have taken this into account when weighing the evidence before us.

27. We also reminded ourselves of Nicol J in ***Sadler*** at [14] that :

"There was some debate at the hearing as to whether the IOP could only suspend Dr Sandler on public interest grounds if this was 'necessary'. In my judgment, the Legal Adviser was plainly right to observe that, while the statute allows suspension on public protection grounds only if this is necessary, there is no such qualification to the public interest limb. In ***Sheikh*** *at [15] Davis J. thought that nonetheless 'if the public interest is to be invoked in this context under the statute, then that to my mind, does*

at least carry some implication of necessity; and certainly it at least carries with it the implication of desirability.' He added at [16] 'At all events, in the context of imposing an interim suspension order, on this particular basis, it does seem to me, adopting the words of Mr Winter [counsel for the Claimant], that the bar is set high; and I think that, in the ordinary case at least, necessity is an appropriate yardstick. That is so because of reasons of proportionality.' I certainly agree that a doctor could not be the subject of interim suspension unless this was at least desirable in the public interest. I also agree that the Panel must consider very carefully the proportionality of their measure (weighing the significance of any harm to the public interest in not suspending the doctor against the damage to him by preventing him from practising), but I do, with respect, think that the Court must be cautious about superimposing additional tests over and above those which Parliament has set."

28. The panel are therefore cautious about adding any gloss to the relevant test. We also have taken into account the factual differences given by Nicol J which distinguished the case of ***Sheikh.*** He stated [23]:

"*However, I accept the principal submission of Ms White which I have summarised in paragraph 21 above. The charges which have been brought against Dr Sandler are serious. One incident might have been regarded as an aberration, but here the wilful signing of false certificates is alleged to have taken place on at least 116 occasions over a number of years. I agree with Ms White as well that it is significant that this lack of probity is alleged to have occurred in the course of the doctor's clinical duties (a distinction, incidentally, from the frauds which were alleged in the Sheikh case and which Davis J. did not think justified interim suspension)*" and "*The GMC was entitled to wait for the outcome of the police investigation. Once this was known it took swift action. Mr Leonard argued that the impact on the reputation of the profession was a matter which could justify a final penalty imposed by a FPP, but it was difficult to see why it called for an interim suspension before the allegations were proved. I disagree. The reasons given by Ms White and the Panel show that the reputation of the profession could be adversely affected (and, correspondingly, the public interest could be damaged) if a doctor who faced such serious allegations was allowed to continue to practise while they proceeded through the criminal courts. These are matters on which the views of the IOP are particularly important and, in my judgment, entitled to particular weight."* It was on this basis that the interim suspension was not continued.

29. We are very aware that this matter attracted a good degree of publicity – not emanating from ND who remained silent. The public interest may

have slackened somewhat by 2010 however the criminal proceedings and sentence will have reawakened some interest. We do not accept that the private nature of these proceedings justifies a finding that the public interest would require a continued suspension.

30. From the date of the disposal of the criminal proceedings to the final version of the formal allegation on the day before the tribunal hearing there was no legal or evidential justification for the delay. The PPC did not adequately investigate the reasons for the delay (as it then stood) at the renewal hearing. Accordingly, the PPC could not properly conclude that a further 6 months suspension was justified, necessary or proportionate.
31. We were concerned that the committee were still considering the issue of "being concerned in the supply" of cocaine because the formal allegations had not been formulated. This factor must have necessarily influenced their assessment of risk. On our assessment there is a nil or minimal risk to the public by ND. We do not condone her actions or minimise them, however when we evaluate the current evidence, including the evidence of abstinence, frankness with her employer and the police and acceptance of wrong doing by a plea of guilty we find that ND has done everything in her power to show a much reduced risk of harm. We do not think that it is likely that she would act in an inappropriate way with a service user. She was a senior social worker working in the complex area of child protection. The tribunal were not made aware of any adverse comment(s) about her work. She was not intoxicated at work nor is there any evidence to show that she used cocaine for anything other than a short period away from the work environment.

32. We are very concerned about the investigation into the reasons for the delay. The fact that it took 3 months to obtain a memorandum of conviction is unimpressive when a person's livelihood is at stake. The committee were told that there were two police statements outstanding but did not challenge this which is surprising given the fact that the exact parameters of the evidence were known. Nor did they

investigate why the formal allegation had not been formulated. These are things which might properly have been considered when considering the proportionality of the ISO.

33. We were referred by both advocates to the decision of Davis J in **Sheikh v GDC [2007] EWHC 2972 (Admin)** and we have taken the following paragraphs into account in our deliberations:

14 "On behalf of Mr Shiekh, Mr Winter QC says that the decision reached by the Panel simply cannot and should not be sustained and this court should terminate the interim suspension. It is common ground between Mr Winter and Mr Bradly, who appears on behalf of the General Dental Council, that for the purposes of section 32(4) the only relevant statutory test which applies here in this particular case is that which relates to the public interest. It is agreed, and has always been agreed, that interim suspension was neither sought nor could be justified by reference to considerations of what is necessary for the protection of the public or what was in the interests of the practitioner concerned.

15. As a matter of strict language, no grammatical interpolation of the word "necessary" falls to be applied to the phrase "or is otherwise in the public interest". But that is not the end of the matter because it does seem to me that if "the public interest" is to be invoked in this context, under the statute, then that, to my mind, does at least carry some implication of necessity; and certainly it at least carries with it the implication of desirability. …

*16. At all events, in the context of imposing an interim suspension order, on this particular basis, it does seem to me, adopting the words of Mr Winter, that the **bar is set high**; and I think that, in the ordinary case at least, necessity is an appropriate yardstick. That is so because of reasons of proportionality. It is a very serious thing indeed for a dentist or a doctor to be suspended. It is serious in many cases just because of the impact on that person's right to earn a living. It is serious in all cases because of the detriment to him in reputational terms. Accordingly, it is, in my view, likely to be a relatively rare case where a suspension order will be made on an interim basis on the ground that it is in the public interest. I do not use the words "an exceptional case" because such language is easily capable of being twisted and exploited in subsequent cases; but I do think, as I say, it is likely to be a relatively rare case. Ultimately, of course, all these things have to be decided on the facts of each particular case.*

17. Mr Winter makes two other initial points which seem to me to have a degree of validity. First, he submitted that where a Panel is making an interim suspension order that carries at least the implication that that Panel is taking it that a suspension order

is very likely to be made at the final hearing. Mr Bradly agreed, pointing out that that was more or less inherent in a power to suspend on an interim basis. As Mr Bradly rightly acknowledged, however, it would be a very unfortunate matter indeed for a dentist to find himself on an interim basis the subject of a suspension order and then, when the full facts and evidence and mitigation are deployed at the substantive hearing, it is then decided that a suspension order is not in fact warranted: but, as he submitted, that risk was inherent in the nature of interim powers.

18 *The second general point made by Mr Winter is that an interim suspension order does have the effect, in the ordinary case, of depriving an individual practitioner of showing that in that period he otherwise has conducted himself well and competently and so, as it were, enhanced his prospects in front of the Panel undertaking the final hearing. As to that last point, that has considerably less force in the circumstances of this particular case because, as it would appear, Mr Shiekh has been in a position indirectly to carry on his business of running dental practices (even though not himself practising) and it also cannot be said that he will be deprived of his livelihood by reason of the interim suspension order in fact made: although that is not a point alluded to by either Panel in their decisions.* (emphasis added).

34. In the light of the above findings and the written and oral evidence and submissions that we have read and heard we do not find that an ISO is necessary for the protection of the public, or is otherwise in the public interest or in the interests of ND.

DECISION

It is our unanimous decision that the appeal be allowed. The decision of 10th March 2010 is set aside.

Nancy Hillier

Tribunal Judge
11th July 2010.